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## Developing a Healthy Beverage Vending Agreement

A healthy beverage vending contract gives a school district the opportunity to control the array of products sold or advertised to students while generating much-needed revenue from the agreement. This fact sheet outlines key considerations for schools, including what to look for when soliciting a vendor, best practices to ensure a sound agreement, and ways for parents and other community members to get involved in the process.

### Beverage vs. Food Vending Agreements

Beverage vending agreements contain financial benefits that are not provided by food vending agreements, such as sponsorship fees or cash advances. That's because vendors who handle beverage contracts represent a single beverage company, selling and advertising only that company's brands—they can offer exclusive selling rights and more lucrative contracts. Vendors who service food machines, on the other hand, stock and sell products for multiple companies, so they don't offer exclusive selling rights.

*The percentage of overweight children and adolescents in the United States has nearly tripled over the past three decades.<sup>1</sup> Children's access to unhealthy foods is one factor contributing to this alarming trend, and limiting the availability of sugary drinks from school vending machines is one way to help promote students' health.*



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## Laws Regulating Beverage Sales at Schools

The first step in creating a strong beverage vending agreement is to review federal and state laws to see how they may affect the agreement. On the federal level, the U.S. Department of Agriculture (USDA) is authorized by the Healthy, Hunger-Free Kids Act of 2010 to issue healthy nutrition standards for “competitive foods,” foods and beverages that compete with lunches served under the USDA’s National School Lunch Program. The USDA is expected to issue proposed regulations in December 2011, and these changes will not be fully implemented until at least the 2013–2014 school year. In the interim, the USDA requires state agencies and schools to continue to establish rules or regulations to prohibit the sale of “foods of minimal nutritional value,”<sup>2</sup> including soda, chewing gum, and many candies,<sup>3</sup> in the food service areas during the lunch period.<sup>4</sup> The existing regulations permit state agencies and schools to enact further controls over these and other competitive foods.

Some states have already shown that strong standards can be a success. At least 35 states have laws regulating the sale of competitive foods at schools.<sup>5</sup> Several states specifically regulate which beverages may be sold in schools. Connecticut, for example, only permits the sale of milk, nondairy milk, 100% fruit and vegetable juice (with no added sugars), and water (with no added sugars or caffeine) in schools, and restricts portion sizes (other than water) to 12 ounces or less.<sup>6</sup> It is important to become familiar with your state’s laws to ensure your vending agreement conforms to their requirements.

## Selecting a Vendor: The Competitive Procurement Process

*Competitive procurement* refers to the process by which a school district awards contracts to vendors who can provide certain goods or services. It is intended to (1) ensure that all bidders are subject to fair and uniform criteria; (2) enhance competition among potential vendors to maximize the purchasing value of public funds; and (3) provide safeguards against favoring particular vendors.<sup>7</sup> Generally, states require competitive bidding for purchases over a certain dollar amount.

If a school uses any federal funds to procure food or equipment (including the purchase/rental and servicing of vending machines), it must follow federal rules for the way it awards contracts to vendors.<sup>8</sup> If a district does not use federal funds for its vending contracts, it must comply with state and local laws and policies.

A school district must ensure that the terms in the document it uses to solicit vendors (see “Soliciting a Bid: Two Options” at right) and the contract that results comply with state and local laws and policies, including the district’s wellness policies. The terms outlined in the solicitation will serve as the basis for the contract, so be sure to make the RFP or IFB as complete and detailed as possible.

A district’s solicitation should include:

- A technical description of product specifications (e.g., no beverages containing artificial sweeteners, flavorings, or coloring agents; no diet beverages; 100% juice drinks only; no sports drinks)
- A rate schedule (e.g., how much the vendor intends to charge per unit of goods sold, and how much of a commission the vendor will give the district for each unit sale)
- A “revenue enhancement contribution” formula to determine “best expected value” of the contract (e.g., a calculation determining how much cash or non-cash incentives the vendor will pay the district)
- Product delivery requirements and rules about product substitutions
- Commission payment schedules
- Financial reporting requirements
- Advertising guidelines or restrictions
- The duration of the contract



Photo by Lydia Daniller

## Soliciting a Bid: Two Options

State laws generally require either an “invitation for bid” (IFB) or a “request for proposal” (RFP) to obtain goods or services.

An **IFB** is primarily used when cost is the main consideration. A district publicly advertises its need for goods or general services, identifying its technical and contractual requirements and the evaluation criteria it will use in awarding the contract.<sup>9</sup> Bids are usually submitted under seal, and the district is required to accept the lowest bidder meeting the established specifications.

An **RFP** is usually used when a district must consider factors other than cost, such as experience and qualifications. Purchasing professional or otherwise specialized services typically calls for an RFP. Generally, an RFP process is less rigid than an IFB, permitting districts greater flexibility in how the solicitation is issued, evaluated, and accepted.

# Best Practices

In addition to complying with relevant state and local laws, the district should follow these best practices to ensure a sound vending agreement.

## Best Practice #1: Control Which Products Are Sold or Advertised

The district—not the vendor—should retain control over the following contract terms:

- The type of beverages sold, including the choice not to sell certain products such as soda, high-sugar juice drinks, diet sodas, or sports drinks
- The number and location of vending machines on school property
- The placement of the beverages in the vending machines (also called “slotting position”)
- The portion size of the beverages (for example, 12-ounce rather than 20-ounce portions)
- Advertising rights, including the decision to prohibit advertising of all kinds (for example, on the front of the vending machine or on the vending supply cups)

## Best Practice #2: Control How Products Are Sold

- Require that nutritious products (such as milk, 100% juice, and plain water) be priced lower than less- or non-nutritious options (such as sodas, diet sodas, sports drinks, or flavored waters)
- Require that commission rates paid for non-nutritious items not be disproportionately higher than the rates paid for nutritious items, since this could encourage schools to favor non-nutritious items
- Require that nutritious products be kept stocked as continuously as non-nutritious products
- Require that the contract state that the primary purpose of the agreement is to provide healthy beverages, and that the vendor’s failure to deliver those products is a material breach of contract
- Require that if the vendor stocks a machine with products that are not on the contract’s approved-product list, the vendor must pay predetermined liquidated damages for breaching the agreement

## Best Practice #3: Maximize Financial Benefit to the District

- Ensure that state standards, the standards contained in the district’s healthy vending policy, and, if relevant, the technical specifications for permitted beverages are contained in the competitive bidding documents
- Consolidate all vending operations at the district level, rather than negotiating contracts school by school
- Negotiate terms with the vendor for cash advances, commissions, and exclusive contract rights
- Require the vendor to provide accurate and timely financial reports
- Require the vendor to permit periodic audits of the vendor’s financial records related to the contract
- Require that the contract allow the district to terminate the contract for cause or convenience without incurring financial or other penalties
- Commit to no more than a five-year contract (if permitted by law) to maximize competition between vendors
- Ensure that the contract can be modified if new federal, state, or local laws affect the contract terms
- Ensure that all vending machines meet the highest standards of energy efficiency (to minimize energy costs)

## Glossary

*The following key terms appear frequently in vending agreements:*

### Cash advance / Sponsorship / Revenue enhancement

The payment a vendor can make to a district upon entering into a vending agreement. In a national study analyzing 120 school beverage contracts from 16 states, the cash advances vendors paid to school districts ranged in value from \$0 to \$79.37 per student per year.<sup>10</sup>

### Commission

The payment a vendor can make to a district as a percentage of the point-of-sale price. The study cited above found that commission rates varied according to the type of beverage and ranged from 12 to 58 percent of beverage sales; the average was 33 percent.<sup>11</sup>

### Exclusive contract

A contract in which the district agrees to use only that vendor's products. A district does not have to enter into an exclusive vending agreement, although its financial value is likely to be higher.

### Liquidated damages clause

A provision that determines in advance the amount of money a party must pay the other if it violates the agreement.

### Material breach

A violation of a contractual obligation by one party that is significant enough to relieve the other party from its duties under the agreement and allow the injured party the right to sue for damages (money).

### Term

The length of time the agreement lasts. State or local law may dictate the maximum length of a district contract.

*The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of ChangeLab Solutions. ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.*

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<sup>1</sup> Ogden et al. "Prevalence and trends in overweight among U.S. children and adolescents, 1999-2000." *Journal of the American Medical Association*, 288: 1728-32, 2002.

<sup>2</sup> 7 C.F.R. § 210.11 (1994).

<sup>3</sup> 7 C.F.R. pt. 210, Appendix B (1994).

<sup>4</sup> 7 C.F.R. § 210.11 (1994).

<sup>5</sup> Trust for America's Health. *Fas in Fat: How Obesity Threatens America's Future*. 2011, p. 44. Available at: [www.healthyamericans.org](http://www.healthyamericans.org).

<sup>6</sup> C.G.S.A. § 10-221q (2006).

<sup>7</sup> See, e.g., N.M.S.A. § 13-1-29 (1978); C.R.S.A. § 24-101-102.

<sup>8</sup> 7 C.F.R. § 210.21(a) (2007).

<sup>9</sup> 10 McQuillin Mun. Corp. § 29.44 (3rd ed.).

<sup>10</sup> Center for Science and the Public Interest & The Public Health Advocacy Institute. *Raw Deal: School Beverage Contracts Less Lucrative Than They Seem*. 2006, p. 8. Available at: [www.cspinet.org/beveragecontracts.pdf](http://www.cspinet.org/beveragecontracts.pdf).

<sup>11</sup> *Id.* at 9.

<sup>12</sup> 42 U.S.C. § 1751 (Child Nutrition and WIC Reauthorization Act of 2004).

## Community Involvement

Parents, students, and other community members may be involved in developing a healthy beverage vending agreement in a number of ways:

### Obtaining a copy of the district's existing beverage vending agreement.

School beverage contracts, once awarded, are public documents and may be obtained under your state's public records act. Schools may prefer requests made in writing that reference your state's public records law. For more information about public records laws, see the Reporters Committee for Freedom of the Press' Open Government Guide available at [www.rcfp.org/ogg](http://www.rcfp.org/ogg).

### Participating in the development of the school district's wellness policy.

Federal law requires all school districts to establish "local wellness policies" that set nutrition standards in schools.<sup>12</sup> Community members can help work to develop a wellness policy requiring that beverages sold in vending machines are limited to healthy choices.

### Making sure the document soliciting vendors is consistent with the district's wellness policy.

Community members can find out who is responsible for procurement in your district and confirm that individual has the nutrition standards. Then, once the bidding document is issued, they can check to see that it contains the proper standards. If it does not, they may report it to the superintendent or school district office.

### Ensuring the beverage contract is consistent with the district's wellness policies.

Most school boards must approve contracts over a certain value. Because states require school boards to meet publicly and take comments from the public, community members may attend the meetings and provide comment, particularly if the contract does not comply with the wellness standards.