



Domestic Preference or Domestic Confusion? Made in America Laws in Government Contracting

With the signing of the 2021 Infrastructure Investment and Jobs Act, which includes the Build America, Buy America Act (BABA), the Biden administration reiterated a long-standing policy trend of “Made in America” laws. These regulations aim to prioritize and promote the production of goods within U.S. borders to foster national economic growth. The Buy American Act of 1933 (BAA) and Trade Agreements Act of 1979 (TAA) are the most widely recognized of the laws but are not the only domestic preference requirements.

Each regime has a slightly different take on what constitutes “Made in America,” and whether the requirement prohibits the government from purchasing foreign products, the government should apply a preference, the contractor benefits from a tax credit, or otherwise.

This article, written by [Joyce Tong Oelrich](#), provides an overview of domestic preference laws and manufacturing requirements for companies with overseas operations to help you assess your company’s eligibility to receive funds through these channels. Given the complexity of the determination, many factors will influence which regulations apply and how to comply with each – use the analysis below as a starting point for internal discussion regarding domestic preferences.

What are the domestic preference laws?

Law	TLDR*	Which Agency?	Funding Type	Waiver?
Buy America Act , 49 C.F.R. § 661	<ul style="list-style-type: none"> All steel and iron must be “produced” in the US – no restrictions on raw materials. Manufactured products must be manufactured in the US and contain 100% US origin components. 	Federal Transit Administration, but other Department of Transportation offices have similar requirements.	Federal financial assistance	Yes
The Buy American Act (BAA), 41 U.S.C. §§ 10a-10c; 48 C.F.R. § 25	Manufacture in the US and must meet specific US content percentages (50-65%) of components	Any procurement the US government makes	Procurement contracts	Yes – multiple exceptions
Made in the USA , 15 U.S.C. § 68-70	All, or virtually all, of the product is made in the US	All products bearing the label or implying that the product is of US origin	n/a	No
Berry Amendment , 10 U.S.C. § 2533a, 48 C.F.R. § 225.7002-7003	Certain cloth and specialty metals must be sourced and produced in the US	Department of Defense	Procurement contracts	Yes
Rural Electrification Act of 1936 (Rural Utilities Service (RUS) Buy American) 7 C.F.R. § 1787	Purchase only domestic or eligible country products, to the extent practicable and reasonable, with RUS loan funding	USDA Rural Utilities Service	Financial Assistance (Loans)	Yes
Build America, Buy America Act (BABA) part of the Infrastructure Investment and Jobs Act (IIJA)	All iron, steel, manufactured products, and construction materials must be produced in the US – no restrictions on raw materials for iron and steel or subcomponents.	All US government agencies using Infrastructure funding	<i>Non-contractual funding</i>	Yes
Inflation Reduction Act (IRA)	<ul style="list-style-type: none"> All iron and steel must be “produced” in the US – no restrictions on raw materials. 40% of “manufactured product”¹ must be produced in the US and contain US origin components. 	Any agency using IRA funding	Tax Credit increased by 2-10%	No

*Summary, each law has nuances that require additional legal analysis and guidance.

¹ US origin components are manufactured in the US but do not need to contain US origin subcomponents. Subcomponents do not need to meet any requirements.

What does “manufacture” look like? How do I determine whether our manufacturing processes meet the requirement?

As a very fact-specific nuanced inquiry, use the guidance below for an overview, but consult your legal advisors for final determinations. Generally, you should first determine which domestic preference applies to your procurement before turning to supply chain analysis.

Law	Manufacture process
Buy America Act	<p>All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives – no origin restriction on raw materials.</p> <p>Manufactured product is 100% produced in the US: 1) all manufacturing processes take place in the US <u>AND</u> 2) all components are of US origin. <i>No requirements on subcomponents.</i></p> <p>Rolling stock must contain 70% US origin components and subcomponents, with final assembly in the US.</p>
BAA	Something more than assembly but not necessarily entirely new form or function, with most of the components being US origin.
Made in the USA	All, or virtually all, of the product is made in the US – the end product must contain no or negligible foreign content. Final assembly or manufacture must be performed in the US.
Berry Amendment	<p>Cloth must be sourced and produced in the US, including raw materials.</p> <p>Specialty metals must be melted or produced in the US, including all components. Several exceptions apply for fasteners or COTS products.</p>
RUS Buy American	1) Products that undergo something more than assembly but not necessarily entirely new form or function, with 50% of the components being US origin OR 2) products from an eligible country (which corresponds similarly to qualified countries under the TAA).
BABA	<p>All iron and steel manufacturing processes must take place in the US – no origin restriction on raw materials.</p> <p>Manufactured products must be 1) processed into a specific form and shape OR 2) combined with other items to create a product with different properties, AND the cost of components must be greater than 55% of the total cost of all components for the manufactured product. <i>No requirements on subcomponents.</i></p>
IRA	<p>All iron and steel manufacturing processes must take place in the US, except metallurgical processes involving refinement of steel additives – no origin restriction on raw materials.</p> <p>40% of “manufactured products”² for the project must be produced in the US and contain US origin components. <i>No requirements on subcomponents.</i></p>

² US origin components are *manufactured* in the US but do not need to contain US origin subcomponents. Subcomponents do not need to meet any requirements.

What does the Trade Agreements Act (TAA) do?

Passed in 1979, the TAA, 19 U.S.C. §§ 2501-2582, implements the US obligations under international trade agreements such as membership in the World Trade Organization. Where the US government has signed a free trade agreement with another country and that agreement requires open government procurement, the TAA authorizes the US Trade Representative to waive domestic preferences. The TAA typically only applies to government procurement – so not financial assistance like grants or loans – and implements a different supply chain analysis than under the domestic preferences.

Does the Trade Agreements Act waive the domestic preference?

Law	Yes	No
Buy America Act		No
BAA	Yes, when value exceeds thresholds	
Made in the USA	N/A	N/A
Berry Amendment		No
RUS Buy American	Yes	
BABA		No
IRA		No

What does the TAA require?

The TAA states that the US government may purchase end products from qualified countries, or products that have been “substantially transformed” in a qualifying country. Substantial transformation is a highly fact-specific analysis that examines the type of manufacturing processes that occur within the qualifying country. It may differ from traditional country of origin customs markings.

Given the numerous moving parts to ensuring compliance with BAA/TAA and now BABA, contact [Joyce Tong Oelrich](#) for additional insight on your company’s compliance and eligibility to receive funds through these channels.