

Takeaways From Senate 'Buy American' School Lunch Bill

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Last month, Sens. Dan Sullivan, R-Ark., and Maria Cantwell, D-Wash., introduced the American Food for American Schools Act of 2018 (S.2641),^[1] which seeks to “improve the requirement to purchase domestic commodities or products” under the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). Even if this proposed legislation fails to make it out of committee, it signals a continued trend to strengthen the “Buy American” requirement under these programs.

The “Buy American” Regime Under the NSLP and SBP

The National School Lunch Act states that the secretary of agriculture “shall require that a school food authority [located in the contiguous United States] purchase, to the maximum extent practicable, domestic commodities or products” under the NSLP and SBP.^[2] The “Buy American” requirement for these federally assisted meal programs is implemented at 7 CFR § 210.21(d) (NSLP) and 7 CFR § 220.16(d) (SBP).

The National School Lunch Act and its implementing regulations define a “domestic commodity or product” as (1) “an agricultural commodity that is produced in the United States,” or (2) “a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.”^[3] Although neither the National School Lunch Act nor its implementing regulations define what it means for a food product to be “substantially” processed in the United States, the U.S. Department of Agriculture’s Food and Nutrition Service has interpreted this to mean that the food product “must be processed domestically using domestic agricultural food components that are comprised of over 51% domestically grown items, by weight or volume.”^[4] Agricultural food commodities/components include: “meats/meat alternates, grains, vegetables, fruits, and fluid milk.”^[5]

The Food and Nutrition Service (FNS) has identified two “limited” exceptions to the “Buy American” requirement. A school food authority (SFA) may procure a nondomestic food item if (1) “[t]he product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality,” or (2) “[c]ompetitive bids reveal the costs of a U.S. product are significantly higher



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than the non-domestic product.”[6] To date, “[i]f an SFA is using one of the above exceptions, there is no requirement to request a waiver from the State agency or FNS in order to purchase a non-domestic product.”[7] SFAs therefore have been permitted to determine the applicability of one of the exceptions for themselves.

Proposed Changes Under the American Food for American Schools Act of 2018

Similar to a bipartisan bill sponsored last year (H.R.1241)[8] by Rep. Doug LaMalfa, R-Calif., and 21 other members of the House, the American Food for American Schools Act of 2018 (S.2641) would require the implementation of a formal “Buy American” waiver process under the NSLP and SBP.

First, subject to certain exceptions, an SFA would be required to submit a waiver request to the secretary before a “foreign [i.e., nondomestic] commodity or product” can be procured.[9]

Second, the secretary would only be permitted to grant a waiver if: (1) the foreign commodity or product is “not produced domestically in a sufficient quantity or of a satisfactory quality,” or (2) a domestic commodity or product “would be significantly higher in price than a foreign commodity or product.” (Note: This language mimics the exceptions recognized in the 2017 FNS Buy American Memo and is similar to certain Buy American Act exceptions.)

Third, the waiver must be made “publicly available” on the SFA’s website, and the SFA must “email a notification of the waiver to parents or guardians of students who will be served the foreign commodity or product purchased pursuant to the waiver.”

Key Takeaways

Bipartisan Push to Strengthen the “Buy American” Requirement

As stated in the bipartisan bill, the implementation of this formal waiver process is intended to “improve the requirement to purchase domestic commodities or products.” In our experience, adding a formal waiver process to “improve” a purchasing requirement is often code for strengthening.

If this proposed legislation becomes law, we would expect that the secretary (or whomever is delegated approval authority) would closely scrutinize any waiver requests, and that school food authorities may be less inclined to present waiver requests absent a truly compelling need. SFAs also may be more likely to structure a procurement that will yield domestic offers.[10]

All in all, this likely would result in less foreign commodities and products being acquired by SFAs, i.e., strengthening the “Buy American” requirement.

Expect Increased “Buy American” Scrutiny

Regardless of whether this bill makes it out of committee and eventually onto President Donald Trump’s desk, contractors selling commodities or food products under the NSLP or SBP should expect increased “Buy American” scrutiny.

Notably, the 2017 Food and Nutrition Service Buy American memo placed a significant emphasis on “Buy American” compliance and monitoring. For example, the memorandum stressed that SFAs must “monitor[]” the “Buy American” requirement “to determine contractor compliance,” and that “state

agencies conducting procurement reviews ... must ensure SFA compliance with the Buy American provision.”[11] The memorandum also included a sample “Buy American” certification for contractors to complete.[12]

In addition, the FNS Research and Evaluation Plan for 2018[13] notes that the FNS “currently ha[s] three studies examining SFA activities that include questions on the Buy American provision in SFAs and how SFAs ensure compliance, document the use of exemptions, and train staff on local purchasing.”[14] Ultimately, the FNS will issue a white paper “focusing on the Buy American provisions of these studies, with policy recommendations on how to maximize the benefits of the provision.”[15]

Combine the FNS’ recent emphasis on “Buy American” compliance and monitoring with (1) Congress’ piqued interest, (2) President Trump’s “Buy American” rhetoric[16] and (3) a July 2017 California state auditor report[17] concluding that the California Department of Education “has not taken adequate steps to ensure that California’s school food authorities comply with the Buy American requirement,” and you very well may have a perfect storm.

Compliance Is Critical

Given the potential for statutory/regulatory changes and increased scrutiny, contractors selling agricultural commodities or food products under the NSLP or SBP must continue to be vigilant with “Buy American” compliance. Compliance failures can lead to anything from a breach of contract or termination action to fraud exposure (through common law fraud or the False Claims Act) to suspension or debarment. The best way to avoid such potential issues is to establish and maintain a compliance plan with tailored policies, procedures and training, and to carefully evaluate and document any application of a “Buy American” exception.

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[1] This bill is available at <https://www.congress.gov/bill/115th-congress/senate-bill/2641/text>.

[2] 42 USC § 1760(n)(2)(A), (B).

[3] 42 USC § 1760(n)(1); 7 CFR §§ 210.21(d)(1), 220.16(d)(1). School food authorities located in Hawaii and the Commonwealth of Puerto Rico are subject to different requirements. See 42 USC § 1760 (n)(3), (4); 7 CFR §§ 210.21(d)(3), 220.16(d)(3).

[4] FNS Memo SP 38-2017 at 1-2 (June 30, 2017) (the “2017 FNS Buy American Memo”). The 2017 FNS Buy American Memo is available at <https://fns-prod.azureedge.net/sites/default/files/cn/SP38-2017os.pdf>. The FNS also provided a companion webinar, which is available at <https://www.fns.usda.gov/fns-buy-american-webinar-112017>. It appears that the guidance provided in the 2017 FNS Buy American Memo and companion webinar also would apply to the SBP.

[5] Id. at 2.

[6] Id. at 3.

[7] Id.

[8] This bill is available at <https://www.congress.gov/bill/115th-congress/house-bill/1241>.

[9] As written, the stated exceptions are unclear. The 2018 bill states that “[a] school food authority may purchase a foreign commodity or product without a waiver under clause (i) if the foreign commodity or product is—(I) produced domestically; or (II) available domestically.” Based on our review of Rep. LaMalfa’s related 2017 bill, we believe that the 2018 bill may have been intended to read as follows: “[a] school food authority may purchase a foreign commodity or product without a waiver under clause (i) if the foreign commodity or product is not—(I) produced domestically; or (II) available domestically.” (Emphases added). In other words, a waiver would not be required to purchase a commodity or product that simply is not produced or available domestically.

[10] See also 2017 FNS Buy American Memo at 3 (noting that SFAs should consider whether the timing of a procurement could affect domestic availability, and if a domestic product can be substituted for a foreign product).

[11] 2017 FNS Buy American Memo at 3-4.

[12] Id., Addendum at 2-4.

[13] This plan was issued in May 2018, and is available at <https://fns-prod.azureedge.net/sites/default/files/ops/study-and-evaluation-plan-2018.pdf>.

[14] FNS Research and Evaluation Plan at 8.

[15] Id.

[16] See, e.g., “4 Takeaways From The ‘Buy American’ Executive Order,” Law360 (Apr. 19, 2007) for an analysis regarding the “Buy American” Executive Order, available at <https://www.law360.com/articles/914680/4-takeaways-from-the-buy-american-executive-order>.

[17] This report is available at <https://www.auditor.ca.gov/pdfs/reports/2016-139.pdf>.