



DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Request for Information: Buy American in the National School Lunch Program and School Breakfast Program

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice: Request for Information.

SUMMARY: This is a Request for Information from stakeholders, including local operators, State administrators, industry and producers, about the Buy American provision in the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). The NSLP and SBP, which are administered by the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS), play a critical role in ensuring that America's children have access to nutritious food they need to learn and succeed in the classroom, in addition to supporting American agriculture, and small, minority, and women's businesses and agricultural producers. In order to claim Federal reimbursement for meals served, school food authorities (SFAs) must follow Federal procurement and program regulations. These include the Buy American provision. The purpose of this Request for Information is to help FNS gather feedback from a wide variety of stakeholders on how the Buy American provision and guidance are currently implemented, changes FNS should make to current regulations and guidance and feedback on how FNS can better support local operators as they strive to purchase domestic foods and food products.

DATES: Written comments must be received on or before [insert date 90 days after date of publication in the Federal Register].

ADDRESSES: USDA invites the submission of the requested information through one of the following methods:

- Federal eRulemaking Portal (preferred method): Go to <http://www.regulations.gov>.

Follow the online instructions for submitting comments.

- Mail: Send written comments to the School Meals Monitoring Branch, Program Monitoring and Operational Support Division, Child Nutrition Programs, USDA Food and Nutrition Service, Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314.

All comments submitted in response to this Request for Information will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. USDA will make the comments publicly available via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Jessica Saracino, School Meals Monitoring Branch, Program Monitoring and Operational Support Division, Child Nutrition Programs, USDA Food and Nutrition Service, 703-605-3223.

SUPPLEMENTARY INFORMATION: On January 25, 2021, President Biden signed the *Executive Order on Ensuring the Future is Made in All of America by All of America's Workers* (referred to as the Buy American Executive order hereafter) supporting the American economy by requiring terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States. FNS is issuing this RFI in response to this Executive Order.

Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (PL 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 existing regulatory provision stems directly from the statutory requirement.

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 and food products served in NSLP and SBP. Although Alaska, Hawaii, and the U.S. territories are exempt from the Buy American provision, SFAs in Hawaii are required to purchase food and food products produced in Hawaii in sufficient quantities, as determined by the SFA, to meet NSLP and SBP needs per 7 CFR 210.21(d)(3) and 7 CFR 220.16(d)(3). Likewise, SFAs in Puerto Rico are required to purchase food and 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 United States and a food product that is processed in the United States substantially using agricultural commodities produced in the United States. Report language accompanying the legislation noted that “substantially means over 51% from American products.” Accordingly, FNS has established in guidance that over 51% of the final processed product 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, as determined by the SFA. Any processed product used must contain over 51% of the product’s food component from United States origin. This definition of domestic product serves both the needs of schools and American agriculture. Foods and food 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 United States.

FNS has provided through guidance 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 United States in sufficient and reasonably available quantities of a satisfactory quality; or
- Competitive bids reveal the costs of a United States product are significantly higher than the non-domestic product.

It should be noted that FNS has not defined a dollar amount or percentage triggering possible use of an exception. It is each individual SFA's responsibility to determine what dollar amount or percentage constitutes a significantly higher price thus permitting the use of the exception. If an SFA is using one of the above exceptions, there is no requirement at this time 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). State agencies must ensure SFA compliance with the Buy American provision when conducting oversight processes.

FNS has already received feedback that stakeholders face difficulties in implementing and monitoring the Buy American provision and guidance. Additionally, stakeholders have reached out for assistance with interpreting and following the Buy American provision and have also requested help with understanding the exceptions. Feedback provided in response to this Request for Information will help inform future rulemaking and guidance around the Buy American provision.

Maximizing the Value of Public Feedback

This notice contains a list of questions, the answers to which will assist FNS in identifying those regulations, and/or policies that may benefit from modification, streamlining, expansion, or repeal in light of the Buy American Executive order. FNS encourages public comment on these questions and seeks any other data commenters believe are relevant to FNS's review efforts. The type of feedback that is most useful to the agency includes feedback that identifies specific regulations and/or policies that could benefit from reform; feedback that refers to specific barriers to participation; feedback that offers actionable data; and feedback that specifies viable

alternatives to existing approaches that meet statutory obligations. For example, feedback that simply states that a stakeholder feels strongly that FNS should change a regulation or policy but does not contain specific information on how the proposed change would impact the costs and benefits of the regulation, is much less useful to FNS. FNS is looking for new information and new data to support any proposed changes. Highlighted below are a few of those points, noting comments that are most useful to FNS. Commenters should consider these principles as they answer and respond to the questions in this notice.

- Commenters should identify, with specificity, the program regulation and/or policy at issue, providing the Code of Federal Regulation (CFR) citation where appropriate.
- Commenters should identify, with specificity, administrative burdens, program requirements, or unnecessary complexity that may impose unjustified barriers in general, or that may have adverse effects on equity for all, including individuals who belong to underserved communities that have been denied equitable treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities, including learning disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.
- Commenters should provide, in as much detail as possible, an explanation why a program regulation and/or policy should be modified, streamlined, expanded, or repealed, as well as specific suggestions of ways the agency can better achieve its statutory and regulatory objectives in light of the Buy American Executive order.
- Commenters should provide specific data that document the costs, burdens, and benefits of existing requirements to the extent they are available.

List of Questions for Commenters

This Request for Information reflects the commitment of FNS to work with our stakeholders, including local operators, State administrators, industry and producers, to ensure that the Program-specific Buy American provision support the Administration's priorities, is practicable and that FNS provides adequate guidance.

The below non-exhaustive list of questions is meant to assist members of the public in the formulation of comments and is not intended to restrict the issues that commenters may address.

General

1. What changes, if any, to the Buy American provision and guidance would you recommend to FNS to support the Buy American executive order? Please describe in detail.
2. Please describe what works well for your organization when implementing and/or meeting the Buy American provision.
3. Please describe any challenges or impediments identified in meeting or monitoring the Buy American provision.
4. Do you have State-specific requirements to ensure SFAs comply with the Buy American provision (e.g., recording every exception used, listing alternatives considered, etc.)? If so, please describe in detail.
5. Does your SFA use geographic preference when soliciting for unprocessed locally grown or locally raised agricultural products?
 - a. If not, what are the reason(s) your SFA does not use geographic preference to purchase locally grown or locally raised agricultural products?
6. Does your SFA use small, minority, and/or women's businesses, including Tribal businesses, and labor surplus firms to purchase or process foods from local producers such as farmers, ranchers, and other producers, or to process unprocessed, locally grown agricultural commodities into usable food products, needed to operate the NSLP and SBP? If yes, which of the above does your SFA use and how often?

Please describe whether your SFA has experienced any additional benefits (other than obtaining affordable foods) by using local producers.

7. Please provide suggestions on how FNS can support stakeholders in meeting the Buy American provision or in connecting U.S. food producers to local schools.

Exceptions

8. FNS allows two limited exceptions to the Buy American provision: costs of a United States product that are significantly higher than the non-domestic product, and insufficient domestic quality or quantity. List the foods and/or food products that most often require an exception.
 - a.) Exceptions due to quantity or quality
 - b.) Exceptions due to a significantly higher cost
9. If these currently available exceptions were more or less available, what impacts would this have?
10. Do you think FNS should establish additional detail in the regulations for the Buy American provision?
11. Do you think FNS should define what is considered a significantly higher cost? If so, how should FNS define “significant”? Please be as specific as possible.
12. What methodology do you use to determine a significantly higher cost to your SFA that will require the purchase of non-domestic foods or food products? Do you use a dollar value or percentage in your determination? If yes, list the dollar value or percentage you use.
13. Should FNS consider a defined list of Buy American “excepted” items for food or food products that have been determined as not produced in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality? If so, what criteria would you use to include items on this list, and which items would currently be included?

Collection of Information Requirements: This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. However, this document does contain a general solicitation of comments in the form of a request for information. In accordance with implementing regulations of the Paperwork Reduction Act of 1995 (PRA), specifically 5 CFR 1320.3(h)(4), this general solicitation is exempt from the PRA. Facts or opinions submitted in response to general solicitations of comments from the public, published in the Federal Register or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter other than that necessary for self-identification, as a condition of the agency's full consideration, are not generally considered information collections and therefore not subject to the PRA.

Timothy English,

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Food and Nutrition Service.

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