Date: May 27, 2009  
Reference: # SFSP 2009-05

To: Summer Food Service Program (SFSP) Contractors

Subject: Clarification of Requirements in Food Service Management Company (FSMC) and Management of Donated Foods in Child Nutrition Programs Final Rules

Effective Date: November 6, 2008

Purpose

CLARIFY existing policy regarding FSMC and the management of USDA-donated food in the SFSP.

Background

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), published its final rule, Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions, August 8, 2008. This Policy Alert contains questions and answers for the management of donated foods in the SFSP.

Implementation

Immediately

Procedure

NOTE: This Policy Alert only applies to SFSP sponsors who contract with a FSMC that uses USDA-donated foods.

ADD The following questions and answers to Section 11000 of the SFSP Handbook:

Questions and Answers Regarding Management of USDA-Donated Foods and Food Service Management Companies (FSMC)

1) Question: If food service management company (FSMC) contracts were just re-bid for program year (PY) 2009, in accordance with the implementation schedule must sponsors re-bid again for PY 2010 to comply with the implementation schedule in the FSMC final rule? Refer to Policy Alert FDP 2009-1, Publication of Final Rule – Management of Donated Foods.

Answer: Sponsors must re-bid contracts expiring at the end of PY 2009, except in the following cases:

This Policy Remains in Effect Until Further Notice
Situation 1

The contract already includes provisions relating to crediting for and use of United States Department of Agriculture (USDA)-donated foods, the method of determining the value of donated foods used in crediting and recordkeeping requirements that ensure compliance with the requirements of the final rule; or

Situation 2

The contract has an annual renewal provision that would permit it, with Texas Department of Agriculture (TDA) – approval, to extend the contract for one more 12-month period (i.e., through PY 2010).

Crediting and Value of Donated Foods

1) Question: Is it correct that the FSMC will be required to credit the sponsor for donated foods when they are received by the sponsor for use. Is that correct? Historically, credit for donated foods has been based on usage, not when received. Will the FSMC still be permitted to credit donated foods when used or only when received?

Answer: In accordance with new regulations, the FSMC must credit the sponsor for the value of all donated foods received for use in the food service in the program year, whether the USDA-donated foods are used in that program year or not.

2) Question: In accordance with regulations, the FSMC must credit the sponsor for the value of all donated foods received for use in the food service in a program year, as provided in its contract. However, when is USDA-donated food considered “received”? Is it when the USDA- donated food arrives at the kitchen or storage facility? OR, is it when it arrives at a State storage facility, or at a processor facility and is credited to the sponsor’s entitlement?

Answer: USDA-donated foods that will be used by the FSMC as part of its contract with the sponsor are considered “received” when the foods arrive at the kitchen or sponsor or FSMC storage facility, either raw form or in processed end products. The fact the TDA may credit the sponsor’s entitlement at a different time (e.g., upon delivery of the USDA-donated foods to a processor’s facility) is not directly related to the crediting requirement imposed on the FSMC.

3) Question: What are the requirements for the FSMC in crediting the sponsor for the value of USDA-donated foods in the following situations:

Situation 1

When the FSMC procures end products from a processor on behalf of the sponsor on a fee-for-service basis.

continued
Procedure continued

**Answer:** The FSMC must credit the sponsor for the value of donated foods contained in end products that the FSMC procures from a processor on behalf of the sponsor, regardless of the method of sales used in its procurement. The specific method of crediting utilized, which may be by invoice, reductions, discounts, refunds or another means must be indicated in the sponsor’s contract with the FSMC. The method utilized may depend on the type of contract (i.e., in a cost-reimbursable contract, the FSMC may simply bill the sponsor for its food purchases and disclose, in its billing, the savings resulting from donated foods contained in its purchase processed end products). If such purchase was made on a fee-for-service basis, indication of such method of purchase in its billing would provide the required disclosure, since, by definition, the fee-for-service excludes the donated food value in the fee charged. Crediting for donated foods in processed end products must be at the processing agreement value in accordance with the State Participation Agreement or State Processing Agreement with the processor. All methods of crediting must provide clear documentation of the value received by the sponsor for the USDA-donated foods in such end products.

**Situation 2**

When the FSMC procures end products from a processor on behalf of the sponsor under a rebate system.

**Answer:** Same as 1) above. However, it should be noted that in a cost-reimbursable contract, as described above, the FSMC must remit the rebate of refund to the sponsor, or otherwise credit the sponsor for the value of USDA-donated foods in end products it purchases from the processor and charges to the sponsor at the commercial, or gross, price.

**Situation 3**

When the sponsor procures end products from the processor and provides them to the FSMC for use in the SFSP.

**Answer:** The FSMC is not required to credit the sponsor for the value of USDA-donated foods in end products that the sponsor procures from the processor and provides to the FSMC for use in the SFSP – unless, in accordance with its contract, the FSMC acts as an intermediary between the processor and sponsor in passing along the USDA-donated food value (e.g., in receiving refunds from the processor and remitting them to the sponsor). The processor must credit the sponsor for the donated food value in end products procured by the sponsor. The sponsor must ensure that the FSMC uses such end products in the SFSP. If it must also ensure that the FSMC does not charge it for such end products and may choose to include a provision in its contract to assure this (as it might choose to do for other foods the sponsor has procured and provided to the FSMC for use in the food service).

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4) **Question:** Is it correct that under cost-reimbursable contracts, the sponsor can specify the frequency with which they will receive credit for commodities and that frequency can be as little as one time per year?

**Answer:** Yes, that is correct for both cost-reimbursable contracts and fixed-price contracts.

5) **Question:** Please clarify and provide examples of the requirement for the recipient agency (RA) to ensure that the specified methods of valuation of USDA-donated foods permits crediting to be achieved in the required time period.

**Answer:** For example, since crediting for USDA-donated food value must be achieved at least annually, the method of valuation may not use an average price for that food for a period of time extending beyond the current program year.

6) **Question:** Can TDA prohibit the use of “donated food values determined by an alternate means of the RA’s choosing” and simply require that all RAs use the USDA-donated food values determined by TDA?

**Answer:** Yes, TDA may require RAs to use the USDA-donated food values established by TDA and may prohibit the use of alternate values.

7) **Question:** The requirement for the contract to “ensure that all donated foods received for use by the RA for the program or fiscal year are used in the RA’s food service” doesn’t acknowledge that regulations provide for substitutions of USDA-donated foods.

**Answer:** That is correct. This will be amended in the third 7 CFR Part 250 rule to clarify that the contract must ensure the use of USDA-donated foods, the use of commercial substitutes of the same generic identity, or U.S. origin and of equal or better quality in place of USDA-donated foods.

8) **Question:** Who is responsible for ensuring that commercially purchased foods used in the sponsor’s food service in place of USDA-donated foods are “of the same generic identity, of U.S. origin, and of equal or better quality” than the USDA-donated foods?

**Answer:** The sponsor must ensure that commercially purchased foods used in place of USDA-donated foods are of the same generic identity, of U.S. origin, and of equal or better quality than the USDA-donated foods, in the course of their monitoring of the FSMC food service.

9) **Question:** Will TDA require the use of USDA-donated ground beef and USDA-donated ground pork without substitution be changed upon publication of the Processing Final Rule to mirror the full substitution policy expected in that rule?

**Answer:** No, because unlike processors, FSMCs are not subject to the grading requirements that ensure substitutions of USDA-donated foods with commercial foods of equal or better quality than the USDA-donated foods.

continued
10) **Question:** Does the sponsor retain title to USDA-donated foods that are provided to the FSMC for use in the SFSP?

**Answer:** Yes, the sponsor retains title to USDA-donated foods provided to the FSMC for use in the SFSP.

11) **Question:** If credit for USDA-donated foods is provided upon receipt, does this mean that the FSMC owns the USDA-donated foods until they are used in the SFSP?

**Answer:** It is not accurate to say that the FSMC “owns” the USDA-donated foods, since the ownership implies that the FSMC is free to use them as they please. The FSMC must “manage” the USDA-donated foods to ensure that they are used in the SFSP, or those commercial substitutes of the same generic identity, of U.S. origin and of equal or better quality are used in their place (except that USDA-donated ground beef and ground pork, and all processed end products must be used without substitution). When commercial substitutes are used in place of USDA-donated foods, the FSMC may then use the USDA-donated foods without restriction.

12) **Question:** May the FSMC sell on the open market USDA-donated foods that have been substituted with commercially purchased foods on the open market?

**Answer:** FSMCs are not prohibited from selling USDA-donated foods that have been substituted with commercially purchased foods on the open market.

13) **Question:** Please clarify the requirements to “use all donated ground beef, donated ground pork and all processed end products, in the RA’s food service” refers only to processed end products produced under the State Participation Agreement/processing program – or also to further processed items made available by USDA, such as chicken fajita strips and turkey taco filling.

**Answer:** In accordance with the definitions of “end product” and “processing”, “processed end product” refers to a product containing USDA-donated food processed by a commercial processor and does not include a donated food provided by USDA in a processed form (which would simply be another type of USDA-donated food).

**Storage and Inventory Management**

1) **Question:** What happens to existing, or slow moving, donated food inventory carried over from a previous contract, some of which may already have exceeded the best-if-used-by date, or with USDA-donated food inventory that cannot be efficiently utilized in the SFA food service?

**Answer:** The FSMC must use all USDA-donated foods and processed end products in inventory carried over from a previous contract in the SFSP, unless the sponsor determines that such foods are out-of-condition, in which case they must not be used.
2) **Question:** Is TDA required to initiate a claim against the sponsor, or against the FSMC conducting the food service on behalf of the sponsor, for USDA-donated foods that go out-of-condition as a result of inadequate storage procedures?

**Answer:** No, the FSMC must meet the requirements that ensure safe storage of USDA-donated foods and the sponsor must ensure that food storage, preparation and service comply with the sanitation and health standards established under State laws and regulations. However, the sponsor, or the FSMC conducting the food service on behalf of the sponsor, may commingle USDA-donated foods with other foods purchased for the SFSP, in a single inventory management system. Under such system, it is difficult to distinguish USDA-donated foods from other foods, and all foods are managed in a like manner. The SFA must, however, ensure that the FSMC has credited it for the value of all USDA-donated food received for use in the SFSP in a program year, without respect to the actual use of the foods.

3) **Question:** Is it correct that the FSMC may continue to manage USDA-donated food inventories separate from other foods if it works best for the FSMC and continues to ensure that appropriate credit is given to the sponsor?

**Answer:** Yes, that is correct.

4) **Question:** In cost-reimbursable contracts, must the sponsor ensure that the FSMC does not charge it for commercially purchased foods substituted for USDA-donated foods?

**Answer:** Yes. The FSMC, under its cost-reimbursable contract, must ensure that its system of inventory management does not result in the sponsor being charged for USDA-donated foods. This requirement also applies to commercially purchased foods substituted for USDA-donated foods. The sponsor must ensure FSMC compliance with this requirement in the course of its required monitoring of the FSMC food service and the annual reconciliation.

### Termination of Contract

1) **Question:** Is the sponsor required to refund any credit already received to the FSMC for USDA-donated foods that remain with the sponsor at termination of a contract? If they are not required to refund any credit, how will those USDA-donated foods be handled when they are turned over to the “successor” FSMC? It would not seem appropriate that the successor FSMC must also provide credit for the value of such USDA-donated foods. What are the requirements for the successor FSMC?

**Answer:** The sponsor may not refund any credit to the FSMC for the value of any USDA-donated foods that remain unused when a contract terminates, and is not extended or renewed. The “successor” FSMC must ensure use of such USDA-donated foods in the SFSP, but would not have to credit the sponsor for the value of such USDA-donated foods, as that value would already have accrued to the SFSP.
2) **Question:** Does the FSMC have to credit the sponsor for existing USDA-donated food inventory carried over from a previous contract that operated under the old rules, in which the value of USDA-donated foods was usually credited as the foods were used rather than received? If so, at what value must such USDA-donated foods be credited? What about such USDA-donated foods that are determined to be out-of-condition?

**Answer:** The FSMC must credit the sponsor for the value of USDA-donated foods carried over from a previous contract if the value of such foods has not already accrued to the SFSP (i.e., if the value was not credited to the sponsor by the previous FSMC). However, if the FSMC is not required to credit the sponsor for the value of such USDA-donated foods that are determined to be out-of-condition, and the sponsor must ensure that such out-of-condition foods are not used in the SFSP.

3) **Question:** Must the FSMC return other unused USDA-donated foods, in addition to unused USDA-donated ground beef, ground pork and other processed end products, when a contract terminates, and is not extended or renewed? If so, is the sponsor required to refund any credit received to the FSMC for such returned USDA-donated foods?

**Answer:** When the contract terminates, and is not extended or renewed, the FSMC must return unused USDA-donated ground beef, ground pork and all processed end products, and must return other unused USDA-donated foods at the discretion of the sponsor (i.e., in accordance with the contract). The sponsor may not refund any credit received to the FSMC for the value of any USDA-donated foods that remain unused when the contract terminates and is not extended or renewed.

**Records and Reviews**

1) **Question:** Is TDA expected to monitor sponsor compliance with the provisions of USDA-donated foods in contracts with FSMC during its on-site reviews?

**Answer:** Yes. TDA is required to perform on-site reviews of the SFSP and the sponsor’s compliance with USDA-donated foods and FSMC contracts would be part of this review.

2) **Question:** What documentation would the sponsor use to verify receipt of USDA-donated foods in its annual reconciliation? In some situations, would it have to rely on FSMC records of receipt to ensure that the FSMC has credited it for all USDA-donated foods received in the program year?

**Answer:** If the FSMC is responsible for receiving shipments on behalf of the sponsor, and retaining records of receipt of USDA-donated foods and end products, the sponsor should verify delivery of USDA-donated food shipments through the Texas Commodity System (TCS), or by contacting TDA or the processor, and should not rely solely on the FSMC records.
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