Fifty-two years after the Richard B. Russell National School Lunch Act (NSLA) was signed into law, a section was added requiring school food authorities (SFAs) to purchase domestic commodities and/or commercial products; it became known as the Buy American provision. The addition of this regulation was intended to serve as a reminder of the original two-fold mission of the National School Lunch Program (NSLP): to improve the nutrition intake of school-age children and to support American agriculture.

While the provision has been around for two decades, it has received renewed attention in recent years, especially as school nutrition operations seek to offer greater variety, add more ethnic cuisines and transition to less-processed menus. Mandated increases in fruit and vegetable servings meant new complications, as some popular produce items are not grown domestically at all or only in limited volumes at high prices. USDA began receiving a number of inquiries related to the compliance and enforcement of the Buy American rule.

To that end, it released guidance in 2016 and again in 2017. Policy memo SP 38-2017, issued June 30, 2017, revisits the history, reviews the rules, suggests contract language for procurement solicitations, defines monitoring by state agencies and reinforces the economic importance of the Buy American provision, particularly in supporting local businesses.

But let's be honest: Even with this guidance, the Buy American provision, and K-12 school meal procurement in general, can be downright headache-inducing. In this article, SN will attempt to distill its complexities to the fundamentals. It's a rule that must be followed, so this overview may prove helpful to school menu developers, district purchasing professionals, site managers and vendor partners alike.
THE BASICS

Even before the Buy American provision was added, the original NSLA created the statutory basis for the rule with language that details, “the Secretary shall require that a school food authority (SFA) purchase, to the maximum extent practicable, domestic commodities or products.” But what does that mean?

Let’s try to break down the government-speak: The definition of a “domestic commodity or product” is:

- an agricultural commodity that is grown and harvested in the United States and its inhabited territories (Guam, American Samoa, Virgin Islands, Puerto Rico and the Northern Mariana Islands); and
- a commercially available food product that is processed substantially within this country. In this context, “substantially” means that 51% or more of the final processed food product (by weight or volume) must contain agricultural commodities that were grown domestically and that the processing itself is domestic.

Frozen fruit cups are a good example of an item that is “substantially processed.” When a domestic packer is making pear fruit cups, for example, grape or apple juices are often used to help preserve the fruit. But, most of the juice used is imported because of limited domestic juice production. If 51% or more of the fruit cup is domestic pears and 49% juice, the product would be acceptable. On the other hand, let’s say you are buying commercially-cooked beef patties. If the processor uses 60% imported beef and cuts it with 40% domestic beef, this item does not comply.

It’s important to recognize that the Buy American provision applies to SFAs in all of the 48 contiguous states. SFAs in Alaska, Hawaii and U.S. territories are exempt from the rule, although SFAs in the Aloha State are required to purchase food products produced in their state when sufficient quantities are available.

In addition to the NSLP, the rule also applies to foods purchased for the School Breakfast Program. However, the Buy American provision applies only to food products and not to equipment, supplies or technology.

EXCEPTIONS TO THE RULE

Most school foodservice operations have need of a little wiggle room to purchase items and ingredients to deliver the meals their students want. The Buy American provision provides flexibility in two areas: product availability and cost. SFAs do not need to comply with the Buy American provision:

- for a food item that is not produced or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality, and
- when competitive bids reveal the cost of the domestic food is significantly higher than the non-domestic food.

Given the rising costs of food and labor—and reimbursement rates that don’t keep up—most SFAs are continually on the hunt for the lowest-price alternative. But even with these stipulated exceptions, USDA makes SFAs jump through some bureaucratic hoops to make non-domestic purchases something that’s done at the last resort, rather than as a matter of standard practice.
Before being granted the exemption, SFAs must demonstrate that they’ve taken the following into consideration:

- Is there another domestic source of a food or food product that can be substituted?
- Is this the best time of the year to solicit bids for a specific product?
- How can I access a third-party verification for cost and availability?

The operator’s answer will vary, but it is important to note that USDA will "suggest" that SFAs change their menus to include domestically grown alternatives instead.

It’s also important to note that the definition for a "significantly higher" price for a domestic food is very subjective. USDA has not set a threshold or provided guidance on such prices, deferring to the local authority to make determinations. This leaves operators in a difficult position. As always, ask your state agency for assistance.

If you choose to work with USDA through your state agency to be granted an exception, you must keep ample and accurate documentation that justifies your case. An exception request must include the (higher) price of the domestic option, the (limited) availability of said item and a stated reason for pursuing the exception.

KEYS TO COMPLIANCE

The easiest way to comply with the Buy American provision is to rely completely on USDA Foods. This is not a practical course of action, however—and menu items that have been processed from your USDA Foods allotment still must meet the 51% domestic weight or volume requirement. Refer to the pear fruit cups example from earlier. You may divert USDA pears to a packer to make individual fruit cups. Importing juices may still be used for these, so long as 51% of the content of the cup is USDA Foods pears.

Since you will have to purchase food items beyond the USDA Foods Available List, the key to Buy American...
compliance is in the consistency of implementation and being sure that you and your vendors are fully aware of the law. Make sure the Buy American language is included in all
• documented procurement procedures;
• procurement solicitations and contracts; and
• bid specifications.

When soliciting suppliers and drawing up contracts, include this requirement. Don't be afraid to require information on domestic content from distributors and manufacturers. Language can also be included to require certification of the domestic percentage of the agricultural product during the procurement process. It is important to continually monitor contracts to ensure compliance and to help verify cost and availability. You can find helpful data through USDA Agricultural Marketing Service’s weekly market report at www.marketnews.usda.gov.

Although USDA had not (at press time) identified formal penalties for non-compliance, Buy American compliance is a part of the Administrative Review process. State agencies will issue a finding and require corrective action in any cases of non-compliance with the provision. These actions could include requiring contract amendments with language stipulations, new contracts and mandatory attendance at procurement training. In addition, fiscal action for repeat or egregious findings will be enacted on a case-by-case basis, with approval by the appropriate FNS Regional Office.

THE BENEFITS
The Buy American provision provides trickle-down benefits for everyone from local farmers and U.S. food manufacturers to the students eating in school cafeterias. Its addition in the 1998 Reauthorization came at a particularly fortuitous time: In the early 2000s, there was a general decline in the U.S. production of various agricultural products, along with an increase in competition from imported goods. The rising demand for real estate gobbled up farmland and taxes increased on what was left. Many farmers faced labor shortages. The Buy American provision gave farmers a much-needed boost and continues to help them today.

In addition to the federal Buy American rule, many individual SFAs have implemented policies to prioritize procurement of locally sourced items. When local growers and producers partner with school nutrition operators, it can lead to enhanced educational opportunities for students, while also building greater awareness of the value of school meals in the community. FNS encourages the expansion of farm to school initiatives and local sourcing policies. Ultimately, these interactions can help secure future jobs in U.S. agriculture, which employs more than 24 million Americans. An emphasis on local sourcing also benefits the environment, reducing the damaging effects associated with cross-country and overseas shipping, including emissions and fuel consumption.

While the Buy American provision can make procurement a bit trickier—especially for small districts where a director has little staff support—you can find outside help. Start with your state agency. In addition, both USDA and SNA have a number of online resources, including webinars, fact sheets, conference presentations and other tools. Finally, when frustration threatens to overwhelm, remember the good intentions and benefits of this rule. SN

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DOMESTIC PRODUCT BUYING TIPS

• Just because a company is headquartered in the United States does not mean that all (or any) of its products comply with the Buy American requirement. Remember that the definitions apply to the product and its processing.
• Read labels and other manufacturer’s documents carefully to identify the country of origin. If you’re unsure, reach out to a company representative and ask.
• Be cautious of labeling that says “processed/packed” in the United States versus “grown/produced.”
• Be aware that such product labels as “USDA Approved” or “California-Style” does not automatically mean the item is “American-grown.”