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To: School Business Administrators, Charter School Leads,
Non Public School Administrators, Food Service Directors

From: Rose Tricario, Director
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Date: August 30, 2017

Subject: Federal Procurement Requirements for School Food Authorities

The attached guidance has been developed to provide an overview of the different methods of procurement and to provide a basic flow of the steps to be taken for proper procurement. It will assist School Food Authorities (SFAs) in understanding, and complying with, Federal procurement regulations 2 CFR Part 200; New Jersey Public School Contracts Law -N.J.S.A. 18A:18A-1 et seq.; New Jersey's Administrative Code N.J.A.C. 5:34-1 et. seq.; and the Child Nutrition Programs specific procurement regulations 7 CFR section 210.21 National School Lunch Program (NSLP), 7 CFR section 220.16 School Breakfast Program (SBP), 7 CFR section 215.14a Special Milk Program (SMP) and 7 CFR sections 250.50 - 54 Donation of Foods for Use in the United States, its Territories and Possessions, and Areas Under its Jurisdiction, as applicable, in the implementation of School Nutrition Programs.

As background, the Division of Food and Nutrition recently conducted procurement reviews on selected SFA's SY 2015-16 records. The most common issues identified were:

- the lack of a Code of Conduct for Procurement
- the lack of written Procurement Policies and Procedures **that complied with the Federal standards**
- failure to include a reference to the use of small, minority and women's businesses, business enterprises, and labor surplus firms whenever possible in procurement solicitation documents
- failure to competitively procure goods and/or services when required
- failure to adhere to Buy American Provision
- inadequate monitoring of all aspects of a Food Service Management Company's (FSMC's) operations and use of incorrect FSMC monitoring forms
- SFAs not verifying the receipt of (1) purchase discounts and rebates in full and/or (2) the proper value of USDA foods returned to their nonprofit food service account
- Unallowable costs being charged to the Enterprise Fund (60) -Food Service account

Guidance for Procurement

General Procurement Rule for ALL SFAs

SFAs must always follow State, Federal, and Program procurement regulations when purchasing from, and entering into contractual agreements with, entities for goods and/or services. All purchases must be made in a manner that reflects full and open competition. The procurement regulations apply to all contracts and means of purchasing, whether with a Food Service Management Company (FSMC), a commercial vendor or food service operations directly administered by the SFA.

SFA's must ensure that there are no improper business practices, conflicts of interests or situations that create or appear to create an unfair competition or advantage to one vendor or contractor. **Full and open competition means that all suppliers are on a level playing field and have the same opportunity to compete.** All procurement procedures, informal and formal, must be performed in a manner that assures compliance with all applicable Federal, State and local regulations and guidance.

Written Code of Conduct and Procedures for Procurement

School Nutrition Programs are required to develop and implement a written Code of Conduct covering conflicts of interest and governing the performance of employees engaged in the selection, award and administration of contracts. Each SFA must also develop and implement Procurement Procedures designed to govern procurement activities. The Code of Conduct for Procurement and Procurement Procedures should address the following:

Standard of Conduct: Maintain written standards of conduct. SFAs must ensure that any person involved in the preparation of bid documents, the procurement process, including evaluation and selection/award, or administration of the contract does not have an organizational, personal, or financial interest in the bid award, including familial relationships that have personal or financial interests in the bid award. The Code of Conduct for Procurement must state specific guidelines and limitations for an employee's actions during the procurement process specifically prohibiting employees from soliciting and/or accepting gifts, travel packages and other incentives from prospective contractors. Finally, the Code of Conduct for Procurement must provide for disciplinary actions based on the severity of the infraction to be applied for violations of such standards by officers, employees or agents of the SFA.

Responsive and Responsible Vendors: Award contracts only to responsible vendors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration should be given to such matters as vendor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Documentation: Maintain records sufficient to detail the history of procurement. These records should include, at minimum, rationale for the method of procurement, selection of the contract type, contractor selection or rejection, and the basis for the contract price.

Contract Responsibility: Be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation,

protests, disputes, and claims. Bid protest procedures are strongly encouraged as a best practice to handle and resolve disputes relating to procurements.

Product Specifications: Have written procedures for procurement transactions that incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. This description must not, in competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured, and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

Small, Minority and Women's Business: Ensure that procurement solicitation documents always include a reference to the use of small, minority and women's businesses, business enterprises, and labor surplus firms whenever possible.

All participants in the School Nutrition Programs must have policies in place regarding procurement, and all transactions must be conducted as outlined in these policies. The Division has developed several new forms to assist SFAs in developing the required procurement documents. (See Resources section at the end of this memo.)

Determination of Threshold Amount

The first step in selecting the procurement method is determining the threshold amount.

- Public and Charter Schools must compare the Federal regulations and requirements with the State and local Public School laws and requirements. Where there is a conflict between the Federal and State requirements, the regulation/law that is **most restrictive** should be followed. Most restrictive means the Federal, State, or local regulation/law that imposes the greater requirement. The Federal Simple Acquisition threshold amount used to determine whether a formal or informal procurement process is to be followed is \$150,000. However, in New Jersey the small purchase thresholds are \$29,000 (without a Qualified Purchasing Agent (QPA)) and \$40,000 (with a QPA). New Jersey's thresholds are therefore more restrictive and must be utilized.
- A QPA is the individual who is assigned the authority, responsibility, and accountability for public school purchases; has the authority and duties defined in NJSA 40A:11-9 and NJAC 5:34-5-1 et. seq.; and possesses a QPA certificate. Although New Jersey law allows the QPA to award a contract without seeking competitive quotations when the total contract price is 15% or less of the \$29,000 or \$40,000 threshold, Federal regulations are more restrictive and require that competitive quotations be obtained when procuring goods and services above the micro-purchase threshold of \$3,500. (See Micro-Purchases section).
- If desired, SFA's can set more restrictive lower small purchase thresholds, which must be indicated in their adopted procurement policies.
- Non-public schools participating in the School Nutrition Programs are required to obtain formal bids for procuring goods and/or services purchased in a single transaction when the purchase is \$150,000 or more in compliance with Federal procurement standards. For amounts below \$150,000, the micro purchase and small purchase methods should be used

accordingly. If desired, non-public schools can set more restrictive small purchase thresholds lower than the federal \$150,000 threshold, which must be indicated in their adopted procurement policies.

Choosing the Correct Procurement Method

There are two types of procurement methods, informal and formal, that all participants in School Nutrition Programs must use when purchasing food, services, and/or supplies (non-food items). The informal methods are micro-purchase and small purchase. The formal methods are sealed bids and competitive proposals. The proper procurement method to use is determined by the total cost of the purchase. Additionally, non-competitive procurement is an exception and can be utilized only under certain conditions.

Informal Procurement Methods

Informal procurement procedures are used when the purchase of food, services, and/or supplies from a supplier (wholesaler, retailer, and/or vendor) for a single transaction is less than the Simple Acquisition or small purchase threshold. The responsive and responsible vendor with the lowest total price should be selected. All information and prices discussed must be documented in the SFA's School Nutrition Program procurement files.

Micro-Purchases

Micro-purchasing may be used for the procurement of food, supplies, or services when the aggregate dollar amount does not exceed \$3,500. This base amount, or threshold, of \$3,500 was set by the Federal government as of October 1, 2015, and will be adjusted periodically for inflation. Micro-purchases may be awarded without soliciting competitive quotations if the SFA considers the price to be reasonable. To the extent practicable, SFAs must distribute micro-purchases equitably among qualified suppliers, and the SFA's written procurement procedures must include a procedure to ensure that micro-purchases are rotated among qualified suppliers.

Small Purchases

Small purchase procedures are relatively simple and informal procurement methods for securing food, services, and/or supplies that do not cost more than the Simple Acquisition or small purchase threshold. The SFA must contact at least three known suppliers of the food, services, and/or supplies needed and obtain competitive price quotations. Quotes should be obtained in writing. Quotes obtained by telephone should be followed up with a written document or communication from the vendor confirming items and prices discussed. SFAs must ensure that all suppliers receive the same information about the food, services, and/or supplies. To the extent possible, a comparison should be made of equivalent food, services, and/or supplies, and all suppliers should be informed of any special need that could affect the price. An example of a special need would be the delivery of the product to a specific building or kitchen.

When determining if the small purchase threshold applies, it is not permissible for an SFA to split a purchase into smaller units or subgroups for the purpose of avoiding the formal procurement process.

For example, if an SFA purchases \$150,000 of bread, the SFA may not split the purchase of bread between two suppliers at \$75,000 each in order to avoid the formal procurement process. This is not to say the SFA must use a single supplier for bread. If the SFA wants two different

types of bread, the appropriate method would be to complete the formal procurement process but in the bid/proposal specifications indicate that it may be a multi award contract based on the two different types of bread. The key is that the formal procurement process is conducted because the amount the SFA pays for bread in the aggregate over the course of the year will exceed the applicable small purchase thresholds.

A single transaction may refer to any of the following:

- Single purchase order for an item or items
- Aggregate total of all invoices of a service contract
- Aggregate total of all purchase orders from a single supplier

The Division has developed a sample log with instructions to assist SFAs in documenting informal procurements and a chart that will assist SFAs in the application of the appropriate procurement method based on the amount of the procurement and whether or not the SFA is a public/charter or non-public school. (See Resources section at the end of this memo.)

Formal Procurement Methods

Formal procurement procedures are used to purchase food, services and/or supplies when the single transaction cost exceeds the Simple Acquisition or small purchase threshold. Schools and non-school institutions must use a competitive process by issuing an Invitation for Bid (IFB) or a Request for Proposal (RFP) for any procurement over the Simple Acquisition or small purchase threshold. Both must be formally advertised and contain reasonable bid specifications.

Invitation for Bid

Invitation for Bid, also called a sealed bid, is a formal procurement method in which bids are solicited, and a firm fixed price contract is awarded to the responsive and responsible vendor whose bid conforms to all of the material terms and conditions of the Invitation for Bid and is the lowest in price.

Request for Proposal

Request for Proposal, also called a competitive proposal, is a formal procurement method in which proposals are solicited and either a fixed price or cost reimbursable contract is awarded to the responsive and responsible vendor whose proposal is most advantageous to the SFA's meal program with price and other factors considered. Price must be the primary consideration once the most qualified proposal is identified.

Non-Competitive Procurement

Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source. This method of procurement may only be used i) if the item is available only from a single source, ii) if a public exigency or emergency for the requirement will not permit a delay resulting from a competitive procurement, iii) the USDA or NJDA expressly authorizes a noncompetitive proposal, or iv) after the solicitation of a number of sources, competition is determined inadequate.

Group Purchasing Organizations and Third Party Purchasing Agents

All Federal, State, and local procurement regulations discussed above apply to purchasing cooperatives, group purchasing organizations, group buying organizations, and/or third party purchasing agents purchasing on behalf of an SFA. These groups must adhere to the regulations in the same manner as the SFA would if it were the purchaser. The SFA is ultimately

responsible for ensuring that all contracted vendors have been properly procured and that contract monitoring is performed. This is true even when the services are offered free of charge. More information can be found regarding purchasing cooperatives, group purchasing organizations, and group buying organizations in USDA Memo SP 05-2017 published October 19, 2016.

Buy American Provision Requirements

All procurement transactions for food when funds are used from the nonprofit food service account, whether directly by an SFA or on its behalf, procurement transactions must comply with the Buy American provision. Implementation of the Buy American provision should be done by: including Buy American in documented procurement procedures, State agency prototypes documents, and all procurement solicitations and contracts; including domestic requirements in bid specifications; contract monitoring; and verifying cost and availability of domestic and non-domestic foods using data in the USDA Agricultural Marketing Service's (AMS) weekly market report. There are limited exceptions to the provision and alternatives to consider. More information about the Buy American provision can be found in USDA Memo SP 38-2017 published on June 30, 2017.

SFA Monitoring and Recordkeeping Requirements

Procurement standards require SFAs to maintain oversight of vendors to ensure that they perform in accordance with the terms, conditions, and specifications of their contracts and purchase orders. To ensure that the FSMC performs the contracted services in accordance with the contract, the SFA must monitor the operation of the FSMC. Contract administration of a FSMC is more than just a periodic on-site visit in order to ensure that the FSMC complies with the contract and any other applicable Federal, State and local rules and regulations. The SFA must monitor the billing invoices to ensure the number of meals served is reported correctly, that the value of USDA Foods received is credited to the SFA for both the "brown box" foods and processed end-products, and that USDA Foods are used in meals served. **For SFAs with cost-reimbursable contracts, the SFA must also ensure that the value of discounts, rebates, and credits received by the FSMC are reported and credited to the SFA nonprofit food service account.**

Unallowable Costs Charged To The Enterprise Fund (60) – Food Service Account

Current Federal guidance on allowable direct and indirect costs requires that the nonprofit school food service account funds be limited to those expenses that are reasonable, necessary, and allocable to provide quality meals for the NSLP and SBP as specified in 2 CFR Part 200 Subpart E. The Enterprise Fund (60) - Food Service Account must not be used for expenditures that are not directly related to the operation and improvement of the School Nutrition Programs. Unallowable products and/or services that are not included in the original contract terms and conditions must not be invoiced to the SFA's and paid from the Enterprise Fund (60) – Food Service Account. SFAs that pay unallowable costs from the Enterprise Fund (60) will be required to reimburse the Fund from other funding sources.

RESOURCES

- **[Code of Conduct for Procurement and Procurement Checklist – Form # 325](#)**
This checklist is provided as a resource to assist SFAs in developing a Code of Conduct for Procurement document and Procurement Procedures. It provides instructions on the basic components required in these two procurement documents. If your SFA has an existing written Code of Conduct for Procurement and Procurement Procedures, cross-reference the checklist with your SFA's procurement documents to ensure that all of the applicable components are included. If your SFA does not have a written code of Conduct for Procurement and Procurement Procedures, refer to the checklist to help your SFA develop the required procurement documents
- **[Procurement Procedures for School Food Authorities – Form # 326](#)**
SFAs can use this sample form to identify their procurement plan for their USDA School Nutrition Programs.
- **[Sample Code of Conduct for Procurement – Form # 327](#)**
SFAs can use this sample form to develop their Code of Conduct for Procurement.
- **[Appendix G – Sample SFA-FSMC Monitoring Form – Form # 330](#)**
This sample SFA-FSMC monitoring form has been available as a resource in the USDA publication – Contracting with Food Service Management Companies: Guidance for School Food Authorities published in May 2016 (Reference USDA Memo SP 40-2016 published June 2, 2016). We are providing direct access to the correct form to be used by the SFA when monitoring an FSMC
- **[Informal Procurement Log Evaluation & Instructions Form – Form # 331](#)**
This informal (micro-purchase and small purchase) Procurement Log and Sample can be used to document all bids received as a result of the SFA's solicitation for purchasing products and services costing less than the applicable small threshold amount.
- **[Federal Funds Procurement Method Selection Chart – Form #358](#)**
This chart has been developed as a visual aid to assist SFAs in the application of the appropriate procurement method (formal and informal) based on the amount of the procurement and whether or not the SFA is a public/charter or non-public school.
- The link for the procurement webinar is
<https://attendee.gotowebinar.com/recording/5775636009381366019>

General procurement questions should be directed to Emma Davis-Kovacs at 609-984-1438 or **emma.davis-kovacs@ag.state.nj.us**.