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# Procurement

Procurement is a very difficult and time-consuming task that can make the difference in a successful foodservice operation. Food procurement should be customer-driven to maximize student participation and profits. Student advisory boards that taste-test and assist in creating the school's menus have proven to be very successful. Equipment procurement must be based on the latest industry predictions on future trends. The procurement regulations are constantly changing with new requirements being implemented.

It is recommended that directors and purchasing agents review this chapter, as well as the Ethics section before beginning the procurement process to assist in being in full compliance.

For specific regulations and procedures regarding procurement, please refer to the Purchasing Module of the *Texas Education Agency Financial Accountability System Resource Guide*, which incorporated the *Handbook on Purchasing for Texas Public Schools, Junior Colleges and Community Colleges* that can be found at [www.tea.state.tx.us](http://www.tea.state.tx.us) under audits or contact the Texas Education Agency's Audit Division at (512) 463-9095.

## **Source of Federal Procurement Regulations**

State and local governments should operate under 7 CFR 3016. Institutions of higher education, hospitals, and other nonprofit organizations should operate under 7 CFR 3019. Copies of these versions may be accessed on the Government Printing Office website at:

[http://www.access.gpo.gov/nanra/cfr/waisidx\\_00/7cfrv15\\_00.html#300](http://www.access.gpo.gov/nanra/cfr/waisidx_00/7cfrv15_00.html#300)

## **Procurement Contracts**

When acquiring goods and services school districts may contract with persons and companies that have provided specification information for use in drafting procurement specifications. This provision is intended to encourage program administrators to obtain information from as many sources as possible to assist them in drafting procurement documents. A potential contractor or other interested party may not participate in the procurement process through drafting the procurement specifications, procedures, or documents, such as requests for proposals, invitations for bids, and contracts. However, this provision does not prevent participation in a group purchasing arrangement or prevent program administrators from forming purchasing co-operatives where they are permitted. This provision is intended to ensure that program operators have sufficient flexibility in contracting matters while maintaining maximum open and free competition.

## **Criminal Penalty**

The maximum fine for embezzling, willfully misapplying, stealing, or obtaining by fraud, funds, assets, or property acquired under the National School Lunch Act or Child Nutrition Act is \$25,000.

## **Fraud Statement**

“Whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program whether received directly or indirectly, shall if such funds, assets or property are of a value of \$100 or more, be fined no more than \$25,000 or imprisoned not more than 5 years or both; or if such funds, assets or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals or retains for personal use or gain, funds, assets or property provided under the National School Lunch Program and School Breakfast Program, whether received directly or indirectly, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to the same penalties.” This statement regarding fraud is from National School Lunch Program Regulations.

## **Federal Procurement Standards**

When procuring property and services under a grant, a state will follow the same policies and procedures it uses for procurements from its non-federal funds. The state will ensure that every purchase order or other contract includes any clauses required by regulations.

- (1) Districts will use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the procurements conform to applicable federal law and the standards identified in this section.
- (2) Districts will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

## **Standards of Conduct**

- (3) Districts will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer, or agent of the district shall participate in selection, or in the award or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved. Such conflict would arise when:
  - (i) The employee, officer, or agent,
  - (ii) Any member of his immediate family
  - (iii) His or her partner, or
  - (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The district's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or practices to subagreements. Districts may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by state or local law or regulations, such standards or conduct will provide for penalties, sanctions, or disciplinary actions for violations of such standards by the district's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.
- (4) District procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Considerations should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
- (5) To foster greater economy and efficiency, districts are encouraged to enter into state and local intergovernmental agreements for procurement or use of common goods and services.
- (6) Districts are encouraged to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.
- (7) Districts are encouraged to use value-engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

- (8) Districts will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- (9) Districts will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following; rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.
- (10) Districts will use time and material type contracts only
  - (i) after a determination that no other contract is suitable, and
  - (ii) if the contract includes a ceiling price that the contractor exceeds at its own risk.
- (11) Districts alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the district of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the district unless the matter is primarily a federal concern. Violations of law will be referred to the local, state, or federal authority having proper jurisdiction.
- (12) Districts will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the district before pursuing a protest with the federal agency. Reviews of protests by the federal agency will be limited to:
  - (i) Violations of federal law or regulations and the standards of this section (violations of state or local law will be under the jurisdiction of state or local authorities) and
  - (ii) Violations of the district's protest procedures for failure to review a complaint or protest. Protests received by the federal agency other than those specified above will be referred to the district.

#### **Questions Related to Code of Conduct**

- (1) Can employees purchase from school bids? On the issue of employees purchasing off bids, when a person purchases at the school's bid price or at another discounted price, that person is actually accepting from the vendor the cash difference between the bid or discount price and what one would have to pay for the item in the retail market. Even if the vendor were to charge the retail price, the person would still be receiving the convenience of a personal delivery and therefore would be accepting a favor from the vendor.
- (2) Can employees accept gifts such as Christmas gifts for Child Nutrition (CN) staff and managers? It is in conflict with state and federal procurement regulations dealing with a code of conduct or code of ethics. No school district employees should accept gratuities, favors, or anything of monetary value from companies with which the district currently or could potentially do business.

- (3) Is it allowable for the company employing a relative of the CN director or manager to bid on items needed by the CN operation? No. Federal regulations prohibit any employee from participating in the selection, award, or administration of a contract if there is a conflict of interest, real or apparent. Such a conflict would occur when the employee, any member of his/her immediate family, or his/her partner or an organization that employs or is about to employ any of the aforementioned has a financial or other interest in the firm selected for award. It is suggested that the school district's attorney or state agency's legal division be contacted if there are any questions regarding a particular situation.

### **Open and Free Competition**

- (1) All procurement transactions will be conducted in a manner providing full and open competition. Some of the situations considered to be restrictive of competition include but are not limited to:
- (i) Placing unreasonable requirements on firms in order for them to qualify to do business,
  - (ii) Requiring unnecessary experience and excessive bonding,
  - (iii) Noncompetitive pricing practices between firms or between affiliated companies,
  - (iv) Noncompetitive awards to consultants that are on retainer contracts,
  - (v) Organizational conflicts of interest,
  - (vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and
  - (vii) Any arbitrary action in the procurement process.
- (2) Districts will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable State (Section 44.042, Texas Education Code) and federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws.
- (3) Districts will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:
- (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features, which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or services to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of procurements. The specific features of the named brand that must be met by offerors shall be clearly stated: and
  - (ii) Identify all requirements, which the offeror must fulfill, and all other factors to be used in evaluating bids or proposals.

- (4) Districts will ensure that all prequalified lists of persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Although the prequalification of vendors results in an efficient procurement process, districts will not preclude potential bidders from qualifying during the solicitation period.

### **Questions Concerning Open and Free Competition**

- (1) What is an adequate number of price quotes when purchases over a 12-month period are less than \$25,000 and formal bid procedures do not have to be followed? The adequate number of price quotations that must be obtained for food purchased under small purchase procedures is determined by the local market conditions. Regardless of the dollar value, there must be open and free competition. For example, two price quotations may be considered sufficient in a small school district located where there are a limited number of produce vendors available to provide service to the area. However, in a larger metropolitan area where there are six produce vendors, all six should be given an opportunity to submit price quotations.

### **Methods of Procurement**

- (1) **Procurement by small purchase procedures.** Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at (\$20,000 school bus lease/lease purchase/purchase; \$25,000 personal property; \$25,000 non-professional services; \$25,000 energy management systems; \$100,000 professional services; \$10,000 - \$25,000 competitive quotes for personal property). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.
- (2) **Procurement by Sealed Bids (formal advertising).** Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in section (2)(i) apply.
  - (i) In order for sealed bidding to be feasible, the following conditions should be present:
    - (A) A complete, adequate, and realistic specification or purchase description is available;
    - (B) Two or more responsible bidders are willing and able to compete effectively for the business; and
    - (C) The procurement lends itself to a firm fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.
  - (ii) If sealed bids are used, the following requirements (additional requirements should be reviewed in State law) apply:
    - (A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

- (B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond:
  - (C) All bids will be publicly opened at the time and place prescribed in the invitation for bids.
  - (D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
  - (E) Any or all bids may be rejected if there is a sound documented reason.
- (3) **Procurement by Competitive Proposals.** The technique of competitive proposals (see additional requirement in State law for competitive sealed proposals for public works contracts and real property) is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:
- (i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;
  - (ii) Proposals will be solicited from an adequate number of qualified sources;
  - (iii) Districts will have a method for conducting technical evaluations of the proposals received and for selecting awardees;
  - (iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
  - (v) Districts may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.
- (4) **Procurement by Noncompetitive Proposals.** This is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.
- (i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:
    - (A) The item is available only from a single source;
    - (B) The public exigency or emergency involving destruction or severe damage to equipment, school facility or personal property and the board determines that competitive procurement process would prevent or impair the conduct of classes or other essential activities;
    - (C) The awarding agency authorizes noncompetitive proposals; or
    - (D) After solicitation of a number of sources, competition for professional services is determined inadequate.

- (ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.
- (iii) Districts may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with the “Awarding Agency Review” paragraph in this section.

### **Contracting With Small and Minority Firms, Women’s Business Enterprise and Labor Surplus Area Firms**

Contracting with small and minority firms, women’s business enterprise and labor surplus area firms.

- (1) Districts will take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms are used when possible.
- (2) Affirmative steps shall include:
  - (i) Placing qualified small and minority businesses and women’s business enterprises on solicitation lists;
  - (ii) Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources;
  - (iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women’s business enterprises;
  - (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women’s business enterprises;
  - (v) Using the service and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
  - (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (2) (i) through (v) of this section.

### **Contract Cost and Price**

- (1) Districts must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, districts must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when competition is lacking for sole source procurements. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.
- (2) Districts will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor’s investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.
- (3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent

with federal cost principles. Districts may reference their own cost principles that comply with the applicable federal cost principles.

- (4) The cost-plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

### **Awarding Agency Review**

- (1) Districts must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the district desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.
- (2) Districts must on request make available for awarding agency pre-award review procurements documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:
  - (i) A district's procurement procedures or operation fails to comply with the procurement standards in this section; or
  - (ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or
  - (iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or
  - (iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
  - (v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.
- (3) A district will be exempt from the pre-award review in this section.
  - (i) A district may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.
  - (ii) A district may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the district that it is complying with these standards. A district will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

### **Contract Provisions**

A district's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

- (1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold).
- (2) Termination for cause and for convenience by the district including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000).
- (3) Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity" as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations. (All construction contracts awarded in excess of \$10,000 by districts and their contractors or subgrantees).
- (4) Compliance with Copeland "Anti-Kickback" Act as supplemented in Department of Labor regulations. (All contracts and subgrants for construction or repair).
- (5) Compliance with the Davis-Bacon Act as supplemented by Department of Labor regulations. (Construction Contracts in excess of \$2,000 awarded by districts when required by Federal grant program legislation).
- (6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act as supplemented by Department of Labor regulations. (Construction contracts awarded by districts in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers.)
- (7) Notice of awarding agency requirements and regulations pertaining to reporting.
- (8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention that arises or is developed in the course of or under such contract.
- (9) Awarding agency requirements and regulations pertaining to copy rights and rights in data.
- (10) Access by the district, the federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representative to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
- (11) Retention of all required records for five years after districts make final payments and all other pending matters are closed.
- (12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857 (h)), section 508 of the Clean Water Act (33 U.S.C. 1368, Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)
- (13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871). [53 FR 8044, 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19641, Apr. 19, 1995]

## **Debarment and Suspension**

"Debarment and suspension" actions are a result of state and federal investigations and prosecutions of dairies, bakeries, and related individuals involved in bid rigging on contracts to supply food products to local school districts participating in the National School Lunch and School Breakfast Programs. A school district is prohibited from contracting with a company or indi-

vidual that has been debarred or suspended. This prohibition does not extend to contracts in existence at the time of the debarment/suspension or to most contracts under \$100,000. Rather, it applies to new contracts and extensions or renewals of existing contracts of \$100,000 or more and to contracts for audit services, regardless of amount. The prohibition does not apply to proposed debarments.

To ensure that the school district does not enter into a contract with a debarred or suspended company or individual, each school district must require that each responsive bidder include a statement with each bid on each covered contract. By signing the certification statement, the bidder certifies that neither it nor any of its principals (e.g., key employees) has been proposed for debarment, debarred, or suspended by a federal agency. To review suspension and debarment actions, visit the following website: <http://epls.arnet.gov>

Refer to the Suspension and Debarment Certification Statement Form at the end of this section.

### **Buy American Provision**

Schools and institutions participating in the NSLP and SBP are required by law to use CN funds, to the maximum extent practicable, to buy domestic commodities or products for meals served under these programs. A “domestic commodity or product” is defined as one that is either produced in the U.S. or is processed in the U.S. *substantially* using agricultural commodities that are produced in the U.S. The term “substantially” means that over 51 percent of the final processed product consists of agricultural commodities that were grown domestically. Therefore, when CN funds are used to acquire foods, schools and institutions must ensure that the items are in compliance with this requirement. Additional requirements for preference for agricultural products from Texas are applicable to the use of CN funds, in accordance with Section 44.042, Texas Education Code.

### **Compliance with Clean Air and Water Act**

USDA requires districts to comply with the Clean Air and Water Act in contracts that exceed \$100,000. The following verbiage should be included in bids for the prospective vendors to complete.

I, the vendor, am in compliance with all applicable standards, orders or regulations issued pursuant to the Clean Air Act of 1970, as Amended (42 U.S.C. 1857(h)), Section 508 of the Clean Water Act, as amended (33 U.S.C. 1368), Executive Order 117389 and Environmental Protection Agency Regulation, 40 CFR Part 15 as required under OMB Circular A-102, Attachment O, Paragraph 14(1) regarding reporting violations to the grantor agency and to the United States Environment Protection Agency Assistant Administrator of the Enforcement.

## **Procurement of Commercially-Prepared Ready-to-Eat Foods**

The Food Safety Inspection Service (FSIS) exempted meat-or poultry-topped pizzas from federal meat inspection requirements.

The principal provisions of the rule include:

- Meat or poultry products must have been previously inspected and passed in a cooked or cured ready-to-eat form.
- Pizza must be served in public or private nonprofit institutions.
- Pizzas must be ready-to-eat with no further cooking or preparation needed.
- Pizzas must be transported directly to the receiving institution by employees of the preparing firm, receiving institution or foodservice management company employed by the receiving institution.
- Firms claiming the exemption must comply with specific provisions of the Food and Drug Administration's 1976 Food Service Sanitation Manual that have been incorporated by reference into the rule. In addition, the rule establishes specific requirements for the manual or machine cleaning of utensils and equipment.
- FSIS may withdraw or modify the exemption for any firm if necessary to ensure food safety and public health. The rule establishes due process procedures for taking such actions.
- Firms claiming the exemption are now free to sell fresh meat- or poultry-topped pizzas to districts participating in the National School Lunch Program.
- Under the exemption, state and local health inspection programs have primary responsibility for sanitation. FSIS also reserves the right to conduct any inspections it deems appropriate.

### **Additional Meal Service Requirements for Commercial Establishments**

The Department of State Health Services (DSHS) has the following information regarding this FSIS rule.

“Previously, most wholesale food products containing more than three percent meat fell under the jurisdiction of the USDA and the Texas Department of Health's Bureau of Veterinary Public Health, Cooperative Meat Inspection (CMI) Program. However, federal legislation, sometimes referred to as the 'Pizza Hut Bill,' exempts certain retailers who wish to sell food products containing meat to entities, such as local school districts, for use in school lunch programs. The revision to the Federal Meat Inspection Act exempts these retailers from mandatory inspection (no longer amenable to the Act) by USDA/CMI.

However, this revision now subjects these 'manufacturers' to provisions of the Texas Food, Drug, and Cosmetic Act (FD&C Act), Chapter 431, Texas Health and Safety Code, to which these firms were previously exempt. Under the Texas FD&C Act, such 'retailers' are now manufacturers because they no longer sell only individual portion servings directly to the consumer. As such they must have registered with this Division [Texas Department of Health, division of Food and Drugs] and paid the appropriate fee. They are also subject to unannounced inspection by this Division [Texas Department of Health, Division of Food and Drugs.] A manufacturer who fails to register is distributing food from an 'unapproved source.'

School districts should be aware of the requirement and request that such firms be registered with this Division [Texas Department of Health, Division of Food and Drugs] prior to the sale of pizzas, tacos, or other foods to be served at school functions.” Include in bid specifications.

## **Food Manufacturer/Food Wholesalers License**

### **Unlicensed Wholesale Food Distributors**

Wholesale food distributors are no longer required to obtain a wholesale food license if the distributor provides “food for immediate human consumption to a licensed nonprofit organization.”

## **The Procurement Process**

The procurement process is composed of the following steps:

### **1. Develop Purchasing Schedule**

A purchasing system should be organized so that all activities are completed and the system operates smoothly by using the same procedure that management uses in organizing large ongoing projects. Identify all the tasks in proper sequence, and plan enough time to accomplish all tasks. First, it is necessary to establish bid periods for the various items to be purchased.

Target a completion date (delivery date) for each bid period. Work backwards from the target completion date and identify everything to be completed by that date. For example,

- Awarding of Contract — 4 weeks before delivery
- Opening of Bids — 4 weeks before award
- Issuing Bid Documents — 30 days before bid opening
- Advertisement — 30 days before bid opening
- Make-Ready time — 2 months
- Obtain approval for cafeteria improvements, construction, renovations and other public works contracts from the Texas Department of Agriculture, Food and Nutrition Division — 1 month

### **2. Written Contracts**

A written contract is required by procurement regulations. To have a valid contract, one party must make an offer and the other party must accept the offer on the terms contained in the offer. Another requirement is that the offer must be definite on all essential terms, that is, it must identify the parties to the contract and specify the subject matter, the time for performance and the price. When school districts send out invitations to bid they are asking vendors to provide certain quantities of goods at a specific price. The school district must then accept the offer for there to be a contract.

Some districts insert a contract clause in the invitations to bid. The invitation to bid also contains the contract provision required by federal regulations. To award the contract, the school district (1) designates the items to be awarded, (2) signs the contract clause, and (3) mails a copy to the address listed by the vendor on the invitation to bid.

Other districts accept an offer by sending a bid award letter which lists the item(s) which have been awarded to the vendor. In this case, the invitation to bid must specify that the bid award letter, when mailed to the vendor at the address listed on the invitation, will constitute acceptance of the offer, and the invitation to bid must contain the contract provisions required by federal regulations.

### **Instructions to Vendors**

Issues that should be addressed before your bids are released are as follows:

**1. Drop Deliveries** — If the school district will accept a drop shipment, it must be clearly stated in the invitation to bid. If deliveries are to be made to schools, a list of the schools and their addresses should be included so that the bidder may calculate transportation costs. Regulations specify that the invitation for bid, including specifications and pertinent attachments shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

If a low bid is received from a vendor who can make a drop delivery, but the instructions to vendors do not mention the acceptability of drop delivery, the bid from the vendor who can make a drop shipment or delivery at a lower price is actually a nonresponsive bid and must be rejected. It is possible that one of the other bidders may have bid an even lower price on a drop shipment had the vendor been offered the opportunity.

**2. Child Nutrition (CN) Label or Certified Product Analysis Statement** — Districts should be consistent in information requested of vendors. Acceptable documentation is a CN labeled product, or a signed and dated Certified Product Formulation Statement.

Any processed food product that does not have a yield listed in the *Food Buying Guide* needs either a CN label or a signed and dated Certified Product Analysis Statement. This includes commercially prepared items that may provide part of a meal component. The CN label or Certified Product Analysis Statement clearly identifies the contribution of a product toward meeting the meal pattern requirements.

**3. Specifications** — A well written specification should adequately describe the specific item to be purchased. A USDA publication, *First Choice*, addresses specific details concerning specifications. Specifications could include the following:

**(a) Minimum Drained Weight**—It is necessary to specify minimum drained weights in specifications for canned fruits and vegetables. This ensures the minimum acceptable amount of product per can.

**(b) Generic Terminology**—When writing a specification for a product without specifying brand name, use the generic name that is usually listed under the trade name. A brief description of the product can also be included. For example, some generic names of breakfast cereals are:

- Toasted oat cereal, donut-shaped
- Puffed wheat cereal, sugarcoated

- Cornflakes, sugarcoated
- Shredded wheat biscuits, small, sugarcoated

**(c) Bread Specifications** — If a bread item has a standard of identity, it is still necessary to specify enriched. The U.S. Food and Drug Administration has standards of identity for non-enriched bread products as well as the enriched products. To be sure of receiving enriched products, specify enriched.

**(d) Grade Specifications** — When U.S. Grade A Fancy or U.S. Grade B Choice is specified; it indicates that a federally graded product is required. If a vendor bids an item that is only vendor grade, it is a nonresponsive bid. When Fancy or Choice is specified or any mention of quality is omitted, bids may be received on undesirable products.

If desiring to designate a level of quality without requiring federal grading, put in the specification “U.S. Grade A or equal” or write “Grade A” or “Grade B” without the “U.S.” in front of it in the specifications. Product testing is recommended and procedures must provide for an objective evaluation of tested and documentation of test results must be maintained on file in the school district. List acceptable or approved brands on the invitation for bids; the words “or equal” must be included after listing the approved brands. If a brand is specified, the specification must clearly convey to perspective bidder the general style, type, character and quality of the brand desired and equivalent products will be acceptable.

Grade A has the same meaning as U.S. Grade A without requiring federal grading. State in the instructions to vendors when a U.S. grade is mentioned in the specifications for fruits and vegetables, federal grading is not required but items bid must meet or exceed the USDA grading requirements for the item and grade specified.

**(e) Approved Brands** — It is acceptable to specify a list of approved brands as part of a specification. Many school districts test and approve brands that meet their standards and student preferences. The object of testing must not be to determine the “best” product on the market but rather to determine which products are of acceptable quality to meet the needs of the program. Product testing procedures must provide for an objective evaluation of tested products, and documentation of test results must be maintained on file in the school district. List acceptable or approved brands on the invitation for bids; the words “or equal” must be included after listing the approved brands.

**(f) Standardized Specifications for a Geographical Area** — Developing a manual of standardized specifications for several districts within a geographical area is advantageous to the vendor and the buyer for many reasons, including:

- Reduces the vendor’s inventory.
- Reduces the vendor’s dilemma of keeping up with numerous district specifications and item numbering systems.
- If the vendor can reduce duplication of stock or inventory and can increase volume buying of agreed upon items, he should be able to negotiate lower prices.

Advantages to the buyer:

- Reduction of cost passed on by the vendor.
- Less work for each supervisor.
- Pooling of resources for a stronger purchasing system.

**(g) Estimated Quantities To Use Should Be Stated** — Estimating quantities may help get lower prices. If the vendor knows the exact quantities needed he may be able to offer better prices. Put yourself in the vendor's position, bidding on unknown quantities is a weak position for negotiation with his supplier. With good management and active teamwork from managers, accurate forecast usage can be determined. Some supervisors hesitate to estimate quantities because of uncertainty of commodities. This is why many districts utilize short bid periods for certain classes of items. It gives time to predict commodities and adjust the amount required.

Estimating quantities could help in receiving deliveries. For example: If two school districts go out on bid at the same time, and one school district estimates usage of fish portions at 50 cases, and the other school district only gets price quotes with no estimate of quantities, the school district that has contracted for a definite quantity will be more assured of delivery.

There may be no legal remedy if quantities were not stated. An actual contract may not exist.

#### **What if estimated usage is overcorrected?**

With some storage space either centrally or at the school level and use of cycle menus, extra amounts will be used. Again, the use of short bid periods helps to quickly adjust surplus inventory.

#### **What if estimated usage is under forecasted?**

New price quotations or sealed bids may have to be solicited or permission to extend the contract obtained. One way of allowing some flexibility is to insert a clause in the general instructions to vendors that allows some tolerance range in estimating amounts.

### **3. Formal Bid Procedures**

#### *Aggregate Purchase Amount*

The requirements of the competitive bidding law apply, for a majority of the school districts, to five broad categories of foodservice items. If purchases for a particular foodservice category do not exceed \$25,000, then the requirements in the competitive bidding law do not apply. For most school districts these categories are: (1) milk, (2) bread, (3) fresh meats and (4) frozen, canned, and other miscellaneous food items. Some small school districts that purchase all of these items from a local grocery store would have basically one food category.

#### **Questions Concerning Aggregate Purchase Amounts**

(1) Quotations are taken for fresh and frozen meats for a two-month period but meats are actually ordered weekly. No invoice during the period even comes close to \$25,000, but during the two months well over \$25,000 is spent. Must the meats be formally bid?

According to federal regulations, competitive sealed bid procedures must be followed for the purchase of any food items where the aggregate cost is more than \$25,000. In this example, the aggregate amount is the value of all fresh and frozen meats purchased during the two-month bid period.

#### **4. Public Advertisement**

An advertisement for formal bid should contain the following information:

- Name of the school district.
- General category or specification of the item to be bid.
- Date, time and location of the opening of bids and awarding of bids.
- Address and telephone number for location where invitation to bid and general instructions and specifications may be obtained.
- Notice that the “public is invited.”

#### **5. Receiving Sealed Bids**

Date-stamp sealed bids and maintain sealed bids in a secure place until the time of bid opening. Examples of a secure location include a locked file cabinet, a locked metal box, or any place where there could be no question of tampering.

#### **6. Public Bid Opening**

It is suggested that at least two employees of the school district be present. These employees should be directly involved with the procurement process such as representatives from the Child Nutrition Programs and/or from the purchasing department. One person could open the bids and read the prices while the other person records them. School board members do not need to be present unless mandated by local policy. State and federal regulations mandate that the bids be opened publicly, vendors and other interested parties may also attend.

#### **7. Awarding Bids**

##### *Disqualifying Vendors*

When a vendor fails to deliver certain items or delivers items that do not meet specifications, document the problem, noting the date and writing an accurate description of the problem. Notify the vendor of the problem and tell the vendor specifically how the problem is to be corrected. Even with the best vendors, problems occasionally arise and frequently a single phone call is all that is needed to correct a problem.

Keep a record of the dates of all phone calls and what was discussed in the event that talking with the vendor does not resolve the problem. If the problem continues, give the vendor written notification of the problem, state that immediate correction is expected and failure to do so will be considered a breach of contract and could result in the cancellation of the contract. If the vendor seems to be making little effort to resolve the problem, discuss the problem with the school board attorney and explore the options open to your school district. If cancellation of the contract becomes necessary, take steps to disqualify the vendor from future bidding. Even if the contract is not cancelled, consider taking action to disqualify the vendor from future bidding.

### **Awarding by Total**

Delivery to the school district could be a problem because some schools are rurally located. Awarding bids by item could result in several vendors making expensive trips to the school district resulting in higher prices. To properly evaluate a bid or price quotation, which will be awarded by total to one vendor instead of by item to multiple vendors, the quantities to be purchased must be estimated. Each estimate is multiplied by the bid price and an estimated total cost is obtained for each bid. The vendor with the lowest estimated total cost would be awarded the contract.

This procedure for evaluating bids and quotations should be used for all contracts awarded by total to one vendor such as milk bids, bread bids and fresh produce quotations.

### **Awarding by Item, Class or Total**

To determine if it is more advantageous to award bids by item, class of items, or total sum will depend on a combination of factors including, the size of the school district and its location: i.e., is the district rural or is it located in or near a metropolitan area, is the district large enough so vendors could profitably handle only a portion of the school's business, or would they need all of the school's business to make delivery worthwhile.

Another factor to consider is the capabilities of the vendors in the area. For example, are there several full-service vendors in the area or are the vendors limited in the lines of merchandise they carry? Do some vendors in the area handle only red meats, others ham and sausage, and others chicken, fish, and prepared items? If so, it would not be advantageous to have an all or nothing bid for chilled and frozen meats.

Another consideration is the school district's capabilities for storing and transporting deliveries. For example, if the district has a delivery truck and a central warehouse with a refrigerator and a freezer and can accept a drop shipment, award the bid by item even though it is a small, rural school district. Explore all options and then estimate the cost for each option. The option, which provides the most benefits to the school district for the least cost should be chosen.

### **Awarding Other Than Low Bid**

Adequate justification for awarding a bid to other than the lowest bidder might be for the following reasons:

- A. The item or service bid is not responsive to the specifications, to the invitation to bid or to the general instructions.
- B. The bidder is not responsible (vendor integrity documented by record of past performance).
- C. The financial and technical resources of the bidder are not adequate.
- D. There is evidence of noncompliance with public policy.

In any case, document on the bid evaluation sheet the reason the lowest bid was not accepted. If the bid is not responsive, document what requirement the bid did not meet. If a vendor is not responsible, make every effort to disqualify the vendor prior to the issuing of invitations to bid. This would prevent the possibility of having to decline a low bid.

### **Questions Concerning Purchases from a Vendor Bidding Lower Than Award**

(1) A vendor offers an item at a much lower price than the bid price awarded. How can district purchase at such a reasonable price?

Once a bid on an item has been accepted, the purchaser is not free to obtain bids, quotations, or to purchase from anyone other than the vendor who has received the bid unless: (1) a specified amount is in the bid, (2) the specific amount will still be purchased from the bidder, and (3) the amount to be purchased is in addition to the amount that was bid. Small purchase procedures or competitive sealed bids must be used in obtaining prices on the additional merchandise.

### **Purchasing Items Currently Not on Bid**

(1) A vendor offers at a special price below market value on an item not presently in use by the district. What process does the district have to follow?

All purchases must be based on specifications that clearly describe the item to be purchased. If a new product is to be purchased, a clear description of the item must be written. Either small purchase procedures or competitive sealed bids must be used, depending on the dollar value of the purchase.

### **Awarding Bid to Vendors Offering Special Incentives**

A vendor offers incentives such as stamps, equipment, or other prizes with bid products. However, the prices paid for all purchases should be based solely on the bid or quotation offered by the responsible seller giving the lowest price meeting specifications.

When incentives, such as prizes, stamps, equipment, etc., are offered and accepted the following applies:

- (1) the incentive must in no way affect the decision to purchase and
- (2) the incentive must become the property of the CN program. Under no condition can the incentive become the property of an individual. Special offers often mean higher prices, or lower quality, or both. Frequently, special prices are offered on old merchandise that the vendor wants to move.

### **Sole Source Bid**

As new food products are developed, it is possible that a product may be available from a sole source. To document this, it is advisable to contact a number of sources and document that the sources do not have the product needed.

### **No Bids Received**

If your district issues an invitation to bid for an item that requires a competitive sealed bid and no bids are returned, obviously, the first question to ask is why? Was the invitation sent to all potential bidders? Was sufficient time allowed for potential bidders to respond? Were specifications unduly restrictive? Were unrealistic delivery schedules requested?

If ample opportunity to bidders has been provided, yet no bids received, competitive negotiation may then be appropriate. Be sure to maintain written documentation of the attempt to receive bids. If no bids were received, the district should limit its purchases to its current needs and re-advertise for bids. If no bids are received after the second advertisement, contact the Attorney General's Office.

#### **8. Documenting Procurement Process**

Documentation should be kept on the procurement process and for each formal bid. Maintain documentation on file for at least five years after the end of the federal fiscal year to which they pertain. The following documentation should be maintained:

- A. Copy of invitation to bid, including instructions to vendors and specifications.
- B. Copy of public advertisement(s).
- C. Dated mailing list (list of vendors who were mailed a copy of the bid).
- D. Bids submitted by vendors (attach bid envelope and a copy of the receipt if hand delivered).
- E. Bid evaluation sheet (include documentation whenever the lowest price is not accepted).
- F. Copies of bid award letters and letters to unsuccessful bidders.
- G. Copies of contracts.

For telephone quotations for purchases less than \$25,000, record prices quoted on a price evaluation sheet and document items awarded. Maintain on file.

Maintain a list of any vendors who request to be sent Invitations to Bid.

### **Texas Building and Procurement Commission (formerly General Services Commission)**

The commission is responsible for providing support services for state agencies. Among other services the commission institutes and maintains an effective and economical system for the purchase, lease or rental of supplies, materials, services, and equipment for the state; purchase of school buses, tires, and tubes for any school district participating in the Foundation School Program; and contract purchases for local governments participating under the Cooperative Purchasing Program.

#### **Cooperative Purchasing Program**

Cooperative Purchasing is allowable for school districts. Federal regulations encourage such practices. Before entering into such an agreement, there are several points that need to be considered and included in the written plan. Those include specifications, billing, storage costs, delivery costs and dates of delivery. It is advisable for school districts contemplating cooperative purchasing to enter into a contract defining the responsibilities of each party.

The commission has instituted and maintains an effective and economical system for purchasing supplies, materials, services and equipment for state agencies.

It is the policy of the commission to perform purchasing services for local governments when the commission considers it feasible and may include the following:

1. the extension of state automated term contract prices to participating local governments;
2. solicitation of bids on the open market for items desired by a local government; and
3. provision of information and technical assistance to local governments about the purchasing program.

The commission is required to charge a participating local government an amount not to exceed the costs incurred by the commission in providing purchasing services to the local government under this program. The fees are reviewed periodically and adjusted as required to ensure recovery of costs incurred to operate the program.

### **Participation in Cooperative Purchasing**

Local government participation in the cooperative purchasing program is on a voluntary basis and to the extent the commission deems feasible. The director for purchasing shall determine the feasibility of participation based on availability of resources to perform the required purchasing services.

A local government may be enrolled in the program only after submission of a resolution. The resolution must specify the agent of record, acknowledgment of obligation to pay participation fees established by the commission and be signed by the chairperson of the governing body.

Enrollment in the program will be in effect from the day of receipt by the commission of a complete resolution until notification is received from the local government to discontinue its participation in the cooperative purchasing program. Any change in the resolution of a jurisdiction or participation status must be made in writing by the agent of record or chairperson of the governing body.

Requests for purchase on the open market may be made in writing to the director for purchasing. The director for purchasing or his/her designee will determine the feasibility of accomplishing the purchase on a case-by-case basis and will advise the local government of the determination within a reasonable period of time.

### **Responsibilities of Local Governments**

A local government participating in the cooperative purchasing program must:

1. Submit a resolution evidencing intent to participate in the cooperative purchasing program and pay costs associated therewith. Contact the Texas Building and Procurement Services for a resolution form and a new account form.
2. Send contract requisitions to the commission for processing and forwarding to the contract vendor.
3. Pay the vendor under each contract directly.
4. Be responsible for the vendor's compliance with all terms and conditions of performance under the contract.

A local government that purchases an item from a state contract satisfies any state law requiring the local government to seek competitive bids for the purchase.

Participation costs include an annual nonrefundable subscription fee, which includes a complete set of term contracts received monthly. To receive paper copies of the term contract books printed each month, an additional annual fee is charged. Contact the Texas Building and Procurement Commission for appropriate costs.

When the commission receives a completed resolution and subscription fee from the local government, a complete set of term contract, a Term Contract Purchasing Instruction Booklet and a supply of order forms will be forwarded. Some discounted list contracts currently include: paper for office and print shop, cutlery, dishes, flatware, glassware, trays, utensils, supplies, and paper and plastic products.

### **Comprehensive Requirements for Food and Nonfood Items**

The Specification Section of the Texas Building and Procurement Commission has developed comprehensive requirements for food and nonfood items available through the commission. These requirements are contained in specification publications that may be obtained from the commission. The meat and meat products specification publication prescribes general requirements for the inspection, packaging, packing, and delivery of the meat and meat products contained therein and for the examination, acceptance, and certification of the products by the U.S. Department of Agriculture (USDA) meat graders. Approved specifications include those for fresh beef, fresh lamb and mutton, fresh veal and calf, fresh pork, cured, cured and smoked, and fully cooked pork products and sausage products.

### **Cooperative Food Purchasing Programs**

Several kinds of cooperative food purchasing programs are designed to benefit school districts through improved economic and administrative efficiencies. Included in these cooperative food-purchasing programs are those administered by Education Service Centers (ESCs), the Texas Building and Procurement Commission and local governments. For additional information on the food purchasing programs offered by these entities, please contact your regional ESC.

Refer to the Resource Section for Education Service Center locations and contact information. You may also contact the state office at (888) TEX-KIDS or the Texas Building and Procurement Commission at (512) 463-6363 for specific information relating to purchasing food items through the Texas Building and Procurement Commission.

### **Additional Resources**

- Texas Building and Procurement Commission (formerly General Services Commission): [www.tbpc.state.tx.us](http://www.tbpc.state.tx.us)
- Texas Department of Economic Development: [www.ted.state.tx.us](http://www.ted.state.tx.us)
- Comptroller of Public Accounts: [www.cpa.state.tx.us](http://www.cpa.state.tx.us)
- Universal Public Purchasing Certification Council/National Institute of Government Purchasing (NIGP): [www.nigp.org](http://www.nigp.org)

## U.S. Department of Agriculture

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### Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion— Lower Tier Covered Transactions

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This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 7 CFR Part 3017, Section 3017.510, Participants' responsibilities. The regulations were published as Part IV of the January 30, 1989, *Federal Register* (pages 4722-4733). Copies of the regulations may be obtained by contacting the Department of Agriculture agency with which this transaction originated.

(Before completing certification, read attached instructions.)

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
  
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

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Organization Name

PR/ Award Number or Project Name

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Name and Title of Authorized Representative

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Signature

Date

#### **Instructions For Suspension/Debarment Certification Statement**

1. By signing and dating the certification statement, the bidder certifies that neither it nor any of its principals (e.g., key employees) has been proposed for debarment, debarred or suspended by a federal agency on the date signed.
2. The prospective bidder shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective bidder learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
3. Federal and State penalties exist for vendors and districts that knowingly enter into contracts with suspended/ debarred persons.

## Certification Regarding Lobbying

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Applicable to Grants, Subgrants, Cooperative Agreements, and Contracts Exceeding \$100,000 in Federal Funds.

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Submission of this certification is a prerequisite for making or entering into this transaction and is imposed by section 1352, Title 31, U.S. Code. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The undersigned certifies, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of congress, or an employee of a Member of Congress in connection with the awarding of a Federal contract, the making of a Federal grant, the making of a Federal loan, the entering into a cooperative agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The undersigned shall require that the language of this certification be included in the award documents for all covered subawards exceeding \$100,000 in Federal funds at all appropriate tiers and that all subrecipients shall certify and disclose accordingly.

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Name/ Address of Organization

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Name/ Title of Submitting Official

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Signature

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Date



## Instructions for Completion of SF-LLL, Disclosure of Lobbying Activities

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal Action.
2. Identify the status of the covered Federal Action.
3. Identify the appropriate classification of this report. If this is a follow-up report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal Action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants, and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee," then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal Agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.  
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

## Definitions

- **Aggregate Purchase Amount**—Any purchase or group of purchases estimated at \$25,000 or more and capable of being secured from a single vendor on a given date or within a purchase period.
- **Approved Vendor List**—A list of vendors who have demonstrated the ability to perform successfully under the terms and conditions of a proposed procurement, consideration being given to contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- **Catalogue Purchases**—School districts may participate in the catalogue-purchasing program of the Texas Building and Procurement Services (formerly the State Purchasing and General Services Commission), which provides purchasing services for local governments. Catalogue purchase procedures may be utilized for the acquisition of computer equipment, software and services only. Catalogue purchases are an alternative to other procurement methods if the catalogue purchasing process provides the best value to the district.
- **Certified Product Analysis Statement**—A Certified Product Analysis Statement form, signed and dated by the food manufacturer, can be utilized to document the contribution a commercially prepared food item makes toward meeting menu requirements. Unlike the CN labeled product, the Certified Product Analysis Statement provides no warranty against audit claims. However, should an audit exception be made following analysis of the product, the school district may have a legal recourse against the food manufacturer submitting the signed statement.
- **Code of Conduct**—Standards of conduct that shall govern the performance of the school district’s officers, employees, or agents in contracting for payment and expending program funds. State and federal procurement regulations require each school district to maintain a written code or standards of conduct.
- **Competitive Sealed Bids**—One procurement option, commonly called formal bid procedure, that is allowed by state and federal regulations whenever the aggregate purchase amount exceeds \$25,000. Purchase by competitive sealed bids requires (1) public advertisement of the invitation to bid, (2) bid solicitation from an adequate number of known suppliers, (3) a clear description of the items or services needed (specifications), and (4) public opening of bids.
- **Competitive Sealed Proposals**—The competitive sealed proposal process is an alternative to competitive bidding. The terms and conditions of competitive sealed proposals are identical to those for competitive bidding except for the important difference relating to the finality of initial offers. Under competitive sealed proposals, changes in the nature of a proposal and in prices may be negotiated after proposals are opened. The competitive sealed proposal process provides for full competition among proposals and allows for negotiation with the proper proposers to obtain the best services at the best price.
- **Contract**—(1) a legally enforceable agreement between two (or more) parties where each promises to do (or not to do) something, (2) the writing or document containing such an agreement.
- **Drop Delivery**—Delivery to one location within the school district, such as a central warehouse. The school district assumes responsibility for delivery to the schools.
- **EEO Clause**—A provision required in instructions to the vendors for contracts over \$10,000. The provision or clause requires the vendor’s compliance with Executive Order 11246, entitled “Equal Employment Opportunity,” as amended by Executive Order 11375 and as supplemented in Department of Labor regulations (41 CFR Part 60). “No individual shall be excluded from

participation in, denied the benefit of, subjected to discrimination under, or denied employment in the administration of, or in connection with, any such program because of race, color, religion, sex, national origin, age, handicap, or political application or belief.”

- **Formal Bid**—Common name for the purchase method of using competitive sealed bids. Formal bid, or competitive sealed bid, is one option allowed for contracting for goods and/or services by federal regulations whenever the aggregate purchase amount exceeds \$25,000.
- **Interlocal Contracts**—A school district can contract or agree with another local government, the state or a state agency, including the State Purchasing and General Services Commission, to perform governmental functions and services. The purpose of an interlocal contract may be to study the feasibility of using an interlocal contract to perform a governmental function or service or to provide a governmental function or service that each party to the contract is authorized to perform individually.
- **Purchases of Produce**—Purchases of produce are exempted from competitive procurement requirements. However, a district must purchase these items using price quote procedures or may elect to competitively procure such purchases.
- **Request for Proposals**—A Request for Proposals (RFP) is a part of the competitive sealed proposal process. The RFP is the mechanism that generates the receipt of competitive sealed proposals. A RFP may also be used as a procurement option to generate a non-sealed competitive proposal. In this instance, a school district may open the proposal upon receipt and begin the negotiation process for the offered goods/services.
- **Sole Source**—Sole source means there is only one source of the item and accordingly, no price competition.
- **Specification**—A clear and simple description of an item or service that is identifiable with the current market, is capable of being checked, is fair and protective, and allows maximum competition in purchasing. The use of clear specifications is required with any method of purchasing.
- **Standards of Identity**—Food standards that are regulated by the Food and Drug Administration which describe the nature and character of a given item and specify the kinds and amounts of ingredients that must go into a product. The standard of identity for a specific food tells what is in it, how it is made, how the product looks and sets limits, such as fat and moisture content.
- **Terms and Conditions**—Specific requirements that are binding upon the vendor awarded the contract and communicate the district’s expectations in regard to the vendor’s performance in connection with the district’s purchase.

Examples of foodservice specific terms and conditions might include inspections for wholesomeness, conditions of delivery, requirements for packaging and provisions for making substitutions when necessary.

## Procurement Questions and Answers

### I. Local Purchasing

1) Question: 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?

Answer: 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) Question: 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, 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?”

Answer: 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) Question: Is processing meat into a hamburger patty allowed under this rule?

Answer: 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) Question: 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?

Answer: Due to the geographic diversity of Texas, 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.

## II. Buy American

1) Question: 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 National School Lunch Act (42 USC 1760(n)) requiring that an SFA, to the maximum extent practicable, purchases domestic commodities or products. Does this provision extend to other products like paper plates, equipment, or software?

Answer: 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.

2) Question: 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?

Answer: 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.

### III. Transferring Equipment

1) Question: 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 Texas Department of Agriculture (TDA) 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?

Answer: 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 7 CFR 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.

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

Answer: 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 TDA. 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 TDA shall have the right to an amount calculated by multiplying the current market value or proceeds from the sale by TDA's share of the equipment.

### IV. Commodities

1) Question: If food service management company (FSMC) contracts were just re-bid for School Year (SY) 2009 (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?

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

- The contract already includes provisions relating to crediting for and use of USDA-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
- The contract has an annual renewal provision that would permit it, with TDA approval, to extend the contract for one more 12-month period (i.e. through SY 2010).

2) Question: 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?

Answer: 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.

## V. General Requirements

1) Question: 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”?

Answer: 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 should consult with TDA to determine 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.

2) Question: 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?

Answer: The rule requires contractors to provide sufficient information to permit the SFA 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, TDA approval should be sought.

3) Question: Can an SFA purchase directly from a Buying Organization or Group?

Answer: SFAs 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.