Reponses to the questions are in BLUE

1. (P. 3 RFP): By submitting a bid in response to this RFP, FSMC is agreeing to comply with all applicable terms of SFA's policies and the Permanent Agreement.

(P. 1 Contact): 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.

Question:

Will the SFA please provide the permanent agreement specified? This is the agreement between the SFA and the State Agency, not the contract that will be entered into by the SFA and the FSMC. The FSMC should have the opportunity to weigh this and discuss with legal counsel. Does SFA expect the FSMC to become a party to this Permanent Agreement? According to USDA Regulations/Guidance 7 CFR 210.16(a)(5), the following is what is stated.

"The SFA shall retain signature authority on the State agency-school food authority agreement."

A copy of the contract has been included on the school's website. My understanding is the permanent agreement will be between the school district and South Dakota DOE.

2. (P. 4 RFP) The contract will be for fixed meal or snack prices. The standard contract template provided by the State Agency must be used for the contract, and is attached to this RFP. No changes may be made to the standard contract unless preapproved by the State Agency. Upon the award of the Fixed-Price Contract and beginning on the Effective Date, FSMC will be subject to the sanctions outlined in the Fixed-Price Contract for any breach of its terms.

(P. 1 Contract) 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 Insert Text Here (the "School Food Authority" or "SFA") and Insert Text Here (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

(P. 37 Contract)
ARTICLE XXII MISCELLANEOUS 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.

Question:

According to the RFP, P. 4, beginning on the effective Date, FSMC will be subject to sanctions outline in the Fixed-Price Contract for any breach of its terms. According to P. 1 of the Contract, FSMC's proposal in response to the RFP is expressly incorporated by reference and is part of the agreement. According to p. 37 of the contract, Article XXII, FSMC must comply with the provisions of the proposal. According

to Article XXII, FSMC will comply with the provisions of its Proposal, which are hereby in all respects made a part of the agreement, including all agreed to negotiations. Will the SFA consider amending the highlighted sentence to read as follows so that it is consistent with Article XXII Miscellaneous?

"FSMC's proposal (the "Proposal") in response to SFA's request for proposal, including all mutually agreed upon negotiations between SFA and selected FSMC which have been approved in writing by the State Agency ("Request for Proposal" or "RFP") is expressly incorporated by reference and is part of this Agreement."

If the RFP is negotiated, we will need to keep the proposal page and attach an amended negotiated price/services page that will need to be signed by both parties. It will also need to state the change is not material.

3. (P. 4 RFP) Proposals must be submitted by 12:00 p.m. on March 24, 2023 at the address shown above. No proposal will be accepted if it is received after the exact time and date specified. SFA will open proposals at 2:00pm on March 24, 2023.

Question:

Because this is a formal solicitation in the form of an RFP, requesting bid proposals, and not an IFB, which is an Invitation for bids, can the SFA or CANS confirm that the competitive bid proposals will not be open to the public because information contained within is considered proprietary and not open as such as with an IFB?

There will not be a public opening and information will not be shared.

4. (P. 4 RFP) To be considered for award of the Fixed-Price Contract, FSMC must submit a complete response to this solicitation using the standard templates and forms provided. No modification may be made to the standard templates and forms.

Question:

Are FSMC's able to add other information such as photos and information about their business and service in the form of a binder/booklet as a part of the formal response? Or is #4 above specifically requiring the FSMC's to only submit answers to this RFP on the documents that are provided in the RFP with no additional information allowable?

Number four states that no modifications will be allowed to the templates and forms but other information can be provided.

5. (P. 4 & 5 RFP) SFA reserves the right to negotiate the final terms and conditions of the Fixed-Price Contract, which may differ from those contained in the proposal, provided the SFA considers such negotiation to be in its best interest. Any change in the terms and conditions must not create a material change, which is any alteration or modification to the original terms stated in the RFP or Fixed-Price Contract that would have resulted in different proposals from all FSMCs. A

material change will require SFA to rebid the contract. State Agency must review all changes to determine whether the change is a material change.

Question:

As written, this definition of material change is subjective, which creates a problem if both parties agree to an alteration or modification to the original terms stated in the RFP/Contract. To avoid this ambiguity and problem, the USDA Contracting with FSMCs Guidance provides a clearly defined material change threshold (outlined below). For this reason, would the SFA please clarify what the simplified acquisition threshold dollar value will be that may result in a material change and what is allowable to be negotiated in the contract and what is not?

Our threshold for material change is 10% of the contract value.

P. 14, Contracting with Food Service Management Companies: Guidance for School Food Authorities ***https://fns-prod.azureedge.us/sites/default/files/cn/SP40_CACFP12_SFSP14-2016a2.pdf*** *which addresses the State Agency Review and states the following:*

State agency Contract Review*—As noted earlier, the SFA must ensure that the State agency approves the SFA-FSMC contract prior to execution and annually reviews the contract (including all supporting documentation) between any SFA and FSMC prior to execution of the contract, as well as the contract renewal, to ensure compliance with all the provisions and standards set forth in 7 CFR 210 and 250, Subpart D; 2 CFR 200.318-326; as well as regulations for other Programs operated. As set forth in 210.19(a)(6), when the State agency develops prototype FSMC documents for use by the SFA that meets the required provisions and standards, this annual review may be limited to changes made to that contract* ***to ensure contract modifications do not change the scope or exceed the simplified acquisition threshold****. The State agency may establish due dates for the submission of the contract, renewal, or contract amendment documents.*

P. 18, ***Contracting with Food Service Management Companies: Guidance for State Agencies and reads as below:***

Contract amendments that modify the scope or change the value of a contract in excess of the Simplified Acquisition Threshold may result in a material change, making them subject to State agency review and approval prior to execution. To avoid amendments, States and SFAs are strongly encouraged to consider all programs and school district plans that, if adopted, may result in contract amendment(s).

The simplified acquisition threshold was changed to $250,000 by statute (see FAR Case 2018-004). No further increase in the basic threshold is proposed, as there has been insufficient inflation.

https://www.fns.usda.gov/cn/federal-micro-purchase-and-simplified-acquisition-thresholds

Question:

Can SFA or CANS please clarify what is allowable to be negotiated in the contract and what is not, or please more clearly define what constitutes a material change dollar threshold so that all FSMC's are all equally aware.

Our threshold for material change is 10% of the contract value.

6. (P. 7 RFP) Meal Equivalents for a La Carte Foods
The meal equivalency factor for school year 2022-2023 is $4.84. The factor is based on the school year 2022-2023 rates of federal reimbursement for a free school lunch, plus the performance-based lunch reimbursement, plus the per-meal USDA Foods entitlement value, plus any other state meal funding support. The meal equivalency factor will be used to determine the number of meals that the a la carte food service is equivalent to, for the purpose of paying FSMC for the a la carte food service at the fixed meal price paid per school lunch. Net a la carte revenue (excluding catering) will be divided by the meal equivalent factor noted above to determine the number of equivalent lunches for payment to FSMC. The factor will be updated for any year that the Fixed-Price Contract is renewed.

Question:

Please clarify how will the MEF be updated Annually? If this formula is used each year, should FSMCs assume that the USDA and State entitlement values will increase along with the CPI utilized by the USDA in the Federal Register each July starting in July of 2024? If not, please clarify how the MEF will be increased each year so FSMCs can propose their fixed pricing accordingly.

The MEF will be based on the school year 2022-23 rates of federal/state funding information then updated when new funding information is available, typically in July.

7. (P. 7 RFP) Food Substitutions
FSMC will meet the following requirements for food substitutions and modifications:

#2 FSMC must comply with all SFA policies to provide substitutions that meet the meal pattern for preferences of students without a disability, upon written request of a parent or legal guardian.

Question:

Does the SFA have a policy that addresses/specifies this? This would be a very difficult specification for any FSMC to factor into their pricing without understanding if the school has a policy or if they intend to implement one.

If not, could CANS please point out where this is located in USDA regulation or SD Codified law? If this is not a requirement and the SFA would rather not have the FSMC's arbitrarily factor this into their fixed fees, would the SFA clarify or amend this RFP to remove?

The Spearfish School District does not have a policy but functions under the premise of working with the parent, guardian, adult, or a person acting on behalf of the participant, to offer a reasonable modification that allows an equal opportunity to participant in the program.

8. (P. 31 RFP) Menus should be submitted in the format provided in the examples on the following pages.

Question:

Although format will be similar, does the SFA agree that the FSMCs can submit menus based on their menu system capabilities and format? Or is this saying that the FSMCs are required to submit menus in Word/table

format only? FSMCs menu software will all be slightly different and having to use a Word/table format will add time and energy to a menu that has already been created and generated.

I believe the RFP states that either the example may be used or an attachment of the proposed 21 day menu.

9. (P. 37 RFP) FSMC acknowledges that the contract will be awarded based on the lowest proposed Total Cost to SFA, shown below, combined with SFA's evaluation of non-price criteria specified in this RFP.

Question:

Could the SFA please clarify if they are awarding the contract based on the total proposed COST as stated on p. 37, which is referring to the price proposal on P. 38 or if the SFA plans to award the contract based upon the scoring rubric containing all factors from the RFP to be weighed on P. 15 of the RFP and as notated on P. 3: "FSMC must submit its proposal to meet the requirements described in this Request for Proposal ("RFP"), including the attachments that require information from FSMC. Responsive proposals submitted by FSMC will be evaluated by SFA for award of the Fixed-Price Contract. SFA, based on evaluation of the proposals including price, may award the Fixed-Price Contract to the FSMC that submits the proposal awarded the most points."

Price and proposed total cost are different and we are asking the SFA to clarify which method will be used as the language in the RFP is contradictory.

The evaluation process will utilize the rubric on page 15 of the RFP and total proposed cost.

10. (P. 45 RFP) Authorization Agreement- Clarifying Numbers 2,3 and 5

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#2. That the terms, conditions, warranties, and representations made within this RFP and FSMC's proposal are binding upon FSMC and are a part of the Fixed-Price Contract (Food Services Management Agreement) as if incorporated therein.

Question:

This contradicts the RFP, #8 P. 4-5, 6., which states: "The SFA reserves the right to negotiate the final terms and conditions of the Fixed-Price Contract, which may differ from those contained in the proposal, provided the SFA considers such negotiation to be in its best interest."

Please clarify how the proposal can be considered as a part of the binding Fixed-Price Contract until after it has been negotiated?

The FSMC is bound to their proposal, unless a negotiation has been agreed upon. The negotiation is signed by both parties and confirmed the negotiated item is not a material change.

Does the SFA agree to change the language to the below? If not, will the SFA agree to take this out of the RFP?

"That the terms, conditions, warranties and representations made within the RFP and FSMC's proposal shall become binding after all negotiations have been conducted and the contract is fully executed."

#3. FSMC has carefully examined all terms and conditions set forth in the Fixed-Price Contract (Food Services Management Agreement).

Question:

Would the FSA agree to amending this sentence in the RFP language, as the final contract as not been negotiated.

"FSMC has carefully examined all terms and conditions set forth in the sample Fixed-Price Contract (Food Services Management Agreement) and if awarded, will negotiate any further terms with the SFA after consulting with respective legal counsel."

If the RFP proposal is negotiated, an amended negotiated price/services page signed by both parties will need to state the change does not represent a material change.

11. (P. 40 RFP) Cost Responsibility Designation Chart

Question:

Can the SFA verify which party is responsible for procuring and purchasing the food? This is not listed on the chart on p. 40. Currently it is the responsibility of the FSMC. Does the SFA wish to continue to have the FSMC procure and purchase food? The FSMC will continue to procure and purchase food.

Can the SFA verify they will remain responsible for the cost and/or for cleaning the hoods, vents, and grease traps in the kitchen facilities on an annual basis? The SFA will remain responsible for the above cleaning areas.

Currently, the SFA is responsible for costs associated with non-expendable equipment such as smallwares. Could the SFA please clarify if that cost will continue to be a responsibility of the SFA? If the smallwares on agreed upon in advance, the SFA will continue to purchase them

Currently the FSMC is able to utilize the school's printing equipment. Printing Materials is marked as the responsibility of the FSMC. Does the SFA agree to continue to allow utilization of school printing equipment? If the FSMC presents a number of copies, or the copying is deemed reasonable, the SFA will allow the FSMC to utilize its copying equipment by presenting copying "jobs" to the SFA copying person.

Additional Question-on Service in the High School:

Currently, there are two serving windows where food served out of, and an additional serving window located in the concessions area. Could the district please verify if FSMC's should plan to staff all three serving windows as it has done in the past? The FSMC should plan on staffing three serving windows at the high school.

*Clauses, conditions, terms not listed in the RFP section but are listed in the Contract:

1. (P. 4 Contract) The following are located in the contract.

ARTICLE II
FEES AND FINANCIAL TERMS

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.

Questions?

Could the SFA please clarify if they are willing to specify an escalator or other provision allowing periodic cost adjustments into the final contract? The current contract contains the following cost adjustment clause. Does the SFA agree to include this clause into the new agreement?

I think the escalation of price based on CPI is addressed in the contract.

Contract Cost Adjustment

The renegotiation of price terms under this Contract is permitted only upon the occurrence of unpredictable, unexpected conditions beyond the control of both parties. If those conditions create a significant and material change in the financial assumptions upon which the price terms of this Contract were based, then those price terms so affected may be renegotiated by both parties. Renegotiation of price terms under such conditions must be mutual and both parties must agree on any changes in price terms. Any adjustments so negotiated and agreed upon must accurately reflect the change in conditions. The occurrence of contingencies that are foreseeable and predictable, but not certain, should be calculated into the defined price terms, to the extent possible, with the goal of minimizing the need for renegotiation of price terms during the term of the Contract. Substantive changes of the Contract will require the SFA to rebid the Contract. Determination of whether it is a substantive change and if a rebid is needed should be reviewed with the SFAs legal counsel and confirmed by the SFA with the SD DOE.

2. (P. 4 Contract) 2.3 Economic Price Adjustment. 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.

Question:

Although this is a one-year contract with up to four renewals, the FSMC will need to price the contract accordingly. Without set annual economic price adjustment, a price will be set that cannot change over the course of five years. This means, the SFA will be paying for costs in year one, that include projections of costs for five years.

Due to the instability and volatility in food and labor markets, not allowing an annual economic price adjustment will cause the FSMC's to factor in all cost projections, known and as best predicted, that the SFA will be responsible for paying. No economic price adjustment clause creates undue difficulty in fiscal management for both the SFA and the FSMC. This is important for any FSMC to know before submitting a proposal, so they are not building unnecessary, and additions cost in the current pricing structure.

Does the SFA agree to amend the RFP to include the following:

"Fee will be increased by an annual economic price adjustment through the annual renewal process. Adjustment factors must reflect changes in federal Consumer Price Index for All Urban Consumers Food Away from Home as of the February the year of renewal. This adjustment, if extended by the SFA, shall be for all fixed prices as set by the terms of the agreement."

The economic price adjustment is listed in the contract. The CPI is all urban consumers food away from home as of the February preceding the year of renewal, if renewed.

*The USDA specifically states that if this is not provided for in the RFP and incorporated into the resulting agreement, adding it later could be considered a material change. P. 18 USDA: Contracting with a FSMC: Fee adjustments to payments are not permitted unless provided for in the **IFB or RFP** and incorporated into the resulting contract, in order to prevent any material change to a contract.*

3. (P. 4 Contract) 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.

Question:

Would the SFA agree to amend this term in the agreement to state the following:

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, as determined and monitored by the SFA in accordance with USDA regulation and applicable laws, SFA will have no responsibility or liability for the amount denied. FSMC assumes sole risk for any amount denied.

4. (P. 9 Contract) 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.

Question:

Could SFA please clarify and specify the above highlighted condition? If the FSMC is to coordinate SFA's food service with classroom instruction, could SFA please provide what specific instruction will need to be coordinated? If this is not something the SFA expects, is the SFA agreeable to removing this from the contract? FSMC will need to understand this so they can plan for it as part of the proposed program. Classroom instruction will the responsibility of the SFA with potential nutritional guidance from the FSMC.

5. (P. 10 Contract) 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.

Question:

Would the SFA be agreeable to changing the last sentence to read as follows:

"and that the maximum amount of USDA Foods are received and utilized, if they are of good value and quality and applicable to SFA approved, compliant menus of selected FSMC, prior to the end of the school year."

With the volatility FSMC's and SFA's have seen in the food industry, we as a FSMC cannot agree that we guarantee to utilize the SFA's maximum entitlement. Many commodities may not conform with compliant analysis of menus and over the past two years, have not always been of good value or quality.

The maximum amount of USDA foods expected to be used and the SFA will monitor the amounts to ensure the USDA entitlement is used as intended. The above highlighted language cannot change. If there are complaints with USDA foods that need to be addressed with the food distribution program and documented via proper program procedure. The SFA, or FSMC if designated but the school, places the food orders and completes the annual survey.

6. (P. 10 Contract) 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.

Statement:

FSMC does not agree with this term and condition. This reads that 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. The FSMC does not have control over quality and value of commodities, or what will be added to bonus or FFAVORS throughout the terms of the agreement. FSMC's are not allowed to take possession of commodities and we cannot guarantee that the commodities delivered or offered will even conform to the proposed menus depending on what can be ordered. Holding the FSMC accountable for projected entitlement and any future added commodity allocations is not in conformance with USDA regulations/guidance, nor is it noted anywhere in the RFP section of this solicitation.

- P. 44 RFP:
  - The meal prices in this proposal do not consider the value of USDA Foods that FSMC may receive for use during the year. If the contract is awarded, FSMC will fully credit SFA for the value of USDA Foods received for use.
- P. 22-23 USDA Guidance FSMC Guidance for State agencies – May 2016 states the following:
  - This price-per-meal is to be quoted without consideration for the availability of USDA Foods used in prior years or based on estimated entitlement values for upcoming school years. Entitlement values for USDA Foods vary from one year to next; therefore, USDA Foods must be identified as a credit on invoices submitted by the FSMC for payment to the SFA. In fixed-price contracts purchased credits and prompt payment discounts do not apply and the return of any applicable credits is only for USDA Foods.

This is also, contradictory to P. 11, 6.7 below, of the contract section, which is reflective of USDA Guidance.

- 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.

Question:

Does the SFA agree that the FSMC will not be responsible for reimbursement to the SFA the difference between the allocation and what the value of what was not utilized and agree to take this out of the contract? FSMC's would like to stay in accordance with USDA guidance and the conditions within the RFP requiring FSMC's to not consider the availability of USDA food used in prior years or based on estimated entitlement values for upcoming school years. If the FSMC were held to this arbitrary condition, we would be forced to plan some risk of how much we may have to reimburses the district into our price per meal if we were unable to utilize the full entitlement. This goes against USDA guidance and is not a fiscally sound decision for the SFA as it has the potential of forcing the SFA to pay a higher price than necessary.

It is a regulatory requirement that in a fixed price contract, the FSMC must credit the school for the value of all donated foods receive for use in the school's meal service in a school year. This cannot be removed or modified.

The FSMC will reimburse the SFA for ordered items, the value of which is represented on the delivery document. All USDA products ordered, received and used in meal preparation will be credited to the SFA on monthly invoices in the value amount on delivery documents.

7. (P. 10 Contract) 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.

Question:

Same question as 6, with same rationale: Does the SFA agree that the FSMC will not be responsible for reimbursement to the SFA the difference between the allocation and what the value of what was not utilized and agree to take this out of the contract? FSMC's would like to stay in according to USDA guidance and the conditions within the RFP requiring FSMC's to not consider the availability of USDA food used in prior years or based on estimated entitlement values for upcoming school years, If the FSMC were held to this arbitrary condition, we would be forced to plan some risk of how much we may have to reimburses the district by into our price per meal, if we were unable to utilize the full entitlement, This goes against USDA guidance and could has the potential of forcing the SFA to pay a higher price than necessary.

The value of the unused USDA items as indicated on the delivery document will be reimbursed to the SFA. This item cannot be changed.

8. (P.10 Contract) Delivery Fees. FSMC will be responsible for all delivery, freight/handling, storage, and warehousing costs associated with USDA Food

Question:

Currently, the SFA is paying for delivery fee of USDA food. This was not listed out in the division of cost responsibility and is contradictory of what is happening currently.

Since this was not listed within the Division of Cost responsibility charts and because this is not how this is being operated currently, would the SFA agree to remove this from the contract and keep it a cost responsibility of the SFA? If the FSMC has to project delivery costs into the prices, the SFA may be paying higher prices than necessary. If the SFA agrees to pay the delivery as it has been operated, the SFA will only incur the actual costs, not a projection.

The State of South Dakota pays the delivery and storage fees of USDA entitlement foods to public schools. This item does not belong in the division of cost responsibility for the SFA

9. (P. 12 Contract) 6.17 Agreement Extension. The term of this Agreement cannot be extended if FSMC is in breach of any provision relating to donated foods.

Question:

Would SFA agree to changing the wording of this section to the following?

The term of this Agreement cannot be extended if the SFA determines that the FSMC is in breach of any provision relating to donated foods.

A breach may be determined by a state agency review of the SFA's nutrition program, and would prohibit the extension of the Agreement

10. (P. 18 Contract) 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.

Question:

Is there a SD law that requires FSMC employees to receive certain testing for medical purposes before they can become an employee of a school contractor? If so, can the SFA please provide the SD Codified Law that supports this? Should FSMC's be factoring in the costs associated with testing for communicable diseases and if so, all FSMC's should have a listing of what is required to test for. As this was not listed in the RFP division of cost responsibility, and if this is not required, would the SFA agree to removing this condition?

Administrative rule food service codes, 44:02:07:06, 07, 08, 09. There isn't a testing requirement, the employee must report to the FSMC and the FSMC must exclude them based on SD food service code.

11. (P. 19 Contract) 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.

Question:

Who is responsible for the cost associated with initial background checks as this was not listed in the Division of Cost responsibility chart? If the initial background check is the cost responsibility of the FSMC, does the SFA agree to pay for a supplementary or updated criminal background check or would the SFA like the FSMC's to price a projected amount into our costs? The FSMC does not want to propose fees that require the SFA to pay unnecessary expense. If the SFA does not agree to pay for supplementary or updated criminal background checks, would they agree to remove the supplementary or updated language from this term? Important for a FSMC to know as they work to establish fixed prices.

This is a portion of the FSMC employment and not a service provided in the school nutrition programs, the cost of background checks would be the FSMC's responsibility.

12. (P. 21 Contract) 15.2Licenses. 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.

Question:

Would SFA please remove, this is contradictory to 4.5 above and should be the responsibility of the SFA.

Applicable licenses for the FSMC to operate as a business are for the FSMC to obtain and maintain.

13. (P. 23 Contract) 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.

Question:

Same as question #5 above, p. 2 of this document and with regards to the RFP. If SFA agrees with #5 on p. 2, can this be reflected in this provision?

Our threshold for material change is 10% of the contract value.

14. (P. 23-24 Contract) Termination Clauses:

- **<u>Termination for Convenience</u>. At any time SFA may terminate this Agreement by giving 60 days written notice to FSMC. 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.**

Question:

Would SFA please agree to alter the first sentence to read as follows so that the contract is equitable for both parties?

The language in the agreement will be changed to "at any time the SFA and FSMC may terminate this agreement by giving 60 days written notice to the other party.

"At any time either party, the SFA or the FSMC, may terminate this agreement by giving 60 day written notice."

- **<u>Termination for Regulation</u>. 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.**

Question:

Could the SFA please clarify or provide examples of what this clause suggests or provide examples of laws or regulations this clause is referring to? Could the SFA clarify who has the authority outside of the contracted parties and the USDA to determine what types of laws or regulations changes during the term of the agreement explicitly require immediate termination and a rebid?

This is a very open-ended termination clause that we are not finding to be a USDA requirement. If this is a SD law, could the SFA please provided the codified law number that addresses this? Without understanding who determines what laws and regulations would require immediate termination, this makes it very difficult for a FSMC to plan a proposal for services.

This clause is to protect both parties in the event new federal regulations are released that explicitly require termination or rebidding. No changes are allowed here.

- **<u>Loss of Funding Source</u>. 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.**

Question:

Could the SFA share where this loss of funding source termination clause is located in USDA Regulations or in SD Codified law? If there is not a specific regulation or law, FSMC asks that this clause be removed or at the very least, be noted that SFA agrees that this language can be amended as part of negotiations? FSMC does not agree, as a party to the contact for obligations ceasing immediately without penalty of further payment being required.

The federal government, federal programs, state government and department of education all control the financial administration of the USDA child nutrition programs in the state of SD. This language protects the SFA from facing ongoing charges from the FSMC if program funding stopped. No changes are allowed here.

- **<u>Immediate Termination per the SFA</u>. 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.**

Question:

Does the SFA agree with this Clause? This exposes more risk to the contractor and FSMC's will have to weigh they risk associated with it having all, or part of, our agreement terminated immediately, for a potentially subjective reason. If SFA would rather wait and have both SFA and the awarded FSMC legal counsel weigh in on this clause, that would be acceptable as well and would allow the FSMC to continue preparing the proposal as long as there is an understanding that this clause may be open to negotiations.

The SFA would need to identify "the actions, or failure to act, of FSMC, its agent, employees have caused, or reasonably could cause jeopardy to health, safety, or property; or if the SFA determines that the FSMC lacks the financial resources to perform". These are very high bars that would need to be reached to take this action.