

## COMMERCIAL VENDOR CONTRACT/ADDENDUM

### FACT SHEET

#### BASE YEAR CONTRACTS

##### General Procurement Rule for All Schools

Whether you follow the federal law or federal and state and local laws, the general rule when buying goods and/or services with School Nutrition Program funds is that such purchases must be done in a manner that is open and competitive. These types of purchases are known in the law as “procurement.”

The rule for purchasing applies no matter what form of contract or means of purchasing applies to your individual school – that is, this is the rule whether your school contracts with a Food Service Management Company( FSMC) or contracts with a commercial vendor for vended meals (vended meal contract). As a point of clarification, a vended meal contract is when a vendor provides only meals/meal components and does not provide employees on-site to make final meal preparations or serve meals or manage any aspect of the food service.

Generally, the purchasing of goods and services involves distinct phases of planning, drafting specifications, advertising the procurement (where a formal 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. Free 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 a nonpublic school.

##### NON-PUBLIC SCHOOLS [*Nonprofit Private Schools*]

The applicable federal regulation that applies in this context is 2 CFR Parts 200, 215, and 230. **The first step in determining which procurement process to follow – formal or informal - is to determine if the costs for the contract are “at or above” or below \$150,000.00.**

To determine total costs for the contract, multiply the current per meal (lunch, breakfast, snack, dinner) 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 and then added together to determine the total cost of the contract. Paragraph X of the SFA/VENDOR CONTRACT TEMPLATE (Form #233) should be used to do the calculation.

### **At or above \$150,000.00 – Formal Process**

If the total amount of the purchase is at or above \$150,000.00, federal law requires non-public schools to abide by the rules of formal open and free competition. This process is called the formal procurement process and can be carried out using either sealed bids competition (where the only issue to be negotiated is price) or requests for proposals (where there is more than price that needs to be negotiated). The Invitation for Bid (IFB) or Request for Proposal (RFP) **must be publicly advertised in a regional news source/official newspaper.**

SFA developed specifications must be provided to any vendor that expresses an interest in submitting a bid or proposal. The *Commercial Vendor RFP/Specifications Fact Sheet* (Form #238) provides information on writing specifications.

For sealed bids competition, bids must be opened publicly at the time and place stated in the IFB. The contract must be awarded to the most responsible vendor, whose bid met conditions/requirements and is lowest in price.

For requests for proposals, specifications must include all significant evaluation factors, including price or cost and their relative importance. The contract may be awarded to the responsible vendor, whose proposal will be most advantageous to the SFA, price and other factors considered.

### **Below \$150,000.00 – Informal Process**

If the total amount of the purchase is below \$150,000.00, the informal process of purchasing meals should be followed. While the process is known as an informal or “small purchase” process, this does not mean it lacks competition. The informal in the name is because there is no advertising required when using the small purchase process.

Therefore, in order to ensure that purchases under \$150,000.00 still meet the requirement of competition; federal law still requires non-public schools, at a minimum to:

1. Determine and identify its food service needs.
2. Develop and write the criteria or specifications that the commercial vendor must fulfill and that the non-public school will use in making its commercial vendor selection. The specifications should detail: (a) general purchasing conditions or requirements and (b) specific purchasing requirements. Examples of general purchasing requirements are when the goods or services are to be provided, such as serving days, location and time, and a requirement that vendors maintain a Hazard Analysis and Critical Point (HAACP) Food Safety controls and applicable State and local sanitation and health standards. 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, dinner), delivery schedules, etc.
3. Include scoring criteria in the specifications that will be used to make final vendor selection.
4. Identify an adequate number of sources eligible, able, and willing to provide the products.
5. Contact at least three sources by email, fax, or mail and/or publicly advertise in a regional news source/official newspaper.

6. Evaluate the potential vendor's response to your written specifications and rank them using scoring criteria.
7. Determine which vendor is the most responsive and responsible at the lowest price.
8. Specify how and why a quote was chosen.

### **PUBLIC SCHOOLS/CHARTER SCHOOLS**

With regard to charter schools, please note that under New Jersey's Administrative Code (N.J.A.C.) 6A:23A-22.5, a charter school, or an agent, corporation, or person or entity that enters into an agreement on behalf of a charter school is also required to comply with the same contract law as public schools. So, whenever the word public school is used in this document, a charter school is also incorporated.

Just like non-public schools, public schools must meet federal legal requirements when procuring goods and/or services using federal School Nutrition Program funds. This means that some requirements described above for nonpublic schools such as the small purchase threshold applies to public schools as well. In addition to those requirements, public schools must also meet the applicable State and local laws when making purchases. Public schools 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 legal framework 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 and State and local law requirements.

The applicable federal regulations that apply in this context can be found at: 7 CFR 210.21 for the National School Lunch Program (NLSP), 7 CFR 220.16 for the School Breakfast Program (SBP), 7 CFR 215.14a for the Special Milk Program (SBP). 7 CFR 226 for the CACFP Dinner Program and 2 CFR 200.318-200.326 which covers 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 by the Public Schools Contract Law; and New Jersey's Administrative Code (NJAC) 5:34-1 et. seq., which are the governing rules by the Division of Local Government Services (LGS) in the Department of Community Affairs.

As discussed above, the federal amount to determine whether a *formal or informal purchase* process is to be followed is \$150,000.00. In addition, the State's 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 and 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 bid threshold is \$40,000.00. If there is no QPA, the bid threshold is \$29,000.00. In addition, the State law provides that where the total contract price is 15% or less of these thresholds, then the QPA can award the contract without competitive quotations.

A useful chart, found on the New Jersey Division of Community Affairs' website, <http://www.nj.gov/dca/>, is cited herein in relevant part as a quick summary of these thresholds:

Bid Threshold with a QPA	\$40,000.00
Quote Threshold with a QPA	\$6,000.00
Bid Threshold without a QPA	\$29,000.00
Quote Threshold without a QPA	\$4350.00

*Note: these amounts are effective July 1, 2015.*

Let's see these rules in application in the most common contexts where conflicts or questions arise

### **Threshold**

A frequent area of confusion to public schools is which threshold amount applies in light of the fact that the federal regulations have a \$150,000.00 threshold and the Public Schools Law provides a lower threshold of \$40,000.00 (if there is a QPA) or \$29,000.00 (if there is no QPA).

#### Example 1

Assume a public school's total food costs and services in a contract are below \$150,000.00 and that it has a QPA, so that the \$40,000.00 cut off applies, which threshold does the public school follow?

**Answer:** The \$40,000.00 threshold. Why? Because it is the most restrictive – that is, this lower amount imposes greater legal requirements than the federal threshold. So, that means if a public school's food costs and services are above \$40,000.00, the public school must follow a formal procurement process.

#### Example 2

By extension and analogy, if the public school's costs and services are below \$150,000.00 and there is no QPA and the \$29,000.00 cut off applies, the \$29,000.00 threshold applies as this is the most restrictive requirement.

It is important to note that 2 CFR 200.318-200.326 requires public schools to conduct a cost analysis or price analysis with every purchase action, *including contract modification*. The method and degree of the analysis is dependent on the facts surrounding the purchase. An essential starting point is to make independent estimates of the costs or prices before receiving quotes, bids or proposals. A price analysis is required in all instances to determine the reasonableness of the price.

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

A common question for vended meal contracts is what length (term) the contract should take. There are two options:

1. The term of the contract can be for a **school year or a 12 month year** (with 4 additional one year renewals allowed).

Example term: September 1, 2016 - June 30, 2017 or September 1, 2016 - August 31, 2017

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 and dinner) must remain the same for the entire length of the base multi-year contract. A one or two year extension is allowed (5 year cap).

Example term: September 1, 2016 - June 30, 2018 or September 1, 2016 - June 30, 2019

## **RECORDKEEPING REQUIREMENTS/STATE AGENCY APPROVAL FOR CONTRACTS**

For all public/charter and non-public schools, all records of the procurement process detailing the history of the procurement, the rationale for the method used [formal or informal] and detailing the steps identified above, should be kept on file for a minimum of three years after the end of the fiscal year to which they pertain except if audit findings have not been resolved, in which case the records shall be retained beyond the three year period as long as required for the resolution of the issues raised by the audit.

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, etc. A sample *Record of IFB/RFP for Vended Meals* (Form 240) is available to use to document quotes/bids received.

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 declining to submit a proposal, specifications, award of the contract, scoring criteria.

**All Local Education Agencies (SFAs) that purchase meals from a commercial vendor MUST use “Local Education Agency/Commercial Vendor Contract” (Form #233) as the standard contract form**, available at the New Jersey Department of Agriculture website at <http://www.state.nj.us/agriculture/applic/forms/#5> or in SNEARS, under Resources.

All required records/documents must be sent to the State Agency for approval as part of the annual agreement process. For a checklist of specific documents that must be submitted, see *Local Education Agency (SFA)/Commercial Vendor Contract Checklist* (Form #199), available in SNEARS under Resources.

**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 (ADDENDUMS)**

### **CONTRACT RENEWAL REQUIREMENTS (All Schools)**

SFAs have the option to renew the base year contract or start the procurement process again to secure a new base year commercial vendor contract.

SFA Four requirements must be met when renewing a contract.

1. Each renewal shall 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 shall 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 shall 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 shall remain substantially the same. [N.J.S.A. 18A:18A-42].

#### One Year Contract Renewal

If the original contract term was for a one year period, the parties can renew the original contract 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) a one two-year term; or, (b) two one-year terms.

Note: SFAs executing a multiyear contract must submit all documents on the SFA/Commercial Vendor Contract Checklist (#199) the first year of the contract. A copy of the contract must be submitted each year of the effective period of the base contract.

#### **ALLOWABLE MEAL PRICE INCREASES**

For renewals, **any** price increase to the original meal price(s) of the contract are tied to the Consumer Price Index (Quarterly Index Rate), which can be accessed at the New Jersey Department of Community Affairs Division of Local Government Services website at: [www.state.nj.us/dca/divisions/dlgs/programs/lpcl\\_docs/cur\\_index\\_rate.pdf](http://www.state.nj.us/dca/divisions/dlgs/programs/lpcl_docs/cur_index_rate.pdf).

The School Purchasing Agent, business administrator, head administrator or authorized legal representative ("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.

#### Points to Remember When Using the Quarterly Index Rate

- The index rate percentage is applied to the **base year** meal price(s) for each meal type (breakfast, lunch, snack, or dinner).
- The calculated increase is added to the meal price(s) for each meal type (breakfast, lunch, snack, or dinner) from the **previous year**.
- The index rate percentage for each meal type **CAN NOT** be exceeded at all.
- **PUBLIC SCHOOLS:** Index rate is determined based on the index rate posted on the web site on the date of the Board meeting when the renewal is approved. The quarter that the rate covers is not applicable.
- **NON-PUBLIC SPONSORS:** Index rate is determined based on the index rate posted on the web site on the date the addendum is executed (signed) by the SFASFA. The quarter that the rate covers is not applicable.

**CAUTION:** Failure to structure vended meal contract price increases in accordance with the above quarterly index rate requirements will result in the SFA not receiving State agency approval for the Addendum and may result in the SFA having to re-bid for vended meals or losing reimbursement.

Example of quarterly index rate calculation:

Base year lunch price: \$3.25

Base year breakfast price: \$2.00

Quarterly index rate in effect at time of renewal: 1%

Lunch

$\$3.25 \times 1\% = \$.0325$

$\$3.25 + \$.0325 = \$3.2825^*$

Meal price can be increased to **\$3.28**

**\*Always round down**

Breakfast

$\$2.00 \times 1\% = \$.02$

$\$2.00 + \$.02 = \$2.02$

Meal Price can be increased to **\$2.02**

### **STATE AGENCY APPROVAL OF ADDENDUMS**

SFAs renewing the contract with a commercial vendor must use the “*Local Education Agency/Vendor Addendum Template*” (Form #234) as the standard addendum form, available at the New Jersey Department of Agriculture website at <http://www.state.nj.us/agriculture/applic/forms/#5> or in SNEARS, under Resources.

SFAS must complete the *Index Rate/Vended Meal Cost Worksheet* (Form # 232) to document that the quarterly index rate was implemented correctly.

**The above documents as well as all required records must be sent to the State Agency as part of the annual agreement process.** For a checklist of records needed in the annual submission, see Local Education Agency (SFA) Commercial Vendor Addendum Checklist (#239) available in SNEARS under Resources

*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 your food purchasing needs are not covered by this guidance and you need additional assistance, you may contact the New Jersey Department of Agriculture School Nutrition Programs at 609-984-0692.*