### Reply to attn of: MW S&CNP: SA-05-1 November 18, 2004

Subject: FY 05 School & Community Nutrition Programs Policy Memorandum # 05-04

FY 05 Child &Adult Care Feeding Program Policy Memorandum # 05-02

FY 05 Summer Food Service Program Policy Memorandum # 05-02

### Reaffirming FNS’ Position on Rebates, Discounts, and Other Applicable Credits in Cost Reimbursable Contracts

### State Directors

# Child Nutrition Programs

## Midwest Region

Our headquarters recently received inquiries from food service management company (FSMC) representatives concerning FNS’ position on rebates, discounts, and other applicable credits in cost reimbursable contracts. Specifically, the inquiries requested confirmation that: (1) State agencies (SAs) and School Food Authorities (SFAs) are not required under federal law to include contractual language regarding rebates, discounts, and other applicable credits; (2) but that if they choose to do so, they may include such provisions in their contacts with FSMCs; and (3) if SAs or SFAs decide to include such provisions in their contracts, it would be lawful as a matter of USDA/FNS regulation and policy for them to do so upon the next Request for Proposal (RFP) cycle, rather than seek to impose such new provisions in mid-cycle contract renewals or through the issuance of an unscheduled new RFP.

In response to items (1) and (2), FNS reaffirms the position provided in policy memo # 04-08 - Applicability of Federal Requirements to School Food Service Procurements, dated February 4, 2004. As stated in “Question 5” of this memo, the application of 7 CFR Parts 3016 and 3019 to SFA procurements does not change FNS’ position on the crediting of discounts and rebates in cost reimbursable contracts. FNS strongly encourages, but does not require, that all cost reimbursable contracts include provisions to ensure SFAs are only charged net, allowable costs. The Office of Management and Budget and the Department’s Office of the General Counsel have made clear that SAs and SFAs can impose compliance with net cost requirements through contractual terms. Please note, this position applies to all cost reimbursable contracts (not just SFA-FSMC cost reimbursable contracts).

In response to item (3), FNS provided the following response:

“The National School Lunch Program regulations (7 Code of Federal Regulations Part 210) at §210.16(d) limits the duration of contracts between a SFA and a FSMC to one year, with options for yearly renewals, not to exceed 4 additional years. The option to renew does not create a multi-year contract between the SFA and the FSMC because each renewal results in a separate one-year contract. Since the decision to renew the contract is an affirmative decision that is made by both parties to the contract each year, either party, for any reason, may decide not to exercise the renewal option. An SFA that opts not to renew its FSMC contract must either conduct a new procurement or self-operate its food service.

As long as the SFA has conducted a proper procurement and both parties have met their obligations under the terms of the contract, the renewal option is generally exercised, except where prohibited by applicable law or regulations. Should either party determine revisions to the contract are needed, non-material changes are generally made when the contract is renewed. Usually, an SFA will incorporate changes resulting from its experience under the current contract and FNS and State agency guidance, recommendations and policy changes in its next invitation for bid/request for proposal. Neither party may make or impose material changes to an existing contract during the contract year or as part of the annual contract renewal process. All material changes require rebidding.

Because the annual renewal provision is an option and not a guarantee or obligation of either party, FNS cannot require or recommend that an SFA exercise the renewal option in lieu of conducting a new procurement. Likewise there is no requirement to recompete an otherwise legal contract until all renewal options have been exercised.”

Please share this information with your SFAs and provide technical assistance where needed. If you have any questions, please feel free to contact Joseph Templin of my staff at (312) 353-1900.

***Signed by***

***LIZA COWDEN***

***for***

DICK GILBERT

Acting Regional Director

Special Nutrition Programs