



**United States
Department of
Agriculture**

April 14, 2017

Food and
Nutrition
Service

Midwest Region

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20th Floor
Chicago, IL
60604-3511

Mr. Mark Haller, Director
Division of Nutrition and Wellness
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

Dear Mr. Haller:

The MWRO received a copy of the position paper, "HPS Response to USDA Memo SP-05-2017" which we understand HPS has been providing to IL school districts and asserts that it is in compliance with USDA's procurement requirements. The MWRO has a number of concerns with the accuracy of the document. This correspondence provides FNS' response to HPS' assertions noted in its position paper.

1. HPS Position Paper:

FNS' webinar explains that the "one source of price" limitation on the use of GPO price lists applies to GPOs that do not comply with Program and government-wide regulations. However, HPS then notes that FNS' memo further clarified that if a GPO conducts procurements for its contracts in compliance with Program and government-wide regulations, then Program operators may "procure these sources," i.e., make purchases under the GPO's properly procured contracts.

HPS argues in its position paper that it "conducts its procurement activities on behalf of its SFA members [both current and those that join in the future] in a manner consistent with applicable federal procurement standards"

MWRO Response to HPS' position paper:

HPS is misinterpreting the information provided in FNS' webinar and should only refer to official policy guidance given in Answer 3.iii of Q1 in Memo SP-05-2017 as referenced in the HPS position paper. SFAs may not make purchases from the GPO without considering other sources simply because the GPO asserts that it complies with all Program and government-wide regulations. There are no FNS provisions for third-party entities to self-certify their procurement systems. Therefore, self-certification does not fulfill a CN Program operator's responsibility to ensure that its procurement procedures comply with Program and government-wide regulations, which State agencies must review to ensure compliance.

In addition, SP-05-2017 does not in any way imply that if an organization such as HPS conducts procurement in compliance with Federal regulations, then these organizations will be able to procure for CN program operators without the SFA conducting proper procurement for that organization. Rather, the SFA must follow proper procurement procedures, and then may utilize the GPO's price list as one source when using small purchase procedures, sealed bids or competitive proposals, as applicable.

“Procure from” means accepting prices if an entity responds to your solicitation and comparing those prices to other responses; “procure from” does not mean having an entity procure for you, unless an express agency relationship is established. In some cases, a GPO may be acting as a procurement agent/third party purchaser. In those instances, SP-05-2017 clarifies that the agent may not use pre-existing contractual relationships in lieu of conducting a competitive procurement on behalf of the Program operator. When pre-existing contractual relationships exist, the GPO must still conduct a competitive procurement for the specific SFA(s); it cannot use the pre-existing contractual relationship in lieu of this.

For HPS to serve as a procurement agent, the SFA(s) would have to state in their solicitation that they are procuring for a procurement agent. Secondly, in such a role, HPS would have to treat each individual SFA with whom it has won a procurement agent contract as a client. It is not possible to sign a contract with a distributor with your client’s exclusive interests in mind, before you have even won a bid from that “client” and know their specific needs.

2. HPS Position Paper re: SP-05-2017

HPS states, “Each school food contract that HPS awards requires the vendor to permit any SFA that is a member of HPS in the applicable state to participate in purchasing activities (piggyback) under that contract, regardless of whether the SFA was named in the original RFP.” HPS further notes, “HPS provides ongoing contract monitoring services to the SFAs.”

MWRO Response to HPS’ position paper re: SP-05-2017:

The contracts that HPS negotiates with its prime distributor(s) apparently contain the condition that the winning bidder must continue to accept new SFA HPS members during the course of the contract. However, conditions stipulated in the contract between HPS and its distributor(s) in no way substitute for the federal procurement requirements and limitations regarding piggy-backing that SFAs must follow in their own solicitations and subsequent contracts with distributors directly or with distributors through a GPO. Those requirements for SFA contracts, as summarized in FNS SP-05-2017 state that:

“Contracted parties considering additional parties must include a provision allowing “piggybacking” in their contracts in order to avoid creating a material change. If such a provision is not included in the contract and a material change is determined, a new competitive procurement is required. For a contract containing such provisions, language should be included specifying applicable limitations of the extension (e.g., dollar value or the number of additional parties that may be added).”

Regardless of whether or not an HPS contract with its distributor(s) contains a provision requiring that the distributor accept an unlimited number of SFAs piggybacking on the contract, federal procurement rules require that any clause in an SFA’s solicitation regarding piggybacking be in compliance with the limitations as clearly indicated in the paragraph quoted from FNS SP-05-2017 immediately above. Therefore, if SFAs choose to allow additional parties to piggyback on their contract, the SFAs must include provisions for piggybacking that are in compliance with federal regulations in their solicitations. For a solicitation containing such provisions, language should specify applicable limitations of the extension (e.g., dollar value or the number of additional

parties that may be added). For further guidance on “piggybacking” refer to memo SP 02-2016; CACFP 02-2016; SFSP 02-2016.

In addition, SFAs are responsible for monitoring their contracts with third party vendors, distributors, procurement agents and other entities to ensure that they are receiving the goods and services detailed in their agreements. HPS’ assertion that it monitors contracts it has with vendors on behalf of SFA members does not absolve SFAs from managing their contracts with HPS and other third-party vendors and procurement agents. SFAs must provide oversight even if the entities with which they contract “self-attest” or certify as to their compliance with all federal procurement regulations and policies.

3. HPS Position Paper Response to SP-05-2017

HPS states that, “Vendors’ proposals are evaluated by the applicable HPS School Food Purchasing Advisory Committee, whose members consist of member volunteer school food service directors from the particular state covered by the RFP. It is important to note that SFA representatives control this decision.”

MWRO Response to HPS’ position From FNS Resource SP-05-2017:

SP05-2017 defines a “Program Operator-only Cooperative” as, “A group of Program operators agreeing to cooperatively procure together to take advantage of volume pricing for products or services procured in one contract. Under Program operator-only cooperative agreements, the group of Program operators, as defined in the scope of the solicitation, cannot materially change from the original group who plan to purchase together.” Although HPS has SFA members on its committee and notes that SFA representatives “control” this decision, this committee does not constitute an all-SFA Coop as defined by FNS under Memo SP-05-2017, nor does the ensuing agreement between HPS and the winning distributor constitute anything other than an agreement between HPS and the winning distributor.

Please distribute this information accordingly. If you have questions or would like to further discuss, please let me know.

Sincerely,



Vista Suarez Fletcher, PhD, RD
Branch Chief, School Programs and Food Distribution