



Food and
Nutrition
Service

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Park Office
Center

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

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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

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.

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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.

A handwritten signature in blue ink, appearing to read "Sarah E. Smith-Holmes". The signature is fluid and cursive, with a large initial "S" and "H".

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.