

## **DEPARTMENT OF COMMERCE**

### **National Telecommunications and Information Administration**

#### **General Applicability Public Interest Waiver of the Buy America Domestic Content Procurement Preference for Certain Recipients of Tribal Broadband Connectivity Program Infrastructure Deployment Awards**

**ACTION:** Notice; Request for Comments

**SUMMARY:** Congress passed the Build America, Buy America Act (BABA or Act), which includes strong and permanent domestic sourcing requirements across all federal financial assistance programs. The Department of Commerce (Department), in keeping with our mission to create the conditions for economic growth and opportunity for all communities, is ready to help lead on this important mission to help catalyze domestic manufacturing, resilient supply chains, and job growth. The Department is eager to help grow America's domestic production capacity and will comply with BABA's requirements as much as possible while balancing equity, practicality, and implementation costs. The transition for some existing programs or hard to produce products may take time, so flexibility will be important as we implement the provisions of BABA.

In accordance with BABA requirements, the National Telecommunications and Information Administration (NTIA) is proposing to issue a limited general applicability public interest waiver of the Buy America Domestic Content Procurement Preference (Buy America Preference) for certain recipients of Tribal Broadband Connectivity Program (TBCP) broadband infrastructure deployment awards. The proposed waiver would be narrowly tailored in that it would be limited to those recipients that submitted applications for TBCP funding by the September 1, 2021 application deadline established in the June 3, 2021 TBCP Notice of Funding Opportunity (NOFO). Both the NOFO publication date and the funding application deadline occurred prior

to BABA's enactment on November 15, 2021. Pursuant to the BABA, NTIA has found that this proposed waiver would be in the public interest as it would enable NTIA to treat the affected TBCP recipients in a consistent and equitable manner, which would not be possible without the waiver. NTIA made broadband infrastructure deployment awards to several TBCP recipients prior to the May 14, 2022 effective date of the Buy America Preference. However, most TBCP broadband infrastructure deployment award recipients will receive grant awards after the May 14, 2022 effective date. In the absence of a waiver, NTIA would be compelled to treat these two groups of TBCP recipients in a disparate manner that would raise significant equity concerns. Because the application submission deadline for these TBCP recipients occurred before the enactment of BABA, these recipients had no notice of its future enactment when they submitted their applications. The imposition of the Buy America Preference would therefore create significant administrative burdens for these TBCP recipients, due to the need to revise budgets and other plans prepared without knowledge of the BABA requirements. The proposed waiver would also be in the public interest because it would provide NTIA with the opportunity to consult with Tribal governments regarding the application of the Buy America Preference to the TBCP before issuing a second NOFO, which NTIA anticipates releasing in the fall of 2022. Such consultation would be consistent with both Executive Order 13175, Consultation and Coordination with Indian Tribal Governments and the Tribal Consultation and Coordination Policy of the U.S. Department of Commerce (Commerce Department). NTIA hereby seeks public comment on the proposed limited general applicability public interest waiver for TBCP recipients as discussed in this Notice.

**DATES:** Submit comments on or before 11:59 p.m. ET on July 27, 2022. This limited general applicability public interest waiver is effective as of July 27, 2022, unless, after reviewing

comments, NTIA publishes a subsequent notice explaining any changes to its decision to issue the waiver.

**ADDRESSES:** Please submit comments to [tbcp@ntia.gov](mailto:tbcp@ntia.gov). Note: All submissions received, including any personal information therein, will be posted without change or alteration. Do not submit Confidential Business Information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Jennifer Duane, Director, Grants Management, Administration, and Compliance, Office of Internet Connectivity and Growth, National Telecommunication and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4887, Washington, DC 20230, via telephone at (202) 482-2048 or by email at [jduane@ntia.gov](mailto:jduane@ntia.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Many Native American, Alaska Native, and Native Hawaiian communities have insufficient access to broadband internet and the educational and economic opportunities that it offers. The Biden-Harris Administration is committed to expanding broadband internet access for these communities, as part of its efforts to ensure the availability of broadband internet service for all Americans. These efforts include the TBCP, which authorizes grants to eligible Native American, Alaska Native, and Native Hawaiian entities for broadband infrastructure deployment, digital inclusion, workforce development, telehealth, and distance learning. The TBCP received \$1 billion in appropriated funding pursuant to the Consolidated Appropriations Act, 2021, Public Law 116-260, 134 Stat. 1182. The Infrastructure Investment and Jobs Act, Public Law 117-58, 135 Stat. 429, appropriated an additional \$2 billion in funding for grants under the TBCP and allowed TBCP recipients up to four years to expend the grants funds awarded under this

program. The NTIA is the Executive Branch agency that is principally responsible by law for advising the President on telecommunications and information policy issues. NTIA is the administrator of the TBCP. The NTIA does not expect to receive future appropriations for this program.

On June 3, 2021, NTIA published a NOFO on Grants.gov to describe the requirements under which it will award grants for the TBCP. Because the NOFO was released more than five months before the enactment of the BABA, it did not provide notice or other information about the Buy America Preference. The application window for the TBCP closed on September 1, 2021, which too was prior to the enactment of the BABA. Accordingly, the applications received by NTIA did not take into account the impacts of the Buy America Preference relative to project timelines and project budgets. NTIA received 301 TBCP applications. NTIA continues to evaluate these applications and to issue grant awards on a rolling basis.

On November 15, 2021, the Infrastructure Investment and Jobs Act was enacted, which includes the BABA. Section 70914(a) of the Act requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”

Since the enactment of the BABA, the Department, including NTIA, has worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the BABA, the Department has produced a report that identifies and evaluates each of its federal financial assistance programs with potentially eligible uses of funds that include infrastructure as defined by the BABA to determine which programs would be in compliance with the Buy

America Preference and which would be considered inconsistent with Section 70914 of the BABA and thus “deficient” as defined by Section 70913(c) of the BABA. The Department submitted this report to Congress and the Office of Management and Budget and also published it in the Federal Register within 60 days of the enactment of the BABA, on January 21, 2022. Specifically, the Department published the required report in a notice entitled “Department of Commerce’s Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act.”

## **II. Equitable and Consistent Treatment of All TBCP Award Recipients, Increasing Flexibility for Tribal Waivers, and Tribal Consultation Regarding the Buy America Preference**

NTIA seeks the proposed waiver as part of its effort to ensure the equitable and consistent treatment of those TBCP recipients that submitted their funding applications before the enactment of the BABA. The proposed waiver would be narrowly tailored, as it would only apply to TBCP recipients that submitted funding applications by the September 1, 2021 deadline established by the June 3, 2021 TBCP NOFO. The waiver would not apply to recipients of any TBCP awards granted pursuant to a potential second NOFO, which NTIA anticipates releasing in the fall of 2022.

NTIA made broadband infrastructure deployment grant awards to several TBCP award recipients prior to the May 14, 2022, effective date of the Buy America Preference. These awards are not subject to the Buy America Preference. However, a significant number of TBCP broadband infrastructure deployment award recipients that submitted funding applications before the enactment of the BABA will receive grant awards after May 14, 2022.

Without a waiver, the recipients of these awards would be subject to the Buy America Preference, resulting in their awards being treated in a substantially disparate manner versus recipients that received awards prior to May 14, 2022. This disparity would result solely from the date that TBCP awards are processed by NTIA and not because of substantive differences across the portfolio of TBCP broadband infrastructure deployment awards.

This disparate treatment of otherwise similarly situated award recipients raises important equity considerations. In particular, recipients subject to the Buy America Preference might face significantly higher administrative burdens in complying with BABA than would recipients of awards made before May 14, 2022. These administrative burdens would result from the need to revise project budgets and other plans prepared without any notice that a requirement like the Buy America Preference would apply to TBCP awards. As noted above, the NOFO publication date and the TBCP application submission deadline were both prior to the enactment of the BABA.

Importantly, the proposed general applicability public interest waiver would be consistent with established Executive Branch policy regarding consultation and coordination with Indian Tribal governments in the development of Federal policies that have Tribal implications. Section 6 of Executive Order 13175 specifically concerns increasing flexibility for Indian Tribal waivers. It directs federal agencies to streamline the processes through which Indian Tribes apply for waivers of statutory and regulatory requirements. It further directs federal agencies to consider waiver requests from Tribal governments “with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian [T]ribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.” A waiver of the Buy America Preference for TBCP award recipients would be consistent with

and further the intent underlying Executive Order 13175 as such a waiver would constitute the use of a flexible policy approach to advance the objective of making broadband internet service more readily available for Native communities.

The proposed waiver would also provide NTIA with the time necessary to consult with Tribal governments about the application of the Buy America Preference to any TBCP awards granted pursuant to a potential second TBCP NOFO. As noted previously, NTIA anticipates publishing a second TBCP NOFO in the fall of 2022. Consultation with Tribal governments on how the Buy America Preference should affect the preparation of a second TBCP NOFO would conform to the provisions of both Executive Order 13175 and the Tribal Consultation Policy of the Commerce Department (<https://www.commerce.gov/sites/default/files/media/files/2013/tribal-consultation-final.pdf>). Section 7 of the Tribal Consultation Policy of the Commerce Department states that the Commerce Department and its operating units, such as NTIA, “will engage in meaningful dialogue with Tribes regarding all policies that have [T]ribal implications.” It further states that the Commerce Department and its operating units “will notify Tribes of policies that have [T]ribal implications.” Pursuant to the Tribal Consultation Policy, NTIA held three consultation sessions with Tribal leaders in February of 2021 concerning the TBCP. These consultation sessions considered such topics as program eligibility standards, reporting requirements, and the equitable distribution of TBCP funds. NTIA relied on the comments and other guidance obtained from Tribal leaders in these consultation sessions when preparing the June 3, 2021 NOFO. Because the BABA was not enacted until November 15, 2021, it was not possible for NTIA to provide Tribal leaders with any notice of its future enactment during these consultation sessions. The grant of the proposed waiver would enable NTIA to engage in additional Tribal consultations, specifically regarding how the Buy America

Preference would affect the TBCP awards. NTIA would then be able to incorporate the results of these consultations into its preparation of a second TBCP NOFO. This would be consistent with the intent of Executive Order 13175 and of the Tribal Consultation Policy of the Commerce Department.

The Infrastructure Investment and Jobs Act and the Buy America Preference provide a unique opportunity to create domestic manufacturing jobs, strengthen critical supply chains, and help lower costs. Waivers of the Buy America Preference may sometimes be necessary to meet ambitious goals and timelines, such as those associated with the efforts of the Biden-Harris Administration to ensure the availability of broadband service for all Americans, including Native communities. Federal agencies use such waivers as a tool to promote domestic investment and to prepare American workers and businesses for global competition and leadership. When evaluating the proposed waiver, NTIA carefully considered the benefits of the Buy America Preference. NTIA also examined such factors as the equitable treatment of TBCP recipients and the importance of Tribal consultation. NTIA has determined that a narrowly tailored waiver of the Buy America Preference, restricted to only those TBCP recipients that submitted funding applications by the September 1, 2021 deadline established by the June 3, 2021 TBCP NOFO, would provide an appropriate means to balance the benefits offered by the Buy America Preference to promote domestic manufacturing with the interests of TBCP recipients in receiving equitable and consistent treatment in the implementation of their TBCP awards.

The proposed waiver would enable NTIA to administer the TBCP program in a consistent and equitable manner for the affected award recipients. Moreover, the proposed waiver would enable NTIA to fulfill its responsibilities under Executive Order 13175 to provide increased



flexibility for waivers involving Federal policies with Tribal implications. In this connection, the proposed waiver would be consistent with M-22-11. It provides at page 10 that “a waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act....”

Additionally, M-22-11 provides that a Federal agency may wish to consider issuing a limited number of general applicability public interest waivers to promote efficiency and to ease burdens for recipients. Given these considerations, NTIA proposes the grant of a limited general applicability public interest waiver of the Buy America Preference for recipients of TBCP broadband infrastructure deployment awards that submitted their applications by the September 1, 2021 deadline established by the June 3, 2021 NOFO and received awards after May 14, 2022.

### **III. Assessment of Cost Advantage of a Foreign-Sourced Product**

Office of Management and Budget Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, published on April 18, 2022 (M-22-11), states on page 12 that agencies are expected to assess, when it is appropriate to do so, “whether a significant portion of any cost advantage of a foreign-sourced product is the result of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” before granting a public interest waiver. NTIA’s analysis has concluded that this assessment is not applicable to this proposed waiver because it is not based in the cost of foreign-sourced products.

### **IV. Request for Comments and Instructions for Commenters:**

As required under Section 70914(c) of the Act, NTIA seeks public comments on its proposal to grant a limited general applicability public interest waiver of the Buy America Preference of the Act for certain recipients of TBCP broadband infrastructure awards. NTIA has determined that

the issuance of such a waiver would allow the Agency to treat TBCP award recipients in a more consistent and equitable manner than would otherwise be possible without a waiver. The issuance of a waiver would also facilitate the intent of Executive Order 13175 relative to increasing flexibility for Indian Tribal waivers. In addition, it would provide NTIA with the time necessary to consult with Tribal governments regarding the Buy America Preference and a potential second TBCP NOFO. NTIA invites comment on its proposed limited general applicability public interest waiver for certain recipients of TBCP broadband infrastructure deployment awards, as well with respect to any other issue or concern presented by this Notice. Comments that contain references to studies, research, and other empirical data that are not widely available should include copies of the referenced materials along with the submitted comments. Organizational commenters may wish to identify a point of contact for the comments, which will facilitate Agency follow up for clarifications as necessary. Commenters are advised not to incorporate information that concerns business trade secrets or other confidential commercial or financial information as part of the comment. Please do not include any information you would not like to be made publicly available.

#### *Paperwork Reduction Act*

This notice does not contain collection-of-information requirements subject to the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.). Notwithstanding any other provisions of law, no person is required to, nor shall a person be subject to penalty for failure to comply with, a collection of information subject to the requirements of PRA unless that collection of information displays a currently valid Office of Management and Budget (“OMB”) control number.