

# Contract Provisions: *Quick Tip Guide*

## State of Florida SFA Required Language, regardless of contract value:

- Jessica Lunsford Act
- Protest procedures (Chapter 120, FL Statutes)

## Provisions for non-Federal entity contracts under Federal awards, regardless of contract value:

- Buy American
- Energy Policy and Conservation Act
- Equal Employment Opportunity
- Debarment and Suspension
- Funding Agreement (Rights to Invention)
- Drug Free Workplace
- Record Retention
- Discounts, Rebates & Credits
- Hold Harmless and Indemnify
- Civil Rights
- Prohibitions of Gratuities
- Scope of Work

## USDA Required Language that must be included based on contract value are as follows:

### Greater than the Small Purchase Threshold:

- Allow for Audit of Records

### Greater Than \$10,000:

- Termination for Cause and Convenience
- Recovered Materials

### Greater Than \$100,000:

- Contract Work Hours and Safety Standards Act
- Byrd Anti-Lobbying

### Greater Than \$150,000:

- Clean Air and Water Pollution Acts
- Breach of Contract
- Administrative, Contractual or Legal Remedies

### If you have a Construction Contract over \$2,000:

- Davis-Bacon Act and Copeland Anti-Kickback Act

### Best Practice to include:

- Certification of Independent Price Determination
- Piggybacking
- If necessary, USDA Foods requirements
- Bid bonds and Insurance requirements, if applicable
- Inspection of Facility
- Invoicing and Payments



This institution is an equal opportunity provider.

## *Additional Details of Each Provision*

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- **JESSICA LUNSFORD ACT** - Background screening requirements for certain non-instructional school district employees and contractors.—(1) Except as provided in s. 1012.467 or s. 1012.468, non-instructional school district employees or contractual personnel who are permitted access on school grounds when students are present, who have direct contact with students or who have access to or control of school funds must meet level 2 screening requirements as described in s. 1012.32. Contractual personnel shall include any contractor, individual, or entity under contract with a school or the school board.(2) Every 5 years following employment or entry into a contract in a capacity described in subsection (1), each person who is so employed or under contract with the school district must meet level 2 screening requirements as described in s. 1012.32, at which time the school district shall request the Department of Law Enforcement to forward the fingerprints to the Federal Bureau of Investigation for the level 2 screening. If, for any reason following employment or entry into a contract in a capacity described in subsection (1), the fingerprints of a person who is so employed or under contract with the school district are not retained by the Department of Law Enforcement under s. 1012.32(3)(a) and (b), the person must file a complete set of fingerprints with the district school superintendent of the employing or contracting school district. Upon submission of fingerprints for this purpose, the school district shall request the Department of Law Enforcement to forward the fingerprints to the Federal Bureau of Investigation for the level 2 screening, and the fingerprints shall be retained by the Department of Law Enforcement under s. 1012.32(3)(a) and (b). The cost of the state and federal criminal history check required by level 2 screening may be borne by the district school board, the contractor, or the person fingerprinted. Under penalty of perjury, each person who is employed or under contract in a capacity described in subsection (1) must agree to inform his or her employer or the party with whom he or she is under contract within 48 hours if convicted of any disqualifying offense while he or she is employed or under contract in that capacity.(3) If it is found that a person who is employed or under contract in a capacity described in subsection (1) does not meet the level 2 requirements, the person shall be immediately suspended from working in that capacity and shall remain suspended until final resolution of any appeals.
- **PROTEST PROCEDURES (CHAPTER 120, FL STATUTES)** - Additional procedures applicable to protests to contract solicitations or award. Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process.

### *USDA Contract Provisions that are required to be in all contracts:*

- **BUY AMERICAN (7 CFR PART 210.21 (D))** - Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a provision, Section 12(n) to the NSLA (42 USC 1760(n)), requiring school food authorities (SFAs) to purchase, to the maximum extent practicable, domestic commodity or product. Section 12(n) of the NSLA defines “domestic commodity or product” as an agricultural commodity that is produced in the United States and a food product that is processed in the United States using substantial agricultural commodities that are produced in the United States. “Substantial” means that over 51 percent of the final processed product consists of agricultural commodities that were grown domestically. Products from Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands are allowed under this provision as territories of the United States. The Buy American provision (7 CFR Part 210.21(d)) is one of the procurement standards SFAs must comply with when purchasing commercial food products served in the school meals programs.
- **ENERGY POLICY AND CONSERVATION ACT** - Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. 6201).

- **EQUAL EMPLOYMENT OPPORTUNITY** - Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal
- **DEBARMENT AND SUSPENSION** - SFAs must obtain satisfaction that an FSMC is neither excluded nor disqualified before doing business with the FSMC. The uniform Federal suspension/debarment certification has been abolished and the collection of paper certifications is no longer mandatory. Current rules provide greater flexibility in meeting requirements. An SFA may meet the requirements by any one of three methods. They are:
  1. Checking the Excluded Parties List System. This is available on the internet at <http://epls.arnet.gov>
  2. Collecting a certification that the contractor is neither excluded nor disqualified. Since a Federal certification form is no longer available, an entity electing this method must devise its own certification.
  3. Including a clause to this effect in the solicitation/contract.
 

*Example language:* The prospective bidder certifies, by submission and signature of this bid, that the bidder complies fully with the Federal Debarment Certification regarding debarment suspension, ineligibility and voluntary exclusion. As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR, part 85, as defined at the 34 CFR part 85, sections 85.105 and 85.110-(ed80-0013).

    - a. The prospective lower tier (\$25,000) participant certifies, by submission and of this bid, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.
    - b. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participants shall attach an explanation to this bid.
- **FUNDING AGREEMENT (RIGHTS TO INVENTIONS)** - Rights to Inventions made under a contract or agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR § 401.2 (a) and the recipient or sub recipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or sub recipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.
- **DRUG FREE WORKPLACE** - This certification is required by the regulations implementing Sections 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 USC 701 et seq.), 7 CFR Part 3017, Subpart F, Section 3017-600, Purpose. The January 31, 1989, regulations were amended and published as Part II of the May 25, 1990 Federal Register (pages 21681-21691).
- **RETENTION REQUIREMENTS FOR RECORDS** - Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a sub recipient. Federal awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities.

- **DISCOUNTS, REBATES & CREDITS** - Language stating that all goods, services, or monies received as the result of any equipment or USDA Foods rebate shall be credited to the SFA's nonprofit food service account.
- **HOLD HARMLESS AND INDEMNIFICATION** - The contractor agrees to release, discharge, indemnify, defend and hold harmless the district, its employees and agents for all illness, injury or damage to persons or property that may arise out of the activities covered under this agreement, including the transportation, distribution, use or consumption of food items, irrespective of any negligence on the part of the district. Furthermore, the contractor agrees to defend and fully indemnify the district from any and all liability, loss or damage the district or its agents or employees may suffer as a result of claims, demands, costs, penalties, litigation or judgments against it arising from any and all illness, injury or damage to any person, persons or property caused by or resulting from the activities covered under this agreement, including the transportation, distribution, use or consumption of food items.
- **CIVIL RIGHTS** - The contractor shall comply with Title VI of the Civil Rights Act of 1964, as amended; USDA regulations implementing Title IX of the Education Amendments; Section 504 of the Rehabilitation Act of 1973; Age Discrimination Act of 1975; 7 C.F.R. Parts 15, 15a, and 15b; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement—Nutrition Programs and Activities, and any additions or amendments.
- **PROHIBITION OF GRATUITIES** - By submission of a bid, a contractor certifies that no employee of SFA has or shall benefit financially or materially from such bid or subsequent contract. Any contract issued as a result of this ITB may be terminated at such time as it is determined that gratuities of any kind were either offered or received by any of the aforementioned persons.
- **SCOPE OF WORK** - The Scope of Work (SOW) is the area in an agreement where the work to be performed is described. The SOW should contain any milestones, reports, deliverables, and end products that are expected to be provided by the performing party. The SOW should also contain a time line for all deliverables.

### *Greater than Small Purchase Threshold*

- **ALLOW FOR AUDIT OF RECORDS** - A provision to allow for the audit, examination, excerpt, and transcription of records that are pertinent to the contract by the USDA, the Comptroller of the United States, TDA, and their authorized representatives.

### *Greater Than \$10,000:*

- **TERMINATION FOR CAUSE AND CONVENIENCE** - All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.
- **RECOVERED MATERIALS** - A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

### *Greater Than \$100,000:*

- **CONTRACT WORK HOURS AND SAFETY STANDARDS ACT** - All contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
- **BYRD ANTI-LOBBYING AMENDMENT** - Contractors that apply or bid for an award of \$100,000 or more 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.

### *Greater Than \$150,000:*

- **CLEAN AIR AND WATER POLLUTION ACTS** - Contracts and sub grants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).
- **BREACH OF CONTRACT** - Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
- **ADMINISTRATIVE, CONTRACTUAL OR LEGAL REMEDIES** - If the contractor fails to perform to the SFA's satisfaction any material requirement of the contract or is in violation of a material provision of the contract, the SFA shall provide written notice to the contractor requesting that the breach or noncompliance be remedied within a set time frame outlined in the contract. Such provisions protect the sponsor's interests and ensure the contractor is fully aware of its responsibilities, as well as the remedies that will be available to the sponsor for nonperformance. "Nonperformance" by a contractor is any failure to follow the terms of the contract, whether related to the quality of food provided, the number of meals delivered, the time of meal delivery, or other contract provisions.

### *Construction Contract:*

- **DAVIS BACON (CONSTRUCTION CONTRACTS)** - When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts

Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or sub recipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

### *Best Practice to include:*

- **CERTIFICATION OF INDEPENDENT PRICE DETERMINATION** - (also known as “non-collusion statement”)—While not required by program regulations, it is strongly suggested that SFAs and FSMCs certify that the prices in the bid or proposal have been arrived at independently, without consultation, communication or agreement for the purpose of restricting competition.
- **PIGGYBACKING** - When adding parties to a contract, known colloquially as “piggybacking,” the contract must have been procured in compliance with 2 CFR Part 200.318-.326 and applicable program regulations. Contracted parties considering additional parties must include a provision allowing “piggybacking” in their contracts to avoid creating a material change. If such a provision is not included in the contract and a material change is determined, a new competitive procurement is required. For a contract containing such provisions, language should be included specifying applicable limitations of the extension (e.g., dollar value or the number of additional parties that may be added). Such contracts should be thoroughly reviewed by members to ensure they meet their needs and conform to all applicable program requirements. For further guidance on “piggybacking” refer to memo SP 02-2016; CACFP 02-2016; SFSP 02-2016.
- **USDA FOODS REQUIREMENTS** - to include requirements to manage, utilize, credit, etc. USDA Foods. Examples are available upon request.
- Bid bonds and Insurance requirements, if applicable
- **INSPECTION OF FACILITY** - Reserve the right to inspect the contractor’s preparation and storage facilities, and transporting vehicles prior to award of Contract and without notice at any time during each Contract Term, including the right to be present during preparation and delivery of meals.
- **INVOICING AND PAYMENTS** - Provide details of preferred invoicing and payment methods.