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**FISCAL YEAR 2005  
CHILD AND ADULT CARE FOOD PROGRAM  
OPERATIONAL MEMO #44**

TO: Child and Adult Care Food Program Institutions

FROM: Mary Ann Chartrand, Director  
Grants Coordination and School Support

DATE: September 29, 2005

SUBJECT: **Applicability of Federal Requirements to School Food Service Procurements**

Procurement procedure requirements for the Child Nutrition Programs have been moved by regulation from Department regulation 7 CFR Part 3015 to 7 CFR Parts 3016 and 3019. Attached are a number of questions and answers concerning how these requirements changed the procurement procedures for public and non-profit school districts and/or child care institutions.

If you have questions, call the CACFP office at (517) 373-7391.

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**Question 1: How did regulations 7 CFR Parts 3016 and 3019 change the procurement procedures for public and non-profit SFAs?**

**Answer:** The Part 3016 regulation implements the concept of Federalism for school districts administering the child nutrition programs. Pursuant to Part 3016.36(b), school districts will use their own procurement procedures that reflect applicable state and local laws and regulations, as long as those procedures are consistent with the requirements found at §3016.36(b) through (i) and §3016.60(b) through (c). A school district may establish any procurement or contract procedure or requirement that is within its authority to establish, so long as the procedures and requirements are consistent with §3016.36(b-i) and §3016.60(b-c).

A child care institution may elect to follow the procurement procedures at §3019.40 – 3019.48 or use its own organizational procedures as long as those procedures are consistent with the requirements of Part 3019.

**Question 2: Please explain §3106.36(b-i) and §3016.60(b-c).**

**Answer:** 7 CFR Part 3016.36(b-i) establishes the minimum standards a school district must follow to conduct a proper procurement. These standards address such elements as the requirement that a school district have a written code of conduct governing the performance of employees engaged in the award and administration of contracts (§3016.36(b)(3)); methods of procurement (§3016.36(d)); the requirement that the school district perform a cost or price analysis for every procurement, including contract modifications (§3016.36(f)); and required contract clauses and certifications (§3016.36(i)). For additional information, please consult regulation 7 Part 3016.

The requirement at §3016.60(b), allows a school district to award a contract to a potential contractor that provided information to the school district that the school district used in its drafting of specifications, bid, proposal, or contract terms, but prohibits the award of a contract to a potential contractor when the potential contractor actually drafted the specifications, bid, proposal, procurement, or contract terms. The school district alone is responsible for developing the documents used in conducting its procurements. 7 CFR Part 3016.60(c) prohibits the use of in-state and local geographic preferences in the award of contracts.

**Question 3: Does regulation 3019 contain the same requirements and prohibitions for child care institutions?**

**Answer:** The minimum standards (§3019.40-.48) non-profit child care institutions must follow in conducting procurements are generally the same as those that apply to school districts.

While a child care institution cannot award a contract using an in-state or local geographic preference, Part 3019 does not contain a corresponding prohibition to §3016.60(c). The specific prohibition is not necessary in Part 3019 because child care institutions lack the legal standing to establish in-state or local geographic preferences. Child care institutions have been prohibited from awarding contracts to potential contractors that drafted procurement documents since the mid-1970s. That prohibition is stated at §3019.43.

**Question 4: Do the specific procurement and contract clause requirements of the Program regulations still apply?**

**Answer:** Yes. For example, the Part 210.16 requirements regarding the 21-day cycle menu requirement (§210.16(a) (1)), specific clauses at §210.16(c) and duration of contracts (§210.16(d)) still apply to food service management company (FSMC) procurements and contracts.

**Question 5: Does applying Parts 3016 and 3019 to school district procurements change Food Nutrition Services' (FNS) position on the crediting of discounts and rebates in cost reimbursable contracts?**

**Answer:** No. FNS' position on this subject remains unchanged. FNS strongly encourages, but does not require, that all cost reimbursable contracts include provisions to ensure school districts are only charged net, allowable costs. The United States Office of Management and Budget, and the United States Department of Agriculture Office of the General Counsel have made clear that State Agencies (SAs) and school districts can impose compliance with net cost requirements through contractual terms.

**Question 6: Does Federalism prevent the State Agency from establishing procurement and contract requirements that school districts must follow?**

**Answer:** No. Consistent with the "flow down" concept of Federalism, an SA may establish procurement and contract requirements that school districts must follow, as long as those requirements are not inconsistent with Program requirements.

**Question 7:** Can a school district follow the procurement procedures at §3016.36(b-i) instead of its own state and local requirements?

**Answer:** No, a school district cannot substitute §3016.36(b-i) for more restrictive state or local requirements.

**Question 8: Whom should a State Agency (SA) contact to obtain information about the procurement requirements that apply to school districts?**

**Answer:** SAs should seek guidance from their state procurement officials and legal counsel or the chief state legal official. Any questions related to procurement should be addressed to Cheryl Schubel at the Michigan Department of Education, Grants Coordination and School Support.

**Question 9: If questions or disputes arise concerning a school district's procurement practices or contracts, do we still contact FNS for guidance?**

**Answer:** No. These issues include contract management and compliance matters such as questions related to source evaluations, protests, disputes, and claims. FNS will not substitute its judgment for that of the SA or school district on these issues unless the matter is primarily a Federal concern. FNS will, however, take the necessary steps to assure compliance with the procurement requirements contained in §3106.36(b-i); §3016.60(b-c); §3019.40 - 3019.48, and the school nutrition program regulations.

Since disputes may result from the application of state and local laws, regulations, and policies, we recommend both SAs and school districts direct these disputes to appropriate state procurement and legal officials and the school district's own local legal counsel.

This includes any dispute arising from the SA's decision requiring school district compliance with one or more of the procurement procedures contained at §3016.36(b-i) and any decision by a SA or school district to expand the procurement procedures at §3016.36(b-i).

**Question 10: Doesn't the Federalism concept result in differences between states regarding procurement procedures and contract requirements and even between school districts within the same State?**

**Answer:** While procedural practices may differ, the fundamental requirements do not. Most school districts already operate under requirements that recognize the procurement principles incorporated in Part 3016, such as the requirement for full and open competition and the prohibition against conflicts of interest. To the extent procurement requirements do not exist or are less restrictive than those contained in Part 3016, the common rule requirements continue to apply.

In addition, as noted above, all school nutrition program regulations applicable to procurement and contract management, such as the requirement that federally donated commodities accrue only to the benefit of the school food service (7 CFR 210.16(a)(6)) and the Buy American requirement (7 CFR 210.21(d)), continue in effect. With respect to all contracts, including those with FSMCs, school districts are free to include procurement and contract management requirements in their contract with these companies.

FNS strongly encourages school districts include, in all solicitations and contracts, terms that protect the nutritional and financial integrity of the school nutrition programs. Such terms may include requirements in cost reimbursable contracts that FSMCs, distributors, and brokers obtain goods for the programs through competitive procurements and that all discounts, credits, and rebates received by these contractors must be credited to the school district's non-profit school food service.

Further, FNS encourages SAs to develop prototype procurement and contract documents as a means of providing technical assistance to school districts. The Michigan Department of Education (MDE) currently has a prototype contract that school districts can use for procuring a food service management company.

FNS is currently considering proposing regulations to ensure greater consistency with respect to the participation of FSMCs and other cost reimbursable contractors in the school nutrition programs.

Thus, although the Federalism principles incorporated in Part 3016 do provide greater flexibility and may result in some procedural variations between states and among school districts within a state, such as different small purchase thresholds, the basic requirements for sound procurement and contract management remain in place and will continue to be consistently applied. FNS will fully support SAs and school districts that exercise sound administrative practices and good business judgment in establishing procurement practices and contract terms that protect the integrity of the school nutrition programs.