

## DEPARTMENT OF COMMERCE

### **National Telecommunications and Information Administration Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied Solely to Recipients of Tribal Broadband Connectivity Program Grant Awards Made Pursuant to the July 27, 2023 Tribal Broadband Connectivity Program Notice of Funding Opportunity**

**ACTION:** Notice of Final Waiver

**SUMMARY:** Congress passed the Build America, Buy America Act (BABA or Act) on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58, 135 Stat. 429, 70901-70927. BABA establishes domestic content procurement preference requirements for federal financial assistance projects for infrastructure. The Buy America domestic content procurement preference (Buy America Preference) under BABA applies to all iron or steel products, manufactured products, and construction materials used for infrastructure projects under a program for federal financial assistance.<sup>1</sup> The Department of Commerce (DOC), in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead on this important mission to catalyze domestic manufacturing, resilient supply chains, and job growth. DOC will also help grow America's domestic production capacity while advancing BABA's requirements to strengthen the resiliency of domestic supply chains and support America's communities, workers, and firms.

Under IIJA Section 70914(b), DOC has the authority to waive the application of the Buy America Preference when: (1) the application of that preference would be inconsistent with the public interest; (2) the materials and products subject to that preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality; or (3) the inclusion of domestically produced materials and products subject to that preference would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination to issue a waiver and provide a public comment period of not less than 15 days.

Based upon a formal consultation process with Tribal government leaders and the assessment by the National Telecommunications and Information Administration (NTIA) and DOC of the domestic supply chain for relevant manufactured products, construction materials, and iron or steel products, DOC has determined that certain manufactured products and construction materials are not produced in the United States in sufficient and reasonably available quantities to meet the needs of the second funding round of the Tribal Broadband Connectivity Program (TBCP),<sup>2</sup> administered by NTIA. DOC is therefore issuing a limited, general applicability, nonavailability waiver of the Buy America Preference requirements for certain construction

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<sup>1</sup> See IIJA § 70912(2).

<sup>2</sup> For purposes of clarity, this Notice refers to the second TBCP funding round as TBCP 2, which is distinct from the first TBCP funding round, also identified herein as TBCP 1. References to the "TBCP" should be understood as referring to the program as a whole. Further information about the TBCP and its two separate and distinct funding rounds appears below. The waiver adopted herein applies solely to TBCP 2 awards.

materials<sup>3</sup> and certain manufactured products<sup>4</sup> only to recipients and subrecipients of Federal financial assistance awarded pursuant to the second TBCP Notice of Funding Opportunity, released on July 27, 2023 (Second TBCP NOFO).<sup>5</sup> All recipients of funding under the Second TBCP NOFO are subject to BABA, regardless of their status as a non-federal entity or for-profit corporation.<sup>6</sup> Consistent with Office of Management and Budget (OMB) Memorandum M-24-02, this waiver is time-limited; targeted to specified items, products, materials, and categories; and conditional on the requirement that certain manufacturing processes must occur in the United States.<sup>7</sup> The waiver: (1) incentivizes the domestic production of specific manufactured products based on strategic prioritization criteria, including network and data security, which will directly expand American job opportunities; (2) promotes broad participation in TBCP 2; (3) ensures that TBCP 2 recipients and subrecipients will have access to the manufactured products necessary to fulfill their obligations under TBCP 2; (4) allows funding recipients to continue to provide economic opportunity through timely deployment of broadband infrastructure, which is recognized to expand job opportunities; (5) supports the timely development of critical domestic public infrastructure that makes available broadband Internet services to all Americans; and (6) reflects established Executive Branch policy favoring flexibility for Indian Tribal waivers. Recipients and subrecipients to whom the waiver applies must report on their purchases of items from foreign sources, as set forth below.

**DATES:** For those TBCP 2 awards made pursuant to the Second TBCP NOFO and obligated on or after the effective date of this waiver, December 16, 2024, through December 16, 2029 (*i.e.*, five years from the effective date), the waiver will apply to funds expended by award recipients and subrecipients during the entire period of performance of the award. For awards made pursuant to the Second TBCP NOFO and obligated prior to the effective date of this waiver, the waiver only applies to funds expended by award recipients and subrecipients after the effective date and for the remainder of the period of performance of the award. This waiver only applies to those awards made pursuant to the Second TBCP NOFO, and not to those made pursuant to any other TBCP-related funding opportunity, such as TBCP 1. DOC will review this waiver no less than annually to assess whether it remains necessary to the fulfillment of DOC's missions and goals and consistent with applicable legal authorities, such as the IJJA, Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*, and OMB M-24-02 (or any successor M-Memorandum or guidance).

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<sup>3</sup> Specifically, for non-optic-glass inputs (e.g., an overlaid cylinder) to preforms used to manufacture optical fiber and fiber optic cable in TBCP 2 projects and for unrepeated submarine fiber optic cable.

<sup>4</sup> Specifically, for passive optical equipment and for all electronics in TBCP 2 projects, except for: 1) Optical Line Terminals (OLTs) and remote Optical Line Terminals (rOLTs); 2) OLT line cards; 3) optic pluggables; and 4) Standalone Optical Network Terminals and Optical Network Units. For these four categories of products, DOC waives the 55 percent cost of components requirement and provides specific guidance regarding manufacturing processes that must occur in the United States.

<sup>5</sup> Tribal Broadband Connectivity Program, Notice of Funding Opportunity, National Telecommunications and Information Administration (July 27, 2023).

<sup>6</sup> Consistent with the authority provided in 2 CFR §100.101(a)(2), the Department of Commerce Standard Terms and Conditions (which are applicable to TBCP 2 awards) apply Subparts A through E of 2 CFR Part 200 to for-profit entities. This includes implementation of the Buy America preference in 2 CFR §200.322(c).

<sup>7</sup> Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, Office of Management and Budget (OMB M-24-02) (Oct. 25, 2023), at 9.

**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 AND BACKGROUND INFORMATION**

### **I. TBCP: Expanding Broadband Internet Access for Native Communities**

This waiver applies only to the application of the Buy America Preference to recipients and subrecipients of awards made under the second round of TBCP funding, also identified herein as TBCP 2, as further detailed below.

#### **A. TBCP Description**

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

On June 3, 2021, NTIA published a Notice of Funding Opportunity on Grants.gov to describe the requirements under which it would make awards for the first round of TBCP funding (First TBCP NOFO).<sup>8</sup> NTIA has made approximately \$1.86 billion in TBCP 1 awards to 226 Tribal entities pursuant to the First TBCP NOFO.

Because NTIA released the First TBCP NOFO five months before the enactment of the IIJA, the First TBCP NOFO did not include information about the Buy America Preference set forth in the Act. NTIA also made several TBCP 1 awards prior to the May 14, 2022 effective date of the Buy America Preference. However, most recipients of broadband infrastructure deployment awards under the First TBCP NOFO did not receive these awards until after the May 14, 2022 effective date. Concerns about the consistent and equitable treatment of TBCP 1 award recipients led NTIA to grant a limited, general applicability, public interest waiver of the Buy America Preference for those recipients that submitted applications for TBCP 1 funding prior to the September 1, 2021 deadline established by the First TBCP NOFO. This waiver also reflected established Executive

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<sup>8</sup> Notice of Funding Opportunity, Tribal Broadband Connectivity Program, National Telecommunications and Information Administration (June 3, 2021).

Branch policies that favor increased flexibility for Indian Tribal waivers and emphasize the importance of consultation with Tribal governments.<sup>9</sup>

During the 2022 calendar year, NTIA conducted formal Tribal consultations concerning questions about the second round of TBCP funding.<sup>10</sup> This consultation process included multiple online consultation sessions with Tribal leaders from across the United States. These sessions took place in January and September of 2022. The sessions specifically addressed, among other topics, the issue of whether recipients of the second round of TBCP funding should be subject to the Buy America Preference. The Tribal leaders who participated in these consultation sessions consistently expressed strong support for a waiver of the Buy America Preference for the second TBCP funding round. In doing so, they emphasized the importance of factors like the urgent need of Tribal communities for broadband services, the difficulties posed by the remote nature of many such communities for infrastructure deployment projects, the limited financial and other resources of Tribal governments, and concerns about significant delays in equipment procurement caused by supply chain problems.<sup>11</sup> Furthermore, consultation participants discussed issues like the possibility of NTIA providing an “authorized list of resources or activities” that would offer BABA guidance for Native communities, including information about specific vendors and/or manufacturers that are BABA-compliant.<sup>12</sup>

DOC also participated in a separate joint Tribal consultation process regarding BABA in September of 2022.<sup>13</sup> The White House Council on Native American Affairs (WHCNA) led this joint process, which involved seven other Federal government agencies.<sup>14</sup> During the WHCNA Tribal Consultation, Native leaders emphasized that Tribal waivers of the Buy America Preference

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<sup>9</sup> 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, National Telecommunication and Information Administration (Aug. 5, 2022).

<sup>10</sup> Letter to Tribal Leaders from Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, and Douglas W. Kinkoph, Associate Administrator, Office of Internet Connectivity and Growth, regarding Tribal Broadband Connectivity Program Tribal Consultation, National Telecommunications and Information Administration (Aug. 18, 2022). *See also, e.g.*, Letter to Tribal Leaders from Douglas W. Kinkoph, Associate Administrator, Office of Internet Connectivity and Growth, regarding Tribal Broadband Connectivity Program Tribal Consultation, National Telecommunications and Information Administration (Dec. 28, 2021); NTIA Tribal Consultation Summary Report, National Telecommunications and Information Administration (January 2022) (January 2022 Tribal Consultation Summary Report).

<sup>11</sup> *See, e.g.*, Summer 2022 Virtual Tribal Consultation Number 1 Transcript, Moderator Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, National Telecommunications and Information Administration (Sep. 12, 2022) (Tribal Consultation Number 1 Transcript), at 25-27; *see also* Summer 2022 Virtual Tribal Consultation Number 2 Transcript, Moderator Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, National Telecommunications and Information Administration (Sep. 14, 2022) (Tribal Consultation Number 2 Transcript), at 23-26; Summer 2022 Virtual Tribal Consultation Number 3 Transcript, Moderator Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, National Telecommunications and Information Administration (Sep. 16, 2022) (Tribal Consultation Number 3 Transcript), at 36-37.

<sup>12</sup> Tribal Consultation Number 2 Transcript at 23-24.

<sup>13</sup> Letter to Tribal Leaders from Anthony Morgan Rodman, Executive Director, White House Council on Native American Affairs (Aug. 18, 2022).

<sup>14</sup> The other Federal agency participants were: the U.S. Department of Agriculture; the U.S. Department of Energy; the U.S. Department of Health and Human Services, Administration for Native Americans; the U.S. Department of Housing and Urban Development; the U.S. Department of the Interior; the U.S. Small Business Administration; and the U.S. Department of Transportation. *Id.* at 2.

allow ample opportunity for ongoing consultations while also building the capacity of Tribes to work towards eliminating the need for future waivers.<sup>15</sup> Such waivers therefore both serve as a tool to promote investment in our domestic manufacturing base and promote equity and justice for Native communities.<sup>16</sup>

On July 27, 2023, NTIA published the Second TBCP NOFO on Grants.gov to make available up to approximately \$980 million for a second round of TBCP grant awards. In this second funding round, NTIA expects to make awards of between \$1 million and \$50 million for broadband infrastructure deployment projects, as well as awards of between \$100,000 and \$2.5 million for broadband adoption and use projects. The requirements established by the Second TBCP NOFO for the second round of awards incorporate the Buy America Preference and the other provisions of the BABA. The waiver announced in this notice is limited to recipients and subrecipients of awards made pursuant to the Second TBCP NOFO.

On May 8, 2024, DOC released the Public Interest Tribal Waiver. This waiver applies to expenditures by Tribal awardees under any DOC financial assistance agreement incurred on or after its effective date. However, the Public Interest Tribal Waiver specifically states that it “does not apply to awards made under the DOC’s National Telecommunications and Information Administration’s (NTIA) Broadband Equity, Access, and Deployment (BEAD) or Tribal Broadband Connectivity Program (TBCP).”<sup>17</sup> The waiver discussed in this notice is specifically for recipients and subrecipients of awards made under the Second TBCP NOFO. The Public Interest Tribal Waiver does not apply to or otherwise affect any award funding made under the Second TBCP NOFO.

## **B. Restrictions on TBCP Use of Items Manufactured in China**

Independent of BABA, Section 60102(g)(1)(D)(i) of the IIJA prohibits the expenditure of TBCP funds to purchase or support any covered communications equipment or service, as defined in Section 9 of the Secure and Trusted Communications Networks Act of 2019 (47 U.S.C. § 1608).<sup>18</sup> Further, TBCP funds may not be used to purchase or support “fiber optic cable and optical transmission equipment manufactured in the People’s Republic of China, except that the Assistant Secretary [of Commerce for Communications and Information] may waive the application of this clause with respect to a project if the eligible entity that awards a subgrant for the project shows that such application would unreasonably increase the cost of the project.”<sup>19</sup> The Assistant

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<sup>15</sup> See, e.g., Public Interest Waiver for Financial Assistance Agreements to Indian Tribes, Notice of Final Waiver, U.S. Department of Commerce (May 8, 2024) (Public Interest Tribal Waiver), at 2. See also [www.commerce.gov/oam/build-america-buy-america](http://www.commerce.gov/oam/build-america-buy-america).

<sup>16</sup> See, e.g., Public Interest Tribal Waiver at 2.

<sup>17</sup> *Id.* at 1; see also Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program, U.S. Department of Commerce, Notice of Final Waiver (Feb. 22, 2024) (BEAD BABA Waiver) (available at: [www.commerce.gov/oam/build-america-buy-america](http://www.commerce.gov/oam/build-america-buy-america)).

<sup>18</sup> See also 2 CFR 200.216 (“Prohibition on certain telecommunications and video surveillance services or equipment.”).

<sup>19</sup> IIJA § 60102(g)(1)(D)(ii). Note that applicable regulations governing federal financial assistance generally use the term “subrecipient” to refer to what the Infrastructure Act calls “subgrantees” and the term “subaward” to refer to what the Infrastructure Act calls “subgrants.” See generally 2 CFR Part 200. As used herein, the terms “subgrantee” and

Secretary of Commerce for Communications and Information does not expect to issue such waivers.

## II. Industry Assessment and Public Comments

Given the importance of BABA and its potential to impact NTIA-administered grant programs and funding rounds such as the TBCP 2,<sup>20</sup> NTIA initiated an assessment of the domestic supply chain for relevant manufactured products, construction materials, and iron or steel products. In order to obtain a thorough understanding of the broadband supply chain in the context of the TBCP 2, DOC staff have held the above-described Tribal consultations, as well as additional meetings with Tribal governments, other representatives of Native communities, equipment manufacturers, and Internet service providers (ISPs), among others.

Publication of the public notice seeking comment on the proposed Second TBCP NOFO BABA waiver initiated a 30-day public comment period.<sup>21</sup> DOC received eight sets of comments from an array of stakeholders in response to the Proposed Second TBCP NOFO BABA Waiver Notice. The commenters were: two telecommunications trade associations; a Tribal government; two intertribal organizations; a broadband provider; an Alaska Native Corporation; and a manufacturer of telecommunications equipment.

Most commenters expressed strong general support for the proposed waiver. For example, an Alaska Native Corporation favored the proposed waiver on the grounds that it would address “the urgent need of indigenous communities for broadband services,” as well as the difficulties faced by Native communities in Alaska due to geographic remoteness and “supply chain problems.” A telecommunications trade association praised the proposed waiver as “a critical step” in making broadband services available for all Americans. An intertribal association also supported the proposed waiver, stating that “without the waiver, . . . [our] member tribes will miss out on the TBCP opportunities we desperately need.” A telecommunications equipment manufacturer urged “DOC to adopt the TBCP waiver in its entirety to advance DOC’s own goals and the goals of BABA and the IJJA, consistent with DOC’s findings in the BEAD Waiver and in the TBCP Notice itself.” However, an intertribal organization, a broadband provider, and an individual Tribal government each requested changes that would significantly expand the proposed waiver. DOC summarizes and responds to these comments in the sections that follow.

Based on its extensive industry engagement, research, and assessment, as well as the comments it has received and above-described Tribal consultations, DOC has determined that some construction materials and manufactured products required for broadband infrastructure deployments, as detailed further below, are not presently available in the quantity or quality needed

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“subgrant” are meant to have the same meaning, respectively, as the terms “subrecipient” and “subaward” in those regulations and other governing authorities.

<sup>20</sup> See generally DOC Office of Acquisition Management, Build America, Buy America page, available at [www.commerce.gov/oam/build-america-buy-america](http://www.commerce.gov/oam/build-america-buy-america).

<sup>21</sup> Department of Commerce, Notice; Request for Comments; Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied Solely to Recipients of Tribal Broadband Connectivity Program Grant Awards Made Pursuant to the July 27, 2023, Tribal Broadband Connectivity Program Notice of Funding Opportunity (Sep. 15, 2024) (Proposed Second TBCP NOFO BABA Waiver Notice).

for the TBCP 2 to achieve the timeframes established by the IIIJA.<sup>22</sup> In light of these findings, DOC is issuing this limited, general applicability, nonavailability waiver to provide recipients and subrecipients of Federal financial assistance under the Second TBCP NOFO a limited exemption from application of the Buy America Preference. Consistent with OMB M-24-02, this waiver is time-limited; targeted to specified items, products, materials, and categories; and conditional on the requirement that certain manufacturing processes must occur in the United States.<sup>23</sup>

## **A. Construction Materials, Including Optical Fiber and Fiber Optic Cable**

Optical fiber and fiber optic cable - construction materials that require domestic production and are essential for broadband infrastructure deployments – will be used across TBCP 2 projects. DOC’s industry assessment showed a lack of redundancy in the domestic supply of optical fiber and, consequently, fiber optic cable. This lack of redundancy in domestic suppliers, combined with the high demand for U.S.-made optical fiber and fiber optic cable driven by other NTIA funded programs leads NTIA to conclude there is not the quantity, quality, or diversity of supply needed for the TBCP 2 to achieve its goals in the timeframes established by the IIIJA. As a result of its independent research and concurring comments, DOC supports the issuance of a limited waiver for non-optic-glass inputs to the optical fiber pre-form process as set forth in the Proposed Second TBCP NOFO BABA Waiver Notice in order to allow for a sufficient and diverse supply of these materials for the TBCP 2 program.

### **1. Proposed Waiver for Non-Optic Glass Inputs**

The Proposed Second TBCP NOFO BABA Waiver Notice recommended waiving the Buy America Preference for non-optic-glass inputs (e.g., an overclad cylinder) to the preform manufacturing process of optical fiber. This proposed waiver was based on analysis showing that optical fiber and fiber optic cable will see the highest levels of expenditures compared to any other category of equipment used in TBCP 2 fiber broadband deployments. Further, industry forecasts raise the concern that there will not be a sufficient or diverse supply of these construction materials, especially for small- to medium-sized ISPs, during peak demand for construction materials during the rollout of the TBCP 2, which will coincide with demand for BABA-compliant optical fiber from other NTIA-funded broadband infrastructure programs.

Most commenters did not address this specific element of the proposed waiver. However, an intertribal organization did state that “the TBCP Notice correctly proposes to waive the Buy America preference for non-optic glass inputs to the optical fiber preform manufacturing process.”

Based on careful consideration of, *inter alia*, the comments and its own assessments, DOC finds that a waiver for non-optic-glass inputs to the preform is appropriate. This waiver will ensure that sufficient, diverse, and reasonably available quantities of optical fiber are available during the TBCP 2. Additionally, the waiver applies to an input that is a minor element of the overall cost of a finished fiber optic cable and will help to ensure the availability of a secure, diverse supply of BABA-compliant optical fiber and fiber optic cable for the duration of the TBCP 2. DOC further

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<sup>22</sup> See IIIJA § 70914(b)(2) (authorizing waiver of the domestic content procurement preference where relevant items “are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality”).

<sup>23</sup> OMB M-24-02 at 9.

notes, based on representations regarding the positive impact this limited waiver will have on jobs, that this waiver fulfills one of the key purposes of BABA by incentivizing domestic manufacturing of optical fiber and fiber optic cable and maximizing the number of direct manufacturing jobs in the United States.<sup>24</sup>

## **2. No Need for Expansion of Optical Fiber and Fiber Optic Cable Waiver**

As discussed above, DOC finds that the waiver for non-optic-glass inputs to the preform manufacturing process for optical fiber is likely to ensure sufficient domestic supply of optical fiber and fiber optic cable. As a result, DOC finds that adoption of an expanded waiver for optical fiber and fiber optic cable is not necessary to ensure that these materials are “produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.” DOC will therefore not expand the scope of the waiver.<sup>25</sup>

## **3. Plastics and Polymers Used in Fiber Optic Cable**

On August 23, 2023, OMB issued final guidance “to support implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act and to clarify existing provisions related to domestic preferences.”<sup>26</sup> DOC supports the application of the manufacturing process standard OMB adopted for fiber optic cable for the same reasons articulated by OMB and maintains that standard, without the addition of a domestic manufacturing requirement for plastics and polymer-based products.<sup>27</sup> No commenters addressed this specific issue.

## **4. Fiber Optic Cable Connectors and Connectorization**

There was limited discussion in the comments of fiber optic cable connectors and connectorization. Per 2 CFR Part 184, DOC considers connectors to be minor additions to fiber optic cable that occur after the construction material has been produced in the United States.<sup>28</sup> Because DOC considers connectors to constitute minor additions to fiber optic cable, the addition of connectors does not affect the overall classification of connectorized fiber optic cable as a construction material under BABA – and not a manufactured product. Connectors do not, therefore, need to be manufactured in nor attached to fiber optic cable in the United States.

## **5. Unrepeated Submarine Fiber Optic Cable**

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<sup>24</sup> IIA § 70911(2), (4), (11); *see also* IIA § 70915(b)(2)(B) (directing OMB to issue manufacturing process standards that “take into consideration and seek to maximize the direct and indirect jobs benefited or created in the production of the construction material.”).

<sup>25</sup> IIA § 70914(b)(2).

<sup>26</sup> Office of Management and Budget, Guidance for Grants and Agreements, 88 Fed. Reg. 57,750 (Aug. 23, 2023) (OMB Final Guidance). The effective date for this guidance was October 23, 2023. *See* 2 CFR 184.2(b).

<sup>27</sup> OMB Final Guidance at 57,763-64. (“For example, commenters specifically noted the confusion and compliance costs that may have resulted from attempting to separately apply every construction material standard that applied to different components of fiber optic cable, such as the standard for plastic and polymer-based products.”).

<sup>28</sup> *See* 2 CFR 184.6(a)(4) (standard for fiber optic cable is silent with respect to connectorization, which occurs after jacketing); *see also* 2 CFR 184.3 (definition of “construction materials” stating that “[m]inor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.”)



DOC sought comment on the waiver of the Buy America Preference for unrepeated submarine fiber optic cable. This reflected supply chain research that showed that there is no domestic source for this type of submarine fiber optic cable, which DOC expects to be used in certain TBCP 2 deployments.

Several commenters favored the waiver of the Buy America Preference for unrepeated submarine fiber optic cable. For example, a telecommunications trade association stated that “[t]here are no submarine cable manufacturers within the United States that produce unrepeated cables that would fit Alaska’s unique submarine cable needs.” It further argued that without the proposed waiver for unrepeated submarine fiber optic cable, “Alaska’s TBCP Round 2 broadband projects would be at risk.” An intertribal organization expressed support as well for this proposed waiver, maintaining that it would provide cost savings for many Tribal communities, e.g., those in coastal areas. A broadband provider similarly favored the proposed waiver of the Buy America Preference for unrepeated submarine fiber optic cable. However, it also advocated that the waiver should include repeated submarine fiber optic cable used to extend existing cable systems. The broadband provider argued that this expansion of the proposed waiver would promote greater competition and “facilitate smoother and more efficient project execution.”

Based on the comments and DOC’s own assessments, DOC waives the Buy America Preference for unrepeated submarine fiber optic cable. DOC has found that the lack of a domestic source for unrepeated submarine fiber optic cable justifies this waiver. Further, DOC has found that this waiver will offer significant benefits, e.g., cost savings and the means to provide broadband access in remote areas with extreme climate or geographic conditions. However, DOC has determined that there is a domestic supply of repeated submarine fiber optic cable. DOC therefore declines to waive the Buy America Preference for repeated submarine fiber optic cable.

## **B. Manufactured Products**

### **1. Electronics**

DOC’s industry assessment has shown that electronics are likely to be the second largest segment of equipment used in TBCP 2 fiber broadband deployments. Such electronics include, but are not limited to, Optical Line Terminals (OLTs) and remote Optical Line Terminals (rOLTs), OLT line cards, optic pluggables, Optical Network Terminals and Optical Network Units (ONTs/ONUs), routers, switches, optical amplifiers, and power systems. These electronics, and comparable electronics used in fixed wireless and other types of broadband network deployments (e.g., radios, power management systems, antennas and antenna arrays, and radiofrequency conditioning and connectivity devices), are almost all manufactured overseas. As part of its supply chain research, DOC explored with manufacturers the possibility of moving the manufacturing of certain electronics to the United States to facilitate implementation of the Buy America Preference. During DOC's industry assessment, two key factors became apparent:

- Semiconductors, also referred to as integrated circuits, including systems on a chip, memory, central processing units, and others are key components of essentially all electronics that are used to build broadband networks. Semiconductors represent the majority of the value of the components that make up such products – often in

excess of 70 percent. Almost all of these chips are currently manufactured outside the United States. While the historic CHIPS and Science Act, Pub. L. 117-167, 136 Stat. 1366, is expected to spur a major investment in domestic semiconductor manufacturing, the construction timeline and type of semiconductor fabrication plants mean that the impact of that investment is unlikely to be realized during the time period needed for the TBCP 2.<sup>29</sup>

- There are some classes and categories of electronics that are currently manufactured outside of the United States, but for which there is an economic case for onshoring final assembly.

The Proposed Second TBCP NOFO BABA Waiver Notice therefore proposed to waive the Buy America Preference requirements for manufactured products for all electronics in TBCP 2 projects, with the exception of four categories of electronics:

- Optical Line Terminals and remote Optical Line Terminals (OLTs/rOLTs);
- OLT line cards;
- Optic pluggables; and
- Optical Network Terminals and Optical Network Units (ONTs/ONUs).

For those four categories of electronics, DOC proposed to waive the 55 percent cost of components requirement for manufactured products and proposed specific guidance regarding the manufacturing processes that must occur in the United States for those categories of electronics to be considered “produced in the United States.”<sup>30</sup>

*a. Optical Line Terminals and Remote Optical Line Terminals*

An intertribal association expressed concern about the “potential availability and costs associated with” OLTs and rOLTs. It described them as “essential components for broadband delivery.” It therefore recommended that NTIA should grant “a full Buy America waiver” in the event that a “Tribal Nation informs NTIA that these products are in limited supply and/or cost prohibitive for broadband deployment and adoption activities.” This intertribal association argued that NTIA should do so on the basis of Section 5 of Executive Order 14112, which, among other things, directs federal agencies to provide waivers for federal funding programs for Tribal nations to achieve such objectives as: (i) taking into account the unique needs, limited capacity, or significant barriers faced by Tribal nations by providing reasonable and appropriate exceptions or accommodations where necessary; and (ii) increasing the flexibility of funding for Tribal nations by removing, where feasible, unnecessary limitations on Tribal spending.<sup>31</sup> The intertribal association also cited the importance of Tribal sovereignty and the treaty obligations of the federal governments to Tribal nations in making this argument.

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<sup>29</sup> CHIPS Incentives Program, authorized by Title XCIX - Creating Helpful Incentives to Produce Semiconductors for America of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283, referred to as the CHIPS Act or Act), as amended by the CHIPS Act of 2022 (Division A of Pub. L. 117-167).

<sup>30</sup> For the purposes of this waiver, the “55 percent cost of components requirement” refers to subsection (2)(ii) of the definition of “produced in the United States” set forth in 2 CFR 184.3.

<sup>31</sup> Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination, Executive Order 14112 (Dec. 6, 2023) (Executive Order 14112).

No other commenters advocated for an expanded waiver of the type favored by the intertribal association. An Alaska Native Corporation did express support for “NTIA’s proposal to waive the BABA requirement for all electronics in TBCP projects, with the exception of the four categories of electronics identified in the request for comment.” A separate intertribal association did not discuss individual categories of electronics in its comments but did state that it “agrees with the specific exemptions proposed by NTIA.” For the reasons discussed in the following subsection, DOC declines to grant the requested expansion of the proposed waiver.

*b. OLT Line Cards*

The same intertribal organization argued that OLT line cards are also essential components for OLTs and that OLT line cards should therefore be treated in the same above-discussed manner as OLTs and rOLTs. As described above, an Alaska Native Corporation supported “NTIA’s proposal to waive the BABA requirement for all electronics in TBCP projects, with the exception of the four categories of electronics identified in the request for comment,” and a separate intertribal organization “agrees with the specific exemptions proposed by NTIA.”

DOC declines to grant the above-discussed “full Buy America waiver” for cases in which a Tribal Nation claims that OLTs, rOLTs, and/or OLT line cards “are in limited supply and/or cost prohibitive.” DOC carefully evaluated the potential benefits of this requested waiver. DOC weighed these potential benefits against the BABA goals of promoting domestic manufacturing, resilient supply chains, and job growth. In doing so, DOC found that the Buy America Preference requirements for OLTs, rOLTs, and OLT line cards do not constitute the kind of “unnecessary limitations on Tribal spending” referenced by Executive Order 14112. DOC further found that the critical economic and national security benefits that BABA implementation offers to all Americans, including Native communities, require the inclusion of OLTs, rOLTs, and OLT line cards in the categories of excepted electronic products. DOC’s extensive market research and assessments also indicate that domestic supplies of OLTs, rOLTs, and OLT line cards are sufficient for the needs of Second TBCP NOFO recipients.

DOC determined that the Buy America Preference requirements adopted herein do not improperly infringe upon the sovereignty of Tribal Nations participating in the TBCP 2. These requirements are similar to and consistent with those in DOC grants to individual States, which are also sovereign entities that possess a government-to-government relationship with DOC.<sup>32</sup> In fact, the Buy America Preference requirements for Second TBCP NOFO recipients closely resemble those of the BEAD Program, for which most award recipients are States. Moreover, participation in the TBCP 2 is entirely voluntary and uncoerced in nature. The TBCP 2 Buy America Preference requirements are therefore fully compatible with the sovereignty of Tribal Nation award recipients.

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<sup>32</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (“It is incontestable that the Constitution created a system of “dual sovereignty.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained “a residuary and inviolable sovereignty,” *The Federalist* No. 39, at 245 (J. Madison).”). 521 U.S. at 918-19. See also, e.g., *Murphy v. National Collegiate Athletic Association*, 584 U.S. 453 (2018) (“The Constitution limited but did not abolish the sovereign powers of the States . . . Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.”). 584 U.S. at 470.

In addition, the special technical assistance measures discussed later in this Notice reflect DOC's ongoing efforts to assist Native communities with administrative compliance matters, pursuant to Executive Order 14112.

DOC notes that multiple companies have announced the reshoring or domestic expansion of OLTs, rOLTs, and OLT line card manufacturing. In order to reinforce this domestic manufacturing requirement, DOC clarifies below that any line card that performs the functions of an OLT is subject to the Buy America Preference as set forth below, regardless of where the line card is installed, what it is called, or what additional capabilities the line card might possess.

*c. Optic Pluggables*

Most commenters did not specifically discuss optic pluggables. The above-referenced intertribal association did do so, however, stating that its concerns about the availability and costs of OLTs, rOLTs, and OLT line cards did not apply to optic pluggables.

DOC clarifies that the waiver requirements are intended to capture only subscriber-facing optic pluggables, which DOC's market research has determined typically make up the bulk of optic pluggables used in an OLT. DOC has provided clarifying language below.

*d. Optical Network Terminals and Optical Network Unites (ONTs/ONUs)*

Most commenters also did not specifically discuss ONTs/ONUs. As with optic pluggables, an intertribal association indicated that it did not view the availability or cost of ONTs/ONUs as a source of concern.

DOC clarifies that standalone ONTs/ONUs must be manufactured in the United States, whereas application of the Buy America Preference to combined ONTs/ONUs is waived.<sup>33</sup> DOC sets forth below the specific manufacturing processes required for standalone ONTs/ONUs to be considered "produced in the United States" and therefore compliant with the Buy America Preference.

## **2. Fixed Wireless Access and Other Non-Fiber Broadband Electronics**

DOC clarifies that the scope of the electronics waiver set forth below applies to comparable electronics used in fixed wireless and other types of broadband network deployments (e.g., radios, power management systems, antennas and antenna arrays, and radiofrequency conditioning and connectivity devices).

## **3. Enclosures**

The Proposed Second TBCP NOFO BABA Waiver Notice stated that for purposes of its proposed waiver, DOC considers enclosures to be manufactured products used to protect and house a network function, e.g., active electronics, fiber split or splice, or other connection points. It further stated that DOC considers enclosures as generally falling into one of four categories, which are:

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<sup>33</sup> Subrecipients may not avoid application of the Buy America Preference by deploying combined ONTs that function only as a standalone ONT/ONU (e.g., a combined ONT/router with the routing functionality disabled).

cabinets; vaults and other below-ground housings (Vaults); pedestals and other above-ground housings (Pedestals); and closures and terminals. Few commenters addressed enclosure-related issues.

It is the assessment of DOC that closures (including aerial closures) and terminals are likely to be the most utilized enclosure types in TBCP 2 projects, and that closures and terminals are mostly manufactured and assembled outside of the United States. DOC's assessment further indicates, however, that (a) many closures and terminals manufactured outside of the United States incorporate a significant percentage of domestic components, and (b) manufacturers have the incentive and ability to invest in domestic capacity to manufacture the molded outer shells of closures and terminals to meet TBCP 2 demand.

In light of the above, DOC does not waive the 55 percent cost of components requirement for cabinets, Vaults, Pedestals, and closures and terminals and sets forth the specific manufacturing processes that must occur in the United States for these products to be considered "produced in the United States."

DOC clarifies that enclosures should be evaluated for compliance with the Buy America Preference on a standalone basis.

Likewise, construction materials and manufactured products bundled or packaged with an enclosure must themselves be evaluated for compliance with the Buy America Preference.<sup>34</sup>

#### **4. Passive Optical Equipment**

DOC's assessment indicates that "passive optical equipment" is a category of manufactured products separate from electronics that is made up of devices that split, combine, or facilitate the passage of optical signals in a fiber optic communication system without use of power. Examples of passive optical equipment include splitters, multiplexers, demultiplexers, taps, directional couplers, connectors, optical filters, attenuators, and wave division multiplexers that require no power for operation.<sup>35</sup> There was little discussion of passive optical equipment in the comments.

DOC's assessment indicates that passive optical equipment is almost exclusively manufactured overseas and will generally make up a small percentage of overall network spend, meaning there is little economic incentive for manufacturers to invest in domestic production. As discussed below, DOC therefore waives application of the Buy America Preference for passive optical equipment.

#### **5. Other Network Equipment**

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<sup>34</sup> By way of example, if a TBCP 2 subrecipient purchases a cabinet that comes packaged with a length of fiber optic cable, the TBCP 2 subrecipient must ensure that the cabinet meets the standards set forth in this waiver for cabinets, and that the fiber optic cable meets the standards set forth in this waiver for fiber optic cable.

<sup>35</sup> Taps are sometimes referred to as fiber terminals. For the sake of clarity, passive optical fiber terminals are not the "terminals" discussed in the electronics or enclosures sections below.

The Proposed Second TBCP NOFO BABA Waiver Notice stated that NTIA's research indicates that there is some domestic production capacity for other network equipment that is not electronics, and that expenditures on this category of equipment as a percentage of total network spend are low. It further stated that DOC expected that, to the extent that there are classes or categories of other network equipment used in broadband network deployments that are not domestically available, the public interest waiver of the Buy America Preference for *de minimis* infrastructure project purchases would be sufficient for most projects.<sup>36</sup> Few commentators addressed issues involving other network equipment.

DOC believes the additional clarification it is providing regarding the scope of this waiver, including the clarification that this waiver waives the Buy America Preference for passive optical equipment, is sufficient to address concerns regarding the application of the DOC *de minimis* waiver to other network equipment (e.g., conduit, mounting brackets, patch panels).

With regard to minor hardware items, DOC believes that the value of such items will not exceed *de minimis* thresholds under its existing waiver. TBCP 2 recipients and subrecipients are expected to make a good faith effort to measure the quantity and value of minor hardware items utilized in a project and report accordingly.

### **C. Other Issues Raised By Commenters**

This section addresses other issues raised by commenters in response to the Proposed Second TBCP NOFO BABA Waiver Notice.

#### **1. Adequate Notice of Waiver and Prior Tribal Consultation**

An individual Tribal government argued that several concerns it expressed regarding the Proposed Second TBCP NOFO BABA Waiver Notice justify a complete waiver of the Buy America Preference for Second TBCP NOFO award recipients. First, the Tribal government contended that TBCP 2 funding applicants should have had prior notice that they might not receive a complete waiver of the BABA requirements. It claims that the Proposed Second TBCP NOFO BABA Waiver Notice placed “tribes who submitted their applications under the assumption of a full BABA exemption in an extremely difficult position.” This Tribal government also claimed that “the decision to apply the BABA waiver after the [TBCP 2] application window closed” conflicts with the directives of Executive Order 14112. The Tribal government further argued that DOC erred in releasing the Proposed Second TBCP NOFO Waiver Notice to seek public comment on the proposed waiver after having previously engaged in Tribal consultations.

The Tribal government does not offer adequate grounds for its requested complete waiver of the Buy America Preference for all TBCP 2 recipients. Applicants for TBCP 2 funding had no reasonable basis to assume that they would subsequently receive “a full BABA exemption.” The Second TBCP NOFO clearly states that all BABA requirements will apply to awards made under

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<sup>36</sup> See Department of Commerce, Department-wide Public Interest Waivers for De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products, Notice of Final Waiver (May 17, 2023) (DOC *de minimis* Waiver) (available at: [www.commerce.gov/oam/build-america-buy-america](http://www.commerce.gov/oam/build-america-buy-america)).

it.<sup>37</sup> The Tribal government does not cite any source that an applicant could have reasonably relied upon to assume that Second TBCP NOFO awards would not be subject to the Buy America Preference. Finally, IIA § 70914(c) specifically requires that a federal agency seek public comment before issuing a BABA waiver. DOC would therefore have had no legal authority to waive the Buy America Preference solely on the basis of the Tribal consultations that it has conducted.<sup>38</sup> NTIA also notes that it partly relied on the Tribal consultations it has conducted in developing the special technical assistance measures discussed later in this Notice.

## **2. Requested Indefinite General Waiver of Buy America Preference for All Tribal Nation Participants in NTIA Programs**

An intertribal association requested an indefinite general waiver of the Buy America Preference “for Tribal Nations across NTIA’s programs and services.” It stated that it opposes the use of Buy America Preference requirements for “Tribal projects, as these purchasing requirements are likely to undermine the overall goals of advancing Tribal Nation sovereignty, self-determination, and infrastructure deployment on our lands.” It also argued that Executive Order 14112 provides a further basis for its requested indefinite general BABA waiver.

The BABA waiver requirements established by OMB M-24-02 necessitate the denial of this request. OMB M-24-02 provides authoritative guidance on BABA implementation. It requires that all BABA waivers must be time-limited, narrowly targeted, and conditional.<sup>39</sup> It further requires that general applicability waivers must typically be reviewed within five years of the date the waiver was issued.<sup>40</sup> OMB M-24-02 also provides that “[g]eneral applicability waivers should include appropriate expiration dates.”<sup>41</sup> The requested waiver does not satisfy any of these requirements and must therefore be denied. Moreover, as discussed above, DOC found that the Buy America Preference requirements adopted herein do not improperly infringe upon the sovereignty of Tribal Nations participating in TBCP 2. These requirements are similar to and consistent with those in DOC grants to individual States, which are also sovereign entities that possess a government-to-government relationship with DOC.<sup>42</sup>

It is important to note that DOC has already authorized multiple waivers of the Buy America Preference for NTIA programs that benefit Native communities. In addition to the waiver adopted

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<sup>37</sup> See, e.g., Second TBCP NOFO at 8 (“Importantly, Broadband Infrastructure Deployment projects are subject to the Build America, Buy America domestic content procurement preference requirements, set forth in the IIA, which includes the Build America, Buy America Act, Pub. L. No. 117-58, §§ 70901-52 (BABA)”). See also, e.g., Second TBCP NOFO at 42, 59.

<sup>38</sup> IIA § 70914(c) (“Before issuing a waiver under subsection (b), the head of the Federal agency shall . . . (2) provide a period of not less than 15 days for public comment on the proposed waiver.”). See also 2 CFR 184.7(d)(2) and (e).

<sup>39</sup> OMB M-24-02 at 9.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Id.* at 13-14.

<sup>42</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (“It is incontestable that the Constitution created a system of “dual sovereignty.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained “a residuary and inviolable sovereignty,” *The Federalist* No. 39, at 245 (J. Madison).”). 521 U.S. at 919. See also, e.g., *Murphy v. National Collegiate Athletic Association*, 584 U.S. 453 (2018) (“The Constitution limited but did not abolish the sovereign powers of the States . . . Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.”). 584 U.S. at 470.

herein, these include the waiver granted First TBCP NOFO award recipients, the BEAD BABA Waiver, and the Public Interest Tribal Waiver. The special technical assistance measures discussed later in this Notice also reflect DOC's ongoing efforts to reduce administrative burdens for Tribal governments.

#### **D. Consistency with International Agreements**

Consistent with OMB guidance, DOC notes that pursuant to Section 70914(e) of BABA, this waiver must be applied in a manner consistent with the obligations of the United States under international agreements.<sup>43</sup> Federal financial assistance awards are generally not subject to international trade agreements because these international obligations generally only apply to direct Federal procurement activities by signatories to such agreements. The Federal Acquisition Regulation (FAR) addresses how international trade agreements implemented by the Trade Agreements Act apply to direct Federal procurement activities of the United States at FAR Subpart 25.4.<sup>44</sup> DOC will follow the procedures in Section 184.7 of the OMB guidance in 2 CFR Part 184 and relevant supplemental guidance in OMB M-24-02 in evaluating waiver requests. For additional information, interested entities may also consult with NTIA.

### **III. Limited, General Applicability Waiver**

In light of the foregoing, DOC is issuing a limited, five-year, general applicability, nonavailability waiver of the Buy America Preference requirements for certain construction materials and certain manufactured products for Second TBCP NOFO award recipients and subrecipients under the circumstances described below. Because this proposed waiver is limited to recipients and subrecipients of Second TBCP NOFO funding, it will not interact with or otherwise affect either the Public Interest Tribal Waiver or the separate and previous waiver of the Buy America Preference for TBCP 1 funding recipients that submitted grant applications prior to the September 1, 2021 deadline established by the First TBCP NOFO.

#### **A. Scope of Waiver**

##### **1. Construction Materials**

DOC waives the Buy America Preference for non-optic-glass inputs (e.g., an overclad cylinder) to preforms used to manufacture optical fiber and fiber optic cable in TBCP 2 projects. However, all optic glass used in the manufacturing of optical fiber and fiber optic cable (including "core rods") must meet the standard set forth in 2 CFR 184.6(a)(3): "All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States."<sup>45</sup> DOC also requires that all fiber optic cable and optical fiber must otherwise meet the standards for those materials set forth in 2 CFR 184.6(a)(4) and (a)(5).<sup>46</sup>

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<sup>43</sup> IIA § 70914(e).

<sup>44</sup> See also FAR 25.1101, 25.1103, and 52.225-5.

<sup>45</sup> 2 CFR 184.6(a)(3).

<sup>46</sup> 2 CFR 184.6(a)(4), (a)(5).



DOC clarifies that it considers connectors to be minor additions to fiber optic cable that occur after the construction material has been produced in the United States.<sup>47</sup> Connectors do not, therefore, need to be manufactured in nor attached to fiber optic cable in the United States.

In addition, as included in the Proposed TBCP Second NOFO BABA Waiver Notice, in order to ensure that optical fiber and fiber optic cable are produced in the United States, the DOC *de minimis* Waiver may not be applied to recipient or subrecipient purchases of optical fiber and fiber optic cable.

DOC waives the Buy America Preference for unrepeated submarine fiber optic cable. However, DOC does not waive the Buy America Preference for repeated submarine fiber optic cable.

## **2. Manufactured Products**

### **a. Electronics**

DOC waives the Buy America Preference for all electronics in TBCP 2 projects, with the exception of the four categories of electronics identified in this section: 1) Optical Line Terminals and remote Optical Line Terminals; 2) OLT line cards; 3) optic pluggables; and 4) Standalone Optical Network Terminals and Optical Network Units. For these four categories of electronics, DOC waives the 55 percent cost of components requirement and provides specific guidance regarding manufacturing processes that must occur in the United States for these categories to be considered “produced in the United States.”<sup>48</sup>

In addition, as included in the Proposed Second TBCP NOFO BABA Waiver Notice, in order to ensure that the four categories of electronics identified in this section are produced in the United States, the DOC *de minimis* Waiver may not be applied to recipient or subrecipient purchases of the four categories of electronics identified in this section.

### **i. Optical Line Terminals and Remote Optical Line Terminals**

Optical Line Terminals (OLTs) and Remote Optical Line Terminals (rOLTs) are optical network electronic components typically found in ISP network hubs or distributed deeper into the network (e.g., in cabinets or other enclosures between a network hub and a customer premises) and are used to send and receive signals. OLTs and rOLTs covered by this waiver include, but are not limited to, OLTs and rOLTs that support EPON, GPON, NGPON2, XGS-PON, 25GS-PON, Point-to-Point Ethernet, and G.fast technologies, as well as future PON technologies.

In order for an OLT or rOLT to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

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<sup>47</sup> See 2 CFR 184.6(a)(4) (standard for fiber optic cable is silent with respect to connectorization, which occurs after jacketing); see also 2 CFR 184.3 (definition of “construction materials” stating that “Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.”).

<sup>48</sup> 2 CFR 184.3 (definitions of “manufactured product” and “produced in the United States.”).

- Printed circuit board (PCB) assembly is required for any PCB in the OLT that contains line card (subscriber-facing) functionality;<sup>49</sup>
- Software integration (including firmware integration, installation of licensed software, and customer-specific configuration);
- Chassis assembly;
- Testing and quality assurance; and
- Packaging and shipping.

## ii. OLT Line Cards

OLT line cards are a type of fiber-optic card that performs the functions of an OLT including, among other things, the physical and data link layer functions of the PON. OLT line cards can be installed in OLTs, rOLTs, and equipment that has the characteristics of OLTs (e.g., switches, routers, virtual OLTs, etc.) to provide network interface ports. An OLT line card is subject to the Buy America Preference regardless of where the line card is installed, what it is called, or what additional capabilities the line card might possess.

In order for OLT line cards, whether sold independently or installed in an OLT, rOLT, or equipment that has the characteristics of OLTs, to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- PCB assembly;<sup>50</sup>
- Line card assembly;
- Software integration (including firmware integration, installation of licensed software, and customer-specific configuration);
- Chassis assembly;
- Testing and quality assurance; and
- Packaging and shipping.

## iii. Optic Pluggables

Optic pluggables are subscriber (or customer)-facing optical transceivers that can be installed in (“plugged into”) OLTs, rOLTs, and equipment that has the characteristics of OLTs (e.g., switches, routers, virtual OLTs). In order for optic pluggables, whether sold independently or installed in an OLT or rOLT, or equipment that has the characteristics of OLTs or rOLTs, to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- Optical sub-assembly installation;
- Housing assembly;

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<sup>49</sup> For the purposes of this waiver, “PCB Assembly” means the complete process of transforming a bare printed circuit board into a functional unit by mounting and soldering components creating a functional board for inclusion in a finished product.

<sup>50</sup> For the purposes of this waiver, “PCB Assembly” means the complete process of transforming a bare printed circuit board into a functional unit by mounting and soldering components creating a functional board for inclusion in a finished product.

- Software integration (including firmware integration, installation of licensed software, and customer-specific configuration);
- Testing and quality assurance; and
- Packaging and shipping.

#### **iv. Standalone Optical Network Terminals and Optical Network Units**

Standalone Optical Network Terminals (ONTs), Optical Network Units (ONUs), and standalone devices that perform the functions of an ONT or ONU (together, standalone ONT/ONUs) are installed in PON/FTTH networks at the customer endpoint to serve as a demarcation between a service provider network and the consumer in-home network. Standalone ONTs/ONUs contain active electronics to convert optical signals to and from electrical signals. In order for a standalone ONT/ONU to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- PCB assembly;<sup>51</sup>
- Software integration (including firmware integration, installation of licensed software, and customer-specific configuration);
- Chassis assembly;
- Testing and quality assurance; and
- Packaging and shipping.

Recipients and subrecipients may not avoid application of the Buy America Preference by deploying combined ONTs that function only as a standalone ONT/ONU (e.g., a combined ONT/router with the routing functionality disabled).

#### **b. Enclosures**

Enclosures are manufactured products used to protect and house a network function (e.g., active electronics, fiber split or splice, or other connection points). Enclosures can generally be viewed as falling into one of four categories:

##### **i. Cabinets**

Cabinets fall into two general categories: passive and active. Passive cabinets offer a housing and management system to split fiber-optic cables from the central office to customer premises. They include a splitter module, responsible for dividing the signal from the feeder cable into individual drop cables, and a chassis that accommodates the ports where fiber-optic cables can be connected. Passive cabinets include optical hub cabinets, optical broadband cabinets, fiber distribution hubs, and primary flex points. Active cabinets are engineered with integrated power and climate control systems.

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<sup>51</sup> For the purposes of this waiver, “PCB Assembly” means the complete process of transforming a bare printed circuit board into a functional unit by mounting and soldering components creating a functional board for inclusion in a finished product.

## **ii. Vaults and Other Below Ground Housings (Vaults)**

Vaults and other below ground housings also fall into two general categories: passive and active. Passive vaults and handholes are underground enclosures that provide access to fiber optic cable for splicing and repairs, and include pull boxes or splice boxes. Active vaults, sometimes referred to as controlled environment vaults, are underground vaults that are engineered with integrated power and climate control systems in which electronics, among other things, can be installed.

## **iii. Pedestals and Other Above Ground Housings (Pedestals)**

Pedestals house splitters and splicers which connect the central office to customer premises. Other above ground housings are, like pedestals, protective units (housing) for splices, taps, splitters, combiners, or other passive optical components.

## **iv. Closures and Terminals**

Closures also fall into two general categories: passive and active. Passive closures are a connection part that connects two or more fiber optical cables together and for housing terminals, splices, splitters/combiners, and taps. They include spliced closures, network interface device (NID) enclosures, and other wall-mount, pole-mount, or aerial closures. Active closures, sometimes referred to as OSP active housing, are closures that are manufactured with an integrated power component.

Terminals are devices used as a connection point for fiber cabling and cable management specifically for splicing, splitting, and distribution. They also provide sealed environmental protection and control for network line deployment (i.e., splices, splitters/combiners, and taps).

## **v. Application of the Buy America Preference to Enclosures**

DOC declines to waive the 55 percent cost of components requirement for cabinets, Vaults, Pedestals, and closures and terminals.<sup>52</sup>

In order for cabinets, Vaults, or Pedestals to be considered “produced in the United States,” in addition to complying with the cost of components requirement, the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

1. Integrate subassemblies;
2. Install internal components, hardware, and wiring;
3. Seal and waterproof; and
4. Test, label, and document.

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<sup>52</sup> As discussed above, DOC’s industry assessment indicated that: (a) many closures and terminals manufactured outside the United States incorporate a significant percentage of domestic components; and (b) manufacturers have the incentive and ability to invest in domestic capacity to manufacture the molded outer shells of closures and terminals to meet TBCP 2 demand.

In order for closures and terminals to be considered “produced in the United States,” in addition to complying with the cost of components requirement, the following manufacturing process, at a minimum, must be conducted entirely within the United States:

1. Manufacturing of the molded outer shell (e.g., by injection molding).

DOC clarifies that enclosures should be evaluated for compliance with the Buy America Preference on a standalone basis.<sup>53</sup> Likewise, construction materials and manufactured products bundled or packaged with an enclosure must themselves be evaluated for compliance with the Buy America Preference.

In addition, in order to ensure that enclosures are produced in the United States, the DOC *de minimis* Waiver may not be applied to recipient or subrecipient purchases of enclosures.

### **c. Passive Optical Equipment**

Passive optical equipment is a category of manufactured products that is made up of devices that split, combine, or facilitate the passage of optical signals in a fiber optic communication system without use of power.<sup>54</sup> Examples of passive optical equipment include splitters, multiplexers, demultiplexers, taps, directional couplers, connectors, optical filters, attenuators, and wave division multiplexers that require no power for operation. DOC waives the Buy America Preference for passive optical equipment.

### **d. Other Network Equipment**

Other network equipment that is not electronics (e.g., conduit, mounting brackets, patch panels, etc.) makes up a small percentage of network expenditures. This waiver does not apply to these types of other network equipment. To the extent that there are classes or categories of other network equipment used in broadband network deployments that are not domestically available, DOC expects that the DOC *de minimis* Waiver will be sufficient for most projects.<sup>55</sup>

## **3. Iron or Steel Products**

DOC does not waive the Buy America Preference for any other iron or steel products used for TBCP 2-funded broadband infrastructure projects, including radio towers used in terrestrial fixed wireless deployments. To the extent that there are products or categories of iron or steel products used in broadband network deployments that are not domestically available, DOC expects the DOC *de minimis* Waiver will be sufficient for most projects.<sup>56</sup>

## **B. Additional Requirements**

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<sup>53</sup> By way of example, if a TBCP 2 subrecipient purchases a cabinet that comes packaged with a length of fiber optic cable, the TBCP 2 subrecipient must ensure that the cabinet meets the standards set forth in this waiver for cabinets, and that the fiber optic cable meets the standards set forth in this waiver for fiber optic cable.

<sup>54</sup> For the sake of clarity, neither optical fiber nor fiber optic cable are “passive optical equipment” as defined in or for purposes of this waiver.

<sup>55</sup> See DOC *de minimis* Waiver.

<sup>56</sup> *Id.*

## **1. Buy America Self-Certification**

Manufacturers that have expressed a willingness to onshore manufacturing of key electronics are concerned that they will be undercut by companies falsely claiming BABA compliance. In order to address such concerns, manufacturers, at the risk of federal penalty, can choose to certify that certain equipment they produce meets the domestic manufacturing requirements described in this waiver. DOC will host a BABA Self-Certification page listing manufacturers that have completed the certification process. Manufacturers will not be required to self-certify. The Self-Certification list is a voluntary mechanism to limit fraudulent claims of BABA compliance. DOC will publish additional self-certification information in separate guidance. The Self-Certification list will, among other things, address the desire expressed in the Tribal consultation process for a document of this type.<sup>57</sup>

## **2. Compliance and Reporting Requirements**

TBCP 2 recipients are responsible for compliance with BABA reporting requirements under this waiver. Manufacturers are required to provide a BABA certification letter to a TBCP 2 recipient for equipment that requires domestic production in this waiver. Recipients are required to maintain this certification letter in the event of an audit. In addition, consistent with the approach taken in the Middle Mile Grant Program and BEAD BABA Waivers, DOC will require TBCP 2 recipients to whom this waiver applies to report on their purchases of items from foreign sources.<sup>58</sup> In particular, TBCP 2 recipients will be required to report certain information on finished waived electronics used in TBCP 2 deployments. DOC will use this information to better understand the electronics used in domestic broadband deployments, including the specific types of equipment, their ubiquity, and their country of origin. NTIA will make available information on the specific reporting requirements for TBCP 2 recipients to track for finished waived electronics on the NTIA webpage.

## **V. Established Executive Branch Policy Favors Increased Flexibility for Indian Tribal Waivers; Adoption of Special Technical Assistance Measures**

This 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 5 of Executive Order 14112 addresses federal agency actions to increase the accessibility, equity, flexibility, and utility of federal funding and support programs for Tribal nations. It indicates that agencies should, among other things, provide waivers for federal funding programs for Tribal nations to achieve such objectives as: (i) taking into account the unique needs, limited capacity, or significant barriers faced by Tribal nations by providing reasonable and appropriate exceptions or accommodations where necessary; and (ii) increasing the flexibility of funding for Tribal nations by removing, where feasible, unnecessary limitations on Tribal spending.

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<sup>57</sup> Tribal Consultation Number 2 Transcript at 23-24.

<sup>58</sup> Department of Commerce, Limited Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Middle Mile Grant Program Awards, Notice of Final Waiver (Apr. 19, 2023) *see also* BEAD BABA Waiver (available at: [www.commerce.gov/oam/build-america-buy-america](http://www.commerce.gov/oam/build-america-buy-america)).

A waiver of the Buy America Preference solely for Second TBCP NOFO award recipients, as described in this Notice, is therefore consistent with and will further the intent underlying Executive Order 14112. In particular, it takes into account the significant barriers faced by Native communities seeking to obtain broadband access. The Tribal consultation processes in which DOC engaged documented these barriers, which include geographic remoteness, the limited financial and other resources of many Tribal governments, and supply chain difficulties.<sup>59</sup>

An intertribal association advocated for technical assistance and related measures to support Second TBCP NOFO award recipients. For example, it stated that NTIA should undertake such measures as “identifying cost-effective materials and products that would support appropriate use of TBCP funds,” as well as providing guidance documents on how the Buy America Preference applies to construction materials and manufactured products. A manufacturer of telecommunications equipment suggested that “[i]n adopting the TBCP Waiver, DOC could require the shared use of NTIA’s certified list [of BABA-compliant equipment] for BEAD, TBCP, and other federally funded awards.” It argued that this would “minimize the burden on all interested parties in understanding and complying with BABA requirements.” A broadband provider stated that it would “welcome the proposed technical assistance to support Tribes in navigating” the BABA requirements.

In light of the above, DOC will provide a series of special technical assistance measures for Second TBCP NOFO recipients. Pursuant to Executive Order 14112, these measures will assist Tribal communities with any administrative burdens they may encounter as part of the TBCP 2 award process. These special technical measures reflect the requests made in comments and Tribal consultations. In addition to the above-described Self-Certification list, these measures may potentially include guidance documents addressing the unique needs of TBCP 2 participants, individualized technical assistance opportunities with Federal Program Officers, and online seminars on TBCP 2-related topics.

## **VI. Anticipated Program and Project Impacts Absent Limited Non-Availability Waiver**

DOC conducted an extensive effort to engage with a wide-ranging set of stakeholders across the broadband ecosystem. These stakeholders have included, but were not limited to, Tribal governments, which were invited to formal Tribal consultations, other representatives of Native communities, ISPs, telecommunications companies, large and small manufacturers, multinational equipment providers, and many of the associations that represent these entities. Based on this extensive engagement, DOC finds that, absent the waiver, potential recipients and subrecipients that may wish to participate in the second round of TBCP funding will be unable to source BABA-compliant electronics or BABA-compliant optical fiber and fiber optic cable in sufficient and reasonably available quantities or of a satisfactory quality. These findings reflect the conclusions reached in the Tribal consultation processes concerning BABA and the TBCP 2. Particularly relevant are those conclusions regarding the harms to Native communities that would result from the lack of a Buy America Preference waiver, e.g., significant delays in achieving broadband

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<sup>59</sup> See, e.g., Tribal Consultation Number 1 Transcript at 25-27; see also Tribal Consultation Number 2 Transcript at 23-26; Tribal Consultation Number 3 Transcript at 36-37.

availability.<sup>60</sup> Given these conclusions, NTIA has found that such harms would create a material, and avoidable, risk to the overall success of the TBCP 2.

## **VII. Effective Date and Duration of the Waiver**

For those Second TBCP NOFO awards obligated on or after the effective date of this waiver, December 16, 2024, through December 16, 2029 (*i.e.*, five years from the effective date), the waiver will apply to funds expended by award recipients and subrecipients, including for-profit entities, during the entire period of performance of the award. For Second TBCP NOFO awards obligated prior to the effective date of this waiver, the waiver only applies to funds expended by award recipients and subrecipients, including for-profit entities, after the effective date and for the remainder of the period of performance of the award.

DOC will review this waiver no less than annually to assess whether it remains necessary to the fulfillment of NTIA's missions and goals and consistent with applicable legal authorities, such as the IJJA, Executive Order 14005, and 2 CFR Part 184. DOC may, based on the results of that review, terminate or narrow the scope or duration of this waiver, or take such other action as it deems appropriate.

## **VIII. 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 OMB control number.

Issued in Washington, DC.

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Alan Davidson  
Assistant Secretary of Commerce for Communications and Information

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<sup>60</sup> See, e.g., Tribal Consultation Number 1 Transcript at 25-27; see also, e.g., Tribal Consultation Number 2 Transcript at 23-26; Tribal Consultation Number 3 Transcript at 36-37.