



STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION



OPERATIONAL MEMORANDUM

TO: Sponsors of National School Lunch, School Breakfast and Special Milk Programs

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

DATE: June 6, 2008

SUBJECT: Operational Memorandum #20-08

- I. Allowability of Procurement Fees in School Food Authority Contracts
- II. USDA Prototype Contract Language for Return of Discounts, Rebates and Credits to School Food Authorities

I. Allowability of Procurement Fees in School Food Authority Contracts

The United States Department of Agriculture (USDA) has provided the following guidance regarding the allowability of procurement fees in school food authority (SFA) contracts:

1. For contracts executed after November 30, 2007, the effective date of the final rule, discounts, rebates and applicable credits must be returned to the SFA's nonprofit school food service account. Therefore, any fee (including a procurement fee) that is directly tied to the amount of discounts, rebates, and applicable credits to be returned to the SFA is an unallowable nonprofit school food service account cost, as it undermines the intent of the new regulation. A fee structured in this way is clearly intended to return some or all of the discounts, rebates, and applicable credits to the company with whom the SFA has contracted for services rather than to ensure that they accrue to the nonprofit school food service account. This is true whether the fee is set forth in the solicitation/contract or not.

SFAs may, however, develop solicitations in a way that allows for management and/or administrative fees that include fees for procurement services. **The procurement fee could be a separate fee or part of another contract fee, as long as it remains fixed.**

2. For contracts that pre-date the effective date of the final procurement regulation, procurement fees are allowable, even if they are tied directly to the amounts of discounts, rebates, and applicable credits to be returned to an SFA, as long as they were properly considered in the solicitation document.

II. USDA Prototype Contract Language for Return of Discounts, Rebates and Credits to School Food Authorities

The final rule, *Procurement Requirements for National School Lunch, School Breakfast and Special Milk Programs*, was published in the Federal Register on October 31, 2007. The rule

explicitly: (1) limits a school food authority's (SFA's) use of nonprofit school food service account funds to costs resulting from proper procurements and contracts; (2) requires that allowable costs paid from the nonprofit school food service account be net of all discounts, rebates, and applicable credits; and (3) requires State agencies (SAs) to review and approve SFA procurements of food service management company services in advance of contract execution.

In response to several requests and to assist SAs and SFAs in their compliance efforts, USDA has provided the following prototype contract language requiring the return of purchase incentives to SFAs:

“The _____ School District shall ensure that _____ (Company/Food Service Management Company) fully discloses all discounts, rebates, allowances, and incentives received by the Company from its suppliers. If the Company receives a discount, rebate, allowance, or incentive from any supplier, the Company must disclose and return to the _____ School District the full amount of the discount, rebate, or applicable credit that is received based on the purchases made on behalf of the _____ School District. All discounts, rebates, allowances, and incentives must be returned to the _____ School District during a mutually agreed upon timeframe that is beneficial to the School District.”

SFAs may also opt to use the language found in 7 CFR Part 210.21(f)(i):

“Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discount, 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 SFA.”

As part of their guidance, USDA states that it is important that SFAs consult with their own legal counsel regarding the use of any particular contract language, to ensure that all Federal, State and local requirements are met.

The final piece to USDA's guidance is their emphasis that not only must SFA contracts contain appropriate language requiring the return of discounts, rebates, and applicable credits to the SFA, but that SFAs monitor contract compliance on an ongoing basis and strictly enforce all contract provisions, including those related to the return of discounts, rebates, and applicable credits. Also, that the SA must implement the necessary safeguards and steps to ensure that the contract provisions are being enforced by the SFAs and applicable incentives are actually recovered.

Questions regarding food management company contracts may be directed to Robert Zwack at (860) 807-2081 or robert.zwack@ct.gov.