

CHILD NUTRITION PROGRAMS REQUIRED FEDERAL PROVISIONS

Disclaimer: This is a living document and is subject to revision. This is merely a guidance document and does not necessarily contain every requirement that pertains to a contract; ACDA accepts no liability for any of its contents. This document was created with input from the ACDA Education Committee, State Agencies, Recipient Agencies, and the Urban School Food Alliance.

In addition to other contracts provisions required by the program regulations for the Federal award, all contracts made by a non-Federal entity under a Federal award must contain provisions set forth in 2 CFR 200.318 -.326 and 2 CFR 200 Appendix II., **as applicable**. Please note, however, that not all of these provisions must be included in every contract awarded by a program operator. If you are unsure whether you will need to include a specific Federal provision in your contract, please consult with your State Agency or an Attorney. There may be additional State or local requirements required, please consult with your State Agency. Program operators always need to follow the strictest of Federal, State, or local requirements.

Below are the required Federal Provisions listed in [2 CFR 200 Appendix II](#) that may pertain to your contract:

- **REMEDIES:** If the contract is for more than the simplified acquisition threshold currently set at **\$150,000**, your contract must include a clause that addresses administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate. The USDA does not prescribe the form or content of these clauses. Check with an attorney to determine if state or local law prescribes the use of specific language.
- **TERMINATION:** If the contract is in excess of **\$10,000**, your contract must contain a clause that addresses termination for cause and for convenience by the school district including the manner by which it will be effected and the basis for settlement. The USDA does not prescribe the form or content of these clauses. Check with an attorney to determine if state or local law prescribes the use of specific language.

Termination clauses should address the following-

- Termination for Cause- example, contractor fails to follow/breaches terms of contract
 - Termination for Convenience- example, customer service is not up to par and you wish to find another vendor
 - Number of days' notice required to terminate contract (generally 30-60 days)
 - Rights of Agency
 - Rights of Contractor
- **EQUAL EMPLOYMENT OPPORTUNITY:** This clause would be required only for contracts that meet the definition of "federally assisted **construction** contract." You should consult with the State agency or an attorney to determine whether this clause should be included.

- **DAVIS–BACON ACT CLAUSE:** This clause would be required only for prime **construction** contracts in excess of **\$2,000** awarded by non–Federal entities. You should consult with the State agency or an attorney to determine whether this clause should be included.
- **CONTRACT WORK HOURS AND SAFETY STANDARDS ACT CLAUSE:** This clause would be required only for contracts awarded by the non–Federal entity in excess of \$100,000 that involve the **employment of mechanics or laborers**. You should consult with your State agency or an attorney to determine whether this clause should be included.
- **RIGHTS TO INVENTIONS MADE UNDER A CONTRACT OR AGREEMENT:** This clause is only necessary when the award meets the definition of “funding agreement” under 37 CFR § 401.2 (a) and the school food authority wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or sub recipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency. A food service department generally does not award contracts of this nature. You should consult with your State agency or an attorney to determine whether this clause should be included.
- **CLEAN AIR / CLEAN WATER:** For contracts and sub grants of amounts in excess of **\$150,000**, your contract must include a clause requiring the contractor to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401–7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251–1387) and the contractor must agree to report all violations to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

Neither the State agency nor the USDA prescribes the form or content of these clauses. The following are suggestions of clauses that can be used:

- The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. The Contractor agrees to report each violation to the USDA and the appropriate EPA Regional Office.
- The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251 et seq. The Contractor agrees to report each violation to the USDA and the appropriate EPA Regional Office.
- **SUSPENSION AND DEBARMENT:** The Contractor understands that a contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.”

The entity can verify the vendor is not debarred or suspended using the SAM system:

<https://www.sam.gov/SAM/pages/public/index.jsf>

While there is not a specific form, the following is suggested language that can be used:

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

The certification in this clause is a material representation of fact relied upon by {**insert name of school district**}. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to {**insert name of school district**}, the Federal

Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 2 CFR 180.220 while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

- **LOBBYING:** Contractors that apply or bid for an award exceeding **\$100,000** must file the required certification pursuant to Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).

Neither the State agency nor USDA prescribes the form or content of these clauses. The following is a suggestion of clause that can be used:

The Contractor will comply with the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) and certifies to the tier above that it will not and has not used Federal appropriated funds to pay an person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by U.S.C 1352. If applicable, contractor will complete the disclosure of lobbying with non-Federal funds using Lobbying Activities Form ([Form SF-LLL](#)) and submit to {insert name of contracting entity} annually.

Below are the required Federal Provisions listed in [2 CFR 200.318 – 200.326](#) that may pertain to your contract:

- **COOPERATIVE AGREEMENTS AKA PIGGYBACKING ((ONLY IF ALLOWING) 2 CFR 200.318):** To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

While there are no specific Federal requirements for language to be included, USDA memo [SP 02-2016](#) and [SP 05-2017](#) includes the requirements that must be in original solicitation and resulting contract.

- **CONTRACTING WITH SMALL AND MINORITY BUSINESSES, WOMEN'S BUSINESS ENTERPRISES, AND LABOR SURPLUS AREA FIRMS (2 CFR 200.321):** The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. Many states have websites that includes resources to find these vendors, as well as the links below.

While there are no specific Federal requirements for language to be included, the following excerpt from 2 CFR 200.321 summarizes the process:

Affirmative steps must include:

- (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- (5) Using the services and assistance, as appropriate, of such organizations as the [Small Business Administration](#) and the [Minority Business Development](#) Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

- **PROCUREMENT OF RECOVERED MATERIALS (2 CFR 200.322):** This provision only applies to a non-Federal entity that is a **state agency** or **agency of a political subdivision of a state** and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. You should consult with your State agency or an attorney to determine whether this clause applies to you and your contractors.
-

ADDITIONAL CONTRACT PROVISIONS REQUIRED BY THE FEDERAL AGENCY (USDA) FOR NSLP, SBP, AND FOOD DISTRIBUTION CONTRACTS

Please remember that Program Operators must also include additional required contract provisions identified in the program regulations for the Federal award (7 CFR 210, 250, etc.).

- **BUY AMERICAN PROVISION:** The Buy American provision was added to the National School Lunch Act (NSLA) by Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336). Section 12(n) to the NSLA (42 USC 1760(n)), requiring school food authorities (SFAs) to purchase, to the maximum extent practicable, domestic commodity or product.

The following clause language is suggested, but not mandatory:

- “Domestic Commodity or Product” are defined as an agricultural commodity that is produced in the United States and a food product that is processed in the United States using substantial agricultural commodities that are produced in the United States.
- “Substantial” means that over 51 percent of the final processed product consists of agricultural commodities that were grown domestically.
- Products from Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands are allowed under this provision as territories of the United States.
- The Buy American provision (7 CFR Part 210.21(d), 7 CFR 220.16(d), 7 CFR 250.23) is one of the procurement standards SFAs must comply with when purchasing commercial food products served in the school meals programs.
- Buy American: Schools participating in the federal school meal programs are required to purchase domestic commodities and products for school meals to the maximum extent practicable. Domestic commodity or product means an agricultural commodity that is produced in the US and a food product that is processed in the US substantially (at least 51 percent) using agricultural commodities that are produced in the US.
- Farmed fish must be harvested within the United States or any territory or possession of the United States. Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel (section 4207 of the Agriculture Improvement Act of 2018).
- Federal regulations require that all foods purchased for Child Nutrition Program be of domestic origin to the maximum extent practicable. While rare, two (2) exceptions may exist when:
 - the product is not produced or manufactured in the US in sufficient, reasonable and available quantities of a satisfactory quality, such as bananas and pineapple; and
 - competitive proposals reveal the cost of a domestic product is significantly higher than a non-domestic product.

- All products that are normally purchased by Distributor as non-domestic and proposed as part of this solicitation must be identified with the country of origin. Distributor shall outline their procedures to notify School when products are purchased as non-domestic.
 - Any substitution of a non-domestic product for a domestic product (which was originally a part of the solicitation), must be approved, in writing, by the Food Service Director, prior to the delivery of the product to the School. Any non-domestic product delivered to the School, without the prior, written approval of the Food Service Director, will be rejected.
 - Distributor must affirm their willingness to assert their best and reasonable efforts to ensure compliance with this Federal rule.
- **GEOGRAPHIC PREFERENCE (OPTIONAL):** A school food authority participating in the NSLP may apply a geographic preference when procuring **unprocessed** locally grown or locally raised agricultural products. School food authorities have the discretion to determine the local area to which the geographic preference option will be applied. Other types of geographic or local preference are prohibited when using Federal Child Nutrition Program funds.

While the State Agency and USDA does not have specific language around this provision, USDA has numerous guidance documents and examples on the [USDA Geographic Preference tip sheet](#).

- **COST REIMBURSABLE CONTRACTS (ONLY IF USING):** The school food authority must include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts.
 - The contract language provided below is mandatory (7 CFR 210.21(f), 7 CFR 220.16(e), and 7 CFR 250.53).
 - Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;
 - The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account);
 - or
 - The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;
 - The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;
 - The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;
 - The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and

- The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.
 - Prohibited expenditures. No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.
- **DURATION OF CONTRACT (FSMC SPECIFIC):** This requirement is for all school food authority's that enter into a contract with a Food Service Management Company.
 - (7 CFR 210.16 (d)) Duration of contract. The contract between a school food authority and food service management company shall be of a duration of no longer than 1 year; and options for the yearly renewal of a contract signed after February 16, 1988, may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.
- **RECALL CONTACTS (USDA FOODS PROCESSING SPECIFIC):** The following two provisions must be included in all bids/responses for USDA Foods Processing ([Responding to a Food Recall – Procedures for Recalls of USDA Foods](#)).
 - A provision for information for processor food recall procedures.
 - Contact information for a point and backup person for handling food recalls.
- **USDA NONDISCRIMINATION STATEMENT:** All publications that mention USDA Child Nutrition Programs must include the following revised nondiscrimination statement. This includes solicitation and bid documents.
 - In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, sex, disability, age, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA.
 - Persons with disabilities who require alternative means of communication for program information (e.g. Braille, large print, audiotape, American Sign Language, etc.), should contact the Agency (State or local) where they applied for benefits. Individuals who are deaf, hard of hearing or have speech disabilities may contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.
 - To file a program complaint of discrimination, complete the [USDA Program Discrimination Complaint Form](#), (AD-3027) found online at: [How to File a Complaint](#), and at any USDA office, or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:
 - (1) mail: U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights
1400 Independence Avenue, SW
Washington, D.C. 20250-9410;
 - (2) Fax: (202) 690-7442; or
 - (3) Email: program.intake@usda.gov.

This institution is an equal opportunity provider