



**BUY AMERICAN**  
U.S. agriculture supporting  
healthy school meals

Participant's Workbook



# **Buy American U.S. Agriculture Supporting Healthy School Meals**

## **Participant's Workbook**

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The University of Mississippi, School of Applied Sciences  
[www.theicn.org](http://www.theicn.org)

Key Area 2: Operations  
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The Institute of Child Nutrition was authorized by Congress in 1989 and established in 1990 at The University of Mississippi in Oxford and is operated in collaboration with The University of Southern Mississippi in Hattiesburg. The Institute operates under a grant agreement with the United States Department of Agriculture, Food and Nutrition Service.

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**PURPOSE**

The purpose of the Institute of Child Nutrition is to improve the operation of child nutrition programs through research, education and training, and information dissemination.

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**MISSION**

The mission of the Institute of Child Nutrition is to provide information and services that promote the continuous improvement of child nutrition programs.

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**VISION**

The vision of the Institute of Child Nutrition is to be the leader in providing education, research, and resources to promote excellence in child nutrition programs.

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## Introduction

### ***U.S. Agriculture Supporting Healthy School Meals***

The Buy American provision requires schools to purchase, to the maximum extent practicable, domestic agricultural foods and products. This requirement is important because it supports the mission of the child nutrition programs, which is to serve children nutritious meals and support American agriculture.

### ***Training***

This training provides general concepts about the Buy American provisions when procuring food for federal school nutrition programs. This training does not replace information provided by current USDA policy memos or procedures determined by the State agency. This training is intended to provide knowledge for the stakeholders that can lead to their success in applying these requirements during the food purchasing and contract monitoring activities. This training is intended for school nutrition directors and anyone responsible for the procuring of foods in the National School Lunch Program (NSLP) or School Breakfast Program (SBP).

To help guide you through this training, the Institute of Child Nutrition has provided each of you with a Participant's Workbook. The workbook contains important information and activities developed specifically for this training. On the upper right corner of the slides, you will see a reference to the corresponding lesson in the Participant's Workbook.

This training will cover a variety of topics, and questions are highly encouraged. Because all your questions are important, please write them on self-adhesive notes, and post them to the Bike Rack. Sometimes questions may require research or a longer answer than time allows at that point.

Please note: The Institute of Child Nutrition is developing a variety of procurement training modules, and these trainings are replacing the discontinued ICN resource, *Procurement in the 21<sup>st</sup> Century*.

### **Training Overview**

This training will discuss the following topics:

- Principles of Buy American
- Limited Exceptions to Buy American
- Contract Specifications and Monitoring
- State Agency Monitoring

Each topic will include a number of sub-topics, many of which will include a number of activities to reinforce the concept.

### **Comfort Level**

During this training, we encourage you to determine your level of participation based on your individual needs.

### **Pre-Assessment**

A pre-assessment is a training tool that provides the participants' baseline knowledge of the training topic. Please select a four-digit numerical identifier, and place it on the top right side of the page. You will need to remember your identifier for the post-assessment.

### **(Activity) Pre-Assessment**

Place an identifier on the top right side of your handout. The same identifier will be used at the conclusion of the training on the post-assessment. It is not necessary for you to write your name on the pre-assessment.

### ***Icebreaker***

We are going to do a quick icebreaker activity. Write your name and where you work on an index card. Next, answer this question, “What comes to mind when you hear Buy American?” Write the first thought that comes to your mind on the other side of the card. We will collect the cards and randomly distribute them.

### **(Activity): Icebreaker**

Locate the individual whose name appears on the card you were given. Introduce yourself, and briefly discuss what you would like to learn from this training. At the end of the activity, you will introduce each other to the rest of the group, and state what each of you would like to learn about the Buy American provision.

### ***USDA Professional Standards and Learning Objectives***

On March 2, 2015, USDA's Food and Nutrition Services (FNS) published the Professional Standards for school nutrition professionals. The rule requires a minimum amount of annual training hours for all state directors of school nutrition programs, state directors of distributing agencies, school nutrition program directors, managers, and staff. Required training topic areas will vary according to position and job requirements. There are also minimum hiring standards for new state directors of school nutrition programs, state directors of distributing agencies that oversee USDA Foods, and school nutrition program directors. Let's take a few minutes to review the **USDA Professional Standards and Learning Objectives Handout**.

### **USDA Professional Standards and Learning Objectives Handout**



## **USDA Professional Standards and Learning Objectives Handout**

### **USDA Professional Standards**

#### **Key Area**

#### **Operations – 2000**

#### **USDA Professional Standard – Operations**

2400 – Purchasing and Procurement

#### **Learning Objectives**

- Review principles of the Buy American provision.
- Identify strategies SFAs can use when a domestic product is not available.
- Discuss ways to write contracts to ensure the SFA purchases domestic products to the maximum extent practicable.
- Discuss which aspects of the Buy American provision a State agency may evaluate during an administrative review and upon request.

## *Key Terms*

Key terms are included in the discussion of this training. Some of the terms and definitions listed may not be included in the training but may serve as a reference at another time. Let's take a few minutes to review the **Key Terms Handout**.

## **Key Terms Handout**

## Key Terms Handout

Terms and definitions are included in the discussion of this training. Some of the terms and definitions listed may not be included in the training but may serve as a reference at another time.

### **Agricultural Marketing Service (AMS)**

The U.S. Department of Agriculture's Agricultural Marketing Service (AMS) administers programs that facilitate the efficient, fair marketing of U.S. agricultural products, including food, fiber, and specialty crops.

### **Buy American**

The Buy American provision in 7 CFR 210.21(d), as defined in section 12(n) of the National School Lunch Act, requires schools to purchase, to the maximum extent practicable, domestic agricultural commodities and products. Purchases made in accordance with the Buy American provision must still follow the applicable procurement rules calling for full and open competition. Additional policy guidance that strengthens this provision is found in SP38-2017, *Compliance with and Enforcement of the Buy American Provision*, dated June 30, 2017.

### **Child Nutrition (CN) Labeling Program**

The U.S. Department of Agriculture (USDA), Child Nutrition (CN) Labeling Program provides food manufacturers the option to include a standardized food crediting statement on their product label. Labels must be authorized by the Food and Nutrition Service (FNS) prior to use, and manufacturers must have quality control procedures and inspection oversight that meet the FNS requirements. Products produced in accordance with the CN Labeling Program are generally purchased by providers for USDA meal programs. For additional information, see <http://www.fns.usda.gov/cnd/cnlabeling/default.htm>

## Key Terms Handout, continued

### **Code of Federal Regulations (CFR)**

The CFR contains a codification of documents of general applicability and future effect and is published in the Federal Register by the Executive departments and agencies of the Federal government.

### **Competitive Proposals (previously known as Competitive Negotiation)**

Competitive proposals, i.e., a Request for Proposals (RFP), solicit a technical proposal that explains how the prospective vendor will meet the objectives of the solicitation and a cost element that identifies the costs to accomplish the technical proposal. While price alone is not the sole basis for award, price remains the primary consideration when awarding a contract under the competitive proposal method.

### **Contract**

A contract is a formal, legally enforceable agreement between a buyer (client) and a seller (vendor) that establishes a legally binding obligation for the seller to furnish goods and/or services and for the buyer to compensate the seller.

### **Contract Administration System**

The contract administration system refers to the policies and procedures the School Food Authority (SFA) has in place to ensure that contractors perform in accordance with the terms, conditions, and specifications of their agreements with the SFA.

### **Distributor**

A distributor is a commercial food company that purchases, receives, and/or stores commercial food products. Distributors sell, deliver, and bill the receiving agency for goods and/or services provided. A distributor sells the products made by manufacturers.

## Key Terms Handout, continued

### **Domestic Commodity or Product**

A domestic commodity or product is an agricultural commodity that is processed in the United States, and/or a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

### **Fixed-Price Contract**

Fixed-price means a price is fixed at the inception of a contract and is guaranteed for a specific period of time. A fixed-price contract may contain an economic cost adjustment provision tied to a standard index. Fixed-price with economic cost adjustment tied to a standard index means the price is fixed for a set period of time specified and an economic cost adjustment based on the stated index may be made to the fixed-price at stated intervals.

### **Food and Nutrition Service (FNS)**

The Food and Nutrition Service (FNS) administers the nutrition assistance programs of the U.S. Department of Agriculture (USDA). The mission of FNS is to work with partners to provide food and nutrition education to people in need in a way that inspires public confidence and supports American agriculture. Throughout the existence of the school nutrition program (SNP), the FNS at the USDA has focused on assisting State agencies and School Food Authorities (SFAs) to find efficient ways of providing nutritious meals to America's schoolchildren.

### **Forecasting**

Forecasting is the process of analyzing current and historical data to determine future trends. In the case of school nutrition programs (SNPs), forecasting involves predicting and estimating the goods, works, and services needed in specified areas for the coming year, and/or assessing needs by reviewing current procurement activities. Forecasting allows for procurement plans to evolve each fiscal year.

## Key Terms Handout, continued

### Full and Open Competition

Full and open competition means that all suppliers have a level playing field and have the same opportunity to compete. Procurement procedures may never unduly restrict or eliminate competition.

### Institution of Child Nutrition (ICN)

The ICN, also known as the Institute, is located at the University of Mississippi, and through its mission, provides information and services that promote the continuous improvement of child nutrition programs nationwide. ICN serves as a trusted resource repository of information that includes applied research, education and training, and technical assistance for child nutrition professionals. The Institute offers a wide variety of educational modalities designed to provide continuing educational and professional development opportunities for child nutrition professionals at all levels of responsibilities.

### Invitation for Bid (IFB)

An Invitation for Bid (IFB) is a type of solicitation document used to competitively solicit sealed bids and in which the primary consideration is cost; the expectation is that bids will be received and an acceptance (award) will be given to the responsive and responsible vendor/bidder whose bid is lowest in price. An IFB is a formal method of procurement and results in a fixed-price contract with or without adjustment factors. The IFB must be publicly advertised, and solicited from an adequate number of known suppliers while providing them with sufficient time to respond prior to the date set for opening the bids. Also, the IFB should describe the minimum standards expected of a responsible vendor/bidder in measurable terms.

## Key Terms Handout, continued

### Lead Time

Lead time is the amount of time necessary for the distributor to prepare and deliver the product to the district. Generally, the more lead time that can be provided to a distributor, the most cost-effective price for the product. A longer lead time may be necessary for special orders and fresh products.

### Manufacturers

Manufacturers are the companies responsible for processing raw products, developing new products, and sending finished products to distributors. In some cases, customers may directly purchase from the manufacturer when volume warrants.

### Micro-Purchases (found in 2 CFR 200.320(a))

Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,500 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably amount qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

## Key Terms Handout, continued

### **Noncompetitive Proposal** (found in 2 CFR 200.320(f))

Noncompetitive Proposal is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: the item is available only from a single source, public exigency or an emergency for the requirement will not permit a delay resulting from competitive solicitation, the awarding agency expressly authorizes noncompetitive proposals, or after solicitation of a number of sources, competition is determined inadequate. Proposals must include both price and terms using the same procedures that would be followed for competitive proposals.

### **Non-Federal entity**

Non-Federal entity means a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient. FNS commonly uses terms such as SFA or Program operators.

### **Nonprofit School Food Service Account**

The nonprofit school food service account is the restricted account in which all of the revenue from all food service operations conducted by the school food authority principally for the benefit of schoolchildren is retained. This account is used only for the operation of or improvement of the nonprofit school food service.

### **Processed Foods**

Processed foods in school meals are often food components manufactured from one or more foods. To meet the Buy American provision, processed food components must meet the over 51% domestic requirement, by weight or volume, and must be processed in the United States.

## Key Terms Handout, continued

### **Processor**

For USDA foods, processor means, as defined in 7 CFR 250.3, "... any commercial facility which processes or repackages USDA Foods. However, commercial enterprises which handle, prepare, and/or serve products or meals containing USDA Foods on-site solely for the individual recipient agency under contract are exempt under this definition."

### **Procurement**

Procurement is a multi-step process for obtaining goods, products, and/or services at the best possible price in accordance with applicable rules and regulations. The steps in the process are planning, writing specifications, advertising the procurement, awarding the contract, and managing the contract.

### **Request for Proposal (RFP)**

A Request for Proposal (RFP) is a type of solicitation document used for the formal procurement method of competitive proposals. The RFP identifies the goods and services needed and all significant evaluation factors. FNS requires that price is the primary factor for contract award. The RFP is publicized and is used to solicit proposals from a number of sources. Negotiations are conducted with more than one of the sources submitting proposals, and either a fixed-price or cost reimbursable type contract is awarded.

### **Responsive and Responsible Respondent (Bidder/Offeror)**

To be considered responsive, a respondent must submit a response to the Invitation for Bid (IFB) or Request for Proposal (RFP) that conforms to all material terms and conditions of the solicitation. To be considered responsible, a respondent must be capable of successfully performing under the terms and conditions of the contract. In order to be awarded a contract, a respondent must be responsive and responsible.

## Key Terms Handout, continued

### **School Food Authority (SFA)**

The School Food Authority (SFA) is the governing body responsible for the administration of one or more schools, and has legal authority to operate the National School Lunch Program and/or School Breakfast Program.

### **School Nutrition Programs (SNPs)**

School nutrition programs (SNPs) are federally funded programs and include School Breakfast Program (SBP), National School Lunch Program (NSLP), After School Snack Program (ASSP), Fresh Fruit and Vegetable Program (FFVP), Special Milk Program (SMP), Seamless Summer Option (SSO), and Summer Food Service Program (SFSP).

### **Solicitations**

Solicitations are documents used by the SFA to acquire goods and/or services. Solicitations must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Solicitations must also identify all of the contract provisions required by

Federal procurement regulations, requirements, terms, and conditions which the offerors must fulfill and all other factors to be used in evaluating the bids or proposals. In child nutrition programs, the evaluation and scoring criteria must result in a contract award to the lowest responsive and responsible bidder/offeror most advantageous to the program with price as the primary factor.

### **Specification**

A specification is a concise statement of a set of requirements to be satisfied by a product, material, and/or process.

## Key Terms Handout, continued

### State Agency

State agency means (a) the State educational agency; (b) any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools, as specified in 7 CFR §210.3(b); or (c) the FNS Regional Office (FNSRO), where the FNSRO administers the Program as specified in §210.3(c).

### Transparent

Transparent in the child nutrition programs (CNPs) means that everything done by the SFA must be clear, forthright, and conducted in a manner that maximizes full and open competition.

### USDA Foods

USDA Foods comply with Buy American. 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 must still meet the over 51% domestic requirement, by weight or volume USDA Foods, and be processed in the United States. USDA Foods are available to any school that participates in a USDA school nutrition program. USDA Foods account for 15% to 20% of the foods in SNPs and are 100% American grown.

### Vendor/Bidder

A vendor/bidder, also referred to as a respondent, is a commercial enterprise, public or nonprofit private organization, or individual that enters into a contract with a SFA. A vendor may also be a merchandiser of complete meals, meal components, or raw materials.



## Lesson 1: Principles of Buy American

**Objective:** Review principles of the Buy American provision.

### *The Importance of Buy American*

The Buy American provision is essential to the purpose of the National School Lunch Program, found in Section 2 of the National School Lunch Act (42 U.S.C. 1751), which states: “It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food.”

The Buy American provision applies to National School Lunch and School Breakfast Programs, as well as to School Food Authorities (SFAs) that also operate the Child and Adult Care Food Program (CACFP) or Summer Food Service Program (SFSP) out of the same food service account.

The SFA is the governing body responsible for the administration of one or more schools, and has legal authority to operate the National School Lunch Program and/or School Breakfast Program. 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).

**Why is the Buy American provision important when procuring foods for Federal food assistant programs?**

### ***USDA Foods and Processed Products***

The United States Department of Agriculture, Food and Nutrition Service (FNS) encourages SFAs to take advantage of all of the USDA Foods that are offered. USDA Foods are 100% domestic, thereby complying with Buy American requirements. However, if an SFA purchases a further processed end product that contains USDA Foods, that end product must contain over 51% domestic product, by weight or volume and be processed in the United States.

**Note:** For more information on USDA Foods, refer to Section 32 of the Agriculture Act of 1935 (P.L. 74-320 as amended; 7 U.S. Code 612c).

### ***Domestic Commodity or Product***

A domestic commodity or product is an agricultural commodity that is processed in the United States and/or a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

### **Domestic Commodities and Products Handout**

## Domestic Commodities and Products Handout

A domestic commodity or product is an agricultural commodity that is processed in the United States and/or a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States. FNS defines food component as one of the food groups that comprises reimbursable meals: meats/meat alternates, grains, vegetables, fruits, and fluid milk.

- For foods that are unprocessed, agricultural commodities must be domestic.
- All processed products must contain over 51% of the product's food component, by weight or volume, from U.S. origin and be processed in the United States.
  - 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.
  - FNS defines food component as one of the food groups that comprises reimbursable meals: meats/meat alternates, grains, vegetable, fruits, and fluid milk.
  - 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 domestic, agricultural commodity for purpose of the Buy American provision. Likewise, packaging and labor are not agricultural commodities.

## Domestic Commodities and Products, continued

- 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.
  
- 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.
  
- This provision applies to entities that purchase or process foods on behalf of SFAs as SFAs must serve domestic foods to the maximum extent practicable. See SP38-2017, *Compliance with and Enforcement of the Buy American Provision*, dated June 30, 2017.

### ***Supports Local, Small, and Minority Businesses***

Using food products from local sources supports local farmers, ranchers, and fishermen. FNS encourages purchasing food products from local and regional sources when expanding farm to school efforts.

The Buy American provision also supports the local economy and SFAs working with local, or small, minority, and women-owned businesses as required by Federal regulations (see 2 CFR 200.321).

### ***Scope of Buy American***

SFAs located in the 48 adjoining states must purchase domestic agricultural commodities or products to the maximum extent practicable.

Alaska, Hawaii, and the U.S. territories are exempt from the Buy American provision; however, SFAs in Hawaii are required to purchase food products that are 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 that are produced in Puerto Rico in sufficient quantities.

### **Key Provisions of Buy American Handout**

#### **(Activity): Key Provisions of Buy American**

Take a few minutes to review the **Key Provisions of Buy American Handout**. Remember, these are key provisions and not meant to be all-inclusive of the Buy American requirements. In small groups, share your district's success stories surrounding of the Buy American provision.



## Key Provisions of Buy American Handout

The Buy American provision is essential to the purpose of the National School Lunch Program, found in Section 12(n) of the National School Lunch Act (42 U.S.C. 1751), which states: “It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food.”

- Buy American requires SFAs to purchase, to the maximum extent practicable, domestic foods and products.
- Domestic foods are defined as those foods produced in the United States and, if processed, comprised of over 51% domestic agricultural products.
- Guidance provides for two exceptions under which SFAs may purchase foods not meeting the “domestic” standard:
  - The product is not processed 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.
- For each instance when a non-domestic product is purchased, SFAs must maintain documentation justifying their use of an exception.
- SFAs must include Buy American in documented procurement procedures and all procurement solicitations and contracts.
- SFAs must include domestic requirements in bid specifications and contract monitoring.
- SFAs must routinely monitor compliance of this provision in its agreement with food providers.

**Please note:** These key provisions identified on this handout, are not meant to be all of the Buy American requirements.



## Domestic Commodity and Product Questions

### (Activity): Domestic Commodity or Product Questions

Answer the following questions.

**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 an exception?**

#### FEEDBACK:

No. A domestic commodity or product is 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
- 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.

**Can a State agency provide a list of foods that are not available domestically and, therefore, not subject to the Buy American provision?**

#### FEEDBACK:

A State agency may make the determination that a domestic commodity or product is not available. However, FNS does not currently provide such a list. Please check with the State agency to determine what is applicable in your state.

- 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, as determined by SFA.

Records and documentation must be retained justifying any exception. SFAs can maintain documentation of exceptions for domestic foods that are prohibitively costly or not available in sufficient quantities and present this documentation during an administrative review and/or at any other time requested by the State agency.

## Lesson 2: Limited Exceptions to Buy American

**Objective:** Identify strategies SFAs can use when a domestic product is not available.

### *Limited Exceptions to Buy American*

There are limited exceptions to the Buy American provision which allow for the purchase of foods not meeting the “domestic” standard in circumstances when use of domestic foods is truly not practicable.

These exceptions, to be 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 U.S. product are significantly higher than the non-domestic product.

### *Buy American Documentation*

SFAs must keep documentation justifying any instance in which a non-domestic food was purchased. SFAs must 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.

**What information might a district include to justify instances of approving and accepting non-domestic food purchases?**

### **Buy American Sample Documentation Template for Exceptions Handout**

Take a few minutes to review the **Buy American Sample Documentation Template for Exceptions Handout**.

**Note:** *Please remember the **Buy American Sample Documentation Template for Exceptions Handout** is only an example. Please check with your State agency for State-specific templates.*

## Buy American Sample Documentation Template for Exceptions Handout

SFAs must keep documentation justifying any instance in which a non-domestic food was purchased. SFAs must maintain documentation of exceptions for purchase of non-domestic foods that are prohibitively costly or not available in sufficient quantities and present this during reviews by the State agency. **Please check with your State agency regarding State-specific templates.**

<b>Buy American Sample Documentation Template for Exceptions</b>						
<b>Product Name</b>	<b>Vendor Suggestion/ Country of Origin</b>	<b>Reason for Substitution</b>	<b>Possible Domestic Product Alternative</b>	<b>Contract Compliance</b>	<b>Verify cost and Availability of Domestic and non-domestic foods</b>	<b>Substitution Pre Approved Date</b>
Domestic Sliced Peaches	China Sliced Peaches	Vendor states they cannot get domestic product	Fresh peaches Menu item change	Contract award based on domestic product	AMS 10-01 Peaches available in Southeast region	Email sent on October 12, declining China sliced peaches
Domestic Sliced Peaches	China Sliced Peaches			Vendor did not notify SFA before delivery of non-domestic product		Email sent on Feb 1 indicating vendor is non-compliant with terms and conditions of contract



### Consider Alternatives

FNS has not defined a specific dollar amount or percentage that triggering an allowable exception. Before utilizing an exception, alternatives to purchasing non-domestic food products should be considered.

In the next activity, we will discuss specific instances when your district has purchased non-domestic foods. For this activity, we will need at least one school nutrition director or manager in each group. We will use the **Buy American Consider the Alternatives Handout** and the **Using an Exception Worksheet**.

Each group will respond to the following questions:

- What were the circumstances?
- How did you find out?
- How did you document the substitution?
- What strategies can be used when domestic products are not available?

In small groups, review the questions on the **Using Exception Worksheet** and respond accordingly. Circulate around the room and write your responses on the appropriate flip chart paper. At the end of the activity, review each of the flip chart papers as one large group. Point out any similarities noted among the groups.

**Note:** *This is a subjective activity, and there is not an answer key for this activity.*

### Buy American Consider Alternatives Handout

### (Activity): Using an Exception Worksheet



## **Buy American Consider Alternatives Handout**

Consider these questions when approving a product substitution for a non-domestic item.

- Did the vendor provide domestic products during the initial screening phase of the solicitation, and was the price quoted based on domestic products?
- Are there other domestic sources for this product? Is there a domestic product that could be easily substituted (e.g., substitute domestic pears for non-domestic apples)?
- Am I utilizing USDA Foods to the fullest capacity?
- 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?
- What was the reason for the substitution? Was I satisfied with the explanation from the vendor?
- Did the vendor substitute for a non-domestic item or replace it with another domestic food?
- How did I find out about the shortage? Did the vendor call in advance (desired scenario), or did I find out about it once the non-domestic product was delivered?
- Is this product substitution an ongoing occurrence? If so, what actions did I take to ensure Buy American compliance? Is there supporting documentation for each occurrence of the product substitution?
- Am I using third-party verification, such as through USDA AMS, to determine the cost and availability of domestic and non-domestic foods?
- Did I verify cost and availability of domestic and non-domestic foods using USDA Agricultural Marketing Service's (AMS) weekly market report at <https://marketnews.usda.gov> or by other acceptable means?
- How am I monitoring for compliance with the contract? Does the contract contain specific language pertaining to the Buy American provision and approved substitutions?



## Using an Exception Worksheet Handout

Instructions: Provide responses to the questions. Share your responses with other participants.

1. What was the circumstance under which you used the exception (e.g., seasonal availability, product cost was significantly higher)?
2. What was the product that was unavailable, and what did you substitute it?
3. How did you find out about the lack of domestic product (e.g., did supplier tell you in advance, did you find out at the time of delivery)?
4. How did you document the substitution?
5. What strategies can be used when domestic products are not available?

**Note:** *If you are using an exception to the Buy American provision, there is not currently a requirement to request a waiver from the State agency or FNS in order to purchase the non-domestic product. However, you must keep documentation justifying any instance in which a non-domestic food was purchased. You must maintain documentation of exceptions for purchasing non-domestic foods that are prohibitively costly or not available in sufficient quantities and present this during reviews by the State agency.*







## Lesson 3: Contract Specifications and Monitoring

**Objective:** Discuss ways to write solicitations and contracts to ensure the SFA purchases domestic product to the maximum extent practicable.

### *Solicitation and Contract Language*

To ensure compliance with the Buy American provision, the SFA must ensure solicitation and contract language that includes requirements for domestic agricultural commodities and products.

**What are some ways your district ensures in solicitations and contracts the purchases of domestic product to the maximum extent practicable?**

### **Buy American Solicitation and Contract Language Handout**

Take a few minutes to review the **Buy American Solicitation and Contract Language Handout**.



## **Buy American Solicitation and Contract Language Handout**

To ensure compliance with the Buy American provision, the SFA must ensure solicitation and contract language that includes the requirement for domestic agricultural commodities and products. Remember to include the highlighted points when creating bid solicitations and contract language.

- The SFA must include the Buy American requirement in its documented procurement procedures.
- The SFA should ask its supplier, (i.e., manufacturer or distributor) for specific information about the percentage of U.S. content in any processed end product.
- 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; and
  - requiring a certification of domestic origin for products which do not have country of origin labels; and including Buy American solicitation language.

### **Sample Buy American Solicitation 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).”

## Buy American Solicitation and Contract Language Handout, continued

- SFAs should use language in solicitations and contracts to comply with the requirement to retain records documenting any exceptions to the Buy American provision.

### Sample Language

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 following:

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.

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

### ***Monitoring Contractor Compliance***

The district is responsible for contract management. It is critical that the district is prudent in monitoring the contract throughout its duration so potential problems can be eliminated as early as possible. It is imperative that the contract contains clear and precise language that addresses penalties for non-compliance with the Buy American provision and other terms of the contract.

Monitoring contractor compliance is a critical function in enforcing the Buy American provisions.

**What type of penalties can a SFA establish if vendors fail to comply with the Buy American provision and no documentation was approved for any exceptions that exist?**

### **Monitoring Contract Compliance Handout**

#### **(Activity): Buy American Compliance Worksheet**

Take a few minutes to review the **Monitoring Contract Compliance Handout**. Once you have reviewed the information, complete the **Buy American Compliance Worksheet** activity.



## Monitoring Contract Compliance Handout

- As required by 2 CFR 200.318(b), solicitation and contract language must be monitored by the SFA in order to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- Monitoring is accomplished by reviewing products and delivery invoices or receipts to ensure the domestic food that was solicited for and awarded is the food that is received.
- SFAs need to conduct a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses to ensure the products received are the ones solicited for and awarded, and these comply with the Buy American provision unless a documented exception was approved by the SFA prior to delivery.
- SFAs can also require their suppliers to provide certification of domestic origin on food products delivered and on invoices submitted.
  - For example, SFAs 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.
- SFAs 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.
- SFA should establish penalties, including contract termination, if vendors fail to comply with the Buy American provision and no documentation of any exceptions exists.

## Monitoring Contract Compliance Handout, continued

- SFAs should ask any 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 bidding process a requirement for certification. SFAs may include similar to the language below in the bidding process.

### Sample Language

"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."

**Note:** Leave space for supplier to fill in the name of the product and its specific percentage of the domestic agricultural food components (by weight or volume) contained therein.

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

- Contractors may use the following sample language to comply with the Buy American provision; however, language should be tailored to the specific 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."

**Note:** Leave space for the supplier to fill in the name of the product. A variation would be to leave a space for the supplier to fill in the specific percentage of the domestic agricultural food component contained the product.

## Buy American Compliance Worksheet

To ensure compliance with the Buy American provision, the SFA must ensure solicitation and contract language that includes the requirement for domestic agricultural commodities and products.

**Instructions:** Review the Buy American scenarios. Answer the corresponding questions for each of the scenarios.

### **Scenario Solicitation Document: Sliced Peaches**

The school district included in the solicitation document specifications for domestic canned sliced peaches that complied with the Buy American provision. The solicitation contained the following language: "We require bidders to certify that sliced peaches are produced and processed in the U.S. and contains over 51 % of weight or volume of its agricultural food component from the U.S." One vendor includes a price for non-domestic sliced peaches and a price for domestic sliced peaches.

**What should the district do under these circumstances?**

## **Buy American Compliance Worksheet, continued**

### **Scenario Solicitation Document: Fresh Broccoli**

After reviewing past years' invoices and preapproved documentation information, a district determines that the majority of fresh cut broccoli received was a non-domestic product. The district decides to review other options and determines that fresh broccoli, broccoli florets, and chopped broccoli are available domestically. Some of these products are also available through USDA Foods.

The domestic products exceed expectations during the evaluation of documentation for product screening and on product appearance, and taste. However, other districts indicate the domestic products appear to be too expensive.

**What should the district do under these circumstances?**

## **Buy American Compliance Worksheet, continued**

### **Scenario Contract Monitoring: Product Substitutions**

A vendor substitutes domestic red seedless grapes with grapes from a Latin American country. The district staff noticed the substitution upon delivery. The vendor did not notify the district in advance to obtain approval for the substitute product. The product was refused and the menu was changed accordingly.

**What should the district do under these circumstances?**



## Lesson 4: State Agency Monitoring

**Objective:** Discuss which aspects of the Buy American provision the State agency may evaluate during an administrative review and upon request.

### *State Agency Monitoring*

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. Review how the State agency will determine if the SFA is in compliance with the Buy American provision.

- During a procurement review, State agencies should
  - (1) determine if SFAs are purchasing agricultural domestic commodities as defined in 7 CFR 210.21(d);
  - (2) check that solicitations and contracts contain the Buy American certification language; 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 flagrant 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.

### State Agency Buy American Monitoring Key Points Handout

Discuss the **State Agency Buy American Monitoring Key Points Handout**.

## State Agency Buy American Monitoring Key Points Handout

### ■ Procurement Reviews and Administrative Reviews

- Determine if SFAs are purchasing domestic commodities as defined in 7 CFR 210.21(d).
- Check solicitations and contracts for Buy American language.
- Review invoices and receipts for domestic products.
- Determine if solicited for foods were provided by the awarded contractor.
- Review the labels on a variety of food products in SFA storage facilities.
- Request documentation justifying the limited exception(s).

### ■ Non-compliance with Buy American requires issuing findings and require corrective actions such as

- Requiring contract amendments to include language to supply domestic products
- Ensuring that an alternative domestic food component, or an exception to purchase non-domestic foods, has been approved for delivery before accepting the product
- Attending procurement training to increase compliance with Buy American
- Requiring review of food deliveries for contractor compliance
- Monitoring to ensure the correct domestic food components contracted that are contracted for are delivered
- Documentation whether the solicited-for domestic foods were provided by the awarded contractor
- Recommending fiscal action for repeat or egregious findings



**Thank You**

Look at all the take-home messages you can utilize to make sure you are buying as much domestic food as possible. This concludes today's training. Thank you for your active participation and attention in the training. If there are no more questions, we will proceed with the training post-assessment and evaluation.

**(Activity): Post-Assessment and Evaluation**

Place your four-digit numerical on the top right side of the handout. Use the same identifier you used on your pre-assessment. It is not necessary for you to write your name on the post-assessment.



## References

Healthy, Hunger-Free Kids Act of 2010. Public Law 111–296. 111<sup>th</sup> Congress. Retrieved from <https://www.gpo.gov/fdsys/pkg/PLAW-111publ296/pdf/PLAW-111publ296.pdf>

Child and Adult Care Food Program: Meal Pattern Revisions Related to the Healthy, Hunger-Free Kids Act of 2010. Final Rule. Federal Register 24348 (2016) (codified at 7 CFR § 210, 220, and 226). Retrieved from <https://www.fns.usda.gov/cacfp/fr-110116>

U.S. Department of Agriculture. (2017, June 30). *Compliance with and Enforcement of the Buy American Provision in the national school lunch program*. Retrieved from <https://fns-prod.azureedge.net/sites/default/files/cn/SP38-2017os.pdf>

U. S. Department of Agriculture. (2016, December 12). *Memorandum of understanding (MOU) between the department of agriculture (USDA) food and nutrition service (FNS), and the USDA agricultural marketing service (AMS), and the USDA food safety and inspection service (FSIS), and the department of commerce (USDC), and National Marine Fisheries Service (NMFS)*. Retrieved from <http://www.fns.usda.gov/cnd/cnlabeling/default.htm>



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## Appendix

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**Buy American Compliance Worksheet Answer Key**

**3**



## Buy American Compliance Worksheet Answer Key

To ensure compliance with the Buy American provision, the SFA must ensure solicitation and contract language that includes the requirement for domestic agricultural commodities and products.

**Instructions:** Review the Buy American scenarios. Answer the corresponding questions for each of the scenarios.

### **Scenario Solicitation Document: Sliced Peaches**

The school district included in the solicitation document specifications for domestic canned sliced peaches that complied with the Buy American provision. The solicitation contained the following language: "We require bidders to certify that sliced peaches are produced and processed in the U.S. and contains over 51 % of weight or volume of its agricultural food component from the U.S." One vendor includes a price for non-domestic sliced peaches and a price for domestic sliced peaches.

### **What should the district do under these circumstances?**

The district cannot consider the non-domestic price for the sliced peaches since it does not meet the specifications noted in the solicitation document and does not meet the Buy American criteria. The bid is not responsive to the solicitation and thus not eligible for the contract award. Accepting price quotes for products contrary to the solicitation document is unethical and restricts full and open competition. This type of practice may lead to a bid protest or other financial penalties.

## **Buy American Compliance Worksheet Answer Key, continued**

### **Scenario Solicitation Document: Fresh Broccoli**

After reviewing past years' invoices and preapproved documentation information, a district determines that the majority of fresh cut broccoli received was a non-domestic product. The district decides to review other options and determines that fresh broccoli, broccoli florets, and chopped broccoli are available domestically. Some of these products are also available through USDA Foods.

The domestic products exceed expectations during the evaluation of documentation for product screening and on product appearance, and taste. However, other districts indicate the domestic products appear to be too expensive.

### **What should the district do under these circumstances?**

The district has several options for including domestic broccoli as part of their menus. One important consideration is to determine if the USDA Foods broccoli will meet the quantity needs of the district. If no, another option is to purchase the balance of their broccoli needs with another dark green vegetable that is available domestically or consider if frozen broccoli cuts, or chopped broccoli are available domestically in the quantity required and if these are affordable by the district's standards.

Also, has the district conducted an evaluation to screen documentation for the food (s) using quality and yield, appearance, and taste on the non-domestic foods? Once a district conducts the screenings, it may be determined that the non-domestic food quality, yield, taste, and appearance are substandard, and in some foods, the actual number of servings per case of the non-domestic food may be less than the domestic food. Subsequently, using case price alone when comparing bids/responses for domestic and non-domestic agricultural foods may actually result in the determination that non-domestic broccoli may cost the district more money in the end. The district must conduct competitive bids and require vendors to supply domestic foods

## Buy American Compliance Worksheet Answer Key, continued

bids and require vendors to supply domestic foods to ensure the SFA is compliant with the Buy American provision. The competitive procurement process determines if the domestic food (s) is prohibitively costly and if the quality and quantity required is available. SFAs must then evaluate bids/responses to determine the lowest responsive and responsible bidder most advantageous to the Program with price as the primary factor. This includes determining if bids/responses are responsive and responsible meeting the SFA specifications, terms and conditions published in the solicitation. SFAs must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

**Note:** A good practice is to document the country of origin and the name brand of the non-domestic food components during the initial screening process. Accepting foods from a similar region of the non-domestic product originally screened may result in foods from a similar region also not meeting the districts specifications. Remember, when a domestic food is prohibitively costly or not available in the quantity or quality required, the SFA should consider an alternative domestic food prior to automatically approving a non-domestic food.

### **Scenario Contract Monitoring: Product Substitutions**

A vendor substitutes domestic red seedless grapes with grapes from a Latin American country. The district staff noticed the substitution upon delivery. The vendor did not notify the district in advance to obtain approval for the substitute product. The product was refused and the menu was changed accordingly.

### **What should the district do under these circumstances?**

The district staff made the right decision to refuse the product. The district must contact the vendor to find out the reason for sending a product without approval, document the incident,

remind the vendor of its contractual responsibilities, and determine a plan of action that will prevent similar situations from occurring in the future. As the district may need to obtain an alternate fruit for the menu prior to serving, they will need to request available alternate fruit and consider the cost. If no alternate domestic fruit is available, they may document this process and authorize a non-domestic fruit the vendor will supply.

The district is responsible for contract management. It is critical that the district is prudent in monitoring the contract throughout its duration so potential problems can be eliminated as early as possible. It is imperative that the contract contains clear and precise language that addresses penalties for non-compliance with the Buy American provision and other terms and conditions of the contract.





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