

SCHOOL FOOD SERVICE AGREEMENT

BETWEEN

TIMBERLANE SCHOOL DISTRICT  
AND  
WHITSONS NEW ENGLAND, INC.

SCHOOL YEAR 2012-2013

WHITSONS  
RECEIVED

AUG 28 2012

LEGAL DEPT.

ARTICLE I  
INTRODUCTION

- 1.1 Date of and Parties to the Agreement. This agreement, dated as of August 22, 2012, is between Timberlane Regional School District, hereafter called the School Food Authority (“SFA”), and Whitsons New England, Inc. (the “FSMC”).
- 1.2 Purpose of Agreement. This agreement sets forth the terms and conditions upon which the SFA retains the FSMC to manage and operate the SFA’s food service for the SFA’s students, employees, and visitors.
- 1.3 Duration of Contract. The initial term of this agreement commences on August 22, 2012, and continues until June 30, 2013, unless terminated by either Party as hereinafter provided. The agreement is subject to four (4) additional one-year renewals upon the written consent of both parties. In the event of a renewal, the Administrative Fee and the Management Fee shall be adjusted annually by a percentage equal to at least the minimum percentage increase in the most recently published Consumer Price Index Food Away From Home, Northeast Region, (“CPI”) over the previous year.

ARTICLE II  
RELATIONSHIP OF THE PARTIES

- 2.1 Independent Contractor. The FSMC shall be an independent contractor and shall retain control over its employees and agents. Nothing in this Agreement shall be deemed to create a partnership, agency, joint venture or landlord-tenant relationship.
- 2.2 FSMC Responsibilities.
  - A. The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement; make all records available to the SFA upon request; and retain all records for a period of three (3) years after the SFA submits the final Claim for Reimbursement for the fiscal year for inspection and audit by representatives of the SFA, State Agency (SA), United States Department of Agriculture (USDA) and the State Comptroller General, at any reasonable time and place. In instances where audit findings have not been resolved, the records must be retained beyond the 3-year period until resolution of the issues raised by the audit. **[Recordkeeping, as referenced in 7 CFR Part 3016.42 and Part 3019.53 and § 210.16(c)(1)]**
  - B. The FSMC shall to the maximum extent possible, utilize USDA donated foods made available by the SFA solely for the purpose of providing benefits for the SFA’s food service operation. **[as referenced in 7 CFR § 210.16(a)(6)]**
  - C. The FSMC shall have State and/or local health certification for any facility outside the school in which it proposes to prepare meals and the FSMC shall maintain this health certification for the duration of the contract. The FSMC must meet all applicable State

and local health regulations in preparing and serving meals at the SFA facility. **[as referenced in 7 CFR § 210.16(c)(2)]**

- D. The FSMC shall prepare and serve a variety of appetizing, high quality, wholesome, and nutritious meals and a la carte items for the SFA's students, employees, and visitors in accordance with the terms and conditions of this agreement. The FSMC agrees that it will perform the work described in this agreement in full compliance with all applicable laws, rules, and regulations adopted or promulgated by any federal or state regulatory body or governmental agency.
- E. The FSMC agrees to meet all requirements and performance standards that may be specified by rule or regulation by any administrative officials or bodies charged with enforcement of any state or federal laws on the subject matter of this agreement.
- F. The FSMC agrees to assume full responsibility for the payment of all contributions, assessments, both state and federal, including, but not limited to, wages, pension benefits, federal, state and local employment taxes, unemployment taxes, social security, and worker's compensation costs, as to all employees engaged by it in the performance of this agreement.
- G. The FSMC agrees to furnish the SFA, upon request, a certificate or other evidence of compliance with state or federal laws regarding contributions, taxes, and assessments on payrolls.

### 2.3 SFA - Responsibilities.

The SFA shall:

- A. Ensure that the food service operation is in conformance with the school food authority's agreement under the Program **[as referenced in 7 CFR § 210.16(a)(2)]**
- B. Monitor the food service operation through periodic on-site visits to ensure the food service is in conformance with program regulations **[as referenced in 7 CFR § 210.16(a)(3)]**
- C. Retain control of the quality, extent, and general nature of its food service and the prices to be charged for meals **[as referenced in 7 CFR § 210.16(a)(4)]**
- D. Retain signature authority on the State agency-School Food Authority agreement, free and reduced price policy statement and Claims for Reimbursement **[as referenced in 7 CFR § 210.16(a)(5)]**
- E. Retain title to all USDA donated foods; and ensure that all USDA donated foods made available to the FSMC, including processed USDA donated foods, accrue only to the benefit of the school food authority's nonprofit school food service and are fully

utilized therein. All refunds and rebates received from processors must be retained by the SFA **[as referenced in 7 CFR § 210.16(a)(6)]**

- F. Maintain all applicable health certification and assure that all State and local regulations are being met by the food service management company preparing or serving meals at a school food authority facility **[as referenced in 7 CFR § 210.16(a)(7)]**
- G. Establish and maintain an advisory board composed of parents, teachers, and students to assist in menu planning **[as referenced in 7 CFR § 210.16(a)(8)]**
- H. Make reasonable regulations with regard to all matters under its supervision and control, and the FSMC shall comply with them as soon as reasonably possible after proper notification is given;
- I. Retain control of the nonprofit school food service account and overall financial responsibility for the nonprofit food service operation and retain control for establishment of all prices, including price adjustments, for meals served under the nonprofit school food service account, e.g., pricing for reimbursable meals, a la carte service including vending machines, and adult meals; **[as referenced in 7 CFR 210.16(a)(4)]**
- J. Retain signature authority and be responsible for all contractual agreements entered into in connection with the school nutrition program. **[as referenced in 7 CFR § 210.21];**
- K. Ensure resolution of program review and audit findings. **[as referenced in 7 CFR § 210.9(b)(17)].**
- L. The FSMC shall adhere to the 21-day cycle menu that was provided in the RFP or in the FSMC's proposal. **[as referenced in 7 CFR § 210.16 (b)(1)]**
- M. Provide detailed specifications for each food component or menu item specified in 7 CFR Part 210, and include these specifications in the IFB or RFP. **[as referenced in 7 CFR § 210.16(c)(3)]**
- N. Maintain applicable health certification and be assured that the FSMC is meeting all state and local regulations in preparing or serving meals at any location other than the facilities. **[as referenced in 7 CFR § 210.16(a)(7)]**
- O. Develop, distribute, and collect the parent letter and application for free and reduced price meals. **[as referenced in 7 CFR § 245.6]**
- P. Determine eligibility and verify applications for free and reduced price meals benefits and will conduct any hearings related to such determinations. **[as referenced in 7 CFR § 245.6, 6a, 7, 10]**

- Q. Assure that the maximum amount of USDA donated foods are received and utilized by the FSMC. [as referenced in 7 CFR § 210.9(b)(15)].
- R. Maintain responsibility for securing processing agreements, private storage facilities, or any other aspect of financial management relating to commodities. [as referenced in 7 CFR § 250.15]

ARTICLE III  
FOOD SERVICE PROGRAM

- 3.1 Location. The FSMC shall prepare and serve meals for the Timberlane Regional Central School and Timberlane Regional Middle School. The SFA and the FSMC may, by mutual written agreement, add other locations.
- 3.2 Calendar. All meals will be provided in accordance with the approved calendar, attached as *Appendix A*. For the first twenty-one (21) days of food service, the FSMC will adhere to the 21-day cycle menu agreed upon by FSMC and the SFA. Changes thereafter may only be made with approval of the SFA. [as referenced in 7 CFR § 210.16 (b)(1)].
- 3.3 Meal Program. The FSMC shall provide nutritious, high-quality breakfasts, lunches, snacks, milk service, a la carte food, and vending items in accordance with the following terms:
  - A. In order to offer a la carte food service, the FSMC must also offer free, reduced price and paid reimbursable meals to all eligible children. [as referenced in 7 CFR § 210.16(a)]
  - B. All reimbursable lunches, breakfasts and snacks shall meet the qualifications for USDA reimbursement as referenced in 7 CFR § 210.10, 220.8 and 225.16.
  - C. The SFA shall administer the application process for all free and reduced price meals, and shall establish and notify parents and guardians of program criteria for eligible students. Both the SFA and the FSMC shall be responsible for protecting the anonymity of students receiving free or reduced price meals. [as referenced in 7 CFR § 210.16 (a)(5)]
  - D. The FSMC shall collect gross sale receipts, on behalf of the SFA, for meals, a la carte items, and vending items. Gross cash receipts shall be turned over to the SFA or deposited in the SFA's account on a daily basis.
  - E. The SFA and FSMC shall purchase, to the maximum extent practicable, domestic commodities or products for use in meals served in the NSLP in compliance with the Buy American Provision as referenced in 7 CFR 210.21(d)(2) and 7 CFR Part 250.

- 3.4 Nutrition Awareness Programs. In cooperation with the SFA, the FSMC shall conduct on-going nutrition awareness programs for students, teachers, parents, and other interested parties and participate as a member of the School Wellness Committee.
- 3.5 Special Diets. The FSMC shall, in accordance with SFA policy, supply special diets for students where medically necessary and when prescribed by a licensed physician.
- 3.6 Advisory Board. The FSMC shall cooperate with the SFA's Advisory Board, consisting of students, parents, SFA staff, and a FSMC representative in developing menus and other food service programs.
- 3.7 Catering. Upon request by the SFA, the FSMC shall provide catered food service at times and prices mutually agreed upon. The SFA may, if a price cannot be agreed upon in good faith or the FSMC cannot provide the service, obtain outside catering services, provided the FSMC shall first have been given the opportunity to match the prices and terms of the outside catering service. If the FSMC chooses not to match such terms, then the SFA shall be free to retain the outside catering service. The FSMC shall submit catering invoices by the end of the month in which the services are rendered or within 30 days of rendering the services, whichever is later. Costs of catered functions shall not be supported by the nonprofit foodservice account funds. The FSMC shall provide the SFA with copies of invoices and an invoice control log within ten (10) days after the end of each month.
- 3.8 Environmental Protection Agency Compliance. In performance of this agreement, the FSMC shall comply with Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, Executive Order 11738, and EPA Regulations 40 CFR Part 15, et seq. Environmental violations shall be reported to the United States Department of Agriculture and US EPA Assistant Administrator for Enforcement, and the FSMC agrees not to utilize a facility listed on the EPA's "List of Violating Facilities." **[as referenced in Part 3016.36(i)].**
- 3.9 Energy Policy and Conservation Act Compliance. The SFA and the FSMC shall recognize mandatory standards and policies relating to energy efficiency which are contained in the Energy Policy and Conservation Act. **[as referenced in Part 3016.36(i)].**
- 3.10 Contract Work Hours and Safety Standards Act Compliance. In performance of this agreement, and as employer for all management food service employees, the FSMC shall comply with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. **[as referenced in Part 3016.36(i)].**
- 3.11 Debarment Certification. The FSMC shall complete and submit to the SFA the United States Department of Agriculture (USDA) Certification Regarding Debarment. The certification must also accompany the four (4) additional one-year renewals. **[as referenced in 7 CFR § 3017.300].**
- 3.12 Lobbying. Pursuant to section 1352, Title 31, US Code, the FSMC shall complete and submit a Certificate Regarding Lobbying and a Disclosure of Lobbying Activities to the

SFA. These certifications must accompany the four (4) additional one-year renewals. [**as referenced in 7 CFR § 3018**].

3.13 Donated Foods (Additional language required as a result of the Final Rule effective November 6, 2008, **as referenced in 7 CFR 250** Management of Donated Foods in Child Nutrition Programs, The Nutrition Services Incentive Program, and Charitable Institutions.).

- A. The FSMC will provide the following services in relation to commodity foods:
  - 1. Preparing and serving meals
  - 2. Ordering or selection of donated foods, in coordination with the SFA and in accordance with 7 CFR 250.52
  - 3. Storage and inventory management of donated foods in accordance with 7 CFR 250.52
  - 4. Payment of processing fees and or submittal of refund requests to a processor on behalf of the SFA, or remittance of refunds for the value of donated foods in processed end products to the SFA, in accordance with subpart C of 7 CFR 250
- B. The FSMC must credit the SFA for the value of all donated foods received for use in the SFA's meals service in a school year (including both entitlement and bonus foods), including the value of donated foods contained in processed end products if the FSMC procures processed end products on behalf of the SFA, or acts as an intermediary in passing the donated food value in processed end products on to the SFA.
- C. The FSMC shall credit for donated foods by disclosure, i.e., the FSMC shall credit the SFA for the value of donated foods by disclosing, in its billing for food costs submitted to the SFA, the savings resulting from the receipt of donated foods for the billing period. Crediting by disclosure does not affect the requirement that the FSMC shall only bill the SFA for net allowable costs. The FSMC shall use the USDA's [November 15<sup>th</sup>] list of commodity food values to report the value of donated foods in its disclosure of the value of donated foods to the SFA on its invoices.
- D. All donated foods (this includes but is not limited to ground beef, ground pork, and all processed end products) shall be used in SFA's food service operations.
- E. The FSMC must meet the general requirements **as referenced in 7 CFR 250.14(b)** for the storage and inventory management of donated foods. Additionally, the FSMC must ensure that its system of inventory management does not result in the SFA being charged for donated foods.
- F. Upon the termination of this Agreement, the FSMC must return all unused donated foods, including but not limited to ground beef, ground pork, and processed end products to the SFA.

- G. The SFA must ensure that the FSMC has credited it for the value of all donated foods received for use in the SFA's meal service in the school year. The FSMC agrees to cooperate and provide information reasonably requested by the SFA.
- H. The FSMC must ensure compliance with the requirements of subpart C of 7 CFR part 250 and with the provisions of the distributing and/or the SFA's processing agreements in the procurement of processed end products on behalf of the SFA, and will ensure crediting of the SFA for the value of donated foods contained in such end products at the processing agreement value.
- I. The FSMC shall not enter into the processing agreement with the processor **as referenced in** subpart C of 7 CFR 250.
- J. The distributing agency, sub distributing agency, SA or SFA, the Comptroller General or the US Department of Agriculture, or their duly authorized representatives, may perform onsite reviews of the FSMC's food service operation, including the review of records, to ensure compliance with requirements for the management and use of donated foods.
- K. The FSMC will maintain records to document its compliance **as referenced in** 7 CFR 250.54(b).
- L. Any extension or renewal of the Agreement is contingent upon fulfillment of all provisions in this Agreement relating to donated foods.
- M. The FSMC must maintain the following records relating to the use of donated foods:
  - 1. The donated foods and processed end products received from, or on behalf of, the SFA, for use in the SFA's food service operations;
  - 2. Documentation that it has credited the SFA for the value of all donated foods received for use in the SFA's food service operations in the school year, including, **as referenced in** 7 CFR 250.51(a), the value of donated foods contained in processed end products; and
  - 3. Documentation of its procurement of processed end products on behalf of the SFA, as applicable.
- N. The SFA shall ensure that the FSMC is in compliance with the requirements of this section through its monitoring of the food service operation, **as referenced in** 7 CFR parts 210, 225, or 226, as applicable.
- O. The SFA shall conduct a reconciliation at least annually (and upon termination of the Agreement) to ensure that the FSMC has credited it for the value of all

donated foods received for use in the SFA's food service in the school year, including, **as referenced in** 7 CFR 250.51(a), the value of donated foods contained in processed end products.

- P. The FSMC will assure that USDA donated foods are not used for special functions conducted outside the nonprofit school food service.

#### ARTICLE IV MANAGEMENT AND PERSONNEL

- 4.1 **FSMC Management and Professional Employees.** The FSMC shall provide sufficient and qualified management and professional employees to manage the food service operations and supervise all employees employed therein. During the term of this agreement (including any renewal thereof) and for one year thereafter, SFA shall not solicit FSMC management/professional employees to work in a similar or other capacity whether at the SFA's food service facility or elsewhere, nor will SFA permit the employment of said individuals by others (including successor food service management company) in any operation providing food service throughout the school district. SFA further covenants and agrees not to hire, nor allow to be hired by others (including a successor food service management company), said management/professional employees to perform work on behalf of SFA or on SFA premises, for a period of one (1) year following such FSMC employee's termination of employment with FSMC. If at any time during the term of this agreement or upon the expiration or termination of this agreement, SFA or any parent, subsidiary, affiliate, agent or contractor (including successor food service management company) of the SFA nevertheless hires an FSMC management/professional employee in violation of the foregoing covenants, then SFA in recognition of FSMC's considerable investment in attracting and training such employee agrees to pay a fee to FSMC of two times the annual salary of said employee as liquidated damages. Said fee shall become due and payable upon the commencement date of employment with SFA or any parent, subsidiary, or affiliate of the SFA or any successor food service management company. Any such fee shall not be paid by funds from the non-profit food service account.
- 4.2 **Non-Management Employees.** All non-management food service employees shall be employees of the SFA or FSMC, as the case may be. The FSMC managers shall direct and supervise SFA and FSMC food service employees.
- 4.3 **Student Workers.** The SFA has a policy of providing work experience for appropriate students as part of the educational curriculum. In furtherance of that policy, the SFA may assign students for work in the food service operation in such numbers and at such times as are agreed upon between the SFA and the FSMC.
- 4.4 **Payroll and Taxes.** The FSMC shall prepare and process the payroll for and shall pay its employees directly. The FSMC further warrants that it shall withhold or pay as appropriate all applicable federal and state employment taxes and payroll insurance with respect to its

employees, specifically including, but not limited to, any income, social security, and unemployment taxes and workers' compensation payments.

- 4.5 Workers' Compensation Insurance. The FSMC shall procure Workers' Compensation Insurance or shall maintain a system of self-insurance in conformance with applicable state law covering its employees and shall provide proof of such coverage or system to the SFA.
- 4.6 Nondiscrimination. The SFA and the FSMC shall comply with Executive Order 11246, entitled "Equal Employment Opportunity" as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60). **[as referenced in Part 3016.36(i)]**
- 4.7 Fingerprinting Requirements. The FSMC shall be responsible for obtaining any necessary fingerprint clearances for its employees as required by law. The SFA will fingerprint and perform criminal background checks on all new employees both SFA and FSMC; (current staff has already been processed) working within our school district. The FSMC must pay the fee payable to the State of NH (currently at \$51.50 per new employee processed). Appointments for fingerprinting must be made with the SFA Personnel Secretary.
- 4.8 The FSMC will assure conformance with all civil rights requirements that are applicable to the SFA.

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

- 5.1 Inventories of Food and Supplies. The SFA and FSMC shall conduct a joint inventory of existing food and operational supplies at both the beginning and the end of this Agreement. If the ending inventory is less than the value of the beginning inventory the FSMC will credit the SFA for the difference. The cost of food and operational supplies ordered by FSMC on behalf of the SFA in performance of this agreement shall be paid for by the FSMC and the FSMC shall then be reimbursed for those costs incurred. The inventory of food and operational supplies shall remain the SFA's property.
- 5.2 The SFA and the FSMC shall inventory the equipment and commodities owned by the SFA at the beginning of the Agreement year, including, but not limited to, consumable and non-consumable flatware, trays, china, glassware and food. The FSMC shall be responsible for reimbursing the SFA for all shortages noted on the year-end inventory.
- 5.3 Office Facilities. The SFA shall provide, without cost to the FSMC, suitable office facilities, including furniture and equipment, for use by the FSMC in performance of this agreement. The FSMC shall take reasonable care of the office facilities and equipment, and shall return them to the SFA in good condition upon termination of this agreement, ordinary wear and tear excepted.
- 5.4 Sanitation. The FSMC shall be responsible for usual and customary cleaning and sanitation of the SFA's food service facilities.

- A. The FSMC shall be responsible for housekeeping and sanitation in areas used for food preparation, storage, and service, and shall clean and sanitize dishes, pots, pans, utensils, equipment, and similar items. The SFA shall designate a refuse collection area and the FSMC shall be responsible for transporting refuse to the designated refuse collection area.
  - B. The SFA shall be responsible for the required cleaning and maintenance of dining areas, as well as periodic cleaning of all ceilings, walls, windows, ceiling fixtures, air ducts, and hood vent systems (as per local ordinance). The SFA shall also provide and maintain adequate fire extinguishing equipment for food service areas, provide necessary pest control, and shall be responsible for the removal of refuse from the designated refuse collection area.
  - C. If the SFA is unable to perform any of its responsibilities described in subparagraph B above, the FSMC may, with the written approval of the SFA (not to be unreasonably withheld or delayed), temporarily assume those responsibilities and shall bill the SFA for any costs incurred.
- 5.5 Maintenance. The SFA shall provide, at the SFA's expense, maintenance personnel and outside maintenance services, parts, and supplies required to properly maintain and repair the food service facilities and equipment.
- 5.6 Condition of Facilities and Equipment. The SFA shall obtain necessary health permits and certification for its facilities. The premises and equipment provided by each party in performance of this agreement shall comply with all applicable building, safety, sanitation, and health laws; and shall satisfy all permit requirements, ordinances, rules, and regulations, including the federal Occupational Health and Safety Act of 1970 or applicable state act and standards promulgated thereunder. FSMC shall take reasonable and proper care of all premises and equipment in its custody and control and shall use them in a manner that will not cause violation of applicable laws, ordinances, rules, and regulations, including any reporting and record-keeping requirements. If at any time the FSMC is notified by an authorized government agency that the SFA's premises or equipment are not in compliance with any law, ordinance, rule, or regulation, the FSMC shall promptly inform the SFA of such notification.
- 5.8 Nonconforming Facilities and Equipment. Each party shall, at no cost to the other, make all repairs, alterations, modifications, or replacements which may be necessary to correct any conditions of premises or equipment owned, leased or controlled by such party which violate applicable building, sanitation, health, or safety law, ordinance, rule or regulation.

## ARTICLE VI FINANCIAL AND PAYMENT TERMS

- 6.1 Billing for Reimbursements, Administrative Fee, and Management Fee. The FSMC must separately identify for each cost submitted for payment to the SFA the amount of the cost

that is allowable (can be paid from the nonprofit food service account) and the amount that is unallowable (cannot be paid from the nonprofit food service account). The FSMC shall submit supporting documents and invoice to the SFA monthly for the following direct, actual costs, administrative fee and management fee:

- A. The actual and direct costs for the wages, taxes, and benefits of the food service director and other management employees on the FSMC's payroll.
- B. Direct operating costs paid by the FSMC arising from performance of this agreement. Direct operating costs are defined as:
  - Food and supply purchases by the FSMC necessary to perform this agreement
  - Food service program mileage costs incurred
  - Advertising and promotions within the SFA
  - The FSMC's insurance necessary for performance of this agreement
  - Employee training and development costs
  - Laundry, linen, and uniforms
  - Licenses and permits for performance of this agreement
  - Commodity processing and delivery charges and storage rental
  - Service business and occupation tax
  - Sales and use tax, if applicable
  - Technology expenses, including hardware, software and licensing expense
  - Fingerprinting and background checks as required
  - Minor Repairs
  - Office supplies, printing, postage and telephone expense
  - Depreciation of FSMC investment on a straight-line basis
  - Other expenses necessary for the performance of this agreement, as mutually agreed
- C. The FSMC's management fee of \$2,500.00 per month for ten (10) months. The following functions are the FSMC's responsibility, and will be included in such fees:
  - Overhead Allowance
  - Supervision of FSMC employees by executives not assigned to the food Service Operation
- D. The FSMC's administrative fee of \$7,500.00 per month for ten (10) months. The following functions are the FSMC's responsibility, and will be included in such fees:
  - Financial reporting and analysis
  - Field auditing
  - Marketing Assistance
  - Purchasing administration
- E. To the extent necessary, the FSMC's Management fee will be reduced to cover any loss in the food service account, but only to the extent of the Management Fee. This will be the SFA's exclusive remedy for FSMC's failure to achieve the Break-Even Guarantee contemplated hereunder, and in no event shall FSMC be liable for any amount in excess of its Management Fee. Any loss that exceeds the amount of the Management Fee will be covered by the SFA with a transfer from General Funds.

F. Expenses paid by the FSMC and not charged to the SFA or the food service operation and are unallowable include:

- Reports filed to the State
- Corporate income tax

6.2 Invoice Due Date. The FSMC will invoice the SFA for the amount of the food service budget in ten (10) equal monthly installments, starting on August 31, 2012, which invoices will be due and paid by the SFA on the second Tuesday of every month (starting in September) for which the invoice is submitted. The last invoice submitted by the FSMC at the end of the school year shall contain any necessary adjustment and reconciliation of actual costs against budget. The FSMC will be notified immediately of any invoice that does not pass audit and the specific reason for the rejection of any invoice. In any event, SFA shall pay that portion of any invoice that is undisputed. The SFA shall pay all undisputed amounts (including Management and Administrative Fees) when due.

6.3 Guarantee. The SFA and the FSMC shall work together to ensure a financially sound and well-run operation. The FSMC shall guarantee that the food service program will achieve financial surplus of \$81,000. The Guarantee is based on, and subject to, the following conditions and assumptions remaining in effect throughout the term: (i) reimbursement rates for Program meals will not be less than the rates estimated in the FSMC's proposal; (ii) the value of government donated commodities and/or cash in lieu thereof will not be less than the value of government donated commodities and/or cash in lieu thereof estimated in FSMC' proposal or received during the prior school year; (iii) the number of days meals are served during the school year will be not less than 180 days for breakfast and 178 lunch days; (iv) the number of serving periods, locations, serving times and types of service will not differ from as listed in the RFP; (v) the student enrollment for the term of the contract period will be not less than 3839 students; (vi) the level of wages, salaries and fringe benefits will not exceed those proposed and listed in the original proposal, and the SFA's labor costs charged to the budget shall not exceed \$509,639; (vii) The actual costs charged to the Food Service budget by the SFA shall not exceed the projected operating expenses as set forth in the FSMC's' proposal; (viii) service will not be interrupted as a result of fire, work stoppage, strike or school closing; (ix) Milk prices shall remain constant throughout the year; (x) selling prices of Menu Pattern Meals and A-La-Carte selections will be not less than those included in the FSMC's proposal; (xi) the SFA and its representatives including but not limited to, school principals, teachers and SFA employees shall fully cooperate with FSMC in the implementation of the Food Service Program including, if applicable, breakfast in the classroom at all elementary schools.; (xii) There shall be no competitive food and beverage sales immediately before, after or during the meal service times, and the SFA shall fully cooperate with Whitsons to limit the expansion of competitive food sales in order to maximize the gross receipts and other non-cash sales of the Food Service Program; (xiii) Legislation, regulations and the SFA's Wellness Policy or practice shall remain consistent with those at the time of the original proposal; and (xiv) to the extent applicable, the SFA shall approve the FSMC's recommended changes relating to food service staff levels and/or staff schedules based on the operational needs of the Food Service Program.

- 6.4 Operating Statements. The FSMC shall submit monthly operating statements to the SFA by the tenth (10th) of the next month. This statement shall reflect all activity for the previous calendar month.
- 6.5 Re-negotiation of Financial Terms. Except as set forth in Article I, Section 1.3, the renegotiation of price terms under this agreement is permitted only upon the occurrence of unpredictable, unexpected conditions beyond the control of the parties. If those conditions create a significant and material change in the financial assumptions upon which the financial terms of this agreement are based (including the assumptions set forth in Section 6.3 above), then those financial terms so affected may be renegotiated by the parties. Renegotiation of financial terms under such conditions must be mutual, and any changes in financial terms must be agreed upon by both parties acting reasonably and in good faith. Any adjustments so negotiated and agreed upon must accurately reflect the change in conditions. The occurrence of contingencies that are foreseeable and predictable, but not certain, should be calculated into the defined price terms to the extent possible, with the goal of minimizing the need for renegotiation of price terms during the term of the agreement, it being understood and agreed that the contingencies set forth in the assumptions contained in Section 6.3 shall not be deemed to be foreseeable and predictable.
- 6.6 Availability of Funds. Every payment obligation of the SFA under this Contract is conditioned upon the availability of funds appropriated or allocated for the payment of such obligation. If funds are not allocated and available for the continuance of this Contract, this Contract may be terminated by the SFA at the end of the period for which funds are available. No liability shall accrue to the SFA (except for liability that accrued prior to the date of termination) in the event this provision is exercised, and the SFA shall not be obligated or liable for any future payments or for any damages as a result of termination under this paragraph.
- 6.7 Allowable costs. Allowable costs will be paid from the nonprofit school food service account to the FSMC net of all discounts, rebates and other applicable credits accruing to or received by the FSMC or any assignee under the contract to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;
- The FSMC's determination of its allowable costs must be made in compliance with the applicable USDA and program regulations (**as referenced in** 7 CFR parts 210, 215, 220, 3016 and 3019, as applicable) and Office of Management and Budget Cost Circulars (A-87 cost Principles for State, Local Governments and Indian Tribal Governments, or A-122 Cost Principles for Non-profit Organizations, as applicable);
- 6.8 Discounts, Rebates and Other Applicable Credits. The FSMC must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the SFA for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. This information must be supplied on a monthly basis.

The FSMC must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the SFA, the State agency, or the United States Department of Agriculture. The FSMC shall return the value of all discounts, rebates and other applicable credits allocable to the contract to the SFA.

- 6.9 FSMC Investment. During the first year of this Agreement, the FSMC shall purchase those items (which items shall be presented by the FSMC and approved by the SFA prior to purchase) attached hereto as Appendix B (the "Investment") in an amount not to exceed \$76,407. The FSMC shall be reimbursed in whole for the equipment purchased within 30 days from when the FSMC submits invoices to the SFA. Timberlane School District does not require amortization of the Investment. Title to the equipment and fixtures that are part of the Investment shall vest with the SFA when they are placed in service.
- 6.10 FSMC records pertaining to the SFA shall be maintained at SAU #55 Offices, 30 Greenough Road, Plaistow NH 03865 while the contract is in effect and for the required retention period.

## ARTICLE VII GENERAL TERMS AND CONDITIONS

- 7.1 Compliance with Law. The FSMC shall comply with all laws, ordinances, rules, and regulations of all applicable federal, state, county, and city governments, bureaus, and agencies, regarding purchasing, sanitation, health, and safety of the food service operations and shall procure and maintain all necessary licenses and permits. The SFA shall cooperate, as necessary, for the FSMC's compliance and procurement efforts.
- 7.2 National School Lunch Program. In order to assist the SFA's participation in the National School Lunch Program:
- A. Any federally donated commodities received by the SFA and made available to the FSMC shall be used only for the benefit of the SFA's food service operation. Any commodity processing contracts shall be established by the SFA. All goods, services, and monies received as a result of rebate under a processing contract must be used in the SFA's nonprofit food service. **as referenced in 7 CFR § 210.16 (a)(6)**. The FSMC shall maintain a perpetual inventory record of donated commodities.
  - B. No payment shall be made for meals or snacks that are spoiled or unwholesome at the time of service, or do not meet specifications developed by the SFA, or do not otherwise meet the requirements of this agreement. **[as referenced in 7 CFR § 210.16 (c)(3)]** No deduction in payment shall be made by the SFA unless the SFA notifies the FSMC in writing within 48 hours of the meal service for which the deduction is to be made, specifying the number of meals for which a deduction is to be made and describing the reasons for the deduction.

C. The FSMC shall report the claim information to the SFA promptly at the end of each month or more frequently as specified by the SFA. **[as referenced in 7 CFR 210.16(c)(1)].**

- 7.3 Comprehensive Insurance. The FSMC shall obtain and keep in force during this agreement, for the protection of the SFA and the FSMC, Comprehensive General Bodily Injury and Property Damage Liability Insurance in the combined single limit of no less than one million dollars (\$1,000,000). That insurance shall include, but not be limited to, Personal Injury Liability, Broad Form Property Damage Liability, Blanket Contractual Liability, and Products Liability, covering only the operations of the FSMC under this agreement, and shall deliver to the SFA a certificate evidencing such policies and coverage within thirty (30) days after the execution of this agreement by the parties. The insurance policies shall contain a covenant by the issuing company that the policies will not be canceled unless a thirty (30) day prior written notice of cancellation is given to the SFA. The policies for \$1,000,000 coverage shall also name the SFA as an Additional Insured, but only with respect to operations of the FSMC under this agreement.
- 7.4 Indemnity. Unless otherwise expressly provided, the SFA and the FSMC shall remain responsible for all claims, liability, loss, and expense, including reasonable costs, collection expenses, and attorney's fees incurred, which arise by reasons of negligent or wrongful act or omission of the party, its agents, or its employees in the performance of its obligations under this agreement.
- 7.5 Trade Secrets. All financial, statistical, operating, marketing and personnel materials and information, including, but not limited to, the information technology systems, 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 FSMC and shall be confidential. SFA shall keep such Confidential Information confidential during or subsequent to the term of this Agreement and shall so instruct its agents, employees, and independent contractors, and the use of such Confidential Information by SFA in any manner shall not affect FSMC's ownership or the confidential nature of such Confidential Information. SFA shall not photocopy or otherwise duplicate any such Confidential Information without the prior written consent of FSMC. SFA agrees that all computer software programs, signage and marketing and promotional literature and material (collectively referred to as "Proprietary Materials") used by FSMC on SFA's premises in connection with the food services provided by FSMC under this Agreement shall remain the property of FSMC notwithstanding the fact that SFA may have paid a fee for the use of such Proprietary Materials in connection with the Food Service Program. Upon the expiration or termination of this Agreement, all use of trademarks, service marks and logos owned by FSMC or licensed to FSMC by third parties shall be discontinued by FSMC, and the SFA shall immediately return to FSMC all Proprietary Materials. The SFA shall designate any information it considers confidential or proprietary, including recipes, surveys and studies, management guidelines, operating manuals, and similar documents which it regularly uses in the operation of its business or which it develops independently during the course of this agreement. Information so designated and identified shall be treated as confidential by the FSMC. The SFA and the FSMC shall exercise the same level of care in maintaining the

confidences of the other party as they would employ in maintaining their own confidences. All such confidential and proprietary materials shall remain the exclusive property of the party that developed them and shall be returned to that party immediately upon termination of this agreement. The foregoing notwithstanding, the Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes: (a) The copy right in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support. **[as referenced in 7 CFR § 3016.34].**

- 7.6 Assignment. This agreement may not be assigned by either party, in whole or in part, without the written consent of the other party.
- 7.7 Notices. Any notice or communication required or permitted under this agreement shall be in writing and shall be delivered personally or sent by United States registered or certified mail, postage prepaid and return receipt requested, or by express mail or overnight courier service, addressed to the other party as follows:

Notices to the SFA:

Timberlane Regional School District  
Kathy Smith  
30 Greenough Road  
Plaistow NH 03865

Notices to the FSMC:

Whitsons New England, Inc.  
1800 Motor Parkway  
Islandia, NY 11749  
Attention: Paul Whitcomb, Executive Vice President

With a copy to the same address, Attention: Corinne P. Kevorkian, Esq., General Counsel

Other persons or places may also be designated, in writing, by either of the parties, during the term of this agreement. Notices shall be effective when received. Sent notices will be considered received forty-eight (48) hours after they are deposited in the US mail or courier service.

- 7.9 Catastrophe. With the exception of payment obligations for prior performance under this agreement, neither party shall be liable for the failure to perform their respective obligations under this agreement when such failure is caused by fire, explosion, flood, act of God, civil disorder, strikes, vandalism, war, riot, sabotage, weather and energy related closings, governmental rules or regulations, or other like causes beyond the reasonable control of such party, nor for any real or personal property destroyed or damaged due to such causes. The FSMC shall resume food service operations as soon as possible. **[as referenced in Part 3016.36(i)].**

- 4 7.10 Termination for Cause. Either party may cancel the contract for cause by giving sixty (60) days notice in writing to the other party of its intention to do so. **[as referenced in 7 CFR § 210.16 (d)].**
- 7.11 Cure Period. If a cure or remedy is found for the termination request by mutual agreement of the contracting parties, the termination or non-renewal letter must be withdrawn in writing by the terminating party within the sixty (60) day period as described in paragraph 7.10 above. This letter should be counter-signed by the receiving party and the letter should become an amendment to this agreement. **[as referenced in Part 3016.36(i)].**
- 7.12 Termination without Cause. Either party may terminate the Agreement without cause. The party terminating the Agreement without cause shall give no less than sixty (60) days written notice to the other party of its intention to terminate the Agreement without cause.
- 7.13 Rights beyond Termination. The right of termination referred to in this agreement is not intended to be exclusive, and is in addition to any other rights available to either party at law or in equity. If either party breaches a material provision of the contract and fails to cure such breach within sixty (60) days after receiving written notice of such breach the non-breaching party may elect to pursue any available legal, contractual or administrative remedy. **[as referenced in Part 3016.36(i)].**
- 7.14 Construction and Effect. A waiver of any failure under this agreement shall neither be construed as, nor constitute a waiver of, any subsequent failure. This agreement supersedes all prior negotiations, representations, or agreements regarding the subject matter hereof. The Article and Paragraph headings are used solely for convenience and shall not be deemed to limit the subject of the Articles and Paragraphs or be considered in their interpretation. The appendixes referred to herein are made part of this agreement by the respective references to them. This agreement may be executed in several counterparts, each of which taken together shall be deemed an original.
- 7.15 Amendments to the Agreement. The parties cannot alter any provision in this agreement that is required by any law, rule or regulation. The parties cannot otherwise amend or alter this agreement, except as to minor, non-substantive provisions or issues that do not materially affect the scope of work or the cost of the agreement. The parties must mutually agree, in a written document signed by both parties and attached to this agreement, to amend, add, or delete an Article or Appendix. Any amendment to this agreement shall become effective at the time specified in the amendment.
- 7.16 Notification of Termination:  
The New Hampshire State Department of Education shall be notified immediately of termination action and reason for termination.
- 7.17 Any silence, absence or omission from the contract document specifications concerning any point shall be regarded as meaning that only the best commercial practices are to

prevail, and that only materials (food, supplies, etc) and workmanship of a quality that would normally be specified by the SFA are to be used.

- 7.18 If the FSMC makes the purchases in a cost-reimbursable contract, the prices charged the SFA will be reasonable and necessary.
- 7.19 The FSMC accepts liability caused by FSMC's negligence for claims assessed as a result of Federal or State reviews/audits, corresponding with the SFA's period of liability.
- 7.20 The FSMC accepts liability for any negligence on its part that results in any loss of, improper use of, or damage to USDA donated foods.

The parties agree that the terms of this Contract are in accordance with the Request for Proposal (RFP) published by the Board and any amendments to the RFP, and the proposal submitted by the FSMC, which are kept on file at the Board Offices and through this reference, are incorporated into this contract. In the event that contradictory statements are contained in the RFP, the FSMC proposal, and this contract, the following order of precedence shall apply: contract, RFP, FSMC proposal.

SO AGREED:

WHITSONS NEW ENGLAND, INC.

By: *Paul Wittent* Executive Vice President 8/28/12  
Name: Title Date

TIMBERLANE REGIONAL SCHOOL DISTRICT

By: *[Signature]* Interim Superintendent 8/27/12  
Name: Title Date

WHITSONS	
LEGAL OK	
CG	8/28/12

**Cost of Sales**

Food	\$ 562,381
Labor District includes FICA & Medical	
Labor FSMC	\$ 203,405
<b>Total Cost of Sales</b>	<b>\$ 765,787</b>

**Operating Expenses**

Liability Insurance	\$ 5,270
Supplies	\$ 47,532
Vehicle Insurance	\$ -
Uniforms	\$ 5,145
Background Checks	\$ 429
Fingerprinting	\$ -
Repairs	
Linens	
Vehicle Rental	\$ -
Gas	\$ -
Mileage Reimbursement	\$ 1,199
Merchandising	
Office Supplies	\$ 1,500
Licenses & Permits	\$ 2,000
Depreciation (term of contract)	\$ -
Printing	\$ 1,000
Postage	\$ 750
Telephone Cell Phone	\$ 1,500
Recruitment	\$ 500
Performance Bond Eliminated	\$ -
Net Chef	\$ 2,432
WRM Fees	\$ 2,650
WMP Fees	\$ 2,500
Smallwares	
Opening Equipment Client provided	\$ -
MISC	\$ 1,500
Commodity Trucking	\$ 2,500
<b>Total Operating Expenses</b>	<b>\$ 78,407</b>
<b>Total Direct Costs</b>	<b>\$ 844,193</b>
Administrative Fee	\$ 75,000
Management Fee	\$ 25,000
<b>Total Cost of Sales</b>	<b>\$ 944,193</b>

TRSD -

2011-12 was \$ 961,178.

**Purchase Order**

**BILL TO: ACCOUNTS PAYABLE**  
TIMBERLANE REGIONAL SCHOOL DISTRICT  
30 GREENOUGH ROAD  
PLAISTOW, NH 03865

**No. 300903 1**  
**PO REVISED**

MAIL INVOICES TO ABOVE ADDRESS  
Submit 2 copies of invoice  
Ship Prepaid

PO number must appear on all  
invoices, packages, and correspondence.  
DO NOT EXCEED PO VALUE

P.O. Date: 08/23/2012      Questions ? (603) 382-6119

P.O. Issued To :

Whitsons New England, Inc.  
1800 Motor Parkway  
Islandia NY 11749

Ext:      Account:

Ship To:

Timberlane Reg School District  
Attn: Kathy Smith  
30 Greenough Rd  
Plaistow NH 03865  
(603) 382-6119

Contact:      Location: District Wide

Phone:      Fax:      Project: n/a

Req# 340997

Reference:      Date Required: 09/07/2012

Award Number:

Line	Qty	Unit	Part#	Description	Account Number	Unit Price	Extended	Tax	Freight
1	9	EA		2012-2013 Food Service Mgmt September to May (9 Months)	210.3120.330.21.33.0.00000	94,419.30	849,773.70	0.00	0.00
2	0.5	EA		2012-2013 Food Service Mgmt June Pmt	210.3120.330.21.33.0.00000	94,419.30	47,209.65	0.00	0.00

APPROVAL SIGNATURES:

Sub-Total:	896,983.35
Freight:	0.00
Tax:	0.00
Total Amount:	896,983.35

NOTES:

Order Via:

Mail

**FILE COPY**

**Purchase Order**

**BILL TO: ACCOUNTS PAYABLE**  
TIMBERLANE REGIONAL SCHOOL DISTRICT  
30 GREENOUGH ROAD  
PLAISTOW, NH 03865

**No. 300904 1**

**PO REVISED**

MAIL INVOICES TO ABOVE ADDRESS

Submit 2 copies of invoice

Ship Prepaid

PO number must appear on all  
invoices, packages, and correspondence.  
DO NOT EXCEED PO VALUE

P.O. Date: 08/23/2012

Questions ? (603) 382-6119

Ext:

Account:

P.O. Issued To :

Ship To:

Whitsons New England, Inc.  
1800 Motor Parkway  
Islandia NY 11749

Timberlane Reg School District  
Attn: Kathy Smith  
30 Greenough Rd  
Plaistow NH 03865  
(603) 382-6119

Contact:

Location: District Wide

Phone:

Fax:

Project: n/a

Req# 341002

Reference:

Date Required: 09/07/2012

Award Number:

Line	Qty	Unit	Part#	Description	Account Number	Unit Price	Extended	Tax	Freight
1	1	EA		2012-2013 Equipment Upgrades	100.2620.737.21.33.4.00000	76,536.00	76,536.00	0.00	0.00

APPROVAL SIGNATURES:

Sub-Total:	76,536.00
Freight:	0.00
Tax:	0.00
Total Amount:	76,536.00

NOTES:

[Redacted notes area]

Order Via:

Mail

**FILE COPY**