

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Six-Month Adjustment Period Public Interest General Applicability Waiver, Excepting Fiber Optic Glass and Fiber Optic Cable, of the Buy America Domestic Content Procurement Preference for Recipients of Connecting Minority Communities Pilot Program Awards

ACTION: Notice; Request for comments

I. Summary

The National Telecommunications and Information Administration (NTIA) is proposing a public interest general applicability waiver of Section 70914 (Buy America Preference) of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act, Public Law Number 117-58, 135 Stat. 429 (IIJA), for all iron, steel, manufactured products, and construction materials, with the exception of fiber optic glass and fiber optic cables, used in infrastructure projects funded through Connecting Minority Communities Pilot Program (CMC or CMC Pilot Program) awards. This proposed waiver would be in effect for a six-month adjustment period beginning on the date of its issuance.

NTIA conducted an initial industry assessment by contacting a broad set of industry trade associations, network operators, and communications technology manufacturers to obtain input on the challenges they anticipate in meeting BABA requirements while deploying broadband infrastructure for the IIJA grant programs. This initial assessment informed NTIA's analysis of the impact of BABA on items to be acquired for the CMC Pilot Program. NTIA will conduct further market research during the proposed six-month adjustment period to identify items that can be domestically sourced, such as fiber optic glass and fiber optic cable. After the six-month adjustment period, the up-to-date list of items that meet BABA requirements will be available at the Build America, Buy America website of the Department of Commerce (Department). The six-

month adjustment period would also give CMC recipients the needed time to identify potential domestic sources for necessary components of their projects and assess the costs from such sources. NTIA would then assess whether this waiver remains necessary to the fulfillment of the project objectives of the CMC Pilot Program recipients.

Based on its review of CMC recipients' budgets, NTIA expects that some of their purchases under the waiver will include manufactured products, such as broadband switching equipment, broadband routing equipment, and external broadband wireless equipment that contain iron and/or steel. Additional items that will be used in projects funded by CMC awards are: cabling; conduits; transceivers; antennas; power supplies; broadband customer premises equipment; storage units and enclosures; controllers; access points; radio units; distribution nodes; batteries; solar panels; hardware such as brackets, bolts, or screws; steel poles; monopole towers; and tower structural supports. Several of these products, such as broadband communications equipment and end-user devices, relate to critical supply chains in the Information and Communications Technology Industrial Base (ICT) as identified in Executive Order 14017 (*America's Supply Chains*, 86 Fed. Reg. 11849 (Mar. 1, 2021)). NTIA proposes to have recipients to whom the proposed waiver would apply report on their purchases of items from foreign sources. Recipients reporting foreign-sourced items will help with future NTIA grant programs and awards that also use those items and support market research. NTIA will use this information to better understand the market and availability of U.S. products in this supply chain to inform its implementation of the CMC Pilot Program as well as its other broadband infrastructure deployment programs, such as the Middle Mile Grant (MMG) Program and the Broadband Equity, Access and Deployment Program (BEAD).

The CMC Pilot Program aims to address the lack of broadband access, connectivity, adoption, and equity at our nation's Historically Black Colleges or Universities (HBCUs), Tribal Colleges or Universities (TCUs), and minority-serving institutions (MSIs). The CMC Pilot Program authorizes new federal funding for the NTIA Assistant Secretary to make grants to eligible HBCUs, TCUs, and MSIs in anchor communities: (i) for the purchase of broadband internet access service or any eligible equipment; or to hire and train information technology personnel; or to facilitate educational instruction and learning, including through remote instruction; (ii) to operate a minority business enterprise (MBE); or (iii) to operate a tax-exempt 501(c)(3) organization. The CMC Pilot Program is not a grant program to construct broadband infrastructure. However, several projects under the category described by section (i) of the previous sentence propose funding infrastructure-related components as part of their activities, such as classroom upgrades or improvements to broadband systems internal to campus networks. The proposed waiver would be in the public interest because it would alleviate the need for budgeting and planning revisions that the immediate imposition of the Buy America Preference would impose on HBCU, TCU, and MSI CMC recipients. Because the CMC Pilot Program Amended Notice of Funding Opportunity (NOFO) **was released before the enactment of the BABA**, CMC recipients had no notice of the Buy America Preference when preparing their applications and would have to revise their budgets and project timelines to account for the BABA requirements. They would therefore benefit significantly from a public interest waiver that provided a six-month adjustment period. This would allow CMC recipients to receive their awards and begin implementing their project activities, many of which also include important components unrelated to broadband infrastructure, *e.g.*, hiring IT personnel or facilitating educational instruction and digital skills training, to support their students with the greatest

unmet financial needs. The six-month adjustment period would also give CMC recipients the needed time to identify potential domestic sources for necessary components of their projects and assess the costs from such sources.

The proposed waiver would be consistent with Executive Orders 14041 and 14049, which emphasize the need to strengthen the capacities of HBCUs and TCUs to participate in federal programs and funding opportunities. The proposed waiver would also satisfy the intent of Executive Order 13175 by providing increased flexibility for waivers involving Federal policies with Tribal implications (given the planned CMC awards to multiple TCUs). NTIA hereby seeks public comment on this proposed six-month adjustment period general applicability public interest waiver for the CMC Pilot Program, as described in this Notice.

II. Background

The IJIA, which includes the BABA, was enacted on November 15, 2021. The Buy America Preference set forth in Section 70914 of the BABA requires that all iron, steel, manufactured products, and construction materials used for infrastructure projects with Federal financial assistance awards be produced in the United States. NTIA may waive the application of the Buy America Preference in any case in which it finds that: applying the domestic content procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination and provide a period of not less than 15 days for public comment on the proposed waiver. Agencies must submit proposed waivers to the Office

of Management and Budget (OMB) Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

The IJIA 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 appropriate 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 those served by HBCUs, TCUs, and MSIs. Federal agencies use waivers of the Buy America Preference as a tool to promote domestic investment and to prepare American workers and businesses for global competition and leadership.

Since the enactment of the BABA, the Department and NTIA have worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the BABA, the Department 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 OMB 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.” For more information on the Buy America Preference, please visit www.commerce.gov/oam/build-

america-buy-america and www.madeinamerica.gov. Since issuing the report, the Department has held regular meetings with the MIAO and is an active participant in the MIAO Buy America Preference Working Group.

III. The CMC Pilot Program

The Biden-Harris Administration is committed to expanding internet access for vulnerable communities as part of its efforts to ensure the availability of high-speed internet service for all Americans. The CMC Pilot Program was created because students and communities of color experience significant barriers to digital access, adoption, and connectivity, often causing them to forfeit important economic and educational opportunities. The COVID-19 pandemic has further exacerbated these digital inequities for students, faculty, and staff of HBCUs, TCUs, and MSIs. Through the CMC Pilot Program, NTIA will provide up to \$268 million in federal grants to eligible HBCUs, TCUs, and MSIs to purchase broadband service or equipment, hire IT personnel, operate an MBE or a tax-exempt 501(c)(3) organization, or facilitate educational instruction. The CMC Pilot Program is authorized by Section 902 of the Consolidated Appropriations Act, 2021, Division N, Title IX, Section 902, Public Law 116-260, 134 Stat. 1182 (CAA). It is a non-recurring program in that NTIA does not expect to receive future appropriations for this program.

On November 9, 2021, NTIA published an amended NOFO on Grants.gov, which amended the original CMC Pilot Program NOFO published on August 3, 2021, to describe the requirements under which it will award grants for the CMC Pilot Program. Because NTIA released the CMC Pilot Program NOFO before the enactment of the BABA, the NOFO did not include information about the Buy America Preference. The application window for the CMC Pilot Program closed on December 1, 2021. The applications received by NTIA did not account for the impacts of the

Buy America Preference relative to project timelines and project budgets. NTIA received over 200 applications for CMC awards for a total funding request of over \$842 million. NTIA has completed its review of these applications, has submitted its recommendations for CMC awards to the NIST Grants Office, and began making awards on a rolling basis in July 2022.

IV. Items Covered by the Proposed Waiver

The proposed waiver would cover all iron, steel, manufactured products, and construction materials, with the exception of fiber optic glass and fiber optic cables, used in infrastructure projects funded through CMC Pilot Program awards. NTIA will then conduct market research during the proposed six-month adjustment period to identify additional items that may be added to the fiber optic glass and fiber optic cable products that are currently domestically available and not covered under this proposed waiver. The up-to-date list of items excluded from this proposed waiver, and therefore subject to BABA requirements, would be available at the Build America, Buy America website of the Department. The six-month adjustment period would also give CMC recipients the needed time to identify potential domestic sources for necessary components of their projects and assess the costs from such sources. NTIA would then assess whether this waiver remains necessary to the fulfillment of the project objectives of the CMC Pilot Program recipients.

V. Public Interest in a General Applicability Waiver Providing a Six-Month Adjustment Period for CMC Recipients, Strengthening HBCU and TCU Capacity to Participate in Federal Programs and Funding Opportunities, and Increasing Flexibility for Waivers Granted to Tribal College Recipients

NTIA anticipates that many CMC Pilot Program recipients will receive funding for projects without expenditures on broadband infrastructure components, such as the hiring of IT personnel, the operation of an MBE, or the facilitation of educational instruction and digital

skills training. In the absence of NTIA's proposed waiver of the Buy America Preference, CMC recipients with projects that include infrastructure expenditures would be immediately subject to the Buy America Preference without any adjustment period. The NOFO provided no notice to CMC applicants of the future enactment of the BABA. CMC recipients therefore prepared their project budgets and project implementation schedules without any notice that a requirement like the Buy America Preference would apply to the CMC Pilot Program.

The immediate imposition of the Buy America requirement on CMC awards for projects with infrastructure expenditures would cause CMC recipients to have to revise budgets and project timelines to account for the BABA requirements. This would increase administrative burdens and delay HBCUs, TCUs, and MSIs in implementing their awards. Many CMC projects, which also include important components unrelated to infrastructure that CMC recipients need (*e.g.*, the hiring of IT personnel or the facilitation of educational instruction), may be delayed in their implementation as a result. NTIA has recommended awards to those CMC recipients that demonstrated that they have student populations with the greatest unmet financial needs, in accordance with the methodology in Section III.C.4 of the NOFO. The delays and additional burdens associated with the immediate imposition of the Buy America Preference would therefore harm some of our nation's neediest and most vulnerable students, as well as the institutions that serve them. NTIA has determined that a public interest waiver providing a six-month adjustment period would provide an appropriate means to address these concerns while also promoting domestic manufacturing. NTIA proposes to have recipients to whom the proposed waiver would apply report on their purchases of items from foreign sources. NTIA expects that many of the items purchased from foreign sources would be types of broadband equipment, such as switching equipment, routing equipment, and customer premise equipment,

that are not widely available from domestic manufacturers. The proposed waiver would therefore offer clear market signals to American businesses about the demand for such products. This would provide them with the opportunity to respond to this demand and reduce the need for future similar waivers. The use of waivers to promote domestic manufacturing in this manner is one of the goals of the BABA waiver process. NTIA would also be able to use the reported information for market research, including to better understand the availability of U.S. products in the ICT supply chain, and the management of future grant programs, including BEAD and the MMG programs.

The proposed waiver would be consistent with recent Executive Orders emphasizing the importance of HBCUs and TCUs. The pool of CMC award recipients affected by the proposed waiver would include both HBCUs and TCUs. Section 1 of Executive Order 14041 states that it is the policy of the Biden-Harris Administration to use partnerships with HBCUs to promote educational equity, excellence, and economic opportunity. Section 2 of Executive Order 14041 specifically provides for efforts to strengthen “the capacity of HBCUs to participate in Federal programs, access Federal resources, including grants and procurement opportunities, and partner with Federal agencies.” It also addresses efforts to promote “campus modernization and infrastructure improvements,” as well as ones to “break down barriers and expand pathways for HBCUs to access federal funding and programs” in such areas as innovation and research and development. Executive Order 14049 emphasizes that TCUs are “integral and essential to Tribal communities.” In a manner similar to Executive Order 14041, Section 2 of Executive Order 14049 discusses “breaking down barriers that impede the access of higher education institutions that serve Native American students, such as TCUs, to federal funding and strengthening the capacity of those institutions to participate in Federal programs and partnerships.” The grant of

the proposed limited applicability waiver would therefore be consistent with the policy goals of Executive Orders 14041 and 14049.

The pool of CMC recipients whose projects have broadband infrastructure components will also include multiple TCUs. The proposed waiver would thus be consistent with established Executive Branch policy regarding consultation and coordination with Indian Tribal governments in the development of Federal policies that have Tribal implications. Section 6 of Executive Order 13175 specifically concerns increasing flexibility for Indian Tribal waivers. It directs federal agencies to streamline the processes through which Indian Tribes apply for waivers of statutory and regulatory requirements. It further directs federal agencies to consider waiver requests from Tribal governments “with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian [T]ribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.”

The proposed waiver would be consistent with and further the intent underlying Executive Order 13175, as it would constitute the use of a flexible policy approach to advance the objective of making broadband internet service more readily available for Native communities and minimize the burden of revising budgets already submitted and approved for the CMC Pilot Program.

When evaluating the proposed waiver, NTIA carefully considered the benefits of the Buy America Preference. NTIA also examined such factors as the need for CMC recipients to revise project budgets and other plans to account for the Buy America Preference and Executive Orders concerning the institutions served by the CMC Pilot Program. NTIA has determined that a public interest waiver of the Buy America Preference, offering a six-month adjustment period for CMC recipients, would provide an appropriate means to balance the domestic manufacturing and

other benefits offered by the Buy America Preference with the interests of CMC recipients in beginning their projects as soon as possible.

Moreover, the proposed waiver would enable NTIA to fulfill its responsibilities under Executive Order 13175 to provide increased flexibility for waivers involving Federal policies with Tribal implications. In this connection, the proposed waiver would be consistent with the Buy America implementation guidance published by the Office of Management and Budget on April 18, 2022, as part of M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (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 public interest waivers to promote efficiency and to ease burdens for recipients. Given these considerations, NTIA proposes the grant of a public interest waiver of the Buy America Preference for CMC Pilot Program recipients as described in this Notice.

M-22-11 states on page 12 that agencies are expected to assess, when it is appropriate to do so, “whether a significant portion of any cost advantage of a foreign-sourced product is the result of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” before granting a public interest waiver. NTIA’s analysis has concluded that this assessment is not applicable to this proposed waiver because it is not based on the cost of foreign-sourced products.

VI. Request for Comments and Instructions for Commenters

This Notice posted on September 19, 2022 satisfies the requirement to publish any proposed Buy America waiver and provide the public with a reasonable period of time for notice and comment. NTIA seeks public and industry comment from all interested parties on this proposed waiver, as well as on any other issue or concern presented by this Notice. Relevant information and comments will help NTIA understand the facts surrounding this proposed waiver. Comments that contain references to studies, research, and other empirical data that are not widely available should include copies of the referenced materials along with the submitted comments.

Organizational commenters may wish to identify a point of contact for the comments, which will facilitate NTIA follow-up for clarifications as necessary. Commenters are advised not to incorporate information that concerns business trade secrets or other confidential commercial or financial information as part of the comment. Please do not include any information you would not like to be made publicly available.

This Notice will be closed for comments on October 3, 2022 at 11:59 p.m. Eastern Time. Please submit comments to CMC@ntia.gov. For further information, 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.