United States Department of Agriculture

Food and Nutrition Service

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Alexandria, VA 22302-1500

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SUBJECT: April 2006 Procurement Questions

TO: State Directors
Child Nutrition Programs
All States

We continue to receive questions regarding procurements in the Child Nutrition Programs, particularly in the National School Lunch and School Breakfast Programs. Attached are the most recently received questions and answers. As in the past, please share these questions and answers with your school food authorities. If you have any questions, please contact your regional office.

Original Signed

for STANLEY C. GARNETT
Director
Child Nutrition Division

Attachment

cc: Lael Lubing, GMD
Rachel Bishop, OGC

Question #1: We often see guaranteed returns in contracts between school food authorities (SFAs) and food service management companies (FSMCs) and would like to know what they are.

Answer: When dealing with procurement contracts involving the National School Lunch and Breakfast Programs there are two basic variations of guaranteed returns. One involves the FSMC guaranteeing a return to the nonprofit school food service account at the end of the school year if certain agreed upon conditions in the contract are met. For example, if conditions x, y, and z are met the FSMC agrees at the end of the year to increase the nonprofit school food service account by an amount specified in the contract. A second type involves an agreement between the FSMC and the SFA that if the predetermined return amount is not met at the end of the school year, the FSMC will cover the amount by reducing its management fee, up to the amount of the fee. As with all terms and conditions, the guaranteed return provision must be specified in both the solicitation and contract documents.

Question #2: What if the management fee doesn't cover the predetermined return amount? This is a possibility if at the end of the school year the loss exceeds the agreed upon predetermined return amount.

Answer: This is a potential problem which is why the SFA should review the guaranteed return provision carefully. If the guaranteed return provision requires the FSMC to provide a guarantee that they will repay an amount up to the agreed upon management fee, but not to exceed the fee if the terms and conditions of the agreement are not met, then the SFA is essentially agreeing to limit the contractor's liability. SFAs should consider that any agreement to limit the contractor's liability places the nonprofit school food service account at great risk should a substantial to catastrophic loss be experienced that school year.

Question #3: If the SFA enters into a contract containing such a guaranteed return, does this mean they do not have to pay the FSMC for any losses incurred in the prior year?

Answer: No. It simply means they cannot pay for them out of the nonprofit school food service account. If the SFA entered into a contract that included a guaranteed return provision requiring that any losses incurred by the contractor in one year would have to be paid by the SFA in the subsequent year, then the SFA would have to pay with funds other than the nonprofit school food service account funds.

Question #4: When can an SFA pay bonuses?

Answer: Generally, bonuses paid to employees are allowable costs and nonprofit school food service account funds may be used to pay the costs of bonuses for efficient performance or as a result of a suggestion or safety improvement.   However, the bonuses can be paid to employees only as long as the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to a formally established labor agreement. Thus, this generally requires that such payments be a standard personnel practice.

Question #5: A contractor is telling an SFA that they have to cover the costs of bonuses the contractor pays to its own employees. Can the SFA pay the bonuses for these employees?

Answer: Generally, no. Bonuses go to the SFA employees and not to their contractors. Neither the contractor nor its employees are employees of the SFA. One exception might entail an SFA paying for such bonuses if in its bid documents the SFA had explicitly included as a cost an FSMC's total compensation package for its employees that included bonuses (i.e., total compensation includes rate plus incentives). SFAs should be aware that if language does not exist in the Request for Proposal and in subsequent contracts to allow for such costs to be paid, then the SFA does not have to cover these costs. SFAs should be aware that the payment of such costs should be consistent with standard personnel practices. Also, such a provision should be considered very carefully as the incentive for a contractor to perform well should be inherent in the awarding of the contract and not based on bonuses at the end of the contract period.

Question #6: In light of the disaster stemming from Hurricanes Katrina and Rita, what would USDA consider an appropriate length of time available to conduct an emergency procurement?

Answer: During a disaster situation noncompetitive contracts may be awarded only when a public exigency or emergency exists that will not permit a delay in contracting that would result from a competitive solicitation. Our recommendation is that the SFA research its State's requirements on what constitutes an emergency situation and whether the provision discusses timeframes. Clearly these would qualify as emergency situations but not all disasters are clear. The State has to make the determination as to whether the emergency condition exists in the entire State or certain locales. The SFA must also check with the State to determine the length of the emergency situation so that any noncompetitive contracts comply with the timeframes associated with the designated emergency situation.

Question #7: If a State has a provision in place that allows an SFA to use a noncompetitive contract due to an emergency situation such as the situations created by the hurricanes, does the SFA need FNS approval as well?

Answer: No. As noted above, as long as an SFA has received approval from its respective State regarding emergency designation they do not need FNS approval.

Question #8: An SFA would like to purchase milk in plastic packaging (commonly called chugs) instead of the traditional paperboard cartons. If, however, the SFA is unaware whether it can afford the higher cost of the plastic packaging how can it award the contract to a supplier of the milk in plastic packaging when the supplier of the paperboard carton submitted a cheaper bid price?

Answer: As long as the SFA is not prohibited by State and local procurement requirements from using options within its bid documents, then it can conduct a solicitation that will allow for pricing on each type of carton individually. To accomplish this, the SFA's bid document should: 1) include the specifications for each type of product (i.e., plastic packaging versus traditional paperboard cartons); 2) provide explicit information about how bids for each option will be evaluated to determine responsiveness and pricing and the basis for contract award; 3) make clear that in the evaluation of the bids, responsiveness and pricing will be compared only within each option (i.e., the bids submitted for plastic packaging are only compared to each other); or across all of the options (i.e., price of plastic packaging compared to paperboard packaging); and 4) ensure that the award criteria is drafted to permit the SFA to award the bid to the lowest priced responsible responsive bidder for either of the options. Also, to maximize competition, potential bidders should be encouraged to submit bids for all of the options offered.

Question #9: How can SFAs participating in Cooperative Buying Groups (CBGs) provide more than one supplier on the purchasing list so that they are not limited in terms of the items they can purchase?

Answer: By pooling their purchasing power to acquire goods and services, SFAs hope to lower their operating costs, better respond to competition, and improve overall performance. Often, however, CBGs believe that their ability to purchase in large quantities, due to their pooling of purchasing power, limits them to negotiating a volume purchase with only one food vendor to achieve the best price. This does not have to be the case. A CBG can identify in its solicitation document that it will seek multiple suppliers. The CBG would test the products of the responding vendors using an evaluation system that assesses and scores the products based on taste, price, quality, and quantity. The CBG would set a percentage and those vendors whose products score at or beyond the set percentage would pre-qualify.   The CBG would then ask for best and final prices of those that have pre-qualified and allow the SFAs participating in the CBG to purchase from the top ranked of the vendors who provided the lowest price.