

Domestic Preference Requirements Overview

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Domestic Preference Requirements

Presentation outline:

- Purpose and Need
- Office of Ports & Waterways Overview
- Grants and Programmatic Assistance Summary
- Domestic Preference Requirements:
 - Buy America (23 U.S.C. § 313)
 - The Buy American Act (41 U.S.C. Chapter 83)
- Grant Implications

Domestic Preference Requirements

Purpose of this presentation:

Review domestic preference requirements currently in effect for MARAD-administered grant projects.

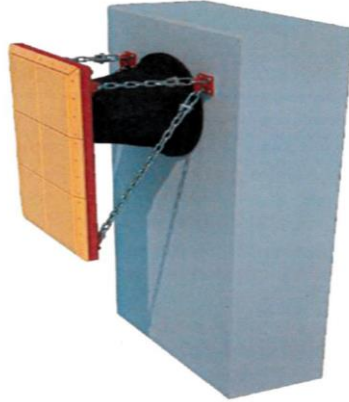
What is domestic preference?

- It is Federal policy to maximize the use of goods, products, and materials produced in the United States.
- Domestic preference requirements include all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal financial assistance, including those that refer to "Buy America" or "Buy American" that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods.

Why is it important?

- Domestic preference requirements promote economic and national security, stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases.
- Domestic preference applies to all MARAD-administered grant projects.

Domestic Preference Requirements – Purpose and Need



MISSION:

Improve the Maritime Transportation System, including ports, connectors and Marine Highways through *investment, integration and innovation* to meet the current and future needs of the Nation.

VISION:

A capable, connected system – water, road and rail – to benefit every American.



Since 2009, USDOT has awarded:

- \$25,000,000 in ARRA grants for three port projects;
- \$1,034,000,000 in TIGER/BUILD grants for 77 port projects;
- \$384,300,000 in FASTLANE/INFRA grants for 14 port projects;
- \$508,000,000 in PIDP grants for 33 port projects; and
- \$40,200,000 in America's Marine Highway grants for 37 projects.

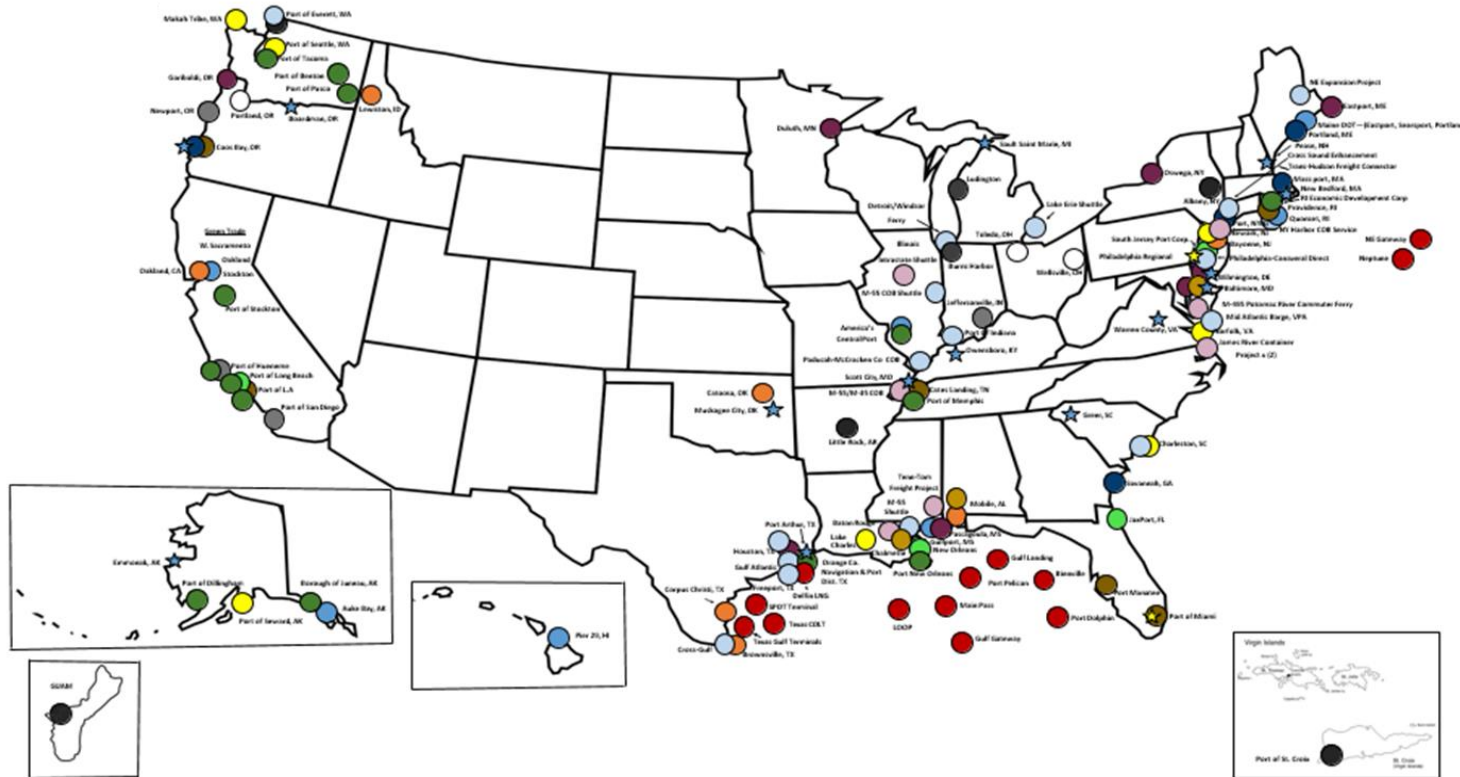
Total USDOT port and port related grants to date:

- \$1,991,500,000 (Federal funding)
- 164 projects

Total program funding (Fed and leveraged non-Fed)

- Approximately \$4.5 billion to date

Grants and Programmatic Assistance Summary



○ ARRA Grants 2009 (3)	● TIGER IV FY 2012 (7)	● TIGER VIII FY 2016 (5)	● DEEP WATER PORTS (13)	★ INFRA FY 17/18 (2)
● TIGER I FY 2009 (7)	● TIGER V FY 2013 (8)	● TIGER VIII FY 2017 (3)	● PORT CONVEYANCE (14)	★ BUILD 2018 (14)
● TIGER II FY 2010 (6)	● TIGER VI FY 2014 (7)	● FASTLANE 2016 (5)	● MH PROJECTS (23)	
● TIGER III FY 2011 (4)	● TIGER VII FY 2015 (4)	● FASTLANE II 2017 (2)	● MH GRANTS (12)	

Map only through 2018. Since 2018, an additional \$817 million for 68 port projects has been awarded.

What are the domestic preference requirements applicable to MARAD-administered grant projects?

Buy America

- 23 U.S.C. § 313 (FHWA's Buy America Statute)
- Implementing regulations at 23 C.F.R. § 635.410
- Applied to FASTLANE/INFRA grants and other Federal-aid highway projects

Buy American Act

- 41 U.S.C. Chapter 83 (The Buy American Act)
- Implemented by MARAD through the terms of each grant agreement
- Applied to MARAD-administered TIGER/BUILD, PIDP, and AMHP grants

Buy America Requirements

23 U.S.C. § 313 and 23 C.F.R. § 635.410 (commenced in 1982)

- Federal Highway Administration's (FHWA) Buy America statute and implementing regulations apply to all FASTLANE and INFRA grant projects that MARAD administers under the provisions of the FAST Act.
- Buy America requires domestic manufacture of all steel and iron (from initial melting to protective coatings) that will remain ***permanently incorporated*** into the project.
- There's a nationwide waiver of the application of Buy America requirements to *manufactured products* that do not contain steel or iron components.
- The Buy America statute and regulations require that the entire manufacturing process of all steel and iron permanently incorporated into a Federal-aid highway project (including Fastlane and INFRA projects) must take place in the United States.

The Buy American Act Requirements

41 U.S.C. Chapter 83

- The Buy American Act of 1933 applies to the other grant programs administered by MARAD (PIDP, TIGER/BUILD, AMHP).
- MARAD applies specific Buy American requirements as a condition of grant funding in each of its grant agreements.
- ***Grant agreements are not government procurement contracts***, so the FAR Part 25 (foreign acquisition and availability) and the Free Trade Agreement exceptions are inapplicable to MARAD grant projects, except where otherwise referred to in the terms of the grant agreement.
- Essentially, the Buy American Act is intended to maximize the use of goods, products, materials, and manufactured products produced in the United States (not just iron and steel).
- The Buy American Act applies to all materials, including steel, iron, and manufactured products, used or purchased in MARAD-administered Federal grant projects (excluding FASTLANE/INFRA projects).

Public Work

“The terms "public building", "public use", and "public work" mean a public building of, use by, and a public work of, the **Federal Government**, the District of Columbia, Puerto Rico, American Samoa, and the Virgin Islands.

Federal Financial Assistance

Assistance that non-Federal entities receive or administer in the form of: **grants**; cooperative agreements; non-cash contributions or donations of property (including donated surplus property); direct appropriations; food commodities; and other financial assistance. Federal financial assistance also includes assistance that non-Federal entities receive or administer in the form of: loans; loan guarantees; interest subsidies; and insurance.

Infrastructure Project

A project to develop public or private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; **ports**, including navigational channels; water resources projects; energy production, generation, and storage, including from fossil-fuels, renewable, nuclear, and hydroelectric sources; electricity transmission; gas, oil, and propane storage and transmission; electric, oil, natural gas, and propane distribution systems; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; cybersecurity; and any other sector designated through a notice published in the Federal Register by the Federal Permitting Improvement Steering Council

Executive Orders and ARRA

- Executive Order # 10582 – Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act (1954)
- Executive Order #13788 – Buy American and Hire American (2017)
- Executive Order #13858 – Strengthening Buy-American Preferences for Infrastructure Projects (2019)
- Executive Order #13881 – Maximizing Use of American-Made Goods, Products, and Materials (2019)
- American Recovery and Reinvestment Act (2009)

Exceptions to MARAD's Buy American Requirements

▪ Recipients shall not use foreign materials, unless:

- The item is a COTS item manufactured in the U.S.;
- the contract is below the micropurchase threshold (currently \$10,000);
- the item is listed at 48 C.F.R. 25.104; or
- MARAD has authorized one of the following exceptions:
 - Applying the Buy American requirements to the material would be impracticable or inconsistent with the public interest;
 - the material is not mined, produced, or manufactured in the US in sufficient and reasonably available commercial quantities of a satisfactory quality; or
 - the cost of the domestic material is unreasonable.
- Exception determinations are fact-based, and MARAD requires that a Recipient provide detailed information about the materials, manufacturers, and the Recipient's due diligence to comply with the Buy American Act when submitting exception requests.
- Exceptions may require Secretary approval and are generally authorized only in rare circumstances.

Commercial Off the Shelf (COTS) Items

MARAD allows for an exception for COTS items that are **manufactured in the US** in its grant agreements, based on the provisions in the FAR Part 25. COTS means:

- (1) Any item of supply (including construction material) that is—
 - (i) A commercial item as defined by 48 C.F.R. § 2.101;
 - (ii) Sold in substantial quantities in the commercial marketplace; and
 - (iii) Offered to the Government, under an agreement, without modification, in the same form in which it is sold in the commercial marketplace; and

- (2) Does not include bulk cargo, as defined in 46 U.S.C. § 40102(4), such as agricultural products and petroleum products.

The important consideration with COTS products is that the final manufacture of the item must take place in the United States. The item may contain foreign sourced components, but the finished product must be manufactured in the United States.

As a condition of receiving funding under a MARAD-administered grant (TIGER/BUILD, AMH, PIDP), a recipient agrees to comply with the Buy American Act requirements contained in the applicable grant agreement.

- **The Recipient agrees that all materials used in a project be mined or produced in the US substantially all from domestic materials. A domestic material means:**
 - An unmanufactured material mined or produced in the US;
 - A material manufactured in the US if:
 - The cost of its components mined, produced, or manufactured in the US exceeds 50% of the cost of all its components; and
 - The material is a COTS item.

Note: Grant agreements are not Government procurement contracts, so the FAR Part 25 (foreign acquisition and availability) and the Free Trade Agreement exceptions are inapplicable to MARAD grant projects, except where otherwise cited to in the terms of the grant agreement.

Buy American Requirements.

- (a) The Recipient shall apply, comply with, and implement all provisions of the Buy American Act, 41 U.S.C. §§ 8301-8305. The project is a public work of the Federal Government under 41 U.S.C. § 8301.
- (b) This section 11.2 implements 41 U.S.C. §§ 8301-8305, the Buy American Act, by providing a preference for domestic construction material. The Recipient shall not use foreign construction materials in performing this agreement, except that:
 - (1) the Recipient may use a commercially available off-the-shelf item under 41 U.S.C. § 1907 regardless of its components if the item is manufactured in the U.S.;
 - (2) the Recipient may use information technology that is a commercial item;
 - (3) the Recipient may use foreign construction materials that are listed at 48 C.F.R. 25.104; and
 - (4) the Recipient may use foreign construction materials if the USDOT has authorized their use under section 11.2(d).
- (c) If the Recipient uses foreign construction material in violation of section 11.2(b), the USDOT may disallow and deny reimbursement of costs incurred by the Recipient and take other remedial actions under section 8.1 and 2 C.F.R. 200.338.
- (d) The USDOT may authorize the Recipient to use foreign construction material, by modifying this agreement under section 6.1, if the USDOT determines that:
 - (1) applying the Buy American statute to the construction material would be impracticable or inconsistent with the public interest;
 - (2) the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or
 - (3) the cost of domestic construction material is unreasonable.

The cost of a domestic construction material is unreasonable under section 11.2(d)(3) if the cost of that material exceeds the cost of comparable foreign material by more than 6 percent.
- (e) The Recipient may request that the USDOT authorize the Recipient to use foreign construction material under section 11.2(d). If the Recipient makes a request under this section 11.2(e), the Recipient shall provide adequate information for the USDOT to evaluate the request, including:
 - (1) a description of the foreign and domestic construction materials;

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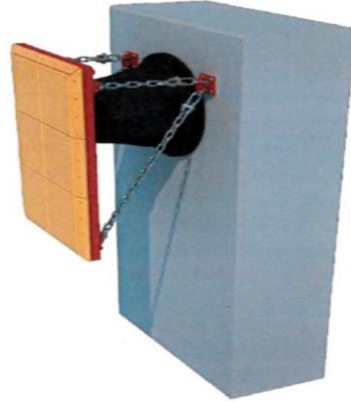
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- (1) a description of the foreign and domestic construction materials;
 - (2) unit of measure;
 - (3) quantity;
 - (4) price, including all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued);
 - (5) time of delivery or availability;
 - (6) location of the construction project;
 - (7) name and address of the proposed supplier; and
 - (8) a detailed justification of the reason for use of foreign construction materials identifying the specific basis for an exception under section 11.2(d);
 - (9) if the Recipient requests authorization under section 11.2(d)(3), a reasonable survey of the market and a full price comparison measuring the relative costs of the available domestic and foreign construction materials; and
 - (10) if the Recipient submits the request after contract award, an explanation why the Recipient could not have, before contract award: (A) reasonably foreseen the need for the determination and (B) requested the determination.

- (f) The Recipient acknowledges that (1) this agreement is not a Government procurement contract; (2) acquisitions of supplies, services, or construction materials by the Recipient under this agreement are not acquisitions by the Government; and (3) the Free Trade Agreement exceptions to the Buy American Act as provided by 48 C.F.R. Part 25, Subpart 25.4 are inapplicable to this agreement.

MARAD agreements also provide specific definitions of terms that are crucial to the administration of the Buy American Act. They include:

- **Commercial off-the-shelf item**
- **Construction material**
- **Cost of components**
- **Domestic construction material**
- **Foreign construction material**
- **United States**

Domestic Preference Requirements – Project Implications



**Thank you for participating in today's
listening session!**

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