

National School Lunch Program Procurement Requirement

BUY
AMERICAN
PROVISION



south dakota
DEPARTMENT OF EDUCATION
Learning. Leadership. Service.

- USDA FNS memo [SP 38-2017](#)
- Buy American provision in [7 CFR 210.21\(d\)](#)
- 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))

GUIDANCE

- Requires School Food Authorities (SFAs) to purchase, to the maximum extent practicable, **domestic commodities or products**.
- This provision supports the mission of the Child Nutrition Programs, which is to serve children nutritious meals and support American agriculture.

REQUIREMENT

Purchasing Cooperatives, Food Service Management Companies, other Contract Arrangements

- 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.

REQUIREMENT

- Product made from a U.S. agricultural product but **manufactured** in another country **cannot** be purchased from the nonprofit school food service account without a documented exception.
 - The product must be **processed entirely in the U.S.** and must substantially use domestic agricultural commodities.
- 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.

REQUIREMENT

- Unprocessed Agricultural Product:
 - An agricultural commodity that is produced in the U.S.
- Processed Food Product:
 - A food product that is processed in the U.S., substantially using agricultural commodities produced in the U.S.
 - Substantially means over 51% from American products.

Section 12(n) of the NSLA

DOMESTIC COMMODITY
OR PRODUCT

- Juice must contain over 51% of the juice or juice concentrate, by volume, from fruits or vegetables grown in the U.S.
- The juice must be processed and packed in the U.S.
- Water is not a domestically grown agricultural commodity
- Packaging and labor are not agricultural commodities

AN EXAMPLE: JUICE

- Using food products from local sources supports local farmers
- This provision supports local, or small, minority, and women-owned businesses (see 2 CFR 200.321).
- FNS also encourages purchasing food products from local and regional sources when expanding farm to school efforts.

SUPPORT LOCAL & SMALL
BUSINESS

- All procurement transactions for food, when funds are used from the nonprofit food service account, must comply with the Buy American provision.
 - Includes: a la carte, all nonprogram foods, Smart Snacks, and any other food purchased using food service funds.

FUNDS FROM NONPROFIT FOOD SERVICE ACCOUNT



Include Buy American requirement in:

- SFA Procurement Plan (required for all SFAs)
- All procurement solicitations and contracts
- Bid specifications
- Contract monitoring

IMPLEMENTATION

An SFA can **verify 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>

AG MARKETING SERVICE'S

- SFAs should maximize their use of USDA Foods.
- USDA Foods are domestic, and purchasing from 100% domestic origin sources.
- **One caution:** processed end products that contain USDA Foods need to meet the 51% domestic requirement, by weight or volume.

USDA
FOODS/COMMODITIES

Allowed exceptions to this provision:

- Circumstances when use of domestic foods is truly not practicable.
- These exceptions, 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.


LIMITED EXCEPTIONS

Before using the Allowed Exceptions


consider alternatives to purchasing non-domestic food products.

- 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)?

LIMITED EXCEPTIONS
CONSIDERATIONS

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- 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?

LIMITED EXCEPTIONS CONSIDERATIONS

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- Using an acceptable exceptions does not require a waiver from the State agency
 - SFAs must, however, keep documentation justifying their use of exception(s)

LIMITED EXCEPTIONS DOCUMENTATION

- SFAs should ask the supplier, manufacturer, or distributor, for specific information about the percentage of U.S. content in any processed end product
- SFAs should include a requirement for certifying the domestic percentage of the agricultural food component of commodities and products

SOLICITATION AND CONTRACT LANGUAGE

- “[Name of 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 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).”


EXAMPLE SOLICITATION 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:
 - 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.”

EXAMPLE SOLICITATION 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.”
- Allow space for the supplier to fill in the name of the product and its specific percentage of the domestic agricultural food component contained therein.


EXAMPLE CONTRACTOR
LANGUAGE

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- SFA's may require a certification of domestic origin for products which do not have country of origin labels.


REQUIRE CERTIFICATION

- The SFA must monitor:
 - Contractor compliance - contractors must perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
 - Products and delivery invoices or receipts to ensure the domestic food that was solicited and awarded is the food that is received.

CONTRACT/AGREEMENT MONITORING

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- Buy America is reviewed during the Administrative Review and the Procurement Review
 - **Procurement Review:**
 - Determine if SFAs are purchasing domestic commodities.
 - Check that solicitations and contracts contain the Buy American certification language.

STATE AGENCY MONITORING

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- 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.

STATE AGENCY MONITORING

- Buy America is checked in the Administrative Review and the Procurement Review
- **Administrative Review:**
 - Labels on a variety of food products in SFA storage facilities are checked.
 - If the State agency identifies non-domestic foods, the State agency must request documentation justifying the limited exception(s).
 - If documentation is not provided, the State agency must issue a finding and require corrective action.

STATE AGENCY MONITORING

- Include requirement in:
 - SFA Procurement Plan
 - Contracts
- Retain documentation to show compliance:
 - Solicitations, Invoices, PO's, etc.
 - Records of communications between them and their food supplier (emails, notes from a telephone conversations, faxes, etc.)
 - Documentation of any exceptions used

DOCUMENTATION

- No, neither FNS nor a State agency(SA) may make the determination that a domestic commodity or product is not available.
- Each SFA should determine on an individual basis, whether domestic alternatives exist first, and if not, whether an exception is warranted.

CAN THE STATE AGENCY
PROVIDE/KEEP A LIST?

QUESTIONS?

CANS

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