

LOCAL FOOD FOR LOCAL GOVERNMENT

CONSIDERATIONS IN GIVING PREFERENCE TO LOCALLY GROWN FOOD



ChangeLab Solutions
Law & policy innovation for the common good.

ABOUT THIS GUIDE

State and local governments have a strong interest in improving the health of their residents. Not only does better health benefit community members, it also saves governments money. One way to lower health care costs is to improve residents' diets: the medical treatment of obesity-related diseases costs approximately \$147 billion annually in the United States alone.¹

State and local governments also have a strong interest in promoting local food systems – that is, networks integrating sustainable food production, processing, distribution, consumption, and waste management in a way that enhances the environmental, economic, and social health of a particular place.² Initial research indicates that improving local food systems can offer benefits to communities by bringing jobs and income to the area.³ Research also suggests that local food systems can give residents access to fresher, more appealing, and more nutritious produce.⁴ In the event of a natural or other disaster interrupting interregional transportation networks, a strong local food system also can provide food security, ensuring continued access to fresh foods.

Government procurement—the process by which the federal, state, and local governments use tax dollars to purchase goods and services—can both improve American diets and benefit local food systems. Government agencies often procure goods and services for use by employees, students, and community members. Among other things, these agencies (and the community-based organizations with whom they contract to operate social services) buy food to provide meals to people in jails, juvenile facilities, public hospitals, child-care centers, schools, and senior programs and residences. Government departments also purchase food to sell to employees and the public in retail outlets, such as vending machines, cafeterias, and concession stands on government property.

Whether a state or local government may give preference to purchasing local foods, and thereby promote local food systems, depends on:

1. The source of the funds used to purchase food and any restrictions on the use of the funds, and
2. State, and sometimes local, procurement laws.

This guide provides an overview of the factors affecting whether a state or local agency may procure locally produced food and agricultural products. For advice on specific procurements, be sure to contact your local government attorney.



Purchasing Locally to Benefit Residents

Many states, and some local governments, have laws awarding some type of preferential treatment to residents when expending government funds on goods and services.⁵ These laws vary: some give preferences to resident businesses, contractors, or vendors; others give preferences to goods grown or produced in the state; and some give preferences to contractors who employ local residents. States reason that the benefits generated by state purchases should go to the citizens of the state, who fund the treasury and for whom the state was created to serve.⁶ Generally, courts have upheld that reasoning as a sufficient basis for these laws.

Reciprocity Laws

State preference laws favor state residents – which means they penalize out-of-state bidders. To counteract this effect, legislatures pass reciprocity laws. Generally, reciprocity laws require a state agency to increase the bid of an out-of-state bidder by the same amount the out-of-state bidder is favored in his or her home state. For example, suppose Pennsylvania gives a 10 percent discount to Pennsylvania-based contractors. If Ohio has a reciprocity law and a Pennsylvania-based contractor bids on an Ohio state agency's contract, Ohio would increase Pennsylvania's bid by 10 percent – the amount of discount the Pennsylvania bidder receives in her home state. Because states have no power to change other states' laws, the reciprocity laws are the way they protect their citizens. According to a survey by the National Association of State Procurement Officials, as of 2009, 31 states have some type of reciprocity law.⁷



PROCUREMENT IN BRIEF

While specific procurement laws and procedures vary, all government agencies use a competitive solicitation process to obtain the best value when expending tax dollars, ensure equal opportunities for potential bidders, and provide safeguards against favoritism.

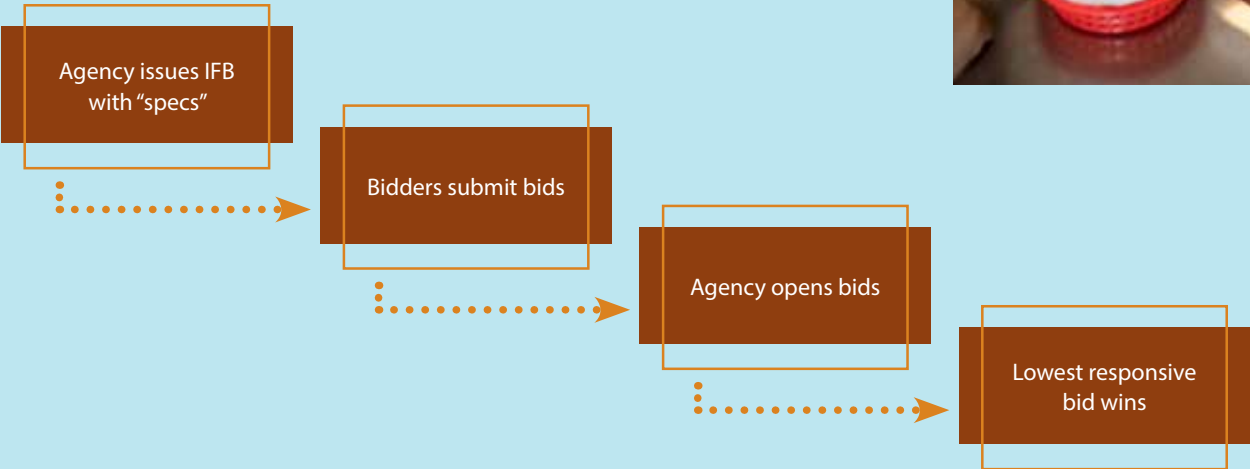
Generally, when a state or local agency purchases goods – such as food – the agency uses a competitive process to find the supplier who can provide the lowest-priced goods. (In contrast, when purchasing services, agencies use a process that considers price alongside other factors like education and experience.) The agency issues a solicitation for bids – usually referred to as an invitation for bids (IFB) – that specifies what goods it wants to purchase and any particular conditions related to the goods (often referred to as “specifications” or “specs”).

Next, potential contractors submit bids demonstrating that they can meet the terms of the specifications and provide the goods, and for what price. The government entity opens the bids and then selects the lowest “responsive bidder” – the lowest bid that meets the material terms of the specifications.

The government agency then negotiates a contract with the winning bidder. For more information on the procurement process, see ChangeLab Solutions’ “Understanding Healthy Procurement: Using Government’s Purchasing Power to Increase Access to Healthier Food,” available at www.changelabsolutions.org/publications/healthy-procurement.



PURCHASING GOODS TYPICAL INVITATION FOR BIDS (IFB)

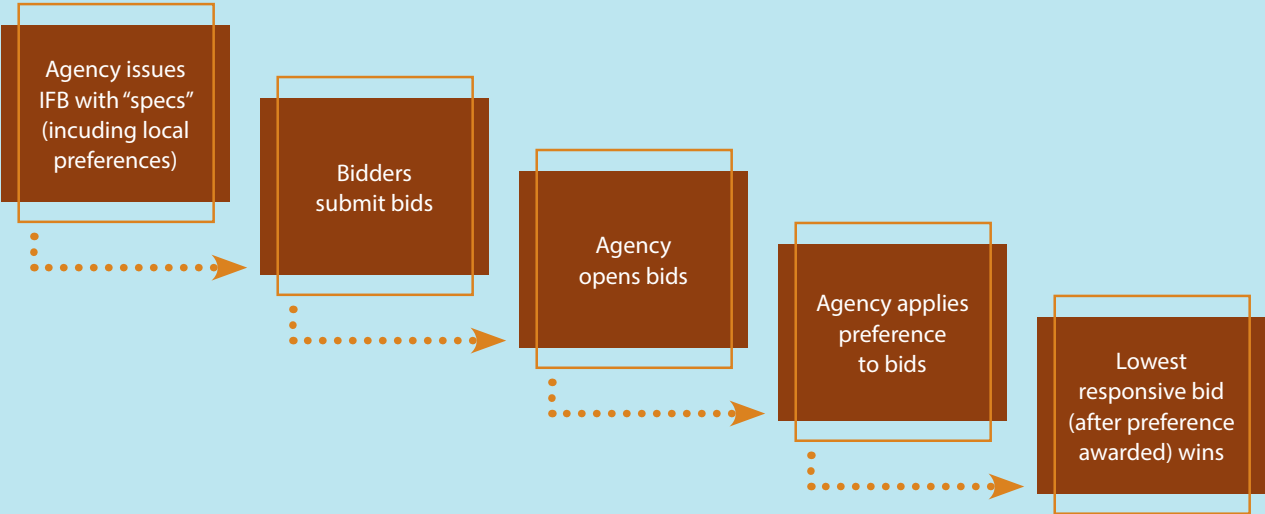


USING A GEOGRAPHIC PREFERENCE

Government agencies that give a competitive preference to locally grown food introduce a factor other than price into their selection process. At least 37 states have laws requiring some or all state and local agencies to give preference to food grown or processed within the state.⁸ In some states, such as Alabama, agencies may opt for state-grown food when the food is equal in price and quality to out-of-state food.⁹ Generally, in those states, when an agency opens the bids, it first considers whether the bids meet the specifications for responsiveness of the bid (for quality and quantity of food, for example), then ranks the bids according to price. If more than one bid is the lowest ranked bid and one is within the geographic preference region, the state or locally grown bid wins. (The actual mechanics of the process may vary according to state and local law and practice.)

In other states, such as Alaska, state-grown food may be selected even if its price is higher than the lowest bid – up to the percentage amount stated in the law.¹⁰ In those states, legislators have determined that the benefit from buying local food is worth the price difference. The bids are first considered for responsiveness and price, and then the agency applies the percentage preference and discounts the state-grown food bids by that percentage. If, after applying the preference, the home-grown bid is lowest, that bid is awarded the contract.

PURCHASING GOODS USING A LOCAL PREFERENCE



LOCAL PREFERENCES AND COMPETITIVE BIDDING

Determining whether an agency may apply a local preference is a multistep process.

1. Does the funding source restrict the use of a competitive preference?

First, consider the source of the funds used for the purchase and determine whether the funder – which may be the federal government or a state, local, or private entity – prohibits use of a geographic preference. When accepting funds from another entity, an agency accepts any conditions the funder places on use of the moneys, even if its state or local law differs from the condition. If the funder prohibits using a geographic preference when spending the accepted funds, the agency cannot use such a preference – to do so risks losing the funds and potentially other penalties.

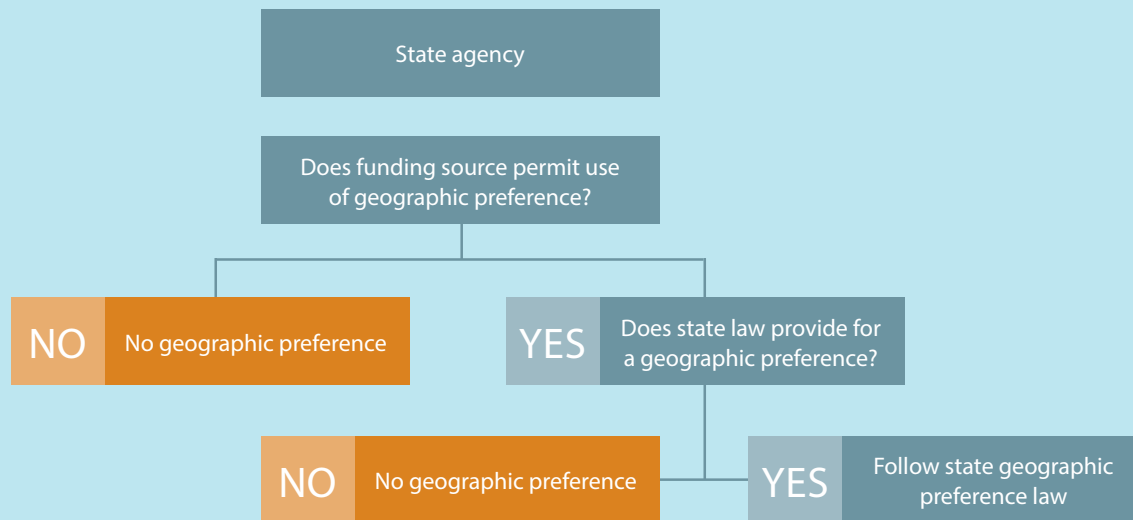
The federal government, for example, prohibits the use of “statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference.” Therefore, unless the specific federal program expressly permits use of a geographic preference, state and local agencies cannot use a local preference when using those federal funds. A notable exception is the federal law encouraging the use of geographic preferences for purchases of unprocessed and locally grown agricultural products with Child Nutrition Act funds. (See “Schools and Other Institutions Using Child Nutrition Act Funding,” page 8.)



2. If there are no restrictions on use of the funds, does state or local law require or permit a geographic preference?

State agencies

Each state has its own procurement laws and processes that set forth the purchasing rules, competitive thresholds, the agencies responsible for purchasing, and whether the agencies may use a geographic preference when purchasing food. (See the table accompanying this overview for an outline of states' preference laws.) Even states that do not have a specific law permitting preference for locally grown food may have a law giving preference to in-state businesses or vendors. Depending on the nature of the procurement, preference for local vendors could result in promoting the purchase of local food.

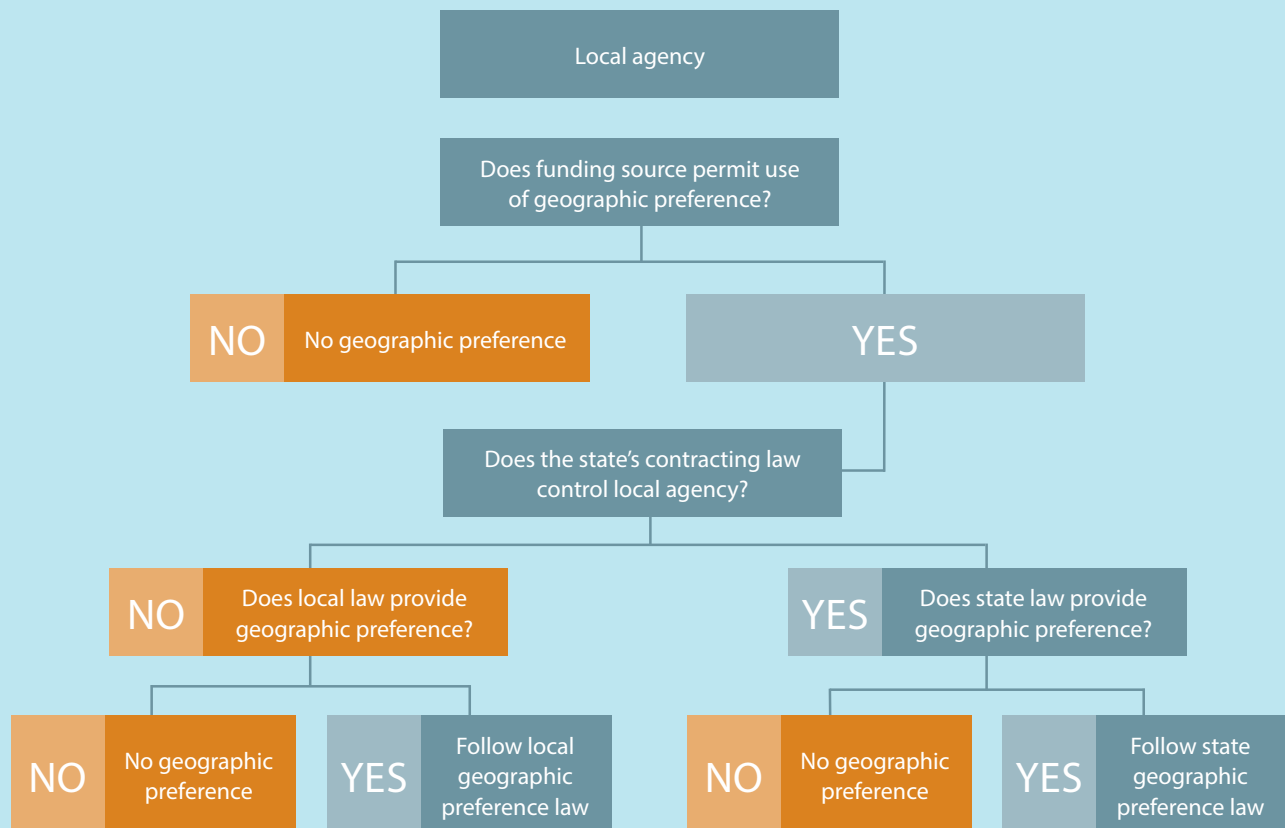




City and county agencies

Determining whether a city, county, or other local agency may give geographic preference requires consideration of both state and local law. In states where state law regulates local governments' procurement, local agencies are bound by any applicable state law regarding state-grown preference.

Other states delegate power to all or some cities and counties to regulate their own internal governmental processes, including contracting and purchasing. These "home rule" cities and counties may have the authority to create their own purchasing processes, including geographic preferences. (Whether a state law gives home rule authority to a city or county and the nature of that authority is beyond the scope of this overview. Contact a local government attorney for further information.)



Schools and other institutions using Child Nutrition Act funding

School districts or other institutions that receive federal funding for purchasing food through the Child Nutrition Programs are subject to a specific federal law regarding local purchasing preferences. The 2008 Farm Bill amended the Richard B. Russell National School Lunch Act (NSLA) to direct the Secretary of Agriculture to encourage institutions operating Child Nutrition Programs, including schools participating in the School Lunch and Breakfast programs, to purchase “unprocessed locally grown and locally raised agricultural products.”

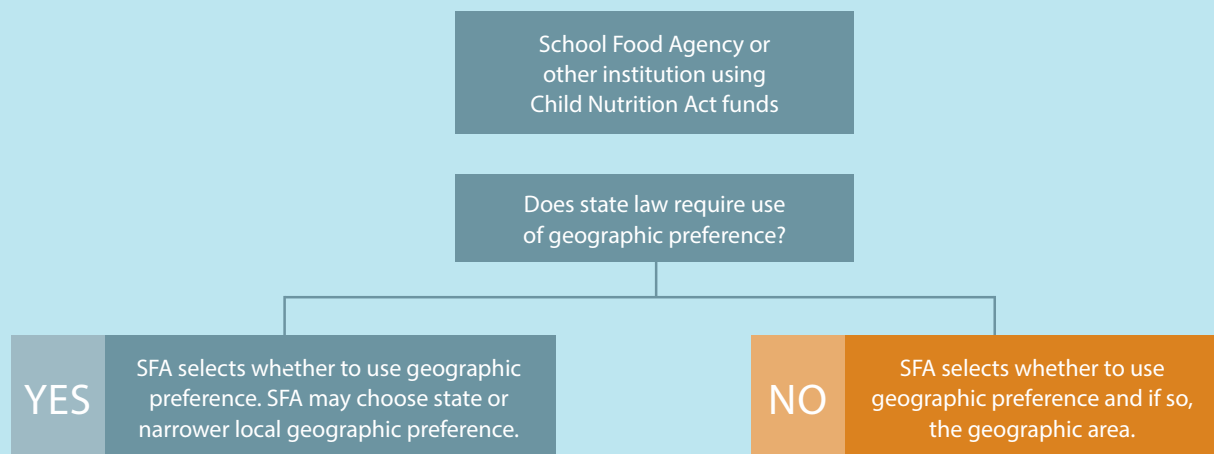
In February 2011, the United States Department of Agriculture (USDA) clarified that the purchasing institutions, school food agencies (SFA), child-care institutions, and Summer Food Service Program (SFSP) sponsors have the authority to choose whether to give a preference to locally grown food and, if so, to specify the geographic area within which unprocessed locally raised and grown agricultural products will originate.¹² The USDA concluded that even if a school district’s state law requires that districts give a preference to state-grown agricultural products, the school district is not required to follow the state law and may instead select a narrower geographic area.¹³ School districts are, however, subject to the federal “Buy American” requirements.¹⁴ School districts located in border states must ensure that the preferred geographic area is limited to the United States.



In adopting the final regulation, the USDA interpreted “unprocessed locally grown or locally raised agricultural products” to mean “only those agricultural products that retain their inherent character.”¹⁵ The USDA concluded that the following food handling and preservation techniques do not change the inherent character of the agricultural products:

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); the addition of ascorbic acid or other preservatives to prevent oxidation of produce; butchering livestock and poultry; cleaning fish; and the pasteurization of milk.¹⁶

Schools purchasing agricultural products falling within the definition may choose to apply a local preference and, if so, the geographic area to which the preference applies.



ENDNOTES

1. Martinez et al. Local Food Systems: Concepts, Impacts, and Issues, ERR 97, U.S. Department of Agriculture, Economic Research Service, May 2010, pp. 44-45.
2. *Id.* at pp. 45-46
3. Finkelstein EA, Trogon JG, Cohen JW, and Dietz W. "Annual Medical Spending Attributable to Obesity: Payer and Service-Specific Estimates." *Health Affairs*, 28(5): w822-w831, 2009.
4. University of California Sustainable Agriculture Research and Education Program. "What Is a Sustainable Community Food System?" Available at: www.sarep.ucdavis.edu/cdpp/cfsdefinition.htm.
5. Kingsley O. "The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts." *40 Public Contract Law Journal*, 715: pp. 717-718, Spring 2011.
6. See, e.g., *Smith Setzer & Sons v. South Carolina Rev. Pane*, 20 F.3d 1311, 1323 (4th Cir. 1994).
7. Kingsley O. "The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts," *supra*, at p. 720.
8. See attached table.
9. See, e.g., Ala. Code § 41-16-27
10. See, e.g., Ala. St. Ann § 36.15.150.
11. 7 C.F.R. § 3016.36.
12. U.S.D.A. "Procurement Geographic Preference Q & As." Memo SP_18 – 2011. February 1, 2011.
13. Procurement Geographic Preference Q & As, *supra*, q. no. 10.
14. Procurement Geographic Preference Q & As, *supra*, q. no. 11.
15. 7 C.F.R. § 210.21.
16. *Id.*

This tool was developed with support from the Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Centers for Disease Control and Prevention.

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

© 2016 ChangeLab Solutions

Design: Wick Design Studio

Photos: Lydia Daniller (cover, pages 2, 4, 9), and Tim Wagner for HEAC (pages 3, 4, 6, 7, 8).