



United States  
Department of  
Agriculture

Food and  
Consumer  
Service

# Contracting with Food Service Management Companies

Guidance for School Food Authorities

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June 1995

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## **Introduction**

Under their agreements with a State agency (SA), school food authorities (SFAs) are responsible for operating the school nutrition programs in schools under their jurisdiction. These programs include the National School Lunch Program (NSLP), the School Breakfast Program (SBP), and the Special Milk Program for Children (SMP). To assist in carrying out this responsibility, a SFA may contract with a food service management company (FSMC) to manage the food service operation involving these programs in one or more of its schools.

SFAs must comply with existing Federal, State and local procurement requirements when obtaining the services of a FSMC. The NSLP regulations appear at 7 CFR Part 210, the SBP regulations appear at 7 CFR Part 220 and the SMP regulations appear at 7 CFR Part 215. This guidance presents an overview of the Federal standards for SFAs and SAs. As provided in 7 CFR 210.19(e), SAs may impose additional requirements which meet or exceed the required Federal standards. Additionally, State and local procurement standards take precedence over those suggested practices set forth in this guidance which are not required by Federal regulations. A SFA should contact its SA for guidance before entering into any procurement of FSMC services.

In order to make an informed decision about whether contracting with a FSMC will provide the SFA with the best food service operation available, the SFA should consider a number of issues. These issues include the financial, administrative and operational activities that will be affected by contracting. The SFA should allow sufficient time to identify and analyze these issues and to prepare for conversion from operating the food service to using a FSMC. Ideally, this process should start one full year before the FSMC begins operations.

In contracting with a FSMC, the SFA must use procurement procedures and documents that provide adequate safeguards for the SFA, as well as ensure that the FSMC operates the food service in accordance with the objectives of the SFA. The SFA should have a sufficient number of knowledgeable staff to coordinate, monitor, review and control food service operations and to perform the responsibilities that must be retained by the SFA.

The following guidance identifies items that should be considered in deciding whether to use a FSMC, the actions that should be taken once a decision to use a FSMC has been made, and the responsibilities of the SFA after the SFA-FSMC contract becomes operational. This guidance is not all-inclusive. Each SFA and SA will have unique circumstances that should be evaluated.

## Chapter 1

### Responsibilities and Considerations

#### Deciding to Use a FSMC

The following steps should be undertaken when considering the use of a FSMC:

**Analyze Food Service Operation**—conduct an analysis of the current food service operation to determine what method of providing food service best meets the SFA's goals and objectives, i.e.:

- Identify the current cost of operating the food service.
- Determine all cost elements that will be affected by contracting with a FSMC. These could include personnel costs, food costs, other labor costs and contractual obligations that must be met by the SFA regardless of whether a FSMC is used.
- Analyze all non-fiscal aspects of the current food service operation to determine the impact of utilizing a FSMC (e.g., nutrition goals and nutrition education activities).
- Identify the functions that might be contracted, and the pros and cons of contracting each.

**Contact SA/State Distributing Agency**—contact the SA to obtain information on FSMCs operating within the State, the names of SFAs currently using FSMCs, State requirements and technical assistance, if needed.

Contact the State Distributing agency to determine under what situations a FSMC would be subject to the provisions of 7 CFR 250.30, State processing of USDA donated foods. If subject to these provisions, the SFA must ensure that the State Distributing agency has reviewed and approved any processing agreement prior to the delivery of USDA donated foods for processing.

**Contact Other SFAs**—contact other SFAs using FSMCs for technical assistance.

## **SFA Responsibilities**

If the SFA uses a FSMC, the SFA remains responsible for the overall operation of the school nutrition programs. This responsibility requires that the SFA retain and maintain direct involvement in the operation of the food service.

The following SFA responsibilities must not be delegated to a FSMC:

**Preparation of Contract Documents**—prepare all contract documents issued prior to the award of the SFA-FSMC contract. These documents include, but are not limited to, bid specifications, the invitation for bid (IFB), the request for proposal (RFP), and the SFA-FSMC contract, as applicable. Section 210.16(c)(3) specifically addresses the SFA's development of specifications for each food component or menu item and requires these specifications to be included in the IFBs or RFPs. Specifications must cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

**Program Oversight**—ensure that the food service is in conformance with the SFA's agreement with the SA and that responsibility for all contractual agreements entered into in connection with the school nutrition programs remains with the SFA. Resolve program review and audit findings.

**Monitoring**—monitor the food service operation through periodic on-site visits.

**Control the Quality, Extent and Nature of Food Service**—retain control of the quality, extent and general nature of the food service and the prices to be charged to the children for meals. Such control must include retaining control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food services and adult meals, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR Part 210; conveying menu adjustment requirements to the FSMC, and monitoring implementation of those adjustments. Additionally, any refunds received from processors must be paid to the SFA.

**Signature Authority**—retain signature authority on the agreement to participate in the NSLP, the SBP and the SMP, including the SFA's free and reduced price policy statement and the Claim for Reimbursement.

**Free and Reduced Price Meal Process**—determine eligibility for free and reduced price meals and free milk in accordance with 7 CFR Part 245. Such responsibilities include the conduct of any hearings related to such determinations and verification of applications for free and reduced price meals.

**USDA Donated Foods**—ensure that all USDA donated foods received by the SFA and made available to the FSMC accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. Retain title to USDA donated foods.

**Health Certification**—maintain applicable health certification(s) and assure that all State and local regulations are being met by a FSMC preparing or serving meals at a SFA facility.

**Establishment of an Advisory Board**—establish and maintain an advisory board composed of parents, teachers and students to assist in menu planning.

**Development of the 21-Day Cycle Menu**—develop the 21-day cycle menu for the FSMC bid proposal. If the SFA determines and the SA agrees that the SFA is unable to develop a cycle menu, the SA may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu.

FSMC developed cycle menus are appropriate to use only under the competitive negotiation method of procurement. Under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements as well as determine the lowest bid price. In the absence of a uniform menu, the SFA will not have consistent information among offerors upon which to determine responsiveness and lowest bid price, and may expose itself to bid protests unnecessarily. The SFA must approve any changes to the cycle menu after the first 21 days of meal service.

**Internal Controls**—apply the internal control procedures required by 7 CFR 210.8(a) to the preparation of the monthly Claim for Reimbursement.

**Reports**—complete all reports as required by the SA.

**Identify Scope  
of Contract**

Once the decision to hire a FSMC has been made:

**Identify Scope of Work**—determine the general extent or scope of work to be performed by the FSMC, i.e.:

- Identify which Federally reimbursable program(s) or nonprofit food service activities the FSMC will be involved in, e.g., NSLP, SBP, a la carte sales during and/or between meal service periods, after hours snacks under the NSLP or meal/snack service under the Child and Adult Care Food Program/Summer Food Service Program.
- Decide if the operation of any SFA vending machines will be turned over to the FSMC.
- Decide if the FSMC will cater any special activities and/or be involved in any food service activity outside the nonprofit food service.
- Decide if the FSMC will be allowed to subcontract any of the work under the contract. It is strongly recommended that subcontracting not be allowed since it complicates contract monitoring and effectively reduces the SFA's control over the contract. Note: In accordance with 7 CFR Part 250, a FSMC is not permitted to subcontract USDA donated foods for further processing.

**Identify Responsible Personnel**—identify SFA personnel responsible for managing the SFA-FSMC contract and meeting the SFA's responsibilities, including the existing responsibilities that cannot be delegated to the FSMC and the new responsibilities that will occur under the SFA-FSMC contract.

**Select Method of Procurement**—decide which method of procurement to use in accordance with State and local requirements and the SFA's needs.

**Develop Contract Documents**—for competitive sealed bid procurement, the contract document is the IFB which includes specifications and pertinent attachments which clearly define the

items and services. The contract should be issued as part of the IFB. Under competitive negotiation, all non-negotiable components of the contract should also be included in the RFP. In either type of procurement, the contract or contract provisions should be reviewed by the SFA's legal counsel to ensure legal sufficiency as well as to provide the maximum amount of protection possible to the SFA.

SFAs are encouraged to provide specific information about the food service. For example, essential information includes the number of school buildings, meal prices, number of students available for lunch, meal preparation facilities, number of serving days, historical information on quantities/types of USDA donated foods available, Federal/State reimbursement rates, meal service hours, food service and serving methods, number of meal service periods, commodity usage, estimated serving counts, personnel salaries and benefits, total revenues, total operating costs, etc.

FSMC-developed contracts are not allowed under competitive sealed bid procurement since they would compromise open and free competition. While not recommended, a SFA may invite the successful offeror under a RFP to assist in finalizing the contract provisions after the successful offeror has been identified.

Program regulations require SAs to annually review each contract. It is strongly recommended that all contract documents be submitted to and reviewed by the SA prior to the finalization of the contract.

## Chapter 2

### Procurement Methods

Before entering into a procurement action, the SFA must identify which procurement method meets its needs most effectively. The two most frequently used methods of procurement for contracting with a FSMC are:

**Competitive Sealed Bids**—competitive sealed bids uses an IFB.

**Competitive Negotiation**—competitive negotiation uses a RFP.

The two other methods of procurement, Small Purchase and Noncompetitive Negotiation, are limited to specific situations and should not be used unless expressly approved by the SA.

### Open and Free Competition

The underlying foundation of all procurement, without regard to dollar value, is that regardless of the method used, the procurement must be conducted in a manner that provides maximum open and free competition. Procurement procedures must not restrict or eliminate competition. Examples of such restrictions include, but are not limited to:

**Unreasonable Requirements**—placing unreasonable requirements on firms in order for them to qualify to do business, e.g., requiring unnecessary experience and bonding requirements.

**Noncompetitive Practices**—encouraging or fostering noncompetitive practices, e.g., collusion between firms.

**Conflicts of Interest**—allowing conflicts of interest to occur. Conflicts of interest can occur when the individual(s) responsible for determining bid/proposal responsiveness can be overruled by other individuals within the organization or if the individual responsible for determining responsiveness (or any member of his or her family) has any personal or corporate ties or any financial interest in any of the offering firms.

**Inappropriate Practices**—using information prepared by FSMCs in the IFB or RFP; entering into negotiations with a firm prior to

evaluating proposals; negotiating with any bidder at any time when the competitive sealed bid procurement method is used; and providing only certain firms with the results of pre-bid meetings or releasing the contents of a bid proposal to other bidders/proposal offerors.

**Insufficient Time**—not allowing bidders/offerors sufficient submission time when advertising/soliciting the IFB/RFP.

**Geographic Preferences**—awarding geographic/local preferences in contractor selection to an extent that restricts competition.

## **Competitive Sealed Bids**

Competitive sealed bids is the best method to use when the SFA wishes to have a fixed-price (lump sum or unit price) contract.

Factors to consider for using competitive sealed bids are:

**Fixed Scope of Services**—the SFA has identified exactly which services and costs it wishes to contract out to the FSMC.

**Legal Advice Needed**—the SFA should obtain legal advice in the development of a contract for inclusion in the IFB.

**No Negotiation Involved**—the SFA either does not wish or lacks the needed experience to negotiate price and contractual responsibilities with the FSMC.

**Competition Available**—more than one FSMC is willing and able to compete effectively for the contract.

**Fixed-Price Bids Mandated**—the SA mandates fixed-price bids.

**Responsible/Responsive Bidder**—the bid will be awarded to the responsible firm that submits the lowest responsive bid.

The SFA must include sufficient information in the IFB to allow bidders to properly respond to the IFB, thus enabling the SFA to determine **responsiveness**. The SFA must use responsiveness criteria that are measurable. Normally this means establishing minimum levels. The IFB must also indicate how bidders will demonstrate compliance with these criteria. For example, if an IFB requires a copy of the food handler's license, the bidder should provide it as requested. Open-ended criteria cannot be used in IFBs.

In determining whether a responsive bidder is also a **responsible** firm, factors such as contractor integrity and prior working relationships with the firm can be used as well as contractor experience and financial and technical resources.

**Needed Information**—the place and time the bids will be opened and the award made must be included in the invitation as well as any information concerning pre-bid meetings and the need for board approval of the selected bidder. If bid and/or performance bonds will be required, the amount, any requirements concerning the bonding firm, and when the bond(s) must be provided to the SFA must be included in the invitation.

### **Advantages**

The advantages of using competitive sealed bids include:

**Advance Preparation**—the contract is prepared prior to soliciting bids. This generally allows the SFA to more accurately estimate costs and assign staff resources well in advance of the effective date of the contract.

The pre-bid preparation of the contract also permits the SFA to arrange for its legal authorities to review the contract provisions for legal sufficiency without the pressures of negotiation.

Again, because the contract is prepared prior to soliciting bids, the SA review of the contract may be completed prior to announcing the IFB, this allows the SFA to award the contract immediately after the bid opening, pending board approval, if applicable.

**Easier Identification of Revenues and Expenses**—fixed-price contracts more easily permit the SFA to identify anticipated revenues and expenses, as well as the total anticipated cost of the contract.

**No Negotiation Responsibilities**—the SFA is relieved from negotiating both the cost and responsibilities with bidders.

**Simplified Monitoring**—the monitoring of the status of the nonprofit food service account is not difficult. Transactions are restricted to processing billings from and payments to the FSMC; the FSMC does not pass costs on to the SFAs.

## Disadvantages

The disadvantages of using competitive sealed bids are:

**Demands Precise Identification of Needs**—if the bid document does not clearly identify the services requested, the bid prices and the services provided by the FSMC may not be reasonable or responsive to the SFA's needs.

**May Limit Competition**—during periods of rapidly rising prices, prospective bidders may decline to bid on a fixed-price basis or bid overly high. In situations where prices are declining, fixed-price contracts do not allow the SFA to benefit from the decline.

## Competitive Negotiation

Competitive negotiation is effective when the SFA has identified what it expects a FSMC to accomplish, but has not identified how it will be accomplished.

Competitive negotiation is effective only when the SFA will actually negotiate with prospective offerors. The resulting contract may be fixed-price or cost-based reimbursement. Unlike the cost-plus-fixed-fee method, "cost-plus-a-percentage-of-cost" or "cost-plus-a-percentage-of-income" contracting is not permitted.

If cost-reimbursable contracts are used, the RFP should require that the offerors provide a maximum cost, i.e., a cap. Whatever type of contract cost system is used, the SFA must have sufficient information upon which to project the total anticipated cost of the contract.

Factors to consider when using competitive negotiation are:

**Technical Skills Needed**—the SFA must possess the technical skills necessary to evaluate the proposals and negotiate with the offerors. These skills usually include knowledge of procurement and contracting, school food service, and financial management.

**Legal Advice Needed**—while the SFA must prepare a descriptive RFP, the actual contract will not be prepared until after the proposals are evaluated. As a result, the SFA's legal authority should be available to assure that the proposed contractual language reflects the agreement reached between the successful offeror and the SFA.

**Monitoring Costs Required**—under a cost-reimbursable contract, the SFA must independently monitor the costs incurred under the contract for compliance with 7 CFR Part 3015, Subpart T (Appendix A), program regulations and instructions.

**Careful Preparation of Evaluation Criteria**—the criteria that will be used to evaluate the proposals, and their weights, must be carefully prepared and included in the RFP. These criteria must be followed in evaluating the proposals. Negotiations will then be conducted with those offerors who exceed a pre-determined "cut-off" score.

**Requires Inclusion of All Pertinent Information**—the due date for proposal submission must be included in the request as well as any information concerning pre-proposal meetings and the need for board approval of the selected offeror. If a performance bond will be required, the amount, any requirements concerning the bonding firm, and when the bond must be provided to the SFA, must be included in the proposal.

#### **Advantages**

The advantages of using competitive negotiation are:

**Flexibility in Assigning Responsibilities**—based upon the responses received from the offerors, the SFA decides which functions will be performed by the FSMC. SFAs must ensure that the SFA responsibilities specified in Chapter 1 are not delegated to the FSMC.

**SFAs Benefit During Periods of Falling Prices**—RFPs that result in cost-reimbursable contracts allow the SFA to take advantage of price declines during periods of falling prices.

**Greater Flexibility in Selecting FSMC**—the SFA has somewhat more flexibility in selecting a FSMC because the SFA is not limited to selecting the offeror that submits the lowest price bid.

## **Disadvantages**

The disadvantages of using competitive negotiation are:

**Complex Monitoring**—the monitoring of revenue and expenses under the contract will be more complex because:

- The Federal cost principles referenced in 7 CFR Part 3015, Subpart T (Appendix A), apply to cost-type contracts. This means the SFA must review specific items of cost the FSMC charges to the food service account for conformity to these cost principles. The FSMC cannot pass unallowable costs on to the SFA.
- The timing of expenses will affect the status of the food service account. If the FSMC records expenses on the cash basis of accounting and bills the SFA accordingly, it will bill for goods and services at the time they are purchased. Under the accrual basis of accounting, the FSMC would record expenses and bill the SFA when the goods are actually used in the food service operation.

The accrual basis of accounting is the preferred method because it measures the benefits received from the FSMC's purchases. Cash basis billing can distort this measurement. It can generate overstated expenses and an understated account balance at the time of purchase, and the reverse situation at other times. The SFA can correct such distortions only by making adjustment entries. If the FSMC does not use the purchased goods at the same rate from month to month, the SFA must recalculate the adjustment entry each month.

**Unbudgeted Costs During Periods of Rising Prices**—RFPs that result in cost-reimbursable contracts may result in additional costs to the SFA during periods of rising prices.

**Potential Reopening of Negotiations**—under a RFP, the contract is prepared based upon the negotiations. The contract should not be finalized until the SA reviews the document. If deficiencies are noted, it may be necessary for the SFA to reopen negotiations.

**Essential Skill and Experience**—the negotiation process requires that the SFA possess significant skill and experience in negotiating, contracting and financial management. It may be necessary for the

SFA to hire individuals to provide the needed expertise, which can be cost prohibitive. Attempting to negotiate without the needed expertise can result in the SFA entering into a contract that meets regulatory requirements and is fully enforceable, but is detrimental to the SFA.

**Unexpected Responsibilities**—to the extent that the SFA has not identified whether it or the FSMC will perform certain functions, the SFA may incur duties and related costs not planned or budgeted.

## Chapter 3

### Characteristics of a Comprehensive Agreement

<b>Authority</b>	Section 210.16(c) states "Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met." These provisions are expanded upon below to incorporate program policies, pertinent regulatory requirements and guidance. Some of the required provisions are based upon the dollar threshold of the contract. In such cases, the total dollar value of the contract must be considered, e.g., in the case of a cost-reimbursable contract, the total value of the contract must reflect the management fee as well as the direct costs incurred by the FSMC which are billed to the SFA, such as food and labor.
<b>Required vs. Suggested</b>	<p>Every effort has been made to distinguish between required and suggested contract provisions. Provisions typed in shaded boxes are Federal requirements that must appear in the contract documents. Regardless of whether a provision is required to actually appear in the contract documents, SFAs are required to ensure that the food service is operated in accordance with program regulations.</p> <p>SFAs are urged to include additional provisions that supplement those regulatory provisions that must appear in the contract to ensure that the best interest of the SFA is served, provided that such provisions are not inconsistent with program regulations. Such provisions may include, competitive purchasing to obtain the best price and quality of food, extending the required controls of USDA donated foods to purchased food as well, and requiring FSMCs to comply with the intent of Federal procurement and cost principles.</p>
<b>General Provisions</b>	A comprehensive contractual agreement covers a wide range of areas that delineate both the SFA and FSMC responsibilities. A Prototype SFA-FSMC Contract Document Checklist is provided in Appendix B. Such responsibilities include, but are not limited to:

## **Compliance with State and Federal Regulations**

The Code of Federal Regulations (CFR) provides rules that SFAs must observe if they are to participate in the NSLP, the SBP, the SMP, and other meal programs. All contracts should require that the FSMC conduct program operations in accordance with 7 CFR Parts 210, 215, 220, 245, 250 and FCS instructions and policies, as applicable. Incorporation of program regulations provides a common basis for performance by the FSMC.

Contracts must contain language that confirms the SFA's responsibility to ensure that the food service operation is in conformance with the SFA's agreement under the program. (§210.16(a)(2))

The most effective approach would be to require the FSMC to be in conformance with the applicable portions of the SFA's agreement under the program.

Contracts should also contain reference to applicable State regulations, e.g., procurement, health and sanitation requirements.

SFAs may want to consider including an addendum to the SFA-FSMC contract which summarizes Federal and State requirements.

### **Signature Authority**

Contracts must include a provision that reaffirms that the SFA retains signature authority for: the agreement with the SA to participate in the NSLP, SBP and SMP, including the SFA's free and reduced price policy statement; and the monthly Claim for Reimbursement. (§210.16(a)(5))

The contract should ensure that the SFA retains responsibility for all contractual agreements on behalf of the school nutrition programs.

### **Free and Reduced Price Meal Process**

SFAs are not permitted to delegate responsibility for free and reduced price eligibility determinations. Therefore, contracts should not include provisions that diminish the SFA's responsibility for:

- Determination of eligibility for free and reduced price meals and free milk.
- Verification of free and reduced price applications.
- Direction of hearings related to such determinations.

### **USDA Donated Foods**

**All contracts must contain provisions that reaffirm the SFA's responsibility to ensure that all USDA donated foods received by the SFA and made available to the FSMC, including processed donated foods, accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. This provision also applies to any refunds received from processors. Further, all contracts must state clearly that the SFA retains title to USDA donated foods. (§210.16(a)(6))**

Additionally, contract language must not permit FSMCs to enter into subcontracts for further processing of USDA donated foods on behalf of the SFA. Contract language should include a provision that prohibits the use of USDA donated foods for special functions conducted outside of the nonprofit school food service.

Contract provisions that relate both to the receipt and use of USDA donated foods by the FSMC are critical in managing USDA donated foods provided to a FSMC. Therefore, SFA-FSMC contracts should address ordering procedures, proper utilization, storage practices, and inventory control.

Additionally, contracts should specify the method and frequency by which the SFA will be given the full value of USDA donated foods, including processed items. The method would differ depending on the type of contract.

In fixed-price contracts, in order to establish and document the commodity value-pass-through, the contract should specify that the credits or reductions will be indicated on the invoices to the SFA.

For cost-reimbursable contracts, the value of USDA donated foods used should be itemized in the regular monthly billings to the SFA to document savings resulting from commodity usage. In either case, it should be specified that values are to be based on the values at the point the SFA receives the USDA donated foods from the State Distributing agency, and on the USDA commodity file prices pertinent to the time period. The appropriate commodity file is available from the State Distributing agency.

The contract should specify that the FSMC accepts liability for any negligence on its part that results in any loss of, improper use of, or damage to USDA donated foods, since the SFA is ultimately responsible for any loss of USDA donated foods due to negligence. The contract should require the FSMC to maintain accurate and complete records with respect to the receipt, use/disposition, storage and inventory of USDA donated foods.

Failure by the FSMC to maintain records required under the contract must be considered prima facie evidence of improper distribution or loss of USDA donated foods. Under 7 CFR 250.12(b)(3), SFAs have and preserve the right to assert claims against other persons to whom USDA donated foods are delivered for care, handling or distribution. Under 7 CFR 250.12(b)(4), SFAs are required to take action to obtain restitution in connection with claims for improper distribution, use or loss of, or damage to USDA donated foods.

### **Health Certification**

Contract language must include a provision that confirms the SFA's responsibility to maintain all applicable health certifications and to assure that all State and local regulations are being met by a FSMC preparing or serving meals at a SFA facility. Contract language must also require the FSMC to have State or local health certification for any facility outside the school in which it proposes to prepare meals for the duration of the contract. (§210.16(a)(7) and (c)(2))

## Monitoring

Contract language must confirm the SFA's responsibility for monitoring the food service operation through periodic on-site visits to ensure the food service is in conformance with program regulations. (§210.16(a)(3))

This should encompass determining whether the food service operation is in conformance with the SFA's agreement to operate the program in accordance with program regulations. Contract language should also confirm the SFA's responsibility to implement internal controls as required under 7 CFR 210.8(a) and to ensure resolution of program review and audit findings.

The contract must state that records must be made available to the Comptroller General, USDA, the SA, and the SFA, upon request for the purpose of making audit, examination, excerpts and transcriptions. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.h)

## Use of Advisory Board

Contract language must reaffirm that it is the SFA's responsibility to establish and maintain an advisory board made up of parents, teachers, and students to assist in menu planning. (§210.16(a)(8))

If the SFA wishes to have the FSMC work within the advisory board, contract language should identify the specific FSMC responsibilities.

## **Meal Service Provisions**

Contracts should also cover the range of services expected from the FSMC. These services include the types of meals provided by the FSMC and the division of responsibility for the various activities that make up meal services such as food purchasing and storage, preparation, service, management of the SFA's free and reduced price meal tickets, and other related activities.

### **Descriptive Information Regarding Food Service**

SFAs are encouraged to provide specific information about the food service. Refer to Chapter 1, Identify Scope of Contract, for examples.

Such information may be provided in a fact sheet that accompanies the IFB/RFP or in either the IFB or RFP. It would not be necessary to restate in the contract any information that appears in the IFB or RFP, provided that the IFB or RFP is expressly incorporated into the contract.

### **Types of Meals to be Provided**

Contracts should clearly specify what types of meals and other services will be provided (i.e., lunch, breakfast, a la carte and vending machine sales, adult meals and special event meals), the reimbursement category of those meals, and what programs will be offered. Unless the SFA intends to seek separate bids, the bids should cover all other meal programs administered by the SFA, e.g., the Child and Adult Care Food Program, the Summer Food Service Program and vended meals provided to other SFAs.

Contract language must specify that in order to offer a la carte food service, the FSMC must offer free, reduced price and full price reimbursable meals to all eligible children. (§210.16(a))

## **21-Day Cycle Menu**

SFAs must include a 21-day cycle menu developed in accordance with the meal pattern requirements specified in 7 CFR Part 210, in the IFB or the RFP. (§210.16(b)(1))

Under the competitive sealed bid method, the 21-day cycle menu enables the SFA to review each bid for responsiveness to the bid requirements.

The SFA should develop the 21-day cycle menu for the bid/proposal. If the SFA is unable to develop a 21-day cycle menu, the SA may develop the cycle menu on behalf of the SFA.

If the SFA has no capability to prepare a cycle menu, it may, with SA approval, request that a 21-day cycle menu be developed and submitted by each FSMC. However, FSMC-developed cycle menus are appropriate to use only under the competitive negotiation method of procurement since, in the absence of a uniform menu, the SFA will not have consistent information among bidders upon which to determine responsiveness, and lowest bid price and may expose itself to bid protests unnecessarily.

Contract language must also stipulate that the FSMC is required to adhere to the cycle menu for the first 21 days of meal service, with changes thereafter made only with the approval of the SFA. (§210.16(b)(1))

The SFA may want to stipulate that any changes to the cycle menu made after the first 21 days include foods of cost and quality equivalent to those in the cycle menu.

### **Quality, Extent and General Nature of Food Service**

Contract language must assert the SFA's responsibility to retain control of the quality, extent, and general nature of its food service. (§210.16(a)(4))

- Specifications

In addition, the IFB/RFP must ensure that SFAs provide detailed specifications for each food component (meat or meat alternate, milk, bread or bread alternate and vegetable/fruit) or menu item as specified in 7 CFR Part 210. Specifications must cover items such as grade, style, condition, weight, ingredients, formulations and delivery time and, in some cases, purchase units, e.g., 1/2 pints of milk. (§210.16(c)(3))

Contract language should also include other standards, such as: applicability of USDA major ingredient specifications, use of the Child Nutrition Labeling Program, and applicability of USDA standards about the use of texturized vegetable protein fillers and extenders.

SFAs must not use information prepared by FSMCs in the IFB or RFP. For example, open and free competition can not be compromised by providing product specifications on "brand name" products that only one FSMC or its distributor can supply.

- Samples

SFAs may want to consider including a contract provision that mandates that the FSMC holds meal samples for a 48-hour period to ensure that the procedures specified in FCS Instruction 782-2, Food Poisoning Outbreaks, are met.

- Food Testing

Contracts should also address food testing by the SFA, such as testing portion sizes and food temperature.

- Competitive Foods

In accordance with 7 CFR 210.11, SFAs must exert control over the sale of foods sold in competition with school lunch and school breakfast. Included are snacks and beverages sold as part of a la carte meal offering or through vending machines. SFAs may want to address the SFA's position regarding the kinds of foods to be offered, the location of vending machines, the hours of students' access to a la carte and/or vending machines, etc.

SFAs are encouraged to include language which prohibits the sale of foods of minimal nutritional value in the food service area and which fosters the nutritional integrity of the school nutrition programs.

- No Payment

SFAs must include a provision to the effect that no payment is to be made for meals that are spoiled or unwholesome at time of delivery; do not meet detailed specifications as developed by the SFA for each food component or menu item specified in the meal pattern requirements of 7 CFR Part 210; or do not otherwise meet the requirements of the contract. (§210.16(c)(3))

### Activities Supporting Meal Services

Contracts for food services should also contain language about activities that support food services, e.g., food purchasing (for cost-type contracts), menu planning, inventory and storage, and nutrition education, if desired.

- General

Contracts are strengthened by designating the specific range of services for which the FSMC is responsible. These services may include, serving of meals, processing of meal tickets, meal service at special functions, lunch ticket sales, and food delivery to serving sites.

- **Financial**

Cost-reimbursable contracts for food services should also contain language about payment of vendor bills and accounts. A common approach is for the FSMC to assume responsibility for paying these bills and then invoicing the SFA for the costs. This is consistent with a "cost-reimbursable with a fixed-fee" payment structure.

Contract language should specify the requirements for back-up documentation that supports the cost reimbursement portion of the invoice, e.g., supplier invoices for food costs, and time and attendance documentation for labor costs. Additionally, the contract should also specify the management controls and accountability procedures, if the SFA advances money at the start of the school year, and for administrative costs charged by the FSMC.

- **Food Purchasing**

In developing a cost-reimbursable contract, SFAs should incorporate a range of controls over purchasing, including whether the FSMC is permitted to purchase from its own subsidiaries, whether the cost of products is the sole determinant for purchase, and how trade discounts are passed through to the SFA.

If the SFA does the purchasing, clauses that limit the selection of vendors to only FSMC-approved vendors are not permitted. Such clauses have the effect of limiting open and free competition. FSMCs may, however, recommend vendors.

In the case of cost-reimbursable contracts, the SFA should include a provision requiring a FSMC to demonstrate that the prices it is charging the SFA for food, supplies, etc., are reasonable and necessary. Additionally, SFAs should include a provision which requires a FSMC to submit documentation periodically (i.e., monthly) that supports what the SFA was charged for each product purchased or makes such documentation available for inspection by the SFA.

- Food Inventory and Storage

The SFA should also include provisions that specify the particulars of food inventory and storage to identify the responsible party. Responsibility should be clearly delineated to ensure that all needed activities are covered, e.g., who is responsible for food storage and maintenance of inventory and for conducting the initial inventory and the final inventory.

Other considerations for inclusion in the contract are:

- Utilization of USDA donated foods on a first-in first-out basis.
- In cost-reimbursable contracts, whether the FSMC bills the SFA for foods when purchased or when used.
- The method by which inventories of food and supplies are handled at the beginning and end of the contract. For example, if the FSMC bills the SFA for supplies as purchased, rather than as used, the contract should ensure that the FSMC will purchase back unused supplies from the SFA at the conclusion of the contract in order to prevent over-buying.

- Nutrition Education

If the SFA requires the FSMC to take any responsibility for nutrition education and other non-meal services associated with the meal service component of the FSMC operation, the specific responsibilities should be delineated.

- Nondiscrimination

The SFA is always required to ensure that no child is discriminated against on the basis of race, color, national origin, age, sex or disability. Contract language must not diminish the intent of the nondiscrimination provision.

- Free and Reduced Price Policy

FSMCs often implement meal-related portions of the free and reduced price policy, such as distributing tickets, obtaining accurate meal counts and preventing overt identification of free

and reduced price eligible students. Contracts should include language requiring the FSMC to comply with the SFA's free and reduced price meal policies.

## **Financial Provisions**

Contracts between SFAs and FSMCs provide the basis for payments and management of the business relationship. SFA oversight is of particular importance given the range of financial terms and conditions of SFA-FSMC contracts, such as fee structures, cost controls and financial management. The financial provisions discussed below all flow through the nonprofit school food service account.

### **Fee Structures**

Federal program regulations permit two types of payment or fee structures in SFA contracts with FSMCs: a fixed-price or fee, and cost-plus-a-fixed-fee. SFAs must ensure that contract provisions are limited to the permissible fee structures.

Contracts are not permitted to contain a "cost-plus-a-percentage-of-cost" or "cost-plus-a-percentage-of-income" provision. (§210.16(c))

- Fixed-price/fee, which is permissible either under an IFB or RFP, takes the form of a unit charge where the unit may be per meal or per time period, typically a year. For example, the FSMC might charge \$1.50 per meal or \$50,000 per year. In each instance, the fee charged is expected to cover all operating and administrative costs with no additional charges to the SFA.
- A cost-reimbursable contract, which is not permissible under an IFB, permits the FSMC to pass food service operating costs through to the SFA and charge an additional fixed- or flat-fee that covers management and administrative costs.

The fee may be described in different ways, e.g., service fee, management fee, administrative fee, or a combination of any of these. A "cost-plus-fixed-fee" contract may also have multiple fees. There may be a per meal cost and an annual fee. Also one fee might

be called an administrative fee and another a management or service fee; typically, the administrative fee represents overhead costs and the management fee represents the profits.

The contract should have enough detail regarding fee structure to ensure that there is no double billing, i.e., same item(s) included in the management fee and administrative fee. Additionally, the contract should specify the cost documentation requirements.

### **Control of the Nonprofit School Food Service Account**

**Contracts must include a provision that makes it clear that the SFA retains control of the nonprofit school food service account and overall financial responsibility for the nonprofit food service operation. (§210.16(a)(4))**

Under cost-plus-fixed-fee contracts, all revenue, including refund payments for processed end products, and any expenses that are charged to a SFA must flow through the SFA's food service account(s). Revenue can be used only for the SFA's nonprofit school food service program and cannot accrue to the FSMC. FSMC expenses that are not billed to the SFA cannot be recorded as expenses to the food service account.

**In addition, contracts must include a provision that reaffirms that the SFA establishes all prices, including price adjustments, for meals served under the nonprofit school food service account (e.g., pricing for all reimbursable meals, a la carte service and vending machines, and adult meals). (§210.16(a)(4))**

- **A La Carte Conversion (Per Meal Equivalency)**

A component of the overall payment structure is the manner in which a la carte food service is counted and valued in a fee per meal contract. In a fee per meal contract, the FSMC is paid on the basis of the number of meals served. In order for a FSMC to be paid for the a la carte food service, many SFAs convert a la carte food service activity into an equitable number of reimbursable lunches. The conversion of the a la carte activity

into an equitable number of lunches is termed the "per meal equivalency."

Contracts should define a per meal equivalency that fairly relates to the cost of producing the reimbursable lunch. One means of obtaining the per meal equivalency is by dividing the total cost of producing a la carte items sold by the unit cost of producing a reimbursable lunch.

Absent cost data, the SFA may obtain a per meal equivalency by dividing the a la carte revenue by the per meal sum of the Federal and State free reimbursement plus the value of USDA entitlement and bonus donated foods. A la carte revenue should include all sales to adults and a la carte sales to students.

- **Adult Meals**

Adult meal charges must be established in accordance with FCS Instruction 782-5, Pricing of Adult Meals in the National School Lunch and School Breakfast Programs. Under that instruction, "Breakfasts and lunches served to teachers, administrators, custodians and other adults must be priced so that the adult payment in combination with any per-lunch revenues from other sources designated specifically for the support of adult meals (such as State or local fringe benefit or payroll funds, or funding from voluntary agencies) is sufficient to cover the overall cost of the lunch, including the value of any USDA entitlement and bonus donated foods used to prepare the meal. If cost data are not available, the minimum adult payment should reflect the price charged to students paying the school's designated full price, plus the current value of Federal cash and donated food assistance (entitlement and bonus) for full price meals. In nonpricing programs, the adult charge should be at least the amount of reimbursement received for a free lunch under Sections 4 and 11 of the National School Lunch Act, plus the per-meal value of both USDA entitlement and bonus donated foods or, for breakfasts, the rate established for free meals under Section 4 of the Child Nutrition Act, plus the value of bonus commodities."

- **Changes in Prices Charged for Meals**

While contract language that ensures that the SFA retains control over pricing is required, language that provides the SFA some formal means of changing prices is recommended.

- Special Functions

When reviewing cost-type contracts, particular attention should be given to the scope and pricing of special functions, which are conducted outside of the nonprofit school food service. Contract language should include a provision that prohibits the use of USDA donated foods or processed end products containing USDA donated foods for such functions. Separate billings for special functions are preferable to ensure that school food service costs and special function costs are not intermixed, thus preventing double billing.

- Vending Machines

Contracts should include a provision which sets forth the SFA's position on vending machines, if applicable. This provision may include the SFA's position on the ownership of the machines, responsibility for maintenance, control of the revenues they generate, etc.

- Adjustments to Payments

The fee structure prescribed in a contract may require adjustment if actual experience does not conform to the assumptions upon which the original fee structure was based. Such cases may include unanticipated drops in enrollment or lowering of Federal reimbursement rates. Contracts may contain language permitting the SFA and FSMC to examine and renegotiate payment terms. Fee adjustments may not, however, be permitted unless provided for in the IFB or RFP and incorporated into the contract.

Any methods and basis for fee adjustment upon renewal must be addressed in the original contract. SFAs should consider limiting fee increases in some way, e.g., to no more than the percentage of change in the Consumer Price Index for All Urban Consumers.

Contracts that allow a FSMC to renegotiate its flat fee rate when a "guaranteed volume" has not been achieved are discouraged because this may inhibit open and free competition. FSMCs may provide an artificially low bid if it were thought that a guaranteed volume could not be achieved. Actual participation is dictated by

the quality of the meal service over which the FSMC would have direct control.

### **Meal Program Cost Controls**

Cost and reporting controls must exist. Specifying the types of reports required of the FSMC provides a SFA with one important means of monitoring performance.

- **Program Cost Accounting and Reporting**

As appropriate, SFAs should require periodic reports on operations and state whether the contract is to include monthly profit and loss statements or operating cost reports, daily meal counts, and end of year financial statements.

- **Control of Food Service Equipment Purchases**

Food service equipment represents a major capital investment for SFAs. The addition or replacement of equipment by the FSMC without prior approval from the SFA presents a risk to the SFA. Contracts should provide the SFA with final, prior approval authority for the purchase of equipment that would be used in the storage, preparation and delivery of school meals. Contracts should establish an amortization schedule, if appropriate. Whether or not an amortization schedule is used, title to the property must be vested with the SFA when the equipment is placed in service.

Clauses that require the full repayment of unamortized costs incurred by the FSMC when the contract is terminated or not renewed are not permitted. The contract should state that the SFA can retain the property and continue to make payments in accordance with the amortization schedule or return the property to the FSMC in full release of the unpaid balance. Payment of interest on borrowing, however represented, is an unallowable cost under OMB Circular No. A-87, Cost Principles for State and Local Governments.

- Performance Security

A performance security, or bond, is a method available to a SFA to obtain financial recourse in the event that the FSMC fails to perform in a satisfactory manner or defaults on its duties and responsibilities. The performance security would be specified as a flat amount or as a percent of the estimated value of service.

A performance security or bond must be from a surety company listed in the most recent U.S. Department of Treasury Circular 570. SFAs, however, are reminded that OMB Circular No. A-102 considers unnecessary experience and bonding requirements to be restrictive of competition. For example, a \$10 million bond would be unnecessary for a \$1 million contract.

### **Operating Cost Guarantees and Recovery**

- Guarantees

Contracts for food services may also contain language by which the FSMC guarantees to meet fiscal goals specified by the SFA. Any guaranteed return promised by the FSMC must remain in the nonprofit food service account. If the contract contains such guarantees, the contract should also contain language that ensures that the FSMC bears responsibility for failure to meet those goals. "Returns" cannot be contingent upon multi-year contract duration.

- Loss Recovery

Contracts are the appropriate place to address liability for losses. Contracts usually address FSMC liability in one of two ways: the FSMC may either be required to reimburse the SFA for the loss without limit or it may reimburse the SFA with limits equal to the management fee or a specified ceiling. Contracts should also address the length of time the SFA can seek recovery of losses. SFAs should seek recovery of any losses for a period of time corresponding to the SFA's period of liability.

- Recovery of Overclaims

SFAs are encouraged to add a provision in the contract that requires the FSMC to pay the SFA for any overclaims assessed by the SA due to FSMC negligence or noncompliance with

regulations. This liability should correspond to either the 3-year record retention period established in 7 CFR 210.23(c) or the SA-established record retention timeframe, whichever is greater. (Refer to the paragraph concerning "Nonperformance" in this chapter.)

- Negligence

It is also suggested that any waiver of liability by the SFA for damages by the FSMC to equipment or facilities contain an exclusion to this waiver for any damages caused by negligence.

## Other Provisions

### Reporting and Recordkeeping Requirements

Contract language must ensure that the FSMC maintains such records as the SFA will need to support its Claim for Reimbursement and must, at a minimum, report claim information to the SFA promptly at the end of each month. Contract language must state that such records be made available to the SFA upon request. (§210.16(c)(1))

Contract language should ensure that FSMCs maintain appropriate business records, as applicable, e.g., food and supply bid specifications, purchase orders, invoices, and personnel records that relate to the provision of food services to a SFA.

Contract language must ensure that the FSMC retains records to support the SFA's Claim for Reimbursement for the daily number of meals served, by type. (§210.16(c)(1))

The SFA may want to require reports of program income by school and expenditures, meals served to adults, value of a la carte sales, value of USDA donated foods including processed USDA donated foods, and amount of milk served.

Contract language must ensure that the FSMC report the daily number of meals served, by type. (§210.16(c)(1))

It is recommended that all FSMC records pertaining to the SFA be maintained at the SFA while the contract is in effect, and copies of those records be delivered to the SFA at the conclusion of the contract.

Contract language must ensure that the FSMC adheres to the record retention requirements, i.e., records must be retained for a period of 3 years after the SFA submits the final Claim for Reimbursement for the fiscal year for inspection and audit by representatives of the SFA, SA, USDA and the Comptroller General, at any reasonable time and place. (§210.23(c))

Contract language must stipulate that if audit findings have not been resolved, the records must be retained beyond the 3-year period for as long as required for the resolution of the issues raised by the audit. (§210.16(c)(1) and §210.23(c))

SFAs/FSMCs may retain necessary records in their original form or on microfilm. Contracts should stipulate whether original or microfilm records are required and that records are:

- Maintained in such a way that they are easily accessible;
- Available upon demand; and
- Available at the SFA premises rather than at an FSMC location.

### **Facilities Management**

Contracts should clearly define the responsibilities for food service facilities and operations, such as providing the meal preparation and service facilities, repair and maintenance of equipment, cleaning of the dining areas, trash removal, exterminator services, and repairs.

## **Hiring and Personnel Practices**

Contracts for food services generally contain language about personnel management including hiring practices, management of staff and employee benefits.

- **SFA and FSMC Staff**

Contract language should enable the SFA to have final approval authority for the FSMC's school lunch manager. The SFA may want to consider including educational requirements and experience requirements for the school lunch manager position.

Contracts may have provisions against cross-hiring. Cross-hiring refers to the hiring of staff by one party to a contract when such employees are employed by the second party to the contract. Such practices would be of concern if the SFA sought to hire a member of the FSMC staff rather than renewing the contract.

Cross-hiring provisions by either the SFA or the FSMC should be reviewed by the SFA's legal counsel to ensure compliance with Federal and State labor laws.

- **Personnel Management**

Contracts should define responsibility for personnel management in some fashion. In general, FSMCs are responsible for personnel management, even when the staff they are managing are employees of the SFA. Management activities may include employee and labor relations, personnel development, and hiring and termination of management staff. Contracts should also specify responsibility for non-management staff hiring and firing.

- **Employee Benefits**

Contracts should define responsibility for employee benefits and refer to the responsibilities placed upon the FSMC with respect to its own employees. The benefits identified in contracts may include medical benefits, insurance, retirement and holiday pay.

## **Insurance Requirements**

To protect the interests of the SFA, contracts for food services should also contain language about insurance requirements for the FSMCs. Contracts generally identify three liabilities, i.e., comprehensive general liability, workman's compensation, and vehicle insurance. SFAs, however, are reminded that the cost of unnecessary insurance is unallowable under the Federal cost principles.

## **Nonperformance**

In addition to the "no payment" provision identified under the "Meal Service Provisions" section of this chapter, all contracts must contain provisions that allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.a)

SFAs should add a provision in the contract language that requires the FSMC to pay the SFA any overclaims due to FSMC negligence or noncompliance with regulations, including those overclaims based on review or audit findings.

It is recommended that the time limit established in the contract for this provision correspond to either the 3-year record retention period established in 7 CFR 210.23(c) or the SA-established record retention timeframe, whichever is greater.

## **Contract Duration**

The contract language must identify a beginning and ending date to ensure that the contract between the SFA and the FSMC is no longer than 1 year in duration. (§210.16(d))

The beginning date should not be prior to the date the contract is signed.

Options for yearly renewal of a contract must not exceed four additional 1 year extensions. (§210.16(d))

The basis for renewing the contract, including price increase or decrease provisions, if any, should be stated in the contract and IFB/RFP, as appropriate. Price increase/decrease provisions should be based on a measurable index such as the Consumer Price Index for All Urban Consumers.

### Termination Clause

All contracts must contain a termination clause whereby either party may cancel for cause with 60-day notification. (§210.16(d))

All contracts in excess of \$10,000 must contain suitable provisions for termination by the SFA, including the manner by which it will be effected and the basis for settlement. Such contracts must describe conditions under which the contract may be terminated for default, as well as conditions where the contract may be terminated because of circumstances beyond the control of the FSMC. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.b)

SFAs may also want to include a termination for convenience clause that provides adequate advance notice that would permit the SFA sufficient time to arrange alternate food service if the FSMC exercises the clause.

### Certifications

All contracts must include certification of compliance with the provisions of the following Acts and regulations, as specified below.

OMB Circular No. A-102, Attachment O, provided in Appendix C, and 7 CFR Parts 3017 and 3018, provided in Appendix A, identify

the authority for the required contract language. Reference these appendices for specific contract language.

- For all contracts:

Energy Policy and Conservation Act. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.j)

- For contracts in excess of \$2,500:

Provisions of the Contract Work Hours and Safety Standards Act for those contracts involving food service workers whose duties are manual or physical in nature. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.f)

- For any contracts involving research, developmental (such as software), experimental or demonstration work:

The requirements established in USDA regulations concerning USDA rights to copyrights, patent rights and rights in data and reporting of discoveries and inventions. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.g)

- For all contracts in excess of \$10,000:

Executive Order 11246, entitled "Equal Employment Opportunity", as amended by Executive Order 11375 and Department of Labor Regulations. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.c)

- For all contracts of \$25,000 or more:

**Debarment, Suspension, Ineligibility and Voluntary Exclusion  
-- Lower Tier Covered Transactions. (Appendix A: 7 CFR  
Part 3017)**

SFAs should contact their SA for further information regarding debarment and suspension. A copy of the certification statement used by USDA in nonprocurement transactions is provided in Appendix E.

- For all contracts in excess of \$100,000:

**Section 306 of the Clean Air Act (42 USC 1857(h)), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738 and Environmental Protection Agency regulations. (Appendix C: OMB Circular No. A-102, Attachment O, paragraph 14.i)**

**Certification Regarding Lobbying, pursuant to 31 USC 1352,  
(Appendix A: 7 CFR Part 3018)**

In accordance with the provisions of 7 CFR Part 3018, FSMCs who bid for an award exceeding \$100,000 must submit a certification regarding lobbying which conforms in substance with the language provided in 7 CFR Part 3018. A copy of the certification form used by USDA is provided in Appendix F.

**Disclosure of Lobbying Activities, pursuant to 31 USC 1352,  
(Appendix A: 7 CFR Part 3018)**

In accordance with the provisions of 7 CFR Part 3018, FSMCs who bid for an award exceeding \$100,000 must disclose lobbying activities in connection with school nutrition programs. SFAs should contact their SA for further information regarding

disclosure of lobbying activities. A copy of the disclosure form is provided in Appendix F.

While not required, SFAs are encouraged to include provisions for:

- Civil Rights Compliance

Compliance with the following, as amended: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; 7 CFR Parts 15, 15a and 15b; and FCS Instruction 113-6, Civil Rights Compliance and Enforcement in the School Nutrition Programs. While it is the SFA's responsibility to ensure compliance with the civil rights requirements, this provision is intended to ensure that the food service operation conducted by the FSMC does not compromise SFA compliance with these requirements.

- Buy American

Compliance with the Buy American provision for contracts that involve the purchase of food by the FSMC. While compliance with the Buy American provision is a SFA responsibility under 7 CFR Part 250, inclusion of this provision in the contract is intended to ensure that the FSMC's operations do not compromise SFA compliance.

- Specifications

A provision stating that any silence, absence or omission from the contract specifications concerning any point must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the SFA is to be used. This provision should be contained in both the IFB/RFP and the contract.

- Certification of Independent Price Determination (also known as "non-collusion statement")

While not required by program regulations, it is strongly suggested that SFAs and FSMCs certify that the prices in the offer have been arrived at independently, without consultation, communication or agreement for the purpose of restricting

competition. A sample certification form, Certification of Independent Price Determination, is provided in Appendix D.

Appendix B, Section J, highlights some unallowable SFA-FSMC contract document provisions.

## Chapter 4

### Advertising

#### Solicit Bids

The SFA must solicit bids/proposals in accordance with State/local procurement procedures. To comply with Federal standards, State/local procedures must provide a sufficient amount of time, prior to the date for opening of bids/proposals, to allow for the preparation and submission of bids/proposals.

If, after solicitation of a number of sources, competition is determined inadequate, a contract may be awarded by noncompetitive negotiation. Since noncompetitive negotiation is limited to specific situations, it should not be used unless expressly approved by the SA. In such instances, the SFA must maintain documentation of its efforts to solicit bids.

#### Time Allowed

Unless otherwise specified by State or local procurement standards, it is suggested that at least 45 days for IFBs and 60 days for RFPs be allowed from the time bids/proposals are solicited to the time that they are due. (It should be noted here that substantially more time overall must be allotted for a procurement under a RFP to allow for such things as proposal evaluation, negotiation with offerors, contract development, etc.) Provided that the IFB/RFP has been properly prepared, an adequate amount of solicitation time works to the advantage of both the SFA and the offeror and contributes to an effective and efficient procurement process.

#### Advertising Methods

Under either the IFB or RFP procurement method, bids/proposals must be solicited directly from an adequate number of qualified FSMCs and the IFB/RFP must be publicized in order to provide for maximum open and free competition. To accomplish this, copies of the complete IFB/RFP should be mailed to prospective offerors, i.e., those FSMCs that are believed to be qualified and that might reasonably be expected to respond to the solicitation. This may include FSMCs that are currently doing business with other SFAs in the State, in adjoining States, or elsewhere. SA guidance should be requested and SA requirements in this matter must be followed including any FSMC registration requirements. Any amendments or changes to the IFB/RFP as well as any questions and answers

resulting from written offeror inquiries or from a pre-bid/pre-proposal meeting must be submitted to all prospective offerors. No information regarding the IFB/RFP should be considered official or binding on the SFA until and unless it is provided in writing.

Publicizing of the IFB/RFP should be accomplished in accordance with State/local procurement procedures. Generally this would be done by advertising in major newspapers/trade journals that are normally used by the SFA for publicizing other procurements. It is not necessary that the entire IFB/RFP be published. At a minimum, however, the advertisement should include the IFB/RFP number and date, a brief description of what is being proposed for procurement, and instructions for obtaining a copy of the IFB/RFP.

### **Pre-bid/ Pre-proposal Meeting**

A SFA may be required to conduct a pre-bid/pre-proposal meeting under State/local procurement procedures or may simply wish to do so, particularly if this is the first procurement of FSMC services by the SFA. It is recommended that such a meeting be conducted and that it be held approximately two weeks after the IFB/RFP is issued but prior to the date bids/offers are due. There are two important reasons for holding a pre-bid/pre-proposal meeting:

**Provide Information**—to provide information concerning contract performance requirements that may be helpful in the preparation of bids/proposals.

**Answer Questions**—to answer any questions prospective offerors may have regarding the solicitation.

Furthermore, the meeting may bring to light ambiguities, errors, or omissions in the IFB/RFP, that may later be corrected through written amendments to the IFB/RFP. (The meeting should not be held, however, as a substitute for formally amending a deficient or ambiguous specification or to disseminate performance requirements in addition to those contained in the solicitation.)

The following are some items to consider in planning and conducting a pre-bid/pre-proposal meeting:

**Information Regarding Meeting**—information regarding the meeting should be a part of the IFB/RFP solicitation package. It need not be publicly advertised but it must be provided to each

FSMC that has received a copy of the IFB/RFP either directly or upon request. The information should include a request that questions be submitted several days prior to the meeting to enable the SFA to do research and prepare to respond at the meeting.

**Recommended Attendance of Offerors**—attendance at the meeting by prospective offerors is strongly recommended but generally should not be required for submittal of a bid/proposal.

**Recommended Attendance of SA**—in accordance with SA procedures and particularly for first-time FSMC procurements, the SA should be invited to attend the meeting and should receive a copy of all information relevant to the meeting.

**Information Provided in Writing**—information provided by the SFA at the meeting should not be considered official until provided in writing to all FSMCs that have received the IFB/RFP. Following the meeting, the SFA should prepare a set of questions and answers that were covered at the meeting and should mail this information simultaneously to all prospective offerors.

## Chapter 5

### Bid/Proposal Openings and Evaluations

It is imperative that bid/proposal openings and evaluations are conducted fairly. Inconsistent actions by the individuals responsible for this component of the FSMC procurement can result in bid protests or legal action.

#### **Bid Openings and Evaluations**

Opening sealed bids under an IFB must be conducted in public, at the time and place stated in the invitation. It is recommended that the SA be invited to attend the bid opening.

Any bids received after the listed deadline will not be considered. Since the bids must be sealed to be valid, unsealed bids must be rejected.

If the IFB required a separate presentation of a bid bond, cover sheet or attachment for the bidders to use to demonstrate compliance with the IFB responsiveness criteria, these documents may be pre-screened. If the documents are not pre-screened, they should be checked once the bids are opened to ensure the bidders have met the responsiveness criteria. All bids that fail to meet the responsiveness criteria must be rejected.

Once the bids are opened, the name of each bidder and bid price must be recorded. The contract must be awarded to the responsible FSMC whose bid, conforming to all the material terms and conditions, is the lowest price unless there are sound documented business reasons to reject a bid in the best interest of the program.

Since SFAs must often receive approval of all contracts by their school board, the SFA may refrain from making a formal award until they receive board approval. The successful bidder should be notified of the SFA's intent to recommend acceptance of the bid, but the bidder must be clearly informed of the need for board approval. Once board approval is obtained, a written notice of the award should be made to the successful bidder. Usually, this written notice accompanies a copy of the signed contract. The SFA should contact their legal counsel to identify their responsibilities regarding

notification of unsuccessful bidders. At a minimum, unsuccessful bidders should be notified promptly. A copy of the signed contract should also be sent to the SA.

**Proposal  
Evaluation Plan**

Proposals should be thoroughly reviewed and subjected to an impartial evaluation. An evaluation plan should be prepared prior to the receipt of any proposals. Among the items that would be included in that plan are:

**Information on Evaluation Team**—the size of the evaluation team, the expertise needed on the evaluation team, and the names of the team members.

**Scoring System**—the scoring system that will be used to evaluate the proposals. This would include the standards to be applied, the relative ranking of each standard, and how the score will be calculated, i.e., the sum of the individual team scores or an average of the total team score.

**Ancillary Materials**—development of scoring sheets, composite scoring forms, and any other forms or letters that may be needed. The scoring sheets should contain the evaluation criteria, standards to be applied, scoring columns and room for comments.

The individuals who will be evaluating the proposals should have sufficient knowledge of the goals of the SFA, experience in school food service or congregate feeding, financial management experience (of food service, if possible), and experience in evaluating proposals. It is recommended that the SFA invite the SA to attend the evaluation of the proposals.

**Proposal  
Opening and  
Evaluation**

Proposals should not be opened or reviewed until after the due date established in the RFP. The person responsible for receiving the proposals must safeguard them in order to prevent unauthorized disclosures.

On the date established for opening and evaluating the proposals, each member of the evaluation team should score each proposal independently. If the RFP allows alternative proposals, care must be taken to ensure the offeror's alternatives address the basic guidelines established in the RFP. Proposals should not be compared to one another. Proposals that fail to address all requirements are unresponsive and cannot receive further consideration. Therefore, the team members should be instructed to use a pass-or-fail basis for eliminating unresponsive proposals, and then use the pre-established scoring system for evaluating the responsive proposals.

If oral presentations are a component of the RFP, great care must be taken to ensure the presentation is scored only for its content. Presentations must be ranked against measurable standards. The team members should be instructed to evaluate the substance of the presentation. Offerors must not be allowed to alter or amend their proposals through the presentation process.

Proposals must be evaluated using the weighted criteria stated in the RFP. Negotiations are conducted with offerors whose proposals receive evaluation scores that exceed a numerical value (i.e., cut-off score) established in advance by the evaluation panel. This "cut-off" score is determined prior to opening any of the proposals. After the evaluations have been completed and all proposals are ranked, those proposals that meet or exceed the pre-established cut-off score are forwarded to the individual or team responsible for negotiating with the offerors. As with IFB bid openings, the name of each offeror and the evaluation score must be recorded. Offerors not selected for further negotiation should be notified in writing.

Contract negotiations must be conducted in a fair and equitable manner. As with all aspects of procurement, the negotiators must be well prepared. The individual(s) evaluating the proposals should not be the same individuals who conduct negotiations with offerors whose proposals receive scores above the prescribed cut-off. The negotiators should inform all offerors of the terms and conditions of the negotiation, including which elements will not be negotiable and which elements can be negotiated. If at all possible, the negotiators should be experienced in school food service operations, school finance and contract negotiations.

It is expected that the negotiation process will result in the selection of the successful offeror. However, if after negotiations, two or more offerors are still under consideration, the SFA must make a

final selection using an unbiased method, e.g., the bidders are asked to submit a best and final price. The offerors should be informed of the situation and the method the SFA will use to select the successful offeror. The award should be made to the responsible offeror whose proposal is most advantageous to the SFA, price and other factors considered.

The SFA should provide written notification to the successful offeror which clearly states that while the offeror has been successful, the proposed contract is subject to review by the SA. This notice should also inform the successful offeror that if nonsubstantive changes are needed as a result of the SA review, an opportunity will be provided to amend the proposal.

If board approval of the contract is required, this requirement should also be included in the letter to the successful offeror. Unsuccessful offerors should be notified promptly.

#### **Analysis of Price**

The contract documents should clearly indicate factors to be considered in determining the price. Whether an IFB or RFP, the following factors must be considered:

**Prompt Payment Discounts**—prompt payment discounts may only be included in the price determination when prior experience of the SFA indicates that such discounts are generally taken.

**Volume Discounts**—volume discounts can only be considered if there is a reasonable expectation that the SFA will be able to use the discounts.

**Financial Incentives**—financial incentives that do not accrue to the nonprofit school food service account cannot be used to determine the price submitted.

**Other Benefits**—goods, services, or other benefits that do not accrue to the nonprofit school food service account cannot be used to determine the price submitted.

**Total Cost**—the total cost of the bid/proposal for the breakfast, lunch, a la carte meal service and any other child nutrition program meal service such as the Summer Food Service Program or the Child and Adult Care Food Program that is operated by the SFA and

included in the bid/proposal request, must be used in determining the lowest offeror.

**21-Day Cycle Menu**—under a RFP, when the SFA has obtained approval from the SA to allow the FSMC to submit the 21-day cycle menu, the SFA must carefully review the menu and its components to determine if it complies with the meal pattern requirements specified in 7 CFR Part 210, proposal requirements, student preferences and the goals of the SFA's food service. The SFA must ensure that its evaluation and determination of proposal costs is based upon comparative menus. This may entail requiring offerors to provide sufficient information to ensure that the FSMC-prepared cycle menus use foods of equivalent specifications. Since negotiation with bidders is not permissible under an IFB, FSMC-submitted cycle menus are not appropriate for competitive sealed bid procurement.

## Chapter 6

### SA Review

#### Timing

Under 7 CFR 210.19(a)(5), the SA must review the SFA-FSMC contract, i.e., contracts, completed IFBs/RFPs that become signed contracts and all contract renewals. SAs are also encouraged to review proposed IFBs/RFPs, as well as proposed contracts developed by SFAs. The contract is also subject to review by the State Distributing agency, if different from the SA. The amount of time needed for these reviews and when they occur will be determined by the agencies involved and will depend upon a variety of factors.

Under a sealed bid procurement, the SA should review the contract prior to the SFA's issuance of the IFB. Sufficient time should be allotted for the SA to conduct this review and make recommendations.

Under competitive negotiation, the SA would generally review the contract that has resulted from the negotiations unless the SA also requires review of the RFP. SA review of the RFP prior to issuance is recommended, particularly for SFAs entering into a FSMC procurement for the first time. In any case, in order to minimize delays in finalizing the contract, each SFA should submit all segments of the contract that will not be negotiable to the SA for review prior to releasing the RFP.

#### Contract Checklist

A Prototype SFA-FSMC Contract Document Checklist is provided in Appendix B. The checklist should be completed by the SFA and submitted with documents to be reviewed by the SA. In the case of renewals, the SFA may want to submit with the renewal documents a copy of the checklist submitted with the initial contract, with notations where changes have occurred and an indication of the basis for the renewal.

#### Response to SA Comments

For sealed bid procurement, the SA's comments on the prototype contract can be easily accommodated and the contract awarded without further review. In the case of negotiated contracts, the situation may be more complex. If the SA reviewed the non-negotiable provisions of the contract prior to release of the

RFP, the SA's comments can be incorporated prior to issuing the RFP. After negotiations are completed, the negotiated provisions of the proposed contract should be reviewed by the SA. These provisions may require revision before the contract is finalized. This can create situations where the offeror withdraws or modifies a best and final offer. In these cases, the SFA may need to reopen negotiations. In cases where the SA did not review the non-negotiable provisions of the contract, the entire contract should be reviewed and could be open for revision.

In either case, any revisions required by the SA in a negotiated contract must be accepted by the successful offeror before the contract can be finalized. If the revisions significantly alter the scope of work under the contract, it is possible that renegotiations may be necessary. Sufficient time must be allotted for this situation when the SFA is determining its timeframe for converting to a FSMC. After the SA reviews the negotiated contract and any revisions have been made, the contract can be signed by the SFA and the FSMC.

For both sealed bid and negotiated contracts, a copy of the signed contract must be submitted to the SA.

## Chapter 7

### SFA Monitoring/Recordkeeping Responsibilities

#### Monitoring

The SFA must monitor the operation of the FSMC through periodic on-site visits to ensure that the FSMC complies with the contract and any other applicable Federal, State and local rules and regulations. The SFA should maintain documentation of its monitoring, any corrective action required, and whether or not corrective action was taken. The SFA's contract monitoring responsibilities include, but are not limited to evaluating:

**Cycle Menu**—adherence to the cycle menu and any and all deviations allowed under the contract.

**Meal Pattern**—adherence to the meal pattern requirements specified in 7 CFR Parts 210 and/or 220.

**Claim Documentation**—records, by school, to support the Claim for Reimbursement (meal/milk counts and any other data on the claim for which the FSMC is responsible).

**Cost Records**—cost records, including source documentation supporting charges for contractually approved costs for cost-based contracts, e.g., time and attendance records for staff hours charged.

**Meal Count Records**—meal count records for meals not covered by the Claim for Reimbursement, e.g., adult meals, etc.

**Revenue Records**—revenue records broken down by source, type and category of meal or food service, e.g., a la carte sales, reduced price and full price NSLP and SBP meals, vending machine sales, etc.

**Outside Activities**—outside food service activities.

**Preparation Facilities**—the FSMC meal preparation facilities.

## USDA Donated Foods

- the amount and kind of donated food offered versus accepted to determine if the FSMC is accepting USDA donated foods to the maximum extent, in quantities that can be used and stored without waste.
- the utilization of the donated food by the FSMC.
- the value-pass-through of the USDA donated food for fixed-price contracts, e.g., credits or reductions on the invoice in the month of utilization.

### **Additional Monitoring Responsibilities**

The SFA must conduct on-site school reviews and must monitor through these reviews and by other means:

**Civil Rights**—compliance with civil rights requirements. In addition to monitoring compliance, the SFA must ensure the FSMC complies with the procedures established by the SFA for referring any civil rights complaints to the SFA.

**Free and Reduced Price Policy**—adherence to the SFA's approved free and reduced price meal policy statement.

**Offer versus Serve**—compliance with offer versus serve requirements.

**Competitive Foods**—compliance with the competitive foods requirements of the NSLP regulations in all schools by all parties.

**SFA Policies**—compliance with all policies established by the SFA.

### **Recordkeeping Responsibilities**

The SFA must maintain any books, documents, papers and records directly pertinent to: the solicitation, award or extension of any given contract and the implementation of that contract. Such records must be maintained for a period of 3 years, as specified in 7 CFR 210.23(c).

## Chapter 8

### Contract Duration/Renewals

#### Duration

As stated earlier, the contract duration must be limited to one year, with the effective beginning and ending dates stated in the contract. The beginning date should not be prior to the date the contract is signed. Additionally, if renewals will be permitted, the contract must also state the date by which the renewal must be executed by both the SFA and FSMC. Although four one-year renewals are permitted, contracts cannot contain automatic renewal provisions. The renewal date must occur on or prior to the expiration date of the current contract. Any provisions, including adjustments to payments, that will be used for renewing contracts must be stated in the contract and the IFB or RFP, as applicable. These alterations cannot result in substantive changes to the original contract. If the SFA determines that significant changes are necessary, the SFA must rebid the contract. The following changes would normally not substantially change the contract:

**Number of Schools**—new schools added;

**Changes in Enrollment**—decreases and increases in student enrollment and the corresponding change expected in participation;

**Changes in Price**—meal price changes (determined by the SFA);

**Cost Increases**—cost increases limited to a measurable index (such as the Consumer Price Index for All Urban Consumers); and

**Meal Equivalency**—minor adjustments to the per meal equivalency.

Examples of substantive changes which could require the SFA to rebid the contract include: the addition of a program, such as the SBP; major changes to the formula for determining meal equivalency; a major shift in responsibilities for SFA/FSMC staff; and significant changes in the basis for determining guaranteed returns.

## Renewals

While contract renewals are permitted, a SFA is not required to renew the contract for an additional year and should do so only after careful evaluation of the FSMC's performance and a determination that the renewal will benefit the SFA. Among the elements that should be used when deciding whether to renew a contract are:

**Performance**—the overall performance of the FSMC in accordance with the contract provisions, including the FSMC's completion of planned activities as described in the contract. The SFA should document its findings while conducting its monitoring requirements of the FSMC and refer to these documents when making this determination. In addition to reviewing the deficiencies noted in the FSMC's performance, the SFA should review the effectiveness of the FSMC's corrective action plans.

**Meal Quality**—meal quality, including adherence to menu cycle/food specifications, and complaints.

**Costs**—the full cost of using a FSMC versus the projected costs under the contract.

**Financial Status**—the overall financial status of the food service operation and the food service account.

**Unexpected Costs**—any unexpected costs incurred as a result of using a FSMC, and any unexpected cost reductions that have resulted from using a FSMC. The SFA should ascertain these costs based on information received from the FSMC and other sources.

**Participation**—participation trends including NSLP/SBP participation compared to a la carte sales.

**Advisory Board**—the comments and recommendations of the advisory board and the FSMC's responsiveness to these recommendations.

**Adjustments to Payments**—any increase in the prices requested by the FSMC or any change in the basis upon which the FSMC is paid.

**Use of USDA Donated Foods**—utilization of USDA donated foods, including the current inventory on hand.

**Corrective Actions**—recommendations from local, State and Federal reviews and audits, including the status of required corrective actions.

## Glossary of Terms

For the purposes of this guidance, the term:

**Bid** means an offer to perform, in accordance with specifications and conditions, for a stipulated price.

**Code of Federal Regulations (CFR)** means the codification of the general and permanent rules published in the *Federal Register* by the Executive departments and agencies of the Federal government.

**Competitive Negotiation** means a method of procurement whereby proposals are requested from a number of sources and the RFP is publicized, negotiations are conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of competitive sealed bids.

**Competitive Sealed Bids** means a method of procurement whereby sealed bids are publicly solicited and a firm fixed-price contract is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the IFB, is lowest in price.

**Contract** means a formal, legally enforceable agreement duly executed by the authorized representatives of the SFA and the food services contractor that calls for the provision of services, materials, supplies or equipment by the food service contractor in accordance with all conditions and specifications in the bid/proposal documents, for a price to be paid by the SFA.

**Contract Documents** means the bid specifications, requirements, the IFB, the RFP and the contract, as applicable.

**Cost-type Contract** means a contract in which the contractor is paid on the basis of the costs it incurs. The term includes cost-plus-fixed-fee contracts and subcontracts therein. However, the term does not include any subcontracts under a fixed-price contract.

**Donated Foods** means foods donated, or available for donation, by the United States Department of Agriculture.

**Equipment** means an article of tangible personal property that has a useful life of more than two years and an acquisition cost of \$500 or more. State law or policy may set stricter capitalization thresholds for equipment than the one set by Federal standards. Any SFA may use its own definition if its definition would at least include all items of equipment as defined here.

**FCS** means the Food and Consumer Service of the United States Department of Agriculture.

**Fixed-price** means price is guaranteed for a specific period of time.

**Fixed-price Contract** means any contract except a cost-type contract. The term includes firm fixed-price contracts. It also includes contracts under which the contractor is paid at a fixed rate per unit of service or unit of labor time.

**Food Service Management Company (FSMC)** means a commercial enterprise or a nonprofit organization that is or may be contracted with by the SFA to **manage** any aspect of the school food service.

**Invitation for Bid (IFB)** means an instrument of competitive sealed bids. An IFB is used to publicly solicit sealed bids. An IFB contains specifications and pertinent attachments that clearly define the items or services needed in order for bidders to properly respond to the invitation.

**Noncompetitive Negotiation** means procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources if competition is determined inadequate.

**Nonprofit School Food Service** means all food service operations conducted by the SFA principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

**OMB Circular No. A-102, Attachment O** means the Federal standards governing procurements made by SAs, SFAs and other local program operators under Federal open-ended entitlement programs. Such programs include the National School Lunch Program, the School Breakfast Program and the Special Milk Program for Children; accordingly, these standards apply to SFAs operating these programs.

**Processor** means, as defined in 7 CFR 250.3, "... any commercial facility which processes or repackages donated foods. However, commercial enterprises which handle, prepare and/or serve products or meals containing donated foods on-site solely for the individual recipient agency under contract are exempt under this definition."

**Procurement** means the process of obtaining goods and/or services in accordance with applicable rules and regulations.

**Request for Proposal (RFP)** means an instrument of competitive negotiation. In competitive negotiations, the RFP is used to solicit proposals from a number of sources. The RFP identifies the goods or services needed, all significant evaluation factors and the importance of each factor.

**Responsible Bidder/Offeror** means a bidder/offeror who is qualified by experience, equipped to perform the work required or furnish the necessary material indicated in the specifications, and who has the necessary financial backing and ability to complete the contract.

**Responsive Bidder/Offeror** means a bidder/offeror whose bid/offer conforms with all the material terms and conditions of the IFB/RFP.

**7 CFR Part 3015** means USDA's regulations regarding the administration of grants. Subpart S sets forth the procurement provisions and Subpart T sets forth the cost principles.

**7 CFR Part 3017** means USDA's regulations regarding debarment and suspension.

**7 CFR Part 3018** means USDA's regulations regarding lobbying activities.

**Small Purchase** means relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing not more than \$10,000, or as otherwise specified by State law; provided that such amount is not more than \$10,000.

**Vendor** means a merchandiser of complete meals, meal components, or raw materials.

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**Appendix A**  
**USDA Financial Assistance Regulations**  
7 CFR Part 3015, Subparts S and T  
7 CFR Part 3017  
7 CFR Part 3018

## **Subpart S -- Procurement**

### **§ 3015.180 Scope and applicability.**

(a) This subpart contains information for complying with Attachment 0, "Procurement Standards", of OMB Circulars A - 102 and A - 110. Circular A - 102 covers grant and cooperative agreement programs with State and local governments and Indian Tribal governments. Circular A - 110 covers grant and cooperative agreement programs with institutions of higher education, hospitals, and other nonprofit organizations. Copies of both Circulars may be obtained from O&F.

(b) This subpart applies to recipient procurements (by purchase, rental, or barter) of supplies, equipment, and services (including construction).

(c) This subpart applies only to procurements that are supported in whole or in part by a grant or cooperative agreement.

(d) This subpart does not apply to procurements of land, existing land improvements or structures, or any other existing real property.

(e) The Attachment 0 of Circulars A - 102 and A - 110 apply to procurements under subgrants as well as grants.

### **§ 3015.181 Standards of conduct.**

(a) Recipients shall maintain a written code or standards of conduct governing the performance of their officers, employees or agents engaged in awarding and administering contracts supported by Federal funds:

(1) No employee, officer or agent shall participate in the selection, award, or administration of contracts using Federal funds where to his knowledge, such employee, officer or agent or his immediate family, partners or organizations has a financial interest in, is negotiating with, or has any arrangements concerning prospective employment with the proposed contractor.

(2) The recipient's officers, employees or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or proposed contractors.

(3) Provisions shall be made for disciplinary actions against the recipient's officers, employees, or agents or by contractors or their agents violating the standards of conduct.

(b) Awarding agencies may review the written standards of conduct to determine if they meet the minimum standards of Attachment 0 of OMB Circulars A - 110 and A - 102. Recipients will be

notified of deficiencies and make corrective action.

**§ 3015.182 Open and free competition.**

All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value shall be conducted in a manner that provides maximum open and free competition.

**§ 3015.183 Access to contractor records.**

The Attachment 0 requires recipients to include in specified kinds of contracts a provision for access to the contractor's records by the recipient and the Federal government. The following applies to the provision:

(a) The provision must require the contractor to place the same provision in any subcontract which would have to have the provision were it awarded by the recipient.

(b) The provision must require retention of records for three years after final payment is made under the contract or subcontract and all pending matters are closed. The provision must also require that, if any audit, litigation, or other action involving the records is started before the end of the three year period, the records must be retained until all issues arising out of the action are resolved or until the end of the three year period, whichever is later.

(c) In contracts and subcontracts under a subgrant, the provision must require that access to the records be provided to the recipient as well as the subrecipient and the Federal government.

**§ 3015.184 Equal employment opportunity.**

(a) The Attachment 0 requires recipients to include in contracts in excess of \$10,000 a provision requiring compliance with Executive Order 11246, concerning equal employment opportunity as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Chapter 60).

(b) If construction is to be assisted by a grant or subgrant, the Executive Order and the Department of Labor supplementing regulations apply, unless an exemption is granted by or under those regulations. Recipients shall observe all applicable requirements of the Order and regulations and include in their nonexempt construction contracts the specific clauses prescribed by 41 CFR 60 - 1.4(b) and, if applicable, 41 CFR 60 - 4.3.

**Subpart T -- Cost Principles**

**§ 3015.190 Scope.**

This subpart makes the allowable costs incurred by the recipient the maximum amount of money a recipient is entitled to receive from USDA. In addition, this subpart identifies the principles to be used in determining allowable costs. These cost principles shall apply to transactions and activities conducted under grants, subgrants, cooperative agreements, cost-type contracts and cost-type subcontracts under grants.

(a) *Allowable costs.* Grant funds may be used only for allowable costs of the activities for which the grant was awarded. This means that the total amount of money that the recipient is entitled to receive from USDA may not exceed the allowable costs incurred by the recipient for those activities.

(b) The following rules apply in computing maximum allowable costs:

(1) *Third party in-kind contributions.* Because they are not allowable costs of the party that receives them, the value of third party in-kind contributions received may not be included in determining maximum allowable costs. However, as provided in Subpart G of this part, third party in-kind contributions may count towards satisfying a cost-sharing or matching requirement of the Federal grant.

(2) *Costs supported by another grant.* Allowable costs incurred by the recipient and supported by another Federal grant (or by a non-Federal grant) awarded to the recipient may not be included in determining maximum allowable costs. The basic intent of this rule is to prevent double compensation. It does not, however, prevent proration of costs that are allowable under two or more awards.

(3) *Costs used to match another Federal grant.* A cost that the recipient uses to meet a cost-sharing or matching requirement of one Federal grant may not count towards determining maximum allowable costs under another Federal grant, unless specifically authorized by a Federal statute.

(4) *Costs supported by general program income.* A grant may not pay for a cost which is supported by general program income earned by the recipient or by a subrecipient under the grant. Therefore, these costs may not be included in determining maximum allowable costs.

(5) *Use of money due Federal government.* In accordance with § 3015.173, an awarding agency, under certain circumstances, may authorize a recipient to use certain money due the Federal government for allowable costs of the project or programs, instead of returning the money to the Federal Government. Costs supported by the money may not be included as part of the maximum allowable costs charged to USDA.

(6) *Subgrant and contract costs.* The recipient's allowable costs include allowable outlays, if any, to its subrecipients and contractors. If the recipient pays a subrecipient more than the allowable costs incurred by the subrecipient, the excess is not an allowable cost of the recipient and may not

be included as part of the maximum allowable costs charged to USDA. However, for cost-type contracts a reasonable fee or profit paid by the recipient to the contractor, in addition to the contractor's allowable costs, may be included in this maximum unless prohibited by the provisions of the grant award.

**§ 3015.191 Governments.**

(a) OMB Circular No. A - 87, and any subsequent amendments to this Circular published in the Federal Register by OMB, shall be used in determining the allowable costs of activities conducted by governments.

(b) Additional amendments to the Circular, unless otherwise prescribed by OMB, shall go into effect at the start of a government's first fiscal year following the amendment's publication in the Federal Register.

**§ 3015.192 Institutions of higher education.**

(a) OMB Circular No. A - 21, including any amendments to the Circular published in the Federal Register by OMB, shall be used in determining the allowable costs of activities conducted by institutions of higher education (other than for-profit institutions).

(b) Additional amendments to the Circular, unless otherwise prescribed by OMB, shall go into effect at the start of an institution's first fiscal year following the amendment's publication in the Federal Register.

**§ 3015.193 Other non-profit organizations.**

(a) OMB Circular No. A - 122, including any subsequent amendments to the Circulars published in the Federal Register by OMB, shall be used in determining the allowable costs of activities conducted by nonprofit organizations under grants, cooperative agreements, cost reimbursement contracts, and other contracts in which costs are used in pricing, administration, or settlement. It does not apply to colleges or universities which are covered by Circular A - 21; State, local and federally recognized Indian Tribal governments which are covered by Circular A - 87, or hospitals.

(b) Future amendments to the Circular, unless otherwise prescribed by OMB, shall go into effect at the time the initial award is made to the recipient.

**§ 3015.194 For-profit organizations.**

The principles to be used in determining the allowable costs of activities conducted by for-profit organizations are contained in the Federal Procurement Regulations at 41 CFR 1 - 15.2. Exception: Independent research and development costs including the indirect costs allocable to them are unallowable. Independent research and development are defined in the Federal Procurement

**§ 3015.195 Subgrants and cost-type contracts.**

USDA cost principles applicable to a cost-type contractor or a subrecipient will not necessarily be the same as those applicable to the recipient. For example, where a State government awards a subrecipient or cost-type contract to an institution of higher education, OMB Circular A - 21 would apply to the costs incurred by the institution of higher education even though OMB Circular A - 87 would apply to the costs incurred by the State.

**§ 3015.196 Costs allowable with approval.**

Each set of cost principles specifically identifies certain costs that, in order to be allowable, must be approved by the awarding agency. Other costs do not require approval. The following procedures govern approval of these costs:

(a) When costs are allocated in accordance with a government-wide cost allocation plan or when treated as indirect costs, acceptance of the costs as part of the indirect cost rate or cost allocation plan shall constitute approval.

(b) (1) All direct costs must be approved in advance by the awarding agency.

(2) When costs are specified in the budget, approval of the budget shall constitute approval of the cost.

(3) Specific prior approval in writing from the awarding agency is required if the costs are not specified in the budget, or if there is no approved budget. For this purpose the prior approval procedures of Subpart M shall be followed, except that, for formula or mandatory grants, the awarding agency's written approval may be signed by any authorized official of the awarding agency.

(c) The awarding agency may waive or conditionally waive the requirement for its approval of the costs. A waiver, as such, shall be applicable only to the requirement for approval. If it is determined, by audit or otherwise, that the costs do not meet other requirements or tests for allowability specified by the applicable cost principles, such as reasonableness and necessity, the costs may be disallowed.

(d) In the case of subgrants and cost-type contracts, no approval shall be given which is inconsistent with the purpose or the provisions of the Federal grant.

**PART 3017 -- GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)**

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Appendix A to Part 3017 -- Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions

Appendix B to Part 3017 -- Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transactions

Authority: E.O. 12549; Sec. 5151 - 5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100 - 690, Title V, Subtitle D; 41 U.S.C. 701 et seq.); 5 U.S.C. 301.

Source: 54 FR 4731, Jan. 30, 1989, unless otherwise noted.

Cross Reference: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

**Subpart A -- General**

**§ 3017.100 Purpose.**

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in § 3017.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

#### § 3017.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(1) A USDA agency, when used in the context of USDA internal procedures or requirements, is any organizational unit of the U.S. Department of Agriculture with authority delegated in 7 CFR Part 2 to carry out primary covered transactions under USDA programs.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 - 12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea,

including a plea of nolo contendere.

(f) *Debarment*. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official*. An official authorized to impose debarment. The debarring official is either:

- (1) The agency head, or
- (2) An official designated by the agency head.

(i) In USDA, the authority to act as a debarring official is not delegated below the agency head level.

(3) In USDA, each Under Secretary, Assistant Secretary, or agency head who has been delegated authority in Part 2 of this title to carry out a covered transaction is authorized to act as a debarring official in connection with such covered transaction.

(h) *Indictment*. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible*. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings*. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement list*. The portion of the List of Parties Excluded from Federal Procurement or Nonprocurement Programs compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice*. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant*. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person*. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign government, or foreign governmental entities.

(o) *Preponderance of the evidence*. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal*. Officer, director, owner, partner, key employee, or other person within participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(q) *Proposal*. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent*. A person against whom a debarment or suspension action has been initiated.

(s) *State*. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official*. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(i) In USDA, the authority to act as a suspending official is not delegated below the agency head level.

(3) In USDA, each Under Secretary, Assistant Secretary, or agency head who has been delegated authority in Part 2 of this title to carry out a covered transaction is authorized to act as a suspending official in connection with such covered transaction.

(u) *Suspension*. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded*. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) *Appeals officer*. Any administrative law judge of the Office of Administrative Law Judges, Department of Agriculture.

(x) *USDA*. U.S. Department of Agriculture.

#### § 3017.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction*. For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction*. Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: Grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction*. A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) Principal investigators.

(2) Providers of federally-required audit services.

(2) Exceptions. The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(3) *Department of Agriculture covered transactions.* These Department of Agriculture regulations apply only to the Department's domestic assistance covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) including, except as noted in paragraph (a)(2) of this section: Grants, cooperative agreements, scholarships, fellowships, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements; subawards, subcontracts, and transactions at any tier that are charged as direct or indirect costs, regardless to type (including subtier awards under awards which are statutory entitlement or mandatory awards).

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 3017.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 3017.110(a). Sections 3017.325,

''Scope of debarment,'' and 3017.420. ''Scope of suspension,'' govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

#### § 3017.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

#### Subpart B -- Effect of Action

#### § 3017.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, no agency shall enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 3017.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 3017.110(a)(1)(ii)) for the period of their debarment or suspension.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured

by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations;  
and

(7) Other transactions where the application of these regulations would be prohibited by law.

#### **§ 3017.205 Ineligible persons.**

Persons who are ineligible, as defined in § 3017.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

#### **§ 3017.210 Voluntary exclusion.**

Persons who accept voluntary exclusions under § 3017.315 are excluded in accordance with the terms of their settlements. USDA shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

#### **§ 3017.215 Exception provision.**

USDA may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 3017.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 3017.505(a).

#### **§ 3017.220 Continuation of covered transactions.**

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A

decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in § 3017.215.

#### § 3017.225 Failure to adhere to restrictions.

Except as permitted under § 3017.215 or § 3017.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

#### Subpart C -- Debarment

#### § 3017.300 General.

The debarring official may debar a person for any of the causes in § 3017.305, using procedures established in §§ 3017.310 through § 3017.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

#### § 3017.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 3017.300 through § 3017.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before March 1, 1989, the effective date of these regulations or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 3017.215 or § 3017.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 3017.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 3017.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[54 FR 4731, Jan. 30, 1989, as amended at 54 FR 4952, Jan. 31, 1989]

#### § 3017.310 Procedures.

USDA shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in § § 3017.311 through 3017.314.

§ 3017.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

(a) The decision to utilize agency personnel, the Office of Inspector General (OIG), or other appropriate resources to conduct the investigation and develop the documentation required by paragraph (b) of this section is the responsibility of the agency possessing the information.

(b) Basic documentation shall be developed that includes but is not limited to:

(1) The name of the specific respondent(s) against whom the action is being proposed or taken;

(2) The reason(s) for proposing the debarment;

(3) The specific cause(s) for debarment from § 3017.305;

(4) A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the need to debar;

(5) The recommended time period for the debarment;

(6) The potential effect and/or consequences that the debarment will have on the respondent(s);

(7) Copies of any relevant support documentation identified under this section.

(c) The debarring official shall be responsible for deciding whether or not to proceed with the action.

(d) The Office of the General Counsel (OGC) is responsible for:

(1) Reviewing the documentation and notices for legal sufficiency, and

(2) Providing any necessary coordination with the Department of Justice (DOJ).

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

§ 3017.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(1) Information on the specific debarment action proposed must be given.

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 3017.305 for proposing debarment;

(d) Of the provisions of §§ 3017.311 through 3017.314, and any other USDA procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

In USDA, the notice to the respondent shall be signed by the debarring official and transmitted by certified mail, return receipt requested. OGC will be consulted on all proposed debarment actions prior to the notice being sent to the respondent.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

#### § 3017.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

#### § 3017.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(1) In USDA debarment actions where respondent(s) fail(s) to timely provide any submission in opposition, the action will be considered decided.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 3017.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

(3) In USDA, the notice to the respondent shall be in writing, signed by the debarring official, and transmitted by certified mail, return receipt requested. The OGC will be consulted on all debarment actions prior to the notice being sent to the respondent.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

#### § 3017.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, USDA may, at any time,

settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

**§ 3017.320 Period of debarment.**

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part (see 3017.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of § § 3017.311 through 3017.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination or other causes for which the debarment was imposed;  
or

(5) Other reasons the debarring official deems appropriate.

[54 FR 4731, Jan. 30, 1989, as amended at 54 FR 4952, Jan. 31, 1989]

**§ 3017.325 Scope of debarment.**

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from

all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see § § 3017.311 through 3017.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

#### Subpart D -- Suspension

##### § 3017.400 General.

(a) The suspending official may suspend a person from any of the causes in § 3017.405 using procedures established in § § 3017.410 through 3017.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 3017.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include

an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 3017.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of § 3017.400 through 3017.413 upon adequate evidence:

- or
- (1) To suspect the commission of an offense listed in § 3017.305(a);
  - (2) That a cause for debarment under § 3017.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 3017.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(1) The decision to utilize agency personnel, OIG or other appropriate resources to conduct the investigation and develop the documentation required by paragraph (a)(2) of this section is the responsibility of the agency possessing the information.

(2) Basic documentation shall be developed that includes but is not limited to:

(i) The name of the specific respondent(s) against whom the suspension is to be taken;

(ii) The reason(s) for proposing the suspension;

(iii) The specific cause(s) for suspension from § 3017.405;

(iv) A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the suspension;

(v) The recommended time period for the suspension;

(vi) The potential effect and/or consequences that the suspension will have on the respondent(s);

(vii) Copies of any relevant support documentation identified under this section.

(3) The suspending official shall be responsible for deciding whether or not to proceed with the suspension.

(4) OGC is responsible for:

- (i) Reviewing the documentation and notice for legal sufficiency, and
- (ii) Providing any necessary coordination with DOJ.

(b) *Decisionmaking process.* USDA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 3017.411 through § 3017.413.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

**§ 3017.411 Notice of suspension.**

When a respondent is suspended, notice shall immediately be given:

- (a) That suspension has been imposed;
- (b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;
- (c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;
- (d) Of the cause(s) relied upon under § 3017.405 for imposing suspension;
- (e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;
- (f) Of the provisions of § 3017.411 through § 3017.413 and any other USDA procedures, if applicable, governing suspension decisionmaking; and
- (g) Of the effect of the suspension.

In USDA, the notice to the respondent shall be signed by the suspending official and transmitted by certified mail, return receipt requested. OGC will be consulted on all proposed suspension actions prior to the notice being sent to the respondent.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

**§ 3017.412 Opportunity to contest suspension.**

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(A) In USDA, such determination shall be made by the suspending official, after coordination with OGC.

(B) In USDA, the suspending official shall continue the suspension only if he/she determines, after consultation with OGC, that there is enough evidence to proceed without using the facts that DOJ has advised would prejudice the contemplated legal proceedings. If there is not such evidence, the suspension shall be terminated immediately without prejudice.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

#### § 3017.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 3017.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(1) In USDA, the suspending official shall terminate the suspension immediately when additional proceedings to determine disputed facts have been

denied on the basis of DOJ advice. The agency, however, reserves the right to proceed with the suspension when DOJ completes its legal proceedings or is satisfied that the suspension no longer will prejudice DOJ's proceedings.

(2) In USDA suspension actions, where the respondent(s) fail(s) to timely provide any submission in opposition, the action will be considered decided.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

(1) In USDA, the notice to the respondent shall be signed by the suspending official and transmitted by certified mail, return receipt requested. OGC will be consulted on all proposed suspension actions prior to the notice being sent to the respondent. The notice shall include the following:

(i) Reference to the previously issued notice of suspension;

(ii) The reason(s) for the action taken in this notice.

(iii) The effective date(s) of the suspension taken in this notice and, where appropriate, the period of the suspension;

(iv) Advice that the suspension is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or a designee authorized by an agency head makes a determination referred to in § 3017.215.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4732, Jan. 30, 1989]

#### § 3017.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuring legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney

requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

(1) The suspending official shall notify OGC which will notify DOJ of the impending termination of a suspension.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4733, Jan. 30, 1989]

#### § 3017.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 3017.325), except that the procedures of § § 3017.410 through 3017.413 shall be used in imposing a suspension.

#### Subpart E -- Responsibilities of GSA, Agency and Participants

#### § 3017.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

#### § 3017.505 USDA responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspensions, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which USDA has

granted exceptions under § 3017.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 3017.500(b) and of the exceptions granted under § 3017.215 within five working days after taking such actions.

(1) Each communication with GSA regarding additions, deletions, or changes to the Nonprocurement List shall be in writing.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

(f) USDA agencies shall provide the Office of Finance and Management (OFM) with a copy of any information provided to GSA pursuant to this section.

(g) USDA agencies shall notify GSA and OFM, in writing, of debarment or suspension decisions overturned on appeal under § 3017.515.

[54 FR 4722 and 4731, Jan. 30, 1989, as amended at 54 FR 4733, Jan. 30, 1989]

#### § 3017.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.*  
(1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to USDA if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposal.

#### § 3017.515 Appeal of debarment or suspension decisions.

(a) If a decision to debar or suspend is made by a debarring or suspending official under § 3017.314 or § 3017.413, the respondent may appeal the decision to the Office of Administrative Law Judges (OALJ) by filing the appeal, in writing, to the Hearing Clerk, OALJ, United States Department of Agriculture, Washington, DC 20250. The appeal must be filed within 30 days of receiving the decision and it must specify the basis of the appeal. The decision of a debarring or suspending official under § 3017.314 or § 3017.413 may be vacated by the assigned appeals officer if the officer determines that the decision is:

- (1) Not in accordance with law;
- (2) Not based on the applicable standard of evidence; or
- (3) Arbitrary and capricious and an abuse of discretion.

(b) The appeals officer will base his/her decision solely upon the administrative record.

(c) Within 90 days of the date the appeal is filed with USDA's OALJ Hearing Clerk, the appeals officer will notify, in writing, the respondent(s) and the debarring or suspending official, who took the action being appealed, of his/her decision in the appeal. The notice must specify the reason(s) for the decision made by the appeals officer.

(d) The appeals officer's decision is final and is not appealable within USDA.

[54 FR 4733, Jan. 30, 1989]

Appendix A to Part 3017 -- Certification Regarding Debarment, Suspension, and Other Responsibility Matters -- Primary Covered Transactions

## Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered

transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters  
-- Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal has one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix B to Part 3017 -- Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transactions

## Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department of agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

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

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department of agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

## **PART 3018 -- NEW RESTRICTIONS ON LOBBYING**

### **Subpart A -- General**

Sec.

3018.100 Conditions on use of funds.

3018.105 Definitions.

3018.110 Certification and disclosure.

### **Subpart B -- Activities by Own Employees**

3018.200 Agency and legislative liaison.

3018.205 Professional and technical services.

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### **Subpart D -- Penalties and Enforcement**

3018.400 Penalties.

3018.405 Penalty procedures.

3018.410 Enforcement.

### **Subpart E -- Exemptions**

3018.500 Secretary of Defense.

### **Subpart F -- Agency Reports**

3018.600 Semi-annual compilation.

3018.605 Inspector General report.

Appendix A to Part 3018 -- Certification Regarding Lobbying

## Appendix B to Part 3018 -- Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101 - 121 (31 U.S.C. 1352); 5 U.S.C. 301.

Source: 55 FR 6737 and 6746, Feb. 26, 1990.

Cross Reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

### Subpart A -- General

#### §3018.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

#### §3018.105 Definitions.

For purposes of this part:

(a) Agency, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) Covered Federal action means any of the following Federal actions:

- (1) The awarding of any Federal contract;
- (2) The making of any Federal grant;
- (3) The making of any Federal loan;
- (4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) Federal contract means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) Federal cooperative agreement means a cooperative agreement entered into by an agency.

(e) Federal grant means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) Federal loan means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) Indian tribe and tribal organization have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) Influencing or attempting to influence means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) Loan guarantee and loan insurance means an agency's guarantee or insurance of a loan made by a person.

(j) Local government means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) Officer or employee of an agency includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) Person means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) Reasonable compensation means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) Reasonable payment means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) Recipient includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) Regularly employed means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

#### **§3018.110 Certification and disclosure.**

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding \$100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding \$100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding \$100,000 at any tier under a Federal loan exceeding \$150,000; or,

(4) A contract or subcontract exceeding \$100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and

commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

#### **Subpart B -- Activities by Own Employees**

##### **§3018.200 Agency and legislative liaison.**

(a) The prohibition on the use of appropriated funds, in §3018.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95 - 507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

##### **§3018.205 Professional and technical services.**

(a) The prohibition on the use of appropriated funds, in §3018.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation,

submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

#### **§3018.210 Reporting.**

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

#### **Subpart C -- Activities by Other Than Own Employees**

#### **§3018.300 Professional and technical services.**

(a) The prohibition on the use of appropriated funds, in §3018.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §3018.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For

example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

#### **Subpart D -- Penalties and Enforcement**

##### **§3018.400 Penalties.**

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of \$10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between \$10,000 and \$100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

#### **§3018.405 Penalty procedures.**

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

#### **§3018.410 Enforcement.**

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

### **Subpart E -- Exemptions**

#### **§3018.500 Secretary of Defense.**

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

### **Subpart F -- Agency Reports**

#### **§3018.600 Semi-annual compilation.**

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate

and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

#### **§3018.605 Inspector General report.**

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

#### **Appendix A to Part 3018 -- Certification Regarding Lobbying**

##### **Certification for Contracts, Grants, Loans, and Cooperative Agreements**

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

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any

person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

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

#### Statement for Loan Guarantees and Loan Insurance

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

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Note: The Disclosure of Lobbying Activities form is located at Appendix F, Contracting with Food Service Management Companies: Guidance for School Food Authorities

**Appendix B**  
**Prototype SFA-FSMC Contract Document Checklist**

# Prototype SFA-FSMC Contract Document Checklist: Instructions

## General Information

This checklist is based on the requirements contained in 7 CFR Parts 210, 3015, 3017, and 3018, and OMB Circular No. A-102, Attachment O. OMB Circular No. A-102, Attachment O, has been provided at Appendix C to the Guidance as a reference for specific contract document language. This checklist does not include the requirements applicable to those FSMCs subject to the provisions of 7 CFR 250.30, State processing of USDA donated food. For information regarding those requirements, the SFA should contact the State Distributing agency. The SFA must ensure that the State Distributing agency has reviewed and approved any processing agreement prior to the delivery of commodities for processing.

Though the checklist identifies certain unallowable SFA-FSMC contract document provisions (page 7) and advisable contract document provisions (pages 8 and 9), it is in no way inclusive of all such provisions. The State agency (SA) must carefully examine the contract document(s) to ensure that it **does not** contain other unallowable contract document provisions as well as provisions that are not in the best interest of the SFA. Careful scrutiny of the contract document(s) is required to ensure that there are no provisions that have the effect of restricting competition. If States have additional contractual requirements, an addendum to the checklist may be attached.

## Contract Document Review

SA reviews are required of contracts, completed IFBs/RFPs that become signed contracts, and all contract renewals. This checklist should be completed by the SFA and submitted with the reviewed document(s) to the SA within the timeframe established by the SA. SFA-FSMC contracts are also subject to review by the State Distributing agency. In the blanks provided, for each of the required provisions contained in the checklist, the page number(s) in the document(s) where the provision is contained is to be indicated.

**Initial Contract**—though not required, it is strongly recommended that SAs review proposed IFBs/RFPs, as well as proposed contracts developed by SFAs.

**Contract Renewal**—if the option for the yearly renewal of a contract is exercised, the SFA should include a copy of the checklist which was submitted with the initial contract, and a new checklist cover sheet, when submitting the extension agreement to the SA. The initial checklist should include notation(s) where changes have occurred. The basis for renewing the contract, as well as the basis for any fee increases or decreases, if applicable, should be noted. Additionally, a new Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions and Certification Regarding Lobbying are required for each renewal period.

## **Awarded Contracts or Contract Renewals**

The following sections should be completed or updated, as applicable:

- A. Cover Sheet, page 1**
- B. SFA Responsibilities, pages 2 and 3**
- C. FSMC Responsibilities, page 4**
- D. General Terms - All SFA-FSMC Contracts, page 5**

The following section(s) should be completed or updated, as applicable (in the case of a cost-reimbursable contract, the total value of the contract must reflect the management fees as well as the direct costs incurred by the FSMC which are billed to the SFA such as food and labor):

- E. SFA-FSMC Contracts in Excess of \$2,500, page 5**
- F. SFA-FSMC Contracts in Excess of \$10,000, page 5**
- G. SFA-FSMC Contracts - \$25,000 or More, page 6**
- H. SFA-FSMC Contracts in Excess of \$100,000, page 6**
- I. SFA-FSMC Contracts Involving Research, Developmental, Experimental and Demonstration Work, page 6**

The following section should be completed or updated:

- J. Unallowable SFA-FSMC Contract Document Provisions, page 7**

A review of the document(s) should also include **Section K, Advisable Inclusions, pages 8 and 9.**

**Prototype SFA-FSMC Contract Document Checklist**  
**Section A - Cover Sheet**

SFA Use: Review of the following attached document(s) was completed relative to the applicable requirements contained in this checklist:

**Proposed Documents:**

Invitation for Bid (IFB)     Request for Proposal (RFP)     Contract

**Completed Documents:**

Bid Documents (IFB/Signed Contract)     Bid Documents (RFP/Signed Contract)

Contract Renewal. Indicate basis for both renewal and fee increases or decreases, if applicable: \_\_\_\_\_

1st Renewal     2nd Renewal     3rd Renewal     4th Renewal

Period Covered by Renewal: From: \_\_\_\_\_ To: \_\_\_\_\_  
(Date) (Date)

For Awarded Contract (please attach sheet if additional space is needed):

Name of FSMC: \_\_\_\_\_

Agreement No.: \_\_\_\_\_ Contract Value: \_\_\_\_\_

School Food Authority: \_\_\_\_\_

School Name(s): \_\_\_\_\_

Period Covered by Contract: From: \_\_\_\_\_ To: \_\_\_\_\_  
(Date) (Date)

SFA Authorized Representative: \_\_\_\_\_ Date: \_\_\_\_\_  
(Signature)

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State Agency Use \_\_\_\_\_ Date Received: \_\_\_\_\_  
Action Taken: \_\_\_\_\_

State Agency Reviewer: \_\_\_\_\_ Date: \_\_\_\_\_  
(Signature)

## Section B - SFA Responsibilities

Page No.

- 
- \_\_\_\_\_ 1. **Provisions Under Program Agreement, §210.16(a)(2)**—ensure that the food service operation is in conformance with the SFA's agreement under the program.
- 
- \_\_\_\_\_ 2. **Signature Authority, §210.16(a)(5)**—retain signature authority on the SA-SFA agreement, free and reduced price policy statement and Claims for Reimbursement.
- 
3. **Control of the School Food Service Account and Overall Financial Responsibility**
- \_\_\_\_\_ a. **§210.16(a)(4)**—retain control of the nonprofit school food service account and overall financial responsibility for the nonprofit food service operation; and
- \_\_\_\_\_ b. retain control for the establishment of all prices, including price adjustments, for meals served under the nonprofit school food service account, e.g., pricing for reimbursable meals, a la carte service including vending machines, and adult meals.
- 
4. **USDA Donated Foods**
- \_\_\_\_\_ a. **§210.16(a)(6)**—retain title to USDA donated foods; and
- \_\_\_\_\_ b. ensure that all USDA donated foods made available to the FSMC, including processed USDA donated foods, accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. All refunds received from processors must be retained by the SFA.
- 
5. **Quality, Extent and General Nature of Food Service**
- \_\_\_\_\_ a. **§210.16(c)(3)**—provide detailed specifications for each food component or menu item as specified in 7 CFR Part 210, and include these specifications in the IFBs or RFPs. Specifications must cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

**Section B - SFA Responsibilities  
(continued)**

Page No.

**5. Quality, Extent and General Nature of Food Service (Continued)**

- \_\_\_\_\_ b. **§210.16(a)(4)**—retain control of the quality, extent, and general nature of its food service.
- \_\_\_\_\_ c. **§210.16(c)(3)**—make no payment for meals that are spoiled or unwholesome at the time of delivery, do not meet detailed specifications or do not otherwise meet the requirements of the contract.
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- \_\_\_\_\_ 6. **Health Regulations, §210.16(a)(7)**—maintain all applicable health certifications and assure that all State and local regulations are being met by a FSMC preparing or serving meals at a SFA facility.
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- \_\_\_\_\_ 7. **Monitoring Responsibilities, §210.16(a)(3)**—monitor the food service operation through periodic on-site visits to ensure the food service is in conformance with program regulations.
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- \_\_\_\_\_ 8. **Use of Advisory Board, §210.16(a)(8)**—establish and maintain an advisory board composed of parents, teachers, and students to assist in menu planning.
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- \_\_\_\_\_ 9. **21-Day Cycle Menu, §210.16(b)(1)**—include a 21-day cycle menu developed in accordance with the meal pattern requirements specified in 7 CFR Part 210.

## Section C - FSMC Responsibilities

Page No. \_\_\_\_\_

- \_\_\_\_\_ 1. **Health Certification, §210.16(c)(2)**—maintain all applicable State and/or local health certification(s) for the duration of the contract for any facility outside the school in which it proposes to prepare meals. The FSMC must meet all applicable State and local health regulations in preparing and serving meals at the SFA facility.

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- \_\_\_\_\_ 2. **21-Day Cycle Menu, §210.16(b)(1)**—adhere to the 21-day cycle menu which was included in the IFB or RFP for the first 21 days of meal service. Changes thereafter may only be made with the approval of the SFA.

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- \_\_\_\_\_ 3. **Provision of Free and Reduced Price Meals, §210.16(a)**—in order to offer a la carte food service, the FSMC must also offer free, reduced price and full price reimbursable meals to all eligible children.

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- \_\_\_\_\_ 4. **USDA Donated Foods, §210.16(a)(6)**—to the maximum extent possible, utilize USDA donated foods made available by the SFA solely for the purpose of providing benefits for the SFA's food service operation.

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- \_\_\_\_\_ 5. **Recordkeeping, OMB Circular No. A-102, Attachment O, paragraph 14.h and §210.16(c)(1)**—maintain records to support the SFA's Claim for Reimbursement; make all records available to the SFA upon request; and retain all records for a period of three (3) years after the SFA submits the final Claim for Reimbursement for the fiscal year for inspection and audit by representatives of the SFA, SA, USDA and Comptroller General, at any reasonable time and place. In instances where audit findings have not been resolved, the records must be retained beyond the 3-year period until resolution of the issues raised by the audit.

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- \_\_\_\_\_ 6. **Reporting, §210.16(c)(1)**—report the claim information to the SFA promptly at the end of each month or more frequently as specified by the SFA.

## Section D - General Terms - All SFA-FSMC Contracts

Page No.

1. **Contract Duration**

- \_\_\_\_\_ a. **§210.16(d)**—contracts must be of a duration no longer than one (1) year.
- \_\_\_\_\_ b. **§210.16(d)**—options for the yearly renewal of a contract may not exceed four (4) additional one-year extensions.

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\_\_\_\_\_ 2. **Energy Policy and Conservation Act, OMB Circular No. A-102, Attachment O, paragraph 14.j**

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\_\_\_\_\_ 3. **Termination Clause, §210.16(d)**—either party may cancel for cause with 60-day notification.

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\_\_\_\_\_ 4. **Nonperformance Sanctions - OMB Circular No. A-102, Attachment O, paragraph 14.a**—provisions allowing for administrative, contractual, or legal remedies in instances where the FSMC violates or breaches contract terms, and providing for such sanctions and penalties as may be appropriate.

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## Section E - SFA-FSMC Contracts in Excess of \$2,500 Involving Food Service Workers Whose Duties are Manual or Physical in Nature

Indicate with a check mark (✓) in the block if the following provision is not applicable.

Page No.

\_\_\_\_\_ **Contract Work Hours and Safety Standards Act, OMB Circular No. A-102, Attachment O, paragraph 14.f**

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## Section F - SFA-FSMC Contracts in Excess of \$10,000

Indicate with a check mark (✓) in the block if the following provisions are not applicable.

Page No.

- \_\_\_\_\_ 1. **Termination Clause - OMB Circular No. A-102, Attachment O, paragraph 14.b**
- \_\_\_\_\_ 2. **Equal Employment Opportunity - OMB Circular No. A-102, Attachment O, paragraph 14.c**

## Section G - SFA-FSMC Contracts - \$25,000 or More

Indicate with a check mark (✓) in the block if the following provision is not applicable.  
Date Signed

\_\_\_\_\_ **Debarment, Suspension, Ineligibility and Voluntary Exclusion, 7 CFR 3017.510**—certification regarding debarment/suspension from participating in Federal contracts/grants/awards. A new certification is also required for each renewal period.

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## Section H - SFA-FSMC Contracts in Excess of \$100,000

Indicate with a check mark (✓) in the block if the following provision is not applicable.  
Date Signed

\_\_\_\_\_ **Certification Regarding Lobbying, 7 CFR Part 3018**—a new certification is also required for each renewal period.

Indicate with a check mark (✓) in the block if the following provision is not applicable.  
Date Signed

\_\_\_\_\_ **Disclosure of Lobbying Activities, 7 CFR Part 3018**—lobbying activities in connection with school nutrition programs must be disclosed. If there are material changes after the initial filing, updated reports must be submitted on a quarterly basis.

Indicate with a check mark (✓) in the block if the following provision is not applicable.  
Page No.

\_\_\_\_\_ **Clean Air Act, Clean Water Act, and Environmental Protection Agency Regulations, OMB Circular No. A-102, Attachment O, paragraph 14.i**

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## Section I - SFA-FSMC Contracts Involving Research, Developmental, Experimental and Demonstration Work

Indicate with a check mark (✓) in the block if the following provision is not applicable.  
Page No.

\_\_\_\_\_ **USDA Rights to Copyrights, Patent Rights and Rights in Data and Reporting of Discoveries and Inventions, OMB Circular No. A-102, Attachment O, paragraph 14.g**

## Section J - Unallowable SFA-FSMC Contract Document Provisions

The following indicate problem areas that have been identified in SFA-FSMC contract documents. The contract documents **must** be thoroughly checked, regardless of the procurement method used, to ensure that these areas **have not been included**, in any form. Indicate with a check mark (✓) in each block that the review of the document(s) indicates that there are no such provisions in the reviewed document(s), unless specified below.

Check (✓) as described above.

- 1. **Cost Plus a Percentage of Cost/Income**—cost plus a percentage of cost/income to the FSMC, however represented.
- 2. **Duplicate Fees**—fee structures that permit a FSMC to bill management fees and charge the same costs as cost-reimbursable expenses.
- 3. **Purchasing**—if the SFA does the purchasing, clauses that limit the selection of vendors to only FSMC-approved vendors.
- 4. **Acceleration Clause**—provisions (multi-year) that require full payment (e.g., program equipment purchases) if the contract is not renegotiated.
- 5. **Interest Payments**—interest payments to the contractor, however represented, including interest payments for equipment purchases.
- 6. **Guaranteed Return**—"guaranteed return" provisions unless the "return" remains in the nonprofit food service account. "Returns" cannot be contingent upon multi-year contract duration.
- 7. **Delegation of SFA Responsibilities**—FSMC responsibility for any of the functions that must be retained by the SFA.
- 8. **Automatic Renewal**—provisions which automatically renew the contract.
- 9. **Processing Contracts**—contract document language that permits the FSMC to subcontract USDA donated foods for further processing.

For the item(s) above not checked (✓), indicate item number(s) with corresponding page number(s) of document(s) where provision(s) appears.

Item Number(s)	Page Number(s)
_____	_____
_____	_____
_____	_____

## Section K - Advisable Inclusions

Though the items below are not regulatory in nature, they have been included to offer technical assistance to the SFA in developing contractual language that will ensure that the best interest of the SFA is served by the contract.

### Page No.

\_\_\_\_\_ 1. **Compliance with Program Regulations**—requirement that the FSMC conduct program operations in accordance with 7 CFR Parts 210, 215, 220, 245 and 250, and FCS instructions and policy.

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### 2. **USDA Donated Foods**

\_\_\_\_\_ a. Method which delineates how the FSMC will pass the value of USDA donated foods used to the SFA.

\_\_\_\_\_ b. Specific statement that USDA donated foods are not to be used for special functions conducted outside the nonprofit school food service (e.g., catered meals).

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\_\_\_\_\_ 3. **Special Functions**—method which delineates the cost allocation for special functions conducted outside the nonprofit school food service. The method should demonstrate that labor costs are not being double billed for program meals and special function meals.

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### 4. **Fee Structure**

\_\_\_\_\_ a. In a cost-reimbursable contract, requirement for breakdown of administrative and management fees in order to prevent double billing.

\_\_\_\_\_ b. Basis for fee adjustments.

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### 5. **Purchasing**

\_\_\_\_\_ a. In a cost-reimbursable contract, if the FSMC makes purchases, the prices charged the SFA must be reasonable and necessary.

\_\_\_\_\_ b. A provision stating that any silence, absence or omission from the contract document specifications concerning any point shall be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the SFA are to be used.

**Section K - Advisable Inclusions  
(continued)**

Page No.

- 
- \_\_\_\_\_ 6. **Certification of Independent Price Determination**—certification regarding non-collusion. This certification may be met through the use of the Certification of Independent Price Determination form (Appendix D).
- 
- \_\_\_\_\_ 7. **Civil Rights Compliance**—assurance that the FSMC will conform with all civil rights requirements applicable to the SFA.
- 
- \_\_\_\_\_ 8. **Buy American Provision**—compliance with the Buy American provision under 7 CFR Part 250.
- 
- \_\_\_\_\_ 9. **Claim Liability**
- \_\_\_\_\_ a. The FSMC accepts liability caused by FSMC negligence for claims assessed as a result of Federal/State reviews/audits, corresponding with the SFA's period of liability.
- \_\_\_\_\_ b. The FSMC accepts liability for any negligence on its part that results in any loss of, improper use of, or damage to USDA donated foods.
- 
- \_\_\_\_\_ 10. **Location of Records**—all FSMC records pertaining to the SFA should be maintained at the SFA while the contract is in effect, and preferably for the required retention period.
- 
- \_\_\_\_\_ 11. **Nutrition Education**—FSMC responsibility for nutrition education activities, as applicable.

**Appendix C**  
**OMB Circular No. A-102, Attachment O**

PROCUREMENT STANDARDS

1. Applicability

a. This Attachment establishes standards and guidelines for the procurement of supplies, equipment, construction and services for Federal assistance programs. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and executive orders.

b. No additional procurement requirements or subordinate regulations shall be imposed upon grantees by executive agencies unless specifically required by Federal law or executive orders or authorized by the Administrator for Federal Procurement Policy. This prohibition is not applicable to payment conditions issued in accordance with Treasury Circular 1075, individual grantee requirements pursuant to Section 10 of the basic circular or the provisions of this or other OMB circulars.

c. Provisions of current subordinate requirements not conforming to this Attachment shall be rescinded by grantor agencies unless approved by the Office of Federal Procurement Policy (OFPP).

2. Grantee/Grantor Responsibility

a. These standards do not relieve the grantee of any contractual responsibilities under its contracts. The grantee is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered in support of a grant. These include but are not limited to source evaluation, protests, disputes, and claims. Executive agencies shall not substitute their judgment for that of the grantee unless the matter is primarily a Federal concern. Violations of law are to be referred to the local, State, or Federal authority having proper jurisdiction.

b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs

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conform to the standards set forth in this Attachment and applicable Federal law.

### 3. Grantee Procurement Improvement

Executive agencies awarding Federal grants or other assistance which require or allow for procurement by the recipients are encouraged to assist recipients in improving their procurement capabilities by providing them with technical assistance training, publications, and other aid.

### 4. Procurement System Reviews

a. Executive agencies are encouraged to perform reviews of their grantees' procurement systems if a continuing relationship with the grantee is anticipated or a substantial amount of the Federal assistance is to be used for procurement and review of individual contracts is anticipated. The purpose of the review shall be to determine: (1) whether a grantee's procurement system meets the standards prescribed by this Attachment or other criteria acceptable to the OFPP, such provisions of the Model Procurement Code for State and local government; and (2) whether the grantee's procurement system should be certified by the reviewing agency. Such a review will also give an agency an opportunity to give technical assistance to a grantee to remedy its procurement system if it does not fully comply. In addition, such a review may provide a basis for deciding whether the grantee's contracts and related procurement documents should be subject to the grantor's prior approval, as provided by Section 6.

b. In conducting procurement system review, grantor agencies will evaluate a grantee's procurement system in terms of whether it complies with the standards prescribed by this Attachment and represents a fair, efficient and effective procurement system. To the maximum extent feasible, reviewers will rely upon State or local evaluations and analyses performed by agencies or organizations independent of the grantee contracting activity.

c. When a Federal grantor agency completes a procurement review, it shall furnish a report to the grantee, with a copy to OFPP.

d. All agencies should normally rely upon the resultant findings or certification for a period of 24 months before another review is performed.

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e. Reviews shall be conducted in accordance with standards and guidelines approved or issued by OFPP.

f. The reviews authorized by Section 6 are waived if a grantee's procurement system is certified.

#### 5. Protest Procedures

a. Grantor agencies may develop an administrative procedure to handle complaints or protests regarding grantee contractor selection actions. The procedure shall be limited as follows:

a. No protest shall be accepted by the grantor agency until all administrative remedies at the grantee level have been exhausted.

b. Review is limited to:

(i) Violations of Federal law or regulations. Violations of State or local law shall be under the jurisdiction of State or local authorities.

(ii) Violations of grantee's protest procedures or failure to review a complaint or protest.

#### 6. Grantor Review of Proposed Contracts

Federal grantor pre-award review and approval of the grantee's proposed contracts and related procurement documents, such as requests for proposal and invitations for bids, is permitted only under the following circumstances:

a. The procurement is expected to exceed \$10,000 and is to be awarded without competition or only one bid or offer is received in response to solicitation.

b. The procurement expected to exceed \$10,000 specifies a "brand name" product; or

c. The grantee's procurement procedures or operation fails to comply with one or more significant aspects of this Attachment. The grantor agency shall notify the grantee in writing, with a copy of such notification to the OFPP.

#### 7. Code of Conduct

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Grantees shall maintain a written code or standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Federal funds. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- a. The employee, officer or agent;
- b. Any member of his immediate family;
- c. His or her partner; or
- d. An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements.

Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.

#### 8. Procurement Procedures

The grantee shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by grantee officials to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidation or breaking out to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency, grantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

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9. Contracting with Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms

a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of suppliers, equipment, construction and services. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists.

(2) Assuring that small and minority businesses are solicited whenever they are potential sources.

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.

(5) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the the Department of Commerce and the Community Services Administration as required.

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in 1 through 5 above.

b. Grantees shall take similar appropriate affirmative action in support of women's business enterprises.

c. Grantees are encouraged to procure goods and services from labor surplus areas.

d. Grantor agencies may impose additional regulations and requirements in the foregoing areas only to the extent specifically mandated by statute or presidential direction.

10. Selection Procedures

a. All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and

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free competition consistent with this Attachment. Procurement procedures shall not restrict or eliminate competition. Example of what is considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business; (2) noncompetitive practices between firms; (3) organizational conflicts of interest; and (4) unnecessary experience and bonding requirements.

b. The grantee shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation shall:

(a) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.

(b) Clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

#### 11. Method Procurement

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Procurement under grants shall be made by one of the following methods, as described herein: (a) small purchase procedures; (b) competitive sealed bids (formal advertising); (c) competitive negotiation; (d) noncompetitive negotiation.

a. Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than \$10,000. Grantees shall comply with State or local small purchase dollar limits under \$10,000. If small purchase procedures are used for a procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources.

b. In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(1) In order for formal advertising to be feasible, appropriate conditions must be present, including, as a minimum, the following:

(a) A complete, adequate and realistic specification or purchase description is available.

(b) Two or more responsible suppliers are willing and able to compete effectively for the grantee's business.

(c) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(2) If formal advertising is used for a procurement under a grant the following requirements shall apply:

(a) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(b) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

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(c) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(d) A firm-fix-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the grantee indicates that such discounts are generally taken.

(e) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program.

c. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposal shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

(2) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.

(3) The grantee shall provide mechanisms for technical evaluation of the proposals received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award.

(4) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

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(5) Grantees may utilize competitive negotiation procedures for procurement of architectural/engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitors' is selected, subject to negotiation of fair and reasonable compensation.

d. Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(1) The item is available only from a single source;

(2) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(3) The Federal grantor agency authorizes noncompetitive negotiation; or

(4) After solicitation of a number of sources, competition is determined inadequate.

e. Additional innovative procurement methods may be used by grantees with the approval of the grantor agency. A copy of such approval shall be sent to the OEPP.

## 12. Contract Pricing

The cost plus a percentage of cost and percentage of construction cost method of contracting shall not be used. Grantees shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

## 13. Grantee Procurement Records

Grantees shall maintain records sufficient to detail the significant history of a procurement. These records shall

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include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

#### 14. Contract Provision

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal law or the grantor agency.

a. Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

b. All contracts in excess of \$10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

c. All contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).

d. All contracts and subgrants for construction or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.

e. When required by the Federal grant program legislation, all construction contracts in excess of \$2,000 awarded by grantees and subgrantees shall include a provision for compliance

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with the Davis-Bacon Act (40 USC 276a to a-7) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less often than once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The grantee shall report all suspected or reported violations to the grantor agency.

f. Where applicable, all contracts awarded by grantees and subgrantees in excess of \$2,000 for construction contracts and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 USC 327-330) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of standard workday of 8 hours and a standard workweek of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1-1/2 times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

g. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements and regulations pertaining to copyrights and rights in data.

h. All negotiated contracts (except those awarded by small purchase procedures) awarded by grantees shall include a

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provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.

Grantees shall require contractors to maintain all required records for three years after grantees make final payments and all other pending matters are closed.

i. Contracts, subcontracts, and subgrants of amounts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 USC 1857(h)), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR, Part 15), which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the grantor agency and to the USEPA Assistant Administrator for Enforcement (EN-329).

j. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163).

Grantor agencies are permitted to require changes, remedies, changed conditions, access and record retention and suspension of work clauses approved by the Office of Federal Procurement Policy.

#### 15. Contract Administration

Grantees shall maintain a contract administration system ensuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

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**Appendix D**  
**Prototype Certification of Independent Price Determination**

**Prototype  
Certificate of Independent Price Determination**

Both the school food authority and the Food Service Management Company (offeror) shall execute this Certificate of Independent Price Determination.

\_\_\_\_\_  
Name of Food Service Management Company

\_\_\_\_\_  
Name of School Food Authority

(A) By submission of this offer, the offeror certifies and in the case of a joint offer, each party thereto certifies as to its own organization, that in connection with this procurement:

(1) The prices in this offer have been arrived at independently, without consultation, communication or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other offeror or with any competitor;

(2) Unless otherwise required by law, the prices which have been quoted in this offer have not been knowingly disclosed by the offeror and will not knowingly be disclosed by the offeror prior to opening in the case of an advertised procurement, or prior to award in the case of a negotiated procurement, directly or indirectly to any other offeror or to any competitor; and

(3) No attempt has been made or will be made by the offeror to induce any person or firm to submit or not to submit, an offer for the purpose of restricting competition.

(B) Each person signing this offer on behalf of the Food Service Management Company certifies that:

(1) He or she is the person in the offeror's organization responsible within the organization for the decision as to the prices being offered herein and has not participated, and will not participate, in any action contrary to (A)(1) through (A)(3) above; or

(2) He or she is not the person in the offeror's organization responsible within the organization for the decision as to the prices being offered herein, but that he or she has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated and will not participate, in any action contrary to (A)(1) through (A)(3) above, and as their agent does hereby so certify; and he or she has not participated, and will not participate, in any action contrary to (A)(1) through (A)(3) above.

**To the best of my knowledge, this Food Service Management Company, its affiliates, subsidiaries, officers, directors and employees are not currently under investigation by any governmental agency and have not in the last three years been convicted or found liable for any act prohibited by State or Federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding on any public contract, except as follows:**

_____ Signature of Food Service Management Company's Authorized Representative	_____ Title	_____ Date
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**In accepting this offer, the SFA certifies that no representative of the SFA has taken any action which may have jeopardized the independence of the offer referred to above.**

_____ Signature of School Food Authority's Authorized Representative	_____ Title	_____ Date
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**Note: Accepting a bidder's offer does not constitute award of the contract.**

**Appendix E**  
**Certification Regarding Debarment, Suspension, Ineligibility and Voluntary**  
**Exclusion**

# U.S. DEPARTMENT OF AGRICULTURE

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

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

### (BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

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

---

Organization Name

PR/Award Number or Project Name

---

Name(s) and Title(s) of Authorized Representative(s)

---

Signature(s)

Date

## Instructions for Certification

1. By signing and submitting this form, the prospective lower tier participant is providing the certification set out on the reverse side in accordance with these instructions.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this form that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this form that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

**Appendix F**  
**Certification Regarding Lobbying**  
**Disclosure of Lobbying Activities**

CERTIFICATION REGARDING LOBBYING

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

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

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

(1) No Federal appropriated funds have been paid or will be paid by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of a Federal contract, the making of a Federal grant, the making of a Federal loan, the entering into a cooperative agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all covered subawards exceeding \$100,000 in Federal funds at all appropriate tiers and that all subrecipients shall certify and disclose accordingly.

Name/Address of Organization

Name/Title of Submitting Official

Signature

Date



## INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

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

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

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



