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Commissioner of Education

CN07-G-009

TO: Nutrition Service Directors

FROM: Dan C. McMillan, Director, Nutrition and Transportation

DATE: October 12, 2006

SUBJECT: Buy American Requirement – Update and Reminder

This guidance serves as a general reminder to school districts and other sponsoring agencies about the importance of complying with the Buy American provisions that are found in the regulations of the National School Lunch Program (NSLP) at 7 CFR 210.21(d) and the School Breakfast Program (SBP) at 7 CFR 220.16(d).

Districts/Sponsors must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provisions to the maximum extent practicable. This includes foods that are sold to students as a la carte food items.

Actions that districts/sponsors can take to comply with the Buy American requirements are:

- 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; and
- Asking the supplier for specific information about the percentage of U.S. content in the food product.

The U.S. Department of Agriculture (USDA) has provided a series of Questions and Answers relating to the Buy American provision, and is attached for your reference.

Please refer also to our previous memos on procurement requirements, the *Administrators Reference Manual*, and other procurement resources, all found on our web site at:

http://www.cde.state.co.us/index_nutrition.htm

If you have any questions, please contact our office at 303.866.6661 or 888.245.6092 outside of the Denver Metro area.

- 1) **Question:** What are the requirements of the Richard B. Russell National School Lunch Act's (NSLA) Buy American provision that School Food Authorities (SFA's) must follow when purchasing food and food products for use in the Child Nutrition Programs?

Answer: Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a new provision, Section 12(n) of the NSLA [42 USC 1760(n)], requiring SFA's to purchase domestically grown and processed foods, to the maximum extent practicable. Purchases made in accordance with the Buy American provision must still follow the applicable procurement rules calling for free and open competition.

- 2) **Question:** How would the SFA determine it is a "domestic commodity or product"?

Answer: Section 12(n) of the NSLA defines "domestic commodity or product" as one that is produced and processed in the United States substantially using agricultural commodities that are produced in the United States. One of the reports accompanying the legislation noted that "substantially" means that over 51% of the final processed product consists of agricultural commodities that were grown domestically.

- 3) **Question:** Are there any exceptions to the requirements of the Buy American provision?

Answer: Yes. While rare, two situations which may warrant a waiver to permit purchases of foreign food products include: 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.

- 4) **Question:** Does the Buy American provision apply to entities that purchase on behalf of the SFA, such as a purchasing cooperative or a food service management company?

Answer: Yes. Any entity that purchases food or food products on behalf of the SFA must follow the same "Buy American" provisions that the SFA is required to follow.

- 5) **Question:** Does the Buy American provision apply only to purchases made using Federal funds under the Child Nutrition Programs?

Answer: No. SFA's must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provision. Pursuant to Child Nutrition Program regulations, all Federal funds, all money received from children as payment for program meals, all proceeds from the sale of competitive foods, and all other income generated by the school food service must inure to the food service account. As a consequence, the entire nonprofit school food service account becomes subject to Federal procurement standards.

6) **Question:** What can the SFA do to comply with the requirements of the Buy American provision?

Answer: There are a number of ways SFA's can comply with the provision. SFA's should be including a Buy American clause in all product specifications, bid solicitations, requests for proposals (RFP's), purchase orders, and other procurement documents issued. Additionally, SFA's are required by 7 CFR 3016.36(b)(2) to monitor contractor performance to ensure compliance with all contractual requirements, including the Buy American provision. SFA's can also ask their suppliers to provide certification as to the origin of the product which is discussed in more detail in question #9.

7) **Question:** How should the SFA determine the country of origin for an end product?

Answer: For manufactured end products, there is a two-part test to define end product: (1) the article must be manufactured in the United States; and (2) the cost of domestic components must exceed 50 percent of the cost of all the components. It is not enough to assume that a product with a well recognized American brand name or product supplied by a domestic foodservice distributor complies with the Buy American provision. SFA's should inquire further with their suppliers to determine the country of origin for an end product because some products sold in school meals may carry the name brand of a domestic company but the product itself may derive from another country. SFA's should also examine product packaging as the Nutrition Labeling and Education Act of 1990 mandates that the country of origin for both domestic and imported food products be identified on the product labels.

8) **Question:** Should SFA's rely on the distributors' reliance on information from American suppliers about the amount of domestic content in the parts, components, and other elements they buy and use for their final products?

Answer: According to the Federal Trade Commission, if given in good faith, entities can rely on information from foodservice distributors about the domestic content in the parts, components, and other elements contained in the product. However, rather than assume that the input is 100 percent U.S.-made, SFA's would be wise to ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content. SFA's can include in their bidding process a requirement for certification along the lines of: "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 ___ have at least ___% U.S. content," with space for the supplier to fill in the name of the product and its percentage of U.S. content.

9) **Question:** Doesn't this place some of the burden on the manufacturers and distributors of food and food products in the Child Nutrition Programs?

Answer: Yes. The ability to certify, as required by the terms of the contract with the SFA, will require that manufacturers and processors look back far enough in the manufacturing process to be reasonably sure that any significant foreign content has been identified.