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TO: Superintendents, Nutrition Directors and Sponsor Representatives

FROM: Herminia J. Vigil, Director – Nutrition & Transportation Unit – 303.866.6661

DATE: July 15, 2008

SUBJECT: Final Rule – Procurement Requirements for the National School Lunch, School Breakfast, and Special Milk Programs

The final rule, Procurement Requirements for the National School Lunch, School Breakfast, and Special Milk Programs was published in the Federal Register on October 31, 2007. The purpose of the memorandum is to highlight the key provisions of the final rule and emphasize the responsibilities in ensuring compliance with these provisions and with contract enforcement and oversight.

The rule was prompted in part by audits released by the Office of Inspector General which identified that food service management companies improperly received purchase discounts and/or USDA donated commodities which were intended to accrue to the school food authority's (SFA's) nonprofit school food service account.

The rule explicitly:

- (1) limits an SFA's use of nonprofit school food service funds to costs resulting from proper procurements and contracts;
- (2) requires that allowable costs paid from the nonprofit school food service account be net of all discounts, rebates, and applicable credits; and
- (3) requires State agencies to review and approve SFA procurements of food service management companies' services in advance of contract execution.

Therefore, in accordance with the final rule, each contractor to the SFA must identify the amount of each discount, rebate, and other applicable credit on bills and invoices presented to the SFA for payment, and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. 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 under the contract.

In addition, the final rule requires the SFA to obtain prior written approval of invitations for bids and requests for proposals for food service management companies before their issuance. Further, the State agency must review and approve the contract terms to ensure contract language requiring compliance with net cost requirements is contained within the contracts. The SFA must incorporate all State agency-required changes into the contract or amendment before executing the contract. These requirements will promote full and open competition in

SFA procurements of goods and services, and also provide a means for identifying and correcting problems in contracts before they are signed.

The rule became effective November 30, 2007. The final regulation applies to all new solicitations issued on or after this date. However, implementation is being phased in for existing contracts. For solicitations issued prior to November 30, 2007: (1) contracts with a term of 12 months or fewer remaining are exempt; (2) contracts that have annual renewal provisions may delay implementation until expiration of the current contract plus one 12-month renewal period, with State agency approval; and (3) contracts that have a term of more than 12 months may delay implementation up to 24 months when the solicitation for the contract was issued prior to the effective date of this regulation, with State agency approval.

Finally, it is important that State agencies recognize they must continue to monitor contracts that were executed prior to the final rule. Many of these contracts between SFAs and food service management companies contain provisions which require the return of discounts, rebates and applicable credits to the SFAs nonprofit school food service account. State agencies should take steps through their monitoring efforts to ensure that these contract provisions are enforced and that SFAs receive the funds in accordance with the terms of these contracts.