

# TEXAS POLICY

In Texas, organizations contracting directly with the Texas Department of Agriculture (TDA) to operate nutrition programs federally funded through the United States Department of Agriculture (USDA) are called Contracting Entities, or CEs. The Summer Food Service Program (SFSP) is a federally funded nutrition program and, as such, sponsors are considered CEs.

Each year the USDA publishes the SFSP *Administrative Guidance for Sponsors* (AGS) which provides federal policy information and program guidance for all CEs that participate or plan to participate in SFSP. In order to facilitate program participation and compliance, TDA occasionally issues Texas Policy releases to supplement federal policy found in the AGS.

## Procurement

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

Costs incurred through improper procurements are unallowable. If TDA disallows costs because of improper procurements, the agency may determine that a food service operation is not nonprofit and terminate a CEs participation in the program.

CEs can only participate in the SFSP if they 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 TDA 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.**

A CE cannot allow a conflict of interest or potential conflicts of interest when procuring goods and services. All CEs must establish and maintain a written code of standards of conduct. No officer, agent, consultant, contractor, volunteer or other employee of an 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

All CEs 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, a CE must choose from the following methods of purchasing:

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

**NOTES:** School food authorities (SFAs) that have an exclusive year-round contract with a food service management company (FSMC) are not required to use the standard *SFSP Invitation for Bid (IFB) and Contract* developed by TDA for SFSP. Such SFAs also are not required to use separate competitive bidding procedures in procuring SFSP meals, provided all SFSP-related requirements are included in the original solicitation and resultant FSMC contract. If the SFSP is added to an existing contract, this may represent a material change to the contract requiring the SFA to re-bid. CEs whose total contract with a FSMC will not exceed \$50,000 are not required to use competitive sealed bid procedures. CEs may award contracts following small purchase procurement requirements or competitive negotiation procurement requirements and award to the responsive bidder whose proposal is most advantageous, considering price and other factors such as quality, appeal and acceptability.

All CEs must keep written procurement procedures for how they will:

- Make purchases;
- Advertise (if needed) the items that they plan to purchase;
- Select and evaluate various bids or proposals; and
- Evaluate potential contractors (that is, the criteria that they 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, all CEs must ensure free and open competition. They 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 their business.

Sponsors may establish their own procurement standards provided that:

- The standards comply with Texas and local laws, rules, and regulations;
- Procurements comply with 7 Code of Federal Regulations (CFR), Part 3016 or 7 CFR, Part 3019, as applicable; and
- The standards are consistent with the standards in this Texas Policy.

## Small Purchase

Pursuant to USDA regulations at 7 CFR Part 3016.36(d), the federal small purchase threshold, currently set at \$150,000 (one hundred fifty thousand dollars), must be used for all Child Nutrition Program procurements, including SFSP. State and local agencies have the authority to set a lower small purchase threshold and thereby impose more restrictive procurement procedures.

TDA imposes a more restrictive small purchase threshold of \$50,000 (fifty thousand dollars) for all CEs.

If purchasing services, supplies or other property with an aggregate cost under \$50,000 in a fiscal year, a CE may use small purchase procedures. The \$50,000 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 CEs to obtain price quotations from an adequate number of qualified sources (for example, three vendors). CEs must follow formal bid procedures for all procurement with an aggregate value of more than \$50,000. CEs cannot circumvent the procurement process by using small purchase procedures to award multiple contracts under \$50,000 to different vendors for a single item or many items of the same general type.

## Competitive Sealed Bids

CEs must use competitive sealed bids if a purchase is \$50,000 or more and can:

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

When conducting a competitive sealed bid, a CE will:

- Advertise publicly (for example, in a newspaper of general circulation in the county where meals are needed);
- Solicit bids from an adequate number of known suppliers;
- Clearly describe the item that they 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 \$56,000 per year. There are several dairies in your community. Since the purchase is over \$50,000 and this type of purchase lends itself to sealed bids, you must advertise your milk contract for competitive sealed bids.*
- *You want to purchase meals for your sites from a FSMC (that is, a vendor). There are several vendors in your area. This purchase lends itself to a unit price and is appropriate for competitive sealed bids.*

CEs 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

CEs must draft their 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 procurement, 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 to eliminate an unfair competitive advantage.

**EXCEPTION:** If a CE 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 CE may not use any child nutrition funds for the resulting award.

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

## Competitive Negotiation

CEs should use competitive negotiation for purchases of \$50,000 or more when the conditions for sealed bids do not exist. The competitive negotiation method of procurement requires CEs to publicize a request for proposals (RFP) and solicit proposals as well. After CEs receive the proposals, negotiations with two or more contractors will ensue.

When using competitive negotiation, CEs must:

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

**EXAMPLE:** *The CE is purchasing accounting services that would cost more than \$50,000 per year. Since several factors are of equal or greater importance than price, CEs may want to use competitive negotiation for this purchase.*

## Non-Competitive Negotiation

In non-competitive negotiation, CEs negotiate with a single source. CEs may use this method only when they have been granted permission from their TDA Community Operations regional office. TDA may permit CEs to use this method under the following conditions:

- The item that the CE wants to purchase is only available from one source;
- An emergency exists; or
- The CE determines that competition is inadequate after soliciting several sources.

## Procurement Action and Procedures

CEs 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 the material, product or service must conform if the material, product or service 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

CEs must ensure that an invitation for bid (IFB):

- Does not specify a minimum price;
- 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 CE or conditions on the CE 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 material, product or service 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 from the Community Operations regional office will be present at bid opening if the CE expects to receive \$150,000 (one hundred fifty thousand dollars) 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.
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, the CE must:
  - a. 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 (generally this is done at the time the CE submits their application to participate in the SFSP);
  - b. Notify the chosen contractor by telephone, then in writing. This will provide the contractor with the necessary time to prepare an acceptance letter; and
  - c. Notify the rejected bidders, in writing, of the name of the selected contractor.

## Contract Award

A CE can only award a contract to a responsible contractor with the potential to perform successfully under the specified terms. CEs 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

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

- The reasons for choosing the specific method of procurement;
- A copy of *SFSP Invitation for Bid (IFB) and Contract*, if applicable;
- 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

If a CE is exempt from competitive bidding, a simple written agreement may be used and must include:

- 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 of this Texas Policy; and
- The inclusive dates and signatures of required personnel.

In addition, for SFA CEs, 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 (two thousand five hundred dollars) 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 \$50,000 (fifty thousand dollars), 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 \$50,000 (fifty thousand dollars), 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 \$150,000 (one hundred fifty thousand dollars), 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

CEs may contract with a FSMC to provide their food service.

## Invitation for Bid and Contract

CEs must use *SFSP Invitation for Bid (IFB) and Contract* provided by TDA unless:

- CEs are exempt from competitive bidding, under the \$50,000 (fifty thousand dollar) threshold, or
- CEs receive approval from their TDA Community Operations regional office to use an alternative at least 10 calendar days prior to use.

## Contract Provisions

A contract with an FSMC must:

- Contain a list of the feeding sites that 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 the CE to increase or decrease the number of meals that it orders, within a prior notice period identified in the contract;
- Indicate that the CE 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 both the CE 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 the CE 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 the CE 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 the FSMC 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 its contract with the CE;
- Deliver meals in accordance with the delivery schedule; and
- Not use USDA Foods (donated commodities) to prepare meals.

**NOTE:** If a CE requires accommodations for special diets in its FSMC contract, the CE must specify so during the procurement process. If the contracting FSMC is unable to provide special diets, the CE must find an alternate source for those meals.

## Selection Criteria

When selecting a contractor, all CEs should consider the:

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

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

CEs 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.

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

## Award Conference

After awarding a contract, but before executing the contract, the CE should meet with the FSMC to discuss 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. CEs should also explain to the FSMC the function of monitors, reviews and statistical monitoring, if applicable, in the operation of SFSP.

## Contract Renewal Options

CEs 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 TDA administered nutrition program;
- Changes in fees or the basis for fee increases not reflected in the original invitation for bid;
- 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.

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

## **Bankruptcy Procedures**

If the CE's FSMC providing 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.

CEs 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**

CEs must forward the bid(s) to their TDA Community Operations regional office 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 – CE must also include an explanation for its decision;
- The bid will be awarded by competitive or non-competitive negotiation; or
- The bid totals \$150,000 (one hundred fifty thousand) or more.

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

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

## Submitting Documents to the TDA

CEs 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 *SFSP Invitation for Bid (IFB) and Contract*, for approval.
- Copies of all opened bids, a certificate of independent price determination and an explanation for the decision to select a particular FSMC. A CE 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 the CE 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 \$150,000 (one hundred fifty thousand dollars) for any *SFSP Invitation for Bid (IFB) 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 (5%) nor more than 10 percent (10%) of the value of the contract as determined by the CE. This bond must be submitted with the bid, and
- A performance bond for 10 percent (10%) of the total value of the contract, as determined by TDA. This bond must be submitted to the CE within 10 days of the contract award date.

## Solicitation of Small and Minority Businesses

Information about solicitation of small and minority businesses can be found in the USDA *Administrative Guidance for Sponsors*.

## Compensation for Purchased Services

If a CE agrees or contracts with a consultant or subcontractor for the purchase of a service, the CE will compensate the consultant or subcontractor for that service based on the provisions of the 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 the CE.

**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 the CEs responsibility to obtain legal counsel for the resolution of any disputes arising from its participation in a third-party arrangement.

## 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, *SFSP Invitation for Bid (IFB) and Contract*;
- 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