State of Arizona
Department of Education

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MEMORANDUM

To: National School Lunch Program (NSLP) Sponsors, Summer Food Services Program (SFSP) Sponsors, Child and Adult Care Food Program (CACFP) Sponsors

From: Mary Szafranski, Deputy Associate Superintendent
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Original Signed

Date: October 25, 2012

RE: Procurement Geographic Preference Q&As – Part II

The purpose of this memorandum is to address recent inquiries on the application of the geographic preference option in the procurement of unprocessed locally grown or raised agricultural products. This memorandum provides additional guidance and technical assistance to memorandum CN# 21-11, Procurement Geographic Preference Q&As, which was issued on March 1, 2011 and CACFP CN#009-08, SFSP CN#01-09 issued August 1, 2008. For a copy of these memoranda, please visit:
http://www.azed.gov/health-nutrition/memos/

Procurement Threshold

Q1: Has the small purchase threshold been changed from $100,000 to $150,000?

A: Yes, the federal small purchase threshold has been changed to $150,000. The Federal Office of Management and Budget (OMB) will publish federal regulations for review and comment by the general public later this year. Pursuant to U.S. Department of Agriculture regulations at 7 CFR Part 3016.36(d), at this time, the new federal small purchase threshold of $150,000 may be used for Child Nutrition Program procurements. State and local agencies may set a lower small purchase threshold and thereby impose more restrictive procurement procedures as authorized by

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7 CFR §3016.36(a), §3016.37(a), and §3016.60(a). Pursuant to Arizona Revised Statutes (A.R.S.) §15-213, the small purchase threshold for sealed bids and proposals is $50,000. Therefore, all State and local procurement requirements still apply.

Geographic Preference

Q2: May a State mandate or otherwise require that a school food authority (SFA)/institution/sponsor **cannot** use the geographic preference procurement option?

A: No. Any SFA/ institution/sponsor participating in the Federal CNPs has the option to apply a geographic preference when procuring unprocessed, locally grown or raised agricultural products. States may not prohibit use of the geographic preference procurement option.

As noted in the initial implementing memorandum, CN# 21-11, Applying Geographic Preferences in Procurements for the Child Nutrition Programs, "[t]he institution responsible for the procurement has the discretion to determine whether and how a geographic preference meets its needs." This is also further outlined in the final rule, Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs (http://www.fns.usda.gov/cnd/Governance/regulations/2011-04-22.pdf).

Q3: May a State or other local government entity require the use of a specific definition for local when applying the geographic preference procurement option?

A: No. As noted above, and stated in Q12 of Policy Memorandum CN# 21-11, the geographic preference regulation states that only the SFA, or Arizona Department of Education (ADE) making purchases on behalf of the SFA, can determine the definition of local. Thus, any attempted restriction to make decisions regarding how to define local for purposes of the geographic preference procurement option would be inconsistent with Federal law and unallowable.

We understand that many state and/or local governments have adopted buy local programs that may include definitions of local such as "within the state" or "within the county." An SFA/institution/sponsor electing to use its federally conferred option to indicate a geographic preference when sourcing food for the meal program **is under no obligation** to adopt any definition for local that might be in existence in its local area.

An SFA/institution/sponsor operating in a state with state laws designed to encourage buying of products grown within the state may **elect** to use a "within the state" definition, but again, is under no obligation to do so. The choice of which definition to use, if any at all, rests solely with the entity making purchases. The choice by an entity or ADE undertaking procurement on behalf of one or more entities has primacy.

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Q4: My state has "buy within the state" legislation. I understand I can define local on my own terms for purposes of procuring unprocessed locally grown or raised agricultural products. My location is on the state border and thus I typically buy products from the neighboring state and consider those products to be local. I would like to honor the state preference for products grown within the state, while also giving preference to the products that are local in my area. How might I do this?

A: There are a variety of options which may be explored. One consideration is the use of a tiered approach in a procurement preference - for instance, awarding 5 extra points to vendors with products grown within the state, while awarding 8 extra points to vendors with products grown within 150 miles.

Q5: I know the geographic preference rule does not mandate a specific definition for local but, are some methods better than others?

A: No. There is no one best method. Politically defined areas such as "within the county" or "within the state" may be used. Also, a definition of local may include more than one state (i.e., Georgia, Alabama, and Florida) or discrete parts of several states (i.e., specific counties in southwest Washington, specific counties in northeast Oregon, and specific counties in Idaho). Furthermore, local may be defined using a mileage range such as "within 150 miles" or "within 400 miles" of a specified location. Regardless of which definition is used, ensure that the definition of local does not restrict free and open competition in such a way that only one or two respondents meet the definition.

Q6: Is there one best method of providing preference (i.e., advantage) to meet a geographic preference definition?

A: No. The regulations are not prescriptive. For example, a point system, percentage based system, or a different system may be used. There is no set method. The solicitation must clearly define and describe the evaluation criteria of award to be used and then ensure the method does not unreasonably limit free and open competition. If questions arise about methodology, contact the FNS Regional Office.

Q7: What is considered an unreasonable limit on competition?

A: An unreasonable limit on competition is one which has an adverse impact on or restricts free and open competition. It limits the ability of an SFA/institution/sponsor, or ADE acting on its behalf, to procure the best products for use in the CNPs. For example, indicating a preference for products grown within 5 miles when only one farm meets that definition, would be considered an unreasonable limit on competition. However, if 100 farms meet that definition, the preference would not result in an unreasonable limit on competition. The entity or ADE acting on its behalf, has to use their best judgment.

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Q8: Can USDA provide a list of the types of products to which a geographic preference can be applied?

A: Geographic preference can be applied to a wide array of products provided those products meet the definition of unprocessed or minimally processed at 7 CFR Part 210.21 (g)(2). Allowable products include, but are not limited to:

- Fruits;
- Vegetables;
- Meats (Including fresh or unprocessed frozen products and formed products, such as patties, that contain no additives or fillers.);
- Fish (Including whole, form, filets or nuggets that contain no additives or fillers.);
- Poultry (Including whole, form, or various cuts.);
- Dairy (Please note that while unflavored fluid milk is allowed, flavored milk or any processed dairy products such as yogurt, cheeses, etc. is not allowed.);
- Eggs; and
- Grains (Including quinoa, rice, barley, etc. in whole form and other grains in ground form such as flour.)

Q9: How would an SFA/institution/sponsor determine if milk is considered "local"?

A: The final rule on geographic preference speaks to locally grown and raised agricultural products, which means that a farm animal must be raised locally and fruits and vegetables must be grown locally. With respect to milk, "local" milk must be from dairy cows that are milked and reside in the "local" geographic area. "Local" may also be defined to mean that pasteurization must take place locally. (Please note that the geographic preference rule does not apply to fluid milk products that contain additives, such as chocolate or strawberry flavored milks, nor any processed dairy products such as cheese, yogurt, etc.)

Q10: How would an SFA/institution/sponsor determine if meat products are considered "local"?

A: The geographic preference procurement option may state that farm animals need to be raised in a certain geographic area. (Please note that the geographic preference rule does not apply to any meat products that have been cooked, heated, canned or that have any additives. It does apply to fresh and frozen meats, ground meats, and even formed meat patties provided there are no additives in any of these meat products.)

Q11: How would an SFA/institution/sponsor determine if fish products are considered "local"?

A: The geographic preference procurement option may state that fish need to be caught or, in the case of aquaculture, raised in a certain geographic area. (Please note that the geographic preference rule does not apply to any seafood products that have been cooked, heated, canned or that have any additives. It does apply to fresh and frozen fish, including fish filets.)

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Q12: I understand that the definition of unprocessed and minimally processed excludes value-added items such as chili, salsa, and soup but can the geographic preference procurement option help me in finding local sources of these items?

A: The geographic preference procurement option can be used in sourcing the raw ingredients. An SFA/institution/sponsor, or ADE acting on its behalf, could use the geographic preference procurement option, for example, to procure local tomatoes and onions for tomato sauce. The entity could make the tomato sauce itself or it could procure a processor that would use the items the SFA/institution/sponsor sourced locally to make the tomato sauce. The geographic preference procurement option may not be used when selecting a vendor to process the locally sourced items. However, an SFA/institution/sponsor, or ADE acting on its behalf, may use a competitive procurement and include in its solicitation documents a requirement that the processor use only the raw ingredients provided (i.e., the local ones procured using the geographic preference procurement option).

Q13: If an SFA/institution/sponsor, or ADE acting on its behalf, goes through the formal procurement process (i.e., procurement valued over the Federal, State or local small purchase threshold), can the contract be awarded to a farmer that did not respond to the solicitation, if the cost of certain products from that farmer is lower?

A: No. In the situation described above, the entity conducted the formal procurement process and the farmer did not respond to the formal solicitation; therefore, the bid cannot be awarded to a nonresponsive bidder/farmer who did not participate in the competition. Scoring of bids/proposals must be based on the solicitation issued and the responses received. The contract must be awarded to the winning bidder/respondent which allows the direct purchase from that entity.

Q14: Does FNS have a prototype solicitation or contract specifically created for the procurement of unprocessed locally grown or raised agricultural products?

A: No. Because State procurement requirements can be more restrictive than Federal procurement requirements, and often vary from State to State, prototypes are generally developed at the State Agency level. (Note: While it is the case that SFAs/institutions/sponsors will need to follow their State procurement requirements in addition to Federal procurement requirements, as noted above, there is no situation in which State laws or regulations may dictate how local is defined for purposes of procuring locally grown and raised agricultural products.)

Q15: If an SFA/institution/sponsor, or ADE acting on its behalf, awards a main produce contract, can the entity reserve the right to do individual competitive procurement of certain local, seasonal produce items?

A: Yes, as long as the entity issues a solicitation and executes a main produce contract that reserves such a right. The entity needs to think through issues of this nature prior to issuing a solicitation for a main produce distributor. A review of USDA's web-based procurement training available online through the University of Mississippi's National Food Service

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Management Institute (NFSMI) is advised. A direct link to the training can be found at http://www.nfsmi.org/Templates/TemplateDefault.aspx?qs=cElEPTEzNQ. *State Agency Guidance on Procurement*, Topic 1 and 2, are currently available for free to the public and provide general information on drafting solicitations and contracts.

Q16: I'd like to support small farmers. Is it appropriate to divide a procurement into smaller quantities in order to allow participation by small, minority, or women-owned farms?

A: Yes, per USDA regulations at 7 CFR Part 3016.36(e)(iii).

Q17: What is the role of a procurement agent in the application of the geographic preference procurement option?

A: An SFA/institution/sponsor may procure the services of an entity to act as a procurement agent to purchase food and other products used in the CNPs on behalf of the entity. The procurement agent is required by Federal regulations to include in the solicitation and resulting contract a clear statement requiring the procurement agent to follow all Federal procurement regulations. The procurement agent would apply the geographic preference procurement option in the same manner as the SFA/institution/sponsor.

Q18: Can an SFA/institution/sponsor enter into forward contracts with local producers in advance of the season?

A: A forward contract is generally understood to involve a contract between two parties to buy or sell products at a specified time in the future at a price agreed upon today. Entering into a forward contract with local producers in advance of the season may pose risk as farmers may experience crop loss due to outside elements such as weather or infestation. An SFA/institution/sponsor is the steward of the nonprofit school food service account; and must ensure that all costs are reasonable, necessary, and allocable. Thus, careful consideration must be given to such contracts and the potential risk weighed against the benefit. Additionally, the entity needs to ensure that the farmer is capable of providing substitutions that are meaningful in the event of crop failure and to incorporate language into the contract affording meaningful substitutions or a return on the original financial investment.

Q19: Can an SFA/institution/sponsor participate in a Community Supported Agriculture program (CSA)? For example: A contract with a local farm pays $2,000 for produce in advance in the early spring when the farmer needs the "seed money." By paying in advance, the entity shares in the harvest all season, but also shares the risks of bad weather, oversupply or crop failure with the farmer.

A: Yes, there may be instances where participation in a CSA program is reasonable; however, in general FNS does not recommend such. Pursuant to Federal regulations, an entity is the steward of the nonprofit food service account and must ensure that all costs charged are reasonable, necessary, and allocable for CNP purposes. Participating in a CSA may not be a prudent or reasonable way of spending these limited funds given there is often no guarantee that benefit will

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be derived from the expenditure (i.e., there may be a crop loss). Additionally, in a CSA model, there is no guarantee the funds provided to the CSA/farmer will generate the desired quantity needed to service the CNPs or justify the cost. In addition, due to the nature of a CSA (i.e., contributions are made prior to harvest and there is no guarantee of the desired product at the desired quantity), it would be difficult to compare bidders to written specifications under both formal and informal procurement methods.

Q20: Can an SFA/institution/sponsor issue a solicitation that includes specifications related to qualitative factors (i.e., freshness, ripeness, time elapsed between harvest and delivery, etc.) in addition to preferences related to geographic location?

A: Yes, specifications may be written for a wide variety of qualitative factors designed to complement a preference for local products. These factors could be provided as either required specifications or preferred specifications. These factors may include, but are not limited to:

- Freshness;
- Ripeness; and
- Time elapsed between harvest and delivery.

The entity will need to determine whether specifications of this nature unreasonably limit competition. Before issuing a solicitation, the entity should do proper forecasting which involves a survey of the market. This will help the entity determine if specifications of this nature unreasonably limit competition prior to issuing a solicitation.

Q21: Can an SFA/institution/sponsor issue a solicitation that includes specifications related to agricultural practices, (i.e., organic or no-spray) and preferences related to geographic location?

A: Product practices can be included as specifications as long as doing such does not unnecessarily limit competition. However, geographic preference may not be provided to such specifications as they are not geographic in nature, rather they are attributes of a product.

Q22: Can an SFA/institution/sponsor, or ADE acting on its behalf, utilize the geographic preference procurement option when using the informal procurement method (i.e., procurement valued under the Federal, State or local small purchase threshold)?

A: Yes, however, the entity must clearly describe the manner in which the geographic preference will be applied within the written specifications.

Q23: Can an SFA/institution/sponsor procure unprocessed locally grown or raised products at a farmers market?

A: An entity may generally be able to procure unprocessed locally grown or raised products at a farmers market through the informal procurement method (i.e., procurement valued under the Federal, State or local small purchase threshold). Though procurements conducted using the federal small purchase threshold follow a less rigorous process than the formal methods of sealed

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bidding or competitive negotiation, competition is still required. The entity must draft specifications in writing and ensure that the sources it contacts, including a vendor at the farmers market, provide the type of products described in the specifications in the specified quantity. For example, the entity may compare three sources at the farmers market for cherry tomatoes or contact two sources outside of the farmers market for cherry tomatoes and then compare source(s) at the farmers market providing the same product as described within the written product specifications.

Q24: Can an SFA/institution/sponsor use market reports to obtain quotes in an informal procurement?

A: No. While market reports may be used as a guide to determine if a bidder is selling their agriculture product at a fair price, these reports do not assure a quoted price or volume from a particular bidder and, therefore, may not be used as a method for satisfying the informal procurement requirements. Please refer to the Procurement FAQs on the Farm to School website for additional information on informal procurements (www.fns.usda.gov/cnd/f2s/faqs_procurement.htm)

If you have additional questions or concerns regarding this memorandum, please contact Ellen Pimental at (602) 602-542-6208 or email her at Ellen.Pimental@azed.gov.

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