

**(ATTACHMENT 12) ACTION ON THE AWARD OF PROFESSIONAL SERVICES CONTRACTS  
RELATED TO SCHOOL NUTRITION**

Purchase Requisition Number: CR042407  
Contract Number: B0001353  
Vendor Number: V026782

**MILWAUKEE BOARD OF SCHOOL DIRECTORS  
PROFESSIONAL SERVICES CONTRACT**

This Contract is being entered into this 1st day of February 2019, by and between **ES Foods, Inc.** (“Contractor”) and Milwaukee Board of School Directors (“MPS”). This Contract is the result of an open competitive procurement, specifically Request for Bid (RFB) 5768.

**1. SCOPE OF SERVICES**

Contractor shall specifically perform the following tasks:

As requested by MPS and in accordance with Section 4 of RFB 5768 (Scope of Request), which is hereby incorporated by reference, Contractor shall provide finished food products (“End Products”) made from USDA donated commodities for consumption in MPS schools which have been determined to be acceptable to the Department of Nutrition Services (“DNS”); Contractor has been approved by the United States Department of Agriculture’s (“USDA”) under a National Processing Agreement (“NPA”) and/or a processing agreement with the Wisconsin Department of Public Instruction (“DPI”),

Orders will be placed by MPS’s Prime Vendor for quantities as needed. MPS does not guarantee the amount that will be purchased.

RFB 5768 (including all exhibits and addenda) and Contractor’s Response to RFB 5768, are incorporated herein by reference. All minimum respondent qualifications of the RFB are material terms of this Contract with which Contractor must comply.

Contractor shall provide, at its own expense, all personnel required to perform the services under this Contract.

**2. TERM**

This Contract shall be in effect from July 1, 2019 through June 30, 2020 (“Initial Term”), with the possibility of four one-year extensions at the sole discretion of MPS. MPS will base its renewal decisions on the following performance metrics to be rated by MPS personnel. Contractor must attain a minimum score of 90 points to be eligible for contract renewal; however, 90 points does not guarantee renewal.

<b>Performance Metrics</b>	<b>Points</b>
Efficiency and Accuracy of Deliveries into Prime Vendor	30
Customer Service/Responsiveness to Problem Solving	20
Quality of Product	50
Total	100

If there is carry-over inventory at the end of the final year of the Contract, a modification will be issued to extend the Contract until October 31<sup>st</sup> of the following school year.

No work shall commence before a Contractor receives a fully executed Contract and has been given approval to proceed. Any work performed by the Contractor prior to obtaining a fully-executed Contract with approval to proceed shall not be compensated pursuant to this Contract. Any continuation of the Contract beyond this term must be set forth in writing and signed by the original signatories to the Contract.

**3. COMPENSATION**

There shall be no funds exchanged between MPS and the Contractor. Contractor shall be compensated directly by the Prime Vendor; MPS shall reimburse Prime Vendor for End Products. The Prime Vendor will apply one of the following pass-through methods to MPS for reimbursement: net off invoice (“NOI”) basis; fee-for-service (“FFS”) basis; or rebate, as specified in Contractor’s Response to RFB 5768 which is herein incorporated by reference.

**4. PRODUCT LIST**

Contractor shall process the food commodities awarded to it, which are listed below, into the End Product as indicated in Contractor’s Response to Food Specifications for Direct Diversion Form, Exhibit 1 of RFB 5768.

Category	Contractor	Product #	Product	2019-2020 Commodity Delivery Price into Prime Food Distributor	2019-2020 Commercial Price
Cheese Barrel Bulk 110242	ES Foods, Inc..	5915	Macaroni and Cheese Reduced Fat & Reduced Sodium Whole Grain Rich (Large Elbow)	\$39.25	\$49.92

**5. NON APPROPRIATION OF FUNDS**

This Contract is contingent upon the appropriation of sufficient funds by appropriate MPS officials. If funds are not appropriated, Contractor agrees to take back any commodities furnished under the Contract, terminate any services supplied to MPS under the Contract, and relieve MPS of any further obligations under the Contract.

**6. NON-DISCRIMINATION**

In the performance of work under this Contract, Contractor shall not discriminate in any way against any employee or applicant for employment on the basis of a person's sex, race, age, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, disability, or socio-economic status. This prohibition includes but is not limited to employment; promotions, demotions and transfers; recruitment; advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeships. Contractor is required to include a similar provision in all subcontracts to this Contract.

If MPS determines Contractor has violated this non-discrimination policy, MPS may terminate this Contract without liability for undelivered services or materials. MPS may also deem the Contractor ineligible to participate in future contracts with MPS.

**7. INDEMNITY**

Notwithstanding any references to the contrary, Contractor assumes full liability for all of its acts or omissions in the performance of this Contract, as well as the acts or omissions of its subcontractors. Contractor shall indemnify and hold harmless MPS, its agents, officers and employees against all liabilities, losses, judgments, decrees, costs, and expenses that may be claimed against MPS as a result of granting of this Contract to said Contractor, or that may result from the carelessness or neglect of said Contractor, its agents, or employees. If judgment is recovered against MPS in suits of law or equity for any reason, including by reason of the carelessness, negligence, or acts or omissions of the Contractor, against such persons, firms or corporations carrying out the provisions of the Contract for the Contractor, the Contractor assumes full liability for such judgment, not only as to any monetary award, but also as to the costs, attorneys' fees or other expenses resulting therefrom.

In accordance with applicable laws, MPS shall be responsible for defending and paying judgments on behalf of its officers, employees and agents while acting within the scope of their employment or agency for any claims that may arise out of MPS's negligence for acts, policies, or directives that affect the activities covered by this Contract.

**8. BACKGROUND CHECKS**

Contractor will conduct, at Contractor's expense, a criminal information records background check, (hereinafter referred to as "background check"), through the Wisconsin Department of Justice and other appropriate states' agencies, on all current and potential administrators, board members, officers, and employees who have, or who are anticipated to have, "direct, unsupervised contact" with MPS students in the performance of this Contract.

An out of state background check should be completed in the state(s) in which the individual resided for at least six months within the last two years and was eighteen years or older at the time.

Contractor will submit to MPS's Department of Employment Relations (DER), (via mail to Milwaukee Public Schools Background Checks, Attn: Department of Employment Relations, Room 116, 5225 West Vliet Street, Milwaukee, WI 53208, or via email at [564@milwaukee.k12.wi.us](mailto:564@milwaukee.k12.wi.us)), all completed background checks. Such records will be reviewed and MPS will notify Contractor of any individual(s) who, based on MPS standards, are unfit and should not have contact with MPS students. All determinations made by MPS with regards to whether an individual is fit to provide services pursuant to this Contract are made in MPS's sole discretion.

The following will each be a material failure to comply with the terms of this Contract and cause for immediate termination of this Contract by MPS: failure to perform background checks as outlined in this Section 7; failure to submit background checks to MPS as outlined in this Section 7; allowing services to be provided by an individual who has not be subjected to a background

check; and allowing services to be performed by an individual who has been determined to be unfit by MPS as outlined in this Section 7.

**9. INSURANCE AND PROOF OF FINANCIAL RESPONSIBILITY**

Contractor understands and agrees that financial responsibility for claims or damages to any person, or to Contractor's employees and agents, shall rest with the Contractor. Contractor and its subcontractors shall effect and maintain any insurance coverage, including, but not limited to, Workers' Compensation, Employers' Liability, General Liability, Contractual Liability, Automobile Liability and Umbrella Liability to support such financial obligations. The indemnification obligation, however, shall not be reduced in any way by existence or non-existence, limitation, amount or type of damages, compensation, or benefits payable under Workers' Compensation laws or other insurance provisions.

The minimum limits of insurance required of the Contractor by MPS shall be:

Workers' Compensation	Statutory Limits
Employers' Liability	\$100,000 per occurrence
General Liability	\$1,000,000 per occurrence/\$2,000,000 aggregate
Auto Liability	\$1,000,000 per occurrence
Umbrella (excess) Liability	\$1,000,000 per occurrence

The Milwaukee Board of School Directors shall be named as an additional insured under Contractor's and subcontractors' general liability insurance and umbrella liability insurance. Evidence of all required insurances of Contractor shall be submitted electronically to MPS via its third party vendor, EXIGIS Risk Management Services. Waivers and exceptions to the above limits will be in the sole discretion of MPS and shall be recorded in the EXIGIS system, which records are incorporated into this Contract by reference. The certificate of insurance or policies of insurance evidencing all coverages shall include a statement that MPS shall be afforded a thirty (30) day written notice of cancellation, non-renewal or material change by any of Contractor's insurers providing the coverages required by MPS for the duration of this Contract.

**10. SHIPPING /TAXES**

If goods are provided pursuant to this Contract, please note that MPS is exempt from Federal Excise and Wisconsin Sales Taxes. All vendor quotes, bids and invoices must include delivery FOB destination to the MPS location receiving the goods and freight must be prepaid. This means any freight, shipping, processing, handling or like charges must be part of a unit price. Any separate line items for freight, shipping, processing, handling or like charges listed on an invoice will be deleted and NOT PAID.

All textbook purchases shall be governed by the terms and conditions in the Milwaukee Board of School Directors' Textbook Contract, which provides that textbooks shipped to MPS or its schools must be done at no additional charge to MPS or its schools.

MPS reserves the right to reject any items that do not conform to the bid, quote or Purchase Order. All return freight charges associated with the rejected materials shall be borne by the vendor.

**11. IRREPARABLE HARM**

It is mutually agreed the breach of this Contract on Contractor's part shall result in irreparable and continuing damage to MPS for which money damages may not provide adequate relief. Therefore, the breach of this Contract on Contractor's part shall entitle MPS to both preliminary and permanent injunctive relief and money damages insofar as they can be determined under the circumstances.

**12. TERMINATION BY CONTRACTOR**

Contractor may, at its option, terminate this Contract upon the failure of MPS to pay any amount, which may become due hereunder for a period of sixty (60) days following submission of appropriate billing and supporting documentation. Upon said termination, Contractor shall be paid the compensation due for all services rendered through the date of termination including any retainage.

**13. TERMINATION BY MPS - BREACH BY CONTRACTOR**

If Contractor fails to fulfill its obligations under this Contract in a timely or proper manner, or violates any of its provisions, MPS shall thereupon have the right to terminate it by giving five (5) days written notice before the effective date of termination of the Contract, specifying the alleged violations, and effective date of termination. The Contract shall not be terminated if, upon receipt of the notice, Contractor promptly cures the alleged violation with five (5) days. In the event of termination, MPS will only be

liable for services rendered through the date of termination and not for the uncompleted portion, or for any materials or services purchased or paid for by Contractor for use in completing the Contract.

#### **14. TERMINATION BY MPS**

MPS further reserves the right to terminate this Contract at any time for any reason by giving Contractor written notice by Registered or Certified Mail of such termination. MPS will attempt to give Contractor 20 days' notice, but reserves the right to give immediate notice. In the event of said termination, Contractor shall reduce its activities hereunder, as mutually agreed to, upon receipt of said notice. Upon said termination, Contractor shall be paid for all services rendered through the date of termination, including any retainage. This section also applies should the Milwaukee Board of School Directors fail to appropriate additional monies required for the completion of the Contract.

#### **15. INDEPENDENT CONTRACTOR**

Contractor agrees and stipulates that in performing this Contract, it is acting as an Independent Contractor, and that no relationship of employer and employee, partnership or joint venture is created by this Contract. Contractor has exclusive control over work hours, location, and other details of such services, and MPS's sole interest is to ensure that said service shall be performed and rendered in a competent, safe, efficient, timely and satisfactory manner in accordance with the terms of this Contract.

Contractor has the sole obligation to provide for and pay any contribution or taxes required by federal, state or local authorities imposed on or measured by income. Contractor specifically covenant not to file any complaint, charge, or claim with any local, state or federal agency or court in which Contractor claims to be or to have been an employee of MPS during the period of time covered by this Contract and that if any such agency or court assumes jurisdiction of any complaint, charge or claim against MPS on Contractor's behalf, Contractor will request such agency or court to dismiss such matter. MPS shall not be charged any obligation or responsibility whatsoever of extending any fringe benefits which may be extended to MPS employees, including any insurance, or pension plans.

Contractor further agrees that MPS is not to be charged with the obligation or responsibility of extending any fringe benefits such as hospital, medical and life insurance, or pension plans which may be extended to employees of MPS from time-to-time and further agree to indemnify and hold harmless MPS and all its employees, officers and agents from any liability for personal injuries, including death, or for damage to or loss of personal property, which might occur as a result of the performance of the services provided for under this Contract.

#### **16. ASSIGNMENT LIMITATION**

This Contract shall be binding upon and inure to the benefit of the parties and their successors and assigns; provided, however, that neither party shall assign its obligations hereunder without the prior written consent of the other.

#### **17. PROHIBITED PRACTICES**

- A. Contractor during the period of this Contract shall not hire, retain or use for compensation any member, officer, or employee of MPS to perform services under this Contract, or any other person who, to the knowledge of Contractor, has a conflict of interest.
- B. Contractor hereby attests it is familiar with MPS's Code of Ethics, providing in pertinent part, "[a]n employee of Milwaukee Public Schools may not accept any gift or gratuity in excess of \$25.00 annually from any person, persons, group or any firm which does business with or is attempting to do business with MPS."
- C. No person may enter into this Contract for services that the MPS employee would otherwise perform as an employee.
- D. No current or former MPS employee may perform services on a professional services contract without the prior written consent of the MPS Chief Human Capital Officer or his/her designee.
- E. If the Contract is for apparel for \$5,000.00 or more, the Contractor agrees to provide only items manufactured by responsible manufacturers. Contractor is required to include a similar provision in all subcontracts to this Contract.

#### **18. LIVING WAGE REQUIREMENT**

Contractor shall comply with, and ensure its subcontractors performing work under this Contract comply with, Milwaukee Board of School Directors' Administrative Policy 3.09(17), which requires that employees be paid a "living wage."

**19. NOTICES**

Notices to either party provided for in this Contract shall be sufficient if sent by Certified or Registered mail, postage prepaid, addressed to the signatories on this Contract, or to their designees.

**20. WAIVER**

The waiver or failure of either Party to exercise in any respect any rights provided for in this Contract shall not be deemed a waiver of any further right under this Contract.

**21. INTEGRATION / SEVERABILITY**

This Contract and its exhibits and addenda and Contractor's Response to RFB 5768, as amended, constitute the entire Contract among the Parties with respect to the subject matter hereof and supersede all prior proposals, negotiations, conversations, discussions and Contracts among the Parties concerning the subject matter hereof. No amendment or modification of any provision of this Contract shall be effective unless the same shall be in writing and signed by both Parties.

The District shall not be bound by any terms and conditions included in of Contractor's packaging, service catalog, brochure, technical data sheet or other document which attempts to impose any conditions at variance with or in addition to the terms and conditions contained herein.

If any term or provision of this Contract should be declared invalid by a court of competent jurisdiction or by operation of law, the remaining terms and provisions of this Contract shall be interpreted as if such invalid Contracts or covenants were not contained herein.

**22. CHOICE OF LAW & FORUM**

The state courts of Wisconsin shall be the sole forum for all disputes arising of this Contract. The validity, construction, enforcement and effect of this Contract shall be governed solely by the laws of the State of Wisconsin.

**23. TIMING**

Time is of the essence in this Contract.

**24. CERTIFICATION REGARDING DEBARMENT OR SUSPENSION**

Contractor certifies that neither Contractor or its principals; its subcontractors or their principals; the sub-recipients (if applicable) or their principals are suspended, debarred, proposed for debarment, voluntarily excluded from covered transactions, or otherwise disqualified by any federal department or agency from doing business with the Federal Government pursuant to Executive Orders 12549 and 12689. Contractor specifically covenants that neither the Contractor or its principals, its sub-contractors or their principals, or the sub-recipients (if applicable) or their principals are included on the Excluded Parties List System ("EPLS") maintained by the General Services Administration ("GSA").

**25. FORCE MAJEURE**

MPS will not be liable to pay Contractor for any work that the Contractor is unable to perform due to act of God, riot, war, civil unrest, flood, earthquake, outbreak of contagious disease or other cause beyond MPS's reasonable control (including any mechanical, electronic, or communications failure, but excluding failure caused by a party's financial condition or negligence).

**26. STUDENT DATA**

Contractor acknowledges that student data is protected by both federal and state law. *See* Wis. Stat. § 118.125; 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.1 *et seq.* If MPS determines that Contractor has disclosed any student record information in violation of either federal or state law, without prejudice to any other rights or remedies the MPS may have, MPS shall be entitled to immediately terminate this and every other existing Contract without further liability. Moreover, MPS may bar Contractor from future MPS contracts for varying periods up to and including permanent debarment.

**27. NON-DISCLOSURE**

Absent prior written consent of the person listed in Section 3 or his/her designee, Contractor shall not: (1) disclose, publish, or disseminate any information, not a matter of public record, that is received by reason of this Contract, regardless of whether the Contractor is or is not under contract at the time of the disclosure; or (2) disclose, publish, or disseminate any information developed for MPS under this Contract. Contractor agrees to take all reasonable precautions to prevent any unauthorized use, disclosure, publication, or dissemination of the same information.

All information and any derivatives thereof, whether created by MPS or Contractor under this Contract remains the property of MPS and no license or other rights to such information is granted or implied hereby. For purposes of this Contract, "derivatives" shall mean: (i) for copyrightable or copyrighted material, any translation, abridgment, revision, or other form in which an existing work may be recast, transformed, or adapted; and (ii) for patentable or patented material, any improvement thereon.

Within ten business days of the earlier of receipt of MPS' written or oral request, or final payment, Contractor will return all documents, records, and copies thereof it obtained during the development of the work product covered by this Contract.

#### **28. MPS LOGO/PUBLICITY**

No Contractor shall use the MPS Logo in its literature or issue a press release about the subject of this Contract without prior written notice to and written approval of MPS's Executive Director of Communications & Outreach.

#### **29. ORDER OF PRIORITY**

In the event of a conflict among the documents constituting this Contract, the order of priority to resolve the conflict shall be: 1) this Contract; 2) RFB 5768 (including all exhibits and addenda); and 3) Contractor's Response to RFB 5768, as amended.

#### **30. PUBLIC RECORDS**

Both parties understand that the Board is bound by the Wisconsin Public Records Law, and as such, all of the terms of this Contract are subject to and conditioned on the provisions of Wis. Stat. § 19.21, *et seq.* Contractor acknowledges that it is obligated to assist the Board in retaining and producing records that are subject to Wisconsin Public Records Law, and that the failure to do so shall constitute a material breach of this Contract, and that the Contractor must defend and hold the Board harmless from liability under the law. Except as otherwise authorized, those records shall be maintained for a period of seven years after receipt of final payment under this Contract.

#### **31. CONTRACT COMPLIANCE REQUIREMENT**

The HUB requirement on this Contract is 0%. The student engagement requirement of this Contract is 0 hours. The Career Education requirement for this Contract is 0 hours. Failure to achieve these requirements may result in the application of some or all of the sanctions set forth in Administrative Policy 3.10, which is hereby incorporated by reference.

#### **32. STATE AND FEDERALLY REQUIRED CONTRACTUAL PROVISIONS**

Contractor must have obtained, and will continue to maintain during the entire term of the Contract, all permits, approvals or licenses necessary for lawful performance of its obligations under the Contract. In addition, Contractor is responsible to abide by all applicable Federal and State laws and policies of the DPI and State and Local boards of education, as applicable, when providing services under the Contract.

#### **33. LIQUIDATED DAMAGES**

Contractor acknowledges that damages will be incurred by MPS, in the amount of \$1,000.00 per working day, not to exceed one-half of the total of the contract, for every day past the agreed upon scheduled delivery dates. Contractor agrees that MPS shall have the right to liquidate such damages through deductions from Contractor's invoices/statements.

#### **34. RECORDKEEPING**

Any and all documents, books, records, invoices, and/or quotations of schools' purchases shall be made available, upon demand, in an easily accessible manner for a period of at least three (3) years from the end of the Contract term (including renewals) to which they pertain and after all other pending matters are closed, for audit, examination, excerpts and transcriptions by MPS, State, and Federal representatives and auditors in accordance with federal regulations. Contractor must ensure that any such records held by a subcontractor are likewise subject to these provisions.

#### **35. CLEAN AIR ACT AND ENERGY POLICY AND CONSERVATION ACT**

Contractor shall comply with Section 306 of the Clean Air Act (42 USC 1857(h)), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15), as applicable, as well as the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871, and any related state energy laws, as applicable. Contractor shall report all violations to MPS and to the relevant federal or state agency as appropriate.

#### **36. BUY AMERICAN/DOMESTIC COMMODITY OR PRODUCT**

Classified as an Agricultural commodity produced in the United States (US) or processed in the US substantially (at least 51%)

using agricultural commodities produced in the US. Make sure all products shall conform to Federal and State regulations and requirements in the National School Lunch (NSLP) and Breakfast Program (SBP).

**37. FOOD LAW**

Contractor shall operate in accordance with all applicable laws, ordinances, regulations and rules of Federal, State and local authorities, including but not necessarily restricted to a Hazard Analysis and Critical Control Point (HACCP) plan. MPS may inspect Contractor's facilities and vehicles.

**38. FOOD RECALL**

Contractor shall comply with all Federal, State and local mandates regarding the identification and recall of foods from the commercial and consumer marketplace. Contractor shall have a process in place to effectively respond to a food recall; the process must include accurate and timely communications to MPS and assurance that unsafe products are identified and removed from School sites in an expedient, effective and efficient manner. Contractor shall maintain all paperwork required for immediate and proper notification of recalls for full and split cases.

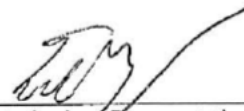
**39. BIOSECURITY**

Contractor must have a written policy regarding biosecurity and the food supply, in accordance with the Bioterrorism Act 2002 under the US Department of Health and Human Services, Food and Drug Administration and under the USDA, Food Safety and Inspection Service.

IN WITNESS WHEREOF, the parties here to have executed this Contract on the day, month and year first above written.

CONTRACTOR (Vendor #: V026782)


MILWAUKEE BOARD OF SCHOOL DIRECTORS

By:   
Authorized Representative


By:   
Adria D. Maddaleni, J.D., Director  
Procurement and Risk Management

Date: 3/25/19  
ES Foods, Inc.  
20 Crossways Park N  
Woodbury, NY 11797  
(516) 682-5494

Date: 3/28/19

By:   
Keith P. Posley, Ed.D.,  
Superintendent of Schools

Date: 4-4-19

SSN / FEIN:   
Budget Code: 000-0-0-000-BL-ECTS

By:   
Mark A. Sain, President  
Milwaukee Board of School Directors

Date: 4-9-19

Purchase Requisition Number: CR042407  
Contract Number: B0001353  
Vendor Number: V026782

Reviewed by Risk Management:

By: 

Date: 1-17-20