

Procurement Updates

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Overview

- Publication of the Final Rule for School Nutrition Programs
- Summary of the New Requirements
- Suggestions On How to Implement the New Requirements
- Other Hot Topics
 - Buy American
 - Web-Based Training Initiatives

Final Rule: Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs

- Published on October 31, 2007
- Effective November 30, 2007



Why The Need For This Rule?

- Two audits released by the Office of Inspector General (OIG) in 2002, identified deficiencies in procurement practices that undermined full and open competition and resulted in unallowable uses of nonprofit school food service account funds.
- Contracts between SFAs and FSMCs lacked controls as to:
 - How the FSMC would determine the allowability of costs charged to the SFA, including how the company would provide the SFA with the benefits of purchase discounts, rebates, and credits in the determination of net costs.
 - How the SFAs were monitoring contract provisions.

What Are the New Requirements?

- SFAs are prohibited from using nonprofit school food service account funds to pay any amount above net allowable costs, computed by deducting certain rebates, discounts and other credits.
- Requirements apply to cost reimbursable contracts.



Continued...

- Contractors are required to identify appropriate information to permit SFAs to identify allowable and unallowable costs and the amount of all such discounts, rebates and credits on invoices and bills presented for payment.
- Contractors are not limited to FSMCs -- includes contracts under all procurement relationships.



Continued...

How must contractors report their costs?

Option 1: Contractors can identify allowable and unallowable costs in billing documents.

Option 2: Contractors can exclude unallowable costs from billing documents and certify that only allowable costs are submitted for payment. Records have to maintain the visibility of unallowable costs.

New Requirements Continued...

- Child Nutrition State agencies are responsible for reviewing and approving SFA contracts and contract amendments with FSMC's prior to contract execution.
 - Not a new requirement, as only the timing of when the review occurs has changed.
 - Prior written approval for State approved prototypes only when changes made to the contract.

Implementation Timeline

- **Effective Date: November 30, 2007**
- **Provisions apply to all new solicitations issued on or after the effective date.**
- **For solicitations issued prior to November 30, 2007:**
 - **Contracts with a term of 12 months or fewer remaining do not need to comply with the new requirements;**
 - **Contracts that have annual renewal provisions may delay implementation until expiration of the current contract plus one 12-month renewal period, with State agency approval; and**
 - **Contracts that have a term of more than 12 months may delay implementation up to 24 months when the solicitation for the contract was issued prior to the effective date, with State agency approval.**

Timeline continued...

- Remember:
 - An FSMC contract is a one year contract with up to four additional one year renewals. It is not a single contract.
 - The decision to renew the contract is an affirmative decision by both parties.



How Can Child Nutrition State Agencies Implement These New Requirements?

- ✓ Ensure contracts contain clear provisions prohibiting payment from the nonprofit school food service account in excess of the contractor's actual net allowable costs.
- ✓ Ensure contracts identify or require the contractor to identify a methodology by which discounts, rebates, and credits will be returned.

Continued.....

- ✓ Continue to develop staff expertise in purchasing and train SFAs accordingly.
- ✓ Consider developing prototype language to ensure discounts, rebates, and applicable credits are returned to the SFAs.



What Can SFA's Do to Implement These New Requirements?

- ✓ Ensure they understand the methodology used to document costs charged and track discounts, rebates, and applicable credits.
- ✓ In situations where a contractor has been designated an Agent for purchasing purposes, ensure clear language in contract returning discounts, rebates and applicable credits to the SFA.
- ✓ Reserve the right to conduct an audit of the cost of the products charged by manufacturer (i.e. review the contractor's product reports in comparison to purchase reports).

Continued....

- ✓ Be more proactive in pursuing competition directly with:
 - Distributors
 - Manufacturers



What Can Contractors Do?

- ✓ Adhere to the billing requirements agreed upon.
- ✓ Be transparent.
 - Develop clear tracking systems to identify discounts, rebates, and applicable credits.
 - Ensure that the SFA understands the process used to track the discounts, rebates, and applicable credits.

The Importance of a Good Procurement Plan

- SFAs should allow ample time each year to assess and forecast needs:
 - Does my solicitation and contract need updating in light of recent final rule?
 - What inventories are on hand and what processed and unprocessed commodities will likely be available to the district in the coming school year?
 - Are there other services (such as delivery, storage, accounting, trash removal) that will need to be procured in order to support the district's meal service?
- After the contract is awarded, having a system in place to manage the contract and to ensure that the company is complying with terms of the contract.

Hot Topics



Buy American Requirement:

- Statutory -- Section 12(n) of the NSLA
- Implementing regulations at 7 C.F.R. 210.21(d)
- Applies to all local food purchases for school meal programs
- Requires the purchase of domestic agricultural commodities and domestic food products

Hot Topics Continued...

How can State Child Nutrition Agencies help SFAs comply with the Buy American requirement?

- **Encourage them to include a Buy American clause in all product specifications, bid solicitations, requests for proposals (RFPs), purchase orders, and any other procurement documents.**
- **Have them require suppliers to certify to the origin of the products they receive.**
- **Ensure that SFAs include a provision in their contracts requiring case by case approval be granted for any non-U.S. products.**

Other Hot Topics

How are donated commodities affected by the Buy American provision?



- **Donated commodities are 100% domestic**
- **A school food authority can combine donated commodities with another product to achieve a new end product as long as 51% of the final processed product consists of agricultural commodities that were grown domestically.**

Web-Based Training Initiatives

- Will take place in two segments beginning in Spring of 2008
 - Web-based Modules
 - “Live Training” via web
- Target audience is SA Staff working with procurements for NSLP and SBP
- Content:
 - General procurement planning and administration
 - Requirements of the final rule
 - Special considerations for SFAs



Related Questions and Answers

Q: SFAs and State agencies having contracts with a term of 12 months or fewer remaining are exempt from applying the provisions of this new rule to those contracts. Does this exemption apply to all contracts even those not related to FSMCs?

A: Yes.



Related Questions and Answers

Q: With state agency approval, can SFAs that have contracts containing annual renewal provisions delay implementation until expiration of the current contract plus one 12-month renewal period?

A: Yes.

Q: What happens if a school food authority and an FSMC are already in a renewal year of their contract? Do they still get the extra 12-month renewal period?

A: Yes, with State Agency approval.

Related Questions and Answers

Q: Are State agencies free to establish shorter timeframes for implementation or require some SFAs to implement the requirement sooner than others?

A: Yes.

Related Questions and Answers

Q: The final rule requires contractors to identify the amount of each discount, rebate, and applicable credit on all bills and invoices sent to the school. Can a state agency approve reporting on other than a monthly basis?

A: Yes.

Related Questions and Answers

Q: Does this Final Procurement Rule only apply to cost reimbursable contracts or does it pertain to fixed-priced contracts as well?

A: Cost reimbursable contracts only.

Related Questions and Answers

Q: Is the requirement for contracts to be reviewed by the State agency prior to execution required of *all* contracts the SFA may enter into?

A: No. The requirement for the State agency to review the contract, including amendments, and all supporting documentation, before execution of the contract, is specific to contracts between SFAs and FSMCs.

Thank you