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Food Service Management Companies

Food Service Management Companies

School food authorities (SFAs) considering contracting for foodservice management with a private sector management company are advised that there are specific federal and state regulations delineating procurement and contract requirements and responsibilities. SFAs considering this choice must contact the Texas Department of Agriculture (TDA) for information prior to initiating the procurement process and before posting a public notice for bids or proposals.

Procedures for Competitive Bidding/Competitive Proposal for a Food Service Management Company (FSMC)

The procedures listed below must be followed.

1. Notify TDA of the intent of the SFA to contract with a FSMC. Information will be provided to the SFA about competitive procurement of foodservice and the proper procedures to follow in accordance with federal and state requirements.
2. SFAs must use the TDA-approved Request for Proposal (RFP) and Contract when soliciting bids/proposals for a FSMC.
3. The SFA should complete the SFA specific criteria within the RFP and Contract. The RFP is the most commonly used and appropriate method. In order to ensure objective contractor performance and eliminate unfair competitive advantage, a person that develops or drafts specifications, requirements, statements of work, requests for proposals, contract terms and conditions or other documents for use by an SFA in conducting procurement under Child Nutrition Programs will be excluded from competing for such procurements.
4. The SFA must mail the RFP and Contract to TDA for approval prior to the initial advertisement to seek proposals for foodservice at least two weeks prior to the first advertisement date. All proposal criteria must be submitted to TDA before February 15 for approval for FSMC contracts procured for the following school year. TDA will also send the SFA a copy of the Vendor's List of approved FSMCs in Texas.
5. The SFA advertises for proposals for foodservice management for the upcoming year with options up to four consecutive one-year renewals. The term of any contract for foodservice

will be July 1 – June 30. The RFP and Contract must be distributed to all vendors on the TDA Vendor’s List. Public advertisement must also occur in a publication of general circulation covering the area served by the SFA for two consecutive weeks (14 days). One source for advertisement is the Internet Web site administered by the Texas Comptroller of Public Accounts. The Electronic State Business Daily Web site is located at <http://esbd.cpa.state.tx.us>.

6. If more than one FSMC responds to the public advertisement with intentions of submitting a proposal, the SFA must conduct a Prebid Conference for all interested bidders to attend at least two weeks after the date of the last public advertisement. All respondents to the public advertisement must be invited to the Prebid Conference. Any questions asked by prospective bidders at the Prebid Conference that would cause change to the RFP must be responded to, in writing, by the SFA, with copies provided to all attending bidders. If any questions asked by vendors result in any change to the RFP, then a new copy must be provided to TDA for approval. If only one FSMC responds to the public advertisement with intentions of submitting a proposal, then the SFA may then conduct a walk-through of the facility instead of a Prebid Conference.
7. Proposals should be submitted no earlier than two weeks after the Prebid Conference or walk-through. The due date for proposals must be stated in the RFP.
8. RFPs must be ranked in accordance with the Weighted Criteria Evaluation Worksheet, which must be a part of the RFP approved by TDA. The SFA may enter into competitive negotiations with the highest ranked proposer/vendor. TDA recommends that the attorney for the SFA take an active role in negotiations and contract review with the FSMC before the SFA signs any contractual document.
9. The SFA must furnish TDA with the following documents for approval of the contract prior to April 30.
 - a. A completed TDA checklist (can be found on the www.squaremeals.org website).
 - b. A copy of the completed RFP and Contract with all exhibits attached and the completed USDA Contract Checklist (can be found on the www.squaremeals.org website).
 - c. To accommodate the number of requests and proposals that need to be evaluated, SFAs should consider submitting the necessary documentation several weeks in advance of the April 30 submission deadline. The SFA will be notified in writing by TDA of the approval of the contract or the need for an amendment.
10. Contract approval by TDA must occur before the start of the contract year for contracts to be executed for the upcoming school year. Reimbursement cannot be paid for meals served under a FSMC contract that has not been approved by TDA and a signed copy submitted to TDA.

Procedures for Renewal of FSMC Contract for an Optional One-Year Term

1. The SFA will be provided with any changes in regulatory requirements in the contracting process by TDA.
2. The SFA and the FSMC may negotiate terms of the renewal of the contract only as allowed by the RFP and Contract. The term of any contract renewal will be for one year and run from July 1 through June 30, per the original contract. Fee increases to the SFA must be in accordance with the terms of the RFP and Contract. Fee increases are linked to the Consumer Price Index (CPI) as stated in the RFP and Contract, and accompanied by a written methodology from the old fee to the new fee. This documentation of fee increases must be provided to TDA as part of the contract renewal packet.
3. The SFA must furnish TDA with the following documents for approval of the contract renewal prior to the April 30 deadline:
 - a. A letter stating the intent of the SFA to renew the contract with the FSMC for the upcoming school year.
 - b. A copy of any amendments, subcontracts, letter agreements or any other relevant documentation pertaining to the contract;
 - c. A copy of the previous year-end auditable foodservice budget.
 - d. A copy of the upcoming year projected auditable budget.
 - e. A List of Campuses Served.
 - f. Methodologies for all allocated changes that document the change as an actual cost to the FSMC.
 - g. To accommodate the number of renewals and contracts that need to be evaluated, SFAs must submit the necessary documentation before April 30 of each year. The SFA's renewal packet must be approved, in writing, by TDA before the start of the contract year. Reimbursement cannot be paid for meals served under a FSMC contract that has not been approved by TDA and of which a signed copy has been submitted to TDA.
 - h. The SFA will be, in writing, by TDA that the renewal has been approved.

Substantive Changes to Contracts

There are types of changes to an existing FSMC contract that are considered "substantive" and would require either rebidding the FSMC contract or separately contracting for an additional service. They include:

- New services being desired by the SFA that are beyond the scope of the original or current contract. Examples include catering, a la carte sales, vended meals, convenience stores, vending machines, and concessions.
- Adding participation in another TDA-administered program.
- Changes in services within the scope of the original or current contract but which alter the value, terms or conditions of the original contract. Examples include changes to the formula for determining meal equivalency, any change in fees or basis for fee increases not reflected

in the original RFP and Contract, a major shift in responsibilities for your staff or the FSMC staff and significant changes in the basis for determining guaranteed returns.

- A major shift in responsibilities for the NSLP/SBP contractor or the FSMC staff.
- Changes to the formula that is used to identify the meal.
- Changes that involve \$100,000 or more.

Note: Consider any changes in the work to be performed to be within the general scope of a contract if these changes can be regarded as fairly and reasonably performed with the expectation of the parties as when you entered into the contract. However, if you have a question about whether the proposed change will be substantive, please contact TDA.

Non-Substantive Changes to Contracts

Changes not requiring rebidding the FSMC contract include:

- The original RFP requested, and the contract provided for, the priced option(s) to implement the added service(s); and
- Emergency situations when time does not permit conducting a formal competitive procurement and the current FSMC contractor has all the capabilities necessary to perform the new service. Emergency situations must be approved, in advance and in writing, by TDA.

SFAs, in approved emergency situations, are permitted to use noncompetitive negotiation as the means to procure the changes. After negotiating the price and terms, the SFA would simply modify the contract to reflect the new services and charges.

Fee Increases with Contract Renewals

A contract with a FSMC can only provide for "fixed fees". This includes either a fixed price contract or a cost reimbursable contract. Fee increases are not allowable unless provided for in the RFP and Contract. Since full and open competition must be maintained in all procurement actions, any information regarding potential fee increases must be available to all potential bidders at the outset of the procurement action through the RFP.

In the RFP and Contract, the SFA must identify all requirements which the offeror/bidder must fulfill and must also identify all evaluation factors, including their relative importance, to be used in evaluating bids or proposals.

In addition, the SFA should make an independent cost or price analysis before receiving proposals (using the required CPI) and use the analysis to determine the reasonableness of a proposed price increase. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicators, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine

reasonableness, allocability and allowability. Since fees are such a basic part of price or costs, they, along with any provisions for increase must be evaluated by the SFA.

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. Since fee adjustments may not be permitted unless provided for in the original RFP and Contract, any change in fees or basis for fee increases not reflected in the original RFP and Contract would constitute a substantive change to the contract which would require that the contract be rebid.

Any fee increases must be based on changes from the first, or base year. The prototype RFP and Contract requires fees be increased on specified areas using the Consumer Price Index (CPI) Food Away from Home.

Whatever index is used, if any fee increases are to be allowed, the SFA must include the specific CPI or other index to be used for fee increases on renewal of the contract.

Some of the provisions and procedures which do not meet the above requirements are:

- Negotiating or instituting fee increases on renewal of the contract with no basis in the RFP;
- Using RFP and Contract language to the effect that the parties will negotiate any fee increases on renewal of the contract;
- Using RFP and Contract language to the effect that the parties will negotiate fee increases on renewal, and if negotiation fails, a specific CPI will be used as a default index; and
- Using RFP and Contract language which only provides a general, non-specific index such as stating that the specific CPI will be used and does not indicate which CPI, such as one of the three listed above.

Contracting With a FSMC and Operating More than One School

SFAs may contract with a FSMC to manage the school food service operations; however, SFAs may not delegate certain duties to the FSMC. SFAs, not FSMCs, are responsible for:

- Observing the limitations on the use of the SFAs nonprofit food service revenue account. This includes using the Child Nutrition Program account funds to pay **only** allowable costs billed by the FSMC;
- Determining the eligibility of children for free and reduced-price meals;
- Ensuring that **only** reimbursable meals are included on the claim for reimbursement, regardless of the total number of meals billed for by the FSMC;
- Retaining financial responsibility for payment of the storage and distribution of United States Department of Agriculture (USDA)-donated commodities;
- Ensuring income and expenses do not accrue to the FSMC; and
- Monitoring the FSMC's food service operation through periodic on-site visits.

SFAs with more than one school must conduct an annual on-site review of each school prior to February 1st of each school year to observe the school's counting and claiming procedures. If

the review identifies a problem with a school's meal counting or claiming procedure, the SFA must:

- Ensuring the school implements corrective action, and
- Conducting follow-up on-site reviews within 45 days of the review to determine if the corrective action resolved the problem(s).

Accounting for USDA-Donated Commodities in Cost-Reimbursable Contracts with FSMC

Contracts between SFAs and FSMCs may be cost-reimbursable contracts. Under a cost-reimbursable contract, the SFA pays the FSMC for the food costs, supplies, labor, etc., used during a billing cycle.

To ensure that the FSMC does not include USDA-donated commodities when computing the food costs billing, the SFA must include controls in its cost-reimbursable contract for differentiating between USDA-donated commodities and commercially purchased foods in the inventory records. Contract terms to help the SFAs ensure that its food cost billings do not include charges for USDA-donated commodities are included in the RFP and Contract. All USDA-donated commodities received for the SFA during the contract period must be accounted for; SFAs may also require separate reporting by the FSMC of USDA-donated commodities used during the billing cycle.

TDA has also included in the RFP and Contract, terms to require return of discounts, rebates, credits, etc to the SFA.

Bankruptcy Procedures

If the FSMC from which you purchase NSLP and/or SBP meals files Chapter 11 bankruptcy, TDA:

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

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

Food Service Consulting

Foodservice management involves the day-to-day operation of the foodservice program with the contractual responsibility of daily oversight and management of the program. Consulting is specifically focused in areas, such as training or procurement, where the consultant works with existing SFA employees in designated areas but does not oversee daily operation of the program.

Caution should be exercised when multiple services are provided under a consulting agreement, as these services by a consultant could become the overall management of the foodservice operation. Time spent on-site does not determine the type of service provided. A consultant may be in the SFA daily for an extended period. The key criterion is whether the day-to-day operation of the foodservice program is under the management of the SFA or the FSMC.

Consulting contracts of \$25,000 or more annually must be submitted to competitive procurement in accordance with state and federal regulations and related bid thresholds. Documentation of competitive procurement must be retained by the SFA for review by the appropriate government agencies. Options for renewal of a consulting contract are allowed. Care should be taken to ensure free and open competition is not compromised by extended renewals, therefore it is recommended that consulting contracts be submitted to competitive procurement no less frequently than a contract for foodservice management or every fifth year.

Consulting contracts must include contract provisions in accordance with dollar thresholds required federal procurement regulations. Suspension and debarment and lobbying certifications must be included if the dollar amount of the contract is \$100,000 or more. It is also recommended that a Certificate of Independent Price Determination or Anti-Collusion Affidavit be included in contracts for consultation. For questions about consulting contracts, please contact TDA at (888) TEX-KIDS.

Compensation for Purchased Services

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

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

FSMC Questions and Answers

1. **Question:** May a food service management company (FSMC) have a role in the procurement of a technology system for a school food authority (SFA) if the FSMC has a business interest or corporate relationship in one or more technology companies in which might compete in the procurement?

Answer: Yes, in some circumstances an FSMC could have a role in the procurement by an SFA as described. This type of procurement question was discussed in a May 24, 2005 and a July 14, 2005 memorandum:

<http://www.fns.usda.gov/cnd/governance/Policy-Memos/2005/2005-05-24.pdf>.

<http://www.fns.usda.gov/cnd/governance/Policy-Memos/2005/2005-07-05.pdf>.

In a question from the July 2005 memo, a scenario was discussed in which an SFA sought to amend an existing contract with an FSMC to add a new deliverable such as a point of service system. In this current question, the procurement is being designed prior to solicitation. Below are two examples of circumstances in which an FSMC could have a role in the procurement of an SFA's point of service system:

- a. *An SFA structures its solicitation for goods and services to include both the services of an FSMC and a point of service system.*

This is allowable if the solicitation clarifies that the point of service system would be used at the same time and during the duration of the SFA and FSMC contract and that the SFA would take no ownership interest or option in the point of service system procured. The solicitation would allow all respondents the same opportunity to bid/offer on both the FSMC services and the point of service system or respond using the system of a preferred provider with which they may have a pre-existing relationship.

In this scenario, because the SFA would not "own" the point of service system, it is essential to anticipate how to terminate agreements and retain open competition.

- b. *After contract award, the SFA requests that the successful FSMC provide the additional service of procuring a point of service system for the SFA.*

This is allowable as long as the original solicitation included among the duties for the successful FSMC to act as the purchasing agent for the SFA. The FSMC may procure a point of service system for the SFA even if the original solicitation did not identify this specific procurement responsibility, as long as the contract identified the FSMC as the purchasing agent for the SFA. Pursuant to applicable program requirements, the FSMC would undertake procurement of a point of service system as the SFA's agent.

All SFA procurements using federal funds are to be conducted with full and open competition. As noted in the July 2005 memorandum, USDA regulations prohibit the participation of an employee, officer or agent in the award or administration of a contract (this includes developing or drafting specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use by a grantee or subgrantee in conducting a procurement).

Please note that even if an FSMC's services have been properly procured and the scope of services include acting as the SFA's purchasing agent, the FSMC and its subsidiary may not submit a bid or offer in response to a solicitation for a technology system. In this situation where the successful FSMC has a business interest in or a corporate relationship with a point of service system provider, that provider may not be deemed a responsive bidder on the procurement administered by the FSMC, as this would create a conflict of interest. Though these entities with whom the FMSC has a business interest cannot bid, the FSMC may still act as the procurement agent for the SFA.

2. **Question:** Is the SFA liable if reports and documents, used in support of meal claims and prepared by the FSMC, are determined to be inaccurate?

Answer: Program regulations require that an SFA contracting with an FSMC shall “[r]etain signature authority on the State agency-school food authority agreement, free and reduced-price policy statements and **claims**”. Pursuant to program regulations, under its contract with an SFA, an FSMC must maintain records needed by the SFA in submitting its Claim for Reimbursement and must report that information to the SFA at least monthly. An SFA is responsible for the all aspects of program management.

The SFA is responsible for having its own official review, and analyzing and signing the Claim for Reimbursement. In the event that there is a “failure to submit accurate claims [it] will result in the recovery of an overclaim and may result in the withholding of payments, suspension or terminations” of the SFA's program participation.

Recognizing that all contracts – including small purchase acquisition contracts – may provide for legal and financial remedies for nonperformance, it is understood that some SFAs include in their contracts with FSMCs a provision requiring that the SFA be made whole for any losses resulting from overclaims based on inaccurate information provided by the FSMC. USDA regulations do not prohibit such provisions, and it is the responsibility of the SFA to enforce this provision when included in the contract.