Chapter 2:

Procurement

Open and Free Competition

The underlying foundation of all procurement, without regard to dollar value, is that, regardless of the method used, the procurement must be conducted in a manner that provides maximum open and free competition. Procurement procedures must not restrict or eliminate competition. Examples of such restrictions include, but are not limited to:

Unreasonable Requirements—placing unreasonable requirements on firms in order for them to qualify to do business, e.g., requiring unnecessary experience and bonding requirements.

Noncompetitive Practices—encouraging or fostering noncompetitive practices, e.g., collusion between firms.

Conflicts of Interest—allowing conflicts of interest to occur. Conflicts of interest can occur when the individual(s) responsible for determining bid/proposal responsiveness can be overruled by other individuals within the organization or if the individual responsible for determining responsiveness (or any member of his or her family) has any personal or corporate ties or any financial interest in any of the offering firms.

Inappropriate Practices—using information prepared by FSMCs in the IFB or RFP; entering into negotiations with a firm prior to evaluating proposals; negotiating with any bidder at any time when the competitive sealed bid procurement method is used; and providing only certain firms with the results of pre–bid meetings or releasing the contents of a bid proposal to other bidders/proposal offerors.

Insufficient Time—not allowing bidders/offerors sufficient submission time when advertising/soliciting the IFB/RFP.

Geographic Preferences—allowing geographic preference to occur without following Federal regulations. Even if there are State or local laws for geographic preferences, in-State or local geographic preferences are prohibited in Federal procurements except where applicable Federal laws expressly permit their use.

The recently enacted Food, Conservation, and Energy Act of 2008 (P.L.

110-246), also known as the Farm Bill, amended the National School Lunch Act to allow institutions receiving funds through the Child Nutrition Programs to apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products.

Unprocessed products are those products that have not been cooked, seasoned, frozen, canned, or combined with any other products. Acceptable useable forms of these unprocessed products include: "washing vegetables, bagging greens, butchering livestock and poultry, pasteurizing milk, and putting eggs in a carton."

While the statute permits institutions to apply a geographic preference to the maximum extent practicable and appropriate, it does not require institutions to purchase locally grown and locally raised agricultural products, or to apply a geographic preference in their procurements of these products. Moreover, States cannot mandate through law or policy that institutions apply a geographic preference when conducting these procurements, because the NSLA grants this authority directly to the institutions. The institution responsible for the procurement has the discretion to determine whether and how a geographic preference meets its needs.

Procurement Methods

After the SFA plans for the procurement, they must solicit for bids or proposals to ensure they receive the best possible product at the lowest possible price. The SFA must identify which procurement method meets its needs most effectively. The two most frequently used methods of procurement for contracting with a FSMC are:

Competitive Sealed Bids, i.e., an Invitation for Bid means a formal method of procurement in which sealed bids are publicly solicited, i.e., through and invitation for bid, resulting in the award of a firm fixed-price contract to the responsible bidder whose bid is responsive to the IFB, conforms with all the material terms and conditions of the invitation for bids, and is lowest in price. In this case, the IFB must be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them with sufficient time to respond prior to the date set for opening the bids.

Competitive Proposals (previously known as Competitive Negotiation), i.e., a Request for Proposal, is a method of procurement whereby a technical proposal is solicited that explains how the prospective contractor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method. The two other methods of procurement, Small Purchase and Noncompetitive Negotiation, are limited to specific situations and should not be used unless expressly approved by the SA.

Competitive Sealed Bids

Procurement of tangible items such as food or food service often lend themselves to the formal procurement method known as competitive sealed bids. The reason the procurement of goods or products often lends itself to this method is that a SFA can choose a contractor solely on the basis of cost and does not need to negotiate with the bidders. The nature of the product the SFA is buying is such that, if all bids are responsive to the published specifications, they will differ along no dimension other than price.

Factors to Consider—Factors to consider for using competitive sealed bids are:

Fixed Scope of Services—the SFA has identified exactly which services and costs it wishes to contract out to the FSMC.

Legal Advice Needed—the SFA should obtain legal advice in the development of a contract for inclusion in the IFB.

No Negotiation Involved—the SFA either does not wish to, or lacks the needed experience to, negotiate price and contractual responsibilities with the FSMC.

Competition Available—more than one FSMC is willing and able to compete effectively for the contract.

Fixed-Price Bids Mandated—the SA mandates fixed-price bids.

Responsible/Responsive Bidder—the bid will be awarded to the responsive/responsible bidder that submits the lowest responsive bid.

The SFA must include sufficient information in the IFB to allow bidders to properly respond to the IFB, thus enabling the SFA to determine responsiveness. The SFA must use responsiveness criteria that are measurable. Normally, this means establishing minimum levels. The IFB must also indicate how bidders will demonstrate compliance with these criteria. For example, if an IFB requires a copy of the food handler's license, the bidder should provide it as requested. Open–ended criteria cannot be used in IFBs.

In determining whether a responsive bidder is also a responsible bidder, factors such as contractor integrity and prior working relationships with the firm can be used as well as contractor experience and financial and technical resources.

Needed Information—the place and time the bids will be opened and the award made must be included in the invitation as well as any information concerning pre-bid meetings and the need for board approval of the selected bidder. If bid and/or performance bonds will be required, the amount, any requirements concerning the bonding firm, and when the bond(s) must be provided to the SFA must be included in the invitation.

Advantages—Advantages of using competitive sealed bids include:

Advance Preparation—the contract is prepared prior to soliciting bids. This generally allows the SFA to more accurately estimate costs and assign staff resources well in advance of the effective date of the contract.

The pre–bid preparation of the contract also permits the SFA to arrange for its legal authorities to review the contract provisions for legal sufficiency without the pressures of negotiation.

Again, because the contract is prepared prior to soliciting bids, the SA review of the contract may be completed prior to announcing the IFB. This allows the SFA to award the contract immediately after the bid opening, pending board approval, if applicable.

Easier Identification of Revenues and Expenses—fixed-price contracts more easily permit the SFA to identify anticipated revenues and expenses, as well as the total anticipated cost of the contract.

No Negotiation Responsibilities—the SFA is relieved from negotiating both the cost and responsibilities with bidders.

Simplified Monitoring—the monitoring of the status of the nonprofit food service account is not difficult. Transactions are restricted to processing billings from and payments to the FSMC; the FSMC does not pass costs on to the SFAs.

Disadvantages—The disadvantages of using competitive sealed bids are:

Demands Precise Identification of Needs—if the bid document does not clearly identify the services requested, the bid prices and the services provided by the FSMC may not be reasonable or responsive to the SFA's needs.

May Limit Competition—during periods of rapidly rising prices, prospective bidders may decline to bid on a fixed-price basis or bid overly high. In situations where prices are declining, fixed-price contracts do not allow the SFA to benefit from the decline.

Competitive Negotiation

Competitive negotiation is effective when the SFA has identified what it expects a FSMC to accomplish. Typically, a SFA would generally choose competitive negotiation when they are procuring services that may differ along dimensions other than price. This process is most often used when the basis for award is not solely dependent upon the lowest cost but other factors as well.

Unlike the competitive sealed bidding method, the competitive negotiation method allows more flexibility when awarding the contract, as the SFA may engage in discussions with respondents after evaluating their proposals.

The resulting contract from a competitive negotiation may be fixed-price or cost-reimbursable. Unlike the cost-plus-fixed-fee method, "cost-plus-a-percentage-of-cost" or "cost-plus-a-percentage-of-income" contracting is <u>not</u> permitted.

Factors for Consideration—Factors to consider when using competitive negotiation are:

Technical Skills Needed—the SFA <u>must</u> possess the technical skills necessary to evaluate the proposals and negotiate with the offerors. These skills usually include knowledge of procurement and contracting, school food service, and financial management.

Legal Advice Needed—while the SFA must prepare a descriptive RFP, the actual contract will not be prepared until after the proposals are evaluated. As a result, the SFA's legal authority should be available to assure that the proposed contractual language reflects the agreement reached between the successful offeror and the SFA.

Monitoring Costs Required—under a cost-reimbursable contract, the SFA must independently monitor the costs incurred under the contract for compliance with 7 CFR Part 3015, Subpart T.

Careful Preparation of Evaluation Criteria—the criteria that will be used to evaluate the proposals, and their weights, must be carefully prepared and included in the RFP. These criteria must be followed in evaluating the proposals. Negotiations will then be conducted with those offerors who exceed a pre-determined "cut-off" score.

Requires Inclusion of All Pertinent Information—the due date for proposal submission must be included in the request as well as any information concerning pre-proposal meetings and the need for board approval of the selected offeror. If a performance bond will be required the amount, any requirements concerning the bonding firm, and when the bond must be provided to the SFA, must be included in the proposal.

Advantages—The advantages of using competitive negotiation are:

Flexibility in Assigning Responsibilities—based upon the responses received from the offerors, the SFA decides which functions will be performed by the FSMC. SFAs must ensure that the SFA responsibilities specified in Chapter 1 are not delegated to the FSMC.

SFAs Benefit During Periods of Falling Prices—RFPs that result in cost-reimbursable contracts allow the SFA to take advantage of price declines during periods of falling prices.

Greater Flexibility in Selecting FSMC—the SFA has somewhat more flexibility in selecting a FSMC because the SFA is not limited to selecting the offeror that submits the lowest price bid.

Disadvantages—The disadvantages of using competitive negotiation are:

Complex Monitoring—the monitoring of revenue and expenses under the contract will be more complex because:

- The Federal cost principles referenced in 7 CFR Part 3016.22(b) apply to cost-type contracts. In addition, 7 CFR Section 210.21(f) highlights requirements for contractors billing SFAs under cost-reimbursable contracts. The SFA must review specific items of cost the FSMC charges to the food service account for conformity to these cost principles.

- The timing of expenses will affect the status of the food service account. If the FSMC records expenses on the cash basis of accounting and bills the SFA accordingly, it will bill for goods and services at the time they are purchased. Under the accrual basis of accounting, the FSMC would record expenses and bill the SFA when the goods are actually used in the food service operation.

- The accrual basis of accounting is the preferred method because it measures the benefits received from the FSMC's purchases. Cash basis billing can distort this measurement. It can generate overstated expenses and an understated account balance at the time of purchase, and the reverse situation at other times. The SFA can correct such distortions only by making adjustment entries. If the FSMC does not use the purchased goods at the same rate from month to month, the SFA must recalculate the adjustment entry each month.

Unbudgeted Costs During Periods of Rising Prices—RFPs that result in cost-reimbursable contracts may result in additional costs to the SFA during periods of rising prices.

Potential Reopening of Negotiations—under a RFP, the contract is prepared based upon the negotiations. The contract should not be finalized until the SA reviews the document. If deficiencies are noted, it may be necessary for the SFA to reopen negotiations.

Essential Skill and Experience—the negotiation process requires that the SFA possess significant skill and experience in negotiating, contracting and financial management. It may be necessary for the SFA to hire individuals to provide the needed expertise, which can be cost prohibitive. Attempting to negotiate without the needed expertise can result in the SFA entering into a contract that meets regulatory requirements and is fully enforceable, but is detrimental to the SFA.

Unexpected Responsibilities—to the extent that the SFA has not identified whether it or the FSMC will perform certain functions, the SFA may incur duties and related costs not planned or budgeted.