

DATE: October 1, 2010

MEMO CODE: SP 01 - 2011

SUBJECT: Reaffirming the Requirement that School Food Authorities Comply with Federal Regulations Affecting Rebates, Discounts, and Other Applicable Credits in All Cost Reimbursable Contracts

TO: Child Nutrition Programs

This is a reminder of the importance of ensuring compliance with the procurement requirements established in regulations affecting the National School Lunch Program, School Breakfast Program, and Special Milk Program which became effective on November 30, 2007:

http://www.fns.usda.gov/cnd/Governance/regulations/ProcRule10_07.pdf

The regulations at 7 CFR 210.21(f), 220.16(e) and 215.14a(d) require that school food authorities (SFA) must include in all cost reimbursable contracts, contracts including cost reimbursable provisions and solicitations for such contracts, provisions which limit the use of nonprofit school food service account funds to costs resulting from proper procurements and contracts. Specifically, the regulations require that SFAs may use nonprofit school food service account funds to pay only for allowable costs – those costs net of all discounts, rebates and other applicable credits. The regulations require that in advance of solicitation or contract execution, a State agency (SA) must review and approve an SFA's procurement procedures and cost reimbursable contracts. 7 CFR 210.21(c), 215.14a(c) and 220.16(c). The regulations ensure that SFAs receive the full benefit of any discounts, rebates or credits arising from purchases made under cost reimbursable contracts on behalf of the school meals programs. As such, it helps ensure that limited school meals program resources are used as efficiently as possible.

The regulations apply to all new solicitations issued on or after the regulation's effective date, November 30, 2007. Recognizing that a requirement to rebid all contracts immediately would have posed a potential hardship on some SFAs, the Food and Nutrition

Service (FNS) included an implementation timeline in the regulation's preamble to structure rebidding of contracts by SFAs in phases. In addition, FNS responded to concerns raised by SAs related to cost-reimbursable contracts which at the time of the regulation's effective date, included provisions requiring that all discounts, rebates and other applicable credits would be credited to the SFA by the vendor, most often a food service management company (FSMC). FNS advised that in so far as a FSMC was crediting all such discounts, rebates and other applicable credits to the SFA under those cost reimbursable contracts, the relevant cost reimbursable contract could be amended to incorporate the required language of the regulation without constituting a material change. The SFA would not be required to re-bid those contracts. Even in those instances, FNS required that all cost reimbursable contracts between an SFA and a FSMC or other vendor, regardless of the date entered into, were to be in compliance with the regulatory requirements by School Year 2009-2010.

As noted in prior guidance, the regulations require contractors under cost reimbursable contracts to provide sufficient information to permit the SFA to identify allowable and unallowable costs, as well as the amount of all such discounts, rebates and credits on invoices and bills presented for payment to the SFA. 7 CFR 210.10(f), 215.14a(d) and 220.16(e). It is critically important not only that all cost reimbursable contracts include the required provisions as described above, but that the contract provisions are monitored and enforced by SAs. SAs should continue to work closely with SFAs to ensure that cost reimbursable contracts, contract provisions and solicitations contain the required provisions and terms and conditions to accomplish the necessary tracking of the discounts, rebates, and applicable credits.