



POLICY STATEMENT

Donated Foods in Contracts with Food Service Management Companies

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| Source: | Subpart D of USDA Final Rule – Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions, published August 8, 2008. |
| Code: | NSLP 03-09 |
| Audience: | All School Food Authorities |
| Effective Date: | 01/15/2009 |
| Replaces: | None |
| Program: | NSLP |

INTRODUCTION

The purpose of this memorandum is to highlight the key revisions and clarifications to 7 CFR Part 250, Subpart D as presented in the final rule “Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions” published in the Federal Register on August 8, 2008. This final rule is referred to hereon in this memorandum as the “Food Service Management Company (FSMC) final rule”.

STATEMENT OF POLICY

A. Overview of the FSMC Final Rule

1. The FSMC final rule establishes requirements to ensure that Local Educational Agencies (LEAs) receive the benefit and value of all donated foods received and provided to food service management companies (FSMC) to conduct food service.
2. The FSMC final rule was published in the Federal Register on August 8, 2008.
3. This memorandum focuses on the provisions related to Subpart D of the FSMC Final Rule, “Donated Foods in Contracts with Food Service Management Companies.
4. Provisions of this memorandum must be implemented occurring to the following schedule:
 - a. All new procurement solicitations initiated on or after August 8, 2008 must follow the requirements.
 - b. For all procurement solicitations for contracts issued prior to the effective date of this final FSMC rule:
 - i. Contracts with a term of 12 months or fewer remaining are exempt from applying the provisions of this rule to those contracts;
 - ii. LEAs with contracts that have annual renewal provisions may delay implementation until the expiration of the current contract plus one 12-month renewal period.

B. Procedure Changes to 7 CFR 250.50, FSMC Contract Requirements and Procurement

1. An LEA must enter into a FSMC contract with a FSMC prior to donated foods being made available to the FSMC.
2. The contract must ensure that all donated food received for use by the LEA for a specified period of time are used in the LEA’s food service program.
 - a. The specified period of time may be either the school year or fiscal year.
3. LEAs must ensure that procurement and contract documents clearly specify any donated food activities that a FSMC is to perform.

4. A FSMC may perform specific activities related to donated foods in accordance with procurement documents and its contract with the LEA. These activities may include:
 - a. Procurement of processed end products on behalf of the LEA;
 - i. The FSMC itself may not enter into the processing agreement with the processor.
 - ii. This procurement must ensure compliance with the provisions of the state agency or LEA processing agreements.
 - iii. This procurement must ensure crediting of the LEA for the value of donated foods contained in such end products at the processing agreement value.
 - b. Preparing and serving meals;
 - c. Ordering or selection of donated foods in coordination with the LEA and in accordance with 7 CFR 250.58(a);
 - d. Storage and inventory management of donated foods, in accordance with 7 CFR 250.52;
 - e. Payment for processing fees or submittal of refund requests to a processor on behalf of the LEA;
 - f. Remittance of refunds for the value of donated foods in processed end products to the LEA.
5. The procurement and contract documents must also specify the method used to determine the donated food values to be used in crediting the LEA, or the actual values assigned to the donated foods.
 - a. The method used to determine the donated food values must not be established through a post-award negotiation, or by any other method that may directly or indirectly alter the terms and conditions of the procurement contract.

C. Procedure Changes in 7 CFR 250.51, Crediting For, and Use of, Donated Foods

1. A FSMC must credit the LEA for the value of all donated foods received for use in the LEA's meal service program in a school year or fiscal year.
 - a. This provision applies to both fixed price and cost reimbursable contracts.
2. This requirement includes crediting for the value of donated foods contained in processed end products if the FSMC contract requires the FSMC to:
 - a. Procure processed end products on behalf of the LEA; or
 - b. Act as an intermediary in passing the donated food value in processed end products on to the LEA.
4. Crediting of the value of donated foods may occur through invoice reductions, refunds, discounts, or other means.
5. Crediting methodology will depend on the type of FSMC procured:
 - a. Fixed Price Contracts – A FSMC may pre-credit a LEA for donated foods where a deduction for the value of the donated foods is included in the established fixed price per meal.
 - i. The LEA must ensure that the FSMC provides an additional credit for any donated foods not included in the fixed price per meal.
 - ii. The LEA must require crediting to be performed not less frequently than annually.
 - b. Cost Reimbursable Contracts – A FSMC may credit through disclosing in the food cost billing any savings resulting from the receipt of donated foods.
6. The LEA must require crediting to be performed not less frequently than annually.
7. The LEA must ensure that the FSMC uses the donated food values determined by the State Agency in accordance with 7 CFR 250.58(e) or, if approved by the State Agency, donated food values determined by alternate means of the LEA's choosing when crediting for donated foods.
 - a. The method for determining the donated food values to be used in crediting must be included in procurement documents and in the contract.
 - b. The method must result in the determination of actual values.
 - i. Actual values may be determined from 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.
 - c. Negotiation of such values is not permitted.

8. The FSMC must use all donated ground beef, ground pork, and all processed end products in the LEA's food service.
9. The FSMC must use all other donated foods or commercially purchased foods of the same generic identity, of US origin, and of equal or better quality than the donated foods in the LEA's food service.
 - a. The contract may specifically stipulate that the donated foods, and not such commercial substitutes, be used.

D. Procedure Changes in 7 CFR 250.52, Storage and Inventory Management of Donated Foods

1. The FSMC must meet the general requirements in 7 CFR 250.14(b) for the storage and inventory management of donated foods.
2. The FSMC may store and inventory donated foods with foods purchased commercially.
 - a. The LEA may specifically prohibit this practice in the contract.
 - b. If this storage method is utilized, the FSMC must ensure compliance with 7 CFR 250.51(d).
 - c. The system of inventory management must not result in the LEA being charged for donated foods.
2. If a contract terminates and is not extended or renewed, the FSMC must return all unused donated ground beef, donated ground pork, processed end products, and other unused donated foods to the LEA.
3. The LEA must ensure that the FSMC has credited it for the value of all donated foods received for use in the LEA's meal service in a school year or fiscal year as applicable.

E. Procedure Changes for 7 CFR 250.53, Contract Provisions

1. Fixed Price FSMC Contract documentation must include the following provisions:
 - a. A statement that the FSMC must credit the LEA for the value of all donated foods received for use in the LEA's meal service program in the school year or fiscal year.
 - i. This statement must include both entitlement and bonus foods.
 - ii. This statement must include the value of donated foods contained in processing end products.
 - b. The method and frequency by which the crediting will occur, and the means of documentation to be utilized to verify the value of all donated foods has been credited
 - c. The method of determining the donated food values to be used in crediting in accordance with 7 CFR 250.51(c), or the actual donated food values.
 - d. Any activities related to donated foods that the FSMC will be responsible for in accordance with 7 CFR 250.50(d), and assurance that such activities will be performed in accordance with the applicable requirements in 7 CFR 250.
 - e. A statement that the FSMC will use all donated ground beef and ground pork products, and all processed end products, in the LEA's food service program.
 - f. A statement that the FSMC will use all other donated foods, or will use commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service.
 - g. Assurance that the procurement of processed end products on behalf of the LEA, as applicable, will ensure compliance with the requirements in subpart C of 7 CFR part 250 and with the provisions of state agency or LEA processing agreements, and will ensure crediting of the LEA for the value of donated foods contained in such end products at the processing agreement value.
 - h. Assurance that the FSMC will not itself enter into the processing agreement with the processor required in subpart C of 7 CFR part 250.
 - i. Assurance that the FSMC will comply with the storage and inventory requirements for donated foods.
 - j. A statement that the state agency, the LEA, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform onsite reviews of the food service management company's food service operation, including the review of

- records, to ensure compliance with requirements for the management and use of donated foods.
- k. A statement that the FSMC will maintain records to document its compliance with requirements relating to donated foods, in accordance with Sec. 250.54(b).
 - l. A statement that extensions or renewals of the contract, if applicable, are contingent upon the fulfillment of all contract provisions relating to donated foods.
2. Cost-reimbursable contracts must include the following provisions:
 - a. The same provisions as those required for a fixed-price contract in Part E, number 1, a through l of this memorandum.
 - i. Such provisions must also be included in procurement documents.
 - b. A cost-reimbursable contract must also contain a statement that the food service management company will ensure that its system of inventory management will not result in the recipient agency being charged for donated foods.

F. Procedure Changes for 7 CFR 250.54, Recordkeeping and Reviews

1. The LEA must maintain the following records relating to the use of donated foods in its contract with the FSMC:
 - a. The donated foods and processed end products received and provided to the FSMC for use in the LEA's food service.
 - b. Documentation that the FSMC has credited it for the value of all donated foods received for use in the LEA's food service in the school or fiscal year including, in accordance with the requirements in Sec. 250.51(a), the value of donated foods contained in processed end products.
 - c. The actual donated food values used in crediting.
2. The FSMC must maintain the following records relating to the use of donated foods in its contract with the LEA:
 - a. The donated foods and processed end products received from, or on behalf of, the LEA, for use in the LEA's food service.
 - b. Documentation that it has credited the LEA for the value of all donated foods received for use in the LEA's food service in the school or fiscal year, including, in accordance with the requirements in Sec. 250.51(a), the value of donated foods contained in processed end products.
 - c. Documentation of its procurement of processed end products on behalf of the LEA, as applicable.
3. The LEA must ensure that the FSMC is in compliance with the requirements of this part through its monitoring of the food service operation, as required in 7 CFR parts 210, 225, or 226, as applicable.
4. The LEA must also 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 LEA's food service in the school or fiscal year, including, in accordance with the requirements in 7 CFR 250.51(a), the value of donated foods contained in processed end products.
5. The State Agency and USDA may conduct reviews of FSMC operations, as necessary, to ensure compliance with the requirements of this memorandum with respect to the use and management of donated foods.

Please keep this memo on file for reference. A copy of the memo is available for downloading from the Ohio Department of Education (ODE) website at: <http://www.ode.state.oh.us/>. If you have any questions regarding this memo, please contact your ODE School Meal Programs Regional Consultant.

Approved 1/14/09 CT