



# Buying American: Domestic Preference Restrictions under Federal Grant and Loan Programs

The slides and a recording of the event will be made available to you shortly after the webinar.

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## Introduction

- Renewed Focus on Buy National Restrictions
  - Globalized Supply Chain
  - Recovery Act Impact
- Different Regimes – Common Questions – Different Answers
  - What is the product?
  - Are services covered?
  - How is “origin” determined?
  - Is there a definition of “manufacture”?
  - Statutory requirements and waivers?

## The Landscape of Domestic Preference Regimes

	Federal Procurement	Federal/State/Local Projects Funded by Grants or Loans
Buy American Act	Yes	No
Trade Agreements Act	Yes	No
ARRA	Yes	Yes
DOT (FTA, FAA, FHWA)	Yes	Yes
Foreign Military Financing	No	Yes
USAID	No	Yes
Export-Import Bank	No	Yes

## American Recovery and Reinvestment Act of 2009

- Statutory restriction at ARRA Section 1605
  - All of the iron, steel, and manufactured goods used in the project must be produced in the United States
- OMB Guidance at 2 CFR Part 176
- Key Points:
  - ✓ No component test
  - ✓ Evaluate origin of “manufactured good,” not “construction material”
  - ✓ International agreements: threshold issue of whether the contracting entity is subject to any agreements
  - ✓ Agency specific interpretations (EPA, DOE, etc.)

## Department of Transportation

- Special restrictions attach to Federal funds to states for mass transit and highway projects
  - Federal Aviation Administration
  - Federal Highway Administration
  - Federal Railroad Administration High Speed Rail Program
  - Amtrak
  - Federal Transit Administration
- Restrictions apply even where project is partially or wholly funded by ARRA

## FTA Buy America

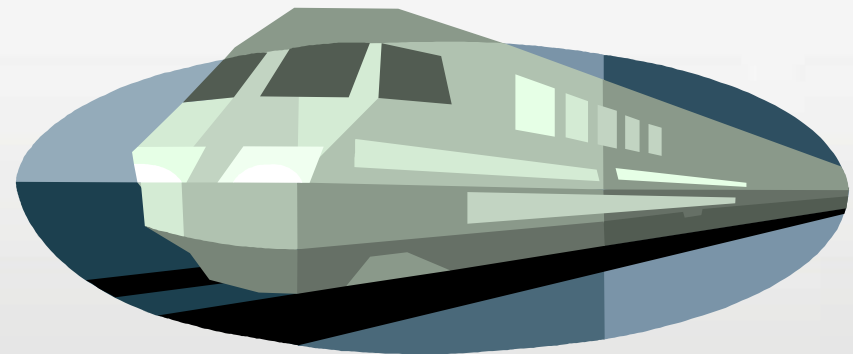
- By statute, funds may only be used on projects where the steel, iron, and manufactured goods are produced in the United States
  - 49 U.S.C. § 5323(j), 49 CFR Part 661
  
- Key Points
  - ✓ FTA generally treats the construction project as the “manufactured good” and the main elements to be incorporated as “components”
  - ✓ Non-shift test
  - ✓ Rolling stock

## FAA Buy American Requirements

- For projects funded by Airport Improvement Program or ARRA, FAA applies its own Buy American restriction
  - All products must be “wholly produced in the U.S. of U.S. materials”
  - 49 U.S.C. § 50101
  
- Key Points:
  - ✓ Standing waiver where 60% or more of the components and subcomponents in a facility or equipment are of U.S. origin and final assembly in U.S.

## Other DOT Domestic Preference Regimes

- Federal Highway Administration, 23 U.S.C. § 313, 23 CFR § 635.410
- Federal Railroad Administration High Speed Rail Program, 49 U.S.C. Chapters 244, 246, § 24405
- Amtrak, 49 U.S.C. § 24305





## Export-Import Bank of the United States

- Eligibility criteria
  - Available on website ([www.exim.gov](http://www.exim.gov))
  - Legislation to require ExIm to establish firm domestic content guidelines
- Key Points:
  - ✓ Shipment from US
  - ✓ Short-term programs: product must have more than 50% U.S. content based on direct costs; 100% financing
  - ✓ Medium and long-term exports: finance the lesser of 85% of value of eligible goods and services or 100% of U.S. content; support for up to 30% of contract price for local (foreign) goods or services)
  - ✓ Less restrictive for small businesses

## Foreign Military Financing Program - DCCs

- DoD Policy – *no* regulations
  - DSCA Guidelines & Certification
  - *But* 22 USC §2791(c)
- Key Policies:
  - ✓ Finance only US content
  - ✓ Must Disclose *all* non-US content
  - ✓ No non-US services
- Key Exceptions:
  - ✓ COTS
  - ✓ Prior Purchase of by USG

## USAID Programs

- General requirement to procure from US, recipient country or developing countries. 22 USC § 2354
  - Implemented by Source, Origin & Nationality rules in 22 CFR Part 228
- Key Points:
  - ✓ Source & Origin of commodity
  - ✓ Nationality of supplier
  - ✓ Local procurement
  - ✓ Waivers

## Compliance and Enforcement

- Navigating the different regimes remains a challenge, given their complexity and differences, and the commercial global-sourcing pressure on contractors and subcontractors



## Enforcement Mechanisms

- Civil/Criminal False Claims Act
- Suspension/Debarment
- Termination and Reprocurement
- Replacement
- Reimbursement of Cost
- Negative Past Performance
- Bid Protests

## Recent Enforcement Actions

- City of Burlington – K Turbo USA (ARRA)
- Charlotte Area Transit System (FTA)
- City of Houston (ARRA/FTA)
- City of Pittsburgh (ARRA)
- Elkton, Maryland Housing Authority (ARRA)

## Prospective Compliance

- Internal Certification Processes
  - Certifications directly to public entities
  - Certifications to higher tiers
  - Standardization
  - Understanding legal requirements
- Flow down to suppliers, vendors and subcontractors
  - Standardization
  - Indemnity
  - Process for review/resolution

## Retroactive Compliance

- Mandatory Disclosure
  - Federal contracts/subcontracts
  - Many federal grant programs (including ARRA)
- Review of Recent Projects



## Questions?

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