



Food and
Nutrition
Service

Park Office
Center

3101 Park
Center Drive
Alexandria
VA 22302

DATE: February 03, 2016

MEMO CODE: SP-24-2016

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

TO: Regional Directors
Special Nutrition Programs
All Regions

State Directors
Child Nutrition Programs
All States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regional and State Directors

Page 4

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



Sarah E. Smith-Holmes

Director

Program Monitoring and Operational Support

Child Nutrition Programs

Questions and Answers for the Buy American Provision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: Yes; consider the examples provided below:

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

- ii) Availability of the domestic alternative substitute (s) in relation to the quantity ordered.
- b) Reason for exception: limited/lack of availability or price (include price):
 - iii) Price of the domestic food product; and
 - iv) Price of the non-domestic product that meets the required specification of the domestic product.

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

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

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

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

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

Answer: According to the Federal Trade Commission, if given in good faith, entities can rely on information from foodservice distributors about the domestic content in the parts, components, and other elements contained in the product. However, rather than assume that the content is 100 percent U.S.-made, SFAs would be wise to ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content. SFAs can include in their bidding process a requirement for certification along the lines of: "We require that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you." Appearing under this statement

could be the sentence, "We certify that our ____ have at least ____% U.S. content," with space for the supplier to fill in the name of the product and its percentage of U.S. content.

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

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

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

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

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

