

Kentucky Educational Development Corporation (KEDC)

This procurement plan provides a written description of the procurement procedures that are used when procuring goods and services for the federal Child Nutrition Program. SFAs are required to have and use written procurement procedures that comply with the federal regulations, laws, and policies. However, SFAs must also follow any applicable State and local procurement requirements when they are stricter than but not in contradiction to what is federally required.

While not required by SCN for this procurement plan to have an official approval by the schools governing body or administration, it is important that they are knowledgeable of the procedures that are reflected in this document and understand that they must be used when procuring for the Child Nutrition Program. These procedures should be reviewed at least once annually and updated at the frequency needed to remain current with what is required for the SFA to follow.

This procurement plan is implemented beginning SY 2023-2024

  
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Chief Executive Officer

7/20/23  
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Date

  
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Board Chair

7/20/23  
\_\_\_\_\_  
Date

Approved at

JUL 20 2023

KEDC Board Meeting

value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the SFA.

If the SFA has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the SFA must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the SFA is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

**NOTE:** If the SFA has a different code of conduct implemented, ensure that it meets the minimum federal requirements and then replace the Code of Conduct provided below.

KEDC has implemented the following Code of Conduct:

The following conduct will be expected of all persons who are engaged in the awarding and administration of contracts supported by Child Nutrition Program Funds.

- No employee, officer or agent of KEDC shall participate in the selection or in the award or administration of a contract supported by program funds if a conflict of interest, real or apparent, would be involved.
- Conflicts of interest arise when one of the following has a financial or other interest in the firm selected for the award:
  - a. The employee, officer or agent;
  - b. Any member of the immediate family;
  - c. His or her partner;
  - d. An organization which employs or is about to employ one of the above;
  - e. A less-than-arms-length transaction. This is one party's ability to control or influence the other party to the transaction. A less-than-arms-length transaction occurs:
    - i. When a transaction is conducted between related parties, meaning that the integrity of the transaction could be compromised;
    - ii. When one party to the transaction is able to control or influence the actions of the other party.
    - iii. Examples include:
      1. Hiring an administrator's relative as a favor;
      2. Purchasing goods or services from a business owned by an officer, employee, or relative of the Sponsor's entity.
      3. Agreement for equipment maintenance between a business and person who are related to the Sponsor's employees or board members.
- KEDC employees, officers or agents must not solicit or accept gratuities, favors, or anything of monetary value from prospective contractors/vendors, potential contractors, or parties of subcontract.
- KEDC must set standards when financial interest is not substantial, or the gift is an unsolicited item of nominal value and may be acceptable.

procuring goods and services for its members.

**CNP State agency cooperative agreements:**

Although not a co-op, contracts procured by the state agencies that administer the child nutrition programs in the state may be used without conducting further procurement by SFAs. In Kentucky this includes KDE contracts (e.g. Point of Service contract) and KDA contracts (e.g. Hauling of commodities).

Whenever a SFA only group purchasing model is used:

- The procurement must be conducted in compliance with the procurement standards that apply to an individual SFA. This includes the procurement requirements in 7 CFR 210, 7 CFR 220, 2 CFR 250 and 2 CFR 200.317-.327, as well as any state and local procurement standards, if more restrictive.
- Solicitations must be published and clearly identify all product descriptions, specifications, and estimated quantities required, and all terms, conditions, required contract provisions as applicable.
- When applicable, the solicitation and contract must outline how the allocable portion of each discount, rebate and/or credit will be returned and/or disclosed to each participating SFA.
- When applicable, the solicitation and contract must also outline how each proportionate value pass-through method for crediting the value of USDA foods will be returned and/or disclosed to each participating SFA.

If an SFA determines that additional goods and services are needed but were not procured by the SFA only co-operative group, the SFA must conduct a separate competitive procurement process following their own procurement procedures to purchase them.

- **Procurement Agents:**

If a procurement agent was used to procure a contract available through an intergovernmental or an interagency agreement, the procurement agent must have been properly procured. A procurement agent is an individual or business authorized to act on an entity's behalf. Agents must have been procured using one of the federal procurement methods that contractually required them to conduct all competitive procurements with the SFAs interests solely in mind. SFAs must ensure that all contracts were procured by a procurement agent in an acceptable manner and maintain all documentation of the procurement process in their records prior to use.

Procuring a procurement agent:

1. The scope of duties and responsibilities of the procurement agent must be clearly defined in the solicitation, as well as how prices/costs for services are to be quoted for evaluating agents' bids/responses for contract award.
2. When fees are charged, the SFA must ensure that the fees are fixed based on a purchase unit, volume or cost (fees cannot be a percentage of cost). Agents cannot be considered if they do not openly provide the full price per purchase unit for their service. Paying a fee does not constitute a solicitation or contract with an agent.
3. Ensure that the following required solicitation and contract language is included:  
"When procuring goods or services for their client, agents must follow procedures consistent with 2 CFR Part 200.317-.327 and applicable program regulations" (including state and local procurement requirements if more restrictive).

Similar to the Non-CNP state agency contracts, SFAs may consider these agreements or contracts as one response or one source of price when conducting a competitive procurement. If the purchase is under the SFAs micro-purchase threshold, the SFA may purchase directly from these sources using micro-purchase procedures. If the procurement is less than the SFAs small purchase threshold, the SFA may obtain a price or rate quotation from these sources.

For procurements over the SFAs small purchase threshold, the SFA must:

1. Conduct a cost analysis,
2. Develop a solicitation (sealed bid or competitive proposal), and
3. Use the contracted vendors and prices from the inter-agency contract as one response or source.

The procurement of the inter-agency contracts does not replace the competitive procurement process that is required to be conducted by the SFA. Rather, the inter-agency contracts give SFAs additional sources that may be utilized when conducting a competitive procurement.

**Group Purchasing Organizations:** The business model of a GPO may include a variety of services such as facilitating procurement for their members/member agencies and procuring products and services from an external source such as an affiliated or unaffiliated full-line distributor. Other examples that GPO's may be called include third party purchasers, group buying organizations, and procurement cooperatives.

Paying a membership fee or conducting a formal procurement for the services of a GPO does not constitute compliance with the competitive procurement process that must be followed by SFAs to enable the use of the GPOs contracts, price lists, discounts, or services outside of the SFA conducting a competitive procurement process. Similar to the Non-CNP state agency contracts, and inter-agency agreements, the SFA may consider the prices available through the GPO contracts or agreements as one response or one source of price when conducting a competitive procurement. SFAs may pay a membership fee to multiple GPOs and when using micro or small purchase procedures and may consider the price for products from GPOs as one source among an adequate number of qualified sources.

For procurements over the SFAs small purchase threshold, the SFA must:

1. Conduct a cost analysis,
2. Develop a solicitation (sealed bid or competitive proposal), and
3. Use the contracts and prices from the third-party entity as one response or source, or the GPO may independently respond to the solicitation.

The procurement of access to the services of a third-party entity or the payment of a membership fee does not replace the competitive procurement process that is required to be conducted by the SFA. Rather, the third-party entity provides an SFA additional sources that may be utilized when conducting a competitive procurement.

- **Piggybacking onto Existing Contracts:** Prior to piggybacking onto an existing contract, the SFA must obtain the documented history of the procurement in order to determine that contract was procured in compliance with 2 CFR Part 200.318-.327 and the applicable program regulations.
  - The procurement history documentation collected must include all documents demonstrating the details of the procurement that is relevant for the procurement method conducted.
  - Contracted parties considering additional parties must have included a provision allowing "piggybacking" or the addition of additional entities in their contracts in order to avoid creating

In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.

Situations considered to be restrictive of competition include but are not limited to:

- 1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- 2) Requiring unnecessary experience and excessive bonding;
- 3) Noncompetitive pricing practices between firms or between affiliated companies;
- 4) Noncompetitive contracts to consultants that are on retainer contracts;
- 5) Organizational conflicts of interest;
- 6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
- 7) Any arbitrary action in the procurement process.

**Geographic Preference 2 CFR 200.319(c):**

The use of state, or local geographical preferences in the evaluation of bids or proposals is prohibited, except as expressly allowed by USDA to mandate or encourage geographic preference.

As amended, the National School Lunch Act (NSLA) allows SFAs receiving funds through a Child Nutrition Program to apply a geographic preference when procuring unprocessed, locally grown or locally raised agricultural products. The ability to apply a preference for local products applies only to unprocessed or minimally processed items. The geographic preference rule does not apply to any products that have been cooked, heated, canned or that have any additives or fillers. It can be applied to a wide array of products that meet the definition of unprocessed or minimally processed such as various forms of fruits, vegetables, meats, fish, poultry, dairy, eggs, and grains.

Definitions for local vary widely depending on the unique geography and climate where a school is located and on the abundance of local food producers and manufacturers. Local may be defined as within a certain number of miles from the school, within the county, or within the state. Alternatively, definitions might include more than one state (i.e., Kentucky, and Tennessee) or distinct parts of states (i.e., specific counties in southwest Kentucky). In addition, different definitions of local can depend on the product or season.

When determining what will be considered local, the SFA must ensure that there is adequate competition within the defined area for the products to be procured. If there is inadequate competition in the defined geographic area, the SFA must re-examine their definition of “local” for the procurement.

Locally grown/raised means within Kentucky or contiguous states.

**Written Procedures for Procurement Transactions 2 CFR 200.319(d):**

The SFA will follow their written procedures for conducting procurement transactions to ensure that all solicitations:

1. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must 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, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its

### **Section C: Methods of Procurement to Be Followed 2 CFR 200.320**

The SFA must have and use documented procurement procedures, consistent with the standards of this section and 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required the operation and administration of the Child Nutrition Program. The SFA must utilize a federal procurement method for each purchase or procurement in which Child Nutrition Funds are expended.

- 1) Informal methods
  - Micro-purchases
  - Small purchases
- 2) Formal procurement methods
  - Sealed Bids
  - Competitive Proposals
- 3) Noncompetitive Procurement

Thresholds for these procurement methods are set at the federal level, the state level, and the local level. State and local thresholds may be more restrictive than the Federal thresholds, but they may not be more permissive than the federal levels. The most restrictive (lowest) threshold that applies to the SFA must be followed when conducting procurement.

The procurement standard regarding records in 2 CFR 200.318(i) requires that the rationale for the procurement method used is documented in the records detailing the history of a procurement.

When determining whether to use informal or formal procurement procedures, there are two (2) main factors that should be considered:

1. The estimated value or cost of a purchase or procurement.
2. The length of time vendors may guarantee a price.

**Estimated Value or Cost:** An independent estimate of what the value or cost of an anticipated procurement should be determined early in the procurement process. There are multiple sources that an independent estimation of cost may be based on.

These include, but are not limited to:

- Published price lists, commercial catalogs or published commodity market indexes.
- Historical prices paid for same or similar items.
- Existing Federal contract prices
- Survey of other SFAs for what they pay, or price quotes received for the same or similar items.
- Information received through a Request for Information (RFI) process.

When using historical prices there may be known factors that will increase the estimated price, such as the consumer price index (CPI). These known factors should be included in your independent cost estimate.

If the estimated value or cost of the procurement is at or above the small purchase threshold, the procurement must be formally solicited. If the estimated value or cost of the procurement is below the small purchase threshold, the procurement may be informally solicited.

**Length of time price is guaranteed:** When price and/or availability of food items are subject to significant fluctuations it may not be feasible to find vendors who will guarantee a fixed bid price for a full year. Breaking these purchases up into smaller procurement transactions to benefit from market conditions may allow for the use of an informal procurement method.

Chief Executive Officer or designee is responsible for:

- Determining the value or cost of the procurement (aka independent cost estimate).
- Determine the procurement method that will be used.

#### **Informal Procurement Methods 2 CFR 200.320(a):**

There are two (2) informal procurement methods:

- Micro-purchase procedures
- Small purchases procedures

The SFA may utilize the informal procurement methods when the estimated cost of the goods and services to be procured will be below the applicable threshold for each method. Even in situations where micro-purchase procedures may be used, small purchase procedures should be utilized if it is determined to be more advantageous to do so.

The Chief Executive Officer or designee is responsible for documentation of each micro-purchase transaction:

- ✓ Rationale/Justification for using micro-purchase method.
- ✓ Written specifications of the goods or services procured (i.e., a solicitation).
- ✓ Vendor Name and relevant contact information.
- ✓ Purchase date.
- ✓ Itemized receipt of purchase that includes what was purchase and the amount paid.
- ✓ The method used by the SFA used to determine that the price was reasonable.
- ✓ Receipts, invoices, and payment history.

### **Small Purchase Procedures 2 CFR 200.320(a):**

Small purchase procedures may be used when goods or services have an aggregate total cost that is equal to or less than the SFAs small purchase threshold. When small purchase procedures are used, price or rate quotes must be obtained from an adequate number of qualified sources as determined by the SFA.

#### Small Purchase Procedures:

1. **PLANNING:** Identify the goods or services to be procured, ensure that it is necessary to be purchased for the program, and identify the anticipated cost of the procurement.

Chief Executive Officer or designee is responsible for:

- Planning for the procurement.
  - Ensuring the amount of the procurement will not exceed the SFAs small purchase threshold.
2. **DEVELOP A WRITTEN SOLICITATION:** A written solicitation document will be developed for each small purchase procurement. The solicitation document will include the written specifications for the goods and services to be procured including the Buy American Provision requirements when applicable, any additional technical requirements that a vendor must be able to provide, such as delivery requirements, and any applicable information that may be relevant to the vendors response to the solicitation. The specifications and technical requirements will be written so that they allow for full and open competition. No unreasonable requirements will be used such as unnecessary experience requirements, or the specification of a “brand name” product without allowing “an equal to” product. Once developed, the solicitation document will be used to obtain 2 or more price quotes and/or pricing information as appropriate from responsible vendors.
  3. **OBTAIN PRICE QUOTES:** Price quotes may be obtained orally, in writing, or from electronic sources. All prospective vendors will be provided the same solicitation information when obtaining price quotes. The responses of other vendors will not be shared with other prospective vendors until the purchase has been awarded.

Chief Executive Officer or designee is responsible for:

- Ensuring that solicitations are developed and include written specifications of the goods or services to be procured (including the Buy American Provision when applicable), any additional technical requirements for vendors, such as delivery requirements, and any applicable information relevant to the procurement that may affect a vendors response.



### **Formal Procurement Methods 2 CFR 200.320(b):**

There are two formal procurement methods that may be used when procuring goods and services for the Child Nutrition Program:

1. Sealed Bids
2. Competitive Proposals

The SFA will utilize one of the formal procurement methods when the estimated cost of the goods and services to be procured will be above the small purchase threshold. Formal procurement methods may be utilized when purchases are estimated to be under the small purchase threshold if it is determined to be appropriate or more advantageous to do so.

### **Sealed Bidding 2 CFR 200.320(b)(1):**

The Sealed Bidding procurement method is the preferred method to use when conducting a formal procurement where there is no substantive difference, other than price, of products or services that meet established specifications. A firm fixed price (lump sum or unit price) contract will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bid, is the lowest in price.

When determining if sealed bidding is feasible, the following conditions should be determined to be present:

- ✓ A complete, adequate, and realistic specification or purchase description is available;
- ✓ Two or more responsible bidders are willing and able to compete effectively for the business; and
- ✓ The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

### Sealed Bidding Procedures:

1. **PLANNING:** Identify the goods or services to be procured, ensure that it is necessary to be purchased for the program, and identify the anticipated cost of the procurement.
2. **DEVELOP A SOLICITATION DOCUMENT:** An Invitation for Bid (IFB) is used when using the sealed bidding procurement method.

The IFB should include:

- Written specifications or description of the products or services needed.
- Terms and conditions of the contract.
- Any attachments or instructions needed for the bidder to properly respond.
- Identification of the type of contract to be awarded.
- The federal contract clauses and provisions as applicable.
- An explanation of how the contract will be evaluated for contract award (Line item, Total Cost, or Market Basket).
- If value-added language (broad language inviting incentives or investments) is included, stated criteria for how this will be evaluated, and a statement informing the bidder that the unallowable cost items will be excluded prior to the evaluation for contract award. Unallowable

Bids will only be deemed responsive to the solicitation when all specifications, terms, and conditions (including buy American requirements when applicable) are met. When bids are deemed non-responsive to the solicitation, the reason they have been deemed non-responsive will be identified and documented.

When a response includes an offer of goods or services that is beyond what was solicited, the overly responsive offer will either be eliminated from consideration, or the portion deemed to be overly responsive will not be considered when evaluating for contract award.

All bids deemed responsive to the solicitation will be evaluated as described in the solicitation for contract award. A fixed price contract will be awarded to the responsible bidder(s) with the lowest price bid.

One of the following methods will be used to evaluate the lowest price bid for contract award:

- Bottom Line or Total Cost Analysis: The prices and anticipated quantities are totaled for all items being procured. The lowest total priced bid from a responsive vendor is selected for the award.
- Line-Item Analysis: Each item listed on the bid is individually awarded to the lowest bidder.
- Market Basket Analysis: A representative sample that reflects 75% or more of the estimated contract value (estimate cost of items and expected quantities needed) is evaluated for contract award. The lowest bid from a responsive vendor is awarded the contract. Although not evaluated for contract award, the bidder must provide pricing for all items bid which then becomes the contracted price for those items. Goods may be added to the contract after contract award if that option was allowed in the solicitation, if the total value of all additional goods does not exceed the amount specified in the contract (limiting additional cost to 5-10% is recommended), and added goods are included in a contract amendment.

The Chief Executive Officer or designee is responsible for ensuring that bid openings, acceptance or rejections, evaluations and contract awards are made in compliance with requirements.

## 6. RECORDKEEPING:

The Chief Executive Officer or designee is responsible for documentation of records ensuring that the history of Competitive Sealed Bidding Procurements is adequately documented (2 CFR 200.318(i)).

The following documents will be maintained:

- ✓ Rationale for the procurement method used.
- ✓ The independent cost estimate of goods or services determined prior to advertising the IFB with documentation of the market research conducted (if any).
- ✓ A copy of the Invitation for Bid and any amendments that were published.
- ✓ Documentation evidencing advertisement of the procurement.
- ✓ Documentation concerning the pre-bid or proposal conference (if applicable) and/or any solicitation Questions and Answers.
- ✓ Signed acknowledgement of any solicitation amendments.
- ✓ Documentation concerning any "No Bid" letters or correspondence and the disqualification of bidders ("nonresponsive").

- The time and date in which proposals must be received.
- Any other pertinent information needed to enable the vendor to respond to the solicitation.

The SFA will ensure that the specifications, terms, criteria for evaluation and the conditions in the RFP will not unnecessarily limit competition by, but not limited to:

- Ensuring all specifications, terms and conditions are reasonable.
- Not requiring unnecessary experience.
- Not specifying “brand name” products. An “equal” product with performance or relevant requirements will always be allowed.
- Not using specifications developed by vendors.
- Not using arbitrary actions that may directly or indirectly limit competition.
- The criteria to be scored in proposals will be clearly identified and will be both objective and measurable.
- The criteria to be scored will include price and other criteria such as product specifications, service and deliveries, geographic preferences for local products, and overall qualifications. Price will have the highest weight of the criteria used.
- How each criterion will be scored is clearly described in solicitation documents.

The Chief Executive Officer or designee is responsible for ensuring the Request for Proposal solicitation document includes all necessary information and does not limit competition.

3. **PUBLICLY ADVERTISE:** The Request for Proposal (RFP) will be publicly advertised for a length of time that provides sufficient time to solicit from an adequate number of qualified vendors. RFPs will be advertised on the internet to publicize the intent of the Child Nutrition Program to purchase needed items or services. The advertisement for proposals or legal notice will be run for a minimum of seven calendar days. Additionally, known suppliers may be directly contacted and informed of the solicitation’s availability. Affirmative steps to include Minority Businesses, Women’s Business Enterprises, and Labor Surplus Firms will be utilized. The announcement (advertisement or legal notice) will contain a general description of items to be purchased, the deadline for submission of proposals and the address where complete specifications and other procurement documents may be obtained.

The Chief Executive Officer or designee is responsible for ensuring the Request for Proposal solicitation is publicly advertised for an adequate length of time to solicit from an adequate number of suppliers.

If any potential vendor has questions concerning the specifications or purchase conditions, an interpretation will be provided by the Chief Executive Officer or designee.

4. **EVALUATION AND CONTRACT AWARD:** RFPs will be accepted, evaluated, and awarded a fixed price or cost-reimbursable contract as described in the solicitation. Any proposals that are rejected will have a documented sound reason for doing so. No contracts will be awarded to bidders that developed the specifications or descriptions for the procurement. When a response includes an offer of goods or services that is beyond what was solicited, the overly responsive proposal will either be eliminated from consideration, or the portion deemed to be overly responsive will not be considered when evaluating for contract award.

- ✓ Correspondence/documentation related to complaints or vendor performance.
- ✓ Invoices and Payment Vouchers.
- ✓ Contact administration correspondence between the SFA and the Vendor.
- ✓ Correspondence/documents concerning contract close-out.

**Noncompetitive Procurement Procedures 2 CFR 200.320(c):**

There are specific circumstances in which noncompetitive procurement may be used. Noncompetitive procurement will only be conducted if one or more of the following circumstances apply:

- 1) The aggregate dollar amount of the goods or services needed does not exceed the micro-purchase threshold. (Micro-purchase procedures will be followed.)
- 2) The item is available only from a single source.
- 3) The public exigency or emergency for the purchase will not permit waiting for the time required to publicize and award a competitive solicitation.
- 4) School and Community Nutrition expressly authorizes a noncompetitive procurement in response to a written request.
- 5) After solicitation of a number of sources, competition is determined inadequate. (i.e. only 1 response received to a competitive solicitation, or no responses received were fully responsive to a competitive solicitation).

**Inadequate Competition and Sole Source:**

In accordance with 2 CFR 200.324(b) the SFA will negotiate profit as a separate element of the price for each contract in which there is no price competition (sole source or only one response to the solicitation received). 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 vendor, the vendors 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.

When inadequate responses are received from a solicitation, the SFA will evaluate if the lack of responses may be due to a poorly written solicitation or if the written specifications and technical requirements established are too restrictive. The SFA will also evaluate the solicitation to determine what changes may be needed to have a competitive procurement process in the future.

The Chief Executive Officer or designee is responsible for negotiating profit as a separate element of the price for each contract in which there is no price competition. (Sole source or only one response to solicitation received)

The Chief Executive Officer or designee is responsible for evaluating if the lack of responses may be due to a poorly written solicitation or if the written specifications and technical requirements established are too restrictive.

**Public Exigency or Emergency:**

Lack of planning is not considered an emergency and will not justify conducting noncompetitive purchasing. Even when a public emergency is enacted, the individual circumstance of the SFA is still the determining factor if noncompetitive procedures can be used.

**Section D: Minority Businesses, Women’s Business Enterprises, and Labor Surplus Firms (2 CFR 200.321):**

SFAs must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible.

The following affirmative steps must be taken:

- 1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- 2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- 3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- 4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- 5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- 6) Requiring third party entities and procurement agents who may procure on behalf of the SFA to take the same affirmative steps in the procurement process.

- ✓ Alternatives that the SFA considered prior to approving an exception. (e.g. substitute domestic pears for non-domestic bananas may have been considered).
- ✓ The reason(s) why the SFA decided to grant the exception to substitute a non-domestic product for a domestic one.

Exception granted for a significant cost difference:

- ✓ Communication(s) from the vendor indicating that there is a significant cost difference between a domestic and non-domestic product. (Can be emails, documentation of telephone communications, etc.)
- ✓ The cost of the domestic and non-domestic product compared.
- ✓ Alternatives that the SFA considered prior to approving an exception.
- ✓ The reason(s) why the SFA decided to grant the exception to substitute a non-domestic product for a domestic one.

The Chief Executive Officer or Designee is responsible for receiving exception requests from vendors, reviewing the request to see if it is for an allowable exception, determine if an exception request from vendors will be approved, and ensures all actions are adequately documented.

**Monitoring of Buy American Requirements:**

To ensure that contractors perform in accordance with contracts or purchase orders, the SFA will review products and delivery invoices or receipts to ensure the domestic food that was solicited and awarded is the food that is received. In addition, a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses will be conducted in order to ensure the products received are the ones solicited, and awarded, in compliance with the Buy American provision.

Procedure to monitor when deliveries are received:

1. Product labels and packaging are inspected to identify non-domestic food products when food deliveries are received.
2. If any products are substituted in the delivery, the product packaging and labels will be inspected to ensure they comply with Buy American requirements. If the country-of-origin information is not identified, the vendor will be contacted to obtain the country-of-origin or a certification of the % of U.S. content.
3. When non-domestic **USDA or DOD food products** are delivered:
  - a) The product will be rejected.
  - b) The Kentucky Department of Agriculture (KDA) will be contacted immediately.
  - c) All of the shipping and receiving information for the product will be provided to KDA.
  - d) A complaint will be logged in the WBSCM.
4. When **non-USDA or DOD foods**, the process for addressing vendor non-compliance will be implemented when the unapproved non-domestic products are delivered.

**Section F: Procurement of Recovered Materials 2 CR 200.323:**

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

#### **Section H: FNS or SCN Review of Records 2 CFR 200.325:**

The SFA will make available, upon request of the USDA Food and Nutrition Services (FNS) or School and Community Nutrition (SCN) the technical specifications on proposed procurements where FNS or SCN believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. If conducted, this review will take place prior to the time the specification is incorporated into a solicitation document. However, if the SFA desires to have the review accomplished after a solicitation has been developed, FNS or SCN may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

The SFA will make available upon request, to FNS or SCN pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

1. The SFAs procurement procedures or operation fails to comply with the federal procurement standards;
2. The procurement is expected to exceed their small purchase threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
3. The procurement, which is expected to exceed their small purchase threshold, specifies a "brand name" product;
4. The proposed contract is more than their small purchase threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
5. A proposed contract modification changes the scope of a contract or increases the contract amount by more than their small purchase threshold.



**Section J: Solicitation and Contract Clauses and Provisions 2 CFR 200.327:**

Contracts used by SFAs are required to contain the clauses and provisions set forth in the Federal Uniform Requirements, Cost Principles, and Audit Requirements for Federal Awards 2 C.F.R. Pt. 200, App. II., as applicable. Contracts must also conform to the program specific regulatory requirements set forth in 7 CFR 210, 7 CFR 220, and 2 CFR 250 as applicable.

SFAs must determine which of the following clauses and provisions are applicable to a particular procurement and include them in the solicitation and contract documents when required. When federal funds will be used to pay for purchases made from an awarded contract, all the federally required contract clauses and provisions must be included. This requirement applies whether the SFA is conducting their own procurement, or when using contracts that are procured by the district, co-operative groups, and third-party entities.

The tables below provide a summary of the required clauses or provisions identified in 2 CFR 200 Appendix II, and in the program regulations 7 CFR 210, 7 CFR 220, and 2 CFR 250. Additional clauses and provisions may be required or beneficial depending on what good or service is being procured. A full description of the clauses and provisions, suggested or required language, required form links, and other requirements can be found in **Appendix A of this document**. SFAs must use the required language and forms when indicated. The suggested language may be used to assist SFAs when they are writing their own clauses and provisions to include in their procurement documents.

**2 CFR 200 Appendix II Required Clauses and Provisions Summary**

	Required Provision	Contract Criteria	Suggested or Required Language, Information, or Form?
1	Remedies for breach of contract	> Small Purchase Threshold	No. – Must be based on SFA specific procedures.
2	Termination for cause or convenience	> \$10k	Yes – <b>Suggested</b> language
3	Equal Employment Opportunity	Construction, alteration, and/or repairs (including painting and decorating)	Yes – <b>Required</b> Language
4	Davis Bacon Act	Construction, alteration, and/or repairs (including painting and decorating)	Yes – <b>Suggested</b> Language
5	Copeland Anti-Kickback Act	Construction, alteration, and/or repairs (including painting and decorating) > \$2k	Yes – <b>Suggested</b> Language
6	Contract Work Hours and Safety Standards Act	> \$100k + mechanics or laborers	Yes. <b>Suggested</b> language based on requirements in 29 CFR 5.5(b)
7	Rights to inventions made under a contract or agreement	Funding agreements	Yes – <b>Suggested</b> Language
8	Clean Air Act and Federal Water Pollution Control Act	>\$150k	Yes – <b>Suggested</b> Language

**Section K: Prior Written Approval 2 CFR 200.407:**

While not a procurement policy, there are federal financial management regulations that require some purchases to be pre-approved by SCN before the procurement process is conducted in order to be an allowable cost to the non-profit foodservice account.

**Equipment Purchases 2 CFR 200.439(b)(2):**

Equipment purchases are allowable as a direct cost to the Child Nutrition Program, if items with a unit cost of \$5,000 or more (or less if the SFA has a lower capital threshold established) has the prior written approval from the Division of School and Community Nutrition.

2 CFR 200.33 defines “equipment” as tangible personal property (including information technology systems) having a useful life of one year or longer and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization threshold established by the SFA for financial statement purposes, or \$5,000.

SFA Capitalization Threshold:	\$5,000
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The USDA allows state agencies to establish a list of equipment that SFAs may purchase without submitting a request for prior approval (USDA memo SP 39-2016; SFSP 13-2016; CACFP 11-2016). If the amount of purchase for equipment is greater than the applicable capitalization threshold, the following procedure is used:

1. The SFA will identify if the desired equipment is identified on the SCN approved equipment list.
  - If the equipment is listed, the appropriate procurement method will be determined, and the applicable procedures followed to procure the equipment.
2. If the equipment desired is not on the approved list, the SCN Prior Approval Equipment Request form will be completed and submitted to SCN for approval.

**Reconversion Costs 2 CFR 200.462:**

Facility alteration costs incurred for the maintenance and/or updates to facilities that will be charged to the Child Nutrition Program are allowable as a direct cost when written prior approval has been obtained from SCN.

Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to their books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with

Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The SFA must report all suspected or reported violations to the Federal awarding agency.

**Suggested Language:**

- “The successful bidder will be required to conform to the wage requirements prescribed by the federal Davis-Bacon and Related Acts which requires that all laborers and mechanics employed by contractors and subcontractors performing on contracts funded in whole or in part with federal funds in excess of \$2,000 pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor, for corresponding classes of laborers and mechanics employed on similar projects in the area.”

**5. COPELAND “ANTI-KICKBACK” ACT:**

**Description:** In addition to the Davis-Bacon Act, the Copeland “Anti-Kickback” Act is applicable to contracts valued at \$2,000 or more for construction, alteration, and/or repairs (including painting and decorating, of a public building or public work). Compliance is required with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The SFA must report all suspected or reported violations to the Federal awarding agency.

**Suggested Language:**

- “Contractor shall comply with 18 U.S.C. § 874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into the contract. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as appropriate agency instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses. A breach of the contract clauses above may be grounds for termination of the Contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.”

**6. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT:**

**Description:** This clause is required for contracts in excess of \$100,000 that involve the employment of mechanics or laborers. Contracts must be in compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.

**No suggested or required language.**

**8. THE CLEAN AIR ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT:**

**Description:** Contracts and subgrants of amounts in excess of \$150,000 must include a provision requiring the contractor to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401–7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251– 1387) and to report all violations to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

**Suggested Language:**

➤ Clean Air Act:

1. “The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.
2. The contractor agrees to report each violation to the (name of applicant entering into the contract) and understands and agrees that the (insert name of the applicant entering into the contract) will, in turn, report each violation as required to assure notification to the appropriate Environmental Protection Agency Regional Office, and the Federal awarding agency, or USDA.
3. The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by Federal funds.”

➤ Federal Water Pollution Control Act:

1. “The contractor agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq.
2. The contractor agrees to report each violation to the (name of the applicant entering into the contract) and understands and agrees that the (insert name of the applicant entering into the contract) will, in turn, report each violation as required to assure notification to the appropriate Environmental Protection Agency Regional Office, and the Federal awarding agency, or USDA.
3. The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal funds.”

**9. DEBARMENT AND SUSPENSION:**

**Description:** Grantees, contractors, and subcontractors (at any level) that enter into covered transactions are required to verify that the entity (as well as its principals and affiliates) they propose to contract or subcontract with is not excluded or disqualified. USDA/FNS follows the guidance in 2 CFR part 180, *OMB Guidelines to Agencies on Governmentwide Nonprocurement Debarment and Suspension*, as well as related *Executive Orders 12689 and 12549*, which requires verification that the person with whom they intend to do business has not been excluded or disqualified when entering a transaction covered by this section.

This verification may be done by using one of the following methods:

1. Checking the System for Award Management (SAM) or the Excluded Parties List System (EPLS);  
or
2. Collecting a certification from that person; or
3. Adding a clause or condition to the covered transaction with that person.

**Suggested Language and Required Form:**

- “Contractors that apply or bid for an award exceeding \$100,000 must file the required anti-lobbying certification. Each tier must certify to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the Customer. As applicable, Contractor agrees to file all certifications and disclosures required by, and otherwise comply with, the Byrd Anti-Lobbying Amendment (31 USC 1352). Contractor certifies that it is currently in compliance with all applicable provisions of the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) and will continue to be in compliance throughout the term of the Contract and further certifies that:

No Federal appropriated funds have been paid or will be paid by or on behalf of the Contractor, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of a Federal contract, the making of a Federal Grant, the making of a Federal Loan, the entering into a cooperative Master Agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative Master Agreement.

If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing, or attempting to influence, an officer or employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative Master Agreement, Contractor shall complete and submit Standard Form – LLL, “Disclosure Form to Report Lobbying” in accordance with its instructions.

Contractor shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative Master Agreements) and that all subcontractors shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certificate is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.”

**11. PROCUREMENT OF RECOVERED MATERIALS PURSUANT TO 2 C.F.R. § 200.323:**

**Description:** A Non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

**13. DOMESTIC PREFERENCES FOR PROCUREMENTS PURSUANT TO 2 CFR § 200.322:**

**Description:** As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. This is implemented through the program regulations. **See “BUY AMERICAN”.**

**14. Buy American:**

**Description:** 7 CFR 210.21(d) requires that SFAs purchase, to the maximum extent practicable, domestic commodities or products. A domestic commodity or product is an agricultural commodity that is processed in the United States (including U.S. Territories) and/or a food product that is processed in the United States (including U.S. Territories) substantially using agricultural commodities that are produced in the United States (including U.S. Territories). A Buy American Provision is required to be included in solicitations and agreement or contracts when procuring food that are considered “food components.” FNS defines a food component as one of the food groups that comprises reimbursable meals: meats/meat alternates, grains, vegetables, fruits, and fluid milk. Foods that are unprocessed, agricultural commodities must be domestic. All processed food products must contain over 51% of the product’s food component, by weight or volume, from U.S. origin (including U.S. Territories) and be processed in the United States (including U.S. Territories).

There are two (2) limited exceptions to Buy American requirements:

1. The product is not processed or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or
2. Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

Exceptions must be requested by vendors and approved by SFAs prior to accepting or receiving non-domestic foods.

**Suggested Language:**

When asking suppliers to provide information about the percentage of U.S. content for individual processed end products:

- “We require bidders to certify that (insert product name) was processed in the U.S. and contains over (insert % of weight or volume) of its agricultural food component from the U.S.,” with space for the supplier to fill in the name of the product and its percentage of the domestic agricultural food component (by weight or volume) contained therein.”

**Suggested Language:**

- “The District/State agency/Territory participates in the National School Lunch Program and School Breakfast Program and is required to use the nonprofit food service funds, to the maximum extent practicable, to buy domestic commodities or products for Program meals. A ‘domestic commodity or product’ is defined as one that is either produced in the U.S. or is processed in the U.S. substantially using agricultural commodities that are produced in the U.S. as provided in 7 CFR 210.21(d).”

Exceptions to the Buy American provision are very limited; however, an alternative or exception may be approved upon request. To be considered for an alternative or exception, the request must be submitted in writing to a designated official, a minimum of \_\_\_ day (s) in advance of delivery. The request must include the following:

1. Alternative substitute(s) that are domestic and meet the required specifications:
  - a) Price of the domestic food alternative substitute(s); and
  - b) Availability of the domestic alternative substitute(s) in relation to the quantity ordered.
2. Reason for exception: Identify if for limited/lack of availability or price (include price):

preference to procure unprocessed locally grown or locally raised agricultural products, SFAs must ensure that solicitation and contract documents clearly define and describe how this will be evaluated for contract award and in contract monitoring procedures as applicable.

**No Suggested or Required Language.** Language used must clearly define what the SFA considers “local”.

**17. PROCESSING USDA FOOD CONTRACTS:**

**Description:** 2 CFR 250.31(b) identifies the minimum information that must be included in procurement contracts and solicitations for processed end products containing USDA foods in addition to requirements related to the procurement method used. The goal is to ensure that federal rules requiring full and open competition are followed and to assist SFAs in ensuring that they receive credit for the value of USDA foods in finished end products.

**Required information that must be addressed in solicitations and contracts when procuring processed end products containing USDA donated foods:**

- 1) The price to be charged for the end product or other processing service;
- 2) The method of end product sales that will be utilized and assurance that crediting for donated foods will be performed in accordance with the applicable requirements for such method of sales in §250.36;
- 3) The value of the donated food in the end products; and
- 4) The location for the delivery of the end products.

**18) PROCUREMENT AGENTS:**

**Description:** USDA Policy Memo SP 05-2017 establishes the guidance that must be followed when procuring a procurement agent who will procure goods and services on behalf of the SFA. The procurement agent must confirm in its response to the solicitation that it will represent the client and will have the client’s best interests exclusively in mind when preparing solicitations for publication on the client’s behalf. The agent may not have any conflict of interest, real or apparent. For example, the agent may not use pre-existing contractual relationships in lieu of conducting a competitive procurement on behalf of the Program operator.

**Required Solicitation Language:**

- “When procuring goods or services for their client, agents must follow procedures consistent with 2 CFR 200.317-.327 and applicable program regulations.”