

Buy American Requirements

The following three documents (hyperlinks) are consistent in defining the Buy American requirements:

1. [Richard B Russell National School Lunch Act](#) (n)1 (A) and (B)
2. [7 CFR 210.21 Procurement](#), (3)d and
3. [SP 20-2006: Procurement questions related to the Buy American Provision](#)

The Richard B. Russell National School Lunch Act provides in Section 12(n) the Buy American provision which requires that school food authorities (SFAs) operating school meals programs purchase domestically produced (grown) and processed foods, to the maximum extent practicable. The Buy American provision was codified in the National School Lunch Program regulations at 7 CFR 210.21(d). A “domestic commodity or product” is defined in the Federal regulations as:

- (i) an agricultural commodity that is produced in the United States (U.S.); **and**
- (ii) a food product that is processed in the U.S., substantially using agricultural commodities that are produced in the U.S., 7 CFR 210.21(d).

The language about ‘*substantially*’ using U.S., agricultural commodities is referring to products that are processed in the U.S., comprised of at least 51% domestic ingredients. According to the regulations, a food product must meet a two part test to be considered a domestic commodity or product: (1) the food product must be processed in the U.S.; and (2) the food product must be processed substantially using agricultural commodities that are produced in the U.S. There is no further need to determine whether 51% of a foreign product consists substantially of agricultural commodities that are produced in the U.S., because the product does not meet the first part of the test as it is not processed in the U.S.

Waivers to the Buy American provision are rare. While the Food and Nutrition Service (FNS) sets the Buy American requirements by which States and SFAs must abide, keep in mind that USDA is not a party to the contract between an SFA and its food supplier. It is the responsibility of the SFA to document that there is a basis for allowing an exception (waiver); it is unacceptable for exceptions to be granted without substantial evidence that either of the two following situations have occurred:

- 1) The product is not produced or manufactured in the U.S., in sufficient and reasonable available quantities of a satisfactory quality; **and**
- 2) Competitive bids reveal the costs of a U.S., product is significantly higher than the foreign product.

Availability, cost, and quality are factors an SFA must weigh when considering the purchase of non-domestic products. The SFA needs to review current market information to determine if purchasing a specific non-domestic product meets one or more of the exceptions to the Buy American provision.

SFAs are encouraged to include in their bidding process a requirement for certification similar to: "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 U.S., processed ___ have at least ___% U.S., content," with space for the supplier to fill in the name of the product and its percentage of domestic content. The SFA’s active role in clarifying the Buy American provision to all contractors in the bidding process helps ensure that contractors have a clear understanding of the Federal requirements and the ingredients contained in a product during the manufacturing process do not contain significant foreign content. Additionally, the best tool an SFA has to ensure that the Buy American provision is being followed is its contract with the distributor. If an SFA writes a contract with specific provisions and administers its contract properly, many conflicts or issues with the distributor can be avoided.

It is important for both SFAs and distributors to recognize that the determination as to whether a product meets the requirements of the Buy American contractual provision rests with the SFA; it is not enough to assume that a product with a well recognized American brand name or a product supplied by a domestic foodservice distributor complies with the Buy American provision. Distributors/suppliers should, in good faith, facilitate this process and provide the SFA with sufficient information regarding the country of origin for each end product in order for the SFA to make a determination. These efforts will enable distributors and suppliers to provide SFAs with products that meet the specifications of their contract. A brief description of the Buy American Requirement is printed behind the front cover of the Food Buying Guide for Child Nutrition Programs.