

# New Mexico Public Education Department



## Student Success and Wellness Bureau



# LEA Sample Fixed Price Contract Food Service Management Company Enter School Year for Implementation of Contract

Note: Please fill in all areas that are highlighted

ARTICLE I  
INTRODUCTION

1.1 Date of and Parties to the Agreement.

This agreement, dated, \_\_\_\_\_ is between \_\_\_\_\_, hereafter called the Local Education Agency (LEA), and Food Service Management Company (the FSMC): \_\_\_\_\_.

1.2 Purpose of Agreement. This agreement sets forth the terms and conditions upon which the LEA retains the FSMC to manage and operate the LEA's food service for the LEA's students, employees, visitors, and guests.

1.3 Term of the Agreement. The initial term of this agreement commences on \_\_\_\_\_, and continues until \_\_\_\_\_ (*this date may be no more than one year from the date the agreement commences*). The agreement is subject to maximum four (4) additional one-year renewals upon the consent of both parties, unless terminated earlier as provided in the Article concerning General Terms and Conditions. Extensions or renewals are contingent upon the fulfillment of all contract provisions contained herein.

1.4 Integration of Terms. In the case where competitive proposal solicitations are used, the terms of this agreement shall be in accordance with the Request of Proposal (RFP), any amendments to the RFP that may be submitted by the LEA, and the proposal submitted by the FSMC, which are incorporated by reference into this agreement. In the case where sealed bid solicitations are used, the terms of this agreement shall be in accordance with the Invitation for Bids (IFB) any amendments to the IFB that may be submitted by the LEA, and are incorporated by reference into this agreement. In the event contradictory statements the following order of precedence shall apply: agreement, RFP or IFB, and proposals, if any.

ARTICLE II  
RELATIONSHIP OF THE PARTIES

2.1 Limited Agency. To the extent that the state or federal statutes or regulations require that the FSMC shall be an agent of the LEA for certain regulatory purposes, such statutes and regulations shall be controlling, and the FSMC shall be the LEA's agent for such purposes. Otherwise, FSMC shall be an independent contractor and not an officer, agent, employee, partner, joint venture, tenant or servant of the LEA.

2.2 Responsibilities of FSMC.

A. As agent, the FSMC shall purchase, prepare and serve a variety of high quality, wholesome, and nutritious foods and beverages for students, faculty, staff, employees, and others as designated by the LEA in accordance with the terms and conditions of this agreement.

B. The FSMC agrees that it 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.

C. The FSMC agrees to 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.

D. The FSMC agrees to conduct program operations in accordance with 7 CFR Parts 210, 215, 220, 245, 250 and FNS instructions and policies as applicable.

E. The FSMC agrees to assume full responsibility for the payment of all contributions, assessments, both state and federal, as to all employees engaged by it in the performance of this agreement.

F. The FSMC agrees to procure processed end products from donated foods on behalf of the LEA in accordance with 7 CFR Part 250 and credit the LEA nonprofit food service account with all donated foods received for use in the LEA meal service in the school year received. (Include the value pass-through method to be used and the frequency of crediting (monthly, quarterly, etc.); however, not less than annual.[7 CFR Part 250.51(b-c)]

Also, include required contract provisions in [7 CFR Part 250.53(a)(1-12)].

G. The FSMC agrees to furnish the LEA, upon request, a certificate or other evidence of compliance with state or federal laws regarding contributions, taxes, and assessments on payrolls and agrees to retain records in compliance with 7 CFR Part 210.16(c)(1) and 210.23(c)

H. The FSMC agrees that it will not itself enter into the processing agreement with the processor.

I. The FSMC agrees to comply with the storage and inventory management requirements for donated foods. 7 CFR Part 250.52 (Recommend keeping the entire part which references 250.14(b))

J. The FSMC agrees to comply with the SFA's free and reduce priced meal policies. The information cannot be used or possessed by the FSMC for any use other than to determine eligibility for free and reduced meals.

K. The FSMC will following the LEA's established policy regarding marketing/advertising within school district buildings.

L. The FSMC will abide by the New Mexico Procurement Code, §13-1-28 through §13-1-199 NMSA, and acknowledges that the Code imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities, and kickbacks.

M. The FSMC shall adhere to the New Mexico Employees Health Coverage as follows:

- 1.) For all contracts solicited and awarded on or after January 1, 2008: If the Offeror has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Offeror must agree to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees no later than July 1, 2010 if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.
- 2.) Offeror must agree to maintain a record of the number of employees who have (a) accepted health insurance; (b) decline health insurance due to other health insurance coverage already in place; or (c) decline health insurance for other reasons. These records are subject to review and audit by a representative of the state.
- 3.) Offeror must agree to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information <http://insurenemexico.state.nm.us/>.
- 4.) For Indefinite Quantity, Indefinite Delivery contracts (price agreements without specific limitations on quantity and providing for an indeterminate number of orders to be placed against it); these requirements shall apply the first day of the second month after the Offeror reports combined sales (from state and, if applicable, from local public bodies if from a state price agreement) of \$250,000.

### 2.3 Responsibilities of LEA.

A. The LEA shall supervise and retain control of the FSMC's daily operation of the food service described in this agreement; retain control of the quality, extent, and general nature of the food service operation; and establish all program and non-program meal and a la carte prices. Authorized representatives of the LEA shall have access to all portions of the food service facilities at all times, and shall monitor the performance of the FSMC under this agreement to ensure conformance with program regulations through periodic on-site visits. 7 CFR 210.16(a)(2)(3)(4).

B. The LEA may make reasonable regulations with regard to all matters under its' supervision and control, and the FSMC shall comply with them as soon as reasonably possible after proper notification is given.

C. The LEA shall retain control of the school food service account and overall financial responsibility for the school nutrition program. 7 CFR 210.19 (a)(1).

D. The LEA shall retain signature authority on the Child Nutrition Program Food Services Agreement, Free and Reduced Price Policy Statement, and all claims for reimbursement. 7 CFR 210.9(a)(b); 210.16(a)(5).

E. The LEA shall be responsible for all contractual agreements entered into in connection with the school nutrition program. 7 CFR 210.21; 210.19(a)(1); and 3015.

F. The LEA shall implement internal controls and ensure resolution of program review and audit findings. 7 CFR 210.8(a), 210.9(b)(17), 210.18(k)(1)(2).

G. The LEA shall provide a 21-day cycle menu (**Attach a copy of the menu and label as an Appendix or Attachment**). The FSMC must adhere to the cycle menu for the first 21 days of meal service, and any changes made thereafter may be made only with approval of the LEA. 7 CFR 210.16(b)(1).

H. The LEA shall establish an advisory board composed of parents, teachers, and students to assist in menu planning. 7 CFR 210.16(a)(8).

I. The LEA shall maintain applicable health certification and be assured that the FSMC is meeting all state and local regulations in preparing and serving meals at the facilities. 7 CFR 210.16(a)(7).

J. The LEA shall distribute and collect the parent letter and application for free and reduced price meals. 7 CFR 245.6.

K. The LEA shall establish a policy for providing meals to students without adequate funds. The LEA policy will protect students by providing equal services to all students. The FSMC will defer to the LEA's policy in providing meals. The FSMC will bill the LEA for the meals served with the LEA payment from funds other than non-profit food service funds.

L. The LEA shall [determine eligibility and verify applications for free and reduced price meal benefits and] conduct any hearings related to such determinations. 7 CFR 245.6, 6a, 7, 10.

M. The LEA shall assure that the maximum amount of USDA donated foods are received and utilized by the FSMC. 7 CFR 210.9(b)(15).

N. The LEA shall establish commodity processing agreements. 7 CFR 250.51(a).

O. The LEA shall retain title to donated foods. 7 CFR 210.16 (a) (6).

P. The LEA will abide by the New Mexico Procurement Code, §13-1-28 through §13-1-199 NMSA, and acknowledges that the Code imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities, and kickbacks.

Q. The LEA shall adhere to the New Mexico Employees Health Coverage as follows:

- 1.) For all contracts solicited and awarded on or after January 1, 2008: If the Offeror has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Offeror must agree to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees no later than July 1, 2010 if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.
- 2.) Offeror must agree to maintain a record of the number of employees who have (a) accepted health insurance; (b) decline health insurance due to other health insurance coverage already in place; or (c) decline health insurance for other reasons. These records are subject to review and audit by a representative of the state.
- 3.) Offeror must agree to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information <http://insurenwnewmexico.state.nm.us/>.
- 4.) For Indefinite Quantity, Indefinite Delivery contracts (price agreements without specific limitations on quantity and providing for an indeterminate number of orders to be placed against it); these requirements shall apply the first day of the second month after the Offeror reports combined sales (from state and, if applicable, from local public bodies if from a state price agreement) of \$250,000.

### ARTICLE III FOOD SERVICE PROGRAM

3.1 Location. The FSMC shall purchase food, prepare and serve meals for the schools/sites listed in Appendix A. The LEA and the FSMC may agree to add other locations.

3.1a Programs. The FSMC shall prepare and serve meals for the LEA acting as a sponsor of **one or more** of the following USDA Child Nutrition Programs:

- National School Lunch Program (NSLP)
- School Breakfast Program (SBP)
- After School Snack Program
- Fresh Fruit and Vegetable Program (FFVP)

3.2 Calendar. All meals will be provided in accordance with the approved calendar, attached as Appendix B (make sure this is attached). For the first twenty-one (21) days of food service, FSMC will adhere to the 21-day cycle menu agreed upon by FSMC and the LEA. Changes in the menu may later be made with approval of the LEA. 7 CFR 210.16 (b) (1).

3.3 Meal Program. The FSMC shall provide nutritional, high-quality breakfasts, lunches, snacks, suppers, a la carte food, and vending items, as applicable, in accordance with the following terms:

A. All reimbursable lunches, breakfasts, and snacks shall meet the qualifications for USDA reimbursement as described in 7 CFR 210.10, and 220.8, 225.16 and 226.20, as applicable.

B. Prices to be charged for meals, and snacks during the current contract year shall be established by the LEA (7CFR 210.16(a)(4)).

C. The LEA shall administer the application process for all free and reduced price meals, and shall establish and notify parents and guardians of program criteria for eligible students. Both the LEA and the FSMC shall be responsible for protecting the anonymity of students receiving free or reduced price meals.

D. The FSMC shall collect gross sale receipts, on behalf of the LEA, for cash-paid meals, a la carte items, and vending items. Gross cash receipts shall be turned over daily to the LEA.

3.4 Nutrition Awareness Programs. In cooperation with the LEA, the FSMC shall conduct on-going nutrition awareness programs for students, teachers, parents, and other interested parties.

3.5 Special Diets. The FSMC shall supply special diets for students where medically necessary and when prescribed by licensed physician for disabled students, or medical practitioner, for non-disabled students, in accordance with state, USDA and PED regulations, and approved in writing by the LEA.

3.6 Food Committee and Advisory Board. The FSMC shall cooperate with the LEA's Food Service Advisory Committee, consisting of students, parents, and LEA staff in developing menus and other food service programs.

*Checking box will delete the section below, if not applicable*

3.7 Catering. Upon request by the LEA, the FSMC shall provide catered food service at times and prices mutually agreed upon. For all LEA sponsored and third party functions catered by the FSMC, the FSMC shall prepare and submit prenumbered invoices to appropriate administrators of the LEA and representatives of third party organizations, which shall pay the LEA directly. Such invoices will be submitted by the FSMC by the end of the current month. Any invoice payments received by the FSMC shall be immediately delivered to the LEA's Accounting Department. The LEA shall be responsible for collecting amounts due on food service accounts receivable invoices. The FSMC shall provide the LEA with copies of invoices and an invoice control log within ten (10) days after the end of each month. Costs of catered functions shall not be supported by the nonprofit food service account funds.

3.8 Environmental Protection Agency Compliance. In performance of this agreement, the FSMC shall comply with Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, Executive Order 117389, and EPA Regulations 40 CFR Part 15, et seq. Environmental violations shall be reported to the United States Department of Agriculture and US EPA Assistant Administrator for Enforcement, and the FSMC agrees not to utilize a facility listed on the EPA's "List of Violating Facilities."

3.9 Energy Policy and Conservation Act Compliance. The LEA and the FSMC shall recognize mandatory standards and policies relating to energy efficiency which are contained in the state conservation plan issued in compliance with the Energy Policy and Conservation Act.

3.10 Contract Work Hours and Safety Standards Act Compliance. In performance of this agreement, and as employer for all management food service employees [and non-management foodservice employees], the FSMC shall comply with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act.

3.11 Debarment Certification. The FSMC shall complete and submit to LEA the New Mexico Public Education Department's (PED) Certification Regarding Non-Procurement Debarment and Suspension. The LEA shall submit the certification to the PED's Coordinated School Health and Wellness Bureau with the contract for review.

3.12 Lobbying. Pursuant to section 1352, Title 31, US Code, the FSMC shall complete and submit to the LEA Certificate Regarding Lobbying and a Disclosure of Lobbying Activities. The LEA shall submit the certification to the PED' Coordinated School Health and Wellness Bureau with the contract for review.

3.13 "Buy American" Provision. Section 104(d) of the William F Goodling Child Nutrition Reauthorization Act of 1998 requires schools and institutions participating in the National School Lunch Program (NSLP) and School Breakfast Program (SBP) in the contiguous United States to purchase, to the maximum extent practicable, domestic commodities or products with nonprofit school food service account funds. Also found in 7 CFR Part 210.21(d)

#### ARTICLE IV MANAGEMENT AND PERSONNEL

4.1 FSMC Management and Professional Employees. The FSMC shall provide sufficient and qualified management and professional employees to manage the food service operations and supervise all employees employed therein.

4.2 Non-Management Employees. All non-management food service employees shall be employees of the LEA [FSMC]. The FSMC managers shall direct and supervise the food service employees.

*Checking box will delete the section below, if not applicable*

4.3 Student Workers. The LEA has a policy of providing work experience for its students as part of the educational curriculum. In furtherance of that policy, the LEA may assign students for work in the food service operation in such numbers as are agreed upon between the LEA and the FSMC.

4.4 Payroll and Taxes. The FSMC shall prepare and process the payroll for and shall pay its employees directly. The FSMC further warrants that it shall withhold or pay as appropriate all applicable federal and state employment taxes and payroll insurance with respect to its employees, specifically including any income, social security, and unemployment taxes and workers' compensation payments.

4.5 Workers' Compensation Insurance. The FSMC shall procure Workers' Compensation Insurance or shall maintain a system of self-insurance in conformance with applicable state law covering its employees and shall provide proof of such coverage or system to the LEA.

4.6 Nondiscrimination.

In accordance with Federal civil rights law and U.S. Department of Agriculture (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, religious creed, disability, age, political beliefs, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA.

Persons with disabilities who require alternative means of communication for program information (e.g. Braille, large print, audiotape, American Sign Language, etc.), should contact the Agency (State or local) where they applied for benefits. Individuals who are deaf, hard of hearing or have speech disabilities may contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program complaint of discrimination, complete the USDA Program Discrimination Complaint Form, (AD-3027) found online at [http://www.ascr.usda.gov/complaint\\_filing\\_cust.html](http://www.ascr.usda.gov/complaint_filing_cust.html), and at any USDA office, or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by

(1) mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410;

(2) fax: (202) 690-7442; or

(3) email: [program.intake@usda.gov](mailto:program.intake@usda.gov).

## ARTICLE V INVENTORIES, FACILITIES, EQUIPMENT, AND MAINTENANCE

5.1 Inventories of Food and Supplies. Prior to the commencement of the term of this agreement, the existing food and operational supplies shall be delivered and charged to the FSMC for the performance of this agreement. The cost of food and operational supplies ordered by FSMC on behalf of the LEA in performance of this agreement shall be paid for by the FSMC. The inventory of food and operational supplies shall remain the FSMC'S property.

A. Any federally donated commodities received by the LEA and made available to the FSMC shall be used only for the benefit of the LEA's nonprofit food service operation and must be fully utilized, including all donated ground beef and ground pork and all end products received from processors. Bonus commodity items must be used to reduce the cost of meals, but not replace purchased products. The value of commodities is the average USDA purchase price as listed by PED. Notwithstanding the foregoing, if, upon termination of the Agreement, there remains USDA donated commodities that have not been used but have been credited (other than ground pork, ground beef, or processed end products), then the LEA may, at its discretion and in accordance with USDA regulations, mutually agree with the current FSMC on other use or disposition of such commodities. This agreement could include the removal of such products by the current FSMC.

B. The FSMC may store and inventory donated foods and commercially purchased food together to the extent that the system ensures required use of donated foods. Any commodity processing contracts shall be established by the LEA.

C. All goods, services, and monies received as a result of rebate under a processing contract must be used in the LEA's nonprofit food service.

D. FSMC representative must have authorization from LEA to have access to commodity ordering system and the name of authorized representative on file with the SA.

5.2 Small wares. The FSMC shall furnish the necessary smallwares, including trays, dishes, glassware, flatware, serving utensils, and the like. The FSMC must determine whether they are permanent or disposable.

5.3 Office Facilities. The LEA shall provide, without cost to the FSMC, suitable office facilities, including furniture and equipment, for use by the FSMC in performance of this agreement. The FSMC shall take reasonable care of the office facilities and equipment, and shall return them to the LEA in good condition upon termination of this agreement, ordinary wear and tear excepted.

5.4 Sanitation. The FSMC shall be responsible for usual and customary cleaning and sanitation of the LEA's food service facilities.

A. The FSMC shall be responsible for housekeeping and sanitation in areas used for food preparation, storage, and service, and shall clean and sanitize dishes, pots, pans, utensils, equipment, and similar items.

B. The LEA shall be responsible for the required cleaning and maintenance of dining areas and snack bar seating areas beyond the front edge of the serving lines, as well as periodic cleaning of all ceilings, ceiling fixtures, air ducts, and hood vent systems (as per local ordinance). The LEA shall also provide and maintain adequate fire extinguishing equipment for food service areas, provide necessary pest control, and shall be responsible for the removal of refuse from refuse collection centers.

C. If the LEA is unable to perform any of its responsibilities described in subparagraph B above, the FSMC shall temporarily assume those responsibilities and shall bill the LEA for any costs incurred.

D. The FSMC shall be responsible for complying with all applicable federal, state, and municipal laws related to food preparation and sanitation and all rules and regulations promulgated there under for any facility outside the school in which it prepares meals and at LEA facilities.7 CFR 210.16(c)(2).

E. The LEA shall be responsible for compliance relating to structural and equipment matters.

5.5 Maintenance. The LEA shall provide, at the LEA's expense, maintenance personnel and outside maintenance services, parts, and supplies required to properly maintain the food service facilities and equipment. If the FSMC is required by an outside maintenance service to make payment at the time of service, the LEA shall reimburse the FSMC for such payments made.

5.6 Condition of Facilities and Equipment. The LEA shall obtain necessary health permits and certification for its facilities. The premises and equipment provided by each party in performance of this agreement shall comply with all applicable building, safety, sanitation, and health laws; and shall satisfy all permit requirements, ordinances, rules, and regulations, including the federal Occupational Health and Safety Act of 1970 or applicable state act and standards promulgated thereunder. FSMC shall take reasonable and proper care of all premises and equipment in its custody and control and shall use them in a manner that will not cause violation of applicable laws, ordinances, rules, and regulations, including any reporting and record-keeping requirements. If at any time the FSMC is notified by an authorized government agency that the LEA's premises or equipment are not in compliance with any law, ordinance, rule, or regulation, the FSMC shall immediately inform the LEA of such notification.

*Checking box will delete the section below, if not applicable*

5.7 Transportation Equipment and Vehicle. The LEA shall provide transportation vehicles and equipment to be used in the food service program. Maintenance, fuel, insurance, and equipment for transportation shall be the responsibility of the LEA

5.8 Nonconforming Facilities and Equipment. Each party shall, at no cost to the other, make all repairs, alterations, modifications, or replacements to premises and equipment provided by each party in performance of this agreement which may be necessary to correct any conditions of premises or equipment which violate applicable building, sanitation, health, or safety law, ordinance, rule or regulation.

ARTICLE VI  
FINANCIAL AND PAYMENT TERMS

6.1 Billing for Fixed Price Per Meal. The LEA and the FSMC have mutually agreed upon the fixed price per meal as follows:

**SBP**

- Breakfast \$ 0.00 per meal
- Meal Equivalents \$ 0.00 per meal based on \$ 0.00 rate

**NSLP**

- Lunch \$ 0.00 per meal
- Snack \$ 0.00 per snack
- Meal Equivalents \$ 0.00 per meal based on \$ 0.00 rate

**SFSP**

- Breakfast \$ 0.00 per meal
- Lunch \$ 0.00 per meal
- Snack \$ 0.00 per snack

**CACFP**

- Breakfast \$ 0.00 per meal
- Lunch \$ 0.00 per meal
- Supper \$ 0.00 per meal
- Snack \$ 0.00 per snack

**SMP**

- Milk \$ 0.00 per half pint

**FFVP**

- Serving \$ 0.00 per student

A. Meal Equivalent Defined:

1. For fixed price per meal purposes, each reimbursable lunch shall be considered one (1) meal/meal equivalent, each reimbursable breakfast shall be considered one-third (1/3) of a meal/meal equivalent, and one reimbursable snack shall be considered one-fourth (1/4) of a meal/meal equivalent.

2. For cash meal sale other than reimbursable meals, the number of meal equivalents shall be determined by dividing the total of all food sales except reimbursable meal and snack sales (including sales of adult meals, a la carte meals, snack bar, catering, conference, and any other function sales) by the sum of the current school year free meal reimbursement rate and the commodity value. (Example: The meal equivalency rate = \$2.72 plus \$0.2025 equals \$2.9225 and Lunch Equivalents = total A la Carte dollars divided by \$ 2.9225).

B. The FSMC shall submit the following supporting documents to the LEA monthly:

- Daily meal counts by benefit category by school for each program
- Daily menu production records by program
  
- Monthly summary of Value of Commodities used

- Monthly summary of Revenues from other sales

C. Expenses paid by the FSMC and not charged to the LEA or the food service operations include, but are not limited to:

- Reports filed to the State
- Corporate income tax

D. Crediting Value of Commodities Received by the LEA – The FSMC must credit the LEA for the value of all donated food received, entitlement and bonus, for use in the LEA’s meal service during the school year. This includes the value of donated food contained in processed end products. The FSMC shall list on the invoice the value of commodities received, for the period and deduct the amount of value from the total owed by LEA for the NSLP meals served. The value of commodities for entitlement and bonus is the average USDA purchase price as listed by PED For processed commodities it is the processing agreement value.

6.2 Invoice Due Date. Invoices submitted to the LEA by the FSMC will be paid according to the LEA’s “Accounts Payable Cut-Off Schedule,” or as otherwise agreed upon. If invoices are received in the LEA’s Accounting Department by the cut-off date, and they pass audit, payment will be made on the release date listed on the schedule. The FSMC will be notified immediately of any invoice that does not pass audit. The LEA shall pay all amounts when due. If the LEA does not make a payment when due, the FSMC may charge interest or a late fee on the past due receivable; however, the LEA may not pay the interest or late fee with funds from the nonprofit school food service account funds, pursuant to 7 CFR 210.16(c).

6.3 Operating Statements. The FSMC shall submit monthly operating statements to the LEA and shall report claim information to the school food authority promptly at the end of each month. This statement shall reflect all activity for the calendar month. Such available records should be made available to the school food authority, upon request, and shall be retained in accordance with 7 CFR 210.23(c).

6.4 Inspection of Books and Records. The books and records of the FSMC pertaining to operations under this agreement shall be available to representatives of the LEA, state agency, the USDA, and the US General Accounting Office at any reasonable time and place.

6.5 Renegotiation of Financial Terms. The fixed price per meal/lunch equivalent will be subject to an annual price adjustment provision, made at the time of contract renewal, based on the CPI For Food Away from Home. The specific CPI used is: CPI-U All Urban Consumers: US City Average Food Away From Home. Use the CPI for the 12 month period of March of 2016 to March of 2017.

6.6 Financial Reconciliation. Within ninety (90) days of the end of the school year, the parties shall complete a reconciliation of the annual operational financial report, which the report shall be signed by the parties as being true and correct.

6.7 Break-Even Guarantee: This is optional depending on what was in the RFP. The LEA and the FSMC shall work together to ensure a financially sound and well-run operation. The

FSMC shall guarantee that the food service program will achieve, at a minimum, financial break-even, defined, as “generated program revenues will be sufficient to cover the fixed price per meal for all meals served plus LEA direct and indirect costs as set forth in this Agreement.”

6.8 7 Prohibited Expenditures. No expenditure may be made from the nonprofit school food service account for any cost resulting from a procurement failing to meet the requirements of this part, pursuant to CFR Part 210.21(c)(3).

## ARTICLE VII

### GENERAL TERMS AND CONDITIONS

7.1 Compliance With Law. The FSMC shall comply with all laws, ordinances, rules, and regulations of all applicable federal, state, county, and city governments, bureaus, and agencies, purchasing, sanitation, health, and safety of the food service operations. The FSMC will comply with all requirements of the National School Lunch Program, the School Breakfast Program, the Special Milk Program, the Summer Food Service Program and the Child and Adult Care Food Program [as applicable] and shall procure and maintain all necessary licenses and permits. The LEA shall cooperate, as necessary, for the FSMC's compliance and procurement efforts.

7.2 USDA Child Nutrition Program. In order to assist the LEA participation in the following Child Nutrition Programs:

- National School Lunch Program (NSLP)
- School Breakfast Program (SBP)
- After School Snack Program
- Fresh Fruit and Vegetable Program (FFVP)

A. No payment shall be made for meals or snacks that are spoiled or unwholesome at the time of service, or do not meet specifications developed by the LEA, or do not otherwise meet the requirements of this agreement. No deduction in payment shall be made by the LEA unless the LEA notifies the FSMC in writing within 48 hours of the meal service for which the deduction is to be made, specifying the number of meals for which a deduction is to be made and describing the reasons for the deduction.

B. The FSMC shall maintain such records, for a period of not less than five (5) years, as are needed by the LEA to support its claims for federal and state reimbursements. The FSMC shall submit to the LEA a monthly meal reimbursement claim report including all meals served under all programs operated by the LEA for the LEA to submit to the PED.

C. The FSMC shall make available, as required by state and federal regulations, all facilities, books and records pertaining to food service operations available for onsite review by the LEA, State Agency, the US Department of Agriculture, and the Comptroller General or their duly authorized representatives to ensure compliance with program requirements and the management and use of donated foods.

D. The FSMC must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in 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 §250.51(a). Further, the FSMC must maintain the following records relating to the use of the donated foods:

- 1) The donated food and processed end product received from or on the behalf of the LEA for use in meal service.
- 2) Documentation that it has credited the LEA of the value of all donated food received for use in the LEA's food service in the school year, including the value of donated foods contained in processed products.

3) Documentation of the FSMC's procurement of processed end products on behalf of the LEA.

Each SFA needs to review this section with their Risk Manager:

7.3 Comprehensive Insurance. The FSMC shall obtain and keep in force during this agreement, for the protection of the LEA and the FSMC, Comprehensive General Bodily Injury and Property Damage Liability Insurance in the combined single limit of no less than one million dollars (\$1,000,000). That insurance shall include, but not be limited to, Personal Injury Liability, Broad Form Property Damage Liability, Blanket Contractual Liability, and Products Liability, covering only the operations of the FSMC under this agreement, and shall deliver to the LEA a certificate evidencing such policies and coverage within thirty (30) days after the execution of this agreement by the parties. The insurance policies shall contain a covenant by the issuing company that the policies will not be canceled unless a thirty (30) day prior written notice of cancellation is given to the LEA. The policies for \$1,000,000 coverage shall also name the LEA as an Additional Insured, but only with respect to operations of the FSMC under this agreement.

7.4 Waiver of Insurance Subrogation. Neither party has any obligation or responsibility for loss or damage to the other's real or personal property that is caused by fire, extended coverage perils, vandalism, or malicious mischief. The parties waive all rights of recovery against each other for loss or damage to the waiving party occasioned by any such peril insured against under any policies insuring the waiving party's real or personal property.

7.5 Trade Secrets. During the term of this agreement, the FSMC shall designate any information it considers confidential or proprietary, including recipes, surveys and studies, management guidelines, operating manuals, and similar documents regularly used in the operation of the FSMC's business. Information so designated and identified shall be treated as confidential by the LEA, and the LEA shall exercise the same level of care in maintaining the confidences of the FSMC as it would employ in maintaining its own confidences. All recipes, files, records, compilations, manuals, and similar items shall remain the exclusive property of the FSMC and shall be returned to the FSMC immediately upon termination of this agreement. The LEA shall have no right to the use trademarks, service marks, copyrights, or trade names of the FSMC following termination of this agreement. The FSMC shall remove all evidence of its trade names and registered trademarks within thirty (30) days after termination of this agreement. Nothing in this section prohibits the Federal government's rights of reproduction or distribution for any material developed with nonprofit school food service account funds or for any materials in which the FSMC purchases an ownership interest.

7.6 Assignment. This agreement may not be assigned by either party, in whole or in part, without the written consent of the other party.

7.7 Notice. Any notice or communication required or permitted under this agreement shall be in writing and shall be served personally or sent by US registered or certified mail, postage prepaid and return receipt requested, addressed to the other party as follows:

Notices to the LEA:

LEA: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_, NM \_\_\_\_\_  
Email: \_\_\_\_\_

Notices to the FSMC: (Only one 1 notice shall be sent to the FSMC. The FSMC is responsible for providing additional copies to others within their organizations):

FSMC: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_, NM \_\_\_\_\_  
Email: \_\_\_\_\_

Notices shall be effective when received. Sent notices will be considered received forty-eight (48) hours after they are deposited in the US mail.

7.8 Attorney's Fees. If any action or proceeding is necessary to enforce the provisions of this agreement, including any claim or demand, or to interpret this agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which it may otherwise be entitled, whether or not such action or proceeding is prosecuted to judgment.

7.9 Catastrophe. With the exception of payment obligations for prior performance under this agreement, neither party shall be liable for the failure to perform their respective obligations under this agreement when such failure is caused by fire, explosion, water, act of God or inevitable accident, civil disorder, strikes, vandalism, war, riot, sabotage, weather and energy related closings, or other like causes beyond the reasonable control of the party, nor for any real or personal property destroyed or damaged due to such causes. The FSMC shall resume food service operations as soon as possible.

7.10 Cure Period. If either party, SFA and FSMC, commits any material breach or default of any of the obligations required of it in this agreement under this contract, such breach, default or failure shall be cured within ten (10) business days of written notice of failure by the injured party.

7.11 Termination.

A. Termination for Convenience: This contract may be terminated at any time by the mutual written consent of the parties. Either party may terminate this agreement without cause. Either the LEA or the FSMC shall give not less than sixty (60) days written notice of the intention to terminate for convenience.

B. Termination for Cause: If either party fails to comply with any of the obligations required of it in this agreement the injured party may give a written notice of Termination. Following receipt of written notice the contract will be terminated in sixty (60) days.

If a cure or remedy is found within the cure period as described in 7.10 above, for the termination request by mutual agreement of the contracting parties, the termination or non-renewal letter must be withdrawn in writing by the terminating party with the sixty (60) day period. This letter should be counter-signed by the receiving party and the letter should become an amendment to this agreement.

C. At the point of termination the FSMC will surrender to the LEA all program records pertaining to the contract period and renewals. These documents include, but are not limited to: daily meal counts by meal benefit category by school/site for each program; monthly benefit issuance rosters with student start and withdrawal dates; and daily menu production records by program.

D. When a contract terminates and is not extended or renewed the FSMC must return all unused donated ground beef, donated ground pork, and processed end products to the LEA. The LEA will ensure that the FSMC has credited it for the value of all donated foods received for use in the LEA's meal service in a school year.

7.12 Remedy. If either party, LEA and FSMC, commits any material breach or default of any covenant, warranty, obligation or agreement under this contract, or fails to perform the Work under this Contract in accordance with its terms, such breach, default or failure shall be cured within (10) ten business days of written notice by the injured party. Failure to cure or remedy shall be grounds for Termination for Cause.

7.13 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.

7.14 Construction and Effect. A waiver of any failure under this agreement shall neither be construed as, nor constitute a waiver of, any subsequent failure. This agreement supersedes all prior negotiations, representations, or agreements. The Article and Paragraph headings are used solely for convenience and shall not be deemed to limit the subject of the Articles and Paragraphs or be considered in their interpretation. The appendixes referred to herein are made part of this agreement by the respective references to them. This agreement may be executed in several counterparts, each of which shall be deemed an original.

7.15 Amendments to the Agreement. Each of the Articles and any Appendixes shall remain in effect throughout the term of this agreement unless the parties mutually agree, in a written document signed by both parties and attached to this agreement, to amend, add, or delete an

Article or Appendix. Any amendment to this agreement shall become effective after receiving State agency prior approval and at the date/time specified in the amendment.

7.16 Sanctions. For breach of the agreement and associated benefits:

A. The Public Education Department shall be notified immediately of termination action and reason for termination.

B. The name of either party who has caused the breach shall be kept on record by the State of New Mexico Public Education department for information and action if necessary when co-signing future agreements.

C. If the FSMC causes the breach, the FSMC assumes liability for any and all damages, including excess cost to the LEA in procuring similar services, and is liable for administrative, contractual, and legal remedies as applicable.

SO AGREED:

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Print Name	Signature of FSMC Authorized Representative	Title	Date
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Print Name	Signature of LEA Authorized Representative	Title	Date
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Add signature/title/date placeholder for State agency approval.