Food Service Contracts
Consultants, Food Service Management Companies (FSMCs), and Vended Meals

Section 22, Food Service Contracts Update Guide
February 23, 2017

Updated Section 22, Food Service Contracts to expand the scope of this section to include consultants and vended meals in addition to food service management companies (FSMCs).

Updated to the section to incorporate the following United States Department of Agriculture (USDA) memo and guidance:

- USDA Memo SP 40-2016, Updated Guidance: Contracting with Food Service Management Companies (June 2, 2016)
- USDA Memo SP 35-2016, Bonding Requirements for Food Service Management Companies and Other Subcontractors (May 5, 2016)
- USDA Memo SP 20-2016, Nonprofit School Food Service Account Nonprogram Food Revenue Requirements (December 23, 2015)
- USDA Memo SP 35-2013, State Agency Oversight and Monitoring of School Food Authority Contracts with Food Service Management Companies (April 19, 2013)
- USDA Memo SP 33-2012, Fresh Fruit and Vegetable Program Fees in FSMC Contracts (May 31, 2012)

Clarified information on the following topics:

- Consultant contracts
- Food service management contracts (FSMCs)
- Vending contracts
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Contact Information for the Texas Department of Agriculture (TDA), Food and Nutrition

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

Website:  www.squaremeals.org
Phone:  877-TEXMEAL, (877) 839-6385  |  Fax:  (888) 203-6593

Physical Address:  1700 N. Congress, 11th Floor, Austin, TX 78701
Mailing Address:  PO Box 12847, Austin, TX 78711-2847

Email Contact:
squaremeals@TexasAgriculture.gov

Email Contact for Issues Related to Applications:
National School Lunch Program, School Breakfast Program, & Special Milk Program:
    NSLP-SBP.BOps@TexasAgriculture.gov
Fresh Fruit and Vegetable Program:
    FFVP.Bops@TexasAgriculture.gov
Seamless Summer Option:
    SSO.BOps@TexasAgriculture.gov
Child and Adult Care Food Program:
    CACFP.BOps@TexasAgriculture.gov
Summer Food Service Program:
    SFSP.BOps@TexasAgriculture.gov

Email Contact for Issues Related to Program Operation:
Commodity Operations (USDA Foods):
    CommodityOperations@TexasAgriculture.gov
Community Operations (Child and Adult Care Food Program and Summer Food Service Program):
    Community.Ops@TexasAgriculture.gov
Local Products:
    LocalProducts.SquareMeals@TexasAgriculture.gov
School Operations (National School Lunch Program and School Breakfast Program):
    School.Operations@TexasAgriculture.gov
Food Service Contracts

Consultant, Food Service Management Company (FSMCs), and Vended Meal

A contracting entity (CE) may procure a contractor to support the CE in its food service operation. However, in all cases and with all contracts, the CE is still responsible for ensuring that the program is operated effectively and in compliance with all applicable regulations.

The guidance in this section is intended to assist CEs in procurement and management of the food service contracts for 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)

CEs will find related guidance in the Administrator’s Reference Manual, Section 14, Financial Information Concerning School Nutrition Funds; Section 17, Procurement; and Section 23, USDA Foods.

Types of Food Service Contracts: Food Service Management Company (FSMC), Consultant, or Vended Meal

When preparing for a solicitation and awarding a food service contract, a CE must consider the types of tasks and length of the contract before determining whether the solicitation and contract will be for a consultant, FSMC, or vended meals. This section provides detailed guidance on each of the following:

**Consultant**

A consultant may be procured to temporarily provide support to a CE in areas where the CE lacks the necessary resources, skills, and/or abilities. Through the services of the consultant, the CE is able to gain the necessary resources, skills, and/or abilities to operate an effective and compliant program. A consultant cannot be procured to operate or manage the program. A consultant can assist a CE’s staff to develop strategies or skills to operate a successful and effective program.

**Food Service Management Company (FSMC)**

An FSMC is a commercial enterprise or nonprofit organization that may be procured to assist the CE in managing and operating the program, i.e., to operate the program on behalf of the CE.
Vended Meal Contractor Providing Services for an SNP
A contractor or merchandiser may be procured to provide the CE with complete meals, meal components, and raw materials for the meal service.

Definitions for this Section
For this section, the following definitions will be useful:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
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<tr>
<td>Acting on Behalf of CE</td>
<td>Entity or person who has been given the responsibility to take action for the CE.</td>
</tr>
<tr>
<td>Agent</td>
<td>Person authorized to act for the CE through employment, by contract, or apparent authority.</td>
</tr>
<tr>
<td>Arms-Length Transaction</td>
<td>Transaction in which the parties are dealing from equal bargaining positions—neither party is subject to the other’s control or dominant influence, and the transaction is treated with fairness, integrity, and legality.</td>
</tr>
<tr>
<td></td>
<td>Less than Arms-Length Transaction</td>
</tr>
<tr>
<td></td>
<td>A less than arms-length transaction occurs when a person responsible for making a purchase and appears to have a stake in the outcome is able to control or substantially influence the actions of others. This may include agreements between divisions of an organization; organizations under common control through common officers, directors, or members; and an organization and a director or employee of the organization and his or her immediate family.</td>
</tr>
<tr>
<td>Bid Guarantee</td>
<td>Guaranteed percentage bid price provided by the offeror at the time the offer is submitted. The CE must return all bid guarantees to all unsuccessful offerors when a contract is awarded and to the winning offeror as soon as the contract is signed.</td>
</tr>
<tr>
<td>Bond</td>
<td>Insurance agreement pledging surety for financial loss caused in connection with the contract. For school nutrition programs, if a loss occurs in connection with a contract related to program operations, the loss will be covered to the extent agreed upon in the bond.</td>
</tr>
<tr>
<td>Buy American</td>
<td>Requirement for schools to purchase, to the maximum extent practicable, domestic commodities and products.</td>
</tr>
<tr>
<td></td>
<td>A domestic commodity or product means an agricultural commodity that is produced (grown) in the United States and processed in the United States or that is processed in the United States substantially using agricultural commodities that are produced in the United States.</td>
</tr>
<tr>
<td>Capital Expenditures</td>
<td>A direct cost expense for an item to be used for general purposes and intended to be used for multiple years.</td>
</tr>
</tbody>
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1 TDA must approve capital expenditures before a CE makes a capital expenditure purchase.
| **Code of Conduct** | Set of written standards the CE must develop that outline the responsibilities of, or proper practices for, an individual or organization which govern the following:  
1. Performance of the officers, employees, or agents engaged in contract awards and administration when the contract is funded in whole or in part by Food and Nutrition Service (FNS) program funds.  
2. Methods of procurement including the requirement that the CE perform a cost or price analysis for every procurement (including contract modifications) and determination of which contract clauses and certifications are required in the CE’s contracts. |
| **Conflict of Interest** | Any action that allows a person to benefit at the expense of the public interest or the expense of their employer. |
| **Contract** | Formal, legally enforceable agreement (terms and conditions) between a buyer (the CE) and a seller (contractor) that clearly and accurately describes the products and/or services to be delivered or performed and sets forth the method and the compensations the contractor receives when products and/or services are provided. |
| **Consultant** | Consultant that provides temporary support to the CE in areas where the CE lacks the necessary resources, skills, and/or abilities in order to assist the CE in gaining the necessary resources, skills, and/or abilities to operate an effective and compliant program. |
| **Cooperative Purchasing** | Group of CEs joining together to purchase products and/or services with the intention of reducing costs and improving the quality of products and/or services available to members of a group. In this reference, a purchasing cooperative consists of a group of CEs. |
| **Cost Analysis** | Review and evaluation of each element of cost to determine reasonableness, allocability, and allowability. |
| **Cost Index** | Tool that is designed to show the impact of an economic measure on the price of purchasing a specific type of item. |
| **Cost Reimbursable Contract** | Reimbursable contract that is a formal, legally enforceable contract that reimburses the contractor for costs incurred under the contract but does not provide for any other payment to the contractor with or without a fixed fee. In a cost reimbursable contract, allowable costs will be paid from the nonprofit school nutrition account to the contractor net of all discounts, rebates, and other applicable credits accruing to or received by the contractor. In a cost reimbursable contract, the fixed price (fee) includes the contractor’s direct and indirect administrative costs and profit allocable to the contract. |
| **Debarment** | Action taken by a debarring official to exclude a person from participating in covered transactions. A person so excluded is debarred, that is, unable to participate. |
| **Distributor** | Commercial food company that purchases, receives, and/or stores commercial food products and, then, sells, delivers, and bills the recipient agency for goods and/or services provided. |
| **Drop Delivery** | Delivery to one location within the CE, such as a central warehouse. |

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2 FNS administers the nutrition assistance programs for USDA.  
3 Covered transactions in this section refer to transactions related to child nutrition programs.
<table>
<thead>
<tr>
<th><strong>Economies of Scale</strong></th>
<th>Purchase of large quantities of a product and/or service in order to obtain a better price.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Escalator/ Descalator Clause or Market-based Pricing</strong></td>
<td>Predetermined provisions in a contract stipulating specific conditions for an increase or decrease in price.</td>
</tr>
<tr>
<td><strong>Ethics</strong></td>
<td>Moral standards individuals use to guide decisions in their personal and professional lives. School nutrition professionals have a responsibility to act ethically in accordance with all federal, state, and local guidelines.</td>
</tr>
<tr>
<td><strong>Firm Fixed Price Contract (Also Called Firm Price Contract)</strong></td>
<td>Contracts that provide products or services for a price not subject to adjustment other than increases or decreases tied to an economic indicator stipulated by contract. Firm-fixed price contracts are usually negotiated where reasonably finite specifications and/or technical requirements are available, and costs can be estimated with reasonable accuracy. A fixed price contract places minimum administrative burden on contracting parties, but subjects a contractor to maximum risk arising from full responsibility for all cost escalations.</td>
</tr>
<tr>
<td><strong>Fixed Price (Fee)</strong></td>
<td>Agreed upon amount of money that is fixed at the inception of a contract and is guaranteed for a specific period of time. A fixed-price contract may also contain an economic cost adjustment provision tied to the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home.</td>
</tr>
<tr>
<td><strong>Food Service Management Company (FSMC)</strong></td>
<td>Any organization, whether commercial enterprise or a nonprofit organization, that is or may be contracted by the CE to operate or manage any aspect of the school food service.</td>
</tr>
<tr>
<td><strong>Food Service Management Company (FSMC) Solicitation/Contract</strong></td>
<td>TDA term used to reference the TDA prototype combined solicitation and contract. This term is applicable to this section only.</td>
</tr>
<tr>
<td><strong>Forecasting</strong></td>
<td>Process of analyzing current and historical data to determine future procurement trends. In the case of school nutrition programs, forecasting involves predicting and estimating the goods, works, and services needed in specified areas for the coming year, and/or assessing needs by reviewing current procurement activities. Forecasting allows for procurement plans to evolve each fiscal year.</td>
</tr>
<tr>
<td><strong>Full and Open Competition</strong></td>
<td>Situation where all potential contractors are competing on a level playing field and have the same opportunity to compete and be awarded a contract. Full and open competition is also commonly referred to as free and open competition.</td>
</tr>
</tbody>
</table>

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4 If an NSLP CE operates a Child and Adult Care Food Program and/or Summer Food Service Program, there may be additional regulations that applied for the use of an FSMC to operate the program.
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<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Group Buying Service (GBS)</strong></td>
<td>Organization that buys on behalf of other entities in larger quantities. Other names for group buying services (GBSs) include purchasing cooperatives, purchasing consortia, and group buying/purchasing organizations. A GBS can be for-profit or nonprofit. It is vital that all procurement transactions done by the GBS be conducted in a manner providing full and open competition.</td>
</tr>
<tr>
<td><strong>Incentives</strong></td>
<td>Rewards or benefits received as a result of performing requested actions and/or meeting predetermined milestones.</td>
</tr>
<tr>
<td><strong>Invitation for Bid (IFB)</strong></td>
<td>Formal method of procurement that uses sealed bidding and results in a fixed price contract with or without adjustment factors.</td>
</tr>
<tr>
<td><strong>Local Product</strong></td>
<td>Unprocessed locally grown or raised agricultural products that retain their inherent character.</td>
</tr>
<tr>
<td><strong>Managing the Contract</strong></td>
<td>Procedures the CE has in place to ensure that contractors perform in accordance with the terms, conditions, and specifications and/or technical requirements of their contracts or purchase orders.</td>
</tr>
<tr>
<td><strong>Material Change</strong></td>
<td>Change made to a contract after the contract has been awarded that alters the terms and conditions of the contract substantially enough, that, had other offerors known of the change in advance, they may have bid differently and more competitively.</td>
</tr>
<tr>
<td><strong>Meal Equivalency Factor (MEF)</strong></td>
<td>A statistical tool that is used to convert a la carte sales into a standard of measure, in this case a “meal.” The MEF is often used to convert a la carte sales into meal equivalents for billing purposes in fixed price contracts.</td>
</tr>
<tr>
<td><strong>Non-Federal Entity</strong></td>
<td>State, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a federal award as a recipient or subrecipient.</td>
</tr>
<tr>
<td><strong>Pass Through Entity</strong></td>
<td>Entity receiving federal funds that have passed through another entity. This definition is specific to funding from federal sources and applies to state agencies, CEs, group purchasing cooperatives, and third party entities. These funds are used to fulfill the purposes for a federally funded program.</td>
</tr>
<tr>
<td><strong>Payment Bond</strong></td>
<td>Bond which covers the cost of materials and works for construction contracts.</td>
</tr>
<tr>
<td><strong>Performance Bond</strong></td>
<td>Bond which covers the cost of ensuring that the work is done as specified in the terms of the contract.</td>
</tr>
<tr>
<td><strong>Procurement</strong></td>
<td>Act of obtaining goods or services in exchange for money or value. [NOTE: Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.]</td>
</tr>
<tr>
<td><strong>Reasonable Cost</strong></td>
<td>Amount that does not exceed a cost that would be incurred by a prudent person under similar circumstances.</td>
</tr>
<tr>
<td><strong>Regulatory Authority</strong></td>
<td>Oversight authority dictated by legislative act or regulation.</td>
</tr>
<tr>
<td><strong>Request for Proposals (RFP)</strong></td>
<td>Formal procurement method where potential contractors submit an offer to provide products and/or services under a fixed price or cost reimbursable type contract.</td>
</tr>
<tr>
<td><strong>Responsible</strong></td>
<td>Capable of providing the product(s) and/or service(s) as described in the solicitation.</td>
</tr>
<tr>
<td><strong>Responsive</strong></td>
<td>Offer that addresses terms and conditions of the solicitation including the specifications and/or technical requirements for product(s) and/or service(s).</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Service Fee</strong></td>
<td>Fee charged for the performance of a specific service.</td>
</tr>
<tr>
<td><strong>Solicitation</strong></td>
<td>Process of notifying prospective or qualified offerors about the specifications or technical requirements for purchase of products and/or services. For informal procurement, the solicitation may be communicated by email, in person, by fax, or by phone as long as the person soliciting offers documents the specifications or technical requirements to ensure that every possible contractor is given the same information. For a formal procurement, a written solicitation is required.</td>
</tr>
<tr>
<td><strong>Solicitation/Contract</strong></td>
<td>Term used in Texas for the prototype solicitation and contract that CEs are required to use.</td>
</tr>
<tr>
<td><strong>Specifications and Technical Requirements</strong></td>
<td>Detailed information included in the solicitation and in the final contract that describe the product(s) and/or service(s) that will be provided to the CE under the contract.</td>
</tr>
<tr>
<td><strong>Subgrantees</strong></td>
<td>Governmental or other legal entity to which a subgrant is awarded and is accountable to the grantee for the use of the funds provided.</td>
</tr>
<tr>
<td><strong>Supplier (Sometimes Called Vendor)</strong></td>
<td>Commercial enterprise, public or nonprofit private organization, or individual that enters into a contract with a CE to provide products and/or services. A supplier is also referred to as an offeror during the solicitation phase of procurement.</td>
</tr>
<tr>
<td><strong>Third Party</strong></td>
<td>Entity that is contracted to act on behalf of another entity.</td>
</tr>
<tr>
<td><strong>Transaction</strong></td>
<td>Occurrence in which two or more entities exchange goods, services, or money between them or among them under an agreement formed for their mutual benefit.</td>
</tr>
<tr>
<td><strong>Unallowable Cost or Expense</strong></td>
<td>Cost or expense which cannot be paid using school nutrition program funds. This includes costs and expenses incurred by the CE as well as any third party acting on behalf of the CE. Disallowed is sometimes used in place of unallowable.</td>
</tr>
<tr>
<td><strong>Value</strong></td>
<td>Something of monetary or material worth or something that has usefulness that can be exchanged for something of worth, merit, or importance.</td>
</tr>
<tr>
<td><strong>Vended Meal Contract</strong></td>
<td>Contractor or merchandiser providing the CE with complete meals, meal components, and raw materials for the meal service.</td>
</tr>
<tr>
<td><strong>Vendor Participation Fees</strong></td>
<td>Charge to participate which is paid by the participant or by those providing products and/or services.</td>
</tr>
</tbody>
</table>
Consultant Contracts
CEs may use a consultant as a short-term\textsuperscript{5} strategy to support the CE in areas where the CE lacks the necessary resources, skills, and abilities to manage and operate the program effectively and in compliance with all regulations. Before procuring a contract for a consultant, the CE should also consider if its regional education service center (ESC) can provide technical assistance at no cost to the CE.

Roles for a Consultant in a School Nutrition Program (SNP)
Consultant contracts may be used as described in the following circumstances:

- **Regulatory Change**
  When there is a lack of resources, skills, or abilities to perform a required service or action, including, but not limited to, when there is regulatory change that the CE is not prepared to implement, the CE may procure a consultant to gain access to resources and develop staff skills and abilities to achieve or maintain compliance.

- **Implementation Support**
  Where the services provided are not of a continuing nature, the CE may procure the services of a consultant for a limited period of time while the CE builds staff capacity or develops a plan for implementation.

- **Most Cost Effective Strategy**
  When tasks to be performed can be accomplished in a short period of time and the services can be provided more economically by a short-term consultant instead of a direct hire, the CE may procure a consultant. Cost effective in this case means a lower cost to the CE.

- **Operational and Management Tasks**
  A consultant role is not to perform operational or management tasks. It is to support the CE’s staff in performing operational and management tasks. When a consultant assumes operational and management roles, it has become an FSMC.

\textsuperscript{5} In general, a consultant’s contract should last no more than a year. In some cases, it is acceptable to extend the contract as the staff move into implementing what they have learned from the consultant. The consultant role takes the form of an advisor helping staff process and assess implementation actions.
Long-Term Contract
The role of the consultant is intended to be a short-term role. If a CE has procured a consultant or a series of consultants to address long-term issues, the CE is not using consultant services as allowed. Instead, the CE is using a consultant in an FSMC capacity and, therefore, must procure an FSMC if the CE is not ready or chooses not to transfer these responsibilities to its own staff.

If the activities in this contract include duties or actions that are considered to be program operation or management tasks, the CE must reevaluate its consultant’s solicitation and contract and either remove those duties or reissue a solicitation for an FSMC contract.

Consultant Contract, Responsibility for Program Compliance
The CE cannot delegate its responsibility to operate and manage the program in compliance with all applicable federal, state, and local regulations. The CE is also responsible for ensuring that the activities described in a consultant’s contract are appropriate for this type of contract, that is, the activities do not involve program management.

Procuring a Consultant Contract
A CE must procure a consultant’s contract appropriately as described in Administrator’s Reference Manual, Section 17, Procurement. In the solicitation and contract, the CE should include the following information and requirements at a minimum:

Scope of Work
- Statement of the objectives to be achieved with measurable indicators of when the objectives have been met and progress milestones
- Qualifications or technical specifications necessary to provide the services needed under the contract
- Explanation of the types of issues the consultant is expected to address

Financial Elements
- Explanation that the offer to be submitted is for a set price, i.e., the offer must include a statement for the total costs for the contract
- Process for submitting invoices and receiving payment

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6 A consultant’s contract cannot be awarded to an offeror that has submitted a cost plus percentage or cost plus added expenses. All costs to be charged for the contract must be included in the offer.
Terms and Conditions

- Process for addressing conflicts in the contract
- Statement of the expected timeline for the contract duration
- Terms and conditions for terminating the contract

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

FSMC Contract

CEs may use an FSMC to manage and operate the food service program or specific elements of the food service program on behalf of the CE. An FSMC may be a commercial enterprise or a nonprofit organization.

Scope of Work for an FSMC

FSMC contracts include, but are not limited to, some or all of the following tasks:

Eligibility Determination/Verification
- Student eligibility determinations
- Eligibility verification process
- Retention of required records

Meal Planning, Preparation, and Service
- Menu development
- Preparation of meals
- Service of meals
- Maintain food production records
- Health and safety requirements
- Receipt and use of USDA Foods, including maintaining all required records
- Inventory management

If an NSLP CE operates a Child and Adult Care Food Program and/or Summer Food Service Program, there may be additional regulations that applied for the use of an FSMC to operate the program.
Counting and Claiming Data

- Operate the point of service (POS) system
- Collect and report data for meals served
- Maintain and provide counting and claiming data to CE

Procurement on Behalf of CE

- Procure necessary food and supplies
- Assist CE in procurement of USDA Foods processing
- Maintain records on procurement, including, but not limited to, all documentation related to credits, discounts, and rebates and credit for USDA Foods values

An FSMC contract may be a short-term or long-term method of managing or operating the program; the contract may be awarded for a period of up to one year and may be renewed for four additional periods of up to one year before a new solicitation is required. An FSMC contract may only be renewed if the specifications, technical requirements, and terms and conditions of the original contract are still in place.

The FSMC contract may also stipulate that the assigned tasks for the FSMC are different for different child nutrition programs.

Responsibility for Program Compliance, FSMC Contracts

The CE cannot delegate its responsibility to operate and manage the program in compliance with all applicable federal, state, and local regulations. It is the responsibility of the CE to monitor the FSMC contract and ensure that all regulatory requirements are met.

Issues to Consider for FSMCs

Whether a CE is considering the use of an FSMC for the first time or evaluating its current use of an FSMC, the CE should consider the following issues:

1. What method of providing food service best meets the CE’s goals and objectives?
   - What are the goals for the program?
     - Customer service?
     - Educational activities such as nutrition lessons, school gardens, or farm to school activities?
     - Financial?

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8 These requirements are commonly referred to as pass through entity requirements.
Local wellness policy activities?

Nutrition?

• What the measurable objectives for meeting each goal?
• What are the financial considerations for program operations?
• What other elements of program operation are important to the CE?

2. What type of services does the food nutrition program provide?

• How many reimbursable meals—lunch, breakfast, snack, and summer—are served each year?
• What is the average daily participation (ADP) by site?
• What other meal service activities does the CE provide?
  – Catering?
  – Special events?
  – Fundraisers?
  – Other Activities?

3. What is the current cost of operating the food service program and income for the program?9

Income

• What is the reimbursement the CE receives by program operated—lunch, breakfast, snack, and summer—and in total?
• What income does the CE receive for other food service program activities?
• What income does the CE receive for credits, discounts, and rebates and credits for USDA Foods values?

Costs

• What are the costs incurred for operating the program?
  – Food
  – Labor
  – Supplies
  – Equipment
  – Indirect costs
  – Employee benefits
  – Storage of USDA Foods
  – Processing of USDA Foods
  – Other items?

9 The annual Financial Report submitted to TDA will provide some financial information, but the CE should work with the CE’s financial manager to explore income and costs more thoroughly. TDA also provides the Budget Tool at www.squaremeals.org which will help the CE collect the data needed to conduct a full financial analysis of the school nutrition program.
4. What are the reasons the CE is considering changing to FSMC operation?
   - Cost?
   - Staffing challenges?
   - Operating challenges?
   - Other issues?

5. What elements of program operation does the CE feel an FSMC can manage more effectively than the CE?
   - Eligibility determination?
   - General program management?
   - Meal Service?
   - Menu planning?
   - Procurement?
   - Staffing?

6. Other than meal program operational changes, are there other impacts if the CE changes to FSMC operation?
   - Employees loosing positions?
   - Other school groups or organizations that are served by the SNP?

CEs may get additional assistance from their regional education service center (ESC) child nutrition specialist and may also find contacting other CEs of similar size to learn about their experiences with self-operation and/or FSMC operation helpful.

**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](http://www.comptroller.texas.gov/)


**Texas Education Agency (TEA)**


**United States Office of Management and Budget (OMB)**


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**Procuring an FSMC Contract**

FSCM contracts must be procured appropriately. *Administrator’s Reference Manual, Section 17, Procurement* provides additional guidance on the procurement process that should be used with the guidance in this section. In this section, the term solicitation/contract is used to reference the TDA prototype combined solicitation and contract.

- An FSMC contract must be fixed price or cost reimbursable. Cost-plus-a-percentage-of-cost and cost-plus-a-percentage-of-income FSMC contracts are prohibited.
• Fee increases are not allowable unless indicated in the solicitation/contract.
• Full and open competition must be maintained in all procurement actions.
• Any information regarding potential fee increases must be available to all potential offerors at the outset of the procurement action through the final contract award.

**Required Use of FSMC Solicitation/Contract Prototype**
CEs must use the TDA prototype to procure an FSMC. USDA strongly recommends that CEs obtain legal counsel in the development of solicitations and contracts when procuring an FSMC.

**Approval Process**
The CE must take the following actions before releasing its FSMC solicitation/contract:

1. Notify TDA of the CE’s intent to contract with a FSMC.
   
   *TDA will provide information the CE will need to complete the process.*

2. Use the TDA prototype solicitation/contract.¹⁰
   
   *FSMC-developed contracts and amendments are not allowed.*

3. Submit the prepared solicitation/contract to TDA for approval at least two weeks prior to the first advertising date.
   
   *All proposed solicitation/contracts must be submitted to TDA before February 15.*

**Approval for a Renewal**

4. Submit appropriate documentation to TDA for approval of the contract renewal prior to the April 30 deadline:
   
   *An FSMC contract may be renewed up to four times. However, if there is a material change¹¹ to the contract, the contract must be rebid.*

The CE’s FSMC contract and/or renewal packet must be approved, in writing, by TDA before the start of the contract year. The CE cannot claim reimbursement for meals served under FSMC operation if (1) the FSMC contract or renewal has not been approved by TDA and (2) a signed copy of the FSMC contract has not been submitted to TDA.

While the procurement process for FSMCs must adhere to the procurement requirements described in *Administrator’s Reference Manual, Section 17, Procurement*, there is additional guidance that is specific to the procurement of an FSMC contract.

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¹⁰ Available at [www.squaremeals.org](http://www.squaremeals.org).
¹¹ See *Administrator’s Reference Manual, Section 17, Procurement* for additional guidance on material change.
FSMC Contract Cost Analysis

Before issuing a solicitation for an FSMC contract, a CE must conduct a cost analysis in order to establish an expectation of the cost. Price analysis may be accomplished in various ways, including the review of the CE’s income and costs over a period of time, market prices, and similar contracts.¹²

Whatever type of contract cost analysis is used, the CE must have sufficient information upon which to project the total anticipated cost of the contract. Since fee adjustments may not be permitted, unless provided for in the original solicitation and contract through the use of the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home, any change in fees or basis for fee increases not reflected in the original solicitation and contract would constitute a substantive or material change to the contract which would require that the contract be rebid.

FSMC Contract Cost, Fresh Fruit and Vegetable Program (FFVP)

Administrative costs for the FFVP must not exceed 10 percent of the overall grant. When a CE includes the FFVP in an FSMC contract, the CE must insure that this financial requirement is met.

¹² The annual Financial Report submitted to TDA will provide some financial information, but the CE should work with the CE’s financial manager to explore income and costs more thoroughly. TDA also provides the Budget Tool at www.squaremeals.org which will help the CE collect the data needed to conduct a full financial analysis of the school nutrition program.
In Texas, CEs may use one of two methods of procurement: (1) invitation for bids (IFB) or competitive sealed bid method or (2) request for proposals (RFP) or competitive proposal.

<table>
<thead>
<tr>
<th>FSMC Procurement Method</th>
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<tbody>
<tr>
<td><strong>Invitation for Bids (IFB)</strong></td>
<td><strong>Request for Proposals (RFP)</strong></td>
</tr>
<tr>
<td><em>(Also called competitive sealed bid)</em></td>
<td><em>(Also called competitive proposal)</em></td>
</tr>
<tr>
<td><strong>Pricing</strong></td>
<td></td>
</tr>
<tr>
<td>– Contract must be fixed-price.</td>
<td>– Contract may be fixed price or cost reimbursable.</td>
</tr>
<tr>
<td><strong>Method Design</strong></td>
<td></td>
</tr>
<tr>
<td>– <em>Expectations</em>—Scope of work and specifications and/or technical requirements are well defined and measurable.</td>
<td>– <em>Expectations and Evaluation</em>—Scope of work and specifications and/or technical requirements are clearly defined, but the CE has scoring criteria for factors in addition to price.</td>
</tr>
<tr>
<td>– <em>Evaluation</em>—The solicitation/contract must indicate the method by which the offeror demonstrates that it has met the specifications and/or technical requirements.</td>
<td>– <em>Contract Award</em>—Contract is awarded to the most responsive/responsible offeror. However, price must be the primary consideration in awarding a contract.</td>
</tr>
<tr>
<td>– <em>Offers</em>—Offers must be publicly opened and the process for opening offers must be described in the solicitation/contract.</td>
<td>– <em>Offers</em>—Offers do not have to be publicly opened, but the process for opening offers must be described in the solicitation/contract.</td>
</tr>
<tr>
<td>– <em>Contract Award</em>—Contract is awarded to the responsive/responsible offeror that submits the lowest responsive offer.</td>
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</table>
### FSMC Procurement Method

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</tr>
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</table>

#### Questions to Consider

- **Scope of Work** — Is the CE able to clearly define or describe the programs to be operated, products and services the FSMC will provide, assigned responsibilities for the FSMC and CE, and costs the FSMC will cover?

- **Competition** — Are there multiple entities or companies that are able to make an offer?

- **Technical Skills** — Does the CE possess the technical skills necessary to develop the written evaluation and scoring criteria, complete a review of the responses received to evaluate, and score the proposals as specified in the solicitation, and negotiate with offerors?
  - Strong knowledge of procurement and experience with contract negotiation
  - Knowledge of Child Nutrition Program (CNP) regulations, including allowable and unallowable cost provisions?
  - School food service administration and operation management?
  - Financial management of a nonprofit food service account?

- **Evaluation and Scoring Criteria** — Does the CE have a process in place to document communication about the evaluation and scoring criteria in the solicitation/contract, predetermined cut-off score for responsive offers, evaluation, and award of the contract?
<table>
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<tr>
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<tr>
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<td>(Also called competitive proposal)</td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
<td></td>
</tr>
<tr>
<td>– <strong>Revenue and Cost</strong> — A CE is able to more accurately estimate program revenue and contract costs.</td>
<td>– <strong>Responsibilities</strong> — The CE has control of the weight or score for each of the evaluation criteria, so the evaluation criteria can be used to ensure that the elements in the offer related to the key FSMC responsibilities are emphasized.</td>
</tr>
<tr>
<td>– <strong>Billing and Payments</strong> — Since the FSMC does not pass individual costs for goods and services to the CE, payment transactions are limited to the monthly contract fee.</td>
<td>– <strong>Pricing</strong> — Cost-reimbursable contracts allow the CE to take advantage of lower costs during periods of falling prices.</td>
</tr>
<tr>
<td>– <strong>Simplified Monitoring</strong> — The CE must conduct onsite monitoring for compliance, but there are fewer areas to be monitored: 21-day cycle menu and meal pattern, health and safety regulations, program operation, credit for the value of USDA Foods, and status of the nonprofit food service account for revenues and expenses.</td>
<td></td>
</tr>
<tr>
<td>– <strong>Economic Cost Adjustment</strong> — Changes in contract costs may be tied to the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home. If cost adjustments are tied to the CPI, market price variability will not significantly impact the cost of the contract.</td>
<td></td>
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</table>
### FSMC Procurement Method

<table>
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</tbody>
</table>

#### Disadvantages

- **Precise Descriptions** — Because the FSMC is submitting an offer for the scope of work and specifications and/or technical requirements provided in the solicitation/contract, a poorly written solicitation/contract will result in a contract that does not meet the needs of the CE.

- **Monitoring Costs** — Monitoring costs may be higher because of number of areas that must be monitored, 21-day cycle menu and meal pattern, health and safety regulations, advisory board, record keeping, allowable costs, Buy American provision, third party procurement, USDA Foods values, and credits, discounts, and rebates for other purchases.

- **Unbudgeted Costs** — Cost-reimbursable contracts may result in higher costs during periods of rising prices or volatile market prices.

- **Essential Skill and Experience** — If CE staff do not have sufficient knowledge, skill, and experience in procurement, allowable cost provisions, negotiation, program operations, and financial management, it may be necessary for the CE to hire experts to finalize the terms and conditions of the contract. Attempting to negotiate the final terms and conditions without the needed expertise may result in the CE entering into a fully enforceable contract that fails to meet regulatory requirements. Moreover, because an administrative review or other audit may result in fiscal action for noncompliance, staff that lack knowledge, skill, and experience may not ensure that responsibilities are assigned in a way that limits the financial burden on the CE.

- **Poorly Defined Responsibilities** — If the solicitation/contract does not fully and clearly define FSMC responsibilities, the CE may incur additional costs for goods or services that were not budgeted in the FSMC contract.

- **Final Terms and Conditions** — CEs must insure that in establishing the final terms and conditions they maintain scope of work and specifications and/or technical requirements communicated in the original solicitation/contract.
## Advertising for FSMC Contracts

A CE must provide a sufficient number of postings to ensure that there is broad distribution of the advertising announcement and allow sufficient time for offerors to respond to the solicitation/contract. While there is no required amount of time for these activities in USDA guidance, CEs must ensure that they advertise to the widest possible audience across a period of time that is sufficient for offerors to create and submit their offer.

| Timing of Advertisement | As a general rule, the CE should issue the advertisement at least twice. Because of the complex nature of FSMC solicitations, releasing the advertisement at least 45-60 days before the offer due date will allow the contractor sufficient time to review, develop, and submit a response. However, if a pre-bid meeting is planned, the CE will also need to allow additional time for the meeting and for providing information from the pre-bid meeting with all participants.15

[NOTE: If the CE receives a small number of offers, the CE should review the timing of its release to ensure that the timeline was sufficient for offerors to respond to the solicitation.] |
| Content of Advertisement | Advertising must include how the potential offeror may obtain the complete solicitation, method for submitting an offer, information concerning a pre-bid meeting (if applicable), time and place for opening offers, summary of evaluation criteria, and processes for awarding the contract. |
| Additional Required Notification for FSMC Contracts | CEs must distribute the FSMC solicitation/contract to the vendors listed on TDA’s Food Service Management Company Approved Vendor List. |

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13 See Administrator’s Reference Manual, Section 17, Procurement for additional guidance on advertising.
14 The Texas Education Agency (TEA) also has procurement guidance that may apply. As long as TEA guidance is not in conflict with USDA guidance, CEs may use that guidance.
15 See the Pre-Bid Meetings IFB/RFP subtopic in the Special Guidance for FSMC Contracts subsection in this section for additional guidance.
<table>
<thead>
<tr>
<th><strong>Elements to Be Included in the FSMC Solicitation/Contract Scope of Work, and Specifications and/or Technical Requirements</strong></th>
</tr>
</thead>
</table>
| **Certifications** 16 | The contract must include certification statements that the FSMC will comply with the following requirements:  
- Suspension and debarment method and appropriate documentation  
- Lobbying  
- Non-collusion or certification of independent price determination  
- Civil rights compliance 17  
CEs may also add a provision stating that any silence, absence, or omission from the contract specifications concerning any point will be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the CE is to be used. This provision should be contained in both the solicitation and the contract. |
| **Competitive Food Nutrition Standards** | Description of the FSMC and CE responsibilities for compliance with the Competitive Food Nutrition Standards and the retention of related documentation that demonstrates that the CE is in compliance with all regulations. |
| **Contract Duration** | Statement that the contract is one year contract, July 1 to June 30. The CE may add that an FSMC contract may be renewed for an additional four times, i.e., four additional one year contracts. |
| **Facilities Management** | Description of the expectations for managing facilities, including, but not limited to, the following:  
- Cleaning  
- Extermination or pest control  
- Maintenance of meal preparation and service areas  
- Repairs  
- Trash removal  
- Other as appropriate |

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16 See Administrator’s Reference Manual, Section 17, Procurement for additional information on acceptable method to meet certification requirements.

17 See the Texas Education Agency (TEA) website to obtain a copy of TEA’s financial manual and the forms TEA provides for this purpose. CEs may use applicable TEA forms that accomplish the USDA requirement.

18 See Administrator’s Reference Manual, Section 19, Other Operational Issues for additional information on requirements related to civil rights.
**Elements to Be Included in the FSMC Solicitation/Contract Scope of Work, and Specifications and/or Technical Requirements**

| Financial, Allowable Costs<sup>19</sup> | Statement describing the methods to identify allowable and unallowable costs—The FSMC must use one of the following methods:  
1. Identify each cost submitted for payment and indicate whether each cost is allowable or unallowable  
   or  
2. Exclude all unallowable costs from billing documents and certify that only allowable costs are submitted for payment.  
The FSMC must maintain records that demonstrate compliance with this requirement and must make these records available to the CE for verification of allowable and unallowable cost identification.<sup>20</sup> However, in all cases, it is the CE’s responsibility to ensure the FSMC bills the CE for allowable expenses only.  
If the CE has an FFVP grant, the solicitation/contract must state that the administrative costs for operating an FFNP cannot exceed 10 percent of the overall grant. The FSMC must maintain records that demonstrate compliance with this requirement and must make these records available to the CE for verification of allowable and unallowable cost identification. |
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Financial, Food Service Account</td>
<td>Statement that all revenues and profits must be retained exclusively by the nonprofit food service account and that the FSMC must provide all necessary documentation to the CE to demonstrate compliance with all regulations.</td>
</tr>
</tbody>
</table>

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<sup>19</sup> There are two common types of accounting and billing systems that a CE may use: (1) cash basis, billing for goods and services at the time of purchase and (2) accrual basis, billing when the goods and services are actually used. The accrual basis of accounting is the preferred method because it measures the benefits received from purchases. Cash basis billing can distort this measurement by generating overstated expenses and an understated account balance at the time of purchase, and the reverse situation at other times. The CE can correct such distortions only by making adjustment entries. If the FSMC does not use the purchased goods at the same rate from month to month, the CE must recalculate the adjustment entry each month.<br><br>**For additional information on this requirement,** see USDA’s *Contracting with Food Service Management Companies: Guidance for School Food Authorities.*
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td><strong>Financial, Method of Invoicing</strong></td>
</tr>
<tr>
<td>Specific directions on the method for the following actions:</td>
</tr>
<tr>
<td>– Methods for the FSMC to submit invoices</td>
</tr>
<tr>
<td>– Information on payment processes</td>
</tr>
<tr>
<td>– Required documentation to support invoices and payments</td>
</tr>
<tr>
<td>– Requirements related to credits, discounts, and rebates and USDA Foods values as well as necessary documentation to demonstrate compliance with these payments</td>
</tr>
<tr>
<td>– Frequency payments after invoices are received—monthly, prorated monthly, or other frequency</td>
</tr>
<tr>
<td><strong>Financial, Method of Payment</strong></td>
</tr>
<tr>
<td>Explanation of the fee structure and documentation required to (1) demonstrate accuracy of all transactions and compliance with all applicable regulations and (2) description of type of payment method to be used: service fee, management fee, administrative fee, or a combination of any of these methods. The fee may be structured in a variety of ways.</td>
</tr>
<tr>
<td>– A cost-plus-fixed-fee contract may have multiple fees provided that the fees are specified and defined.</td>
</tr>
<tr>
<td>– There may be a per-meal cost and an annual fee.</td>
</tr>
<tr>
<td>– One fee might be called an administrative fee which typically refers to overhead costs, and another may be called a management or service fee which typically represents the profits.</td>
</tr>
<tr>
<td>The fee must be expressed as a dollar value unit per meal and/or an annual cost for administrative or management services.</td>
</tr>
<tr>
<td><strong>Financial, Procurement Practices and Preferences</strong></td>
</tr>
<tr>
<td>Description of the CE’s expectations for how procurement will be handled by the CE and the FSMC which includes the following information:</td>
</tr>
<tr>
<td>– Types of foods to be purchased including menu item grade, purchase units, style, conditions, weight, ingredients, formulations, delivery time, and other related expectations</td>
</tr>
<tr>
<td>– Requirements related to the processing of USDA Foods</td>
</tr>
<tr>
<td>– Local preferences and expectations</td>
</tr>
<tr>
<td>– Statement that the FSMC must provide documentation necessary to demonstrate compliance with all procurement regulations</td>
</tr>
</tbody>
</table>
### Elements to Be Included in the FSMC Solicitation/Contract Scope of Work, and Specifications and/or Technical Requirements

<table>
<thead>
<tr>
<th>Financial, Program and Nonprogram Proportion</th>
<th>Description of requirements to provide adequate documentation to demonstrate compliance with the required proportion of nonprogram and program costs and income. Documentation must include the following:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Food cost of reimbursable meals, food cost from non-program foods, revenue from non-program foods and total revenue</td>
</tr>
<tr>
<td></td>
<td>- Sufficient information for both the CE and TDA to determine compliance with the requirement</td>
</tr>
<tr>
<td></td>
<td>[NOTE: This requirement applies to fixed-price and cost-reimbursable contracts.]</td>
</tr>
</tbody>
</table>

| Financial, Roles and Responsibilities | Description of the role and responsibilities for both the CE and FSMC related to accounting and finances. These descriptions should be designed to ensure that the CE is able to monitor all transactions for accuracy. This includes, but is not limited to, statement that the CE be provided all documentation required to demonstrate compliance with all regulations. |

<table>
<thead>
<tr>
<th>Inventory Management</th>
<th>Description of the FSMC’s and CE’s responsibilities for managing the program’s inventory of food (including USDA Foods) and supplies—This includes ensuring that all food is stored safely and the most cost effective use of USDA Foods.</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>- Conducting onsite reviews</td>
</tr>
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<td></td>
<td>- Counting and claiming</td>
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<tr>
<td></td>
<td>- Food production records and other necessary documentation</td>
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<tr>
<td></td>
<td>- Health and safety including any expectations for sample menu items to be refrigerated and tested in the event of an outbreak of food borne illness, if applicable(^{21})</td>
</tr>
<tr>
<td></td>
<td>- Management of ticket sales</td>
</tr>
<tr>
<td></td>
<td>- Meal pattern requirements including, but not limited to, the 21 day menu cycle</td>
</tr>
<tr>
<td></td>
<td>- Nonprogram food including a la carte, catering, vending, and special events services</td>
</tr>
<tr>
<td></td>
<td>- Nutrition programs under contract</td>
</tr>
<tr>
<td></td>
<td>- Oversight of program operations</td>
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<tr>
<td></td>
<td>- Point of service system expectations</td>
</tr>
</tbody>
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\(^{21}\) Retaining food samples for this purpose is an optional requirement. If adopted, (1) food samples are typically maintained for a 48-hour period, but may be kept for a longer period, and (2) requirements related to labeling, dating, and storage will need to be included.
<table>
<thead>
<tr>
<th><strong>Elements to Be Included in the FSMC Solicitation/Contract Scope of Work, and Specifications and/or Technical Requirements</strong></th>
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<tbody>
<tr>
<td><strong>Meal Preparation and Service</strong></td>
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<tr>
<td><strong>Onsite Monitoring</strong></td>
</tr>
<tr>
<td><strong>Other Local, State, and Federal Regulations</strong></td>
</tr>
<tr>
<td><strong>Professional Standards</strong></td>
</tr>
<tr>
<td><strong>Records Retention</strong></td>
</tr>
<tr>
<td></td>
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<td></td>
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<td></td>
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<td></td>
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<td></td>
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<tr>
<td></td>
</tr>
</tbody>
</table>

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22 The list of applicable federal regulations is listed in *Administrator’s Reference Manual, Section 17, Procurement.*
## Protecting School Nutrition Funds

| Bond Requirements | Description of any type of bond(s) that the CE requires and time of submission, if applicable. CE may require payment bonds, performance bonds, and bid guarantees. See Administrator’s Reference Manual, Section 17 Procurement for additional information on these types of bonds. |
| Federal, State, and Local Regulations | The solicitation/contract must include a requirement that the FSMC must be in compliance with all federal, state, and local regulations. |
| Financial Guarantees | Statement that stipulates financial guarantees for meeting fiscal goals as specified by the CE. Food service contracts may contain language which stipulates that the FSMC guarantees to meet fiscal goals specified by the CE. Any guaranteed return promised by the FSMC must remain in the nonprofit food service account. |
| - If the contract contains such guarantees, the contract should also contain language that ensures that the FSMC bears responsibility for failure to meet those goals. Guaranteed fiscal goals or returns cannot be contingent upon multi-year contracts as FSMC contracts are for duration of one year with the option of up to four one-year renewals. |
| - When an option for contract renewal is considered, the CE should specify in the original solicitation the CE’s expectations of the guarantee for each renewal year option and if changes in the guarantee will be allowed. |
| Insurance | Description of the CEs requirements related to insurance coverage. For insurance costs to be an allowable cost, they must be specified in both the solicitation and contract. |

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23 For NSLP programs, requiring a bond is local decision. For NSLP CEs operating the Summer Food Service Program, a bid bond and performance bond are required as outlined in 7 CFR 225.15(m)(5-7).

24 The list of applicable federal regulations is listed in Administrator’s Reference Manual, Section 17, Procurement.
## Protecting School Nutrition Funds

| Loss Recovery | Statement of the CE’s expectation for the FSMC’s liability for financial losses—Contracts typically offer two options to address FSMC liability. The CE must include one of the following options in the solicitation/contract:

1. Reimburse the CE for the loss without limit  
   or  
2. Reimburse the CE with limits equal to the management fee or a specified ceiling. Clauses for loss recovery liability should address the length of time the CE can seek recovery of losses. CEs should seek recovery of any losses for a period of time corresponding to the CE’s period of liability.  
   Contracts should also address the length of time the CE can seek recovery of losses. A CE should seek recovery of any losses for a period of time corresponding to the CE’s period of liability (contractual and legal period of liability). |
| Negligence | Statement that communicates liability for damage caused by negligence—CEs should exclude any contract term or waiver of liability statement for FSMC damage to equipment or facilities caused by negligence. |
| Recovery of Overclaims (Non Performance) | Provision that the FSMC pay the CE for any overclaims assessed by TDA due to FSMC negligence or noncompliance with regulations, including overclaims based on review or audit findings. This liability should correspond to either the five year record retention period for public and charter schools or three years for nonprofit private schools, other organizations, and residential child care institutions (RCCIs). |
### Prior Program Information

<table>
<thead>
<tr>
<th>Description of CE’s prior revenues and operating expenses, and related information—This includes, but is not limited to, the following:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Total program income for the prior year.</td>
</tr>
<tr>
<td>- Total program expenses for the prior year.</td>
</tr>
<tr>
<td>- Prior and expected practice for subsidizing program operations with general funds.</td>
</tr>
<tr>
<td>- Staffing requirements including number of employees, approval of child nutrition director, insurance requirements, management of staff, and responsibility for employee benefits.</td>
</tr>
</tbody>
</table>

**[NOTE: Contracts may have provisions against cross-hiring. Cross-hiring refers to the hiring of staff by one party to a contract when such employees are employed by the second party to the contract. Terms and conditions related to cross-hiring need to describe when an employee is no longer employed (retirement, resignation, or termination) and when an employee may cross-hire and how employee costs will be transferred from one party to the other party. Without such provisions, changes to contract provisions for handling personnel costs not included in the scope of the original solicitation and contract may represent a material change when the FSMC services are modified to include such changes. Cross-hiring provisions by either the CE or the FSMC should be reviewed by the CE’s legal counsel to ensure compliance with federal, state, and local labor laws.]**

<table>
<thead>
<tr>
<th>Information on general program operation, including, but not limited to, the following:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Food preparation facilities (all sites prepare food versus one central kitchen)</td>
</tr>
<tr>
<td>- Meal prices for students and adult meals</td>
</tr>
<tr>
<td>- Meal service hours at each site</td>
</tr>
<tr>
<td>- Methods of meal service (operator-served or buffet/self-service, salad bars, etc.)</td>
</tr>
<tr>
<td>- Number of current employees, including status (full-time or part-time), salaries, and benefits, as applicable</td>
</tr>
<tr>
<td>- Number of school food service sites including nutrition programs operated</td>
</tr>
<tr>
<td>- Number of serving days, including a school calendar that includes holidays and no school days for students</td>
</tr>
<tr>
<td>- Type and value of nonprogram foods and meals to be offered (catering or fundraising)</td>
</tr>
<tr>
<td>- Current federal reimbursement rates</td>
</tr>
</tbody>
</table>
## Prior Program Information

**Program Participant Demographics**

- Information on CE’s demographics—Description of the demographics of school and program participants, including, but not limited to, the following:
  - Anticipated student growth or loss and/or additional or reduced service locations
  - Description of student age/grade for meal patterns required
  - Educational programs available that will also receive services (pre-kindergarten, half-day kindergarten, adult education centers, alternative schools, or technical programs)
  - Indication of number of students enrolled and the average daily participation (ADP)

## Contract Terms and Conditions

<table>
<thead>
<tr>
<th><strong>Conflict Resolution</strong></th>
<th>Description the CE’s process for resolving contract conflicts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contract Duration</strong></td>
<td>Statement that the contract is a one year contract and may be renewed for up to 4 additional one-year time periods as specified in the solicitation and contract.</td>
</tr>
<tr>
<td></td>
<td>[NOTE: If contract renewal is not stated in the terms and conditions of the contract, the existing contract cannot be renewed.]</td>
</tr>
<tr>
<td><strong>Logistics for the FSMC Contract Award</strong></td>
<td>Description of key dates associated with awarding the FSMC contract, including, but not limited to, the following:</td>
</tr>
<tr>
<td></td>
<td>- Approval process milestones for contract award</td>
</tr>
<tr>
<td></td>
<td>- Dates offers will be opened, evaluated, negotiated, and awarded</td>
</tr>
<tr>
<td></td>
<td>- Location if the offers are to be opened publicly</td>
</tr>
<tr>
<td></td>
<td>- Pre-bid meeting, if applicable[^25]</td>
</tr>
<tr>
<td><strong>Protests</strong></td>
<td>Explanation of the method the CE will use to address protests</td>
</tr>
</tbody>
</table>

[^25]: The CE cannot designate the offer due date less than two weeks after the pre-bid meeting.
## Contract Terms and Conditions

| **Renewal, Cost Index** | Statement that describes if the CE will allow an adjustment to the contract fee/cost when a contract is renewed using the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home to be used to adjust the cost of the contract during renewal years. If this option is used, the price of the contract must also decrease if the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home indicates a decrease. |
| **Signatory Authority** | Description of the approval authority for this type of contract. |
| **Termination** | Explanation of the terms and conditions for terminating the contract. [NOTE: Regulations require that any contract in excess of $10,000 must address termination for cause and convenience, including the manner by which it is effected and the basis for settlement. In addition to the provision of termination for cause, CEs may also want to include a termination for convenience provision that provides adequate advance notice that would permit the CE sufficient time to arrange alternate food service if the FSMC exercises this clause.] |

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

## USDA Foods

| **Management of USDA Foods** | Descriptions of the CE's expectation of the FSMC for managing USDA Foods, including, but not limited to, the following: |
| | - Inventory of USDA Foods |
| | - Method of USDA Foods storage |
| | - Ordering USDA Foods in coordination with CE |
| | - Previous use of USDA Foods |
| | - Processing |
| | - Quantities/types of USDA Foods available, or ordered for the upcoming year |
| | - Utilization of USDA Foods |
**USDA Foods**

Description of the method and frequency of reporting USDA Foods values. This includes the following:

1. Specified method for reporting and payments at an interval that allows the CE to track and verify that all values have been paid to the CE

   [NOTE: The FSMC must provide a report to the CE demonstrating all payments for USDA Foods values at the end of the year. However, a report at the end of the year may not allow the CE sufficient time to verify that all values have been paid accurately. TDA recommends that CEs require these reports at least quarterly if not monthly.]

2. Retention of all documentation related to credits, discounts, and rebates and USDA Foods values

3. Providing documentation upon request to the CE, TDA, USDA, or other authorized agency

The FSMC must report the credit for USDA Foods values on the billing invoice submitted to the CE for payment.

**FSMC Offer Evaluation**

A CE must use the evaluation criteria from the solicitation/contract to rank all offers before awarding the contract. Cost must be the primary consideration when awarding a contract.26

**Plan for Evaluating FSMC Offers**

To ensure that the procurement of an FSMC contract is a well-run and fair process, the CE should also develop a plan for evaluating offers as it develops the solicitation. While an IFB plan for evaluation will have fewer factors to consider, the CE should carefully plan the evaluation of the IFB offers as well as RFP offers. The plan for evaluating offers will include the following components:

**Offer Evaluation Team**

The CE needs to identify the evaluation team members and prepare them for the task.

- What staff members or other persons currently have the knowledge and expertise to evaluate the offers?

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26 See Administrator’s Reference Manual, Section 17, Procurement for additional guidance on evaluation and cost as the primary consideration in awarding a contract.
• What kind of knowledge and expertise is needed to evaluate the specifications and technical requirements?
  – Who has that knowledge and expertise? Establish the standards for the evaluation/rubric tools? Create evaluation/rubric tools? To evaluate?
  – Do members of the team need additional information before beginning to evaluate the offers?

• How many members does the evaluation team need to both complete the work and ensure that there is a fair process?
  – How many offers does the CE expect to receive?
  – How long will it take a person to review the offer?

• Who has to approve the contract before it is formally awarded?
  – What actions need to be taken to get necessary approvals?
  – Who will take these actions?
  – Who will monitor the process to ensure that all approvals are obtained?

• How will the CE communicate the outcome of the solicitation to all offerors?
  – Who will develop the appropriate notification documentation? Sign the documentation? Send the notification documentation?

Scoring Rubric or System

Though price is the primary consideration in awarding all contracts, the scoring system is intended to ensure that the process for scoring each offer is fair and ensure that the most responsive and responsible offer is awarded the contract. The scoring system should include the following processes at a minimum:

• Develop standards that indicate responsive and responsible offers which are aligned to the solicitation specifications and technical requirements and other requirements as appropriate.
  – **Responsible** is defined as capable of providing the product(s) and/or service(s) as described in the solicitation.
  – **Responsive** is defined as an offer that addresses all terms and conditions of the solicitation including the specifications and/or technical requirements for product(s) and/or service(s).
• Develop the evaluation/rubric to be used to rank and assign weight for each standard the CE has set for a responsive and responsible offer.

• Develop a method to calculate the total points for each offer and a form for compiling the total points for all offers.

• Ensure fairness by having more than one evaluation team member complete the evaluation/rubric for each offer independently of all other evaluation team members and develop criteria for addressing differences in scores for the same offer among all evaluation team members such as taking two highest scores.

• Establish documentation that demonstrates the rank and weight for each standard for each offer, calculation of total points for each offer, and justification for determining the most responsive and responsible offer.

<table>
<thead>
<tr>
<th>Information Box 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Examples of Evaluation Criteria</strong></td>
</tr>
<tr>
<td>The following criteria are commonly used in contract evaluation:</td>
</tr>
<tr>
<td>– Price/Cost (total cost of proposal submitted, <strong>must</strong> be the primary consideration)</td>
</tr>
<tr>
<td>– Management plan (demonstrates FSMC’s plan and personnel for how services identified in the solicitation are proposed to be accomplished)</td>
</tr>
<tr>
<td>– Experience of FSMC, reference letters, etc. (includes total business experience as well as with CEs of similar size operating Child Nutrition Programs including references of these CEs)</td>
</tr>
<tr>
<td>– Financial Condition/stability, business practices</td>
</tr>
<tr>
<td>– Accounting and reporting systems</td>
</tr>
<tr>
<td>– Personnel management and professional standards plan</td>
</tr>
<tr>
<td>– Procurement-specifically the quality of the food to be purchased</td>
</tr>
<tr>
<td>– Promotion/Marketing in school food service</td>
</tr>
</tbody>
</table>

For an IFB, the list of items to be addressed in the scoring system will be finite and well defined. For an RFP, the list of items to be addressed in the scoring system may be finite and well defined or may allow a wide range of responses.
**Responsible and Responsive**

A CE must award the contract to the most responsible/responsive offeror.

- **Responsible** is defined as *capable of providing the product(s) and/or service(s) as described in the solicitation.*

Responsible offerors possess the ability to perform successfully under the terms and conditions of a proposed procurement. In the evaluation criteria, the CE may give points for contractor integrity, compliance with public policy, record of past performances, and financial and technical resources.

- **Responsive** is defined as *an offer that addresses all terms and conditions of the solicitation including the specifications and/or technical requirements for product(s) and/or service(s).*

Responsive offers respond to the scope of work and each of the specifications and/or technical requirements as described in the solicitation/contract.

**Overly Responsive Offer**

Giving consideration to overly responsive elements of the offeror’s bid or response is prohibited. A contract award must be made by evaluating responses against the evaluation and scoring criteria stated in the solicitation/contract with price as the primary consideration.

### Information Box 3

Examples of Evaluation Criteria Point/Percentage System

CEs may use an appropriate evaluation point system. The most commonly used options are to use points or to use a percentage.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Amount to Be Awarded</th>
<th>Option to Use Points</th>
<th>Option to Use Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price/Cost—Primary Consideration</td>
<td>25</td>
<td>20%</td>
<td></td>
</tr>
<tr>
<td>Management Plan—FSMC’s Plan for Accomplishing Goals Presented in Solicitation</td>
<td>20</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td>Experience of FSMC—Total Business Experience, Experience with CEs of Similar Size, Experience Operating Child Nutrition Programs</td>
<td>10</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Financial Condition/Stability, Business Practices</td>
<td>20</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td>Accounting and Reporting Systems</td>
<td>20</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td>Personnel Management and Professional Standards Plan</td>
<td>20</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>Quality of Food to Be Procured</td>
<td>15</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>Promotion/Marketing in School Food Service</td>
<td>10</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Stakeholder Involvement—Students, Staff, and Others</td>
<td>10</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td><strong>Highest Possible Total</strong></td>
<td><strong>140 points</strong></td>
<td><strong>100%</strong></td>
<td></td>
</tr>
</tbody>
</table>
Consideration may be given to responses that add value to the program; however, it is the CE’s responsibility to ensure that the item or service adds value to an element included in the solicitation/contract as opposed to being overly responsive.

For Example: If the solicitation/contract does not include equipment yet the offer includes equipment, the added value is likely to be overly responsive.

The CE must ensure that the value added responses do not include items or services that are unallowable. School food service funds must only be used for the operation or improvement of the food service program.

Special Guidance for FSMC Contracts
CEs must use the following guidance in developing and implementing an FSMC contract:

Assistance in Preparing the Solicitation/Contract
The CE must not
1. engage an individual, entity, business, or organization that will be submitting an offer or
2. use information that is prepared by any individual, entity, business, or organization that will be submitting an offer for the FSMC contract in the solicitation/contract.

If a CE awards the FSMC contract to an individual, entity, business, or organization that has provided information used in the solicitation/contract, the costs of the FSMC contract are not allowable and cannot be paid with funds from the school food service account.

However, a CE may survey prospective offerors to determine if there are individuals, entities, businesses, or organizations that are able to provide specific goods and services. In cases where CEs conduct a survey of potential offerors, the CE must take care to ensure that possible offerors do not provide assistance in preparing the solicitation/contract.

Additional Communication with Potential Offerors
If information or documentation is provided to any potential offeror, it must be provided to all potential offerors. This includes, but is not limited to, the questions asked by any potential offeror and the answer provided to the question. CEs often find the easiest way to distribute the questions and answers is through a web-based format. In all cases, the CE must provide the location and method for accessing questions and answers or additional information in the solicitation.
Conflict of Interest

CEs awarding an FSMC contract must avoid conflicts of interests. Conflicts of interest may occur in the following situations:27

- If an individual(s) responsible for determining bid/proposal responsiveness can be overruled by other individuals within the organization.
  
- If the individual responsible for determining responsiveness (or any member of his or her family) has any personal or corporate ties or any financial interest in any of the offering firms.
  
- When gratuities, favors, or anything of monetary value is solicited or accepted and requires disciplinary action for violations.

When there is a conflict of interest, the CE must address the conflict as described in its written procurement procedures. The Texas Education Agency (TEA) also provides guidance on this issue specific to school districts and charter schools. CEs may use applicable forms developed by TEA to assist them in efforts to avoid conflict of interest.

When an FSMC assists a CE in the development of a solicitation to procure additional services and/or products, the FSMC, the FSMC’s parent company, and any subsidiaries of the FSMC’s parent company cannot submit an offer. It is a conflict of interest for the FSMC to have prior knowledge of the solicitation and input into any aspect of an offer that would be a part of the evaluation to award a contract.

Contract Negotiation

A CE must not negotiate with any offeror at any time when an IFB method is used.

A CE must not enter into negotiations with an RFP offeror prior to the evaluation of offers. CE’s cannot negotiate price, but they can use negotiation with responsive offerors that have different approaches to ask offerors to further explain a process or product that is included in the offer.

For an RFP, a CE may negotiate with the top responsible and responsive scorers who score above a specified score or percentage that was pre-determined before the evaluation of the offers began. See Administrator’s Reference Manual, Section 17, Procurement for specific guidance on how negotiation may be used in contracts procured for school nutrition programs. The individuals evaluating the offers should not be the same individuals who conduct the negotiations.

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27 See Administrator’s Reference Manual, Section 17, Procurement for detailed information on the conflict of interest and the written procedures a CE must have in place to avoid conflicts of interest.
TDA recommends that the attorney for the CE take an active role in negotiations and contract review with the FSMC before the CE signs any contractual document.

Material Change
Any change in a contract may result in a material change in the contract. If there is a material change to the contract, the CE must rebid the contract. See the Administrator’s Reference Manual, Section 17, Procurement for detailed information on material change.

Changes Commonly Not Considered a Material Change
Though every change should be considered individually, the following changes are commonly not considered to be a material change:

- The original contract included an anticipated change that was described as an option in the scope of work and/or specifications and/or technical requirements.
- Emergency situations when time does not permit conducting a formal competitive procurement and the current FSMC contractor has all the capabilities necessary to perform the new service. Emergency situations must be approved by TDA in advance and in writing. CEs, in approved emergency situations, are permitted to use noncompetitive negotiation as the means to procure the changes. After negotiating the price and terms, the CE would modify the contract to reflect the new services and charges.

Changes That Commonly Are Considered a Material Change
Material changes that require a new bid or separate contract include, but are not limited to, the following:

- Addition of new services to an existing contract that are not included in the current scope of work and/or specifications and/or technical requirements of contract
  
  For Example: Adding any of the following meal service options: catering, a la carte sales, vended meals, convenience stores, vending machines, and concessions

- Addition of FSMC management for another program that is not included in the current scope of work and/or specifications and/or technical requirements of contract
  
  For Example: Adding another Child Nutrition Program (CNP) to the contract such as Child and Adult Care Food Program (CACFP), Summer Food Service Program (SFSP), or Seamless Summer Option (SSO)

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28 See the Administrator’s Reference Manual, Section 17, Procurement for additional information on material change.
• Making changes in services within the scope of work or specifications and/or technical requirements of the original or current contract which alter the value, terms, or conditions of the original contract.  
  
  For Example:  
  - Changes to the formula for determining meal equivalency  
  - Any change in fees or basis for fee increases not reflected in the original solicitation and contract  
  - Major shift in responsibilities for the CE’s staff or FSMC staff  
  - Significant changes in the basis for determining guaranteed returns  
  - Change to or adding elements to the option to renew the contract  
  - Changes to the formula that is used to identify the meal.  
  - Changes that involve $100,000 or more  

**Opening Bids**  
To ensure that all offerors are treated fairly and competition is not limited, CEs must follow the timeline and processes communicated in the solicitation and in the CE’s written procurement procedures to open bids.  

*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 and include a statement that the CE has submitted the solicitation/contract to TDA for approval.

• Unsuccessful offerors should be notified promptly. ¹⁰

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.

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

¹⁰ 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.
Pre-Bid Meetings IFB/RFP

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 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
  - 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 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 to attend at least two weeks after the date of the last public advertisement. If only one offeror responds to the public advertisement with intentions of submitting a proposal, then the CE may then 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 Additional Communication with Potential Offerors 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 retain documentation about the pre-bid meeting. Documentation includes, but is not limited to, sign-in sheet for all in attendance and a summary of all information shared, questions asked, and answers provided.

The CE must document the pre-bid meeting occurred by providing a sign-in sheet for all in attendance, a summary of all information shared, questions asked, and answers provided.

All information shared during the pre-bid meeting 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 there is an addendum to the solicitation, the addendum must be provided to all potential offerors. If more than one addendum is required, each addendum should be numbered, and a copy of each addendum should 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.

_TDA’s Food Service Management Company Approved Vendor List_

CEs may only contract with a FSMC vendor from _TDA’s Food Service Management Company Approved Vendor List_. The solicitation/contract must also be distributed to all vendors on the vendor list.\(^{30}\)

**USDA Foods**

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

**Awarding the Contract**

The FSMC contract must be awarded to the offeror that is the most responsive and responsible to the solicitation with price as the primary consideration.

**Overly Responsive Offer**

Giving consideration to overly responsive elements of the offeror’s bid or response is prohibited. A contract award must be made by evaluating responses against the evaluation and scoring criteria stated in the solicitation/contract with price as the primary consideration.

Consideration may be given to responses that add value to the program; however, it is the CE’s responsibility to ensure that the item or service adds value to an element included in the solicitation/contract as opposed to being overly responsive.

For Example: If the solicitation/contract does not include equipment yet the offer includes equipment, the added value is likely to be overly responsive.

\(^{30}\) Available at [www.squaremeals.org](http://www.squaremeals.org).
The CE must ensure that the value added responses do not include items or services that are unallowable. School food service funds must only be used for the operation or improvement of the school food service program.

**Invitation for Bid (IFB) Awards**

For an IFB, the contract is awarded to the offeror with the most responsive and responsible offer that has the best price. When determining if an offer is responsive and an offeror responsible, the CE will use the evaluation/rubric tool developed to ensure that the offer meets specifications and technical requirements and other provisions described in the solicitation.

**Request for Proposals (RFP) Award**

For an RFP, the contract is awarded to the most responsive and responsible offer that is the most advantageous to the program with price as the primary consideration. CEs will make this determination by using the ranked and weighted criteria in the evaluation/rubric tool that has been developed by the CE. Contractor integrity, compliance with public policy, record of past performance and financial and technical resources are valid factors in determining contractor responsibility. CEs must not change or bypass the published evaluation and scoring criteria in order to circumvent full and open competition.

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

**FSMC Contract Management**

Even though the FSMC solicitation/contract will describe specific responsibilities for the FSMC, the CE still maintains overall responsibility for program operation and for specific actions as described in regulation. If a responsibility is not included in the solicitation/contract scope of work, the responsibility remains with the CE. If the FSMC assumes responsibilities not described in the original solicitation/contract, performing new responsibilities may be a material change and require the FSMC solicitation/contract to be rebid.

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31 See the Plan for Evaluating Offers subsection in this section for more information on this topic.

32 See the Administrator’s Reference Manual, Section 17, Procurement for additional information on material change.
CE Responsibilities

Accounting and Finances

The CE must ensure that all financial transactions are in compliance with requirements. This includes, but is not limited to, the following:

- Use of school food service funds only for allowable costs.
- All income accrues to the school food service account and that FSMC income reports include income broken down by source, type, and category of meal or food service
- Responsibility for the overall operation of food service programs, including financial requirements
  - Limiting administrative costs for the FFVP to 10 percent of the overall grant, if applicable
- Preparation of the solicitation and contract
- Maintain responsibility for the accuracy of counting and claiming
- Maintain responsibility for the accuracy of bills and invoices, including credits, discounts, and rebates
- Application of USDA Foods values, if applicable
- Application of credits, discounts, and rebates.

Administrative Review (AR) and Other Audits

The CE must maintain responsibility for the resolution of all Administrative Review (AR) or audit findings. While the FSMC will be involved in preparing and providing information for an AR or other audit, the CE is responsible for all responses for an AR or other audit. This includes, but is not limited to, resolving findings from ARs and other audits.

Advisory Board

The CE must ensure that an advisory board composed of parents, teachers, and students to assist in menu planning is established and maintained.

33 All CEs in Texas must use the prototypes from provided by the Texas Department of Agriculture (TDA). Available at www.squaremeals.org.
Agreements and Contracts

The CE must retain responsibility for all contractual agreements entered into in connection with the operation of the program. This includes, but is not limited to, the following:

- Signature authority on the permanent agreement with TDA and compliance with the permanent agreement
- Signature authority for the CE’s Policy Statement for Free and Reduced-Price Meals Attachment B: Meal Count/Collection Procedure(s)
- Responsibility for processor agreements and contracts
- Oversight to ensure that all third party contracts are in compliance with all regulations

Civil Rights

The CE must ensure that the FSMC complies with the procedures established by the CE for referring any civil rights complaints to the CE.34

Competitive Foods

The CE must ensure that the FSMC is in compliance with Competitive Food Nutrition Standards (also called smart snacks) as described in Administrator’s Reference Manual, Section 20, Competitive Food Nutrition Standards. This also includes FSMC reporting of non-program food and meal expenditures and revenue and the proportion of costs to revenues must also be reported by CEs. If the FSMC is to report this information on behalf of the CE, this must be specified in the original solicitation and contract.

Eligibility Determination

Even if the FSMC conducts eligibility determinations on behalf of the CE, the CE is responsible to ensure that the following requirements are met:

- Accuracy of eligibility determinations and the verification process (with the exception of appeals as described below)
- All hearings related to eligibility determinations and verifications

34 See Administrator’s Reference Manual, Section 19, Other Operational Issues for more information on the required actions when there is a civil rights complaint.
Health and Safety

The CE must ensure that the FSMC maintains all applicable health and safety certifications and all health and safety regulations are met including, but not limited to, the following:

- Development and use of a Hazard Analysis Critical Control Point (HAACP) plan
- Compliance with all state and local health inspection regulations
- Safe and appropriate storage of all foods, commercial products

Meal Service

The CE must retain control of the quality, extent, and general nature of food service for program and nonprogram foods and meals. This includes, but is not limited to, the following:

- 21-day cycle menu for the FSMC
  - With TDA approval for a request for proposal (RFP) competitive bid, an FSMC may develop the 21-day cycle menu if the CE is not capable of developing a cycle menu.
- Meal pattern compliance
- Prices to be charged for meals
- Incorporation of USDA Foods into meals to the greatest extent possible,
- All meal service operational requirements are met including, but not limited to, offer versus serve (OVS).

Monitoring

The CE must monitor the FSMC’s operation of the program on a routine basis. This includes the onsite monitoring the counting and claiming system as well as monitoring the overall operation of the program. TDA has developed the *Food Service Management Company (FSMC) Monitoring Form*35 for this purpose; however, the CE may use its own form as long as it includes all of the same information as the TDA form.

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35 Available at [www.squaremeals.org](http://www.squaremeals.org).
Onsite Monitoring—CEs with more than one school must conduct an annual onsite review of each school prior to February 1st of each school year to observe the school’s counting and claiming procedures. This includes any schools where an FSMC operates; CE staff must conduct the required onsite reviews. TDA provides forms for conducting this review at www.squaremeals.org. If the review identifies a problem with a school’s meal counting or claiming procedure, the CE must take the following actions:

- Implementation of corrective action
- Follow-up onsite reviews within 45 days of the review to determine if the corrective action resolved the problem(s).

FSMC Monitoring—CE must monitor the following areas of program operation:

- Competitive Food Nutritional Standards
- Documentation for meal service, including but not limited to, menus, standardized recipes, production records, reimbursable meal service
- Documentation supporting reporting
- Engagement of advisory committee
- Financial and accounting practices
- Health and sanitation
- Implementation of the CE’s Policy Statement for Free and Reduced-Price Meals
- Attachment B: Meal Count/Collection Procedure(s)
- Menus, meal pattern, dietary specifications, and food service
- Nonprogram revenues and expenses
- Paid lunch equity calculations, if applicable
- Procurement
- Records retention
- Staffing
- Terms and conditions of the contract
- USDA Foods
Contract Renewal Documentation

The CE must furnish TDA with the following documents for approval of the contract renewal prior to April 30:

1. Letter stating the intent of the CE to renew the contract with the FSMC for the upcoming school year
2. Copy of any amendments, subcontracts, letter agreements or any other relevant documentation pertaining to the contract
3. Copy of the previous year-end auditable foodservice budget
4. Copy of the upcoming year projected auditable budget
5. List of sites served
6. Actual methodology and calculations, together with an explanation for the method used to calculate changes in the contract costs, and the actual cost changes made

Reports

The CE must ensure that reporting requirements are met.

USDA Foods

- Must ensure that the FSMC credits the CE for the value of USDA Foods used as described in the solicitation and contract.\(^{36}\)
- Must ensure compliance with USDA Foods usage, storage, and processing.
- Must monitor how effectively the FSMC is using USDA Foods.

FSMC Responsibilities

Credits, Discounts, and Rebates and USDA Foods Values

- Must provide credits, discounts, and rebates and USDA Foods values as described in the terms of the contract.
- Must maintain documentation of credits, discounts, and rebates and USDA Foods values.
- Must provide such documentation upon request to the CE, TDA, USDA, or other authorized agency.

\(^{36}\) See the Administrator’s Reference Manual, Section 21, USDA Foods for additional information on this requirement.
Operational Tasks

- Must operate the program as it is described in the solicitation/contract.
- Must ensure privacy for program participants.
- Must adhere to the cycle menu for the first 21 days and may make changes after the first 21 days with CE approval.

Special Guidance, FSMCs
The following guidance will assist CEs in addressing special situations in FSMC contracts.

Procuring or Purchasing on Behalf of the CE
When FSMC purchase on behalf of the CE, the following guidance must be used:

Capital Expenses
Purchases of equipment which exceed $5,000 require prior approval from the CE and TDA.37

Equipment Used in the Storage, Preparation, and Delivery of School Meals
Contracts should describe the appropriate authorizations and forms required for TDA and the CE to approve the purchase of equipment to be used in the storage, preparation, and delivery of school meals.

Ownership of FSMC Purchased Equipment
When the FSMC is expected to invest in equipment on behalf of the CE, the original solicitation and contract must describe this provision. This includes, but is not limited to, the total amount of the investment over the total life of the contract or as prorated annually within a specified timeframe. Adding these provisions after the original solicitation and contract are awarded may create material changes that will require the solicitation to be re-bid.

If the contract expires or is terminated prior to the complete repayment of the investment, the CE must, on the expiration date or within five days after receipt by either party of any notice of termination under the contract, either (1) deliver the equipment items funded by the investment to the FSMC in full release of the unpaid balance or (2) retain the property and continue making payments in accordance with the amortization schedule as described in the solicitation and contract.

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37 Use the capital expenditure form in TX-UNPS for this purpose.
Bankruptcy Procedures
If the FSMC under contract to provide NSLP and/or SBP meals files for bankruptcy, the CE must contact TDA immediately to inform the agency of the bankruptcy. TDA will take the following actions:

- Review the bankruptcy documentation along with other issues that might have an impact on the FSMC ability to comply with contract terms as appropriate and
- Remove the FSMC from the FSMC vendor’s list unless the FSMC is able to provide a required performance bond.

[NOTE: CEs cannot impose any additional criteria or assurances (for example, bonds) on a FSMC regardless of a contract’s value solely due to Chapter 11 status.]

Vended Meal Contract
CEs may use a vended meal contract to provide a CE with complete meals, meal components, or raw materials which are to be used for the meal service. A vended meal contractor cannot operate the program; it can only provide a service.

Appropriate Use of a Vended Meal Contract
Vended meal contractors may be procured to perform the following tasks:

- Prepare complete meals, meal components, or raw materials meals according the menu specifications provided by the CE, including ready-to-serve meals, heat-and-serve meals, ready-to-prepare meals, and raw ingredients.
- Provide menu choices from which the CE may choose meals or food and beverage items to be served.
- Deliver meals, meal components, or raw ingredients at designated times to designated locations.
- Serve meal in portions as described in the planned menu.
- Provide documentation that demonstrates that the prepared meals or food and beverage items delivered meet the program requirements as indicated in the contract. This would include providing product labels and other appropriate documentation demonstrating that specific food and beverage items contain the appropriate amount of ingredients for the items to meet the meal pattern or Competitive Food Nutrition Standards.
Inappropriate Use of a Vended Meal Contract

A vended meal contractor cannot perform the following tasks:

- Determine if the meal served meets the meal pattern at the point of service (POS).
  
  \[NOTE: \text{The CE provides meal pattern specifications to the vendor. The vendor supplies a meal as specified. It is the CE’s responsibility to determine if the meal that is served is reimbursable.}\]

- Code a meal as reimbursable in the POS system.
- Count and collect data for CE claims.
- Receive direct delivery of USDA Foods.\(^{38}\)

If the activities in this contract include duties or actions that are considered to be program operation or management tasks, the CE must reevaluate its vendor’s solicitation and contract and either remove those duties or reissue a solicitation for an FSMC contract.

Vendor Contract, Responsibility for Program Compliance

The CE cannot delegate its responsibility to operate and manage the program in compliance with all applicable federal, state, and local regulations. The CE is also responsible for ensuring that the activities described in a vendor’s contract are appropriate for this type of contract, that is, the activities do not involve program management.

Procuring a Vendor Contract

A CE must procure a vendor’s contract appropriately as described in Administrator’s Reference Manual, Section 17, Procurement. In the solicitation and contract, the CE should include the following information and requirements at a minimum:

Scope of Work

- Specific description of the meals/food or beverage items the CE intends for the vendor to provide.
- Explanation and description of the meal pattern specifications that meals are to meet as well as types of meal options the CE wants the vendor to provide.
- Detailed information on how the food is to be delivered: packaging, containers, food safety requirements, etc.
- Description of the quality of food and beverage items the vendor is to provide.
- Description of the number of meals, food, or beverages to be delivered, the time(s) of delivery, and the location for deliver.

\(^{38}\) USDA is piloting the delivery of USDA Foods to vended meal providers. CEs not participating in the pilot must accept delivery of USDA Foods and arrange for delivery from an acceptable delivery location to the vendor.
• Explanation of any equipment or facility support the CE will provide.
• Explanation of how or if the CE will approve substitutions.
• Explanation of how leftover meals are to be handled.
• Explanation of the type of documentation the CE will require the vendor to retain and the process for providing retained documentation to the CE on request and on a routine basis.
• Explanation of when and how the CE will notify the vendor if there is a change in the CEs standard order based on early release, field trips, or other changes to the students’ regular schedule.

Financial Elements
• Explanation that the offer to be submitted is for a set price, i.e., the offer must include a statement for the total costs for the contract.
• Process for submitting invoices and receiving payment.

Terms and Conditions
• Process for addressing conflicts in the contract.
• Statement of the expected timeline for the contract duration.
• Terms and conditions for terminating the contract.

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

Additional Resources
TDA provides the required resources for procuring or renewing a contract for an FSMC on the SquareMeals website.

Additionally, TDA has developed the FSMC Monitoring Form to assist CEs in reviewing the FSMC’s operation. It is also available at www.squaremeals.org.

39 A vendor’s contract cannot be awarded to an offeror that has submitted a cost plus percentage or cost plus added expenses. All costs to be charged for the contract must be included in the offer.

40 Available at www.squaremeals.org.
Records Retention

CEs must retain documentation about food production and service. 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, nonprofit organizations, and residential child care institutions after the end of the fiscal year to which they pertain.

When a CE engages an FSMC to manage its food service program, the CE must work with the FSMC to ensure that all required records are provided to the CE in a timely manner. It is the responsibility of the CE to ensure that all required records are retained and maintained for the period of time required.

CEs have the option to maintain records on paper or electronically. If the operational tasks are performed by the FSMC, the CE must still ensure that all required documentation is retained and made available to the CE. 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.

TDA may also request documentation for both offsite and onsite administrative review. CEs are encouraged to develop a system of document retention that allows them to readily retrieve documentation. Documentation includes, but is not limited to, the following topics:

- Food production
- Program participation
- Procurement
- Financial management
- Eligibility
- Verification
- Practices aligned to the local wellness policy
- Competitive foods
- Professional standards
- Inventory management
- USDA Foods, including USDA Foods values
- Credits, discounts, and rebates
- Buy American
- Solicitation and contracts
- Activities to manage the contract

For more information on the specific types of documentation that are required, see Administrator’s Reference Manual, Section 3, Records Retention.

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 FSMC requirements or the requirements related to consultants or vended meals. TDA will assess compliance with the related operational, accounting, procurement, and financial requirements based on the documentation that CE has submitted throughout the year as well as documentation submitted for offsite and onsite administrative review processes or other procurement review activities.

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.

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41 Inclusion of this provision in all contracts and all CE approvals of all purchases that do not meet the requirements of the Buy American provision. See the Administrator’s Reference Manual, Section 17, Procurement for additional information on this topic.
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,\(^{42}\) 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 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.

\(^{42}\) Text added. This requirement includes the Special Milk Program.