

## Chapter 3:

### Characteristics of a Comprehensive Agreement

#### Authority

Section 210.16(c) states "Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met." These provisions are expanded upon below to incorporate program policies, pertinent regulatory requirements, and guidance. Some of the required provisions are based upon the dollar threshold of the contract. In such cases, the total dollar value of the contract must be considered, e.g., in the case of a cost-reimbursable contract, the total value of the contract must reflect the management fee as well as the direct costs incurred by the FSMC which are billed to the SFA, such as food and labor.

#### Required vs. Suggested

Every effort has been made to distinguish between required and suggested contract provisions. Provisions typed in *italics* are Federal requirements that must appear in the contract documents. Regardless of whether a provision is required to actually appear in the contract documents, SFAs are required to ensure that the food service is operated in accordance with program regulations.

SFAs are urged to include additional provisions that supplement those regulatory provisions that must appear in the contract to ensure that the best interest of the SFA is served, provided that such provisions are not inconsistent with program regulations. Such provisions may include competitive purchasing to obtain the best price and quality of food, extending the required controls of USDA donated foods to purchased food as well, and requiring FSMCs to comply with the intent of Federal procurement and cost principles.

#### General Provisions

A comprehensive contractual agreement covers a wide range of areas that delineate both the SFA and FSMC responsibilities:

**Compliance with State and Federal Regulations**—The Code of Federal Regulations (CFR) provides rules that SFAs must observe if they are to participate in the NSLP, the SBP, the SMP, and other meal programs. All contracts should require that the FSMC conduct program operations in accordance with 7 CFR Parts 210, 215, 220, 245, 250 and FNS instructions and policies, as applicable. Incorporation of program regulations provides a common basis for performance by the FSMC.

The most effective approach would be to require the FSMC to be in conformance with the applicable portions of the SFA's agreement under the program. (7 CFR Part 210.16(a)(2))

Contracts should also contain reference to applicable State regulations, e.g., procurement, health and sanitation requirements.

SFAs may want to consider including an addendum to the SFA-FSMC contract which summarizes Federal and State requirements.

**Signature Authority**—The SFA retains signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims. (7 CFR Part 210.16(a)(5)) The SFA also retains signature authority for their free and reduced price policy statement and the monthly Claim for Reimbursement.

**Free and Reduced Price Meal Process**—The SFA determines eligibility for free and reduced price meals and free milk in accordance with 7 CFR Part 245. Such responsibilities include the conduct of any hearings related to such determinations and verification of applications for free and reduced price meals.

An employee of the food service management company may perform for the SFA in various aspects of the application, certification and verification process of eligibility for school meals programs. The company's employee must comply with all requirements for these processes, including limited disclosure of individual eligibility information. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA and cannot be used or possessed by the food service management company for any use other than to determine eligibility for free or reduced price meals.

**USDA Donated Foods**—The SFA's agreement must comply with the regulations for the use of USDA donated foods, including:

**Crediting for the Value of Donated Foods**—In accordance with 7 CFR 250.51(a) and (b), contracts must ensure that the FSMC credits the SFA for the value of all donated foods received for use in the SFA's meal service in the school year, on at least an annual basis, through invoice reductions, refunds, discounts, or other means. Such requirement includes crediting for the value of donated foods contained in processed end products if the FSMC, in accordance with

its contract, procures such end products on behalf of the SFA, or acts as an intermediary in passing the donated food value in such end products on to the SFA. All forms of crediting must include clear documentation of the value received from the donated foods. In cost-reimbursable contracts, crediting may be performed by disclosure; i.e., the FSMC credits the SFA for the value of donated foods by disclosing, in its billing for food costs submitted to the SFA, the savings resulting from the receipt of donated foods for the billing period.

**Donated Food Values Required in Crediting**—In accordance with 7 CFR 250.51(c), the SFA must ensure that, in crediting it for the value of donated foods, the FSMC uses the donated food values determined by the distributing agency, in accordance with 7 CFR 250.58(e), or, if approved by the distributing agency, donated food values determined by an alternate means of the SFA's choosing. However, the method of determining the donated food values to be used in crediting must be included in procurement documents and in the contract, and must result in the determination of actual values; e.g., the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. Negotiation of such values is not permitted.

**Use of Donated Foods**—In accordance with 7 CFR 250.51(d), the FSMC must use all donated ground beef, donated ground pork, and all processed end products, in the SFA's food service, and must use all other donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the SFA's food service (unless the contract specifically stipulates that the donated foods, and not such commercial substitutes, must be used).

**Storage and Inventory Management**—The FSMC must meet the general requirements for the storage and inventory management of donated foods in 7 CFR 250.14(b). In accordance with 7 CFR 250.52(a), the FSMC may store and inventory donated foods together with foods it has purchased commercially for the SFA's use, unless this is specifically prohibited in its contract. It may store and inventory such foods together with other commercially purchased foods only to the extent that such a system ensures compliance with the requirements for the use of donated foods in 7 CFR 250.51(d). Additionally, under cost-reimbursable contracts, the FSMC must

ensure that its system of inventory management does not result in the SFA being charged for donated foods.

**Recordkeeping and Review Requirements**—The SFA and FSMC must maintain records of receipt of donated foods and processed end products, of crediting for the value of donated foods, and other records relating to donated foods, in accordance with 7 CFR 250.54. The SFA must conduct a reconciliation at least annually (and upon termination of the contract) to ensure that the FSMC has credited it for the value of all donated foods received for use in the SFA's food service in the school year including, in accordance with requirements in 7 CFR 250.51(a), the value of donated foods contained in processed end products.

**Monitoring**—This should encompass determining whether the food service operation is in conformance with the SFA's agreement to operate the program in accordance with program regulations. Contract language should also confirm the SFA's responsibility to implement internal controls as required under 7 CFR 210.8(a) and to ensure resolution of program review and audit findings.

**Use of Advisory Board**—If the SFA wishes to have the FSMC work within the advisory board, contract language should identify the specific FSMC responsibilities.

## **Meal Service Provisions**

Contracts should also cover the range of services expected from the FSMC. These services include the types of meals provided by the FSMC and the division of responsibility for the various activities that make up meal services such as food purchasing and storage, preparation, service, management of the SFA's free and reduced price meal tickets, and other related activities. This includes:

**Descriptive Information Regarding Food Service**—SFAs are encouraged to provide specific information about the food service. Refer to Chapter 1, Identify Scope of Contract, for examples.

Such information may be provided in a fact sheet that accompanies the IFB/RFP or in either the IFB or RFP. It would not be necessary to restate in the contract any information that appears in the IFB or RFP, provided that the IFB or RFP is expressly incorporated into the contract.

**Types of Meals to be Provided**—Contracts should clearly specify what types of meals and other services will be provided (i.e., lunch, breakfast, a la carte and vending machine sales, adult meals and special event meals),

the reimbursement category of those meals, and what programs will be offered. Unless the SFA intends to seek separate bids, the bids should cover all other meal programs administered by the SFA, e.g., the Child and Adult Care Food Program, the Summer Food Service Program and vended meals provided to other SFAs.

**21-Day Cycle Menu**—Under the competitive sealed bid method, the 21-day cycle menu enables the SFA to review each bid for responsiveness to the bid requirements.

The SFA should develop the 21-day cycle menu for the FSMC bid/proposal. If the SFA determines, and the SA agrees that the SFA is unable to develop a cycle menu, the SA may develop the cycle menu or allow the FSMC to develop the 21-day cycle menu as long as doing so was a requirement of the solicitation up front.

The SFA must ensure that its solicitation contains information on how the SFA will be evaluating the FSMC's menu, such as affordability, nutrition requirements, and appeal to the students. The solicitation must also identify whether the SFA will be providing food specifications, or whether the FSMC will be developing the specifications. In the first scenario, the FSMC must respond directly to the food specifications provided by the SFA in the solicitation. In those cases where the SFA has not supplied specifications, the FSMC must identify the food products that will be served via the menu using specifications like grading, weight, item labels, nutritional qualities, etc., to allow the SFA to fairly evaluate all bids. Whether the specifications are provided by the SFA or the FSMC, they must be clearly identified and described in the solicitation or the proposal.

However, FSMC-developed cycle menus are only appropriate to use under the competitive negotiation method of procurement since, under the competitive sealed bid method, the SFA must review each bid for responsiveness to the bid requirements. Moreover, an SFA may not contract a FSMC to develop their menu for use in the SFA's solicitation if the FSMC plans to respond to the solicitation at hand, as doing so could place them at a competitive advantage. The SFA must convey menu adjustment requirements to the FSMC and monitors implementation of those adjustments (e.g., meal pattern changes issued by USDA). The SFA must also approve any changes to the cycle menu after the first 21 days of meal service. Such changes should include foods of cost and quality equivalent to the first 21 days of meal service.

## Quality, Extent and General Nature of Food Service:

**Specifications**—Contract language should also include other standards, such as: applicability of USDA major ingredient specifications, use of the Child Nutrition Labeling Program, and applicability of USDA standards about the use of texturized vegetable protein fillers and extenders.

**Samples**—SFAs may want to consider including a contract provision that mandates that the FSMC holds meal samples for a 48-hour period (or follow the SFA's requirements) to ensure that the procedures specified in *Serving It Safe*, are met.

**Food Testing**—Contracts should also address food testing by the SFA, such as testing portion sizes and food temperature.

**Competitive Foods**—In accordance with 7 CFR 210.11, SFAs must exert control over the sale of foods sold in competition with school lunch and school breakfast. Included are snacks and beverages sold as part of a la carte meal offering or through vending machines. A SFA may want to address its position regarding the kinds of foods to be offered, the location of vending machines, the hours of students' access to a la carte and/or vending machines, etc.

SFAs are encouraged to include language which prohibits the sale of foods of minimal nutritional value in the food service area and which fosters the nutritional integrity of the school nutrition programs.

**Activities Supporting Meal Services**—Contracts for food services should also contain language about activities that support food services, e.g., food purchasing (for cost-type contracts), menu planning, inventory and storage, and nutrition education, if desired.

The SFA must retain control of the quality, extent and general nature of the food service and the prices to be charged to the children for meals. Such control must include retaining control of the nonprofit school food service account and overall financial responsibility for the school nutrition programs; establishing all prices for all meals served under the nonprofit school food service account (e.g., pricing for reimbursable meals, a la carte food services and adult meals, as applicable); developing the 21-day cycle menu in accordance with the meal pattern requirements specified in 7 CFR Part 210; conveying menu adjustment requirements to the FSMC, and monitoring implementation of those adjustments. Additionally, any refunds received from processors must be paid to the SFA.

**General**—Contracts are strengthened by designating the specific range of services for which the FSMC is responsible. These services may include, serving of meals, processing of meal tickets, meal service at special functions, lunch ticket sales, and food delivery to serving sites.

**Financial**—Cost-reimbursable contracts for food services should also contain language about payment of vendor bills and accounts. A common approach is for the FSMC to assume responsibility for paying these bills and then invoicing the SFA for the costs. This is consistent with a "cost-reimbursable with a fixed-fee" payment structure.

Contract language must contain a provision clearly requiring that all costs to the program be net of applicable discounts, rebates, and credits. SFAs must be sure to 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: 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 [210.21(f)(1)(i)].

Additionally, the SFA must ensure that contractors provide sufficient information to permit the school food authority to identify allowable and unallowable costs and the amount of all such discounts, rebates, and credits on invoices and bills presented for payment to the school food authority [210.21(f)(1)(ii)(A)]. It is important to note that 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 [(210.21(f)(1)(iii)].

The contractor must be transparent in their identification of these rebates, discounts, and credits [210.21(f)(1)(iii),(iv),(v),(vi)].

Contract language should also specify the requirements for back-up documentation that supports the cost reimbursement portion of the invoice, e.g., supplier invoices for food costs, and time and attendance documentation for labor costs. Additionally, the contract should also specify the management controls and accountability procedures, if the SFA advances money at the start of the school year, and for administrative costs charged by the FSMC.

**Food Purchasing**—In developing a cost-reimbursable solicitation and contract, SFAs should clearly identify a range of controls over purchasing, including whether the FSMC is permitted to purchase from its own subsidiaries, whether the cost of products is the sole determinant for purchase, and how discounts, rebates, and applicable credits are passed through to the SFA. In addition, the SFA must ensure that the FSMC procurement of processed end products (i.e., end products that contain donated foods) is restricted to those processors that have signed processing agreements with the State distributing agency or the SFA, in accordance with 7 CFR Part 250, Subpart C.

If the SFA does the purchasing, clauses that limit the selection of vendors to only FSMC-approved vendors are not permitted. Such clauses have the effect of limiting open and free competition. FSMCs may, however, recommend vendors.

In the case of cost-reimbursable contracts, the SFA should include a provision requiring a FSMC to demonstrate that the prices it is charging the SFA for food, supplies, etc., are reasonable and necessary. Additionally, SFAs should include provisions which require a FSMC to submit documentation periodically (i.e., monthly) that supports what the SFA was charged for each product purchased and requiring that allowable costs 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 SFA. The FSMC should make all of the documentation available for inspection by the SFA. (7 CFR Part 210.21) In addition, the SFA should include a provision that ensures crediting of the SFA for the value of donated foods in processed end products purchased on behalf of the SFA, as applicable.

**Food Inventory and Storage**—The SFA should also include provisions that specify the particulars of food inventory and storage to identify the responsible party. Responsibility should be clearly delineated to ensure that all needed activities are covered, e.g., who is responsible for food storage and maintenance of inventory and for conducting the initial inventory and final inventory.

**Nutrition Education**—If the SFA requires the FSMC to take any responsibility for nutrition education and other non-meal services associated with the meal service component of the FSMC operation, the specific responsibilities should be delineated.

**Nondiscrimination**—The SFA is always required to ensure that no child is discriminated against on the basis of race, color, national origin, age, sex or disability. Contract language must not diminish the intent of the nondiscrimination provision.

**Free and Reduced Price Policy**—FSMCs often implement meal-related portions of the free and reduced price policy, such as distributing tickets, obtaining accurate meal counts and preventing overt identification of free and reduced price eligible students. Contracts should include language requiring the FSMC to comply with the SFA's free and reduced price meal policies. However, the SFA is ultimately responsible for ensuring that all requirements are being met and the information on the application remains the property of the SFA. The information cannot be used or possessed by the food service management company for any use other than to determine eligibility for free or reduced price meals

**Other Considerations**—More considerations for inclusion in the contract are:

- Utilization of USDA donated foods on a first-in first-out basis.
- In cost-reimbursable contracts, whether the FSMC bills the SFA for foods when purchased or when used.
- The method by which inventories of supplies are handled at the beginning and end of the contract. For example, if the FSMC bills the SFA for supplies as purchased rather than as used, the contract should ensure that the FSMC will purchase back unused supplies from the SFA at the conclusion of the contract in order to prevent over-buying.

## **Financial Provisions**

Contracts between SFAs and FSMCs provide the basis for payments and management of the business relationship. SFA oversight is of particular importance given the range of financial terms and conditions of SFA-FSMC contracts, such as fee structures, cost controls and financial management. The financial provisions discussed below all flow through the nonprofit school food service account:

**Fee Structures**—Federal program regulations permit two types of payment or fee structures in SFA contracts with FSMCs: a fixed-price or fee, and cost-plus-a-fixed-fee. SFAs must ensure that contract provisions are limited to the permissible fee structures.

Fixed-price/fee, which is permissible either under an IFB or RFP, takes

the form of a unit charge where the unit may be per meal or per time period, typically a year. For example, the FSMC might charge \$1.50 per meal or \$50,000 per year. In each instance, the fee charged is expected to cover all operating and administrative costs with no additional charges to the SFA.

A cost-reimbursable contract, which is not permissible under an IFB, permits the FSMC to pass food service operating costs through to the SFA and charge an additional fixed- or flat-fee that covers management and administrative costs.

The fee may be described in different ways, e.g., service fee, management fee, administrative fee, or a combination of any of these. A "cost-plus-fixed-fee" contract may also have multiple fees. There may be a per meal cost and an annual fee. Also, one fee might be called an administrative fee and another, a management or service fee; typically, the administrative fee represents overhead costs and the management fee represents the profits.

The contract should have enough detail regarding fee structure to ensure that there is no double billing, i.e., same item(s) included in the management fee and administrative fee. Additionally, the contract should specify the cost documentation requirements.

**Control of the Nonprofit School Food Service Account**—Under cost-plus-fixed-fee contracts, all revenue, including refund payments for processed end products, and any expenses that are charged to a SFA must flow through the SFA's food service account(s). Revenue can be used only for the SFA's nonprofit school food service program and cannot accrue to the FSMC. FSMC expenses that are not billed to the SFA cannot be recorded as expenses to the food service account.

**A La Carte Conversion (Per Meal Equivalency)**—A component of the overall payment structure is the manner in which a la carte food service is counted and valued in a fee per meal contract. In a fee per meal contract, the FSMC is paid on the basis of the number of meals served. In order for a FSMC to be paid for the a la carte food service, many SFAs convert a la carte food service activity into an equitable number of reimbursable lunches. The conversion of the a la carte activity into an equitable number of lunches is termed the "per meal equivalency."

Contracts should define a per meal equivalency that fairly relates to the cost of producing the reimbursable lunch. One means of obtaining the per meal equivalency is by dividing the total cost of producing a la carte items sold by the unit cost of producing a reimbursable lunch.

Absent cost data, the SFA may obtain a per meal equivalency by dividing the a la carte revenue by the per meal sum of the Federal and State free reimbursement plus the value of USDA entitlement and bonus donated foods. A la carte revenue should include all sales to adults and a la carte sales to students.

**Adult Meals**—Adult meal charges must be established in accordance with FNS Instruction 782-5, Pricing of Adult Meals in the National School Lunch and School Breakfast Programs. Under that instruction, "Breakfasts and lunches served to teachers, administrators, custodians and other adults must be priced so that the adult payment in combination with any per-lunch revenues from other sources designated specifically for the support of adult meals (such as State or local fringe benefit or payroll funds, or funding from voluntary agencies) is sufficient to cover the overall cost of the lunch, including the value of any USDA entitlement and bonus donated foods used to prepare the meal. If cost data are not available, the minimum adult payment should reflect the price charged to students paying the school's designated full price, plus the current value of Federal cash and donated food assistance (entitlement and bonus) for full price meals. In nonpricing programs, the adult charge should be at least the amount of reimbursement received for a free lunch under Sections 4 and 11 of the National School Lunch Act, plus the per-meal value of both USDA entitlement and bonus donated foods or, for breakfasts, the rate established for free meals under Section 4 of the Child Nutrition Act, plus the value of bonus commodities."

**Changes in Prices Charged for Meals**—While contract language that ensures that the SFA retains control over pricing is required, language that provides the SFA some formal means of changing prices is recommended.

**Special Functions**—When reviewing cost-type contracts, particular attention should be given to the scope and pricing of special functions, which are conducted outside of the nonprofit school food service. Contract language should include a provision that prohibits the use of USDA donated foods or processed end products containing USDA donated foods for such functions. Separate billings for special functions are preferable to ensure that school food service costs and special function costs are not intermixed, thus preventing double billing.

**Vending Machines**—Contracts should include a provision which sets forth the SFA's position on vending machines, if applicable. This provision may include the SFA's position on the ownership of the

machines, responsibility for maintenance, control of the revenues they generate, etc.

**Adjustments to Payments**—The fee structure prescribed in a contract may require adjustment if actual experience does not conform to the assumptions upon which the original fee structure was based. Such cases may include unanticipated drops in enrollment or lowering of Federal reimbursement rates. Contracts may contain language permitting the SFA and FSMC to examine and renegotiate payment terms. Fee adjustments may not, however, be permitted unless provided for in the IFB or RFP and incorporated into the solicitation/contract thereby not creating a material change.

Any methods and basis for fee adjustment upon renewal must be addressed in the original contract. SFAs should consider limiting fee increases in some way, e.g., to no more than the percentage of change in the Consumer Price Index for All Urban Consumers.

Contracts that allow a FSMC to renegotiate its flat fee rate when "guaranteed volume" has not been achieved are discouraged because this may inhibit open and free competition. FSMCs may provide an artificially low bid if it were thought that a guaranteed volume could not be achieved. Actual participation is dictated by the quality of the meal service over which the FSMC would have direct control.

**Meal Program Cost Controls**—Cost and reporting controls must exist. Specifying the types of reports required of the FSMC provides a SFA with one important means of monitoring performance.

**Program Cost Accounting and Reporting**—As appropriate, SFAs should require periodic reports on operations and state whether the contract is to include monthly profit and loss statements or operating cost reports, daily meal counts, and end of year financial statements.

**Control of Food Service Equipment Purchases**—Food service equipment is a major capital investment for SFAs. The addition or replacement of equipment by the FSMC without prior approval from the SFA presents a risk to the SFA. Contracts should provide the SFA with final, prior approval authority for the purchase of equipment that is used in storage, preparation and delivery of school meals. Contracts should establish an amortization schedule, if appropriate. Whether or not an amortization schedule is used, title to the property must be vested with the SFA when the equipment is placed in service. Clauses that require the full repayment of unamortized costs incurred by the FSMC when the contract

is terminated or not renewed are not permitted. The contract should state that the SFA can retain the property and continue to make payments in accordance with the amortization schedule or return the property to the FSMC in full release of the unpaid balance. Payment of interest on borrowing, however represented, is an unallowable cost under OMB Circular No. A-87, Cost Principles for State and Local Governments.

**Performance Security**—A performance security, or bond, is a method available to a SFA to obtain financial recourse in the event that the FSMC fails to perform in a satisfactory manner or defaults on its duties and responsibilities. The performance security would be specified as a flat amount or as a percent of the estimated value of service.

A performance security or bond must be from a surety company listed in the most recent U.S. Department of Treasury Circular 570. SFAs, however, are reminded that OMB Circular No. A-102 considers unnecessary experience and bonding requirements to be restrictive of competition. For example, a \$10 million bond would be unnecessary for a \$1 million contract.

#### **Operating Cost Guarantees and Recovery:**

**Guarantees**—Contracts for food services may also contain language by which the FSMC guarantees to meet fiscal goals specified by the SFA. Any guaranteed return promised by the FSMC must remain in the nonprofit food service account. If the contract contains such guarantees, the contract should also contain language that ensures that the FSMC bears responsibility for failure to meet those goals. Returns" cannot be contingent upon multi-year contract duration.

**Loss Recovery**—Contracts are the appropriate place to address liability for losses. Contracts usually address FSMC liability in one of two ways: the FSMC may either be required to reimburse the SFA for the loss without limit or it may reimburse the SFA with limits equal to the management fee or a specified ceiling. Contracts should also address the length of time the SFA can seek recovery of losses. SFAs should seek recovery of any losses for a period of time corresponding to the SFA's period of liability.

**Recovery of Overclaims**—SFAs are encouraged to add a provision in the contract that requires the FSMC to pay the SFA for any overclaims assessed by the SA due to FSMC negligence or noncompliance with regulations. This liability should correspond to either the 3-year record retention period established in 7 CFR

210.23(c) or the SA-established record retention timeframe, whichever is greater. (Refer to the paragraph concerning "Nonperformance" in this chapter.)

**Negligence**—It is also suggested that any waiver of liability by the SFA for damages by the FSMC to equipment or facilities contain an exclusion to this waiver for any damages caused by negligence.

## **Other Provisions**

**Reporting and Recordkeeping Requirements**—Contract language should ensure that FSMCs maintain appropriate business records, as applicable, e.g., food and supply bid specifications, purchase orders, invoices, and personnel records that relate to the provision of food services to a SFA. SFAs must adhere to the recordkeeping requirements found at *7 CFR Part 210.15*.

The SFA may want to require reports of program income by school and expenditures, meals served to adults, value of a la carte sales, value of USDA donated foods including processed USDA donated foods, and amount of milk served.

It is recommended that all FSMC records pertaining to the SFA be maintained at the SFA while the contract is in effect, and copies of those records be delivered to the SFA at the conclusion of the contract.

SFAs/FSMCs may retain necessary records in their original form or on microfilm. Contracts should stipulate whether original or microfilm records are required and that records are:

- Maintained in such a way that they are easily accessible;
- Available upon demand; and
- Available at the SFA premises rather than at an FSMC location.

**Facilities Management**—Contracts should clearly define the responsibilities for food service facilities and operations, such as providing the meal preparation and service facilities, repair and maintenance of equipment, cleaning of the dining areas, trash removal, exterminator services, and repairs.

**Hiring and Personnel Practices**—Contracts for food services generally contain language about personnel management including hiring practices, management of staff and employee benefits. This should include the following:

**SFA and FSMC Staff**—Contract language should enable the SFA to have final approval authority for the FSMC's school lunch manager. The SFA may want to consider including educational requirements and experience requirements for the school lunch manager position.

Contracts may have provisions against cross-hiring. Cross-hiring refers to the hiring of staff by one party to a contract when such employees are employed by the second party to the contract. Such practices would be of concern if the SFA sought to hire a member of the FSMC staff rather than renewing the contract.

Cross-hiring provisions by either the SFA or the FSMC should be reviewed by the SFA's legal counsel to ensure compliance with Federal and State labor laws.

**Personnel Management**—Contracts should define responsibility for personnel management in some fashion. In general, FSMCs are responsible for personnel management, even when the staff people they are managing are employees of the SFA. Management activities may include employee and labor relations, personnel development, and hiring and termination of management staff. Contracts should also specify responsibility for non-management staff hiring and firing.

**Employee Benefits**—Contracts should define responsibility for employee benefits and refer to the responsibilities placed upon the FSMC with respect to its own employees. The benefits identified in contracts may include medical benefits, insurance, retirement and holiday pay.

**Insurance Requirements**—To protect the interests of the SFA, contracts for food services should also contain language about insurance requirements for the FSMCs. Contracts generally identify three liabilities, i.e., comprehensive general liability, workman's compensation, and vehicle insurance. SFAs, however, are reminded that the cost of unnecessary insurance is unallowable under the Federal cost principles.

**Nonperformance**—SFAs should add a provision in the contract language that requires the FSMC to pay the SFA any overclaims due to FSMC negligence or noncompliance with regulations, including those overclaims based on review or audit findings.

It is recommended that the time limit established in the contract for this provision correspond to either the 3-year record retention period

established in 7 CFR 210.23(c) or the SA-established record retention timeframe, whichever is greater.

**Contract Duration**—The beginning date should not be prior to the date the contract is signed.

The basis for renewing the contract, including price increase or decrease provisions, if any, should be stated in the contract and IFB/RFP, as appropriate. Price increase/decrease provisions should be based on a measurable index such as the Consumer Price Index for All Urban Consumers.

**Termination Clause**—SFAs may also want to include a termination for convenience clause that provides adequate advance notice that would permit the SFA sufficient time to arrange alternate food service if the FSMC exercises the clause.

**Certifications**—SFAs must obtain satisfaction that a FSMC is neither excluded nor disqualified before doing business with the FSMC. The uniform Federal suspension/debarment certification has been abolished and the collection of paper certifications is no longer mandatory. New rules provide greater flexibility in meeting requirements. A SFA may meet the requirements by any one of three methods in 7 CFR Section 3017.300. They are:

- 1) Checking the Excluded Parties List System. This is available on the internet at <http://epls.arnet.gov>
- 2) Collecting a certification that the FSMC is neither excluded nor disqualified. Since a Federal certification form is no longer available, a SFA electing this method must devise its own.
- 3) Including a clause to this effect in the solicitation/contract.

For all contracts in excess of \$100,000, set by U.S.C. 403(11):

In accordance with the provisions of 7 CFR Part 3018, FSMCs that bid for an award exceeding \$100,000 must submit a certification regarding lobbying which conforms in substance with the language provided in 7 CFR Part 3018.

In accordance with the provisions of 7 CFR Part 3018, FSMCs that bid for an award exceeding \$100,000 must disclose lobbying activities in connection with school nutrition programs. SFAs should contact their

SA for further information regarding disclosure of lobbying activities.

While not required, SFAs are encouraged to include provisions for:

- Civil Rights Compliance—Compliance with the following, as amended: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; 7 CFR Parts 15, 15a and 15b; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement in the School Nutrition Programs. While it is the SFA's responsibility to ensure compliance with the civil rights requirements, this provision is intended to ensure that the food service operation conducted by the FSMC does not compromise SFA compliance with these requirements.
- Specifications—A provision stating that any silence, absence or omission from the contract specifications concerning any point must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the SFA is to be used. This provision should be contained in both the IFB/RFP and the contract.
- Certification of Independent Price Determination (also known as "non-collusion statement")—While not required by program regulations, it is strongly suggested that SFAs and FSMCs certify that the prices in the offer have been arrived at independently, without consultation, communication or agreement for the purpose of restricting competition.