

# TEXAS POLICY

In Texas, organizations that contract directly with Texas Department of Agriculture's USDA federally funded nutrition programs are called Contracting Entities or CEs. The Summer Food Service Program (SFSP) is identified as a nutrition program and, as such, sponsors are considered CEs.

## Procurement

Procurement is the orderly process of acquiring, by lease or purchase, goods and services such as food, meals, equipment, bookkeeping and auditing. You must comply with state and federal procurement procedures. These procedures enable you to purchase goods and services at the best available price and avoid conflicts of interest when making your purchases.

Costs incurred through improper procurements are unallowable. If we disallow costs because of improper procurements, we may determine that your food service operation is not nonprofit and terminate your participation in the program.

You can only participate in the Summer Food Service Program (SFSP) if you operate a nonprofit food service.

## Conflicts of Interest

Sponsors participating in the SFSP are required to disclose and identify related-party transactions, less-than-arms-length transactions, ownership interest in equipment, supplies, vehicles and facilities, or disclose any other information that inhibits us from making an informed assessment of the allowability of a particular cost.

A less-than-arms-length transaction is a transaction between the sponsor and its parent corporation, corporate divisions, subsidiaries, employee(s), officer(s), agent(s) or members of the sponsor's immediate family, either directly or indirectly through corporations, trusts or similar arrangements in which the sponsor holds a controlling interest, no matter how represented. All related-party transactions are less-than-arms-length transactions.

You cannot allow a conflict of interest or potential conflicts of interest when procuring goods and services. You must establish and maintain a written code of standards of conduct. No officer, agent, consultant, contractor, volunteer or other employee of your organization may engage in any activity that causes or could cause a conflict of interest in the operation of the SFSP, including but not limited to:

- Renting or leasing from a firm in which any officer, agent, consultant or employee (or relative) has an interest and this related-party transaction has not been fully disclosed.
- Soliciting or accepting gratuities, favors or anything of monetary value from contractors or potential contractors.
- Soliciting donations or fees from sites.
- Asking sites to engage in any kind of business on your behalf.

## Conduct of Employees

You must maintain standards of conduct governing the performance of all officers, employees and agents who participate in awarding and administering contracts using SFSP funds.

Standards of conduct include the following items:

- An officer, employee or agent must not participate in the selection, award or administration of a contract if they, their immediate family or a partner has any financial interest in or is arranging prospective employment with a contractor or potential contractor.
- No officer, employee or agent may solicit or accept gratuities, favors or anything of monetary value from the contractors or potential contractors.
- Penalties, sanctions or other disciplinary action may be incurred against any officer, employee, agent, or subcontractor or their agent who violates these standards.

## Procurement Methods

Depending on the circumstances, you must choose from the following methods of purchasing:

- Small purchase;
- Competitive sealed bids;
- Competitive negotiation; and
- Non-competitive negotiation.

**EXCEPTION:** Schools and SFAs that have an exclusive contract with a food service management company (FSMC) for year-round service and sponsors whose total contracts with FSMCs will not exceed \$25,000 are not required to comply with competitive bid procedures. These sponsors may award contracts to the responsible bidder whose proposal is most advantageous to the program, considering price and other factors.

You must keep written procurement procedures for how you will:

- Make purchases;
- Advertise (if needed) the items that you plan to purchase;
- Select and evaluate various bids or proposals; and
- Evaluate potential contractors (that is, the criteria that you will use for evaluation, such as integrity, compliance with public policy, past performance, and financial and technical resources).

Regardless of the dollar amount or the method of procurement used, you must ensure free and open competition. You cannot:

- Require unreasonable credentials for potential bidders when qualifying them to do business;
- Allow non-competitive practices between suppliers;
- Permit organizational conflicts of interest; or
- Impose unnecessary experience and bonding requirements on suppliers that seek your business.

Sponsors may establish their own procurement standards provided that:

- The standards comply with Texas and local laws, rules, and regulations;
- Procurements made with SFSP funds comply with 7 CFR, Part 3016 or 7 CFR, Part 3019, as applicable; and
- The standards are consistent with the standards in this section.

## Small Purchase

If purchasing services, supplies or other property with an aggregate cost under \$25,000 in a fiscal year, you may use small purchase procedures. The \$25,000 aggregate limit applies to:

- Single items (for example, rent), and
- Many items of the same general type (for example, office supplies).

Small purchase procedures require you to obtain price quotations from an adequate number of qualified sources (for example, three vendors). You must follow formal bid procedures for each procurement with an aggregate value of more than \$25,000.

## Competitive Sealed Bids

You must use competitive sealed bids if a purchase is \$25,000 or more and you can:

- Completely and accurately describe the item that you want to purchase;
- Locate two or more responsible suppliers that are willing to compete for your business;
- Award a firm-fixed price contract; and
- Choose from among bidders mainly on the basis of price.

When conducting a competitive sealed bid, you will:

- Advertise publicly (for example, in a newspaper);
- Solicit bids from an adequate number of known suppliers;
- Clearly describe the item that you want to purchase in the invitation to bid;
- Publicly open the bids at the time and place stated in the invitation; and
- Award the contract to the lowest bidder that meets the requirements of the invitation.

### EXAMPLES:

- You purchase milk for your sites at a cost of \$26,000 per year. There are several dairies in your community. Since the purchase is over \$25,000 and this type of purchase lends itself to sealed bids, you must advertise your milk contract for sealed bids.
- You want to purchase meals for your sites from a FSMC (that is, caterer). There are several caterers in your area. This purchase lends itself to a unit price and is appropriate for sealed bids.

You cannot allow any entity bidding for a contract award to develop:

- Specifications
- Requirements
- Statements of work
- Invitations for bids
- Requests for proposals
- Contract terms and conditions
- Other procurement documents

You must draft your own specifications and procurement documents. Any SFSP sponsor that copies a list of features or evaluation and ranking criteria drafted by a potential vendor and then permits that potential vendor to submit a bid has violated both federal and state procurement regulations.

While it is understood that SFSP sponsors have broad discretion in gathering information for use in connection with procurements, any information from potential bidders must be appropriately modified to develop tailored specifications; otherwise, these bidders must be excluded from competing for such procurements. This is to ensure objective contractor performance and eliminate unfair competitive advantage.

**EXCEPTION:** If the SFSP sponsor chooses to use a vendor's information or assistance in developing procurement documents and the vendor is allowed to compete for the award, then the SFSP sponsor must not use any SFSP funds for the resulting award.

Any action that diminishes open and free competition undermines the integrity of the procurement process and may subject the sponsor to bid protests. Therefore, SFSP sponsors must have protest procedures in place to handle and resolve disputes relating to their procurements and must disclose information regarding a protest to TDA.

## Competitive Negotiation

You should use competitive negotiation for purchases of \$25,000 or more when the conditions for sealed bids do not exist. The competitive negotiation method of procurement requires you to publicize a request for proposals (RFP) and solicit proposals as well. After you receive the proposals, you will conduct negotiations with two or more contractors.

When using competitive negotiation, you must:

- Solicit proposals from an adequate number of qualified sources;
- Publicize your RFP;
- Honor all requests to compete to the greatest extent possible or practical;
- Identify in the RFP how you will choose the successful bidder;
- Have a written procedure for evaluating proposals, for determining with whom you will negotiate and for selecting the successful bidder;
- Award contracts to the most advantageous bidder; and
- Promptly notify unsuccessful bidders.

**EXAMPLE:** You want to purchase accounting services that would cost more than \$25,000 per year. Since several factors are of equal or greater importance than price, you may want to use competitive negotiation for this purchase.

## Non-Competitive Negotiation

In non-competitive negotiation, you negotiate with a single source. You may use this method only when you have been granted permission from us. We may permit you to use this method under the following conditions:

- The item that you want to purchase is only available from one source;
- An emergency exists; or
- You determine that competition is inadequate after soliciting several sources.

## Procurement Action and Procedures

You must maintain written selection procedures for procurement transactions. These procedures must ensure that all solicitations:

- Include a clear and accurate description of the technical requirements for the material, product or service to be procured. The description shall not contain features that would unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible, and
- Identify all requirements that a contractor must fulfill and all other factors to be used in evaluating bids or proposals.

## Invitation for Bids

You must ensure that an invitation for bid:

- Does not specify a minimum price;
- Contains food specifications and meal quality standards approved by TDA;
- Does not specify requirements to meet ethnic or religious needs unless the special requirements are necessary to meet the needs of children served;
- Does not provide for loans, other monetary benefits to the sponsor or conditions on the sponsor by food service management companies; and
- Excludes non-food items unless they are essential to the food service operation.

## Competitive Bidding Procedures

The following steps should be followed when soliciting competitive bids:

1. Solicit bids from an adequate number of known suppliers in sufficient time prior to the established date for opening of the bids.
2. Publicly announce the proposed contract at least once and not less than 14 calendar days before the opening of bids. Include the time and place of the bid opening in the public announcement.
3. Clearly define the items or services needed so that bidders can properly respond.
4. Notify TDA about the time and place of bid opening at least 14 days before the bids are opened. A TDA representative will be present at bid opening if you expect to receive \$100,000 or more in program payments.
5. Open the bids publicly at the time and place stated on the invitation for bid.
6. If required, obtain TDA approval before awarding the contract. Refer to Item 7500, Texas Department of Agriculture Approval of Contracts.
7. Select the responsible contractor that submits the lowest bid that conforms to the invitation for bid. **Note:** If specified in the bidding document, consider factors such as discounts, transportation costs and life cycle costs in determining the lowest bid. Payment discounts may be used only if prior experience with the bidder indicates that these discounts are generally taken. Reject any or all bids if there are sound documented reasons to do so in the best interest of the program.
8. Before program operations begin, you must:
  - o Submit copies of all bids that were received, the reason for selecting the contractor, the name of the contractor, a copy of the awarded contract and certification of independent price determination;
  - o Notify the chosen contractor by telephone, then in writing. This will provide the contractor with the necessary time to prepare an acceptance letter; and
  - o Notify the rejected bidders, in writing, of the name of the selected contractor.

## Contract Award

You can only award a contract to a responsible contractor with the potential to perform successfully under the specified terms. You should consider factors such as the contractor's integrity, compliance with policy, record of past performance, and financial and technical resources.

## Documentation of Procurement Action

You must document the history of procurement action. At a minimum, the following information must be included in your records:

- The reasons for choosing the specific method of procurement;
- A copy of Form H1628, *SFSP Invitation for Bid and Contract*;
- Copies of all opened bids, a certificate of independent price determination and an explanation for your decision to select a particular contractor;
- The list of contractors to whom a copy of the invitation to bid was sent;

- A list of newspapers, magazines or other method of public notification in which advertisements were placed and the dates that they appeared;
- A copy of the contract; and
- The basis for the cost or price of a contract.

## Contract Form

You must use Form H1628, *SFSP Invitation for Bid and Contract*, provided by the TDA unless:

- You are exempt from competitive bidding, or
- You have received TDA approval to use an alternative at least 10 days prior to use.

If you are exempt from competitive bidding, you may use a simple written agreement that includes:

- A statement that each meal served will meet the USDA requirements for the SFSP;
- The established meal rates of reimbursement;
- The applicable provisions listed under Contract Provisions; and
- The inclusive dates and signatures of required personnel.

In addition, for school sponsors, a statement that reimbursement will not be claimed under the NSLP may be included.

This simple written agreement must be submitted to TDA a minimum of five workdays prior to the effective date of the agreement.

## Contract Provisions

The following provisions or conditions must be included in procurement contracts and subcontracts:

- A provision to allow for the audit, examination, excerpt and transcription of records that are pertinent to the contract by the USDA, the Comptroller of the United States, TDA and their authorized representatives.
- A requirement that mandates compliance with the energy efficiency standards and policies contained in the Texas Energy Conservation Plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163).
- The mandatory retention of all program records for three years after the end of the contract period. If audits, claims or litigation have not been resolved, all records must be retained until all issues are resolved.
- Except for small purchase contracts, a provision that allows administrative, contractual or legal remedies if the contractor violates or breaches the contract terms, and includes appropriate sanctions and penalties.
- For contracts that exceed \$2,500 and include the employment of mechanics or laborers, a provision that requires compliance with Section 103 of the Contract Work Hours and Safety Standards Act (40 USC 327-330), as supplemented by Department of Labor regulations (29 CFR, Part 5). The contractor must compute the wages of mechanics and laborers on the basis of a standard workday of eight hours and a standard work week of 40 hours. Work that exceeds the standards must be compensated at least 1 1/2 times the basic pay rate for

overtime hours worked. These requirements do not apply to the purchase of supplies or materials ordinarily available on the open market or contracts for transportation.

- For contracts that exceed \$25,000, a provision for termination of the contract by the sponsor, including the procedures for termination and the basis for settlement. Also include conditions for termination by default and for circumstances beyond the control of the contractor.
- For contracts that exceed \$25,000, a provision that requires 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).
- For contracts that exceed \$100,000, a provision that requires compliance with applicable standards, orders or requirements issued under Section 306 of the Clean Air Act (42 USC 1857 (h), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738 and Environmental Protection Agency (EPA) regulations (40 CFR, Part 15), which prohibit the use of facilities included on the EPA List of Violating Facilities. This provision must also require reporting violations to HHSC and to the EPA Assistant Administrator for Enforcement (EN-329).

## Awarding a Contract to a Food Service Management Company

You may contract with a FSMC to provide your food service.

### Contract Provisions

A contract with an FSMC must:

- Contain a list of the feeding sites that the TDA has approved and for which the FSMC is expected to provide meal service, including the number of meals by type to be delivered to each location;
- Allow you to increase or decrease the number of meals that you order, within a prior notice period identified in the contract;
- Indicate that you will conduct an on-site review of the FSMC's food preparation facilities at least once each year and provide written documentation to the FSMC of any program violations and required corrective action; and
- Specify that meals must conform to the cycle menu upon which the FSMC based its bid and menu changes must be agreed upon by you and the FSMC.

Additionally, the contract must specify that the FSMC will:

- Maintain records (for example, invoice receipts, delivery reports and meal production records) and submit them to you at least once a month;
- Obtain federal, state, or local health certification for each food preparation site that will be used to prepare meals;
- Ensure that health and sanitation requirements are met at all times;
- Accomplish corrective action of program violations according to prescribed time frames;
- Operate in accordance with SFSP guidelines regarding the preparation and delivery of meals and maintenance of records;
- Make all records regarding its contract with you available for inspection by representatives of TDA, USDA or the Department of the U.S. Government Accountability Office (GAO). The FSMC must maintain these records for three years or until all audits are resolved;

- Permit on-site inspections of its food preparation facilities;
- Provide meals that satisfy all SFSP requirements;
- Understand that it will not be paid for meals that are delivered outside of the agreed upon delivery time, are spoiled or unwholesome at the time of delivery or otherwise do not meet the meal requirements contained in your contract;
- Deliver meals in accordance with the delivery schedule; and
- Not use USDA-donated commodities to prepare meals.

**NOTE:** If you will require the accommodation of special diets in your FSMC contract, you must specify so during the procurement process. If the FSMC with which you contract is unable to provide the special diets, you must find an alternate source for those meals.

## Selection Criteria

When selecting a contractor, you should consider the:

- Integrity of the contractor;
- Financial and technical resources of the contractor; and
- Accessibility to other necessary resources by the contractor.

You can only award a contract to a responsible FSMC with the potential to perform successfully under the specified terms.

You should consider the following factors before selecting an FSMC:

- Previous experience and performance in food assistance operations;
- Cost per delivered meal;
- The ability to meet all of the invitation for bid (IFB) specifications;
- The ability to increase or decrease meal deliveries within a reasonable time;
- The location of the preparation facility and its proximity to the sites being served;
- The use of refrigerated delivery trucks; and
- The ability to meet local health and sanitation requirements.

You should award a contract at least two weeks prior to operating the program. This time will allow the FSMC and you to successfully prepare to manage the program. You must submit copies of all bids that you received to TDA and you must include an explanation describing your reasons for selecting a particular FSMC.

## Award Conference

After awarding a contract, but before executing the contract, you should meet with the FSMC to discuss your mutual and individual responsibilities in the food service operation. During this award conference, the representatives should review the following items:

- Procedures for adjusting meal deliveries;
- The cycle menus;
- Food quality specifications;
- Meal packaging; and
- Sanitation requirements.

The FSMC must also be familiar with all state and local health requirements, particularly those concerning food preparation and meal delivery. Most vended meals are packaged to prevent contamination; the greatest danger usually results when meals are held too long or are stored under improper temperatures. You should also explain to the FSMC the function of monitors, reviews and statistical monitoring, if applicable, in the operation of SFSP.

## Contract Renewal Options

You may renew an existing FSMC contract during each of the four consecutive years following the base year (procurement year) of the contract, if the scope and purpose of the contract do not change.

Examples of changes that would affect the original scope and purpose of an existing FSMC contract include:

- The addition of new services;
- Adding participation in another FND-administered program;
- Changes in fees or the basis for fee increases not reflected in the original request for proposal;
- A major shift in responsibilities for the SFSP sponsor or the FSMC staff; or
- Changes to the formula that is used to identify a meal.

You must follow established procurement procedures when obtaining an FSMC contract for the base year. The procurement method that you follow must be appropriate to the total value and scope of services provided by the contract. You then have an option to renew the FSMC contract each of the four consecutive years following the base year without conducting a procurement method. After the base year and four renewal years have passed, you must conduct the full procurement method, as appropriate, when obtaining a FSMC contract.

## Bankruptcy Procedures

If the FSMC from which you purchase SFSP meals files Chapter 11 bankruptcy, TDA:

- May review the Chapter 11 bankruptcy along with other issues that might have an impact on the FSMC ability to comply with contract terms; and
- Will not approve the FSMC to participate in the SFSP if it is unable to obtain the required performance bond.

You cannot impose any additional criteria or assurances (for example, bonds) on an FSMC, regardless of a contract's value, solely due to Chapter 11 status.

## Texas Department of Agriculture Approval of Contracts

You must forward the bid(s) to TDA for approval before awarding a contract if:

- Only one bid was received in response to the solicitation;
- The bid selected exceeds the lowest bid that was received – you must also include an explanation for your decision;
- The bid will be awarded by competitive or non-competitive negotiation; or
- The bid totals \$100,000 or more.

TDA responds to the request for contract approval within five workdays of receipt.

The bid that is approved and accepted by you will be the contract for program operations between the FSMC and you. TDA will retain a copy of this contract.

## Submitting Documents to the TDA

You must submit the following items to the TDA:

- Notification of the date, time and location for bid opening a minimum of 14 calendar days prior to the bid opening date (for competitive bidding).
- A copy of Form H1628, *SFSP Invitation for Bid and Contract*, for approval.
- Copies of all opened bids, a certificate of independent price determination and an explanation for your decision to select a particular FSMC. You cannot award a contract until TDA has reviewed all bids and supporting documentation and has contacted a representative of the contractor.
- The list of contractors to whom a copy of the invitation for bid was sent.
- A list of newspapers, magazines or other method of public notification in which advertisements were placed and the dates that they appeared.
- A copy of the contract between the FSMC and your organization prior to the start of program operations.
- A copy of the award letter and a copy of each letter sent to all rejected bidders after the bid award has been determined.

## Performance Bonds

If an FSMC submits a bid that exceeds \$100,000 for any Form H1628, *SFSP Invitation for Bid and Contract*, the FSMC must also obtain the following bonds from a surety company listed in U.S. Department of Treasury Circular 570:

- a bid bond for not less than 5 percent nor more than 10 percent of the value of the contract as determined by you. This bond must be submitted with the bid, and
- a performance bond for 10-25 percent of the total value of the contract, as determined by TDA. This bond must be submitted to you within 10 days of the contract award date.

## Solicitation of Small and Minority Businesses

You are encouraged, whenever possible, to procure services from minority business enterprises. A minority business enterprise is managed and operated on a daily basis by members of minority groups.

Affirmative steps must be taken to ensure that small and minority businesses are used whenever possible. You must:

- Include qualified small and minority businesses on solicitation lists;
- Divide total contract requirements into smaller tasks or quantities to permit maximum participation by small and minority businesses;
- Establish delivery schedules that encourage the participation of small and minority businesses;
- Use the services of the:
  - The Small Business Administration,
  - The Office of Minority Business Enterprise of the Department of Commerce, and
  - The Community Service Administration;
- Subdivide your SFSP operation into smaller geographical service areas to encourage competition. However, you cannot limit the number of geographical areas that an FSMC can serve;
- Procure goods and services from labor surplus areas whenever possible; and
- Require each prime contractor to take these affirmative steps when subcontracting.

## Compensation for Purchased Services

If you agree or contract with a consultant or subcontractor for the purchase of a service, you will compensate them for that service based on the provisions of your contract or agreement. When a contract or agreement identifies a fee or compensation that is based on a set percentage, the subcontractor or consultant cannot require additional fees from you.

**EXAMPLE:** A subcontractor or consultant cannot charge sales tax on services in addition to a set percentage that is assessed for that service as stated in the contract or agreement. If a subcontractor or consultant charges sales tax on the service provided, they must extract the tax from the compensation (set percentage) that is stated in the contract or agreement.

## Disputes

It is your responsibility to obtain legal counsel for the resolution of any disputes arising from your participation in a third-party arrangement outside of your FND Agreement.

## Record Keeping Requirements

When a procurement contract is continued or renewed annually or recorded at other intervals, the retention period for the records of the contract period starts on the date the final payment is recorded in connection with the final renewal of the contract and not the initial contract

execution. The three-year record retention period does not begin until the final contract renewal period has expired and/or the final payment is recorded, whichever occurs first.

Actions such as bid protests, litigation and audits may result in an extension of the three-year record retention period. In such cases, the records must be retained until the completion of the action and the resolution of all issues arising from it, or the expiration of the regular three-year period whichever occurs latest.

Examples of such records are:

- A written rationale for the method of procurement;
- A copy of the request for proposal or the invitation for bid, Form H1628, *SFSP Invitation for Bid and Contract (FNS-688)*;
- The selection of contract type (fixed price or cost reimbursable);
- The bidding and negotiation history;
- The basis for contractor selection;
- Approval from TDA to support a lack of competition when competitive bids or offers are not obtained;
- The basis for award cost or price;
- The terms and conditions of the contract;
- Any changes to the contract and negotiation history;
- Billing and payment records;
- A history of any contractor claims; and
- A history of any contractor breaches.

If procurement records generated during the performance of the contract award do not demonstrate compliance with applicable procurement requirements, the following penalties may occur:

- Disallowance of costs
- Termination of contract
- Request to contractor to issue a "stop work" order
- Debarment or suspension
- Other actions deemed appropriate

#### Applying Geographic Preference in Procurement of Unprocessed Locally Grown or Locally Raised Agricultural Products

The National School Lunch Act (NSLA) has been amended to allow organizations receiving funds through the Child Nutrition Programs to apply geographic preferences when procuring unprocessed locally grown or locally raised agricultural products. The procuring entity is responsible for defining "locally grown," that is, state, county, region, etc. It is important that local preference should not be defined in a way that limits competition.

This preference can only be applied to products which are locally grown and locally raised, and that have not been cooked, seasoned, frozen, canned or combined with any other products. This does not preclude foods that have been handled and prepared to make them usable, such

as washing vegetables, bagging greens, butchering livestock and poultry, pasteurizing milk and putting eggs in a carton; as well as using a minimal amount of preservatives to prevent spoilage.

Agricultural products that have been chopped, cut, sliced, diced or shucked are considered to be unprocessed. Ground meat for hamburgers is considered “processed” so geographic preference may not be applied to hamburger meat. Livestock and poultry may only be butchered to be considered “unprocessed.”

**NOTE:** Milk is the only dairy product for which geographic preference may be applied, and it must be pasteurized and meet State and local standards.

The option to allow geographic preferences when procuring unprocessed locally grown or locally raised agricultural products does not eliminate the requirement for procurements to be conducted according to the policy.

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