



TO: P-12 Education Committee

FROM: Angelique Johnson Dingle *Angelique Johnson-Dingle*

SUBJECT: Proposed Amendment to Sections 114.3 and 114.4 of the Regulations of the Commissioner of Education Relating to School Food Service Programs and Bidding Exemptions for Purchasing New York State Food and Milk

DATE: July 6, 2023

AUTHORIZATION(S): *Jan M. G. Bellotti*

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed amendment of Sections 114.3 and 114.4 of the Regulations of the Commissioner of Education relating to School Food Service Programs and bidding exemptions for purchasing New York State food and milk?

Reason(s) for Consideration

Required by State statute (Part OO of Chapter 58 of the laws of 2023).

Proposed Handling

The proposed amendment is presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at its July 2023 meeting. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are included.

Procedural History

A Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on August 2, 2023, for a 60-day public comment period. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

On May 3, 2023, Part OO of Chapter 58 of the laws of 2023 was signed into law which, effective April 1, 2023, amended General Municipal Law §103 to facilitate the purchase of New York State food products and milk produced in New York State by school districts or boards of cooperative educational services. The proposed amendments to sections 114.3 and 114.4 were developed in consultation with the Commissioner of Agriculture and Markets (as required by General Municipal Law §103(9) (9-a)) to accommodate and promote the provisions of the farm-to-school program established pursuant to Education Law §305(31) and Agriculture and Markets Law §16(5-b).

The proposed amendment to section 114.3 increases the amount of unprocessed or minimally processed food products grown, produced, or harvested in New York State that school districts or boards of cooperative educational services (BOCES) can purchase without formal bidding requirements from \$100,000 to \$150,000. Additionally, the proposed amendment expands the types of vendors these purchases can be made from to include any vendor that sells such food products. The law previously limited purchases to food products purchased directly from vendors who are New York State producers or growers, or small associations of producers or growers who are owners and operators of farms that combined to sell products to a school district.

The proposed amendment to section 114.3 also increases the dollar threshold for when a school district or BOCES must receive permission from the Commissioner of Education to purchase eligible products from an association of owners of farms when no other producers or growers have offered to sell to such district or BOCES. This amount was increased from \$100,000 to \$150,000.

Additionally, the proposed amendment to section 114.3 provides new definitions for the terminology used in the General Municipal Law §103 amendments. The proposal defines “grown in New York State” and “produced in New York State” consistent with the definition of “processed products” in Agriculture and Markets Law §451(3). The proposal also removes definitions for terms which are no longer used in General Municipal Law §103 (“producer”, “grower”, “directly”, and “association of producers or growers”).

The proposed amendment to section 114.4 removes the limitation on the direct purchases of milk from licensed milk producers that employ less than 40 people and clarifies that the milk subject to the bidding exemption must be produced in New York State. Additionally, as with section 114.3, it provides a definition of “produced in New York State” consistent with the definition of “processed products” provided in Agriculture and Markets Law §451(3).

Related Regents Items

Not applicable.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That sections 114.3 and 114.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective July 18, 2023, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to immediately conform the Commissioner's regulations to Part OO of Chapter 58 of the laws of 2023.

Timetable for Implementation

If adopted as an emergency rule at the July 2023 Regents meeting, the emergency rule will become effective July 18, 2023. It is anticipated that the proposed amendment will be presented for permanent adoption at the November 2023 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. Because the emergency action will expire before the November 2023 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the September 2023 meeting. If adopted at the November 2023 meeting, the proposed amendment will become effective as a permanent rule on November 29, 2023.

Attachment A

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, and 305 of the Education Law, and section 103 of the General Municipal Law, and Part OO of Chapter 58 of the laws of 2023.

1. Section 114.3 of the Regulations of the Commissioner of Education is amended to read as follows:

114.3 Bidding exemption for [direct] purchasing New York State food.

(a) For use in its school food service program, a board of education on behalf of its school district, or a board of cooperative educational services, may separately purchase eggs, livestock, fish, species of fresh fruits and vegetables, juices, grains, and dairy products, excluding milk, [directly from producers or growers, or from associations of producers or growers] grown, produced or harvested, in New York State exempt from the bidding provisions of subdivisions 1 through 8 of section 103 of the General Municipal Law. All such purchases shall be subject to the provisions of this section.

(b) Definitions.

For the purposes of this section:

(1) [*Producer* shall mean the owner of the hens from whom eggs are gathered, the person who owns and raises the livestock, the person who harvests the fish, the person who processes the dairy products, excluding milk, from animals he or she owns and the person who processes juice from fruit he or she owns.] Grown in New York State shall mean food products planted, cultivated, and harvested in the state, including eggs gathered from hens located in the state, livestock raised in the state, and fish harvested in the state.

(2) [*Grower* shall mean the planter, cultivator, and harvester of the crops to be sold.] *Produced in New York State* shall mean any food or dairy product (excluding milk) meeting the definition of “processed products” in Agriculture and Markets Law §451(3).

(3) *Quality* shall be determined by the same market standards of the New York State Department of Agriculture and Markets as apply to products sold at the wholesale markets throughout New York State.

[(4) *Directly* shall mean without an intermediary between the producer and/or grower and the board of education.

(5) *Association of producers or growers* shall mean an association or other unincorporated organized group comprised of 10 or fewer producers or growers who own and operate their farms and who have combined to sell products to a board of education in accordance with this section.]

(c) Vendor limitation. [Exempt purchases by a school district from any single producer and/or grower, and/or association of growers or producers are limited to an annual maximum of \$50,000.] An exempt order must be for one hundred fifty thousand dollars or less. A school district or board of cooperative educational services may apply to the commissioner of education for permission to purchase orders of more than one hundred fifty thousand dollars from an association of owners of such farms when no other producers or growers have offered to sell to such school.

(d)

(e) ...

(f) ...

2. Section 114.4 of the Regulations of the Commissioner of Education is amended to read as follows:

114.4 Bidding exemption for the direct purchasing of milk.

(a) For use in its school food service program(s), a board of education may, on behalf of its school district, separately purchase fluid milk produced in New York State, directly from a licensed milk processor or processors exempt from the bidding provisions of subdivisions 1 through 8 of section 103 of the General Municipal Law, subject to the maximum allowable expenditure set forth in subdivision 10 of such section. All such purchases shall be subject to the provisions of this section.

(b) [~~Definition~~]Definitions. For the purpose of this section[, licensed]:

(1) Licensed milk processor shall mean a processor of milk who is licensed by the New York State Department of Agriculture and Markets at the time the milk is supplied to the school district [and who employs less than 40 people at that time].

(2) Produced in New York State shall mean milk meeting the definition of “processed products” in Agriculture and Markets Law §451(3), with the exception that it must be from a licensed milk processor.

- (c) ...
- (d) ...
- (e) ...
- (f) ...

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

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The proposed amendment to section 114.3 increases the amount of unprocessed or minimally processed food products grown, produced, or harvested in New York State that school districts or board of cooperative educational services (BOCES) can purchase without formal bidding requirements from \$100,000 to \$150,000 and expands the types of vendors these purchases can be made from to include any vendor that sells such food products.

The proposed amendment to section 114.3 also increases the dollar threshold for when a school district or BOCES must receive permission from the Commissioner of Education to purchase eligible products from an association of owners of farms when no other producers or growers have offered to sell to such district or BOCES. This amount was increased from \$100,000 to \$150,000.

Additionally, the proposed amendment to section 114.3 provides new definitions for the terminology used in the General Municipal Law §103 amendments. The proposal defines “grown in New York State” and “produced in New York State” consistent with the definition of “processed products” in Agriculture and Markets Law §451(3). The proposal also removes definitions for terms which are no longer used in General Municipal Law §103 (“producer”, “grower”, “directly”, and “association of producers or growers”).

The proposed amendment to section 114.4 removes the limitation on the direct purchases of milk from licensed milk producers that employ less than 40 people and clarifies that the milk subject to the bidding exemption must be produced in New York State. Additionally, as with section 114.3, it provides a definition of “produced in New York State” consistent with the definition of “processed products” provided in Agriculture and Markets Law §451(3).

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 202(1) and (5), would be the November 2023 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the November 2023 meeting, would be November 29, 2023, the date a Notice of Adoption would be published in the State Register.

Therefore, since Part OO of Chapter 58 of the laws of 2023 is already effective, emergency action is necessary at the July 2023 meeting, effective July 18, 2023, for the preservation of the public health and the general welfare in order to timely implement its provisions, which will facilitate the purchase of New York State food products and milk

produced in New York State by school districts or board of cooperative educational services.

It is anticipated that the proposed amendment will be presented for permanent adoption at the November 2023 Regents meeting, which is the first scheduled meeting after the expiration of the 60-day public comment period mandated by SAPA for state agency rulemaking. However, since the emergency action will expire before the November 2023 Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the September 2023 Regents meeting.