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## **DEPARTMENT OF AGRICULTURE**

### **Rural Utilities Service**

Notice of Limited Waiver of Section 1605 (Buy American Requirement) of the American Recover and Reinvestment Act of 2009 (ARRA) for the Broadband Initiatives Program.

**AGENCY:** Rural Utilities Service, U.S. Department of Agriculture.

**ACTION:** Notice.

**SUMMARY:** The Rural Utilities Service (RUS) is hereby granting a limited waiver of the Buy American requirements of ARRA Section 1605 with respect to certain broadband equipment that will be used in projects funded under the Broadband Initiatives Program (BIP). This action permits the use of certain essential components of a modern broadband infrastructure as specified in section III of this notice.

**EFFECTIVE DATE:** [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

**ADDRESSES:** Send any correspondence regarding this order to David J. Villano, Assistant Administrator Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue., SW, STOP 1590, Room 5151, Washington, DC 20250-1590.

**FOR FURTHER INFORMATION CONTACT:** Ken Kuchno, Director, Broadband Division, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue., SW, STOP 1599, Room 2868-S, Washington, DC 20250-1590

**SUPPLEMENTARY INFORMATION:** In accordance with section 1605(c) of the Recovery Act and section 176.80 of the rules of the Office of Management and Budget (OMB), RUS hereby provides notice that it is granting a limited waiver of section 1605 of the Recovery Act with respect to certain broadband equipment that will be used in projects funded under BIP. (*See* American Recovery and Reinvestment Act of 2009, P.L. 111-5, § 1605, 123 Stat. 115, 303 (Feb. 17, 2009) (“Recovery Act”); Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards, Interim Final Guidance, 74 Fed. Reg. 18449 (Apr. 23, 2009) (codifying the Buy American provisions at 2 C.F.R. Part 176, Subpart B) (“Buy American Guidance”). The basis for this waiver is a public interest determination pursuant to section 1605(b)(1) of the Recovery Act.

## **I. BACKGROUND**

The Recovery Act appropriates \$2.5 billion in budget authority to RUS to establish BIP, through which RUS will provide grants, loans, and loan/grant combinations for broadband initiatives throughout the United States, including projects in unserved and underserved rural 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 BIP, “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.”<sup>1</sup>

Sections 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 manufactured 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 manufactured 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 determines that it is necessary to waive application of the Buy American provision, then the head of the department or agency shall publish a detailed justification in the Federal Register. Finally, 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**

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<sup>1</sup> Because the Buy American provision 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.

The Agency has determined that, as applied to certain broadband equipment used in a BIP project, the application of the Buy American provision would be inconsistent with the public interest. (*See Recovery Act*, § 1605(b)(1), 123 Stat. at 303.) 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 RUS from awarding a BIP grant, loan or loan/grant combination 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 BIP 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 BIP applicant to request a waiver on a case-by-case basis would also be such an administrative burden on the applicant as to discourage participation in the program and would increase RUS' time and costs for processing BIP applications for broadband infrastructure projects. Thus, implementing BIP without a limited programmatic waiver encompassing broadband network components would jeopardize the success of the program and undermine President Obama's broadband initiative.

First, RUS recognizes that 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 could have relied on the “non-availability” exception for granting a waiver, the burden placed on the Department 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 RUS to allocate funds under the Recovery Act. 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 [BIP] grant, loan and loan/grant combination program as expeditiously as practicable,” and the Recovery Act’s requirement that RUS obligate all funds under BIP by September 30, 2010. (*See Recovery Act*, § 6001(d)(1)-(2), 123 Stat. at 513.)

Second, a limited waiver will help facilitate the construction of modern broadband networks – an essential component of the Recovery Act. Applicants to BIP 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 OMB

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 build out. Subjecting public applicants for BIP funds to the Buy American provision ultimately would slow broadband deployment and undermine President Obama's broadband initiatives.

### **III. WAIVER**

Based on the public interest finding discussed above and pursuant to section 1605(c), RUS is granting a limited waiver of the Recovery Act's Buy American requirements with respect to BIP funds used for the following essential components of a modern broadband infrastructure:

- *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, 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 the proposed waiver, it may seek a waiver on a case-by-case basis as part of its application for BIP funds stating the statutory exemption upon which it is relying and its rationale for receiving a waiver.

This supplementary information constitutes the “detailed written justification” required by Section 1605(c) of the Recovery Act and Section 176.80 of OMB’s rules for waivers of the Buy American provisions.

**Authority:** Public Law 111-5 § 1605, 123 Stat. 115; 2 CFR 176.10 *et seq.*

**Date:** June 26, 2009

**Thomas J. Vilsack**

Secretary

United States Department of Agriculture

**Billing Code:** 3410-15P