

# 7 Common Questions About U.S. Domestic Preference Laws: Surveillance and Public Safety

Diving into U.S. domestic preference rules for your surveillance and public safety 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).

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

For some companies in the surveillance and public safety product market, 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 potentially narrowing or even eliminating the Buy American Act’s longstanding exception for commercial IT products and partial waiver for COTS items. Though it is unclear if this interest will translate into policy, limiting the commercial IT exception or COTS waiver almost certainly would have a profound impact on the surveillance industry.

Additionally, the Infrastructure Investment and Jobs Act (IIJA) provides significant funding to improve transportation

infrastructure in the United States, which may include significant expenditures on surveillance equipment. 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 electronic surveillance industry will have to keep close tabs on proposed regulations and guidance issued by federal agencies administering IIJA funds via grant programs.

## **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 of the 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, suppose your company wants to compete for direct federal procurements valued below the applicable Trade Agreements Act threshold. In that case, you should consider focusing on the evolving Buy American Act regulations, which require manufactured end products to be manufactured in the U.S. and to contain a steadily increasing quantity of domestic content (from 55 percent to 60 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, including grants to state and local law enforcement, then you also will have to consider the many nuanced Buy America rules that could

apply. Companies in the surveillance and public safety industry will have to be especially flexible, given that the domestic-sourcing rules and guidance for relevant grant and procurement programs under the IJA are still very much taking shape.

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.

#### **4. The electronics component supply chain is 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. There has been a focus on the scale and capabilities of the U.S.-based electronics manufacturing industry in recent years. We believe this momentum will continue, in part, because of the clear trend towards strengthening U.S. domestic preference rules in publicly-funded projects.

#### **5. 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. Cost of components does not include any costs associated with the manufacture of the end product.

#### **6. 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.

#### **7. 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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