

# The Why and How of Buy American: Best Practices for Agencies and Government Contractors

## Introduction

Passed by Congress in 1933, the Buy American Act created a national preference for the government to procure only domestic materials for use in public projects. The Buy American Act is often confused with the similarly named Buy America Act, but they are very different. The Buy America Act was established within Section 165 of the Surface Transportation Assistance Act of 1982 and was created to address growing concerns over the integrity of construction of our nation's highways and bridges. It gives preference to domestically produced materials on anything funded at least in part by the federal government.

This white paper explores the major differences between the two acts, as well as outlines key considerations government agencies and contractors should take into account under the new Administration.

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## Buy American vs. Buy America: What's the Difference?

One of the major differences between Buy American and Buy America is how the act is applied. Buy American applies to the procurement of specified products purchased by the government or when a federal facility is being constructed. Buy America typically only applies to mass-transit projects initiated by state and local governments, such as transit systems, highways, or railways.

Buy American defines goods or products as being domestic when they are 100% manufactured in the United States with at least 50% domestic content, and the act only applies to direct purchases by the federal government, not third parties. Under Buy America, end products must be 100% manufactured in the United States.

Additionally, steel and iron components must be mined, melted, and manufactured in the United States with one exception: foreign-sourced materials may be allowed if they are valued at \$2,500 or 0.1% or less of the contract value, whichever is greater.

Another important difference between the two acts is the waiver process. Under the Buy American Act, waivers can be issued by the president and/or the head of an agency if there is insufficient quantity or quality of a given product, or the materials are not in the public interest. The Department of Defense has created exceptions to the Buy American Act by negotiating memorandum of understandings with foreign governments. Waivers under the Buy America Act are much less common—and much more difficult to navigate. Waivers can be issued on a project-by-project basis or narrow areas of scope such as ferry boat construction.

The penalties for non-compliance, however, are serious for both acts. Penalties include, but are not limited to, contract termination, civil or criminal False Claims Act violations, suspension, or permanent debarment from contracting. In 2016, the Department of Justice obtained more than \$4.7 billion in settlements and judgments from cases under the False Claims Act.

## New Considerations for Buy American Under the Biden Administration

American sourcing requirements received heightened focus under the Trump administration and continue today. The "Buy American Hire American" executive order enacted under former President Trump was designed to review America's free trade agreements and ensure that American companies are treated fairly and equitably.

It also set out to limit the number of waivers that are issued under the Buy American Act.

In January 2021, President Biden signed a similar executive order. The Buy American Act has several ambiguities depending on the material, the amount of the purchase, and what qualifies as “American made.” Biden’s executive order aims to close those loopholes, ensuring companies can no longer offshore production jobs while still qualifying for domestic preferences. It updates how domestic content is defined and measured, as well as increases the threshold requirement. The order also creates a new senior position at the Office of Management and Budget (OMB) responsible for overseeing the waiver process with a goal of reducing the overall number of future waivers that are granted. Additionally, the order:

- Directs agencies to use the Manufacturing Extension Partnership to connect with small- and medium-sized manufacturers who employ American workers
- Requires agencies to report on their adherence to Made in America laws on a bi-annual basis and make recommendations for achieving the President’s goals
- Reiterates the Jones Act mandating that only U.S.-flag vessels carry cargo between U.S. ports
- Strongly encourages agencies to purchase from suppliers that are growing the sectors of the future and treating their workers with dignity and respect

## What Should Government Agencies and Contractors Do to Prepare?

First and foremost, agencies and contractors alike should stay up to date and follow developments of the executive order’s results.

The results may present new opportunities and procurement methods that strengthen our national security and support innovative manufacturing capabilities and technologies.

Akima is proactively addressing this renewed emphasis by evaluating our key suppliers ahead of time, especially those suppliers that provide construction, hardware, and technology hardware and software. Specifically, Akima is marrying this requirement to other regulations that pose a risk by incorporating the Act into our supply chain risk mitigation procedures.

For government acquisition professionals, it is important to clearly define agency requirements during the proposal process. This ensures contractors can flow down subsequent requirements to their subcontractors, as necessary. By flowing requirements down early in the process, agencies give contractors the opportunity to confirm that their acquisition planning allows for proper sourcing and vetting of suppliers’ procurement processes. It also provides potential contingency planning if certain supplies that meet the requirements for the Buy American Act are not available. In that scenario, Akima envisions a collaboration with its customers to fulfill their needs while remaining compliant with the spirit of the Buy American Act.

To learn more about the latest executive order strengthening the provisions in the Buy American Act, visit [www.whitehouse.gov](http://www.whitehouse.gov).

### REFERENCES:

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