

Procurement “Questions and Answers” to assist in the implementation of the final rule titled Nutrition Standards in the National School Lunch and School Breakfast Programs

Q1: Does the issuance of the final rule create a “material change” in Food Service Management Company (FSMC) contracts?

A1: USDA has advised previously in Policy Memorandum titled July 2005 Procurement Questions available at <http://www.fns.usda.gov/cnd/governance/Policy-Memos/2005/2005-07-05.pdf>, the creation of a material change to a contract between an School Food Authority (SFA) and an FSMC depends on the SFA’s initial solicitation document and the resulting contract during the procurement process. We anticipate that some current contracts between SFAs and FSMCs will not be inconsistent with the new nutrition standards of the final rule. Those contracts would require only nonmaterial changes to ensure consistency with the final rule.

Each contract between an SFA and FSMC will have unique initial solicitation documents and contract terms. State Agencies (SA) and SFAs must review existing contracts to make a determination as to whether a material change has occurred.

SAs and SFAs should ask the following questions to help determine if the change constitutes a material change to the contract:

- If there would be an increase or decrease to the cost of the contract, would the increase or decrease in cost have caused bidders to bid differently if the prospective change had existed at the time of bidding?
- Would the prospective change materially affect the scope of services, types of food products, volume of food products, etc., in both the solicitation document and resulting contract? For example, the final rule requires schools to serve whole-grain rich products, and specific varieties of vegetables, which already may be included in current contracts.

Q2: If it appears that an SFA’s implementation of the final rule will create a material change to the contract with the FSMC, must the SFA rebid?

A2: Per regulations, contracts between SFAs and FSMCs must be no longer than one year in duration with four optional annual renewals. Every SFA should be annually reviewing its FSMC contract with no expectation by either party to renew the contract. As noted above, the SA and SFA must review the current contract and determine if any prospective changes would result in a material change. If the parties determine that prospective changes would be material, the SFA must either:

- Conduct a separate procurement to obtain the desired deliverable that created the material change; or

- Conduct a new procurement and ensure that the new solicitation associated with the rebid contains the appropriate specifications and provision to ensure conformance to the final rule. For example, if the SFA's initial solicitation and resulting contract did not address whole-grain rich foods, the SFA would ensure that rebid specifications would procure such foods.

As needed, an SFA may conduct a procurement at the earliest feasible juncture. However, SAs and SFAs must ensure that a new procurement is completed for the 2013-14 school year.

Q3: If an SA and SFA determine that a material change would occur as a result of implementation of the final rule but conclude that a new procurement cannot be completed prior to the 2013-2014 school year, may the SFA amend its current contract in order to ensure full implementation of the final rule?

A3: Yes. As noted above, annual renewals of a contract between an SFA and an FSMC occur at the discretion of the SFA. In this case, both the SFA and the FSMC would need to agree to the terms of any amendment to the current contract necessary to ensure full implementation of the final rule. Should an FSMC be unwilling or unable to agree to such an amendment to the current contract, the SFA would need to take immediate action. For example, immediate action may include:

- Termination of the current contract between the SFA and the FSMC in accordance with the termination provisions and issuance of a new solicitation;
- Issuance of a separate solicitation to procure the necessary foods in order to ensure compliance with the final rule, consistent with the current contract between the parties.

Q4: If it appears that an SFA's implementation of the final rule will create a material change to the contract with a contractor other than an FSMC (i.e., distributor), should the same principles and time frames outlined in this policy memorandum apply?

A4: Yes, the principles and time frames outlined in this policy memorandum should apply to all contracts between an SFA and contractor.