Section 17, Procurement

Section 17, Procurement Update Guide

February 20, 2020  Updated Section 17, Procurement to correct a misstatement related to cooperative procurement.

January 28, 2020  Updated Section 17, Procurement to incorporate the following United States Department of Agriculture (USDA) memos and guidance:

- USDA Memo SP 20-2019, Revised Federal Micro-Purchase and Simplified Acquisition Thresholds for Procurement, Applying the Simplified Acquisition Threshold in the National School Lunch Program, Child and Adult Care Food Program, and Summer Food Service Program Procurement Standards, and School Food Authority Operations (October 20, 2019)
- USDA Memo SP 04-2018, Market Basket Analysis When Procuring Program Goods and Modifying Contracted-For Product Lists (January 17, 2018)

Clarified information on the following topics:

- Agent contract
- Aggregate
- Awarding a contract
- Buy American
- Conflicting program regulations
- Consultant contract
- Contract award
- Contract evaluation
- Contract negotiation
- Contract renewal
- Cooperative purchasing
- Cost-plus percentage contract
- Credits, discounts, and rebates
- Flexibility for growth
- Forecasting
- Full and open competition
- Local preference
- Market basket purchasing
- Material change
- Micro-purchase method
- Noncompetitive procurement
- Notification, publication of the solicitation
- Offer evaluation
- Other regulatory requirements
- Procurement planning
- Public advertising
- Records retention
- Regulatory conflicts
- Small purchase method
- Solicitation
- Specifications, terms, and conditions
- USDA Foods
- Vendor list
- Written procurement procedures

December 14, 2018  Updated Section 17, Procurement to incorporate a new micro-purchase threshold.

June 25, 2018  Updated Section 17, Procurement to incorporate the following United States Department of Agriculture (USDA) memos and guidance:
- USDA Memo SP 04-2018, Market Basket Analysis When Procuring Program Goods and Modifying Contracted-For Product Lists (January 17, 2018)

Clarified information on the following topics:
- Aggregate
- Buy American
- Conflicts with EDGAR
- Definitions related to market basket purchasing
- Developing solicitations
- Market basket purchasing
- Noncompetitive method
- Reverse auction
- Sole source
- Written procurement procedures

April 4, 2017  Updated Section 17, Procurement to provide new guidance on the Buy America provision.

March 13, 2017  Updated Section 17, Procurement to remove detailed guidance on consultants, food service management companies (FSMC), and vended meals; this guidance has been moved to Administrator’s Reference Manual, Section 22, Food Service Contracts.

Incorporated the following United States Department of Agriculture (USDA) memo and guidance:
- USDA Memo SP 05-2017, Q&A: Purchasing Goods and Services Using Cooperative Agreements, Agents, and Third-Party Services (October 19, 2016)

Clarified information on the following topics:
- Additional resources
- Agent contracts
- Aggregate
- Brand name products
- Buy American
- Consultant contracts
Cooperative purchasing
- Cost-plus percentage of cost pricing structures
- Equipment technical requirements
- New terms related to cooperative purchasing: agent, operator, operator-only cooperative, third-party cooperative
- Noncompetitive method
- Pricing
- Vendor list

November 29, 2016  Updated to address typographical errors
October 26, 2016  Updated Section 17, Procurement to provide clarification on the following topic:
  - Micro-purchase
October 21, 2016  Updated Section 17, Procurement to incorporate the following United States Department of Agriculture (USDA) memo and guidance:
  - USDA Memo SP 35-2016, Bonding Requirements for Food Service Management Companies and Other Subcontractors (May 5, 2016)
  - USDA Memo SP 12-2016, Guidance on Competitive Procurement Standards for Program Operators (November 13, 2015)

Clarified information on the following topics:
- Additional purchases (piggybacking)
- Advertising requirement
- Applicability of the Education Department General Administrative Regulations (EDGAR) and other Texas Education Agency regulations
- Awarding the contract
- Bonding requirements and bid guarantees
- Buy American Provision
- Code of conduct, ethical standards, and conflict of interest
- Consultant contracts
- Contract management
- Cooperative membership
- Cooperative purchasing
- Credits, rebates, and discounts
- Difference between consultant and food service management contracts
- Full and open competition
- Micro-purchase
- Noncompetitive procurement method, including sole source
- Offers received after the due date
- Opening offers prior to the due date
- Other regulatory contract requirements
- Preparation of solicitation
- Procuring fresh fruit and vegetables
- Protests
- Public advertising
- Purchase catalog
Responsive offers
Solicitation, purchase catalog, shared purchasing, taste-testing samples
Total costs
Vendor list for produce
Written procurement procedures

February 10, 2016
Updated Section 17, Procurement to incorporate the following United States Department of Agriculture (USDA) memos and guidance:

- USDA Memo SP 24-2016, Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program (February 3, 2016)

Clarified information on the following topics:
- Buy American Provision

January 5, 2016
Updated Section 17, Procurement to incorporate the following United States Department of Agriculture (USDA) memos and guidance:

- USDA Memo SP 03-2016, Procurement Standards and Resource Management Requirements Related to Franchise Agreements (November 6, 2015)
- USDA Memo SP 02-2016, Questions and Answers on the Transition to and Implementation of 2 CFR Part 200 (October 30, 2015)
- Procuring Local Foods for Child Nutrition Programs (released by USDA September 8, 2015)
- USDA Memo SP 09-2015, Written Codes of Conduct and Performance of Employees Engaged in Award and Administration of Contracts (November 21, 2014)
- USDA Memo SP 03-2013, Procurement Geographic Preference Q&A’s - Part II, October 9, 2012
- USDA Memo SP 01-2103, Federal Small Purchase Threshold Adjustment (October 2, 2012)
- USDA Memo SP 35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, etc. (June 12, 2012)
- USDA Memo SP 19-2012, Soliciting Bids from Commercial Distributors for End Products (February 24, 2012)
- USDA Memo SP 17-2012, Procurement Questions and Answers to Assist in the Implementation of the final rule titled Nutrition Standards in the National School Lunch and School Breakfast Program (February 23, 2012)
USDA Memo SP 14-2012, Procurement Questions Relevant to the Buy American Provision (February 13, 2012)

Clarified information on the following topics:
- Additional resources
- Compliance
- Contracts
- Managing contracts
- Records Retention
- Solicitations
- Types of procurement methods
- Written procurement procedures
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Contact Information for the
Texas Department of Agriculture (TDA), Food and Nutrition

When contacting TDA by phone, Contracting Entities (CEs) need to have their CE Identification Number (CE ID) (and site ID, if applicable). CEs should include their name and CE ID (and the site name and ID if applicable) in all communication or documentation.

<table>
<thead>
<tr>
<th>General Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Physical Address</strong></td>
</tr>
<tr>
<td>1700 N. Congress, 11th Floor, Austin, TX 78701</td>
</tr>
<tr>
<td><strong>Phone</strong></td>
</tr>
<tr>
<td>877-TEXMEAL, (877) 839-6325</td>
</tr>
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<thead>
<tr>
<th>Questions about Program Applications</th>
<th>Questions about Program Operation</th>
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</thead>
<tbody>
<tr>
<td>Child &amp; Adult Care Food Program</td>
<td>USDA Foods Operations</td>
</tr>
<tr>
<td><a href="mailto:CACFP.BOps@TexasAgriculture.gov">CACFP.BOps@TexasAgriculture.gov</a></td>
<td>Community Operations (Child &amp; Adult Care Food Program &amp; Sumner Food Service Program)</td>
</tr>
<tr>
<td>National School Lunch Program, School Breakfast Program, &amp; Special Milk Program</td>
<td><a href="mailto:Community.Ops@TexasAgriculture.gov">Community.Ops@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td><a href="mailto:NSLP-SBP.BOps@TexasAgriculture.gov">NSLP-SBP.BOps@TexasAgriculture.gov</a></td>
<td>School Operations (National School Lunch Program, School &amp; Special Milk Program)</td>
</tr>
<tr>
<td>Seamless Summer Option</td>
<td><a href="mailto:School.Operations@TexasAgriculture.gov">School.Operations@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td><a href="mailto:SSO.BOps@TexasAgriculture.gov">SSO.BOps@TexasAgriculture.gov</a></td>
<td>TX-UNPS Direct Certification Direct Verification System</td>
</tr>
<tr>
<td>Summer Food Service Program</td>
<td><a href="mailto:DirectCertification@TexasAgriculture.gov">DirectCertification@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td><a href="mailto:SFSP.BOps@TexasAgriculture.gov">SFSP.BOps@TexasAgriculture.gov</a></td>
<td>Farm Fresh Initiative (Local Products)</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:FarmFresh@TexasAgriculture.gov">FarmFresh@TexasAgriculture.gov</a></td>
</tr>
</tbody>
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<thead>
<tr>
<th>Questions about Program Flexibility</th>
<th>Questions about Financial Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="mailto:SNPWaivers@TexasAgriculture.gov">SNPWaivers@TexasAgriculture.gov</a> for questions about</td>
<td>Capital Expenditures</td>
</tr>
<tr>
<td>* Breakfast Waiver</td>
<td><a href="mailto:NSLP-SBP.BOps@TexasAgriculture.gov">NSLP-SBP.BOps@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td>* Child Nutrition Program Requirement Waivers</td>
<td>Claims</td>
</tr>
<tr>
<td>* Gender Exception</td>
<td><a href="mailto:BCT.BOps@TexasAgriculture.gov">BCT.BOps@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td>* Hiring Standards for CEs with Less Than 500 Students</td>
<td>Procurement, Including Sole Source</td>
</tr>
<tr>
<td>* Lunch Mealtime</td>
<td><a href="mailto:CE.ProcurementReviews.BOps@TexasAgriculture.gov">CE.ProcurementReviews.BOps@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td>* Paid Lunch Equity (not currently available)</td>
<td>Excessive Balance Plan</td>
</tr>
<tr>
<td>* RCCI Age/Grade Group Meal Pattern</td>
<td><a href="mailto:School.Operations@TexasAgriculture.gov">School.Operations@TexasAgriculture.gov</a></td>
</tr>
<tr>
<td>* Seamless Summer Operation (SSO) Age/Grade</td>
<td></td>
</tr>
<tr>
<td>* Summer Mandate</td>
<td></td>
</tr>
<tr>
<td>* Technology-Based Confirmation</td>
<td></td>
</tr>
<tr>
<td>* Universal Breakfast Mandate</td>
<td></td>
</tr>
<tr>
<td>* Vending Machine to Dispense Reimbursable Meals</td>
<td></td>
</tr>
<tr>
<td><a href="mailto:Nutrition@TexasAgriculture.gov">Nutrition@TexasAgriculture.gov</a> for questions about</td>
<td></td>
</tr>
<tr>
<td>* Milk Substitute Notification</td>
<td></td>
</tr>
</tbody>
</table>

1/14/2020
Procurement

This procurement guidance is intended to assist contracting entities (CEs) in establishing effective and compliant procedures that ensure full and open competition (also called free and open competition) for the purchase of products and/or services.

Procurement is the act of obtaining goods or services in exchange for money or value.¹

The guidance in this section applies to the following school nutrition programs (SNPs):

- National School Lunch Program (NSLP)
  - Afterschool Care Program (ASCP)
  - Fresh Fruit and Vegetable Program (FFVP)
  - Seamless Summer Option (SSO)
- School Breakfast Program (SBP)
- Special Milk Program (SMP)

NSLP CEs that operate CACFP At-Risk and/or SFSP may use the NSLP procurement regulations instead of the CACFP and/or SFSP procurement regulations.

In addition to the guidance in this section, Administrator’s Reference Manual (ARM), Section 17A, Program Integrity provides additional guidance that applies to procurement.

Information Box 1

Additional Resources for Procurement

Texas Comptroller of Public Accounts
The website for the Texas Comptroller provides information on state regulations that apply to state and local governmental entities. Available at www.comptroller.texas.gov/

Resources include the following:


Texas Education Agency (TEA)

United States Office of Management and Budget (OMB)
2 Code of Federal Regulations, Part 200—These regulations provide detailed information on required federal procurement process. Available at www.fns.usda.gov/hs/node/73141

¹ Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.
Consultants, Food Service Management Companies, and Vended Meals
The guidance in this section also applies to contracts for consultants, food service management companies (FSMCs), and vended meals. However, there is also additional guidance specific to these types of contracts located in Administrator’s Reference Manual, Section 22, Food Service Contracts.


2 CFR Part 200 primarily serves to consolidate the previous regulations into one location as a convenience and for clarity. For procurement, 2 CFR Part 200 clarifies existing regulation and adds one new flexibility—micro-purchasing.

[NOTE: 2 CFR Part 200 also applies to all financial and accounting practices. Section 17, Procurement only addresses issues related to procurement. Other finance and accounting issues are addressed in Section 14, Financial Information Concerning School Nutrition Funds.]

Conflicting Program Regulations
For CEs operating Child Nutrition Programs (CNPs), there are federal, state, and local regulations that govern the actions of the CE. When there is a conflict between USDA regulations and other regulations, the CE must follow USDA regulations for the use of CNP funds. If other applicable federal, state, or local regulations do not conflict with USDA regulations, the CE will follow the most restrictive other federal, state, or local regulations. All programs that receive federal funds are required to follow 2 CFR Part 200 unless federal legislation supersedes 2 CFR Part 200.

Education Department General Administrative Regulations (EDGAR)
CEs receiving funds through the United States Department of Education are required to follow the regulations described in the Education Department General Administrative Regulations (EDGAR) for those funds, which incorporates 2 CFR Part 200. However, Child Nutrition Programs (CNPs) are required to follow USDA regulations for financial management, including procurement. While there are regulations in EDGAR that conflict with USDA regulations, in most situations, CEs will find the regulations to be compatible. However, if there is a regulatory conflict, CEs are required to follow the USDA regulations for all CNP funds (income, allowable and unallowable costs, and procurement).
Effective Procurement Systems

The procurement process follows a set of prescribed steps:

1. **Develop** written procurement procedures that guide the staff through actions necessary for successful procurement.

2. **Select** the appropriate procurement method, as described in the written procurement procedures (*not required for the micro-purchase method*).

3. **Develop and publicize** the solicitation as appropriate, as described in the written procurement procedures.

4. **Receive and evaluate** offers according to the rubric or scale, as described in the written procurement procedures.

5. **Determine** the best price, award contract, and execute the contract, as described in the written procurement procedures.

6. **Manage** the contract, as described in the written procurement procedures, including required records retention.

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Procurement Chart

1. **Develop** written procurement procedures that guide the staff through actions necessary for successful procurement.

2. **Select** the appropriate process/procurement method, as described in the written procurement procedures.

3. **Develop** and publicize solicitation as appropriate, as described in the written procurement procedures. *(not required for micro-purchase method)*

4. **Receive and evaluate** offers according to the rubric or scale, as described in the written procurement procedures.

5. **Determine** the best price, award contract and execute the contract, as described in the written procurement procedures.

6. **Manage** the contract, as described in the written procurement procedures, including required records retention.
Program Integrity and Internal Controls

The procurement process is intended to promote program integrity and establish internal controls.

Program Integrity is defined as an organized and structurally sound financial management system that promotes program efficiency and prevents the inappropriate use of program funds.

This type of financial management system provides safeguards that improve the stewardship of federal money and reduce fraud and improper payments by the use of internal controls. In procurement,

Internal controls (1) define actions related to the procurement process, (2) establish standards of ethical conduct, and (3) provide full and open competition.²

Any cost paid to a contractor as a result of improper procurement methods, whether paid by the CE or a third-party, is an unallowable expense. Unallowable expenses must not be paid by the school nutrition program.

Other Entities (Third-Party Entities). Any agency, organization, group, business, food service management company, food processor, contractor, distributor, vendor, or other entity acting on behalf³ of the CE for any of the SNP programs are also required to follow the federal procurement guidance described in this section for any procurement actions they take on behalf of the CE.

All third-party entities must provide adequate documentation⁴ to a CE so that the CE can determine if the procurement regulations have been implemented appropriately, including, but not limited to, documentation related to credits, discounts, and rebates as well as USDA Foods values.

Administrator’s Reference Manual (ARM), Section 17A, Program Integrity provides additional guidance on this topic.

² See the Full and Open Competition subsection in this section for additional information on this topic.
³ See the Definitions subsection in this section for additional information on this topic.
⁴ See the Records Retention subsection in this section for additional information on documentation.
### Definitions for This Section

For this section, the following definitions will be useful:

[NOTE: The definitions provided in this section are specific to financial transactions that occur for school nutrition programs.]

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acting on Behalf of CE</td>
<td>Entity or person who has been given the responsibility to take action for the CE.</td>
</tr>
<tr>
<td>Agent</td>
<td>Person or business that is procured to act on behalf of the CE. This includes procuring on behalf of the CE.</td>
</tr>
<tr>
<td>Aggregate Purchase Amount</td>
<td>Total amount of a single invoice for a single purchase of or transaction for product(s) and/or service(s). Separate aggregate purchase(s) may occur weekly, monthly, or annually. The total aggregate cost may be broken into multiple delivery payments, which are paid as each product and/or service is delivered or when specified expectations are met.</td>
</tr>
<tr>
<td>Approved Supplier List</td>
<td>List of suppliers or potential contractors 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 applicable policy or regulations, record of past performance, and financial and technical resources.</td>
</tr>
<tr>
<td>Arms-Length Transaction</td>
<td>Transaction in which the parties are dealing from equal bargaining positions—neither party is subject to the other’s control or dominant influence, and the transaction is treated with fairness, integrity, and legality.</td>
</tr>
<tr>
<td>Bid Guarantee</td>
<td>Guaranteed percentage of bid price provided by the offeror at the time the offer is submitted. The CE must return all bid guarantees to all unsuccessful offerors when the contract is awarded and to the winning offeror as soon as the contract is signed.</td>
</tr>
<tr>
<td>Bond</td>
<td>Insurance agreement pledging surety for financial loss caused in connection with the contract. For school nutrition programs, if a loss occurs in connection with a contract related to program operations, the loss will be covered to the extent agreed upon in the bond.</td>
</tr>
<tr>
<td>Brokers</td>
<td>Independent sales agents who negotiate sales for manufacturers by working with food distributors and/or school nutrition operations.</td>
</tr>
<tr>
<td>Buy American</td>
<td>Requirement for schools to purchase, to the maximum extent practicable, domestic commodities, and products.</td>
</tr>
</tbody>
</table>

**Less than Arms-Length Transaction**

A less than arms-length transaction occurs when a person responsible for making a purchase appears to have a stake in the outcome is able to control or substantially influence the actions of others. This may include agreements between divisions of an organization; organizations under common control through common officers, directors, or members; and an organization and a director or employee of the organization and his or her immediate family.

**Domestic Commodity or Product**

A domestic commodity or product means an agricultural commodity that is grown in the United States and processed in the United States or that is processed in the United States substantially using agricultural commodities that are produced in the United States.
<table>
<thead>
<tr>
<th>Code of Conduct</th>
<th>Set of written standards the CE must develop that outline the responsibilities of, or proper practices for, an individual or organization and which governs the following:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Performance of the officers, employees, or agents engaged in contract awards and administration when the contract is funded in whole or in part by Food and Nutrition Service (FNS) program funds.</td>
</tr>
<tr>
<td>2.</td>
<td>Methods of procurement, including the requirement that the CE perform a cost or price analysis for every procurement (including contract modifications) and determination of which contract clauses and certifications are required in the CE’s contracts.</td>
</tr>
</tbody>
</table>

| Conflict of Interest | Any action that allows a person to benefit at the expense of the public interest or the expense of their employer. |

| Contract | Formal, legally enforceable agreement (terms and conditions) between a buyer (the CE) and a seller (contractor) that clearly and accurately describes the products and/or services to be delivered or performed and sets forth the method and the compensation the contractor receives when products and/or services are provided. |

| Cooperative Purchasing | Group of entities who join together to purchase products and/or services with the intention of reducing costs and improving the quality of products and/or services available to members of a group. |

| Cost Index | Tool designed to show the impact of an economic measure on the price of purchasing a specific type of item. |

| Cost Plus Percentage Cost | Method of pricing where the contract or agreement creates a pricing structure that charges the cost of the product or service plus a percentage of the cost. This pricing structure is not allowable for any purchase under USDA regulations. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP). |

| Cost-Reimbursable Contract | Reimbursable contract that is a formal, legally enforceable contract that reimburses the contractor for costs incurred under the contract but does not provide for any other payment to the contractor with a fixed fee or with a cost-reimbursement fee. In a cost-reimbursable contract, allowable costs will be paid from the nonprofit school nutrition account to the contractor net of all discounts, rebates, and other applicable credits accruing to or received by the contractor. In a cost-reimbursable contract, the fixed price (fee) includes the contractor’s direct and indirect administrative costs and profit allocable to the contract. |

| Debarment | Action taken by a debarring official to exclude a person from participating in covered transactions. A person so excluded is debarred, that is, unable to participate. |

| Distributor | Commercial food company that purchases, receives, and/or stores commercial food products and then sells, delivers, and bills the recipient agency for goods and/or services provided. |

| Drop Delivery | Delivery to one location within the CE, such as a central warehouse. |

| Economics of Scale | Purchase of large quantities of a product and/or service in order to obtain a better price. |

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5 Covered transactions in this section refer to transactions related to child nutrition programs.
<table>
<thead>
<tr>
<th><strong>Escalator/Declinarelator Clause or Market-based Pricing</strong></th>
<th>Predetermined provisions in a contract stipulating specific conditions for an increase or decrease in price.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ethics</strong></td>
<td>Moral standards individuals use to guide decisions in their personal and professional lives. School nutrition professionals have a responsibility to act ethically in accordance with all federal, state, and local guidelines.</td>
</tr>
<tr>
<td><strong>Firm Fixed-Price Contract (Also Called Firm Price Contract)</strong></td>
<td>Contracts that provide products and/or services for a price not subject to adjustment other than increases or decreases tied to an economic indicator stipulated by the contract. Firm fixed-price contracts are usually negotiated where reasonably finite specifications and/or technical requirements are available, and costs can be estimated with reasonable accuracy. A fixed-price contract places minimum administrative burden on contracting parties but subjects a contractor to maximum risk arising from full responsibility for all cost escalations.</td>
</tr>
<tr>
<td><strong>Fixed-Price</strong></td>
<td>Agreed-upon amount of money that is fixed at the inception of a contract and is guaranteed for a specific period of time. A fixed-price contract may also contain an economic cost adjustment provision tied to the Consumer Price Index (CPI) Food Away from Home.</td>
</tr>
<tr>
<td><strong>Fixed Price (Fee)</strong></td>
<td>Agreed upon amount of money that is fixed at the inception of the contract.</td>
</tr>
<tr>
<td><strong>Food Service Management Company (FSMC)</strong></td>
<td>Any organization, whether commercial enterprise or a nonprofit organization, that is or may be contracted by the CE to manage any aspect of the school food service.6</td>
</tr>
<tr>
<td><strong>Forecasting</strong></td>
<td>Process of analyzing current and historical data to determine future procurement trends. In the case of school nutrition programs, forecasting involves predicting and estimating the goods, works, and services needed in specified areas for the coming year, and/or assessing needs by reviewing current procurement activities. Forecasting allows for procurement timelines and tasks to evolve each fiscal year.</td>
</tr>
<tr>
<td><strong>Full and Open Competition</strong></td>
<td>Situation where all potential contractors are competing on a level playing field and have the same opportunity to compete and be awarded a contract. Full and open competition is also commonly referred to as free and open competition.</td>
</tr>
<tr>
<td><strong>Grade Standards</strong></td>
<td>USDA quality standards based on measurable attributes that describe the value and utility of the products.</td>
</tr>
<tr>
<td><strong>Grantees</strong></td>
<td>Governmental or other legal entity to which a grant is awarded where the receiving entity is held accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.</td>
</tr>
<tr>
<td><strong>Incentives</strong></td>
<td>Rewards or benefits received as a result of performing requested actions and/or meeting predetermined milestones.</td>
</tr>
</tbody>
</table>

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6 If an NSLP CE operates a Child and Adult Care Food Program and/or Summer Food Service Program, there may be additional regulations that applied for the use of an FSMC to operate the program.
<table>
<thead>
<tr>
<th><strong>Internal Controls</strong></th>
<th>Procedures established by the CE that (1) define actions related to the procurement activities, (2) establish standards of ethical conduct, and (3) provide full and open competition.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Invitation for Bid (IFB)</strong></td>
<td>Formal method of procurement that uses sealed bidding and results in a fixed-price contract with or without adjustment factors.</td>
</tr>
<tr>
<td><strong>Just-in-Time (JIT)</strong></td>
<td>Food and supplies kept in quantities an entity anticipates will meet its immediate needs, which results in the entity maintaining a low inventory level.</td>
</tr>
<tr>
<td><strong>Lead Time</strong></td>
<td>Amount of time necessary for a distributor to prepare and deliver products and/or services to the CE.</td>
</tr>
<tr>
<td><strong>Local Product</strong></td>
<td>Unprocessed locally grown or raised agricultural products that retain their inherent character.</td>
</tr>
<tr>
<td><strong>Managing the Contract</strong></td>
<td>Procedures the CE has in place to ensure that contractors perform in accordance with the terms, conditions, and specifications and/or technical requirements of their contracts or purchase orders.</td>
</tr>
<tr>
<td><strong>Market Basket</strong></td>
<td>Solicitation strategy that allows a CE to procure a list of products with varied pricing options for a finite number of products. Each product on the market basket list must have (1) a description with the quantity to be purchased, (2) specifications and/or technical requirements for each product, and (3) a description of how each product will be awarded on the contract.</td>
</tr>
<tr>
<td><strong>Market Basket, Total Cost Analysis and Scoring</strong></td>
<td>Analysis and scoring evaluation based on the aggregate total cost or by line item total.</td>
</tr>
<tr>
<td><strong>Market Basket, Simplified Total Cost Analysis and Scoring</strong></td>
<td>Analysis and scoring evaluation based on a representative sample of all products.</td>
</tr>
<tr>
<td><strong>Material Change</strong></td>
<td>Change made to a contract after the contract has been awarded that alters the terms and conditions of the contract substantially enough that had other offerors known of the change in advance, they may have bid differently and more competitively.</td>
</tr>
<tr>
<td><strong>Micro-purchase Method</strong></td>
<td>Single purchase or transaction with an aggregate total cost that does not exceed $10,000 whether that purchase occurs weekly, monthly, or annually.</td>
</tr>
<tr>
<td><strong>Noncompetitive Method</strong></td>
<td>Procurement method used when there is an insufficient number of offers submitted in response to a solicitation. In this case, full and open competition is deemed inadequate, and there is no way to remedy the situation.</td>
</tr>
<tr>
<td><strong>Open Award</strong></td>
<td>Contract award in which all vendors that submit an offer are awarded a contract. This type of award does not promote full and open competition or pricing that is advantageous to the program. An open award is not the same as using a market basket strategy.</td>
</tr>
<tr>
<td><strong>Operator</strong></td>
<td>Entity that operates a Child Nutrition Program.</td>
</tr>
<tr>
<td><strong>Operator-Only Cooperative</strong></td>
<td>Any type of agreement that is formed solely among CNP operators, including regional education service center (ESC) cooperatives.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Pass-Through Entity</strong></td>
<td>Entity receiving federal funds that have passed through another entity. This definition is specific to funding from federal sources and applies to state agencies, CEs, group purchasing cooperatives, and third-party entities. These funds are used to fulfill the purposes of a federally funded program.</td>
</tr>
<tr>
<td><strong>Payment Bond</strong></td>
<td>Bond which covers the cost of materials and works for construction contracts.</td>
</tr>
<tr>
<td><strong>Performance Bond</strong></td>
<td>Bond which covers the cost of ensuring that the work is done as specified in the terms of the contract.</td>
</tr>
<tr>
<td><strong>Procurement</strong></td>
<td>Act of obtaining of goods or services in exchange for money or value. ([NOTE: Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.]</td>
</tr>
<tr>
<td><strong>Procurement Standards</strong></td>
<td>Standards of conduct that shall govern the performance of the CE’s officers, employees, or agents in contracting for payment and expending program funds. State and federal procurement regulations require each CE to maintain written standards of conduct, including a code of conduct that prohibits employees from participating in the selection, award, and administration of any contract to which an entity or certain persons connected to them have a financial interest.</td>
</tr>
<tr>
<td><strong>Program Integrity</strong></td>
<td>Organized and structurally sound financial management system that promotes program efficiency and prevents the inappropriate use of program funds.</td>
</tr>
<tr>
<td><strong>Proprietary Products</strong></td>
<td>Manufactured products ordered specifically for a particular program or are unique to a manufacturer.</td>
</tr>
<tr>
<td><strong>Reasonable Cost</strong></td>
<td>Amount that does not exceed a cost that would be incurred by a prudent person under similar circumstances.</td>
</tr>
<tr>
<td><strong>Regulatory Authority</strong></td>
<td>Oversight authority dictated by legislative act or regulation.</td>
</tr>
<tr>
<td><strong>Request for Proposals (RFP)</strong></td>
<td>Formal procurement method where potential contractors submit an offer to provide products and/or services under a fixed-price or cost-reimbursable type contract.</td>
</tr>
<tr>
<td><strong>Responsible</strong></td>
<td>Capable of providing the product(s) and/or service(s), as described in the solicitation.</td>
</tr>
<tr>
<td><strong>Responsive</strong></td>
<td>Offer that addresses the terms and conditions of the solicitation, including the specifications and/or technical requirements for product(s) and/or service(s).</td>
</tr>
<tr>
<td><strong>Service Fee</strong></td>
<td>Fee charged for the performance of a specific service.</td>
</tr>
<tr>
<td><strong>Simplified Acquisition Threshold (Also Called Small Purchase Threshold)</strong></td>
<td>Amount established by federal, state, or local regulations that defines when formal and informal procurement methods must be used.</td>
</tr>
<tr>
<td><strong>Sole Source Method</strong></td>
<td>Noncompetitive procurement method used when products and/or services are available from only one supplier, distributor, or contractor. TDA must approve all sole source methods of procurement.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Solicitation</strong></td>
<td>Process of notifying prospective or qualified offerors about the specifications or technical requirements for the purchase of products and/or services. For informal procurement, the solicitation may be communicated by email, in person, by fax, or by phone as long as the person soliciting offers documents the specifications or technical requirements to ensure that every possible contractor is given the same information. For a formal procurement, a written solicitation is required.</td>
</tr>
<tr>
<td><strong>Subgrantees</strong></td>
<td>Governmental or other legal entity to which a subgrant is awarded and is accountable to the grantee for the use of the funds provided.</td>
</tr>
<tr>
<td><strong>Supplier</strong> (Sometimes Called Vendor)</td>
<td>Commercial enterprise, public or nonprofit private organization, or individual that enters into a contract with a CE to provide products and/or services. A supplier is also referred to as an offeror during the solicitation phase of procurement.</td>
</tr>
<tr>
<td><strong>Specifications and Technical Requirements</strong></td>
<td>Detailed information included in the solicitation and in the final contract that describes the product(s) and/or service(s) that will be provided to the CE under the contract.</td>
</tr>
<tr>
<td><strong>Third-Party</strong></td>
<td>Entity that is contracted to act on behalf of another entity.</td>
</tr>
<tr>
<td><strong>Third-Party Cooperative</strong></td>
<td>Any type of cooperative agreement that is formed by sources that are external to CEs which includes the following types of cooperatives: Non-Child Nutrition Program State Agency Procurement Agency Agreements Intergovernmental agreements with the State which may include public, private, and nonprofit entities and are conducted for State facility needs using State procurement standards. These agreements allow local educational agencies and other Child Nutrition Program operators to purchase from the State’s contracted sources. Interagency Agreements Public, private, and nonprofit entities formed for the purpose of procuring goods and services Group Purchasing Organizations, Group Buying Organizations, and Third-Party Vendors (Collectively Referred to as GPOs) CNP and non-CNP operators such as public and private schools, hospitals, universities, law enforcement, public works, etc., who join a third-party company or service provider. A GPO may be a for-profit or a nonprofit entity. Typically, a GPO includes a membership fee for those granted access to the GPO price list of products and services.</td>
</tr>
<tr>
<td><strong>Transaction</strong></td>
<td>Occurrence in which two or more entities exchange goods, services, or money between them or among them under an agreement formed for their mutual benefit.</td>
</tr>
<tr>
<td><strong>Unallowable Cost or Expense</strong></td>
<td>Cost or expense which cannot be paid using school nutrition program funds. This includes costs and expenses incurred by the CE as well as any third-party acting on behalf of the CE. Disallowed is sometimes used in place of unallowable.</td>
</tr>
<tr>
<td><strong>Value</strong></td>
<td>Something of monetary or material worth or something that has a usefulness that can be exchanged for something of worth, merit, or importance.</td>
</tr>
<tr>
<td><strong>Velocity Report</strong></td>
<td>Report providing the quantity, date of purchase, and other valuable information for specific products and/or services purchased by CEs used to assist with forecasting future purchasing needs.</td>
</tr>
</tbody>
</table>
Vendor Participation Fees
Charge to participate. The charge to participate may be paid by the participant, or it may be paid by those providing products and/or services.

Written Procurement Procedures
Procedures that define the critical steps in determining the method of procurement to be used, roles, and responsibilities of staff when procuring products and/or services, and methods for monitoring procured products and/or services.

For this section, the term procedure is used to refer to processes, protocols, standards of behavior, expectations, or any other written method of describing actions staff are to take related to procurement.

Written procurement procedures may include a procurement plan with timelines and tasks, or a procurement plan may be a separate document from the procedures.

Written Procurement Procedures
CEs are required to have written procurement procedures that reflect applicable local, state, and federal regulations that include, but are not limited to, checks and balances that provide internal controls for all financial matters.

For this section, the term procedure is used to refer to processes, protocols, standards of behavior, expectations, or any other written method of describing actions staff are to take related to procurement.

CEs may have a set of overarching procedures at the CE level and more detailed procedures at the site level. Or they may have a single set of procedures that are applied at all levels. CEs should include a procurement plan or schedule with timelines and tasks by type of procurement, type of product, or type of service as a separate document or incorporate it into written procedures.

These procedures are intended to guide staff as they take procurement actions and define the roles and responsibilities for all involved in procurement.

Procedures which define the CE’s internal controls for procurement must achieve the following:

<table>
<thead>
<tr>
<th>Internal Controls Must(^7)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• define actions related to the procurement process,</td>
</tr>
<tr>
<td>• establish standards of ethical conduct, and</td>
</tr>
<tr>
<td>• provide full and open competition.</td>
</tr>
</tbody>
</table>

\(^7\) See Administrator’s Reference Manual (ARM), Section 17A, Program Integrity for additional information on this topic.
To ensure that there is full and open competition, CEs should consider the following questions as they assess their procurement procedures:

- Do the CE’s procurement procedures promote competition among offerors?
- Does the solicitation procedure promote full and open competition?
- Does the procurement procedure create a competitive environment?

Written Procurement Procedures, General Standards

CEs must have written procedures for the selection, award, and administration of procurement transactions that support the CE in accomplishing the following:

1. Compliance with local, state, and federal laws and regulations.
2. Application of the most restrictive law and/or regulations—local, state, or federal—unless USDA regulations supersede the most restrictive practice.
3. Compliance with Buy American provisions for all agricultural products.
4. Application of each method of procurement to be used and the local process for using each method.
   - Informal—Micro or Small Purchasing
     This includes methods for the identification of possible suppliers and methods for communicating and recording product specifications and technical requirements.
   - Formal—Request for Proposal (RFP) or Sealed Bid (IFB)
     This includes methods for developing solicitations, evaluation criteria, and timelines for required tasks.
5. Application of the conditions when purchasing cooperatives are to be used and the local procedure for using a cooperative.
6. Application of written procedures for evaluating contracts, including how to define local, and when to apply local preferences.\(^8\)

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\(^8\) See the Local Preference subsection of this section for additional information using local preference.
7. Application of methods for ensuring that all procurement actions have sufficient documentation to demonstrate compliance with all applicable procurement requirements.

8. Application of written procedures to promote competition and avoid restricting competition.

9. Application of CE’s strategies to handle conflicts of interest.

Written Procurement Procedures, Ethical Standards (Code of Conduct)
CEs must have written procedures that include ethical standards and a code of conduct. *Administrator’s Reference Manual (ARM), Section 17A, Program Integrity* includes detailed guidance on requirements related to these topics.

**Full and Open Competition**
All procurement transactions must be conducted in a manner that provides full and open competition to all entities that choose to participate. Full and open competition means that all possible bidders or offerors are on a *level playing field* and have the same opportunity to compete for the purchase of products and/or services.

Full and open competition fosters decreased costs and increased quality of products and/or services. When full and open competition is achieved, potential offerors receive all the information necessary to respond properly to a solicitation, and the offers are accurately evaluated for the contract award.

The following situations are considered to be restrictive of full and open competition:

- Any arbitrary action in the procurement process.
- Overly restrictive definition for local when applying local preference.\(^9\)
- Organizational conflicts of interest.
- Placing unreasonable requirements on firms in order for them to qualify to do business.
- Requiring unnecessary experience and excessive bonding.\(^10\)
- Noncompetitive pricing practices between firms or between affiliated companies.
- Noncompetitive awards to consultants that are on retainer contracts.\(^11\)
- Specifying only a brand name product instead of allowing an equal product to be offered.\(^12\)

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\(^9\) See the *Local Preference* subsection in this section for more information on using local preference.

\(^10\) See the *Bonding Requirement* subtopic in the *Other Regulatory Requirements for Solicitations and Contracts* subsection in this section for additional information on this topic.

\(^11\) A contract in which a contractor is paid an upfront fee for anticipated services and/or products.

\(^12\) See the *Use of Brand Names for All Contracts* subsection in this section for additional information on the use of brand names in solicitations.
• Using specifications and technical requirements that are so restrictive that only one potential vendor can meet the specifications and/or technical requirements of the solicitation.\textsuperscript{13}

• Any strategy or action that limits any possible bidder or offeror from participation.

The CE must evaluate its procedures for procurements to ensure that the CE has not limited the number of possible offers. There are three questions that are vital in determining if there has been full and open competition:

1. Is there an adequate number of possible offerors that are able to submit offers for the solicitation?
   
   Evaluation includes, but is not limited to, the following factors:
   - Time allowed after the public notice for possible offerors to submit an offer.
   - Circulation range of the public notification.
   - Method for sharing questions and responses with all possible offerors.

2. Are the specifications and technical requirements so restrictive the solicitation does not foster competitive offers?
   
   Evaluation includes, but is not limited to, the following factors:
   - Overly restrictive specifications and terms and conditions requirements or proof of responsibility.
   - Specifications and/or technical requirements that limit competition to a specific company or specific companies or to restrict offers to specifically branded products or services.

3. Were there an adequate number of offerors who submitted responses or offers to the solicitation?
   
   Evaluation includes, but is not limited to, the following factors:
   - Number of offers reflects the anticipated number of offers expected by the CE.
   - Surveys of possible offerors that did not submit an offer.

\textbf{If any aspect of the procurement process has limited the number of possible offerors}, the CE must address the issue(s) before awarding a contract. This action includes restarting the procurement process.

\textsuperscript{13} See the \textit{Noncompetitive Type-Sole Source} subsection in this section for additional guidance on when sole source procurement is appropriate.
Planning for Procurement

While there are many methods to implement procurement activities successfully, the following questions will help CEs to develop internal procurement procedures and in planning for procurement:

- **Advertising**
  - What methods or strategies will be used for advertising for a formal purchase?

- **Cost Analysis**
  - How will the CE ensure that accurate cost analysis is conducted as part of the method of developing the solicitation?\(^\text{14}\)

- **Maximizing Competition**
  - Does the SNP ensure that procurement across programs is used when appropriate in order to increase competition?

- **Protests**
  - What information will staff include in the solicitation about contract protests?

- **Developing the Solicitation**
  - What methods or strategies will be used for advertising for a formal purchase?
  - How will the CE ensure that accurate cost analysis is conducted as part of the method of developing the solicitation?\(^\text{14}\)

- **Solicitation, Technical Requirements, Terms, and Conditions**
  - How will staff identify the specifications and/or technical requirements for the products and/or services to be purchased?\(^\text{15}\)
  - How will staff determine if there are enough potential offerors that can meet the specifications, technical requirements, terms, and conditions to hold a competitive procurement?
  - How will staff ensure that the specifications, technical requirements, terms, and conditions are written into the solicitation to ensure that they do not limit competition?
  - Will the procurement include bonus points for local preference?\(^\text{16}\)
  - Does the solicitation include terms or specifications related to the Buy American Provision?

- **Establishing a Timeline for a Formal Contract Solicitation**
  - What will be the timeline for the purchasing for each type of procurement?
    - [NOTE: USDA recommends that at least 45 days be allowed for the invitation for bid procurement method and 60 days for the request for proposal procurement method.\(^\text{17}\)]

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\(^{14}\) See the Cost Analysis subsection in this section for additional information on this topic.

\(^{15}\) See the Solicitation subsection in this section for additional information on this topic.

\(^{16}\) See the Local Preference topic in the Other State and Federal Regulations for additional information on using local preference. See also USDA’s Procuring Local Foods for Child Nutrition Programs available at [www.fns.usda.gov/farmtoschool/procuring-local-foods](http://www.fns.usda.gov/farmtoschool/procuring-local-foods).

\(^{17}\) See the Procurement Purchasing Methods subsection in this section for additional information on these procurement methods.
<table>
<thead>
<tr>
<th>Section</th>
<th>Question</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approval</td>
<td>What procedure will be used to award the contract for approval of contract awards for each type of procurement method?</td>
</tr>
<tr>
<td>Conflict of Interest</td>
<td>What procedures will staff use to ensure that all conflicts of interest are addressed before a contract or vendor is selected?</td>
</tr>
<tr>
<td>Debarment and Suspension</td>
<td>What procedures will staff use to ensure that the debarment and suspension regulations are followed in selecting a contractor or vendor?</td>
</tr>
<tr>
<td>Evaluation Criteria</td>
<td>What evaluation criteria will be used to evaluate offers for responsibility and responsiveness?</td>
</tr>
<tr>
<td>Responsible</td>
<td>capable of providing products and/or services, as described in the solicitation.</td>
</tr>
<tr>
<td>Responsive</td>
<td>pricing information specific to the products and/or services to be purchased, as described in the solicitation.</td>
</tr>
<tr>
<td>Micro-Purchase</td>
<td>How does the CE determine a reasonable price or equitable distribution if a micro-purchase?</td>
</tr>
<tr>
<td>Assigned Role and Responsibility</td>
<td>What staff will be involved and responsible at each stage of purchasing?</td>
</tr>
<tr>
<td>Preparing for the Post Contract Award</td>
<td>What staff will have approval authority for each type of procurement?</td>
</tr>
<tr>
<td>Disputes/Protests</td>
<td>What methods or strategies will be used to settle all contractual and administrative protests, disputes, and claims arising out of procurements?</td>
</tr>
<tr>
<td>Payments</td>
<td>What CE protocols will apply for approving and processing payments?</td>
</tr>
<tr>
<td>Monitoring</td>
<td>What procedures will be used to monitor the terms, conditions, specifications, and technical requirements of the contract, including specific staff assigned responsibilities?</td>
</tr>
<tr>
<td>Short and Long-Term Storage</td>
<td>What methods will staff use to ensure that documentation demonstrating compliance is retained for the required period of time?</td>
</tr>
<tr>
<td>Retaining Records</td>
<td>What procedures will staff use to document the history of all procurement actions for all types of procurement?</td>
</tr>
<tr>
<td>Small Purchase</td>
<td>What method is used to document bids for a small purchase?</td>
</tr>
</tbody>
</table>

18 See Administrator’s Reference Manual (ARM), Section 17A, Program Integrity for detailed guidance on this topic.

19 See the Protests subsection in this section for additional information on this topic.
Cost Analysis

The CE must perform a cost analysis before issuing a solicitation. In conducting a cost analysis, the CE will use the tools that are also used in forecasting as well as any other available tools or strategies that may help the CE to identify the estimated cost of the products and/or services to be purchased. The method and depth of the cost analysis is dependent on the complexity of the products and/or services to be purchased. Generally, the cost analysis for a formal procurement method is more in-depth than the cost analysis for an informal procurement method.

Forecasting

Effective forecasting helps to ensure that the CE is able to develop a solicitation that includes accurate specifications and/or technical requirements. When forecasting is done well, there is less likelihood that a material change will occur.

Forecasting includes consideration of the following factors:

- Student enrollment, current and projected
- Student average participation, current and projected
- Future campus realignment, including new schools
- Available and future product storage
- Velocity reports (amount ordered/used or served in the past)
- Planned changes specific to products and/or services (menu offerings, adding operation of a different school nutrition program or child nutrition program at a site or sites, results from taste and acceptability activities)
- Established schedule of purchasing to maximize competitive pricing (how often)

Information Box 3

Anticipating Student Tastes

CE may opt for a shorter period of time for the contract. The shorter period of time gives the CE greater control of the inventory and allows the CE to easily make adjustments when student acceptability of food item changes.

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20 See the Cost Analysis or Forecasting subtopic in the Written Procurement Procedures subsection in this section for additional information on this topic.

21 See the Material Change in the Contract subsection in this section for additional information on this topic.

22 The monthly Daily Record/Accuclaim forms for each site provide this information. This form is available at www.SquareMeals.org.

23 Other child nutrition programs include Child and Adult Care Food Program (CACFP) and Summer Food Service Program (SFSP).
Information Box 4

<table>
<thead>
<tr>
<th>Cost-Plus Percentage Contract</th>
</tr>
</thead>
</table>
| In all cases, any contract or agreement that creates a pricing structure that charges the cost of the product or service plus a percentage of cost is not allowable for any purchase for a Child Nutrition Program (CNP).

**Helpful Forecasting Tool**

USDA’s web-based Food Buying Guide Calculator for Child Nutrition Programs provides a method to calculate the amount of food to purchase for a specified number of servings. This tool may be used to calculate the amount to purchase for a single food item or for all food items on a daily menu.

**Procurement Purchasing Methods**

CEs must use their written procurement procedures to guide them in selecting the appropriate procurement method, including the appropriate cost analysis method. There are two types of procurement methods that CEs may use—formal and informal. The decision to use formal or informal is based on the total estimated cost of the purchase and whether it does or does not exceed the simplified acquisition threshold (small purchase threshold).

**Before Selecting a Procurement Method**

To identify the most appropriate procurement method, the CE must follow its written procurement procedures and retain all records related to the procurement. This includes, but is not limited to, conducting a cost analysis to determine the estimated cost for the products and/or services to be procured and all cost comparison documentation.

In all cases, the goal of the procurement process is for the CE to make the most economical and efficient use of federal funds while offering full and open competition. The choices the CE makes should be based on this objective.

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25 See the Written Procurement Procedures subsections in this section for additional information on this topic.
26 In limited cases, a CE may be allowed to use a noncompetitive procurement method. See the Noncompetitive Procurement Method subsection in this section for additional information on this topic.
27 See the Cost Analysis subtopic in the Written Procurement Procedures subsection in this section for additional information on this topic.
28 See the Full and Open Competition subsection in this section for additional information on this topic.
Simplified Acquisition Threshold (Small Purchase Threshold)

The simplified acquisition threshold is the highest total cost that can be procured using the informal procurement method.

- If the purchase is equal to or less than the simplified acquisition threshold, the purchase may be made using an informal or formal method.
- If the purchase exceeds (greater than) the simplified acquisition threshold, the purchase must be made using the formal process.

[NOTE: A CE may use a formal method when a purchase is less than the simplified acquisition threshold in order to take advantage of economies of scale, i.e., purchase of larger quantities resulting in lower costs.]

Most Restrictive Simplified Acquisition Threshold

The CE must follow the most restrictive simplified acquisition threshold requirements that apply based on the type of entity and the agency or organization that has regulatory authority (federal, state, or local) over the entity for all purchases. Each CE is responsible for ensuring that it applies the correct simplified acquisition threshold based on its entity type and regulatory authority.

In Texas, most CEs operating NSLP and SBP will fall into one of three types of entities:

- **Governmental, regulated by the Texas Education Agency (TEA)**—These CEs must use the simplified acquisition threshold established by TEA.

  *As of December 30, 2019, the simplified acquisition threshold for public school districts and charter schools regulated by TEA is less than $50,000. Less than $50,000 means equal to or less than $49,999.99.*

  *CEs should verify that their simplified acquisition threshold amount has not changed since the date this section was released. CEs may also be*
subject to a lower simplified acquisition threshold based on local or other applicable state regulations.


• **Governmental not regulated by TEA**—These CEs must use the simplified acquisition threshold established by or adopted by the governmental agency that has regulatory authority for the CE.

As of December 31, 2019, the simplified acquisition threshold for Texas governmental agencies (unless the agency/regulatory authority establishes other regulations) is less than $25,000. Less than $25,000 means equal to or less than $24,999.99.  

CEs should verify their simplified acquisition has not changed since this date. CEs may be subject to a lower simplified acquisition threshold based on local or other applicable state regulations.

The Texas Comptroller of Public Accounts website provides additional information and resources on financial management for governmental agencies at www.comptroller.texas.gov.

• **Nongovernmental**—These CEs must use the simplified acquisition threshold established by TDA, less than or equal to $50,000.

CEs may be subject to a lower simplified acquisition threshold based on local or other applicable state regulations.

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29 Texas allow other thresholds for certain classifications of purchases. For additional guidance on these thresholds, see the Texas Comptroller of Public Accounts guidance at www.comptroller.texas.gov.
The Purchase Decision Chart demonstrates how the CE makes a decision on which procurement method to use. If a CE has a different threshold that applies, that threshold amount should be substituted for the TDA threshold in the chart.

### Purchase Decision Chart

CE Conducts Cost Analysis to Determine the Estimated Total Cost of the Products and/or Services

<table>
<thead>
<tr>
<th>Equal to or Less Than</th>
<th>Simplified Acquisition Threshold</th>
<th>Greater Than</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal to or Less Than</td>
<td>$50,000*</td>
<td>$50,000*</td>
</tr>
<tr>
<td>($0.01 to $50,000)</td>
<td></td>
<td>($50,001 or more)</td>
</tr>
</tbody>
</table>

(may choose) 30

#### Informal Procurement Methods
- Micro-Purchase
- Small Purchase

#### Formal Procurement Methods
- Sealed Bid Invitation for Bid (IFB)
- Competitive Offer Request for Proposal (RFP)

Purchasing Through Auctions

If a CE chooses to make purchases through an auction, the CE must also apply the procurement regulations to the purchase. CEs that make auction purchases typically use them for produce or other locally grown products. If the amount is under the simplified acquisition threshold, the CE may use the informal method. If the amount exceeds the simplified acquisition threshold, the CE must use the formal procurement method.

CEs may also make purchases through reverse auctions. Reverse auctions must adhere to all procurement requirements, including, but not limited to, procurement method, simplified acquisition threshold, solicitation, and award to the most responsive and responsible offer.

### Informal Procurement Methods

If the cost analysis results in a total cost that does not exceed the simplified acquisition threshold, there are two informal procurement methods a CE may use—micro-purchase or small purchase method.

30 CE may choose to use a formal procurement procedure for a total cost that is equal to or less than the simplified acquisition threshold in order to get a better price.
In the selection of the procurement method and actions related to the procurement, the CE must follow its written procurement procedure and retain all records related to the procurement. Any costs incurred as a result of improper procurement are unallowable costs to the school nutrition program.  

Micro-Purchase Method

The micro-purchase method is intended to minimize the burden for purchases of very small amounts. For micro-purchases, there are two elements for proper procurement: (1) cost aggregate amount less than the threshold and (2) equitable distribution of purchases.

A micro-purchase is a single purchase or transaction that has a total aggregate cost that is equal to or less than $10,000; total aggregate cost may consist of one product and/or service or multiple products and/or services. Separate aggregate purchases may occur weekly, monthly, or annually.

[NOTE: When items are delivered or a service contract spans several workdays, CEs may make payment for the cost of a single aggregate purchase as the order is fulfilled. In these cases, even though a separate invoice may be submitted for each delivery or portion of the complete service, it is a single aggregate purchase.]

Aggregate as Defined by TEA under EDGAR

Under TEA regulations and EDGAR, the aggregate amount, for the purposes of a micro-purchase, is defined locally by the school district by identifying like-type categories of purchases and applying the micro-purchase threshold to all items purchased in the like-type category. The aggregate is calculated across all federal education grants and across the school district’s fiscal year for each like-type category of purchase. The aggregate amount is not applied to a single purchase or single purchase order. When the aggregate for

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31 An unallowable cost or expense cannot be paid using school nutrition program funds.
purchases in a like-type category exceeds the $10,000 threshold, the district must begin obtaining price quotes under the small purchase method.

For CEs operating a Child Nutrition Programs, a CE may apply the TEA/EDGAR aggregate definition to the purchase of items with USDA funds; however, purchases must still be equitably distributed.\(^{32}\) CEs cannot apply any local or state regulation that limits the distribution of purchases to all vendors (prevents equitable distribution) that are able to provide the items and/or services to be purchased.

The small purchase method may be the more appropriate procurement method even though the total aggregate amount for a single purchase qualifies for a micro-purchase. If the CE purchases the same products and/or services frequently, the cost savings from using the small purchase method instead of the micro-purchase method may be significant. In these cases, the CE must explore the benefits of using the informal small purchase method instead of a micro-purchase method.

A micro-purchase may be appropriate in the following types of situations:

- The CE has insufficient refrigerated or storage space to store a large quantity of items. Therefore, the CE must break its purchases into smaller amounts in order to store food items safely.
- The CE is located in a remote area or is providing meals or snacks to a very small number of students.
- There are few, if any, vendors willing or available to submit small purchase offers for the limited quantity of products and/or services the CE needs to procure.
- The CE has broken equipment, and the repair cost is less than the micro-purchase threshold.

However, the micro-purchase method is not appropriate for routine maintenance fees that are paid multiple times in one year. Instead, a small purchase method or formal method is the appropriate procurement method.\(^{33}\)

\(^{32}\) See the Aggregate subsection in this section for additional information on aggregate.

\(^{33}\) Sole source requirements may also apply. See the Noncompetitive Procurement Method subsection in this section for additional information on this topic.
<table>
<thead>
<tr>
<th>Purchase Scenario</th>
<th>Is Micro-Purchase Applicable</th>
<th>Questions to Ask</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single purchase or transaction for computer paper, ink cartridges, and paper towels from the same supplier</td>
<td>If the total amount of the single purchase or transaction—aggregate amount—does not exceed $10,000, the micro-purchase method may be used.</td>
<td>Will these same items be purchased more than one time?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>If so, what procurement method will result in the most economical pricing?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Will the CE get a more competitive price by using a different procurement method?</td>
</tr>
<tr>
<td>Single purchase or transaction from Supplier 1 for computer paper and ink cartridges and a second single purchase or transaction from Supplier 2 for paper towels and cleaning supplies</td>
<td>If the amount of each purchase or transaction—aggregate amount—does not exceed $10,000, the micro-purchase method may be used for each purchase or transaction.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One-year maintenance contract for a copier machine with a renewal option for an additional year.</td>
<td>If the total cost for the year—aggregate amount—does not exceed $10,000, the micro-purchase method may be used. However, if the maintenance fee is broken into small installments, causing each installment to fall under the micro-purchase threshold, but the total cost of the contract is above the threshold, the use of the micro-purchase method is unallowable.</td>
<td>Will the micro-purchase method result in the most economical purchase?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Will the CE get a more competitive price by using a different procurement method?</td>
</tr>
</tbody>
</table>

Any costs incurred as a result of the CE intentionally breaking larger purchases into smaller amounts to qualify under the micro-purchase threshold are unallowable costs.35

The following guidance must be used when making a micro-purchase.

- **Aggregate.** The aggregate total for a micro-purchase amount is the total cost for a single invoice for a single purchase or transaction. It is not an accumulation of weekly, monthly, or annual purchases for a specific product and/or service—it is an individual purchase or contract with an

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34 Sole source requirements may also apply. See the Noncompetitive Procurement Method subsection in this section for additional information on this topic.

35 An unallowable cost or expense cannot be paid using school nutrition program funds.
individual invoice or contracted price. However, the total cost for a micro-purchase may be broken into multiple payments, which are paid as each product and/or service is delivered or when specified expectations are met. In these cases, the aggregate is the total cost when all payments are totaled.

**Examples of Aggregate Amounts for Different Types of Micro-Purchases**

**One-Time Only Purchase:** The CE bought $137.16 in fresh apricots, figs, almonds, and fennel for a tasting event and a pound of ground clove as a one-time yearly purchase. If the tasting event goes well, the CE plans to add new menu items in the next school year. The invoice included 14 pounds of fresh apricots, 4 pounds of shelled almonds, 10 pounds of fresh figs, 8 pounds of fresh fennel, and 1 pound of ground cloves. All items were listed on the same invoice, and the cost was paid in one payment. The total aggregate cost for this micro-purchase was $137.16.

**Delivery of a Single Purchase over a Period of Time:** The CE ordered six computers, six printers, 90 printer cartridge refills (15 for each new computer), printer paper, and six surge cord protectors for a total of $8,826.45. The printer cartridges were not in stock at the time of order, but the remaining items could be delivered. The computers, printer paper, and surge cord protectors were delivered the day after the order was placed. The remaining items were delivered one week later. The vendor submitted a delivery invoice on the day of delivery specifying the products delivered. Though the CE received two separate delivery invoices, the items were ordered in a single transaction. The total aggregate cost for this micro-purchase is $8,826.45.

**Very Small Routine Purchase:** A small CE places an order for fresh produce (fruits and vegetables) every two weeks. Typically, the fresh produce order has a cost of less than $150 dollars each two weeks. Because this is a routine purchase, the CE contacted multiple vendors to determine if there were vendors that would give the CE a better price through the small purchase method. However, the CE was not able to obtain a small purchase offer for bi-weekly, monthly, or quarterly purchases because of the small quantity and the fluctuating price of fresh fruit and vegetables. Since the CE cannot get quotes for a small purchase contract, the CE currently makes a separate purchase every two weeks using the micro-purchase method. Each purchase is a separate micro-purchase; therefore, each purchase has its own aggregate amount. The CE has created a plan for equitable distribution of purchases and has documented its efforts to obtain small purchase quotes and its equitable purchasing procedure.

- **Buy American.** The Buy American provisions apply to micro-purchases.

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36 A contracted price may be provided in writing by the vendor or may be a verbal agreement between the two parties.

37 See the Buy American subsection in this section for additional information on this topic.
• **Competitive Purchasing.** Micro-purchases do not require the CE to solicit quotes or compare prices as long as the price is reasonable.\(^{38}\)

• **Cost Analysis.** When using the micro-purchase method, a formal cost analysis is not required. However, the CE must have a method to document that the cost of the products and/or services is reasonable (for example, a cost comparison). Acceptable documentation includes, but is not limited to, the following:
  
  - Newspaper advertisements from various suppliers/vendors
  - Online advertisements from various suppliers/vendors
  - Written notes from discussions with vendors
  - Documentation of price from various suppliers/vendors to include
    - Supplier/vendor name
    - Name of person providing information
    - Date(s)
    - Information provided, including the pricing for the product and/or service

Other documentation for situational factors that demonstrate that the cost was reasonable if the price wasn’t the determining factor, such as:

  - Maps showing the distance between vendors when the distance is the factor
  - Written procedures that specify micro-purchase must be used because space is the factor, such as refrigeration or storage space

• **Equitable\(^{39}\) Purchasing.** Purchases must be distributed among all qualified suppliers that are able to provide the products and/or services at a reasonable cost. When multiple qualified suppliers are available, the CE cannot make all of its micro-purchases from one qualified supplier.

The CE must include a description of how it will use equitable distribution of micro-purchasing among qualified suppliers in its written procedures.

However, CEs located in rural areas may be limited in their ability to distribute purchases equitably because it is not economically feasible to do so, i.e., cost and time of travel.

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\(^{38}\) For procurement, *reasonable* is defined as an amount that does not exceed a cost that would be incurred by a prudent person under similar circumstances.

\(^{39}\) In this case *equitable* means *fair or balanced* distribution.
In these cases, the CE must document the reasons when it is not feasible for the CE to distribute purchases among a variety of suppliers. Documentation might include a mileage chart listing the distance to the next closest store or printout of an online map demonstrating the driving distance.

**Blanket Purchase Orders**

The requirement to equitably distribute purchases among possible vendors cannot be restricted by local policy or state regulation to limit the number of vendors with blanket purchase orders. CEs must be able to equitably distribute purchases in order to use the micro-purchase option.

- **Most Restrictive Micro-Purchase Threshold.** CEs must apply a more restrictive micro-purchase threshold based on local policy or state regulation. If a CE uses a more restrictive micro-purchase threshold, the CE must include this information in its procurement procedures.

However, when a CE applies a more restrictive micro-purchase threshold, the CE cannot eliminate the requirement to equitably distribute purchases among possible vendors.⁴⁰

- **Routine Purchasing.** Routine purchases must not be broken into smaller purchase amounts in order to qualify for micro-purchasing.

If the CE is routinely using the micro-purchase method for the same items, the CE must maintain documentation that demonstrates why this is the most suitable method for purchasing these products and/or services and why the use of another procurement method is not possible or reasonable.

  *For Example: There is a lack of storage space, so more frequent purchases are necessary.*

The micro-purchase method is not appropriate when a yearly maintenance fee that exceeds the micro-purchase threshold is broken into smaller monthly or quarterly payments. Instead, a small purchase method or formal method is the appropriate procurement method for maintenance fees that exceed the micro-purchase threshold.

**Small Purchase Method**

A small purchase is appropriate when the products and/or services have an aggregate total for a single purchase or total purchase that is equal to or less than the simplified acquisition threshold. The small purchase method results in a contract between the CE and the contractor.

⁴⁰ See the equitable purchasing topic above for an example of an exception.
Any costs incurred as a result of the CE intentionally breaking larger purchases into smaller amounts to qualify under the simplified acquisition threshold are unallowable costs to the school nutrition program.\(^{41}\)

To obtain cost savings, a CE may use the small purchase method instead of the micro-purchase method if the amount of the purchase is equal to or less than the simplified acquisition threshold or may use the formal procurement method for purchases that qualify for informal purchasing methods.

The following guidance must be used when making a small purchase.

- **Aggregate.** The aggregate total for a small purchase amount is the total amount of the cost for a single purchase or the total cost for grouped purchases made over an extended period of time (such as a product delivered once a week or twice a month over a specific period of time).

  *For Example:* The CE procured $13,278.28 in fresh fruit and vegetables from a local vendor. The fruit and vegetables were procured, ordered, and delivered all at one time with a single invoice. The total aggregate cost for this small purchase is $13,278.28.

However, the total cost for a small purchase contract may be broken into multiple payments, which are paid as each product and/or service is delivered or when specified expectations are met. In these cases, the aggregate is the total cost when all payments are totaled.

  *For Example:* The CE procured and ordered fruit and vegetables for a total cost of $21,933.61. Each Monday for 4 weeks, the vendor delivers ¼ of the total order. Though the CE received 4 separate delivery invoices specifying the products delivered, the products were ordered in a single procurement transaction. The total aggregate cost for this small purchase is $21,983.61.

- **Buy American.** The Buy American provisions apply to small purchases.\(^{42}\)

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\(^{41}\) An unallowable cost or expense cannot be paid using school nutrition program funds.

\(^{42}\) See the **Buy American** subsection in this section for additional information.
• **Competitive Purchasing.** When a CE uses the small purchase method, the CE must obtain price quotes from at least three responsible and responsive contractors.
  
  – Quotes may be obtained orally or in writing. The CE must retain documentation demonstrating the price quotes and the information on specifications, terms, and/or conditions provided to each possible vendor.
  
  – Responsible contractors are capable of providing the products and/or services described in the specifications and/or technical requirements.
  
  – Responsive contractors provide pricing information specific to the products and/or services to be purchased.

While a CE using a small purchase method may not have developed a formal solicitation document that is comparable to one developed for IFB or RFP, the CE must have some type of documentation that demonstrates the specifications and technical requirements that were given to all offerors.

A CE may choose to issue an IFB or RFP for a small purchase. In that case, the CE should develop a solicitation, as described in the *Formal Procurement Methods* subsection in this section for information on conducting competitive purchasing for this type of procurement method.

• **Contract.** If the small purchase solicitation results in a contract, the CE must meet all requirements related to the development and use of a contract described in the *Solicitation, Contracts, and Managing the Contract* subsections in this section.

• **Cost Analysis.** When using the small purchase method, the CE must, at a minimum, conduct a price comparison as is described in its written procurement procedures. The CE must retain documentation on cost comparisons.

• **Price.** The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on a cost-plus percentage of the cost.

If the purchase results in credits, discounts, and rebates, the CE must have documentation demonstrating the receipt of the credits, discounts, and rebates is applied to the nonprofit school food service account. This includes processed USDA Foods products.

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43 See the *Records Retention* subsection in this section for additional information on documentation related to oral and written quotes.

44 See the *Forecasting* subtopic in the *Written Procurement Procedures* subsection in this section for additional information on this topic.
Market basket analysis may be used to award a small purchase contract.\textsuperscript{45}

- **Routine Purchasing.** Routine purchases must not be broken into smaller purchase amounts in order to qualify for the small purchase method. If the CE is routinely using the small purchase method for the same items, the CE must maintain documentation that demonstrates why the small purchase method is the most suitable method for purchasing these products and/or services and why the use of another procurement method is not possible or reasonable.

  [NOTE: If the CE routinely uses the small purchase method for the same products and/or services, the cost savings from using formal competitive offers may be significant.]

This includes procurements for routine maintenance fees that are paid multiple times in one year and exceed the small purchase threshold. When there are routine maintenance fees that are paid in smaller installments that total to an amount that is above the small purchase threshold, a formal method must be used.

- **Solicitation.** The CE must maintain documentation that provides the specifications and/or technical requirements given to potential contractors who provided price quotes or pricing information from any other method the CE uses to compare prices. When specifications and/or technical requirements are communicated to possible vendors, each vendor must be given the same solicitation information.

**Formal Procurement Methods**

When the total estimated cost of products and/or services exceeds the simplified acquisition threshold, the CE must use a formal procurement method. Formal procurement methods are intended to be a more rigorous and prescriptive procedure that promotes full and open competition\textsuperscript{46} and results in lower prices.

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\textsuperscript{45} See the Market Basket subsection in this section for additional information on this topic.

\textsuperscript{46} See the Full and Open Competition subsection in this section for additional information on this topic.
Any costs incurred as a result of improperly procured products and/or services are unallowable costs to the school nutrition program.47

Invitation for Sealed Bids (IFB)

An IFB is a competitive procurement method for a fixed-price contract where sealed bids are submitted. An IFB is an ideal procurement method to use when the offers only differ in the price for a lump sum or unit pricing. It is commonly used for a fixed-price contract and is most effective when there are clear specifications and/or technical requirements.

An IFB contract is awarded in writing to the most responsible and responsive offeror whose price is most advantageous to the program.

The following guidance must be used when using the IFB method.

− **Aggregate.** The aggregate total amount for an IFB is the total amount of the cost for a single contract (or a single renewed contract). The total cost for IFB contracts is typically broken into multiple delivery invoices that are paid as each product and/or service is delivered or when specified expectations are met.

− **Award.** The award for an IFB will be made in writing to the lowest responsible and responsive offeror.

− **Buy American.** The Buy American provisions apply to IFB methods.48

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47 An unallowable cost or expense cannot be paid using school nutrition program funds.

48 See the *Buy American* subsection in this section for additional information on this topic.
- **Competitive Purchasing.** Offers must be solicited from an adequate number of known suppliers. For there to be competitive bidding, there must be two or more responsible\(^{49}\) offerors that respond to the solicitation for a firm fixed-price contract.

- **Contract.** An IFB will result in a firm fixed-price contract award.

- **Cost Analysis.** When using the IFB method, a formal cost analysis or price comparison, as described in the CEs written procurement procedures is required.\(^{50}\)

- **Credits, Discounts, and Rebates.** In a firm fixed-price contract, the winning contractor is not required to return credits, discounts, and rebates to the SNP as the contractor factors them into the fixed price for the contract period.

- **USDA Food Values.** In a firm fixed-price contract, the winning contractor must ensure that the value of USDA Foods is returned to the SNP.

- **Evaluation of the Offers.** When the sealed bids are opened, the CE must use the rubric or scoring tool that was provided in the solicitation to determine whether an offeror is both responsible and responsive.\(^{51}\)

- **Opening Sealed Bids.** State and federal regulations mandate that the offers be opened publicly, so possible contractors and other interested parties are able to attend. The CE must provide a description of where and when the sealed bids will be opened. USDA recommends that at least two CE employees be present when sealed bids are opened. These employees should be directly involved with the procurement procedure (i.e., representatives from the School Nutrition Programs and/or from the purchasing department). School board members are not required to be present unless mandated by local policy.

- If the specifications and/or technical requirements for the solicitation are complicated and the CE is not able to quickly and clearly determine which bid is most responsible and responsive, the CE may choose to announce which offers meet the criteria to be considered for an award at the bid opening and announce the actual award at a later date. If this is the case, the CE must clearly describe this possibility in its solicitation. This includes the time and place when the contract award will be announced.

\(^{49}\) Able to provide the product(s) and/or service(s), as described in the solicitation.

\(^{50}\) See the Cost Analysis and Forecasting subtopics in the Written Procurement Procedures subsection in this section for additional information on this topic.

\(^{51}\) Offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).
- **Price.** The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on cost-plus a percentage of the cost. Any costs charged from this type of pricing structure are not allowable costs to a Child Nutrition Program (CNP).

  Market basket analysis may be used to award an IFB contract.\footnote{See the Market Basket subtopic under the Special Situations, Awarding the Contract subheader in this section for additional information on this topic.}

- **Public Advertising.** The invitation for offers must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time\footnote{See the Solicitation subsection in this section for additional information on this topic.} for potential offerors to respond in order to ensure that there is full and open competition.\footnote{See the Full and Open Competition subsection in this section for additional information on this topic.}

  *For Example:* Publicizing a solicitation in a regional newspaper may not be sufficient notification if the circulation of the paper is limited geographically. Potential contractors often check major newspapers for notification on solicitations but would not check a regional paper.

- **Rejecting an Offer.** Any or all offers may be rejected if there is a sound documented reason.

- **Securing Sealed Bids.** As each sealed bid arrives, the bid should be date stamped and stored in a secured place until the time of bid opening.

  *For Example:* Locked file cabinet, locked metal box, or any other tamper-proof location.

- **Solicitation.** The CE must provide the following information in the solicitation related to contract management:\footnote{See the Solicitation, Procurement Purchasing Methods, Other Regulatory Contract Requirements, Awarding the Contract, and Contracts subsections in this section for additional information on these topics.}

  - Specifications and/or technical requirements for the product(s)
  - and/or service(s) to be purchased
  - Bonding requirements if applicable
  - Method for submitting an offer
  - Method and criteria for evaluating the bid
  - Procedure for assigned staff to respond to and resolve all bid protests.\footnote{See the Protests subsection in this section for additional information on this topic.}
  - Contractual statements required by law
  - Method for submitting a protest for the bid award
The CE must maintain documentation that demonstrates the CE’s actions to release the IFB to the public as well as all communication that occurs after the bid is released.

If the CE answers a question from an offeror, there must be a method for the CE to share this information with all potential offerors. CEs commonly post this information on their websites and the Electronic State Business Daily (ESBD) if the ESBD is used.57

Request for Competitive Proposals (RFP) Procurement Method
An RFP is a competitive procurement method that includes specifications and/or technical requirements of the product(s) and/or service(s) to be provided under a fixed price (fee) in a cost-reimbursable or firm fixed-price contract where offerors submit a detailed offer for providing the products and/or services. An RFP is an ideal procurement method to use when a sealed bid method is not appropriate.

An RFP contract is awarded to the most responsible and responsive58 offeror whose offer is most advantageous to the program—price and other factors are considered. The following guidance must be used when using the RFP method.

− **Aggregate.** The aggregate total for an RFP is the total amount of the cost for a single contract (or a single renewed contract). The total cost for an RFP contract may be broken into multiple delivery invoices that are paid as each product and/or service is delivered or when specified expectations are met.

− **Award.** An RFP should be made in writing to the most responsible and responsive offer.

− **Buy American.** The Buy American provisions apply to RFP methods.59

− **Competitive Purchasing.** Offers must be solicited from an adequate number of known suppliers. For there to be competitive bidding, there must be two or more responsible60 offerors that respond to the solicitation for a contract resulting from an RFP.

− **Contract.** An RFP may be used for a firm fixed-price contract or a cost-reimbursable contract.

− **Cost Analysis.** When using the RFP method, a formal cost analysis or price comparison is required, as described in the CE’s written procurement procedures.

57 Available at [http://www.txsmartbuy.com/](http://www.txsmartbuy.com/)
58 Responsible is defined as able to provide the product(s) and/or service(s) as described in the solicitation. Responsive is defined as an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).
59 See the **Buy American** subsection in this section for additional information on this topic.
60 Able to provide the product(s) and/or service(s), as described in the solicitation.
- **Credits, Discounts, and Rebates.** In a cost reimbursable contract, the winning contractor must return credits, discounts, and rebates to the SNP.

- **USDA Food Values.** In a firm fixed-price contract, the winning contractor must ensure that the value of USDA Foods is returned to the SNP.

- **Evaluation of the Offers.** The CE must use the rubric or scoring tool that was provided in the solicitation to determine whether an offer is both responsible and responsive.

- **Price.** The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on cost-plus a percentage of the cost.

  Market basket analysis may be used to award an IFB contract.⁶¹

- **Public Advertising.** The request for proposals (RFP) must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time for potential offerors to respond.⁶² The RFP must be publicly advertised in such a way as to ensure there is full and open competition.⁶³

  For Example:  Publicizing a solicitation in a regional newspaper may not be sufficient notification if the circulation of the paper is limited geographically. Potential contractors often check major newspapers for notification on solicitations but would not check a regional paper.

- **Rejecting an Offer.** Any or all offers may be rejected if there is a sound documented reason.

- **Solicitation.** The CE must provide the following information in the solicitation related to contract management: ⁶⁴
  - Specifications and/or technical requirements for the product(s) and/or service(s) to be purchased
  - Bonding requirements if applicable
  - Method for submitting an offer
  - Method and criteria for evaluating the bid
  - Procedure for assigned staff to respond to and resolve all bid protests.⁶⁵

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⁶¹ See the Market Basket subtopic under the Special Situations, Awarding the Contract subheader in this section for additional information on this topic.

⁶² See the Cost Analysis and Forecasting subtopics in the Written Procurement Procedures subsection and the Public Advertising topic in the Solicitation subsection in this section for additional information on these topics.

⁶³ See the Full and Open Competition subsection in this section for additional information on this topic.

⁶⁴ See the Solicitation, Procurement Purchasing Methods, Other Regulatory Requirements for Solicitations and Contracts, Awarding the Contract, and Contracts subsections in this section for additional information on these topics.
Noncompetitive Procurement Method

A noncompetitive purchase method occurs when only one offer is received. Procurement by a noncompetitive method is an appropriate method of procurement when one or more of the following types of circumstances apply: inadequate competition, public emergency or an unexpected emergency situation, sole source, or TDA authorization in special situations. When a CE uses any noncompetitive method of procurement, the CE must retain all related documentation onsite to demonstrate compliance. If a CE enters into a sole source contract without TDA approval, the contract has been improperly procured. All costs associated with an improperly procured contract are unallowable, including any ongoing and maintenance costs, from the nonprofit food service account.

Noncompetitive Type—Inadequate Competition

Inadequate competition occurs when the CE actively and appropriately attempts to solicit offers from a number of sources, but competition is deemed inadequate: The number of offers that met the solicitation specifications and technical requirements (i.e., responsible and responsive offers) is less than expected.

Approval

The CE is not required to seek TDA approval in this situation as long as the CE has taken appropriate action to ensure that competition was limited, as described in the Determination of Restricted Competition subsection below.

<table>
<thead>
<tr>
<th>Information Box 5</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Inadequate Number of Offers</strong></td>
</tr>
<tr>
<td>An inadequate number of offers does not automatically indicate that the CE should pursue a noncompetitive procurement method. A lack of offers is often caused by a poorly written solicitation or advertising that targets too small of a population base and not a lack of contractors or vendors capable of supplying the products and/or services to be procured.</td>
</tr>
</tbody>
</table>

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65 See the Protests subsection in this section for additional information on this topic.
66 Available at [http://www.txsмарtbuу.com/](http://www.txsмарtbuу.com/)
67 See the Records Retention subsection in this section for additional information on records retention requirements.
68 See the Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition page located after the table of contents for information on how to contact TDA.
Determination of Restricted Competition

When there is inadequate competition (i.e., the CE receives fewer offers than expected), the CE must take the following actions:

1. Determine if the CE took action to promote competition.
   - Were the specifications and/or technical requirements too restrictive? This includes solicitation or contract deadline for submitting an offer and schedule for delivery of products and/or services.
   - Did the CE write the solicitation with a single vendor or product in mind, which made it difficult for any other offeror to meet the specifications, terms, and conditions?
   - Did the public advertising strategy target a large enough circulation area to ensure that notice was provided to an adequate number of suppliers?
   - Was there any action taken by staff or suppliers that improperly limited competition?

2. Review the solicitation procedure to ensure that the solicitation did not limit competition.

When a CE receives an inadequate number of offers for a solicitation, it is often a result of the following conditions:
   - Nonresponsive or overly restrictive specifications and/or technical requirements
   - Inadequate number of suppliers located in the area where public advertising occurred
   - Improper market allocation schemes by suppliers

If the CE determines that an inadequate number of offers is the result of overly restrictive specifications or technical requirements or too narrow of an advertising region, the CE must provide notification of its intention to rebid the contract, review its solicitation, modify the solicitation as necessary, and reissue the solicitation.

Documentation

The CE must retain documentation to demonstrate that the CE (1) took appropriate actions to foster adequate competition and (2) reviewed its solicitation procedure to ensure that CE did not limit competition. Documentation for these purposes would include, but is not limited to,
copies of advertising releases, mailing lists, communication documents, or contact logs.

Noncompetitive Type—Public Emergency or Unexpected Emergency Situation
A public emergency (exigency) or unexpected emergency situation will not permit a delay in procurement caused by the additional time required for a full competitive solicitation for products and/or services—circumstances require immediate purchases. An emergency situation might include the failure of a refrigeration system, supplier canceling a contracted delivery without adequate notice, a natural event, or a Presidentially Declared Disaster.

Approval
A public emergency or unexpected emergency situation noncompetitive procurement requires TDA approval. CEs must contact TDA immediately to initiate the approval process. To request approval to use a noncompetitive method during an emergency, the CE must submit a request to TDA in writing (paper, fax, or email).

In cases of extreme emergency, a CE may call TDA directly to alert TDA about the situation and, then, submit the request in writing. Proactively, notifying TDA by phone will raise TDA’s awareness of the need for an expedited response. In extreme circumstances, a CE may also enlist the assistance of its ESC to help with this requirement.

In its written request, the CE must include the following information:

− Description of the emergency situation
− Products and/or services to be procured
− Supplier, distributor, or manufacturer from whom the product and/or services will be procured
− Period of time the CE plans to use the noncompetitive method for the emergency

TDA will provide written notification of approval or disapproval.

Documentation
CEs must retain documentation about the emergency and all related procurement activities.

Noncompetitive Type—Sole Source
For a sole source purchase, the product and/or service is available only from a single (sole) source distributor, supplier, or manufacturer. When there is only one offer, the procurement is not necessarily a sole source procurement. There may be other potential

See the Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition page, which follows the table of contents for contact information for each program.
offerors that could have submitted an offer but chose not to do so. Before offering a sole source noncompetitive contract, a CE must verify that the product and/or service can only be procured from a single source.

For Example: A CE uses a branded software for its point of service (POS) system. The software must be updated once a quarter. Before the CE can request approval to procure the software updates as a sole source noncompetitive procurement, the CE must verify that no other vendor is allowed to provide the updates without voiding the warranty.

Approval

Sole source procurement requires TDA approval. To request approval to use a sole source contract, the CE must submit a request to TDA in writing (paper, fax, or email)\(^\text{70}\) which includes the following:

- Description of the product and/or services to be purchased
- Copies of the CE’s solicitation, advertising, and other relevant documentation that indicate why the sole source method is appropriate
- Description of the method used to determine if the cost is reasonable
- Description of the CE’s actions to ensure that the supplier, distributor, or manufacturer is the sole source, i.e., including documentation of the CE’s effort to contact other suppliers, distributors, or manufacturers to confirm that the product or service is not available from another source
- Description of the CE’s review of the solicitation, advertising, and other actions to ensure that the original solicitation was competitively solicited
- Period of time (i.e., week, number of months, year) the CE plans to use the sole source method

TDA will provide written notification of approval or disapproval. If a CE enters into a sole source contract without TDA approval, the contract has been improperly procured. Any costs, including any ongoing or maintenance costs associated with an improperly procured contract, are not allowable costs and cannot be covered with funds from the nonprofit school food service account.

\(^{70}\) See the Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition page, which follows the table of contents for contact information for each program.
Determination of Need for Sole Source Procurement

The sole source method of procurement is used when there is only one supplier, distributor, or manufacturer for the product(s) and/or services(s) that are being procured.

Identification of Sole Source Products and/or Services

Before offering a sole source noncompetitive contract, a CE must verify that the product and/or service can only be procured from a single source—procurement where there is only one offer is not necessarily sole source. There may be other suppliers, distributors, or manufacturers that could have submitted an offer but chose not to submit an offer.

For Example: There are 3 companies that commonly provide the type of cooling equipment that a CE is attempting to procure. Company A chooses not to bid because it is unable to meet the delivery timeline. Company B no longer distributes the line of products that would have met the specifications and technical requirements. Therefore, Company C is the only offeror. In this situation, the single offer submitted is not a sole source procurement. Instead, it is an inadequate competitive response to the solicitation. The CE must follow the guidance for that type of noncompetitive procurement.

For a sole source method to be used, there must be only one possible source for the product and/or service.

How does the CE determine the product and/or service is a sole source procurement?

1. A CE cannot accept a statement from the supplier, distributor, or manufacturer as verification that the product and/or service is only available from a single source.

2. The CE must attempt to solicit offers from other suppliers, distributors, or manufacturers.

3. If the product and/or service is available from other sources, but one source offers a feature(s) that other sources do not offer, the special feature cannot become the only factor that defines a product and/or service as the sole source unless the CE can document why this feature is required, not just preferred.
Brand Name Sole Source Purchase

When there is a compelling need, such as compatibility with current equipment, to purchase a specific brand product and/or service, the CE must have documentation that demonstrates that other available brands are not compatible with the CE’s

1. current equipment,
2. replacement part inventory, and
3. maintenance staff’s expertise.

However, even if the CE meets the brand name sole source purchase criteria listed above, it must still determine if there is more than one supplier for the brand of equipment or the services. If there are multiple suppliers, the CE must follow normal procurement procedures in awarding a contract.

[NOTE: In some cases, suppliers for specific brands may be affiliated or associated suppliers, which may result in collaboration among the suppliers and may restrict competition. CEs will need to address this as appropriate to ensure full and open competition.]

Documentation:

CEs must retain records that demonstrate the following: (1) product and/or service availability from only one source; (2) efforts to determine if other suppliers, distributors, or manufacturers provide the product or service; and (3) all procurement-related activities.

Noncompetitive Type—TDA Authorization

TDA authorizes the CE’s use of a noncompetitive procurement method. These cases are rare and are used in special circumstances. TDA will notify a CE when this type of noncompetitive procurement is appropriate.

Approval

TDA pre-approves these procurements, and no additional approval is needed. TDA will notify the CE when it pre-authorizes a noncompetitive procurement and will provide the following information about this authorization:

− Description of the product and/or services to be purchased
− Requirements, as applicable, related to solicitation, advertising, or other
− Description of the method used to determine the cost is reasonable
− Period of time (i.e., week, number of months, year) covered by the TDA authorization for a noncompetitive procurement method.

Documentation

CEs must retain records related to procurement activities for this authorization.
**Buy American**

The Buy American provision applies to all food purchases made with SNP funds. This provision requires CEs and third parties, acting on behalf of CEs, to purchase domestically\(^1\) grown and processed food to the maximum extent practicable.

<table>
<thead>
<tr>
<th>Food Products That Meet the Buy American Provision</th>
<th>Food Products That Do Not Meet the Buy American Provision</th>
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</thead>
<tbody>
<tr>
<td>- Food products grown domestically, i.e., United States territories: Guam, American Samoa, Virgin Island, Puerto Rico, and the Northern Marian Islands.</td>
<td>- Food products grown and processed in another country.</td>
</tr>
<tr>
<td>- Processed food products with over 51% of the final product consisting of agricultural foods that were grown domestically.</td>
<td>- Food products grown in another country and processed in the United States.</td>
</tr>
<tr>
<td>- Products grown in the United States and processed in another country.</td>
<td>- Products grown in another country.</td>
</tr>
</tbody>
</table>

*Administrator’s Reference Manual (ARM), Section 24, Child Nutrition (CN) Labeling and Product Documentation* provides detailed information on how to identify the origin of a product.

In procurement procedures, the CE will address the following issues:

- Methods for ensuring that all purchased food products meet the Buy American provision, including, but not limited to, (1) methods for incorporating the Buy American provision into all solicitations and contracts and (2) strategies for ensuring contractor compliance with the Buy American provisions for awarded contracts.

- Records retention to demonstrate compliance with the Buy American provision, including, but not limited to, documenting exceptions, descriptions on delivery invoices and receipts, and compliant product labels.

To address the Buy American provision in solicitations and contracts, CEs will include the following:

- Require certifications from offerors, including statements on contracts and invoices.

USDA provides the following sample language for contracts related to the Buy American provisions:

- **General Statement for Solicitations and Contracts:**

  The District/State agency/Territory participates in the National School Lunch Program and School Breakfast Program and is required to use the nonprofit food service funds, to the maximum extent practicable, to buy domestic commodities or products for Program meals. 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

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\(^1\) Domestically grown food products are grown and processed in the United States.
using agricultural commodities that are produced in the U.S. as provided in 7 CFR 210.21(d).

- Required Certification from Offerors
  We require that suppliers certify the food product was processed in the U.S. and certify the percentage of U.S. content, by weight or volume, in the food component of processed food products supplied to us.
  OR
  We require bidders to certify that ___ (insert product name) ___ was processed in the U.S. and contains over ____ (insert % of weight or volume) of its agricultural food component from the U.S.

- Designate an offeror as non-responsive if the appropriate phrasing is not included in the offer.
- Establish penalties, including contract termination, for noncompliance.
  If the distributor, supplier, or vendor is repetitively unable to provide domestic food products, the CE should discuss the Buy American requirements with the distributor, supplier, or vendor and determine if the entity is capable of fulfilling the terms and conditions of the contract specific to the Buy American provision.

Third-Party Buy American Requirements
Third parties, acting on behalf of CEs, must purchase domestically\(^2\) grown and processed food to the maximum extent practicable. Third parties must also provide the CE with all documentation the CE requires (1) for the CE to make a determination that procured food products are compliant with the Buy American provisions and (2) for the CE to make a determination that an exception to the Buy American provision is warranted. See the Considerations for a Buy American Exception subsection later in this section for additional information on this topic.

USDA Foods
Non-processed USDA Foods delivered to a CE must be grown in the United States. When USDA Foods\(^3\) items are made into processed end products, 51% of resulting food products must be of United States (US) origin. The food products must be manufactured/processed in the United States.

If a CE receives USDA Foods products that do not meet the Buy American requirements, the CE must refuse delivery and report the issue to TDA immediately.

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\(^2\) Domestically grown food products are grown and processed in the United States.

\(^3\) See Administrator’s Reference Manual (ARM), Section 21, USDA Foods for additional information on the Buy American requirements for processing USDA Foods.
Considerations for a Buy American Exception

The purchase of a non-domestic food product should be an occasional, not frequent occurrence. In all cases, the CE—not the distributor, supplier, or vendor—must determine that the use of a non-domestic food product is appropriate. However, the distributor, supplier, or vendor may provide information that will assist the CE in this determination; the decision purchase or accept delivery of a non-US product must be made by the CE.

Documentation to Support an Exception

The CE must ensure that there is documentation retained to demonstrate the CE considered each of the following questions and that the answer to the question resulted in a determination that an exception is appropriate.

A. Is the food product grown domestically in large enough quantities of a satisfactory quality? Or does 51% of the final processed food product consists of agricultural commodities that were grown domestically?

   No, the food product is not produced in sufficient quantities of a satisfactory quality and/or is not of US origin. In this case, it may be possible to grant an exception. Go to Question B.

   If the answer is yes, the purchase of a non-domestic food product is not appropriate

B. Are there other sources for purchasing a domestic food product instead of a non-domestic product?

   No, there is no alternative source that can provide a domestic product in sufficient quantities and/or of an acceptability quality. In this case, it may be possible to grant an exception. Go to Question C.

   If the answer is yes, the purchase of a non-domestic food product is not appropriate

C. Is there another domestic food product that can be easily substituted for the non-domestic food product?

   No, there is no substitute domestic food product for this food product. In this case, it may be possible to grant an exception. Go to Question D.

   If the answer is yes, the purchase of a non-domestic food product is not appropriate

D. Is the price difference between the domestic product and non-domestic product reasonable in light of the CE’s anticipated per meal price?

   No, the cost difference in purchasing a non-domestic product is reasonable. In this case, it may be possible to grant an exception. Review the answers for Questions A-D.

   If the answer is yes, the purchase of a non-domestic food product is not appropriate
The following information sources may assist the CE in documenting an exception to the Buy American provision:

- Information provided by a distributor, supplier, or vendor that supports the CE’s decision that an exception is warranted.
  
  *USDA does not allow CEs to use notifications, letters, or lists created by distributors, vendors, other suppliers, or organizations/agencies as the sole source of information to demonstrate that an exception to the Buy American provision is allowable.*

- Information available from USDA.
  
  *Agricultural Marketing Resource Center at www.agmrc.org/commodities-products/ and/or USDA Marketing Resource Center at www.ams.usda.gov/*

- Information obtained through general Internet agricultural news sources.

- Information from food product catalogs.

- Information from the USDA Foods survey list.
  
  *USDA only purchases food products when there is sufficient quantity at the time of USDA solicitation. If an item is not available in sufficient quantities for USDA to purchase, there is not a sufficient quantity of the product available for purchase.*

- Industry newsletters, bulletins, and reports on product availability and pricing.

- Notes created by CEs based on contacts with distributors, suppliers, vendors, or other commodity or agriculture sources.

- Responses recorded on the TDA form *Buy American Checklist for Non-Domestic Food Product Purchases*

**Frequency of Establishing a Buy American Exception**

*Each time* a non-domestic food product is purchased or delivered; the CE must determine if an exception to the Buy American provisions is appropriate.

*For Example:* A CE received non-domestic canned peppers as part of its regular delivery the first week of January. At that time, the CE determined that the purchase of a non-domestic product was acceptable and retained documentation demonstrating why it is appropriate. In April, the CE again received non-domestic canned peppers as part of its regular delivery. To be in compliance with the Buy American provision, the CE must again determine that the receipt of a non-domestic product is appropriate and retain documentation demonstrating why it is appropriate.
Buy American Checklist
If the CE purchases non-domestic food products, it must maintain documentation demonstrating the situation that warrants an exception. TDA has developed the Buy American Checklist for Non-Domestic Food Product Purchases to assist CEs in maintaining documentation. This form is available at www.SquareMeals.org.

Local Preference
CEs may\(^{74}\) give preference or bonus points to local producers when soliciting and awarding contracts for the purchase of unprocessed locally grown or raised agricultural products as long as the preference or bonus points do not restrict full and open competition.\(^{75}\) The CE must include its method or methods of using local preference in its written procurement procedures, in the solicitation for the food items, and in the contract as appropriate.

<table>
<thead>
<tr>
<th>Locally Grown and Raised Agricultural Products Chart</th>
</tr>
</thead>
<tbody>
<tr>
<td>Locally grown and raised foods commonly include, but are not limited to, the following:</td>
</tr>
<tr>
<td>- Beans</td>
</tr>
<tr>
<td>- Condiments</td>
</tr>
<tr>
<td>- Eggs</td>
</tr>
<tr>
<td>- Fish (with no additives or fillers)</td>
</tr>
<tr>
<td>- Fruits</td>
</tr>
<tr>
<td>- Grains and flour</td>
</tr>
<tr>
<td>- Herbs</td>
</tr>
</tbody>
</table>

Unprocessed locally grown or raised agricultural products mean those agricultural products that retain their inherent character. The following methods are appropriate handling and preservation techniques for locally grown or raised agricultural products:

- Addition of ascorbic acid or other preservatives to prevent oxidation of produce
- Butchering livestock and poultry
- Cleaning fish
- Cooling
- Drying/ dehydration
- Forming ground products into patties without any additives or fillers
- Freezing
- Packaging (such as placing eggs in cartons)
- Pasteurization of milk
- Refrigerating
- Size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding
- Vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package)
- Washing

\(^{74}\) USDA regulation specifically gives the local entity the choice to use local preference for locally grown or raised products procured with school nutrition program funds or not to apply a local preference for these products.

\(^{75}\) See the Full and Open Competition subsection in this section for additional information on this topic.
Defining Local
USDA regulations give the local entity the authority to define local as long as the definition does not restrict full and open competition. USDA regulations also prohibit any state agency from mandating a definition for local.

For procurement, the CE may define its local geographic areas as areas located within a specified number of miles or within a geographic boundary (county, state, or multi-state). It may use different geographic areas for different types of products and for different seasons.

For Example: A CE is located in the middle of the state and has defined two local geographic areas.

Local Geographic Area 1: Local products readily found with a 100-mile radius of the CE—This local area will be used for herbs, tomatoes, lettuce, potatoes, carrots, and green peppers.

Local Geographic Area 2: Local products readily available in the state, but not readily available within a 100-mile radius of the CE—This local area will be used for peaches, broccoli, and melons.

Local Procurement Preference or Bonus Points
CEs may apply a variety of types of preferences or bonus points methods as long as the methods do not limit full and open competition. CEs must describe all methods to be used in their written procurement procedures.

Information Box 6
Questions to Consider When Defining Local
- What product(s) does the SNP want to source first, and where can they be found?
- Are there products the SNP is already sourcing from nearby areas?
- What is the SNP’s vision for local buying program and what types of producers can support that vision?
- How quickly does the SNP want to add local products to the menu?
- Does the SNP want to couple local purchases with farm visits and educational activities with producers and suppliers?

---

See the Full and Open Competition subsection in this section for additional information on this topic.
Preference or Bonus Point Method Example Chart

Method of giving local preference include, but are not limited to, to the following examples:

<table>
<thead>
<tr>
<th>Preference Applied to Price</th>
<th>Preference Applied to Evaluation Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>A CE may apply the preference to the product price for local producers located within a specified radius of the CE.</td>
<td>A CE may use a tiered approach to awarding preference points for local products.</td>
</tr>
<tr>
<td>In its written procurement procedures, the CE states that it will give preference to local producers by subtracting a set amount from the bid price of local producers that are located within 100 miles of the CE.</td>
<td>In its written procurement procedures, the CE describes how it will use a tiered approach to giving local preference.</td>
</tr>
<tr>
<td>For Example: When procuring fresh fruit by the pound, the CE reduces the product price by $0.10 a pound for local producers located within 100 miles of the CE.</td>
<td>For Example: For products that are readily available within a 100-mile radius of the CE, the CE will give</td>
</tr>
<tr>
<td></td>
<td>– 10 points for a vendor located within 20 miles,</td>
</tr>
<tr>
<td></td>
<td>– 7 points for a vendor located within 50 miles, and</td>
</tr>
<tr>
<td></td>
<td>– 5 points for a vendor located within 100 miles.</td>
</tr>
<tr>
<td></td>
<td>For products that are not readily available within a 100-mile radius of the CE, the CE will give</td>
</tr>
<tr>
<td></td>
<td>– 10 bonus points for vendors located within the state and</td>
</tr>
<tr>
<td></td>
<td>– 5 bonus points for vendors located out of state.</td>
</tr>
</tbody>
</table>

Local Preference in the Solicitation and Contract Award

If a CE gives preference or bonus points for local producers, the CE must describe the way the local preference or bonus points will be used in its written procedures and provide this information in the solicitation. If the CE is procuring a third-party to procure on its behalf, the CE may also include a required preference for local procurement for third-party purchases.

[NOTE: While a CE may give preference or bonus points to local contractors, local cannot be listed as a specification or technical requirement on the solicitation. If local was designated as a specification or technical requirement, the exclusion of all non-locally grown agricultural products would restrict full and open competition.]

A CE must not award a contract based solely on local preference.

- **For an IFB**, if all points are equal for a local and a non-local producer based on the evaluation criteria, the CE must award the contract based on the most cost-effective use of federal funds.
- **For an RFP**, the CE must award the contract with primary consideration given to the cost of the product but must also apply all other evaluation criteria in determining the most cost-effective use of federal funds.

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77 See the Awarding the Contract subsection in this section for additional information on primary consideration.
Information Box 7

Local Preference or Bonus Points Example

The CE reduces the offer price by $0.10 if the supplier meets the local preference criteria.

<table>
<thead>
<tr>
<th>Supplier</th>
<th>Supplier Price</th>
<th>Meets Geographic Preference?</th>
<th>Price with Preference Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplier 1</td>
<td>$1.97</td>
<td>No</td>
<td>$1.97</td>
</tr>
<tr>
<td>Supplier 2</td>
<td>$2.10</td>
<td>Yes</td>
<td>$2.00</td>
</tr>
<tr>
<td>Supplier 3</td>
<td>$2.03</td>
<td>No</td>
<td>$2.03</td>
</tr>
</tbody>
</table>

If the award is an IFB with firm fixed price, Supplier 1 is awarded the contract.

If the award is an RFP, the SNP will evaluate all criteria, including primary consideration for cost, and then make the award. Because there are additional criteria for determining this award, it is possible that the supplier with the lowest cost price may not be awarded the contract.

Other Local Preference Regulations

For local preference, there are differences in the federal and state regulations as they apply to entities that are required to comply with the Texas law.

- Texas law requires (1) that governmental entities (including school districts and charter schools) define local preference as geographically within the state of Texas and (2) that a contract must be awarded to a local supplier over a non-local supplier if both meet the terms and conditions described in the solicitation.

- USDA regulations state (1) that SNPs have the authority to apply local preference in a variety of ways as long as the end result is the most cost-effective use of federal funds or not use local preference in procurement and (2) that a contract cannot automatically be awarded to a local supplier over a non-local supplier if both meet the terms and conditions described in the solicitation.

When the CE is making purchases for the school nutrition program, the CE’s procurement actions must be in compliance with USDA regulations.

For Example: An SNP, located on the border of Texas and New Mexico, issues a solicitation for fresh melons and applies bonus points for potential producers located within 90 miles. Two offers receive the same high score on the evaluation.
- One from a Texas farm 60 miles away
- One from a New Mexico farm 5 miles away

If this contract fell under Texas law for governmental entities, the contract must be given to the Texas farm.

However, because this purchase will be paid from the School Nutrition Program (SNP) funds, USDA regulations allow the SNP to define local to include farms located in New Mexico. In this case, the CE may award the contract to the New Mexico farm if it is the most cost-effective use of federal funds.
Other Regulatory Requirements for Solicitations and Contracts

When federal funds are used, CEs must include specific regulatory and legislative provisions in all solicitations/contracts. This subsection provides general explanations of what is required.

For these requirements, the term, contract, applies to both legal contracts and operational agreements and applies to CEs and third-party entities acting on behalf of CEs to procure services and/or products.

BYRD, Anti-Lobbying

(31 U.S.C. 1352)

Required inclusion in solicitations/contracts exceeding $100,000 using federal funds; requires a contractor to complete specific forms related to lobbying (influencing or attempting to influence) in connection with obtaining a contract.

Title VI of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title 7 CFR Parts 15, 15a, and 15b; the Americans with Disabilities Act; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement – Nutrition Programs and Activities

Civil Rights/Discrimination

Title VI of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title 7 CFR Parts 15, 15a, and 15b; the Americans with Disabilities Act; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement – Nutrition Programs and Activities

Required inclusion in solicitations/contracts using federal funds; prohibits discrimination of all eligible program participants on the basis of age, color, disability, national origin, race, and gender.

Clean Air and Water Act and Federal Water Pollution Control Act

Clean Water Act, 42 U.S.C. 7401-7671q; Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387); and Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15)

Required inclusion when applicable to the services and/or products to be procured for solicitations/contracts exceeding $150,000 using federal funds; requires compliance with all applicable standards, orders, and regulations; prohibits the award of contracts to contractors that are in violation of Clean Air Act. Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).
Contract Work Hours and Safety Standards Act
40 U.S.C. 327-330 Sections 103 and 107 as supplemented by Department of Labor regulations (29 CFR Part 5)

Required inclusion when applicable to the services and/or products to be procured for solicitations/contracts that involve mechanics or laborers exceeding $100,000 using federal funds; establishes standards for hourly and salaried employees related to workweek and overtime.

Copeland Anti-Kickback Act
(18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3)

Required inclusion in construction solicitations/contracts using federal funds; prohibits a contractor or subcontractor from inducing kickbacks from employees.

Davis-Bacon Act
40 U.S.C. 276a to 276a-7 as supplemented by Department of Labor regulations (29 CFR Part 5)

Required inclusion in construction solicitations/contracts exceeding $2,000 using federal funds; requires contractors and subcontracts to include actual wage determinations in bid specifications and contracts.

Energy Policy and Conservation Act
Public Law 94-163, 89 Statute 871

Required inclusion when applicable to the services and/or products to be procured for solicitations/contracts using federal funds; establishes standards for the promotion of energy and water conservation methods when feasibly obtainable.

Equal Employment Opportunity
41 CFR, Chapter 60. 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 (41 CFR Chapter 60)

Required inclusion in construction solicitations/contracts using federal funds; prohibits hiring practices that do not provide an equal opportunity of all persons without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

Health and Safety Certifications, Licensing, or Regulations
Local, state, or federal health and safety certifications, licensing, or regulations

Required inclusion in solicitations/contracts using federal funds; requires all contractors to meet applicable local, state, and federal health and safety certifications, licensing, or regulations which include, but are not limited, to facility use, food establishment, and authorized providers.
Rights to Inventions (Pertaining to Patent Rights, Copyright and Rights)
37 CFR 401.2

Required inclusion, if applicable to solicitations/contracts using federal funds; requires all contractors to observe all applicable patent rights, copyright, and rights laws in operating the program.

Solid Waste Disposal Act
Section 6002 as amended by the Resource Conservation and Recovery Act

Required inclusion to the extent practicable when applicable to the services and/or products to be procured for to solicitations/contracts exceeding $10,000 using federal funds; requires contractors to maximize energy and resource recovery by using recycled materials and/or recycling waste products when reasonable, cost appropriate, and available.78

[NOTE: The CE needs to determine what kinds of purchases and/or services are required to meet this provision. The CE should consider what is reasonable, cost appropriate, and available to the CE.]

Small and Minority Firms, Women’s Business Enterprise, and Labor Surplus Area Firms (Historically Underutilized Business or HUB)
2 CFR 200.321

Necessary affirmative steps to procure from minority firms, women’s business enterprises, and labor surplus area firms whenever possible

Required inclusion in solicitations/contracts using federal funds; requires contractors to encourage and facilitate participation by small businesses, minority-owned firms, and women’s business enterprises whenever to the maximum extent possible.

Preference Points to Encourage Participation of Small and Minority Businesses, Women’s Business Enterprises, and Labor Surplus Area Firms

CEs may include the following preference points in the evaluation to promote small, minority, and women’s businesses and labor surplus forms.

- Placing qualified small and minority businesses and women’s business enterprises on solicitation lists.
- Assuring that small and minority businesses and women’s business enterprises are solicited whenever they are potential sources.

78 The following websites provide additional information on possible waste management actions to meet this requirement: Environmental Protection Agency at https://www.epa.gov/regulatory-information-topic/regulatory-information-topic-waste; USDA, Biopreferred at https://www.biopreferred.gov/BioPreferred/
— Dividing specifications and/or technical requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women’s business enterprises.

— Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women’s business enterprises.

— Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.

Solicitation

A solicitation\(^\text{79}\) is prepared by the CE to describe the products\(^\text{80}\) and/or services the CE wants to acquire. Regulations specify that the solicitation must clearly define the items or services needed in order for the offerors to respond properly to the solicitation. The solicitation is intended to level the playing field so that all offerors have an equal opportunity to compete for the award of the contract.

\[\text{[NOTE: Every aspect of the procurement procedure is important. However, if the solicitation is poorly prepared, the offers submitted will match the poor quality of the solicitation.]}\]

Solicitation for Small Purchases

When products and/or services are procured through a small purchase method, the solicitation may take many forms because quotes for a small purchase may be accomplished by phone, email, or another method. To maintain accurate records, the CE’s written procurement procedures should clearly describe how the CE will document solicitations for small purchases.

At a minimum, the CE must keep a record of contact information for all potential contractors that the CE contacted or attempted to contact, specifications and/or technical requirements provided to the potential contractors, offers or pricing information received, the method for determining the award, and the recipient of an award.

TDA has developed a sample form that may assist CEs with retaining this documentation. See the TDA Resources subsection of this section for additional information on this form and others developed by TDA to assist CEs with procurement.

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\(^{79}\) Micro-purchases do not require a solicitation.

\(^{80}\) USDA’s Agricultural Marketing Service provides examples of specifications that can be used. This information is available at [www.ams.usda.gov/](http://www.ams.usda.gov/)
Solicitation, IFB or RFP

When products and/or services are procured through either formal procurement method (IFB or RFP), the solicitation takes the form of documentation that describes the specifications and/or technical requirements for the products and/or services, the method and criteria for evaluation of responses, a method and schedule for submitting an offer, and the form of contract with standard terms. The standard terms are also called the *terms and conditions*. To maintain accurate records, the CE’s written procurement procedures should clearly describe how the CE will develop and retain the solicitation document prepared for IFBs and RFPs.

The following issues must be addressed in a solicitation document for an IFB or RFP and, if applicable, to a small purchase when procuring products and/or services.

Solicitation/Contract Content

A CE’s solicitation and the resulting contract must contain the following information:

**Evaluation | Required for IFB and RFP Solicitation/Contract**

- Statement of contract award to be awarded to one offeror or split among multiple offerors

  [NOTE: If a contract is to be split among multiple offerors, the statement must include how the split will be made: percentage, by product and/or service, or another method.]

- Description of criteria for identifying the most responsible and responsive offer and weight or percentage applied for each criterion may include actual rubric or a descriptive list of criteria

  For Example: The following evaluation criteria a CE may be included in solicitations:

  - Price/Cost (Cost must be the primary consideration.)
  - Responsiveness to specifications and technical requirements
  - Demonstration of responsibility (experience, reference letters, financial condition/stability, business practices)
  - Accounting and reporting systems
  - Reporting systems
  - Delivery schedules

**Financial—Adjustment or Escalation Clause | Required If Included**

- Name of the independent wholesale index used to adjust prices on contract renewal

- Description of the method for monitoring accuracy of the index adjustment\(^{81}\)—increase or decrease

**Financial—Bonding Requirement | Required If Included**

- Description of the bonding\(^{82}\) requirement

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\(^{81}\) TDA requires the use of the Consumer Price Index (CPI) Food Away from Home when an index is used to adjust prices.
Financial—Costs Allowed to Be Invoiced | Required If Cost-Reimbursable
- Description of allowable costs (materials + direct labor hours)
- Statement of specific ceiling price, i.e., cost the contractor exceeds at its own risk

Financial—Cost of Contract | Required If Firm Fixed-Price
- Statement that the price is fixed for the duration of the contract
- Descriptions of any incentives given to the awarded contractor to control costs and perform with the greatest efficiency

Financial—Credits, Discounts, and Rebates | Required All Solicitations/Contracts
- Description of the acceptable method(s) to provide credits, discounts, and rebates
- Description of documentation awarded contractor must provide to demonstrate accurate receipt of USDA Food values and credits, discounts, and rebates
- Statement indicating frequency to receive USDA Food values and credits, discounts, and rebates
- Description of the penalty for not applying USDA Food values and credits, discounts, and rebates
- Statement of the right-to-audit, which allows the CE routine access to the information necessary to verify receipt of accurate USDA Foods values and applicable credits, discounts, and rebates
  [NOTE: Firm Fixed-Price contracts only require credits for the value of USDA Foods.]

Financial—Forecasting | Required for All Solicitations/Contracts
- Description providing accurate forecasting\(^{83}\) information

Financial—Preferences for Small and Minority Businesses | Required for All Solicitations/Contracts
- Explanation or preferences to encourage the participation of small and minority businesses, women’s business enterprises, and labor surplus area firms

Local Preference | Required If Included
- Description of the method for applying and amount of bonus points or percentage for local\(^ {84}\) products

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\(^{82}\) See the Bonding Requirements subsection in this section for additional information on this topic.

\(^{83}\) See the Forecasting subsection in this section for additional information on this topic.

\(^{84}\) See the Local Preference subsection in this section for additional information on using local preference. See also USDA’s Procuring local Foods for Child Nutrition Programs available at [www.fns.usda.gov/farmtoschool/procuring-local-foods](http://www.fns.usda.gov/farmtoschool/procuring-local-foods).
**Market Basket Evaluation | Required If Included**
- Finite list of products and or/services with quantities, specifications, and technical requirements for each item on the market basket list\(^{85}\)
- Indication of how each product and/or service will be evaluated, including the percentage to be applied to the products included in the price evaluation
- Indication of the percentage of products that may be substituted for products not included in the original solicitation/contract

**Offer Submission — CE Created Prequalified Lists | Required If Included**
- Statement that CE will use a prequalified\(^{86}\) list of persons, firms, or products
- Description of how an offeror can submit information to become prequalified

**Offer Submission — Questions | Required for All Solicitations/Contracts**
- Description of the method and location used to share additional information and questions and answers provided to any potential offeror
  [NOTE: Additional information is often posted on the CE’s website for ease of access.]

**Opening Offers | Required for All Solicitations/Contracts**
- Description of when and where sealed bids/offers will be opened

**Other Regulatory Requirements | Required for All Solicitations/Contracts As Applicable**
- Statements of other regulatory requirements as applicable to the services and/or products to be procured, as described in the Other Regulatory Requirements for Solicitations and Contracts subsection in this section

**Oversight — Management of Contract | Required for All Solicitations/Contracts**
- Description of the methods or procedures the CE will use to manage the contract

**Qualitative Evaluation Elements | Required If Included**
- Explanation for the specific outcomes and/or expectations for the qualitative elements\(^ {87}\) required to ensure that the offeror has sufficient information to submit a responsive bid

**Records Retention | Required for All Solicitations/Contracts**
- Description of all applicable records retention requirements for the awarded contractor

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\(^{85}\) See the Market Basket subsection in this section for additional information on using the market basket evaluation method.

\(^{86}\) Procurement procedures which incorporate prequalified lists must never unduly restrict or eliminate full and open competition. A vendor may submit a bid while waiting for approval for a prequalified list.

\(^{87}\) Qualitative evaluation elements are appropriate when products and/or services that more difficult to describe in objective, concrete terms
Specifications, Technical Requirements, Terms, and Conditions — Contract Termination | Required for All Solicitations/Contracts

- Statement of the remedies in favor of the CE if the contractor cannot or does not perform as required
- Description of actions steps for terminating the contract

Specifications, Technical Requirements, Terms, and Conditions — Delivery | Required for All Solicitations/Contracts

- Description of the frequency and location of expected deliveries for products and/or services, including drop shipments, and, if required, varied packaging, amounts, or sizes per delivery

Specifications, Technical Requirements, Terms, and Conditions — Duration of Contract | Required for All Solicitations/Contracts

- Statement of the length of the contract
- Statement indicating if contract renewals will be allowed, and, if so, at what frequency

Specifications, Technical Requirements, Terms, and Conditions — Equipment and Supplies | Required If Included

- Description of any expectations that the final contract will include the purchase or use of equipment which may include, but is not limited to, the following:
  - Utility and space requirements
  - Quality and features required
  - Installation requirements
  - Indication of whether the CE may retain the property and continue to make payments in accordance with an approved amortization schedule or return the property
- Other factors which may impact the cost of purchasing equipment
- Description of supplies to be provided by CE and offeror

Specifications, Technical Requirements, Terms, and Conditions — Health and Safety | Required for All Solicitations/Contracts If Applicable by Local/State Food Safety Standards

- Statement that all contractors must adhere to all local, state, or federal safety licensing or standards

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88 FSMC contracts are awarded for a maximum of one year and may allow 4 one-year renewals. Other contracts are awarded for a maximum of 1 year and may allow 3 one-year renewals.

89 Interest for payments for retained property is an unallowable cost.
Specifications, Technical Requirements, Terms, and Conditions—Invoicing/Payments
<table>
<thead>
<tr>
<th>Required for All Solicitations/Contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description of the method for submitting invoices for payment, including sufficient information to determine allowable and unallowable costs and submission timelines</td>
</tr>
</tbody>
</table>

Specifications, Technical Requirements, Terms, and Conditions—Products | Required for All Solicitations/Contracts |
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Description which includes the following, as applicable:</td>
</tr>
<tr>
<td>• Applicable nutrition standards</td>
</tr>
<tr>
<td>• Delivery expectations</td>
</tr>
<tr>
<td>• Basic features as well as size/weight/grade specifications and/or technical requirements</td>
</tr>
<tr>
<td>• Packaging requirements, including quantity and warranty</td>
</tr>
</tbody>
</table>

Specifications, Technical Requirements, Terms, and Conditions—Protests | Required for All Solicitations/Contracts |
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Description of the method to submit a protest(^{90}) of the solicitation, cancellation of the solicitation, and contract award</td>
</tr>
<tr>
<td>Description of the method to submit a protest of contract termination</td>
</tr>
<tr>
<td>Description of the method for CE or contractor to file a complaint</td>
</tr>
</tbody>
</table>

Specifications, Technical Requirements, Terms, and Conditions—Samples for Taste-Testing | Required If Included |
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Description of expectation for sample taste-testing, including frequency and numbers(^{91})</td>
</tr>
</tbody>
</table>

Specifications, Technical Requirements, Terms, and Conditions—Services | Required for All Solicitations/Contracts |
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Description for services being procured, including the following, as applicable:</td>
</tr>
<tr>
<td>• Required certifications and/or licensing</td>
</tr>
<tr>
<td>• Description of duties to be performed, i.e., the scope of work</td>
</tr>
<tr>
<td>• Equipment provided by CE and expected to be provided by the contractor</td>
</tr>
<tr>
<td>• Hours of work</td>
</tr>
<tr>
<td>• Performance expectations</td>
</tr>
<tr>
<td>• Required outcomes</td>
</tr>
</tbody>
</table>

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\(^{90}\) See the Protests subsection in this section for additional information on this topic.

\(^{91}\) The CE does need to consider if any product and/or services provided by a potential contractor will become an incentive to award a contract. Moreover, the CE should also remember that any samples provided by the potential contractor are not actually free. The offeror will include the costs for providing samples to the CE in its offer.
Submission of an Offer—Timeline Required for All Solicitations/Contracts

- Description of start dates, major events, and end dates for solicitation and contract

One Solicitation, Award Multiple Contracts

When a CE uses one solicitation to award multiple contracts to different offerors by category group or line item, the CE should consider the following issues in making this decision:

- Will awarding one contract for the total purchase result in cost savings?
- Will awarding one contract for the total purchase encourage more potential contractors to submit offers?
- Will awarding one contract for the total purchase limit competition because fewer potential contractors are able to respond to the quantity or variety in the solicitation?
- What are the facility and staffing requirements for the contract awarded by total purchase or by multiple contracts?

Firm Fixed-Price Contract

A firm fixed-price contract may be awarded for an IFB or RFP. This type of contract is awarded to the lowest cost offer that addresses all the material terms and conditions (responsible and responsive) of the solicitation.

Notification for Firm Fixed-Price Contracts

The solicitation must contain information about the method for submitting an offer, including, but not limited to, the following:

- Date bidding opens and closes
- Method to submit an offer, including location
- Method and criteria for evaluating the offer, including bonus or preference points
- Information about announcements related to the winning and losing offers
- Procedure to protest an offer, including contact information for the person handling protests and timeline for submitting
- Necessary attachments, including certifications, assurances, and sample contract terms and conditions, if applicable
- Method and location where questions, answers, and new information will be shared

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92 Responsible is defined as able to provide the product(s) and/or service(s) as described in the solicitation. Responsive is defined as an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).
Texas Comptroller of Public Accounts Tool

CEs may provide additional notification of invitations for sealed bids (IFBs) or requests for competitive proposals (RFPs) through postings on the Texas Comptroller of Public Accounts bid database, Electronic State Business Daily (ESBD). This database is available to all CEs classified as governmental entities. This database is widely available to various types of potential contractors across the state and offers a venue for notification that may reach potential contractors the CE may not know about.

Specifications and/or Technical Requirements for Firm Fixed-Price Contracts

While this information for specifications and/or technical requirements must be specific, CEs must be careful to ensure they are not so specific that they limit competition. However, to award a contract, the CE must be specific enough in the specifications and/or technical requirements for the CE to be able to determine if the offeror is responsible and responsive.

Prequalified List for All Contracts

If the CE uses prequalified lists, the CE must ensure the following criteria are used:

- The CE must ensure that all procurement prequalified lists of persons, firms, or products are current and include enough qualified sources to ensure maximum full and open competition.
- Procurement procedures that incorporate prequalified lists must never unduly restrict or eliminate full and open competition.
- Although the prequalification of potential contractors results in a more efficient procurement process, CEs must not preclude potential offerors from qualifying for the prequalification list during the solicitation period.

Shared Purchasing for All Contracts

A CE may create a solicitation that combines the products and/or services for other school functions with an SNP products and/or services procurement when the following conditions apply:

1. if the additional items are included in the original solicitation specifications and/or technical requirements (including quantity) and
2. if the SNP recovers the full cost for the products and/or services.

Recovered cost includes, but is not limited to, the actual cost of the product, handling, transportation, and labor. This may include a proportional share of the cost if applicable.


94 Responsible is defined as able to provide the product(s) and/or service(s) as described in the solicitation. Responsive is defined as an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).
Use of Brand Names for All Contracts

In addition to the specifications and technical requirements in the solicitation, a brand name or equal statement may be added to the description of a product to demonstrate the type of product the CE is attempting to purchase. However, a CE cannot stipulate that the only product that meets the specifications and technical requirements is a brand name product unless it is a sole source procurement, as described in the Noncompetitive Method subsection in this section.

Methods for Issuing Solicitations for an Individual Item or List(s) of Items

There are multiple methods for issuing solicitations that a CE may use to obtain the most competitive pricing for an individual product and/or service or a list of products and/or services.

[NOTE: The CE should keep in mind that a vendor may have more than one responsive product that meets the specifications and/or technical requirements, as described in a solicitation. In these cases, the CE will need to evaluate which responsive product to accept and award the full quantity/volume for that product, as described in the solicitation.]

One Solicitation with Groups of Items to Be Awarded to One or More Vendors

The solicitation describes the quantity, specifications, and technical requirements for each item within a group and provides an explanation that the contract for each group of items may be awarded to different vendors. There may be two groups of items or 20 groups of items. For this type of solicitation, vendors will have the option to offer a price option for one, some, or all groups of items. The most responsible and responsive vendor for each group of items is awarded a contract. A vendor may be awarded the bid for more than one group of items, or each group of items may be awarded to a different vendor.

For Example: A CE issues a solicitation which includes the quantities, specifications, and technical requirements for two groups of listed items: Group 1 with 5 bread items and Group 2 with 7 serving items (trays, utensils). After evaluating the offers, the CE awards the contract for the full quantity of the bread items listed in Group 1 to Company A and a contract for the full quantity of serving items listed in Group 2 to Company B.

Multiple Solicitations for One Item or One List to Be Awarded to One or More Vendors

Each solicitation describes the quantity, specifications, and technical requirements for an item or list of items. The most responsible and responsive vendor for each solicitation is awarded the contract. A vendor may be awarded multiple contracts or a single contract.

For Example: A CE issues 3 solicitation documents: (1) list of 12 condiment items which includes the quantity, specifications, and technical requirements for each item; (2) point of service software program with an explanation of specifications and/or
technical requirements and needs; and (3) list of 5 types of milk which includes quantity, specifications, and technical requirements for each milk type. After evaluating each offer, the CE awards a contract for full quantity described in the solicitation to the most responsible and responsive offeror for each solicitation—in this case, 3 separate contracts.

One Solicitation for One Item with a Split Award by Percentage of Total Quantity

The solicitation describes the specifications and/or technical requirements for the item and provides an explanation that there will be multiple awards, with each awardee being given a specific percentage of the total quantity for the item. The vendor has the option to offer a price option for one or more of the percentages of the total quantity. The most responsible and responsive vendor for each percentage for the item is awarded the contract. The number of awarded contracts is based on the percentages described in the solicitation.

For Example: A CE issues a solicitation for beef patties with a description that provides specifications and/or technical requirements and indicates that one award will be for 60% of the total quantity/volume, a second for 20%, and a third for 20%. After evaluating the offers, the CE awards three contracts—one for each percentage described in the solicitation—60% of total quantity/volume to Company A, 20% of total quantity/volume to Company B, and 20% of total quantity/volume to Company C.

Market Basket Method—Issuing a Solicitation for a List of Items from One Vendor

A Market basket strategy allows a CE to procure a list of products with varied pricing options for a finite number of products.

For Example: A CE issues a solicitation asking for an offer for 100 food items, which includes specifications and/or technical requirements and the quantity of each item. After evaluating the offers, the CE awards the contract for the full quantity of each item on the list to one vendor.

Each product on the market basket solicitation list must have (1) a description of each product with the quantity to be purchased, (2) specifications and/or technical requirements for each product, and (3) a description of how each product will be awarded on the contract.

The solicitation must include a description of how the offers will be evaluated. There are two types of cost analysis and scoring for market basket method purchasing that can be used:

1. Total Price Cost Analysis and Evaluation Scoring for All Products—This analysis and scoring evaluation is based on the aggregate total cost or by line item total. This is the preferred method of awarding a contract.
2. Simplified Total Cost Analysis and Evaluation Scoring for a Portion of All Products—This analysis and scoring evaluation is based on a representative sample of all products. In this case, a representative sample must include the following:
   - Aggregate value of at least 75% of the total estimated value of the contract
     and
   - Highest value products from the list of products to be procured.

*Market Basket, Product Specifications*

Each product on the list to be procured, including those products not evaluated in the representative sample for a Simplified Total Cost Analysis and Evaluation Scoring, must have clear and accurate specifications and estimated quantities.

*Market Basket, Adding Products to an Existing Market Basket Contract*

When a CE plans to make purchases beyond the products that are listed on a current market basket contract, these purchases should be made using the appropriate procurement method: micro, small purchase, sealed bid, or competitive proposal.

However, if the CE determines that adding the purchase of a limited number of products to a current market basket contract would be advantageous, the CE may do so if the following conditions are met:

1. **Solicitation and Contract**
   The option to add additional products must be included in the original solicitation and contract as a specific percentage of the estimated value of the contract, as described in the *Market Basket Allocation of Purchases by Percentage of the Estimated Contract Value of the Original Contract Chart* below.

   | Market Basket Allocation of Purchases by Percentage of the Estimated Contract Value of the Original Contract Chart |
   |---------------------------------|-----------------------------------------------------------------------------------------------------------------|
   | Items Listed in Solicitation and Contract => At Least 90% of Total Estimated Value Original Contract |
   | Items Added to Original Contract List => Up to 10% of Total Estimated Value of Original Contract |
   | Items Listed in Solicitation and Contract + Items Added to Original Contract List = 100% of Total Estimated Value of Original Contract |
2. Value of Added Products Exceeds Percentage Specified in Solicitation and Contract
   On an existing market basket contract, the purchase of any additional products that exceed the percentage specified in the solicitation and contract is an unallowable cost. If the value for the added products exceeds the percentage specified in the solicitation and contract, a separate procurement for those products must be conducted.

3. Contract Renewal
   The option to renew a market basket contract must be indicated in the original solicitation and contract.
   - The original solicitation and contract’s specified percentages for listed and added products apply to all renewal contracts.
   - Instead of using the contract’s estimated total value for renewal years, the percentages are applied to the contract’s actual total cost for the previously completed contract year.

   For Example: A CE estimated the total cost for the contract to be $95,000. During the first year of the contract, the CE applied 95% of the estimated contract cost to purchase items on the list included in the solicitation and contract. Therefore, the CE was able to use $4,750 for added products.

   At the end of Year 1, the total contract cost was $94,775. The CE chose to exercise the renewal option for a second year. Therefore, the CE was able to use $4,738.75 for added products in the second year.

**Market Basket, Simplified Total Cost Analysis and Evaluation Scoring**

This method of analysis is appropriate when purchasing a list of products. It is not appropriate for equipment or service contracts.

For USDA Foods, a market basket analysis method may be used for Net-Off-Invoice (NOI) value pass-through contracts and must not be used for fee-for-service processing contracts.6

CEs that use the market basket simplified total cost analysis and evaluation scoring method must include the following information in the solicitation: a statement that indicates (1) that the CE will use a simplified total cost analysis and (2) how the CE will apply the simplified total cost analysis and evaluation scoring.

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95 The percentage allocated for added products in the solicitation and contract cannot exceed 10% of the total estimated value of the contract.

96 See Administrator’s Reference Manual (ARM), Section 21, USDA Foods for additional information on these types of contracts.
Special Situations, Guidance Related to the Solicitation
The following guidance will provide additional clarification:

Approved Brands
CEs may specify a list of approved brands as part of a product description in addition to the specifications and technical requirements in order to demonstrate what types of products are acceptable.\(^{97}\) In these cases, the CE must include the phrase or equal after each approved brand item and indicate that any product that meets the same specification and technical requirement is acceptable.

Bread Specifications
If a bread item has a standard of identity, it is still necessary to specify the whole grain profile. The U.S. Food and Drug Administration (FDA) has standards of identity for non-enriched bread products as well as the whole grain-rich and enriched products.

Contracting with Persons and Companies for Assistance in Developing a Solicitation
When acquiring goods and services, contracting entities (CEs) may contract with persons and companies to provide technical information that the CE may use in drafting procurement specifications and/or technical requirements. This provision is intended to encourage program administrators to obtain information from as many sources as possible to assist them in drafting procurement documents.

However, if a person or company provides technical information to assist a CE in drafting procurement documents, the person or company is prohibited from submitting an offer, as described in the Potential Offerors or Interested Parties Involved in Developing a Solicitation subtopic in the Written Procurement subsection in this section.

Contract Documentation for Food Products
The CE must include a statement about the required documentation that demonstrates that food products, including commercially prepared products, meet the meal pattern or competitive food standards.\(^{98}\) CEs should be consistent in the information requested by potential contractors. Any processed food product that does not have a yield listed in the Food Buying Guide for School

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\(^{97}\) Many CEs 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 with the CE.

\(^{98}\) See the Administrator’s Reference Manual, Section 8, Breakfast; Section 9, Lunch; Section 10, Afterschool Meal Programs; Section 20, Competitive Food Nutrition Standards; and Section 24, Child Nutrition (CN) Labeling and Product Documentation for additional information on required food component contribution and competitive foods.
Nutrition Programs\textsuperscript{99} needs to either have (1) a CN label; (2) a signed and dated product formulation statement; or (3) depending on the product type and intended use, nutrition fact labels. The documentation must identify the contribution of the food product toward meeting the meal pattern requirements or the nutritional values required for the competitive food standards. A USDA Foods Fact Sheet may also be used for processed end products made from USDA Foods.

Flexibility for Growth

CEs may include the possibility of an increased number of products and/or services as long as the increase is reasonable and is clearly outlined in the solicitation. Commonly, this type of option is used (1) to communicate anticipated growth in student population and participation at a specified site or sites or (2) to add another Child Nutrition Program (CNP) at all sites or specified sites.

For enrollment changes to be reasonable, an increase based on student enrollment should correlate to the normal increase in enrollment for the CE and for the specified sites. For the addition of new programs to be reasonable, the solicitation must include the program name, anticipated sites, anticipated student participation, and anticipated date of implementation, which support the possibility of growth.

If the increase included in the solicitation is not reasonable, it is not allowable flexibility for an awarded contract. If the CE does not provide information on the possible program growth in the solicitation, it is not allowable flexibility for an awarded contract.

Generic Terminology

When writing a specification or technical requirement for a product without specifying a brand name, use a generic name or standard of identification that is usually listed under the trade name. A brief description of the product may also be included.

For Example: Generic names of breakfast cereals include the following:
- Toasted oat cereal, donut-shaped
- Puffed wheat cereal, sugarcoated
- Cornflakes, sugarcoated
- Shredded wheat biscuits, small, sugarcoated

\textsuperscript{99} Available at www.fns.usda.gov/tn/food-buying-guide-school-meal-programs
Grade Specifications and/or Technical Requirements
By including grade specifications and/or technical requirements in the solicitation, the CE lets the offeror know that the products must meet or exceed the USDA grading requirements. USDA, Agricultural Marketing Service (AMS) has developed the Understanding Food Qualities Labels tip sheet to assist consumers in understanding the grade specifications and/or technical requirements. When the grade specifications and/or technical requirements are omitted, the offer may be made using undesirable products. If a potential contractor offers an item that is only supplier grade, it is a nonresponsive or overly responsive bid.

Minimum Drained Weight—Canned Fruits and Vegetables
It is necessary to specify minimum drained weights in specifications and/or technical requirements for canned fruits and vegetables in solicitations. This ensures the minimum acceptable amount of product per can.

Potential Offerors or Interested Parties Involved in Developing a Solicitation
A potential contractor or another interested party cannot participate in the procurement of items or services by assisting with or drafting the procurement specifications and/or technical requirements, procedures, or documents.

For Example: If a food service management company (FSMC) provides a cycle menu to be included in a solicitation, the FSMC cannot submit an offer for the contract.

If a potential consultant contractor writes a job description for the scope of work to be included in the solicitation, the consultant cannot submit an offer for the contract.

Procuring Fresh Fruit and Vegetables
While CEs are encouraged to take advantage of economies of scale in order to get the best pricing, long-term contracts for fresh fruit and vegetables are not always available. In these cases, the CE needs to establish a purchasing schedule in its written procurement procedures that allows the CE to get the most cost-effective pricing.

A fresh fruit and vegetable procurement schedule includes, but is not limited to, frequency of procurements and what products to purchase in each season.

[NOTE: A schedule of purchases not only helps the CE obtain a competitive price, but it will also assist menu planners.]

Each time the CE purchases fresh fruit and vegetables, it must be procured correctly. The CE may use any type of procurement method or contract allowed for child nutrition programs.

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100 Available at www.ams.usda.gov/sites/default/files/media/AMS%20Product%20Label%20Factsheet.pdf
101 Procuring large quantities of a product to get a better price.
Purchasing Catalog

The use of a purchase catalog is allowable if the solicitation for the purchase catalog includes specifications and technical requirements that indicate what will be purchased and quantity to be purchased. However, TDA recommends that CEs seek additional guidance from their education service centers (ESCs) before issuing this type of solicitation. If the solicitation is not done correctly, the purchases may result in unallowable costs.102

Single, Multiple, or Split Contract Awards

The CE may award a single, multiple, or split contracts. However, if the CE plans to award multiple or split contracts, it must describe how this will be done in the solicitation so that offerors are able to give their best prices based on this possibility. This includes an indication of quantity for each award that allows the offeror to provide the best price based on the economy of scale.

For Example: A solicitation states that 40% of a product quantity will be awarded to one company and 60% will be awarded to another. An offeror would then be able to quote a price for 40% and/or 60% of the total contract quantity.

Bonding Requirements

USDA has rescinded its previous guidance that bonds are required for all non-construction contracts in excess of $50,000. Instead, each CE must evaluate the products and/or services to be procured and determine if a bond is needed to safeguard any possible loss of funds.

(NOTE: Many contracts have financial guarantees. These guarantees may serve the same purpose as a bond.)

Since CEs across Texas are in various stages of procuring products and/or services for School Year (SY) 2016-2017, CEs will apply the following guidance for all procurements that have been initiated after May 5, 2016, and before June 1, 2016:

- **FSMC Contacts**—All FSMC contracts for SY 2016-2017, including renewals for the upcoming school year, are either approved or in the process of approval. Because the bonding requirement change is being implemented for future contracts, the SY 2016-2017 FSMC contracts will not be modified to remove bonding requirements.

  For SY 2017-2018, the bonding requirements will be removed from the TDA RFP template. Beginning SY 2017-2018, CEs may also remove the bonding requirement in renewals as long as removing the bonding requirement does not cause a material change. If there is a material change, the contract must be competitively rebid. The CE may also renew the contract with the bonding requirement in place.

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102 An unallowable cost or expense cannot be paid using school nutrition program funds.
For SY 2017-2018, a CE issuing a new FSMC solicitation in SY 2017-2018 (1) may continue to include a bonding requirement as long as the bonding requirement does not limit competition or (2) may choose to issue the solicitation without a bonding requirement.

- **Non-FSMC Contracts, Solicitation Has Been Released, But the Contract Has Not Been Signed**—If the solicitation for SY 2016-2017 has been released and includes a bonding requirement, the CE may (1) complete the procurement process with a bonding requirement included in the solicitation and the resulting contract or (2) rescind or pull the solicitation and reissue the solicitation without the bonding requirements. CEs may want to consider if the bonding requirement prevents competition. If it does limit competition, reissuing the original solicitation without the bonding requirement may result in greater competition.

- **Non-FSMC Contracts, Procured Contract Has Been Signed**—If the CE has procured a contract for SY 2016-2017 which includes a bonding requirement, the CE may (1) allow the contract to continue as written with the bonding requirement or (2) terminate the contract if allowed by the terms and conditions of the contract and competitively rebid the contract without the bonding requirements.

- **All Construction Contracts**—All construction contracts in excess of the simplified purchasing threshold (exceeds $50,000) are required to ensure that the federal financial interest is adequately protected by including the minimum bonding requirements in the solicitation and contract: (1) bid guarantee of 5 percent of the bid price, (2) performance bond of 100 percent of the contract price, and (3) payment bond of 100 percent of the contract price. However, if a CE determines that the federal financial interest is adequately protected without requiring the minimum bonding requirements, as described in 2 CFR 200.326, the CE may request TDA to approve a different minimum security or bonding requirement. TDA will review the request in consultation with USDA.

For all new procurements initiated after June 1, 2016, CEs will use the following guidance:

- **All New Non-Construction Solicitations and Contracts from Here Forward**—If the CE determines a bonding requirement is needed and if the bonding requirement does not prevent competition, the CE may require a bond for the products and/or services being procured. See the FSMC Contracts information bullet topic above for additional guidance related to new FSMC contracts and renewals.

- **All Construction Contracts**—All construction contracts in excess of the simplified purchasing threshold (exceeds $50,000) are required to ensure that the federal financial interest is adequately protected by including the minimum bonding requirements in the solicitation and contract: (1) bid guarantee of 5 percent of the bid price, (2) performance bond of 100 percent of the contract price,
price, and (3) payment bond of 100 percent of the contract price. However, if a CE determines that the federal financial interest is adequately protected without requiring the minimum bonding requirements, as described in 2 CFR 200.326, the CE may request TDA to approve a different minimum security or bonding requirement. TDA will review the request in consultation with USDA.

When Bonds Are Used
If the CE determines a bond is necessary, the bonding requirements may be met through the use of a bid bond, certified check, or other negotiable instrument accompanying an offer as assurance that the offeror will, upon acceptance of the bid, execute such contractual documents as required within the time specified.

The CE must describe the bonding requirements in the solicitation, and the bonding requirements must be included in the final contract.

When a Bid Guarantee (Bid Bond) is Used
The bid guarantee or bid bond is intended to cover the cost of rebidding and/or cost of operating without a contract if an offeror does not execute a contract with the CE after being awarded the contract. The offeror must include a bid guarantee with its offer. The CE will return all guarantees to the unsuccessful offerors when the contract is awarded and to the awarded contract as soon as the contract is signed.

When a Performance Bond Is Used
A performance bond covers the cost of ensuring that the products and/or services are provided as specified by the terms of the contract. If the contractor does not provide the products and/or services, as described in the contract, the performance bond covers the following costs:

1. costs incurred for correcting problems,
2. costs associated with performing the services covered in the contract, and/or
3. cost associated with procuring a new contract.

Once the contract is awarded, the contractor must provide a performance bond for 100 percent of the contract price. This bond secures the fulfillment of all the contractor’s obligations under the contract as part of the contract deliverables.
When a Payment Bond Is Used
A payment bond covers the cost of materials and workers under the subcontract. If the contractor fails to pay the supplier for products and services provided under the subcontract, the bond covers the cost of paying for those products and/or services.

When the contract is awarded, the contractor awarded the contract must provide a payment bond for 100 percent of the contract price, which assures payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract as part of the contract deliverables.

Public Advertising
The solicitation must be publicly advertised with sufficient response time prior to the bid opening date to allow enough time for potential offerors to respond. Typically, a sufficient amount of time is two weeks with notification being made at least twice during that period. However, CEs should check to see if there are public advertising requirements specified by the agency or organization that has regulatory authority (federal, state, or local) over the entity for all purchases. Moreover, in cases where the offer for an IFB or RFP is expected to be complicated or lengthy, CEs should expand the notification period in these cases.

Full and Open Competition
An IFB or sealed bid and an RFP must be publicly advertised in such a way as to ensure that there is full and open competition.103

Highest Possible Circulation
The choice of an advertising publication is expected to ensure that the announcement or notice of the solicitation has the highest possible circulation. Therefore, publicizing a solicitation in a regional newspaper may not be sufficient notification if the circulation of the paper is limited geographically.

For Example: A CE is issuing a solicitation for a maintenance contract for refrigerators located at 20 sites. It is likely there will be enough bidders in the city and surrounding areas to ensure that there are sufficient competitive bids for this contract. In this case, placing a notice in the city/county newspaper with the largest circulation will meet the requirement.

A CE is issuing a solicitation for 7 million single-serve, 5-compartment meal trays delivered in increments of 150,000 over a period of 6 months. After identifying that only 1 possible bidder is located in the county where the CE is located, the CE realizes that it will need to advertise to wider circulation in order to get sufficient competitive bids.

103 See the Full and Open Competition subsection in this section for additional information on this topic.
Therefore, the CE places its solicitation notice in the city paper with the largest circulation and in a larger newspaper with a circulation that includes 2 other large cities. In addition, the CE posts a notice in an online state-wide bid notice system. Placing a notice in the two newspapers and the online system will meet the requirement.

In addition to print publication, CEs should consider the value of using an online publication of solicitation documents to reach wider audiences.104

[NOTE: Under Texas law, public schools and charter schools are allowed to provide public notice for a procurement solicitation in the largest circulation newspaper in the county in which the district or charter school is located. This allowance is in conflict with the USDA guidance provided above. For all procurements using the nonprofit school food service account, the CE must use the USDA guidance.]

Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD)

All CEs classified as governmental entities may also post invitations for sealed bids (IFBs) or requests for competitive proposals (RFP) to the Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD).105 This database is widely available to various types of suppliers across the state.

An advertisement of formal solicitations must contain the following information at a minimum:

- Address and telephone number for location where any potential offeror may obtain the solicitation
- Bonding requirements, if applicable106
- Date, time, and location of the opening of offers and awarding of contracts
- Deadline and method for submission
- General category, specification, or technical requirement for the item to be bid
  [NOTE: A CE may choose to put detailed specifications and/or technical requirements on a website or in a separate document that is provided on request instead of including lengthy specifications and/or technical requirements in public advertising. If the CE chooses to take this option, the CE must include the location and method to access the detailed specifications and/or technical requirements in the advertising announcement.]
- Indication of how the contract will be awarded

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104 The Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD) is an example of an online publication method of solicitation.

105 Available at http://www.txsmartbuy.com/.

106 See the Bonding Requirements subsection in this section for additional information on this topic.
• Method and criteria for the evaluation of offers
  [NOTE: A CE may choose to include a summary list of the method and criteria for evaluation in the advertisement instead of the full evaluation rubric. If the CE chooses to take this option, the CE must include the location and method to access the detailed information on the evaluation method and criteria in the advertising announcement.]

• Method of payment
• Name of the CE

Cooperative Purchasing
USDA released updated guidance in the fall of 2016, which supersedes previous guidance on cooperatives that purchase on behalf of CEs. Therefore, CEs that have created written procurement procedures based on earlier guidance must update their procedures to align with the updated guidance.

CEs may join or form cooperative purchasing groups that make purchases on behalf of their members. These cooperatives allow members to obtain better prices through economies of scale.\(^\text{107}\) Cooperatives may be nonprofit or for-profit entities.

Purchases made by the cooperative must be made in accordance with USDA regulations for Child Nutrition Programs (CNPs). If there are any conflicts with other federal or state regulations, the cooperative must apply the USDA regulations since the funds are sourced from a CNP.

In procurement regulations, there are two types of cooperatives: (1) Child Nutrition Program Operator-Only Cooperatives (Operator-Only Cooperatives)\(^\text{108}\) and (2) Third-Party Cooperatives.\(^\text{109}\)

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\(^\text{107}\) By joining together and compiling their total number of purchases, CEs get a better discount based on the increased number of product purchases—an economy of scale.

\(^\text{108}\) Operator in this section means an entity that operates a Child Nutrition Program

\(^\text{109}\) USDA released updated guidance in USDA Memo SP 05-2017, Q&A: Purchasing Goods and Services Using Cooperative Agreements, Agents, and Third-Party Services on October 19, 2016. This memo supersedes USDA Memo SP 35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, etc.
Child Nutrition Program (CNP) Operator-Only Cooperatives (Operator-Only Cooperatives)

Any type of agreement that is formed solely among CNP operators, including a regional education service center (ESC) cooperatives

Establishment of an Operator-Only Cooperative

This type of cooperative does not have to be procured. However, CEs must initiate the creation of these types of cooperatives or, in the case of the Texas ESCs, be established by state law and regulation to procure on behalf of specific entities—public school districts and charters.

Membership in this type of cooperative cannot be solicited.

Cooperative Agreements

Cooperative members must have a written agreement that includes, but is not limited to, the following topics:

- Costs—fees to be charged for services, invoicing, reconciliation of charges for services provided,
- Roles and responsibilities—including, but not limited to, reporting, ordering process, and lead school (if applicable)
- Credits, discounts, and rebates
- Membership—new members, canceling membership

[NOTE: If the agreement includes an option for new members, the possible increase in quantity for orders may be a material change to the awarded contract unless the solicitation and contract include a description of the anticipated increase in quantity based on a reasonable anticipation of growth.]

Fees for an Operator-Only Cooperative

Operator-only cooperative membership may include a fixed fee to cover the overhead or administrative costs as specified in the cooperative agreement.

Agents Procured by Operator-Only Cooperative

Members of operator-only cooperatives may procure an agent to manage the cooperative’s services or to procure on behalf of the cooperative members. Members may pay a fee to a third-party agent for these services. The fee must be established in the solicitation and contract.

When Membership Fees Are Used: If the fee is prepaid, and the cost of services provided by the agent is less than the fee, the remaining fees must be returned to the members. The agent must provide members with documentation demonstrating the use of fees and the payment of any remaining fees to the members. Each cooperative
member is responsibility for ensuring that it receives credit for the remaining amount. Each cooperative is also responsible for retaining documentation that demonstrates the CE has been credited properly for remaining amounts.

When Transaction or Vendor Fees Are Used: An agent procured by an operator-only cooperative may also be paid through the use of transaction or vendor fees. Credits for transaction or vendor fees are classified as income to the SNP and must be credited to the CE’s nonprofit school food service account.

However, a cooperative membership agreement may allow the agent to deduct the cost of services from the fees and pay any remaining amount to members on a regular basis. Each cooperative member is responsibility for ensuring that it receives credit for the remaining amount. Each cooperative must retain documentation that demonstrates that the remaining amounts are paid to the CE.

Unanticipated Profits
Operator-only cooperatives are intended to help CEs make purchases that result in the most cost-effective use of federal funds. Therefore, regulations include a requirement that unanticipated profits from cooperatives be returned to the CE.

For-Profit Cooperatives

When Membership Fees Are Used: At the end of the contract year, the cooperative must return all profit in excess of the profit margin, as described in the contract to the participating CEs. If there is a membership fee, the contractor must distribute to the members any funds received over the profit margin, as described in the contract to the members. Each cooperative member is responsibility for ensuring that it receives credit for the remaining amount. Each cooperative is also responsible for retaining documentation that demonstrates the CE has been credited properly for remaining amounts.

When Transaction or Vendor Fees Are Used: A cooperative may also use transaction or vendor fees to cover the cost of cooperative services. Credits for transaction or vendor fees are classified as income to the SNP and must be credited to the CE’s nonprofit school food service account.

However, a cooperative membership agreement may allow the cooperative to deduct the cost of services from the fees and pay any

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TDA recommends that procured agents communicate this information and make payments on remaining amounts on a quarterly basis.
remaining amount to members on a regular basis. Each cooperative member is responsible for ensuring that it receives credit for the remaining amount. Each cooperative member must retain documentation that demonstrates that the remaining amounts are paid to the CE.

**Nonprofit Cooperatives**

*When Membership Fees Are Used:* At the end of the contract year, if there is a membership fee or charge for services provided, nonprofit cooperatives must return all funds in excess of the cost of operating the cooperative to the CEs participating in the cooperative, as described in the cooperative agreement. Each cooperative member is responsibility for ensuring that it receives credit for the remaining amount. Each cooperative is also responsible for retaining documentation that demonstrates the CE has been credited properly for remaining amounts.

*When Transaction or Vendor Fees Are Used:* A cooperative may also use transaction or vendor fees to cover the cost of cooperative services. Credits for transaction or vendor fees are classified as income to the SNP and must be credited to the CE’s nonprofit school food service account.

However, a cooperative membership agreement may allow the cooperative to deduct the cost of services from the fees and pay any remaining amount to members on a regular basis. Each cooperative member is responsible for ensuring that it receives credit for the remaining amount. Each cooperative member must retain documentation that demonstrates that the remaining amounts are paid to the CE.

**Management of an Operator-Only Cooperative**

Each CE is responsible for monitoring the performance of the cooperative even if there is a designated lead school. Written agreements, which delineate the roles and responsibilities for all involved, will help to ensure that proper procurement occurs. However, having an agreement that delineates roles and responsibilities does not release an individual CE from its responsibility for monitoring the performance of the cooperative.

**Procurement by an Operator-Only Cooperative**

All purchases made on behalf of the cooperative members must follow (1) all USDA procurement regulations and (2) State and local procurement requirements if more restrictive as long as these regulations are not in conflict with USDA regulations. While the cooperative is making purchases on behalf of the member CEs, each CE is still

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111 TDA recommends that cooperatives communicate this information and make payments on remaining amounts on a quarterly basis.

112 TDA recommends that cooperatives communicate this information and make payments on remaining amounts on a quarterly basis.
responsible for retaining documentation that these purchases are compliant with all regulations.

**Conflict of Interest, Operator-Only Cooperative**

In procurement, all involved must avoid conflicts of interest that inhibit proper procurement practices.

USDA also prohibits third-party contracts that procure products or services from a third-party’s parent company, subsidiary of the parent company, or other entities with a financial relationship to the third-party. This includes an FSMC purchasing from FSMC-owned or affiliated vendors. These types of situations represent a real or apparent conflict of interest, limit competitive procurement, and result in school nutrition funds to be used to pay for duplicative services.\(^{113}\)

An agent, agent’s parent company, or subsidiary company of the parent company or the agent publishing a solicitation on behalf of a CNP operator (or CNP operator-only cooperative) cannot respond to this solicitation. Responding to this solicitation would constitute an unfair advantage and be in violation of federal procurement requirements.

**Credits, Discounts, Rebates, and USDA Foods Values for Operator-Only Cooperatives**

Operator-Only Cooperatives must provide members with all applicable credits, discounts and rebates and USDA Foods Values. In these cases, the cooperative must provide the CE with documentation that demonstrates compliance.

**Operator-Only Cooperative Contracts with a Third-Party**

If an Operator-Only Cooperative engages a third-party contractor or agent to manage or purchase products and/or services on behalf of the Operator-Only Cooperative, the third-party must be procured in a manner consistent with all USDA regulations and guidance.

- Any added purchases or services provided by a third-party that are not procured properly may create a material change.\(^{114}\)

- Any products and/or services that are not procured properly may result in unallowable costs.\(^{115}\)

\(^{113}\) See Administrator’s Reference Manual (ARM), Section 17A, Program Integrity for additional information on conflicts of interest.

\(^{114}\) See the Material Change topic located in the Contracts subsection in this section for additional information on this topic.

\(^{115}\) An unallowable cost or expense cannot be paid using school nutrition program funds.
**Price for Operator-Only Cooperatives**

A price based on a cost-plus percentage of cost **is not allowed** for any purchases made on behalf of CEs by an Operator-Only Cooperative. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

**Vendor List for Product Pricing for Operator-Only Cooperatives**

In specific circumstances, an Operator-Only Cooperative may award a bid to a group of approved produce vendors with the intention that each CE will order products and/or services through an on-demand method or request. To be allowable, the solicitation must include specifications and/or technical requirements that establish reasonable total estimated cost and quantities (cost analysis and forecasting) of the products and/or services to be purchased. By describing the total cost and quantities in the solicitation, all potential offerors know what is being solicited and are able to offer CEs the most cost-effective pricing.

When a vendor list is used, the solicitation must also clearly state that a vendor list will be used and must describe the actions a vendor must take to be approved to be on the list. This includes an option for vendors to achieve approval after the solicitation has been released, but before the due date for offers. When CEs use a vendor list, they must ensure that the use of the list does not limit competition.

**Individual CE Purchases through a Third-Party Cooperative**

Even if a CE joins a third-party cooperative, the CE is not required to make all of its purchases through the cooperative—the CE may decide to purchase select products and/or services outside of the cooperative if it is in the best interests of the CE or program as long as the CE has not indicated that the CE will purchase the items through the cooperative.

However, if the CE has agreed to purchase specific products and/or services through the cooperative, the CE **cannot later decide to purchase** these products and/or services from another source until the quantity or amount the CE agreed to purchase through the cooperative is exhausted.
Third-Party Cooperatives

Any type of cooperative agreement that is formed by sources that are external to CEs (i.e., not operator-only cooperatives) which includes the following types of cooperatives:

<table>
<thead>
<tr>
<th>Non-Child Nutrition Program State Agency Procurement Agency Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intergovernmental agreements with the State, which may include public, private, and nonprofit entities, are conducted for State facility needs using State procurement standards. These agreements allow local educational agencies and other Child Nutrition Program (CNP) operators that are governmental entities to purchase from the State’s contracted sources. This type of cooperative includes, but is not limited to, state agency buy boards.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Interagency Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public, private, and nonprofit entities formed for the purpose of procuring goods and services. This includes, but is not limited to, county buying groups and education technology hubs.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Group Purchasing Organizations, Group Buying Organizations, and Third-Party Vendors (Collectively referred to as GPOs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNP and non-CNP operators such as public and private schools, hospitals, universities, law enforcement, public works, etc., who join a third-party company or service provider. A GPO may be a for-profit or a nonprofit entity. Typically, a GPO includes a membership fee for those granted access to the GPO price list of products and services. This type of cooperative includes, but is not limited to, membership buy boards and subscription services.</td>
</tr>
</tbody>
</table>

Establishment of a Third-Party Cooperative

The fee a CE pays to join or participate in a third-party cooperative is typically charged to allow the CE to gain access to a price list of products and/or services. For the CE to use these services, the fee must be properly procured.

Fees for a Third-Party Cooperative

CEs may pay a fee to cover overhead or administrative costs for third-party cooperatives. These fees must be specified in the agreement. These fees do not constitute a competitive procurement. A cost-plus percentage of cost fee is not allowable for any type of fee structure. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

Procurement through a Third-Party Cooperative

When purchases are made through a third-party cooperative, the price must be the primary consideration for awarding a contract or making a purchase. A price based on a cost-plus percentage of cost is not allowed for any purchases made on behalf of CEs by a
third-party cooperative. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

The following guidance must be applied to procurement through third-party cooperatives:

- **Micro-Purchase Method:** If the amount of the purchase is equal to or less than $10,000, the product or service may be procured from a third-party cooperative using a micro-purchase method as long as the micro-purchase requirements, as described in this section, are met. This includes the equitable distribution of purchases.

  A membership fee that is equal to or less than $10,000 may be a micro-purchase. It is the CE’s responsibility to retain documentation that demonstrates the CE’s compliance with the micro-purchase requirements.

- **Small Purchase Method and Formal Procurement Method:** The third-party entity’s procurement practices determine how a CE may use a third-party entity for purchasing.

  - If the CE is a member of a third-party cooperative that follows USDA procurement regulations for small and formal method purchases, as described in this section, the CE may make purchases through the third-party cooperative without additional procurement actions. It is the CE’s responsibility to retain documentation that demonstrates that the third-party cooperative follows USDA procurement regulations for products and/or services procured. The records may include, but are not limited to, the solicitation and contract, advertising documentation, and written procedures.

  - If the third-party cooperative does not follow USDA procurement regulations, as described in this section, the CE may consider the price from the third-party cooperative as one source of pricing for small and formal method purchases (i.e., a bid or an offer). In these cases, the CE must obtain additional competitive offers using a solicitation process as defined by the USDA procurement regulations described in this section.

After obtaining additional offers, the CE will evaluate the price from the third-party entity and the additional offers. Then, the CE will purchase (or award the contract to) the most responsive and responsible offeror with price as the primary consideration. It is the CE’s responsibility to retain documentation that demonstrates the CE’s compliance with the required procurement process.
Individual CE Purchases through a Third-Party Cooperative

Even if a CE joins a cooperative, the CE is not required to make all of its purchases through the cooperative—the CE may decide to purchase select products and/or services outside of the cooperative if it is in the best interests of the CE or program as long as the CE has not indicated that the CE will purchase the items through the cooperative.

However, if the CE has agreed to purchase specific products and/or services through the cooperative, the CE cannot later decide to purchase these products and/or services from another source until the quantity or amount the CE agreed to purchase through the cooperative is exhausted.

Agent Contract

CEs may also procure an agent (also called a third-party vendor) to make purchases on behalf of the CE. An agent is defined as

_A person or business that is procured to act on behalf of the CNP operator to procure products and/or services_

CEs must use the following guidance when they procure an agent to act on their behalf:

Conflict of Interest for an Agent Contract

USDA also prohibits third-party contracts that procure products or services from a third-party’s parent company, subsidiary of the parent company, or other entities with a financial relationship to the third-party. This includes an FSMC purchasing from FSMC-owned or affiliated vendors. These types of situations represent a real or apparent conflict of interest, limit competitive procurement, and result in school nutrition funds to be used to pay for duplicative services.

An agent, agent’s parent company, or subsidiary company of the parent company or the agent publishing a solicitation on behalf of a CNP operator (or CNP operator-only cooperative) cannot respond to this solicitation. Responding to this solicitation would constitute an unfair advantage and be in violation of federal procurement requirements.

Establishing an Agent Contract

An agent must be properly procured following USDA procurement regulations in order for the agent to procure on behalf of the CE. A CE paying a fee does not constitute a solicitation or contract with an agent. Agents cannot be procured if they do not openly provide the full price per purchase unit for their service.

Fees for an Agent Contract

Fees for an agent to procure on behalf of the CE must be fixed and based on purchase unit, volume, or cost.

The fee cannot be a percentage of the cost.
Management of an Agent Contract

The solicitation and contract must require that the agent conduct all competitive procurement methods with the CE’s interests solely in mind. To accomplish this requirement, the procurement agent must take the following actions at a minimum:

- work closely with the CE to understand the CE’s needs;
- develop solicitations on the CE’s behalf consistent with USDA regulations and applicable program regulations as required;
- award contracts only to responsive and responsible contractors whose bid/offer is lowest/most advantageous to the program with price as the primary factor;
- award fixed-price or cost-reimbursable contracts, as specified by the CE, or State agency, as applicable; and
- monitor the resulting contracts on behalf of the CE as required by USDA regulations.

CEs are responsible for monitoring contractor performance to ensure compliance with all contract provisions.

Procurement for an Agent Contract

The agent must apply USDA procurement requirements for all purchases made on behalf of the CE, including State and local procurement requirements if more restrictive as long as these regulations are not in conflict with USDA regulations. The solicitations and contracts for all purchases that the agent procures on behalf of the CE must include a statement that USDA regulations must be followed. It is the CE’s responsibility to retain documentation required to demonstrate compliance with regulations.

- Credits, Discounts, Rebates, and USDA Foods Values: If there are financial transactions that include credits, discounts, or rebates, the agent must provide the CE with the credits, discounts, and rebates. If any transactions conducted by the agent involve USDA Foods values, the agent must ensure that the CE receives these credits. In these cases, the agent must provide the CE with documentation that demonstrates compliance.
- Material Change: Material change requirements apply to a procured agent. Therefore, the solicitation and contract must clearly describe the expected services to be provided by the agent over the course of the contract.
- Pre-Existing Contractual Relationships: Agents may not use pre-existing contractual relationships instead of conducting a competitive procurement on behalf of a CE.
- **Price**: A price based on a cost-plus percentage of cost is not allowed for any purchases made on behalf of the CE by an agent. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

### Consultant Contracts

Consultant contracts are intended to provide short-term or temporary services when a CE lacks the necessary resources, skills, and abilities to manage and operate the program effectively and in compliance with regulations.\(^{116}\) Short-term or temporary services may include a single consultation or a series of consultations over a defined period of time.

*For Example:*

- The kitchen equipment specialist provides suggestions for improving the service line equipment and recommendations for an equipment replacement schedule.
- A registered dietitian provides recommendations related to students with medical accommodations, new recipes, and recommended menu items for unpopular meals.

[NOTE: For small or rural CEs, consultant contracts are also used when budgets and staff limitations do not support a wide range of specialized skills. However, in these cases, a consultant’s contract still cannot include implementing or managing the day-to-day operations of the program.]

If the consultant services include implementing or managing the day-to-day operations\(^{117}\) of the program, a food service management contract should be used instead of a consultant’s contract.

### Franchise Agreements

The services and/or products of a franchise agreement must be properly procured through a competitive process, and the income and costs generated by the agreement must be compliant with financial regulations as well.\(^{118}\) This includes, but is not limited to, the following requirements:

- All equipment purchases with food service funds must be properly procured.
- Franchise agreement restrictions must not create circumstances that cause the CE to be noncompliant with the meal pattern or other program requirements.
- Franchise agreements must have a duration of no more than one year and may include an option for a renewal clause.\(^{119}\)

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\(^{116}\) Before procuring a consultant, a CE should contact its ESC child nutritionist to see if the ESC is able to provide the needed support. See *Administrator’s Reference Manual, Section 22, Food Service Contracts* for additional information on this topic.

\(^{117}\) Day-to-day operations include, but are not limited to, menu planning, inventory management, food production records, and common operational tasks.

\(^{118}\) See the *Administrator’s Reference Manual, Section 14, Financial Information Concerning School Nutrition Funds* for additional information on this topic.

\(^{119}\) A renewal clause cannot be automatic. Non-FSMC contracts may be renewed for an additional year three times.
• Operational practices of the franchise must be in compliance with all applicable local and state health and safety regulations related to the purchase and resell of food under the franchise agreement.

It is the CE’s responsibility to ensure that all terms and conditions of the franchise agreement and operation of a franchise are compliant with all local, state, and/or federal regulations. To ensure that the franchise agreement is compliant with regulations, TDA recommends that the CE consult with its legal counsel before creating a franchise agreement.

**Procurement, USDA Foods Processing**

A CE must competitively procure its USDA Foods processor. Moreover, any entity acting on behalf of the CE must also competitively procure its USDA Foods processor. CEs must take care after they have signed a contract with a processor not to add (piggyback) other purchases and/or services that will create a material change to a contract.\(^\text{120}\)

The CE must also ensure that the USDA Foods values are credited back to the CE by its processor. The processor must provide adequate documentation to demonstrate that the crediting was done correctly. The Food Distribution Program Handbook is available at [www.SquareMeals.org](http://www.SquareMeals.org) for details on USDA Foods. *Administrator’s Reference Manual, Section 21, USDA Foods and Section 21A, USDA Foods Processors* also provide additional guidance.

**Vendor List**

For non-FSMC contracts, a CE may use a vendor list that the CE established when awarding contracts as long as the following criteria are met:

• The CE must have written procedures for how it will use vendor lists.
• The CE must include a statement in the solicitation that the contract may be awarded to an entity on a vendor list.
• The CE must include a description of how a vendor is approved to be on the list. This includes an option for vendors to achieve approval after the solicitation has been released, but before the due date for offers.
• The CE must ensure that the use of a vendor list does not limit competition.

**Awarding the Contract**

The CE must award the contract to the offeror that is most responsible and responsive to the solicitation based on the most cost-effective use of federal funds. CEs must retain documentation demonstrating why the offeror was awarded the contract.

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\(^{120}\) See the [Material Change subtopic in the Contracts subsection in this section for additional information on this topic.](#)
In the evaluation process, the CE must not consider nonresponsive or overly responsive features—the CE must only consider the responsive elements in the bid in its evaluation. A contract that is awarded based on incentives, investments, and/or value-added or overly responsive offers has not been properly procured.

After Offers Are Received

When all offers have been received, the CE must determine if the specifications, technical requirements, terms, and conditions, as described in the solicitation, have limited the number of offerors who were able to submit an offer:

Was there an adequate number of offerors that responded to the solicitation? Was full and open competition restricted?

- If there is not an adequate number of offers submitted, the CE must determine how to address the identified limitations in its solicitation and/or in its method for public advertising and reissue the solicitation.

  [NOTE: An inadequate number of offers do not automatically indicate that the CE should pursue a noncompetitive procurement method. A lack of offers is often caused by a poorly written solicitation or advertising that targets too small of a population base and not a lack of contractors or vendors capable of supplying the products and/or services to be procured. Therefore, the CE must provide notification that the CE is not awarding a contract, review its solicitation, make appropriate changes to the solicitation, and reissue the solicitation.]

- If there are an adequate number of offers submitted, the CE should move to the next step in its procurement procedures.

Evaluation of the Bid and Award of Contract

Responsible Contractors

The CE must only award contracts to responsible contractors who possess the ability to perform successfully under the terms and conditions of a proposed procurement and contract.

When determining if a contractor is responsible, the CE will consider the bidding contractor’s integrity, compliance with public policy, a record of past performance, and financial and technical resources.

121 An overly responsive feature is one that is not requested in the solicitation.

For Example: The CE listed a specification that the POS system automatically generates a letter to households to notify them about a student’s eligibility. A responsive offer would provide information on how the vendor’s system provides notification. An overly responsive offer would provide information on how the vendor’s system provides notification and additional information on how the vendor’s system automatically sends emails to households about a student’s account.

122 See the Noncompetitive Procurement Methods subsection in this section for additional information on this topic.
Responsive Contractors

When a CE is evaluating the documentation submitted by an offeror, the CE must only consider elements that are specifically responsive to the technical requirements presented in the solicitation for offers.

Contractor provided incentives (bonuses, stamps, equipment, or other benefits) that will be received by the CE, the school nutrition program, or enrolled students that may influence the contract award must be treated the same as a gratuity, favor, or anything of monetary value given to a school nutrition program employee, officer, or agent of the CE—these types of incentives may create a conflict of interest.\(^\text{123}\) These kinds of incentives are nonresponsive or overly responsive elements and must not be considered in awarding the contract. See the Written Procurement Procedures, Ethical Standards (Code of Conduct) subsection in this section for more information on this topic.

Cost as Primary Consideration for Awarding the Contract

No matter the type of contract, the cost must be the primary consideration in awarding a contract.

For all contracts, the contract is awarded to the offer that meets all of the terms and conditions described in the solicitation with cost as the primary consideration. Primary consideration means giving the cost criteria the greatest weight among all criteria.

For Example: A CE has five criteria in the solicitation evaluation. The maximum possible points are given according to the following distribution:

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Possible Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost</td>
<td>35</td>
</tr>
<tr>
<td>Financial stability, business practices</td>
<td>5</td>
</tr>
<tr>
<td>Reporting systems</td>
<td>10</td>
</tr>
<tr>
<td>Product specifications and/or technical requirements</td>
<td>30</td>
</tr>
<tr>
<td>Delivery schedule</td>
<td>20</td>
</tr>
</tbody>
</table>

In this case, the cost is the primary consideration—cost is given the highest number of points among all of the criteria.

A CE, or any entity acting on a CE’s behalf, must not make a purchase or award a contract with a cost-plus percentage of cost pricing structure.

\(^\text{123}\) See the Written Procurement Procedures, Ethical Standards (Code of Conduct) subsection in this section and Administrator’s Reference Manual (ARM), Section 17A, Program Integrity for additional information on this topic.
Contract Negotiation Prior to Contract Award

When a solicitation contains qualitative elements, it is common for guidance to use the word negotiate when CE determines which offer will be awarded the contract. In these cases, the word negotiate does not mean that there is a give and take interchange resulting in contract award, i.e., a give and take approach may stifle full and open competition if it creates options that were not addressed in the solicitation. Instead, for this purpose, negotiate means that the CE may seek clarification or additional detail. It does not mean to negotiate equal specifications and/or technical requirements.

As the CE evaluates the offers submitted, it may find that several vendors are responsive to the solicitation but have very different approaches. In this case, the CE may conduct negotiations with the contractors of the top-ranked offers to ask for clarification about the responsive features—the CE may ask each contractor to explain further how it will address specifications and/or technical requirements or to describe further a process or product included in the offer.

For Example: The CE should not say Contractor A is also offering to provide this special service or product: Can you? Instead, the CE might ask a contractor to define further a service the potential contractor will provide.

These negotiations are not intended to give one contractor an advantage over another; they are intended to make sure the CE has a clear understanding of what each contractor is offering. At the end of the negotiation, the CE will award the contract to the most responsible and responsive contractor.

After all offerors have provided clarification, the CE may also ask all or the top offerors to resubmit a best price and final offer.

Awarding a Cost-Reimbursable Contract

A cost-reimbursable contract is effective when there are uncertainties involved in the contract performance affecting price estimates. The contract is awarded to the vendor conforming to all the material terms and conditions of the solicitation and with cost as the primary consideration. A cost-reimbursable contract cannot be awarded using an IFB solicitation; it must be awarded using an RFP solicitation.

Awarding a Firm Fixed-Price Contract

A firm fixed-price contract is most effective when there are clear and detailed specifications and/or technical requirements. The contract is awarded to the vendor conforming to all the material terms and conditions of the solicitation and whose offer or bid includes the best price. A firm fixed-price contract may be awarded using an IFB solicitation or an RFP solicitation.

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124 See the Full and Open Competition subsection in this section for additional information on this topic.
125 When an offeror submits a best price, the offer may be a lower price or the same price.
126 See the Costs as Primary Consideration for Awarding the Contract subsection in this section for additional information on this topic.
Awarding a Noncompetitive Contract (Including Sole Source)
Before a CE can award a contract to a noncompetitive provider, the CE must ensure that the award of the noncompetitive contract is awarded appropriately, as described in the Noncompetitive Procurement Method subsection in this section.

Special Situations, Awarding the Contract
CEs must use the following guidance in awarding a contract:

Awarding a Contract to an Offeror Other Than Lowest Cost Offeror
There are cases where a CE can choose not to award a contract to the offeror with the lowest cost—when the lowest offeror is not the most responsible and responsive.

If the CE chooses to award the contract to a contractor that is not the lowest cost offeror, the CE must have adequate justification and documentation. In these cases, the CE must retain all documentation related to that justification.

[NOTE: Documentation about previous problems with an offeror includes, but is not limited to, notes or examples of prior practices by the offeror, letters sent to or received from the offeror, and phone call notes.]

Common reasons for not awarding the contract to the lowest offeror may include the following:
- The offer is not responsive to the specifications and/or technical requirements.
- The offeror is not responsible, i.e., contractor’s integrity as documented by a record of past performance or references indicates a poor record of meeting expectations.
- The financial and technical resources of the contractor are not adequate to demonstrate the contractor is responsible.
- There is evidence of the contractor’s noncompliance with public policy.

Awarding the Contract to Multiple Contractors or Splitting the Contract
The CE may award the contract to multiple contractors or split the contract as long as the CE has provided notice of this possibility in the solicitation, and the award is made as it is described in the solicitation.

Awarding a Contract That Includes Consultant Contracts, Expenses
If a consultant contract or agreement includes reimbursement for specific types of expenses, such as travel, these expenses must be described and specified by amounts and by type in the offer in order for the offer to be responsive.
If a consultant’s offer is written so that expenses (including travel) do not have an allocated amount in the offer for this purpose, the payment of the expenses is an unallowable expense to the school nutrition program.

The CE may allow the offeror to provide an estimate of expenses, but the estimate must be a realistic expectation of the costs based on the specifications and technical requirements provided in the solicitation.

If the scope of work changes and necessitates an increase in the consultant’s expenses, additional expenses may constitute a material change that may result in a rebid of the contract.

Awarding a Market Basket Contract
CE must apply the following guidance for market basket contracts:

**Contract Award for Market Basket Contracts**
- In all cases, (1) the contract must be awarded to the most responsive and responsible offeror; (2) price must be the primary evaluation factor; and (3) contracts must be awarded to the lowest offer or the offer that is most advantageous to the program.

**Awarding a Market Contract Evaluation**
A CE may use a Total Price Cost Analysis and Evaluation Scoring for All Products or a Simplified Total Cost Analysis and Evaluation Scoring for a Portion of All Products as described in Market Basket Method — Issuing a Solicitation for a List of Items from One Vendor subsection in this section. The method for evaluation and analysis for awarding the contract must be the same as described in the solicitation for the contract.

**Pricing for All Products for Market Basket Contracts**
Even though the CE may base the decision for the award on the cost analysis and scoring of a representative sample from the market basket list, the CE must obtain prices for all products on the list to be purchased for the contract.

If the pricing for the representative sample is used to award the contract, the prices for the products not included in the representative sample must be reasonable\(^\text{127}\) and comparable to market prices for the same products in the geographic area for the quantities purchased.

\(^{127}\) See Administrator’s Reference Manual (ARM), Section 14, Financial Information Concerning School Nutrition Funds for additional information on reasonable cost.
products to win the contract and raising the prices for the nonrepresentative sample products to make up the difference.

No Offers Received
If a CE releases a solicitation and no offers are returned, the CE should first determine if there is a problem with the solicitation. If there are problems with the solicitation, the CE must restart the procurement process and address all limitations.

The following questions will assist the CE in determining what steps to take to address:
- Was the notice (or solicitation) sent to all potential offerors?
- Was sufficient time allowed for potential offerors to respond?
- Were specifications and/or technical requirements unduly restrictive, so offerors were not able to bid?
- Were unrealistic procurement or delivery schedules included or requested?

Nonresponsive or Overly Responsive Offers
If an offeror does not submit an offer that is responsive to the specifications and/or technical requirements described in the solicitation, the offer is considered nonresponsive or overly responsive.

Any extra products and/or services not described in the solicitation that are included in the offer are nonresponsive or overly responsive elements. The CE cannot consider the nonresponsive or overly responsive elements in awarding the contract. Extra products and/or services include, but are not limited to, the following:
- Additional equipment
- Prizes
- Stamps that can be used to obtain another item or service
- Scholarships

A nonresponsive or overly responsive offer cannot be awarded the contract.

If one contractor offers a product and/or service that is equal to another contractor’s product and/or service but has additional special features beyond the specifications and/or technical requirements in the solicitation, the CE must be able to document why those additional special features are required, not just preferred.

Offers Received After the Due Date
The CE should address how it will handle offers received after the due date in its written procurement procedures and indicate that it will not accept offers after
the due date in the solicitation. The CE is not required to open offers received after the due date. To provide an accurate record, the CE may record the names of offerors and date of receipt in a log in case there is a protest.

Opening Offers Prior to the Due Date

A CE may open offers before the due date to check for minor problems (i.e., missing date, signature without printed or typed name). This check for minor problems cannot be used to change the offer—it can only be used to provide notice to the offeror and allow the offeror to correct minor errors.

However, to ensure that the procurement process is fair and open, the CE should open and check all received offers before the due date has passed and send a notice to every offeror at the same time with the same revision deadline to submit a correction before the due date (i.e., 24 hours).

Request for Best Price

The CE may ask the top offeror(s), as determined by the rubric/scale evaluation, to resubmit the best possible price before awarding the contract. If the CE chooses to make this request, the CE cannot change the specifications and/or technical requirements provided in the solicitation or change its rubric/scale used for evaluating offers. The offeror is also not required to change its price offer. While the request for the best price allows the CE to see if it is possible to obtain a more competitive price, it is not intended to be a give and take negotiation.

Request for Clarification

If the CE determines that an offeror is the most responsible and responsive as demonstrated by the score on the rubric or scale used to evaluate offers or the price, but the offeror does not fully respond to one of the specifications and/or technical requirements, the CE can request additional information to determine if the offeror can meet the specification and/or technical requirement as long as the CE does not provide additional information other than what was on the original solicitation document.

Based on the clarification provided by the offeror, the CE may award the contract or ask for a rebid. Asking for a rebid is often the best action, particularly, when the clarification provided by the offeror demonstrates the specifications and/or technical requirements in the solicitation were not clear.

Contracts

Once an offeror has been awarded a contract, the CE ensures that the resulting contract reflects the specifications and/or technical requirements laid out in the solicitation. A contract is

* a formal, legally enforceable agreement (terms and conditions) between a buyer (the CE) and a seller (contractor) that clearly and accurately describes the products and/or services
to be delivered or performed and sets forth the method and the compensations the contractor receives when products and/or services are provided.

A CE must ensure that all contracts are the result of proper procurement procedures. All contracts, no matter the procurement method, must be awarded to a responsible and responsive offeror whose offer is the most advantageous to the program. For a fixed-price contract, the bid is awarded to the most responsible and responsive offeror with the best price. Third-party entities that procure on behalf of the CE are required to follow this same guidance.

Small Purchase Contract
While a CE using a small purchase method may not have developed a solicitation that is comparable to one developed for an IFB or RFP, the CE must document activities and procedures related to the following:

- Method or strategies used to obtain offers
- Product and/or service specifications and/or technical requirements communicated to potential offerors
- Cost quotes submitted by offerors

It is the responsibility of the CE to ensure that the contract requirements mirror those found in the solicitation and that all of the terms of the contract are being met. Any costs arising from a contract that was improperly procured are unallowable to the school nutrition program.

Elements of a Contract
The following elements, at a minimum, should be included in a contract.

General Contract Requirements
- Contract duration
- Identification of the parties in the contract
- Required compliance certifications
- Type of contract (i.e., fixed price or cost-reimbursable with fixed fee)

Contract Management
- Contract renewal options, including terms, conditions, and (as applicable) provisions for price changes
  
  [NOTE: Non-FSMC contracts may be renewed for an additional one year three times. After the third renewal, the contract must be rebid.]
- Contract termination rights for cause and convenience

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128 In cases where third-party entities have the capability to provide additional products and/or services, but these products and/or services were not part of the original solicitation, purchasing these products and/or services without proper procurement may result in unallowable cost. An unallowable cost or expense cannot be paid using school nutrition program funds.
– Contractor recordkeeping requirements
– Default and breach of contract provisions, remedies, cancellation procedures, and penalties

For Contracts in Excess of $10,000
  • Termination for cause and for convenience clause with an explanation of when the clause applies and the basis for settlement

For Contracts That Exceed the Simplified Acquisition Threshold
  • Administrative, contractual, or legal remedies in instances where contractors violate breach of contract terms which includes sanctions and penalties as appropriate
  
  [NOTE: The most restrictive simplified acquisition threshold local or state that applies. See the Procurement Purchasing Methods subsection in this section for additional information on the simplified acquisition threshold.]

– Procedures for contract modification

Invoicing and Payments
– Method for tracking costs to ensure that the CE receives discounts, rebates, credits; USDA Foods values; and other applicable credits
  
  [NOTE: CEs may include a requirement for a routine auditing procedure as defined in the solicitation.]
– Method to ensure that an adjustment or escalation clause is applied both upward and downward in alignment with the index at the frequency, as described in the solicitation
– Procedures for issuing payments, including sufficient information included on invoices to determine if costs are allowable
– Ownership of any equipment or software purchased by the contractor on the CE’s behalf or for the contract
– Procedures for contract modification
– Required compliance certifications
– Sanctions for noncompliance

Other Requirements
– Laws and regulations that govern the contract, including the provisions described in the Other Regulatory Contract Requirements for Solicitations and Contracts subsection of this section.

Products and/or Services to Be Provided
– Product specifications and/or technical requirements
– Professional certification requirements or minimum levels for required experience or education

129 See Administrator’s Reference Manual, Section 25, Professional Standards for more information on requirements for continuing education/training and hiring for school nutrition program staff.
Sanitation and licensing requirements

Scope of work (i.e., a detailed description of duties to be performed, hours of work, performance descriptions, levels of performance, and required outcomes)

Viable IFB (Sealed) Bid Requirements
For a sealed bid to be awarded a contract—viable, the following conditions must be met.

- A firm fixed-price contract award will be made in writing to the lowest responsible and responsive offeror. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs must 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 triggered.
- All offers must be publicly opened at the time and place prescribed in the invitation for bids (IFB) solicitation.
- Any or all offers may be rejected if there is a sound documented reason.
- If the IFB required a separate presentation of a bid bond, coversheet, or attachment for the offerors to use to demonstrate compliance with the IFB’s responsiveness criteria, these documents may be pre-screened to determine if the bid is responsive.
- Two or more responsible offerors are willing and able to compete effectively for the business.

Dispute Resolution
A well-written contract provides a method to resolve any disputes whether the dispute is caused by poor communication or results from a possible breach of the contract. The written contract should include clauses, which make the resolution of problems, including litigation, mediation, or arbitration, feasible and economically viable. CEs may want to consult with an attorney on the appropriate contract statement necessary to address dispute resolution.

For Example: When an attorney fee clause which stipulates that the loser pays the prevailing attorney’s fees is added to a contract, it makes litigation financially possible, and it serves as a motivator for all parties to adhere to the contract because there is a cost for breach of contract other than losing the contract.

Duration of Contract
For the school nutrition program, the duration for all contracts may be less than one year but must not be longer than one school year with an option to renew. It is common for CEs or contractors to say that they have a multi-year contract; however, the school nutrition program does not allow contracts for a term of more than one year.
There is an option to renew for three additional contract periods. Non-FSMC contracts may be renewed for an additional year three times. FSMC contracts may be renewed for an additional year four times. If there is a material change, the contract must be rebid.

Once a CE has a signed contract, the CE is not free to obtain offers or quotes for the contracted products and/or services from another contractor or to purchase the same products and/or services from another contractor unless one the following circumstances occur:

- The specified quantity of product as written into the contract has been purchased.
- The amount to be purchased is in addition to the quantity of the products and/or services stipulated in the contract. In this case, the CE is still obligated to purchase the quantity specified in the contract.

If the situation is appropriate for the CE to purchase from a second contractor, the CE must use the appropriate informal or formal procurement method for the purchase.

When CEs consolidate, current contracts or purchasing agreements are null and void.

Material Change
Material change applies to all procurement contracts. When a CE allows a winning offeror to make changes to contract terms that are materially inconsistent with the original solicitation for the contract, the CE has undermined full and open competition by denying all possible contractors the opportunity to compete under the same terms and conditions.

Anticipated Change
Changes in the terms and conditions of the contract include, but are not limited to, quantity and scope of the products and/or services to be provided. If the CE stipulates expected changes in the solicitation, all potential offerors are able to include that information in their offer—it is a full and open competition and unlikely to be a material change.

The CE must rebid the contract when a change in purchasing products and/or services is inconsistent with the underlying solicitation on which the contract was based—a material change.

Any costs arising from improper procurement are unallowable to the school nutrition program.

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130 See Administrator’s Reference Manual, Section 22, Food Service Contracts for additional information on the duration of a consultant’s contract.
131 See the Material Change subsection in this section for additional information on this topic.
132 See the Full and Open Competition subsection in this section for additional information on this topic.
A material change most often occurs in one of two situations:

- When the solicitation does not mirror the contract.
- When a change is made to a contract that alters the terms and conditions of the contract substantially enough that other potential contractors who responded to the solicitation may have bid differently and more competitively if they had known about the altered terms and conditions.

**Making changes to the contract terms includes** the purchase of products and/or services not included in the contract or within the terms of a contract renewal.

[NOTE: A solicitation that is written to be an open-ended procurement of additional products and/or services is likely to be an inappropriate procurement. When procurement is not done correctly with full and open competition, the cost of the contract and legal defense of the contract are unallowable expenses to the school nutrition program.][133]

**Forecasting is an essential tool** to make sure that a material change does not occur. If a CE anticipates enrollment growth or a reconfiguration of site attendance zones, the CE should consider adding the anticipated changes to the solicitation and contract. However, even if the solicitation and contract include flexibilities based on anticipated growth or reconfigurations, the CE must still evaluate the impact of growth or reconfiguration to determine if a material change has occurred. Any increase in the purchase of products and/or services that is not reasonable may be a material change and may require a rebid of the contract.

**Material Change, Cooperative Contracts**

A change—increase or decrease—in cooperative membership may cause a material change. Therefore, Operator-Only Cooperative agreements must clearly describe the expected level of membership for each participant, including, but not limited to, adding members and canceling membership. See the Methods for Issuing Solicitations for an Individual Item or List(s) of Items subsection of this section for additional information on this topic.

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[133] See the Methods for Issuing Solicitations for an Individual Item or List(s) of Items subsection of this section for additional information on this topic.

[134] See the Forecasting subtopic in the Written Procurement Procedures subsection in this section for additional information on this topic.
Material Change, Determination
The CE must consider the following issues when determining if there has been a material change:

*Increase or Decrease to the Cost of the Contract*
If there was an increase or decrease to the cost of the contract, would the increase or decrease in cost have caused offerors to quote the cost of products and/or services differently if the increase or decrease had existed at the time of the solicitation?

*If yes, it is a material change. The CE must rebid the contract.*

*Increase or Decrease in the Products and/or Services*
Would the prospective change materially affect the scope of services, types, and/or volume of the products and/or services in both the solicitation and resulting contract?

*If yes, it is a material change. The CE must rebid the contract.*

*New Products and/or Services*
Are there new products and/or services added to an existing contract?

*If yes, it is a material change. The CE must rebid the contract.*

If there is a material change to the contract and the CE does not rebid the contract, any contractor that responded to the solicitation and did not win may file a protest to the contract award.\textsuperscript{135}

Protest of Contract
An interested party\textsuperscript{136} may protest any of the following situations:

- Solicitation or another request for offers for a contract for the procurement of property or services
- Cancellation of a solicitation or other request
- Award or proposed award of a contract
- Termination of a contract, if the protest alleges that the termination was based on improprieties in the administration of the contract.

\textsuperscript{135} See the *Protests* subsection in this section for additional information on this topic.

\textsuperscript{136} An interested party is defined as *any entity or person who may be affected by a situation, any entity or person who has a real or direct interest in action being proposed or taken.*
CEs and any entity acting on their behalf must have written procurement procedures in place to address and resolve protests or disputes relating to procurements.

- It is the CE’s responsibility to ensure that all protests are resolved.
- The CE and any entity acting on their behalf must follow its written procedures to resolve protests.
- The CE and any entity acting on their behalf must retain all documentation related to protests.
- The CE must notify TDA when a protest is received.137

The USDA Food and Nutrition Service (FNS) will also accept protests related to solicitation from a protestor directly if the following conditions have been met:

- The contract was made in connection with the School Nutrition Program (SNP).
- The protestor has exhausted all administrative remedies with the CE and any entity acting on the CE’s behalf (grantee and subgrantee) before pursuing the protest with FNS.
- Violations of federal law or regulations and the standards of this section exist.138
- Violation of a CE’s or entity acting on CE’s behalf (grantee or subgrantee) protest procedures exists for failure to review a complaint or protest.

Protests received by FNS other than those specified above will be referred to the CE or the entity acting on behalf of the CE (grantee or subgrantee).

Managing the Contract

The CE must have procedures in place to ensure that contractors perform in accordance with the contract or purchase order terms, conditions, specifications, and technical requirements. This includes, but is not limited to, verifying the following:

Cost Adjustment and Escalation

- The index used for an adjustment or escalation clause is applied correctly.
  Cost adjustments include that the index stipulated in the contract is the one used by the contractor for any cost adjustment or escalation as well as the contractor returning funds to the CE if there is a downward adjustment if the index indicates that prices should be lowered. Documentation related to cost adjustments and escalations must be retained.

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137 See the Contract Information for the Texas Department of Agriculture (TDA), Food and Nutrition, which follows the table of contents for information on contracting TDA.

138 Violations of state or local law will be under the jurisdiction of state or local authorities.
Credits, Discounts, and Rebates and USDA Food Values

- Applicable credits, discounts, and rebates are given to the CE. CEs may elect to include an audit clause in their solicitation and contract that is linked to payment. These clauses require the contractor to provide documentation that demonstrates compliance at regular intervals, or the contractor will not receive payment. Documentation related to credits, discounts, and rebates and USDA Food values must be retained. This requirement applies to FSMC cost-reimbursable contracts.

- Applicable USDA Foods values are awarded to the CE.

- A contractor cannot honor the contract terms and conditions related to credits, discounts, and rebates by providing another product (like or unlike) to the CE to cover the rebated value. The CE must receive the credit, discount, or rebate by one of the following methods:
  1. Actual credit or discount amount documented on an invoice or statement.
  2. Rebate payment in cash documented as appropriate.
  3. Applied value documented on an invoice or statement.

Fiscal

- Products and/or services invoiced to the CE are allowable costs, including that the contractor separately identifies the following for each cost submitted for payment:
  1. Cost that is allowable and may be paid from the nonprofit food service account and
  2. Cost that is unallowable and must be paid from sources other than the school nutrition food service account.

- Products and/or services received from the contractor correlate to the contractor’s invoices.

- Products and/or services procured by a third-party entity acting on the CE’s behalf were procured correctly.

- Documentation related to the cost of products and/or services must be retained.

Specified Products, Services, Terms, and Conditions

- Products and/or services provided to the CE are representative of the products and/or services to be delivered, as described in the solicitation and the contract.

- Products and/or services delivered meet the specifications and/or technical requirements, as described in the contract.
- Products and/or services provided are priced as quoted.
- Products and/or services are provided, as described in the terms and conditions of the contract.

Payments for Cost-Reimbursable Contracts
The CE must not make any payment to a contractor for any cost resulting from a cost-reimbursable contract that fails to include the requirements in this section. The CE must not make any payments to the contractor in excess of the contract’s actual, net allowable costs for a cost-reimbursable contract.

Ensuring That Purchases Align to the Solicitation and Contract Specifications and/or Technical Requirements
CEs are expected to honor all contracts, whether those contracts are the result of informal or formal procurement methods. The purchase of an additional product and/or service offered by a vendor that is not included in the solicitation (i.e., added to an existing contract) may constitute a material change and may result in unallowable costs. CEs should exercise caution when purchasing any additional products and/or services from a vendor that is not included in the original solicitation and contract.

In the solicitation, each product and/or service has a description which includes the quantity to be purchased. When the contract is awarded, the CE is obligated to purchase the products and/or services listed on the contract from the contractor. The CE cannot buy these items from another vendor unless the quantity described in the contract has been exhausted, or the contract has been legally terminated. When the quantity is exhausted, or the contract has been legally terminated, the CE must correctly procure the products and/or services through a new solicitation.

Additional Purchases
A CE cannot add products and/or services to a contract unless the increase in products and/or services are named and described in the original solicitation/contract as an anticipated increase based on enrollment projections, school reorganization, or program participation. A general statement that the CE will add up to a specific number or a specific percentage of new products and/or services is not sufficient to allow additional purchases. All purchased items must be procured correctly. This includes new product lines. Adding products and/or services is also called piggybacking.

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139 An unallowable cost or expense cannot be paid using school nutrition program funds.
140 See the Methods for Issuing Solicitations for an Individual Item or List(s) of Items subsection of this section for additional information on this topic.
Response to Poor Contractor Performance
When a contractor fails to deliver products as prescribed in the contract or delivers items that do not meet the specifications and technical requirements of the contract, it is the CE’s responsibility to ensure that the contractor is providing the products and/or services, as described in the contract.

To raise the issue with the contractor, the CE should contact the contractor and tell the contractor specifically how the problem is to be corrected in order to meet the specifications and/or technical requirements for the products and/or services, as described in the contract. When the CE contacts the contractor about problems, the CE must also keep a record of the dates of all phone calls or other contacts with the contractor and what was discussed. This documentation is required for procurement records retention and will also be useful if the contractor does not resolve the problem.

If the problem is not resolved, the CE should provide the contractor written notification of the problem and 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. To preserve documentation, the CE should provide this notification by a method that will date stamp the date sent and date received.

If the contractor makes little or no effort to resolve the problem, the CE should implement the dispute resolution process as defined in its written procurement procedures and included in the solicitation and the contract.

If the cancellation of the contract becomes necessary, the CE may take steps to disqualify the contractor from future bidding as a non-responsible offeror.

Additional Resources

TDA Resources

TDA resources are available on the SquareMeals website, www.SquareMeals.org.

- Approved Purchase List—Form designed to provide a list of products approved to purchase with information that will be helpful to menu planners and staff managing the contract.
- Budget Tool—Form designed to assist the CE in tracking various incomes and costs of the program, including cost analysis for products and/or services.
- Buy American Checklist for Non-Domestic Food Product Purchases—Checklist to assist CEs in determining if a non-domestic product is acceptable.
- **Procurement Snapshot Tool**—Form designed to provide a summary of procurement activities for the program year or fiscal year.
- **Micro-Purchase Log**—Form designed to track purchases made under the micro-purchase method.
- **Informal Small Purchase Log**—Form designed to track offers and offerors for small purchase procurement.

**Institute for Child Nutrition (ICN)**
  
  [NOTE: This resource is not a guidance document, but it does provide useful information.]

**USDA**

**Other Websites**
- Texas Procurement and Support Services (TPASS) (Formerly Texas Building and Procurement Commission), available at [www.window.state.tx.us/procurement/](http://www.window.state.tx.us/procurement/)
- Comptroller of Public Accounts, available at [www.cpa.state.tx.us](http://www.cpa.state.tx.us)
Records Retention

The CE is required to maintain an organized accounting and financial system that includes documentation that demonstrates compliance with program regulations and the history of all procurements. Records retained for procurement must be sufficient to detail the history of procurement for each procured product and/or service, including but not limited to the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. CEs have the option to maintain records on paper or electronically.

These records must be accessible to appropriate CE staff members and federal or state reviewers. TDA may request procurement documentation during both offsite and onsite administrative review processes as well as any additional review specific to procurement.

All documentation or records must be kept on file for a minimum of five years for public and charter schools or three years for private schools, other nonprofit organizations, and residential child care institutions (RCCIs) after the end of the fiscal year to which they pertain.

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<tr>
<th>Information Box 8</th>
<th>Records Retention</th>
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<td>Public and charter schools are required to keep documentation related to school nutrition programs for 5 years.</td>
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</tr>
<tr>
<td>Private schools, other nonprofit organizations, and residential childcare institutions (RCCIs) are required to keep documentation for 3 years.</td>
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Procurement System

The CE has documentation that demonstrates that CE has established internal controls to promote program integrity. This includes, but is not limited to, documentation that illustrates the following:

- Written procurement procedures, including, but not limited to, actions or tasks for cost analysis, selection of procurement method, ethical standards, and other requirements, as described in this section
- Procedures for effective contract management
- Verification of third-party entity compliance with procurement regulations, including the requirements listed in the Buy American, Local Preference, and Other Regulatory Contract Requirement subsections in this section

Solicitation

Documentation that demonstrates that the CE has issued a solicitation that meets the procurement requirements—this includes, but is not limited to, all solicitation documents released as part of the procurement process and documentation that illustrates the following:

- All offers submitted in response to the procurement solicitation
• Cost analysis (price quotes for small purchase procurement)
• Evaluation and ranking criteria for each procured product and/or service, including rubrics, scales, or evaluation tools
• Expectations for the award of credits, discounts, rebates; USDA Foods values; application of adjustment or escalation clauses; and other credits as applicable
• Offeror responsibilities including terms and conditions, the timeline for major events, and other requirements or expectations
• Potential contractor’s questions and method for sharing answers with other potential contractors
• Public advertisement or notification for solicitations
• Specifications and/or technical requirements
• Statements indicating compliance with all required federal regulations, including the Buy American provision

Contract
Documentation that demonstrates that the CE has issued a contract that meets the procurement requirements—this includes, but is not limited to, following:
• Actual contracts resulting from all methods of procurement
• Use of the System for Award Management (SAM)
• Compliance with all applicable requirements—federal, state, and local
• Health and safety certifications, licensing, or regulations as applicable
• Professional standards as applicable
• Records reflecting CE actions to manage and monitor all contracts
• Statements indicating compliance with all required federal regulations, including the Buy American provision
• Renewal contract and renewal contract amendments, including standard and market basket renewal documentation

Special Situations
Documentation related to the following situations:
• Approval to use a sole source procurement or emergency method
• Inability to buy an American product
• Material change, when there is and is not a material change
• Micro-purchase equitable distribution of purchases or reason for an inability to do so
• Noncompetitive method procurements
• Preference given for Small and Minority Firms, Women’s Business Enterprise, Labor Surplus Area Firms, and other federal contract requirements as applicable
• Purchases made through a cooperative
• Purchases made through an agent
• Return of credits, discounts, and rebates as well as USDA Foods values to the CE as applicable to the type of contract (or agreement) including CEs participating in Group Buying Cooperatives; CEs using purchasing agents; and CEs participating in a operator-only cooperative.
• Third-party compliance with procurement regulations

Compliance
TDA may take appropriate fiscal action or terminate the Food and Nutrition (FND) Agreement for any CE that is not in compliance with the procurement requirements. Additionally, TDA will assess compliance with the accounting and financial requirements based on the documentation that the CE has submitted throughout the year as well as documentation submitted for offsite and onsite administrative review processes or other procurement review activities.

The cost for any products and/or services that were procured improperly are unallowable costs to the school nutrition program. This includes any costs that the CE has incurred as a result of intentionally breaking up purchases into smaller amounts to qualify under the micro-purchase threshold or simplified purchase threshold as well as purchases made on behalf of the CE by a third-party.

CEs must make available, upon request of the awarding agency (state or federal), any or all of the documentation described in the Records Retention subsection in this section.

Obligation of the Contracting Entity (CE) to Report Fraud, Bribery, and Gratuity Violations
CE’s must report, in writing to TDA, all violations of federal criminal law—fraud, bribery, or gratuity.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal

141 An unallowable cost or expense cannot be paid using school nutrition program funds.
criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in § 200.338 Remedies for noncompliance, including suspension or debarment. (2 CFR 200.113; 31 U.S.C. 3321).

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
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 [and/or Special Milk 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 no 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/or 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.

Termination of the Permanent Agreement for Financial Fraud or Misuse of Funds. If serious deficiencies, such as fraud or misuse of funds occur, and corrective action is not practical, TDA will amend the FND Agreement to terminate the CE’s participation in the SNP. In this case, TDA may also refer the matter to the appropriate local, state, and/or federal authorities.