

6.0 PROCUREMENT

This chapter is provided for State agencies that are administering FNS programs that need to acquire or purchase services from a contractor to meet their information system (IS) needs. The information contained in this chapter is intended to serve as a guideline and is not meant to be a definitive step-by-step guide to procurement. The degree of detail in the procurement process will depend upon the extent of needed services and the phase of the Systems Development Life Cycle (SDLC) or APD process. State-specific procurement procedures are not included in this chapter, nor are FNS program-specific regulations. It is vital that the State procurement or purchasing office be consulted and involved throughout the procurement process and that the State agency is aware of and adhere to FNS program-specific regulations for procurement.

The major objective for the State agency in any procurement process should be to identify the best solution to meet the State's specific IS needs. In submitting a proposal in response to the State agency's requirements, the contractor's major objectives will be to prepare a cost-effective solution to meet these requirements and to win the business on the basis of the strengths of its proposal. For both parties, a common objective in any procurement process should also be to minimize the risks, costs, and efforts required by all parties in pursuit of these major objectives. It is essential that the State agency and FNS ensure that there is fair and open competition for IS acquisitions.

6.1 REGULATIONS AND POLICIES

The authority for government agencies to conduct acquisition of information technology (IT) systems flows from two principal sources—Executive Direction and public law (legal basis). Executive Direction flows from the authority of the President and the Federal Government's executive agencies to issue orders and regulations to both enforce and facilitate the law and to help carry out the constitutional duties of the executive branch. Executive Direction includes the President, the Office of Management and Budget (OMB), and USDA, to name a few. These offices generate Policy and Directives which impact the acquisition process.

Examples of executive direction relevant to State acquisitions include the following:

- ▶ *OMB Circular A-11* (http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html) describes the process for preparation and submission of budget estimates, strategic plans, and annual performance plans, and the planning, budgeting, and acquisition of capital assets for all executive departments.
- ▶ *OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments* (http://www.whitehouse.gov/omb/fedreg/2005/083105_a87.pdf) establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and Federally recognized Indian tribal governments (governmental units).

State agencies use their own applicable State procurement regulations and standards to prepare procurement documents using Federal funds, provided they conform to the Federal standards and ensure that the acquisition is conducted in the most effective and economical manner.

State agencies must conform to the following standards identified at 7 CFR 3016.36 (http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr3016.36.pdf) of FNS regulations for procurement using FNS funds:

- √ Maintain a contract administration system that ensures contractors perform in accordance with the terms, conditions, and specifications of their contractor or purchase orders
- √ Maintain a written code of standards of conduct for employees involved in the award and administration of contracts to avoid conflict of interest
- √ Provide for a review of proposed procurements to avoid purchases of duplicative or unnecessary items and strive to obtain the most economical purchase
- √ Enter into State and local intergovernmental agreements for procurement or use of common goods and services for greater economy and efficiency
- √ Use Federal excess and surplus property, in lieu of purchasing new, whenever the use is feasible and reduces project costs
- √ Make awards only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed procurement
- √ Maintain records sufficient to detail the significant history of the contract, including the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis of the contract price
- √ Use time and material-type contracts only after determining that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk
- √ Be responsible for the settlement of all contractual and administrative issues arising out of procurements, including protests, disputes, and claims
- √ Establish protest procedures to handle and resolve disputes.

6.2 THE ACQUISITION PROCESS

The Federal Acquisition Regulation (**FAR**) (2005) (<http://www.arnet.gov/far>) established a basic acquisition process, which begins with acquisition planning and ends with contract award, administration, and closeout for use by Federal agencies. FNS recommends that State agencies conduct the procurement and contracting process in accordance with their State-defined processes and/or with the following basic steps:

1. Determine the need for services
2. Draft the RFP or equivalent State procurement document
3. Develop the criteria to select the contractor
4. Submit the Request for Proposal (RFP) or procurement document to FNS for prior

- approval, if required (on the basis of funding thresholds)
5. Respond to comments or questions from FNS, as necessary
 6. Release the RFP
 7. Hold a bidders' conference to take questions from potential contractors (at the discretion of the State procurement office)
 8. Receive proposals from bidders
 9. Evaluate the proposals on the basis of previously established criteria and select the contractor
 10. Draft a contract
 11. Submit the contract to FNS for approval, if required
 12. Receive FNS approval, if required
 13. Award the contract
 14. Administer the contract
 15. Close out the contract.

There are different terms that are used to refer to acquisitions within a State, such as Invitation for Bids (IFB), Request for Response, Request for Quotation (RFQ) and Request for Proposal (RFP). For the purposes of this handbook, RFP is generally used to refer to all of these terms, but they may be used interchangeably. Please be aware that these terms may not be used interchangeably elsewhere as they are very specific requests for certain items.

RFPs may be written by State agencies or by their authorized contractors—FNS has no preference. However, the States must avoid any conflict of interest when using contractors to write an RFP (see Section [6.9](#)). This section is intended to give guidance on FNS expectations and requirements for an RFP, regardless of where the State is in the APD process (e.g., planning, development and implementation, or maintenance and operations (M&O)).

State agencies are reminded that, with the exception of FSP EBT, an approved PAPD or IAPD or Federal funding grant should be completed prior to embarking upon any procurement using Federal financial participation (FFP) or Federal funding.

[Figure 6-1](#) indicates the funding thresholds for each program and how they relate to each major procurement document (i.e., RFP, contract, and contract amendment). The RFP will comply with Federal regulations that require, to the maximum extent practicable, open and free competition. Because most IS projects will involve competitive procurements, the remainder of this chapter will refer to funding thresholds for these types of procurements.

Figure 6-1. RFP and Contract Document Submission Thresholds

Procurement Documents	Competitive Procurements Program/Funding Source				Noncompetitive Procurements Program/Funding Source			
	RFP	FSP	FSP EBT	WIC	WIC EBT	FSP	WIC	WIC EBT
State agency prepares and submits RFP. FNS reviews and/or approves RFP within 60 days.	For all projects requesting FFP with total project costs > \$5M	For all projects requesting FFP	For all projects requesting Federal funding ≥\$100,000	For all projects requesting Federal funding	For all projects with total acquisition cost > \$1M	For all projects requesting Federal funding ≥\$100,000	For all projects requesting Federal funding	For all projects requesting Federal funding
Contract	FSP	FSP EBT	WIC	WIC EBT	FSP	WIC	WIC EBT	
State agency prepares and submits contract. FNS reviews and/or approves contract within 60 days.	For all projects requesting total FFP > \$5M	For all projects requesting FFP	For all projects requesting Federal funding ≥\$100,000	For all projects requesting Federal funding	For all projects with total acquisition cost > \$1M	For all projects requesting Federal funding ≥\$100,000	For all projects requesting Federal funding	For all projects requesting Federal funding
Contract Amendment	FSP	FSP EBT	WIC	WIC EBT	FSP	WIC	WIC EBT	
State agency prepares and submits contract amendment. FNS reviews and/or approves contract amendment within 60 days.	For any amendment ≥ 20% of base contract cost (cumulative)	For all projects requesting FFP	For any amendment ≥ 20% of base contract cost (cumulative)	For all projects requesting Federal funding	For all projects with total acquisition cost > \$1M	For all projects requesting Federal funding ≥\$100,000	For all projects requesting Federal funding	For all projects requesting Federal funding

The State agency should submit contracts to FNS for approval before signature and execution by the State agency, if the total project cost is greater than or equal to \$100,000 in total project costs for WIC or \$5 million in total project costs for FSP.

Noncompetitive procurements using Food Stamp FFP that exceeds \$1 million in total acquisition costs or WIC Federal funding that exceeds \$100,000 in total acquisition costs require prior approval.

Because there are State-specific procurement regulations and requirements, FNS does not want to burden the State agency with duplicative requirements and document preparation. States may

be able to submit State planning, IT project, and/or procurement-related documents that contain the information required in APDs and RFPs, provided the State submits a detailed crosswalk to FNS requirements. State agencies should consult with FNS to help make this determination.

6.2.1 State Agency Roles and Responsibilities

The contracting process includes activities designed to provide States with reliable, efficient, and current technology. Some roles, responsibilities, and authorities for IS acquisitions are specified by regulation. For example, 7 CFR 3016.32

(http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr3016.32.pdf) of the regulations requires that a State use, manage, and dispose of equipment acquired under an award in accordance with State laws and procedures, as well as with the specific provisions of the regulation. Others may vary from acquisition to acquisition and from State to State. Regardless, a senior-level official should designate an acquisition team (see [Figure 6-2](#)) with responsibilities for each acquisition early in the process.

Figure 6-2. Roles and Responsibilities in the Acquisition Process

Role	Responsibilities
Program Manager	<ul style="list-style-type: none"> • Represent the Program Office • Ensure that the organization's long- and short-term needs are met through the acquisition process • Provide material for inclusion in the solicitation • Prepare and submit a cost estimate to the contracting officer as soon as possible in the pre-solicitation phase • Oversee the progress of the project
Project Manager	<ul style="list-style-type: none"> • Represent the Project Office • Work with the contracting officer to define the contract management plan, including acceptable performance criteria • Ensure that the organization's long- and short-term needs are met through the acquisition process
Information Systems Manager	<ul style="list-style-type: none"> • Provide technical expertise to the project manager and contracting officer throughout the acquisition process
Contracting Officer	<ul style="list-style-type: none"> • Enter into, administer, and terminate contracts and make related determinations and findings • Issue the solicitation document (i.e., RFP) when it is complete and accurate • Prepare the solicitation package and incorporate input from the Program Manager

State agencies should negotiate contracts and agreements that are based on Federal procurement regulations and individual State procurement rules. Generally, terms and conditions reflect the requirements of these rules.

6.2.2 FNS Roles and Responsibilities

All contracts and their subsequent amendments that exceed applicable thresholds must be submitted to FNS for review and approval before their execution. FNS will review contracts within **60 days**.

6.2.2.1 Food Stamp Program

For the FSP, if FNS has not provided written approval, disapproval, or a request for additional information within **60 days** of FNS' acknowledging receipt of the State's request, the request is

deemed to have provisionally met the prior approval requirements. However, provisional approval will not exempt a State from having to meet all other Federal requirements that pertain to the acquisition of IS equipment and services. Such requirements remain subject to FNS audit and review.

6.2.3 Procurement Methods

State agency procurements using FNS program funds shall be made by one of the following methods:

- **Small Purchase Procedures** (for services or supplies costing in aggregate not more than \$100,000)
- **Competitive Sealed Bids** (formal advertising) result in the awarding of a firm-fixed price contract to the bidder whose bid, conforming with the terms and conditions of the invitation for bids, is lowest or the best value
- **Competitive Negotiation** (proposals are requested from several sources, and the RFP is publicized) result in the awarding of either a fixed-price or cost-reimbursement type of contract
- **Noncompetitive Negotiation** (solicitation of a proposal from only one source) contract awarding is limited to the following:
 - The item is available only from a single source.
 - A public emergency is involved.
 - FNS authorizes noncompetitive procurement.
 - After soliciting several sources, competition is determined inadequate.

When submitting a request for an exception to competitive procurement (approval of a sole source or noncompetitive procurement) certain key information is required (See [Appendix D-24](#)). State agencies should contact either their State Systems Branch (SSB) or Regional Office (RO) contact.

At the discretion of FNS, a State agency may be required to notify FNS regardless of the dollar amount, whenever a noncompetitive procurement strategy is chosen. For major procurements involving IS equipment and services, competitive procurements requiring an Invitation for Bids (IFB) and competitive negotiation requiring an RFP are primarily used. The nature of the IS acquisition often requires the competitive negotiation process, such as in circumstances involving development of software applications.

6.3 REQUEST FOR PROPOSALS

An RFP is the document that the State agency will use to obtain contractor support or purchase hardware and software. The RFP is developed to solicit contractor services for a variety of efforts, including planning activities, document development, software, and IS development, Quality Assurance (QA), operations, maintenance, training, and other program life-cycle services. The State agency is responsible for ensuring that the RFP contains the components required by FNS and that it is consistent with State procurement regulations. The State should

submit RFPs to FNS for review and comment prior to release to the vendor community. FNS should review the RFP and notify the State agency of the review status within **60 days**. After FNS review, the State agency may release any RFPs to the vendor community.

State agencies may take advantage of competitive procured master agreements or master contracts between the State and contractors for many of their requirements, though most States have procedures in place for large procurements that require the use of an RFP for vendor solicitation.

6.3.1 State Agency Roles and Responsibilities

Unless otherwise directed by FNS, the State agency shall submit the RFP or similar document for approval before its release. The RFP is normally made a part of the contract between the State and selected vendor to ensure that the vendor complies with all of the RFP's provisions. The State agency is responsible for submitting the RFP or similar document to each individual Federal agency that may be participating in the Federal funding of the project (i.e., separate copies must be submitted to FNS and Department of Health and Human Services (HHS)).

The general system design or system specification may reference an existing State system as a possible transfer that contains the level of IT and functionality desired. The RFP must ask the vendor to bid the best possible system solution; however, the RFP itself cannot request the vendor to transfer a specific State system. States can identify the specific functionality and technical platform and cite examples but should not specify a State system by name in an RFP. An exception to this would be for those WIC State agencies seeking State Agency Model (SAM) funds.

6.3.2 Components of an RFP

During the project life cycle, the State agency will need to develop and release several RFPs for acquiring various contracted goods and services. RFPs will likely be released to procure planning, QA, development and implementation, and M&O contractor support. RFPs developed by the State agency should contain, at a minimum, the following components:

- ▶ **Introduction and Overview**—Includes details, such as background information about the effort; agencies and programs that will use the system, including any placeholders for potential future partners; major objectives of the proposed system; type of contract anticipated; and procurement schedule.
 - ✓ **Current Processing Environment**—Describes existing methods, procedures, systems, applications, hardware configurations, and components that the system will support
 - ✓ **Workload Data**—Describes statistics of online transactions, volumes of regular and peak loads, and incremental growth forecast for various workload data, etc.
 - ✓ **New System Environment**—Describes improvements that the agency expects to gain, performance requirements, database management requirements, and associated constraints, etc.
- ▶ **Solicitation Instructions and Conditions**—List issuing office and agency manager responsible for procurement; submission requirements, limitations/stipulations imposed on all bidders, standards, and subcontractors; and so forth. FNS recommends that all solicitations remain open for a minimum of 90 days to allow vendors sufficient time to

respond and to promote fair and open competition.

- ▶ **Statement of Work (SOW)**—Lists the tasks and other potential activities, mandatory requirements, deliverables, and staffing, including the following:
 - ✓ **Desired Schedule**—Should provide realistic schedules, including time for Federal and State review and approval of each deliverable
 - ✓ **Contract Deliverables**—Describes the products and services that the State expects contractor to deliver (This should also include acceptable performance criteria or measurements for each deliverable.)
 - ✓ **Installation, Conversion, Maintenance, and Personnel Requirements**—Lists specific requirements for installation and onsite maintenance as well as staffing requirements
 - ✓ **Functional Requirements Document (FRD)**—Defines the proposed system and documents system goals, objectives, and programmatic requirements and describes what the new system and/or hardware should do
- ▶ **Management Plan**—Identifies management requirements, such as the State agency project manager/lead State agency to whom the contractor will report, type and frequency of project status reports, and review and approval of work performed.
- ▶ **Proposal Structure and Content**—Describes general proposal appearance and organization, attachments, supplements, and other supporting documentation.
 - ✓ Statement, including personnel background and experience, of the contractor’s staff resources planned for assignment to the project
 - ✓ Statement of corporate financial resources, history of prior involvement in similar projects, and information regarding pending litigation, debarment, and suspension
 - ✓ Line-item cost statement, covering both developmental and operational costs, for the expected life of the system
- ▶ **Evaluation of Proposals and Contract Award**—Identifies proposal controls, such as the methods that States will use to evaluate proposals, requirements for benchmarks and system demonstrations, evaluation criteria, and State appeals process.

Refer to [Appendix D](#) for additional information and guidance.

6.3.3 FNS RFP Requirements

The RFP and the resulting contract should stipulate that payment will occur following review and acceptance of each major deliverable by the State agency. FNS may stipulate certain deliverables for submission and review. Major deliverables may include the detailed system design, as well as system and functional requirements documents. In addition, FNS recommends that the RFP require the contractor(s) to perform the following activities:

- ✓ Use configuration management (CM) software (e.g., Aegis, HP Openview) during design, development, and testing
- ✓ Develop requirements documents (which may include use cases) that should be signed off on and accepted by the State agency
- ✓ Implement a change request process to document all requested changes to the system and

to track their status, to help control scope creep and ensure that all requests (implemented now or in the future) are documented

- ✓ Conduct an incremental system demonstration every few months during development
- ✓ Provide detailed system and functional requirements, system design specifications, source code with inline comments, and a complete system installation guide
- ✓ Ensure that the system under development occurs in accordance with FNS program requirements and regulations
- ✓ Conduct full system testing, including end-to-end internal testing, User Acceptance Testing (UAT), full regression testing, and pilot testing.

6.3.4 Recommendations for Developing RFPs

Preparing an RFP consists of selecting appropriate clauses and provisions, tailoring them when necessary, and finally assembling the various parts of a solicitation for issuance. As part of this preparation, it is important that the State agency have a general source selection strategy. The RFP also should clearly state the significant evaluation factors—such as cost or price, cost or price-related factors, past performance, and other non-cost or non-price-related factors that will be considered in making the source selection and their relative weight or importance. Once the RFP is finalized and approved by the State procurement office and FNS, it is released to the contracting community.

It is important that RFPs released to the vendor community clearly outline State agency requirements and expectations. The following recommendations concerning RFP development are presented to help the State ensure that such releases are clear:

- ✓ Ensure that RFPs contain enough detail to clearly define requirements
- ✓ Describe requirements and timeline expectations in specific terms to provide the contractor with adequate information to develop a responsive bid
- ✓ Describe acceptable levels and measures of performance for products and/or deliverables
- ✓ Ensure that the State agency employs a process for RFP review by individuals having sufficient technical expertise and knowledge so that the support requested in the RFP is what the State agency desires.

Although the State agency may choose to hire a planning contractor to write the RFP for development and implementation services, State agency staff should strive to gain the confidence and expertise to drive the RFP process and manage the contractor appropriately. Not doing so may result in a system that does not meet State agency requirements.

State agencies must conduct all procurement activities in a manner that ensures free and open competition. Examples of situations that inappropriately restrict competition include the following:

- ▶ Placing unreasonable requirements on firms to qualify to do business
- ▶ Specifying geographical preferences

- ▶ Requiring unnecessary experience and excessive bonding
- ▶ Including unlimited liability clauses
- ▶ Specifying a “brand name” product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement
- ▶ Using noncompetitive pricing practices between firms or affiliated companies
- ▶ Permitting organizational conflicts of interest
- ▶ Allowing noncompetitive awards to consultants on retainer contracts
- ▶ Taking any arbitrary action in the procurement process.

6.4 TYPES AND ROLES OF CONTRACTORS

The contracting services that State agencies require for their IT needs may fall under any stage of the SDLC, and as the IS project progresses through its life cycle, the level of support and types of service required will change. It is the program manager’s responsibility to ensure that the appropriate resources are available to complete the project on time. The requirement to provide management and monitoring on a systems project is “cradle to grave,” from planning the concept through design and development, testing and deployment, M&O, and final disposition. State agencies that implement FNS programs use several types of contractors to support the different phases of the SDLC—contractors for planning, development and implementation, QA, project management, and IV&V. The type of contractor a State agency may need depends upon the complexity of the project, internal resources and expertise, and the budget allocated to the project. State agencies may have in-house resources that can carry out these functions without the need of contractor assistance. The contractor always reports to the State agency for task assignment, acceptance, and payment. The roles listed below are examples of some functions that may be performed by a contractor for a State agency.

6.4.1 Planning Contractor

The State agency may decide to retain a planning contractor to perform several planning or project management (PM) responsibilities. This type of contractor would likely play a major role during the planning and procurement phases of the project life cycle. Typical responsibilities for the planning contractor include:

- ▶ Guide the State agency in identifying system needs to meet program requirements or missing functionality (i.e., gap analysis), identify potential system solutions (upgrade, transfer, new development), and procurement methods
- ▶ May assist in business process review or reengineering efforts to streamline the process and facilitate the introduction of a new or updated system
- ▶ Guide the State agency and assist in development of the IAPD and the Implementation RFP for the development and implementation contractor (as well as the revisions, finalization, and coordination until FNS approval)
- ▶ May assist in the development of RFP for a project manager contractor (to perform

project management role) as long as the planning contractor is not eligible to bid on those services

- ▶ May assist in the development of RFP for a QA contractor (e.g., to perform project QA responsibilities) as long as the planning contractor is not eligible to bid on those services
- ▶ Guide the State agency in identifying selection criteria and process for choosing development and implementation contractor (as long as the planning contractor is not eligible to bid)
- ▶ Facilitate coordination by doing the following:
 - Assist in identifying and achieving project milestones
 - Develop documentation for meetings
 - Create and maintain, a central repository to house documentation
- ▶ Arrange and set up demonstrations of potential systems
- ▶ Manage the overall project schedule
- ▶ Produce periodic status reporting for project stakeholders, including FNS and other funding agencies.

6.4.2 Project Management Contractor

A PM contractor may be retained by the State agency to carry out project management, testing, and training activities. The focus of the PM contractor is on a well-managed project, completing a project within defined scope, time, and cost constraints. The PM contractor may play a major role during the development and implementation phase of the project life cycle. While a PM contractor may assume the day-to-day PM activities, the State agency remains responsible for project management and Federal reporting. The PM contractor reports to the project manager or project director as defined in the contract agreement. The project manager or project director is responsible for all communications with the Federal funding authorities. Typical roles and responsibilities for this type of contractor support include the following:

- ▶ Providing PM support by ensuring that the program stays on track, meets timelines, and stays within the budget
- ▶ Overseeing and monitoring program activities (State supervises system development and implementation; contractor advises State on these activities.)
- ▶ Providing the State with additional expertise and advice on the management of the development and implementation processes
- ▶ Identifying potential solutions to correct program missteps, delays, and cost overruns
- ▶ Coordinating activities of key stakeholders and decision makers (e.g., arranging meetings, developing support documents)
- ▶ Arranging and setting up additional demonstrations of systems, as needed
- ▶ Producing periodic status reporting for State decision makers, FNS, and others
- ▶ Facilitating coordination by doing the following;
 - Assist in identifying and achieving project milestones

- Develop documentation for meetings
- Maintain a central repository to house documents
- ▶ Developing a user training plan.

6.5 PROS AND CONS OF CONTRACTOR SUPPORT OPTIONS DURING THE INITIAL LIFE-CYCLE PHASES

To decide the level and type of contractor support required during the initial planning phases of the project life cycle, the State must evaluate the options for selecting a planning and PM contractor. [Figure 6-3](#) identifies some of the considerations involved in making decisions concerning planning and PM support.

Figure 6-3. Pros and Cons of Contractor Options

Option	Pros	Cons
1. A single contract award for performance of both planning and PM roles	<ul style="list-style-type: none"> • Increases continuity of efforts • Does not require additional ramp-up time to learn issues • Has potential for increased efficiency of contractor resources; already familiar with State agency operating procedures • Can result in time savings 	<ul style="list-style-type: none"> • Harder to define roles and responsibilities for future project phases, because the planning phase for defining roles, responsibilities, and activities covering the entire project has not yet occurred • May increase cost by resulting in higher bids from potential contractors due to unknowns.
2. Two separate contracts awarded for contractor performance of planning and PM roles In this instance: <ul style="list-style-type: none"> • State writes RFPs for planning and PM contractor functions OR • Planning contractor writes PM contractor RFP 	<ul style="list-style-type: none"> • Could facilitate project movement by allowing release of the initial planning contractor RFP instead of requiring additional time to define specifications and release a single RFP • Provides the opportunity for decreased risk of conflict of interest if bidders are limited to only one of the two project phases • Enables more accurate definition of roles and responsibilities in the RFPs • Allows more specific definition of tasks and requirements prior to contract award • Potentially lowers contract costs due to contractors' bidding for the PM support tasks after they have been fully defined and accurately detailed 	<ul style="list-style-type: none"> • Requires two RFPs to retain contractors (however, both RFPs may be drafted initially, and the second RFP may be revised later) • Can lead to loss of continuity and efficiency • Can reduce the choices of contractors if potential bidders choose not to bid on the planning role, allowing them to be eligible to bid on the longer term and greater value contract to fulfill the PM role

6.5.1 Development and/or Implementation Contractor Support

A development and/or implementation contractor may be retained by the State agency to design, build, and implement a new IS. This contractor will play a major role during the development and/or implementation phase. Typical roles and responsibilities for the development and implementation support contractor(s) that may be provided either by the State agency or contractor support include the following:

- ▶ Creating a detailed project timeline
- ▶ Guiding the State agency through a detailed design process to verify functional and technical requirements
- ▶ Writing or adapting software code and converting the data from the old system
- ▶ Writing technical and user documentation
- ▶ Installing hardware and software to support the system
- ▶ Developing any necessary interfaces to other systems, such as Electronic Benefits Transfer (EBT)
- ▶ Testing and demonstrating system functions
- ▶ Training personnel on the new system

- ▶ Implementing rollout of the new system
- ▶ Designing and building enhancements to the system
- ▶ Testing and demonstrating system enhancements
- ▶ Developing test plans and scenarios for users of system enhancements
- ▶ Training personnel on system enhancements
- ▶ Implementing enhanced system rollout
- ▶ Providing preliminary Help Desk support.

6.5.2 Maintenance and Operations Contractor Support

States either provide their own staff or may want to hire a contractor or multiple contractors for M&O of the IS after implementation. M&O may be a separate procurement from the initial implementation RFP, or it can be a phase requested as part of the initial implementation RFP. Regardless, M&O cannot be added noncompetitively once the project has started.

6.6 AWARDING GOVERNMENT CONTRACTS

Once all bids have been received, the State agency must evaluate contractor offers for comparison with its proposal and select the best-value offer in accordance with State procurement process. This section provides general practices that may be used in awarding contracts, but States should follow their procurement processes at all times.

6.6.1 Evaluating Proposals

The State must use an evaluation process to determine the relative merits of an offer and the offeror's ability to successfully accomplish the prospective contract. A competitive range is determined on the basis of the ratings of each proposal against all evaluation factors and refers to the range of proposals that are identified as the most highly rated.

An evaluation team is selected that can commit time for a thorough review of a proposal. The evaluation team should comprise members from diverse stakeholder groups, such as the State program director, lead nutritionist, EBT/vendor coordinator, State purchasing representative, IT department representative, and local agency representatives. The team should be trained on the evaluation criteria, process, and timeline. The evaluation team will judge the proposals in accordance with the evaluation factors (specified in the RFP). The offeror with the highest score will be recommended to the procurement office for review and contract award.

When evaluating a proposal, the State should consider the following basic questions:

- √ To what extent does the proposed alternative perform essential functions?
- √ Are program interests and goals represented?
- √ Are the planned equipment and software purchases appropriate for the tasks they are to perform?
- √ Is the technical proposal current and reflective of up-to-date technology when compared with industry standards?

- √ Do system functions match specific State program needs in detail?

The State should be wary of bids that either offer what was not asked for or simply restate the requirements defined without specifying *HOW* to meet the requirements. Benefits of each alternative should be weighed in the context of managerial requirements and efficiency, as well as technological effectiveness.

The evaluation should include an examination of the technical proposal and the management structure of the proposal, respectively, based on a comparative assessment of proposals against all source selection criteria in the solicitation. The evaluation team should be able to provide the rationale for its award decision.

6.6.2 Criteria for Evaluating Proposals

All government agencies seek to award contracts on the basis of the best overall value. This means that the State should consider all relevant factors, such as cost, performance, quality, and schedule, and make potential tradeoffs between cost and noncost factors, rather than just buying from the lowest cost, technically acceptable offeror. Relevant factors include the following:

- ▶ Response format as required by the RFP
- ▶ Adequacy and completeness of proposal
- ▶ Offeror's understanding of project/statement of understanding (Offeror demonstrates they understand the purpose and goals of the project.)
- ▶ Project experience in providing similar services (Offerors should provide samples of past work experience and qualifications relevant to the RFP.)
- ▶ Project personnel (Offerors should submit resumes of the staff that will participate in the project.)
- ▶ Project management plan and methodology to accomplish tasks
- ▶ Proposed system documentation
- ▶ Technical skills (Offerors should map staff skills to the functional areas identified in the RFP.)
- ▶ Cost
- ▶ References (Offerors should provide valid references and points of contact, including telephone numbers and mailing addresses.)
- ▶ Other factors (e.g., current relationship with the contractor and ability to accept incremental funding and Subject to Availability of Funds orders)
- ▶ Company stability (e.g., cancelled contract history, financial stability).

The State agency should weigh the cost of each bidder's proposal, with attention paid not just to the actual project costs, but also to the costs of ongoing operations of the proposed system compared with the State's current technical operations costs. For example, can the State afford the M&O costs on this proposed system, once the development and implementation contractor and any special FNS funding for it are gone? Efficient and careful use of funds is crucial in

managing FNS programs, but the States should not base their decision solely on cost, unless their procurement laws direct them to use lowest bidder procurement. To ensure the best product and long-term value for the project, it is important that the State agency not weight the cost proposal too highly and choose the lowest bidder, regardless of other factors.

FNS recommends the cost proposal be weighted as 25 percent to 45 percent of the total proposal, to provide a balanced evaluation between the technical and cost factors. States should test their formula before use to ensure they are comfortable with the results. Scenarios to be tested include the following:

- ▶ High technical score, low cost score
- ▶ Low technical score, low cost score
- ▶ High technical score, high cost score
- ▶ Low technical score, high cost score.

Too little weight on the cost may result in a strong technical proposal's winning, no matter how high the cost. Too much weight on the cost may result in a low bid's winning, no matter how poor the technical proposal.

The contracting officer should use every means available to determine whether a fair and reasonable price can be determined before requesting cost or pricing data from the contractor. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources. Normally, competition establishes price reasonableness.

6.6.2.1 Previous Program Experience

States should not put previous program experience in their selection criteria as a pass/fail element. Instead an RFP may require and assign evaluation points for relevant experience in large-scale eligibility or benefit management programs and may award more points for program-specific experience. Therefore, the RFP should not contain language, such as "must have WIC experience" but should assign points on the basis of experience. States should assess the quality of the experience as well as the existence of the experience.

6.6.2.2 Geographic Preference Prohibition

The USDA rule at 7 CFR 3016.36 (2)

(http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr3016.36.pdf) states that grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases in which applicable Federal statutes expressly mandate or encourage geographic preferences. Nothing in this section preempts State licensing laws; therefore, a State can require that a vendor be licensed in the State.

6.7 TYPES OF CONTRACTS

A contract is a legally binding obligation between the buyer (client) and the seller (offeror/contractor) and establishes a legally binding obligation for the seller to furnish goods and services and for the buyer to compensate the seller. The contract must clearly and accurately describe the goods and services to be delivered or performed and the terms and conditions of the agreement. Contracts should be consistent with State and Federal Government regulations, including those of OMB. Therefore, all Federal Government requirements and program procurement provisions must be included in all contracts approved by FNS. All contracts must be in accordance with individual State agency procurement or acquisition rules and regulations.

Government contracts generally are grouped into two broad categories: fixed-price contracts (including firm fixed-price contracts) and cost-reimbursement contracts.

6.7.1 Firm Fixed-Price Contracts

Although there are several types of fixed-price contracts, the Federal Government, including USDA advocates the use of firm-fixed-price contracts to acquire goods and services when feasible. Firm-fixed-price contracts provide a firm price for services delivered. In other words, the price is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This type of contract places maximum risk and full responsibility for all costs and resulting profit or loss on the contractor. Firm-fixed-price contracts provide maximum incentives for the contractor to control costs and to perform effectively, imposing a minimum administrative burden on the contracting parties. Firm-fixed-price contracts are usually implemented when the following conditions exist:

- ▶ There is adequate price competition.
- ▶ Reasonable price comparisons are available through prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data.
- ▶ Pricing comparisons are available to permit realistic estimates of the probable costs for goods and services.
- ▶ Services and quantities are known and unlikely to fluctuate.
- ▶ Processes or methods are mature.
- ▶ Requirements are stable.
- ▶ Cost control is a driving factor.

When a reasonable basis for firm-fixed pricing does not exist, other contract types should be considered, and negotiations should be directed toward selecting a contract type that will appropriately tie profit to contractor performance. For example, another type of fixed-price contract is the fixed-price contract with award fee. This contract type is used to motivate a contractor when contractor performance cannot be measured objectively, making other incentives inappropriate. The contracting officer may use a firm-fixed-price contract in conjunction with an award-fee incentive when the award fee or incentive is based solely on factors other than cost.

6.7.2 Travel and Per Diem in Fixed Price Contracts

Travel policy and per diem for contractors normally follow the specific State's travel regulations for its employees. Per diem is the allowance for lodging (excluding taxes), meals, and incidental expenses for temporary duty travel. The General Services Administration (GSA) (<http://www.gsa.gov>) establishes per diem rates for destinations within the Continental United States for Federal travelers and contractors who travel on official business. The rates should be adhered to when any work is performed under Federal government contracts. Contractors working for States should follow the State travel guidelines in a similar manner. Some State procurement laws allow the use of the GSA per diem rates for contractors.

States should define a methodology that allows travel and per diem associated with all aspects of a project, including individual tasks, to be readily identifiable within the proposal's budget. Many times these costs are embedded in the bid as a portion of the price to complete the individual task and cannot be easily separated. FNS strongly recommends that all travel and per diem be identified as a separate budget line item, with the number of events, staff, and associated costs clearly identified. Likewise, the States need to have controls in place to ensure that meetings and events that occur sequentially at a location are not over-billed. These events may have been bid as separate occurrences, but in reality occur over a collapsed period of time at one location, thus incurring less cost for air fare and transportation than originally budgeted. States should only be billed for actual costs incurred. This situation also applies to strict accounting of time sheets for hours worked, such that there should not be a 24-hour hourly rate charge when in travel status. Often, the requirements of a task change and affect the amount of travel and per diem that should be reimbursed to the contractor.

6.7.3 Cost-Reimbursement Contracts

Cost-reimbursement contracts provide for payment of allowable incurred costs to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.¹³ Cost-reimbursement contracts are used when the following conditions exist:

- Fixed-price contracts are inappropriate because of uncertainty with probable costs. Cost-reimbursement contracts may be appropriate if the service or product to be provided is unique and exact costs are difficult to determine.
- Services can be described only in general terms.
- It is likely that there will be a need to rapidly refocus efforts (e.g., changing requirements).
- The contract involves development of new processes, products, or intellectual capital for which there are few or no precedents.

¹³ FAR, Subpart 16.3.

- Technical quality or schedule performance is the driving factor.

Cost-reimbursement contracts are rare in the system development arena, but may occur in the M&O phase or with certain types of system enhancements.

6.7.4 Contract Comparisons

The biggest difference between the two major contract types is in the assignment of risk (see [Figure 6-4](#)). In fixed-price contracts, the contractor is required to deliver the product specified, and there is a maximum limit on the amount of money the Government must pay. In cost-reimbursement contracts, the contractor is required to deliver a best effort to provide the specified product. All allowable costs must be reimbursed, regardless of delivery, up to the level specified in the contract.

Figure 6-4. Comparison of Fixed Price and Cost-Reimbursement Contracts ¹⁴

Characteristic	Fixed Price	Cost Reimbursement
What is Promised	Contractor Will Deliver	Contractor's Best Effort
Risk to Contractor	High	Low
Risk to State Agency	Usually Low	High
Cash Flow	Paid On Delivery	Cost Incurred by Invoice
Fee/Profit Payment	On Delivery	Periodic
Financing	Progress/Performance Payments	None
Administration of Contract	Minimum Surveillance	Maximum Control

6.7.5 Considerations for Determining Contract Type

Among the factors to consider when making the determination of which contract type to select are the following:

- ▶ Price competition
- ▶ Price analysis
- ▶ Cost analysis
- ▶ Type and complexity of the requirement
- ▶ Urgency of the requirement
- ▶ Period of performance or length of production run
- ▶ Contractor's technical capability and financial responsibility
- ▶ Adequacy of the contractor's accounting system

¹⁴ Integrated Defense Acquisition, Technology and Logistics Life Cycle Management Framework Back of Chart, <http://www.dau.mil/pubs/IDA/chart%20back%208-5X11.pdf>

- ▶ Concurrent contracts
- ▶ Extent and nature of proposed subcontracting
- ▶ Acquisition history.

FAR Section 16 (<http://www.arnet.gov/far/current/html/FARTOCP16.html#wp226194>) states that “a *firm-fixed price contract*, which best utilizes the basic profit motive of the business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty.” [Figure 6-5](#) identifies some major differences to consider when selecting the type of contract.

Figure 6-5. Considerations for Choosing Contract Type

Firm Fixed-Price	Cost-Reimbursement
<ul style="list-style-type: none"> • Adequate price competition exists • Reasonable price comparisons are available • Known services and quantities • Little chance of requirements fluctuation • Processes and methods for service/goods delivery are mature • Cost control the driving factor 	<ul style="list-style-type: none"> • Unique services; thus, costing estimates are inexact • Uncertainty in costs • Changing requirements • Few precedents for goods and services to be delivered • Technical quality or schedule performance the driving factor

6.7.6 Service Agreements

A service agreement can take many different forms, depending upon the type and scope of the service, the service arrangement, and type of organization. State agencies should execute service agreements when IT services—such as telecommunications, network installation and maintenance, hardware installation and maintenance, and system planning services—are to be provided by their internal IT department or by other State and local agencies. Examples of service agreements include: Master Service Contracts, General Schedules, Blanket Purchase Agreements, and Service Level Agreements (SLA). These are all competitively procured by the State to provide the best value solutions available to State agencies.

Service agreements typically contain the following components:

- ▶ **Introduction**—Introduces the purpose, participants, and general service description.
- ▶ **Service Environment**—Describes the environment in which the organization will perform the service, from physical location, to hardware/software being used and the policy and procedures the service provider will need to follow.
- ▶ **Roles and Responsibilities**—Describes the roles and responsibilities of all major participants. The service provider responsibilities need to articulate not just the service tasks but also the documentation of their services, reporting their actions, and support functions (e.g., if the new service will likely initiate trouble calls, the service agreement should articulate who and how these calls will be handled)
- ▶ **Service Level**—Identifies the measurement, the service level, and methodology for assessing the service level. (Organizations may choose to articulate the service level in a

range: from unacceptable to minimum to interim to target, or they may choose to set varying service levels for various user groups or schedule times. If so, each service level will need to be articulated.)

- ▶ **Terms and Adjustments**—Provides the costs (e.g., proposed budget and schedule of charges) and period of performance of the service levels and roles and responsibilities articulated in the previous sections. Also provides processes for resolving service agreement disputes, remedying noncompliance, and amending the agreement to account for changing requirements.

IT security managers should develop their system security component of the service agreement only after negotiations with the service provider and, most importantly, in consultation with their organization's legal and contractual experts.

Although service agreements need not be submitted for prior approval, the State agency must have valid service agreements on file and available for FNS review. In addition, any equipment or software acquired through a service agreement–type relationship must have FNS prior approval if FNS may reasonably be expected to be billed for more than 50 percent of the total. Equipment may be acquired through State schedules, assuming that such schedules have been established competitively. It is also recommended that States consider the quantities of hardware or software licenses being acquired vis-à-vis guaranteed quantities under State schedules. ***Separate procurements for large quantities may be advisable and result in significant cost savings over costs incurred using State schedules.*** Costs for unapproved acquisitions or undocumented service agreements may be disallowed by FNS.

6.7.7 Performance-Based Contracting

Performance-based contracting emphasizes that all aspects of an acquisition be structured around the purpose of the work to be performed versus the manner in which the work is to be performed (e.g., broad, imprecise statements of work that preclude an objective assessment of contractor performance).¹⁵ It is designed to ensure that contractors are given freedom to determine how to meet the Government's performance objectives, that appropriate quality levels are achieved, and that payment is made only for services that meet these needs.

Performance-based contracting involves employing acquisition strategies, methods, and techniques that describe and communicate measurable outcomes rather than direct performance processes. It is a method for acquiring what is required and placing the responsibility for how it is accomplished on the contractor.¹⁶ Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed meet contract standards.

Performance-based contracting provides many benefits, including the following:

¹⁵ *A Guide to Best Practices for Performance-Based Service Contracting*, Office of Federal Procurement Policy, OMB, and Executive Office of the President, Final Edition, October 1998.

¹⁶ *Guidebook for Performance-Based Services Acquisition in the Department of Defense*, December 2000.

- √ Likelihood of meeting mission needs increased
- √ Focus on intended results, not the process
- √ Facilitating meeting the goal of obtaining better value and enhanced contractor performance
- √ Risks shifted to contractors
- √ No detailed specification or process descriptions required
- √ Encouragement to contractor innovation in proposing solutions
- √ Facilitating more meaningful and less frequent contract surveillance.¹⁷

6.7.8 Elements of Performance-Based Contracting

The *Guidebook for Performance-Based Services Acquisition (PBSA)*, published by the Office of Federal Procurement Policy (OFPP), describes the following four elements that must be present for an acquisition to be considered performance-based:

- **Statement of Objectives**—Provides a summary of the key goals, outcomes, or both, that are incorporated into performance-based acquisitions
- **Performance Work Statement (PWS)**—Identifies the technical, functional, and performance characteristics in a specification for a performance-based acquisition
- **Quality Assurance Surveillance Plan (QASP)**—Measures contractor performance
- **Incentives and Remedies**—Adjusts profit and establishes the final contract price on the basis of contractor performance.

The PWS, QASP, and incentives and remedies components are interdependent; they must be compatible in form, style, and substance and should be cross-referenced in any solicitation.

6.7.9 Quality Assurance Surveillance Plan

The FAR¹⁸ states that agencies must develop a QA plan when acquiring contractor services. The QA plan, also known as the QASP, can be part of the solicitation and is usually referenced in the PWS. However, in most cases, because of its size, it is a separate contract exhibit. The QASP recognizes the responsibility of the contractor to carry out its Quality Control (QC) obligations and contains measurable inspection and acceptance criteria corresponding to the performance standards contained in the SOW. Further, it identifies the performance standards and measures the contractor's performance. The QASP is needed to determine whether contractor services meet contract PWS requirements. Negative, and possibly positive, performance incentives based on QASP measurements should be included in this plan. The QASP will specify procedures for the reduction of fee or price when services are not performed or do not meet contract

¹⁷ *Seven Steps to Performance-Based Services Acquisition*, OFPP, online at www.acqnet.gov/Library/OFPP/BestPractices/pbsc.

¹⁸ FAR, General Services Administration, DoD, National Aeronautics and Space Administration, July 2004.

requirements and rework is not feasible. In addition, the QASP may also include positive performance incentives.

6.7.10 Incentives and Remedies

The OFPP recommends that incentives be used when they will promote better quality contractor performance. Incentives may be positive, negative, or a combination of both. They should apply to the most important aspects of the work instead of being applied to every task. Incentives should correlate with results and are best used for high-dollar efforts or efforts with a history of problems with performance or cost overruns. To achieve the greatest effect, incentives should be applied selectively to motivate contractor efforts that might not otherwise be emphasized and to discourage inefficiency. Definitions of the maximum positive and negative incentives should be clearly spelled out in the solicitation. OFPP has provided the following useful guidelines on incentives:

- √ Avoid rewarding contractors for simply meeting minimum standards of contract performance
- √ Use incentives to create a proper balance among cost, performance, and schedule factors
- √ Use incentive amounts that correspond to the difficulty of the task required but do not exceed the value of the benefits the Government receives
- √ Verify the effectiveness of incentives to ensure they accomplish what they are intended to (e.g., encourage good performance and discourage unsatisfactory performance).¹⁹

Remedies are used in performance-based contracts to specify procedures or reductions in price (or fee) when services are not performed or do not meet contract requirements. As part of the process for implementing remedies, the State agency must give the contractor the opportunity to correct nonconformance service at no increase in contract price. In addition, the State agency can choose to allow the contractor to reperform the service at no additional cost to the State agency. Acceptance procedures should be clearly identified by the State agency to ensure that the contractor adequately meets requirements. The purpose of remedies is to ensure that the State agency does not pay for services that do not meet identified requirements and performance standards.

6.7.11 Terms and Conditions

States should use contract terms to ensure that systems developed for Federal programs meet the Federal requirement for maximum practical open and full competition and that these systems are procured in the most cost-effective way. States should be aware that excessive terms and conditions such as large performance bonds, unlimited liability, and large holdbacks on payments may limit competition. States undertaking IS development projects should balance these concerns with State requirements and vendor performance remedies when contemplating the inclusion of the following in their contracts:

¹⁹ *A Guide to Best Practices for Performance-Based Service Contracting*, OFPP, OMB, and Executive Office of the President, Final Edition, October 1998.

- ▶ **Prescribed Payment Terms**—Payments or holdbacks are prorated according to the relative value of, and tied to acceptance of, deliverables. In many cases, this includes a final payment that is a substantial percentage of the total contract value (e.g., 20 percent). This amount is not paid until the system is accepted or certified. The preferred method of ensuring contractor performance is through prescribed payment terms. Payment terms may be used in conjunction with liquidated damages clauses to ensure that all contract obligations, including timeliness and quality of deliverables, are met by the vendor.
- ▶ **Liquidated Damages**—Fixed amounts are assessed to contractors for compensation of damages, which may be difficult or impossible to determine precisely, as a result of contractor nonperformance. Provision for liquidated damages, in combination with prescribed payment terms, provides the level of security needed to ensure vendor performance. Most contractors are willing, and expect, to abide by a combination of holdbacks (i.e., payment percentage terms), liquidated damages, and software escrow. While vendors must be held accountable for their performance, using one or a combination of the methods described above involves costs for contractors that are passed on to Federal and State agencies.
- ▶ **Performance Bonds**—Bonds, from which costs for noncompliance can be assessed, are secured usually through financial or insurance firms. Performance bonds, in particular, are costly, because a contractor must make a direct outlay of funds to acquire the bond and the systems initiatives being bonded are costly, which affects the cost of the bond. This increases the bid price and the cost of the project, and may deter potential bidders from doing government business and ultimately may inhibit competition.

For cases in which States have had problems or failures in systems projects, performance bonds would not have provided the compensation States seek. In these cases, performance problems most often stem from a lack of specificity in the SOW section of the RFP and other matters, including PM. When the project is effectively managed, performance issues are kept to a minimum.

6.8 CONTRACT COMPONENTS AND REQUIREMENTS

The basic format for Government contracts is outlined in [Figure 6-6](#). For brevity, not all sections are described in detail.

Figure 6-6. Uniform Contract Format²⁰

Section	Title
Part I—The Schedule	
A	Solicitation/contract form
B	Supplies or services and prices/costs

²⁰ FAR, 15.204; <http://www.arnet.gov/far>.

Section	Title
C	Description/specifications/SOW
D	Packaging and marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
Part II—Contract Clauses	
I	Contract clauses
Part III—List of Documents, Exhibits, and Other Attachments	
J	List of attachments
Part IV—Representations and Instructions	
K	Representations, certifications, and other statements of offerors or respondents
L	Instructions, conditions, and notices to offerors or respondents
M	Evaluation factors for award

The same basic format is used to issue the RFP as is used to award a contract. The RFP explains to the proposed contractor the SOW, the terms and conditions, the type of contract, delivery schedule, and the format of the proposal and evaluation factors.

State procurement regulations and standards should reflect the Federal regulations and ensure that the acquisition is conducted in the most effective and economical manner. The standards do not relieve the State agency of any contractual responsibilities. The State agency is responsible for settling all contractual and administrative issues resulting from procurements. In addition to the contract terms (i.e., holdbacks, liquidated damages, and performance bonds) that were described as incentives and remedies in performance-based contracting, additional contract requirements related to procurement standards include the following:

- ✓ **Effective Date and Term**—Identifies when the project starts and ends
- ✓ **Performance Standards**—Describes the subject matter of the contract, why the contractor has been selected, and expectations for contractor performance
- ✓ **Priority of Documents**—States that the conditions, provisions, and terms of the RFP which the contractor's proposal must meet under this contract
- ✓ **Quality of Work and Warranty**—States the requirements concerning contractor expert knowledge and skills needed to accomplish the tasking in a manner acceptable to the State
- ✓ **Modifications to the RFP**—Describes all modifications, if any, to the RFP
- ✓ **Duties and Obligations of the Contractor**—Describes the scope of work

- √ **State Duties and Obligations**—States the project management process, time limit for acceptance of deliverables, compensation requirements, contract renewal or extension requirements, and other contract modifications
- √ **Breach Procedure**—Describes the procedures for notice of breach, the right to cure, and available remedies
- √ **General Provisions**—Describes in detail the legal conditions and issues regarding the relationship between the contractor and the client, including insurance policies and compliance with Federal requirements and regulations
- √ **Special Provisions**—Lists other special conditions, such as funds availability, software piracy prohibition, and employee financial interest.

6.8.1 General and Special Provisions

6.8.1.1 *Code of Conduct and Conflict of Interest*

The State agency should maintain a written code of conduct that governs the performance of its officers, employees, or agents engaged in contract awards and administration funded in whole or in part by FNS program funds.

6.8.1.2 *Contracting with Small and Minority Firms, Women's Business Enterprises, and Labor Surplus Firms*

State agencies should be aware of the Federal regulations for how contracting applies to such concerns as small and minority business firms, women's business enterprises, and labor surplus area firms. State agencies must take affirmative steps to ensure that such businesses are used, when possible, as sources of supplies, equipment, and services.

6.8.1.3 *Free and Open Competition*

All State agency procurements must be conducted in a manner that provides for maximum free and open competition. In this regard, States should have written selection procedures that should not unduly restrict or eliminate competition. Solicitation of offers, whether by competitive sealed bid or competitive negotiation, shall accurately describe the technical requirements for the material products or services desired. These descriptions should not, in competitive procurements, contain features that unduly restrict competition. Descriptions may state the qualitative nature of the product or service desired and set forth those minimum essential characteristics and standards to which the product or service must conform. A brand name or equal description may be used to define the performance or requirements desired when it is impractical or uneconomical to describe clearly and accurately the technical requirements.

6.8.1.4 *State Agency Procurement Records and Information Systems*

The State agency must make available to FNS procurement records and provide access to all aspects of the IS. This includes design, development, operation, and work performed by any source, including cost records of contractors and subcontractors. Failure to provide this access will result in suspension or termination of FNS funds for the costs of the system and its operation.

6.8.1.5 *Ownership Rights to Software*

State or local governments must include a clause in all contracts providing that the State or local government will have all ownership rights of *any* software or software modifications and associated documentation designed, developed, or installed with Federal funding. Proprietary vendor software packages and operating systems (OS) that are provided at established catalog or market prices and sold or leased to the public are not subject to these ownership provisions. Federal funding is not available for proprietary applications software developed specifically for FNS programs. 7 CFR 3016.34

(http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr3016.34.pdf) of the regulations states: “The federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes the copyright in any work developed under a grant, sub-grant, or contract under a grant or sub-grant or any rights of copyright to which a grantee, sub-grantee or contractor purchases ownership with grant support.”

6.8.1.6 *Ownership Rights to Hardware*

Title to property whose acquisition cost is borne, in whole or in part, by FNS will become vested with the State agency upon acquisition. The State agency shall use the property for program purposes. When this need no longer exists, the State agency may use the property where needed in the administration of other programs in the following order: other Federally-funded FNS programs, other Federally-funded USDA programs, or other Federally-funded programs. When a need in any of these categories ceases to exist, the property may be used for the State agency’s own official activities under the following conditions:

- If the property had a total acquisition cost of **less than \$5,000 per unit**, the State agency may use the property without reimbursement to FNS.
- If the property had a total acquisition cost of **more than \$5,000 per unit**, the State agency may retain it for its own use, provided fair compensation is made to FNS for the FNS share of the property (compensation is computed by applying the percentage of FNS participation in the cost of the property to the current fair market value of the property).

If the State agency has no need for the property, disposition shall be made in accordance with FNS regulations. Refer to 7 CFR 3016.32

(http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr3016.32.pdf) of the regulations.

6.8.1.7 *Use of Information Systems*

Information systems designed, developed, or installed with FFP will be used for the period of time specified in the APD, unless FNS stipulates a shorter period.

6.8.1.8 *Disallowance of Federal Financial Participation*

Payments of FFP may be disallowed if FNS finds that any approved ADP acquisition fails to comply with the criteria, requirements, and other activities described in the approved or modified APD.

6.8.1.9 Use of Privately Developed Software

The following provisions of 7 CFR 3016.34

(http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr3016.34.pdf) and 277.18(I)

(http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr277.18.pdf), pertaining to grants to State and local governments, are relevant with regard to FNS' right to use privately developed software. The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and authorize others to use for the following Federal Government purposes:

- The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant
- Any rights of copyright to which a grantee, subgrantee, or a contractor purchases ownership with grant support.

This regulation means that State use of FNS funds to purchase ownership of copyright in software would give FNS royalty-free use of the software, including the right to authorize other States to use the software in FNS programs. State use of FNS funds simply to lease contractor-developed software would not give FNS such royalty-free use.

FNS requires State agencies to incorporate the above-defined Government license in any Federally-funded subgrant or contract to develop software. FNS is entitled to the above-defined Government license in software only if FNS funds are used to develop the software, or if a State uses FNS funds to purchase copyright ownership of privately developed software.

6.8.1.10 Assistance Provided by State Employee

Whether FNS may use privately developed software when a State employee may have assisted the private developer depends on the degree of assistance. If the employee's assistance is significant enough to make him or her a joint author of the software, then Section 201(b) of the Copyright Law, Title 17 of the U.S. Code (<http://www.copyright.gov/title17>) would confer ownership of the employee's share upon the State, and it could be argued strongly that Section 3016.34 of the regulations would give FNS a license, at least with regard to the employee's contribution. The Government is not in a strong position to claim licensing rights in software developed at private expense with assistance from a State employee, unless the employee's contribution is equal to co-authorship. Such rights are best addressed in a formal agreement at the time a State employee is requested by a private organization to participate in software development.

6.8.1.11 Acceptance of Free Software

Offers of free, or practically free, software should be rejected if acceptance thereof would give the offeror an unfair competitive advantage as to subsequent hardware procurement or follow-on software. This would be equal to receiving a gift from an interested party or would be an unauthorized barter arrangement rather than a gift.

[Figure 6-7](#) displays a summary of the major contract provisions that should be contained in any contract entered into by the State agency.

Figure 6-7. Basic Contract Provisions Checklist

Provision Type	Examples	
Standard Contract Provisions	<ul style="list-style-type: none"> • Governing laws of the State, county, and/or Federal Entity under whose purview the contract will be governed • Agreement duration of the start and end periods of the contract and possible extensions • Document incorporation and order of precedence (i.e., controlling order) • Scope of contract • Contract amendment provisions • Subcontracting provisions • Interpretation and disputes • Contractor hold-harmless clause • Force majeure • Record retention • Reporting requirements • Confidentiality provisions • Affirmative Action provisions • Indemnification provisions of patents and copyrights 	<ul style="list-style-type: none"> • Key personnel provision • Termination provisions • System acceptance criteria • System warranty provisions • Maintenance provisions • Payment provisions • Charges to be reported by contractors to the State agency • Liquidated damages • Notice provisions • QA provision • Risk of loss or damage provision • Ownership of source code provision • specifications (SOW) • Training provisions • Out-of-scope services • Contractor bond provisions (for action as an irrevocable letter of credit) • Limitation of liability clause • Ownership of materials provisions • Jointly developed materials provisions
FNS-Required Provisions (based on 7 CFR 3016)	<ul style="list-style-type: none"> • Compliance with Executive Order 11246 related to Equal Employment Opportunity • Compliance with the Copeland “Anti-Kickback Act” (18 U.S.C. 874) • Compliance with Section 306 of the Clean Air Act • Compliance with Section 308 of the Clean Water Act • Compliance with the Anti-Lobbying Act • Compliance with Americans with Disabilities Act • Compliance with Drug-Free Workplace requirements • Compliance with suspension/debarment requirements • FNS has royalty-free rights to use software and documentation developed 	
Commonly Found Provisions	<ul style="list-style-type: none"> • Executory clause • Nonassignment clause • Comptroller’s approval • Workers’ compensation benefits • Wage and hours provisions • International boycott prohibition • Conflict of interest 	<ul style="list-style-type: none"> • Fair practices • Antitrust • Publicity • Reduction of Federal or State funding • Penalty clause • Off-set rights • Insurance provisions

6.8.2 Required Federal Assurances

Suspension and debarment actions preclude companies and individuals from participating in Government contracts or subcontracts. Suspension or debarment by one Federal agency is Government wide and prohibits a company from doing business with other agencies. The suspension/debarment rules provide grantees with two options for obtaining satisfaction that prospective contractors are not suspended, debarred, or disqualified—check the list on the website (<http://epls.arnet.gov>) or include an applicable clause in the contract. The title of the list of suspended, debarred, and disqualified parties has been changed to Excluded Parties List System (EPLS) (<http://epls.arnet.gov>).

For IS purposes, State agencies will need to include a statement in an RFP or procurement vehicle that at least one of these actions will be taken for all viable responding vendors and a statement in the contract that this action has been taken for the selected vendor. Therefore, the contract may include a clause that requires bidders to certify that they have not been indicted as part of this process. For example, this clause may state: *In accordance with this assurance, Contractor understands that it must comply with Federal Executive Order 11246, the Copeland “Anti-Kickback Act” (18 USC 874), Section 306 of the Federal Clean Air Act, Section 508 of the Federal Clean Water Act, and that it has certified that neither it nor its principals are debarred or suspended from Federal financial assistance programs and activities and to complete and return in pursuit of such certification any appropriate form required by the State agency (see Federal Executive Order 12549 and 7 CFR Part 3017).*

Transactions subject to the suspension/debarment rules (covered transactions) include grants, subgrants, cooperative agreements, and prime contracts under such awards. Subcontracts are not included. Also, the dollar threshold for covered procurement contracts is \$25,000. Contracts for Federally required audit services are covered regardless of dollar amount.

6.9 CONFLICT OF INTEREST

“The appearance of impropriety can be as damaging as the act of impropriety.” – Anonymous

Conflict of interest situations may arise when procuring contractors for IS acquisition efforts, particularly related to planning and implementation activities. A conflict of interest is any situation that may or may appear to do the following:

- Impair a contractor’s ability to provide objective and impartial information, advice, or counsel
- Create an unfair competitive advantage for the contractor or its subcontractors.

A conflict of interest can have serious consequences for the contractor and the State agency. The contractor runs the risk of being precluded from bidding or performing future work due to a perceived unfair competitive advantage; of damaging its professional reputation; or being debarred. The State agency may suffer injury due to real or perceived bias or lack of objectivity in its work. No employee, officer, or agent of the State agency shall participate in the selection, award, or administration of a contract if a conflict of interest, real or apparent, would be

involved. Such conflicts may arise when an employee, officer, agent, or any member of his or her immediate family, his or her partner, or an organization that employs or is about to employ any of the above has a financial or other interest in the procurement.

6.9.1 Contracts with Potential Conflict of Interest

FNS strongly discourages States from pursuing combo contracts, such as PM/QA or Planning/QA. Although these areas are closely related, States should strive to promote free and open competition and avail themselves of expertise in all areas to avoid any conflict of interest. States should carefully weigh the roles and responsibilities of each area in making this decision.

6.9.2 Examples of Conflict of Interest Situations

Contractors potentially enter a conflict of interest situation when asked to do any of the following:

- ▶ Analyze or evaluate the performance of components of an agency where they have ongoing or future expectations of business
- ▶ Review products or deliverables they have helped develop
- ▶ Develop specifications or SOWs that they may wish to respond to or that will be responded to by organizations with which they have business relationships
- ▶ Provide acquisition support to an agency and also seek to be a product or system supplier to that agency
- ▶ Have access to budgetary, source selection, or other nonpublic information on future procurement programs for which they expect to compete
- ▶ Have access to sensitive third-party information that gives insight into competitor approaches to future procurements
- ▶ Streamline or perform enterprise business architecture (EBA) work (e.g., identify the appropriate architectures or interfaces, define the requirements, and integrate/implement them)
- ▶ Define or measure performance parameters against which implementers must deliver (modeling and simulation)
- ▶ Prepare, review, evaluate, or modify program and planning information
- ▶ Perform systems planning and implementation activities.

For example, no contractor is allowed to define the requirements, tasks, or skills for another contracted function and then bid on that function. This would occur if a planning contractor wrote the requirements or RFP for the QA contractor and then bid on the work, or if a project management contractor also served as a QA contractor by evaluating the project. See [Figure 6-8](#) for Conflict of Interest examples.

Figure 6-8. Conflict of Interest Examples

If the contractor:	Conflict of interest if contractor also:	Rationale:
Acts as the project manager or provides project manager assistance	<ul style="list-style-type: none"> • Develops deliverables • Reviews the quality of deliverables • Provides M&O of the system 	<ul style="list-style-type: none"> • Project manager role provides the opportunity to define and approve the work to be done. • Project manager would be involved in developing the QA plan. • Project manager would have an advantage over other contractors in providing M&O of the system by having influenced or directly defined these responsibilities and deliverables.
Defines requirements for deliverables; writes the SOW requirements	<ul style="list-style-type: none"> • Develops the system • Reviews the quality of the deliverables 	<ul style="list-style-type: none"> • Contractor would have unfair knowledge of the requirements. • Contractor would not be in position to fairly evaluate deliverables it helped defined (subjective vs. objective opinion).
Plans the development project or conducts alternatives analysis in preparation for the development project	<ul style="list-style-type: none"> • Develops the system • Reviews the quality of the deliverables 	<ul style="list-style-type: none"> • Contractor would have inside information and unfair knowledge of how system requirements and functionality were defined and may have assisted in defining the architecture and platform of the system. • Contractor may also have had influence on defining the QA plan or level of QA for the system development.
Develops the system, including functional and technical design, coding, and documentation	<ul style="list-style-type: none"> • Reviews the quality of deliverables 	<ul style="list-style-type: none"> • Contractor cannot provide objective QA of its own work.
Provides QA review of deliverables by development contractor	<ul style="list-style-type: none"> • Provides IV&V to ensure the system meets the State's requirements and functions properly. 	<ul style="list-style-type: none"> • Contractor cannot provide IV&V of deliverables it has already reviewed for QA.

6.10 DISPUTES

FNS strongly recommends, and most States' own contract language specifies, that the various documents in the procurement process be ranked in order of precedence, so that all parties understand which document prevails in the event of a disparity. The State contract must include an order of precedence or Governing Documents clause to facilitate dispute resolution. For example, the State's own language in the RFP should outrank the contractor's language in the proposal, if the two should differ. This order of precedence should then be consulted in the investigation and resolution of a dispute. It is usually labeled "Order of Precedence" or "Governing Documents" in the RFP and/or contract. The State's own standard contract or boilerplate language should also include steps for dispute resolution, which include how to initiate the process, the office with oversight, and any procedural time limits.

6.10.1 Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is an essential contract tool that includes any procedure, or combination of procedures, voluntarily used to resolve issues in controversy without the need to resort to costly and time-consuming litigation. There should be multiple levels and opportunities to settle disputes before the State agency or contractor must turn to legal remedies. Failure to include such options may force the parties into costly litigation over relatively simple matters.

The following methods are intended to suggest options that have worked in the past. They are designed to supplement, but not to replace, existing extrajudicial approaches to dispute resolution:

- ▶ **Mediation**—A neutral third party serves as an advisor to determine mutual interests and defines best and worst alternatives to a negotiated agreement. Mediation may also be called conciliation.
- ▶ **Minitrials**—Each party makes presentations to a panel composed of senior executives from each side and also a neutral party. The panel attempts to work out an equitable agreement.
- ▶ **Fact-Finding**—An impartial third party examines the issues and submits a report with a recommended settlement.
- ▶ **Partnering**—An agreement between the parties describes how they will work together to keep issues from becoming adversarial.
- ▶ **Arbitration**—A neutral third-party serves as decision maker to examine issues and render a binding opinion.

Any method that results in settlement, or partial settlement, of a contract dispute is a good method. The parties may select any ADR method for any claim of more than \$50,000. (For claims of \$50,000 or less, an Appellant may elect consideration under the Expedited Procedure, Board Rule 12.2 (http://www.usda.gov/bca/rul.html#R_12_2), without agreement by the Government. Guidelines, schedules, and requirements implementing the ADR method selected will be by agreement of the parties and the settlement judge or neutral advisor. ADR can be used successfully at any stage of an appeal, although election should be as early as possible. Proceedings generally will be conducted within 120 days of approval.

These ADR procedures are intended to shorten and simplify the ADR Board's more formalized procedures. Parties who in good faith attempt to resolve their differences by agreement will gain both time and money and be able to maintain or restore amicable relations. This tool acknowledges that unforeseen problems may occur and that no contract is perfect, allowing the State agency and contractor to engage in a collaborative process to remove obstacles and enable joint mission success.