

# The Buy American Provision



The Buy American provision was added to the National School Lunch Act (NSLA) by Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336). 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.

“Domestic Commodity or Product” is defined 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.

## **Complying with the Buy American Provision**

1. SFA can make a procurement plan that explains the Buy American provision. A procurement plan can help to make sure that prohibited or anti-competitive practices are not employed by the SFA in its procurements under the Child Nutrition Programs and also can be an effective tool for ensuring the proper application of the Buy American provision.
2. The SFA should include a Buy American clause in all procurement documents (product specifications, bid solicitations, requests for proposals, purchase orders, etc.)
3. The SFA must monitor contractor performance [as required by 7 CFR Part 3016.36(b)(2)] to ensure compliance with all contractual requirements, including the Buy American provision.
4. The SFA can require suppliers to certify the origin of the product.
5. The SFA should examine product packaging for identification of the country of origin.

6. The SFA should ask the supplier for specific information about the percentage of U.S. content in the food product.

USDA FNS memo SP 20-2006 guidance (see Q&A 5) states that SFAs must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provision. This includes foods that are sold to students as a la carte food items. Memo SP 20-2006 guidance describes actions that SFAs can take to comply with the Buy American requirements.

### **Two Exceptions to the Buy American Provision**

There are two exceptions to the Buy American provision that permit the purchase of foreign products:

1. Availability: when the product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities to a satisfactory quality.
2. Cost: when responses to solicitations reveal that the cost of a U.S. product is significantly higher than the cost of a comparable foreign product.

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).
- It should be noted that FNS has not defined a dollar amount or percentage triggering this exception.

### **Is there a domestic product that could be easily substituted?**

Yes. Check to see what is in season:

- [Harvest Calendar](#)
- [Harvest of the Season](#)

- [Arizonagrown.com](http://Arizonagrown.com)

## **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.

- Including a Buy American clause in all procurement documents (product specifications, bid solicitations, requests for proposals, purchase orders, etc.
- Monitoring contractor performance
- Requiring suppliers to certify the origin of the product
- Examining product packaging for identification of the country of origin
- Asking the supplier for specific information about the percentage of U.S. content in the food product

## **Example of Solicitation and Contract Language**

**Buy American:** Schools participating in the federal school meal programs are required to purchase domestic commodities and products for school meals to the maximum extent practicable. Domestic commodity or product means an agricultural commodity that is produced in the US and a food product that is processed in the US substantially (at least 51 percent) using agricultural commodities that are produced in the US.

1. Federal regulations require that all foods purchased for Child Nutrition Program be of domestic origin to the maximum extent practicable. While rare, two (2) exceptions may exist when the product is not produced or manufactured in the US in sufficient, reasonable and available quantities of a satisfactory quality, such as bananas and pineapple or competitive proposals reveal the cost of a domestic product is significantly higher than a non-domestic product.
2. ALL products that are normally purchased by Distributor as non-domestic and proposed as part of this solicitation must be identified with the country of origin. Distributor shall outline their procedures to notify the SFA when products are purchased as non-domestic.
3. Any substitution of a non-domestic product for a domestic product (which was originally a part of the solicitation), must be approved, in writing, by the Food Service Director, prior to the delivery of the product to the SFA.
4. Any non-domestic product delivered to the SFA, without the prior, written approval of the Food Service Director, will be rejected.

Distributor must affirm their willingness to assert their best and reasonable efforts to ensure compliance with this federal rule.

### **Monitoring the Buy American provision by SFAs**

The USDA requires SFAs to purchase, to the maximum extent practicable, domestic commodities or products. This is accomplished by SFAs including the Buy American provision in solicitations (Bid or RFP document), contracts, and product specifications.

- A reply offer (response to your bid or RFP) 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.

### **Buy American Provision Memos**

- [SP 24-2016: Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program](#) -*Questions and Answers for the Buy American Provision (Revision of SP 14-2012 and SP 20-2006)*
- [SP 29-2006: Buy American Reminder](#) – USDA Guidance Memo

## Examples of Non-Compliant Products

Product	Product Of
Tropical Fruit Cocktail	Vietnam
Sliced Nacho Jalapenos	Mexico
Balsamic Vinegar	Italy
Frozen Vegetable Blend	Mexico
Pepperoncini	Turkey
Frozen Broccoli	Mexico
Bananas	Guatemala
Canola Oil	Canada
Pineapple Tidbits	Thailand



Non-Compliant Products

**DICED PEACHES IN LIGHT SYRUP**

Product Information	
Classification:	Temporary Classification - (99999999)
Dimensions (HxWxD):	7.2 x 12.9 x 18.6 Inches
Weight Gross / Net:	44.9 Pounds / 44 Pounds
Origin:	(CN) CHINA
Storage Temp:	41°F
Pallet Configuration:	Tl: 7 Hi: 8
Serving Size:	140 Grams
Servings Per Container:	21
Features and Benefits	
Features:	
Storage:	
Nutritionals and Ingredients	
<b>Nutrition Facts</b>	
Serving Size 140 Grams	
Servings Per Container 21	
Amount Per Serving	
Calories 70	

Non-Compliant Products

Prototype

## Buy American Waiver

SFA's can use this form to help with proper documentation of the last resort exemption

## Prototype Buy American Exception Document

Per 7 CFR Part 210.21(d), the Department shall require that a SFA purchase, to the maximum extent practicable, domestic products. However, there are two situations which are exceptions to the Buy American provision and permit purchases of foreign products:

1. **Availability:** when the product is not manufactured in the U.S. in sufficient and reasonable available quantities of a satisfactory quality.
2. **Cost:** when responses to solicitations reveal that the cost of a U.S. product is significantly higher than the cost of a comparable foreign product.

Before utilizing an exception, alternatives to purchasing non-domestic food products should be considered:

- 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 (ex: 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?

Although exceptions to the Buy American provision exist, they are to be used as a last resort. Documentation justifying the exception is required.

LEA Name: \_\_\_\_\_

School Food Authority Contact: \_\_\_\_\_

Product for which the exemption is requested: \_\_\_\_\_

### Hardship(s) experienced in procuring acceptable American product (Check all that apply)

- ☐ Financial hardship (Attach documentation showing increased cost)
- ☐ Limited availability (Include documentation from vendors, with specific product names)

**Describe in detail the hardships you indicated above.**

**Describe the efforts you have taken to find products that meet the Buy American requirement.**

- ☐ I am aware of the exceptions to the Buy American provision and have exhausted all resources to ensure that this provision is being followed. I will reevaluate our situation yearly, to find alternative resources in order to comply with the Buy American provision.
- ☐ I understand that this exemption request only applies to the product identified above. I also agree that approval of this exemption does not exempt the entire menu from meeting the Buy American act.

**Authorized Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_