USDA

United States Department of Agriculture
Food and Nutrition Service

Southeast Region

Reply to Attn. of: Policy Series

April 22, 2004

Subject: Policy 210.21-18, 225.17-13, 226.22-12, 235.09-06, 250.15-16: Applicability of Federal Requirements to State Agency Procurements

To: All State Directors
National School Lunch Program
Child and Adult Care Food Program
Food Distribution Program
Southeast Region

As you know, in August 2000, the procurement requirements for the Child Nutrition Programs were moved from Department regulation 7 CFR Part 3015 to 7 CFR Parts 3016 and 3019. The following information provides answers to a number of questions we have received concerning how these requirements changed the procedures for procurements paid with State Administrative Expense (SAE) Funds.

Question 1: What regulations apply to SAE funded procurements?

Answer: A SA expending SAE funds is subject to the procurement requirements found at 7 CFR Part 235.9. Part 235.9 states procurements must comply with the Part 3015 requirements. As you know, Part 3016 replaced Part 3015 in August 2000, so SAs are required to comply with Part 3016. The general procurement requirements are found at 3016.36. Since SAE is classified as an entitlement program, additional procurement rules are found at 3016.60.

Question 2: How do the provisions of 3016.60 apply to SAE funded procurements?

Answer: Part 3016.60(a) gives the SA two options when conducting a procurement that will be funded with SAE. The SA may follow 3016.36(a), i.e., its own State laws, policies and procedures, or the SA may follow the procurement standards found at 3016.36(b-i).

Regardless of whether the SA follows 3016.36(a) or 3016.36(b-i), the SA must comply with 3016.60(b and c). Part 3016.60(b) prohibits the award of a contract when the potential contractor engages in certain activities that could undermine free and open competition. Part 3016.60(c) prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the award of most contracts.

Question 3: If State rules permit the SA to enter into a cost plus percentage of cost contract, can the SA pay for the contract with SAE funds?

Answer: Yes, as long as cost plus percentage of cost contracts are permitted under State rules and the SA has chosen to follow its own State rules. Given that cost plus percentage of cost contracts provide no incentive for contractors to control costs, we do not recommend SAs enter into this form of contract pricing. If the SA is intent on entering into this form of contract pricing, we strongly encourage that the SA ensure adequate cost controls exist within the contract.

Question 4: If the State rules permit a SA to enter into a contract with a college or university without any form of competition, can the SA use SAE funds to pay for the contract?

Answer: Yes. Part 3016.36(a) directs a SA, spending Federal funds, to follow the same policies and procedures that it would use for procurements from its non-Federal funds. Since, in this question, the SA is following its own rules, SAE funds could be used to pay for the contract costs.

Question 5: One of our SAs has asked for our interpretation and guidance on how to comply with some of its State procurement rules. How can we provide this assistance?

Answer: It is not appropriate for FNS to interpret and provide guidance on State rules. The SA should be directed to seek assistance from its own State officials responsible for procurement. However, you should remind the SA that the provisions of Part 3016.60(b and c) must be followed, regardless of its own State rules.

Question 6: When conducting a management evaluation, how does FNS determine that the SA has complied with its own procurement rules?

Answer: Unless FNS has reason to believe (audit, complaints, etc.) that the SA has not complied with its own procurement rules, FNS need only review the SA's compliance with Part 3016.60. If FNS believes, or has information, that the SA did not comply with its own procurement rules, FNS should work with the appropriate State officials, i.e., State auditors, procurement and legal officials, to identify the scope of the deficiency and the appropriate actions to remedy the deficiency.

Question 7: Does the SA have the same option of following its own State rules when the resulting contract will be paid with CN program (National School Lunch, School Breakfast, Child and Adult Care Food and Summer Food Service Programs) funds?

Answer: Not unless the State's rules are at least equal to the Federal requirements at 3016.36(b-i) or Part 3019.40-.48, as applicable. SAs conducting procurements on behalf of CN program participants, i.e., school food authorities, Child and Adult Care Food Program institutions and Summer Food Service Program sponsors, must follow the same rules that the program participant would follow. For public organizations these requirements are found at 3016.36(b-i) and 3016.60(b and c), while the nonprofit requirements are found at 3019.40-.48.

If you have additional questions or concerns, please contact us.

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