

## Chapter 1:

### Responsibilities and Considerations

#### Deciding to Use a FSMC

The following steps should be undertaken when considering the use of a FSMC:

**Analyze Food Service Operation**—conduct an analysis of the current food service operation to determine what method of providing food service best meets the SFA's goals and objectives, i.e.,:

- Identify the current cost of operating the food service.
- Determine all cost elements that will be affected by contracting with a FSMC. These could include personnel costs, food costs, other labor costs and contractual obligations that must be met by the SFA regardless of whether a FSMC is used.
- Analyze all non-fiscal aspects of the current food service operation to determine the impact of utilizing a FSMC (e.g., nutrition goals and nutrition education activities).
- Identify the functions that might be contracted, and the pros and cons of contracting each.

**Contact SA/State Distributing Agency**—contact the SA to obtain information on FSMCs operating within the State, the names of SFAs currently using FSMCs, and State requirements and technical assistance if needed.

Contact the State Distributing agency to determine under what situations a FSMC would be subject to the provisions of 7 CFR Part 250, Subparts C and D with respect to the processing of USDA donated foods. If the SFA is subject to these provisions, it must ensure that the State Distributing agency has reviewed and approved any processing agreement prior to the delivery of USDA donated foods for processing.

**Contact Other SFAs**—contact other SFAs using FSMCs for technical assistance.

## **SFA Responsibilities**

If the SFA uses a FSMC, the SFA must remain responsible for the overall operation of the school nutrition programs. This responsibility requires that the SFA retain and maintain direct involvement in the operation of the food service and not delegate certain responsibilities to the FSMC. The SFA is also responsible for:

**Preparation of Contract Documents**—prepare all contract documents issued prior to the award of the SFA-FSMC contract. These documents include, but are not limited to: bid specifications, the invitation for bid (IFB), the request for proposal (RFP), and the SFA-FSMC contract, as applicable. Section 210.16(c)(3) specifically addresses the SFA's development of specifications for each food component or menu item and requires these specifications to be included in the IFBs or RFPs. Specifications must cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time. In order to ensure objective contractor performance and eliminate unfair competitive advantage, a person that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other documents for use by a grantee or sub-grantee in conducting a procurement under the USDA entitlement programs specified in 7 CFR Part 3016.4(b) shall be excluded from competing for such procurements.

**Contract Review**—ensure that the SA annually reviews each contract (including all supporting documentation) between any SFA and FSMC prior to execution of the contract to ensure compliance with all the provisions and standards set forth in Part 210 and in Part 250, Subpart D. As set forth in 210.19(a)(6), when the SA develops a prototype contract for use by the SFA that meets the required provisions and standards, this annual review may be limited to changes made to that contract. Each SA shall review each contract amendment between a SFA and FSMC to ensure compliance with all provisions and standards set forth in this Part 210 and in Part 250, Subpart D before execution of the amended contract by either party. The SA may establish due dates for the submission of the contract or contract amendment documents. (See the section on Developing Contract Documents for recent changes.)

An important change made by the procurement regulation is that all contracts must contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and applicable credits. SFAs should include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: Only

allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority [210.21(f)(1)(i)].

Ensure that SA-approved FSMC prototype contracts meet the provisions of the governing regulations and that all changes the SFA makes to the prototype contract are reviewed and approved annually by the SA and prior to execution of the contract.

**Program Oversight**—ensure that the food service is in conformance with the SFA's agreement with the SA and that responsibility for all contractual agreements entered into in connection with the school nutrition programs remains with the SFA. Resolve program review and audit findings.

**Monitoring**—monitor the food service operation through periodic on-site visits, including accordance with 7 CFR 250.51(d), assurance that the FSMC uses USDA donated foods or, as applicable, commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods. [See 7 CFR Part 210.16(a)(3)]

**Control the Quality, Extent and Nature of Food Service**—retain control of the quality, extent, and general nature of the food service and the prices to be charged to the children for meals. Such control must include retaining control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food services and adult meals, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR Part 210; conveying menu adjustment requirements to the FSMC, and monitoring implementation of those adjustments. Additionally, any refunds received from processors must be paid to the SFA.

**Signature Authority**—retain signature authority on the agreement to participate in the NSLP, the SBP and the SMP, including the SFA's free and reduced price policy statement and the Claim for Reimbursement.

**Free and Reduced Price Meal Process**—maintain responsibility for the implementation of free and reduced price policy in accordance with 7 CFR Part 245. Such responsibilities include the conduct of any hearings related to such determinations and verification of applications for free and

reduced price meals. An employee of the food service management company may perform for the SFA in various aspects of the application, certification, and verification process of eligibility for school meals programs. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA.

**USDA Donated Foods**—retain title to USDA donated foods. The SFA ensures that all USDA donated foods received by the SFA and made available to the FSMC, including processed USDA donated foods, accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. This provision also applies to any refunds received from processors. The SFA must ensure that the FSMC has credited it for the value of all donated foods received for use in the meal service in the school year, in accordance with 7 CFR 250.51(a) and (b).

**Health Certification**—maintain applicable health certification(s) and assure that all State and local regulations are being met by a FSMC preparing or serving meals at a SFA facility.

**Establishment of an Advisory Board**—establish and maintain an advisory board composed of parents, teachers and students to assist in menu planning.

**Development of the 21-Day Cycle Menu**—develop the 21-day cycle menu for the FSMC bid proposal. If the SFA determines, and the SA agrees, that the SFA is unable to develop a cycle menu, the SA may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the solicitation up front. The solicitation should identify the criteria that the SFA will use to evaluate the FSMC's menu, such as affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.

However, FSMC-developed cycle menus are only appropriate to use under the competitive negotiation method of procurement since, under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract a FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality, equivalent to the first 21 days of meal service.

**Internal Controls**—apply the internal control procedures required by 7 CFR 210.8(a) to the preparation of the monthly Claim for Reimbursement.

**Reports**—complete all reports as required by the SA.

## Identify Scope of Contract

Each procurement takes time and requires a great deal of thought and planning. Once the decision to hire a FSMC has been made, there are many factors that must be considered. The SFA must:

**Identify Scope of Work**—determine the general extent or scope of work to be performed by the FSMC, i.e.,:

- Identify which Federally reimbursable program(s) or nonprofit food service activities the FSMC will be involved in, e.g., NSLP, SBP, a la carte sales during and/or between meal service periods, after hours snacks under the NSLP or meal/snack service under the Child and Adult Care Food Program/Summer Food Service Program.
- Decide if the operation of any SFA vending machines will be turned over to the FSMC.
- Decide if the FSMC will cater any special activities and/or be involved in any food service activity outside the nonprofit food service.
- Decide what specific activities relating to USDA donated foods the FSMC will be required to perform, in accordance with 7 CFR 250.50(d). Such activities may include, for example:
  - 1) The procurement of processed end products (i.e., containing donated foods) on behalf of the SFA (such procurements must ensure compliance with the requirements in 7 CFR Part 250,

Subpart C, and with processing agreements between the processor and distributing agency or SFA). Please note that SFAs should pay careful attention to their solicitation and subsequent contract to ensure that they have allowed for the acceptance and processing of commodities.

- 2) Ordering or selection of donated foods, in coordination with the SFA.
- 3) Storage and inventory management of donated foods.
- 4) The payment of processing fees or submittal of refund requests to a processor on behalf of the SFA, or remittance of refunds for the value of donated foods in processed end products to the SFA, in accordance with the requirements in 7 CFR Part 250, Subpart C.

**Identify Responsible Personnel**—identify SFA personnel responsible for managing the SFA-FSMC contract and meeting the SFA's responsibilities, including the existing responsibilities that cannot be delegated to the FSMC and the new responsibilities that will occur under the SFA-FSMC contract.

**Select Method of Procurement**—decide which method of procurement (i.e., sealed bid or competitive negotiation) to use in accordance with Federal, State and local requirements and the SFA's needs. See Chapter 2 for details. Be mindful of the method chosen and ensure that the processes associated with that method are employed. For example, when using the sealed bid process, don't refer to it as a Request for Proposal if the actual term is Invitation for Bid.

**Develop Contract Documents**—for competitive sealed bid procurement, the contract document is the IFB which includes specifications and pertinent attachments which clearly define the items and services. The contract should be issued as part of the IFB. Under competitive negotiation, all non-negotiable components of the contract should also be included in the RFP. In either type of procurement, the contract or contract provisions should be reviewed by the SFA's legal counsel to ensure legal sufficiency as well as to provide the maximum amount of protection possible to the SFA.

In accordance with new FSMC regulation “Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentives Program, and Charitable Institutions” issued on August 8, 2008, all contracts must include the provisions relating to donated foods in 7 CFR

250.53, as applicable.

In the solicitation and contract, it is crucial for SFAs to provide specific information about the food service and all the goods and services they are seeking to procure. For example, essential information includes the number of school buildings, meal prices, number of students available for lunch, meal preparation facilities, number of serving days, historical information on quantities/types of USDA donated foods available, Federal/State reimbursement rates, meal service hours, food service and serving methods, number of meal service periods, commodity usage, estimated serving counts, personnel salaries and benefits, total revenues, total operating costs, etc.

It is also important for a SFA to ensure that the solicitation encompasses all the goods and services they foresee in the near future, so changes do not need to be made to the contract soon after execution. For example, if a SFA foresees the possibility of adding a school breakfast program to their food program in the next few months, after the contract will be executed, they should be sure to account for this in their original solicitation.

SFAs must not use information prepared by FSMCs in the IFB or RFP. For example, open and free competition cannot be compromised by providing product specifications on "brand name" products that only one FSMC or its distributor can supply.

FSMC-developed contracts are never allowed since they would compromise open and free competition. While not recommended, a SFA may invite the successful offeror under a RFP to assist in finalizing the contract provisions after the successful offeror has been identified. Such changes cannot result in a material change to either the solicitation or contract.

New regulations governing procurement requirements in the NSLP, SBP, and SMP, issued on October 31, 2007, made an important modification to the requirements found at 7 CFR 210.19. As previously worded, the regulations permitted State agencies to make their first review of such contracts at any time during the first year of the contract.

It is important to remember that the new regulations in 7 CFR 210.19(a)(6) require each SA to annually review each contract (including all supporting documentation) between any SFA and FSMC prior to execution (i.e., prior to signature) of the contract to ensure compliance with all the provisions and standards set forth in this part and in Part 250,

Subpart D. This change is meant to ensure that contracts containing unallowable terms and conditions are corrected prior to the contract being executed.

When developing the contract document, it is also important to ensure that the contract must contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and credits. SFAs should include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts: Only allowable costs will be paid from the nonprofit school food service account. Such costs must be net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority.

This rule also requires contractors to provide sufficient information to permit the school food authority to identify allowable and unallowable costs and the amount of all such discounts, rebates, and applicable credits on invoices and bills presented for payment to the school food authority. (7 CFR Part 210.21) It is important that SFAs ensure that the contract contain this requirement so that the contractor is transparent in their identification of these rebates, discounts, and credits.

When the SFA is using a prototype contract developed by the SA that meets the required provisions and standards, this annual review may be limited to the changes that are made to that prototype contract. Each SA shall review and approve each contract amendment between a SFA and FSMC to ensure compliance with all provisions and standards set forth in Part 210 and in Part 250, Subpart D before execution of the amended contract by either party. The SA may establish due dates for the submission of the contract or contract amendment documents.