

COMMERCIAL VENDOR CONTRACT/RENEWALS FACT SHEET

GENERAL PROCUREMENT RULE FOR ALL SCHOOL FOOD AUTHORITIES (SFAs)

The rule when buying goods and/or services with School Nutrition Program funds is that such purchases must be made in a manner that is open and competitive. Federal state, and local laws refer to these purchases as “procurement.”

The rules for procurement apply no matter what form of contract, or means of purchasing, applies to an individual school – that is, this is the rule whether the school contract with a Food Service Management Company (FSMC) to operate the food service program or contracts with a commercial vendor to provide vended meals (vended meal contract).

As a point of clarification, a vended meal contract is when a vendor provides only meals and does not provide any employees on-site to make final meal preparations or serve meals or manage any aspect of the food service. A commercial vendor must prepare and provide a complete meal, with or without milk. No other component (i.e. fruit, vegetable) can be excluded. If the vendor does not provide milk, the SFA must purchase milk following all procurement requirements.

Generally, the procurement of goods and services involves distinct phases of planning including drafting specifications, advertising the procurement (where a formal process is followed) or soliciting price quotes (where an informal process is followed), awarding a contract and managing the contract. In addition, all procurements must ensure that there are no improper business practices or conflicts of interests – these arise in situations that create or appear to create an unfair competitive advantage to one vendor or contractor. Full and open competition means that all suppliers are on a level playing field and have the same opportunity to compete.

CHOOSING THE CORRECT PROCUREMENT PROCESS

The procurement process to follow, formal or informal, depends on the total cost of the purchase and if the School Food Authority (SFA) is a public or non-public school.

NON-PUBLIC SCHOOLS *(Nonprofit Private Schools)*

The applicable Federal regulations that apply in this context are 2 CFR Parts 200.318 through 2 CFR Part 200.326 and 7 CFR 210.21.

The first step in determining which procurement process to follow – formal or informal – is to determine if the total costs for the contract are “at or above” \$250,000.00 or below \$250,000.00.

To determine total costs for the contract, multiply the current per meal cost (or projected per meal cost) times the estimated total number of meals ordered each day times the number of serving days in the school year. This calculation must be computed separately for each meal type offered (breakfast, lunch, snack) and then added together to determine the total cost of the

contract. Paragraph VII of the SFA/Vendor Contract (Form #233 – Revised January 2021) should be used to perform this calculation.

At or above \$250,000.00 – Formal Process Required

If the total amount of the procurement is at or above \$250,000.00, federal law requires non-public school to abide by the rules of formal full and open competition. This process is called the formal procurement process and can be carried out using either sealed bids competition (where the determining factor is price) or requests for proposals (where there are determining factors in addition to price). The Invitation for Bid (IFB) or Request for Proposal (RFP) must be publicly advertised in a regional news source/official newspaper.

Below \$250,000.00 – Informal Process

If the total amount of the procurement is below \$250,000.00, the informal process of purchasing should be followed. While the process is known as an informal or “small purchase” process, this does not mean it lack competition. The informal in the name is because there is no public advertising required when using the small purchase process of solicitation letters. SFAs will need to solicit written price quotes from at least three vendors in order to achieve full and open competition and to satisfy federal and state procurement requirements.

IMPORTANT: If the estimated total cost of the contract is close to the \$250,000.00 threshold, use the Formal Procurement Method.

PUBLIC/CHARTER SCHOOLS

Public and Charter schools must meet Federal legal requirements when procuring goods and/or services using School Nutrition Program funds. This means that some requirements described above for non-public schools, such as the \$250,000.00 threshold determining the procurement process, apply to public schools as well.

However, in addition to those requirement, public schools must also meet applicable state and local laws when making purchases. Public school must compare the federal regulations and associated circular requirements with the state and local requirements. Where there is a conflict between the laws, the law that is most restrictive should be followed. To be clear, restrictive means the law that imposes the greater requirement. In addition, it does not mean a school picks one law exclusive of others; rather, a school must follow Federal, state and local law requirements.

The Federal regulations that apply in this context can be found at 7 CFR 210.21 for the National School Lunch Program (NSLP), 7 CFR 220.16 for the School Breakfast Program (SBP), 7 CFR 215.14a for the Special Milk Program (SMP). 7 CFR 226.22 for the CACFP At-Risk Afterschool Meals (Dinner) Program and 2 CFR 200.318-200.326 for the general procurement requirements for public entities. The applicable statutes and rules in New Jersey for public schools are NJSA 18A:18A-1 et. seq. (the Public Schools Contract Law); certain sections of NJSA 40A:11-1 et. seq. (the Local Public Contracts) as incorporated by reference in the Public Schools Contract Law; and New Jersey’s Administrative Code (NJAC) 5:34-1 et. seq., which provides the governing rules of the Division of Local Government Services (LGS) in the New Jersey Department of Community Affairs.

As indicated above, the Federal amount to determine whether a formal or informal procurement process is to be followed is \$250,000.00. In addition, New Jersey Public Schools Contract Law sets two different thresholds depending on whether a public school has a qualifying purchasing agent (QPA) or not. A QPA is the individual who gets assigned the authority, responsibility, and accountability for public school purchases, who has the authority and duties defined in NJSA 40A:11-9 and NJAC 5:34-5-1 et. seq., and who possesses a QPA certificate. If the public school has a QPA, the state bid threshold is \$44,000.00. If there is no QPA, the state bid threshold is \$32,000.00. **SFAs should always err on the side of formal procurement.**

FORMAL PROCUREMENT PROCEDURES (IFB/RFP)

Specifications must be developed for both IFB and RFP. The Commercial Vendor Specification Guidance for Formal and Informal Procurement (**Form 238** – Revised January, 2021) provides guidance on writing specifications. Applicable provisions/requirements in the Base Year Commercial Vendor Contract (**Form 233**) should be included in the specifications. **New requirements for documents from commercial vendors, specified in both Forms 233 and 238, must be included in specifications.**

For an RFP, federal procurement regulations require that evaluation and scoring criteria be included to inform potential vendors of the evaluation criteria the SFA will use to award the contract. The Commercial Vendor RFP Sample Scoring Criteria (**Form 247** – Revised March 2020) provides recommendations for the SFA to use when selecting their scoring criteria. The Commercial Vendor RFP Scoring Criteria & Evaluation Form (**Form 222** – Revised March 2020) with criteria and weighting factors completed, must be included with the specifications. Forms are available on SNEARS Resources under the Vended Meal/SFA to SFA/Consolidation category.

USDA procurement standards for the formal procurement process require the IFB/RFP to be publicly advertised in a regional news source/official newspaper. The SFA cannot advertise exclusively on the school district web site or in a local news source with limited circulation.

Specifications must be provided to any vendor requesting them and SFAs are required to honor any response to the publicized IFB/RFP to the maximum extent possible.

For IFB:

Formal bids must be publicly opened on the date specified in the public advertisement.

Contract must be awarded to the bidder whose bid, conforming to all material items and conditions, is lowest in price.

For RFP:

Proposals that offer items or services that were not requested by the SFA in the specifications are “overly responsive” and the SFA cannot consider the unsolicited items or services in its evaluation of the proposal.

Proposals that did not meet specification requirements are considered “non-responsive” and must be rejected.

The SFA must evaluate proposals using the weighted evaluation criteria described in the RFP.

The Commercial Vendor Scoring and Evaluation Form (**Form 222**) must be completed by each SFA evaluator for each vendor who submits a proposal.

The primary factor in the award must be the total price offered along with other criteria evaluated and scored to ensure award of the contract to the most responsive and responsible commercial vendor whose proposal conforms to the RFP solicitation. The contract is awarded to the vendor whose proposal, based on scoring and ranking, is most advantageous to the SFA, with price as the primary factor and other factors considered.

INFORMAL (SMALL PURCHASE) PROCUREMENT PROCEDURES

In order to ensure that purchases under \$250,000.00 still meet the requirements of full and open competition, federal law requires SFAs, at a minimum to:

1. Determine and identify its food service needs.
2. Develop and write the criteria/specifications that the vendor must fulfill and that the SFA will use in making its vendor selection. The specifications should detail:
 - a. General purchasing conditions or requirements. Examples of general purchasing requirements are when the meals are to be provided, such as serving days, location and time, and a requirement that vendors abide by Hazard Analysis and Critical Point (HAACP) Food Safety controls and applicable state and local sanitation and health standards, etc.
 - b. Specific purchasing requirements. Examples of specific requirements are identifying the quantity and quality of the products needed, a sample menu, number of meals projected for each meal type (breakfast, lunch, snack), delivery schedules, etc.
 - c. Required documents and certifications (as referenced in Commercial Vendor Contract – **Form 233** and Specifications – **Form 238**) vendor must provide before award.
3. Identify an adequate number of potential vendors eligible, able, and willing to provide meals.
4. Contact **at least three** vendors by email, fax, or mail.
5. Award the contract to the most responsible and responsive vendor with the lowest price.

Note: If an SFA eligible for the Informal (Small Purchase) Procedure wants to award a contract based on ANY criteria other than lowest price (i.e. taste tests, menu choices offered, vendor qualifications, etc.) an RFP IS REQUIRED AND FORMAL PROCUREMENT PROCEDURES MUST BE FOLLOWED.

CONTRACT LENGTH AND MEAL PRICES (All schools – public/charter and non-public):

All contracts must be awarded based on a July 1 through June 30 time frame. There are two options for contract length:

1. The term of the contract can be for a one-year period (must be a 12-month year) with 4 additional one-year renewals allowed. Meal prices for renewals can only be increased up to the current quarterly index rate in effect at the time of renewal.
 - a. Example one-year term: July 1, 2021 – June 30, 2022
2. The term of the contract can be for a multi-year period. A multi-year contract is defined as a contract that exceeds 12 months. Under the multi-year provision, the base contract cannot exceed a term of three years and the meal price (breakfast, lunch, snack) must remain exactly the same for the entire length of the base multi-year contract. A one-year or two-year extension is allowed (5-year cap).
 - a. Example multi-year term: July 1, 2021 – June 30, 2023 or July 1, 2021 – June 30, 2024

RECORDKEEPING REQUIREMENTS

For all schools (public/charter and non-public), records of the procurement process detailing the history of the procurement and the rationale for the method used (formal or informal) must be kept on file for a minimum of three years after the end of the fiscal year to which they pertain. However, if audit findings have not been resolved, the records shall be retained beyond the three-year period for as long as required until the resolution of the issues raised by the audit. Records must be available for review during Administrative Reviews and/or Procurement Reviews.

For the Formal Process:

Required records include a copy of the affidavit of publication or actual published advertisement, specifications, record of the bids/quotes received, award of the contract, scoring criteria and scoring forms (for RFP), etc. The Commercial Vendor Meals Record for IFB/RFP (**Form 240**) must be used to document bids/quotes received. Board minutes awarding the contract are required for public/charter schools.

For the Informal Process:

Required records include a copy of the letters or emails sent to a minimum of 3 potential vendors and responses received (even if vendor declined to submit a proposal), specifications, award of the contract, etc. A Sample Request for Proposal Letter (**Form 245**) for requesting price quotes is available. The Informal Commercial Vended Meals Documentation Log (**Form 251**) must be used to document price quotes received.

For all commercial vendor contracts, regardless of procurement method, the following documents from the vendor must be provided to the SFA before award:

- Valid New Jersey Business Registration Certificate or Certificate of Business Formation (for vendors contracting with Non-Public SFAs only) from the Dept. of Treasury
- Vendor's current Health and Sanitation Certificate (within last 12 months)

- License to Operate a Wholesale Food-Cosmetic Establishment (N.J.S.A. 24:15-14)
- Form 380 – Commercial Vendor Questionnaire (available in SNEARS Resources)

State Agency Approval of Contracts

All SFAs that purchase meals from a commercial vendor MUST use the “School Food Authority/Commercial Vendor Contract.” The contract must be completed electronically in the Electronic Contract Approval System (ECAS). A sample contract (**Form 233**) is available for reference only in SNEARS Resources.

Documents for formal and informal procurement that must be submitted with the contract are indicated in ECAS. The Commercial Vendor (Base Year) Instructions for ECAS Submission (**Form 116**) indicates the specific documents for each type of procurement.

Note: SFAs executing a multi-year contract must submit all required documents the first year of the contract. For the second and, if applicable, third year of the contract, SFA must verify in ECAS that meal/snack prices have not changed. **There can be no meal price increases through the multi-year contract term.**

CAUTION: Failure to follow appropriate procurement procedures in accordance with requirements will result in the SFA not receiving State Agency approval for the contract and may result in the SFA having to re-bid/solicit quotations for vended meals and in loss of reimbursement.

CONTRACT RENEWAL REQUIREMENTS (All Schools – Public/Charter and Non-Public)

SFAs have the option to renew the base year contract (or can start the procurement process again to secure a new base year commercial vendor contract). Four requirements must be met when renewing a contract:

1. Each renewal must be awarded by resolution of the SFA upon a finding that the services are being performed in an effective and efficient manner;
2. The contract must not be renewed or extended so that it runs for more than a total of five consecutive years;
3. Any price change included as part of a renewal must be based upon the price of the original contract as cumulatively adjusted pursuant to any previous adjustment or renewal, and shall not exceed the change in the Index Rate (as defined in Public Schools Contract Law, N.J.S.A. 18A:18A-1 et seq.) for the 12 months preceding the most recent quarterly calculation available at the time the contract is renewed; and
4. The terms and conditions of the contract must remain substantially the same. (N.J.S.A. 19A:18A-42)

One-Year Contract Renewal

If the original contract term was for a one-year period, the parties can renew the original contract annually for up to four additional one-year periods (an approach that follows the traditional federal framework for food service contracts).

Multi-Year Contract Renewal

If the original contract term was a multi-year contract (more than 12 months but less than 3 years), the multi-year provision allows extensions of: (a) one two-year term or (b) two one-year terms.

ALLOWABLE MEAL PRICE INCREASES

For renewals, **any** price increase to the original meal price(s) of the contract are tied to the Quarterly Index Rate, which can be accessed at the New Jersey Department of Community Affairs, Division of Local Government Services website at:

https://www.nj.gov/dca/divisions/dlgs/programs/lpcl_docs/cur_index_rate.pdf

School officials must ensure that price increases for each meal type/meal price are in compliance with the quarterly index rate in effect at the time the contract is renewed. Renewals that include meal prices that exceed the current index rate by any amount will not be approved. The “time the contract is renewed” means:

- **PUBLIC/CHARTER SCHOOLS**: Current index rate is determined based on the index rate posted on the date of the Board meeting approving the renewal. The quarter that the rate covers is not applicable.
- **NON-PUBLIC SPONSORS**: Current index rate is determined based on the index rate posted on the date the renewal is executed (signed) by the SFA. The quarter that the rate covers is not applicable.

STATE AGENCY APPROVAL OF RENEWALS

A mandatory renewal template and other required documents must be completed and submitted to the State Agency through ECAS as part of the annual agreement.

For all commercial vendor renewals, a current Health and Sanitation Certificate for each commercial vendor facility where meals are prepared must be provided to the SFA before signing the renewal.

Forms and guidance are available in SNEARS Resources under the Vended Meals/SFA to SFA/Consolidation category. Recorded webinars are available in SNEARS Training. The general public can access links for Resources and Trainings from the NJDA’s School Nutrition Programs webpage at: <https://www.state.nj.us/agriculture/divisions/fn/childadult/school.html>

Disclaimer: *This guidance is intended to provide all entities with a general framework on how to structure their vendor contracts. It does not replace the advice of legal counsel. If there are any questions in this area, additional guidance can be found at the Federal level by accessing the applicable laws and USDA policy memos at the USDA website and at the state and local level by accessing the Department of Community Affairs (DCA)’s Local Government Services at the DCA website. If further assistance is needed, contact the New Jersey Department of Agriculture, Division of Food and Nutrition Contract Team by email at: DFNContracts@ag.nj.gov*