

## **Proposed Nonavailability Waiver of Buy American Act requirements: Port of Corpus Christi Authority to Purchase Marine Loading Arms**

**Action:** Notice, request for comments.

**Web posting date:** January 7, 2025

**Close of public comment period: 15 days following the web posting date.**

### **Summary**

The Maritime Administration (“MARAD”) is seeking comments on whether to grant a limited waiver of the Buy American Act requirements under 41 U.S.C. chapter 83 for non-domestic marine loading arms for the Port of Corpus Christi Authority of Neuces County, Texas’s (PCCA) Avery Point Public Oil Docks Redevelopment—Phase 1: Expanding Oil Dock 3 project, which received funding under the FY 2019 Port Infrastructure Development Program (PIDP). The Buy American Act requires that manufactured articles, materials, or supplies be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. The proposed waiver would apply only to the procurement of eight non-domestic 8-inch diameter manually operated marine loading arms (NAICS 488320) based on nonavailability, as identified by the manufacturer responses received by PCCA, and, therefore, would not apply to any other items procured under this project.

### **Supplementary Information**

#### **I. Project History and Background**

On June 18, 2019, MARAD published a Notice of Funding Opportunity announcing application requirements and establishing selection criteria to obtain grant funding under the FY 2019 PIDP. The FY 2019 round of PIDP provided Federal funding to make grants to improve port facilities at coastal seaports.

On February 5, 2020, MARAD selected PCCA to receive a FY 2019 PIDP grant in the amount of \$17,600,000 for its Avery Point Public Oil Docks Redevelopment—Phase 1: Expanding Oil Dock 3 project. The project will double the capacity at Dock 3 at Avery Point, enabling PCCA to meet growing demand for berth space to support exports of refined petroleum products. The project includes refurbishment of the existing docks and construction of a second dock and related infrastructure to accommodate barges discharging and loading cargo.

To handle the increased demand at Dock 3, not only is a physical geospatial expansion needed, but ancillary material handling means are also necessary. Marine loading arms are comprised of a riser, baseplate, an inboard arm pivotally mounted to the riser, an outboard arm pivotally mounted to the inboard arm, and a triple swivel connection pivotally mounted to the outboard arm. They are used to connect a tankship or barge to a cargo terminal to safely and efficiently load and unload liquid or gaseous products from barges and tankers.

## II. MARAD's Domestic Content Requirements and Policy

MARAD does not have its own modal-specific Buy America authority that applies to PIDP grants. Instead, consistent with the Congressional directive in the Consolidated Appropriations Act, 2019,<sup>1</sup> MARAD applied the domestic content requirements of the Buy American Act, 41 U.S.C. chapter 83, to grants awarded under the FY 2019 PIDP. As a result, FY 2019 PIDP recipients must purchase domestic products and materials when using those appropriated Federal dollars.

MARAD implemented the Buy American Act requirements by contract in each FY 2019 PIDP grant agreement executed. In PCCA's agreement, these requirements were included in section 18.2 of the general terms and conditions of the grant, located at [https://www.maritime.dot.gov/sites/marad.dot.gov/files/2021-06/FINAL.FY2019%20PIDP%20Grant%20Agreement%20template%20general%20terms%20and%20conditions.rev\\_6.23.21.docx.pdf](https://www.maritime.dot.gov/sites/marad.dot.gov/files/2021-06/FINAL.FY2019%20PIDP%20Grant%20Agreement%20template%20general%20terms%20and%20conditions.rev_6.23.21.docx.pdf). MARAD executed a grant agreement with PCCA on March 30, 2022. MARAD considers FY 2019 PIDP projects as public works of the Federal Government under 41 U.S.C. 8301.<sup>2</sup>

The Buy American Act requires that manufactured articles, materials, or supplies be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. Pursuant to 41 U.S.C. chapter 83, manufactured articles, materials, and supplies *of iron and steel* are deemed manufactured in the United States only if all manufacturing processes involved in the production of such iron and steel, from the initial melting stage through the application of coatings, occurs in the United States. *See* 41 U.S.C. 8303.

MARAD strictly enforces compliance with its domestic content requirements to ensure that MARAD-funded projects maximize the use of materials produced in the United States. MARAD expects grantees to work with suppliers to conduct thorough market research and adequately consider, where appropriate, qualifying alternate items, products, or materials. Compliance with MARAD's domestic content requirements supports industry and well-paying jobs.

## III. MARAD's Authority to Waive Domestic Content Requirements

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<sup>1</sup> *See* section 410 of the Consolidated Appropriations Act, 2019: "No funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 8301-8305, popularly known as the "Buy American Act")." Although the Buy American Act normally governs acquisitions made directly by the Federal government, through this provision Congress extended the requirements of the Buy American Act to recipients of Federal assistance using appropriated funds under DOT programs.

<sup>2</sup> Infrastructure projects funded under PIDP in more recent years would be subject to the domestic preference requirements of the Build America, Buy America Act (BABA) (Pub. L. 117-58, title XI, subtitle A, sections 70901-70927). However, as the grant agreement for the PCCA project was executed prior to the May 14, 2022 effective date of BABA, only the Buy American Act requirements would apply.

There are limited circumstances in which MARAD can waive the domestic content requirements applied to its financial assistance programs. MARAD will grant a waiver request that is consistent with the statutory criteria for a waiver and where a grantee has adequately justified the need for a waiver.

Under 41 U.S.C. 8303, MARAD may consider a waiver of the Buy American Act requirements if MARAD determines that applying the requirements (1) would be impracticable or inconsistent with the public interest; (2) the item 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 the item is unreasonable.<sup>3</sup>

If MARAD determines a waiver is appropriate, MARAD will provide notice and seek comment from the public. Unless otherwise specified, waiver decisions are non-precedential and are only applicable to the entities and components for the specific project identified in the final decision.

#### IV. PCCA's Request for Waiver

PCCA submitted the Buy American Act waiver request to MARAD on January 23, 2024, after completing a public search for domestic marine loading arms. On August 10, 2023, PCCA released a request for Competitive Sealed Proposals (CSP) for Dock 3 design, fabrication, and delivery of marine loading arms. PCCA received three proposals in response to the CSP request from Emco Wheaton Loading Systems (Emco Wheaton); Kanon Loading Equipment (Kanon); and Technip Energies USA, Inc. (Technip). All responders were advised of the Buy American Act requirements and were asked follow-up questions. None of the responders indicated that they could provide a fully Buy American-compliant marine loading arm.

In its request for a waiver, based on the results of the CSP, PCCA concluded that they believe a waiver is justified because there are no domestically manufactured marine loading arms that comply with the Buy American Act requirements. Detailed information on PCCA's search for Buy American-compliant marine loading arms is documented in the attached waiver request letter.

In the absence of a waiver, the project could not be delivered as intended since there are no domestic manufacturers of marine loading arms that can make a Buy American Act-compliant product.

#### V. Proposed Waiver

Based on its review of the waiver request and PCCA's efforts in sourcing a domestic item, MARAD has preliminarily determined that the marine loading arms that meet PCCA's technical specifications are not produced in the United States in a sufficient and reasonably available

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<sup>3</sup> Per the terms of PCCA's grant, the cost of a domestic construction material is considered unreasonable if the cost of that material exceeds the cost of comparable foreign material by more than 6 percent. This percentage was based on the similar percentage outlined in the Buy American Act implementing regulations (FAR subpart 25) in effect at the time PCCA's grant was executed.

amount or satisfactory quality, consistent with 41 U.S.C. 8303. MARAD thus proposes to waive the Buy American Act requirements for the following items under this project:

- 8-inch diameter manually operated marine loading arms

The proposed waiver would apply only to the items listed above for use in PCCA's project, as described in the grant agreement between MARAD and PCCA. The proposed waiver would not apply to other MARAD grantees or to other grants that might be made to PCCA for other projects (including future phases related to the FY 2019 project). The proposed waiver would expire upon the end of the period of performance of the grant agreement for the project, estimated to be August 31, 2030.

## VI. Request for Comment

MARAD will consider all comments received in the initial 15-day comment period during our evaluation of the waiver request. Comments received after this period, but before notice of our finding is published in the Federal Register, will be considered to the extent practicable.

Comments can be submitted via email at [pidpgrants@dot.gov](mailto:pidpgrants@dot.gov) or by mail with attention to:

Wade Morefield  
Transportation Industry Analyst  
Office of Port Infrastructure Development  
U.S. Maritime Administration  
1200 New Jersey Ave., SE  
Washington, DC 20590

The proposed waiver will also be posted to the Made in America website.

**MARAD Contacts:** For questions about this notice:

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(202) 366-6025

## Public Participation

*How do I prepare and submit comments?*

To ensure that your comments are correctly filed, please include the title of this document in your comments. If you are submitting comments electronically as a PDF (Adobe) File, MARAD asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing MARAD to search and copy certain portions of your submissions. Please note that pursuant to the Data Quality Act, for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines.

*How do I submit confidential business information?*

Confidential business information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. MARAD will treat such marked submissions as confidential under the FOIA, and they will be exempt from release. In addition, we recommend that you submit at least a summary of the information that is otherwise considered CBI and from which you have deleted any claimed CBI. Any comments MARAD receives which are not specifically designated as CBI will be available to the public.

*Will the agency consider late comments?*

We will consider all comments received before the close of business on the comment closing date. To the extent possible, we will also consider comments received after that date.

*How can I read the comments submitted by other people?*

MARAD may make the comments it receives publicly available by posting them to its website after the comment closing date. Privacy Act Anyone can request the comments received under a Freedom of Information Act request. For information on DOT’s Privacy Program and compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.