

**Pro Forma Contract**  
**FOOD SERVICES MANAGEMENT AGREEMENT**

**THIS AGREEMENT**, made this \_\_\_\_\_ day of \_\_\_\_\_, 2015 by and between Germantown Municipal School District and **FOOD SERVICE MANAGEMENT COMPANY (FSMC)**.

**WITNESSETH THAT:**

**EMPLOYMENT OF FSMC:**

District employs FSMC to provide management services to District in connection with the operation of District's non-profit school food service operation in the attendance units listed in Exhibit A, attached hereto and made a part hereof. By mutual agreement between the District and the Food Service Management Company, other Germantown Municipal Schools may be added or removed. FSMC shall be the sole provider to District of such management services during the term of this Agreement. In providing management services for District's food service operation, FSMC shall comply with the applicable provisions of the National School Lunch Act, as amended and the United States Department of Agriculture (USDA) regulations set forth in 7 CFR 210, 7 CFR 220 and 7 CFR 225. The distributing agency, sub-distributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or the duly authorized representatives, may perform onsite reviews of the food services management company's food service operation, including the review of records, to ensure compliance with requirements for the management and use of donated foods.

**DEFINITIONS:**

The following words and phrases when used in this Agreement shall have the meanings given to them in this Paragraph:

- A. "Accounting Periods":** The two (2) Accounting Periods of four (4) weeks each and one (1) Accounting Period of five (5) weeks which occur in each quarter. The September Accounting Period shall consist of six (6) weeks.
- B. "Agreement":** This Food Services Management Agreement
- C. "Cash Equivalents":** An amount equal to the Direct Costs attributable to those special functions of District for which there are no cash receipts.
- D. "Charge":** A charge established by FSMC, which is reasonably allocated to District, for certain services provided by FSMC to client locations.
- E. "Current Year":** The 2015-16 School Year.
- F. "Direct Costs":** Costs incurred by FSMC directly attributable to services provided under this Agreement. All costs incurred by FSMC in providing services to District shall be presumed to be Direct Costs unless expressly provided otherwise in this Agreement.
- G. "Effective Date":** August 1, 2015.
- H. "Food Service Facilities":** The areas, improvements, personal property and facilities are available by District to FSMC for the provision of the food services as more fully described herein.

**H. “Food Service Program”:** The preparation and service of food to District’s students, staff, employees and authorized visitors.

**J. “General and Administrative Expense”:** Costs incurred by FSMC for the financial reporting, legal, tax and audit services and management oversight provided to client locations by FSMC at the regional and corporate levels.

**K. “Reimbursable Costs”:** Direct Costs, Charges, and General and Administrative Expense incurred by FSMC in providing services under this Agreement.

**L. “Servicewares”:** Items utilized in the service of food, including such things as chinaware, glassware and silverware.

**M. “Small Expendable Equipment”:** Items utilized in the preparation of food, including such things as pots, pans and kitchen utensils.

## **AUTHORITY OF DISTRICT**

District shall retain control of its Food Service Program. District shall designate representatives, who shall:

**A.** Ensure that the Food Service Program is in conformance with the District’s agreement under the National School Lunch Program and School Breakfast Program (if applicable).

**B.** Monitor the Food Service Program through periodic on-site visitations to ensure the food service program is in compliance with regulations.

**C.** Retain control of the quality and quantity of food service under the contract and the extent and general nature of the food service. Retain control of the establishment of prices; include price adjustments for all meals service, pricing reimbursable meals, a la carte service including vending machines and adult meals. Any increases in the prices of the pattern breakfast and lunch during the period of the contract along with the list of the FSMC prospective vendors/purveyors will be subject to approval of the Board of Education. This approval must be asked for and given in writing.

**D.** Retain signature authority on the State agency-District agreement, free and reduced price policy statement and claims for reimbursement.

**E.** Retain title and ensure that all USDA donated food received by the District made available to FSMC accrue only to the benefit of the District’s non-profit school food service and are fully utilized therein. All refunds received from processors must be retained by the District;

**F.** Maintain applicable health certification and assure that all State and local regulations are being met by FSMC in preparing and serving meals at the District’s facilities; and

**G.** Establish an advisory board composed of parents, teachers and students to assist in menu planning.

**H.** Retain control of the school food service account and overall financial responsibility for the Program;

**I.** Be responsible for ensuring resolution of the Program review and audit findings;

**J.** Develop, distribute and collect parent letters and applications for free and reduced price meals and free milk;

**K.** Be responsible for supervising the process of determining and verifying applications for free and reduced price meals or milk benefits and conducting any hearings related to such determinations; however, the

actual application processing (determining eligibility and verification activities) shall be the responsibility of the FSMC.

**L.** Include a 21-day cycle menu, developed in accordance with meal pattern requirements specified in 7 CFR Part 210. The District may defer to the FSMC to provide the 21-day cycle menu from the beginning of the school year. The invitation to bid or request for proposal contains a 21-day cycle menu developed in accordance with the provisions of 210.10, to be used as a standard for the purpose of basing bids or estimating average cost per meal. A School Food Authority with no capability to prepare a cycle menu may, with State Agency approval, require that each food service management company include 21-day cycle menu, developed in accordance with the provisions of 210.10, with its bid or proposal. The Food Service Management Company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the School Food Authority.

**M.** The SFA shall be legally and financially responsible for the conduct of the food service and shall ensure compliance with the rules and regulations of the Tennessee School Nutrition Program.

**N.** At the SFA's discretion, the SFA may conduct performance reviews of the FSMC's performance under the contract. Any services performed under this Contract shall be subject to a performance review. The vendor shall cooperate with the SFA in these reviews, which may require the vendor to provide records of its performance. Performance reviews may be used by the SFA to determine whether to enter into future contractual relationships with the vendor, including subsequent Contract renewal Terms, as applicable Performance Reviews may include, but are not limited to:

- Completion and performance of contractual services rendered to ensure that the food service operation is in conformance with SFA's agreement under program;
- Adherence to the meal pattern and food specification requirements, including quality and variety;
- Performance of SFA On-Site Reviews and status of required corrective action, if any and as applicable;
- Performance of State and/or Federal reviews and status of required corrective action, if any and as applicable;
- Participation trends, including program participation compared to a la carte sales, if applicable; and
- Responsiveness of regional management to SFA and local staff/management.

**O.** Obtain written approval of invitations for bids and requests for proposals before their issuance when required by the State Agency. The School Food Authority must incorporate all State Agency required changes to its solicitation documents before issuing those documents, and;

**P.** Ensure that the State Agency has reviewed and approve the contract terms and that the school food authority has incorporated all State Agency required changes into the contract or amendment before any contract or amendment to an existing food service management company contract is executed. Any changes made by the School Food Authority or a Food Service Management Company to a State Agency-approved contract term must be approved in writing by the State Agency before the contract is executed. When requested, the School Food Authority must submit all procurement documents, including responses submitted by potential contractors, to the State Agency, by the due date established by the State Agency.

## REGULATORY REQUIREMENTS

- A.** FSMC shall conduct program operation in accordance with 7 CFR Parts 210, 215, 220, 245 and 250 and FSMC instructions and policy. Any invitation to bid or request for proposal must indicate that nonperformance subjects the Food Service Management Company to specified sanctions in instances where the Food Service Management Company violates or breaches contract terms. The School Food Authority shall indicate these sanctions in accordance with the procurement provisions stated in 210.21.
- B.** FSMC shall maintain such records as District will need to support its claim for reimbursement for daily number of meals served by type under the National School Lunch Program and School Breakfast Program (7 CFR 210.16), and shall provide the necessary reports to District promptly at the end of each month of operation or more frequently as specified by District. The FSMC accepts liability caused by FSMC negligence for claims assessed as a result of Federal/State reviews/audits, corresponding with the SFA's period of liability. All records of FSMC pertaining to District's Food Service Program shall be maintained at the District and made available to representatives of District, the state agency, USDA, the US Comptroller General or the US General Accounting Office upon request, at FSMC's offices during regular business hours.

The Food Service Management Company shall maintain such records as the School Food Authority will need to support its claim for reimbursement under this part, and shall, at a minimum, report claim information to the School Food Authority promptly at the end of each month. Such records shall be made available to the School Food Authority, upon request, and shall be retained in accordance with 210.23.

All such records shall be kept on file for three years after the end of the school year to which they pertain, or such other period which the Secretary of Agriculture or appropriate State officials may from time to time determine; provided however that if audit findings have not been resolved, the records shall be retained beyond the three year period as long as required for the resolution of the issues raised by the audit. Retention of all required records for three years after grantees or sub-grantees make final payments and all other pending matters closed.

Authorized representatives of the District, the State, and USDA shall have the right to conduct on-site administrative reviews of the food service operations. FSMC shall be responsible for ensuring compliance with the SFA's local wellness policy (as mandated under the 2004 Reauthorization of WIC and Child Nutrition).

FSMC shall be responsible for ensuring compliance with all aspects of the HACCP plan developed by the District to comply with Section III of the Child Nutrition and WIC Reauthorization Act of 2004.

- C.** Food not prepared in facilities provided by District, but delivered for use in District's Food Service Program, shall meet all State and local sanitation standards. FSMC shall have State or local health certification for any facility outside the District in which it shall prepare meals for use in District, and shall maintain such health certification for the duration of this Agreement.
- D.** No payment is to be made for meals that spoiled or unwholesome at time of delivery, do not meet specifications as developed by the school food authority for each food component specified in 210.10, or do not otherwise meet the required of the contract. Specifications shall cover items such as grade, purchase units, style, condition, weight, ingredients, formulation and delivery time.

E. If this Agreement is in excess of \$100,000, the District and FSMC shall comply with all applicable standards, orders or regulations issued, including:

1. Section 306 of Clean Air Act (42 USC 1857(h)),
2. Section 508 of the Clean Water Act (33 USC 1368)
3. Executive Order 11738 and Environmental Protection Agency regulations,
4. Certification Regarding Lobbying pursuant to 31 USC 1352 (Appendix A: 7 CFR Part 3018), and;
5. Disclosure of Lobbying Activities pursuant to 31 USC 1352 (Appendix A: 7 CFR Part 3018)
6. Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR Part 3).
7. 2 CFR 200.322 Procurement of 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.

The FSMC certifies that it is in compliance with :

- a. Energy Policy and Conservation Act (PL 94-163.89 Stat 871)
- b. Provisions of the Contract Work Hours and Safety Standards Act involving Food Services workers whose duties are manual and physical in nature (USD 40 327-330 as supplemented by Department of Labor regulations (29 CFR Part 5)
- c. Executive Order 11246 entitled "Equal Employment Opportunity" as amended by Executive Order 11375 and Department of Labor Regulations and as supplemented in Department of Labor regulations (41 CFR Chapter 60).

## **FOOD SERVICE**

A. FSMC shall serve, on such days and at such time as requested by District:

- 1) Meals, priced as a unit, which meet the meal component requirements prescribed by the USDA. District and FSMC will encourage maximum participation in the National School Lunch Program and School Breakfast Program.
- 2) Such other food as may be agreed upon by FSMC and District. A la carte offering will comply with applicable Federal and State regulations.

B. For the first 21 days of meal service, the District would like for the FSMC to provide a menu.

Thereafter, changes in the menu may only be made with the approval of the District. The District may

defer to the FSMC, if it submits age-appropriate menus for the 21-day cycle menus for K-5, K-8, 6-8 and 9-12 grade age groups .

**C.** FSMC shall make recommendations to District regarding the quality, extent and general nature of the Food Service Program, and the prices to be charged for meals and other food; but District will retain control over such aspects of the Food Service Program and shall have the right to make the final decisions regarding such matters.

**D.** FSMC shall cooperate with the District in promoting the nutritional education aspects of District's Food Service Program and in the efforts of District to coordinate those aspects with classroom instruction, PTS evening meeting meetings, nutrition education programs, PE classes, and similar.

**E.** The District and the FSMC must serve Free and Reduced meals to those children who qualify, while protecting their anonymity. If the District offers Free and Reduced meals, then the District and FSMC may offer an a la carte service.

**F.** Labor costs for special functions should not be double billed for program meals and special function meals.

**G.** The serving sizes provided by the SFA on the 21-day cycle menu in most cases, are based on the required minimum serving sizes. The serving sizes for the food items indicated on the menu(s) must meet the required average daily calorie ranges per five-day week and the nutrient standards as stated, the FSMC must adjust the serving sizes and/or provide additional food item as necessary to meet the required calorie ranges and nutrient standards while meeting all Lunch and Breakfast Meal Pattern requirements and without significantly altering the 21-day cycle menu.

**H.** The vendor shall be responsible for providing meals and menus appropriate for the age of the students served and acceptable to students evidenced by a minimum of plate waste and participation levels in the National School Lunch and School Breakfast Programs.

**I.** The FSMC must adhere to ALL nutrition standards indicated by the USDA for implementation through the 2015-16 school year.

## **FACILITIES AND EQUIPMENT**

**A. Food Service Facilities:** District shall make available to FSMC suitable Food Service Facilities, completely equipped and ready to operate, together with such heat, fuel, refrigeration, freezer and utilities services as may be reasonably required for the efficient performance of this Agreement. District shall have full access to the Food Service Facilities at all times. It is specifically understood that the School District may, without interfering with normal food service, use the dining, production, and service areas from time to time for such purposes (student testing, dances, etc.) as may be required. Appropriate set-up and clean-up should all be undertaken by the School District's personnel at no cost to the contractor. Facilities shall be restored to conditions mutually satisfactory to the contractor and the School District before the next regularly scheduled meal service. The cost of long distance telephone calls made by the Food Service Management Company will be at the contractor's expense.

**B. Repair, Replacement and Maintenance:** District shall furnish building maintenance services for the Food Service Facilities, shall promptly make all equipment repairs and replacements, and shall be

responsible for compliance with all Federal, state and local safety and health laws and regulations with respect to the Food Service Facilities.

**C. Servicewares and Small Expendable Equipment:** District shall provide and maintain an adequate inventory of Servicewares, Small Expendable Equipment and cash registers. All Servicewares and Small Expendable Equipment and cash registers shall remain the property of the District.

On termination or expiration of the contract, the School District shall conduct a physical inventory of all non-expendable supplies and capital equipment. At that time, the contractor shall surrender the facilities and equipment to the School District in as good a condition as at the start of the contract-ordinary wear and tear expected.

## **CLEANING RESPONSIBILITIES**

**A. FSMC's Responsibilities:** FSMC shall maintain high standards of sanitation and shall be responsible for routine cleaning and housekeeping in the food preparation and service areas (including food service, kitchen floors, hoods and grease filters) and for the routine cleaning of cafeteria tables and chairs.

**B. District's Responsibilities:**

- 1) District, at its cost, shall provide regular cleaning service for cafeteria walls, windows, floors, light fixtures, draperies and blinds and period waxing and buffing of floors. In addition, District will be responsible for routing cleaning of grease traps, duct work, plenum chambers and roof fans.
- 2) District, at its cost, shall be responsible for trash and garbage removal and extermination service.

**C. Joint Responsibilities:** FSMC and District shall comply with all applicable standards, order or requirements issued pursuant to Section 306 of the Clean Air Act of 1970, as amended (42 USC 1857 (h)), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 117389, and Environmental Protection Agency regulations (40 CFR, Part 15), and any violations thereof shall be reported to the United States Department of Agriculture and to the USEPA Administrator of Enforcement (EN-329) or other appropriate authority. (Contracts, subcontracts and sub grants of amounts in excess of \$100,000.)

FSMC and District shall comply with all 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 (PL 94-163, 89 Stat.871).

## **HEALTH CERTIFICATION**

FSMC, as a Direct Cost, shall comply with all federal, state and local laws and regulations governing the preparing, handling and serving of food, and shall obtain on behalf of District and keep in effect all licenses, permits, as are required by law, and shall post such items in a prominent place within the Food Service Facilities as required.

## PERSONNEL

### A. FSMC Personnel:

- 1) FSMC shall provide and pay a staff of management employees assigned to duty on District's premises for efficient management of the Food Service Program. FSMC's management employees will be subject to rules and regulations of District while on District's premises.
- 2) FSMC shall be reimbursed for the Direct Costs incurred by FSMC in connection with its employees assigned to duty on District's premises, including compensation, payroll costs and education assistance, and shall charge a charge for fringe benefits and human resource services. Such fringe benefits and human resources services may include, but not be limited to, medical, disability and life insurance, retirement benefits, training programs and payroll services.
- 3) FSMC shall comply with Sections 103 and 107 of the Contract Work Hours and Safety Act (40 USC 327-330), as supplemented by Department of Labor regulations (29 CFR, Part 5). Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of the standard workday of eight hours and a standard work week is permissible provided that the worker is compensated at a rate of not less than one and one-half times the basis rate of pay for all hours worked in excess of eight hours in any calendar day or 40 hours in the work week. Section 107 provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous to this health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor.
- 4) Compliance with the Davis-Bacon Act (40 U.S.C 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of \$2000 awarded by grantees and sub grantees when required by Federal Grant Program legislation).
- 5) FSMC shall assign to duty on District's premises only employees acceptable to District. The school district requires all employees of the FSMC to give written consent to have both a criminal history from the State of Tennessee and a criminal record check through the Federal Bureau of Investigation (FBI) beginning January 1, 2006 per state law. The school district requires all employees of the proposer to supply a fingerprint sample and submit to a criminal history records check to be conducted by the Tennessee Bureau of Investigation and the Federal Bureau of Investigation prior to permitting the person to have contact with such children or enter school grounds. FSMC shall provide a list of employee names and social security numbers to the District's Human Resources Department so that the required Department of Children Services background checks can be performed. Employees must meet State requirements to be employable.
- 6) During the progress of the contract work, the contractor is to assume all risk and to bear all loss occasioned through neglect or accident caused by his personnel.



**B. District Personnel:**

- 1) All other supervisory and non-supervisory food service employees shall be FSMC's employees. As District employees leave or retire, they will be replaced with FSMC employees. Such employees shall be supervised on District's behalf by FSMC's management employees.
- 2) District shall maintain accurate and detailed records of District personnel and other payroll costs or employees assigned to the **Food Service Department**, and shall grant FSMC access, during regular business hours, to such books and records.

**C. District Personnel Actions:**

If FSMC incurs any costs, including legal fees, retroactive wages and damages, as a result of any personnel action taken by District or by FSMC at the direction of District, FSMC shall charge District for such costs as District Costs.

**D. Restrictive Covenant:**

- 1) FSMC agrees that no supervisory employees of District shall be hired by FSMC for the term of this Agreement and 12 months thereafter.
- 2) District acknowledges that FSMC has invested considerable amounts of time and money in training its supervisory employees in the systems, procedures, methods, forms, reports, formulas, computer programs, recipes, menus, plans, techniques and other valuable information which is proprietary and unique to FSMC's manner of conducting its business and that such information is available, on a confidential basis, to FSMC's supervisory employees. Therefore, District agrees that supervisory employees of FSMC will neither be hired by District or any facility affiliated with District for the term of this Agreement and 12 months thereafter, nor will District permit supervisory employees of FSMC to be employed on District's premises or on the premises of any facility affiliated with District for a period of 12 months subsequent to the termination of this Agreement (unless such employees were formerly employees of District) whether as an individual or as owner, partner, majority stockholder, director, officer or employee of a food service provide. For the purpose of this prohibition, "Supervisory employees" shall be defined as those persons who have directly or indirectly performed management or professional services on District's premises at any time during the 12-month period immediately preceding termination of this Agreement.

In addition, District agrees that if it violates the conditions set forth in the immediately preceding paragraph, then District shall pay to FSMC and FSMC shall accept as liquidated damages and not as a penalty for such breach, an amount equal to two times the annual salary of the FSMC supervisory employee hired by or allowed to work in District in violation of the terms of this Agreement.

#### **E. Equal Opportunity and Affirmative Action Employer**

Neither party shall discriminate because of race, color, religion, sex, age, national origin, disability or status as a Vietnam veteran, as defined and prohibited by applicable law, in the recruitment, selection, training, utilization, promotion, termination or other employment related activities concerning employees assigned to duty in the District's Food Service Program. FSMC affirms that it is an equal opportunity and affirmative action employer and shall comply with all applicable federal, state and local laws.

#### **HEALTH EXAMINATIONS**

FSMC shall cause all of its employees assigned to duty on District's premises to submit to periodic health examinations as required by law, and shall submit satisfactory evidence of compliance with all health regulations to District's medical department upon request. The cost of such examinations shall be a Direct Cost.

#### **PURCHASING**

- A.** Goods purchased become the property of the District.
- B.** Reimbursement for cost of goods will be the actual purchases as documented by invoice documentation. For all purchases made, the FSMC must adhere to the minimum Procurement Specifications as detailed in Section N-USDA Foods. FSMC shall competitively procure all items funded in whole or in part with proceeds from the nonprofit school food service program. For purchases made outside of District contracts, the FSMC must adhere to the minimum Procurement Specifications as detailed in Section N-USDA Foods.
- C.** All goods, services, or monies received as a result of equipment or USDA donated commodity rebates, including rebated payments for processing of USDA donated foods, shall accrue only to benefit of the SFA's nonprofit school food service. All refunds received from commodity processing must be retained by SFA.
- D.** In accordance with Federal Regulations 7 CFR Part 250, Part 210.21, Part 215.14, and Part 220.16, the District will receive any allocated discounts and rebates for the purchases of food or products that are purchased for the District's use in the non-profit food service program. These discounts and rebates will be identified and credited to the District during normal billing cycles. The contractor must identify method by which it will reports discounts, rebates and other applicable credits allocable to the contract that are not reported prior to the conclusion of the contract.

The District shall pay all allowable expenses of operating the Food Service Program and shall collect all monies for sales. Contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs in a manner suitable for contract cost determination and verification. The

Contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs, in a manner suitable for contract cost determination and verification. In respect to food purchased by the Food Service Management Company for the School District, the amounts due from the School District to the Food Service Management Company as reimbursement for such food purchases shall be accounted for separately and apart from management fees. The Food Service Management Company agrees to bill the School District or the actual cost of food used. The District will require the Food Service Management Company to provide the necessary documentation, on a monthly basis, to verify the amount billed.

The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars. The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the School Food Authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State Agency, the School Food Authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually. The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reports prior to the conclusion of the contract. And, the contractor must maintain documentation of costs and discounts, rebates and other applicable credits and must furnish such documentation upon request to the school food authority, the State Agency, of the Department.

**E. Prohibited Expenditures.** No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.

**F.** In the event the FSMC, either directly or through one of its affiliated companies, furnishes products or ancillary services necessary for the efficient operation of District's Food Service Program, the charges to District for such products or ancillary services shall be competitive with the cost of obtaining such services from an independent source in the open market. Billing for such products or services shall be a Direct Cost.

**G.** Any silence, absence or omission from the Contract document specifications concerning any point shall be regarded as meaning that only the best commercial practices shall prevail, and that only materials (food, supplies, etc.) and workmanship of quality that would normally be specified by the District are to be used.

## **INVENTORY OF FOOD AND SUPPLIES**

At the commencement of operations, FSMC and District shall jointly inventory all food and related supplies to be utilized in District's Food Service Program. A summary of such inventory shall become part of this Agreement. District represents and warrants that all District food and supplies inventories, including commodities, existing at the beginning of the Current Year are usable and shall meet, FSMC's menu requirements. At the commencement of operations hereunder, FSMC and District shall mutually agree on the usability of such existing inventory and shall make an appropriate adjustment, if necessary, to the value of such existing inventory. During the course of this Agreement, title to all District food and supplies shall remain in District. At the termination of this Agreement, FSMC and District shall jointly undertake a closing inventory of all food and supplies. The value of the opening inventory shall be offset against the value of the closing inventory. The value of the inventories shall be determined by invoice cost. In the event the opening inventory is greater than the closing inventory, the difference shall be credited against FSMC's final billing. In the event the closing inventory is greater than the opening inventory, the difference shall be added to FSMC's final billing as a Direct Cost.

## **GOVERNMENT-DONATED FOODS AND COMMODITIES**

**A.** USDA foods offered to the District and made available to the FSMC shall be utilized solely for the purpose of providing benefits for the District's non-profit school food service program, and are not to be used for special functions conducted outside of the non-profit school food service program.

**B.** The FSMC shall accept and use USDA foods in as large a quantity as may be efficiently utilized in the non-profit school food service program subject to approval by the District. In accordance with 7 CFR 250.50(d), the FSMC may, in most cases, use commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality in place of donated foods. Exceptions are donated ground beef, ground pork, and all processed end products (i.e., containing donated foods), which cannot be replaced with commercial substitutes.

**C.** The FSMC shall not enter into subcontracts for further processing of USDA Foods. The SFA shall have processing contracts in place when a commercial facility processes or repackages USDA foods. The FSMC shall pay all related processing fees and costs. The SFA shall not be responsible for any cost associated with processing fees and costs. The SFA shall not be responsible for any cost associated with processing USDA Foods. The State Processing Contract, or National Processing Contract must be used as the basis for the processing agreement as determined by the Tennessee State Board of Education. The terms and conditions of the processing contract must comply with 7 C.F.R Part 250. In accordance with 7 CFR 250.51(1), the FSMC must credit the SFA for the full value of all USDA foods received for use in the SFA's meal service in a school year or fiscal year (including both entitlement and bonus foods). This includes crediting for the value of USDA foods contained in processed end products.

**D.** The District and the FSMC shall consult and agree on end products to be processed from USDA foods during the time of this Agreement. Under both the State Master Agreement and the Recipient Agency Agreement, the District is responsible for conducting the procurement of processing services, as stipulated in 7 CFR 3016.36.

**E.** The FSMC must itemize on the District's monthly operating statement the current market value of all USDA foods received for use in the non-profit school food service programs. USDA foods must be valued at the Fair Market Price at time of receipt. This information will be used for tracking and will identify the value of savings from the use of USDA foods.

**F.** The FSMC must credit the District for the value of all donated foods received for use in the District'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 products, in accordance with the contingencies in 7CFR 205.51(a). A year-end reconciliation shall be conducted by the District to ensure and verify that. The District reserves the right to conduct commodity credit audits throughout the year to ensure compliance with federal regulation 7CFR210 and 7CFR250.

**G.** The District shall be legally responsible for any losses of federally donated food that may arise due to equipment malfunction or loss of electrical power not within the control of the FSMC.

**H.** The FSMC will be responsible for the costs of the USDA foods administrative charges and processing charges as associated with USDA foods. The FSMC will be responsible for payment of delivery and storage charges associated with USDA foods and commodities.

**I.** The FSMC shall maintain and make available records to substantiate the receipt, use, storage and inventory of USDA foods. The FSMC must submit to the District monthly inventory reports showing all transactions for processed and non-processed USDA foods.

**J.** The District shall retain control and title to all USDA foods.

**K.** The FSMC must meet the general requirements for the storage and inventory management of donated foods in CFR 250.14(b). In accordance with 7CFR 250.52(a), the FSMC may store and inventory USDA foods together with foods that it has purchased commercially for the District's use. The food service management company will ensure that its system of inventory management will not result in the recipient agency being charged for donated foods.

**L.** The FSMC and the District agree to comply with Federal Regulations 7 CFR Part 250, Section 250.12(b)(3) which states that recipient agencies have and preserve a right to assert claims against other persons to whom donated foods are delivered for care, handling and distribution and Section 250.12(b)(4)

which states that recipient agencies will take action to obtain restitution in connection with claims for improper distribution, use or loss to donated foods.

**M.** Assurance that the procurement of processed end products on behalf of the recipient agency, as applicable will ensure compliance with the requirements in subpart C of 7 CFR Part 250 with the provisions of distributing or recipient agency processing agreements, and will ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value.

**N. USDA FOODS:**

- Any USDA Foods received for use by the SFA and made available to the vendor shall be utilized within the specified Term of this Contract in the SFA's food service operation for the preparation and service of meals and for other allowable uses in accordance with the Code of Federal Regulations, 7 CFR Part 250.
- The vendor shall accept and use USDA Foods in as large a quantity as may be efficiently utilized in the nonprofit food service subject to approval of the SFA.
- The vendor shall manage all USDA Foods to ensure the USDA Foods are utilized in the SFA's food service.
- The vendor shall utilize all USDA ground beef, ground pork, and processed end products received in the SFA's food service. Commercially purchased foods shall not be substituted for these foods.
- The vendor shall utilize all other USDA Foods, or substitute commercially purchased foods of the same generic identity, of US origin, and of equal or better quality than the USDA Foods as determined by the SFA, in the SFA's food service.
- The vendor shall credit the SFA's monthly bill/invoice the current market value of all USDA Foods received during each Contract Term as the USDA Foods are used in the SFA's food service. The vendor must credit the SFA for all USDA Foods received for use in the SFA's food service each Contract Term whether the USDA Foods have been used or not. Such credit shall be issued in full prior to the expiration of each Contract Term.
- Credit issued by the vendor to the SFA for USDA Foods received during each Contract Term and used in the SFA's food service shall be recorded on the monthly bill/invoice as a separate line item entry and shall be clearly identified and labeled. Attached to the invoice shall be a detailed list identifying each received USDA Foods item used in the SFA's food service and each USDA Foods item credit issued for unused USDA Foods, along with the current market value as issued by the Tennessee Department of Agriculture.

- The current market value of USDA Foods is based on the prices issued by the Tennessee Department of Agriculture in compliance with 7 CFR § 250.58(e).
- The SFA shall ensure the method and timing of crediting does not cause its cash resources to exceed limits established in 7 CFR § 210.9(b)(2).
- At the end of each Contract Term and upon expiration or termination of the Contract, reconciliation shall be conducted by the SFA to ensure and verify correct and proper credit has been received for the full value of all USDA Foods received by the vendor during each Contract Term for use in the SFA's food service.
- The SFA shall verify receipt of USDA Foods shipments through its electronic records or by contacting the Tennessee Department of Agriculture or processor as applicable.
- The SFA reserves the right to conduct USDA Foods credit audits throughout each Contract Term to ensure compliance with federal regulations 7 CFR Part 210 and Part 250.
- The vendor may store and inventory USDA Foods together with commercial foods purchased for use in the SFA's food service. The vendor must meet all storage and inventory management requirements outlined in 7 CFR Part 250. USDA ground beef, ground pork, and processed end products shall be stored in a manner that ensures usage in the SFA's food service.
- The vendor must accept liability for any negligence on its part that results in any loss, damage, out of condition, or improper use of USDA Foods not yet credited to the SFA, and shall credit the SFA either monthly or through a fiscal year-end reconciliation.
- The SFA and vendor shall consult and agree on end products to be produced from USDA Foods during each Contract Term. If the SFA and vendor cannot agree on end products, the vendor shall utilize the USDA Foods in the form furnished by the USDA.
- The SFA shall have processing contracts in place when a commercial facility processes or repackages USDA Foods. The vendor shall pay all related processing fees and costs. The SFA shall not be responsible for any costs associated with processing USDA Foods. The Tennessee Recipient Agency Processing Contract, Tennessee State Master Processing Contract, or National Processing Contract must be used as the basis for the processing agreement as determined by the Tennessee Department of Agriculture. The terms and conditions of the processing contract must comply with 7 CFR Part 250. In accordance with 7 CFR 250.51(a), the vendor must credit the SFA for the value of all USDA Foods received for use in the SFA's meal service in a school year or fiscal year (including both entitlement and bonus foods). This includes crediting for the value of USDA Foods contained in processed end products (per 6.19 below).

- The vendor shall not enter into subcontracts for further processing of USDA Foods.
- The vendor shall be responsible for all delivery, freight/handling, storage, and warehousing costs associated with USDA Foods, if applicable.
- If the vendor acts as an intermediary between a processor and the SFA, the vendor shall credit the SFA for the value of USDA Foods contained in the processed end products at the USDA Foods processing agreement value unless the processor is providing such credit directly to the SFA. Such credit shall be issued to the SFA on the monthly bill/invoice as a separate line item entry and shall be clearly identified and labeled.
- The vendor shall have records maintained and available to substantiate the receipt, use, storage, and inventory of USDA Foods. The vendor must submit to the SFA monthly inventory reports showing all transactions for processed and non-processed USDA Foods.
- The SFA, Tennessee Department of Agriculture, Comptroller General, and US Department of Agriculture, or their duly authorized representatives, may perform on-site reviews of the vendor's food service operation, including the review of records, to ensure compliance with the requirements of this Contract and federal regulations 7 CFR Part 210 and Part 250.
- The vendor shall return all unused USDA ground beef products, ground pork products, and processed end products to the SFA upon termination, expiration, or non-renewal of the Contract.
- At the discretion of the SFA, the vendor may be required to return other unused USDA Foods to the SFA upon termination, expiration, or non-renewal of the Contract.
- The SFA shall retain title to all USDA Foods provided to the vendor for use in the SFA's food service.
- The bid rate per meal must be calculated as if no USDA Foods were available.

#### **O. FOOD SPECIFICATIONS**

- All USDA Foods offered to the SFA and made available to the vendor are acceptable and should be utilized in as large a quantity as may be efficiently utilized.
- For all other food components, specifications shall be as follows:
  - Breads, bread alternates, and grains must be whole-grain rich. All breads and grains must be fresh (or frozen, if applicable) and must meet the minimum weight per serving as listed



on Exhibit C. If applicable, product should be in moisture-proof wrapping and pack-code date provided.

- All meat and poultry must have been inspected by the United States Department of Agriculture (USDA) and must be free from off color or odor.

Beef must be at least 80:20 lean to fat, preferably 85:15 lean to fat.

Poultry should be US Grade A when applicable and should meet the recommendations outlined in *Specifications for Poultry Products, A Guide for Food Service Operators* from the USDA.

For breaded and battered items, all flours must be enriched for breads/grains credit and breading/batter must not exceed 30 percent of the weight of the finished product.

For sausage patties, the maximum fat allowed is 50 percent by weight; industry standard of 38 to 42 percent fat preferred.

- All cured processed meats (bologna, frankfurters, luncheon meat, salami, others) shall be made from beef and/or poultry. No variety meats, fillers, extenders, non-fat milk solids, or cereal will be allowed. Meats must not show evidence of greening, streaking, or other discoloration.
- All cheese should be firm, compact, and free from gas holes; free of mold; free of undesirable flavor and odors; pasteurized when applicable; and preferably reduced or low-fat. All cheese should also have a bright, uniform, and attractive appearance; have a pleasing flavor; demonstrate satisfactory meltability; and contain proper moisture and salt content.
- All fish must have been inspected by the United States Department of Commerce (USDC) and meet minimum flesh and batter/breading requirements for a USDC Grade A product or a product packed under federal inspection (PUFI) by the USDC.
- All fresh fruits must be ripe and in good condition when delivered and must be ready for consumption per the USDA *Food Buying Guide*. At a minimum, fruit must meet the food distributors' second-quality level. Fruits should have characteristic color and good flavor and be well-shaped and free from scars and bruises. Size must produce a yield equal to or greater than the attached 21-day cycle menu requirements.
- All fresh vegetables must be ripe and in good condition when delivered and must be ready for consumption per the USDA *Food Buying Guide*. At a minimum, vegetables must meet the food distributors' second-quality level. Vegetables should have characteristic color

and good flavor, be well-shaped, and be free from discoloration, blemishes, and decay. Size must produce a yield equal to or greater than the attached 21-day cycle menu requirements.

- All canned vegetables must meet the food distributors' first-quality level (extra fancy and fancy) and canned fruits (standard) must meet the second-quality level. Vegetables should have characteristic color and good fresh flavor and be free from discoloration, blemishes, and decay.
- Eggs must be inspected and passed by the state or federal Department of Agriculture and used within 30 days of date on carton. Eggs should be grade A, uniform in size, clean, sound-shelled, and free of foreign odors or flavors.
- Sauces, such as gravy, spaghetti sauce, pizza sauce, etc., must be smooth and uniform in color with no foreign substance, flavor, odor, or off color.
- If applicable, the food production facility, manufacturing plant, and products must meet all sanitary and other requirements of the Food, Drug, and Cosmetic Act and other regulations that support the wholesomeness of products.
- Meals and food items must be stored and prepared under properly controlled temperatures and in accordance with all applicable health and sanitation regulations.
- All fruit juices must be 100 percent fruit juice.
- When the specification calls for "Brand Name or Equivalent," the brand name product is acceptable. Other products may be considered with proof that such products meet stated specifications and are deemed equivalent to the brand products in terms of quality, performance, and desired characteristics, as determined by the SFA.
- All food items must adhere to the sodium target levels in subsequent Contract Terms, if applicable, as required by the USDA *Nutrition Standards in the National School Lunch and School Breakfast Programs, Implementation Timeline for Final Rule* and/or other subsequent guidance issued by the USDA.
- Nutrition labels or manufacturer specifications must indicate zero grams of trans fat per serving for all foods.

- Fluid milk must be low-fat (1 percent milk fat or less, unflavored only) or fat-free (unflavored or flavored). Two choices must be offered daily as required by the SFA.

## **LICENSES, PERMITS AND TAXES**

FSMC shall obtain all federal, state and local licenses and permits required for District's Food Service Program and shall be responsible for all sales, use, excise, state and local income taxes and all other state and local taxes attributable to District's Food Service Program. The cost of all such licenses, permits and taxes, including an estimated amount for state income taxes based on the operating unit's income, shall be charged as District Costs.

In the event that determination is made by a government authority that any sales, purchases, payments, maintenance or use of inventory or property made to or by the FSMC under this Agreement, either in whole or in part, are subject to any sales, use, gross receipts or any similar tax constitute a Direct Cost and shall immediately be reimbursed by District to FSMC upon FSMC's demand therefore, notwithstanding the fact that this Agreement may have expired or been terminated for any reason by either party hereto prior to the date of such determination; further, in the event that such determination is made, the District shall pay such tax to the FSMC as a Direct Cost or, if applicable, shall assist the FSMC in collecting such tax at the point of sale.

## **INSURANCE**

FSMC agrees to provide a certificate of insurance to the Board of Education showing that FSMC has Contractor's Public Liability, Property Damage and Worker's Compensation Insurance providing and including full coverage for the Board of Education and its agents and employees. The minimum limits of bodily injury are \$5,000,000 and \$10,000,000. Property damage limit is \$100,000. Certificates of Insurance shall contain a ten-day cancellation and/or modification clause with requirements of a written notice by the insurance company to the Board of Education. The successful contractor shall indemnify and hold harmless the Board of Education, and its employees through appropriate insurance (evidence of same will be submitted).

District and FSMC waive any and all right of recovery from each other for property damage, or loss of use thereof, howsoever occurring. This waiver shall include, but not be limited to, losses covered by policies of fire, extended coverage, boiler explosion and sprinkler leakage. This waiver shall not apply to claims for personal injury or death.

## INDEMNITY

The FSMC hereby assumes the entire responsibility and liability in and for any and all damages and/or injuries of any kind or nature whatsoever, to all persons, whether employees or otherwise, and to property growing out of or resulting from the operation of the cafeteria as herein before set forth, and provided in this contract, and for any and all damages and/or injuries of any kind which shall occur in connection therewith and said Food Service Management Company agrees to indemnify, defend and save harmless the Board, its agents, servants, and employees from and against any and all loss, expenses including legal fees and disbursements, damages or injuries occurring in connection with, or resulting from the use by the Food Service Management Company, its agents or employees, or of equipment, stock, appliance, implements, works, tools or machinery or any other property owned, rented, borrowed by or assigned to the aforesaid Board of Education arising under any law whatsoever, which may be in effect in the locality in which the work is situated or otherwise.

## FINANCIAL TERMS

**A. District's Food Service Program:** FSMC shall manage District's Food Service Program for the benefit to District's students, faculty and staff. All Federal and State reimbursement and cash receipts shall be utilized solely in District's Food Service Program or for the improvement of such Food Service Program. All cash receipts shall be turned over to the District for deposit in District's food service account. District represents and warrants that the financial and operating information provided by the District to the FSMC is true, complete and correct and presents fairly and accurately all items of revenue and expense of District's Food Service Program to be managed by FSMC herein in conformity with generally accepted accounting principles consistent with that of the preceding years and applied in accordance with past practice.

**B. District's Responsibilities:** All facilities, equipment and services to be provided by District shall be at District's expense.

**C. Payment to FSMC:** FSMC shall be reimbursed for all Reimbursable Costs incurred by FSMC in providing services pursuant to this Agreement including an allowance for its General and Administrative Expense of \$\_\_\_\_\_ per month for 10 months. In addition, FSMC shall receive a management fee of \$\_\_\_\_\_ per meal served (the "Management Fee"). The total of such Reimbursable Costs and Management Fee shall be referred to as "District's Financial Obligation." Labor costs for special functions conducted outside the non-profit school Food Service should not be double billed for program meals and special function meals.

**D. Equivalent Meal Count:** For the purpose of computing the foregoing meal count, the number of National School Lunch Program and School Breakfast Program meals served to children shall be determined by actual count. Cash receipts, other than sales of National School Lunch Program and School Breakfast Program meals served to children, and Cash Equivalents may be divided by \$\_\_\_\_\_ to

arrive at an equivalent meal count for school year 2015-16. For 2015-16 the free reimbursement rate has not been published. Once it is published the total Cash Equivalent value will be computed and that value will be used for billing purposes during the school year. For each year of contract renewal thereafter, the Cash Equivalents shall be divided by the free reimbursement rate plus the current value of commodities for the current year of the Agreement.

**E. Number of Meals:** FSMC's allowance for its General and Administrative Expense and Management Fee is based on an anticipated service per school year of 210000 National School Lunch Program and School Breakfast Program meals and Cash Equivalents. In the event that existing conditions at District change (including by way of example, student population, number of service days, type and number of schools, personnel practices, hours, length or type of meal service or any other conditions beyond the control of FSMC), so that such minimum number of meals is not achieved, District and FSMC agree to renegotiate the Financial Terms set forth herein. Should unscheduled events such as strikes, lay-offs, excessive snow or emergency closings occur, the relationship of participation volume to cost and contract charges shall be resolved on a pro-rata basis. Furthermore, the projected number of meals to be served by FSMC in the Current Year is based on the meal counts provided by the District to FSMC as part of the request for proposal process. District represents and warrants that such meal count data is true and correct.

**F. Renegotiation:** FSMC's allowance for its General and Administrative Expense and Management Fee may be increased on an annual basis but it cannot be increased by an amount greater than the Yearly Percentage Change in the Consumer Price Index, as published by the US Department of Labor, Bureau of Labor Statistics (1982- 100% base period, Food Eaten Away from Home or a comparable index if that index is not available. Such increase shall be effective on a prospective basis of each anniversary date of this Agreement. The Yearly Percentage Change in the CPI shall be defined as the percentage change in the CPI during the 12-month period preceding each anniversary date hereof.

## **ACCOUNTING**

**A. Initial Four-Week Payment:** Prior to the commencement of operations hereunder, FSMC shall submit to District an invoice for an amount equal to an estimate of District's Financial Obligation for one four-week Accounting Period.

Within 20 days prior to the commencement date of each school year thereafter, FSMC will submit to District an invoice in an amount equal to the increase of a credit memo for the decrease, if any, in such estimated Financial Obligation from the amount previously billed.

The foregoing payments shall be used by the FSMC in making purchases as authorized agent of District. To the extent that any overage exists, these payments will be credited to District at the time of the last billing made by the FSMC to District at the termination of this Agreement.

**B. Accounting Period Billing:** Within seven days after the end of each Accounting Period, FSMC will submit to District an invoice for District's Financial obligation.

**C. Accounting Period Operating Statement and Notification of Billing Adjustment:** Within 30 days after the end of each Accounting Period, FSMC shall submit to District an operating statement for such period. Any difference between the amount of the invoice previously submitted for the Accounting Period (as referred to in Paragraph 17.8) and the amount shown on the operating statement as owing to FSMC for the Accounting Period will be reflected in the subsequent Accounting Period billing.

**D. Payment Terms:** All invoices submitted by FSMC to District shall be paid within 10 days of the invoice date. In the event invoices are not paid within 25 days of the invoice date, interest shall be charged on each invoice at the rate of 125% of the Prime Rate (as hereinafter defined) per annum on the unpaid balance (or in the event local law prohibits the charge of such rate, interest will be charge at the maximum legal rate permitted), computed from the invoice date until the date paid. The Prime Rate shall be the rate published in The Wall Street Journal as the base rate on corporate loans posted by at least 75% of the 30 largest U.S. banks, such rate to be adjusted at the end of each Accounting Period. District shall not utilize National School Lunch Program funds to pay any interest so charged.

The right of FSMC to charge interest for late payment shall not be construed as a waiver of FSMC's right to receive payment of invoices within 10 days of the invoice date. In the event that FSMC incurs legal expense in enforcing its right to receive timely payment of invoices, District agrees to pay FSMC's reasonable attorney's fees and other costs. School Food Service Funds cannot be used to pay late charges. Late charges MUST be paid from the General Purpose Fund.

**E. Current Year Reconciliation:** Within 30 days following the end of the Current Year, FSMC shall submit to District an operating statement for the Current Year, FSMC shall submit to District an operating statement for the Current Year and shall pay to District the amount, if any, due District pursuant to Paragraph 16.F, herein.

## REMEDIES

**A.** Neither party shall be responsible to the other for any losses resulting from the failure to perform any terms or provisions of this Agreement, except for payments of monies owed, if the party's failure to perform is attributable to war, riot, or other disorder; strike or other work stoppage; fire; flood; or any other act not within the control of the party whose performance is interfered with, and which, by reasonable diligence, such party is unable to prevent. Any such occurrence shall be referred to as a "Force Majeure".

In the event of a Force Majeure which interferes with the operation of District's Food Service Program, upon request, FSMC will take all reasonable steps to continue to provide service upon terms and conditions

satisfactory to FSMC and District and any guarantee provided herein shall be adjusted to account for lost gross receipts and any increased food service costs incurred.

**B.** If, at any time, FSMC or District shall make a reasonable decision that adequate funding from federal, state or local sources shall not be available to enable District to carry out its financial obligation to FSMC, then FSMC or District shall have the option to terminate this Agreement by giving 10 days' written notice to the other party.

**C.** In the event of a breach of this Agreement by either district or FSMC, the non-breaching party shall give the breaching party written notice specifying the default, and the breaching party shall have 30 days within which to cure the default. If the default is not cured within that time, the non-breaching party shall have the right to then terminate this Agreement by giving the breaching party 30 days' notice of its intention to terminate.

**D.** Notwithstanding any other provision of this Agreement, both parties shall be deemed to have retained any and all administrative, contractual and legal rights and remedies to which they may be entitled.

#### **CONFIDENTIAL INFORMATION AND PROPRIETARY MATERIALS**

**A. Confidential Information:** All financial, statistical, operating, marketing and personnel materials and information, including, but not limited to, manuals, recipes, menus and meal plans, and computer programs relative to or utilized in FSMC's business or the business of any affiliate of FSMC (collectively, "Confidential Information"), shall be the property of the FSMC and shall be confidential. District shall keep such Confidential Information confidential during and subsequent to the term of this Agreement and shall so instruct to its agents, employees, and independent contractors, and the use of such Confidential Information by District in any manner shall not affect FSMC's ownership or the confidential nature of such Confidential Information. District shall not photocopy or otherwise duplicate any such Confidential Information without the prior written consent of FSMC.

**B. Proprietary Materials:** Districts agrees that all computer software programs, signage and marketing and promotional literature and material (collectively referred to as "Proprietary Materials") used by FSMC on District's premises in connection with the food services provided by the FSMC under this Agreement shall remain the property of FSMC. Upon termination of this Agreement, all use of trademarks, service marks, and logos shall be discontinued, and District shall immediately return all Proprietary Materials.

- Proprietary Materials shall include any patents developed and/or awarded for any discovery or invention in the course or under such contract.
- Proprietary Materials shall also include any copyrights and rights in data developed and/or secured in the course or under such contract.

If funds from the non-profit School Foodservice account are used to develop programs or materials, those programs and materials cannot be proprietary. To be clear, items developed with these funds cannot become part of the contractors' property.

Rights to Invention 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 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 Organization and Small Business Firms Under Governmental Grants, Contracts and Cooperative Agreement," and any implementing regulations issued by the awarding agencies.

**C. District Information:** FSMC acknowledges that during the course of this Agreement, FSMC shall have access to business systems, techniques and methods of operation developed at great expense by District which FSMC recognizes to be unique assets of District's business. FSMC agrees to keep such information confidential and shall not disclose such information directly or indirectly during or subsequent to the term of this Agreement.

## **TERM AND TERMINATION**

1. This Agreement will be effective for a one-year period commencing **July 20, 2015 through June 30, 2016** with option to renew annually for a period not to exceed four additional years. Extensions or renewals of the contract, if applicable, are contingent upon the fulfillment of all contract provisions relating to donated foods.
2. This Agreement shall remain in effect throughout its term unless the parties mutually agree, in a written document signed by both parties and attached to the Agreement, to amend, add, or delete any article or exhibit.
3. This Agreement can be terminated by either the District or FSMC with a 60-day notification to the resident manager. The FSMC shall not incur new obligations after the effective date of termination and shall cancel as many outstanding obligations as possible.
4. The District may terminate the Agreement immediately without further cost or liability in the event of the occurrence of any of the following: insolvency of the successful FSMC; liquidation or dissolution of the successful FSMC; the institution of any voluntary or involuntary bankruptcy proceeding by or against the successful FSMC; assignment by the successful FSMC for the benefit of creditors; or the appointment of a receiver or trustee to manage the property of the FSMC.
5. The District, in its discretion, may terminate the Agreement in whole or in part at any time, whenever it is determined that the successful FSMC has failed to comply with or breached one or more of the terms and



conditions of the Agreement or specifications incorporation therein and the successful FSMC has failed to correct such failure or breach to the District's satisfaction within a period of 15 days after receiving written notice thereof from the District. In the event the partial or total termination of the Agreement, it is hereby agreed that the District shall only be obligation to pay in accordance with the terms of the Agreement for services which have been accepted by the District.

6. In the event that the Board of Education fails to approve the appropriation of funds sufficient to provide for the District's obligations under the Agreement, or if the funds are not appropriated due to federal, state or local action, the District shall have the right to terminate the Agreement by providing written notice to the successful FSMC and the District will thereby be relieved of all further obligations under the Agreement.
7. Upon termination of the Agreement, the FSMC shall vacate all parts of the premises occupied by the FSMC. Premises are to be in the same condition as made available to the FSMC, with the exception of reasonable wear and tear, fire and other casualty loss.
8. The District, in the event that FSMC is not able to perform under this Agreement due to event beyond the reasonable control of the FSMC (e.g. strike, labor or material shortage, fire, flood or other casualty or Acts of God) may, at its option, terminate this Agreement and assume control of the facilities, equipment, food supplies, expendables, etc., necessary for the continued operation of the District's non-profit school food service program.
9. Neither the FSMC nor the District shall be responsible for any resulting losses if the fulfillment of the Agreement is delayed or prevented by wars, acts of public enemies, strikes, fires, floods, Acts of God, or any other acts which could not have been prevented by the exercise of due diligence.
10. Failure of the FSMC to comply with and maintain all local and state sanitation requirements shall constitute a default of the Agreement by the FSMC and at the District's option may result in termination of the Agreement.
11. 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 USC 1908, must address administrative, contractual or legal remedies instances where contractors violate or breach contract terms and provide for such sanctions and penalties as appropriate.
12. 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.

## **DEBARMENT/SUSPENSION CERTIFICATE**

FSMC must sign a Debarment/Suspension Certification. This certification assures District that FSMC has not been debarred from entering into contracts with the federal government or any entity receiving federal funds or suspended from entering contracts during a time when FSMC is being investigated or a legal action is being taken to debar FSMC from contracting activities. The certification must be attached to the signed contract and kept on file at District. A copy of the certification must also be forwarded to the State Agency with a copy of the signed contract or addendum.

## **INDEPENDENT PRICE DETERMINATION CERTIFICATION**

**Certification:** FSMC must sign a Certificate of Independent Price Determination regarding pricing which conforms in substance with language in attached certificate of Independent Price Determination prototype. The certification must be attached to the signed contract kept on file at District. A copy of the certification must also be forwarded to the state with a copy of the signed contract or addendum.

## **LOBBYING**

**A. Certification:** FSMC must sign a Lobbying Certification regarding lobbying which conforms in substance with language in 7 CFR 3018. The certification must be attached to the signed contract and kept on file at District. A copy of the certification must also be forwarded to the state agency with a copy of the signed contract or addendum.

**B. Disclosure Form:** FSMC must disclose lobbying activities in connection with the Programs. The disclosure forms must be attached to the signed contract and kept on file at District. A copy of the disclosure form must also be forwarded to the state agency with a copy of the signed contract or addendum.

## **ENTIRE AGREEMENT AND AMENDMENTS**

This Agreement, along with the Request for Proposal documentation, represents the entire agreement between the parties and supersedes any and all prior agreements. All prior negotiations have been merged into this Agreement and there are no understandings, representation or agreements, oral or written, express or implied other than those set forth herein. The terms of this Agreement may not be changed, modified or amended except by a writing signed by both parties. Obligations of the parties set forth in this Agreement arising out of events occurring during the life of this Agreement shall survive the termination of this Agreement.

## **NOTICES**

All notices, consents, waivers or other communications which are required or permitted hereunder shall be sufficient if given in writing and delivered personally, or by sending a copy thereof by first class or express mail, postage prepaid, or by telegram (with messenger service specified), telex or courier service, charges prepaid, or by facsimile transmission (followed by the original) to the address (or to the telex, facsimile or telephone number), as follows (or to such other addressee or address as shall be set forth in a notice given in the same manner):

<b>To District:</b>	Germantown Municipal School District 6685 Poplar Avenue, Suite 202 Germantown, TN 38138
<b>To FSMC:</b>	FSMC Address

If such notice is sent by mail, telegraph or courier service, it shall be deemed to have given to the person entitled thereto when deposited in the United States mail or with a telegraph office or courier service for delivery to that person or, in the case of telex, when dispatched or, in the case of facsimile transmission when received.

## **WAIVER**

The failure of FSMC or District to exercise any right or remedy available under this Agreement upon the other party's breach of the terms, covenant or conditions of this Agreement or the failure to demand prompt performance of any obligation under this Agreement shall not be deemed a waiver of such right or remedy; of the requirement of punctual performance; or of any subsequent breach or default on the part of the other party.

## **SEVERABILITY**

If any provision of this Agreement or the application thereof to any person or circumstance is held invalid, the remainder of this Agreement, and the application of such provision to other persons or circumstances, shall not be affected thereby, and to this end the provisions of this Agreement are declared to be severable.

## **GENERAL RULES**

It will be strictly understood that the FSMC and any of the employees of the Food Service Department shall at no time bring upon the premises any alcoholic beverages for sale, gifts or for use in any manner whatsoever.

No tobacco or drugs in any form are to be sold or served by the FSMC or any of the Food Service employees on the premises and it is also agreed that all Food Service employees shall abstain from the use of tobacco and alcohol in any form whatsoever in the kitchen, storage rooms, eating rooms, or in any other room wherein the food is stored, prepared or served.

No food shall be prepared in the school Food Service facility other than food used for the School Food Service Program or special occasions approved by the Board of Education.

## **HEADINGS**

All paragraph headings contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and shall not affect in any way the meaning or interpretation of this Agreement.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be signed by their duly authorized representatives the day and year first above written.

**GERMANTOWN MUNICIPAL SCHOOL DISTRICT (“District”)**

**By:** \_\_\_\_\_

**Jason Manuel**  
**Superintendent**

**Food Service Management Company**

**By:** \_\_\_\_\_

**Authorized Signature**

**Title:** \_\_\_\_\_