

Geographic Preference



 SCHOOL
FOOD FOCUS

A primer on purchasing fresh local food for schools

Prepared for FOCUS by the
Harrison Institute for Public Law
Georgetown Law



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School Food FOCUS

School Food FOCUS is a national collaborative that leverages the knowledge and procurement power of large school districts to make school meals nationwide more healthful, regionally sourced, and sustainably produced. FOCUS aims to transform food systems to support students' academic achievement and lifelong health, while directly benefiting farmers, regional economies, and the environment. Procurement of school food is a central theme of this work. FOCUS is a program of Public Health Solutions.

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Harrison Institute for Public Law

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Preface

Geographic Preference—Potential, Pitfalls and Proper Procedures by Kathy Lawrence, School Food FOCUS

In April 2011, USDA published an exciting new rule on geographic preference that helps school districts to increase their purchases of local, minimally processed foods. School Food FOCUS (FOCUS) applauds this federal action and strongly encourages school districts to use the rule in implementing new standards and patterns for meals that emphasize whole and minimally processed foods.

As the spotlight remains on children's health and school meals, the use of local preferences is attracting greater attention – and scrutiny – to school food procurement. Legal guidance is needed for school districts to make the most of this new federal authority while complying with state and local laws. Accordingly, FOCUS has partnered with the Harrison Institute for Public Law, Georgetown University Law Center (Harrison), to clarify the interplay of federal, state, and local procurement regulations.

This work began with an in-depth study of federal law and the geographic preference (GP) rule as well as court cases interpreting them. Harrison also reviewed numerous Requests for Proposals (RFPs) and Invitations for Bids (IFBs) from FOCUS school districts. We gained a broad perspective on how these vary across regions and food categories. We also learned that many districts are purchasing local products in ways that do *not* fully conform to federal, state, and local laws. Fortunately, it is relatively easy to bring procurement documents into compliance.

Our goals regarding GP are to:

- Encourage districts to use their authority to favor local food purchases, with a solid body of research, analysis and advice to guide them;
- Alert districts that they have to be careful about their wording of preferences;
- Show how districts can comply with federal competitive bidding and GP regulations; and
- Emphasize that districts must also comply with their own state and local laws.

To achieve these goals Harrison and FOCUS have developed and vetted with food-service professionals the following set of materials.

- A GP Primer (this document) that provides:
 - authority and corresponding rationale for creating a GP policy to undergird district purchasing,
 - state and federal legal standards in plain language, and
 - guidance on decisions that school districts must make for a geographic preference policy – defining local and the amount of preference – that fits their unique goals;
- Guidelines on informal and formal procurement procedures with sample RFP/IFB language on clearly stating preference criteria.
- Detailed case studies developed for and with specific school districts.
- GP rationales, tailored for specific school districts and grounded in state and local law.

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Executive Summary

Benefits of Buying Local Foods

Hunger among children persists and childhood obesity is at record-high levels.¹ School food is one of several interventions that can influence both hunger and obesity; it can make a positive impact by providing healthy meals and teaching children about nutrition, food choices, and the food system. About 32 million children eat school food every day through the National School Lunch Program.² For many of them, schools are the only consistent source of nourishment through lunch, breakfast, snack, and even supper programs.³

School Food FOCUS and many others promote fresh local food as part of a strategy to improve the quality of school meals.⁴ Studies show that farm to school programs serving local foods have a positive effect on students' participation in school meals and dietary choices.⁵ The same studies indicate that serving local food increases consumption of nutritious fruits and vegetables.⁶ The federal government promotes local foods with programs like *Farm to School*, which many states have adopted, and *Know Your Farmer, Know Your Food*.⁷

Federal Authority to Implement a Geographic Preference

FOCUS applauds the federal government's recent shift to actively promote local foods in school meals. Congress amended the laws governing school food programs to allow school

¹ CTRS FOR DISEASE CONTROL AND PREV., CHILDHOOD OVERWEIGHT AND OBESITY, (Oct. 2011), <http://www.cdc.gov/obesity/childhood/> (last visited June 6, 2013).

² U.S. DEP'T OF AGRIC., FOOD NUTRITION SERVICES, *National School Lunch Program*, (2011), <http://www.fns.usda.gov/cnd/lunch/aboutlunch/NSLPFactSheet.pdf>.

³ See U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. REP. 125, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES 2010 (2011), <http://www.ers.usda.gov/Publications/ERR125/err125.pdf>.

⁴ In the context of geographic preference, USDA has specifically not defined local, leaving it for each school district to define as it sees fit. Definitions of local can include a number of states, a region, a state boundary, mileage radius, or tiered definition. Definitions of local are discussed in Section IV. In this document, we use local to include regional unless otherwise noted.

⁵ Anupama Joshi, et al., *Do Farm-to-School Programs Make a Difference? Findings and Future Research Needs*, 3 J. OF HUNGER & ENVTL. NUTRITION, 229, 233-237 (2008). See also *Benefits of Farm-to-School Projects, Healthy Eating and Physical Activity for School Children: Hearing Before S. Comm. On Agric., Nutrition & Forestry*, 111th Cong. (2009) (statement of William Dietz, PhD., Director of Div. of Nutrition, Physical Activity, and Obesity, Nat'l Ctr. for Chronic Disease Prev. and Health Promotion, Ctrs for Disease Control and Prev., U.S. Dep't of Health and Human Services); U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. REP. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES, at 45-46 (2010).

⁶ Id.

⁷ U.S. DEP'T OF AGRIC., FARM TO SCHOOL, <http://www.fns.usda.gov/farm-school> (last visited June 6, 2013); U.S. DEP'T OF AGRIC., KNOW YOUR FARMER, KNOW YOUR FOOD, <http://www.usda.gov/wps/portal/usda/knownyourfarmer?navid=KNOWYOURFARMER> (last visited June 6, 2013).

districts to implement a preference for locally produced foods,⁸ and the U.S. Department of Agriculture (USDA) followed up with regulations and guidance.⁹

A geographic preference provides a competitive advantage to local, minimally processed foods. However, under federal competitive bidding regulations, preferences cannot operate to exclude non-local products, create a quota for local products, or enable local producers to charge significantly higher than market prices. For example, a school district solicitation that states, “we will only accept locally grown apples” would violate federal regulations. Instead, a school district can solicit bids for a product – local and non-local – and provide preference, for example, a 5-point advantage to bids that meet the school district’s definition of local.

State Authority and Procurement Laws

Federal regulations make it clear that using a geographic preference is an option, not a condition for receiving federal funds.¹⁰ While school districts spend federal funds on meals, they are created and governed by state law, which defines their authority for purchasing food, among other things.¹¹ Most states require school districts to award contracts to the lowest responsible bidder. Although the meaning of *lowest responsible bidder* varies, some courts interpret this literally. It is common for disappointed bidders to challenge a procurement award that does not go to the lowest bid.

Fortunately, states grant one or more types of authority that a school district can use to shape and defend a geographic preference. The strongest is when a state explicitly grants authority to use a preference or authority to adopt procurement policy locally. Less clear, but more common, is when a state provides implied authority for a preference. For example, all states delegate authority to provide school meals. A school district can assert that the authority to provide meals implies the authority to purchase food that is fresh and nutritious – food that that students will choose and eat. Offering locally produced food is a proven means of promoting students’ consumption of minimally processed foods.

Another example of implied authority is a state farm to school law that encourages education on agriculture and promotes the objective of expanding markets for locally grown produce. Even in the absence of state legislation, a school district can assert an educational rationale for a local preference. But to do so, it must incorporate local food and farmers in a program of nutrition education – an approach that has shown to improve both dietary choices and nutrition knowledge.

⁸ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-23, § 4302, 122 Stat. 923, 1125-26 (2008).

⁹ Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs, 76 Fed. Reg. 22603 (April 22, 2011) (codified at 7 CFR Parts 210, 215, 220, 225, and 226) (hereafter referred to as Geographic Preference Option); FOOD AND NUTRITION SERVICES, U.S. DEP’T OF AG., POLICY MEMO SP_18-2011, PROCUREMENT Q&A (2011), POLICY MEMO SP_03-2013, PROCUREMENT Q&A (2012) PT. 2, at <http://www.fns.usda.gov/cnd/Governance/policy.htm> (last visited June 6, 2013).

¹⁰ *Id.*

¹¹ See 16B McQuillin Mun. Corp. § 46:20 School Boards and School Districts (3rd ed. 2011); 16B McQuillin Mun. Corp. § 46:30 Powers of Boards of Education – Contracts (3rd ed. 2011).

Implementing a Geographic Preference Policy

Once a school district has identified its legal authority and objectives, it can tailor its geographic preference policy to meet its specific needs and limitations. The first decision is to **define “local.”** Many definitions of *local* exist – e.g., a mileage radius, a political boundary, or a tiered definition. A district should consider whether its definition of *local* is expansive enough to ensure competition among local products as required by federal regulations.

The second step is to **decide on a type of preference** and then to **set a preference amount.** The amount should provide enough of an advantage to be effective, but it should not be so much that it undermines competition for products. An efficient preference may vary depending on the school district’s climate, agricultural market and time of year. A preference amount for meat may be very different than a preference amount for produce, the need for which varies with the growing season and infrastructure (e.g., hoop houses, flash freezing facilities, etc.). School districts may want to change a preference or its amount depending on the season. School districts can use their own procurement records of market prices to determine what amount provides a competitive advantage. Agricultural economists at university extensions may be another resource to help school districts tailor the amount of a preference.

School districts with explicit authority have greater latitude to set the amount of a preference. Districts with implicit authority should be more conservative and hue closer to prevailing wholesale prices.

Regarding the **procurement process**, the USDA directs school districts to follow state and local procurement laws as long as they incorporate **competitive bidding** and require a formal procurement method (with advertising and written solicitations) for contracts at or above \$150,000. Thus, school districts must follow state and local procurement procedures as long as they meet or exceed federal standards; the state standards can be stricter.

In summary, geographic preferences are a part of a strategy to improve child nutrition and education about healthy eating choices. A preference is allowed under federal regulations, and a school district can deter challenges under state law by adopting a geographic preference policy. In its policy, a school district should (1) identify one or more types of authority, (2) provide parallel objectives for using a preference, (3) define *local* and how the preference will work (including the connection with educational programming and choices in the cafeteria), and finally, (4) use competitive bidding that meets the strictest standard – federal, state or local – for full and open competition.

I. INTRODUCTION

When purchasing fresh local foods, school districts must navigate three levels of procurement law – federal, state, and local. This primer summarizes state and federal law and provides guidance for setting a preference that complies with both. It also provides step-by-step guidance on how a school district can implement a geographic preference policy starting with articulating the legal authority and rationale for buying local.

School districts are beginning to use their authority under federal regulations to spend school lunch funds on local agricultural products. Doing so turns out to be legally complex because school districts also have to comply with federal, state, and local procurement laws for competitive bidding.

Now that school districts have federal permission to use a local preference, the question is whether they have authority under state law to do so. That authority is often not explicit. Even when it is not, this primer explains how **all** school districts can assert state authority to use a local preference. Knowing the nature of their authority will help school districts make decisions about how to implement a geographic preference and, specifically, how to define “local” and set the amount of a preference. In making these decisions, school districts can tailor their policies according to their authority and specific objectives.

This primer has six remaining parts.

- Part II highlights the benefits of buying local foods.
- Part III summarizes the federal regulations addressing a geographic preference.
- Part IV discusses the importance of state authority to implement a geographic preference and summarizes the types of authority that exist under state law.
- Part V explores how a school district can implement a geographic preference policy that focuses on articulating a school district’s authority and rationale for buying local, defining local, and deciding the type and amount of a preference.
- Part VI presents an overview of the minimum procurement standards under federal regulations that school districts must follow as a condition of receiving federal funds for school meal programs.
- Part VII concludes with a summary of guidance for adopting a geographic preference policy.

II. BENEFITS OF BUYING LOCAL FOODS

Depending on how it is drafted, a geographic preference can serve four distinct purposes – to support health, food service, education, and community development. Research shows that a preference contributes to each, but a school district’s authority might not extend to all four purposes.

A. Supporting health

Geographic preference is limited to minimally processed foods. This means that exercising a geographic preference favors the purchase of whole foods for schools to use in scratch-cooking or to serve with minimal additional preparation. Moving away from highly processed foods lets schools better control what goes into meals, such as levels of sodium and sugar, additives and preservatives, and potential allergens. For example, by purchasing whole, local chicken drumsticks to bake on site, districts can serve students much more healthful protein entrées without the dozens of fillers, additives and high sodium levels that characterize highly processed chopped and formed chicken products (e.g., chicken patties and nuggets). Similarly, by buying and serving local, fresh peaches, schools can avoid using fruit that may be packed in syrup with added sugar. Also, locally procured foods such as produce and minimally processed grains are well suited to help schools meet new USDA meal pattern standards for fruits, vegetables and whole grains.¹²

Geographic preference can also offer schools the opportunity to purchase higher quality and more nutrient-dense produce. Though many factors determine produce quality (e.g., post-harvest handling, processing, and storage),¹³ local foods usually minimize transportation, which gives them greater potential to maximize nutritional value, freshness and taste.

Local produce may be higher in terms of vitamin content.¹⁴ Produce left longer on the plant may be more nutritious and provide



¹² Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088 (Jan. 26, 2012) (codified at 7 CFR 210 and 220).

¹³ See Kathleen Frith, *Is Local More Nutritious, It Depends*, HARV. MEDICAL SCH., CTR. FOR HEALTH AND THE GLOBAL ENV'T., (2007), http://chge.med.harvard.edu/sites/default/files/resources/local_nutrition.pdf.

¹⁴ I.L. Goldman, et al., *Influence of Production, Handling and Storage on Phytonutrient Content of Foods*, 57 NUTRITION REV. 46, 49 (1999).

higher levels of vitamin C.¹⁵ Since local produce can be consumed near to where it is grown, without days in transport, it has a nutrition advantage from its extra time left on the plant before harvest.¹⁶

Surveys indicate that people who buy local prefer the quality, freshness, and taste of local food. And while this choice is subjective, the demand for local foods is increasing.¹⁷ Schools reflect this preference. Studies show an increase in school meal participation when local foods are incorporated into school meals, for example, in salad bars. When students find that fresh, local foods taste better, they are more likely to buy school lunch and consume more fruits and vegetables.¹⁸

B. Supporting food service

Schools that have increased their use of minimally processed foods have seen a range of other benefits.¹⁹ When schools cook from scratch or use minimally processed foods they have greater control over the ingredients in meals and more knowledge about their provenance. This lessens concerns about allergens and improves a district's ability to implement meal patterns. Greater control also allows the district the opportunity to be creative and respond to student preferences, adjusting dishes and menus to fit their particular needs.²⁰ Food service employee morale also tends to go up with increased scratch cooking and use of minimally processed foods. With more responsibility and control, employees take more ownership



¹⁵ Frith, *supra* note 14, at 2. See S.K. Lee & A.A. Kader, *Preharvest and Postharvest Factors Influencing Vitamin C Content of Horticultural Crops*, 20 *POSTHARVEST BIOLOGY AND TECH.*, 3, 207-220 (2000).

¹⁶ *Id.*

¹⁷ D.C. Adams & A.E. Adams, *Availability, Attitudes and Willingness to Pay for Local Foods: Results of a Preliminary Survey*; selected paper for American Agricultural Economics Association Annual Meeting, Orlando, FL, (July 27-29, 2008), <http://ageconsearch.umn.edu/bitstream/6237/2/470290.pdf>; John Cloud, *Eating Better Than Organic*, *TIME.COM* (Mar. 2, 2007), at <http://www.time.com/time/magazine/article/0,9171,1595245-1,00.html>; U.S. DEP'T OF AGRIC., AGRIC. MKTG. SERV., *FARMERS MARKET GROWTH: 1994-2011*, (AUG. 2011) <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=frmrdirnkt> (last visited June 6, 2013).

¹⁸ Joshi, *supra* note 5, at 236-38.

¹⁹ See Kirk Johnson, *Schools Restore Fresh Cooking to the Cafeteria*, *N.Y. TIMES* (Aug. 16, 2011), at <http://www.nytimes.com/2011/08/17/education/17lunch.html> (last visited June 6, 2013).

²⁰ See Harvard Pilgrim Health Care, *Dishing Out Healthy School Meals*, (Oct. 2010), at <https://www.harvardpilgrim.org/pls/portal/docs/PAGE/FOUNDATION/FOUNDATION-PUBLICATIONS/HEALTHYMEALS.PDF>.

over the quality of meals prepared for the cafeteria.²¹

Responsiveness and positive attitude can increase student participation and boost revenues. Schools can also use local foods to market to students, teachers and parents. Many school food service programs have successfully advertised themselves through cafeteria visits by farmers, local food days, programs such as “Harvest of the Month,” signs in the cafeteria, and menus that promote local foods.

Implementing a geographic preference can also help schools to diversify their suppliers for greater resiliency. Volatile weather patterns increasingly disrupt food production, as when the cold snap in 2010 Florida destroyed orange, pepper, tomato and green bean crops.²² The supply chain can also be broken by contamination events that have recently plagued centralized processing facilities. If a school system has local suppliers, it can be more resilient to both kinds of disruption in food supply. In addition, a local preference helps local farmers achieve economies of scale, which can reduce prices for foods in season. Advocates for regional food systems argue that de-centralizing the food system makes it more resilient and more competitive.²³

C. Supporting learning

Local foods in the cafeteria support opportunities in the classroom. With the abundance of highly processed food, studies show that children are unaware of where and how food is grown.²⁴ Local foods support learning about food choices, nutrition, and food systems. Using local foods in classroom-based education increases overall knowledge of healthy food choices, which students demonstrate by increasing the amount of fruits and vegetables that they eat.²⁵ For this reason, the federal government and many states are encouraging the use of local foods to educate students about



²¹ See Real Food, Real Jobs, *Feeding Chicago's Kids the Food They Deserve: The Lunch Ladies' View of Meals at Chicago Public Schools*, at <http://www.realfoodrealjobs.org/2012/01/chipublicschool/> (last visited June 17, 2013).

²² Ron Scherer, *Food Costs Soaring in US After Harsh Winter Will Higher Prices Last?*, CSMONITOR.COM (Mar. 16, 2011), at <http://www.csmonitor.com/Business/2011/0316/Food-costs-soaring-in-US-after-harsh-winter.-Will-higher-prices-last> (last visited June 6, 2013); Richard Luscombe, *Cold Weather ends, but Has Damage to Florida Oranges Been Done?*, CSMONITOR.COM (Jan. 11, 2010), at <http://www.csmonitor.com/USA/2010/0112/Cold-weather-ends-but-has-damage-to-Florida-oranges-been-done> (last visited June 6, 2013).

²³ Jennifer Jensen, *Local and Regional Food Systems for Rural Futures*, RURAL POLICY RESEARCH INSTITUTE (RUPRI) RURAL FUTURES LAB FOUNDATION PAPER NO.1, NOV. 2010, http://www.rupri.org/Forms/RUPRI_Rural-Futures-Lab_2010_Food_Systems_for_Rural_Futures.pdf; Michael Pollan, *Farmer in Chief*, N.Y. TIMES (Oct. 9, 2008), at <http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?pagewanted=all> (last visited June 6, 2013).

²⁴ See The Food Trust, *Kindergarten Initiative Evaluation Report*, (Feb. 2007), http://www.farmtoschool.org/files/publications_114.pdf.

²⁵ See U.S. DEP'T OF AGRIC., FARM TO SCHOOL, STORIES, at <http://www.fns.usda.gov/cnd/F2S/sightsoundsstories.htm> (providing case studies around the country about how education on local food positively influences dietary choices

diet and nutrition.²⁶ Face-to-face interaction with local farmers, in the cafeteria, classroom and on field trips, enables school children to connect with food systems in a personal and meaningful way.²⁷

Exposure to local and minimally processed foods can also educate beyond students. By highlighting local foods on menus and in newsletters, school food programs can educate teachers, parents and others in the school community about the benefits of healthy eating with a connection to local food. This constructive marketing boosts parent knowledge and parent perceptions of the school food service.

D. Supporting communities

Outside of nutrition and education benefits, buying local foods can help local farms and the greater economy of a community, state, or region. Local producers and processors retain a greater proportion of profits and have a livable income.²⁸ Buying local “recycles” money in the local economy; it creates a multiplier effect as commerce and business experience build among agriculture-related businesses such as equipment suppliers, food processors, and distributors.²⁹ A number of states have passed laws to encourage local food systems. For example, Illinois passed the Local Food, Farms, and Jobs Act in 2009, noting that increasing local food sales has the potential to support \$20 to \$30 billion in commerce.³⁰



in the cafeteria) (last visited June 17, 2013); U.S. DEP'T OF AGRIC., *KNOW YOUR FARMER, KNOW YOUR FOOD, KYF Compass*, 11, (available at <http://www.usda.gov/wps/portal/usda/knownyourfarmer?navid=KNOWYOURFARMER> (last visited June 17, 2013).

²⁶ U.S. DEP'T OF AGRIC., FARM TO SCHOOL, <http://www.fns.usda.gov/farm-school> (last visited June 6, 2013). See ALASKA STAT. § 03.20.100 (West 2012); CO STAT. § 22-82.6-102 (West 2012); CT STAT § 22-38D (West 2012); DC CODE § 38-823.01 (West 2012); FL ST § 570.981 (West 2012); IL ST CH 105 S 124/10 (West 2012); IA ST § 190A.1 (West 2012); MD AGRIC. § 10-1601 (West 2012); MI ST § 388.843 (West 2012). Note this is only a representative list of state statutes.

²⁷ S.A. French and G. Stables, *Environmental Interventions to Promote Vegetable and Fruit Consumption Among Youth in School Settings*, 37 PREVENTIVE MED. 6 PT. 1, 209-227 (2007).

²⁸ U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. REP. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES, at 43-45 (2010) (referred hereafter as USDA, ERS, LOCAL FOOD SYSTEMS) citing the following studies: L. Zepeda and J. Li, *Who Buys Local Food*, 37 J. OF FOOD DISTRIBUTION RESEARCH 3, 1-11 (2006); K. Darby, et al., *Decomposing Local: A Conjoint Analysis of Locally Produced Foods*, 90 AM. J. OF AGRIC'L ECON. 2, 476-86 (2008).

²⁹ USDA, ERS, LOCAL FOOD SYSTEMS, at 43-45, citing D. Swenson, *Investigating the Potential Economic Impacts of Local Foods for Southeast Iowa*, LEOPOLD CENTER FOR SUSTAINABLE AGRICULTURE, (Jan. 2010), at <http://www.leopold.iastate.edu/pubs-and-papers/2010-01-local-foods-southeast-iowa> (last visited June 6, 2013).

³⁰ THE ILLINOIS LOCAL AND ORGANIC FOOD AND FARM TASK FORCE, LOCAL FOOD, FARMS & JOBS: GROWING THE ILLINOIS ECONOMY, A REPORT TO THE ILLINOIS GENERAL ASSEMBLY, at 12 (March 2009). See Illinois Local Food, Farms and Jobs Act of 2009, 30 ILCS 595/1 (West 2012); Brooke Jarvis, *Can a Farm State Feed Itself, Yes!*, Sept. 4, 2009, at <http://www.yesmagazine.org/new-economy/eating-in> (last visited June 6, 2013).

III. FEDERAL AUTHORITY FOR A GEOGRAPHIC PREFERENCE

Federal law and regulations clearly allow and encourage school districts to implement a geographic preference as long as a school district uses competitive bidding and limits the preference to minimally processed foods. This section of the Primer summarizes the federal procurement standards that a school district must meet if it uses a geographic preference.

A. Open competition

School districts receiving federal funds for school food must follow their state and local procurement laws as long as those laws meet minimum federal standards, including “full and open competition.”³¹ Competitive bidding provides a forum for awarding public contracts so that the school district can receive the “best and most responsive product at the lowest possible price.”³² Another purpose of competitive bidding is to ensure that a school district and bidders have an objective process that is free of arbitrary action or influence.³³

Under the federal regulations of a geographic preference, school districts must not solicit bids just for local products or guarantee local products or suppliers a certain level of business.³⁴ Rather, the federal regulations authorize a school district to provide a “defined advantage” for local products in the procurement process³⁵ in terms of points or percentage in comparison to the price of non-local products.

... school districts must not ... guarantee local products or suppliers a certain level of business ... Rather, the federal regulations authorize a school district to provide a “defined advantage ... in terms of points or percentage ... ”

Solicitations for goods or services must have a clear and accurate written description. This includes a qualitative description and the minimum essential characteristics and standards to

³¹ 7 C.F.R. § 3016.36.

³² Id.

³³ Id.

³⁴ Geographic Preference Option, *supra* note 9, at 22603.

³⁵ Id.

which it must conform.³⁶ Solicitations must also identify all the requirements and factors that will be used in evaluating bids, including how a geographic preference will be applied.³⁷

B. Informal or formal procurement methods

The federal regulations authorize two procurement methods – informal and formal. Informal procurement applies when the total amount for a purchase does not exceed \$150,000.³⁸ Also referred to as a small-purchase procedure, informal procurement requires price or rate quotes from a minimum of three qualified sources after a school district has drafted a solicitation.³⁹

Procurement methods under federal law:



A formal process is required by federal regulations when the total amount for a purchase is \$150,000 or more.⁴⁰ After a school district has drafted a solicitation, a formal process requires public advertising.⁴¹ School districts must comply with whichever threshold is lower—state or federal, and states may take a more restrictive approach.⁴² For example, if a state requires that

³⁶ Id.

³⁷ Id.

³⁸ 7 C.F.R. § 3016.36. See also FOOD AND NUTRITION SERVICES, U.S. DEP'T OF AGRIC., POLICY MEMO SP_18-2011, PROCUREMENT Q&A (2011) (referred hereafter as FNS, USDA, PROCUREMENT Q&A_2011); POLICY MEMO SP_03-2013, PROCUREMENT Q&A (2012) Pt. 2, at <http://www.fns.usda.gov/cnd/Governance/policy.htm> (last visited June 6, 2013) (referred hereafter as FNS, USDA, POLICY MEMO 03-2013).

³⁹ Id.

⁴⁰ 7 C.F.R. § 3016.36.

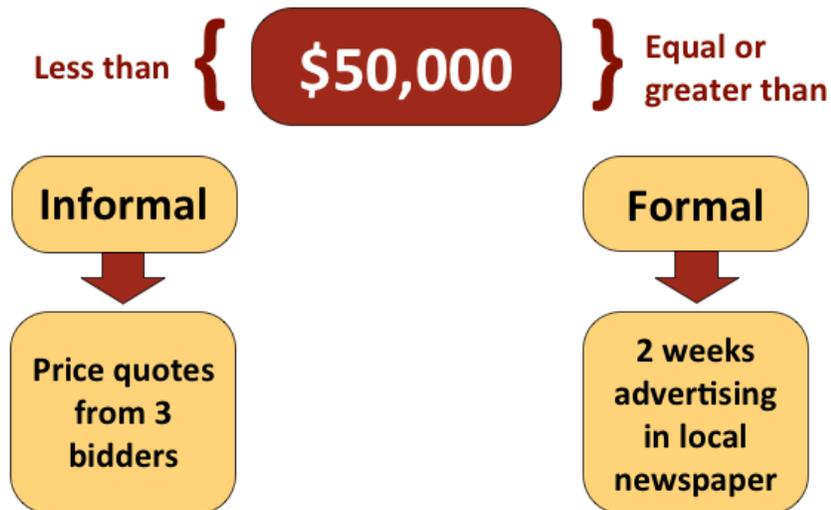
⁴¹ Id.

⁴² FOOD AND NUTRITION SERVICES, U.S. DEP'T OF AGRIC., POLICY MEMO SP_18-2011, PROCUREMENT Q&A (2011) (referred hereafter as FNS, USDA, PROCUREMENT Q&A_2011); POLICY MEMO SP_03-2013, PROCUREMENT Q&A (2012) Pt. 2, at <http://www.fns.usda.gov/cnd/Governance/policy.htm> (last visited June 6, 2013) (referred hereafter as FNS, USDA, POLICY MEMO 03-2013).

goods or services that exceed \$50,000 require a formal procedure, a school district must follow this process because doing so complies with both state and federal requirements.

School districts must comply with whichever threshold is more strict – federal, state or local.

State thresholds may be more strict:



The consistent principle is that regardless of amount, school districts must always use competitive bidding. Additional guidance on using a formal or informal procedure is provided in *FOCUS guidelines for formal and informal procedures*.⁴³

The consistent principle is that regardless of amount, school districts must always use competitive bidding.

c. Limited to minimally processed foods

A geographic preference can be applied only to unprocessed or minimally processed agricultural products.⁴⁴ The regulation prohibits any processing method that “alters the inherent character of the agricultural product;”⁴⁵ it permits the following methods:

⁴³ The FOCUS guidelines are available at FOCUS Resources and Publications >> Policy, http://www.schoolfoodfocus.org/?page_id=1413.

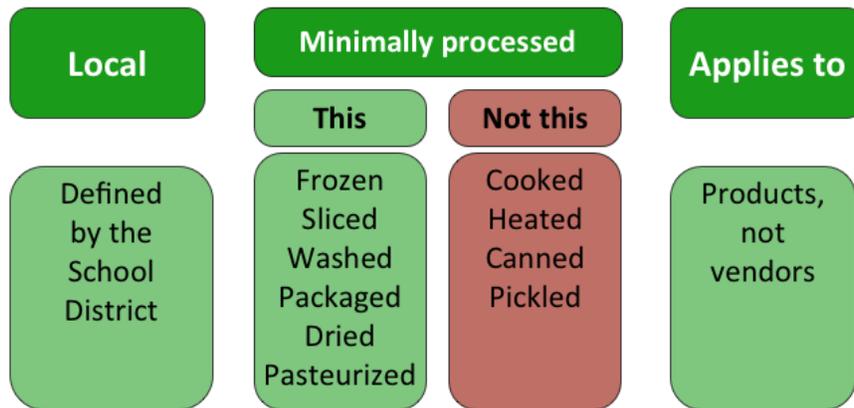
⁴⁴ Geographic Preference Option, *supra* note 9, at 22604.

⁴⁵ *Id.*

Cooling; refrigerating; freezing; size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding; forming ground products into patties without any additives or fillers; drying/dehydration; washing; packaging (such as placing eggs in cartons), vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package); addition of ascorbic acid or other preservatives to prevent oxidation of produce; butchering livestock and poultry; cleaning of fish; and the pasteurization of milk.⁴⁶

USDA excludes cooking, heating (for any other purpose than pasteurization of milk), pickling, and canning.⁴⁷

Summary of USDA regulations on geographic preference:



⁴⁶ Id.

⁴⁷ Id. at 22605. See also FNS, USDA, POLICY MEMO 03-2013, *supra* note 42.

IV. STATE AUTHORITY AND PROCUREMENT LAW

Federal regulations give school districts permission to spend federal funds while giving an advantage to local food products. At the same time, school districts are creatures of the state; they must have state-level authority to give an advantage to local products. Absent such authority, they run the risk of being challenged in court by a non-local bidder who would otherwise win the competition.

This part of the Primer summarizes state law on awarding contracts to the “lowest responsible bidder,” and it explains the types of authority that school districts can invoke to justify a local food preference. That authority is clear when it is explicit. It is less clear when it is implied. Fortunately, at the least, every district has authority to serve meals, and with it the implied authority to promote consumption of fresh local foods. Many districts will be able to cite additional sources of authority, either explicit or implicit.

The nearly universal baseline of state law is that school districts must purchase goods from the lowest responsible bidder.⁴⁸ A geographic preference provides a competitive advantage in the procurement process for local products, and, consequently, allows a school district to award a contract to a bidder that may not have the lowest bid. If a school district awards a contract to a local vendor without the lowest bid, it increases the risk of a legal challenge from a disappointed bidder. The challenge would be that the school district is not acting within the scope of its authority when it applies a geographic preference – to the disadvantage of the lowest bidder.⁴⁹

In order to safeguard school districts from lawsuits challenging a geographic preference, this section explains the various types of authority that exist under state law to implement a competitive advantage for fresh local products that are minimally processed. But first, it helps to understand why a school district must follow both state law and federal regulations governing a geographic preference.

⁴⁸ See 16B McQuillin Mun. Corp. § 46:30 Powers of Boards of Education – Contracts (3rd ed. 2011).

⁴⁹ See, e.g., *Best Bus Joint Venture v. Bd. of Educ. Of City of Chicago*, 288 Ill. App.3d 770 (May 1997), where the court found the School Board exceed its authority in providing a 2% preference to local school bus companies because there was no expressed authority from the state to provide a preference to local bus companies. Note that this is distinguishable from a geographic preference because the Illinois legislature has passed a Farm to School Act specifically finding that “[i]t is in the interest of this State to promote farm-to-school programs that emphasize the purchase of farm fresh foods by schools in order to improve child nutrition and strengthen local and regional farm economies.” 105 IL Compiled Statute 124/5 (West, 2012). Therefore, school districts in Illinois have implied authority to implement a geographic preference.

A. Importance of state authority

Federal regulations governing school food programs clearly allow for a geographic preference. USDA guidance states, “[a]ny SFA/ institution/sponsor participating in the Federal [Child Nutrition Programs] has the option to apply a geographic preference when procuring unprocessed, locally grown or raised agricultural products.”⁵⁰ However, if a school district is sued for exceeding its authority by a disappointed bidder, a state court may well see USDA regulations as federal permission to spend federal funds with a preference, which is necessary, but not sufficient in the absence of state-level authority. The meaning of *lowest responsible bidder* varies by state; some courts take a literal approach, while others are more deferential to local districts.

School districts have only the powers that states delegate to them,⁵¹ so the strategy to prevent (or win) disappointed-bidder lawsuits begins when a district clearly identifies its source of authority for using a geographic preference. As explained below, that authority can be explicit or implied. A fully developed rationale for using a local preference starts with (1) identifying one or more types of state authority, and then rationally implementing that authority by (2) providing parallel objectives for favoring local food (e.g., to provide nutritious meals, educate about food, or strengthen the delivery system from farm to school), (3) defining *local* and how a preference would work (including the connection with educational programming and choices in the cafeteria), and finally, (4) using competitive bidding that meets the strictest standard – federal, state or local – for full and open competition. Once a rationale with this balance and scope is established, courts will usually not question or interfere with a school district’s procurement decision.⁵²

B. Types of state authority to apply a preference

There are generally two ways that states delegate authority to school districts: explicitly through clear authorizing language or implicitly by authorizing school districts to fulfill an overarching purpose.⁵³ An example of the former is language that allows a school district to use a preference in procurement. An example of the latter is when states authorize school districts to administer child nutrition programs, which implicitly authorizes schools to procure food to provide school meals.

The authority to have a geographic preference policy functions in the same manner; some states explicitly allow school districts to have a geographic preference, while others implicitly allow for the preference. As shown in the chart below, the type of authority to implement a preference can be viewed as a spectrum of legal authority. Explicit authority is the most clear; implicit authority is less clear. Each type of authority in the chart is discussed below.

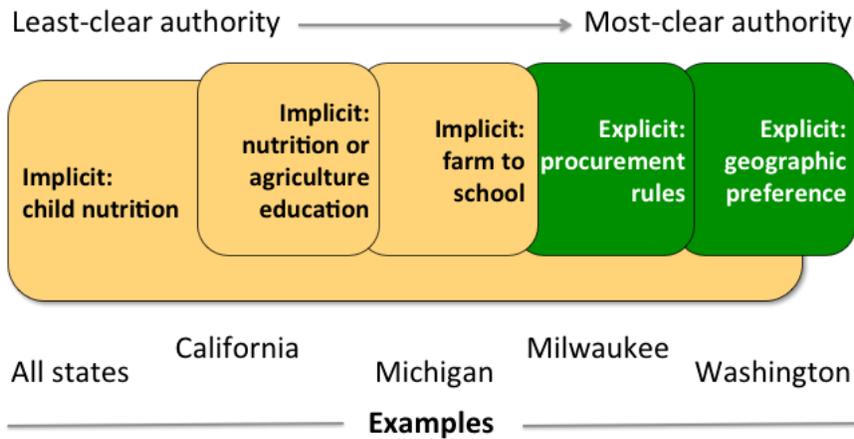
⁵⁰ FNS, USDA, POLICY MEMO 03-2013, *supra* note 42.

⁵¹ See 16B McQuillin Mun. Corp. § 46:20 School Boards and School Districts (3rd ed. 2011); 16B McQuillin Mun. Corp. § 46:30 Powers of Boards of Education – Contracts (3rd ed. 2011).

⁵² See *e.g.*, Fairbanks North Star Borough Sch. Dist. v. Bowers Office Prod, Inc., 851 P.2d 56 (1993); Pritchard v. Madison Metro. Sch. Dist., 2001 WI App. 62, 242 Wis. 2d. 301, 625 N.W.2d 613 (2001).

⁵³ 16B McQuillin Mun. Corp. § 46:24 Powers of Boards of Education (3rd ed. 2011).

Types of State Authority to use a geographic preference



i. Explicit authority to use a preference

Washington State law provides an example of explicit language allowing school districts to implement a preference. It says:

a school district may develop and implement policies and procedures to facilitate and maximize to the extent practicable, purchases of Washington grown food but not limited to, policies that permit a percentage price preference for the purpose of procuring Washington grown food.”⁵⁴

Thus, under Washington law, school districts have explicit authority to provide a preference to “Washington grown food.”⁵⁵

ii. Explicit authority to set procurement policies

A state can also explicitly authorize its school districts to set their own procurement policies. For example, Wisconsin law explicitly authorizes Milwaukee Public Schools to “establish competitive bidding policies and procedures for purchases and construction contracts.”⁵⁶ Although the language itself does not authorize a geographic preference, it does authorize the school board of Milwaukee to set its own procurement policy. When reviewing this language in cases involving school districts in Wisconsin, courts accord broad discretion to Milwaukee Public Schools. As long as the law does not prohibit a decision by Milwaukee schools, courts will not interfere with that decision.⁵⁷

⁵⁴ WASH. REV. CODE ANN. § 28A.335.190 (West 2011).

⁵⁵ Id.

⁵⁶ WIS. STAT. ANN. § 119.16(4) (West 2011).

⁵⁷ See *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App. 62, 242 Wis. 2d. 301, 625 N.W.2d 613 (2001). This case involved whether the Madison school district had the authority to provide health benefits to employee partners because the specific statute to provide health benefits only listed employee spouses and children. The court found

iii. Implicit authority under farm to school laws

Wisconsin has also enacted a farm to school program that directs the state’s Agriculture Department to “encourage schools, as part of farm to school programs, to purchase food produced in this state and to provide nutritional and agricultural education ...”⁵⁸ While this Wisconsin language does not clearly authorize schools to have a geographic preference, it does imply that Wisconsin’s policy is for schools to purchase Wisconsin food and to provide nutritional and agricultural education. Likewise, Michigan enacted a “Farm-to-School Procurement Act” directing the Departments of Agriculture and Education to investigate ways to increase local foods for schools.⁵⁹ In terms of local objectives, some state farm to school laws expressly aim to support communities and their economic development, while others do not. However, there is at least implicit authority to support farmers through purchase of local food under a farm to school law.⁶⁰

iv. Implicit authority under providing nutrition or agriculture education

Even in the absence of a state farm to school law, a school district can assert an educational objective for using a local preference. But to do so, it must incorporate local food and farmers in a program of nutrition education – an approach that promotes dietary choices and nutrition knowledge as noted in part II. However, when implied authority for a preference is limited to nutrition and agriculture education, it does not extend to the objective of economic development.

Implied authority will be clearer if state law expressly mentions nutrition education as an objective. For example, California law states that “proper nutrition of children is a matter of highest state priority” and that schools “provide for the nutritional needs and nutrition education of all pupils during the school day.”⁶¹

v. Implicit authority under child nutrition programs

Lastly, school districts have the authority to implement a preference if they are participating in providing school meals under federally funded child nutrition programs, for example, the

that even if there is a more specific statute delegating power to a school district, the specific statute did not limit the broad construction of a school district’s statutory duties and powers. Since the specific statute did not prohibit the school district from providing health benefit to persons other than the ones listed in the statute, the Court upheld the school district’s actions.

⁵⁸ WIS. STAT. ANN. §. § 93.49 (West 2011).

⁵⁹ “The MDE and the MDA shall..(a) Investigate the potential of various procurement procedures and tools for school food authorities to purchase local farm products and abide by federal regulations...” MICH. COMP. LAWS ANN. § 388.843 (West 2011).

⁶⁰ See also ALASKA STAT. § 03.20.100 (West 2012); CO STAT. § 22-82.6-102 (West 2012); CT STAT § 22-38D (West 2012); DC CODE §38-823.01 (West 2012); FL ST§ 570.981 (West 2012); IL ST CH 105 S 124/10 (West 2012); IA ST § 190A.1 (West 2012); MD AGRIC. § 10-1601 (West 2012); MI ST § 388.843 (West 2012). This is only a representative list of state statutes.

⁶¹ ANN. CAL. EDUC. CODE § 49530 (West 2012).

National School Lunch Program (NSLP). All states participate in the NSLP, and most states have statutes directing the state’s education agency to administer the NSLP. It is these state laws that provide school districts with authority to provide school meals under the NSLP. Implicit in this delegation is the responsibility to comply with federal regulations.

Since a geographic preference is an option available under the NSLP, there are two arguments that all states authorize a geographic preference (absent explicit law to the contrary).

- The first is that states implicitly authorize school districts to use a local preference that promotes consumption of fresh whole foods, so long as the school district complies with state and federal standards of full and open competition.⁶²
- The second is that the authority to administer the NLSP allows a school district to do anything that the federal regulations permit – including the use of a local preference.
- Both arguments are supported by the federal regulations, which limit use of a preference to minimally processed foods (the nutrition objective) and require full and open competition (the efficiency objective).

vi. Summary of authority

There is a spectrum of legal authority to implement a geographic preference under state law. Explicit authority to either establish procurement policies or provide a preference provides school districts with the *most-clear* authority to act. The *least-clear* authority is derived implicitly from the authority to operate a school food program. A district can assess whether another type of implicit authority exists, as outlined above. Many school districts will be able to identify more than one type of authority for using a geographic preference.

⁶² See sources cited at notes 5 and 12-18, *supra*. See also *See Di Vincenti Bros., Inc. v. Livingston Parish School Bd.*, 355 So.2d 1, 6 (La. 1977) (The state’s low-bid requirement “gives the School Board the discretion to accept ... higher bids” based on quality standards such as meat certification).

V. IMPLEMENTING A GEOGRAPHIC PREFERENCE POLICY

Knowing where school districts fall (perhaps in more than one place) within the spectrum of legal authority will guide their choice of rationales for having a geographic preference policy. This section of the Primer provides guidance on the next steps of implementing a geographic preference policy: explaining the authority and objectives, defining *local*, deciding on a type of preference, and setting its amount.

Expressing a preference involves two decisions. The first is what form the preference should take, e.g., should it be a percentage of the price of local products? The second is what amount the preference should be. Our survey of state law shows that 5% is a common amount of preference for other products, and this would be a prudent ceiling for districts that do not have explicit authority to adopt a preference.

In addition, districts should factor in the time of year, since some preferences will only work during a local growing season. One approach would be for a school district to authorize a range of preferences, which school food administrators can adjust for the product and time of year.

A. Explaining authority and objectives

Because disappointed bidders might challenge a geographic preference, it is helpful to adopt a geographic preference policy. The policy enables a court to see how districts are acting within their authority, and in so doing, diminishes the threat of litigation.

Once a school district identifies one or more types of authority under state law, it should explain that authority and provide parallel objectives for its geographic preference. Here are three examples:

- **Meals** – All school districts have authority to serve meals. A parallel nutrition objective would be to promote consumption of fresh fruits and vegetables. A consistent activity would be to provide a salad bar, tasting tables, or seasonal harvests that feature local produce.
- **Education** - All school districts have an educational purpose that can support the objective of providing nutrition or agricultural education. In some districts, this objective is set in state law. A consistent activity would be to use the preference to ensure local cafeteria offerings, which in turn, are featured in educational programming such as curriculum on the nutrition benefits of fresh local foods or agriculture education

with participation by local farmers or farm tours. Produce from these farms can be featured in the cafeteria offerings.

- **Community development** – Authority to serve meals or educate on nutrition does not extend to the objective of developing the local farm economy. To support this objective, a school district would need explicit authority for a preference, or at the least, implicit authority under a farm to school law. If that authority exists, a district could operate its preference on a larger scale to support development objectives, so long as the preference is not so great that it undermines full and open competition.

B. Defining local

Eating local has gone mainstream, from corporations using “locally grown” as part of their advertising to state and local governments adopting farm to school programs.⁶³ As the movement for local food continues to grow, definitions of *local* abound. With regard to a geographic preference, USDA regulations enable school districts to define *local* themselves.⁶⁴ They can define *local* as within a multi-state region, within a mileage radius crossing state boundaries, or within a state boundary. School districts could also define *local* as within a few counties or a single county, but they must ensure that the definition does not “unnecessarily restrict competition.”⁶⁵

Under USDA regulations governing geographic preference, school districts have the discretion to define *local* however they want as long as the definition does not “exclude bidders from outside the designated geographic area or otherwise unnecessarily restrict competition.”⁶⁶ USDA guidance explains that excluding non-local products is not a preference; it is “a requirement of bidding and therefore is overly restrictive.”⁶⁷

USDA guidance states that to ensure adequate competition, districts must “leave an appropriate number of qualified firms, given the nature and size of the procurement, to compete for the contract ...”⁶⁸ USDA requires school districts to contact a minimum of three sources to ensure adequate competition under an informal method.⁶⁹ There is no comparable guideline for formal procurement. USDA guidance states that “if 100 farms meet that definition [of local], the preference would not result in an unreasonable limit on competition,” and in that spirit, a school district must use its “best judgment.”⁷⁰

⁶³ See U.S. DEP’T OF AGRIC., FARM TO SCHOOL, <http://www.fns.usda.gov/farm-school> (last visited June 6, 2013); Stacy Mitchell, *Selling out local*, NEWS REVIEW (July 16, 2009), at <http://www.newsreview.com/sacramento/selling-out-local/content?oid=1036032> (last visited June 6, 2013).

⁶⁴ Geographic Preference Option, *supra* note 9, at 22603.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ FNS, USDA, POLICY MEMO 03-2013, *supra* note 42.

⁶⁹ *Id.*

⁷⁰ *Id.*

Advocates for sustainable agriculture, farm to school programs, and local economic development have long supported keeping the right to define *local* at state and local levels. A one-size-fits-all definition of *local*, applied nationwide, would fail to take into account factors that are unique to each school district. For example, factors such as climate, availability of arable land, and the strength and diversity of the farming sector can affect how an individual district defines *local*. The ability of local farms to meet demand and the existence of state policies favoring a state definition of local will likely affect how an individual district defines *local*.

A review of many definitions of *local* reveals that three approaches are most common: mileage radius, political boundary, and a complex definition. A *mileage radius* defines *local* as within a certain number of miles from a place. For example, Milwaukee Public Schools define *local* as within 250 miles of the Milwaukee Public Schools administrative building. A *political boundary* definition uses county or state boundaries to define *local*. For example, Michigan has a farm to school law that defines *local* as within Michigan. There are several *complex* definitions. One is a food shed, which is a model that calculates the amount of land necessary to provide food for a given population center. Another *complex* definition uses a tiered approach. For example, San Diego Unified School District (SDUSD) uses three tiers to define local: (1) local as defined with 25 miles of the San Diego Border, (2) regional as defined within 250 miles of San Diego County, and (3) state as defined as within the state of California.

School districts have the discretion to define *local* according to their objectives for buying local foods, their delegated authority, and whether state policies encourage a certain definition of *local*. For example, a state farm to school law may encourage purchases of in-state products. While this law gives the school district implied state-law authority for a geographic preference policy, it may also influence how a school district defines *local* to be consistent with state policy. For example, a school district may choose to define local to provide an advantage on multiple levels – within the state and then perhaps within a region.

... school districts have the discretion to define local however they want as long as the definition does not “exclude[] bidders from outside the designated geographic area or otherwise unnecessarily restrict competition.”

In guidance memos, USDA interprets its GP regulations to mean that *local* can only be defined by a school district, and “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.”⁷¹ USDA further states that a school district “with state laws designed to encourage buying of products grown within the state may elect to use a ‘within the state’ definition, but ... is under no obligation to do so.”⁷² Within states that encourage (but do not mandate) purchase of in-state food, school districts might appreciate the

⁷¹ FNS, USDA, POLICY MEMO 03-2013; FNS, USDA, POLICY MEMO 03-2013, *supra* note 42.

⁷² *Id.*

nuance provided by the tiered definition of *local* described above. It provides an advantage for food produced in the state, while also providing some advantage for local foods that are produced in a neighboring state.⁷³

USDA's interpretation (i.e., school districts are not obligated to follow a state's "in-state" definition of *local*) would potentially conflict with a state law that explicitly limits preferences to in-state products. It might be possible to manage such a conflict by using a tiered definition of *local* that gives an advantage to both in-state products (at a higher level) and local products from outside the state. Whether this works would depend on the wording of the state law.

C. Deciding on a type of preference

Federal regulations authorize a school district to choose a preference type and amount that will provide a competitive advantage to local products. A preference can be as simple as a tie-breaker, which applies when two bids are equal in cost while one bidder meets a specific criterion for supplying local foods. However, the tie-bid preference is of limited utility because tie bids are rare,⁷⁴ in part because quality of products can break a tie, even if the cost is equal.⁷⁵

While an absolute preference can be imagined (e.g., five cents for each watermelon), a percentage preference is more flexible for a range of products that vary in value and units of measure. A percentage preference multiplies a preference amount times a basis amount. For example, Colorado's preference for recycled plastic is 5% times the price of the product.⁷⁶

This section explains six types of basis to calculate a percentage preference (i.e., percentage of what). Option 1 uses a percentage of the bidder's price: five percent of a local bidder's price is subtracted in order to provide the advantage.

⁷³ See FNS, USDA, POLICY MEMO 03-2013, at 2 (Q4), *supra* note 42.

⁷⁴ See, e.g., COL. REV. STAT. § 24-103-202.5 (2011) (defining low tie bids as "low responsive bids from bidders that are *identical in amount* and that meet all the requirements and criteria set forth in the invitation for bids pursuant to this code") (emphasis added), UTAH CODE ANN. § 63G-6-426 (2011) (defining a tie bid as "a low responsive bid from a responsive bidder that is *identical in price* to a responsive bid from another responsive bidder") (emphasis added).

⁷⁵ See, e.g., ME. REV. STAT. tit. 5, § 1825-B (2011) (awarding an in-state bid "if the price, quality, availability and other factors are equivalent"), UTAH CODE ANN. § 63G-6-426 (2011) (awarding an in-state bid if "the quality of the commodity offered by the provider of state products is equal to or greater than the quality of the commodity offered by the other tied bidders").

⁷⁶ COLO. REV. STAT. § 8-19.5-101 (2011).

**Option 1:
PERCENTAGE OFF BIDDER'S PRICE**

	Product 1	Product 2 Local	Product 3
Bid Price	\$0.96	\$1.00	\$1.04
Meets geographic preference? If so, 5% off the bid price	No	Yes (5%)	No
Price with preference	\$0.96	\$0.95	\$1.04

Having met the geographic preference requirements, the bidder of Product 2 receives a 5% preference, which translates to subtracting five cents from its bid price for purposes of evaluating the bid for award. Although the actual bid price — and the price paid by the purchaser — is not the lowest, Bidder 2 gets the contract.

Option 2 shows another way to do the math. Instead of subtracting 5% from a local product, Option adds 5% to the lowest overall bid. If a local product is within that range, it would prevail over the lowest price that is not local.

**Option 2:
PERCENTAGE OF A LOCAL BID**

	Product 1	Product 2 Local	Product 3
Bid Price	\$0.96	\$1.00	\$1.04
5% within lowest price is \$1.01. Does product meet both geographic and percentage preference?	No	Yes	No

Option 3 applies a percentage preference for bidders whose products are a mix of local and non-local. This is a sliding scale system; the preference amount increases based upon the volume of local products. Here is an example:

**Option 3:
SLIDING SCALE PERCENTAGE OF LOCAL PRODUCTS BY VOLUME**

- 3% preference to products whose volume is between 25% to 50% local
- 5% preference to products whose volume is between 50% to 75% local
- 7% preference to products whose volume is at least 75% local⁷⁷

⁷⁷ See ALASKA STAT. § 36.30.332 (2011) outlining Alaska's sliding percentage preference - 3% preference to products that are more than 25% and less than 50% produced or manufactured in the state, 5% preference to products that are more than 50% and less than 75% produced or manufactured in the state, and 7% preference to products that are at least 75% produced in the state.

Option 4 uses a sliding scale, but instead of volume (e.g., percent of weight), it multiplies the preference amount times the percent of cost (i.e., percentage of total cost that is local). Here is an example:

**Option 4:
SLIDING SCALE OF LOCAL PRODUCTS BY COST**

- 3% preference to the total cost of products that are between 25% to 50% local
- 5% preference to the total cost of products that are between 50% to 75% local
- 7% preference to the total cost of products that are at least 75% local

The last two options convert percentage preferences into a point system for awarding contracts. Especially for larger contracts, many school districts evaluate bids according to criteria, such as cost, time of delivery, or sanitation. The district grades a bid based upon points for each criterion, and awards the contract to the bidder that accumulates the highest number of points. There are at least three methods for inserting a geographic preference into a point system when school districts evaluate bids.

Option 5 shows the first method, in which the geographic preference is a separate evaluation criterion. The school district would assign that criterion a particular point value that would factor into the total point amount. In the example below, providing local products would score up to 5 points so that a 5-point advantage equals a 5% preference if the total points add up to 100. A school district can either provide a preference if bidders can attest to providing local products or it can provide a sliding scale preference based on the percentage of local product offerings. If providing a preference based on the percentage of local products, 10% of local products could earn one point; 50% or more local would earn 5 points.

**Option 5:
PERCENTAGE CONVERTED TO POINTS FOR LOCAL**

General requirements	20
Staff qualifications	
Proposer references	
Technical requirements	30
Product categories	
Deliveries	
Reports	
Safety and Sanitation	
Cost	45
Local Products	<u>5</u>
Total	100

Similarly, school districts can use a sliding scale option and provide preference points based on the percentage of local content as measured by cost (rather than volume). For example, if 10% of the total cost of products is local, a school district would award 1 point; if 50% of the total cost of products is local, a school district would award 5 points.

Option 6 applies the local percentage preference to points earned by the cost of the product. The local advantage is expressed by subtracting the preference amount (e.g. 5%) from the cost of the product. The product with the lowest cost after the preference has been applied would receive the maximum number of cost points. For all other products, the number of cost points allocated would be inversely related to the cost: the higher the cost of the product, the lower the number of cost points given. In the following example for Option 6, the maximum number of cost points is 50. The local advantage is 5% of cost, and this results a slightly lesser advantage in terms of cost points.

**Option 6:
PERCENTAGE OF COST CONVERTED TO POINTS**

	Product 1	Product 2 Local	Product 3
Price	\$0.96	\$1.00	\$1.04
Meets geographic preference? If so, 5% off the price	No	Yes (5%)	No
Price with preference	\$0.96	\$0.95	\$1.04
Cost points	49	50 Local wins	45

Option 6 is more complex than Option 5, but a district might want to use it in order to minimize changes in the point system now being used. Option 6 enables a district to continue the point system already in place; the only change would be to use a local preference to give an advantage in points based on cost of the products.

D. Setting an amount of preference

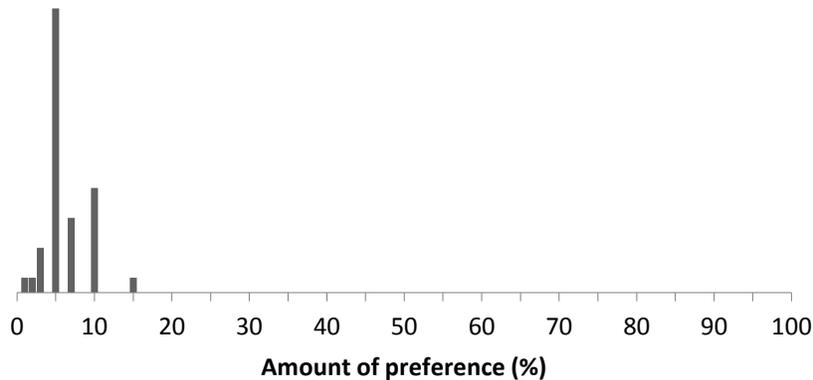
In order to analyze the amount of preference school districts can use, we conducted a literature review of existing state and local preferences. As geographic preferences for food are fairly new, we focused on preferences that currently exist – recycled-product preferences, in-state production preferences, and in-state vendor preferences.⁷⁸ Appendix A lists a representative set of state and local statutes that create preferences.

⁷⁸ NATIONAL ASSOCIATION OF STATE PROCUREMENT OFFICIALS, *2009 Survey of State Government Purchasing Preferences*, (Sept. 2009), at 8, at

http://www.naspo.org/content.cfm/id/2009_surveyhttp://www.naspo.org/content.cfm/id/2009_survey

(hereinafter NASPO 2009 Survey) (last visited June 6, 2013). In 2009, twenty-seven states provided a legal preference for in-state bidders, one more than reported that preference in 2007.

Figure 1. Existing models for range of preference



As demonstrated by Figure 1 and the appendix, states most commonly use 5% when adopting a preference. Unfortunately, the legislative history of state statutes reveals no insight as to how states decide upon the 5% amount. It appears that there is no specific methodology for how states evaluate the scope of a preference. Court decisions, however, provide some guidance as to how courts will review challenges to state legislation that adopts a preference.⁷⁹

Courts have generally upheld the authority of state legislatures to implement a 5% preference. For example, the Supreme Court of New Mexico deferred to the legislature's decision that the added cost of applying a 5% preference is "'practicable' for the taxpayer to bear in terms of balancing cost against benefit."⁸⁰ Such benefits may include encouraging local industry in order to strengthen the local economy and reduce unemployment.⁸¹ At least one court, however, held that a 5% preference placed a large burden on the taxpayers, because on a large public project it would amount to taxpayers paying millions of additional dollars.⁸²

Although a 5% preference is most common, Appendix A demonstrates that legislatures have authorized higher preference amounts. However, court cases addressing higher than the 5% amount are scarce. Lastly, there are statutes that grant contracting agencies the discretion to set their own preference higher than 5%. Oregon, for example, allows the contracting agency to set the preference at a higher percentage than the statutorily prescribed 10% if the contracting

⁷⁹ See, e.g., *Coral Const. Co. v. King County*, 941 F.2d 910, 924 (9th Cir. 1991) ("[w]hile the preference is locked at five percent, such a fixed preference is not unduly rigid"), *City of Green River v. Debernardi Const. Co., Inc.*, 816 P.2d 1287, 1290 (Wyo. 1991) (finding a five percent preference to be "reasonable"), *Bristol Steel & Iron Works, Inc. v. State, Dept. of Transp. & Dev.*, 507 So. 2d 1233, 1236 (La. 1987) (upholding a five percent preference).

⁸⁰ See *Bradbury & Stamm Const. v. Bd. of County Com'rs of Bernalillo County*, 35 P.3d 298, 302 (N.M. 2001) (requiring a county to follow the statutory 5% preference for resident contractors).

⁸¹ See *Galesburg Const. Co. Inc. of Wyoming v. Bd. of Trustees of Mem'l Hosp. of Converse County*, 641 P.2d 745, 750 (Wyo. 1982) ("When contracts are awarded to Wyoming corporations, as opposed to out-of-state corporations, local industry is encouraged. This contributes to, strengthens, and stabilizes the state and local economy-the primary interest is that of the public."), *State v. Antonich*, 694 P.2d 60, 62 (Wyo. 1985) (noting that "reduction in unemployment among Wyoming citizens constitutes a valid state goal").

⁸² See, e.g., *Big D Const. Corp. v. Court of Appeals for State of Ariz., Div. One*, 789 P.2d 1061, 1064 (Ariz. 1990).

agency finds “good cause to set the higher percentage” and documents its findings and reasons for the higher percent.⁸³

Note that the court cases mentioned above interpret a *state legislature’s* decision to provide a preference; these cases do not indicate how courts would interpret a *school district’s* decision to provide a preference. In general, courts that review state legislation determine whether the legislature acted rationally to serve a public purpose. In contrast, when reviewing a school district’s decision, a court would first determine whether the school district had the delegated authority to act and then whether it acted rationally within the scope of that authority.

The amount of preference that a school district provides to local products will depend on the authority that school districts have to implement a preference. School districts in states that have provided explicit authority have more leeway to provide a larger preference. Conversely, school districts in states with only implicit authority to provide a preference need to take a more conservative approach to the preference amount. As a 5% preference for things like in-state products and recycled products is fairly common, this amount might be an appropriate ceiling for school districts without express authority.

Depending on the type of authority, a school district may choose to have a higher or lower preference amount than 5%. The guiding principle is to provide a competitive advantage to local products and still be in compliance with full and open competition.

i. Competitive advantage to local products

In order to fulfill the objectives of a geographic preference policy, a preference must be sufficient to provide an advantage to local products. In the above chart (GP option 1, page 19), where the prices range from \$0.96 to \$1.04, a 2% preference is not a sufficient advantage to increase procurement of local products. If the policy objective is to increase consumption of fresh local food, a small percentage preference may not accomplish that objective. Because wholesale prices may vary greatly, school districts need market data in order to determine whether the amount of preference is large enough to achieve the desired result. A clearly articulated purpose and concrete market data will help guide this determination.

The USDA provides a valuable tool for determining both current and historical price trends by tracking foods sold at terminal markets in selected U.S. cities. The online database differentiates prices by each product’s origin, variety, size, package, and grade.⁸⁴ In the aggregate, the data reveal price ranges for particular products. For example, the data for the Boston terminal market show that in early June 2013, prices for conventional bunched carrots

⁸³ OR. REV. STAT. § 279A.128 (2009) states that the contracting agency can set a higher percentage preference than 10% if the contracting agency “in a written determination to support the order, finds good cause to set the higher percentage and explains the contracting agency’s reasons and evidence for the finding.”

⁸⁴ U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., TERMINAL MARKET, http://www.marketnews.usda.gov/portal/fv?paf_dm=full&paf_gear_id=1200002&startIndex=1&dr=1&navType=term&final=true (last visited June 6, 2013).

ranged from \$18.00 to \$21 per container (sacks of 24-count 2-lb. film bags) and averaged \$19.71 from Jan. 2012 to Jan. 2013.⁸⁵

School districts may also look at their own records to determine the historical range of bids in their region or conduct a survey of potential bidders.⁸⁶ School districts can also consider delivery costs, which may comprise a significant portion of the final cost of the product.⁸⁷ Transportation costs can vary widely depending upon product, distance traveled, load size and logistics management.⁸⁸ Since transportation costs factor heavily into the final cost of the product, school districts can take them into consideration when setting a preference.

ii. Compliance with full and open competition

A preference amount that provides too much of an advantage may result in a windfall to the preferred bidder, thus excluding all competition and violating full and open competition. An overly high preference is likely to run afoul of the federal regulations, which require that application of the geographic preference option “must leave an appropriate number of qualified firms, given the nature and size of the procurement, to compete for the contract.”⁸⁹ In addition to considering the minimum amount of a preference, school districts will need to take into account the outer limits as well. Although 5% appears to be the common preference amount for recycled products, in-state products, and in-state vendors, data on the range of market prices for food is, once again, needed to evaluate any specific amount to ensure that preferences do not eliminate all competition.

An overly high preference is likely to run afoul of the federal regulations, which require that application of the geographic preference option “must leave an appropriate number of qualified firms, given the nature and size of the procurement, to compete for the contract.”

⁸⁵ Id. at Custom Reports.

⁸⁶ A recent USDA study found that local food farms primarily produce vegetables, fruits, and nuts, whereas farms without a local food market primarily produce livestock and program commodity crops. Vegetable, fruit, and nut farms account for 43% of all local food farms and generate 65% of total sales of locally grown food. Furthermore, vegetable, fruit, and nut farms are 8 times more likely than other farms to sell food locally. U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. REP. 128, DIRECT AND INTERMEDIATED MARKETING OF LOCAL FOODS IN THE UNITED STATES, (Nov. 2011), at 7.

⁸⁷ See U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. REP. 99, COMPARING THE STRUCTURE, SIZE, AND PERFORMANCE OF LOCAL AND MAINSTREAM FOOD SUPPLY CHAINS (2010), at 67. See also U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. REP. 766, STATISTICAL ANALYSIS OF BID PRICES FOR FIVE FSA COMMODITIES, (1998), at 36.

⁸⁸ See U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. REP. 99, COMPARING THE STRUCTURE, SIZE, AND PERFORMANCE OF LOCAL AND MAINSTREAM FOOD SUPPLY CHAINS (2010), at 67.

⁸⁹ FNS, USDA, POLICY MEMO 03-2013, *supra* note 42.

E. When to apply a preference

Another factor for school districts to consider when implementing a geographic preference is when a preference should be applied. Depending on the product and varying production cycles, school districts may only want to apply a geographic preference to certain products and at certain times. For example, some school districts have implemented programs showcasing local foods monthly or for a whole week during the school year.⁹⁰ Using a geographic preference may assist in getting local foods for those types of programs.

F. Authorizing a range of preferences

As an alternative to a “one size fits all” preference amount, school districts may consider adopting a policy that authorizes geographic preference as a range. The evaluation criteria outlined above yield different results when applied to different products at different times of year. For example, a particular preference amount may be too small for produce, resulting in no benefit to local fruits and vegetables, while the same preference amount may be too large for dairy products, resulting in an impermissible windfall. Similarly, a “one size fits all” preference amount may not be appropriate for seasonal products, particularly certain kinds of produce, the wholesale price of which varies by growing season. Thus, school districts may wish to implement a geographic preference policy that authorizes a range of preference based on the type of product and the time of year. Within this scope of authority, school districts would then be able to set a specific amount of preference in solicitation documents to ensure an open and transparent procurement process.

Procurement laws vary by state, so it is important to assess whether your state law meets or exceeds federal standards ... the threshold amounts for informal or formal procurement methods vary.

VI. COMPETITIVE BIDDING AND PROCUREMENT METHODS

Some states delegate authority to school districts to set their own competitive procurement practices (i.e., through local laws or school district regulations), while other states specify a procurement process that school districts must follow.⁹¹

Procurement laws vary by state, so it is important to assess whether your state law meets or exceeds federal standards of competitive bidding, including the \$150,000 threshold for an informal procurement method. States also require competitive bidding for school districts.

⁹⁰ See, e.g., CALIFORNIA HARVEST OF THE MONTH, at <http://www.harvestofthemonth.cdph.ca.gov/program-overview.asp> (last visited June 6, 2013); NORTHEAST IOWA FARM TO SCHOOL PROGRAM, HOME GROWN SCHOOL LUNCH WEEK, at <http://www.iowafreshfood.com/site/farm2school.html> (last visited June 6, 2013).

⁹¹ 16B McQuillin Mun. Corp. § 46:20 School Boards and School Districts (3rd ed. 2011); 16B McQuillin Mun. Corp. § 46:30 Powers of Boards of Education – Contracts (3rd ed. 2011).

However, the threshold amounts for informal or formal procurement methods will vary, as will the procedural requirements.

VII. CONCLUSION

Federal regulations allow and encourage school districts to implement a geographic preference as long as the preference is limited to minimally processed products. School districts must also comply with state law, and, if applicable, local district policies. State law requires districts to award contracts to the lowest responsible bidder. Yet a preference for local food – if it works as intended – will result in contracts that are not awarded to the lowest bidder. This primer anticipates the risk that disappointed bidders will challenge use of a preference – legally or politically – on grounds that it exceeds procurement authority under state law.

School districts can deter challenges to a preference and boost its effectiveness if they adopt a policy with these elements: (1) identify one or more types of authority for a preference, (2) provide parallel objectives for using a preference, (3) define *local* and how the preference will work including the connection with educational programming and choices in the cafeteria, and finally, (4) use competitive bidding that meets the strictest standard – federal, state or local – for full and open competition.

Steps to Implement a Geographic Preference Policy

- 1. Identify legal authority: one or more types**
 - a. Explicit authority
 - (1) To use a preference
 - (2) To set procurement policies
 - b. Implicit authority
 - (1) To implement farm to school laws
 - (2) To provide nutrition or agriculture education
 - (3) To serve nutritious meals
- 2. Provide parallel objectives: why you have a preference**
 - a. Promote consumption of minimally processed foods
 - b. Support nutrition or agriculture education
 - c. Expand markets for local farmers
 - d. Other objectives that reflect the types of authority
- 3. Define *local* and how a preference works: type, amount and programming**
 - a. Define local – What is the geographic scope to apply a preference?
 - b. Decide on type of preference – E.g., percentage of price? A point system?
 - c. Set the amount – How much? Which products? Which seasons?
 - e. Connect a preference with educational programming and cafeteria choices.
- 4. Use competitive bidding: which procurement method**
 - a. Informal
 - b. Formal

This primer provides a starting point for school districts that want to adopt a preference. But our guidance is not legal advice based on a reading of specific state laws and local policies. So after you read this primer, read your state procurement law, and consult with your legal advisor. As more school districts incorporate a geographic preference into their procurement, more questions, guidance and practices will emerge. Accordingly, FOCUS plans to update this guide; we invite your questions and comments.⁹²

⁹² FOCUS contact information is at http://www.schoolfoodfocus.org/?page_id=64.

APPENDIX A

Selected statutes and rules granting preference to resident bidders, in-state products, and recycled products

State	In-state product preference	Recycled product preference	Resident bidder preference
AL	ALA. CODE § 41-16-20 5% preference in all contracts involving \$7,500 or more to a person, firm or corporation who (1) produces or manufactures the product within the state; (2) has an assembly plant or distribution facility for the product within the state; (3) is organized for business under the applicable laws of the state.		ALA. CODE § 41-16-20 5% preference in all contracts involving \$7,500 or more to a person, firm or corporation who (1) produces or manufactures the product within the state; (2) has an assembly plant or distribution facility for the product within the state; (3) is organized for business under the applicable laws of the state.
AK	ALASKA STAT. § 36.15.050 7% preference in contracts and calls for bids for agricultural products harvested in the state of Alaska and for fisheries products harvested or processed within the jurisdiction of the State of Alaska when purchased by the state or by a school district that receives state money. ALASKA STAT. § 36.30.332 3% preference for products that are more than 25% and less than 50% produced or manufactured in the state; 5% preference for products that are 50% or more and less than 75% produced or manufactured in the state; 7% preference for products that are 75% produced or manufactured in the state.		
AZ	ARIZ. REV. STAT. ANN. § 34-242 5% preference for bidders who furnish materials produced or manufactured in the state to construct a building or structure, or additions to or alterations of existing buildings or structures to any political subdivision of the state.		ARIZ. REV. STAT. ANN. § 34-243 5% preference to bidders who furnish materials supplied by a dealer who is a resident of the state to construct a building or structure, or additions to or alterations of existing buildings or structures for any political subdivision of the state.
AR		ARK. CODE ANN. § 19-11-260 10% preference to recycled paper products.	ARK. CODE ANN. § 19-11-259 5% preference to a firm resident in Arkansas in the purchase of commodities that are materials and equipment used in public works projects.

CA	<p>CAL. GOV'T CODE § 4334 5% preference to bidders manufacturing supplies in the state to be used or purchased in the letting of contracts for public works, with the construction of public bridges, buildings and other structures, or with the purchase of supplies for any public use.</p>	<p>CAL. GOV'T CODE § 4334 5% preference to bidders manufacturing supplies in the state to be used or purchased in the letting of contracts for public works, with the construction of public bridges, buildings and other structures, or with the purchase of supplies for any public use.</p>
CO	<p>COLO. REV. STAT. § 8-18-103 Discretionary preference given to agricultural products produced in Colorado by a resident bidder when the product is suitable and available in sufficient quantity.</p>	<p>CAL. GOV'T CODE § 8-19.5-101 5% preference for finished products which contain no less than 10% recycled plastics.</p>
HI	<p>HAW. REV. STAT. § 103D-1002 3% preference for products that have 25% to 49% of their manufactured cost in Hawaii; 5% preference for products that have 50% to 74% of their manufactured cost in Hawaii; 10% preference for products that have 75% or more of their manufactured cost in Hawaii.</p>	
IN		<p>IND. CODE § 4-13-6-2.7 5% preference for a contract expected to be less than \$500,000; 3% preference for a contract expected to be at least \$500,000; 1% preference a contract expected to be at least \$1,000,000.</p>
LA	<p>LA. REV. STAT. ANN. § 38:2251 10% preference for products assembled, processed, produced or manufactured in Louisiana; 7% preference for processed meat, meat products, domesticated catfish and produce grown outside of the State of Louisiana, but processed in the State of Louisiana; 10% preference for produce produced and processed in Louisiana.</p> <p>LA. REV. STAT. ANN. §38:2251.1 10% preference for milk and dairy products produced or processed in Louisiana.</p>	<p>LA. REV. STAT. ANN. § 30:2415 5% preference for recycled paper and paper products, tissue and paper towels that contain recycled content, provided that such products are either manufactured in Louisiana or contain recovered materials diverted or removed from the solid waste stream which otherwise would go into a Louisiana landfill.</p>

MD	MD. CODE ANN. § 14-405 5% preference for products made from recycled materials.	
MN	MINN. STAT. § 16B.121 10% preference for recycled materials.	
NM		N.M. STAT. ANN. § 13-4-2 5% preference for resident contractors.
NY	N.Y. STATE FIN. LAW § 165 10% preference for recycled products; 15% preference for products in which 50% of the materials are generated from the waste stream in New York State.	
OH	OHIO ADMIN. CODE § 123:5-1, 5% preference with respect to supply and service contracts, other than construction contracts to bidder offering Ohio products or a bidder with significant Ohio economic presence.	OHIO ADMIN. CODE 123:5-1, 5% preference with respect to supply and service contracts, other than construction contracts to bidder offering Ohio products or a bidder demonstrating significant Ohio economic presence.
PA	PA. CODE §11.8-815A 5% preference for resident businesses or products either manufactured in Allentown or manufactured by entities headquartered in Allentown, but the preference is not to exceed \$2,500 in awarding bids.	PA. CODE §11.8-815A 5% preference for resident businesses or products either manufactured in Allentown or manufactured by entities headquartered in Allentown, but the preference is not to exceed \$2,500 in awarding bids.
SC	S.C. CODE ANN. § 11-35-1524 7% preference for a South Carolina end product.	S.C. CODE ANN. § 11-35-1524 7% preference for a bidder who maintains an office in the State and either (i) maintains at a location in South Carolina at the time of the bid an inventory of expendable items . . . (ii) is a manufacturer headquartered and having an annual payroll in the state . . . or (iii) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in the state.
WV		W. VA. CODE § 5A-3-37 2.5% preference to resident bidders for construction contracts over \$50,000 whose employees are at least 75% West Virginia residents or, nonresident vendors who employ at least 100 residents and have at least 75% resident

WY

employees.

WYO. STAT. ANN. § 16-6-102
5% preference given to resident bidder in public works contracts for the erection, construction, alteration or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvement.