

7 Common Questions About U.S. Domestic Preference Laws: Electric Vehicle Infrastructure

Diving into the rapidly changing world of U.S. domestic preference rules for your electric vehicle (EV) infrastructure 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 EV chargers-Buy American Act, Buy America laws, or TAA?

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 EV infrastructure purchases will be funded via grant programs administered by Department of Transportation (DOT) and Department of Energy (DOE) entities. EV infrastructure suppliers should pay special attention to the domestic-sourcing rules issued by the Federal Highway Administration (FHWA) and Federal Transit Authority (FTA) for EV-related programs. For example, in February 2023, the Biden administration announced a series of standards and initiatives in support of a “Made-in America National Network of

Electric Vehicle Chargers”, which includes a pledge to build a national network of 500,000 EV chargers by 2030. These chargers will be subject to domestic sourcing requirements dictated by DOT and DOE standards. In the same month, FHWA announced a “temporary waiver” that establishes phased requirements for Buy America compliance.

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

As part of the Biden administration’s EV charger initiative, DOT announced the National Electric Vehicle Infrastructure Program (NEVI), a \$5 billion effort to establish a bi-coastal network of EV chargers. To ensure the bulk of EV chargers purchased under the NEVI program will have a domestic component cost of at least 55%, any equipment not meeting the 55% standard must be installed by October 1, 2024.

The IIJA provides \$7.5 billion to improve EV charging infrastructure in the United States. This funding will primarily be allocated to U.S. states through federal grants and includes funds to build a national network of EV charging stations. 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—like FHWA and FTA—the discretion to apply potentially more stringent requirements. This means that EV infrastructure suppliers will have to keep close tabs on proposed regulations and guidance issued by FHWA and FTA for the EV market. For example, in February 2023 FHWA released the final rule establishing domestic assembly and content standards for EV chargers, which are intended to implement the Build America, Buy America (BABA) requirements in the Act.

Additionally, for some companies in the EV infrastructure market 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 making obtaining blanket waivers of Buy American Act requirements more challenging. Though it is unclear if this interest will translate into policy, limiting the availability of waivers for an industry heavily reliant on foreign supply chains would almost certainly 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?

Companies in the EV product market will have to be especially flexible, given that the domestic-sourcing rules and guidance for EV grant and procurement programs under the IIJA are still very much taking shape. The first quarter of 2023 saw a variety of announcements from the government targeting EV chargers, including the new EV charger rule from FHWA. Companies will be most successful if they adopt a flexible compliance model to achieve short-term and long-term regulatory goals. Your company will have to comply with all applicable rules as of the date they are effective. An effective compliance model will largely be defined by the types of federal opportunities your company intends to pursue now and in the future. If your business goals include competing for work under federally-funded grant programs, then you 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.

4. The EV infrastructure supply chain is so global; is it possible to reach the minimum U.S.-made content requirements for electronics?

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 developing the scale and capabilities of the U.S.-based EV infrastructure supply chain and manufacturing industry. We believe this momentum will continue, in part, because of the clear trend towards investing in EV 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?

While we generally expect waivers will become increasingly challenging to obtain, there may be a window in which waivers remain readily available for EV products to support the development of domestic EV infrastructure. The procedures for requesting a waiver of the Buy American Act or Buy America requirements vary by federal agency, though 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 be required to undergo higher-level review and approval within the Office of Management and Budget.

In February 2023, FHWA established a temporary waiver of Buy America requirements specific to EV chargers. FHWA’s “temporary waiver” establishes two phases of compliance for EV chargers. From March 23, 2023 to July 1, 2024, final assembly of EV chargers must occur in the U.S. Beginning July 1, 2024, final assembly must occur in the U.S. for EV chargers and the cost of the EV charger’s components manufactured in the U.S. must exceed 55% of the total cost of components. Notably, FHWA indicated that it could accelerate the timeline of the two “phases” if it determines there is an ample supply of EV chargers.

The rule also created a narrow definition of “EV charger” and applied FHWA’s existing steel and iron requirements on housing enclosures that are made predominantly of steel or iron.

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 do 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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