

9 Common Questions About U.S. Domestic Preference Laws: Communications and Transportation Infrastructure

Diving into U.S. domestic preference rules for your communications and transportation products? Benchmark has compiled the following list of questions we hear most often from our customers on this topic. Looking for more detail? Try “The Unofficial Guide to U.S. Domestic-Preference Laws for Electronics,” available on our website, for a more detailed discussion of the relevant issues.

1. Which rules apply to my product? Buy American Act, Buy America laws, or Trade Agreements Act?

The applicable rules depend on a variety of factors, including the purchasing entity, type of funding, nature of the acquisition (e.g., supplies, services, construction), contract value, place of performance, and whether any exceptions or waivers apply. Generally, the Buy American Act or Trade Agreements Act will apply in direct procurements administered by federal agencies, whereas the Buy America rules typically apply to federally-funded programs managed by state or local government entities (e.g., under federal grants). Under the Infrastructure Investment and Jobs Act (IIJA), it appears that communications and transportation infrastructure will be funded via grant programs. Suppliers in these industries should pay special attention to the domestic-sourcing rules issued by federal entities for IIJA-funded grant programs.

Even where these rules are generally applicable, however, communications and transportation infrastructure products may be covered by existing waivers of the pertinent requirements, including, for example, the Trade Agreements Act’s waiver for certain transportation and basic telecommunications services.

2. What upcoming changes will be most disruptive to my market?

The IIJA provides significant funding to improve communications and transportation infrastructure in the United States. This funding will primarily be allocated to U.S. states through federal grants. While the Act appears to impose minimum domestic content requirements that mirror those of the Buy American Act, it also grants federal entities with significant IIJA funding the discretion to apply potentially more stringent requirements. This means that product suppliers in the communications and transportation industries will have to keep close tabs on proposed regulations and guidance issued by federal agencies administering IIJA funds via grant programs.

Additionally, for some companies in the communications and transportation industries that compete for federal procurements, the steady increase in the minimum threshold for U.S. domestic content under the Buy American Act—from 55 percent to 60 percent as of October 2022 and ultimately to 75 percent by 2029—could prove challenging. It may require material adjustments to their established manufacturing and sourcing strategies. Further, the current administration has signaled an interest in narrowing the commercial IT and partial COTS exceptions and potentially making obtaining blanket waivers of Buy American Act requirements more challenging. Though it is unclear if this interest will translate into policy, narrowing longstanding exceptions or limiting the availability of waivers for industries that historically have relied on foreign supply chains almost certainly would have a profound impact.

3. What if I pursue meeting one set of rules now and changes later result in additional rules I need to meet?

Your company will have to comply with all applicable rules as of the date they are effective. Because many relevant rules are evolving, companies will be most successful if they adopt a flexible compliance model to achieve short-term and long-term regulatory goals. An effective compliance model will largely be defined by the types of federal opportunities your company intends to pursue now and in the future. For example, if your company wants to compete for direct federal procurements valued below the applicable Trade Agreements Act threshold, then you should consider focusing on the evolving Buy American Act regulations. These regulations require manufactured end products to be manufactured in the U.S. and to contain a steadily increasing quantity of domestic content (from 55 percent in October 2022, 65 percent by 2024, and 75 percent by 2029). On the other hand, if your company typically competes for procurements above certain Trade Agreements Act thresholds (e.g., the WTO GPA threshold), you can also potentially rely on manufacturing and sourcing from certain TAA-designated countries. And if your business goals include competing for work under federally-funded grant programs, then you also will have to consider the many nuanced Buy America rules that could apply.

Bottom line — while it can be challenging to structure a compliance model in a world of moving targets, it is achievable and can give your company a significant competitive advantage when pursuing U.S.-funded opportunities. Companies in the communications and transportation industries will have to be especially flexible, given that the domestic-sourcing rules and guidance for relevant grant and procurement programs under the IIJA are still very much taking shape.

4. The communications and transportation component supply chains are so global; is it possible to reach the minimum U.S.-made content requirements for electronics?

Generally yes, though it ultimately depends on the specific product and applicable requirements in the federal opportunities your company wants to pursue. With the enactment of the IIJA, there will be a significant focus on the scale and capabilities of the U.S.-based supply chain and manufacturing industry for communications and transportation products. We believe this momentum will continue, in part, because of the clear trend towards investing in communications and transportation infrastructure in the United States.

5. If I don't meet Buy America or Buy American and it applies to my product, how do I get an exemption?

The procedures for requesting a waiver of the Buy American Act or Buy America requirements vary by federal agency. However, all waiver requests typically require high-level approval and some form of public notice. With the establishment of the “Made in America Office” in January 2021, waiver requests may also require a higher-level review and approval within the Office of Management and Budget. While we generally expect waivers will become increasingly challenging to obtain, there may be a window in which waivers remain readily available for communications and transportation products to support the development of IIJA-funded domestic infrastructure.

6. Is the percent U.S. content requirement based on the cost of parts or the number of parts? What about labor?

Under the regulations implementing the Buy American Act, the domestic content requirement is measured based on the cost of a product's components. The current regulations define "component" as an article, material, or supply incorporated directly into an end product. A product's "cost of components" is determined as follows:

- (a) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product . . . (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (b) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. The cost of components does not include any costs associated with the manufacture of the end product.

7. What if the cost of the parts changes?

Generally, under the Buy American Act, the applicable cost of a product's domestic components is measured as of the date an offeror represents that its product is Buy American compliant (e.g., under FAR 52.225-2 (Buy American Certificate)). If a change in the cost of the product's domestic components causes the product to fall below the applicable threshold, your company should consult with an attorney to determine if it has any disclosure obligations.

8. Is there a Buy America or Buy American certification we need to obtain? Can Benchmark help us prepare the documentation?

Typically, yes—in federal procurements covered by the Buy American Act or Trade Agreements Act, your company will be required to complete a certification when submitting a proposal, such as FAR 52.225-2 (Buy American Certificate) or FAR 52.225-6 (Trade Agreements Act Certificate). Similar certifications are required under certain federally-funded grant programs, such as the certifications required by 49 C.F.R. § 661.6 and 49 C.F.R. § 661.12. Benchmark helps our customers collect the documentation (country of origin of components, etc.) needed to complete these certifications.

9. What aspects of meeting Buy America or Buy American can Benchmark help us with? What should we do ourselves? When should we consult a lawyer or consultant?

Benchmark can help your company develop and execute a manufacturing and sourcing strategy geared towards compliance with U.S. domestic preference laws. Many of Benchmark's clients also consult with a qualified attorney or consultant to determine their compliance obligations and ensure they select a strategy that will satisfy those obligations.

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