

# Federal Procurement:

An overview of Federal Laws relating to  
Domestic Content Requirements for  
Government Procurement



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**T**his chapter will provide readers with an overview of certain country of origin-related requirements used in U.S. federal procurement, including the Buy American Act (BAA), Trade Agreements Act (TAA), the Infrastructure Investment and Jobs Act of 2021 (Public Law 117-58), and the Berry Amendment. We will also discuss practical tips for companies looking to sell products or services to the United States federal government.

## Buy American Act

The Buy American Act (or BAA), as implemented by the Federal Acquisition Regulations (FAR), incentivizes U.S. federal agencies to purchase goods that comply with the domestic preference requirements of the BAA. To accomplish this, the BAA deems “domestic end products” as compliant and “foreign end products” as noncompliant. It should be noted that neither the BAA nor the FAR prohibit the purchase of foreign end products (i.e., those items that do not comply with BAA). Instead, the government applies a price penalty to foreign end products. At the time of publication, the price penalty for foreign products range from 20% (large business offeres) to 50% for Department of Defense purchases. The reasoning behind this approach is that when the government is evaluating best and final offers, including any price penalties for foreign end products, domestic end products will most likely represent a lower cost to the government when compared to the foreign end products. This will lead to the procurement of more domestically manufactured items.

### Manufactured Products

In order for a manufactured product to qualify as compliant under the BAA, that is, to qualify as a “domestic end product”:

1. the item must be manufactured in the United States; and
2. the cost of the item’s components mined, produced, or manufactured in the United States must exceed 55% of the cost of all components (scheduled to increase to 60% in October 2022, 65% in January 2024, and 75% in January 2029).

The term “manufactured” is not defined in the regulations; however, the term has been interpreted broadly. For instance, the U.S. Government Accountability Office (GAO), which handles federal contracting disputes, has interpreted the term “manufactured” to refer to those operations which make the item suitable for the government’s intended use and establishes its identity. The Civilian Board of Contract Appeals (CBCA) has further held that the scope of manufacturing operations required to meet the “manufactured in United States” standard is understood to require more than packaging, but less than a substantial transformation (i.e., processing that results in an article with a new name, character, and

use, as that term is used in U.S. Customs and Border Protection (CBP) country of origin determinations).

On the other hand, the second prong of the BAA test requires that the cost of an item's U.S. components exceed 55% of the cost of all components (scheduled to increase to 60% in October 2022, 65% in January 2024, and 75% in January 2029). When applying the BAA's domestic content test for manufactured products, the cost of components is measured at the component level only and does not include subcomponent cost.

For products that are predominantly made up of iron or steel, the cost of components test level is a much higher 95% (and, of course, the item must also be "manufactured in the United States").

### **Non-Manufactured Products**

Non-manufactured products, on the other hand, are not subject to the two-prong test above. Rather, a non-manufactured product qualifies as a "domestic end product" if it is mined or produced in the United States. "Non-manufactured" items would include items such as raw materials that are mined in the United States and sold to the government in bulk, raw form, for example, this would include precious metals mined in the United States.

The complexity of BAA compliance typically arises in the context of manufactured products and understanding whether both prongs of the BAA compliance test have been met.

### **BAA Exceptions**

There are numerous exceptions to the BAA, as well as the ability for contractors to seek waivers from the procuring agency. Arguably, the most common exception relates to the procurement of Commercially available Off-The-Shelf (COTS) items, as well as for commercial item Information Technology (IT) products. Additional exceptions exist, for instance, where BAA compliance is unavailable and where the government has determined that the BAA's domestic preference is not in the public interest.

## **'Buy America' Rules**

Companies selling to the federal government may also need to comply with 'Buy America' rules, which are different than the BAA, and vary from agency to agency. These rules typically apply to large infrastructure or transportation projects funded by the U.S. Government. While these rules vary across agencies, the 'Buy America' domestic content requirements are often much higher than that of the BAA and there are few, if any, exceptions to the 'Buy America' requirements, including the COTS exception. Similar to the BAA, however, is the requirement that goods be manufactured in the United States.

Therefore, contractors selling to the federal government may need to potentially comply with both BAA and 'Buy America' rules for a particular procurement.

## Trade Agreements Act

Unlike the BAA's domestic price preference regime, the TAA imposes a complete bar on the purchase of items that do not comply with the TAA. Specifically, the TAA limits government procurement to items which are either: (1) U.S.-origin; or (2) the origin of a TAA-eligible country. TAA eligible countries are those with whom the U.S. has signed either a multilateral or bilateral agreement, such as a Free Trade Agreement, or the World Trade Organization Government Procurement Agreement, or that have otherwise been designated as TAA eligible (i.e., Least Developed Countries and Caribbean Basin Countries). A full list of TAA countries can be found at: <https://www.strtrade.com/services/import-customs-compliance/government-procurement/taa-designated-countries/taa-designated-countries>. The TAA applies to government contracts valued above the TAA threshold, which is currently \$183,000 for a supply contract. In such cases, the BAA requirements are generally waived and the TAA requirements would apply.

In order for an item to be TAA compliant, the item must comply with one of the following:

1. the item must be wholly grown, produced, or manufactured in the United States or in a "Designated Country"; or
2. the item must be substantially transformed into a new and different article of commerce in the United States or in a "Designated Country."

A **substantial transformation** occurs when, as a result of further manufacturing or processing, the item's various components (perhaps originating from one or more countries) lose their individual identity and are transformed into a finished article having a new name, character, and use. There are no bright line rules when it comes to substantial transformation and CBP reviews country of origin determinations on a case-by-case basis. That said, it is generally understood that to rise to the level of a substantial transformation, assembly operations must be complex and meaningful and cannot be mere final assembly or screwdriver-type assembly operations. In making such a determination, CBP will look to a myriad of factors to determine whether a substantial transformation has occurred, including the country of origin of components, the skill and training level required for those performing assembly operations, the cost of assembly, and the character and use of the finished product, among other relevant factors and considerations.

It is important to note that the U.S. Court of Appeals for the Federal Circuit in a 2020 decision (*Acetris Health, LLC v. United States*) held that, in at least the pharmaceutical context, certain manufacturing operations which occur in the United States – even though not rising to the level of a substantial transformation – did in fact satisfy the TAA's

compliance standard. However, the scope and reach of this decision in the government contracts context remains unclear.

Additionally, and unlike the BAA, the TAA expressly applies to both products and services (whereas the BAA expressly applies only to products). Thus, for the government to determine whether services provided are in fact TAA complaint, it will look to the contractor performing those services and where that contractor is incorporated or headquartered. If the contractor is incorporated or has its principal place of business in the U.S. or in a TAA-eligible country, then those services will be complaint for TAA requirements.

## Infrastructure Investment and Jobs Act (Public Law 117-58)

The domestic preference requirement in the 2021 Infrastructure Investment and Jobs Act closely tracks the two-pronged BAA test discussed above for manufactured products. However, the law makes clear that the government must issue regulations on a wide range of BAA/domestic preference issues by the end of 2022. Critically, because these implementing regulations are still forthcoming, it is still unclear how important aspects of domestic preference contracting – such as the COTS item exception for manufactured products under the BAA – are to apply to infrastructure bill-funded federal projects.

## Berry Amendment

The Berry Amendment applies to DoD contracts and requires that certain DoD purchases of food, clothing, certain textiles (including fabrics, fibers, and yarns), hand or measuring tools, and specialty metals be entirely grown or produced in the United States. For the covered products, the Berry Amendment imposes, by far, the highest bar in terms of the other domestic preference laws discussed above. The Berry Amendment is implemented through the [Defense Federal Acquisition Regulation Supplement](#).

Under the Berry Amendment, purchases of covered products must be “entirely grown, reprocessed, reused, or produced in the United States.” This means that unless an exception applies, the entire production process of a covered product from the growth or production of the raw materials to the manufacture of all components to final assembly, must be performed in the United States. For example, procurement of clothing under the Berry Amendment, requires that the clothing item must be sewn in the United States using fabric, thread, buttons, and zippers made in the United States from raw materials of U.S. origin. Components that are not normally associated with clothing (such as electronic sensors) are not subject to the Berry Amendment domestic sourcing requirements.

## Exceptions to the Berry Requirements

The Berry Amendment includes a variety of exceptions, which may apply to specific procurement contracts. For example, the Berry Amendment does not apply to:

- Products that are unavailable from American manufacturers at satisfactory quality and in sufficient quantity at market prices as determined by DoD. If the contractor cannot locate a domestic source, a Domestic Non-Availability Determination, may be requested through the contracting officer;
- Acquisitions of food (other than fish, shellfish, or seafood) that have been manufactured or processed in the United States, regardless of where the foods were grown or produced. Fish, shellfish, and seafood must be taken from the sea by U.S. flagged vessels or caught in U.S. waters and processed in the United States or on a U.S.-flagged ship.;
- Acquisitions outside the United States in support of combat operations, contingency operations, or emergency acquisitions outside the United States;
- Products containing noncompliant fibers, if the value of those fibers is not greater than 10% of the product's total price and does not exceed the Simplified Acquisition Threshold (SAT);
- Products are intended for resale at retail stores such as military commissaries or post exchanges; or
- Products that are part of a low-value contract, defined as below the SAT (\$250,000 as of 2020). The SAT is considered for possible change in years evenly divisible by five (i.e., 2020, 2025, etc.).

Finally, there may be instances where a product contains components that are covered by the Berry Amendment and other items which are not. For example, if DoD is purchasing a wooden chair with a padded seat cushion, the fabric of the seat cushion is subject to the Berry Amendment, but the wood is not. In each case, the application of the Berry Amendment is determined on a case-by-case basis by the contracting officer.

## Practical Tips for U.S. Procurement

Contracting with the federal government can be complex, costly, and carry certain risks. However, understanding the rules and regulations governing federal contracting will help to mitigate such risks. A few tips in this regard are:

- Know Your Role: Prime contractors, that is, companies that contract directly with the federal government, assume greater compliance risk than those in the subcontractor, sub-tier subcontractor, or supplier position. As such, it may be worth

exploring opportunities to fulfill government contracts initially as a subcontractor, sub-tier subcontractor, or supplier rather than as prime contractor/direct awardee.



- Know Your Exceptions: When selling COTS items to the government, there are often fewer compliance obligations that apply than when selling specially designed or customized products to the government.
- Know Your Obligations: Companies should consider which related corporate entity or division will be the entity providing services and/or supplies to the federal government (either directly or indirectly). This is important because the corporate entity will be subject to certain compliance obligations and risks that could impact other parts of the entity's operations.
- Know Your Options: Communicate with the relevant contracting agency regarding any questions or concerns. Contracting officers are a great resource. Many contractors are surprised to learn how eager the procuring agency is to assist and help clarify certain issues that are unclear to the contractor.
- Know Your Limits: If any issues are unclear or perhaps are legally sensitive, companies are encouraged to communicate with outside counsel, as early and proactive communication with counsel can provide clarity on legal issues and mitigate risk.

## About ST&R

Since 1977, Sandler, Travis & Rosenberg, P.A. (ST&R) has set the standard for international trade lawyers and consultants, providing comprehensive and effective services to clients worldwide, including strategic advice and counsel on issues at the intersection of government procurement and international trade. ST&R's Government Procurement practice offers the following compliance-related services to its clients:

- providing company-specific training regarding BAA, TAA, and other "Buy America" requirements;
- reviewing strategic product sets/SKUs to determine BAA/TAA eligibility and compliance;

- preparing and submitting country of origin determination rulings to CBP for specific products/SKUs to determine whether a substantial transformation occurred in a TAA-designated country, and therefore, whether the product is TAA compliant; and
- reviewing contract terms and conditions related to specific product or service offerings to determine BAA/TAA/Buy America applicability.

You can learn more about ST&R's Government Procurement practice and the various other ST&R service offerings by visiting ST&R's Government Procurement webpage at <https://www.strtrade.com/services/import-customs-compliance/government-procurement>.

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