



KENTUCKY EDUCATIONAL DEVELOPMENT CORPORATION (KEDC)
904 ROSE ROAD
ASHLAND, KY 41102-7104
(606) 928-0205
www.kedc.org

*** * * INVITATION TO BID * * ***

BID REFERENCE:	<u>PV-DAIRY-2016</u>
BID PUBLIC NOTICE DATE:	<u>June 07, 2016</u>
BID OPENING DATE & TIME:	<u>July 05, 2016, 9:00AM EASTERN</u>
BID CONTRACT PERIOD:	<u>August 1, 2016 – July 31, 2017</u>
BID ITEMS:	<u>Fresh Dairy</u>

STANDARD TERMS AND CONDITIONS

1. **BID PURPOSE:** The Kentucky Educational Development Corporation (KEDC) Board of Directors solicits sealed bids that would, if accepted by the KEDC Board of Directors or its designee, establish contracts, with the general and detailed terms, conditions, and specifications contained in these standard terms and conditions and in the bid specific terms and conditions.
2. **INSTRUCTIONS FOR BIDDERS:** These standard terms and conditions along with the bid specific terms and conditions apply to all bids submitted. Explain any requested deviations or exceptions as part of your bid proposal. KEDC may, at its discretion, accept or reject any or all deviations or exceptions proposed. In the event of a discrepancy between the standard and bid specific terms the bid specific terms will govern. KEDC is utilizing the online procurement services of KPC to facilitate this solicitation. The public notice for this invitation, the invitation itself, and any addendums are available for view, download, or print from the Internet at www.kpc4me.com on the bid public notice date and until the time and date specified for the bid opening. Bid tabulations will be made by KEDC staff and, after the KEDC Board or its designee has taken official action, will be posted to the above website.
3. **BID FORMS AND RETURN INSTRUCTIONS:** KEDC is utilizing the online procurement services of KPC to facilitate this solicitation. KPC has an online interface that creates a confidential and encrypted electronic bid submission. Bid submission requires that each bidder has an updated vendor account. Instructions on how to register as a new vendor or update an existing account and complete the bid submission process can be found at <http://www.kpc4me.com/bid-opportunity>. For assistance with registration or technical questions regarding the online interface contact info@kpc4me.com

Submit all bids and any attachments via the online application. No other form of bid submission (e.g., paper, telephone, facsimile, telegraph, mail, etc.) will be accepted. Bids submitted on company forms

are subject to rejection. The bidder acknowledges that the bidder has read this invitation, understands it, and agrees to bind by its terms and conditions

4. CLARIFICATION: For clarification or additional information relative to this bid invitation contact the KEDC Member Services Team by email at memberserviceteam@kedc.org or phone (606) 928-0205.
5. PROCUREMENT CONSIDERATIONS: KEDC conducts all procurement transactions in full compliance with all applicable federal and state statutes, regulations and rules.

It is the clear intention of KEDC to foster all procurement transactions in a manner to provide to the maximum extent practicable, open and free competition. (20 U.S.C. 1221e-3(a)(1) and 3474, - 22 CFR 135)

KEDC shall make positive efforts toward procuring and utilizing small business and minority-owned business sources of supplies and services. All such efforts shall be made to allow these sources the maximum feasible opportunity to compete for contracts.

All procurement procedures developed and implemented by KEDC shall assure that unnecessary or duplicative items are not purchased. Where appropriate, considerations of lease and purchase alternatives will be made to determine which would be the most economical and practical procurement.

All KEDC bids and solicitations for goods and services shall be based upon a clear and accurate description of the technical requirements for the material, product or service to be procured. Such description shall not, in competitive procurements, contain features that unduly restrict competition. Brand name or equal clause may be used as a means to define the performance of other salient requirements of procurement, and when so used to specify features of the named brand that must be met by bidders/offer's.

A contract will be entered into by KEDC with only responsible bidders who possess the potential ability to perform successfully under the terms and conditions. Consideration shall be made for such matters as a bidder's integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. KEDC shall follow the principles of cost analysis in the review and evaluation of bids to determine if the bidder meets the requirements or reasonableness, allocability, and allowability.

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6. AUTHENTICATION OF BID AND STATEMENT OF NON-COLLUSION AND NON-CONFLICT OF INTEREST AND COMPLIANCE WITH THE KENTUCKY MODEL PROCUREMENT CODE: By my signature on the bid certification, I hereby swear or affirm under penalty of false swearing as provided by KRS 523.040:

I am the bidder (if bidder is an individual), a partner in the bidder (if the bidder is a partnership), or an officer or employee of the bidding corporation having authority on its behalf (if the bidder is a corporation).

The costs quoted in the bid response are correct and have been arrived at by the bidder independently and have been submitted without collusion and without agreement, understanding, or planned common course of action, with any vendor of materials, equipment, or services described in the invitation to bid, designed to limit independent bidding or competition.

The contents of the bid or bids have not been communicated by the bidder, or its employees, or agents to any person not an employee or agent of the bidder or its surety on any bond furnished with the bids and will not be communicated to any such person prior to the official opening of the bid or bids. Bidder certifies that this proposal is made without prior understanding, agreement, or connection with any corporation, firm or person submitting a proposal for the same materials, supplies, or equipment, and is in all respects fair and without collusion or fraud. The bidder certifies that collusive bidding is a violation of federal law and can result in fines, prison sentences and civil damage awards.

The KEDC collective bidding process is conducted consistent with KRS Chapter 45A:345 through 45A:460, the Model Procurement Code and that the contents of the bid response and the actions taken by the bidder in preparing and submitting the bid response are in compliance with above sections of the Model Procurement Code.

The bidder is legally entitled to enter into contracts with agencies of the Commonwealth of Kentucky and is not in violation of any prohibited conflict of interest, gratuities and kickbacks including those prohibited by the provisions of the Model Procurement Code (KRS Chapter 45A). Any employee or official of KEDC or member institution, who shall take, receive, or offer to take or receive, either directly or indirectly, any rebate, percentage of contract, money, or things of value as an inducement or intended inducement, or in the procurement of business, or the giving of business, for or to or from, any person, or in open market seeking to make sales to the membership shall be deemed guilty of a felony and upon conviction such person or persons shall be subject to punishment or fine in accord with state and/or federal laws.

7. CERTIFICATION REGARDING LOBBYING: The bidder certifies, to the best of his or her knowledge and belief, that:
- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
 - (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
 - (3) The bidder shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans,

and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. The Contractor will comply with the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) and the New Restrictions on Lobbying and has signed and attached to this agreement the Certificate Regarding Lobbying and, if applicable, the Disclosure of Lobbying Activities (Forms SF-LLL) and annually will sign and submit a certificate, if applicable, Form SF-LLL to KEDC.

8. CERTIFICATION CONCERNING DISBARMENT AND SUSPENSION: The contractor understands that a contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension."

By electronically signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

The certification in this clause is a material representation of fact relied upon by KEDC. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to KEDC, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 2 CFR 180.220 while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

9. ERROR IN BID: No bid may be altered, or amended after the specified time and date set for the bid opening. The KEDC Board or its designee reserves the right to waive defects and informalities in bids, to reject any or all bids, or to accept any bid as may be deemed to its interest. KEDC may allow the withdrawal of a bid where there is a patent error on the face of the bid document, or where the bidder presents sufficient evidence, substantiated by bid worksheets, that the bid was based upon an error in the formulation of the bid price.
10. WITHDRAWAL OF BID: All bids shall be valid for a period of thirty (30) days from the bid opening date to allow for tabulation, study, and consideration by the KEDC Board or its designee. The bidder may withdraw a bid, without prejudice, prior to the published bid opening date.
11. ADDENDA: KEDC may issue addenda to the bid after its release.
12. REVIEW: After the public opening of proposals received from the Bid Invitation, KEDC staff and member officials will review the results, develop a preliminary tabulation, and may contact the bidder for the purpose of clarification only. If necessary, members may purchase from the apparent low bidder pending approval by the KEDC Board of Directors or its designee.

13. PROTEST PROCEDURES: The KEDC Board of Directors or its designee, shall have authority to determine protests and other controversies of actual or prospective Bidders in connection with the solicitations or selection for award of a contract.

Any actual or prospective bidder, who is aggrieved in connection with solicitation or selection for award of a contract, may file protest with the Office of the Executive Director of KEDC. A protest or notice of other controversy must be filed promptly within two (2) calendar weeks after award. All protests or notices of other controversies must be in writing and addressed to:

Executive Director
KEDC
904 Rose Road
Ashland, KY 41102
(606) 928-0205

The KEDC Board of Directors or its designee shall issue a decision in writing. A copy of that decision shall be mailed or otherwise furnished to the aggrieved party and shall state the reasons for the action taken.

The decision of the KEDC Board of Directors shall be final and conclusive.

14. PRE-QUALIFICATION: KEDC reserves the right to pre-qualify any bidder, especially those which has not previously participated in the KEDC bid program. Criteria for qualification shall include:
- a. Product Line: The bidder shall provide proof that all items listed in the catalog are in stock or quickly obtained.
 - b. Physical Facilities - Bidder must have the warehouse facilities required to safely and securely store the products required by these specifications. All food service distributors must maintain refrigeration facilities used for storing chilled and frozen products that meet recommendations of the Refrigeration Research Council. Delivery temperatures of frozen and chilled food shall be in compliance with AFDOS code as recommended by the Federal Food and Drug Administration. KEDC reserves the right to prequalify any or all bidders and to reject any bidder not meeting the requirements in the areas of warehouse facilities and equipment associated with and necessary for the safe and sanitary storage and delivery of food items requested in these specifications. The facilities and operating practices must, at all times, be in compliance with the United State Food, Drug, and Cosmetic Act as well as any State and Local Statute, Regulation or Ordinance.
 - c. Financial Capacity - The potential bidder shall have financing adequate to purchase items in the most economical quantities. References may be requested to document adequate financial capacity.
 - d. Service Level - If KEDC does not have adequate historical data to determine the bidder's ability to comply with the service level requirement outlined in this bid invitation, then three letters of reference from previous school district customers shall be provided.

- e. Past Performance – The bidder must demonstrate an acceptable level of past performance under previously awarded contracts including conformance to contract requirements, industry standards of performance, reasonable and cooperative behavior, commitment to customer satisfaction, and record of integrity and business ethics.
15. NON-ASSIGNABILITY OF AWARD: The awarded bidder cannot convey this contract to its successors or assigns without the prior, express approval of the Board of Directors of KEDC or its designee.
 16. TRANSMITTAL OF ORDERS: KEDC shall issue purchasing guidelines to members. The members will use formal purchase orders in ordering from the awarded bidder. The successful bidder acknowledges that orders from KEDC members transmitted from KEDC's office on the member's behalf are acceptable. The successful bidder may use salespeople for in-person and/or telephone solicitation of orders in accordance with a mutually arrived schedule developed between the members and the awarded bidder. The bidder shall accept orders electronically from KEDC and/or members.
 17. QUANTITIES: It shall be understood that the bid contract will not obligate KEDC or its members to purchase from the Bid Contract.
 18. WARRANTY: The awarded bidder shall make available and honor all manufacturer's warranties, standard and extended, to all KEDC members.
 19. RECALLS: The awarded bidder shall notify KEDC and its members immediately of any product recalls. The awarded bidder will issue a credit or comparable substitute for any delivered, recalled product at the member's discretion. All costs associated with voluntary and involuntary product recalls shall be borne by the awarded bidder.
 20. RETURNS: The successful bidder must provide a Return Material Authorization within 1 working day of the request by a KEDC member. Bidder must restock returned materials at no charge to the member (special order and custom crafted items excluded).
 21. LIABILITY: The awarded bidder agrees to protect, defend, and save harmless KEDC and members from any suits or demands for payment that may be brought against it for the use of any patented material, process, article, or device that may enter into the manufacture, construction, or form a part of the work covered by either order or contract; and awarded bidder further agrees to indemnify and save harmless KEDC and members from suits or actions of every nature and description brought against it for, or on account of any injuries or damages received or sustained by any party or parties by, or for any of the acts of the bidders, his servants or agents. The awarded bidder will hold KEDC and participating members harmless for any and all damages resulting from consumption of products delivered under this contract when such damages are attributed to foreign materials or other defects in products delivered by the awarded bidder.
 22. ACCOUNTING PRACTICES: During the life of any contract awarded as a result of this bid, the successful bidder must clearly demonstrate the capacity to provide accurate, reliable, and timely reports in

terms of invoices, statements, credits, and usage data. Further, they must demonstrate the ability and capability to provide any and all data necessary to accomplish an accurate and time efficient audit of cost on items being purchased under the cost process.

23. ITEM SUBSTITUTION AND OUT-OF-STOCK BACK-ORDERS: Substitutions require prior written authorization from the member. The bidder is required to notify the member if an item is out of stock, backordered, or if timely delivery is not feasible. Upon member notification, the bidder must receive written directions from the member on how to proceed (i.e. cancel, process, etc.).
24. PENALTY: The bidder agrees to provide total requirements as listed herein, thereby minimizing occurrences when a member may have to seek other interim product sources. The bidder is to deliver 100% of stock items within 10 business days; repeated failure to do so will result in default.
25. PRODUCT AND SAFETY INFORMATION: The successful bidder shall provide upon request by any member, the most recent MSDS information sheets for any products the bidder may deliver to said member. It is the bidder's responsibility to comply with all local, state, and federal regulations.
26. VELOCITY REPORTS: Velocity reports in an electronic format (Microsoft Excel, Access, or SQL) specified by KEDC shall be issued to KEDC upon request. The awarded bidder shall compile velocity reports by member. The reports shall indicate purchasing entity, awarded bidder's item number, manufacturer item number, item description, quantity sold, and dollar value of each item sold. KEDC may request procurement data from participating KEDC members to verify velocity report accuracy.
27. CONTRACT SUSPENSION: KEDC may, at its sole discretion, suspend the awarded contract for a period of up to 90 days to investigate alleged instances of material breach of contract or material non-compliance. Breach of contract, default, or noncompliance renders the awarded contract null and void. The awarded bidder agrees that they have no legal recourse of any nature against KEDC or member entities except for services that are due for prior purchases under the awarded contract. The decision of KEDC regarding suspension and/or termination is final.
28. TERMINATION FOR CONVENIENCE: KEDC reserves the right to terminate any contract at any time, in whole or in part, by thirty (30) day written notice to Contractor. Upon receipt by the Contractor of the "notice of termination", the Contractor shall discontinue all services with respect to the applicable contract. KEDC or the participating member, after deducting any amount(s) previously paid, shall pay for all services rendered or goods supplied by the Contractor, as well as any reasonable costs incurred by Contractor up to the time of termination but not including Contractor's loss of profit. The cost of any agreed upon services provided by the Contractor will be calculated at the agreed upon rate prior to "notice of termination" and a fixed fee contract will be pro-rated (as appropriate).
29. TERMINATION FOR NON-PERFORMANCE (DEFAULT): KEDC may terminate the resulting contract for non-performance, as determined by KEDC, for such causes as:

- a. Failing to provide satisfactory quality of service, including, failure to maintain adequate personnel, whether arising from labor disputes, or otherwise any substantial change in ownership or proprietorship of the Contractor, which in the opinion of KEDC is not in its best interest, or failure to comply with the terms of this contract;
- b. Failing to keep or perform, within the time period set forth herein, or violation of, any of the covenants, conditions, provisions or agreements herein contained;
- c. Adjudicating as a voluntarily bankrupt, making a transfer in fraud of its creditors, filing a petition under any section from time to time, or under any similar law or statute of the United States or any state thereof, or if an order for relief shall be entered against the Contractor in any proceeding filed by or against contractor thereunder. In the event of any such involuntary bankruptcy proceeding being instituted against the Contractor, the fact of such an involuntary petition being filed shall not be considered an event of default until sixty (60) days after filing of said petition in order that Contractor might during that sixty (60) day period have the opportunity to seek dismissal of the involuntary petition or otherwise cure said potential default; or
- d. Making a general assignment for the benefit of its creditors, or taking the benefit of any insolvency act, or if a permanent receiver or trustee in bankruptcy shall be appointed for the Contractor.

30. DEMAND FOR ASSURANCES: In the event KEDC has reason to believe Contractor will be unable to perform under the Contract, it may make a demand for reasonable assurances that Contractor will be able to timely perform all obligations under the Contract. If Contractor is unable to provide such adequate assurances, then such failure shall be an event of default and grounds for termination of the Contract.
31. NOTIFICATION: KEDC will provide ten (10) calendar days written notice of default. Unless arrangements are made to correct the non-performance issues to KEDC's satisfaction within ten (10) calendar days, KEDC may terminate the contract by giving forty-five (45) days notice, by registered or certified mail, of its intent to cancel this contract.
32. ATTORNEY'S FEES: In the event that either party deems it necessary to take legal action to enforce any provision of the contract, and in the event KEDC prevails, the Contractor agrees to pay all expenses of such action, including attorney's fees and costs at all stages of litigation.
33. COMPENSABLE DAMAGES FOR BREACH: The Contractor agrees that the following items shall be included as compensable damages for any breach of a contract with KEDC.
- a. Replacement costs
 - b. Cost of repeating the competitive bidding procedure expenses
 - c. Expenses incurred as the result of delay in obtaining replacements.

The enumeration of compensable damage contained in this section is not intended to be exclusive and will not operate to bar recovery by KEDC for any other damages occasioned by the Contractor's breach

of a contract. However, in cases where contract provides for liquidated damages, said liquidated damages shall be in lieu of all other damages, including those enumerated.

34. OTHER CONDITIONS:

- a. The awarded bidder shall be in compliance and will comply with any and all local, state, and federal laws and regulations related to the awarded contract and the rendering of goods and /or services.
- b. The awarded contract shall be governed in all respects as to validity, construction, capacity, performance, or otherwise by the laws of the Commonwealth of Kentucky.
- c. Any suit, action or other proceeding regarding the execution, validity, interpretation, construction, or performance of this agreement brought against KEDC shall be filed in the Boyd County Circuit Court of the Commonwealth of Kentucky.
- d. Any suit, action or other proceeding regarding the execution, validity, interpretation, construction, or performance of this agreement brought against any participating member shall be filed in the participating member's local jurisdiction.
- e. The bidder assures KEDC they are conforming and will continue to conform to the provisions of the Civil Rights Act of 1964 as amended.
- f. Kentucky Sales and Use Tax Certificate of Exemption Form will be issued upon request.
- g. The awarded bidder shall provide access to KEDC and member entities, the Comptroller General of the United States, the United States Department of Agriculture, the Kentucky Department of Education, the Kentucky Auditor of Public Accounts or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions (7 CFR § 3016.36). Such access shall be used to ensure compliance with all applicable Federal and state statutes, regulations and rules, including but not limited to cost principles set forth in 2 CFR § 225.
- h. The awarded bidder shall comply with all applicable cost principles, including but not limited to those set forth in 2 CFR § 225.
- i. The awarded bidder shall retain all required records for three years after KEDC members make final payments and all other pending matters are closed (7 CFR § 3016.36).
- j. The U.S. Department of Agriculture (USDA) prohibits discrimination against its customers, employees, and applicants for employment on the bases of race, color, national origin, age, disability, sex, gender identity, religion, reprisal, and where applicable, political beliefs, marital status, familial or parental status, sexual orientation, or if all or part of an individual's income is derived from any public assistance program, or protected genetic information in employment or in any program or activity conducted or funded by the Department.
- k. The bidder is and shall remain in compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3).
- l. The bidder is and shall remain in compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR Part 5).

- m. The bidder is and shall remain in compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR Part 5).
- n. The awarded firm agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. and the Federal Water Pollution Control Act as amended 33 U.S.C. §§ 1251 et seq. The Contractor agrees to report each violation to the USDA and the appropriate EPA Regional Office.
- o. The bidder is and shall remain in compliance with all mandatory standards and policies relating to energy efficiency contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).
- p. By submitting this document, the bidder certifies that this response is made without prior understanding, agreement, or connection with any corporation, firm or person submitting a response. For the same materials, supplies, or equipment, and is in all respects fair and without collusion or fraud. The bidder acknowledges that collusive bidding is a violation of federal law and can result in fines, prison sentences and civil damage awards.
- q. The bidder is legally entitled to enter into contracts with agencies of the Commonwealth of Kentucky and is not in violation of any prohibited conflict of interest, including those prohibited by provisions of KRS 164.390, KRS 61.092-61.096, KRS 42.990, KRS 45A.335-490. Any employee or official of KEDC or member institution, elective or appointive, who shall take, receive, or offer to take or receive, either directly or indirectly, any rebate, percentage of contract, money, or things of value as an inducement or intended inducement, or in the procurement of business, or the giving of business, for or to or from, any person, or in open market seeking to make sales to the membership shall be deemed guilty of a felony and upon conviction such person or persons shall be subject to punishment or fine in accord with state and/or federal laws.
- r. KEDC reserves the right to reject any and/or all bids and to waive informalities. A contract, based on this sealed bid, may or may not be awarded.
- s. Cost Reimbursable Contracts
 - i. Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor 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;
 - ii. The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account); Or the contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

- iii. The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;
- iv. The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;
- v. The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and
- vi. The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.
- vii. Prohibited expenditures. No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.

BID SPECIFIC TERMS AND CONDITIONS:

- 1. PARTICIPATING MEMBER INSTITUTIONS: Any institution that is a member of KEDC (hereinafter referred to as member or members) is eligible to utilize the Awarded Contract; however this does not mean that all members will participate. This statement of intent does not obligate any district to utilize this bid.
- 2. AWARD: After the review of the bid proposals, the KEDC Board or its designee may accept one or more bid contracts based on the needs of the members. Each participating member will score all of their relevant proposals using the following criteria:

	POINTS
1. Cost calculation	50
2. Item Availabiliy	20
3. Service History	30
POINT TOTAL	100

Member scoring will serve as a recommendation to the KEDC board. However, only the KEDC board has the authority to make an award and issue a contract. Awards will be made to the highest scored responsive and responsible bidder on a member by member basis.

- 3. SERVICE AREA: A bidder will not be required to sell to or serve all eligible members. Any bidder that cannot serve all members is required to complete the Service Area Tab in the provided Excel Workbook indicating the members the bidder can serve. If this list is not returned then the bid contract will be available to all members.
- 4. SOLICITATION OF QUOTES: KEDC members may exercise their rights to solicit quotes on all non-bid items from the bidder in accordance with all rules, regulations, and governing small purchase procedure

policies. Quotes for non-bid items shall be at the price mutually agreeable between the bidder and the school and shall be inclusive of all delivery and other associated fees.

5. **CONTRACT PERIOD:** The contract period is for one year plus any extensions and will expire July 31, 2017. The contract may be extended on an annual basis by KEDC not to exceed five years in total including the first contract period. KEDC shall notify the awarded bidder in writing of its intent to extend or not to extend the contract by May 15th of each year. If KEDC notifies awarded bidder of intent to extend the contract by one year, awarded bidder shall respond in writing by June 1st that it does not intend to extend the contract, or with any necessary price increases or decreases for the first bid period of the extended year. The determination to renew the contract beyond the initial year shall be determined in part by the performance of the awarded bidder and by price stability during the contract period. If price increases submitted are deemed excessive (defined as greater than index) by KEDC then KEDC shall have cause to not extend the contract.

Any contract extension is contingent upon written agreement of KEDC and the awarded bidder. The bid will not be automatically extended beyond any current year unless expressly approved by KEDC. KEDC reserves the right on any contract extension to revise, update, or supplement the contract terms and conditions including the assessment of administrative fees to the awarded bidder as needed to cover the cost of KEDC servicing the bid contract for the members.

KEDC reserves the right to extend the term for up to 180 days to continue a source of supply until new or replacement contracts are completed.

6. **PRICING:** All bid prices must include transportation and delivery charges to the location (member, KEDC, etc.) specified during ordering. Fuel surcharges and other similar charges are not permitted. The awarded bidder shall provide each item on this bid to all members at the same price. The awarded bidder MAY NOT submit multiple discount levels for the same product by KEDC member.
7. **ESCALATING AND FIRM PRICING:** Awards will be based on both escalating and firm Prices. Members will have the option of purchasing from the firm or escalating price. Nutrition Services Directors will stipulate which price package they will be using annually. Members will be informed that they will have to stay with this choice (Firm or Escalating) for the duration of the contract (12 months).

All prices shall be firm for thirty (30) days, after which prices for milk may **escalate/de-escalate** in accordance with changes in the Class I Skim Milk Price per hundred weight and Butterfat price per pound as announced in the Federal Milk Market Order No. 5 (or whichever Milk Market Order applies to your geographic area).

Any changes (up or down) in price must be announced to the Director of Nutrition Services within the week following the issuance of the Milk Market Order announcement and must be accompanied by a copy of the announcement and conversion calculations used by the supplier to arrive at the amount of increase/decrease.

8. **PROMOTION:** KEDC will actively market the awarded bidder to its members. Marketing includes inclusion of your logo and contact information on the KEDC website, a copy of the awarded contract sent to every KEDC member, and promotion of all KEDC Preferred Vendors during regular district visits by KEDC staff. KEDC may negotiate a formal marketing agreement with the awarded bidder(s).

9. NUTRITIONAL INFORMATION: Awarded bidder shall provide upon request by the School Nutrition Director, the most recent nutritional data, meal contributions, and ingredient labels in a format specified by KEDC. This information must be provided no later than 7 days from the date of request.
10. MILK SPECIFICATIONS: Milk is required in the Kentucky School Systems Nutrition Services Program to be furnished and delivered in accordance with the following:
 - a. There are approximately 177 school days during which milk will be needed. In addition, we will need milk at some schools during the Summer Lunch Program.
 - b. All milk is to be pasteurized and homogenized. All milk shall be produced, processed, handled and distributed in accordance with laws and regulations of the Kentucky Department of Health. Any deviation from this standard shall be considered sufficient cause for cancellation of the contract.
 - c. Coolers/Refrigerator/Freezers must be stocked with clean, undamaged, and ready to serve products.
 - d. Products included in this bid remain property of the bidder until sold to the end consumer. All unused, spoiled, or defective products shall be returned to bidder and a credit shall be issued to the member.
 - e. The successful bidder must be equipped and able to deliver sufficient quantities as may be used in each school of the Kentucky School Systems and must be prepared to deliver additional quantities above the normal use in emergencies and on short notice.
 - f. As determined on a member by member basis, the successful bidder will supply and maintain milk coolers. Vendor supplied coolers must be restored to operation within twenty-four hours of a service request or replaced with a comparable cooler.
 - g. The Board of Education may terminate the contract for any or all of the following reasons, or any other reason that a court would consider as sufficient for termination of the contract.
 1. That the milk does not meet the standards prescribed above.
 2. That the service rendered as to deliveries, etc., is unsatisfactory.
 3. That the milk does not properly satisfy the students and others who use it, as may be evidenced by an unusual amount of complaints or small sales, or any other valid indications that the milk does not properly satisfy its users.
 4. That the successful bidder fails to carry out the specifications, conditions, and/or convenience and obligations which he has made or owes to the Board of Education.
 - h. Milk must meet all current state and federal guidelines for butterfat content. Milk must meet the standards prescribed by the State Board of Health and the Kentucky School Systems Board of Health, and must otherwise be satisfactory.

11. **PRODUCT SAFETY AND HACCP INFORMATION:** The successful bidder shall provide upon request by any member, the most recent MSDS information sheets for any products the bidder may deliver to said member. It is the bidder's responsibility to comply with all local, state, and federal regulations. Awarded bidder HACCP procedures are to be provided to KEDC for publication on the KPC website and to KEDC members upon request.
12. **PRODUCT PROTECTION GUARANTEES:** Members have automatic product protection recourse against suppliers for products that are misrepresented. According to federal regulations, the supplier whose name and address appear on the package is the responsible party. Bidders are expected to take immediate action to correct any situation in which product integrity is violated.
10. **BUY AMERICAN ACT:** The bidder will abide by the Buy American Act (42USC 1760(n)) and all associated USDA policy memorandums (e.g., SP 24-2016, dated February 3, 2016, attached).

In support of the Buy American provision the bidder certifies that the products provided to KEDC members are domestically grown, processed, and manufactured in the United States to the maximum extent practicable. Domestic commodity or product means an agricultural commodity that is produced in the US and a food product that is processed in the US substantially (at least 51 percent) using agricultural commodities that are produced in the US.

The bidder will provide documentation to KEDC prior to award and to the the member prior to shipment for each product sourced internationally. **Documentation must include item number, item description, country of origin, and exception rationale.** Allowable exceptions to the Buy American Provision are limited to 1) the product is not produced or manufactured in the United States in sufficient and reasonable available quantities of a satisfactory quality; and 2) competitive bids reveal the costs of a United States product are significantly higher than the foreign product. Any substitution of a non-domestic product for a domestic product (which was originally a part of the solicitation), must be approved, in writing, by the Food Service Director, prior to the delivery of the product to the School.

If the respondent feels the cost of the domestic product is significantly higher, they must list ththe price of the domestic product as well as the non-domestic product price on the bid worksheet. The decision to purchase domestic or non-domestic product will rest with the Child Nutrition Director of each participating member.

KEDC members reserve the right to return at the bidder's expense all items found to be in violation of the Buy American Provision if the product does not qualify for one of the exceptions listed above.

13. **TRANS-FAT:** Food products and ingredients used to prepare school meals must contain zero grams of trans-fat (less than 0.5 grams) per serving. Documentation for food products and food ingredients must indicate zero grams of trans-fat per serving. Acceptable documentation of the trans-fat specification includes nutrition labels or manufacturer specifications and must be provided to the member by the distributor on request. Meats that contain a minimal amount of naturally-occurring trans-fats are allowed in the school meal programs (7 CFR 210.10 (f) (4)).

14. ADMINISTRATIVE FEE: The awarded bidder will pay an annual administrative fee of \$500.00 per member you serve under this contract. The administrative fee is payable upon award of contract. Remit the administrative fee payment to KEDC, 904 Rose Road, Ashland, KY 41102-7104. For your reference, KEDC's FEIN is 61-0659010.
15. PIGGY BACK CLAUSE: KEDC reserves the right to extend the terms, conditions, and prices of the awarded bidder to other Institutions who express an interest in participating in any contract that results from this bid. Each of the piggyback Institutions will issue their own purchasing documents for purchasing of goods. The respondent agrees that KEDC shall bear no responsibility or liability for any agreements between the respondent and the other Institution(s) who desire to exercise this option. Piggy back contracts may not extend beyond the contact date by KEDC. Participation by other institutions may not result in a material change to the contract.
16. ITEM SUBSTITUTION AND OUT-OF-STOCK BACK-ORDERS: No substitutions are allowed without prior written authorization from the member. Member must be notified if item is out of stock, backordered or if timely delivery cannot be made. It is an expectation that all individual items bid are to be stocked items slotted at all distribution facilities servicing KEDC members. If an awarded bidder is temporarily out of stock of a particular item, **an equal or superior product at an equal or lower price to the original item portion price shall be provided.** Awarded bidder shall maintain a 97% average fill rate.

If the awarded bidder fails to deliver within the time specified, or within a reasonable time as interpreted by each School Nutrition Director, or fails to make replacements of rejected articles when so requested, or demonstrates a continuous inability to secure the bid item, the school at its sole discretion, may purchase a product of equal or greater quality from another source. On all such purchases, the awarded bidder shall be responsible and liable for the difference in cost between the amount paid for the substituted product and the amount which would have been paid the awarded bidder. The awarded bidder's argument that an item could have been purchased at a lower price shall not have merit.

KEDC RESERVES THE RIGHT TO ASSESS A FINANCIAL PENALTY UPON THE AWARDED BIDDER IN THE AMOUNT OF UP TO \$1,000 PER INSTANCE FOR FAILURE TO MAINTAIN THE AVERAGE FILL RATE OR FOR FAILURE TO STOCK/SLOT PRIMARY ITEMS ON A CONTINUOUS BASIS.

17. DELIVERIES: The successful bidder will be expected to have each delivery checked by the appropriate cafeteria personnel and to leave two (2) signed copies of the itemized delivery ticket with them. NO SUBSTITUTIONS PERMITTED WITHOUT THE APPROVAL OF THE NUTRITION SERVICES DIRECTOR OR HIS/HER DESIGNEE. Bidder is expected to keep a reasonable stock of bid items on hand. All copies of invoices and statements, by school, should be sent to the Member Business Office.

Bidder should state number of deliveries to be made to schools during a month (where not specified) and day of week deliveries will be made in order for lunchroom managers to properly schedule delivery date requests on their Purchase Orders.

Deliveries shall be made to the individual school as requested by the lunchroom managers in quantities designated by them.

Deliveries shall be made into the individual schools and placed in the proper location in the respective schools as needed and directed by school principal or lunchroom manager. Acceptable delivery times are to be negotiated between the contractor and each participating member.

It is understood that deliveries are not to be made when school is not in session (Election Day, Holidays, in service days, etc.) with exception of the opening of school. Calendars will be provided to the

successful bidders to designate off-school days. When school is cancelled because of inclement weather or other emergency situation the school system reserves the right to accept the delivery, authorize another acceptance signature, or to cancel the delivery.

All products or services procured from the Bid Contract are to be delivered free of freight charges (FOB destination).

The designated supplier(s) agrees to provide total requirements as listed herein, thereby minimizing occurrences when a member may have to seek other interim product sources. Failure to deliver 100% of the items on the core item list within 48 hours shall be considered default.

18. DELIVERY CRATES/TRAYS: Crates/Trays used to deliver products must be picked up by the vendor within fifteen days of the date of delivery. Crates/Trays left at a member's site longer than fifteen days become property of the member and may be disposed of in any manner deemed necessary.
19. PAYMENTS: Each member shall be responsible for making payment to the awarded bidder. Note: normally, school district members pay bills only after approval from the Board of Education which meets monthly.
20. AUDITS:
 - a. KEDC reserves the right to make audits of a awarded bidder's costs records as follows:
 - i. Prior to award of contract
 - ii. Prior to approval of request for price change and following any allowed price change.
 - iii. At time of one year contract extension if awarded.
 - iv. An unscheduled audit one time during each one year bid period upon appropriate notice given to awarded bidder.
 - b. The awarded bidder shall be given notice of the intent of the cooperative to conduct an audit a minimum of four weeks in advance.
 - c. The audit may be conducted electronically via the internet or at a site mutually agreeable to KEDC and the awarded bidder.
 - d. The awarded bidder shall provide acceptable documentation as follows:
 - i. Manufacturer's invoices
 - ii. Freight bills
 - iii. Perpetual inventory records
 - iv. Market bulletins (used for distributor manufactured items and inner company billing items when price change occurs).
21. PRODUCT EVALUATION: Samples requested must be furnished free of expense to KEDC and or KEDC member for evaluation. If not destroyed or consumed in testing or evaluating, or required in connection with the award, furnished samples will, upon request, be returned at the bidder's expense. Right is reserved to mutilate or destroy any samples if considered necessary for testing purposes.
22. PROMPT PAYMENT DISCOUNT: Awarded bidder may provide a prompt payment percentage discount for invoice payments postmarked less than 30 days from the invoice date, and awarded bidder must provide a satisfactory explanation to KEDC of how this provision will be administered so as to enable KEDC to effectively monitor and verify the discounts, and to ensure that such discounts are returned to the members.

The discount may take the form of either a deduction from the invoice, check, or credit in an amount equal to the discount payable to the member.

	Breakfast Meal Pattern			Lunch Meal Pattern		
	Grades K-5 ^a	Grades 6-8 ^a	Grades 9-12 ^a	Grades K-5	Grades 6-8	Grades 9-12
Meal Pattern	Amount of Food ^b Per Week (Minimum Per Day)					
Fruits (cups) ^{c,d}	5 (1) ^e	5 (1) ^e	5 (1) ^e	2½ (½)	2½ (½)	5 (1)
Vegetables (cups) ^{c,d}	0	0	0	3¾ (¾)	3¾ (¾)	5 (1)
Dark green ^f	0	0	0	½	½	½
Red/Orange ^f	0	0	0	¾	¾	1¼
Beans/Peas (Legumes) ^f	0	0	0	½	½	½
Starchy ^f	0	0	0	½	½	½
Other ^{f,g}	0	0	0	½	½	¾
Additional Veg to Reach Total ^h	0	0	0	1	1	1½
Grains (oz eq) ⁱ	7-10 (1) ^j	8-10 (1) ^j	9-10 (1) ^j	8-9 (1)	8-10 (1)	10-12 (2)
Meats/Meat Alternates (oz eq)	0 ^k	0 ^k	0 ^k	8-10 (1)	9-10 (1)	10-12 (2)
Fluid milk (cups) ^l	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week						
Min-max calories (kcal) ^{m,n,o}	350-500	400-550	450-600	550-650	600-700	750-850
Saturated fat (% of total calories) ^{n,o}	< 10	< 10	< 10	< 10	< 10	< 10
Sodium (mg) ^{n,p}	< 430	< 470	< 500	< 640	< 710	< 740
Trans fat ^{n,o}	Nutrition label or manufacturer specifications must indicate zero grams of trans fat per serving.					

^a In the SBP, the above age-grade groups are required beginning July 1, 2013 (SY 2013-14). In SY 2012-2013 only, schools may continue to use the meal pattern for grades K-12 (see § 220.23).

^b Food items included in each food group and subgroup and amount equivalents. Minimum creditable serving is ⅛ cup.

^c One quarter-cup of dried fruit counts as ½ cup of fruit; 1 cup of leafy greens counts as ½ cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.

^d For breakfast, vegetables may be substituted for fruits, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or “Other vegetables” subgroups as defined in §210.10(c)(2)(iii).

^e The fruit quantity requirement for the SBP (5 cups/week and a minimum of 1 cup/day) is effective July 1, 2014 (SY 2014-2015).

^f Larger amounts of these vegetables may be served.

^g This category consists of “Other vegetables” as defined in §210.10(c)(2)(iii)(E). For the purposes of the NSLP, “Other vegetables” requirement may be met with any additional amounts from the dark green, red/orange, and beans/peas (legumes) vegetable subgroups as defined in §210.10(c)(2)(iii).

^h Any vegetable subgroup may be offered to meet the total weekly vegetable requirement.

ⁱ At least half of the grains offered must be whole grain-rich in the NSLP beginning July 1, 2012 (SY 2012-2013), and in the SBP beginning July 1, 2013 (SY 2013-2014). All grains must be whole grain-rich in both the NSLP and the SBP beginning July 1, 2014 (SY 2014-15).

^j In the SBP, the grain ranges must be offered beginning July 1, 2013 (SY 2013-2014).

^k There is no separate meat/meat alternate component in the SBP. Beginning July 1, 2013 (SY 2013-2014), schools may substitute 1 oz. eq. of meat/meat alternate for 1 oz. eq. of grains after the minimum daily grains requirement is met.

^l Fluid milk must be low-fat (1 percent milk fat or less, unflavored) or fat-free (unflavored or flavored).

^m The average daily amount of calories for a 5-day school week must be within the range (at least the minimum and no more than the maximum values).

ⁿ Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, trans fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent milk fat are not allowed.

^o In the SBP, calories and trans fat specifications take effect beginning July 1, 2013 (SY 2013-2014).

^p Final sodium specifications are to be reached by SY 2022-2023 or July 1, 2022. Intermediate sodium specifications are established for SY 2014-2015 and 2017-2018. See required intermediate specifications in § 210.10(f)(3) for lunches and § 220.8(f)(3) for breakfast

Sodium Reduction: Timeline & Amount				
Age/Grade Group	Baseline: Average Current Sodium Levels As Offered¹ (mg)	Target 1: July 1, 2014 SY 2014-2015 (mg)	Target 2: July 1, 2017 SY 2017-2018 (mg)	Final Target: July 1, 2022 SY 2022-2023 (mg)
School Breakfast Program				
K-5	573 (elementary)	< 540	< 485	< 430
6-8	629 (middle)	< 600	< 535	< 470
9-12	686 (high)	< 640	< 570	< 500
National School Lunch Program				
K-5	1,377 (elementary)	< 1,230	< 935	< 640
6-8	1,520 (middle)	< 1,360	< 1,035	< 710
9-12	1,588 (high)	< 1,420	< 1,080	< 740

¹ SNDA-III



Food and Nutrition Service

DATE: February 03, 2016

Park Office Center

MEMO CODE: SP-24-2016

3101 Park Center Drive
Alexandria
VA 22302

SUBJECT: Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program

TO: Regional Directors
Special Nutrition Programs
All Regions
State Directors
Child Nutrition Programs
All States

Recently, the Food and Nutrition Service (FNS) received a number of inquiries relating to the enforcement of the Buy American provision in 7 CFR Part 210.21(d). This memorandum replaces SP14-2012, *Procurement Questions Relevant to the Buy American Provision*, dated February 13, 2012. It also serves to reinforce the importance of the Buy American provision to our economy and its positive effects on small and local businesses.

The Buy American provision requirements. Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a provision, Section 12(n) to the NSLA (42 USC 1760(n)), requiring school food authorities (SFAs) to purchase, to the maximum extent practicable, domestic commodity or product. Section 12(n) of the NSLA defines “domestic commodity or product” as an agricultural commodity that is produced in the United States and a food product that is processed in the United States using substantial agricultural commodities that are produced in the United States. “Substantial” means that over 51 percent of the final processed product consists of agricultural commodities that were grown domestically. Products from Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands are allowed under this provision as territories of the United States. The Buy American provision (7 CFR Part 210.21(d)) is one of the procurement standards SFAs must comply with when purchasing commercial food products served in the school meals programs.

Implementing the Buy American provision. The Buy American provision supports the mission of the Child Nutrition Programs, which is to serve children nutritious meals and support American agriculture. SFAs are reminded that when funds are used from the nonprofit food service account, procurement transactions for food products on the commercial market must comply with the Buy American provision, whether food products are purchased by SFAs or entities that are purchasing on their behalf.

Some examples of entities purchasing on the behalf of SFAs include: food service management companies, group purchasing organizations, or cooperatives of schools purchasing shared goods and services, or through an inter-entity agreement, etc. If SFAs have difficulty ensuring that food products meet this regulation, FNS encourages a specification to be included in solicitations and contracts that only 100% domestically grown and processed products are approved for purchase.

The Buy American provision supports local and small businesses. Using food products from local sources supports small local farmers and provides healthy choices for children in the school meal programs. Purchasing from these entities also supports the local economy. Compliance with the Buy American provision may also encourage SFAs to work with local, or small, minority, and women-owned businesses. Federal regulations require SFAs to take all necessary affirmative steps, when possible, to assure that small, minority, and women-owned business enterprises are used (2 CFR Part 200.321). These entities may also be good sources for products of the United States, or its territories. FNS encourages purchasing food products from local and regional sources when expanding farm to school efforts as well.

Limited exceptions. There are limited exceptions to the Buy American provision which allow for the purchase of products not meeting the “domestic” standard as described above (“non-domestic”) in circumstances when use of domestic products is truly not practicable. However, before utilizing an exception, alternatives to purchasing non-domestic food products should be considered. For example, SFAs should ask:

- Are there other domestic sources for this product?
- Is there a domestic product that could be easily substituted, if the non-domestic product is less expensive (e.g. substitute domestic pears for non-domestic apples)?
- Am I soliciting bids for this product at the best time of year? If I contracted earlier or later in the season, would prices and/or availability change?

Again, although exceptions to the Buy American provision exist, they are to be used as a last resort. These exceptions, as originally outlined in the 2012 guidance, are:

- The product is not produced or manufactured in the U.S. in sufficient and reasonable available quantities of a satisfactory quality; or
- Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

If a SFA is using one of the above exceptions, there is no requirement to request a waiver in order to purchase a non-domestic product. SFAs must, however, keep documentation justifying the exception(s).

FNS has provided sample language of such, to be used as a reference in solicitation and contract documents; these are found in question 8 of the Questions and Answers document attached. It should be noted that FNS has not defined a dollar amount or percentage triggering this exception. Monitoring by the SFA and oversight by the State agency are critical functions in enforcing the Buy American provision, as further outlined below.

Monitoring the Buy American provision by SFAs. The USDA requires that a school food authority purchase, to the maximum extent practicable, domestic commodities or products. This is accomplished by SFAs including the Buy American provision in solicitations, contracts, and product specifications. A reply offer to comply with Buy American terms in a solicitation ensures contractors are aware of Buy American requirements. Further, bidder assurance of the Buy American provision ensures that the bidder is responsive and responsible to the solicitation. Best practices would then entail including language in the solicitation and contract on how the bidder would address alternative methods to conform to the Buy American provision, if needed. Furthermore, as noted above, language should be included that establishes the method of requesting exceptions before supplying non-domestic products.

Additionally, solicitation and contract language must be monitored to ensure compliance. SFAs must monitor contractor performance as required in 2 CFR Part 200.318(b), formerly in 7 CFR Part 3016.36(b)(2), to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. This is accomplished by ensuring the product label designates the United States, or its territories, as the country of origin. Therefore, SFAs must ensure that products delivered comply with any Buy American contract provisions by reviewing products and/or delivery invoices/receipts to identify the country of origin is the United States or its territories. SFAs also need to conduct a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses to ensure products comply with the Buy American provision, unless a limited exception has been approved.

Monitoring the Buy American provision by State agencies. State agencies conducting procurement reviews in conjunction with or as a separate review from administrative reviews in 7 CFR Part 210.18, must ensure SFA compliance with the Buy American provision. Similar to SFA monitoring, State agencies must determine if a SFA's solicitation and contract documents contain the language for contractors to supply products in compliance with the Buy American provision; review the label on a variety of food products in storage facilities; and review a sample of supplier

invoices/receipts to ensure the country of origin is the United States or its territories. If exceptions are identified, the State agency must request documentation justifying the exception(s) outlined above. If non-domestic products are identified and there is no documentation justifying the exception, the State agency must issue a finding and require corrective action. State agencies are reminded to distribute this memorandum to SFAs immediately. SFAs should direct any questions concerning this guidance to their State agency. State agencies with questions should contact the appropriate FNS Regional Office.



Sarah E. Smith-Holmes

Director

Program Monitoring and Operational Support

Child Nutrition Programs

Questions and Answers for the Buy American Provision

1) Question: What are the requirements of the Richard B. Russell National School Lunch Act's (NSLA) Buy American provision that school food authorities (SFAs) must follow when purchasing food and food products for use in the Child Nutrition Programs?

Answer: Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a new provision, Section 12(n) of the NSLA (42 USC 1760(n)), requiring SFAs to purchase domestically grown and processed foods, to the maximum extent practicable. Purchases made in accordance with the Buy American provision must also follow the applicable procurement rules calling for free and open competition.

2) Question: How would an SFA determine that an item is a “domestic commodity or product”?

Answer: To determine if an item meets the Buy American provision the SFA would need to look at packaging information on food products during deliveries and review delivery invoices/receipts to determine the country of origin. Section 12(n) of the NSLA defines “domestic commodity or product” as one that is produced and processed in the United States substantially using agricultural commodities that are produced in the United States. One of the reports accompanying the legislation noted that “substantially” means that over 51% of the final processed product consists of agricultural commodities that were grown domestically.

3) Question: Are there any exceptions to the requirements of the Buy American provision?

Answer: Yes. While rare, two situations which may warrant an exception to permit purchases of non-domestic food products are: 1) the food product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or 2) competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product. There is not a specific amount or percentage that is considered “significantly higher” and it is the Program operator’s responsibility to determine the threshold.

SFAs may document exceptions with communications between them and their food supplier; this may include emails, documentation of telephone communications, etc. Alternative considerations to approving an exception and reasons for the exception must be provided as to why the domestic product is being substituted using one of the exceptions above. The documentation must be maintained for review by the State agency during procurement reviews of local agency procurement practices.

4) Question: Regarding the exceptions noted above, whose responsibility is it to understand the market availability, potential sources and price fluctuations of agricultural products?

Answer: SFAs are responsible for conducting market research to better understand specific markets. When comparing like products from domestic and non-domestic sources, SFAs should ask:

- Are there other domestic sources of this product?
- Is there a lower cost domestic product that could be easily substituted, if the nondomestic product is less expensive than the product ordered (e.g. substitute domestic pears for non-domestic apples)?
- Am I soliciting bids for this product at the best time of year? If I contracted earlier or later in the season, would prices and/or availability change?

SFAs should take into account the questions outlined above to ensure they are looking at all available sources, substitutions and timing. SFAs understand their budget constraints and needs best and can make a determination.

5) Question: Does the Buy American provision apply to entities that purchase on behalf of an SFA, such as a purchasing cooperative or a food service management company?

Answer: Yes. Any entity that purchases food or food products on behalf of the SFA must follow the same Buy American provision and exceptions that the SFA is required to follow.

6) Question: Does the Buy American provision apply only to purchases made using Federal funds under the Child Nutrition Programs?

Answer: No. SFAs must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provision. Pursuant to Child Nutrition Program regulations, all Federal funds, all money received from children as payment for program meals, all proceeds from the sale of competitive foods, and all other income generated by the school food service must accrue to the food service account. As a consequence, the entire nonprofit school food service account becomes subject to Federal procurement standards.

7) Question: What can an SFA do to comply with the requirements of the Buy American provision?

Answer: Two examples SFAs may use in solicitations and contacts to comply with the provision are:

- Include a Buy American provision using the language in 7 CFR Part 210.21(d) in all product specifications, bid solicitations, requests for proposals (RFPs), contracts, purchase orders, and other procurement documents issued.
- Specify only 100% domestically grown and processed products are approved for purchase.

Additionally, SFAs are required by 2 CFR Part 200.318(b), formerly in 7 CFR 3016.36(b)(2), to monitor contractor performance to ensure compliance with all contractual requirements. This includes compliance with the Buy American provision. SFAs can also ask their suppliers to provide certification as to the origin of the product which is discussed in more detail in question #9. It is recommended that Program operators require country of origin on all products and invoices submitted for payment and implement procedures for monitoring the country of origin at the time of delivery.

For example, Program operators may require vendors to list the country of origin for products in all procurement documentation from a bid or proposal to receipts and invoices. Program operators may also include penalties, including contract termination, if vendors are not able to comply with the Buy American provision, unless a rare exception exists (see question #3).

8) Question: As noted above, Program operators should include language about the Buy American provision in all procurement documents. Can you provide us with sample language for contractors to comply with the Buy American provision and to document justification of alternatives and/or exceptions in contracts? It is understood that these are examples only and should be tailored to the needs of the contracting parties. (Sample language)

Answer: Yes; consider the examples provided below:

1. As required by the Buy American provision, all products must be of domestic origin as required by 7 CFR Part 210.21(d).
2. The District participates in the National School Lunch Program and School Breakfast Program and is required to use the nonprofit food service funds, to the maximum extent practical, to buy domestic commodities or products for Program meals. A “domestic commodity or product” is defined as one that is either produced in the U.S. or is processed in the U.S. substantially using agricultural commodities that are produced in the U.S. as provided in 7 CFR Part 210.21(d).
3. Exceptions to the Buy American provision should be used as a last resort; however, an alternative or exception may be approved upon request. To be considered for the alternative or exception, the request must be submitted in writing to a designated official, a minimum of ___day (s) in advance of delivery. The request must include the:
 - a) Alternative substitute (s) that are domestic and meet the required specifications:
 - i) Price of the domestic food alternative substitute (s); and
 - ii) Availability of the domestic alternative substitute (s) in relation to the quantity ordered.
 - b) Reason for exception: limited/lack of availability or price (include price):
 - iii) Price of the domestic food product; and
 - iv) Price of the non-domestic product that meets the required specification of the domestic product.

9) Question: How should an SFA determine the country of origin for an end product?

Answer: For processed end products, there is a two-part test to define end products: (1) the article must be processed in the United States or its territories; and (2) the cost of domestic components must exceed 50 percent of the cost of all the components. It is not enough to assume that a product with a well-recognized American brand name or product supplied by a domestic foodservice distributor complies with the Buy American provision. SFAs should inquire further with their suppliers to determine the country of origin for an end product because some products sold in school meals may carry the name brand of a domestic company but the product itself may be derived from another country. SFAs should also examine product packaging as the Nutrition Labeling and Education Act of 1990 mandates that the country of origin for both domestic and imported food products be identified on the product labels. It should be noted that the Buy American provision applies even if there have been recent changes to the Country of Origin Label requirements.

10) Question: Can a product made from a U.S. agricultural product, but manufactured in another country be purchased for SFAs?

Answer: No. Section 12(n) of the National School Lunch Act defines “domestic commodity or product” as one that is *produced and processed* in the United States substantially using agricultural commodities that are produced in the United States.”

11) Question: Should SFAs rely on the distributors’ information from American suppliers about the amount of domestic content in the parts, components, and other elements they buy and use for their final products?

Answer: According to the Federal Trade Commission, if given in good faith, entities can rely on information from foodservice distributors about the domestic content in the parts, components, and other elements

contained in the product. However, rather than assume that the content is 100 percent U.S.-made, SFAs would be wise to ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content. SFAs can include in their bidding process a requirement for certification along the lines of: "We require that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you." Appearing under this statement could be the sentence, "We certify that our ____ have at least ____% U.S. content," with space for the supplier to fill in the name of the product and its percentage of U.S. content.

12) Question: Doesn't this place some of the burden on manufacturers and distributors of food and food products in the Child Nutrition Programs?

Answer: Yes. The ability to certify, as required by the terms of the contract with the SFA, will require that manufacturers and processors look back far enough in the manufacturing process to be reasonably sure that any significant non-domestic content has been identified.

13) Question: Is there a dollar amount or percentage triggering an exception to the Buy American provision, or is there a requirement to request a waiver to purchase non-domestic products?

Answer: No, FNS has not defined a dollar amount or percentage that triggers an exception and there is no requirement to request a waiver to purchase non-domestic products. SFAs are responsible for including a Buy American provision in all solicitation documents and awarded contracts paid for with nonprofit food service funds. SFAs are also responsible for monitoring contractor performance to ensure compliance.

State agencies are responsible for oversight of all Program regulations including the Buy American provision. Oversight of the Buy American provision includes ensuring SFA solicitations and contracts contain this requirement; that SFAs are monitoring contractor performance to ensure compliance; by reviewing exception documentation, as requested by supplier, and by reviewing invoices/receipts and products in storage facilities to ensure products are of the United States, or its territories. If non-domestic products are identified and there is no documentation justifying the exception, the State agency must issue a finding and require corrective action.