



**United States
Department of
Agriculture**

Food and
Nutrition
Service

3101 Park
Center Drive
Alexandria, VA
22302-1500

MEMO CODE: SP 08-2009

DATE: January 9, 2009

SUBJECT: Procurement Questions

TO: Regional Directors
Child Nutrition Programs
All Regions

State Directors
Child Nutrition Programs
All States

Recently, we have received a number of questions regarding the procurement regulations applicable to our National School Lunch and School Breakfast Programs. Attached are the most recently received questions and answers. As in the past, please share these questions and answers with your school food authorities.

A handwritten signature in blue ink that reads "Cynthia Long". The signature is written in a cursive, flowing style.

CYNTHIA LONG
Director
Child Nutrition Programs

Enclosure

LOCAL PURCHASING

1) Q: According to the new Farm Bill regulations, institutions receiving funds through the Child Nutrition Programs may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products. Does this mean competition does not need to occur and schools can simply pick a farmer to provide them with fresh, unprocessed vegetables?

A: No. The most important principle to a good procurement is that it is competitive and allows for free and open competition. An institution must still get quotes from several farmers when procuring unprocessed locally grown or locally raised agricultural products, so that competitors have an opportunity to compete for the bid. The way in which a geographic preference is applied could depend on whether the procurement method is informal or formal. If informal, i.e. falling below the small purchase threshold, a school food authority (SFA) may simply want to approach approximately 3-4 local producers and obtain price quotes. Competition is ensured by developing a solicitation that contains criteria which all the respondents will be subject to. If the procurement exceeds the small purchase threshold, a formal procurement method must be used which would involve the sealed bidding process (i.e. IFB) or the competitive negotiation process (i.e. RFP). This would entail public notification of the solicitation; however, when procuring locally unprocessed agricultural products the notification may be focused on the locale in which the school is situated as a criteria of the solicitation. In a situation where the solicitation for locally unprocessed agricultural products is in fact open to offerors beyond the local area, a way in which to apply a geographic preference is to grant preference points to the local farmers who respond to the solicitation.

2) Q: The Joint Explanatory Statement accompanying the new Farm Bill legislation states that de minimis handling and preparation might be necessary to present an agricultural product to a school food authority in a useable form, such as washing vegetables, bagging greens, butchering livestock and poultry, pasteurizing milk, and putting eggs in a carton. Additionally, consistent with FNS guidance, geographic preference may only be applied to the procurement of unprocessed agricultural products which are locally grown and locally raised, and that have not been cooked, seasoned, frozen, canned, or combined with any other products. Does produce that has been chopped or cut fall into the category of “minimal handling and preparation necessary to present in a useable form?”

A: No. De minimis handling does not include chopped, cut, or diced products and therefore geographic preference may not be applied to agricultural products that have been chopped, cut, sliced, or diced.

3) Q: Is processing meat into a hamburger patty allowed under this rule?

A: No. Grinding meat into a hamburger is considered “processing” and therefore geographic preference may not be applied to this product. Livestock and poultry can only be butchered in order to still be considered “unprocessed”.

4) Q: According to the new Farm Bill regulations, institutions receiving funds through the Child Nutrition Programs may apply a geographic preference when procuring unprocessed *locally* grown or raised agricultural products. How is “local” defined? For example, could a school only accept bids/offers for unprocessed agricultural products from local farmers within a 50 mile radius?

A: Due to the geographic diversity in each state, the institution responsible for the procurement has the discretion to define the area for any geographic preference (e.g., State, county, region, etc.). However, it is important to keep in mind that local preference should not be defined in a way that unnecessarily limits competition.

BUY AMERICAN

5) Q: Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a Buy American provision, Section 12(n) of the NSLA (42 USC 1760(n)) requiring that a school food authority, to the maximum extent practicable, purchases domestic commodities or products. Does this provision extend to other products like paper plates, equipment, or software?

A: No. The Buy American provision applies to domestic commodities or products, meaning an agricultural commodity that is produced in the United States, and a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

6) Q: A report accompanying the Buy American provision also states that a food product processed in the United States “substantially” using agricultural commodities produced in the United States means that over 51% of the final processed product consists of agricultural commodities that were grown domestically. Should the packaging of a product be factored in as a portion of this final processed product?

A: No. The packaging of a product is not included in the requirement that over 51% of the final processed product consists of domestic agricultural commodities.

TRANSFERRING EQUIPMENT

7) Q: A new charter school in a district is starting its operations using a public school building; however, the district stripped the building of all food equipment, desks and chairs, etc. The State would like to survey other districts in the area in search of surplus equipment used in connection with other Federal programs to ensure the charter school is able to provide meals under the National School Lunch (NSLP) and School Breakfast Programs (SBP). The charter school does have an agreement with the State Agency to participate in the programs provided they get the equipment. Is it permissible for the charter school to receive surplus equipment that is transferred from the public schools?

A: If the charter school plans to participate in both the NSLP and SBP, then yes, it is fine for the State to locate surplus equipment to ensure that the charter school can function and

provide meals under these programs. According to 3016.32(c)(1), when the equipment is no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency. Therefore, since the charter school is seeking surplus equipment for the purpose of being utilized in a federally sponsored activity (that is, school food service), this transaction is acceptable.

8) Q: Can a school board sell school food service equipment to a non-profit organization for less than the market value?

A: It depends upon the current per-unit fair market value. 7 CFR 3016.32(e)(1) sets forth that items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold, or otherwise disposed of with no further obligation to the awarding agency. This means that as long as the current fair market value of the equipment is less than \$5,000, it may be sold for less than the market value. However, 7 CFR 3016.32(e)(2) states that items of equipment with a current per-unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have the right to an amount calculated by multiplying the current market value or proceeds from the sale by the awarding agency's share of the equipment.

COMMODITIES

9) Q: If food service management company (FSMC) contracts were just re-bid for SY 2009 (i.e., the school year that extends from July 1, 2008 to June 30, 2009) in accordance with the implementation schedule in the final rule, "Procurement Requirements for the National School Lunch, School Breakfast, and Special Milk Programs" (as published in the Federal Register on October 31, 2001), must the contracts be re-bid *again* for SY 2010 to comply with the implementation schedule in the FSMC final rule which was published in the Federal Register on August 8, 2008?

A: School food authorities (SFAs) must re-bid contracts expiring at the end of SY 2009 (i.e., in June 2009), except in the following cases:

1) The contract already includes provisions relating to crediting for and use of donated foods, the method of determining the value of donated foods used in crediting, and recordkeeping requirements that ensure compliance with the requirements of the final rule; or

2) The contract has an annual renewal provision that would permit it, with State administering agency approval, to extend the contract for one more 12-month period (i.e. through SY 2010).

10) Q: An SFA has competitively procured a contract with a distributor for its food for the school year and the market list includes many items. The SFA is notified that some other items are available as commodities. The SFA accepts the offer for the commodities but must have them processed for use in their school lunch program. Does the SFA have to bid the processing of the commodities or can they use the processor that the winning distributor has a contract with?

A: If the processing of these products is in a quantity significant enough to constitute a material change and/or there is a disproportionate amount of commodities that become available, then the processing of the commodities may need to be rebid. However, the decision regarding whether or not a change to a contract is material rests with the SFA. In general, a material change can be thought of as a change made to a contract after it has been awarded that alters the terms and conditions of that contract substantially enough, to the extent that had other bidders known of these changes in advance, they could have bid differently and more competitively. Therefore, the SFA needs to consider the change in the context of the solicitation and the resulting contract. The ultimate decision, however, lies with the SFA and the SFA must document their rationale to support their decision. Additionally, SFAs need to be aware that unless explicitly stated in the contract, a processor may be under no obligation to accept the products for processing. It is important to note, however, that we believe some flexibility is appropriate so that commodities can be utilized efficiently.

GENERAL PROCUREMENT QUESTIONS

11) Q: If a contract already has language requiring the return of rebates, discounts, and credits, must the SFA still re-bid in accordance with the implementation schedule in the final rule, "Procurement Requirements for the National School Lunch, School Breakfast, and Special Milk Programs"?

A: If a solicitation and the resulting cost-reimbursable contract require that all discounts, rebates and other applicable credits must be credited to the SFA by the FSMC, and the FSMC is in fact crediting all such discounts, rebates and other applicable credits to the SFA, then the relevant contract may be amended to incorporate the required language of the procurement final rule regarding discounts, rebates, and applicable credits without constituting a material change and re-bidding of the contract is not required.

The SFA and State agency should make the determination as to whether the existing solicitation and contract do in fact require the crediting of all such discounts, rebates and other applicable credits. If so, then the SFA and the FSMC may amend their existing contract to incorporate the specific language provided in the final procurement rule, without constituting a material change.

12) Q: What if the contract contains the language for the return of rebates, discounts, and applicable credits, but does NOT contain a provision including the methodology for tracking how the invoices will identify these rebates?

A: The rule requires contractors to provide sufficient information to permit the school food authority to identify allowable and unallowable costs and the amount of all such discounts, rebates and credits on invoices and bills presented for payment to the SFA. It is not likely that this addition to the contract would create a material change or alter the financial structure. This may be accomplished by creating an amendment to the contract which accounts for the tracking of these rebates. However, State approval should be sought.

13) Q: Can an SFA purchase directly from a Buying Organization or Group?

A: SFA's are not prohibited from purchasing from a buying organization or group, as long as they comply with the government-wide procurement rules at 7 CFR 3016 and 7 CFR 3019.

However, an SFA cannot purchase directly from a buying organization without considering other sources. Depending on whether the procurement is informal or formal, the appropriate competition must take place to ensure that the SFA is obtaining the lowest responsive bid or offer. Joining or procuring directly from a buying service without opening up competition to other like sources does not ensure that the lowest responsive bid or offer has been obtained. The prices of a buying group or organization could be factored in and assessed against other bidders or offerors.