



United States Department of Agriculture  
Food and Nutrition Service

Southeast Region

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**Reply to**

**Attn. of:** SA 9-1

December 28, 1998

**Subject:** Policy Number 210.21-05: Federal Non-Procurement/Suspension and Debarment Waiver Procedures

**To:** All State NSLP Directors  
Southeast Region

This memorandum is a restatement of policy previously issued as NSLP Policy Memorandum 96-14, dated May 2, 1996. Any changes made to the original text are in **bold**.

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

Person as defined in 7 CFR 3017.205 is any individual, corporation, partnership, association, unit of government or legal entity, however organized. Principals means officers, directors, owners, partners, 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 Food and **Nutrition** Service (FNS) may grant an exception permitting a debarred, suspended, or voluntarily excluded person or principal to participate in a specific covered transaction in a FNS program pursuant to 7 CFR 3017.215. Since granting an exception is a deviation from the government-wide policy established by Executive Order 12549 and 7 CFR 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 stated 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 (SAs) 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's price is significantly lower than the eligible bidder(s)'s price, the local agency may consider requesting an exception. Please note, 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 any local agency seeking to obtain an exception:

1. The local agency must notify the SA 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 determine the suppliers used by these outlets and identify potential suppliers for the product(s) under solicitation:

Public and private schools, military and federal installations, residential institutions, child care centers, county and city correctional and detention facilities, hospitals, grocery stores, and any other commercial or governmental entity within a reasonable geographical area that would be purchasing the same type of product(s).

The SA should also provide the local agency with information on all known suppliers that are utilized for State operated programs. 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 SA approval for noncompetitive negotiation. After approval, the local agency must 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, a local agency may seek an exception from the FNS Administrator through the SA. The request must be in writing and must contain a justification for the exception and sufficient documentation that demonstrates that the local agency has exhausted all possible efforts to find an eligible or lower priced supplier.

4. The SA 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 interests 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.

If you have any questions regarding this matter, please contact our office.

CHARLIE SIMMONS  
Regional Director  
Special Nutrition Programs