



DISTRICT OF COLUMBIA

OFFICE OF THE STATE SUPERINTENDENT OF

EDUCATION

MEMORANDUM

To: School Food Authorities

From: *Elizabeth Leach*
Elizabeth Leach
School Programs Manager

Date: January 9, 2017

Re: Q&A: Purchasing Goods and Services Using Cooperative Agreements,
Agents, and Third-Party Services

State Agency Memo
NSLP #5-17

USDA Food and Nutrition Services (FNS) recently released this Q&A: Purchasing Goods and Services Using Cooperative Agreements, Agents, and Third-Party Services.

This memorandum provides general guidance on the various procurement groups FNS has identified, how to use each group in a way that complies with Federal procurement standards, and supersedes SP 35-2012, Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, etc., dated June 12, 2012. This memorandum applies to all Child Nutrition Program operators.

Although participating in intergovernmental and inter-agency agreements can offer greater economy and efficiency for procurement or use of common or shared goods or services (2 CFR 200.318(e)), Program operators participating in these agreements must still conduct competitive procurement in accordance with 2 CFR Part 200.318-.326 and applicable program regulations and guidance. Specifically, Program operators must ensure all:

- Costs paid from the nonprofit food service account are necessary, reasonable, allocable, and otherwise allowable per 2 CFR 200.403 and the applicable cost principles in 2 CFR 200, subpart E.
- Procurements are conducted in a manner maximizing full and open competition consistent with Federal procurement standards in 2 CFR 200.318-.326 and in applicable Program regulations.

Failure to competitively procure goods and services is a violation of Federal regulations and may result in delays, disputes, findings of noncompliance, and costs being disallowed.

Please reach out to your designated Program Specialist with any questions.

Questions and Answers

Q1. What types of agreements has FNS identified to facilitate procurement by Program operators and how are they defined?

A. The various purchasing agreements that have been identified to facilitate procurement by Program operators are classified into three groups:

1. Child Nutrition Program (CNP) Program operator-only and/or CNP State agency cooperatives,
2. Agents, and
3. Third-Party entities (e.g., state-run cooperative agreements, inter-agency agreements, non-Program operators such as public, private, and non-profit entities, group purchasing organizations, group buying organizations, third-party vendors).

1. CNP Program operator-only and/or CNP State agency cooperative agreement. This is an agreement formed solely between CNP Program operators and may include CNP State agency cooperatives formed to increase purchasing power. This agreement is not a method of procurement, rather an agreement to competitively procure goods and services. Such agreements may include a fixed fee to cover overhead or administrative costs as specified in the cooperative agreement.

2. Agent. An agent is a person or business authorized to act on a client's behalf. An agency may be necessary for procuring goods or services when/if the client does not have the necessary technical understanding of the equipment, service, food or other food service supplies to be purchased; or lacks time or expertise to conduct a proper procurement. A procurement agent represents a special fiduciary relationship of trust between itself and its client. In other words, the agent must be contractually required to conduct all competitive procurement methods with its client's interests solely in mind. An agent's services in excess of the micro-purchase threshold currently set at \$3,500 must be competitively procured in accordance with Federal procurement methods outlined in 2 CFR 200.320.

3. Third-Party entities. Third-Party entities include State procurement agency agreements, inter-agency agreements, group purchasing organizations, group buying organizations, and third-party vendors.

i. State procurement agency agreements: This is an inter-governmental agreement with the State which may include public, private, and non-profit entities. This procurement service is not part of the CNP State agency as the services are conducted for State facility needs using State procurement standards and the State allows local educational agencies (LEAs), school food authorities (SFAs), and other CNP operators to purchase from the State's contracted sources. When competitive procurement methods are conducted by the Program operator, this agreement may be one source of prices when using small purchase procedures, sealed bids or competitive proposals, as applicable.

ii. Inter-agency agreements: This is an agreement which may include public, private, and non-profit entities formed to procure goods and services together. An example is an educational hub whose purpose is to purchase goods and services for LEAs. When competitive procurement methods are conducted by the Program operator, this agreement may be one source of prices when using small purchase procedures, sealed bids or competitive proposals, as applicable.

iii. Group Purchasing Organizations, Buying Organizations, and Third-Party Vendors. Collectively referred to here as GPOs, these often include CNP and non-Program operators such as public and private schools, hospitals, universities, law enforcement, public works, etc. who join a third-party company or service provider. GPOs could be private for-profit or nonprofit entities. A GPO is typically structured in a way that may include a membership fee paid by member users, who are then granted access to the GPO price list of products and services. When competitive procurement methods are conducted by the Program operator, GPO price lists may be one source of prices when using small purchase procedures, sealed bids or competitive proposals, as applicable.

Q2. What competitive process must be conducted by Program operators to be compliant with Federal procurement regulations when purchasing goods and services from each of these agreement types?

Although the competitive process conducted by Program operators may vary according to the agreement type utilized, all competitive procurements must be in accordance with 2 CFR Part 200.318-.326 and all other applicable government-wide and FNS regulations and guidance.

With all procurements, if a Program operator later determines additional goods and services are needed but not included or available from the sources already procured, the Program operator may purchase items using the micro-purchase method, if applicable, or conduct a separate procurement using the applicable procurement methods in 2 CFR 200.320(a-d) and maintain records detailing the history of the procurement as required in 2 CFR 200.318(i).

The procurement process to follow when procuring goods and services within the above agreement types is identified as follow:

1. CNP Program operator-only and/or State agency cooperative agreement. A cooperative that is comprised solely of Program operators and/or the CNP State agency may procure as a group and must do so in compliance with the procurement standards that apply to the individual Program operator (7 CFR 210.21 and 2 CFR 200.318-.326). This includes complying with all State and local procurement standards, if more restrictive, and publishing solicitations and contracts with all terms, conditions, required contract provisions, as applicable, and clearly identifies all product descriptions, specifications, and estimated quantities required. For SFAs, the Buy American and cost-reimbursable

provisions in 7 CFR 210.21(d) and (f) are required. Further, each Program operator is responsible for monitoring contractor performance to ensure compliance with all contract provisions. Written agreements delineating roles and responsibilities are encouraged.

Examples of such cooperatives include:

Program Operator-only Cooperative: A group of Program operators agreeing to cooperatively procure together to take advantage of volume pricing for products or services procured in one contract. Under Program operator-only cooperative agreements, the group of Program operators, as defined in the scope of the solicitation, cannot materially change from the original group who plan to purchase together. Forecasting activities conducted prior to the formation of this cooperative should include actual and potential members of the cooperative and the solicitation should clearly define the expected level of members in the scope.

Educational Service Centers: May be composed of several school districts in a region (of a State) in order to provide shared educational services, including cooperative purchasing in some cases, to the school districts of that region. They may exist under State statute and/or receive funding from the State legislature and membership may be automatic for those public schools in the region. Again, such Program operator-only cooperatives must follow, at a minimum, Federal procurement regulations when procuring goods and services for its members.

CNP State agency cooperative agreements: It is rare, but a few CNP State agencies conduct procurement procedures on behalf of Program operators. In such cases, Program operators may purchase from the CNP State agency's procured sources without further competition as long as the State agency procures on behalf of Program operators following procurement standards in Program regulations and 2 CFR 200.318-.326. State agencies must clearly define the scope of Program operators represented in the cooperative. (See Q5 below for additional information.) Also, if Program operators determine additional goods and services are needed but were not procured by the cooperative or are not available from the procured source, the Program operator must conduct separate competitive procurement procedures using the applicable procurement methods in 2 CFR 200.320(a-d).

State agencies with oversight of CNPs have additional considerations as they must ensure SFAs include the Buy American provision in 7 CFR 210.21(d) in all solicitations and contracts for food and must ensure the contract provisions in 7 CFR 210.21(f) are included in cost- reimbursable contracts. The solicitation and contract must also outline how the allocable portion of each discount, rebate and or credit will be returned and/or disclosed to each participating SFA. The solicitation and contract must also outline how each proportionate value pass-through method for crediting the value of USDA foods will be returned and/or disclosed to each participating SFA.

2. Agent. When an agent is needed to procure goods and services on behalf of the Program operator, the Program operator must first determine if the agent fee is within the micro-purchase threshold or if a competitive procurement method must be conducted for the services of the agent. If a solicitation is required, the scope of duties and responsibilities must be clearly defined as well as how prices/costs for services are to be quoted for evaluating agents' bids/responses for contract award. Some agents often charge fees to vendors who pass such fees on to the Program operator. Fees must be fixed based on a purchase unit, volume or cost (fees cannot be a percentage of cost). Agents cannot be considered if they do not openly provide the full price per purchase unit for their service. Paying a fee does not constitute a solicitation or contract with an agent. Program operators must include language that details "when procuring goods or services for their client, agents must follow procedures consistent with 2 CFR Part 200.318-.326 and applicable program regulations" which includes State and local procurement requirements if more restrictive. Published solicitations and contracts must include all terms, conditions, required contract provisions, as applicable, and all products descriptions, specifications, and estimated quantities required. For SFAs, the Buy American and cost-reimbursable provisions in 7 CFR 210.21(d) & (f) are required. Further, each Program operator is responsible for monitoring contractor performance to ensure compliance with all contract provisions.

The procurement agent must confirm in its response to the solicitation that it will represent the client and will have the client's best interests exclusively in mind when preparing solicitations for publication on the client's behalf. The agent may not have any conflict of interest, real or apparent. For example, the agent may not use pre-existing contractual relationships in lieu of conducting a competitive procurement on behalf of the Program operator.

In order to ensure free and open competition, the procurement agent must:

- work closely with the client to understand the client's needs,
- develop solicitations on the client's behalf consistent with 2 CFR Part 200.318-.326 and applicable Program regulations as required for the Program operators as noted above,
- award contracts only to responsible contractors whose bid/offer is lowest/most advantageous to the Program with price as the primary factor,
- award fixed-price or cost-reimbursable contracts, as specified by the Program operator, or State agency, as applicable, and,
- monitor the ensuing contract on behalf of the Program operator as required in 2 CFR 200.318(b), if specified in the original solicitation and resulting contract.

Please note that an agent publishing a solicitation on behalf of a client may not respond to such solicitation, as such would constitute an unfair advantage and be in violation of Federal procurement requirements as found in 2 CFR 200.319(a).

3. Third-Party entities. As noted above, Program operators must also follow procurement procedures consistent with 2 CFR Part 200.318-.326 and applicable program regulations

when procuring under agreements with third-party entities. Additionally, agreements that include a fee to cover overhead or administrative costs must be specified therein. Other parties outside of these arrangements may be added to properly procured contracts that meet all applicable Program regulations when included in the original solicitation; see Q5 for further information on adding parties to an existing contract.

i. State procurement agency agreements:

The Program operator may consider a non-CNP State agency's procurement as one source for procurement. For example, if the purchase is under \$3,500, the Program operator may purchase directly from the State's procured sources as long as the prices are reasonable and the Program operator equitably distributes all procurements among all qualified suppliers available. If the procurement is less than the Federal Simplified Acquisition Threshold (SAT), (currently set at \$150,000), or State or local threshold; whichever is most restrictive, the Program operator may obtain a price or rate quotation from the State's procured sources, among other qualified sources available. For procurements over the SAT, a Program operator must first conduct a cost analysis (2 CFR 200.323(a)) then develop a solicitation (sealed bid or competitive proposal) and may use vendors and prices from the State's contract as one source. Remember, it is not the State procurement agency agreement that is the competitive procurement; rather, this agreement gives the Program operator further options of sources to utilize to ensure full and open competition.

ii. Inter-agency agreements:

Program operators purchasing through an inter-agency agreement includes entering into the inter-agency agreement to competitively procure common goods and services, then developing and publishing solicitations through sealed bids/competitive proposals. These solicitations must include procurement procedures consistent with 2 CFR Part 200.318-.326 and include the terms, conditions, required contract provisions, as applicable, and all products, descriptions, specifications, and estimated quantities for their Child Nutrition Programs. For SFAs, the Buy American and cost-reimbursable provisions in 7 CFR 210.21(d) & (f) are required. Further, each Program operator is responsible for monitoring contractor performance to ensure compliance with all contract provisions. An example of an inter-agency agreement is an educational hub whose purpose is to competitively procure goods and services for LEAs.

iii. Group Purchasing Organizations, Buying Organizations, and Third-Party Vendors.

The business model of a GPO may include a variety of services of which facilitating procurement for members/member agencies and procuring products and services from an external source such as an affiliated or unaffiliated full-line distributor are included. Membership involves paying a fee in addition to the price of products and services purchased. However, paying a fee does not constitute compliance with the competitive procurement process that Program operators are required to conduct when procuring products and services. A Program operator may pay a membership fee to multiple GPOs and when using micro or small purchase procedures may consider the

price for products from GPOs as one source among an adequate number of qualified sources. For the procurement of good and services greater than the Federal SAT or State or local thresholds that may be more restrictive, Program operators must publish sealed bids or competitive proposals to which GPOs may respond provided the GPO has not drafted such solicitations. Likewise, responses to bids/proposals must be evaluated by the Program operator to determine the lowest responsible and responsive bidder/offeror with price as the primary factor. Purchasing goods and services from a GPO without conducting a compliant procurement process is limited to the micro-purchase threshold. Under the micro-purchase threshold, transactions are below \$3,500, prices would be reasonable, and purchases would be equitably distributed among qualified suppliers.

Q3. Is there an advantage to soliciting prices from qualified sources versus using a procurement agent?

The services of an agent may be beneficial in places where qualified sources are limited or when the Program operator lacks the time or expertise to evaluate needs, write specifications, draft solicitations, evaluate and award contracts, and obtain competitive prices using compliant procurement methods. As noted above, agents may not respond to solicitations drafted on behalf of the Program operator as this would be a conflict of interest and a violation of Federal regulations.

Program operators are encouraged to consider their procurement procedures and to determine if the use of a procurement agent is the best approach when considering the availability of qualified sources, time, expertise, and the agent's fee(s).

Q4. What procurement methods must Program operators use to achieve full and open competition when procuring services through Program operator-only cooperatives, agents, or other third-party entities?

When procuring services through CNP Program operator-only and/or State agency cooperative agreements, agents, or when purchasing under all other third-party entities, Program operators must use the procurement methods found in 2 CFR 200.320 which are (a) micro purchases; (b) small purchase procedures; and (c) sealed bids/competitive proposals. These methods are detailed in SP 02-2016; CACFP 02-2016; SFSP 02-2016: Questions and Answers on the Transition to and Implementation of 2 CFR Part 200 dated October 30, 2015.

Program operators using the micro-purchase method to pay for membership fees to various third-party purchasing entities must still then conduct a competitive procurement using the parties' prices as one source.

Q5. When adding parties to an existing contract, what considerations must be included in solicitations and contracts to allow this practice?

When adding parties to either a fixed-price or cost-reimbursable contract, known colloquially as “piggybacking,” the contract must have been procured in compliance with 2 CFR Part 200.318-.326 and applicable program regulations. Contracted parties considering additional parties must include a provision allowing “piggybacking” in their contracts in order to avoid creating a material change. If such a provision is not included in the contract and a material change is determined, a new competitive procurement is required.

For a contract containing such provisions, language should be included specifying applicable limitations of the extension (e.g., dollar value or the number of additional parties that may be added). Such contracts should be thoroughly reviewed by members to ensure they meet their needs and conform to all applicable program requirements. For further guidance on “piggybacking” refer to memo SP 02-2016; CACFP 02-2016; SFSP 02-2016.