



STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION



TO: Sponsors of the National School Lunch and Breakfast Programs

FROM: Paul F. Flinter, Chief
Bureau of Health/Nutrition, Family Services and Adult Education

DATE: March 28, 2008

SUBJECT: Operational Memorandum # 12-08
Final Rule – Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs

The United States Department of Agriculture (USDA) has revised its regulations governing procedures related to the procurement of goods and services in the National School Lunch Program (NSLP), School Breakfast Program (SBP) and Special Milk Program (SMP).

This final rule addresses the following:

- makes changes in a school food authority's responsibilities for proper procurement procedures and contracts,
- limits a school food authority's use of nonprofit school food service account funds to cover costs resulting from proper procurements and contracts, and
- clarifies the State agency's (SA) responsibility to review and approve school food authority procurement procedures and contracts.

This final rule also amends the SMP and SBP regulations to make the procurement and contract requirements consistent with the National School Lunch Program.

Please note that fixed price contracts and the fixed price fee of cost reimbursable with fixed fee contracts are not subject to the final rule requirement that allowable contractor costs paid from the nonprofit school food service account be net of all discounts, rebates, and applicable credits. To view the complete final rule go to: http://www.fns.usda.gov/cnd/Governance/regulations/ProcRule10_07.pdf.

Timeframes

The changes in procedures and requirements are applicable for all new solicitations for cost reimbursable contracts issued after November 30, 2007.

For those solicitations for cost reimbursable contracts that have an annual renewal provision (e.g., food service management company contracts) that were issued prior to November 30, 2007, school food authorities may delay implementation of these changes in procedures until the end of the current contract plus one 12-month renewal period. The school food authority (SFA) must currently be in no more than the fourth year of the contract in order to take advantage of the 12-month renewal period.

For those cost reimbursable contracts that have a term of more than 12 months (i.e., contracts with entities other than food service management companies) school food authorities may delay implementation up to 24 months from November 30, 2007, until November 30, 2009.

State Agency Review Requirements

Effective immediately, the SA must review all cost reimbursable contracts and cost reimbursable contract renewals between SFAs and food service management companies **prior to being signed**. All Requests for Proposal (RFP) will be reviewed prior to issuance. This will help ensure that the school food authorities' RFP meet the USDA requirements and the resulting allowable and allocable contract cost are eligible for payment from the school food authority's nonprofit school food service account.

If a SFA fails to make changes required by the SA, then as provided under 210.19(a)(2) "All costs resulting from contracts that do not meet the requirements of this part are unallowable nonprofit school food service account expenses. When the school food authority fails to incorporate State agency required changes to solicitation or contract documents, all costs resulting from the subsequent contract award are unallowable charges to the nonprofit school food service account."

Solicitation Documents (RFP) and Contracts

SFAs may choose between two cost reporting provisions for solicitation documents and contracts.

1. The SFA may require that contractors identify allowable and unallowable costs on billing documents; or
2. The SFA may require that contractors exclude unallowable costs from billing documents and certify that only allowable costs are submitted for payment. The food service management company (FSMC) must maintain records that establish the visibility of unallowable costs, including directly associated costs, in a manner suitable for contract cost determination and verification.

Regardless of the cost provision chosen, contractors are still required to report discounts, rebates and other applicable credits. School food authorities are still required to limit expenditures of nonprofit school food service account funds to net allowable costs.

Solicitation Document (RFP)

The Connecticut State Department of Education has changed the sample RFP and will change the sample contract. The revised RFP can be accessed at <http://www.sde.ct.gov/sde/cwp/view.asp?a=2626&q=320668>. This revised RFP will only allow for the food service management company to bill the school food authority for net allowable costs, as represented in option 2 above.

The changes to the RFP are intended to inform contractors upfront about new reporting requirements. These changes also provide the SFAs with the information needed to identify the net allowable portion of their contract costs that can be funded from the nonprofit school food service account, and the amount of unallowable contract costs that must be funded from other sources.

Cost Reimbursable Contract Required Provisions

In cost reimbursable contracts the changes in regulations require that the following provisions must be included in all cost reimbursable contracts, including contracts with cost reimbursable provisions. If the SFA is not using the sample RFP, these provisions apply for its own RFP:

1. Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the

contractor or any assignee under the contract to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;

2. (A) The contractor must separately identify for each cost submitted for payment to the school food authority the amount of the cost that is allowable (can be paid from the nonprofit food service account) and the amount that is unallowable (cannot be paid from the nonprofit food service account); or

(B) The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

3. The contractor's determination of its allowable costs must be made in compliance with the applicable USDA and program regulations (7 CFR parts 210, 215, 220, 3016 and 3019, as applicable) and Office of Management and Budget Cost Circulars (A-87 Cost Principles for State, Local Governments and Indian Tribal Governments, or A-122 Cost Principles for Non-profit Organizations, as applicable);
4. The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the SFA for payment. The contractor also must individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit;
5. The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and
6. The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the SFA, the SA, or USDA.

Contractors are only required to identify the amount of each discount, rebate or applicable credit on the bill or invoice and whether the amount is a discount, rebate or in the case of some other form of applicable credit, the nature of that credit.

Contractors Prohibited from Drafting Contract Terms

USDA maintains that while negotiating contract terms is acceptable, potential contractors are not permitted to draft contract terms and conditions. USDA maintains that this prohibition is consistent with Sections 3016.36(b) and 3016.60(b) of 7 CFR, and with the direction provided in Conference Report 105-786 accompanying the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Pub. L. 105-336).

Definitions

Below are new definitions that have been added as part of the final rule to 7 CFR 210.2, 215.2 and 220.2.

Applicable credits shall have the meaning established in Office of Management and Budget Circulars A-87, C(4) and A-122, Attachment A, A(5), respectively.

Contractor means a commercial enterprise, public or nonprofit private organization or individual that enters into a contract with a school food authority.

Cost reimbursable contract means a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

Fixed fee means an agreed upon amount that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

Nonprofit school food service account means the restricted account in which all of the revenues from all food service operations conducted principally for the benefit of school children is retained and used only for the operation or improvement of the nonprofit food service.

In the preamble to the final rule USDA enumerates some of the funds that comprise the nonprofit school food service account as: federal reimbursements for meals and milk served to eligible children; student payments, adult payments and a la carte sales revenue; and State and local funds and sales revenue from vending and catering activities. Additionally, regardless of the source, the school food authority must retain all of these revenues in the restricted nonprofit school food service account and may only expend these revenues for the allowable costs of the school food authority's nonprofit school food service program.

Note: The sample contract on the CSDE website is being updated to include the changes required by the final rule and is not available to SFAs at this time. The revised contract should be posted on the website after April 15th.

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