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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Broadband Technology Opportunities Program

Agency: National Telecommunications and Information Administration, U.S. Department of Commerce.

Action: Buy American Exception under the American Recovery and Reinvestment Act of 2009.

SUMMARY: The National Telecommunications and Information Administration (NTIA) hereby provides notice that on June 19, 2009, the Secretary of Commerce granted a limited waiver of section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), Pub. L. No. 111-5, 123 Stat. 115, 303 (2009) with respect to certain broadband equipment that will be used in projects funded under the Broadband Technology Opportunities Program (BTOP).

DATES: [insert date of publication in the *Federal Register*].

ADDRESSES: Broadband Technology Opportunities Program, Office of Telecommunications and Information Applications, National Telecommunications and Information Administration, U.S. Department of Commerce, Room 4812, 1401 Constitution Avenue, NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Broadband Technology Opportunities Program, telephone: (202) 482-5032.

SUPPLEMENTARY INFORMATION: In accordance with section 1605(c) of the Recovery Act and section 176.80 of Title 2 of the Code of Federal Regulations, NTIA hereby provides notice that on June 19, 2009, the Secretary of Commerce granted a limited waiver of section 1605 of the Recovery Act (Buy American provision) with respect to certain broadband equipment that will be used in projects funded under BTOP.¹ The basis for this waiver is a public interest determination pursuant to section 1605(b)(1) of the Recovery Act.

¹ Recovery Act § 1605, 123 Stat. at 303; 2 C.F.R. § 176.80.

I. BACKGROUND

The Recovery Act appropriates \$4.7 billion to NTIA to establish BTOP, through which NTIA will provide grants for broadband initiatives throughout the United States, including projects in unserved and underserved areas. Section 1605(a) of the Recovery Act, the Buy American provision, states that none of the funds appropriated by the Act, including the funds that have been dedicated to grants under BTOP, “may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.”²

Subsections 1605(b) and (c) of the Recovery Act authorize the head of a Federal department or agency to waive the Buy American provision by finding that: (1) applying the provision would be inconsistent with the public interest; (2) the relevant goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of the goods produced in the United States will increase the cost of the project by more than 25 percent. If the head of the Federal department or agency waives the Buy American provision, then the head of the department or agency is required to publish a detailed justification in the *Federal Register*. Finally, section 1605(d) of the Recovery Act states that the Buy American provision must be applied in a manner consistent with the United States’ obligations under international agreements.

II. PUBLIC INTEREST FINDING

The Secretary of Commerce has determined that, as applied to certain broadband equipment used in a BTOP project, application of the Buy American provision would be inconsistent with the public interest.³ A modern broadband network is generally composed of the following components: broadband switching, routing, transport, access, customer premises equipment, end-user devices, and billing/operations systems. The Buy American provision would prohibit NTIA from awarding a BTOP grant to a public applicant unless that applicant could certify that each element of each broadband network component containing iron, steel, and manufactured goods are produced in the United States. As explained more fully below, it would be difficult, if not impossible, for a BTOP applicant to have certain knowledge of the manufacturing origins of each component of a broadband network and the requirement to do so would be so overwhelmingly burdensome as to deter participation in the program. Requiring a BTOP applicant to request a waiver on a case-by-case basis also would be such an administrative burden on the applicant as to discourage participation in the program and would increase the agency’s time and costs for processing BTOP applications for

² Because the Buy American limitation applies only to public works and public buildings, completely private projects need not obtain a waiver to utilize iron, steel, and manufactured goods produced outside of the United States. Note, however, that public-private partnerships are considered public for purposes of the Buy American limitation.

³ See Recovery Act § 1605(b)(1), 123 Stat. at 303.

broadband infrastructure projects. Thus, implementing the BTOP without a limited programmatic waiver encompassing broadband network components would jeopardize the success of the program and undermine the broadband initiative.

First, much of the finished products used to manage and operate broadband infrastructure and offer broadband service are manufactured outside of the United States. The manufacturing supply chain varies by product and changes constantly due to the influence of global supply and demand. The result is a very competitive and complex production landscape with components and end products being manufactured and assembled in a large number of countries. While, arguably, the Secretary of Commerce could have relied on the “non-availability” exception for granting a waiver, the burden placed on the Department of Commerce in sourcing and evaluating the availability of each component of broadband equipment would be significant, and the task of sourcing and evaluating would be difficult to complete given the speed with which Congress has told NTIA to allocate the BTOP funds. In addition, requiring public entities to document the origin of broadband equipment and their components in order to determine whether they fit within the scope of the Buy American provision would severely complicate those applicants’ ability to apply for funds and would place an undue burden on State and local governments. Taken as a whole, these burdens would cause delays and would likely thwart the goal of Congress to “establish and implement the [BTOP] grant program as expeditiously as practicable,” and the Recovery Act’s requirement that NTIA to obligate all funds under BTOP by September 30, 2010.⁴

Second, a limited waiver will help facilitate the construction of modern broadband networks – an essential component of the Recovery Act. Applicants to BTOP must have the flexibility to incorporate the most technically-advanced components into their infrastructure, and a limited waiver gives them the ability to incorporate the latest technologies. Third, consistent with the Recovery Act, a limited waiver will help stimulate job growth for construction workers, technicians, equipment designers, engineers, and others who will operate the broadband infrastructure. Fourth, while the Office of Management and Budget has clarified which countries would be exempt from the Buy American provision, some of the key countries that produce broadband equipment would not be exempt. Finally, the broadband industry is very dynamic and global, and equipment can change over the course of a buildout. Subjecting public applicants for BTOP funds to the Buy American provision ultimately would slow broadband deployment and undermine the broadband initiatives.

III. WAIVER

On June 19, 2009, based on the public interest finding discussed above and pursuant to section 1605(c), the Secretary granted a limited waiver of the Recovery Act’s Buy American requirements with respect to BTOP funds used for the following essential components of a modern broadband infrastructure:

⁴ See Recovery Act § 6001(d)(1)-(2), 123 Stat. at 513.

- *Broadband Switching Equipment* – Equipment necessary to establish a broadband communications path between two points.
- *Broadband Routing Equipment* – Equipment that routes data packets throughout a broadband network.
- *Broadband Transport Equipment* – Equipment for providing interconnection within the broadband provider’s network.
- *Broadband Access Equipment* – Equipment facilitating the last mile connection to a broadband subscriber.
- *Broadband Customer Premises Equipment and End-User Devices* – End-user equipment that connects to a broadband network.
- *Billing/Operations Systems* – Equipment that is used to manage and operate a broadband network or offer a broadband service.

Note that this list does not include fiber optic cables, coaxial cables, cell towers, and other facilities that are produced in the United States in sufficient quantities to be reasonably available as end products. To the extent that an applicant wishes to use equipment that is not covered by this waiver, it may seek a waiver on a case-by-case basis as part of its application for BTOP funds, stating the statutory exemption upon which it is relying and its rationale for receiving a waiver. Further information on how to apply for a waiver will be available in BTOP Application Guidelines.

Dated: June 26, 2009

Anna M. Gomez

Acting Assistant Secretary for Communications and Information

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