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DEPARTMENT OF EDUCATION  
JUDY A. JEFFREY, DIRECTOR

TO: Superintendents  
School Food Authority  
School Food Service Directors/Managers  
Business Managers

cc: Iowa Educators Consortium

FROM: Jim Addy, Administrator, Division of School Support and Information  
Julia Thorius, Chief, Bureau of Nutrition, Health, and Transportation Services

DATE: March 2, 2010

RE: Important Information about Procurement of Items for the National School Lunch,  
School Breakfast and related Programs – ALLOWABLE USE OF SCHOOL  
NUTRITION PROGRAM FUNDS

## PLEASE ROUTE AS NEEDED

The United States Department of Agriculture (USDA) has recently determined that some of the procurement practices used in Iowa by some school food authorities (“SFAs”) and at least one cooperative regarding the National School Lunch, School Breakfast and related Programs are deficient. *Many school districts will need to actively begin to make changes now to be in full compliance no later than July 1, 2010.*

SFAs are reminded that the School Meal Programs are grant programs from USDA that use public funds. Accordingly, how those funds are used is strictly regulated.

All cooperatives are subject to the same procurement requirements as are SFAs. What this means for SFAs that purchase from a cooperative is as follows:

1. *General obligations of an SFA vis-à-vis a cooperative.* Members of a cooperative are to be active participants in the cooperative, by being involved with the development of product specifications, bid documents, evaluation of bids, and appropriate monitoring. As a member, the SFA is responsible for being sure all practices followed by the cooperative are in full compliance with USDA regulations, this includes such things as making sure all pricing is net of all rebates and discounts, that if fees are charged that it is a fixed fee for the period of the contract (note: cost plus a % fee is not allowable in any circumstance), that appropriate Buy American provisions are included in bid documents, etc. Each SFA doing business with a cooperative must know which items are and are not part of the cooperative’s “market basket.” In addition, if fees are charged (either directly to the SFA or paid by the vendor selected by the cooperative) the SFA must know how

Grimes State Office Building - 400 E 14th St - Des Moines IA 50319-0146

PHONE (515) 281-5294 FAX (515) 242-5988

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the cooperative is using the fees that it charges. Fees may only be used to pay expenses allowable as school nutrition fund expenditures in accordance with USDA regulations and policy. Any fees returned to the SFA, must be deposited in the non-profit school nutrition program fund of the local district and used only for allowable school meal program purposes.

2. *Items offered through a cooperative.* While participation in a cooperative provides schools with certain advantages, such participation does not excuse schools from doing some level of independent procurement. Regarding items in the “market basket,” the SFA is expected to – at a minimum – sample the market regarding equivalent product, to determine if being a member of and buying items included in the market basket through the cooperative is indeed cost effective for the school district. This sampling may be done formally or informally but needs to be done fully with consideration for fair and open competition. This might include comparing prices with at least two other comparable vendors, for at least three of the highest dollar volume products the SFA anticipates purchasing within each category of the market basket. Categories would vary with the market basket bid, but might include such things as entrees, canned or frozen fruits and vegetables, paper products, etc. In doing the comparison, the specifications and volume the SFA anticipates buying through the cooperative should be used. Whether this comparison is done informally or formally, full documentation of the comparison must be kept on file for three years (or until resolution of any audit or review findings) to justify buying from the cooperative. Generally, this initial comparison/justification could be used for a three-year period, unless there is a significant change to the market basket, types of expenditures by the SFA and/or a new vendor selected by the cooperative; or new vendors enter the market; or other substantive changes that would warrant a new comparison sooner.
3. *Items not in “market basket.”* Any item not included in the original “market basket” in the vendor contract between the cooperative and cooperative’s vendor cannot be offered to schools as if it were part of the contract. Schools that purchase items for the school meal programs, through a cooperative, using the school nutrition fund account, need to know what is in the “market basket” of items involved in the vendor contract between the cooperative and its vendor. Any items offered to a school that were not in the original market basket would be items that were not procured following free and open competition policies that schools must follow, and therefore could not be purchased using non-profit school food service funds. In following bid law for such items, a school must independently obtain competitive bids either formally or informally following District/USDA procurement policy/law. In this situation, for the SFA to consider buying from the cooperative’s vendor, that vendor must submit pricing to the SFA following the same procedures as all other vendors. A school may not just accept the price offered through the cooperative’s vendor. However, after following appropriate bid law, if the cooperative’s vendor has the lowest responsible bid, the school may then contract with that vendor for the item. Note again, documentation of the formal or informal procurement processes must be kept on file for three years or until resolution of any audits or reviews.

In summary, the same USDA procurement rules for the school nutrition program apply to school districts whether participating in a cooperative or buying everything as an individual district. Any school district that is not in full compliance with the USDA requirements for procurement must begin to make the necessary changes immediately for full compliance. In situations where a school district is currently procuring some products through a cooperative that are outside of the “market basket” items from the initial or base year bid, changes should be made as soon as possible, but no later than July 1. This will include following the protocols described above relative to participation in a cooperative, conducting formal (or informal) procurement based on District/USDA policy and law for any products not included in the original “market basket.” Full compliance with all procurement requirements is required for any and all products to be purchased using the non-profit school nutrition program fund *no later than July 1, 2010*. Failure to do so will require any funds expended from the non-profit school nutrition program account to be returned to USDA and paid for using general funds or funds other than the school nutrition program account.

Questions should be directed to Patti Harding, Administrative Consultant School Programs [Patti.Harding@iowa.gov](mailto:Patti.Harding@iowa.gov) or [Julia.Thorius@iowa.gov](mailto:Julia.Thorius@iowa.gov) or your assigned Bureau Consultant.

The following excerpts are provided as a reminder of the USDA’s procurement policy.

#### **EXCERPTS:**

7 C.F.R. section 210.21 Procurement.

- (a) General. State agencies and school food authorities shall comply with the requirements of this part and 7 CFR Part 3016 or 7 CFR Part 3019, as applicable, which implement the applicable Office of Management and Budget Circulars, concerning the procurement of all goods and services with nonprofit school food service account funds.
- (d) Buy American.--(1) Definition of domestic commodity or product. In this paragraph (d), the term ‘domestic commodity or product’ means--
  - (i) An agricultural commodity that is produced in the United States; and
  - (ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.
- (2) Requirement. (i) In general. Subject to paragraph (d)(2)(ii) of this section, the Department shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products... for the school lunch program under this part.

7 C.F.R. section 3016.36 Procurement.

- (b) Procurement standards. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.
- (2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- (5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and

services.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(c) Competition. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of Sec. 3016.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ``brand name'' product instead of allowing ``an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which 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, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ``brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of procurement to be followed. (1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000).<sup>1</sup> If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(4) Procurement by noncompetitive proposals is procurement through

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<sup>1</sup> SFAs are to follow their local procurement policies if their local policies are more stringent than the USDA policy. If the local board policy of an SFA sets the acquisition threshold at \$25,000, e.g., this is the threshold at which the SFA must conduct formal procurement.

solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(f) Contract cost and price. (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see Sec. 3016.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.