Section 17

Procurement

Section 17, Procurement

Update Guide	
June 8, 2026	Replaced references to *ARM Section 14a, USDA Foods Processing*. This section has been removed from the ARM and renamed to the "USDA Foods Processor Handbook." The handbook is located under *Policy/Handbook* on the *Food Distribution Program for Child Nutrition Programs* landing page on SquareMeals.
March 11, 2026	Clarified guidance on: - Simplified Acquisition Threshold (Small Purchase Threshold) - Small Purchase Method - Other Regulatory Requirements for Solicitations and Contracts - Contract renewal term limits Updated the Micro-Purchase Threshold to align with the increased threshold allowed by the Office of Management and Budget.
September 2, 2025	Clarified guidance on: - Awarding the Contract - Documentation Related to the Pre-Bid Meeting Updated the Simplified Acquisition Threshold to align with the increased threshold allowed by the Texas Education Agency (TEA).
February 14, 2025	Clarified guidance on: - Micro-Purchase Method - Small Purchase Method (quotes) Removed the term "aggregate." Incorporated the following provision from the final rule, *Child Nutrition Programs: Meal Patterns Consistent With the 2020-2025 Dietary Guidelines for Americans*: - Geographic Preference Option (Local Preference)
December 7, 2023	Corrected minor typos that do not affect guidance. Provided an example situation that may restrict full and open competition.
August 4, 2023	Clarified guidance on the following topics: - Public Advertising - Micro-Purchase Threshold - Self-Certification of a Higher Micro-Purchase Threshold - Small Purchase Method (removed Contracts) Solicitation – Contract Content
May 19, 2023	Clarified guidance on the following topics: - Market Basket - Noncompetitive Procurement - Public Advertising - TDA Resources Created new *Definitions* and *Contact Information* sections, located at the beginning of the *Administrator's Reference Manual (ARM)*. Removed definitions and contact information from this section.

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Procurement

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

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

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

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

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

In addition to the guidance in this section, contracting entities (CEs) will find additional guidance on procurement and financial systems in the following *Administrator's Reference Manual (ARM)*sections helpful:

- *Section 15, Program Integrity*
- *Section 16, Financial System*
- *Section 16a, Contract Management*
- *Section 17a, Procurement Procedures*
- *Section 17b, Buy American*
- *Section 17c Cooperative Purchasing*
- *Section 18, Food Service Contracts*

Information Box 1

Additional Resources for Procurement

Texas Comptroller of Public Accounts

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

State of Texas Procurement and Contract Management Guide—guidance and recommendations on procurement and improving existing contract management methods and practices. Available at *https://comptroller.texas.gov/purchasing/publications/procurement-contract.php*

Texas Education Agency (TEA)

Financial Accountability System Resource Guide provides detailed guidance of financial accountability, including Module 5, Purchasing, for local education agencies and charter schools. Available at *www.tea.texas.gov/Finance_and_Grants/Financial_Accountability/Financial__Accountability_System_Resource_Guide/*

United States Office of Management and Budget (OMB)

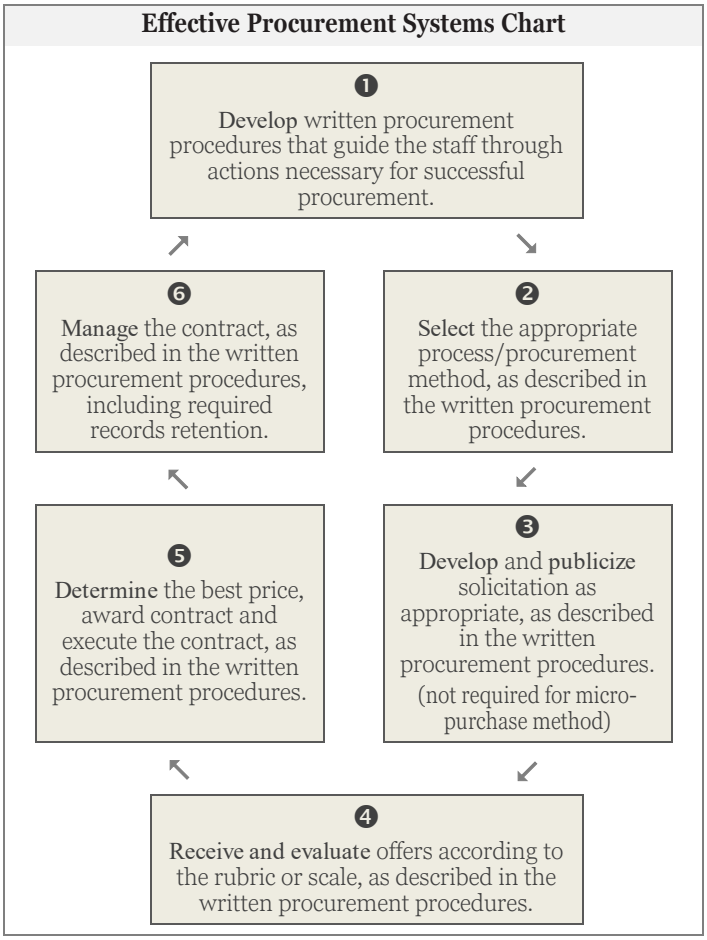
2 Code of Federal Regulations, Part 200—These regulations provide detailed information on required federal procurement process. Available at *www.fns.usda.gov/es/node/73141*

[1] Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.

Effective Procurement Systems

The procurement process follows a set of prescribed steps:

1. Develop written procurement procedures that guide the staff through actions necessary for successful procurement.
2. Select the appropriate procurement method, as described in the written procurement procedures .
3. Develop and publicize the solicitation as appropriate, as described in the written procurement procedures.
4. Receive and evaluate offers according to the rubric or scale, as described in the written procurement procedures.
5. Determine the best value, award contract, and execute the contract, as described in the written procurement procedures.
6. Manage the contract, as described in the written procurement procedures, including required records retention.



Planning for Procurement

The following questions will assist the CE in planning each procurement:

Forecasting	**Analyze Data** → What is the historical and current usage? → What is the yearly budget? → What is the projected need for the product or service? **Determine the Appropriate Procurement Method** → What is the projected total cost? → Which procurement method offers the best cost savings?
Developing the Solicitation	**Advertising** → What methods or strategies will be used for advertising for a formal purchase? **Cost Analysis** → How will the CE ensure that accurate cost analysis is conducted as part of the method of developing the solicitation?[2] **Maximizing Competition** → Does the SNP ensure that procurement across programs is used when appropriate in order to increase competition? **Protests** → What information will staff include in the solicitation about contract protests? **Specifications, Technical Requirements, Terms, and Conditions** → How will staff identify the specifications and/or technical requirements for the products and/or services to be purchased?[3] → How will staff determine if there enough potential offerors that can meet the specifications, technical requirements, terms, and conditions to hold a competitive procurement? → How will staff ensure that the specifications, technical requirements, terms, and conditions are written into the solicitation to ensure that they do not limit competition? → Will the procurement include bonus points for local preference?4 → Does the solicitation include terms or specifications related to the Buy American Provision?
Establishing a Timeline for a Formal Contract Solicitation	**Timeline** → What will be the timeline for the purchasing for each type of procurement? [NOTE: USDA recommends that at least 45 days be allowed for the invitation for bid procurement method and 60 days for the request for proposal procurement method.[5]]

2 See the *Cost Analysis* subsection in this section for additional information on this topic.
3 See the *Solicitation* subsection in this section for additional information on this topic.
4 See the *Local Preference* topic in the *Other State and Federal Regulations* for additional information on using local preference. See also USDA's *Procuring Local Foods for Child Nutrition Programs* available at *www.fns.usda.gov/farmtoschool/procuring-local-foods*.
5 See the *Procurement Purchasing Methods* subsection in this section for additional information on these procurement methods.

Making the Award	**Approval** → What procedure will be used to award the contract for approval of contract awards for each type of procurement method? **Conflict of Interest** → What procedures will staff use to ensure that all conflicts of interest are addressed before a contract or vendor is selected? **Debarment and Suspension** → What procedures will staff use to ensure that the debarment and suspension regulations are followed in selecting a contractor or vendor?[6] **Evaluation Criteria** → What evaluation criteria will be used to evaluate offers for responsibility and responsiveness? Responsible: capable of providing products and/or services, as described in the solicitation. Responsive: pricing information specific to the products and/or services to be purchased, as described in the solicitation. **Micro-Purchase** → How does the CE determine a reasonable price or equitable distribution if a micro-purchase? → What documentation is needed to justify the need for a micro-purchase rather than a small purchase or formal procurement?
Preparing for the Post Contract Award	**Assigned Role and Responsibility** → What staff will be involved and responsible at each stage of purchasing? → What staff will have approval authority for each type of procurement? → Has staff reviewed the code of conduct? → Has the CE determined that there is no conflict of interest? **Disputes/Protests** → What methods or strategies will be used to settle all contractual and administrative protests, disputes, and claims arising out of procurements?[7] **Payments** → What CE protocols will apply for approving and processing payments? **Monitoring** → What procedures will be used to monitor the terms, conditions, specifications, and technical requirements of the contract, including specific staff assigned responsibilities?
Retaining Records	**Short and Long-Term Storage** → What methods will staff use to ensure that documentation demonstrating compliance is retained for the required period of time? → What procedures will staff use to document the history of all procurement actions for all types of procurement? **Small Purchase** → What method is used to document bids for a small purchase?

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

7 See the *Protests* subsection in this section for additional information on this topic.

Program Integrity and Internal Controls

The procurement process is intended to promote program integrity and establish internal controls as a central component of the CE's financial system.

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

For procurement, this means procurement will be conducted in such a way that provides safeguards that improve the stewardship of federal money and reduce fraud and improper payments by the use of internal controls. Any cost paid to a contractor as a result of improper procurement methods, whether paid by the CE or a third-party, is an unallowable expense. **Unallowable expenses must not be paid by the school nutrition program.** *Administrator's Reference Manual (ARM), Section 15, Program Integrity* provides detailed guidance on program integrity.

2 Code of Federal Regulation (CFR) Part 200

The updates to *Administrator's Reference Manual (ARM), Section 17, Procurement* include the consolidated 2 Code of Federal Regulation (CFR) Part 200 which replaced existing rules at 7 CFR Parts 3015, 3016, 3019, and 3052, and the following Office of Management and Budget (OMB) guidance documents; 2 CFR Part 220 (A-21), A-50 (sections related to audits), 2 CFR Part 225 (A-87), A-89, A-102, A-110, 2 CFR Part 230 (A-122), and A-133.

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

All CEs must adhere to the procurement regulations found in 2 CFR Part 200.

Conflicting Program Regulations

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

Therefore, any procurement utilizing CNP funds must adhere to USDA procurement regulations.

Program Regulations in Conflict with Education Department General Administrative Regulations (EDGAR)

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

Other Entities Acting on Behalf of the Contracting Entity

Any agency, organization, group, business, food service management company, food processor, contractor, distributor, vendor, or other entity acting on behalf[8] of a CE for any of the SNP programs are also required to follow the federal procurement guidance described in this section for any procurement actions they take on behalf of the CE.

All third-party entities must provide adequate documentation[9] to a CE so that the CE can determine if the procurement regulations have been implemented appropriately, including, but not limited to, documentation related to credits, rebates, discounts, and USDA Foods values.

Full and Open Competition

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

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

The following situations may restrict full and open competition:

- Any arbitrary action in the procurement process.
- Overly restrictive definition for local when applying local preference.[10]
- Organizational conflicts of interest.
- Placing unreasonable requirements on firms in order for them to qualify to do business.
- Requiring unnecessary experience and excessive bonding.[11]
- Noncompetitive pricing practices between firms or between affiliated companies.
- Noncompetitive awards to consultants that are on retainer contracts.[12]

Information Box 2

Economy and Efficiency of Procurement Practices

Excess and Surplus Property
CEs are encouraged to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs. This includes, but is not limited to, USDA Foods.

Intergovernmental Agreements or Inter-Entity Agreements
To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services, the CE is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

Consolidating or Breaking Up Procurements
Consideration of when consolidating or breaking procurements to more than one contract may lead to a more economical purchase.

Effective Forecasting
Effective forecasting strategies will assist the CE in developing accurate solicitations.

Lease Versus Purchase
CE may conduct an analysis of lease versus purchase alternatives to determine the most economical approach to procuring products and/or services.

8 See the *Definitions* subsection in this section for additional information on this topic.
9 See the *Records Retention* subsection in this section for additional information on documentation.
10 See the *Local Preference* subsection in this section for more information on using local preference.
11 See the *Bonding Requirement* subtopic in the *Other Regulatory Requirements for Solicitations and Contracts* subsection in this section for additional information on this topic.
12 A contract in which a contractor is paid an upfront fee for anticipated services and/or products.

- Specifying only a brand name product instead of allowing an equal product to be offered.[13]
- Using specifications and technical requirements that are so restrictive that only one potential vendor can meet the specifications and/or technical requirements of the solicitation.[14]
- Any strategy or action that limits any possible bidder or offeror from participation.
- Scoring criteria that favor past vendor relationships.

If any aspect of the procurement process has limited the number of possible offerors, the CE must address the issue(s) before awarding a contract. Action to address limiting competition includes restarting the procurement process.

Cost Analysis

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

Forecasting

Forecasting is the process of analyzing current and historical data to determine procurement needs. In the case of school nutrition programs, forecasting involves predicting and estimating the goods, works, and services needed in specified areas for the coming year, and/or assessing needs by reviewing current procurement activities.

In formal procurement, forecasting helps to ensure that the CE develops a solicitation that includes accurate specifications and/or technical requirements. When forecasting is performed well, there is less likelihood that a material change[15] will occur.

Forecasting includes assessment of the following factors:

- Past purchases
- Current prices and trends for the same or like goods or services
- Student enrollment, current and projected
- Student average participation, current and projected[16]
- Future campus realignment, including new schools
- Available and future product storage
- Velocity reports (amount ordered/used or served in the past)

Information Box 3

Anticipating Student Tastes

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

[13] See the *Use of Brand Names for All Contracts* subsection in this section for additional information on the use of brand names in solicitations.
[14] See the *Noncompetitive Type-Sole Source* subsection in this section for additional guidance on when sole source procurement is appropriate.
[15] See the *Material Change* in the *Contract* subsection in this section for additional information on this topic.
[16] The monthly *Daily Record/Accuclaim* forms for each site provide this information. This form is available at *www.SquareMeals.org*.

- Planned changes specific to products and/or services (menu offerings, adding operation of a different school nutrition program or child nutrition program[17] at a site or sites, results from taste and acceptability activities)
- Established schedule of purchasing to maximize competitive pricing (how often)

Helpful Forecasting Tool

USDA's web-based *Food Buying Guide Calculator for Child Nutrition Programs*[18] provides a method to calculate the amount of food to purchase for a specified number of servings. This tool may be used to calculate the amount to purchase for a single food item or for all food items on a daily menu.

Procurement Purchasing Methods

CEs must use their written procurement procedures to guide them in selecting the appropriate procurement method, including the appropriate cost analysis method.[19] There are two types of procurement methods that CEs may use—formal and informal. The decision to use formal or informal is based on the total estimated cost of the purchase and whether the cost of the total purchase does or does not exceed the simplified acquisition threshold (small purchase threshold).[20]

Before Selecting a Procurement Method

To identify the most appropriate procurement method, the CE must follow its written procurement procedures and retain all records related to the procurement. This includes, but is not limited to, conducting a cost analysis to determine the estimated cost for the products and/or services to be procured[21] and all cost comparison documentation.

In all cases, the goal of the procurement process is for the CE to make the most economical and efficient use of federal funds while offering full and open competition.[22] The choices the CE makes should be based on this objective.

Information Box 4

Cost-Plus Percentage Contract

In all cases, any contract or agreement that creates a pricing structure that charges the cost of the product or service plus a percentage of cost is not allowable for any purchase for a Child Nutrition Program (CNP).

Simplified Acquisition Threshold (Small Purchase Threshold)

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

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

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

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17 Other child nutrition programs include Child and Adult Care Food Program (CACFP) and Summer Food Service Program (SFSP).
18 Available at *www.theicn.org/*.
19 See the *Cost Analysis or Forecasting* subtopic in this section for additional information on this topic.
20 In limited cases, a CE may be allowed to use a noncompetitive procurement method. See the *Noncompetitive Procurement Method* subsection in this section for additional information on this topic.
21 See the *Cost Analysis or Forecasting* subtopic in this section for additional information on this topic.
22 See the *Full and Open Competition* subsection in this section for additional information on this topic.

Most Restrictive Simplified Acquisition Threshold

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

Simplified Acquisition Threshold Chart
(Based on Cost Analysis Estimated Amount of Purchase)

Simplified Acquisition Threshold Purchase	
	less than (<) the threshold may use an informal or formal procurement method.
	equal to or greater than (≥) the threshold must use a formal procurement method.

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

- Governmental, regulated by the Texas Education Agency (TEA)—These CEs, such as independent school districts (ISDs) and charter schools, must use the simplified acquisition threshold established by TEA.

  As of September 1, 2025, the simplified acquisition threshold for public school districts and charter schools regulated by TEA is less than $100,000. Less than $100,000 means equal to or less than $99,999.99.

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

  TEA provides guidance on procurement and financial management at *www.tea.texas.gov/Finance_and_Grants/Financial_Accountability/Financial__Accountability_System_Resource_Guide/*.

- Governmental not regulated by TEA—These CEs, such as juvenile detention centers, must use the simplified acquisition threshold established by or adopted by the governmental agency that has regulatory authority for the CE.

  As of December 31, 2019, the simplified acquisition threshold for Texas governmental agencies (unless the agency/regulatory authority establishes other regulations) is less than $25,000. Less than $25,000 means equal to or less than $24,999.99.[23]

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

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

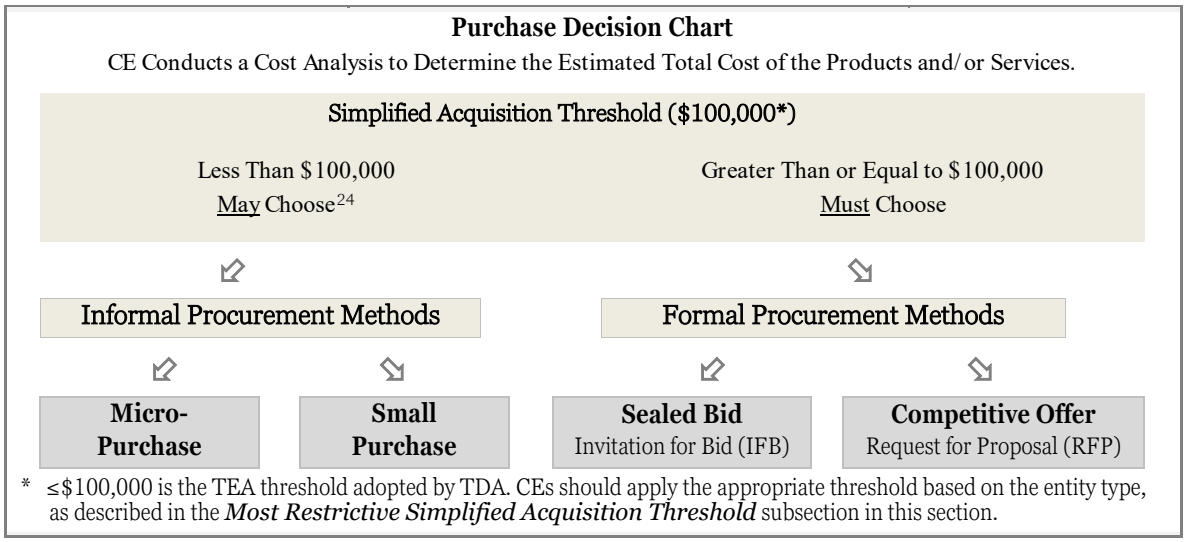
- Nongovernmental—These CEs, such as some Residential Child Care Institutions (RCCIs) or non-profits, must use the simplified acquisition threshold established

[23] Texas allows other thresholds for certain classifications of purchases. For additional guidance on these thresholds, see the Texas Comptroller of Public Accounts guidance at *www.comptroller.texas.gov*.

by TDA to align with TEA, less than $100,000.

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

The *Purchase Decision Chart* demonstrates how the CE decides on which procurement method to use. If a CE has a different threshold that applies, that threshold amount should be substituted for the TDA threshold in the chart.

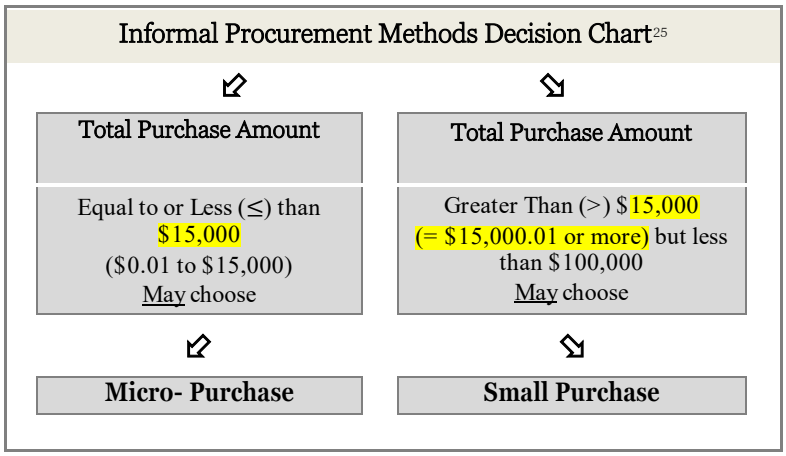


[24] CE may choose to use a formal procurement procedure for a total cost that is equal to or less than the simplified acquisition threshold in order to get a better price.

Informal Procurement Methods

If the total cost does not exceed the simplified acquisition threshold, the small purchase method can always be used for the purchase. In some circumstances, the CE may use the micro-purchase method.

In the selection of the procurement method and actions related to the procurement, the CE must follow its written procurement procedure[26] and retain all records related to the procurement. Any costs incurred as a result of improper procurement are unallowable costs to the school nutrition program.[27]



Micro-Purchase Method

The micro-purchase method is intended to minimize the burden for purchases of very small amounts or to purchase items in an emergency or unexpected situation. For micro-purchases, there are three elements for proper procurement: (1) total purchase amount equal to or less than the $15,000 threshold, (2) equitable distribution of purchases, and (3) reasonable cost.

Micro-purchases are not intended to be the primary method of procurement. CEs are expected to forecast purchases to determine the appropriate procurement method, especially for products and services typically procured via the micro-purchase method multiple times throughout the year.

A good practice during the forecasting and budget process is to consolidate all products and services that fall under the same category and determine the annual cost. If the estimated total annual cost for any such product or service exceeds the micro-purchase threshold, the CE should determine if the Small Purchase method might be more cost effective than multiple micro-purchases and document justification for the method chosen.

The micro-purchase threshold may not be used in lieu of applicable procurement methods that may achieve a more economical approach. TDA will review overall purchases by product and vendor to identify trends, including whether inadequate forecasting led to multiple micro-purchases of the same type of products and services or from the same vendors. CEs may not break larger purchases into smaller amounts to qualify under the micro-purchase threshold, and any costs incurred as a result are unallowable.

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25 CE may choose to use a formal procurement procedure for a total cost that is equal to or less than the simplified acquisition threshold in order to get a better price.

26 See *Administrator's Reference Manual (ARM), Section 17a, Procurement Procedures* for additional information on procurement procedures.

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

Micro-Purchase Scenario Chart		
Purchase Scenario	Is Micro-Purchase Applicable?	Questions to Ask
Single purchase or transaction for computer paper, ink cartridges, and paper towels from the same supplier	If the total cost does not exceed $15,000, the micro-purchase method may be used.	• Has cost been distributed equally? • Will these same items be purchased more than one time? • Will the CE get a more competitive price by using a different procurement method?
Single purchase or transaction from Supplier 1 for computer paper and ink cartridges **and** a second single purchase or transaction from Supplier 2 for paper towels and cleaning supplies	If the total cost of each transaction does not exceed $15,000, the micro-purchase method may be used for each purchase or transaction.	

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

- Purchase amount. Total cost of all products and services in a single procurement transaction. For micro-purchases, the purchase amount must not exceed $15,000. Note that a single micro-purchase can include items to be delivered over a period of time.
- Buy American. The Buy American provisions apply to micro-purchases.[28]
- Competitive Purchasing. Micro-purchases do not require the CE to solicit quotes or compare prices as long as the price is reasonable.[29]
- Cost Analysis. While a formal cost analysis is not required for the micro-purchase method, the CE should utilize budgeting and forecasting tools[30] to determine the appropriate procurement method and ensure the price is reasonable. Acceptable documentation includes, but is not limited to, the following:
  - Newspaper advertisements from various suppliers/vendors
  - Online advertisements from various suppliers/vendors
  - Written notes from discussions with vendors
  - Documentation of price from various suppliers/vendors to include
    - Supplier/vendor name
    - Name of person providing information
    - Date(s)

[28] See the *Administrator's Reference Manual (ARM), Section 17b, Buy American* for additional information on this topic.
[29] For procurement, *reasonable* is defined as an amount that does not exceed a cost that would be incurred by a prudent person under similar circumstances.
[30] See the *Forecasting* subtopic in this section for additional information on this topic.

- Information provided, including the pricing for the product and/or service

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

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

- Equitable[31] Purchasing. Purchases must be distributed among all qualified suppliers that are able to provide the products and/or services at a reasonable cost. When multiple qualified suppliers are available, the CE cannot make all micro-purchases from one qualified supplier.

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

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

  In these cases, the CE must document the reasons when it is not feasible for the CE to distribute purchases among a variety of suppliers. Documentation might include a mileage chart listing the distance to the next closest store or printout of an online map demonstrating the driving distance.

  Blanket Purchase Orders

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

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

  However, when a CE applies a more restrictive micro-purchase threshold, the CE cannot eliminate the requirement to equitably distribute purchases among possible vendors.[32]

- Reasonable Cost. The cost must not exceed an amount incurred by a prudent person under similar circumstances. The CE must have a method to document that the cost of the products and/or services is reasonable (for example, a cost comparison).

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

[31] In this case *equitable* means *fair* or *balanced* distribution.
[32] See the equitable purchasing topic above for an example of an exception.

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

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

The micro-purchase method is not appropriate when routine maintenance or repairs exceeding the micro-purchase threshold are broken into smaller payments. Instead, a small purchase method or formal method is the appropriate procurement method.

Self-Certification of a Higher Micro-Purchase Threshold

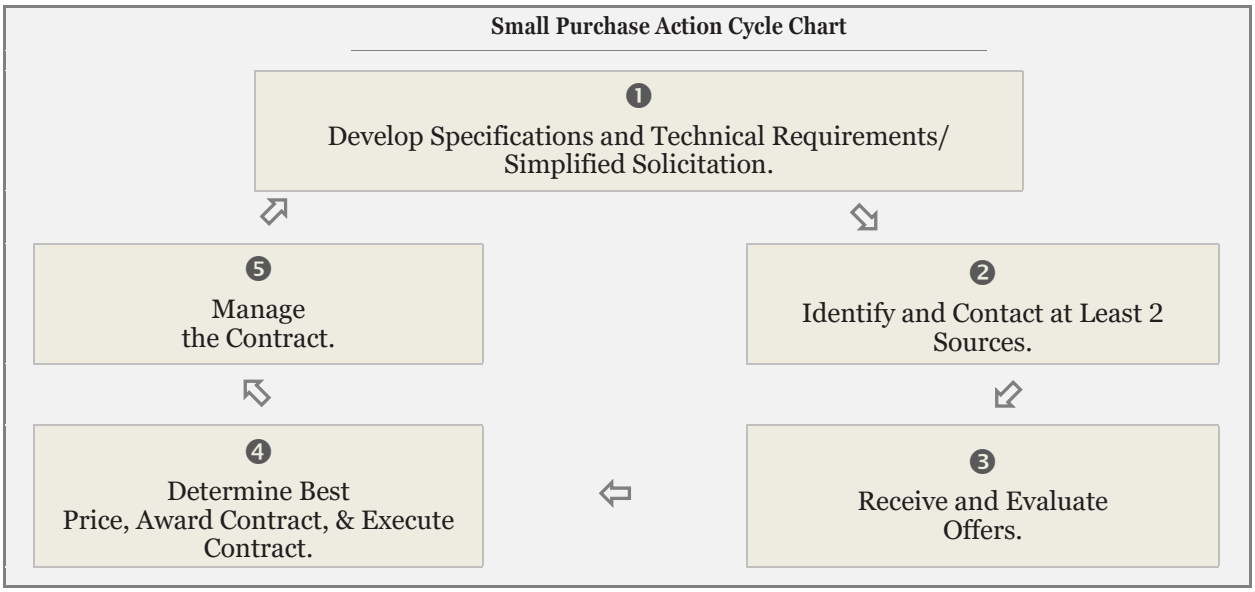
CEs may use a higher micro-purchase threshold up to $49,999.99 if approved by TDA. Annually by October 31, any CE opting to use a higher threshold must submit the request form located at *https://squaremeals.org/Programs/National-School-Lunch-Program*. If approved by TDA, the CE must include the higher threshold in their procurement procedures.

The request must include justification and clear identification of the threshold. The CE must also maintain supporting documentation of one of the following, to be reviewed during an Administrative Review:

- Qualification as a low-risk auditee in accordance with 2 CFR 200.520 for the most recent audit;
- An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,
- For public institutions, a higher threshold consistent with State law.

The supporting documentation will be reviewed during an Administrative Review. If the documentation does not show that the CE meets one of the above criteria, any micro-purchases made above $15,000 may be determined unallowable.

Small Purchase Method



A small purchase is appropriate when the products and/or services have a total cost less than the simplified acquisition threshold. **The small purchase method may or may not result in a contract between the CE and the contractor.**

Any costs incurred as a result of the CE breaking larger purchases into smaller amounts to qualify under the simplified acquisition threshold are unallowable costs to the school nutrition program.[33] This process is considered a circumvention of federal procurement requirements.

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

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

- Purchase amount. Total cost of all products and services in a single procurement transaction. For small purchases, the purchase amount must be less than $100,000.

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

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

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

[33] An unallowable cost or expense cannot be paid using school nutrition program funds.

procurement transaction. The total cost for this small purchase is $21,983.61.

- Buy American. The Buy American provisions apply to small purchases.[34]
- Competitive Purchasing. When a CE uses the small purchase method, the CE must obtain price quotes from at least two responsible and responsive contractors. Obtaining three price quotes is recommended.
  - Quotes may be obtained orally or in writing.[35] The CE must retain documentation demonstrating the price quotes and the information on specifications, terms, and/or conditions provided to each possible vendor.
  - Responsible contractors are capable of providing the products and/or services described in the specifications and/or technical requirements.
  - Responsive contractors provide pricing information specific to the products and/or services to be purchased.

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

  A CE may choose to issue an IFB or RFP for a small purchase. In that case, the CE should develop a solicitation, as described in the *Formal Procurement Methods* subsection in this section for information on conducting competitive purchasing for this type of procurement method.
- Cost Analysis. The CE should utilize budgeting and forecasting tools[36] to determine the appropriate procurement method and ensure the price is reasonable. The CE must retain documentation, including any cost comparisons.
- Price. The CE must choose a responsible and responsive offer with price as the primary consideration. The price must not be based on a cost-plus percentage of the cost or a discount.

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

  Market basket analysis may be used to award a small purchase contract.[37]
- Routine Purchasing. Routine purchases must not be broken into smaller purchase amounts in order to qualify for the small purchase method.

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34 See the *Administrator's Reference Manual (ARM), Section 17b, Buy American* for additional information on this topic.
35 See the *Records Retention* subsection in this section for additional information on documentation related to oral and written quotes.
36 See the *Forecasting* subtopic in this section for additional information on this topic.
37 See the *Market Basket* subsections in this section for additional information on this topic.

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

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

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

- Solicitation. The CE must maintain documentation that provides the specifications and/or technical requirements given to potential contractors who provided price quotes or pricing information from any other method the CE uses to compare prices. When specifications and/or technical requirements are communicated to possible vendors, each vendor must be given the same solicitation information.
- Produce Exception. Due to consistent volatility in the produce market, it is allowable for CEs to use the small purchase method for fresh produce when seasonality and shelf life are a significant factor. CEs may use the small purchase method for such produce **even if the total price exceeds $100,000**—so long as each **individual** line item does not exceed the $100,000 threshold.

Formal Procurement Methods

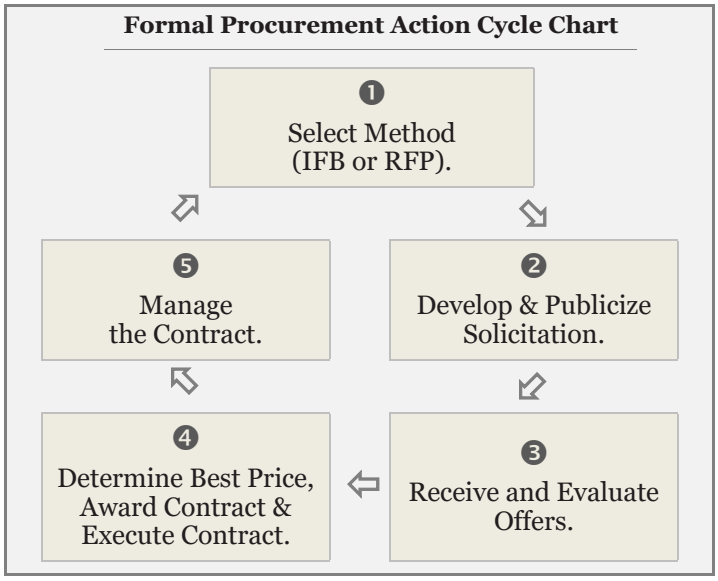
When the total estimated cost of products and/or services exceeds the simplified acquisition threshold, the CE must use a formal procurement method. Formal procurement methods are intended to be a more rigorous and prescriptive procedure that promotes full and open competition[38] and results in lower prices.

Any costs incurred as a result of improperly procured products and/or services are unallowable costs to the school nutrition program.[39]

Invitation for Sealed Bids (IFB)

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

[38] See the *Full and Open Competition* subsection in this section for additional information on this topic.
[39] An unallowable cost or expense cannot be paid using school nutrition program funds.



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

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

- Purchase amount. The purchase amount for an IFB is the total cost for a single contract (or a single renewed contract). The total cost for IFB contracts is typically broken into multiple delivery invoices that are paid as each product and/or service is delivered or when specified expectations are met.
- Award. The award for an IFB will be made in writing to the lowest responsible and responsive offeror.
- Buy American. The Buy American provisions apply to IFB methods.[40]
- Competitive Purchasing. Offers must be solicited from an adequate number of known suppliers. For there to be competitive bidding, there must be two or more responsible[41] offerors that respond to the solicitation for a firm fixed-price contract.
- Contract. An IFB will result in a firm fixed-price contract award.
- Cost Analysis. When using the IFB method, a formal cost analysis or price comparison, as described in the CEs written procurement procedures is required.[42]
- Credits, Rebates, and Discounts. In a firm fixed-price contract, the winning contractor is not required to return credits, rebates, and discounts to the SNP as the contractor factors them into the fixed price for the contract period.

40 See the *Administrator's Reference Manual (ARM), Section 17b, Buy American* for additional information on this topic.
41 Able to provide the product(s) and/or service(s), as described in the solicitation.
42 See the *Cost Analysis or Forecasting* subtopic in in this section for additional information on this topic.

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

- Evaluation of the Offers. When the sealed bids are opened, the CE must use the rubric or scoring tool that was provided in the solicitation to determine whether an offeror is both responsible and responsive.[43]

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

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

- Price. The CE must choose the most responsible and responsive offer with price as the primary consideration. The price must not be based on cost-plus a percentage of the cost. Any costs charged from this type of pricing structure are not allowable costs to a Child Nutrition Program (CNP).

  Market basket analysis may be used to award an IFB contract.[44]

- Public Advertising. The invitation for offers must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time[45] for potential offerors to respond in order to ensure that there is full and open competition.[46]

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

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

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43 Offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).

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

45 See the *Solicitation* subsection in this section for additional information on this topic.

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

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

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

- Solicitation. The CE must provide the following information in the solicitation related to contract management:[47]
  - Specifications and/or technical requirements for the product(s)
  - and/or service(s) to be purchased
  - Bonding requirements if applicable
  - Method for submitting an offer
  - Method and criteria for evaluating the bid
  - Procedure for assigned staff to respond to and resolve all bid protests.[48]
  - Contractual statements required by law
  - Method for submitting a protest for the bid award

  The CE must maintain documentation that demonstrates the CE's actions to release the IFB to the public as well as all communication that occurs after the bid is released.

  If the CE answers a question from an offeror, there must be a method for the CE to share this information with all potential offerors. CEs commonly post this information on their websites and the Electronic State Business Daily (ESBD) if the ESBD is used. [49]

Request for Competitive Proposals (RFP) Procurement Method

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

An RFP contract is awarded to the most responsible and responsive[50] offeror whose offer is most advantageous to the program—price and other factors are considered.

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

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

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

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

48 See the *Protests* subsection in this section for additional information on this topic.

49 Available at *http://www.txsmartbuy.com/*

50 Responsible is defined as able to provide the product(s) and/or service(s) as described in the solicitation. Responsive is defined as an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).

- Buy American. The Buy American provisions apply to RFP methods.[51]

- Competitive Purchasing**.** Offers must be solicited from an adequate number of known suppliers. For there to be competitive bidding, there must be two or more responsible[52] offerors that respond to the solicitation for a contract resulting from an RFP.

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

- Cost Analysis. When using the RFP method, a formal cost analysis or price comparison is required, as described in the CE's written procurement procedures.[53]

- Credits, Rebates, and Discounts. In a cost-reimbursable contract, the winning contractor must return credits, rebate, and discounts, to the SNP.

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

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

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

  Market basket analysis may be used to award an IFB contract.[54]

- Public Advertising. The request for proposals (RFP) must be publicly advertised with sufficient response time prior to the bid opening date to allow sufficient time for potential offerors to respond.[55] The RFP must be publicly advertised in such a way as to ensure there is full and open competition.[56]

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

- Rejecting an Offer. Any or all offers may be rejected if there are sound and causes and/or reasons that have been documented for the rejection. When a CE considers if it has documented cause and/or reason for rejecting an offer, the CE

  1. must avoid arbitrary decisions, i.e., a decision based on personal will or discretion
     and
  2. must determine if the CE has adequate documentation to support the cause and/reason for rejecting an offer.

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51 See the *Administrator's Reference Manual (ARM), Section 17b, Buy American* for additional information on this topic.
52 Able to provide the product(s) and/or service(s), as described in the solicitation.
53 See the *Cost Analysis or Forecasting* subtopic in in this section for additional information on this topic.
54 See the *Market Basket* subtopic under the *Special Situations, Awarding the Contract* subheader in this section for additional information on this topic.
55 See the *Cost Analysis or Forecasting* subtopic in in this section for additional information on this topic.
56 See the *Full and Open Competition* subsection in this section for additional information on this topic.

- Solicitation. The CE must provide the following information in the solicitation related to contract management: [57]
  - Specifications and/or technical requirements for the product(s) and/or service(s) to be purchased
  - Bonding requirements if applicable
  - Method for submitting an offer
  - Method and criteria for evaluating the bid
  - Procedure for assigned staff to respond to and resolve all bid protests.[58]
  - Contractual statements required by law
  - Method for submitting a protest for the bid award

The CE must maintain documentation that demonstrates the CE's actions to release the RFP to the public as well as all communication that occurs after the solicitation is released.

[NOTE: If the CE answers individual offeror questions about the solicitation, the CE must have a method to share all questions and answers with all potential offerors. CEs commonly post this information to their websites and the Electronic State Business Daily (ESBD) [59] if the ESBD is used.]

Inadequate Competition

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

If an inadequate number of offers was received, the CE must ensure that competition was not restricted or limited. A lack of offers is often caused by a poorly written solicitation or advertising that targets too small of a population base, rather than a lack of contractors or vendors capable of supplying the products and/or services to be procured. If the CE determines that the solicitation was not properly completed, the CE must (1) provide notification of its intention to rebid the contract, (2) review its solicitation, modify the solicitation as necessary, and (3) reissue the solicitation.

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

Noncompetitive Procurement Method

Procurement by a noncompetitive method is an appropriate method of procurement when one or more of the following types of circumstances apply: public emergency or an unexpected emergency situation, or sole source.

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

58 See the *Protests* subsection in this section for additional information on this topic.

59 Available at *http://www.txsmartbuy.com/*

When a CE uses any noncompetitive method of procurement, the CE must retain all related documentation onsite to demonstrate compliance.[60] If a CE enters into a sole source contract without TDA approval, the contract has been improperly procured. All costs associated with an improperly procured contract are unallowable, including any ongoing and maintenance costs, from the nonprofit food service account.[61]

Noncompetitive Procurement—Public Emergency or Unexpected Emergency Situation

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

Approval

A public emergency or unexpected emergency situation noncompetitive procurement[62] requires TDA approval. CEs must contact TDA immediately to initiate the approval process. To request approval to use a noncompetitive method during an emergency, the CE must submit the request form found on the SquareMeals website, *www.SquareMeals.org*.

The CE should be prepared to provide the following information:

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

TDA will provide notification of approval or disapproval via email.

Documentation

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

Noncompetitive Procurement—Sole Source

For a sole source purchase, the product and/or service is available only from a single (sole) source distributor, supplier, or manufacturer. When there is only one offer, the procurement is not necessarily a sole source procurement. There may be other potential offerors that could have submitted an offer but chose not to do so.

Before offering a sole source noncompetitive contract, a CE must verify that the product and/or service can only be procured from a single source.

For Example: A CE uses a branded software for its point of service (POS) system. The software must be updated once a quarter. Before the CE can request approval to procure the software

60 See the *Records Retention* subsection in this section for additional information on records retention requirements.

61 See the Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition page at the beginning of this manual for information on how to contact TDA.

62 See *Administrator's Reference Manual (ARM), Section 24, Disaster Situations* for additional information on operation during a disaster situation.

updates as a sole source noncompetitive procurement, the CE must verify that no other vendor is allowed to provide the updates without voiding the warranty.

Approval

Sole source procurement requires TDA approval. To request approval to use a sole source contract, the CE must submit the request form found on the SquareMeals website, *www.SquareMeals.org*. The CE should be prepared to provide the following information:

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

TDA will provide notification of approval or disapproval via email.

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

Determination of Need for Sole Source Procurement

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

Identification of Sole Source Products and/or Services

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

For Example: There are 3 companies that commonly provide the type of cooling equipment that a CE is attempting to procure. Company A chooses not to bid because it is unable to meet the delivery timeline. Company B no longer distributes the line of products that would have met the

specifications and technical requirements. Therefore, Company C is the only offeror.

In this situation, the single offer submitted is not a sole source procurement. Instead, it is an inadequate competitive response to the solicitation. The CE must follow the guidance for that type of noncompetitive procurement.

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

How Does the CE Determine the Product and/or Service Is a Sole Source Procurement?

1. A CE cannot accept a statement from the supplier, distributor, or manufacturer[63] as verification that the product and/or service is only available from a single source.
2. The CE must attempt to solicit offers from other suppliers, distributors, or manufacturers.
3. If the product and/or service is available from other sources, but one source offers a feature(s) that other sources do not offer, the special feature cannot become the only factor that defines a product and/or service as the sole source unless the CE can document why this feature is required, not just preferred.

Brand Name Sole Source Purchase

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

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

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

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

Documentation:

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

[63] Exception, if the contract or product/service instructions indicate that all warranties or guarantees for the purchased item/service are void if CE allows non-authorized/uncertified vendors to provide service and/or parts, the CE may use this documentation as proof for a sole source purchase.

Buy American

The Buy American provision applies to all food purchases made with SNP funds. This provision requires CEs and third parties, acting on behalf of CEs, to purchase domestically[64] grown and processed food to the maximum extent practicable. See *Administrator's Reference Manual (ARM), Section 17b, Buy American* for detailed guidance on this requirement.

Locally Grown Products

CEs may purchase locally grown products for their school nutrition program. Commonly used local products include, but are not limited to fruits, vegetables, beans, grains and flour, meat, poultry, fish, condiments, herbs, eggs, and dairy.

TDA has developed Texas Farm Fresh to promote the use of local products. The Texas Farm Fresh website provides information on strategies for offering local products, various programs that support the use of local products, best practices, success stories, a seasonal produce availability tool, and more. The Texas Farm Fresh website is located at *www.squaremeals.org/FandNResources/TexasFarmFresh.aspx.*

The following resources may also be helpful in promoting the use of locally grown products:

- Contact the local cooperative extension agent or educators to learn more about local products. A list of offices is available at *www.nifa.usda.gov/partners-and-extension-map.*
- Get information on strategies for buying local foods by viewing USDA's Finding, Buying, and Serving Local Foods Webinar Series at *www.fns.usda.gov/farmtoschool/procuring-local-foods*.
- Use USDA's Procuring Local Foods for Child Nutrition Programs available at *www.fns.usda.gov/farmtoschool/procuring-local-foods*.
- Use the USDA Census of Agriculture to get a list of the crops being grown in a specific area. Maps are available at *www.agcensus.usda.gov/Publications/2012/Online_Resources/Ag_Census_Web_Maps/.*

Geographic Preference Option (Local Preference)

CEs have the option to give preference to local producers when soliciting and awarding contracts for the purchase of unprocessed locally grown, raised, or caught agricultural products. Geographic preference may be used when soliciting for food service management companies, who will procure food on behalf of the CE. The geographic preference option includes the following two procurement strategies that may be used:

Strategy 1: use local as a specification (i.e., the written description of a product or service that a vendor must meet to be considered responsive to a solicitation).

Strategy 2: Use a defined scoring advantage while scoring bids in response to a solicitation. This means giving additional points or credit to bids for local unprocessed agricultural products that meet a CE's definition of local.

[64] Domestically grown food products are grown and processed in the United States.

The CE must include its method or methods of using geographic preference in its written procurement procedures, in the solicitation for the food items, and in the contract as appropriate.

Locally Grown and Raised Agricultural Products Chart
Locally grown and raised foods commonly include, but are not limited to, the following: – Beans – Condiments – Eggs – Fish (with no additives or fillers) – Fruits – Grains and flour – Herbs – Meat (with no additives or fillers) – Milk (unflavored fluid milk, but not flavored milk or any processed dairy products such as yogurt or cheese) – Poultry – Vegetables
Unprocessed locally grown or raised agricultural products mean those agricultural products that retain their inherent character. The following methods are appropriate handling and preservation techniques for locally grown or raised agricultural products: – Addition of ascorbic acid (Vitamin C) or other preservatives to prevent oxidation of produce – Butchering livestock and poultry – Cleaning fish – Cooling – Drying/ dehydration – Forming ground products into patties without any additives or fillers – Freezing – Packaging (such as placing eggs in cartons) – Pasteurization of milk – Refrigerating – Size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding – Vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package) – Washing

Defining Local

USDA regulations give the local entity the authority to define local as long as the definition does not restrict full and open competition. [65] USDA regulations also prohibit any state agency from mandating a definition for local.

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

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

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

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

Information Box 6

Questions to Consider When Defining Local

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

Local Preference in the Solicitation and Contract Award

If geographic preference is used in a solicitation, the CE must include a definition of local for unprocessed agricultural products in that solicitation. However, the CE may vary the definition of local within the solicitation—the definition of local may change with the product, the seasons, events, program values, and other factors as determined by the CE.

If a CE utilizes Strategy 2 and gives a scoring advantage to local producers or products, the CE must also describe the way the local preference or bonus points will be used in its written procedures and provide this information in the solicitation. If the CE is procuring a third-party to procure on its behalf, the CE may also include a required preference for local procurement for third-party purchases.

Further, for Strategy 2, a CE must not award a contract based solely on local preference.

- For an IFB, if all points are equal for a local and a non-local producer based on the evaluation criteria, the CE must award the contract based on the most cost-effective use of federal funds.
- For an RFP, the CE must award the contract with primary consideration[66] given to the cost of the product but must also apply all other evaluation criteria in determining the most cost-effective use of federal funds.

[65] See the *Full and Open Competition* subsection in this section for additional information on this topic.
[66] See the *Awarding the Contract* subsection in this section for additional information on primary consideration.

Scoring Advantage

For Strategy 2, CEs may apply a variety of types of preferences or bonus points methods as long as the methods do not limit full and open competition. CEs must describe all methods to be used in their written procurement procedures.

Information Box 7

Strategy 2: Scoring Advantage Example

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

	Supplier Price	Meets Geographic Preference?	Price with Preference Points
Supplier 1	$1.97	No	$1.97
Supplier 2	$2.10	Yes	$2.00
Supplier 3	$2.03	No	$2.03

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

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

Strategy 2: Scoring Advantage Methods Example Chart

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

Preference Applied to Price	Preference Applied to Evaluation Points
A CE may apply the preference to the product price for local producers located within a specified radius of the CE. In its written procurement procedures,[67] the CE states that it will give preference to local producers by subtracting a set amount from the bid price of local producers that are located within 100 miles of the CE. For Example: When procuring fresh fruit by the pound, the CE reduces the product price by $0.10 a pound for local producers located within 100 miles of the CE.	A CE may use a tiered approach to awarding preference points for local products. In its written procurement procedures, the CE describes how it will use a tiered approach to giving geographic preference. For Example: For products that are readily available within a 100-mile radius of the CE, the CE will give – 10 points for a vendor located within 20 miles, – 7 points for a vendor located within 50 miles, and – 5 points for a vendor located within 100 miles. For products that are not readily available within a 100-mile radius of the CE, the CE will give – 10 bonus points for vendors located within the state and – 5 bonus points for vendors located out of state.

State Geographic Preference Regulations

For geographic preference, there are differences in the federal and state regulations as they apply to entities that are required to comply with the Texas law. Texas law requires (1) that governmental entities (including school districts and charter schools) define local as geographically within the state of Texas and (2) that a contract must be awarded to a local

[67] See *Administrator's Reference Manual (ARM). Section 17a, Procurement Procedures* for additional information on this topic.

supplier over a non-local supplier if both meet the terms and conditions described in the solicitation.

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

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

- One from a Texas farm 60 miles away
- One from a New Mexico farm 5 miles away

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

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

Other Regulatory Requirements for Solicitations and Contracts

When federal funds are used for 1) a formal purchase or 2) a small purchase **resulting in a contract**, CEs must include specific regulatory and legislative provisions in all solicitations/contracts**.** This subsection provides general explanations of what is required.

[NOTE: Because micro-purchases do not involve contracts, they are exempt from these provisions.]

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

BYRD, Anti-Lobbying
(31 U.S.C. 1352)

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

Civil Rights/Discrimination
Title VI of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title 7 CFR Parts 15, 15a, and 15b; and the Americans with Disabilities Act.

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

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

Required inclusion when applicable to the services and/or products to be procured for solicitations/contracts exceeding $150,000 using federal funds; requires compliance with all applicable standards, orders, and regulations; prohibits the award of contracts to contractors that are in violation of Clean Air Act. Violations must be reported to the Federal

awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

Contract Work Hours and Safety Standards Act

40 U.S.C. 327-330 Sections 103 and 107 as supplemented by Department of Labor regulations (29 CFR Part 5)

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

Copeland Anti-Kickback Act

(18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3)

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

Davis-Bacon Act

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

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

Energy Policy and Conservation Act

Public Law 94-163, 89 Statute 871

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

Equal Employment Opportunity

41 CFR, Chapter 60. Executive Order 11246 of September 24, 1965, entitled Equal Employment Opportunity, as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR Chapter 60)

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

Health and Safety Certifications, Licensing, or Regulations

Local, state, or federal health and safety certifications, licensing, or regulations

Required inclusion in solicitations/contracts using federal funds; requires all contractors to meet applicable local, state, and federal health and safety certifications, licensing, or regulations which include, but are not limited, to facility use, food establishment, and authorized providers.

Rights to Inventions (Pertaining to Patent Rights, Copyright and Rights)

37 CFR 401.2

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

Solid Waste Disposal Act

Section 6002 as amended by the Resource Conservation and Recovery Act

Required inclusion to the extent practicable when applicable to the services and/or products to be procured for to solicitations/contracts exceeding $10,000 using federal funds; requires contractors to maximize energy and resource recovery by using recycled materials and/or recycling waste products when reasonable, cost appropriate, and available.[68]

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

Small and Minority Firms, Women's Business Enterprise, and Labor Surplus Area Firms (Historically Underutilized Business or HUB)

2 CFR 200.321

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

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

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

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

- Placing qualified small and minority businesses and women's business enterprises on solicitation lists.
- Assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources.
- Dividing specifications and/or technical requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises.
- Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises.
- Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.

[68] The following websites provide additional information on possible waste management actions to meet this requirement: Environmental Protection Agency at *https://www.epa.gov/regulatory-information-topic/regulatory-information-topic-waste*; USDA, Biopreferred at *https://www.biopreferred.gov/BioPreferred/*

Solicitation

A solicitation[69] is prepared by the CE to describe the products[70] and/or services the CE wants to acquire. Regulations specify that the solicitation must clearly define the items or services needed in order for the offerors to respond properly to the solicitation. The solicitation is intended to level the playing field so that all offerors have an equal opportunity to compete for the award of the contract.

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

Solicitation for Small Purchases

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

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

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

Solicitation, IFB or RFP

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

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

Solicitation/Contract Content

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

Evaluation | Only for IFB and RFP Solicitation/Contract

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

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

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

  For example, the following are evaluation criteria a CE may include in solicitations:

[69] Micro-purchases do not require a solicitation.

[70] USDA's Agricultural Marketing Service provides examples of specifications that can be used. This information is available at *www.ams.usda.gov/*

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

Financial—Adjustment or Escalation Clause | Required If Included

- Name of the independent wholesale index used to adjust prices on contract renewal
- Description of the method for monitoring accuracy of the index adjustment[71]—increase or decrease

Financial—Bonding Requirement | Required If Included

- Description of the bonding[72] requirement

Financial—Costs Allowed to Be Invoiced | Required If Cost-Reimbursable

- Description of allowable costs (materials + direct labor hours)
- Statement of specific ceiling price, i.e., cost the contractor exceeds at its own risk

Financial—Cost of Contract | Required If Firm Fixed-Price

- Statement that the price is fixed for the duration of the contract
- Descriptions of any incentives given to the awarded contractor to control costs and perform with the greatest efficiency

Financial—Credits, Rebates, and Discounts | Required All Solicitations/Contracts

- Description of the acceptable method(s) to provide credits, rebates, and discounts
- Description of documentation awarded contractor must provide to demonstrate accurate receipt of credits, rebates, discounts, and USDA Foods values
- Statement indicating frequency to receive credits, rebates, discounts, and USDA Foods values
- Description of the penalty for not applying credits, rebates, discounts, and USDA Foods values
- Statement of the right-to-audit, which allows the CE routine access to the information necessary to verify receipt of accurate credits, discounts, rebates, and USDA Foods values

  [NOTE: Firm Fixed-Price contracts only require credits for the value of USDA Foods.]

71 TDA requires the use of the Consumer Price Index (CPI) Food Away from Home when an index is used to adjust prices.

72 See the *Bonding Requirements* subsection in this section for additional information on this topic.

Financial—Forecasting | Required for All Solicitations/Contracts

- Description providing accurate forecasting[73] information

Financial—Preferences for Small and Minority Businesses | Required for All Solicitations/Contracts

- Explanation or preferences to encourage the participation of small and minority businesses, women's business enterprises, and labor surplus area firms

Local Preference | Required If Included

- Description of the method for applying and amount of bonus points or percentage for local[74] products

Market Basket Evaluation| Required If Included

- Finite list of products and or/services with quantities, specifications, and technical requirements for each item on the market basket list[75]
- Indication of how each product and/or service will be evaluated, including the percentage to be applied to the products included in the price evaluation
- Indication of the percentage of products that may be substituted for products not included in the original solicitation/contract

Offer Submission—CE Created Prequalified Lists | Required If Included

- Statement that CE will use a prequalified[76] list of persons, firms, or products
- Description of how an offeror can submit information to become prequalified

Offer Submission—Questions | Required for All Solicitations/Contracts

- Description of the method and location used to share additional information and questions and answers provided to any potential offeror
  [NOTE: Additional information is often posted on the CE's website for ease of access.]

Opening Offers | Required for All Solicitations/Contracts

- Description of when and where sealed bids/offers will be opened

Other Regulatory Requirements | Required for All Solicitations/Contracts as Applicable

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

Oversight—Management of Contract | Required for All Solicitations/Contracts

- Description of the methods or procedures the CE will use to manage the contract

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73 See the *Forecasting* subsection in this section for additional information on this topic.

74 See the *Local Preference* subsection in this section for additional information on using local preference. See also USDA's *Procuring local Foods for Child Nutrition Programs* available at *www.fns.usda.gov/farmtoschool/procuring-local-foods*.

75 See the *Market Basket* subsections in this section for additional information on using the market basket evaluation method.

76 Procurement procedures which incorporate prequalified lists must never unduly restrict or eliminate full and open competition. A vendor may submit a bid while waiting for approval for a prequalified list. See *Administrator's Reference Manual (ARM), Section 17a, Procurement Procedures* for additional information on this topic.

Qualitative Evaluation Elements | Required If Included

- Explanation for the specific outcomes and/or expectations for the qualitative elements[77] required to ensure that the offeror has sufficient information to submit a responsive bid

Records Retention | Required for All Solicitations/Contracts

- Description of all applicable records retention requirements for the awarded contractor

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

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

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

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

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

- Statement of the length of the contract
- Statement indicating if contract renewals will be allowed, and, if so, at what frequency[78]

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

- Description of any expectations that the final contract will include the purchase or use of equipment which may include, but is not limited to, the following:
  - Utility and space requirements
  - Quality and features required
  - Installation requirements
  - Indication of whether the CE may retain the property and continue to make payments in accordance with an approved amortization schedule or return the property[79]
  - Other factors which may impact the cost of purchasing equipment
- Description of supplies to be provided by CE and offeror

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

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

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77 Qualitative evaluation elements are appropriate when products and/or services that more difficult to describe in objective, concrete terms

78 Contracts are awarded for a maximum of five years and may allow one-year renewals (so long as the sum of the contract and renewal period does not exceed five years). Certain contracts are restricted to one year; see section 16a, Contract Management.

79 Interest for payments for retained property is an unallowable cost.

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

- Description of the method for submitting invoices for payment, including sufficient information to determine allowable and unallowable costs and submission timelines

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

- Description which includes the following, as applicable:
  - Applicable nutrition standards
  - Delivery expectations
  - Basic features as well as size/weight/grade specifications and/or technical requirements
  - Packaging requirements, including quantity and warranty

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

- Description of the method to submit a protest[80] of the solicitation, cancellation of the solicitation, and contract award
- Description of the method to submit a protest of contract termination
- Description of the method for CE or contractor to file a complaint

Specifications, Technical Requirements, Terms, and Conditions—Samples for Taste-Testing | Required If Included

- Description of expectation for sample taste-testing, including frequency and numbers[81]

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

- Description for services being procured, including the following, as applicable:
  - Required certifications and/or licensing
  - Description of duties to be performed, i.e., the scope of work
  - Equipment provided by CE and expected to be provided by the contractor
  - Hours of work
  - Performance expectations
  - Required outcomes

Submission of an Offer—Timeline | Required for All Solicitations/Contracts

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

One Solicitation, Award Multiple Contracts

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

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80 See the *Protests* subsection in this section for additional information on this topic.

81 The CE does need to consider if any product and/or services provided by a potential contractor will become an incentive to award a contract. Moreover, the CE should also remember that any samples provided by the potential contractor are not actually free. The offeror will include the costs for providing samples to the CE in its offer.

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

Firm Fixed-Price Contract

A firm fixed-price contract may be awarded for an IFB or RFP. This type of contract is awarded to the lowest cost offer that addresses all the material terms and conditions (responsible and responsive)[82] of the solicitation.

Notification for Firm Fixed-Price Contracts

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

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

Texas Comptroller of Public Accounts Tool

CEs may provide additional notification of invitations for sealed bids (IFBs) or requests for competitive proposals (RFPs) through postings on the Texas Comptroller of Public Accounts bid database, Electronic State Business Daily (ESBD).[83] This database is available to all CEs classified as governmental entities. This database is widely available to various types of potential contractors across the state and offers a venue for notification that may reach potential contractors the CE may not know about.

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82 Responsible is defined as able to provide the product(s) and/or service(s) as described in the solicitation. Responsive is defined as an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).

83 Available at *http://www.txsmartbuy.com/.*

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

While this information for specifications and/or technical requirements must be specific, CEs must be careful to ensure they are not so specific that they limit competition. However, to award a contract, the CE must be specific enough in the specifications and/or technical requirements for the CE to be able to determine if the offeror is responsible and responsive.[84]

Vendor Lists for All Contracts

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

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

Shared Purchasing for All Contracts

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

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

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

Use of Brand Names for All Contracts

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

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

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

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

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

The solicitation describes the quantity, specifications, and technical requirements for each item within a group and provides an explanation

[84] Responsible is defined as able to provide the product(s) and/or service(s) as described in the solicitation. Responsive is defined as an offer that addresses the specifications and/or technical requirements expressed in the solicitation for product(s) and/or service(s).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Market Basket, Product Specifications

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

Market Basket, Adding Products to an Existing Market Basket Contract

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

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

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

Original Contract Chart below. USDA recommends limiting additional costs to 5-10% of the estimated value of the contract.

Market Basket Allocation of Purchases by Percentage of the Estimated Contract Value of the Original Contract Chart				
Items Listed in Solicitation and Contract	➡	Percentage of Total Estimated Value Original Contract		
Items Added to Original Contract List	➡	Percentage of Total Estimated Value of Original Contract		
Items Listed in Solicitation and Contract	+	Items Added to Original Contract List	=	100 % of Total Estimated Value of Original Contract

2. Value of Added Products Exceeds Percentage Specified in Solicitation and Contract
   On an existing market basket contract, the purchase of any additional products that exceeds the percentage specified in the solicitation and contract is an unallowable cost. USDA recommends limiting additional costs to 5-10% of the estimated value of the contract. If the value for the added products exceeds the percentage specified in the solicitation and contract, a separate procurement for those products must be conducted.
3. Contract Renewal
   The option to renew a market basket contract must be indicated in the original solicitation and contract.
   - The original solicitation and contract's specified percentages for listed and added products apply to all renewal contracts.
   - Instead of using the contract's estimated total value for renewal years, the percentages are applied to the contract's actual total cost for the previously completed contract year.

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

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

Market Basket, Simplified Total Cost Analysis and Evaluation Scoring

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

For USDA Foods, a market basket analysis method may be used for Net-Off-Invoice (NOI) value pass-through contracts and must not be used for fee-for-service processing contracts.[85]

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

Special Situations, Guidance Related to the Solicitation

The following guidance will provide additional clarification:

Approved Brands

CEs may specify a list of approved brands as part of a product description in addition to the specifications and technical requirements in order to demonstrate what types of products are acceptable.[86] In these cases, the CE must include the phrase *or equal* after each approved brand item and indicate that any product that meets the same specification and technical requirement is acceptable.

Bread Specifications

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

Contracting with Persons and Companies for Assistance in Developing a Solicitation

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

However, if a person or company provides technical information to assist a CE in drafting procurement documents, the person or company is prohibited from submitting an offer. See the *Administrator's Reference Manual (ARM), Section 17a, Procurement Procedures* for more information on written procedures related to potential offerors and interested parties involved in developing a solicitation.

CE Survey of Possible Bidders for Product and/or Service Availability

A CE may survey prospective offerors to determine if there are individuals, entities, businesses, or organizations that are able to provide specific products and services. In cases where CEs conduct a survey of potential offerors, the CE must take care to ensure that possible offerors do not assist the CE in preparing the solicitation/contract. If a potential bidder assists the CE in preparing a solicitation or contract, the potential offeror cannot be awarded the contract.

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[85] See *Administrator's Reference Manual (ARM), Section 14,* and *USDA Foods Processor Handbook* for additional information on these types of contracts.

[86] Many CEs test and approve brands that meet their standards and student preferences. The object of testing must not be to determine the best product on the market but rather to determine which products are of acceptable quality to meet the needs of the program. Product testing procedures must provide for an objective evaluation of tested products, and documentation of test results must be maintained on file with the CE.

Contract Documentation for Food Products

The CE must include a statement about the required documentation that demonstrates that food products, including commercially prepared products, meet the meal pattern or competitive food standards.[87] CEs should be consistent in the information requested by potential contractors. Any processed food product that does not have a yield listed in the *Food Buying Guide for School Nutrition Programs*[88] needs to either have (1) a CN label; (2) a signed and dated product formulation statement; or (3) depending on the product type and intended use, nutrition fact labels. The documentation must identify the contribution of the food product toward meeting the meal pattern requirements or the nutritional values required for the competitive food standards. A *USDA Foods Fact Sheet* may also be used for processed end products made from USDA Foods.

Flexibility for Growth

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

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

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

Generic Terminology

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

For Example: Generic names of breakfast cereals include the following:

- Toasted oat cereal, donut-shaped
- Puffed wheat cereal, sugarcoated
- Cornflakes, sugarcoated
- Shredded wheat biscuits, small, sugarcoated

[87] See the *Administrator's Reference Manual (ARM), Section 7, Breakfast Meals; Section 9, Lunch Meals*; *Section 10, Afterschool Snacks & Meal; Section 22, Competitive Foods;* and *Section 23, Food Product Documentation* for additional information on required food component contribution and competitive foods.

[88] Available at *www.fns.usda.gov/tn/food-buying-guide-school-meal-programs*

Grade Specifications and/or Technical Requirements

By including grade specifications and/or technical requirements in the solicitation, the CE lets the offeror know that the products must meet or exceed the USDA grading requirements. USDA, Agricultural Marketing Service (AMS) has developed the *Understanding Food Qualities Labels* tip sheet to assist consumers in understanding the grade specifications and/or technical requirements.[89] When the grade specifications and/or technical requirements are omitted, the offer may be made using undesirable products. If a potential contractor offers an item that is only supplier grade, it is a nonresponsive or overly responsive bid.

Minimum Drained Weight—Canned Fruits and Vegetables

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

Potential Offerors or Interested Parties Involved in Developing a Solicitation

A potential contractor or another interested party cannot participate in the procurement of items or services by assisting with or drafting the procurement specifications and/or technical requirements, procedures, or documents.

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

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

Pre-Bid Meetings for IFB/RFP Contracts

A CE may use a pre-bid meeting to (1) provide information concerning contract performance requirements (2) answer any questions prospective offerors may have regarding the solicitation. A pre-bid meeting cannot serve as a substitute for an offeror formally amending a deficient or ambiguous specification or to disseminate performance requirements in addition to those contained in the solicitation. CEs should consider the following issues in planning and conducting the pre-bid meeting:

Timing of Pre-Bid Meeting

The pre-bid meeting should be held approximately 2 weeks after the release of the solicitation. In the solicitation, the CE should state that it will not accept offers until after the pre-bid meeting is held.

Information Regarding Meeting

The CE is not required to put information about the pre-bid meeting in advertising, but the CE must include information regarding the meeting in the solicitation/solicitation packet. The following strategies will help the CE in preparing for the meeting:

- Prepare an agenda.
- Request questions in advance so answers can be prepared.
- Assign specific roles to staff attending the meeting:
  - Monitor to ensure that everyone signs the attendance sheet
  - Timekeeper to ensure that the meeting agenda is followed

[89] Available at *www.ams.usda.gov/sites/default/files/media/AMS%20Product%20Label%20Factsheet.pdf*

- Note taker so information from the meeting can be accurately shared after the meeting
- Other roles as appropriate

Offeror Attendance

Attendance at the meeting by prospective offerors is strongly recommended but generally should not be required for submittal of an offer. However, a CE may add attending the pre-bid meeting as one of the evaluation criteria.

All potential offerors must be invited to the pre-bid conference. If more than one offeror responds to the public advertisement with an intention of submitting an offer, the CE must conduct a pre-bid conference for all interested offerors at least two weeks after the date of the last public advertisement. If only one offeror responds to the public advertisement to request the solicitation/solicitation packet and express an intention to submit an offer, the CE may conduct a walk-through of the facility instead of a pre-bid conference.

Information Shared at the Pre-Bid Meeting

The CE should tell all attending that the information shared in the meeting is not official until the information has been provided in writing to all potential offerors. All information shared in the meeting should be sent to all prospective offerors simultaneously to ensure that all possible offerors have the same information. See the *Solicitation* subsection in this section for additional information on this topic.

[NOTE: During the meeting questions may bring to light ambiguities, errors, or omissions in the IFB/RFP, which may later be corrected through written amendments to the IFB/RFP.]

If the questions asked at the meeting cause the solicitation/contract to be updated. The CE must send the updated solicitation/contract to TDA to be approved.

Documentation Related to the Pre-Bid Meeting

The CE must document the pre-bid meeting by providing a sign-in sheet for all in attendance. The CE must also add an addendum that summarizes the information shared, questions asked, and answers provided.

All information shared during the pre-bid meeting, including the addendum, must be shared with all potential offerors using the method described in the solicitation. CEs may use an electronic method for sharing this information.

If more than one addendum is issued, each addendum is numbered, and a copy of each addendum will be signed and returned with the offer as additional supporting documentation of receipt of all requirements for consideration as a responsible and responsive offeror. CEs may use an electronic method for sharing an addendum.

Procuring Fresh Fruit and Vegetables

While CEs are encouraged to take advantage of economies of scale[90] in order to

[90] Procuring large quantities of a product to get a better price.

get the best pricing, long-term contracts for fresh fruit and vegetables are not always available. In these cases, the CE needs to establish a purchasing schedule in its written procurement procedures that allows the CE to get the most cost-effective pricing.

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

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

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

Single, Multiple, or Split Contract Awards

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

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

Bonding Requirements

USDA has rescinded its previous guidance that bonds are required for all non-construction contracts in excess of $50,000 as of June 1, 2016. Instead, each CE must evaluate the products and/or services to be procured and determine if a bond is needed to safeguard any possible loss of funds.

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

- All New Non-Construction Solicitations and Contracts—If the CE determines a bonding requirement is needed and if the bonding requirement does not prevent competition,[91] the CE may require a bond for the products and/or services being procured. See the *Administrator's Reference Manual (ARM), Section 18, Food Service Contracts* for additional guidance related to new FSMC contracts and renewals.
- All Construction Contracts—All construction contracts in excess of the simplified purchasing threshold (exceeds $50,000) are required to ensure that the federal financial interest is adequately protected by including the minimum bonding requirements in the solicitation and contract: (1) bid guarantee of 5 percent of the bid price, (2) performance bond of 100 percent of the contract price, and (3) payment bond of 100 percent of the contract price. However, if a CE determines that the federal financial interest is adequately protected without requiring the minimum bonding requirements, as described in 2 CFR 200.326, the CE may request TDA to approve a different minimum security or bonding requirement. TDA will review the request in consultation with USDA.

[91] The cost of the bond is paid by the potential bidder. For this reason, if the contract has a high value, it may reduce the number of potential bidders

When Bonds Are Used

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

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

When a Bid Guarantee (Bid Bond) is Used

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

When a Performance Bond Is Used

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

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

Once the contract is awarded, the contractor must provide a performance bond for 100 percent of the contract price. This bond secures the fulfillment of all the contractor's obligations under the contract as part of the contract deliverables.

When a Payment Bond Is Used

A payment bond covers the cost of materials and workers under the subcontract. If the contractor fails to pay the supplier for products and services provided under the subcontract, the bond covers the cost of paying for those products and/or services.

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

Public Advertising

The solicitation must be publicly advertised with sufficient response time prior to the bid opening date to allow enough time for potential offerors to respond. CEs must submit the advertisement, so it is published for a minimum of 14 consecutive calendar days once the posting of the solicitation starts. CEs should check to see if there are more restrictive public advertising requirements specified by the agency or organization that has regulatory authority (federal, state, or local) over the entity for all purchases. Moreover, in cases where the offer for an Invitation for Bid (IFB) or Request for Proposal (RFP) is expected to be complicated or lengthy, CEs should expand the notification period in these cases accordingly.

Advertising should adhere to the following:

- The publication can be digital or a combination of digital and print; the advertisement does not have to run in a single publication if a combination of multiple print and digital options is more cost effective.
- For a print publication that publishes other than daily, a single advertisement would count for the full number of days that the publication is in circulation.
- Note that a posting on the CE's website does not count as digital advertising, but CEs are encouraged to publish links within the advertisement to allow for more information on the CE's website.

Full and Open Competition

An IFB or sealed bid and an RFP must be publicly advertised in such a way as to ensure that there is full and open competition.[92]

Highest Possible Circulation

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

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

A CE is issuing a solicitation for 7 million single-serve, 5-compartment meal trays delivered in increments of 150,000 over a period of 6 months. After identifying that only 1 possible bidder is located in the county where the CE is located, the CE realizes that it will need to advertise to wider circulation in order to get sufficient competitive bids. Therefore, the CE places its solicitation notice in the city paper with the largest circulation and in a larger newspaper with a circulation that includes 2 other large cities. In addition, the CE posts a notice in an online state-wide bid notice system. Placing a notice in the two newspapers and the online system will meet the requirement.

In addition to print publication, CEs should consider the value of using an online publication of solicitation documents to reach wider audiences.[93]

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

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

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

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

All CEs classified as governmental entities may also post invitations for sealed bids (IFBs) or requests for competitive proposals (RFP) to the Texas Comptroller of Public Accounts, Electronic State Business Daily (ESBD).[94] This database is widely available to various types of suppliers across the state.

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

- Address and telephone number for location where any potential offeror may obtain the solicitation
- Bonding requirements, if applicable[95]
- Date, time, and location of the opening of offers and awarding of contracts
- Deadline and method for submission
- General category, specification, or technical requirement for the item to be bid

  [NOTE: A CE may choose to put detailed specifications and/or technical requirements on a website or in a separate document that is provided on request instead of including lengthy specifications and/or technical requirements in public advertising. If the CE chooses to take this option, the CE must include the location and method to access the detailed specifications and/or technical requirements in the advertising announcement.]
- Indication of how the contract will be awarded
- Method and criteria for the evaluation of offers

  [NOTE: A CE may choose to include a summary list of the method and criteria for evaluation in the advertisement instead of the full evaluation rubric. If the CE chooses to take this option, the CE must include the location and method to access the detailed information on the evaluation method and criteria in the advertising announcement.]
- Method of payment
- Name of the CE

Cooperative Purchasing

CEs may use cooperative purchasing to take advantage of economies of scale. See *Administrator's Reference Manual (ARM), Section 17c, Cooperative Purchasing* for detailed guidance on this topic.

Agent Purchasing Contract

CEs may also procure an agent (also called a third-party vendor) to make purchases on behalf of the CE. The guidance in *Administrator's Reference Manual (ARM), Section 17, Cooperative Purchasing* and *Section 18, Food Service Contracts* will also be helpful in addition to the following guidance. An agent is defined as

A person or business that is procured to act on behalf of the CNP operator to procure products

[94] Available at *http://www.txsmartbuy.com/.*
[95] See the *Bonding Requirements* subsection in this section for additional information on this topic.

and/or services

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

Conflict of Interest for an Agent Contract

USDA also prohibits third-party contracts that procure products or services from a third-party's parent company, subsidiary of the parent company, or other entities with a financial relationship to the third-party. This includes, but is not limited to, an FSMC purchasing from FSMC-owned or affiliated vendors. These types of situations represent a real or apparent conflict of interest, limit competitive procurement, and result in school nutrition funds to be used to pay for duplicative services.

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

Establishing an Agent Contract

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

Fees for an Agent Contract

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

The fee cannot be a percentage of the cost.

Procurement for an Agent Contract

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

- Credits, Rebates, Discounts, and USDA Foods Values: If there are financial transactions that include credits, rebates, discounts, the agent must provide the CE with the credits, rebates, and discounts. If any transactions conducted by the agent involve USDA Foods values, the agent must ensure that the CE receives these credits. In these cases, the agent must provide the CE with documentation that demonstrates compliance.
- Material Change: Material change requirements apply to a procured agent. Therefore, the solicitation and contract must clearly describe the expected services to be provided by the agent over the course of the contract.
- Pre-Existing Contractual Relationships: Agents may not use pre-existing contractual relationships instead of conducting a competitive procurement on behalf of a CE.

- Price: A price based on a cost-plus percentage of cost is not allowed for any purchases made on behalf of the CE by an agent. Any costs charged from this type of pricing structure are unallowable costs to a Child Nutrition Program (CNP).

CEs are responsible for monitoring contractor performance to ensure compliance with all contract provisions. See *Administrator's Reference Manual (ARM), Section 16a, Contract Management* for additional information on the requirements for managing agent contracts.

Consultant Contracts

Consultant contracts are intended to provide short-term or temporary services when a CE lacks the necessary resources, skills, and abilities to manage and operate the program effectively and in compliance with regulations.[96] If the consultant services include implementing or managing the day-to-day operations[97] of the program, a food service management contract should be used instead of a consultant's contract.

Short-term or temporary services may include a single consultation or a series of consultations over a defined period of time. If a consultant's contract is reissued multiple times over multiple years, the contract is no longer a temporary contract. See *Administrator's Reference Manual (ARM), Section 18, Food Service Contracts* for additional information on consultant contracts.

Franchise Agreements

The services and/or products of a franchise agreement must be properly procured through a competitive process, and the income and costs generated by the agreement must be compliant with financial regulations as well.[98] This includes, but is not limited to, the following requirements:

- All equipment purchases with food service funds must be properly procured.
- Franchise agreement restrictions must not create circumstances that cause the CE to be noncompliant with the meal pattern or other program requirements.
- Franchise agreements must have a duration of no more than one year and may include an option for a renewal clause.[99]
- Operational practices of the franchise must be in compliance with all applicable local and state health and safety regulations related to the purchase and resell of food under the franchise agreement.

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

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96 Before procuring a consultant, a CE should contact its ESC child nutritionist to see if the ESC is able to provide the needed support. See *Administrator's Reference Manual (ARM), Section 18, Food Service Contracts* for additional information on this topic.

97 Day-to-day operations include, but are not limited to, menu planning, inventory management, food production records, and common operational tasks.

98 See the *Administrator's Reference Manual (ARM), Section 16, Financial System* for additional information on this topic.

99 A renewal clause cannot be automatic. Contracts may be renewed for an additional year up to four times, so long as the total contract and renewal period does not exceed five years.

Procurement, USDA Foods Processing

A CE must competitively procure its USDA Foods processor. Moreover, any entity acting on behalf of the CE must also competitively procure its USDA Foods processor. CEs must take care after they have signed a contract with a processor not to add (piggyback) other purchases and/or services that will create a material change to a contract.[100]

The CE must also ensure that the USDA Foods values are credited back to the CE by its processor. The processor must provide adequate documentation to demonstrate that the crediting was done correctly. The Food Distribution Program Handbook is available at *www.SquareMeals.org* for details on USDA Foods. *Administrator's Reference Manual (ARM), Section 14, USDA Foods* and the *USDA Foods Processor Handbook*[101] also provide additional guidance.

Vendor List

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

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

Awarding the Contract

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

In the evaluation process, the CE must not consider nonresponsive or overly responsive[102] offers. A contract that is awarded based on incentives, investments, and/or value-added or overly responsive offers has not been properly procured.

After Offers Are Received

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

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

- If there is not an adequate number of offers submitted, the CE must determine how to address the identified limitations in its solicitation

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100 See the *Material Change* subtopic in the *Contracts* subsections in this section for additional information on this topic.

101 The *USDA Foods Processor Handbook* can be found on the *Food Distribution Program for Child Nutrition Programs* landing page on SquareMeals, under "Policy/Handbook."

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

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

and/or in its method for public advertising and reissue the solicitation.

[NOTE: An inadequate number of offers do not automatically indicate that the CE should pursue a noncompetitive procurement method.[103] A lack of offers is often caused by a poorly written solicitation or advertising that targets too small of a population base and not a lack of contractors or vendors capable of supplying the products and/or services to be procured. Therefore, the CE must provide notification that the CE is not awarding a contract, review its solicitation, make appropriate changes to the solicitation, and reissue the solicitation.]

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

Opening Invitation for Bids (IFBs) Received

- Each offer submitted for an IFB solicitation must be time-stamped and dated upon receipt. A CE must not open sealed offers (IFB) before the announced date or at a location other than the location publicized.
- Unsealed offers or offers received after the designated time and date cannot be accepted.
- The CE is not required to announce the winning offer at the opening, but the name of each offeror and the offer price must be read aloud and recorded as each offer is opened. Other information may also be read aloud for each offer: products included in offer, payment terms, delivery date, and such.
- In cases where the scope of work and specifications and/or technical requirements require additional evaluation to determine if the offer is responsive and/or responsible, the CE is not required to announce the winning offer at the time of the opening, but must state the offer price and if the offer appears to be responsible and responsive.
- In cases where the CE cannot announce the winning offer formally until the school board or other authority has approved the contract award, the winning offeror should be notified of the CE's intent to award the contract, but must be informed of the need for approval by the board or other authority and the timeframe for approval.
- Once the timeframe established by the CE for bid protests has passed (and settled, if applicable) and final approval is obtained, the CE should provide written notice to the successful offeror.
- Unsuccessful offerors should be notified promptly.[104]

Opening Requests for Proposal (RFP) Received

- A CE may open submitted responses from RFP offers to determine if all requested documentation is included with the offer or for clerical errors. If CEs chooses to do this, they should set a specific date for opening offers and set a specific date and method for sending notification for missing documentation or clerical errors. This includes allowing time for the offeror to submit an updated offer.

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[103] See the *Noncompetitive Procurement Methods* subsection in this section for additional information on this topic.

[104] The CE should contact their legal counsel to ensure compliance with all state procurement regulations regarding the intent to award and the protest period and to identify the CE's responsibilities regarding notification to unsuccessful offerors.

- All offerors must be given the same period of time to submit updated offers. Therefore, if the CE chooses to open the offers, it must return all offers lacking complete documentation or with clerical errors at the same time with the same amount of time for resubmission.

  For Example:

  - March 1, 2016, 5:00 p.m.: Due date for all offers
  - March 2-3, 2016: Period during which the CE will ensure that all offers have required documentation or if there are clerical errors
  - March 4, 2016: Date on which notification is sent to all CEs missing documentation or with clerical errors
  - March 9, 2016, 5:00 p.m.: Due date for all corrected offers

Evaluation of the Bid and Award of Contract

Responsible Contractors

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

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

Responsive Contractors

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

Contractor provided incentives (bonuses, stamps, equipment, or other benefits) that will be received by the CE, the school nutrition program, or enrolled students that may influence the contract award must be treated the same as a gratuity, favor, or anything of monetary value given to a school nutrition program employee, officer, or agent of the CE—these types of incentives may create a conflict of interest. Offers including these kinds of nonresponsive or overly responsive incentives must be excluded from consideration. See *Administrator's Reference Manual (ARM), Section 17a, Procurement Procedures* and *Section 15, Program Integrity* for more information on ethical standards.

Cost as Primary Consideration for Awarding the Contract

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

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

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

Criteria	Possible Points
Cost	35
Financial stability, business practices	5
Reporting systems	10
Product specifications and/or technical requirements	30
Delivery schedule	20

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

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

Contract Negotiation Prior to Contract Award

When a solicitation contains qualitative elements, it is common for guidance to use the word *negotiate* when CE determines which offer will be awarded the contract. In these cases, the word *negotiate* does not mean that there is a give and take interchange resulting in contract award, i.e., a give and take approach may stifle full and open competition[105] if it creates options that were not addressed in the solicitation. Instead, for this purpose, *negotiate* means that the CE may seek clarification or additional detail. It does not mean to negotiate equal specifications and/or technical requirements.

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

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

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

After all offerors have provided clarification, the CE may also ask all or the top offerors to resubmit a *best price and final offer*.[106]

Awarding a Contract with Contingency Approval

If a contract has a contingency approval by TDA or for other purposes, contingency documentation must be submitted and approved before the costs are allowable. Any costs incurred before the contingency approval is resolved, are unallowable.

Awarding a Cost-Reimbursable Contract

A cost-reimbursable contract is effective when there are uncertainties involved in the contract performance affecting price estimates. The contract is awarded to the vendor conforming to all the material terms and conditions of the solicitation and with cost as the primary consideration.[107] A cost-reimbursable contract cannot be awarded using an IFB solicitation; it must be awarded using an RFP solicitation.

Awarding a Firm Fixed-Price Contract

A firm fixed-price contract is most effective when there are clear and detailed specifications and/or technical requirements. The contract is awarded to the vendor conforming to all the

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105 See the *Full and Open Competition* subsection in this section for additional information on this topic.
106 When an offeror submits a *best price*, the offer may be a lower price or the same price.
107 See the *Costs as Primary Consideration for Awarding the Contract* subsection in this section for additional information on this topic.

material terms and conditions of the solicitation and whose offer or bid includes the best price. A firm fixed-price contract may be awarded using an IFB solicitation or an RFP solicitation.

Awarding a Noncompetitive Contract (Including Sole Source)

Before a CE can award a contract to a noncompetitive provider, the CE must ensure that the award of the noncompetitive contract is awarded appropriately, as described in the *Noncompetitive Procurement Method* subsection in this section.

Special Situations, Awarding the Contract

CEs must use the following guidance in awarding a contract:

Awarding a Contract to an Offeror Other Than Lowest Cost Offeror

There are cases where a CE can choose not to award a contract to the offeror with the lowest cost—when the lowest offeror is not the most responsible and responsive.

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

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

Common reasons for not awarding the contract to the lowest offeror may include the following:

- The offer is not responsive to the specifications and/or technical requirements.
- The offeror is not responsible, i.e., contractor's integrity as documented by a record of past performance or references indicates a poor record of meeting expectations.
- The financial and technical resources of the contractor are not adequate to demonstrate the contractor is responsible.
- There is evidence of the contractor's noncompliance with public policy.

Awarding the Contract to Multiple Contractors or Splitting the Contract

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

Awarding a Contract That Includes Consultant Contracts, Expenses

If a consultant contract or agreement includes reimbursement for specific types of expenses, such as travel, these expenses must be described and specified by amounts and by type in the offer in order for the offer to be responsive.

If a consultant's offer is written so that expenses (including travel) do not have an allocated amount in the offer for this purpose, the payment of the expenses is an unallowable expense to the school nutrition program.

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

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

Awarding a Market Basket Contract

CE must apply the following guidance for market basket contracts:

Contract Award for Market Basket Contracts

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

Awarding a Market Contract Evaluation

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

Pricing for All Products for Market Basket Contracts

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

If the pricing for the representative sample is used to award the contract, the prices for the products not included in the representative sample must be reasonable[108] and comparable to market prices for the same products in the geographic area for the quantities purchased.

For Example: A CE issues a solicitation asking for 30 pounds of peaches, 80 pounds of tomatoes, 200 pounds of ground beef, .5 pound of black pepper, 1 pound of oregano, and 10 pounds of sour cream.

For the products listed above, the CE plans to use the Market Basket, Simplified Total Cost Analysis in awarding the bid and stipulates in the solicitation that the cost analysis will be based on the total price for the peaches, tomatoes, and ground beef. After receiving bids, the CE (1) evaluates the prices for the peaches, tomatoes, and ground beef for the two pricing options and (2) ensures that the costs for the pepper, oregano, and sour cream are reasonable. Then, the CE chooses the vendor that offers the lowest total price for the peaches, tomatoes and ground beef and offers a reasonable price for the other items.

[NOTE: Ensuring that the non-representative sample prices are comparable is central to awarding cost-effective market basket contracts. Verifying that the prices are reasonable and comparable to normal market prices will prevent a potential contractor from lowering the price of the representative sample products to win the contract and raising the prices for the non-representative sample products to make up the difference.]

No Offers Received

If a CE releases a solicitation and no offers are returned, the CE should first determine if there is a problem with the solicitation. If there are problems with

[108] See *Administrator's Reference Manual (ARM), Section 16, Financial System* for additional information on reasonable cost.

the solicitation, the CE must restart the procurement process and address all limitations.

The following questions will assist the CE in determining what steps to take to address:

- Was the notice (or solicitation) sent to all potential offerors?
- Was sufficient time allowed for potential offerors to respond?
- Were specifications and/or technical requirements unduly restrictive, so offerors were not able to bid?
- Were unrealistic procurement or delivery schedules included or requested?

Nonresponsive or Overly Responsive Offers

If an offeror does not submit an offer that is responsive to the specifications and/or technical requirements described in the solicitation, the offer is considered nonresponsive or overly responsive and the offeror must be disqualified.

Any extra products and/or services not described in the solicitation that are included in the offer are nonresponsive or overly responsive. Extra products and/or services include, but are not limited to, the following:

- Additional equipment
- Prizes
- Stamps that can be used to obtain another item or service
- Scholarships

The CE cannot award the contract to a nonresponsive or overly responsive offer.

Offers Received After the Due Date

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

Opening Offers Prior to the Due Date

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

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

Request for Best Price

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

Request for Clarification

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

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

Contracts

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

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

A CE must ensure that all contracts are the result of proper procurement procedures. All contracts, no matter the procurement method, must be awarded to a responsible and responsive offeror whose offer is the most advantageous to the program. For a fixed-price contract, the bid is awarded to the most responsible and responsive offeror with the best price. Third-party entities that procure on behalf of the CE are required to follow this same guidance.[109]

Small Purchase Contract

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

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

[109] In cases where third-party entities have the capability to provide additional products and/or services, but these products and/or services were not part of the original solicitation, purchasing these products and/or services without proper procurement may result in unallowable cost. An unallowable cost or expense cannot be paid using school nutrition program funds.

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

Elements of a Contract

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

General Contract Requirements

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

Contract Management

- Contract renewal options, including terms, conditions, and (as applicable) provisions for price changes

  [NOTE: Contracts may be renewed for additional periods depending on the contract type (see Contract/Renewal Duration Period). However, the sum of any contract and renewal period may not exceed five years. After the final renewal, the contract must be rebid.]

- Contract termination rights for cause and convenience
- Contractor recordkeeping requirements
- Default and breach of contract provisions, remedies, cancellation procedures, and penalties

  For Contracts in Excess of $10,000

  - Termination for cause and for convenience clause with an explanation of when the clause applies and the basis for settlement

  For Contracts That Exceed the Simplified Acquisition Threshold

  - Administrative, contractual, or legal remedies in instances where contractors violate breach of contract terms which includes sanctions and penalties as appropriate

    [NOTE: The most restrictive simplified acquisition threshold local or state that applies. See the ***Procurement Purchasing Methods*** subsection in this section for additional information on the simplified acquisition threshold.]

- Procedures for contract modification

Invoicing and Payments

- Method for tracking costs to ensure that the CE receives credits, rebates, discounts, USDA Foods values or and other applicable credits

  [NOTE: CEs may include a requirement for a routine auditing procedure as defined in the solicitation.]

- Method to ensure that an adjustment or escalation clause is applied both upward and downward in alignment with the index at the frequency, as described in the solicitation
- Procedures for issuing payments, including sufficient information included on invoices to determine if costs are allowable
- Ownership of any equipment or software purchased by the contractor on the CE's behalf or for the contract

- Procedures for contract modification
- Required compliance certifications
- Sanctions for noncompliance

Other Requirements

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

Products and/or Services to Be Provided

- Product specifications and/or technical requirements
- Professional certification requirements or minimum levels for required experience or education[110]
- Sanitation and licensing requirements
- Scope of work (i.e., a detailed description of duties to be performed, hours of work, performance descriptions, levels of performance, and required outcomes)

Viable IFB (Sealed) Bid Requirements

For a sealed bid to be awarded a contract—viable, the following conditions must be met.

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

Dispute Resolution

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

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

[110] See *Administrator's Reference Manual (ARM), Section 27, Professional Standards* for more information on requirements for continuing education/training and hiring for school nutrition program staff.

Duration of Contract

Contracts for Food Service Management Companies (FSMCs), vended meals, and consultants MUST include a contract limit of no more than **one year plus four annual renewals.** For detailed information, see *Administrator's Reference Manual (ARM), Section 18, Food Service Contracts*.

All other contracts must have a duration of **no more than five years** (including annual renewals, if applicable). These contracts may have different combinations of contract and renewal term lengths—for example, two years plus three one-year renewals, or five years and no renewals. If there is a material change, the contract must be rebid.[111]

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

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

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

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

Material Change

Material change applies to all procurement contracts. When a CE allows a winning offeror to make changes to contract terms that are materially inconsistent with the original solicitation for the contract, the CE has undermined full and open competition[112] by denying all possible contractors the opportunity to compete under the same terms and conditions.

Anticipated Change

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

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

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

A material change most often occurs in one of two situations:

- When the solicitation does not mirror the contract.
- When a change is made to a contract that alters the terms and conditions of the contract substantially enough that other potential contractors who

[111] See the *Material Change* subsection in this section for additional information on this topic.
[112] See the *Full and Open Competition* subsection in this section for additional information on this topic.

responded to the solicitation may have bid differently and more competitively if they had known about the altered terms and conditions.

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

[NOTE: A solicitation that is written to be an open-ended procurement of additional products and/or services is likely to be an inappropriate procurement. When procurement is not done correctly with full and open competition, the cost of the contract and legal defense of the contract are unallowable expenses to the school nutrition program.][113]

Forecasting is an essential tool to make sure that a material change does not occur.[114] If a CE anticipates enrollment growth or a reconfiguration of site attendance zones, the CE should consider adding the anticipated changes to the solicitation and contract. However, even if the solicitation and contract include flexibilities based on anticipated growth or reconfigurations, the CE must still evaluate the impact of growth or reconfiguration to determine if a material change has occurred. Any increase in the purchase of products and/or services that is not reasonable may be a material change and may require a rebid of the contract.

Material Change, Cooperative Contracts

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

Material Change, Determination

The CE must consider the following issues when determining if there has been a material change:

Increase or Decrease to the Cost of the Contract

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

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

Increase or Decrease in the Products and/or Services

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

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

New Products and/or Services

Are there new products and/or services added to an existing contract?

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

If there is a material change to the contract and the CE does not rebid the contract, any contractor that responded to the solicitation and did not win may file a protest to the contract award.[115]

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

114 See the *Forecasting* subsection in this section for additional information on this topic.

115 See the *Protests* subsection in this section for additional information on this topic.

Protest of Contract

An interested party[116] may protest any of the following situations:

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

CEs and any entity acting on their behalf must have written procurement procedures in place to address and resolve protests or disputes relating to procurements.

- It is the CE's responsibility to ensure that all protests are resolved.
- The CE and any entity acting on their behalf must follow its written procedures to resolve protests.
- The CE and any entity acting on their behalf must retain all documentation related to protests.
- The CE must notify TDA when a protest is received.[117]

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

- The contract was made in connection with the School Nutrition Program (SNP).
- The protestor has exhausted all administrative remedies with the CE and any entity acting on the CE's behalf (grantee and subgrantee) before pursuing the protest with FNS.
- Violations of federal law or regulations and the standards of this section exist.[118]
- Violation of a CE's or entity acting on CE's behalf (grantee or subgrantee) protest procedures exists for failure to review a complaint or protest.

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

Managing the Contract

The CE must have procedures in place to ensure that contractors perform in accordance with the contract or purchase order terms, conditions, specifications, and technical requirements—manage the contract. See *Administrator's Reference Manual (ARM), Section 16a, Contract Management* for additional guidance on this topic.

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116 An interested party is defined as any entity or person who may be affected by a situation, any entity or person who has a real or direct interest in action being proposed or taken.

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

118 Violations of state or local law will be under the jurisdiction of state or local authorities.

Additional Resources

TDA Resources

TDA resources are available on the SquareMeals website, *www.SquareMeals.org*.

- *Approved Purchase List*—Form designed to provide a list of products approved to purchase with information that will be helpful to menu planners and staff managing the contract.
- *Budget Tool*—Form designed to assist the CE in tracking various incomes and costs of the program, including cost analysis for products and/or services.
- *Buy American Checklist for Non-Domestic Food Product Purchases*—Checklist to assist CEs in determining if a non-domestic product is acceptable.
- *Micro-Purchase Log*—Form designed to track purchases made under the micro-purchase method.
- *Informal Small Purchase Log*—Form designed to track offers and offerors for small purchase procurement.

Institute for Child Nutrition (ICN)

- *First Choice*, a handbook for developing an effective procurement process, available at *www.theicn.org*
- *Procurement in the 21st Century*, manual providing specific details on the procurement process, available at *www.theicn.org*
  [NOTE: This resource is not a guidance document, but it does provide useful information.]
- *State Agency Guidance on Procurement*, a series of web-based training on procurement, available at *www.theicn.org*

USDA

- *Understanding Food Qualities Labels*, a manual provided by USDA's Agricultural Marketing Service (AMS) that provides a guide to product labeling that indicates quality, available at *www.ams.usda.gov/sites/default/files/media/AMS%20Product%20Label%20Factsheet.pdf*

Other Websites

- Texas Procurement and Support Services (TPASS) (Formerly Texas Building and Procurement Commission), available at *www.window.state.tx.us/procurement/*
- Comptroller of Public Accounts, available at *www.cpa.state.tx.us*
- Universal Public Purchasing Certification Council/National Institute of Government Purchasing (NIGP), available at *www.nigp.org*
- USDA Farm to School website, available at *www.fns.usda.gov/farmtoschool/*

Records Retention

The CE is required to maintain an organized accounting and financial system that includes documentation that demonstrates compliance with program regulations and the history of all procurements. Records retained for procurement must be sufficient to detail the history of procurement for each procured product and/or service, including but not limited to the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. CEs have the option to maintain records on paper or electronically.

These records must be accessible to appropriate CE staff members and federal or state reviewers. TDA may request procurement documentation during both offsite and onsite administrative review processes as well as any additional review specific to procurement.

Information Box 8

Records Retention

Public and charter schools are required to keep documentation related to school nutrition programs for 5 years.

Private schools, other nonprofit organizations, and residential childcare institutions (RCCIs) are required to keep documentation for 3 years.

All documentation or records must be kept on file for a minimum of five years for public and charter schools or three years for private schools, other nonprofit organizations, and residential child care institutions (RCCIs) after the end of the fiscal year to which they pertain.

Procurement System

The CE has documentation that demonstrates that CE has established internal controls to promote program integrity. This includes, but is not limited to, documentation that illustrates the following:

- Written procurement procedures, including, but not limited to, actions or tasks for cost analysis, selection of procurement method, ethical standards, and other requirements, as described in this section
- Procedures for effective contract management
- Verification of third-party entity compliance with procurement regulations

See *Administrator's Reference Manual (ARM), Section 15, Program Integrity; Section 16a, Contract Management; Section 17a, Procurement Procedures; Section 17b, Buy American;* and *Section 17c, Cooperative Purchasing* for additional information on document retention for these purposes.

Solicitation

Documentation that demonstrates that the CE has issued a solicitation that meets the procurement requirements—this includes, but is not limited to, all solicitation documents released as part of the procurement process and documentation that illustrates the following:

- All offers submitted in response to the procurement solicitation
- Cost analysis
- Evaluation and ranking criteria for each procured product and/or service, including rubrics, scales, or evaluation tools
- Expectations for the award of credits, rebates, discounts, USDA Foods values, application of adjustment or escalation clauses, and other credits as applicable
- Offeror responsibilities including terms and conditions, the timeline for major events, and other requirements or expectations

- Potential contractor's questions and method for sharing answers with other potential contractors
- Public advertisement or notification for solicitations
- Specifications and/or technical requirements
- Statements indicating compliance with all required federal regulations, including the Buy American provision

Contract
Documentation that demonstrates that the CE has issued a contract that meets the procurement requirements—this includes, but is not limited to, following:

- Actual contracts resulting from all methods of procurement
- Use of the *System for Award Management (SAM)*
- Compliance with all applicable requirements—federal, state, and local
- Health and safety certifications, licensing, or regulations as applicable
- Professional standards as applicable
- Records reflecting CE actions to manage and monitor all contracts
- Statements indicating compliance with all required federal regulations, including the Buy American provision
- Renewal contract and renewal contract amendments, including standard and market basket renewal documentation

Special Situations
Documentation related to the following situations:

- Approval to use a sole source procurement or emergency method
- Inability to buy an American product
- Material change when there is and is not a material change
- Micro-purchase equitable distribution of purchases or reason for an inability to do so
- Noncompetitive method procurements
- Preference given for Small and Minority Firms, Women's Business Enterprise, Labor Surplus Area Firms, and other federal contract requirements as applicable
- Purchases made through a cooperative
- Purchases made through an agent
- Return of credits, rebates, discounts, and USDA Foods values to the CE as applicable to the type of contract (or agreement) including CEs participating in Group Buying Cooperatives; CEs using purchasing agents; and CEs participating in a operator-only cooperative.

- Third-party compliance with procurement regulations

Compliance

TDA may take appropriate fiscal action or terminate the Food and Nutrition (FND) Agreement for any CE that is not in compliance with the procurement requirements. Additionally, TDA will assess compliance with the accounting and financial requirements based on the documentation that the CE has submitted throughout the year as well as documentation submitted for offsite and onsite administrative review processes or other procurement review activities.

The cost for any products and/or services that were procured improperly are unallowable costs to the school nutrition program.[119] This includes any costs that the CE has incurred as a result of intentionally breaking up purchases into smaller amounts to qualify under the micro-purchase threshold or simplified purchase threshold as well as purchases made on behalf of the CE by a third-party.

CEs must make available, upon request of the awarding agency (state or federal), any or all of the documentation described in the *Records Retention* subsection in this section.

Obligation of the Contracting Entity (CE) to Report Fraud, Bribery, and Gratuity Violations
CE's must report, in writing to TDA, all violations of federal criminal law—fraud, bribery, or gratuity.

> The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in § 200.338 Remedies for noncompliance, including suspension or debarment. (2 CFR 200.113; 31 U.S.C. 3321).

Criminal Penalty

The maximum fine for embezzling, willfully misapplying, stealing, or obtaining by fraud, funds, assets, or property acquired under the National School Lunch Act or Child Nutrition Act is $25,000.

Fraud

> Whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program [and/or Special Milk Program] whether received directly or indirectly, shall, if such funds, assets or property are of a value of $100 or more, be fined no more than $25,000 or imprisoned not more than 5 years or both; or if such funds, assets or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals or retains for personal use or gain, funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program, whether received directly or indirectly, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to the same penalties.

Termination of the Permanent Agreement for Financial Fraud or Misuse of Funds

If serious deficiencies, such as fraud or misuse of funds occur, and corrective action is not practical, TDA will amend the FND Agreement to terminate the CE's participation in the SNP. In this case, TDA may also refer the matter to the appropriate local, state, and/or federal authorities.

[119] An unallowable cost or expense cannot be paid using school nutrition program funds.