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# Procurement for Food Service

Wyoming Department of Education

Last Update  
March 2016

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## Procurement Procedures

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Procurement procedures must be followed for all purchases for goods or services that are supported, **in whole or in part**, with non-profit food service account funds and assets.

Federal procurement requirements are based on the simple premise that all procurement must be fair, open, and competitive. Regardless of the procurement method used.

Purchases and contract awards must be made only to responsive and responsible bidders,

**Responsive** means that the bidder and their offer meet the requirements of the procurement. **Responsible** means that the bidder has the means to execute the procurement – they have the ability to provide the goods and/or services required.

The School Food Authorities (SFA)s are responsible for ensuring that allowable costs are net of all discounts, rebates, and applicable credits, and also that all expenditures are necessary, reasonable, and allocable.

**Public institutions or organizations** must follow the most restrictive of state, local, or federal procurement standards. Public institutions must also determine cost allowability by using applicable program regulations, State laws, and the Office of Management and the Budget (OMB) Cost Circular.

**Non-profit institutions** or organizations may use their own established procurement procedures as long as they conform to federal requirements, but are also subject to the OMB Cost Circular to determine cost allow-ability and must still follow all applicable program regulations.

All SFAs must have their procurement procedures in writing. SFAs must also maintain a written “standard of conduct” and have written protest procedures in place to handle and resolve any disputes relating to their procurement processes.

All procurements in the Child Nutrition Programs must meet all standards set forth in program regulations and the **OMB Super Circular 2 CFR 200**. The Federal Child Nutrition Programs are governed by the Code of Federal Regulations (CFR) under 7 CFR Parts 210, 215, 220, 225, 226, 245, 250 (as applicable), and all Federal requirements following 2 CFR Part 200.317 Procurement Standards as outlined in the OMB Super Circular Guidance for Federal Awards

## Proper Procurement

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Proper procurement practices are essential to ensure fairness and that the best products and services are obtained at the best price. Additionally it will ensure that only allowable costs are paid and these costs are net of all discounts, rebates, and applicable credits.

**Remember** that SFAs can enter into contracts or have purchases that result in unallowable costs, but the SFA cannot use non-profit school food service funds to pay any amount for unallowable costs or any amount above net allowable costs.

The SFAs can identify the net allowable portion of their contract costs that can be funded from the non-profit school food service account and the amount of unallowable contract costs that must be funded from other sources. (If applicable)

It is important that the 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 being met.

## Procurement Process

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### Pre-Procurement Actions

- Identify what will be purchased
- Estimate the cost; understand allowable and unallowable program costs. Do a Request for Information (RFI) if necessary
- Identify the procurement methods to be used
- Develop/update a bidders list (if appropriate)

### What do I want to purchase?

SFAs must have a clear and accurate description of the material, product, or service to be procured. All requirements, which must be fulfilled, have to be identified and cannot contain features which unduly restrict competition.

When it is impractical or uneconomical to make clear and accurate descriptions of the technical requirements, a “**brand name or equal**” description may be used as a means to define the performance or other requirements. The specific features of the named brand, which must be met by suppliers, shall be clearly stated per 2 CFR 200.319(c) (1).

Restricting procurement to a brand name or a specific product is not permitted; however, situations do arise when a SFA has a compelling need or reason to purchase a brand specific item. The SFA would then need to document all reasons for this requirement. The SFA must still maximize competition even in the brand specific procurements.

**Sole Source.** A sole source procurement must have prior approval by the Wyoming Department of Education (WDE). Federal rules allow for a sole source when only one supplier is available nationally. The **State Agency (WDE) can authorize** the SFA to conduct a noncompetitive negotiation with that one supplier, if noncompetitive negotiation is allowed under applicable State and local rules. *This is a rare occurrence.*

Contracts cannot be awarded to potential vendors that wrote any of the bid specifications, the solicitation documents, or the contract. **Potential bidders may provide information for the specifications** but cannot prepare documents.

Identical bid specifications must be provided to all potential vendors. This must include all important information such as delivery schedules, quantities, product specifications, and purchase conditions.

**Reminder:** Per 2 CFR 200.321 the SFA will purchase from small, minority, and women's business enterprises and labor surplus firms whenever possible

## Procurement Methods

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There are several ways to meet the fundamental principles of procurement - fair, open, and competitive purchasing,

**Invitation for Bid (IFB)** is a formal method used when the only significant point of differentiation between vendors is the price. An IFB requires the organization to provide clear, concise specifications and should describe the minimum standards expected of a responsible respondent in measurable terms. Bids will be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids. An IFB is a formal method of procurement that uses sealed bidding and results in a fixed price contract with or without adjustment factors.

IFBs will be publically opened at the time and place prescribed in the IFB. The contract will be awarded to the bidder whose bid conformed with all the terms and conditions of the IFB and is the lowest in price.

**A Request for Proposal (RFP)** differs from bids and quotes in that there are other factors that are considered in making an award. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method. The RFP identifies the goods, products, and/or services needed, and all significant evaluation factors. The RFP is publicized and is used to solicit proposals from a number of sources. Competitive proposals may be used if conditions are not appropriate for the use of competitive sealed bids.

RFP must include all evaluation factors and their relative importance. The contract will be awarded to the proposer that is the most advantageous with price and other factors being considered. However, the cost/price must be the primary factor and carry the highest evaluation weight.

Therefore, all RFP Solicitations must include provision for evaluation and scoring factors with cost as the primary factor.

**Requests for Quotation (RFQ)** is similar to bidding except that it is less formal. In some cases it is simply calling several vendors and asking for the price on the goods or services a SFA is requesting and writing that down. A **Request for Quote (RFQ)** is commonly used when you know what you want but need information on how vendors would meet your requirements and/or how much it will cost.

**A Request for Information (RFI)** is a method of identifying the range of possibilities available when a district is unsure what to include in their procurement. As with all forms of procurement, RFIs must be open to all potential respondents. The RFI might be used to prequalify vendors moving forward. A district cannot make an award based on an RFI, but must issue a subsequent IFB or RFP that is more exact.

## Frequency

There are no USDA rules that dictate the frequency that formal procurements must occur for food service. Additionally there are no rules (except for FSMC) that dictate how long a contract can be in place. **Good business practices would suggest every 3 to 5 years between bids and that all contracts should have an annual renewal when in place for longer than one year.**

## Purchase Methods

- **Small Purchase** – Total purchase is less than the small purchase threshold.
- **Formal Procurement** – Total purchase or contract worth that exceeds the small purchase threshold.
- **Micro-Purchase** – Any purchase below \$3,000.00. These purchases may be awarded without soliciting competitive quotes if the price is considered reasonable. To the extent feasible, however, a SFA must distribute micro-purchases equitably among qualified suppliers.
- SFAs need to avoid acquisitions of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.

A small purchase is a simpler process than formal procurement. However, the total purchase must be within the small purchase threshold. Public agencies must use the most restrictive of state, local, or federal guidelines.

### **The Thresholds for Wyoming are as Follows:**

- Federal and most Non-Profits \$150,000.00
- School Districts \$25,000.00 (W.S. 21-3-110 (B)(viii))
  - **Districts must get competitive quotes for purchases between \$10,000.00 and \$25,000.00**
- Local & Private Non-Profit (depends on the written local procurement standards, with local refereeing to the SFA own rules and policies)

### **Wyoming Public SFAs follow:**

- Purchase or contract worth greater than \$25,000:

- If the amount exceeds twenty-five thousand dollars (\$25,000.00) this is considered a **formal purchase**, and contract must be awarded through a formal bid process.
- Purchase greater than \$10,000 and less than \$25,000:
  - SFAs will obtain **competitive bids** (quotes) when any purchase will cost more than ten thousand dollars (\$10,000.00) and less than twenty-five thousand dollars (\$25,000.00).
- Purchase less than \$10,000:
  - Any purchase greater than three thousand five hundred dollars (\$3,500.00) and less than ten thousand dollars (\$10,000.00) is considered a **small purchase** and does not require a bid process, however, the small purchase shall be made on a competitive basis.
  - Any purchase below three thousand five hundred dollars (\$3,500.00) is considered a **micro-purchase**.
  - Micro-purchase thresholds are defined by 2 CFR 200.67 and are periodically adjusted for inflation. Therefore this amount can be adjusted as allowable by federal regulation.

### Wyoming **Non-Profit** SFAs follow:

#### (If more restrictive rules have not been adopted)

- Purchase or contract worth greater than \$150,000.00:
  - If the amount exceeds one hundred fifty thousand dollars (\$150,000.00) this is considered a **formal purchase**, and contract must be awarded through a formal bid process.
- Purchase less than \$150,000.00:
  - Any less than one hundred fifty thousand dollars (\$150,000.00) is considered a **small purchase** and does not require a bid process, however, the small purchase shall be made on a competitive basis.
- Purchase less than \$3,500.00:
  - Any purchase below three thousand five hundred dollars (\$3,500.00) is considered a **micro-purchase**.
  - Micro-purchase thresholds are defined by 2 CFR 200.67 and are periodically adjusted for inflation. Therefore this amount can be adjusted as allowable by federal regulation.

**Micro-purchases** may be awarded without soliciting competitive quotes if the price is considered reasonable. To the extent feasible, however, SFAs must distribute micro-purchases equitably among qualified suppliers

**Open and free competition must still prevail and small purchase procedures do not change the requirements of comparability, documentation, and the need to avoid conflicts of interest.** Remember to balance cost with what is to be purchased and what is available. Don't spend more money getting and/or achieving competition than what will be spent for the needed item(s).



## Small Purchase Procedures and/or Competitive Quotes

1. Solicitation documents
  - a. Describe what goods or services are needed
  - b. Due dates
  - c. Other relevant factors
2. Contact an adequate number of available, qualified sources to achieve competition (if possible).
3. Receive price/rate quotes
4. Evaluate quotes
5. Make purchase
6. Keep Procurement Documentation

## Formal Procurement

Value of purchase exceeds threshold for small purchases. Results in a contract.

- More rigorous and prescriptive:
  - Invitation for Bid (IFB) i.e. Competitive Sealed Bidding
  - Request for Proposal (RFP) i.e. Competitive Negotiation
- Allows the identification of evaluation factors and their relative importance
- Contract is to be issued as result of Procurement

## Formal Procurement Procedures

1. Identify allowable methods, either an RFP or an IFB
2. Prepare solicitation and contract documents. Detailed bid specs must be developed
3. **Advertise.** Bids/Proposals must be solicited to as many bidders as possible.  
NOTICE AND PUBLICATION: Every potential bidder must be given an opportunity to respond. SFAs are required to publish/post any IFBs and RFPs. Prospective bidders may be notified via advertisement in regional and state newspapers, e-mail, solicitations sent directly to vendors, and/or posted on a designated websites for retrieval. Social media can be used as well as trade periodicals and websites.
4. Clarifications, addendums, and questions; must be provided to all prospective bidders during the solicitation phase.
5. Receive and evaluate submissions. Measure and document why one company's response to a particular criterion is better than another – **Scoring System for RFPs.**

### FACTORS USED FOR EVALUATION (Scoring):

- ✓ Clearly list the factors that will be used to evaluate and determine the winner of the bid. **IFBs are based only on price and are publically opened.**
- ✓ Evaluation scores should reflect their importance; therefore, factors should be weighted.
- ✓ Price should always have the highest weight.



6. Award contract
7. Execute contract
8. Administer contract-see [Contract Administration on page 16](#)
9. Maintain documentation – see [Documentation on page 16](#)
10. SFAs and/or contractors may be required to submit any or all documents to the State Agency, auditors and/or USDA for review
11. Have written protest procedures – These are part of SFA’s written procurement policy.

## Solicitation Development

All procurement transactions must be conducted in a manner providing full and open competition. Therefore, **contractors or bidders** that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements.

Some of the situations considered to be restrictive of competition include but are not limited to:

1. Placing unreasonable requirements on contractors in order for them to qualify to do business.
2. Requiring unnecessary experience and/or excessive bonding.
3. Noncompetitive pricing practices between contractors or between affiliated companies.
4. Organizational conflicts of interest.
5. Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement;
6. Any arbitrary action in the procurement process.
7. The use of state or local geographical preferences in the evaluation of bids or proposals, except for Farm to School.

An SFA that uses another SFA’s solicitation documents should always inquire as to the origin of any information so that they do not unintentionally violate procurement provisions. The inquiry should be pursued until the original author of the documents is identified.

### **REMEMBER:**

SFAs must describe cost reporting requirements fully in its solicitation documents. Without adequate details on how to report costs to the SFA, a potential contractor will lack the information needed to determine allowable and unallowable costs, including how the contractor will provide the SFA the benefits of discounts, rebates, and credits.

## Formal Procurement Methods & Contract Types

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- ★ Sealed Bid (IFB)
  - Can award **only a Fixed Price Contract** and the successful bidder can be determined only on the basis of **price**.
  - Must have adequate and realistic specifications or purchase descriptions
  - Must have at least two or more responsible bidders that are willing and able to compete effectively
  
- ★ Competitive Proposal (RFP)
  - Awarded contract may be either **Fixed Price or Cost Reimbursable**.
  - Generally used when conditions are not appropriate for the use of Sealed Bid.

### IFB-Invitation for Bid Procedures (Sealed Bid)

- Prepare Solicitation and Contract Documents
  - ❖ Use Invitation for Bid Solicitation (IFB)
  - ❖ Must have complete, adequate, and realistic specifications or purchase descriptions
- Advertise
  - ❖ The IFB must be publicly advertised and bids shall be solicited from an adequate number of suppliers. Must have two or more responsible bidders
  - ❖ Must provide sufficient time for response
- Receive and Evaluate Submissions - **All bids will be publicly opened at a predetermined time and place as was previously stated in the IFB.**
- Award Contract
  - ❖ **A firm, fixed price contract award will be made in writing.**
  - ❖ Award is made to the lowest priced, responsive, and responsible bidder
  - ❖ When setting the price consideration must have been given to all discounts, rebates, credits, or additional costs by the bidder.
  - ❖ Any or all bids may be rejected. Can reject bidders only for sound, documented reasons
- Administer Contract
- Maintain Documentation

### RFP-Request for Proposal Procedures (Competitive Proposal)

- Prepare Solicitation and Contract Documents
  - ❖ Use Request for Proposal Solicitation (RFP)
  - ❖ Must identify all evaluation factors and their relative importance. **Scoring (evaluation) criteria must be included in the RFP.**
- Advertise - Proposals will be publicly advertised and solicited from an adequate number of qualified sources.
- Receive and Evaluate Submissions.
- Must have a method for evaluation of the received proposals and for award selection (Score Card). [See page 11: How to Score Proposals](#)

- ❖ All responses must be honored to the maximum extent possible.
- ❖ Responses are to be collected and scored, **not to be done publicly.**
- Award Contract
  - ❖ Award will be made to the responsive and responsible party whose proposal is the most advantageous.
    - ★ **Responsive** means that the vendor submits a bid that conforms to all terms of the solicitation.
    - ★ **Responsible** means that the vendor is capable of performing successfully under the terms of the contract.
  - ❖ Price and other factors must have been considered and price must have had the highest weight.
  - ❖ Notification is to be sent to all vendors. A notice shall be sent to awarded vendor(s) and all unsuccessful vendors.
- Administer Contract
- Maintain Documentation

## How to Score Proposals (RFPs)

SFAs must clearly develop **scoring criteria** (score cards) in order to evaluate all proposals received. Solicitations must include the provisions for evaluation and the scoring factors **with cost as the primary factor**.

- Scoring criteria should identify all evaluation criteria and their relative importance.
- Scoring will allow for a contract award only to the responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement.
  - **SFAs cannot include prior experience with the SFA as a scoring category since it would violate the USDA's free and open competition regulation for procurement.**
- **Reminder:** IFBs don't include points (the SFA determines who is responsive based on the solicitation and award the contract to the **lowest priced bidder**).

The regulations are not prescriptive as to how proposals can or should be evaluated except that **cost must be the primary factor for award**.

- A point system, percentage based system, or a different weighted system may be used. There is no set method.
- The solicitation must clearly define and describe the evaluation criteria to be used.
- The SFA must ensure the method chosen does not unreasonably limit free and open competition.
- Federal regulations do not prescribe how to develop scoring criteria to evaluate bids/proposals or the maximum number of preference points.

**Contracts that failed to include cost as the primary factor will be required to be rebid.** Therefore, contracts found to be awarded without cost as the primary factor will require the SFA to begin a rebidding process to allow for a new, compliant contract to be awarded by the beginning of the next school year

**SFAs must watch for unallowable and/or un-allocable costs in vendor solicitation responses and invoices for contract payments. These would include:**

- Overly responsive and value added items
- Third party vendor agreements
- Fees that have not been properly procured or agreed upon.

## **Contract Development**

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### Necessary Contract Elements

- Ensure all needed contract elements were included in solicitation and the contract should include but not limited to:
  - The return of all discounts, rebates, and applicable credits when a cost reimbursable contract or clause is used.
  - Cost Reimbursable contracts have the required cost reimbursable provisions
  - Clear and specific time periods
  - Clauses regarding termination for cause or convenience
  - Allowability of substitutions and/or price changes
  - Remedies for breach (i.e., negligence, nonperformance)
    - Financial penalties
    - Corrective actions or
    - Restitution
- The contract will address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms. Appropriate sanctions and/or penalties will be included.
- All contracts in excess of \$10,000.00 must address termination for cause and for convenience and include the manner by which it will be effected and the basis for settlement.
- Contracts made under a Federal Award (such as with funding from the USDA Child Nutrition Programs) will also contain all applicable federal provisions as referenced under *Appendix II to Part 200-Contract Provisions for Non-Federal Entity Contracts Under Federal Awards*. **See Attachment A for specifics and contract thresholds.**

## **Basic Contract Types**

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### • Fixed Price

- Firm Fixed Price
- Fixed with Economic Adjustment
- Fixed with Prospective Price Predetermination

For fixed price or fixed fee contracts:

- Contractors should have taken into consideration factors such as discounts, rebates, and credits when formulating their prices
- SFA's are not required to determine the allow-ability of costs resulting from fixed price contracts

- Costs must still be necessary, reasonable, and allocable to the nonprofit school food service

- **Cost Reimbursable**

- Cost Contract
- Cost Plus Fixed Fee
- **Cost Plus Percentage\***
- **Cost Plus Percentage of Income (applies to FSMCs)\***

**\*Prohibited Contracts:** These contract types are expressly **unallowable** for the federal Child Nutrition Programs.

### **Cost Reimbursable Contracts - ONLY**

***The SFA must include the following provision in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and solicitation documents for such contracts.***

- *Only 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.*
- *The SFA shall ensure that the CONTRACTOR 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 SFA the full amount of the discount, rebate, or applicable credit that is received based on the purchases made on behalf of the SFA. All discounts, rebates, allowances, and incentives must be returned to the SFA during a mutually agreed upon timeframe that is beneficial to the School District.”*
- *Sufficient detail and information must be supplied to the SFA to identify **allowable and unallowable costs**, as well as the amount of all discounts, rebates and other applicable credits on invoices.*

**Fixed Priced contracts** assume that discounts, rebates, and credits have been applied to the contracted fixed price and do not need to be reported to the SFA on invoices.

The SFA can choose between **two cost reporting provisions**. The contractor can either:

- ✓ Identify allowable and unallowable costs on billing documents for each cost submitted for payment, or
- ✓ Exclude unallowable cost from billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs.

## Discounts, Rebates, and Credits - Continued

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The SFA is responsible for ensuring that allowable costs are net of all discounts, rebates, and applicable credits. However, there are no prescribed or specific methods to be used to identify these amounts.

The contractor must maintain records and source documents in support of discounts, rebates, and credits. They do not have to identify sources but must be able provide sufficient information and can do so without compromising confidential business information or relationships.

The SFAs may also opt to use the language found in 7 CFR Part 210.21(f) (i) for cost reimbursable contracts:

“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 SFA.”

In addition to ensuring that SFA contracts contain appropriate language requiring the return of discounts, rebates, and applicable credits to the SFA, **it is critical 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.

## Unallowable Cost Provisions

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Unallowable contract cost provisions can be the result of the following items:

- Incentives
- Investments
- Resulted from value-added bids/offers
- Resulted from overly responsive bids
- Or can be the result of the SFA failing to consider cost as the primary evaluation factor

Contracts found to be in noncompliance and identified as having unallowable cost provisions will be required to be amended or rebid.

## Incentive Programs

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Incentives are usually points or gifts earned on purchases of commercial end products that may or may not contain USDA Foods. SFAs may be offered incentives in a variety of ways.

Per 7 CFR Part 210.14(a), SFAs can use the incentives they have earned as long as the items are **used solely for the operation or improvement of the non-profit school food service program** and are consistent with federal (2 CFR 200) and state cost principles.

## Procurement and Incentive Programs

SFAs must conduct all procurement transactions to allow for full and open competition. If an SFA chooses to participate in an allowable incentive program, their bid solicitation documents must state that they are seeking vendors to provide incentives.

By not addressing incentive programs within solicitation documents, then eliminating vendors based on whether or not they offer incentives or awarding additional points to those vendors who offer an incentive program; this limits competition by placing unreasonable requirements on them.

SFAs cannot exclude any vendors from qualifying during the solicitation on the basis that they do not offer an incentive program.

## Economic Price Adjustments

A contract with economic price adjustment is appropriate when:

- Contract performance will or may cover an extended period of time;
- There is serious doubt concerning the stability of market conditions during the period of the contract;
- Adjustment standards or indices agreed to are based on contingencies outside the contractor's control; and
- Contingencies, such as increases in labor costs, that would otherwise be included in the contract price can be identified and covered separately in the contract.

The economic price adjustments, which allow an SFA to adjust costs in the contract, must be tied to an appropriate standard or cost index. Relating the price adjustments in a contract to an index allows the SFA to ensure that increases under the contract are not without basis. For example, if fuel prices are increasing drastically, then an appropriate index—such as the Consumer Price Index—will reflect this change.

**The terms of the economic price adjustment, including the appropriate standards or indices to which it will be tied, must be expressly identified in the original solicitation and contract documents.**

The SFA, however, needs to decide whether they would like to include these in their contract; **it is not the vendor's decision**. It is also important to recognize that the SFA will most likely be advised by the contractor when costs go up, but they will not necessarily notify the SFA when costs go down. **The economic price adjustment clause is intended not only to give vendors an option to increase their price, but also for the SFA to demand price reductions when appropriate.**



## Contract Administration

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A contract administration system must be maintained which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contract. SFAs need to be meticulous in contract management, particularly when the contract contains an economic price adjustment clause.

SFAS must ensure that contracted products and services are received prior to authorizing payments.

**SFAs must watch for** fees that have not been properly procured or agreed upon.

Remember, the SFA, not the contractor, is ultimately responsible for ensuring that expenditures from the non-profit school food service account are allowable costs.

- ❖ SFAs will maintain a contract administration system which will ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- ❖ The SFAs **contract administration system** will address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms. Appropriate sanctions and/or penalties must be included.
- ❖ **TIMING:** SFAS need to know when a new contract period starts, how long it lasts, whether the contract may be renewed and if so, how many times, and whether the contract contains escalation clauses to allow adjustments that reflect changing market conditions.

## Documentation

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Retain all required records for at least three years after final payments and all pending matters have been closed and completed. SFAs must adhere to all 2 CFR 200.333 record retention requirements.

Grantees (SFAs) or sub grantees (contractors) may be required to submit any or all documents to a State Agency, a Federal Agency, duly authorized representatives, and/or auditors for review.

These documents include but are not limited to:

- Solicitation documents
- Specifications
- Evaluation criteria
- Procurement procedures
- Proposed contracts
- Final contracts
- And all contract terms

Documentation to be retained will include all solicitation documents, responses, evaluation records, and contracts. These records should detail the history of any procurements and should also include, but are not limited to, the following:

- ★ rationale for the method of procurement used
- ★ selection of contract type
- ★ contractor selection or rejection
- ★ and the basis for the contract price

SFAs will retain all Food Program records for three years after final payments and/or three years after any pending matters have been closed and completed.

SFAs will also need to allow **access** to all records per 2 CFR 200.336. Therefore, the Federal awarding agency (USDA), Inspectors General, the Comptroller General of the United States, and the Wyoming Department of Education, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the SFA which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the personnel for the purpose of interview and discussion related to such documents.

## Nonperformance

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Termination for cause or convenience should be **included in all contracts**, as well as financial penalties for nonperformance, corrective actions, or restitution.

**All contracts in excess of \$10,000.00** must address termination for cause and for convenience and include the manner by which it will be effected and the basis for settlement.

Additionally, contracts should describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

Confront nonperformance by having comprehensive contract terms, timely written notification, prompt termination, rejection of any future bids or responses, and maintenance of all records.

## Protest Procedures

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- Grantees (SFAs) and sub-grantees (contractors) will be responsible for the settlement of all contractual and administrative issues arising out of procurements.
- **Written protest procedures** must be in place to handle and resolve disputes.
- A protestor must exhaust all administrative remedies with both the SFA and the WDE before pursuing a protest with the United States Department of Agriculture (USDA).
- Review of protests by the USDA will be limited to specific instances, such as violations of federal law or regulations.

There are three basic types of protests, based on the time in the procurement cycle they occur.

- ❖ A pre-bid or solicitation phase protest is received prior to the bid opening or proposal due date.
- ❖ A pre-award protest is a protest against making an award and is received after receipt of proposals or bids, but before award of a contract.
- ❖ A post-award protest is a protest received after award of a contract.

When the written procedure is requested, it should be provided immediately. The protest procedure can also be included in solicitation documents.

## Debarment and Suspension

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Any contracts awarded by a grantee or sub-grantee for federally-required audit services, regardless of dollar amount must have verification regarding debarment, suspension, ineligibility, and voluntary exclusion.

To meet this requirement a SFA can:

- Include a suspension/debarment statement within the text of the signed contract.
- Use the state-approved certification form as an attachment.
- Check the federal Excluded Parties List System (EPLS) that can be found on the internet at [www.sam.gov](http://www.sam.gov). The SFA should make note of the findings within the procurement documentation when the EPLS is utilized.

Grantees and sub grantees cannot award (sub-grant or contract) at any tier to any party that is debarred or suspended.

## Fair and Ethical Practices

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A written code of “standards of conduct” governing the performance of employees engaged in the award and administration of contracts supported by federal funds shall be maintained (2 CFR 200.318(c) (1)).

“Standards of conduct” should include policies on conflicts of interest, real or perceived, and the acceptance or soliciting of gratuities, favors, gifts, or anything of monetary value.

The written “standards of conduct” must provide for penalties, sanctions, or other disciplinary actions for any violations of those standards.

## Conflicts of Interest

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No employee shall participate in the selection, award, or administration of a contract when any of the following persons has a financial interest in the firm selected for the award:

- The employee.
- Any member of his/her immediate family.
- People with whom there is an affectionate personal relationship.
- An organization which employs or is about to employ any of the above.

## Gratuities, Favors, and Gifts

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Employees will neither solicit nor accept gratuities, favors, or any item with monetary value from vendors, potential vendors, or parties to sub-agreements including:

- Entertainment
- Lodging
- Transportation
- Gifts
- Meals

The grantee or the sub-grantees may set minimum acceptance rules where the financial interest is not substantial or if the gift is an unsolicited item of nominal value to the extent permitted by state or federal guidelines.

The persons engaged in procurement activities should have a personal commitment to integrity and never be self-serving, be fair in all aspects of the procurement process, be alert to conflicts of interest, and avoid all compromising situations.

## Geographic Preferences

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**Geographic preferences are expressly prohibited** even if required by state or local procurement rules. Any advantages based on location are strictly unallowable for purchases using federal funds. However, institutions receiving funds through the Child Nutrition Programs may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products (Farm to School, Farm to Plate purchases).

Therefore, as part of Farm to School the SFA may choose to apply a geographic preference. However, this can only be a preference and not a bid specification. Additionally, this is allowed but not required for Farm to School purchases.

- REMINDER - Restricting solicitation advertising to the SFA's county would be considered a geographic preference and will be not allowed unless the purchase is for a documented Farm to School effort.

## Open and Free Competition

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Competition is the "rivalry between businesses striving for the same customer." It is a condition of the environment, and may not always exist.

Open and free competition is required by the USDA, ensures availability of the best products at the best prices, and prohibits restrictive actions.

SFAs must always:

- Give identical bid specifications or requests for proposals to all potential vendors.
- Include all-important information such as delivery schedules, quantities, product specifications, and purchase conditions.
- Make cost or price comparisons.

## Pre-Approved or Pre-Qualified Supplier or Vendor Lists

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Regulations allow for the use of pre-approved or pre-qualified lists of vendors, persons, firms, or products. However, a SFA should make sure that this is not prohibited under applicable State laws and/or is permitted under the SFAs written procurement policy. Vendors may be limited to a pre-approved list as long as it is permitted and the SFA's procurement procedures still ensure maximum open and free competition.

The procedures the SFA will follow when conducting procurement and using a pre-approved list depends on the procedures that were used to place the vendors on this list. Some lists are nothing more than mailing lists of potential vendors; i.e., any supplier that may be interested in competing for the SFA's business. However, some lists may be made up of vendors that were subject to a comprehensive, competitive evaluation and must compete with other vendors before being included on this pre-approved list.

When using a "mailing list," the SFA must still fully follow the procurement process. If the SFA uses a pre-approved vendor or supplier list, a technical evaluation of the vendor's products and eligibility to participate in a contract with the SFA occurs prior to adding the vendor's name to this list. In some cases, the prices of products have been established through this competitive process, but not delivery or handling charges. When using this form of pre-approved vendor, the SFA would initiate a competitive procurement for those features that had not previously been subject to competition, but can limit responsive vendors to those on the pre-approved list.

In all cases, the SFA must make sure that:

- The list is current and updated at least annually.
- A suitable number of qualified sources exist on the list.
- When applicable, the product or services on the list are specific in nature, not just a general description such as food, supplies, etc.
- All potential vendors had the opportunity to be included on the list.
- When applicable, all potential vendors were subject to the same evaluation and ranking criteria.
- Vendors that did not request or compete for inclusion on the list are not on the list.
- The opportunity exists to add new qualified vendors.
- Potential vendors are not prohibited from qualifying for inclusion on the list during the solicitation period.
- A system exists to remove listed vendors, for cause.

## Buy American

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SFAs are required to purchase, to the maximum extent possible, domestic products for use in meals served in its National School Lunch and School Breakfast Programs. The "Buy American" requirement (7 CFR Part 210.21(d)) specifies that SFAs should purchase domestically produced food and food products. The purpose of this requirement is to ensure that the highest quality foods are available, and to support American agriculture.

Exceptions are allowed when food preferences can only be met with foreign goods, if insufficient quantities and/or quality are available in the USA, or if domestic costs are significantly higher. The Buy American provision also applies to entities that purchase on behalf of a SFA.

There are a number of ways SFAs can comply with this provision. SFAs should include a **“Buy American”** clause in all product specifications, bid solicitations, requests for proposals, purchase orders, and any other type of procurement documents issued.

## Cooperatives (Co-ops) & Group Purchasing Organizations (GPO)

Each SFA is responsible for their own procurements regardless of whether they issue solicitations independently, participate in a Co-op, hire a purchasing agent to assist with the process, or join a GPO.

### But what are the differences between a GPO and a Purchase Cooperative?

A **Group Purchasing Organization (GPO)** is an entity created to leverage the purchasing power of a group to obtain discounts from vendors based on the collective buying power of the GPO members. **GPO membership would consist of SFAs and other organizations.**

When a third-party organization (GPO) conducts the solicitation process on behalf of SFAs and others, a compliant competitive solicitation (procurement) must be conducted for the services of a GPO. SFAs can procure a GPO's services using either informal or formal procurement procedures.

A **Cooperative** (Co-operative or Co-op) is an association of **only SFAs** that voluntarily cooperate in purchasing practices and share resources for their mutual economic benefit. Members leverage buying power, share knowledge, and pool administrative resources.

### Co-ops must behave as if it is a SFA for all procurements, therefore:

- All members must be involved in the bid and contract process.
- All members need to understand and decide on all fee structures.
- Each SFA is responsible to verify that the Co-op is meeting all of the USDA, State, and SFA procurement and contract rules.
- Each SFA must have a copy of the bid, the response, the contract(s) and the Co-op intergovernmental agreement.
  - 💡 All members must decide, as a group, to what all of the above should look like!
- The SFAs need to watch for specific purchase percents; they are allowed but need caution.

- It is recommended that each individual SFA member have their legal counsel review the **Intergovernmental Agreement** to make sure it is safeguarding the SFA.
- If a Co-op contract, the bid documents, or any amendments are found to be out of compliance for Federal procurement rules, the SFA is to request that the Co-op begin a rebidding process to allow for a new, compliant contract to be awarded by the beginning of the next school year.

### **Administrative Fees (the following would also apply to GPOs):**

Co-ops may be funded by administrative fees. These fees may be paid directly to the Co-op from vendors contracted by the Co-op, or they may be paid directly to the Co-op by SFA Co-op members. Some Co-ops are funded by a combination of both of these methods.

Federal regulations prohibit contracts based on cost plus a percentage by SFAs. Therefore, it is not allowable for Co-ops to collect administrative fees based on a percentage of a SFA's sales volume from the vendors with whom they have negotiated a contract.

## **Farm-To-School Initiative**

The Farm-to-School initiative was developed to encourage schools to purchase unprocessed locally grown and/or locally raised agricultural products from small, local farmers and producers; however, the SFA must still make all purchases in accordance with all federal procurement regulations and applicable State and local laws and statutes. Therefore, the SFA could identify potential local farmers or producers with its procurement solicitations.

NOTE: Many Farm-to-School purchases are often less than the applicable small purchase threshold. Therefore, the SFA would be able to use the relatively simple, informal procurement procedure to obtain desirable products or use the micro-purchase option.

What are unprocessed locally grown and/or locally raised agricultural products?

- Products that meet the definition of unprocessed or minimally process per 7CFR Part 210.21(g) (2).
- Allowable products include, but are not limited to:
  - Fruits;
  - Vegetables;
  - Meats (Including fresh or unprocessed frozen products and formed products, such as patties, that contain no additives or fillers.);
  - Poultry (Including whole, form, or various cuts);
  - Dairy (Please note that while unflavored fluid milk is allowed, flavored milk or any processed dairy products such as yogurt, cheeses, etc. is not allowed);
  - Eggs; and
  - Grains (Including quinoa, rice, barley, etc. in whole form and other grains in ground form such as flour);



- Fish (Including whole, form, filets, or nuggets that contain no additives or fillers).

A geographic preference is allowed to be used for the purchase of unprocessed, locally raised agricultural products. This is a preference not a specification, however.

When considering the different categories of food purchased in school food service operations, the [basic guidelines for purchasing from local sources in Wyoming](#) are:

### **Meat**

Red meat animals raised in Wyoming and offered for sale within Wyoming must be slaughtered and processed in a state Department of Agriculture-inspected facility. If that meat is bought or sold across state lines, it must be processed in a federal USDA-inspected facility. Animals slaughtered and processed in a “custom-exempt” plant may not be sold; that meat is for consumption by the owner(s) of the animal.

### **Poultry**

Poultry raised in Wyoming and offered for sale within the state must be slaughtered and processed in a state Department of Agriculture inspected plant, an USDA-inspected plant, or be a grower inspected by the state. Wyoming agricultural producers selling raw poultry are exempt from licensing but not inspection. However, as with red meat, only poultry processed in an USDA-inspected plant may be sold or bought across state lines.

### **Dairy Products**

Dairy products used in school food service programs must be pasteurized.

### **Eggs**

Grade B or better eggs are required to be used in food service establishments, including school food service programs. Fresh shell eggs (Grade B or better) may be purchased from local producers if the farmer holds an egg-grader license from the Wyoming Department of Agriculture.

### **Produce (Fruit and Vegetables)**

No formal inspections or regulatory oversight are required of fresh, whole uncut, raw produce. Processed items (including minimally processed such as sliced, chopped, or peeled) must have been processed by a Wyoming licensed manufacturer in a licensed and inspected facility. Processors/manufacturers must be licensed by the Wyoming Department of Agriculture Consumer Health Services division. Additionally, if the processor/manufacture is from another state they must have a Wyoming Food license as a distributor.

## **Food Service Management Companies (FSMC)**

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Under an agreement with the State Agency, SFAs are responsible for operating the Child Nutrition Programs within their districts. A SFA may contract with a FSMC to assist in the food service operation.

### Should an SFA Contract with a FSMC?

- First consider the
  - Financial
  - Administrative
  - And operational activities that will be affected

The SFA should allow sufficient time to identify and analyze these issues prior to contracting or issuing a RFP. The SFA should also conduct an analysis to:

- Identify the current cost of operating a food service
- Determine all cost elements which will be affected by contracting with a FSMC
- Analyze all non-fiscal aspects of the current food service
- Identify the functions that might be contracted to the FSMC

The SFA Responsibilities that cannot be delegated to a FSMC are as follows:

- Signature Authority
- Free and Reduced Price Meal Process
- Control of the non-profit school food service account and the overall financial responsibility for the Child Nutrition Programs
- Development of the 21-Day cycle Menu (with exception)
- Title to all USDA Foods
- Conducting monthly Claim for Reimbursement edits and submitting claims
- Monitoring
- Health Certification

### SFA Responsibilities with FSMCs

- Contact WDE to receive guidance before considering a Food Service Management Company (FSMC).
- The SFA **must** use the State's FSMC prototype RFP and contract. Written approval from WDE must also be received for all RFPs and contracts before issuance.
- FSMC solicitation documents must be received by WDE for review no later than **March 1<sup>st</sup> of the current school year.**
- WDE is to review and approve all contracts and contract amendments prior to execution. **Due dates for FSMC contracts and amendments is June 1<sup>st</sup> of the current school year.**
- The SFA is allowed up to four contract amendments or less if required by WDE.
- SFAs must adhere to all WDE and USDA FSMC requirements.

## Finally, things to consider for food service procurements

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Sound competitive practices are established procedures that, when consistently followed, result in procurements that are conducted fairly, with integrity and uniformity, so that the goods and services procured meet the needs and quality standards of the purchaser at the best possible price. Sound competitive practices foster full and open competition and are free from real and perceived conflicts of interest.

## A few key considerations:

- ✓ Specifications for goods and services should be as detailed as possible to ensure receiving exactly what the SFA requires.
- ✓ Estimated quantities should be as accurate as possible and updated regularly.
- ✓ Specifications should not limit or prohibit any vendor from responding.
- ✓ Sole source procurements are **very rare** and there must be clear and compelling reasons for engaging in this type of procurement. Approval by the State Agency is required for sole source purchases.
- ✓ Procurements should almost always allow for alternative brands or products that meet the specifications. This should take the form of including “or equal” when identifying acceptable products.
- ✓ Federal law prohibits contract awards to vendors who have provided written specifications to the procuring agency. However, potential vendors may provide information used by the procuring agency in drafting their own specifications. Always be cautious of this.
- ✓ Award factors must be clearly stated. In the case of an RFP, a scoring system with weights for each factor must be part of the original solicitation.

Districts should weigh all costs and make decisions that are in the best interest of the food program.

Always know if the purchase will require a contract or formal agreement.

**There are no set contract time limits or requirements for bidding. Only for FSMCs. Contract length and frequency of procurements are not dictated by federal regulation or policy. Double check SFA policy for guidance.**

**The recommendation is to bid every three to five years.**

There are any number of additional things to consider in meeting the basic principles of a good procurement. However, if a SFA adheres to the basic principles of fair, open and competitive; they will likely be successful in their efforts.

## Attachment A

### 2 CFR Part 200.326 Contract Provisions (Appendix II to Part 200):

- ❖ Required clauses for all contracts paid with federal funds:
  - ✓ Debarment and Suspension
  - ✓ Right to Inventions Made Under Contract
  - ✓ Equal Employment Opportunity-(**construction contracts**)
  - ✓ Recovered Materials- Only for contracts addressing **solid waste disposal** (will probably not be applicable to food program contracts see §200.322).
  
- ❖ Required clauses for all contract paid with federal funds that **exceed \$10,000.00**
  - ✓ Termination for Cause & Convenience
  
- ❖ Required clauses for all contract paid with federal funds that **exceed \$100,000.00**
  - ✓ Contract Work Hours/Safety Standards Act
  - ✓ Byrd Anti-Lobbying Amendment
  
- ❖ Required clauses for all contract paid with federal funds that **exceed \$150,000.00**
  - ✓ Administrative, Contractual, or Legal Remedies (**This is a good idea for all contracts regardless of contract value**)
  - ✓ Clean Air Act
  
- ❖ Required clauses for contract paid with federal funds that **exceed \$2,000.00.** (**construction contracts** and will probably not be applicable to food program contracts)
  - ✓ Davis-Bacon Act

