

To: Authorized Representatives of Child Nutrition Programs
School Nutrition Programs
Child and Adult Care Food Program
Summer Food Service Program

From: Child and Adult Nutrition Services

Date: August 07, 2018

Subject: Federal Nonprocurement

Memo Number: SNP 213-1
CACFP 213-1
CACFP DCH 213-1
SFSP 213-1

This memo replaces the previous memo on this topic dated November 16, 1999, memo number(s) NSLP-31, CACFP-28, CACFPDCH-13, SFSP-17. The purpose of this memo is to provide guidance with the federal nonprocurement suspension and waiver procedures in the School Lunch Program and other Child Nutrition Programs (Summer Food Service Program, Child and Adult Care Food Program).

This information should be shared with the person(s) who works with the procurement process in the Program. Questions about this memo can be referred to a SD Dept. of Education Child and Adult Nutrition Services staff member.

Questions have been presented concerning the exception provision of the USDA's suspension and debarment regulations at 7 CFR Part 3017 which permits a debarred, suspended or voluntarily excluded person or principal to participate in a particular covered transaction.

Person as defined in 7 CFR Part 3017.205 is any individual, corporation, partnership, association, or unit of government or legal entity, however organized. Principals mean officers, directors, owners, partner, key employees, or other persons with primary management or supervisory responsibilities within a company. Principals also include persons who have critical influence on or substantive control over a covered transaction whether or not employed by the company.

The Administrator of the USDA Food and Nutrition Services (FNS) may grant an exception permitting a debarred, suspended, or voluntarily excluded person or principal to participate in a specific covered transaction in a FNA program pursuant to 7 CFR Part 3017.215. Since granting an exception is a deviation from the government wide policy established by Executive Order 12549 and 7 CFR Part 3017.200, the Administrator must issue a written determination on a case-by-case basis that justifies the reason(s) for permitting the excluded

person/principal to participate in the covered transaction. The regulations clearly state that in accordance with the President's state intention in the Executive Order, exceptions shall be granted only infrequently.

Before requesting an exception from the Administrator of FNS, local agencies must make every effort to find a supplier that is eligible to participate in the covered transaction. State Agencies should assist local agencies in these efforts. When extenuating circumstances do exist, e.g., (1) the ineligible bidder is the only bidder; or (2) the ineligible bidder price is significantly lower than the eligible bidder(s) price, the local agency may consider requesting an exception. Please note, that an exception request will not be approved when there is only small to moderate price differences between the ineligible and eligible bidders. Additionally, an exception will not be granted when an excluded bidder has submitted a "low ball" bid. Any bid from an excluded bidder that has the appearance of a "low ball" bid should be submitted to our office, so that we can forward this information to the U.S. Department of Justice.

The following steps must be followed by a local agency seeking to obtain an exception:

1. The local agency must notify the State Agency of the initial bid results and the proposed actions that the local agency will undertake to re-solicit bids. At a minimum, this should include publicly soliciting bids a second time and directly contacting as many potential suppliers as possible. The local agency should contact the following to identify potential suppliers for the product(s) under solicitation:
 - a. Public and private schools, military and federal installations, residential institutions, child care centers, county and city correctional or governmental entity within a reasonable geographic area that would be purchasing the same type of product(s) to determine the supplier(s) used by these outlets.
 - b. The State Agency should also provide the local agency with information on all known suppliers that are utilized for State operated programs.
 - c. The local agency may modify its initial bid requirements; however, the local agency may not subdivide its bid requirements to avoid the covered transaction threshold, currently set by regulation at \$100,000.
2. If the second solicitation does not result in any eligible bidders or if the bid prices are still significantly higher, the local agency must obtain State Agency approval for noncompetitive negotiation and contact potential suppliers, other than the ineligible bidder, to negotiate a contract. The local agency must enter into these negotiations in good faith. For example, the local agency must demonstrate a willingness to accommodate alternative delivery schedules, case counts, etc. This does not mean that a local agency should accept changes that decrease the nutritional integrity of the Child Nutrition Programs, i.e., accepting a higher fat product in lieu of a specified lower fat product the local agency must document the negotiation results, including the reason(s) that the potential suppliers are unwilling or unable to supply the product(s) or accept a lower price.

3. After all efforts have been exhausted for finding an eligible supplier or obtaining lower prices from an eligible supplier, a local agency may seek an exception from the FCS Administrator through the State Agency. The request must be in writing and must contain and justification for the exception and sufficient documentation demonstrating that the local agency has exhausted all possible efforts to find an eligible or lower priced supplier.
4. The State Agency must endorse the need for an exception in writing, including a certification that the local agency has exhausted all possible avenues to find an eligible supplier or obtain lower prices from an eligible supplier.

Please be aware that complying with the above procedures does not ensure an exception request will be granted. Each case will be reviewed individually and a decision to grant an exception will remain at the discretion of the FNS Administrator. The exception will only be granted when to do so is clearly in the best interest of the Child Nutrition Programs and no other viable alternative exists. Exceptions must be requested and approved by the Administrator of FNS prior to entering into, renewing or continuing a contract with an ineligible entity. The Administrator of FNS will not consider "after the fact" exception requests.