



KENTUCKY EDUCATIONAL DEVELOPMENT CORPORATION (KEDC)
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(606) 928-0205
www.kedc.org

* * * REQUEST FOR PROPOSALS * * *

REFERENCE:	PV-Grocery-2021
PUBLIC NOTICE DATE:	May 4, 2021
OPENING DATE & TIME:	June 15, 2021, 9:00 AM Eastern
CONTRACT PERIOD:	July 1, 2021 – June 30, 2022
ITEMS:	Beverage, Center of the Plate, Cleaning Solutions, Dairy, Disposables & Tabletop, Fruits & Vegetables, Grocery & Bakery, and Potatoes

The Kentucky Educational Development Corporation (KEDC) Board of Directors solicits sealed proposals that would, if accepted by the KEDC Board of Directors or its designee, establish a contract, with the general and detailed terms, conditions, and specifications contained in these standard terms and conditions and in the proposal specific terms and conditions.

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STANDARD TERMS AND CONDITIONS

1. INSTRUCTIONS FOR RESPONDENTS: These standard terms and conditions along with the proposal specific terms and conditions apply to all proposals submitted. Explain any requested deviations or exceptions as part of your 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 proposal specific terms the proposal specific terms will govern.
2. PROPOSAL 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 submission. Submission requires that each respondent has an updated vendor account. Instructions on how to register as a new vendor or update an existing account and complete the 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. Tabulation will be made by KEDC staff and, after the KEDC Board or its designee has taken official action, will be posted to the <http://www.kpc4me.com> website.

Submit all proposals and any attachments via the online application. No other form of submission (e.g., paper, telephone, facsimile, telegraph, mail, etc.) will be accepted. Proposals submitted on company forms are subject to rejection. The respondent acknowledges that the respondent has read this invitation, understands it, and agrees to bind by its terms and conditions

3. CLARIFICATION : For clarification or additional information relative to this invitation contact the KEDC Member Services Team by email at memberservicesteam@kedc.org or phone (606) 928-0205.
4. 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 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 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 the respondent.

A contract will be entered into by KEDC with only responsible respondents who possess the potential ability to perform successfully under the terms and conditions. Consideration shall be made for such matters as a respondent'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 proposals to determine if the respondent meets the requirements or reasonableness, allocability, and allowability.

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

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

The costs quoted in the response are correct and have been arrived at by the respondent 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 request for proposals, designed to limit independent competition.

The contents of the proposal have not been communicated by the respondent, or its employees, or agents to any person not an employee or agent of the respondent or its surety on any bond furnished with the proposal and will not be communicated to any such person prior to the official opening of the proposal. Respondent 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 respondent certifies that collusion is a violation of federal law and can result in fines, prison sentences and civil damage awards.

The KEDC solicitation process is conducted consistent with KRS Chapter 45A:345 through 45A:460, the Model Procurement Code, and that the contents of the response and the actions taken by the respondent in preparing and submitting the response comply with above sections of the Model Procurement Code.

The respondent is legally entitled to enter 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.

6. CERTIFICATION REGARDING LOBBYING : The respondent certifies, to the best of his or her knowledge and belief, that:
- a. 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.
 - b. 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.
 - c. The respondent 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.

7. 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 a proposal, the respondent 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 respondent 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 respondent 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 an offer. The respondent further agrees to include a provision requiring such compliance in its lower tier covered transactions.

8. ERROR IN PROPOSAL : No proposal may be altered or amended after the specified time and date set for the opening. The KEDC Board or its designee reserves the right to waive defects and informalities in proposals, to reject any or all proposals, or to accept any proposal as may be deemed to its interest. KEDC may allow the withdrawal of a proposal where there is a patent error on the face of the document, or where the respondent presents sufficient evidence, substantiated by worksheets, that the proposal was based upon an error in the formulation of the price.
9. WITHDRAWAL OF PROPOSAL : All proposals shall be valid for a period of thirty (30) days from the opening date to allow for tabulation, study, and consideration by the KEDC Board or its designee. The respondent may withdraw a proposal, without prejudice, prior to the published opening date.
10. ADDENDA : KEDC may issue addenda to the solicitation after its release.
11. REVIEW: After the public opening of proposals received from the solicitation, KPC staff and member officials will review the results, develop a preliminary tabulation, and may contact the top scored respondents for further negotiation.
12. PROTEST PROCEDURES : The KEDC Board of Directors or its designee, shall have authority to determine protests and other controversies of actual or prospective respondents in connection with the solicitation or selection for award of a contract.

Any actual or prospective respondent, who is aggrieved in connection with this 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.

13. **PRE-QUALIFICATION** : KEDC reserves the right to pre-qualify any respondent, especially those which has not previously participated in the KEDC procurement program. Criteria for qualification shall include:
 - a. **Product Line**: The respondent shall provide proof that all items listed in the catalog are in stock or quickly obtained.
 - b. **Physical Facilities** - Respondent 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 comply with AFDOS code as recommended by the Federal Food and Drug Administration. KEDC reserves the right to prequalify any or all respondents and to reject any respondent 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, remain in compliance with the United States Food, Drug, and Cosmetic Act as well as any State and Local Statute, Regulation or Ordinance.
 - c. **Financial Capacity** - The potential respondent 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 respondent's ability to comply with the service level requirement outlined in this solicitation, then three letters of reference from previous school district customers shall be provided.
 - e. **Past Performance** – The respondent 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.
14. **NON-ASSIGNABILITY OF AWARD** : The awarded respondent cannot convey this contract to its successors or assigns without the prior, express approval of the Board of Directors of KEDC or its designee.
15. **TRANSMITTAL OF ORDERS** : KEDC shall issue purchasing guidelines to members. The members will use formal purchase orders in ordering from the awarded respondent. The successful respondent acknowledges that orders from KEDC members transmitted from KEDC's office on the member's behalf are acceptable. The successful respondent 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 respondent. The respondent shall accept orders electronically from KEDC and/or members.
16. **QUANTITIES** : It shall be understood that any contract resulting from this solicitation will not obligate KEDC or its members to purchase from the contract.
17. **WARRANTY** : The awarded respondent shall make available and honor all manufacturer's warranties, standard and extended, to all KEDC members.

18. **RECALLS** : The awarded respondent shall notify KEDC and its members immediately of any product recalls. The awarded respondent 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 respondent.
19. **RETURNS** : The successful respondent must provide a Return Material Authorization within 1 working day of the request by a KEDC member. Returned materials must be restocked at no charge to the member (special order and custom crafted items excluded).
20. **LIABILITY** : The awarded respondent 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 respondent 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 respondent, his servants or agents. The awarded respondent 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 respondent.
21. **ACCOUNTING PRACTICES** : During the life of any contract awarded from this solicitation, the successful respondent 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.
22. **ITEM SUBSTITUTION AND OUT-OF-STOCK BACK-ORDERS** : Substitutions require prior written authorization from the member. The respondent 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 respondent must receive written directions from the member on how to proceed (i.e., cancel, process, etc.).
23. **PENALTY** : The respondent agrees to provide total requirements as listed herein, thereby minimizing occurrences when a member may have to seek other interim product sources. The respondent is to deliver 100% of stock items within 10 business days; repeated failure to do so will result in default.
24. **PRODUCT AND SAFETY INFORMATION** : The successful respondent shall provide upon request by any member, the most recent MSDS information sheets for any products the respondent may deliver to said member. It is the respondent's responsibility to comply with all local, state, and federal regulations.
25. **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 respondent shall compile velocity reports by member. The reports shall indicate purchasing entity, awarded respondent'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.
26. **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 respondent 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.

27. **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).
28. **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.
29. **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.
30. **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) day notice, by registered or certified mail, of its intent to cancel this contract.
31. **ATTORNEYS' FEES :** Should either party deem 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.
32. **COMPENSABLE DAMAGES FOR BREACH (REMEDIES) :** 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 solicitation procedure.
 - 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.

33. OTHER CONDITIONS:

- a. The awarded respondent 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 members local jurisdiction.
- e. The respondent 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 respondent 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 respondent shall comply with all applicable cost principles, including but not limited to those set forth in 2 CFR § 225.
- i. The awarded respondent 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 respondent 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 respondent 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 respondent 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 respondent 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 respondent 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 respondent acknowledges that collusion is a violation of federal law and can result in fines, prison sentences and civil damage awards.
- q. The respondent 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 proposals and to waive informalities. A contract, based on this solicitation, 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.

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PROPOSAL SPECIFIC TERMS AND CONDITIONS

These specific terms and conditions along with the standard terms and conditions apply to all proposals submitted. Explain any requested deviations or exceptions as a part of the 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 specific terms, these specific terms will govern.

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 solicitation.
2. **SERVICE AREA :** A list of currently participating institutions and drop locations is included on the worksheet labeled Service Area in the accompanying Excel Workbook (Prime-Grocery-21). By submitting a proposal, the respondent agrees to service all current contract participants.
3. **AWARD:** After the review of the responses and optionally interviews with finalists, the KEDC Board or its designee may award a contract based on the criteria below. In the case of identical proposals, KEDC reserves the right to select and to award the contract based on its reasonable determination of which proposal is likely to be most beneficial to its members. Preliminary responses will be evaluated based on the criteria below:

CRITERIA	POINTS
Item cost calculation	60
Company Background	10
References	15
Online Ordering	20
Prime Vendor Commitment	10
Produce fixed delivery fee cost calculation	10
Direct to manufacturer fixed delivery fee cost calculation	10
Delivery Schedule	5
Prompt Payment Discount	10
POINT TOTAL	150

Following preliminary scoring, KEDC reserves the right to schedule oral presentations with up to three finalists to provide oral presentations, to answer questions, and to clarify KEDC’s understanding of the written proposal. KEDC reserves the right to not require oral presentations if they do not affect final rankings.

CRITERIA	POINTS
Oral presentation and demonstration	25

4. **BEST AND FINAL OFFER:** If following oral presentations (or preliminary scoring if oral presentations are not warranted) additional information is necessary to make a final decision, KEDC may ask the top scored respondents to submit their best and final offer. KEDC may request only one best and final offer. The opportunity to request a best and final offer shall be at the discretion of KEDC. KEDC will notify the top scored respondents in writing of the request for a best a final offer. The request will include the areas to be addressed by the offer and the date and time by which the offer must be received. No discussion shall be conducted with respondents after submission of a best and final offer except for a compelling reason as determined in writing by KEDC.

After review of the best and final offers, KEDC may award a contract or contracts to those respondents whose proposal(s) are determined in writing to be the most advantageous to KEDC and its members.

5. FRESH PRODUCE: Pricing of produce will consist of True Cost plus a fixed delivery fee per case. Definition of “True Cost” includes actual invoice cost (market cost) included and designated as such, less any promotional allowances and bill backs, but does not include any cash discount for prompt payment. The fixed delivery fee must include sums sufficient to cover all costs of handling and delivery. Under no circumstances may any additional costs of doing business be included in True Cost. The awarded respondent will provide True Cost produce pricing for the upcoming week to KEDC and its members no later than close of business Friday throughout the life of the contract. KEDC reserves the right to audit invoices to verify True Cost. The fixed fee shall be bid in dollars and cents, and NOT as a percentage (%). The distributor’s fixed fee shall remain firm for the initial one-year contract period.

Respondents are to submit True Cost pricing for the week of May 17th.

6. QUANTITIES: Estimated quantities for all items labeled as “Current” represent past usage during the 2019-2020 and 2020-2021 school years. (Two years of usage were included due to shifting meal patterns during the 2020-2021 school year because of the COVID-19 pandemic.) Quantities for items listed as “New” represent estimated annual usage based on surveys of participating members.
7. ACCEPTABLE OR EQUAL: Respondents may propose an alternate but equal item that meets the solicitation criteria for any item on the list. For all such items the respondent would list the price as alternate and insert the alternate item in a row directly below the item.
8. PRIVATE LABEL: Items with no manufacturer or manufacturer number listed were private label items on last year’s contract. The respondent may propose a national brand or private label product that conforms to the item description.
9. PRIME VENDOR COMMITMENT: KEDC members participating in the contract agree to purchase 80% of all contract items exclusively from the awarded respondent. The awarded respondent agrees to remit to any member who agrees in writing to utilize the awarded respondent as their prime grocery distributor an additional one percent (1%) rebate on all purchases. The rebate may take the form of either a deduction from the invoice, check, or credit in an amount equal to the rebate payable to the food service account.
10. DIRECT TO MANUFACTURER: KEDC reserves the right to bid direct to manufacturer in order to secure additional incentives and competitive pricing based on the needs of the membership. The awarded respondent agrees to assist KEDC in any such endeavor including but not limited to providing manufacturer contact information and guidance regarding currently slotted items.

The respondent should propose a fixed fee per shipping carton for items KEDC elects to bid direct to manufacturer on the attached spreadsheet. The fixed fee shall be bid in dollars and cents, and NOT as a percentage (%). The distributor’s fixed fee shall remain firm for the initial one-year contract period and shall include ALL overhead, profit, handling, and storage charges.

11. PROCESSING OF USDA DONATED FOODS TO END PRODUCTS: The awarded respondent agrees to comply with USDA National Policy Memorandum FD-119 dated February 13, 2012. Including but not limited to:
 - a. The respondent must be approved by the appropriate state agency to participate in the USDA’s Net Off Invoice/Value Pass Thru Program.
 - b. Only end products with approved end product data schedules, and that meet substitution and grading requirements in 7 CFR 250.30 may be provided.
 - c. The School Food Authority (SFA) must receive credit for the value of the donated foods contained in the end products through a discount from the gross case price.
 - d. The respondent must collaborate with the processor to ensure the SFA is an eligible participant or end products and to ascertain the quantity of end products, or the value of donated food, for which the SFA is eligible.

- e. The respondent must provide notification to the processor of end-product sales so that the appropriate inventory draw-down may occur.

Further the successful respondent will support the diversion of multiple donated foods to a single end-product (e.g., the diversion of cheese, flour, and tomatoes to pizza).

12. **CONTRACT PERIOD:** The initial contract period of any contract awarded arising from this solicitation is from July 1, 2021 of contract award to June 30, 2022. 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 respondent in writing of its intent to extend or not to extend the contract by March 15th of each year. If KEDC notifies awarded respondent of intent to extend the contract by one year, awarded respondent shall respond in writing by April 1st that it either does or does not intend to extend the contract. The determination to renew the contract beyond the initial year shall be determined in part by the performance of the awarded respondent and by price stability during the contract period. KEDC will periodically provide evaluation summaries to the awarded respondent (See draft copy of Evaluation Form included). If both parties agree to extend the contract by one year, awarded respondent shall respond by May 17 with any necessary price increases or decreases for the first contract period of the extended year. If price increases submitted are deemed excessive (defined as greater than CPI-U) then KEDC shall have cause not to extend the contract.

Any contract extension is contingent upon written agreement of KEDC and the awarded respondent. The contract will not be 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.

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.

13. **PRICING:** All prices must include transportation and delivery charges to the location (school district, KEDC, etc.) specified during ordering. Fuel surcharges and other similar charges are not permitted. The awarded respondent shall provide each item in this solicitation to all KEDC members at the same price. The awarded respondent MAY NOT submit multiple discount levels for the same product by KEDC member or region.
14. **PRICE ADJUSTMENTS:** All prices shall remain firm for the duration of the awarded contract. Upward price adjustments are permissible based on documented changes in the Consumer Price Index for All Urban Consumers (CPI-U) apart from produce as outlined above. Food items shall be fixed for six months, non-food items shall be fixed for a year, and produce shall be provided as weekly delivered cost. The awarded respondent shall notify KEDC 45-days prior to the period for any requested price increases or decreases. All price adjustment requests must include a usage report by item in the previous contract price period. If no price changes are received, the current price will remain in effect. The adjustment schedule is as follows:

PRICE PERIOD	PRICE ADJUSTMENT REQUEST DUE DATE
July 1 – December 31	November 16
January 1 – June 30	May 17

Price adjustments shall be evaluated on an item-by-item basis. Cumulative contract value change will not be considered.

15. **PROMOTION:** KEDC will actively market the awarded respondent 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 Prime Vendors during regular district visits by KEDC staff. Awarded respondent will also have access to the KEDC Logo for use in promotional materials. Similarly, the awarded

respondent will support the efforts of KEDC by participating and sponsoring in the KEDC regional meetings and trainings. KEDC may negotiate a formal marketing agreement with the awarded respondent(s).

16. **NUTRITIONAL INFORMATION:** Upon award the respondent shall provide nutritional analysis information in electronic format for import into USDA approved nutritional analysis software. Awarded respondent shall also 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 calendar days from the date of request.
17. **PRODUCT SAFETY AND HACCP INFORMATION:** The successful respondent shall provide upon request by any member, the most recent MSDS information sheets for any products the respondent may deliver to said member. It is the respondent's responsibility to comply with all local, state, and federal regulations. Awarded respondent HACCP procedures are to be provided to KEDC for publication on the KPC website and to KEDC members upon request.
18. **MENUS:** Upon request, each School Nutrition Director can be asked on a voluntary basis to supply a copy of the cycle menu as planned to the awarded respondent's sales representative. It is understood that the menus are only to be used for guidance purposes by the successful respondent and are in no way guaranteed.
19. **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. Respondents are expected to take immediate action to correct any situation in which product integrity is violated.
20. **BUY AMERICAN ACT:** The respondent will abide by the Buy American Act (42USC 1760(n)) and all associated USDA policy memorandums (e.g., SP 38-2017, dated June 30, 2017, attached).

In support of the Buy American provision the respondent 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 respondent will provide documentation to KEDC prior to award and to 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 proposals 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 the price of the domestic product as well as the non-domestic product price on the proposal 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 respondent'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.

21. **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)).

22. ADMINISTRATIVE FEE: The awarded respondent will pay an administrative fee of three percent (3%) on all purchases made by contract participants under this contract to KEDC up to KEDC's cost to solicit, award, and manage the contract. This cost shall be fixed for the 2020-2021 contract period at \$800,000.00. The awarded respondent will make all administrative fee payments to KEDC by the 25th of the succeeding month and any checks are to be made payable to KEDC. Fees generated in excess of KEDC's cost shall be returned to each ordering member in the form of a rebate. Rebates shall be issued as a credit on the ordering schools' invoice on the last billing cycle of the subsequent month. Should the parties agree not to extend the contract, any outstanding rebates earned are to be paid to KEDC by check within 30 days of termination of the contract. The awarded respondent will also compile and provide to KEDC a monthly report showing all purchases made by members under this contract in a format provided by KEDC.
23. REBATES, DISCOUNTS, & CREDITS: To ensure the utmost level of transparency, the awarded respondent will provide to KEDC and/or its member districts all information and documentation requested by KEDC and/or its member districts necessary to effectively monitor and verify all rebates, discounts and credits, to ensure that all such rebates, discounts and credits are returned to the member districts and to ensure that all administrative fees in excesses of KEDC's costs are returned to the member districts.
24. PIGGYBACK CLAUSE: KEDC reserves the right to extend the terms, conditions, and prices of the awarded respondent to other Institutions who express an interest in participating in any contract that results from this solicitation. 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. Piggyback contracts may not extend beyond the contact date established by KEDC. Participation by other institutions may not result in a material change to the contract.
25. REMEDIES FOR ITEM SUBSTITUTIONS 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 proposed are to be stocked items slotted at all distribution facilities servicing KEDC members. If an awarded respondent 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 respondent shall maintain a 97% average weekly fill rate for all solicited items.

If the awarded respondent 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 an item, the school at its sole discretion, may purchase the product from another source. On all such purchases, the awarded respondent shall be responsible and liable for the difference in cost between the amount paid for the product and the amount which would have been paid the awarded respondent. The awarded respondent's argument that an item could have been purchased at a lower price shall not have merit.

KEDC reserves the right to assess the awarded respondent 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 which results in special orders or substitutions.

26. DELIVERY TIME: Acceptable delivery times will generally be between 6:30AM and 2:00PM. Deliveries are to be made to individual schools on a weekly basis. No minimum dollar or case amounts shall be required for the weekly delivery to members who agree to use the awarded respondent as a prime vendor. Additionally, these members

may occasionally request additional deliveries or special arrangements from time to time and awarded respondent shall respond with no extra charge.

Minimum dollar or case amounts may be required for delivery to other KEDC members provided those costs are provided to the member in writing prior to delivery and are equivalent for all members regardless of location.

Specific delivery dates and times shall be negotiated with each School Nutrition Director.

Please detail other delivery options (such as locked key boxes) in your response.

27. DELIVERY PROCEDURES: Drivers and helpers shall deliver merchandise into designated storage areas. Drivers or helpers shall not be required to store merchandise on shelves. Drivers may request the authorized school receiver to verify the accuracy of quantities delivered. Shortages, damages and substitutions shall be noted by the driver to the receiver and noted on the delivery ticket. **This signature will only indicate that the order has been received and will not indicate that the invoice has been reconciled to the actual items delivered.** All products shall be maintained at their proper temperature throughout their staging, loading, transport, and delivery. All the vendor's facilities and delivery vehicles must conform to local, state, and federal rules and regulations regarding sanitation and are subject to inspection by KEDC or its members or other officials at the discretion of KEDC.

It is understood that deliveries are not to be made when school is not in session with exception of the opening of school. Calendars will be provided to the successful respondents to designate off-school days. When school is cancelled because of inclement weather or any other emergency and the delivery truck is already in route, upon arrival the company driver must contact the School Nutrition Director by telephone for instructions. The school system reserves the right to accept the delivery, authorize another acceptance signature, or to return the delivery. If the truck has not left the distributor's warehouse, the delivery will be made on the next day that schools are re-opened unless notified otherwise.

An emergency delivery communication plan is to be provided to each participating KEDC Member upon award.

28. DELIVERY FAILURE: If the vendor fails to deliver an order, the vendor shall take corrective action by either making a special delivery to the member or by arranging for delivery by another vendor. The vendor shall incur any extra cost difference between the price of the originally ordered items and the price of the alternate vendor. This delivery will be made within 48 hours of the original delivery day. The vendor will provide any overtime pay incurred by any of the member's employees if a late delivery occurs.

NOTE: The awarded respondent is responsible for ensuring all the delivery personnel have the correct item numbers and prices loaded into their inventory system upon making delivery to the facility.

29. RETURNS: The awarded respondent must provide a Return Material Authorization within one (1) working day of the request by KEDC member for items not subject to HACCP guidelines. Returned materials shall be restocked at no charge to KEDC member.

30. AUDITS:

- a. KEDC reserves the right to make audits of an awarded respondent's cost 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 contract period upon appropriate notice given to awarded respondent.
- b. The awarded respondent 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 respondent.
 - d. The awarded respondent 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).
31. KENTUCKY BROKER SERVICE: Awarded respondent is encouraged to utilize Kentucky brokers whenever possible.
32. PRODUCT EVALUATION: Samples requested must be furnished free of expense to KEDC and or the 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 respondent's expense. Right is reserved to mutilate or destroy any samples if considered necessary for testing purposes.
33. PAYMENTS: Each school district and/or school shall be responsible for making payment to the awarded respondent. Normally, school districts pay bills only after approval from the Board of Education which meets monthly.
34. PROMPT PAYMENT DISCOUNT: Awarded respondent must provide discount to members for prompt invoice payments (recommended one percent (1%)). Provide a detailed explanation of how this provision will be administered to enable KEDC to effectively monitor and verify the discounts, and to ensure that such discounts are returned to the member districts as part of your response. 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.
35. RFP RESPONSE: In addition to the RFP certification form and the price workbook, please submit a narrative response to each of the following prompts:
- a. **Company Background:**
 - i. Provide company's official registered name.
 - ii. Provide a brief history of your company, including the year it was established.
 - iii. Provide your company's corporate organizational chart.
 - iv. Provide corporate office location information.
 - v. Provide proof of certification if your company is a certified W/MBE vendor. Provide the percentage of your business that is with W/MBE suppliers.
 - vi. Provide your company's Dun & Bradstreet (D&B) number.
 - vii. For each distribution center that will serve KEDC members, list the name of key contacts with title, address, phone, and e-mail address. Key contacts include management, sales (inside and outside), delivery logistics, and billing.
 - viii. Provide name, contact information, and a brief background (experience) for your organization's proposed primary point of contact with KEDC for this contract.
 - b. **References:** provide three references from consortiums of equal or larger size that you currently or previously have served. Include contact name, phone number, and email address.
 - c. **Ordering:** provide a detailed overview of your online order process and website. Be sure to describe any special features of interest to the K-12 market (e.g., American made products are easily identified, CN label and product formulation statement accessibility, ability for participating members to create customized, locked order guides, tracking of commodity dollars/pounds, etc.). Provide details regarding offsite failover, data redundancy, etc. Should the online ordering site be offline other than for previously announced maintenance, detail your emergency offline order process.
 - d. **Prime Vendor Commitment:** Provide a detailed explanation of how this provision will be administered to enable KEDC to effectively monitor and verify the rebates, and to ensure that such rebates are

credited to food service account as requested in section 9 of the proposal specific terms and conditions above.

- e. **Produce Delivery:** provide a fixed (dollar) cost per case for delivery of fresh produce items.
- f. **Direct to Manufacturer:** provide a fixed (dollar) cost per case for delivery of items KEDC elects to bid direct to manufacturer.
- g. **Delivery Schedule:** If your company offers a lock-box delivery option provide details of the program including samples of the agreement and any forms to be completed.
- h. **Prompt Payment Discount:** Detail terms and conditions of the discount for prompt payment as requested in section 30 of the proposal specific terms and conditions above.
- i. **Other Services:** Detail any other services offered by your organization that will be of benefit to KEDC and KEDC members (this item will not be scored).

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Food and
Nutrition
Service

DATE: June 30, 2017

MEMO CODE: SP 38-2017

Park Office
Center

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

3101 Park
Center Drive
Alexandria
VA 22302

TO: Regional Directors
Special Nutrition Programs
All Regions

State Directors
Child Nutrition Programs
All States

The Food and Nutrition Service (FNS) has continued to receive a number of inquiries relating to the details and enforcement of the Buy American provision in 7 CFR 210.21(d). This memorandum replaces SP 24-2016, *Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program*, dated February 03, 2016. This guidance provides several updates, including suggested contract language to be utilized in solicitations, and serves to reinforce the importance of the Buy American provision to our economy and its positive effects on small and local businesses.

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 National School Lunch Act (NSLA) (42 USC 1760(n)), requiring school food authorities (SFAs) to purchase, to the maximum extent practicable, domestic commodities or products. This Buy American provision supports the mission of the Child Nutrition Programs, which is to serve children nutritious meals and support American agriculture.

The Buy American provision applies to SFAs located in the 48 contiguous United States and is one of the procurement standards these SFAs must comply with when purchasing commercial food products served in the school meals programs. Although Alaska, Hawaii, and the U.S. territories are exempt from the Buy American provision, SFAs in Hawaii are required to purchase food products produced in Hawaii in sufficient quantities, as determined by the SFA, to meet school meal program needs per 7 CFR 210.21(d)(3). Likewise, SFAs in Puerto Rico are required to purchase food products produced in Puerto Rico in sufficient quantities, under 42 USC 1760(n)(4).

Section 12(n) of the NSLA defines “domestic commodity or product” as an agricultural commodity that is produced in the U.S. and a food product that is processed in the U.S. substantially using agricultural commodities produced in the U.S. Report language accompanying the legislation noted that “substantially means over 51% from American products.” Therefore, over 51% of the final processed product (by weight or volume) must consist of agricultural commodities that were grown domestically. Thus, for foods that are unprocessed, agricultural commodities must be domestic, and for foods that are processed, they

The contents of this guidance document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

must be processed domestically using domestic agricultural food components that are comprised of over 51% domestically grown items, by weight or volume as determined by the SFA.

For products procured by SFAs for use in the Child Nutrition Programs using nonprofit food service account funds, the product's food component is considered the agricultural commodity. FNS defines food component as one of the food groups which comprises reimbursable meals. The food components are: meats/meat alternates, grains, vegetables, fruits, and fluid milk. Please refer to 7 CFR 210.2 for full definitions. Any product processed by a winning vendor must contain over 51% of the product's food component, by weight or volume, from U.S. origin. This definition of domestic product serves both the needs of schools and American agriculture. Products from Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands are considered domestic products under this provision as these products are from the territories of the U.S.

Implementing the Buy American provision. SFAs are reminded that for all procurement transactions for food when funds are used from the nonprofit food service account, whether directly by an SFA or on its behalf, procurement transactions must comply with the Buy American provision. Implementation of the Buy American provision should be done by: including Buy American in documented procurement procedures, State agency prototypes documents, and all procurement solicitations and contracts; including domestic requirements in bid specifications; contract monitoring; and verifying cost and availability of domestic and non-domestic foods using data in the USDA Agricultural Marketing Service's (AMS) weekly market report at <https://marketnews.usda.gov/mnp/fv-report-config-step1?type=termPrice>.

The Buy American provision supports local and small businesses. Using food products from local sources supports local farmers and provides healthy choices for children in the school meal programs while supporting the local economy. Requiring compliance with the Buy American provision also supports SFAs working with local, or small, minority, and women-owned businesses as required by Federal regulations (see 2 CFR 200.321). FNS also encourages purchasing food products from local and regional sources when expanding farm to school efforts.

USDA Foods comply with Buy American requirements. FNS encourages SFAs to maximize their use of USDA Foods, which comply with Buy American requirements. USDA Foods are domestic, and purchasing from 100% domestic origin sources is a longstanding USDA policy based on Section 32 of the Agriculture Act of 1935 (P.L. 74-320 as amended; 7 U.S. Code 612c). However, processed end products that contain USDA Foods need to meet the 51% domestic requirement, by weight or volume.

Limited exceptions to the Buy American provision. There are limited exceptions to the Buy American provision which allow for the purchase of foods not meeting the “domestic” standard as described above (i.e., “non-domestic”) in circumstances when use of domestic foods is truly not practicable. These exceptions, as determined by the SFA, are:

- The product is not produced or manufactured in the U.S. in sufficient and reasonably 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.

It should be noted that FNS has not defined a dollar amount or percentage triggering an exception requiring consideration of alternatives. 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?
- Am I using third-party verification, such as through USDA AMS, to determine the cost and availability of domestic and nondomestic foods?

If an SFA is using one of the above exceptions, there is no requirement to request a waiver from the State agency or FNS in order to purchase a non-domestic product. SFAs must, however, keep documentation justifying their use of 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 5 in the Questions and Answers document below. Monitoring of contractors by the SFA and oversight by the State agency are critical functions in enforcing the Buy American provision, including review of exceptions, as further outlined below.

Compliance with, and monitoring of, the Buy American provision by SFAs. To ensure compliance with the Buy American provision the SFA must ensure solicitation and contract language includes the requirement for domestic agricultural commodities and products. The SFA must also include the Buy American requirement in its documented procurement procedures and retain records documenting any exceptions. SFAs should ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content in any processed end product. In order for SFAs to be able to document the domestic content, they should include in their procurement process a requirement for certifying the domestic percentage of the agricultural food component of commodities and products.

Further, solicitation and contract language must be monitored by the SFA to determine contractor compliance as required by 2 CFR 200.318(b), in order to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. Monitoring is also accomplished by reviewing products and delivery invoices

or receipts to ensure the domestic food that was solicited and awarded is the food that is received. SFAs also need to conduct a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses to ensure the products received are the ones solicited, and awarded, and comply with the Buy American provision.

Monitoring of the Buy American provision by State agencies. State agencies conducting procurement reviews in conjunction with, or as a separate review from, the administrative review process must ensure SFA compliance with the Buy American provision. During a procurement review, State agencies should: (1) determine if SFAs are purchasing domestic commodities as defined in 7 CFR 210.21(d); (2) check that solicitations and contracts contain the Buy American certification language recommended in Questions 6 and 7 below; and (3) review a sample of supplier invoices or receipts to determine whether the solicited-for domestic foods were provided by the awarded contractor. If the SFA is non-compliant with the Buy American provision, the State agency must issue a finding and require corrective action which may include:

- Requiring contract amendments to include language to supply domestic foods, or a new solicitation if the contract amendment is determined, by the contracting parties or State agency, to be a material change;
- Attending a procurement training to increase compliance with procurement standards, including the Buy American provision; and
- Fiscal action for repeat or egregious findings, on a case-by-case basis with approval by the appropriate FNS Regional Office.

During an on-site administrative review, State agencies should look at the labels on a variety of food products in SFA storage facilities and if the State agency identifies non-domestic foods, the State agency must request documentation justifying the limited exception(s) outlined above. If such is not provided, the State agency must issue a finding and require corrective action, which may include:

- Requiring review of food deliveries for contractor compliance;
- Monitoring to ensure the correct domestic food components contracted for are delivered;
- Prior to accepting foods, ensuring that an alternative domestic food component, or an exception to purchase non-domestic foods, has been approved for delivery; and
- Fiscal action for repeat or egregious findings, on a case-by-case basis with approval by the appropriate FNS Regional Office.

Both the administrative review and procurement review teams should work together and communicate findings in order to provide comprehensive monitoring of the Buy American requirement.

Regional and State Directors
Page 5

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.

Original Signed

Sarah E. Smith-Holmes
Director
Program Monitoring and Operational Support
Child Nutrition Programs

Questions and Answers for the Buy American Provision

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

Answer: To determine if a food item meets the Buy American provision, the SFA would need to ensure that the solicited-for domestic foods were included in the vendor response, and provided by the awarded contractor in the foods delivered to the SFA. Section 12(n) of the NSLA defines “domestic commodity or product” as an agricultural commodity produced in the U.S. and a food product processed in the U.S. substantially using agricultural commodities that are produced in the U.S. Reports accompanying the legislation noted that “substantially means over 51% from American products.”

For products procured by SFAs for use in the Child Nutrition Programs, the food component of the product is the agricultural commodity. FNS defines food component as one of the food groups which comprise reimbursable meals. The food components are: meats/meat alternates, grains, vegetables, fruits, and fluid milk. Please refer to 7 CFR 210.2 and 210.10 for full definitions and use of the terms, respectively. Any product processed by a responsive vendor must contain over 51% of the food component, by weight or volume, from U.S. origin.

When considering juice for example, in order for the product to be considered “domestic” in accordance with the Buy American provision, the juice must contain over 51% of the juice or juice concentrate, by volume, from fruits or vegetables grown in the U.S. FNS does not consider water – whether tap or bottled – to be a domestically grown agricultural commodity for purposes of this provision. Likewise, packaging and labor are not agricultural commodities. For products procured by SFAs to be served in the Child Nutrition Programs, the fruit/vegetable component of the product, by volume, is the agricultural commodity. For fruit/vegetable juices, in order to be considered responsive, the juice provided by a vendor must contain over 51% of the fruit/vegetable component of the juice, by volume, from U.S. origin.

2) 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 provisions and exceptions that the SFA is required to follow.

3) Are all agricultural commodity or food products purchased using the nonprofit food service account subject to the Buy American provision?

Answer: Yes. SFAs must ensure that all agricultural commodity or food products procured 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 nonprofit food service account. As a consequence, the entire nonprofit school food service account becomes subject to Federal procurement standards. Therefore, all agricultural commodity or food product purchases made from the nonprofit school food service account are subject to the

Buy American provision, subject to the limited exceptions noted in the memorandum above.

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

Answer: To ensure compliance with the Buy American provision the SFA must ensure solicitations and contracts include the requirement for domestic agricultural commodities and products, include this requirement in its documented procurement procedures, and retain records documenting any exceptions. Examples of specifications that SFAs may use in solicitations and contracts to comply with the Buy American provision include:

- Utilizing the Buy American definitions in 7 CFR 210.21(d) in all food product specifications, invitations for bids (IFBs), and requests for proposals (RFPs) for food products, contracts, purchase orders, and other procurement documents issued;
- Require a certification of domestic origin for products which do not have country of origin labels; and
- Including the following language: “The District/State agency/Territory 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 practicable, 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 210.21(d).”

Additionally, SFAs are required by 2 CFR 200.318(b) to monitor contractor performance to ensure compliance with all contractual requirements. This includes compliance with the Buy American provision. SFAs can also require their suppliers to provide certification of domestic origin on food products delivered and on invoices submitted as discussed in more detail in Questions 6 and 7, below.

For example, Program operators may require vendors to provide a certification of domestic origin for all food products listed in all procurement documentation, from a bid or proposal to receipts and invoices. Program operators may deem a bid or response unresponsive and ineligible for contract award for noncompliance with the terms and conditions of contract award, if such certifications are solicited for, but not included. Further, the program operator may establish penalties, including contract termination, if vendors fail to comply with the Buy American provision and no documentation of any exceptions exists.

5) How can SFAs comply with the requirement to retain records, which should include documentation of exceptions in adhering to the Buy American provision?

Answer: Below is sample language that SFAs should use in solicitations and contracts to comply with the requirement to retain records documenting any exceptions to the Buy American provision:

- I. Exceptions to the Buy American provision are very limited; however, an alternative or exception may be approved upon request. To be considered for an 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:

- (1) Alternative substitute(s) that are domestic and meet the required specifications:
 - (a) Price of the domestic food alternative substitute(s); and
 - (b) Availability of the domestic alternative substitute(s) in relation to the quantity ordered.
- (2) Reason for exception: limited/lack of availability or price (include price):
 - (a) Price of the domestic food product; and
 - (b) Price of the non-domestic product that meets the required specification of the domestic product.

SFAs may document exceptions by maintaining records of communications between them and their food supplier; this may include emails, documentation of telephone communications, etc. The documentation must be maintained for review by the State agency during procurement reviews of local agency procurement practices.

One resource SFAs and State agencies may use in order to document exceptions is the market news reports available from AMS. AMS provides free, unbiased price and sales information on farm commodities at: <https://marketnews.usda.gov/mnp/fv-report-config-step1?type=termPrice>. Using this website, SFAs and State agencies can find third-party verification of cost and availability of domestic and nondomestic foods. Further, SFAs may use the information to communicate alternatives with food suppliers and document purchase decisions.

6) What is sample language contractors can use to document their compliance with the Buy American provision?

Answer: Below is sample language contractors may use to comply with the Buy American provision; however, language should be tailored to the needs of the contracting parties.

Sample Language:

“We certify that ___(insert product name)___ was processed in the U.S. and contains over 51% of its agricultural food component, by weight or volume, from the U.S.,” with space for the supplier to fill in the name of the product and its specific percentage of the domestic agricultural food component contained therein.

7) How should an SFA document the domestic commodity food components for a processed end product?

Answer: SFAs should ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content in the processed end product. In order for SFAs to be able to document the domestic content, they should include in their bidding process a requirement for certification such as: “We require that suppliers certify the food product was processed in the U.S. and certify the percentage of U.S. content, by weight or volume, in the food component of processed food products supplied to us.”

SFAs may also include the following statement in the bidding process: “We require bidders to certify that ___(insert product name)___ was processed in the U.S. and contains over ___(insert % of weight or volume) of its agricultural food component from the U.S.,” with

space for the supplier to fill in the name of the product and its percentage of the domestic agricultural food component (by weight or volume) contained therein.

State agencies should also include such language in any prototype solicitation documents and contracts provided to the SFAs.

8) Can a product made from a U.S. agricultural product but manufactured in another country be purchased from the nonprofit school food service account absent a limited exception?

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 U.S. substantially using agricultural commodities that are produced in the U.S.” This means that the product must be processed entirely in the U.S. and must substantially use domestic agricultural commodities. A large number of items received by schools state on the label that they are “packed” in the U.S. Non-domestic foods packed in the U.S. or non-domestic foods in packaging produced in the U.S. do not meet the Buy American requirements.

9) Can FNS or a State agency provide a list of foods that are not available domestically and therefore not subject to the Buy American provision?

Answer: No. Neither FNS nor a State agency may make the determination that a domestic commodity or product is not available. Although the Federal Acquisition Regulations (FAR) contain such a list, this applies to procurement by the Federal government only. Each SFA should determine on an individual basis, whether domestic alternatives exist first, and if not, whether an exception is warranted. Exceptions are warranted only when (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. Again, there is not a specific amount or percentage that is considered “significantly higher” and it is the SFA’s responsibility to determine the threshold. Records and documentation must be retained justifying any exception as outlined above. SFAs can maintain documentation of exceptions for domestic foods that are prohibitively costly or not available in sufficient quantities and present this during reviews by the State agency.