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## SENATE COMMITTEE ON EDUCATION

Senator Connie Leyva, Chair  
2021 - 2022 Regular

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<b>Bill No:</b>	SB 1308	<b>Hearing Date:</b>	April 20, 2022
<b>Author:</b>	Caballero		
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<b>Urgency:</b>	No	<b>Fiscal:</b>	Yes
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**Subject:** Public educational institutions: purchase of nondomestic agricultural food products.

### SUMMARY

This bill expands the existing Buy American Provision to 1) prohibit public postsecondary educational institutions and school districts from purchasing agricultural products grown, packed, or processed non-domestically with exceptions; and, 2) specify that an agricultural product that is not California-grown is to be a domestic agricultural product (produced or processed in the United States).

### BACKGROUND

#### *Buy American*

- 1) The federal National School Lunch Act requires school food authorities to purchase, to the maximum extent practicable, domestic commodities or products. (United States Code, Title 7, § 210.21)
- 2) Defines “domestic commodity or product” as:
  - a) An agricultural commodity that is produced in the United States; and
  - b) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States. (7 U.S.C. § 210.21)
- 3) Provides exceptions to the Buy American Provision that allow for the purchase of products not meeting the domestic standard, including:
  - a) The product is not produced or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.
  - b) Competitive bids reveal the cost of a United States product are significantly higher than the nondomestic product. (United States Code, Title 42, § 1760(n))
- 4) Mirrors the provisions above in state statutes, and also includes the following:

- a) Defines “substantial” to mean over 51 percent of the final processed product consists of agricultural commodities grown domestically.
- b) Requires the California Department of Education (CDE) to make requirements, resources, and best practices for the Buy American provision available on its website.
- c) Requires CDE to distribute to school food authorities guidance or regulations from the United States Department of Agriculture for the Buy American provision, as updates are issued. (Education Code § 49563)

*Choose California Produce Act*

- 5) Requires a school district that solicits bids for the purchase of an agricultural product to accept a bid or price for that agricultural product when it is grown in California before accepting a bid or price for an agricultural product that is grown outside the state when both of the following are met:
  - a) The bid or price of the California-grown agricultural product does not exceed the lowest bid or price for an agricultural product produced outside the state.
  - b) The quality of the California-grown agricultural product is comparable to that agricultural produce produced outside the state. (Food and Agricultural Code § 58595)
- 6) Limits application of # 5 to a contract to purchase agricultural products for a value that is less than the value of the threshold for supplies and services for which California has obligated itself under the Agreement on Government Procurement of the World Trade Organization. (Food & Ag Code § 58595)
- 7) Requires all California state-owned or state-run institutions, except public universities and colleges and school districts, that solicit bids for the purchase of an agricultural product to accept a bid or price for that agricultural product when it is grown in California (or grown outside the state but packed or processed in California) before accepting a bid or price for an agricultural product that is grown, or packed/processed outside the state, when both of the following are met:
  - a) The bid or price of the California-grown/packed/processed agricultural product does not exceed by more than 5 percent the lowest bid or price for an agricultural product produced outside the state.
  - b) The quality of the California-grown or packed/processed agricultural product is comparable to that agricultural produce produced outside the state. (Food & Ag Code § 58595)

**ANALYSIS**

This bill expands the existing Buy American Provision to 1) prohibit public postsecondary educational institutions and school districts from purchasing agricultural

products grown, packed, or processed non-domestically with exceptions; and, 2) specify that an agricultural product that is not California-grown is to be a domestic agricultural product (produced or processed in the United States). Specifically, this bill:

- 1) Prohibits the California Community Colleges (CCC), the California State University (CSU), and all local educational agencies (LEAs) that solicit bids for the purchase of an agricultural food product from purchasing, and the University of California (UC) is requested to not purchase, agricultural food products grown, packed, or processed non-domestically unless any of the following applies:
  - a) The bid or price of the non-domestic agricultural food product is more than 25 percent lower than the bid or price of the domestic agricultural food product.
  - b) The quality of the domestic agricultural food product is inferior to the quality of the agricultural food product grown or packed/produced non-domestically.
  - c) The agricultural food product is not produced or manufactured domestically in sufficient and reasonably available quantities of a satisfactory quality to meet the needs of meals provided under the school meal program of the CCC, CSU, UC, or LEA.
- 2) Exempts from # 1 above agricultural food products purchased by or provided to the CCC, CSU, UC, or LEA through the United States Department of Agriculture (commodity food).
- 3) Modifies the existing requirement that school districts accept bids for agricultural products that are California-grown before accepting bids for those grown outside of the state to clarify that the out-of-state agricultural product is to be a domestic agricultural product (grown in the United States).
- 4) Provides the following definitions:
  - a) "Agricultural food product" means a fresh or processed product, including fruits, nuts, vegetables, herbs, mushrooms, dairy, shell eggs, honey, pollen, unprocessed beeswax, propolis, royal jelly, flowers, grains, nursery stock, raw sheared wool, livestock meats, poultry meats, rabbit meats, and fish, including shellfish.
  - b) "Domestic" means inside of the United States.
  - c) "Non-domestic" means outside of the United States.
  - d) "Local educational agency" means a school, school district, county office of education, or charter school.
- 5) States legislative findings and declarations relative to the existing allowance for waivers where the domestic product is priced significantly higher than a nondomestic product, how this creates a loophole that has resulted in widespread noncompliance with Buy American Provision requirements, and that

competition from non-domestic producers hurts California agriculture and threatens to eliminate the jobs that workers depend on to feed their own families.

## STAFF COMMENTS

- 1) *Need for the bill.* According to the author, “California produces more than 400 different agricultural commodities, over one-third of the country's vegetables, and two-thirds of the country's fruits and nuts. Over 99 percent of California’s 1,200 dairy farms are family owned and the dairy sector supports approximately 180,000 jobs. Over 500,000 people work in California’s agriculture, industry, from farmworkers to workers in food processing and canneries. Union jobs in canneries and food processing – among others – provide good wages, benefits, and retirement security to hundreds of thousands of workers.

“One of the largest public institutional purchasers of agricultural products are schools and universities and California receives nearly \$2 billion each year in federal funding for school meal programs. Under current USDA regulations, school districts can bypass the existing “Buy American” requirement and purchase food products imported from outside the United States if there is a significant cost differential between domestic and imported food products. California schools purchase lower quality goods grown and produced outside of the country under less stringent worker, health, and environmental standards, despite the fact that California is one of the most productive agricultural region of the world that also has strong standards to protect workers, public health, and the environment. The agricultural industry has felt the impact of overseas competition. In 2018, Seneca Foods, a producer of peach and fruit cocktail products, shuttered its Modesto plant laying off 265 full-time workers and nearly 1,000 seasonal workers. The company cited ‘import competition from overseas — China and Europe’ as the reason for the plant closure.”

- 2) *Buy American.* Several federal child and adult meal programs include the “Buy American Provision.” The Buy American Provision of the federal National School Lunch Act requires school food authorities to purchase, to the maximum extent practicable, domestic commodities or products. Exemptions from the Buy American Provision allow for the purchase of non-domestic products if the cost of a domestic product is “significantly higher than” the non-domestic product or if the domestic product is not produced in sufficient and reasonably available quantities of a satisfactory quality.

Existing statutes and regulations do not provide a definition of or threshold for what constitutes “significantly higher” costs to allow the purchase of non-domestic commodities or products. The California Department of Education is tasked with monitoring compliance with the Buy American Provision and determining what constitutes “significantly higher” costs.

This bill essentially establishes a threshold of “more than 25 percent lower than the lowest bid or price” to authorize public colleges/universities and LEAs to purchase non-domestic agricultural products. Therefore, this bill requires public colleges/universities and LEAs to purchase only domestic agricultural products unless the non-domestic product is priced more than 25 percent lower than the

lowest bid or price.

A similar yet much lower threshold exists in the state's Choose California Produce Act for all state-owned or state-run institutions *except public colleges/universities and LEAs*, that authorizes state institutions to purchase an agricultural product that is grown/packed/processed outside of California (not necessarily limited to domestic products) when the cost exceeds the lowest bid by more than 5 percent. The Choose California Produce Act authorizes school districts to purchase an agricultural product that is grown outside of California (not necessarily limited to domestic products) when the cost exceeds the lowest bid for a California-grown product and the quality is comparable.

*Is it reasonable to require public colleges/universities to purchase only domestic agricultural products unless the non-domestic product is priced more than 25 percent lower? Is this threshold too high? Could school meal budgets be stretched to afford more expensive domestic agricultural products?*

- 3) *How do schools purchase food?* In the context of K-12 schools, school food authorities first plan meals and menus that align to meal standards (how much protein, fat, salt, etc). According to information provided by the California School Nutrition Association, menus are typically planned at least the prior month or months to service. Some LEAs cycle menus that are adjusted based on new menu items, such as holidays, seasons, or other factors.

After the menu is planned, food is ordered for distribution to school sites. It is possible that the food distributor could have a shortage of or the inability to acquire the food items needed; this necessitates a substitute of the menu item.

School districts are required to have food contracts or pricing agreements based on the amount of purchases that occur during the school year and bid limits according to federal, state, and local regulations. Typically, contracts are written for one year with an option of roll-over for up to two additional years. The contracts include non-commodity, commodity distribution, and commodity processed food/menu items delivered to schools. School districts provide a list of items they plan to use the following school year and the estimated quantity of those items to food distributors for their pricing information.

New items available from food manufacturers can be added to the price list during the school year, and items on the contract can be discontinued from the manufacturer during the school year at any time. This requires additional items to be found as a replacement on the menu, sometimes during the school year.

United States Department of Agriculture (USDA) commodity items are available in January or February to LEAs; at that time, LEAs place an order of quantity of food items by cases, and commodity (raw product) to be sent to processors to manufacture finished items to be distributed back to the LEA for the following school year and part of the subsequent school year. For example, orders placed in February 2022 are for USDA food items for July 2022-September 2023.

Further, LEAs have the option of allocating part of their Commodity Entitlement to

Fresh Fruit & Vegetable/DOD (Department of Defense) Fruit & Vegetable program for the following school year. LEAs typically place these orders only one week prior to delivery, and LEAs have no knowledge of the source of those items other than on the order guide some are listed as “locally grown”. Poor labeling of USDA commodities is a long-standing problem.

Local educational agencies gather food from many sources (USDA, food distributors, and food manufacturers). Based on the availability of food items, they can be from local sources, nationally-sourced or non-domestic, based on demand as well as supply.

*Are the allowable exemptions in this bill sufficient to provide LEAs with the flexibility to purchase the food items needed to fulfill their menus, receive those items in time, and for a price that fits within their budget?*

- 4) *Allowable exemptions from the Buy American Provision.* Existing law allows for the purchase of non-domestic products if the product is not produced or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality or the cost are significantly lower than the domestic product. Existing law requires school food authorities to verify cost and availability of domestic and nondomestic foods and retain records for documenting any exceptions.

According to the CDE’s website, before using an exception, school food authorities should first consider and document their responses to the following questions:

- a) Are there any other domestic sources for this product?
- b) Is there a domestic product that could easily be substituted for the nondomestic product on the menu (e.g. substitute domestic pears for nondomestic apples)?
- c) Am I soliciting bids for this product at the best time of year? If I contracted earlier or later in the season, would prices and/or availability change?
- d) Am I using third-party verification, such as through the USDA Agricultural Marketing Service Web page to determine the cost and availability of domestic and nondomestic foods?

It is up to the school food authority to determine, based on their responses to the questions listed above, if they are able to justify one of the exceptions to the Buy American Provision requirements. If a school food authority is using one of the above exceptions, there is no requirement to request a waiver from the CDE in order to purchase a non-domestic product; however, school food authorities must keep documentation that justifies any exception. Federal regulations require school food authorities to maintain records sufficient to detail the history of procurement, including rationale for the method of procurement, selection of contract type, contractor selection or rejection, and basis for the contract price.

- 5) *Related State Audit.* A 2017 state audit, “California Department of Education: It Has Not Ensured That School Food Authorities Comply With the Federal Buy American Requirement,” found that a) CDE compliance review process has weaknesses that have led to inadequate and inconsistent reviews; b) none of the six school districts reviewed had adequate policies and procedures related to the Buy American requirement and they had purchased foreign-sourced food items, but did not have adequate documentation to justify the purchases; c) verifying compliance with the requirement will be challenging because federal food labeling laws do not always mandate that the country of origin for food items or their ingredients be included on labels. [California Department of Education It Has Not Ensured That School Food Authorities Comply With the Federal Buy American Requirement](#)

Subsequent legislation requires CDE to take specified actions in order to monitor compliance with the Buy American Provisions, including posting resources and best practices on their Web site.

- 6) *California Department of Education (CDE) resources.* The CDE’s website includes information about the Buy American Provision, what school food authorities should consider before using an exception, how school food authorities can monitor compliance by their vendors, how CDE will monitor compliance by school food authorities, required documentation, bid process, best practices, and links to regulations and federal policy memos. [Procurement in School Nutrition Programs - School Nutrition \(CA Dept of Education\)](#)
- 7) *Senate Agriculture Committee.* The Senate Agriculture Committee heard this bill on March 24, 2022. Please see that committee’s analysis for information about the Agreement on Government Procurement of the World Trade Organization.
- 8) *Fiscal impact.* It is possible that colleges/universities and LEAs could have increased costs due to purchasing domestic products that cost up to 25 percent more than non-domestic products.
- 9) *Prior legislation.* AB 1025 (Rivas, 2021) would have required all California state-owned or state-run institutions, all segments of public postsecondary education, and all LEAs to purchase agricultural food products grown, packed, or processed domestically unless either the bid or price of the non-domestic agricultural food product is more than 25 percent lower than the bid or price of the domestic agricultural food product or the quality of the domestic agricultural food product is inferior to the non-domestic agricultural food product. AB 1025 was referred to but not heard in the Assembly Accountability and Administrative Review Committee.

AB 778 (E Garcia, 2021) would have expands the requirement that all state-owned or state-run institutions purchase only California-grown agricultural food products (with exception) to include public colleges/universities and school districts. AB 778 passed the Assembly but was not heard in the Senate.

Agricultural Council of California (co-sponsor)  
California Canning Peach Association (co-sponsor)  
Association of California Egg Farmers  
Butte County Rice Growers Association  
California Apple Commission  
California Blueberry Association  
California Blueberry Commission  
California Cannery Industry Labor-Management Cooperation Committee  
California Cherry Growers and Industry Association  
California Citrus Mutual  
California Fresh Fruit Association  
California Olive Oil Council  
California Pear Growers Association  
California Women for Agriculture  
Far West Equipment Dealers Association  
Olive Growers Council of California  
Pacific Coast Producers  
Sun-maid Growers of California  
Sunsweet Growers  
Teamsters Food Processing Division  
Teamsters Local 517  
Teamsters Local 856  
Teamsters Local 890  
Teamsters Local 948  
United Ag  
United Food and Commercial Workers, Western States Council  
Wawona Frozen Foods

**OPPOSITION**

None received

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