FOOD MANAGEMENT SERVICES AGREEMENT

SOUTH DAKOTA DEPARTMENT OF EDUCATION

SCHOOL FOOD AUTHORITY

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FOOD MANAGEMENT SERVICES AGREEMENT

This FOOD MANAGEMENT SERVICES AGREEMENT (this "Agreement") is entered into effective as of the date the South Dakota Department of Education (the "State Agency") provides final approval, and is made between _____ (the "School Food Authority" or "SFA") and _____ (the "Food Service Management Company" or "FSMC"). FSMC's proposal (the "Proposal") in response to SFA's request for proposal ("Request for Proposal" or "RFP") is expressly incorporated by reference and is part of this Agreement.

ARTICLE I
GENERAL CONTRACTUAL TERMS

1.1 Approval by State Agency. Prior to execution by SFA and FSMC, SFA must submit this Agreement to the State Agency for final approval. This Agreement will not be effective unless and until signed by the State Agency below. This Agreement may not be amended without the written consent of the State Agency. This Agreement, or any amendment thereto, which is not signed by the State Agency will be of no effect. The State Agency will sign and date below to indicate (i) its approval; and (ii) the effective date of this Agreement:

STATE AGENCY
SOUTH DAKOTA DEPARTMENT OF EDUCATION

_____ Date: _____
By: _____
Its: _____

1.2 Term. Unless earlier terminated pursuant to the terms of this Agreement, the initial term of this Agreement will be for a period of one (1) year, beginning on July 1, 20__, and ending on June 30, 20__. Following the initial term, and at the end of each subsequent renewal term, SFA and FSMC may mutually agree to extend the term of this Agreement for up to four (4) additional one (1) year terms (each such term to be known as a "Renewal Term").

1.3 Independent Contractor. FSMC will be, at all times, an independent contractor and not an employee of SFA. The employees of FSMC are not employees of SFA.

1.4 Permanent Agreement. FSMC will, at all times, operate in conformance with SFA's Permanent Agreement with the State Agency (the "Permanent Agreement") and the Free and Reduced Price Policy Statement, in accordance with applicable law.

1.5 Scope of Operations; Exclusivity. FSMC hereby agrees to provide food management services for SFA, in compliance with certain federal programs identified below (the "Services"). Only the programs checked below are included in this Agreement. If a program is added later, the appropriate procurement procedures must be followed.

□ National School Lunch Program ("NSLP"), including Seamless Summer Option ("SSO")
□ School Breakfast Program ("SBP"), including SSO
□ Afterschool Snack ("AS")
□ Special Milk Program ("SMP")
□ Summer Food Service Program ("SFSP")
□ Child & Adult Care Food Program ("CACFP")
□ Fresh Fruit and Vegetable Program ("FFVP")
□ A la carte Sales

(each a "Child Nutrition Program," and all checked Child Nutrition Programs together, the "Program"). FSMC will have the exclusive right to operate the Program at the sites specified by SFA. FSMC will be responsible for all procurement of products as necessary to achieve pricing per bid meal.

1.6 Program Beneficiaries. The Services provided will be operated and maintained as a benefit to SFA's students.

1.7 Maximum Participation. The Services will be managed to promote maximum participation in the Child Nutrition Programs.

1.8 Responsibility for Program. In conformance with the Permanent Agreement, the SFA will be legally and financially responsible for the conduct of the Program and will supervise the Services so as to ensure compliance with the rules and regulations of the State Agency and U.S. Department of Agriculture ("USDA") regarding each of the Child Nutrition Programs covered by this Agreement.

1.9 Establishing Prices. SFA will establish all sale prices, including price adjustments, for all reimbursable and non-reimbursable meals, milk and a la carte sales. Reimbursable meal is defined as meals that meet the nutritional standards established in federal regulations pertaining to the Program and that are served to persons eligible to receive food assistance under the Program. All food sold to students during the school day that is not part of a reimbursable meal will be subject to USDA Smart Snack requirements and nonprogram food pricing requirements.

1.10 Additional Services. FSMC is not permitted to provide any services, except those contracted for in this Agreement, using SFA's equipment and facilities. If FSMC desires to perform additional services, or if SFA seeks additional services (in either case, "Additional Food Services"), the FSMC and SFA must contract separately for such services or the use of SFA's facilities and equipment. Any such agreement may not vary the terms of this Agreement and must be compliant with all applicable local, state, and federal requirements. No Program foods, including federally donated foods ("USDA Foods"), will be used for Additional Food Services. SFA reserves the right, at its sole discretion, to sell or dispense any food or beverage before or after SFA's regularly scheduled lunch or breakfast periods, provided such service is not prohibited by federal program regulations.

1.11 Regulatory Compliance. FSMC agrees to comply with the rules, regulations,

policies, and instructions of the State Agency and USDA and any additions or amendments thereto, including 7 C.F.R. Parts 210, 215, 220, 225, 226, 245, and 250, as well as 2 C.F.R. Parts 200, 400, and 415, as applicable.

1.12 Special Dietary Needs.

a. FSMC will make modifications in the food components of the meal pattern to accommodate students with disabilities as required by applicable federal regulations. A medical statement from a professional licensed to write prescriptions must accompany any school meal modification made outside of the meal pattern requirements. Modifications will be made in accordance with guidance provided in the most recent edition of the Accommodating Children With Disabilities in the School Meal Programs manual.

i. For CACFP and SFSP, please reference the Policy Memorandum on Modifications to Accommodate Disabilities in the Child and Adult Care Food Program and Summer Food Service Program.

b. There will be no additional charge to the student for meal modifications which have been made to accommodate disabilities per this Section.

1.13 Standards of Conduct; No Self-Dealing. SFA must maintain a written code of standards of conduct which will govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Program payments. SFA must disclose any potential conflicts of interest in writing to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy. The officers, employees, and agents of SFA may neither solicit nor accept gratuities, favors, or anything of monetary value from FSMC. No employee, officer or agent of SFA will be permitted to participate in the selection, or in the award or administration of this Agreement if a conflict of interest, real or apparent, would be created between FSMC and:

a. Such employee, officer or agent;
b. Any member of his or her immediate family;
c. His or her partner; or
d. An organization which employs, or is about to employ, any of the above, if such organization has a financial or other interest in FSMC.

ARTICLE II
FEES AND FINANCIAL TERMS

2.1 Fixed Fee Price. FSMC will be paid a fixed price per meal fee as set forth in the Proposal (the "Fee"). The Fee is expected to cover all program costs. The Fee will be fixed for the entire duration of this Agreement, including renewals, unless an escalator or other provision allowing for periodic cost adjustment is otherwise stated in any future amendment to this Agreement.

2.2 Calculation of the Fee. The Fee must be calculated net of applicable discounts,

rebates, and credits received by FSMC. FSMC is responsible for reporting monthly to SFA accurate reimbursable meal and snack counts by program type, student eligibility, USDA Foods received, and any other allowable costs on their invoice. The Fee must be calculated as if no USDA Foods were available, and then any necessary adjustments to the total Fee paid will be reflected on the monthly invoice provided to SFA by FSMC. Pursuant to Section 2.5 below, SFA must receive the full value of USDA Foods; i.e., credits or reductions. SFA will review USDA Foods adjustments that must be reconciled on an annual basis. USDA Foods values will be credited in accordance with 7 C.F.R. § 250.51(c).

2.3 Economic Price Adjustment. The Fee may be subject to an annual adjustment provision if stipulated in an amendment by SFA and FSMC for annual renewals. Adjustment factors must reflect changes in federal Consumer Price Index for All Urban Consumers Food Away from Home as of the February preceding the year of renewal, if applicable. This adjustment provision is for the fixed meal rate only.

2.4 Payment Terms. FSMC will invoice SFA at the end of each month for amounts due based on on-site records. SFA will make payments within 30 business days from the invoice date. Upon termination of the Agreement, all outstanding amounts will immediately become due and payable.

2.5 USDA Foods; Discounts, Rebates, and Credits. FSMC must determine and credit SFA for the full value of all USDA Foods in accordance with Article VI. FSMC's fixed-price invoice will be fully compliant with procurement requirements for the National School Lunch, School Breakfast, Special Milk, Fresh Fruit and Vegetable, Child and Adult Care Food, and Summer Food Service Programs, set forth in 7 C.F.R. Parts 210, 215, 220, 225, 226, and the USDA Food and Nutrition Service ("FNS") Final Rule for the Child Nutrition Programs: Transitional Standards for Milk, Whole Grains, and Sodium issued Feb. 7, 2022, including the Buy American requirement in 7 CFR 210.21(d). FSMC must take discounts, rebates, and other credits into account when calculating the Fee under this Agreement.

2.6 Nonprofit Food Service Account. FSMC's sole source of income under this Agreement will be the Fee. All income accruing as a result of payments by children and adults, federal reimbursements, and all other sources (including, without limitation, donations, a la carte sales, contract meals, grants, and loans) will be deposited daily in SFA's nonprofit food service account (the "Nonprofit Account") as instructed by the SFA. Any profit or guaranteed return will remain in the Nonprofit Account. SFA will retain control of the Nonprofit Account and overall financial responsibility for the Program.

2.7 Failure to Comply. If SFA's entitlement to any reimbursement is denied as a direct result of the failure of FSMC to comply with the provisions of the Agreement or applicable law, SFA will have no responsibility or liability for the amount denied. FSMC assumes sole risk for any amount denied.

2.8 A la Carte Meal Equivalent Factor. For cash meal sales other than reimbursable meals and reimbursable Fresh Fruit and Vegetable Program or Afterschool Snacks, the number of meal equivalents will be determined by dividing (i) the total of all food sales except reimbursable

meal and reimbursable snack sales, (including sales of adult meals, a la carte meals,); by (ii) the Meal Equivalent Factor. For the purposes of this Agreement, a la carte will be inclusive of (i) all foods and beverages sold to students which are not a part of a reimbursable meal or snack, plus (ii) all foods and beverages sold to adults within the scope of this Agreement. The Meal Equivalent Factor will be made publicly available by the State Agency each year.

2.9 Unallowable Costs. All costs resulting from this Agreement that do not meet the requirements of 7 C.F.R. Part 210 are not allowable Nonprofit Account expenses. Without limitation, this includes, interest, fines, penalties, and finance charges that may accrue under this Agreement. Scholarships, catering, gratuities or favors including anything of monetary value (e.g. gift cards) are not allowable expenses to the Nonprofit Account. SFA will not pay unallowable expenses from the Nonprofit Account. If SFA fails to (i) obtain State Agency approval; or (ii) incorporate any changes to this Agreement required by the State Agency, all costs resulting from the subsequent contract award are not allowable charges to the Nonprofit Account.

2.10 Spoiled or Unwholesome Food. SFA will make no payment to FSMC for meals that, in the determination of SFA or the State Agency, are spoiled or unwholesome at the time of delivery, do not meet detailed food component specifications as developed by SFA for the meal pattern, or do not otherwise meet the requirements of this Agreement.

2.11 Invoice Structure. Using the invoice structure contained in the RFP, or other such invoice form as may be agreed upon by FSMC and SFA, FSMC will submit the following supporting documents to SFA monthly:

a. If it is the area of responsibility of FSMC as designated in the RFP, daily reimbursable meal and snack counts broken down by student, by school, and by each Child Nutrition Program and service provided including: NSLP, SBP, FFVP, SSO, SFSP, CACFP and the Afterschool Snack as applicable;
b. Monthly summary of value of USDA foods used;
c. Monthly summary of value of USDA foods delivered; and

Daily meal production records by program for all participating schools must be available on demand or SFA should be given 24/7 online access.

2.12 Fresh Fruit and Vegetable Program. If applicable, an FSMC will operate the SFAs Fresh Fruit and Vegetable Program, which will be paid on a fixed price basis. However, FMSC must submit documentation to SFA to show allowable costs and will categorize the costs attributable to the FFVP program as an operational or administrative cost as defined in the USDA FFVP Handbook and indicate the percentage of each category of costs on all invoices. Administrative costs must not exceed ten percent (10%) of the FFVP grant received by SFA. If SFA elects to participate in the FFVP as part of the Services provided by this Agreement, SFA will submit an FFVP cycle menu as part of the Request for Proposal, or may elect to have FSMC submit a cycle menu.

2.13 Separate Billing. FSMC will submit separate billing for allowed costs covered in this Agreement from other special functions considered unallowable to the Nonprofit Account.

ARTICLE III
DESIGNATION OF PROGRAM EXPENSE

3.1 Allocation of Expenses. FSMC guarantees to SFA that FSMC will be responsible for the expenses identified as "FSMC Expenses" in the Cost Responsibility Detail provided in the Request for Proposal, and SFA will be responsible for the expenses identified as "SFA Expenses" in the Cost Responsibility Detail provided in the Request for Proposal. Any expenses that will be not applicable to this Agreement will be marked with N/A.

ARTICLE IV
OBLIGATIONS OF THE SCHOOL FOOD AUTHORITY

4.1 Signature Authority. SFA will retain signature authority for the Proposal/Agreement, Permanent Agreement, free and reduced-price policy statement with the State Agency, programs indicated in Section 1.4, and the monthly claim for reimbursement.

4.2 Financial Responsibility. SFA will at all times retain control of the Nonprofit Account and will be financially responsible for the administration of the Program.

4.3 Daily Operation. SFA will: (i) supervise and retain control of the daily operation of the food service establishment described in the Permanent Agreement; (ii) retain control of the quality, extent, and general nature of the food service operation; (iii) establish all prices to be charged to children for meals and snacks, e.g., pricing for reimbursable meals, a la carte sales including vending machines, and adult/non-program meals.

4.4 USDA Foods. SFA will ensure that all federally donated foods received by SFA and made available to FSMC accrue only to the benefit of SFA's nonprofit school food service and are fully utilized therein. SFA will ensure that the maximum amount of USDA Foods is received and utilized by FSMC prior to the end of the school year.

4.5 Health Certification. SFA will maintain all applicable health certifications and be assured that FSMC is meeting all Federal, State, and local regulations in preparing or serving meals at SFA facilities.

4.6 Advisory Board. SFA will establish and maintain a food service advisory board composed of parents, teachers, and students to assist in menu planning (the "Advisory Board"). Meeting agendas and minutes will be maintained by SFA.

4.7 Findings. SFA will ensure resolution of program review and audit findings.

4.8 Records. SFA will comply with the recordkeeping requirements set forth in this Agreement.

4.9 Eligibility Roster. SFA will be responsible for the establishment and maintenance of the free and reduced-price meals student eligibility roster. SFA is ultimately responsible for

assuring the accuracy of this roster.

4.10 Eligibility Application; Verification. SFA will be responsible for the development and distribution of the parent letter and Application for Free and Reduced-Price Meals Direct Certification, determination of eligibility for free or reduced-price meals, notification of benefits to households, and appeals. SFA will be responsible for verifying Applications for Free and Reduced-Price Meals as required by USDA regulations and will conduct any hearings related to such determinations.

4.11 Monitoring. SFA will monitor the performance of FSMC under this Agreement through periodic on-site visits. SFA will ensure that its physical facilities comply with food safety inspection requirements prescribed by USDA and will ensure that all state and local regulations are being met by FSMC preparing or serving meals at any SFA facility. Further, if there is more than one school site, there is an additional requirement that SFA conduct an on-site review of the counting and claiming system no later than February 1 of each year as required by 7 C.F.R. § 210.8 and 7 C.F.R. 220.11(d)(1).

ARTICLE V
OBLIGATIONS OF FOOD SERVICE MANAGEMENT COMPANY

5.1 Point of Service Count. If it is the area of responsibility of the FSMC as designated in the RFP, the FSMC will conduct an accurate point-of-service count of reimbursable meals and snacks in a manner that follows the SFAs written agreement with the State Agency and in a manner that eliminates any potential for overt identification of free and reduced-price eligible students.

5.2 Records. FSMC will comply with the recordkeeping requirements set forth in this Agreement.

5.3 Menus; Meals. FSMC will comply with all provisions governing meals and menus, both in this Agreement and in the RFP.

5.4 Students with Disabilities. FSMC is required to make modifications to the food components of the meal pattern to accommodate students with disabilities in accordance with Sections 504 of the Rehabilitation Act of 1973 and USDA implementing regulation, 7 C.F.R. Part 15b, Americans with Disabilities Act (ADA), 28 C.F.R. Part 35, Title II, Subtitle A; and the ADA Amendments Act of 2008.

5.5 Confidential Student Data. FSMC will comply with the relevant requirements of the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g) and South Dakota law regarding the confidentiality of student "education records" as defined in FERPA. Any use of information contained in student education records to be released must be approved by SFA. To protect the confidentiality of student education records, FSMC will limit access to student education records to those employees who reasonably need access to them in order to perform their responsibilities under this Agreement. SFA and FSMC are jointly responsible for protecting the anonymity of all children receiving free or reduced-price meals. Methods for ensuring confidentiality will be jointly agreed upon; provided that nothing in this paragraph, and no agreed-

upon plan adopted by SFA and FSMC, will be construed to relieve FSMC of its independent obligation to protect the anonymity of all children receiving free or reduced-price meals and to provide the required quality and extent of goods and services hereunder. Any student records in FSMC's possession must be returned to SFA when no longer needed for the purposes for which they were provided, or at SFA's written request, they will be permanently destroyed and FSMC will provide written confirmation to SFA upon the destruction of student records.

5.6 Performance Review. At SFA's discretion, but no less frequently than twice per year, SFA will conduct performance reviews of FSMC's performance under this Agreement. All Services are subject to SFA's performance review. FSMC agrees to cooperate with SFA in these reviews, which may require FSMC to provide records of its performance. Performance reviews may be used by SFA to determine whether to enter into future contractual relationships with FSMC, including subsequent Renewal Terms under this Agreement, as applicable. Performance reviews may include, without limitation:

a. Completion and performance of contractual services rendered;

b. Adherence to the meal pattern and food specification requirements, including quality and variety;

c. Performance on SFA On-Site Reviews and status of required corrective action, if any;

d. Performance on State and/or Federal reviews and status of required corrective action, if any;

e. Participation trends, including program participation compared to a la carte sales;

f. Responsiveness of local staff and management to SFA's needs, including the Advisory Board, as applicable;

g. Responsiveness of regional management to SFA and local staff/management;

h. Verification of the country of origin for foods used to meet Buy American obligations, per FNS Policy Memo SP 38-2017; and

i. Observation, when applicable, of correct Offer vs Serve implementation.

5.7 Compliance with Laws. FSMC will perform the work described in this Agreement in full compliance with all applicable laws, rules, and regulations adopted or promulgated by any federal or state regulatory body or governmental agency.

5.8 Certificate of Compliance. FSMC will furnish SFA, upon request, a certificate or other evidence of compliance with state or federal laws regarding contributions, taxes, and assessments on payrolls.

5.9 Performance Standards. FSMC will meet all requirements and performance standards that may be specified by rule or regulation by any administrative officials or bodies charged with enforcement of any state or federal laws on the subject matter of this Agreement.

5.10 Donated Foods. FSMC will ensure that all federally donated foods received by

SFA and made available to FSMC accrue only to the benefit of the Nonprofit Account and are fully utilized therein.

5.11 Equipment Inventory and Storage. FSMC and SFA will inventory all equipment and supplies owned by SFA and used in conjunction with the Services immediately prior to the beginning of the school year and immediately after the end of the school year, including, without limitation, flatware, trays, chinaware, glassware, and kitchen utensils. FSMC will be responsible for replacing any damaged or missing equipment and supplies, except to the extent that damage is the result of normal wear and tear, within 30 days of the end-of-the-school-year inventory.

5.12 Food Storage. FSMC must meet all required local and state safety, sanitation and health requirements for the inventory and storage of purchased foods and supplies as well as the inventory management requirements outlined in 7 C.F.R. Part 250. USDA beef, pork, and processed end products must be stored in a manner that ensures usage as part of the Services. FSMC may store and inventory USDA Foods together with commercial foods purchased for use in SFA's food service at SFAs facility. Expired food will not be used.

5.13 Health Certification. FSMC will obtain State and/or local health certification for any facility outside SFA sites in which it proposes to prepare meals and FSMC will maintain this health certification for the duration of this Agreement. FSMC must meet all applicable State and local health regulations, including food safety inspection requirements, in preparing and serving meals at an SFA facility.

5.14 FSMC Negligence. FSMC will accept liability caused by FSMC negligence for claims assessed as a result of Federal or State reviews/audits, corresponding with SFA's period of liability. FSMC will reimburse SFA for the full amount of any fiscal penalties resulting from adjusted or disallowed claims which are attributable to FSMC's negligence, including those fiscal penalties that occurred during the effective dates of original and renewal contracts.

5.15 USDA Foods. FSMC will accept liability for any negligence on its part that results in any loss of, improper use of, or damage to USDA Foods.

5.16 Advisory Board. FSMC will participate in the Advisory Board.

5.17 Local Wellness Policy. FSMC will adhere to and assist in the implementation, enforcement, and evaluation of all nutrition-related requirements in SFA's Local Wellness Policy. FSMC will remain informed of increasing industry standards and assist SFA in modifying its Local Wellness Policy to reflect the highest current nutrition-related standards.

5.18 Nutrition Education; Signage. FSMC will cooperate with SFA in promoting nutrition education and coordinating SFA's food service with classroom instruction, which may include utilizing and promoting local foods or other Farm to School educational opportunities and tours. FSMC will provide SFA with nutrition education materials and signage for display in the cafeteria. Such signage must educate students, servers and cashiers regarding what constitutes reimbursable meals, nutrition, and other required matters. FSMC will identify, near or at the beginning of serving lines, what foods constitute unit priced reimbursable meals. Schools using

Offer vs Serve must also identify what a student must select in order to have a reimbursable meal under Offer vs Serve.

ARTICLE VI
USDA FOODS

6.1 Use for SFA's Benefit. Any USDA Foods (also known as donated foods, or commodities) offered to SFA and made available to FSMC must accrue solely to the benefit of SFA's Child Nutrition Programs and will be fully utilized therein, including bonus foods. Donated foods will be considered received when the foods arrive at the school kitchen, SFA storage facility, or FSMC storage facility in either raw form or in processed end products. FSMC will maintain and make records available to substantiate that the full value of all donated foods are used solely for the benefit of SFA and that the maximum amount of USDA Foods are received and utilized by FSMC prior to the end of the school year.

6.2 USDA Foods Entitlement Value. The State Agency will provide SFA with an entitlement allocation and options for utilizing that entitlement. SFA hereby delegates decisions about how to utilize the entitlement to FSMC. SFA retains the right to revoke such delegation and make utilization determinations at its sole discretion. If FSMC does not fully utilize the full amount of the entitlement value and bonus foods allocated by the State Agency during the school year, FSMC must refund SFA the difference between (i) the State Agency full entitlement allocation (final entitlement plus the value of bonus foods); and (ii) the value of the utilized entitlement at the end of the school year. In this case, SFA will retain title to any unused USDA Foods, unless an allowable substitution was provided. The entitlement allocation may be comprised of USDA Foods, South Dakota processed foods, foods allocated by SFA into Department of Defense ("DoD") Fresh Fruit and Vegetable Request System ("FFAVORS"), Net Off Invoice ("NOI"), or bonus foods.

6.3 Beginning and Ending Inventory. Prior to the start of initial operations, FSMC and SFA will take a beginning inventory of all USDA Foods already in its system and which are to be provided to FSMC. FSMC and SFA will conduct inventories at (i) the end of every school year; and (ii) at the end of this Agreement.

6.4 Reconciliation. SFA will conduct, at the end of each school year, a full reconciliation to ensure and verify that it has received credit for the full value of all donated foods used by FSMC during the fiscal year. FSMC must credit SFA for the value of all donated foods received for use in the Services during the school year or fiscal year (including both entitlement and bonus foods), and including the value of donated foods contained in processed end products, in accordance with the contingencies in 7 C.F.R. § 250.51(a). SFA reserves the right to conduct donated foods credit audits throughout the year to ensure compliance with federal regulations, including 7 C.F.R. Part 210 and 7 C.F.R. Part 250. If the reconciliation reveals any uncredited value, FSMC will reimburse SFA for the full amount of the uncredited value. If this Agreement terminates, and is not extended or renewed, FSMC must return all unused donated foods to SFA.

6.5 Delivery Fees. FSMC will be responsible for all delivery, freight/handling, storage, and warehousing costs associated with USDA Foods.

6.6 Title. SFA will retain title to all donated foods and FSMC will conduct all activities relating to donated foods for which it is responsible**.**

6.7 Acceptance of Foods. FSMC will accept and use donated foods in as large quantities as may be efficiently utilized in SFA's nonprofit food service, subject to approval of SFA. SFA will consult with FSMC in the selection of donated foods; however, the final determination as to the acceptance of donated foods must be made by SFA.

6.8 Storage and Inventory. FSMC will comply with all storage and inventory requirements for USDA Foods. FSMC will ensure that its system of inventory management will not result in SFA being charged for donated foods. FSMC may store and inventory USDA Foods together with commercial foods purchased for use in SFA's food service. FSMC must meet all storage and inventory management requirements outlined in 7 C.F.R. Part 250. USDA beef, pork, and processed end products must be stored in a manner that ensures usage in SFA's food service.

6.9 Specific Use Requirements. FSMC will use all donated beef and pork products, and all processed end products, without substitution, in SFA's food service. FSMC will use all other donated foods or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in SFA's food service. The procurement of processed end products on behalf SFA will ensure compliance with the requirements of subpart C of 7 C.F.R. Part 250.

6.10 USDA Foods Use. FSMC will assure that USDA Foods are not used for special functions conducted outside the Services.

6.11 Recordkeeping. FSMC will maintain accurate and complete records with respect to the receipt, use/disposition, storage, and inventory of donated foods in accordance with 7 C.F.R. § 250.54(b). Failure by FSMC to maintain the required records under this Agreement will be considered prima facie evidence of improper distribution or loss of donated foods. Records relating to donated foods must be retained for a period of three (3) years from the close of the fiscal or school year to which they pertain. However, records pertaining to claims or audits that remain unresolved in this period of time must be retained until such actions have been resolved.

6.12 Negligence. FSMC will accept liability for any negligence on its part that results in any loss of, improper use of, or damage to donated foods.

6.13 Processing Contracts. FSMC is prohibited from entering into any processing contracts utilizing donated foods on behalf of SFA.

6.14 Discounts, Rebates, Credits. SFA must receive all discounts, rebates or credits for donated foods purchases made on its behalf. All refunds received from processors must be retained in the Nonprofit Account.

6.15 Credit for Food Value. FSMC must identify, as a separate line item in its monthly invoice to SFA, the value of all donated foods received for use in the Services during the school

year or fiscal year (including both entitlement and bonus foods) and including the value of donated foods contained in processed end products, in accordance with the contingencies in 7 C.F.R. § 250.51(a) and 7 C.F.R. § 250.51(b). FSMC will credit SFA for the value of all donated foods on a monthly basis as reflected in the monthly invoices.

6.16 USDA Foods Value for Crediting. The current value of USDA Foods is found in the "*Value of Commodities Received Report*" in the State Agency iCAN system. DoD FFAVORS entitlement is located on the DoD FFAVORS order system. Net Off Invoice or Fee For Service SFA direct processing entitlement is found the in K12 Foodservice or Processor Link. This value is assigned in compliance with 7 C.F.R. § 250.58(e).

6.17 Agreement Extension. The term of this Agreement cannot be extended if FSMC is in breach of any provision relating to donated foods.

ARTICLE VII
SUMMER FOOD SERVICES PROGRAM

If participating in the SFSP, then SFA will offer free meals to all eligible children. If FSMC will operate the SFSP (including the preparation, record keeping, and delivery of meals), a flat price per meal cost must be submitted as part of FSMC's Proposal for the SFSP. In accordance with 7 C.F.R. § 225.15(3), SFA is not permitted to contract out its management responsibilities with respect to the SFSP. SFA will be responsible for ensuring that the food service operation conforms to all Program requirements outlined in 7 C.F.R. Part 225. SFA is responsible for determining the SFSP eligibility for each SFSP sites. SFA as a SFSP sponsor is responsible for conducting and documenting required site visits of each new site (i) for pre-approval; and (ii) those sites determined by the sponsor to need a visit pertaining to operational problems during operation of the Program.

7.1 List of Sites. SFA will provide to FSMC a list of State Agency approved food service sites, along with the approved level for the number of meals which may be claimed for reimbursement for each site, established under 7 C.F.R. § 225.6(h)(2), and will notify FSMC of all sites which have been approved, cancelled, or terminated subsequent to the submission of the initial approved site list and of any changes in the approved level of meal service for a site. The sponsor may seek an upward adjustment in the approved level for its sites by requesting a site review or by providing the State Agency with evidence that attendance exceeds the sites' approved levels. The sponsor may request an upward adjustment at any point prior to submitting the claim for the impacted reimbursement period.

7.2 Unitized Meals. All meals prepared by FSMC under this Article will be unitized, with or without milk or juice, unless the State Agency has approved a request for exceptions to the unitizing requirement for certain components of a meal.

7.3 Payment for Meals. FSMC will be paid by SFA for all meals delivered under this Article in accordance with this Agreement and SFSP regulations. However, neither the USDA nor the State Agency assumes any liability for payment of differences between the number of meals delivered by the contractor and the number of meals served by SFA that are eligible for

reimbursement.

7.4 Meal Order Modification. SFA reserves the right to increase or decrease the daily number of meals ordered on (i) a 24-hour notice; or (ii) less if mutually agreed upon by SFA and FSMC.

7.5 Delivery Schedule. Meals will be delivered in accordance with a delivery schedule, prescribed by SFA, a copy of which was included in the Request for Proposal.

7.6 SFSP Bacterial Inspection. FSMC must ensure that SFSP meals are inspected periodically to determine bacteria levels present in the meals and that the bacteria levels found to be present in the meals conform with applicable standards set by local health authorities. The results of such bacterial inspections must be submitted promptly to SFA and the State Agency.

7.7 Noncompliance. SFA and FSMC will operate in accordance with current SFSP regulations. In cases of nonperformance or noncompliance on the part of FSMC, FSMC will pay SFA for any excess costs which SFA may incur by obtaining meals from another source.

7.8 Bonding Requirement. FSMC will comply with the appropriate bonding requirements, as set forth in 7 C.F.R. § 225.15(m)(5) through (m)(7).

a. If the estimated SFSP reimbursement under this Agreement exceeds $250,000, FSMC will obtain and submit a proposal bond in an amount specified in the Request for Proposal.

b. If the estimated SFSP reimbursement under this Agreement exceeds $250,000, FSMC will obtain a performance bond from a surety company in an amount specified in the Request for Proposal. FSMC will furnish this bond to SFA within 30 calendar days of contract award, but not later than 7 calendar days prior to the commencement of this Agreement. If FSMC has entered into more than one contract with any one sponsor it will obtain a performance bond covering all contracts if the aggregate amount of the contracts exceeds $250,000. FSMC is prohibited from posting any alternative forms of performance bonds. Cash, certified checks, letters of credit, and escrow accounts are not acceptable substitutes for performance bonds.

c. FSMC will obtain proposal bonds and performance bonds only from surety companies listed in the current Department of Treasury Circular 570.

ARTICLE VIII
CHILD AND ADULT CARE FOOD PROGRAMS

If participating in the CACFP, then SFA (which will serve as Sponsor for the purposes of all relevant regulations) will offer meals to all eligible children and adults. If FSMC will operate the CACFP (including the preparation, record keeping, and delivery of meals), a flat price per meal cost must be submitted as part of the Agreement for the CACFP. In accordance with 7 C.F.R. § 226.15(c) SFA is not permitted to contract out its management responsibilities with respect to the CACFP. SFA will be responsible for ensuring that the food service operation conforms to all program requirements outlined in 7 C.F.R. Part 226.

8.1 List of Sites. CACFP institutions will provide FSMC with a list of the State Agency approved child care centers, head starts, day care homes, adult day care centers, outside-school-hours care centers, at-risk after school programs, and homeless or emergency shelters to be furnished meals by FSMC, and the number of meals, by type, to be provided to each location.

8.2 Unitization. All breakfasts, lunches, and suppers delivered for service in outside-school-hours care centers under this Article will be unitized, with or without milk, unless the State Agency determines that unitization would impair the effectiveness of food service operations. For meals delivered to child care centers and day care homes, the State Agency may require unitization, with or without milk, of all breakfasts, lunches, and suppers only if the State Agency has evidence which indicates that this requirement is necessary to ensure compliance with 7 C.F.R. § 226.20.

8.3 Meal Count Modification. Increases and decreases in the number of meal orders may be made by the CACFP Institution, as needed, within a prior notice period of one-day.

8.4 Delivery Schedule. Meals will be delivered in accordance with a delivery schedule prescribed by SFA, a copy of which will be included in the Request for Proposal.

8.5 CACFP Bacterial Inspection. FSMC must ensure that CACFP meals are inspected periodically to determine bacteria levels present in the meals and that the bacteria levels found to be present in the meals conform with applicable standards set by local health authorities. The results of such bacterial inspections must be submitted promptly to SFA and the State Agency.

ARTICLE IX
MEALS; MENUS

9.1 Meal Programs. FSMC will prepare and serve a variety of high quality, wholesome, and nutritious meals, beverages, and a la carte items for SFA's students, faculty, staff, visitors, and others as designated by SFA in accordance with the terms and conditions of the Permanent Agreement.

a. FSMC will serve, on such days and at such times as determined by SFA, pursuant to the Permanent Agreement, the following:

i. Breakfasts, priced as a unit, which meet USDA requirements;
ii. Lunches, priced as a unit, which meet USDA requirements;
iii. Afterschool Snacks, priced as a unit, pursuant to the Afterschool Snack requirements, if applicable;
iv. Summer meals, priced as a unit, which meet USDA requirements for SFSP or School Nutrition Program SSO, if applicable; and
v. A la carte, items priced as a unit, which meet USDA requirements, when applicable.

b. If applicable, FSMC will implement the FFVP at each site identified in SFA's Request for Proposal. FSMC agrees to operate the FFVP in accordance with the

requirements of 42 U.S.C. § 1769(a), all applicable regulations and policies, and the FFVP Handbook for Schools, as well as USDA guidance issued via memorandum and the Administrative Review Manual.

i. FSMC will submit a sample nutrition lesson corresponding with the cycle menu;

ii. FSMC will document and track all FFVP expenses separately and make this documentation easily accessible for SFA, State Agency, or USDA;

iii. FSMC will provide SFA with the number of allowable FFVP snacks served on a monthly basis for billing; and

iv. FSMC will also provide SFA with allowable operational costs including the purchase of fruits and vegetables, the cost of pre-cut produce and delivery charges, and non-food items or supplies that are used in serving or cleaning. Salaries and other costs will not be included in allowable operational costs; these labor costs will be included in administrative costs as a separate line item on invoices and will not exceed ten (10) percent of the grant received by SFA.

9.2 21-Day Cycle Menu. FSMC will adhere to the 21-day cycle menu(s) provided in the RFP or, if requested by the SFA in the RFP, the proposed 21-day cycle menu submitted as part of the Proposal, for the first 21 days of meal service. Thereafter, changes in the menu(s) may be made with prior written approval of SFA. FSMC must ensure all foods and beverages are of equivalent or better quality and variety as the foods and beverages required for the first 21 days of meal service. FSMC must also comply with the Minimum Food Specifications set forth by the State Agency for all programs. FSMC will provide Nutrition Facts Labels, Child Nutrition Labels, Product Formulation Statements, recipes, ingredient lists, and any other documentation required to meet USDA Child Nutrition Program Requirements.

9.3 Meal Pattern. The meals must meet the federally-mandated meal pattern requirements for each Child Nutrition Program for each Term of this Agreement, including any Renewal Term. FSMC will provide meals and a la carte items that satisfy the meal pattern requirements as defined in applicable program regulations. Meals must adhere to all calorie ranges and meet the nutrition standards for National School Lunch, School Breakfast, and/or summer meals programs for the age/grade groups of school children.

9.4 Serving Size. FSMC will meet the serving sizes in the 21-day cycle menu(s) provided in the RFP or Proposal. If the serving sizes for the food items indicated on the menu(s) do not meet the required average daily calorie ranges per five-day week and the nutrient standards set forth by applicable guidelines, FSMC must adjust the serving sizes and/or provide additional food items as necessary to meet the required calorie ranges and nutrient standards while meeting all meal pattern requirements and without significantly altering the 21-day cycle menu(s).

9.5 Schedule. FSMC will serve meals on such days and at such times as requested by SFA and set forth in the RFP "Site Data" sheet. FSMC will provide the Services in the schools/sites identified by SFA set forth in the RFP "Site Data" sheet, which is a part of this Agreement. FSMC will sell on the designated premises only those foods and beverages authorized by SFA set forth in the RFP "Site Data", and only at the times and places designated by SFA.

9.6 Free; Reduced; and Paid. FSMC will offer free, reduced price, and full price reimbursable meals to all eligible children participating in the Programs. FSMC will allow children eligible for free or reduced price lunches to take any Reimbursable Meals or any choices offered as part of a reimbursable meal. SFA may establish different unit prices for each reimbursable meal offered provided that the benefits made available to children eligible for free or reduced price meals are not affected.

9.7 Meal Pattern. FSMC will provide meals that satisfy the meal pattern requirements as defined in applicable program regulations. FSMC that offer a variety of reimbursable school meals, or provide multiple serving lines, must make all required food components available to all students, on every school meal line, in at least the minimum required amounts.

9.8 Participation. FSMC will make good faith efforts to increase participation in the Program.

9.9 Adult Meals. Adult meal charges must be established in accordance with FNS Instruction 782-5 Rev. 1, Pricing of Adult Meals in the NSLP and SBP and revenue from nonprogram food requirements. Pricing must include overall cost of the lunch including the value of any USDA Foods used to prepare meals.

9.10 Menu Development. FSMC will develop menus, beyond the 21-day cycle menu for all programs to be provided along with the Proposal, in consultation with the Advisory Board. All cycle menus will be compliant with 7 C.F.R. § 210.10; § 215.7a; § 220.8; § 225.16; § 226.20; and Appendices to those Parts as applicable.

9.11 Food Quality. For the duration of this Agreement and all subsequent renewal Terms, as applicable, FSMC will purchase foods and beverages that are equivalent or better in quality and variety to those required by the 21-day cycle menu, per the requirements outlined above and the food specifications contained in this Agreement. Further, any purchase of food must meet any additional specifications provided by SFA or set by any applicable regulation.

ARTICLE X
BUY AMERICAN

10.1 Domestic Commodities. FSMC will purchase, to the maximum extent practicable, domestic commodities or products which are (i) an agricultural commodity that is produced in the United States ("U.S.") and (ii) a food product processed in the U.S. substantially using agricultural commodities produced in the U.S.

10.2 Non-Domestic Alternatives. Non-domestic food products may only be used in circumstances when the use of domestic foods is truly not practicable. Use of non-domestic foods must be pre-approved by SFA for one of the following reasons:

a. The product is not produced or manufactured in the U.S. in sufficient or reasonable quantities of a satisfactory quality; or

b. Competitive proposals reveal the costs of a U.S. product are significantly higher than the non-domestic product.

10.3 Non-Domestic Food Use Records. If FSMC considers a domestic food product and elects to use a non-domestic alternative, FSMC must provide documentation that supports the use of the non-domestic alternative. All documentation must be kept on file by FSMC and available upon request by SFA, State Agency, or USDA.

10.4 Percent of US Content. FSMC must certify that the percentage of U.S. content in the products supplied to SFA or used in the Services is at least 51% by weight or volume.

10.5 Certification of Domestic Origin. FSMC will (i) certify the domestic origin of products which do not have country of origin labels; and (ii) provide supporting documentation for such certification.

10.6 Records Review. SFA reserves the right to review FSMC purchase records to ensure compliance with the Buy American provisions of 7 C.F.R. Part 250.

10.7 Geographic preference; Farm to School.

a. SFA may apply a geographic preference for the procurement of unprocessed locally grown or locally raised agricultural products. The local area will be specified in the RFP. FSMC agrees to procure unprocessed locally grown or locally raised agricultural products to be used in the Program, provided such products otherwise comply with the applicable regulations and this Agreement.

b. For the purpose of applying the geographic procurement preference above, "unprocessed locally grown or locally raised agricultural products" means only those agricultural products that retain their inherent character. The effects of the following food handling and preservation techniques will not be deemed to alter the inherent character of an agricultural product: Cooling; refrigerating; freezing; size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding; forming ground products into patties without any additives or fillers; drying/dehydration; washing; packaging (such as placing eggs in cartons), vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package); the addition of ascorbic acid or other preservatives to prevent oxidation of produce; butchering livestock and poultry; cleaning fish; and the pasteurization of milk.

ARTICLE XI
BOOKS AND RECORDS

11.1 Reporting to SFA. FSMC will maintain such records (supported by invoices, receipts, or other evidence) as SFA will need to meet monthly reporting and invoicing responsibilities. Participation records, including claim information by eligibility category, will be submitted no later than the fifth working day of the month succeeding the month in which services were rendered. SFA will review and conduct any required audits or checks on the participation

records provided by FSMC prior to the preparation and submission of the claim for reimbursement.

11.2 Records Location. FSMC will maintain all records SFA requires to support its claim for reimbursement and a copy will be sent promptly to SFA at the end of each month including but not limited to: the menu, food production records, and food labels. Such records will be made available to SFA upon request and will be retained in accordance with 7 C.F.R. § 21023(c).

11.3 Year-End Statement. FSMC will provide SFA with a year-end statement, fully outlining participation, the use of USDA foods, and reimbursement.

11.4 Review of Records. Books and records of FSMC pertaining to this Agreement will be made available, upon demand, in an easily accessible manner for a period of three (3) years after the final claim for reimbursement for the fiscal year to which they pertain. The books and records will be made available for audit, examination, excerpts, and transcriptions by SFA, the State Agency, the USDA, the State Comptroller General, and any distributing or sub-distributing agency, or any other properly authorized state or federal representatives or auditors, at any reasonable time and place. If audit findings regarding FSMC's records have not been resolved within the three-year record retention period, the records must be retained beyond the three-year period for as long as required for the resolution of the issues raised by the audit.

11.5 Federally Required Records. FSMC will not remove federally required records from SFA premises at the end of the term of this Agreement.

ARTICLE XII
EMPLOYEES

12.1 Staffing Plan. FSMC will provide SFA with a full list of anticipated FSMC employees, assigned locations, and hours to be worked as part of its Proposal. Specific locations and assignments with names and job titles will be provided to SFA two full calendar weeks prior to the commencement of operation.

12.2 Free from Disease. FSMC will ensure that all individuals involved in performing the Services on FSMC's behalf in or for schools will be free from communicable diseases, including tuberculosis, prior to performing any such services in or for schools.

12.3 Professional Standards. FSMC will comply with (i) USDA professional standards for hiring and annual training requirements in 7 C.F.R. § 210.30 and the USDA Guide to Professional Standards for School Nutrition Programs, as applicable; and (ii) industry best practices in making hiring and retention decisions for staff employed at SFA. Documentation will be readily available upon request.

12.4 Site Director. SFA will have final approval regarding the hiring of FSMC's site director(s). In the event FSMC wishes to hire a new site director, FSMC must provide written notice to SFA identifying (i) the candidate; and (ii) all relevant hiring information. SFA will provide its decision to FSMC within ten (10) business days from its receipt of written notice. Any site director proposed by FSMC must meet the minimum hiring qualifications in 7 C.F.R. § 210.30,

as applicable.

12.5 SFA Policies. FSMC will instruct its employees to abide by any and all policies, rules, and regulations with respect to use of SFA's premises that may be established by SFA and which are furnished in writing to FSMC.

12.6 Removal of Employees. SFA may request, in writing, the removal of any employee of FSMC who violates health requirements or conducts himself or herself in a manner that is detrimental to the well-being of the students, provided such request is not in violation of any federal, state, or local employment law. FSMC must immediately take action on such request, making a final determination within five (5) business days. In the event of the removal or suspension of any such employee, FSMC will immediately restructure the food service staff without disruption of service.

12.7 Emergency Procedures. All SFA and/or FSMC personnel assigned to the food service operation in each school will be instructed in the use of all emergency valves, switches, and fire safety devices in the kitchen and cafeteria areas.

12.8 Background Check. FSMC will conduct a criminal background check on every employee it hires, and will provide the results to SFA. SFA may also require FSMC to perform a supplementary or updated criminal background check on any FSMC employee and disclose results to SFA.

12.9 Civil Rights Compliance. FSMC will assure conformance with all civil rights requirements that are applicable to SFA. FSMC will conduct civil rights training for all food service employees, including front-line staff, on an annual basis. Specific subject matter required, without limitation:

a. Collection and use of data,
b. Effective public notification systems,
c. Complaint procedures,
d. Compliance review techniques,
e. Resolution of noncompliance,
f. Requirements for reasonable accommodation of persons with disabilities,
g. Requirements for language assistance,
h. Conflict resolution, and
i. Customer service.

12.10 Training. FSMC will conduct annual training on various food service topics related to staff positions and responsibilities for all employees with responsibility for the Program. FSMC will conduct periodic training on various food service related topics for other employees. Such training will emphasize health and safety standards, nutrition, and identification of reimbursable meals at the point of service, and will comply with (i) applicable laws, regulations, and ordinances; and (ii) food service industry best practices.

12.11 Employment Representations and Warranties. FSMC represents and warrants to

SFA that it operates in compliance with all applicable state and federal law with respect to its employees, including, without limitation, on matters relating to timekeeping, sick leave, taxes, the Fair Labor Standards Act, workers' compensation insurance, and civil rights. Without limiting the scope of the indemnification provisions contained elsewhere in this Agreement, FSMC agrees to defend, indemnify, and hold harmless State Agency, SFA, its agents, officers and employees from and against any and all claims, demands, suits, liabilities, injuries (personal or bodily), property damage, causes of action, losses, costs, expenses, damages, or penalties, including, without limitation, reasonable attorneys' fees, arising or resulting from, or occasioned by or in connection with any FSMC's employees or employee obligations.

ARTICLE XIII
USE OF FACILITIES AND EQUIPMENT

13.1 Use of Space. SFA will make available, without cost or charge to FSMC, areas of each premises agreeable to both parties in which FSMC will render the Services. In the event of any confusion regarding what portion of the premises has been made available to FSMC, SFA may provide a map or other document clearly outlining that portion of the premises to be used by FSMC. The SFA's premises may not be used by FSMC except for the purposes of this Agreement, and expressly may not be used for outside business ventures engaged in by FSMC.

13.2 Keys. FSMC will provide SFA with one set of keys for all food service areas secured with locks provided by FSMC.

13.3 Regulatory Compliance. SFA will furnish and install any equipment and/or make any structural changes needed to comply with federal, state, or local laws, ordinances, rules, and regulations.

13.4 Equipment or Utility Malfunction. SFA will be responsible for any losses, including USDA Foods, which may arise due to equipment malfunction or loss of electrical power not within the control of FSMC.

13.5 SFA Equipment. All food preparation and serving equipment owned by SFA will remain on the premises of SFA, and will at all times remain the property of SFA.

13.6 Access to Facilities. SFA will have access, with or without notice, to all SFA's facilities used by FSMC for the purposes of inspection and audit as set forth elsewhere in this Agreement.

13.7 Use of Facilities Other Than for Programs. FSMC will not use SFA's facilities to produce food, meals, or services for other organizations unless approved in writing by SFA. If such usage is mutually acceptable, SFA and FSMC will enter into a separate signed agreement which stipulates the fees to be paid by FSMC to SFA for such facility usage. Facility usage will include use of equipment, utilities, and Agency provided services. Such signed agreement will be subordinate to the terms of this Agreement, and any conflict between such agreement and this Agreement will be resolved in favor of this Agreement. Any such agreement will include a requirement that Program food, including USDA Foods, be stored separately and used only for the

Program.

13.8 Return of Equipment. FSMC will surrender to SFA, upon termination of this Agreement, all equipment and furnishings owned by SFA in good repair and condition, reasonable wear and tear expected.

13.9 Facility Care. SFA will provide and maintain adequate fire extinguishing equipment for food service areas, provide necessary pest control, and will be responsible for the removal of refuse from the designated refuse collection area.

13.10 Loss or Damage. SFA will not be legally responsible for any loss or damage to equipment and/or vehicles owned by FSMC and located on SFA premises.

13.11 SFA Rules. FSMC will comply with all building rules and regulations promulgated by SFA.

ARTICLE XIV
SANITATION

14.1 Trash Removal. If it is the area of responsibility of FSMC as designated in the RFP, FSMC will place garbage and trash in containers in areas designated by SFA. SFA is responsible for garbage and trash removal as designated in the RFP.

14.2 Cleaning of Service Areas. If it is the area of responsibility of FSMC as designated in the RFP, FSMC will clean the meal production, storage and service areas used, and will clean and sanitize dishes, pots, pans, utensils, equipment, and similar items. SFA is responsible for the required cleaning and maintenance of areas designated in the RFP and as per local ordinance.

14.3 General Care. FSMC will operate and care for all equipment and food service areas in a clean, safe, and healthy condition in accordance with standards acceptable to SFA and comply with all applicable laws, ordinances, regulations, and rules of federal, state, and local authorities, including laws related to recycling.

14.4 Local and State Requirements. FSMC will comply with all local and state sanitation requirements in the preparation of food.

ARTICLE XV
LICENSES AND TAXES

15.1 Taxes. FSMC will be responsible for paying all applicable taxes and fees, including, without limitation, excise tax, state and local income tax, and payroll and withholding taxes for FSMC employees. FSMC will hold SFA and State Agency harmless for all claims arising from payment of such taxes and fees.

15.2 Licenses. Throughout the Term of this Agreement and each Renewal Term, FSMC will obtain and maintain all applicable licenses, permits, and health certifications required by

federal, state, and local law.

ARTICLE XVI
NONDISCRIMINATION

16.1 Nondiscrimination. As noted in the USDA Non-Discrimination Statement for Child Nutrition Programs in the Proposal, in accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, sex, disability, age, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA.

16.2 Civil Rights. In the operation of the Program, no child will be denied benefits or be otherwise discriminated against because of race, color, national origin, age, sex, or disability. State agencies and school food authorities will comply with the requirements of: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Department of Agriculture regulations on nondiscrimination (7 C.F.R. Parts. 15, 15a, and 15b); and FNS Instruction 113-1.

16.3 Additional Rights. Both SFA and FSMC further agree that no child who participates in a Program will be discriminated against on the basis of creed, marital status, gender identity, or sexual orientation in employment or in any program or activity conducted or funded by the State of South Dakota.

ARTICLE XVII
EMERGENCY CLOSING

17.1 Utility Interruption. SFA will notify FSMC of any interruption in utility service of which it has knowledge.

17.2 School Closing. SFA will notify FSMC of any delay in the beginning of the school day or the closing of school(s) due to snow or other emergency conditions.

ARTICLE XVIII
TERMS AND TERMINATION

18.1 Remedies for Nonperformance. In the event of FSMC's nonperformance under this Agreement and/or the violation or breach of the Agreement terms, SFA will have the right to pursue all administrative, contractual, and legal remedies against FSMC and will have the right to seek all sanctions and penalties as may be appropriate.

18.2 Assumptions. Financial terms of this Agreement are based upon existing conditions. Except as permitted elsewhere in this Agreement, if there is a material change in conditions, including, without limitation, changes to the following assumptions, this Agreement (i) may be terminated by either party at the end of the current term; or (ii) continue under the same terms as written, whichever is mutually agreed upon.

a. SFA's policies, practices, and service requirements will remain materially consistent throughout the term of this Agreement and any subsequent Renewal Term;

b. Legislation, regulations, and reimbursement rates that create changes in the Program will remain materially consistent throughout the year;

c. Usable USDA Foods, of adequate quality and variety required for the menu cycle, valued at an amount as set forth by USDA per pattern meal for each year of this Agreement will continue to be available;

d. The government reimbursement rates in effect will remain materially consistent throughout the year;

e. Meal components and quantities required for applicable Child Nutrition Programs remain consistent with prior years;

f. Service hours, service requirements, and type or number of facilities selling food and/or beverages on SFA's premises will remain materially consistent throughout the year;

g. The state or federal minimum wage rate and taxes in effect will remain materially consistent throughout the year;

h. The projected number of full feeding days is as listed in the Proposal; and

i. SFA revenue credited to the nonprofit food service program will include all state and federal amounts received specifically for child nutrition operations.

An item will be deemed to have remained materially consistent so long as any change does not (i) materially increase FSMC's cost of providing management service; or (ii) materially decrease the net revenue derived from the food service operations.

18.3 Force Majeure. Neither FSMC nor SFA will be responsible for any losses resulting if the fulfillment of the terms of this Agreement will be delayed or prevented by wars, acts of public enemies, strikes, fires, flood, acts of God, or for any acts not within the control of FSMC or SFA, respectively, and which, by the exercise of due diligence, was unable to prevent.

18.4 Termination for Cause. In the event either party commits a material breach, including, without limitation, violation of program regulations, the non-breaching party may terminate this agreement for cause by giving 60 days written notice. If the breach is remedied prior to the proposed termination date, the non-breaching party may elect to continue this agreement.

18.5 Termination for Convenience. At any time the SFA or FSMC may terminate this Agreement by giving 60 days written notice to other Agreement Party. Following any termination for convenience, FSMC will be entitled to compensation for Services completed upon submission of invoices and proof of claim for services provided under this Agreement up to and including the date of termination. SFA will have the right to receive the Services from FSMC through the effective date of the notice of termination, and may, at its election, procure such work from other contractors as may be necessary to obtain the Services.

18.6 Termination for Regulation. In the event applicable laws or regulations are changed during the term of this Agreement, and such changes explicitly require the termination or rebidding of the Program services, this Agreement will be terminated immediately. Neither party will be

deemed to be at fault as the result of such a termination.

18.7 Loss of Funding Source. Notwithstanding any provision to the contrary in this Agreement, obligations of SFA will cease immediately without penalty of further payment being required if sufficient funds for the Agreement are not appropriated by the State of South Dakota or a federal funding source, or such funds are otherwise not made available to SFA for payments in accordance with this Agreement.

18.8 Immediate Termination. Notwithstanding the notice period above, SFA may immediately terminate this Agreement, in whole or in part, upon notice to FSMC if SFA determines that the actions, or failure to act, of FSMC, its agents, employees have caused, or reasonably could cause jeopardy to health, safety, or property; or if SFA determines that FSMC lacks the financial resources to perform under this Agreement.

18.9 Rights Beyond Termination. The right of termination referred to in this Agreement is not intended to be exclusive and is in addition to any other rights available to either party at law or in equity.

18.10 Notification of Termination. In the event of termination, SFA will provide the State Agency with written notice immediately following such termination action and reason for termination.

ARTICLE XIX
TRADE SECRETS AND PROPRIETARY INFORMATION

19.1 FSMC Trade Secrets. During the term of the Agreement, FSMC grants to SFA a nonexclusive right to access certain proprietary materials of FSMC, including menus, recipes, signage, food service surveys and studies, management guidelines and procedures, operating manuals, software (both owned by and licensed by FSMC), and similar compilations regularly used in FSMC's business operations ("trade secrets"). SFA agrees not to disclose any of FSMC's trade secrets or other confidential information, directly or indirectly, during or after the term of the Agreement. All trade secrets and other confidential information will remain the exclusive property of FSMC and will be returned to FSMC immediately upon termination of the Agreement. Without limiting the foregoing and except for software provided by SFA, SFA specifically agrees that all software associated with the operation of the food service, including, without limitation, menu systems, food production systems, accounting systems, and other software, are owned by or licensed to FSMC and not SFA. Furthermore, SFA's access or use of such software will not create any right, title interest, or copyright in such software and SFA will not retain such software beyond the termination of the Agreement. In the event of any breach of this provision, FSMC will be entitled to equitable relief, including an injunction or specific performance, in addition to all other remedies otherwise available. This provision will survive the termination of the Agreement.

19.2 Right to Inventions. Any discovery, invention, software, or programs paid for by SFA will be the property of SFA to which the State Agency and USDA will have unrestricted rights including copyrights.

19.3 Confidential Information. All FSMC employees working with or with access to Confidential Information will submit a signed Confidentiality Agreement with SFA before beginning work. Each such Confidentiality Agreement will be in the form provided by SFA in the RFP, or in such other form agreed upon by FSMC and SFA. Each of FSMC, SFA, the State Agency and USDA, including their respective agents and subcontractors, may have or gain access to confidential and proprietary data or information of the other parties ("Disclosing Party") including, without limitation, other technical information (including functional and technical specifications, designs, drawings, analysis, research, processes, computer programs, methods, ideas, "know how," and the like), business information (sales and marketing research, materials, plans, accounting and financial information, personnel records, and the like), all student data and information, and other information designated as confidential expressly or by the circumstances in which it is provided ("Confidential Information"). No Confidential Information collected, maintained, or used in the course of performance of this Agreement will be disseminated except as authorized by law or regulation and with the written consent of the Disclosing Party, either during the Term of this Agreement or thereafter. The recipient must return any and all Confidential Information used in the course of the performance of this Agreement, in whatever form it is maintained, promptly upon termination of this Agreement, or earlier at the request of the Disclosing Party, or notify the Disclosing Party in writing of its destruction, if destruction is permitted by the Disclosing Party. Confidential Information does not include data or information lawfully in the recipient's possession prior to its acquisition from the Disclosing Party; received by the recipient from a third party who was free to disclose it; publicly known through no breach of confidentiality obligation by the recipient; or independently developed by the recipient without the use or benefit of the Disclosing Party's Confidential Information.

19.4 Compliance. Notwithstanding the provisions of this Article, SFA may maintain and disclose any information permitted or required by law or regulation.

ARTICLE XX
INSURANCE

20.1 Required Coverage. FSMC will maintain the insurance coverage as specified in the Proposal. Prior to the State Agency's approval of this Agreement, FSMC will provide a Certificate of Insurance as proof of the required coverage.

20.2 SFA as Additional Insured. On each insurance policy obtained by FSMC, SFA will be (i) added as an additional insured by endorsement; and (ii) added as a loss payee.

20.3 FSMC Property Coverage. FSMC will provide fire and theft insurance at its own expense to cover any risk created by fire and/or theft to its property located on the premises of SFA, including, without limitation, equipment, supplies, clothes, garments and other articles owned by their employees.

20.4 Notice to SFA. The contract of insurance will provide for notice to SFA of cancellation of insurance policies 30 days before such cancellation is to take effect. SFA may ask for proof of such direction in the form of a letter from the insurance company.

ARTICLE XXI
CERTIFICATIONS

21.1 Energy Efficiency. FSMC will comply with the standards and policies relating to energy efficiency issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. Ch. 77 *et seq.*).

21.2 Contract Work Hours and Safety Standards Act. FSMC will comply with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act 40 U.S.C. §§ 3701–3708, as supplemented by Department of Labor regulation, 29 C.F.R. Part 5. Under Section 103 of the Act, FSMC will be required to compute the wages of every laborer based on a standard workday of eight hours, and a standard work week of 40 hours. Work in excess of the standard workday or standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or 40 hours in any work week.

21.3 Equal Employment Opportunity. FSMC must comply with Executive Order 11246, entitled *Equal Employment Opportunity*, as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations, 41 C.F.R. Part 60. FSMC must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, small businesses, and labor surplus area firms are used when possible.

21.4 Independent Price Determination. FSMC has signed the *Certification of Independent Price Determination*, which was attached as an addendum to FSMC's Proposal and which is incorporated by reference and made a part of this Agreement.

21.5 Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower-Tier Covered Transactions. FSMC certifies, by submission of its Proposal, that neither it nor its principals are presently listed on the government wide exclusions in the System for Award Management ("SAM"), in accordance with the OMB guidelines at 2 C.F.R. Part 180 that implement Executive Orders 12549 (3 C.F.R. Part 1986 Comp., p. 189) and 12689 (3 C.F.R. Part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. Contract renewals that do not include this certification will not be accepted for consideration.

21.6 Environmental Protections. FSMC will comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q); the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251–1387); Section 306 of Clean Air Act (42 U.S.C. § 1847(h); Section 508 of Clean Water Act (33 U.S.C. § 1368); Executive Order 11738; Environmental Protection Agency Regulations (40 C.F.R. Part 15); State Energy Conservation Plan promulgated in compliance with Energy Policy and Conservation Act (P.L. 94-163, 89 Stat 871); and Energy Policy and Conservation Act (2 C.F.R. Part 200).

21.7 Lobbying Certification. Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and

has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non–Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non–Federal award. FSMC has signed the Lobbying Certification, which was attached as an addendum to FSMC's Proposal and which is incorporated and made a part of this Agreement. If applicable, FSMC has also completed and submitted Standard Form-LLL, *Disclosure Form to Report Lobbying*. The Certification Regarding Lobbying and a Disclosure of Lobbying Activities form (2 C.F.R. Part 418) must accompany each subsequent Renewal Term. Agreement renewals that do not include this certification will not be accepted for consideration.

21.8 Other Pertinent Laws. FSMC will comply with all other pertinent state and federal laws.

ARTICLE XXII
MISCELLANEOUS

22.1 Proposal Specifications. FSMC will comply with the provisions of its Proposal, which are hereby in all respects made a part of this Agreement, including all agreed to negotiations between SFA and selected FSMC which have been approved in writing by the State Agency.

22.2 Subcontracting Prohibited. No provision of this Agreement may be assigned or subcontracted.

22.3 Best Commercial Practices. Any silence, absence, or omission from FSMC's Proposal concerning any point will be regarded as meaning that only the best commercial practices are to prevail and that only materials (e.g., food, supplies, etc.) and workmanship of a quality that would normally be specified by SFA are to be used.

22.4 Claims for Adjustment. Payments on any claim will not preclude SFA from making a claim for adjustment on any item found not to have been in accordance with the provisions of this Agreement.

22.5 Program Review Findings. SFA will be responsible for ensuring the resolution of Program review and audit findings.

22.6 Financial Soundness. SFA and FSMC will work together to ensure a financially sound operation.

22.7 Execution. After this Agreement is approved by the State Agency, the Agreement must be signed by all parties. Material changes or amendments are not valid unless approved in writing by the State Agency prior to execution.

22.8 Contract Entirety. This Agreement and the incorporated FSMC Proposal constitute

the entire Agreement between SFA and FSMC and may not be changed, extended orally, or altered by course of conduct. No other FSMC contracts will be signed by SFA.

22.9 Binding Contract. SFA and FSMC represent and warrant to one another that: (i) it has the right, power and authority to enter into and perform its obligations under the Agreement; (ii) it has taken all requisite action (corporate, statutory or otherwise) to approve execution, delivery and performance of this Agreement; and (iii) this Agreement constitutes a legal, valid and binding obligation upon itself in accordance with its terms.

22.10 No Waiver. No course of dealing or failure of SFA to enforce strictly any term, right, or condition of the Agreement will be construed as a waiver of such term, right, or condition. No express waiver of any term, right, or condition of the Agreement will operate as a waiver of any other term, right, or condition.

22.11 Parties to this Agreement. Neither the State Agency nor the USDA are parties to this Agreement and are not obligated, liable, or responsible for any action or inaction by SFA or FSMC. SFA bears sole responsibility for this Agreement and claims or disputes arising here from.

22.12 Hold Harmless. To the maximum extent permitted by law, FSMC agrees to indemnify, defend, and hold harmless the State Agency, SFA and its agents, officers and employees from and against any and all claims, demands, suits, liabilities, injuries (personal or bodily), property damage, causes of action, losses, costs, expenses, damages, or penalties, including, without limitation, reasonable attorneys' fees, arising or resulting from, or occasioned by or in connection with (i) any bodily injury or property damage resulting or arising from any act or omission to act (whether negligent, willful, wrongful, or otherwise) by FSMC, anyone directly or indirectly employed by them or anyone for whose acts they may be liable; (ii) failure by FSMC to comply with any laws applicable to the performance of the Services; (iii) any breach of this Agreement, including, without limitation, any representation or warranty provided by FSMC in this Agreement; (iv) any employment actions of any nature or kind including, without limitation, workers compensation, or labor action brought by FSMC's employees; (v) any failure by FSMC to maintain or to comply with the terms of any license held or required to be held by FSMC; or (vi) any identity breach or infringement of any copyright, trademark, patent, or other intellectual property right. This clause will survive termination of the Agreement.

22.13 Independent Counsel. SFA and FSMC both agree that they have had the opportunity to consult their own legal counsel with respect to this Agreement, and neither is relying on the representations of (i) the other party; (ii) the State Agency; or (iii) the USDA or United States Department of Education.

22.14 Choice of Law; Venue. Except as governed by federal law, this Agreement will be governed by and construed in accordance with the laws of the State of South Dakota without reference to its conflict or choice of law provisions. Any dispute having its origins in the provisions of this Agreement will be heard in the state or federal courts for the county in which SFA is sited. The parties irrevocably submit to the jurisdiction of such courts. In the event any legal action is commenced to enforce or interpret any provision of this Agreement, the prevailing party in any such action will be entitled to recover from the losing party the prevailing party's attorneys' fees

and all other costs incurred in connection therewith, in addition to all other remedies to which the prevailing party may be entitled.

[Signature Page Follows]

AGREEMENT PAGE

By submission of its Proposal, FSMC certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency; and that it will operate in accordance with all current program regulations.

Furthermore FSMC certifies that is has not exchanged any gratuities, favors, nor anything of monetary value with SFA and that this proposal is made without prior understanding, agreement, or connection with any other offeror submitting a proposal for the same type of service, and is in all respects fair and without collusion or fraud. FSMC agrees to abide by all terms and conditions of this Agreement and certifies that the person below is authorized to sign the Agreement on behalf of FSMC.

FSMC NAME: _____

FSMC ADDRESS: _____

_____

_____

SIGNATURE (of authorized representative): _____

PRINT NAME: _____ DATE: _____

TITLE: _____

PHONE: _____

E-MAIL: _____

(SFA will complete section below this line)

Awarding of this Agreement:

In accepting this proposal and awarding this Agreement, SFA certifies that SFA's officers, employees or agents have not taken any action which may have jeopardized the independence of the proposal referred to above and that SFA will operate in accordance with program regulations.

SFA by signing below is awarding this Agreement to FSMC. This Agreement; all sections of the Agreement; all terms and conditions; and all addendums, and attachments, including any additional addendums mutually agreed to by both SFA and proposer will be incorporated in to this awarded contract. THIS AWARD REMAINS SUBJECT TO STATE AGENCY APPROVAL.

The undersigned hereby accepts proposer's services as an FSMC as specified in this proposal for the period of July 1, 2023 through June 30, 2024.

SIGNATURE (of authorized representative): _____

PRINT NAME: _____ DATE: _____

TITLE: _____