

# Food Service Facts

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# 13. Business Ethics & Purchasing

## Business Ethics Overview

“Ethics” is defined as “the principles of conduct governing an individual or a group.” The human condition has historically inspired philosophers to attempt to establish a set of rules and practices to direct behavior. While there is still debate about what is “ethical” or “unethical,” this section will discuss regulatory definitions of acceptable and unacceptable business practices.

### Fraud Statement from Federal Regulations

Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under the National School Lunch Program and/or School Breakfast Program, whether received directly or indirectly, shall, if such funds, assets or property are of a value of \$100 or more, be fined no more than \$10,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than one year or both. Whoever receives, conceals, or retains for personal use or gain, funds, assets, or property provided under the National School Lunch Program and School Breakfast Program, whether received directly or indirectly, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties.

### Purchasing Ethics

The competitive nature of public purchasing and the expenditure of significant amounts of public funds requires that ethical standards be incorporated into all purchasing functions. Purchasing personnel and the sponsor’s staff face the difficult task of developing good vendor relations and encouraging vendor competition while avoiding even the appearance of favoritism or other misconduct. Numerous problems may be encountered such as:

- ◆ Employees, in an effort to get the job done successfully and on time, are tempted to avoid policies, procedures, and laws or to make their own “legal” interpretations of existing policies. Such activity, although generally well-intentioned, may cause ethical or legal problems.
- ◆ When informal purchasing procedures are used to make repeated purchases of the same items or types of items over the course of 12 months, it may appear that requirements to use formal purchasing procedures are being circumvented. This situation may occur due to lack of centralized control of the purchasing function. Although some sequential purchasing may occur using informal purchasing procedures, it is important to assure that formal purchase procedures are used when required.

- ◆ Component purchasing usually is an attempt to avoid bid laws or other requirements by buying an item through the issuance of multiple purchase orders for the component parts of the items versus a single purchase order for the entire item. Repeated purchases of additional optional equipment or parts after an initial purchase may create the perception of component purchasing.

The sponsor should clearly communicate to all personnel policies related to:

- ◆ Dealing with conflicts of interest
- ◆ Having financial interests in firms conducting business with the sponsor
- ◆ Accepting kickbacks and gratuities
- ◆ Improper use of a position or confidential information

Additionally, the sponsor's employees should be made aware of the penalties for violation of purchasing laws and ethics that may include criminal prosecution and loss of employment opportunities.

## General Ethical Standards

The following section provides a brief summary of common ethical standards that should govern the conduct of employees involved in the purchasing function.

### Personal Gain

It is unethical for any employee of a sponsor to attempt to realize personal gain through performance of his/her duties.

### Influencing Public Employees

It is unethical for any employee of a sponsor to attempt to influence any public employee to breach the standards of ethical conduct.

### Employee and/or Family Member

It is unethical for any employee of a sponsor to participate directly or indirectly in purchasing when the employee knows, or has reason to believe, that:

- ◆ The employee or any member of the employee's immediate family has a financial interest pertaining to the purchase;
- ◆ A business or organization in which the employee or any member of the employee's immediate family has a financial interest pertaining to the purchase; or
- ◆ Any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the purchase. If an employee of the sponsor has a financial interest in a purchase, that person shall abstain from discussion and decisions regarding the award of the purchase contract.

## Gratuities

It is unethical (and in some cases illegal) for a sponsor's employee or former employee to solicit, demand, accept or agree to accept a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or purchase request, including influencing the content of any specification or purchase standard.

## Kickbacks

It is unethical for a contractor (or any person on behalf of a contractor) to make any payment, gratuity, or offer of employment as an inducement for the award of a contract.

## Contract Clause

The ban against gratuities and kickbacks should be clearly stated in every contract and solicitation.

## Confidential Information

It is unethical for any employee or former employee of a sponsor to knowingly use confidential information for actual or anticipated personal gain or for the actual or anticipated gain of any person.

## Vendor Gifts and Relations

A sponsor's officials and employees cannot accept anything of value from a vendor, such as personal gifts or gratuities, which may be considered to have been given to influence the purchasing process. Although such practices may be legitimate and generally accepted in the private sector, giving and receiving gifts in the public sector may constitute a violation of the law.

It is a good practice for a sponsor to consult with its attorney or legal counsel at the Kansas State Department of Education or the Attorney General's Office to develop policies regulating the acceptance of vendor gifts. These policies should not only conform to applicable statutes but should also reflect the sponsor's philosophy regarding regulation of the acceptance of the following from existing or prospective vendors:

- ◆ Trips (including transportation and hotel rooms)
- ◆ Meals
- ◆ Tickets for entertainment, and/or
- ◆ Gifts of any value

Sponsors should also be aware of the disclosure requirements regarding federal conflict of interest regulations that prohibit an employee (and members of the employee's immediate family) who is involved in administering, directing, or authorizing federally-funded transactions from having a financial interest in a vendor associated with federally-funded transactions.

## Incentives

Vendors often will make a special offer on a particular item. They might, for example, offer equipment or other prizes, food products such as charbroiled beef patties at a much lower price than the sponsor's bid price; or offer an item not presently used at a special price that is below market value.

### When a vendor offers incentives

The prices paid for all purchases should be based solely on the bid offered by the responsible vendor giving a sponsor the best bid prices on items meeting specifications. When "incentives," such as prizes, equipment, etc., are offered and accepted:

- ◆ The "incentive" must in no way affect the decision to purchase;  
AND
- ◆ The "incentive" must become the property of the sponsor and under no condition become the property of an individual. Special offers often mean higher prices or lower quality or both. Frequently, special prices are offered on old merchandise that the vendor wants to liquidate.

A sponsor may take advantage of "specials" under the following conditions:

### When a Vendor Offers an Item at a Lower Price than the Bid Price

Once an item has been bid and the bid price accepted, the purchaser is not free to obtain additional bids or to purchase from anyone other than the vendor who has received the bid, unless:

1. The bid specified a quantity to be purchased;
2. The specified quantity will be purchased from the winning bidder; and
3. The amount to be purchased is in addition to the quantity bid.

Procedures for small purchases may be used in obtaining prices on the additional merchandise, unless the additional purchases will exceed \$100,000 for food or \$20,000 for non-food items.

### When a Vendor Offers an Item Not Presently Used at a Special Price Below Market Value

All purchases under competitive bidding must be based on specifications that clearly describe the item to be purchased. If you have tried a new food product and would like to purchase it, competitive sealed bids must be obtained if purchases will be \$100,000 or more.

#### Employees Purchasing Foods

**Q** *May school employees purchase meals or leftover food to take home?*

**A** No. Even if the money was deposited in the Food Service Fund, program regulations state that any food prepared for the Child Nutrition Programs must be consumed on school premises.



## Code of Conduct

A Standard of Conduct for all employees involved in the award and administration of contracts should be implemented by the sponsor. The code of conduct should include policies concerning conflicts of interest and procedures for accepting gratuities, favors or any items with a monetary value.

A code of conduct should include:

- ◆ No employee of the sponsor shall participate in the selection, award or administration of a contract when any of the following persons have a financial interest in the firm selected for the award:
  - The employee
  - Any member of his/her immediate family
  - His/her partner
  - An organization which employs, or is about to employ, any of the above
  
- ◆ School employees will neither solicit nor accept gratuities, favors or any item with monetary value from vendors, potential vendors, or parties to sub-agreements including:
  - Entertainment
  - Hotel rooms
  - Transportation
  - Gifts
  - Meals

Employees should be given guidance about how to respond when a gratuity, favor, or item with monetary value is offered. When there is doubt concerning the appropriateness of accepting gifts, favors, etc. the employee should consider the following questions:

1. **How would the public perceive this action of receiving the gift, favor, etc.?**
2. **Will acceptance of the gift, favor, etc possibly influence a future purchasing decision?**

## Food Taken From Schools

The National School Lunch and Breakfast Programs are designed and funded to serve children in school cafeterias. No food, not even leftover food, is to be taken from the premises. Taking food from the cafeteria may create a serious public relations problem by causing people to lose faith in the integrity of the program(s). Food may only be taken from the school for school-sponsored field trips. For additional information on field trips refer to Chapter 4, Meal Service Policies, School Prepared Sack Lunches.

The above does not prohibit paid, reduced price, or free eligible students or adults from taking all or portions of their own breakfasts, lunches, or a la carte foods from the cafeteria or off campus if approved by the local school. Exceptions to this policy must be approved in school board meeting minutes or board policy.

Leftover foods that cannot be used within the school food service operation and are safe and nutritious may be donated to a formally organized food reclamation program.

**Relative Works for Vendor**

**Q-1** *The spouse of the food service director of a sponsor operating a CNP has recently accepted a position as an officer in a wholesale food distributing company. Should the company be disqualified as a bidder for future contracts with the sponsor?*

**A** Not necessarily, but the sponsor needs to be doubly careful to document its entire food purchasing process. Vendor selection criteria should be as objective as possible, and the final selection should involve officials other than the food service director.



**Buying Items for Personal Use from Vendors**

**Q-2** *In my school system, it has been the practice for principals, teachers, and school food service staff to buy items from vendors at the bid price. Is this acceptable?*

**A** No. Federal regulations require a code of conduct which states that “the sponsor’s officers, employees, or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.” When a person purchases at the sponsor’s bid price or any discounted price, that person is actually accepting from the vendor the cash difference between the bid or discount price and what one would have to pay for the item in the retail market. Even if the vendor were to charge the retail price, the person would still be receiving the convenience of a personal delivery and therefore would be accepting a favor from the vendor.



**Gifts from Vendors**

**Q** *Several food companies like to give my office staff and managers Christmas gifts each year. Is there anything wrong with this procedure?*

**A** This practice should be discontinued immediately as it is in conflict with federal purchasing regulations dealing with a code of conduct. Remember that neither you nor any of your employees should accept gratuities, favors, or anything of monetary value from companies with which you currently, or could potentially, do business.



## Purchasing Overview

Purchasing procedures used in Child Nutrition Programs (CNP) must conform to state, federal and local regulations and procedures. Sponsors should be advised to use their own purchasing procedures as approved by the sponsor's governing board provided that the purchases for the CNP conform to the federal and state purchasing regulations described in this chapter. It may be advantageous for a sponsor to have one individual assume oversight responsibility for all purchasing.

The federal and state purchasing regulations are designed to help the sponsor:

- ◆ Obtain the best products and services
- ◆ Save money
- ◆ Make the best use of federal, state and local funds
- ◆ Provide open and free competition
- ◆ Ensure fair and ethical practices

For definitions of purchasing terms, refer to the "Purchasing Definitions" section at the end of this chapter.

## Purchasing Procedures

The federal purchasing regulations and state statutes ensure that food, supplies, equipment and services will be obtained at the lowest possible cost. All purchases must be obtained using competitive purchasing procedures assuring open and free competition between vendors.

To determine the type of purchasing procedure to use, the sponsor must evaluate the dollar value of the contract. The dollar amounts apply to all purchases from one source for one agreement/contract period.

- ◆ Formal purchasing (also called competitive sealed bids) must be used for non-food items and services valued at \$20,000 or more.
- ◆ Formal purchasing must be used for food items valued at \$100,000 or more.
- ◆ Informal purchasing procedures (also called "small" purchase procedures) should be used for all other purchases.

Formal and informal purchase procedures are described on the following pages.

## Informal (or Small) Purchase Procedures

Informal purchase procedures are relatively simple methods used for purchasing food, supplies, equipment or services. Sponsors are required to compare prices or complete a cost analysis for every good or service purchased. This analysis can only take place when costs or prices are based on the same set of specifications and conditions. Price or rate quotations for the specified items may be obtained verbally, via phone or in person or in writing via written quote, fax or mail. Price quotations must come from an adequate number of qualified sources. The number of price quotations that must be obtained is determined by local market conditions.

Regardless of dollar value, there must be open and free competition between vendors. In rural areas where there may be only two produce vendors that provide service, obtaining price quotations from both vendors may be sufficient. In a larger metropolitan area where there are more produce vendors, all known vendors should be given an opportunity to submit price quotations. All price quotations must be documented.

## Steps for Using Informal Purchasing Procedures

When it is determined that informal purchasing procedures are to be used, the following requirements should be met:

1. Notify prospective vendors of the intent to purchase the foods, supplies or equipment.
2. Provide vendors product specifications, the period of time the bid price must be honored (week, month, semester, etc.), general purchasing conditions and any other information needed for the bidder to properly respond.
3. Obtain price quotations from the sales representative. The price quotes may be obtained in person, by telephone or in writing using a price quote worksheet or catalog price information. Price quotes may be mailed, e-mailed or faxed.
4. Document the prices quoted.
5. Award the bid to the vendor with the lowest price for the quality specified. If the lowest price is not awarded, document reasons for selecting a higher price. Any and all bids may be rejected if there are sound documented reasons.

The Price Quotation Worksheet (Form 13-C) can be used to document price quotes.

## Formal Purchase Procedures

For food purchases of \$100,000 or more per contract or for non-food items and supplies of \$20,000 or more, formal purchase procedures must be used. Formal purchasing procedures require a sealed bid for items specified. The Invitation for Bid (IFB) is solicited using formal advertising. The IFB must include complete, adequate, and realistic specifications of the products or services. Bids are solicited from responsible bidders that comply with all the terms and conditions of the IFB. The bidders should be allowed sufficient time to submit their bids prior to the bid opening date. All bids must be publicly opened, by at least two school employees, at the time and place stated in the IFB.

The purchase must lend itself to a firm fixed-price contract for which the selection of the successful bidder is made principally on the basis of price. A firm fixed-price contract award must be made by written notice to the responsible bidder whose bid is lowest, assuming the bid conforms to the requirements in the IFB. If the award is made based on other factors than the lowest price per item, the method of award must be clearly described in the general conditions of the IFB. Any and all bids may be rejected if they are submitted after the due date or there are sound documented reasons in the best interests of the Child Nutrition Program. Any bids submitted after the due date or submitted unsealed should be returned for noncompliance with the bid specifications.

Purchases made by purchasing co-ops and from prime vendors normally require formal purchasing procedures because they exceed the bid threshold of \$100,000 for food or \$20,000 for non-food items.

### **Steps for Using Formal Purchasing Procedures:**

If it is determined after reviewing the circumstances that formal purchasing is appropriate, the following requirements must be met:

1. The invitation for bids must be publicly advertised.
2. Bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids.
3. The invitation for bid shall include product specifications, general purchasing conditions, and any pertinent attachments in order for the bidder to properly respond.
4. All bids must be opened publicly, by at least two of the sponsor's employees, at the time and place stated in the invitation for bids.
5. Any bids that are submitted beyond the due date should be returned unopened for noncompliance with the bid specifications.
6. A firm fixed-price contract award must be made by written notice to the responsible bidder whose bid is lowest, assuming the bid conforms to the requirements in the invitation for bid. If the award is to be made on a basis other than the lowest price per item, the method of award must be clearly described in the general conditions.
7. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest.
8. Payment discounts may only be used to determine the low bid when prior experience indicates that such discounts are generally taken.
9. Any and all bids may be rejected if there are sound documented reasons.

The [Sample Bid Worksheet](#) (Form 13-B) illustrates a format that could be used for collecting bids on specific items.

### Informal Purchasing Procedures

- ◆ Descriptions of products or services required
- ◆ Instructions required
- ◆ Price quotes may be verbal or written
- ◆ Price documentation required

### Formal Purchasing Procedures

- ◆ Descriptions of products or services required
- ◆ Instructions required
- ◆ Price quotes must be written
- ◆ Price documentation required
- ◆ Formal advertisement required

#### Formal Sealed Bids

**Q-1** *Will it be more expensive to purchase food and supplies under competitive sealed bidding, especially if additional staff must be hired?*

**A** Any full or part-time staff hired to perform the purchasing function should be expected to save more dollars annually than their salary costs. Experience has shown that wise purchasing practices will pay for themselves. If this does not happen, the situation should be reviewed, perhaps with KSDE's assistance.

Additionally, current personnel resources should be evaluated to see if they can be used. Some sponsors are already using competitive sealed bids to purchase items like gasoline, tires, etc. The same staff can sometimes be used for the food service operation if they are provided with food specifications, delivery schedules and technical assistance.



**Q-2** *Does the \$100,000 sealed bid threshold apply to the entire organization or to each school/site?*

**A** It applies to the organization performing the purchasing function. If purchasing is centralized, the \$100,000 threshold would apply on an organization-wide basis. If purchasing is delegated to each site, then the \$100,000 threshold would be applicable on a site basis.

## Purchasing Regulations and Requirements

### Anti-Competitive Practices

The purchasing procedures used by sponsors must **NOT** restrict or eliminate competition. The sponsor should be alert to organizational conflicts of interest or noncompetitive practices among contractors that may restrict or eliminate competition or restrain trade. Anti-competitive practices include the following:

- ◆ Any person or business that develops or drafts specifications, statements of work, invitations for bids, requests for proposals, contract terms and conditions, or other documents for use by the bidder may **NOT** compete for that contract. This requirement ensures objective contractor performance and eliminates an unfair competitive advantage.
- ◆ Prospective vendors **MAY** provide sponsors with specification information related to the purchase of an item and still compete for that item if the sponsor, and not the prospective vendor, develops or drafts the specifications, requirements, statements of work, invitations for bid, and/or requests for proposals.
- ◆ Sponsors are prohibited from purchasing goods or services from a vendor based solely on the geographic location of the vendor. Open and free competition must always prevail. The sponsor must use competitive purchasing practices and make the selection of the product based on price and quality. Sponsors may purchase from a vendor located in a specific geographic area **IF** the purchase decision is based on the price and quality of the goods or services.
- ◆ Sponsors may use geographic preference when purchasing unprocessed locally grown and locally raised agricultural products.
- ◆ Other situations that are considered to restrict competition by a sponsor include:
  1. Placing unreasonable requirements on firms in order for them to not qualify to do business
  2. Requiring unnecessary experience
  3. Choosing to purchase food from the local grocer in an effort to support the local economy
  4. Purchasing all food from a single supplier, unless proper purchasing procedures were followed, even though other suppliers are available
  5. Distributing different specifications to different suppliers
  6. Specifying only a “brand name” product instead of allowing “an equal” product

Any or all bids may be rejected when there are sound reasons that are in the best interest of the sponsor. Those reasons must be documented.

### Specifying Brand Names

**Q** *Can brand names be used in our specification?*

**A** When it is impractical or not economical to make a clear and accurate description of the product to be purchased, a “brand name or equal” description can be used. The specific features of the named brand which must be met, must be clearly stated. For example, a specific brand of taco shell might be desirable not only because of taste and texture, but also because of its resistance to breakage on the serving line. A specification could be written specifying a particular brand of shell, “or equal in terms of taste, texture and resistance to breakage on the serving line.” It would be the responsibility of a vendor to demonstrate that another brand of shell meets the desired features.

Another approach would be to document through taste testing that one particular brand is so clearly preferable to others that the purchasing specifications can simply call for that brand. The documentation should spell out how the test was conducted, what other brands were tested, and how the test results influenced the final choice. Also, such tests should be repeated periodically.



### Purchasing Locally

**Q** *If the school board's policy is to purchase locally, may I purchase my food from the local grocery store?*

**A** No. Sponsors are prohibited from purchasing goods or services from a vendor based solely on the geographic location to the Sponsor. If the local grocer is a responsible contractor and would like to be considered a vendor, open and free competition allows him/her to submit a bid. Geographic preference may be given when purchasing unprocessed locally grown or locally raised agricultural products.



### Vendor Writing Specifications

**Q** *If I want to purchase a new steamer, may the equipment vendor write the specification?*

**A** No. The equipment vendor may not write the specification if he/she will be submitting a bid for the equipment. The vendor may, however provide you with information, such as a catalog, that can be used to help you write the specification.

## Buy American Provision

The Buy American provision requires sponsors to purchase American made products whenever feasible. This provision applies to all items purchased for Child Nutrition Programs regardless of the funding source (e.g. federal, state or local).

The sponsor must comply with the “Buy American” provision and regulations implementing the law’s requirements as follows: To the maximum extent practicable, the sponsor shall purchase domestic commodities or products for use in meals served under the National School Lunch Program and the School Breakfast Program. A “domestic commodity or product” is one that is processed in the United States substantially using agricultural commodities that are produced in the United States. In this context, “substantially” means that over 51 percent of the final processed product consists of domestically grown agricultural commodities. This provision is to be included in bid specifications and applies to all money expended from the sponsor’s Food Service Fund.

Some instances where exceptions are allowed to this provision are:

1. The student’s food preferences can only be met with foreign goods.
2. The products are not produced within the United States in a sufficient quantity and quality.
3. The cost of the domestic food product is significantly higher than foreign products.

## Contracting with Small and Minority Firms, Women’s Business Enterprises and Labor Surplus Area Firms

Small and minority firms, women’s business enterprises, and area labor surplus firms must be considered when they are potential sources for purchased items. When economically feasible, total requirements must be divided into small quantities and delivery requirements or schedules established to allow maximum participation by these firms.

## Debarment and Suspension

Debarment and suspension actions result in the exclusion of companies or individuals from participating in certain transactions involving federal programs at both the state and local levels. These actions are not imposed as punishment but rather are initiated in the public interest and to protect the federal government.

This prohibition does not extend to contracts in existence at the time of the debarment/suspension or to most contracts under \$100,000. It applies to new contracts and extension or renewal of existing contracts of \$100,000 or more and to contracts for audit services regardless of the amount. Before a bid may be accepted, the sponsor must check the Excluded Parties List (EPL) at [www.epls.gov](http://www.epls.gov) to verify the vendor or auditing service has not been debarred or the vendor or auditing service must complete the Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-- Lower Tier Covered Transactions (Form 13-A).

## Exclusive Beverage and Snack Contracts

If any product for use in the Child Nutrition Programs (CNP) is purchased via an exclusive contract, then all federal purchasing regulations must be met. For contracts greater than \$100,000, formal purchasing procedures must be followed. If exclusive beverage and/or snack contracts do **NOT** involve nonprofit school food service funds, federal CNP purchasing regulations do not apply.

If products for use in the school food service program are included in an exclusive contract, any rebates, commissions, scholarship fund contributions, or any other payments back to the sponsor or sponsor-related organizations, must be reimbursed to the Food Service Fund on a prorated basis.

KSDE recommends excluding the Child Nutrition Program from any contract between the sponsor and a vendor for exclusive sales rights.

## Cost Plus Contracts Not Allowed

Cost-plus-a-percentage-of-costs contracts are **NOT** permitted. In this type of contract, the sponsor agrees to purchase the products for actual cost plus a percentage of that cost as a fee for service. The percentage fee is fixed for the duration of the contract. However, if the actual cost of the product rises, so does the fee.

Cost-reimbursement-plus-fixed-fee contracts are permitted. In cost-reimbursement-plus-fixed-fee contracts, the sponsor agrees to reimburse the distributor for the actual product cost plus a fixed dollar fee for services. The fee, which is fixed for the duration of the contract, is usually based on a unit price and may vary from item to item. This method allows a distributor to change the cost of the product billed to a sponsor. An audit of the cost of the product for which the distributor is reimbursed must be performed. Refer to the section of this chapter concerning auditing costs of Prime Vendor contracts.

## Firm Fixed-Price Contracts

In firm-fixed-price contracts the cost of the product remains constant during the contract period. There exists a direct relationship between the length of the time a distributor must hold the price firm and the cost the sponsor pays for the product. The longer the bid period, the greater the distributor's risk, therefore, the higher the price. Line item and bottom line purchasing are methods of purchasing used in firm fixed-price contracts.

## Other Purchasing Guidelines

### Preparing Specifications

In order to assure that true competition occurs, identical specifications and invitations for bids (IFB) or requests for proposals (RFP) must be furnished to the potential vendors. The vendor must be provided the product specification and be informed of other requirements, such as delivery schedules, quantities, purchase conditions, etc. When the product or services are identical, the bids can be compared and the lowest price determined.

USDA publications can help the sponsor write effective specifications for the products needed. These include the USDA *Food Buying Guide*, *Choice Plus* and a *Guide for Purchasing Food Service Equipment*.

### Line Item Purchasing

Line item purchasing is used when a sponsor agrees to purchase a specific item at a fixed price from a contractor for the length of the contract. The price offered on each item is considered independently. The contract is awarded to the bidder with the lowest bid price for each item.

### Bottom Line Purchasing

Bottom line purchasing is used when a sponsor agrees to purchase food and/or supplies in a group at a fixed price from a specified distributor for the length of the contract. The contract is awarded on the basis of a lowest bottom line price per category, which is determined by multiplying unit bid price times anticipated units to purchase. Bottom line awards require a price quote on all items. Reasonable accurate product quantities must be projected.

Bottom line purchasing should be used for milk and dairy products or for bread items. See the Sample Invitation for Bid for Milk and Dairy Products (Form 13-D) and Sample Milk Bid (Form 13-E).

### Contracts with Escalation Clauses

Contracts with escalation clauses are used by sponsors, generally for long-term contracts such as milk, ice cream, and bread. An escalation clause provides for an up or down adjustment of the contract price if specified circumstances occur. For example, the cost of milk might fluctuate in direct relationship to a price index outside of the vendor's control (such as, the state wholesale milk index). The contract should specify a maximum price and other conditions at which the sponsor would be allowed to terminate the contract.

### Documentation Requirements

Sponsors must maintain records to detail the significant aspects of their purchases. Be aware that all purchasing documents are public information. These records include, but are not limited to the following:

- 1. Reasons for selecting the method of purchasing used in specific purchases or types of purchases**

This requirement need not be as burdensome as it may first seem. A one-time adoption of a purchasing plan or policy by a sponsor may fulfill this requirement. The policy could define the sponsor's plan for using the various purchasing methods for the different items to be purchased. For example, the sponsor may specify in its plan the reason for purchasing milk and bread using competitive sealed bids, fresh produce on a weekly bottom line informal purchasing basis, canned goods and frozen goods on a line item informal purchasing basis, etc.

2. **Considerations for vendor selection or rejection**

Along with the sponsor's price analyses, other comparisons or evaluations of the potential vendors or bidders are in order. Awards must be made only to vendors that possess the ability to perform successfully under the terms and conditions of a proposed purchase. Consideration must be given to:

- ◆ Financial and technical resources
- ◆ Vendor integrity
- ◆ Records of past performance (including documentation of past failures that have been brought to the attention of the vendor and have not been corrected)
- ◆ Compliance with public policy (as in the case of Equal Employment Opportunity compliance or compliance with pertinent Environmental Protection Agency regulations)

A sponsor must document its reason for selecting or rejecting a vendor. If the lowest offered bid is accepted, this can be documented in a simple sentence. If the lowest bid price is not the determining factor, documentation must be maintained showing why one vendor was selected over another. Any or all bids may be rejected when there are sound business reasons in the best interest of the program. It is important to document specific reasons for rejecting a bid.

**Purchasing Documentation**

**Q** *What kind of documentation should I keep on the purchasing process, and how long must the documentation be maintained?*

**A** All Sponsors should:

- ◆ Have a written code or standards of conduct on file.
- ◆ Maintain a list of any vendors who request to be sent Invitations to Bid.
- ◆ For each formal bid, maintain the following documentation on file for at least five years after the end of the federal fiscal year to which it pertains:
  - Copy of Invitation to Bid, including instructions to vendors and specifications
  - Copy of public advertisement(s)
  - Dated mailing list (list of vendors who were mailed a copy of the bid)
  - Bids submitted by vendors (attach bid envelope and a copy of the receipt if hand-delivered)
  - Bid evaluation sheet (include documentation whenever the lowest price is not accepted)
  - Copies of bid award letters and letters to unsuccessful bidders
  - Copies of contracts
- ◆ For telephone quotations, record prices quoted on a bid evaluation sheet and document items awarded. Maintain these records on file.



## Purchasing Plans

It is recommended that all sponsors administering Child Nutrition Programs develop and follow a formal purchasing plan. A purchasing plan or policy can be valuable for two reasons. It can serve to clarify the purchasing practices of an organization for the benefit of everyone involved. Secondly, it can guide employees to use the appropriate method of purchasing for each category of items.

The purchasing plan provides justification for using a certain purchasing method to obtain an item. The scope of the plan is determined by the organization of the sponsor. If purchasing is centralized, the plan applies to the entire organization. If purchasing is decentralized, the plan may apply to all sites responsible for purchasing or each site may be permitted to develop its own plan. A new purchasing plan does not need to be developed every year. However, an annual review of the approved plan is suggested to assure its relevance to current procedures. Some examples of how the plan could be used to justify the method of purchasing chosen follow:

### Example #1:

All items, except milk, used in the \_\_\_\_\_ School Food Service Program will be purchased using informal purchase procedures. Except for milk, no purchase or group of purchases being secured during a purchase period will cost \$100,000 or more in total. Small purchase procedures will include obtaining at least two price quotations on items being purchased. To assure a fair comparison of prices, descriptions or specifications and bid forms for commonly used items (such as canned goods, frozen foods, and cleaning supplies) will be furnished to all four potential area vendors along with other firms requesting this material.

### Example #2:

Milk will be purchased by competitive sealed bid on an annual basis. An escalation clause that is directly tied to the state wholesale price is allowable.

### Example #3:

All canned goods are purchased using informal purchasing procedures, since the total amount from this purchase group will be less than \$100,000 per purchase period. Quotes will be obtained from three vendors by mailing specifications to them eight weeks prior to the start of the fall and spring semesters. The vendor having the lowest bottom line cost will be the successful bidder.

### **Need for Competition**

**Q** *When is competitive purchasing required?*

**A** All purchases must be competitive to the extent feasible. No matter what method of purchasing is used (informal or formal) competition must prevail, unless documentation is available to justify that this was not possible.



### Need for a Purchase Plan

**Q** *It appears that a sponsor should be using competitive sealed bidding for milk and ground beef. However, in a decentralized system, there may be no one on the staff who has the time or the responsibility to oversee such a procedure. How should this be handled?*

**A** Many sponsors do not currently have a system in place to purchase food and food service materials using competitive sealed bids. This chapter sets forth standards for open and competitive purchasing towards which sponsors should be moving. The standards should be met in order to assure that products are being obtained fairly and at the lowest cost to the program. Until such time as the sponsor can move into full compliance, it should adhere to the three major requirements for purchasing: competition, comparability and documentation. Development of a purchasing plan is strongly recommended.



## Alternative Purchasing Methods

### Cooperative Purchasing

Cooperative purchasing is when two or more sponsors of Child Nutrition Programs join together to establish an organization with administrative responsibility for purchasing food and/or non-food supplies for its members. The cooperative's main objective is to use volume purchasing to reduce acquisition and administrative costs.

Cooperative purchasing also enables smaller sponsors to gain access to a larger selection of food and non-food items and frequently to higher quality items. It allows for standardization of procedures and specifications. The more uniform these features are, the easier it is for vendors to work with sponsors. An added benefit of cooperative purchasing is that participation in the process gives food service managers and directors an arena for information exchange.

The cooperative enters into an agreement with each sponsor annually. The agreement describes the responsibilities of each entity. KSDE provides a prototype Cooperative Purchasing Agreement. The cooperative is responsible for distributing the agreement to its member sponsors and each sponsor is to keep a copy of the completed agreement on file for review or audit.

## Prime Vendors

The use of a prime (or single) vendor results in a formalized "one-stop shopping" policy. The bid for goods is awarded to one primary vendor. The increased volume of products to be delivered may sometimes mean better prices. When awarding prime vendor contracts all purchasing regulations must be met including:

- ◆ Contracts exceeding \$100,000 for food and \$20,000 for non-food must use formal purchasing procedures that include advertising the invitation to bid, requiring sealed bids, and documenting the reason for selection of the prime vendor.
- ◆ Cost-plus-a-fixed-fee is allowed but cost-plus-a-percentage is not allowed.
- ◆ The vendor's invoice records from the manufacturer must be audited at least annually to assure accuracy in assigning costs. This audit generally takes place at the business offices of the vendor. In addition, invoices must be monitored, and if prices increase by more than ten percent, the vendor must be contacted and an explanation for the increase documented.
- ◆ The contract must contain a clause that allows termination of the contract for cause.

## Conducting a Prime Vendor Cost Audit

Protecting the financial interests of the sponsor and integrity of the bid is essential. It is especially important when a contract permits price changes based on distributor costs during the contract. The simplest approach is to informally review monthly price changes and to formally audit them at least once each year.

Bidding documents should always specify that each month the successful bidder must submit a list of items that had price changes and that were delivered during the prior month. Any item that has increased by more than ten percent should be discussed with the distributor.

Formal price audits should occur near the end of a school year or at the end of a contract period, whichever comes first. A formal price audit may occur at any time it is deemed in the best interest of the school, especially if the informal reviews indicate an audit is needed.

There are several components to a price audit:

### 1. Selecting Items for Audit

- ◆ Select items that represent 80 percent of the dollar volume. This may be obtained by using a monthly price spreadsheet or selecting the top 25 percent of the highest volume items.
- ◆ Items selected for audit should be those that show the most volatile, unexplained price changes.
- ◆ Two or more additional items should also be selected from the product use report. These items can be selected either "at random" or from items that show volatile price fluctuations without proper justification.

- ◆ Using the list of items that represent 80 percent of the dollar volume, develop a spreadsheet showing the price changes by month over the audit period. Items with the largest price changes are selected for audit. Prices are examined only for the month(s) with the largest changes.

## 2. Examination of Price Records

For easy access to records, an audit should be made at the contract distributor's warehouse. It is wise for a supervisor to conduct the audit in the presence of a third party, preferably someone who is familiar with accounting. The main point to remember in conducting audits is to know in advance specifically what items and months are to be examined, and include item description, item brand, distributor's item code, base-month price, service charge, and expected product cost.

The source of price information is normally a packer's invoice with freight bills and other related charges attached. Freight bills may include cooling or refrigerating charges. Product prices and freight-related charges are added and the total divided by the number of units to obtain the distributor's price. However, in distributor operations that are well computerized, the same information can be obtained from computerized printouts. Either source is acceptable. The prices examined, however, must be the last invoice received prior to the date designated for monthly price changes.

## 3. Financial Adjustment

When an audit is completed, it may be necessary to determine the extent of debits and credits so that a financial settlement can be made.

## 4. Close-out of Audit

After the audit is completed, a close-out memorandum should be written as a matter of record. It should include copies of the support information previously noted.

### **Competitively Selecting a Single Vendor**

**Q** *My school is in a rural area and delivery is a problem. If I award bids by item, this will cause several vendors to make expensive trips to my school and will cause me to receive higher prices. I want to award everything to one vendor. How should I evaluate the bids I receive?*

**A** In order to properly evaluate a bid or price quotation which will be awarded in total to one vendor instead of by item to multiple vendors, the quantities that will be purchased must be estimated. Each estimate is then multiplied by the bid price, and an estimated total cost is obtained for each vendor's bid. The vendor with the lowest estimated total cost would be awarded the contract. This procedure for evaluating bids and quotations should be used for all contracts that are awarded by total to one vendor such as milk bids, bread bids, and fresh produce quotations.

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## Contract Provisions

When Child Nutrition Program funds are used, contracts or subcontracts must meet federal, state or local purchasing requirements, whichever are most stringent. Below is an abbreviated list of requirements for purchasing provisions to include in contracts. For additional guidance on federal and state purchasing regulations, contact KSDE.

- ◆ All contracts in excess of \$25,000 must include:
  - Contractual provision or condition which allows for contractual or legal remedies in instances where contractors violate or breach contract terms, and provides for such sanctions and penalties, as may be appropriate
  - Suitable provision of termination by the sponsor, including the manner in which it will be effected and basis for settlement. In addition, such contracts must set forth the conditions under which the contractor may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.
  - A provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity" as amended by Executive Order 11375, and as supplemented in the U.S. Department of Labor regulations
- ◆ All contracts in excess of \$100,000 must include a provision requiring compliance with all applicable standards, order or regulations used pursuant to the Clean Air Action of 1970 as amended.

Sponsors should enter into contracts only with responsible contractors who have the ability to perform successfully under the terms and conditions of a proposed contract. Consideration must be given to such matters as contractor integrity, record of past performance, financial and technical resources and accessibility to other necessary resources.

The sponsor must maintain a system for contract administration to assure contractor compliance with terms, conditions and specifications of the contract and to assure adequate and timely follow-up to all purchases.

**Vendor Service Problems**

**Q** *The vendor who bid the lowest price on a number of items and was awarded the bid has failed to deliver certain items. Also, there have been a number of times when the item delivered has been different from the item that was specified. How should I handle this problem?*

**A** The first thing that should be done when a vendor fails to deliver certain items or delivers items that do not meet specifications is to document the problem, noting the date and writing an accurate description of the problem. Next, notify the vendor by telephone of the problem, and tell the vendor specifically how you want the problem corrected. With even the best vendors, problems occasionally arise and frequently a single phone call is all that is needed to correct the problem. However, you should keep a record of the dates of all phone calls and what was discussed in the event that talking with the vendor does not resolve the problem. If the problem continues, you should give the vendor written notification of the problem, state that you expect immediate correction, and that failure to do so will be considered a breach of contract and could result in the cancellation of the contract. If the vendor seems to be making little effort to resolve the problem to your satisfaction, you should discuss the problem with the sponsor’s attorney and explore the available options. If cancellation of the contract becomes necessary, you should also take steps to disqualify the vendor from future bidding. Even if the contract is not canceled, you may want to consider taking action to disqualify the vendor from future bidding.



### Special Offers

**Q** *What if a sponsor gets the chance to purchase a food item at a much lower than normal cost? Since time is so important for these kinds of purchases, how could the sponsor possibly go through the procedures required for competitive purchasing?*

**A** In the food industry, it is common practice to occasionally have an item offered at a very low price because of a surplus situation. A sponsor should not have to pass up these kinds of opportunities. However, open and competitive purchasing procedures can still be maintained; for example, by phone contacts that are documented.

Consider the following example. Distributor XYZ calls saying that 200 cases of tomatoes are available at a price far below the accepted bid price of Distributor ABC. You can still use the minimum number of cases agreed to in the contract with Distributor ABC and you can use the additional 200 cases.

Using the same specification that Distributor XYZ provided as a description of the offered tomatoes, contact other suppliers by phone to check their prices for the identical goods. If Distributor XYZ's proposal proves to be too good to pass up, make the purchase. Be sure to document your contacts and the price quotations received.



### Purchasing Produce

**Q** *Produce prices change so rapidly that vendors in my area will not give quotations for longer than a week. The amount of paperwork and time required to get weekly quotations is incredible. Do you have any suggestions for a better way to handle purchasing fresh produce?*

**A** Consider using formal purchasing with a cost plus fixed fee. With this approach, produce is invoiced at the contracted distributor's cost with a fixed fee for service added for the duration of the contract. This type of contract necessitates audits of the distributor's records by the sponsor. Note that a cost plus a fixed fee contract is not the same thing as cost plus a percentage (which is not allowed).



### **Purchasing Items Not on Contract**

**Q** *How do I handle the situation where once all bids have been awarded, my schools find out they need several items that have not been bid?*

**A** Before a bid is sent out, every effort must be made to determine that all items needed during the bid period are listed. If an item or several items are accidentally omitted, you must purchase them using either informal or formal purchasing procedures (i.e. competitive sealed bids), depending on the dollar value of the purchase. It would be a good idea to document the reason that the items were not included in the original bid.



### **Purchasing Meals from Another Sponsor**

**Q** *In the operation of the National School Lunch Program, can a sponsor purchase prepared lunches from a neighboring sponsor without soliciting competitive bids from the private sector or from other sponsors?*

**A** Yes. However, a contract should be signed by both parties describing the responsibilities of each sponsor. A prototype contract for a sponsor to provide food service for another sponsor is available at [www.kn-eat.org](http://www.kn-eat.org), School Nutrition Programs, Administration, Program Renewal.



### **Purchasing Consulting Services**

**Q** *Are sponsors required to competitively bid a personal service contract to hire a food service consultant?*

**A** The purchasing of services is subject to the same principles as the purchasing of food, equipment, supplies, etc. The specific method of purchasing may vary depending on circumstances, but an element of competition is always required.



## Purchasing Definitions

**Aggregate Purchase Amount** refers to any purchase or group of purchases, e.g., milk and milk products, bread, canned and staple foods, fresh frozen meats, etc., capable of being secured from a single source on a given date or during a purchase period.

**Approved Vendor List** identifies vendors who have demonstrated the ability to perform successfully under the terms and conditions of a proposed purchase, with consideration being given to contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

**Audit** is a review of vendor's invoices to assure costs charged to the sponsor are based on the vendor's actual costs. An audit is required when a contract permits price changes based on changes in the vendor's costs during the contract period.

**Bid** is a formal notice by the contractor or vendor to the buyer of the conditions and price under which he will furnish the equipment, supplies, or services set forth in the buyer's specifications.

**Child Nutrition (CN) Labeling Program** is a voluntary technical assistance program for the Child Nutrition Programs administered by USDA's Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS), Agricultural Marketing Service (AMS), and National Marine Fisheries Service. This program essentially involves review of a manufacturer's recipe or product formulation to determine the contribution a product makes toward CN meal pattern requirements. A CN labeled product provides a warranty against audit claims if the product is used according to the manufacturer's directions. The warranty applies only to the CN labeled portions, not the entire meal.

**Child Nutrition Program (CNP)** includes the following federal programs: National School Lunch Program, School Breakfast Program, Special Milk Program, After School Care Snack Program, Summer Food Service Program, Fresh Fruit and Vegetable Program, and Child and Adult Care Food Program.

**Comparative Pricing** refers to an examination of prices offered by vendors to determine the comparative difference in a standard unit (e.g. cases, pounds, cost per serving or singular equipment item).

**Competitive Sealed Bids (formal purchasing)** is a method of purchasing in which competitive sealed bids are publicly solicited (i.e. formally advertised) and a firm-fixed-price contract (lump sum or unit price) is awarded to the lowest priced and most responsible bidder.

**Contract** is a written agreement between two or more competent parties to perform or not to perform a specific act or acts for monetary/legal consideration.

**Cost Per Serving** is the total cost of a food or food item divided by the total number of servings purchased or prepared.

**Cost Reimbursable Contract** bases payment on invoices for costs incurred. These costs are submitted by the vendor. This type of contract should not be executed, unless the sponsor has an accurate system to validate the vendor's costs.

**Documentation** refers to written or printed records serving as proof (or supporting references) of the price and general requirements of a purchase. Records such as quotes, bids, invoices, and receiving documents may serve as documentation in the purchasing process.

**Escalation Clause** in a purchase contract provides for an up or down adjustment of the contract price if specified contingencies occur.

**Fixed Price Contract** provides for a firm price; the contractor bears the full responsibility for profit or loss.

**Market Basket** refers to selected items representing 80 percent of the dollar volume or the top 25 percent of the highest volume items. These items should be monitored to determine the relationship between the market price (cost to supplier) and the price the user pays.

**Prime Vending** is a method of purchasing involving a formal agreement with a single vendor to supply the majority of product needs which are generally specified in percent of total need by category. The agreement is based on a commitment to purchase the specified amount for a specified period of time.

**Purchasing (Buying)** is the process of obtaining supplies, equipment, or services of the right quality, at the right time, at the right price and from the right source. It includes all activities from the preparation and processing of a requisition, through receipt and approval of the final invoice for payment. Preparing specifications, making the purchase, and administering the contract are involved.

**Purchasing Method** refers to the use of informal purchase procedures (also known as "small purchase procedures") and formal purchase procedures (also known as competitive sealed bids).

**Purchasing Plan** is a statement of policy or plan of operation, which defines how a sponsor will use the various purchasing methods for the different items to be purchased. The reasons for selecting a certain method should be clearly stated. The plan should address these three key aspects of purchasing: competition, comparability, and documentation.

**Product Analysis Statement** is signed and dated by the food manufacturer and can be used to document the contribution a commercially prepared food item makes toward meeting meal pattern requirements. Unlike the CN-labeled product, the Product Analysis Statement provides no warranty against audit claims. However, should an audit exception be made following analysis of the product, the sponsor may have legal recourse against the food manufacturer submitting the signed statement.

**Purchase Conditions** describe the sponsor's terms and conditions of the proposed purchase which can include type of items the bid is to cover; contract period, date, time, and location of bid opening (if applicable); a list of sites and their addresses; how and when awards will be made; quantities to be purchased; transportation terms, etc.

**Quote** is a formal or informal, but documented, notice by a vendor to the buyer of the conditions and price under which the vendor will furnish certain equipment, supplies, or services.

**Responsible Bidder** is a vendor who is qualified by experience and equipped to perform the work required or furnish the materials indicated in the specification and who has the necessary financial backing and ability to complete the contract.

**Small Purchase Procedures** are simple and informal methods that are sound and appropriate for purchasing food, supplies, equipment, or services, which are not normally more than \$20,000 for non-food items or services or \$100,000 for food items purchased on an aggregate basis. Procedures must be used to ensure free and open competition.

**Specification** is a description of equipment, supplies, or services setting forth in a clear and concise manner the characteristics of the item to be purchased, and the conditions under which the purchase will be made.

**Unprocessed Locally Grown or Locally Raised Agricultural Products** are only those agricultural products that retain their inherent character. The effects of the following handling and preservation techniques shall **not** be considered as changing an agricultural product into a product of a different inherent character: cooling, refrigerating, freezing; size adjustment through size reduction made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding; drying/dehydration; washing; the application of high water pressure or "cold pasteurization"; packaging (such as placing eggs in cartons) and vacuum packing and bagging (such as placing vegetables in bags); butchering livestock, fish and poultry; and the pasteurization of milk.