



OFFICE OF ATTORNEY GENERAL TOM HORNE
CIVIL DIVISION/EDUCATION & HEALTH SECTION

MEMORANDUM

Date: June 7, 2013

To: Arizona Department of Education, Food and Nutrition Services

From: Office of the Arizona Attorney General, Education and Health Section

Re: Geographic Preference for School Nutrition Program

I. Question Presented

Under Arizona and federal law, may schools receiving funding through the federal Child Nutrition Programs implement geographic preference in procurement of food products?

II. Summary Answer

Yes. Schools receiving funding through the Child Nutrition Programs may use, and the State of Arizona may not prevent them from using, geographic preference in the procurement of locally grown or raised agricultural products, provided that all other regulations are met and free and open competition is not unnecessarily restricted.

III. Background

Traditionally, schools receiving funding were required to make procurement contracts with the lowest bidder regardless of where in the country the food was grown or raised. In 2008, the United States Congress amended the Richard B. Russell National School Lunch Act to encourage schools to purchase locally grown or raised agricultural products that would be consumed by children, by allowing them to implement a geographic preference in the procurement process.

IV. Analysis

A. Federal Statute

The Richard B. Russell National School Lunch Act contains the geographic preference requirement. 42 U.S.C. § 1758. This provision mandates that the United States Secretary of Agriculture “encourage institutions receiving funds ... to purchase unprocessed agricultural products, both locally grown and locally raised.” 42 U.S.C. § 1758(9)(j)(1). The Secretary further must allow institutions receiving funds to “use a geographic preference for the procurement” of those products. 42 U.S.C. § 1758(9)(j)(3).

B. Federal Regulations

The implementing regulations are found at 7 C.F.R. 210-245, 3015-3017. Specifically, 7 C.F.R. § 210.21(g) addresses procurement under the National School Lunch Program and specifies that any participating school food authority “may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products.” 7 C.F.R. § 210.21(g). In this regulation, “participating” refers to any school food authority who receives funds under the National School Lunch Program. Procurement standards for the Special Milk Program, School Breakfast Program, Summer Food Service Program, and Child and Adult Care Food Program contain identical provisions for geographic preference. 7 C.F.R. §§ 215.14(a), 220.6, 225.17, 226.22.

Further, 7 C.F.R. § 3016.36(c)(2) states that schools receiving funds may not adhere to any “in-State or local geographical preferences,” except when “Federal statutes expressly mandate or encourage geographic preference.” 7 C.F.R. § 3016.36(c)(2). Here, the federal statute does encourage geographic preference, so the State may not prevent schools from implementing geographic preference.

C. United States Department of Agriculture Memoranda

Since the amendments in 2008, the USDA has released multiple memoranda intended to clarify the geographic preference option for schools receiving funding. These memoranda verify the intended effect of federal statutes and regulations regarding geographic preference. Memorandum SP 30-2008 states in relevant part that the United States Secretary of Agriculture must “encourage institutions operating the Child Nutrition Programs to purchase unprocessed locally grown and locally raised agricultural products.” USDA Memorandum SP 30-2008. It further states that the amendments

allow institutions receiving funds to “apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products.” USDA Memorandum SP 30-2008. The memorandum clarifies that the amended statute “does not require institutions to purchase locally grown and locally raised agricultural products, or to apply a geographic preference” USDA Memorandum SP 30-2008. Finally, it emphasizes that States may not mandate that institutions apply a geographic preference. USDA Memorandum SP 30-2008.

Memorandum SP 02-2010 again confirms that programs receiving federal funds may apply a geographic preference in the procurement of locally grown or raised agricultural products, and clarifies that there is no particular radius of what may be defined as “local.” USDA Memorandum SP 02-2010. It explains that each school may define the area for geographic preference as long as “local” is not defined in a way that unnecessarily limits competition. USDA Memorandum SP 02-2010.

Memorandum SP 18-2011 further emphasizes that institutions receiving funds through the Child Nutrition Programs—including the National School Lunch Program, School Breakfast Program, Fresh Fruit and Vegetable Program, Special Milk Program, Child and Adult Care Food Program, and Summer Food Service Program—may apply an “optional geographic preference in procurement of unprocessed locally grown or locally raised agricultural products.” USDA Memorandum SP 18-2011. It clarifies that states may not mandate that institutions apply a geographic preference, because the federal law “grants this authority directly to the purchasing institution.” USDA Memorandum SP 18-2011.

D. Applicability to Arizona

Arizona law is consistent with the federal statute and regulations regarding geographic preference. The Arizona Administrative Code requires school districts to “comply with federal law and authorized regulations which are mandatorily applicable” if procurement involves federal funding. A.A.C. R7-2-1002(A).¹ The question then is whether the federal laws and regulations discussed above are mandatorily applicable. According to federal regulations, institutions that choose to participate in the National School Lunch Program by accepting any amount of funding must enter into a written agreement with the State agency that administers the funds; this agreement requires the institution to comply with all applicable federal statutes and regulations, including the

¹ A.A.C. R7-2-1002(A) is applicable only to school districts.

procurement provisions. 7 C.F.R. § 210.9(b). Regulations for other Child Nutrition Programs contain similar requirements that institutions and sponsors enter into agreements with the State agency and comply with applicable federal laws and regulations. 7 C.F.R. §§ 220.7, 215.7, 225.6(h)(1). Further, any State agency that administers Child Nutrition Programs must enter into a written agreement with the USDA that mandates administration in accordance with the federal regulations for each program. 7 C.F.R. §§ 210.3, 235.3, 215.3, 226.3, 225.3, 220.3.

Because school districts are required to comply with federal statutes and regulations under their agreement with the State agency, those statutes and regulations are considered mandatorily applicable. Therefore, the federal statutes and regulations discussed above are applicable to every school district in Arizona that receives funding through the various Child Nutrition Programs.

V. Conclusion

Consistent with the federal sources outlined above, schools and other institutions in Arizona may use geographic preference in procurement of locally grown or raised agricultural products if they are receiving any amount of funding through the federal Child Nutrition Programs. The State of Arizona may not prevent schools from using this geographic preference. Similarly, the State may not mandate that geographic preference is used, nor may it mandate a definition of “local.” Finally, each institution must ultimately comply with all other statutes and regulations regarding the administration of Child Nutrition Program funding.