

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Limited 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

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 U.S. 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 assist with catalyzing domestic manufacturing, resilient supply chains, and job growth. The Department is eager to contribute to growing 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 certain products may take time, so flexibility will be important as we implement the provisions of BABA.

The National Telecommunications and Information Administration (NTIA) is establishing a limited general applicability public interest waiver of the Buy America Domestic Content Procurement Preference (Buy America Preference) of BABA for certain recipients of Tribal Broadband Connectivity Program (TBCP) broadband infrastructure deployment awards. This waiver is narrowly tailored in that it will 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 BABA, NTIA has found that this waiver will be in the public interest because it will 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 have been compelled to treat these two groups of TBCP recipients in a disparate manner that would have raised 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 have created significant administrative burdens for these TBCP recipients, due to the need to revise budgets and other plans prepared without knowledge of the BABA requirements.

This waiver will also be in the public interest because it will 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 will be consistent with both Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and the Tribal Consultation and Coordination Policy (Tribal Consultation Policy) of the Department.

PUBLIC COMMENTS: On July 13, 2022, the Department published its proposed limited general applicability waiver for a 15-day public comment period on its Build America, Buy America Waivers website. NTIA also informed Tribal government representatives and other potentially interested stakeholders about the opportunity to comment on the proposed waiver. The public comment period closed at 11:59 p.m. Eastern Daylight Time (EDT) on July 27, 2022. The Department received one comment, which expressed strong support for the proposed waiver.¹

FOR FURTHER INFORMATION CONTACT: For questions about this waiver, 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.

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. 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. 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 was also 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

¹ The Information Technology Industry Council (ITI), an international trade association representing companies from the information and communications technology industry, submitted comments on July 27, 2022 strongly supporting NTIA's proposed limited general applicability public interest waiver of the Build America, Buy America domestic content procurement preference for the reasons expressed in NTIA's public notice.

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 BABA 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

This waiver is part of NTIA’s effort to ensure the equitable and consistent treatment of those TBCP recipients that submitted their funding applications before the enactment of the BABA. This waiver is narrowly tailored, as it only applies to TBCP recipients that submitted funding applications by the September 1, 2021, deadline established by the June 3, 2021, TBCP NOFO. This waiver will not apply to the 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 this waiver, the recipients of these awards would have been 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 have resulted 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 issue of the disparate treatment of otherwise similarly situated award recipients raised important equity considerations, which led to the grant of this waiver. In particular, recipients subject to the Buy America Preference might have otherwise faced significantly higher

administrative burdens in complying with BABA than recipients of awards made before May 14, 2022. These administrative burdens would have resulted 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, this limited general applicability public interest waiver is 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.” This waiver of the Buy America Preference for TBCP award recipients therefore furthers the intent underlying Executive Order 13175, as it constitutes the use of a flexible policy approach to advance the objective of making broadband internet service more readily available for Native communities.

This waiver will 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 Department (<https://www.commerce.gov/sites/default/files/media/files/2013/tribal-consultation-final.pdf>). Section 7 of the Tribal Consultation Policy states that the 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 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. This waiver will enable NTIA to engage in additional Tribal consultations, specifically regarding how the Buy America Preference will affect TBCP awards. NTIA will then be able to incorporate the results of these consultations into its preparation of a potential second TBCP NOFO. This approach will be consistent with the intent of Executive Order 13175 and of the Tribal Consultation Policy of the 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 this 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 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, will 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.

This waiver will enable NTIA to administer the TBCP program in an equitable and consistent manner for the affected award recipients. Moreover, the waiver will 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, this waiver will be consistent with 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). 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. These considerations led NTIA to establish this waiver, which is 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

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 waiver, because it is not based on the cost of foreign-sourced products.

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