

DEPARTMENT OF THE INTERIOR
and
Department of Agriculture
Department of Commerce
Department of Education
Department of Energy
Department of Housing and Urban Development
Environmental Protection Agency
Federal Emergency Management Agency

General Applicability Public Interest Waiver to Indian Tribes

1. Summary

Agency: Department of the Interior (DOI); Department of Agriculture (USDA); Department of Education (ED); Department of Energy (DOE); Department of Housing and Urban Development (HUD); Environmental Protection Agency (EPA); Federal Emergency Management Agency (FEMA); and Department of Commerce (DOC) (hereafter “the Agencies”).

Proposed Waiver: The Agencies are proposing a five (5) year general applicability, public interest waiver of the requirements of section 70914 of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) (Buy America Preference) for Federal Financial Assistance¹ agreements in accordance with 2 CFR.200 awarded to Indian Tribes, as defined in 25 U. S.C. § 5304(e), Tribes, including their governmental arms and instrumentalities, or Tribal organizations, tribal entities, and Native Hawaiian organizations as determined by each program’s regulatory and statutory authority, in the circumstances described below, having determined such waiver to be in the public interest. The comment period for this waiver will be open for fifteen (15) calendar days after the publication date of this notice. The proposed waiver will be modified or finalized after the comment period.

This proposed waiver applies to the following:

- Awards and subawards provided to Tribes at or below \$2.5 million will be exempt from BABA requirements under the following condition: 1) The total prime federal award or subaward does not exceed \$2.5 million, 2) and the Federal award or subaward amount does not exceed \$2.5 million for the life of the award. To the extent projects are co-funded with federal financial assistance awarded to tribal and non-tribal recipients, non-Tribal entities are eligible for coverage under the terms of this waiver if the award or subaward will be used to co-fund a project with Tribal recipients that is otherwise eligible for coverage under this waiver.

¹ For the purposes of this waiver, federal financial assistance includes grants, cooperative agreements, loans, and loan guarantees, and other forms of financial assistance as defined at 2 CFR 200.1

- **Manufactured Products:** In addition, for Federal financial assistance obligated to Tribes between the effective date of the final waiver and September 30, 2026, recipients will be permitted to purchase non-compliant manufactured products, regardless of the Federal financial assistance amount. For Federal financial assistance issued prior to the effective date of the final waiver, the waiver would apply to funds not yet expended.

In addition, other Agency-specific waivers may apply to these projects (e.g., de minimis waivers).

Waiver Type: Public Interest

Waiver Level: General Applicability, All Regions

Applicability: The waiver would be applicable to Federal financial assistance obligated on or after the effective date of the final waiver, and before its expiration. For Federal financial assistance issued prior to the effective date of the final waiver, the waiver would apply to funds not yet expended. This waiver action proposes to apply for Federal Financial Assistance agreements in the terms specified above, in which the recipient or subrecipient is an Indian Tribe as defined in 25 U. S.C. § 5304(e), including their governmental arms and instrumentalities, tribal organizations, tribal entities, and Native Hawaiian organizations as determined by each program’s regulatory and statutory authority.²

Length of the waiver: This waiver, if finalized, would remain in effect for (5) years from [Insert the effective date of this waiver]. The manufactured products waiver is applicable to Federal financial assistance obligated after the effective date of the final waiver and September 30, 2026. For Federal financial assistance issued prior to the effective date of the final waiver, the waiver would apply to funds not yet expended. This waiver, if finalized, would be reviewed as often as necessary to determine if the waiver continues to be in the public interest.

2. Background

The Buy America Preference set forth in section 70914 of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards be produced in the United States.

Under Section 70914 of the Office of Management and Budget’s (OMB) Memorandum M-24-02 *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, Agencies may waive the application of BABA requirements, in any case in which they find that: (i) applying the domestic content procurement preference would be inconsistent with the public interest; (ii) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and

² This waiver does not apply to awards made under the Department of Commerce’s National Telecommunications and Information Administration’s (NTIA) Broadband Equity, Access, and Deployment (BEAD) Program or Tribal Broadband Connectivity Programs (TBCP or TBCP 2). Existing BABA waivers for these three programs - BEAD, TBCP, and TBCP 2 - can be found on the Department of Commerce website.

reasonably available quantities or of a satisfactory quality; or (iii) 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; provide a period of not less than fifteen (15) calendar days for public comment on the proposed waiver; and submit the proposed waiver to the OMB's Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

The Office of Management and Budget's October 25, 2023, M-24-02 memorandum, *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* encourages agencies to consider whether it is in the public interest to waive application of a BABA requirements for equity purposes.

The Agencies have identified a need for such a waiver for Tribal recipients and subrecipients. The following Agencies previously published temporary public interest waivers in order to conduct tribal consultations prior to the BABA requirements going into effect for Tribal recipients, subrecipients, and other stakeholders:

- Department of Agriculture (effective July 14, 2023, expired July 14, 2024)
- Department of Commerce (effective May 8, 2024, expired September 30, 2024)
- Department of Education (effective February 7, 2024, expires February 6, 2025)
- Department of Energy (effective August 18, 2023, expired August 18, 2024)
- Department of Housing and Urban Development (latest waiver issued effective July 1, 2024, expired September 30, 2024)
- Department of the Interior (effective September 1, 2023, expired September 1, 2024)
- Federal Emergency Management Agency (effective February 6, 2023, expired August 6, 2023)

Summary of Funding Programs: The Agencies provide grants and other federal financial assistance to Tribes and Tribal Recipients for infrastructure projects under various programs.

BABA Tribal Consultations: OMB Memorandum M-24-02 provides guidance to agencies to consult with Tribal Nations before applying a Buy America Preference to a covered program that will affect Tribal communities. On September 21, 2022, nine agencies including the U.S. Department of the Interior, Department of Agriculture, Department of Housing and Urban Development, Environmental Protection Agency, Department of Homeland Security Federal Emergency Management Agency, Department of Energy, Department of Transportation, Department of Commerce, and the Small Business Administration participated in a consultation hosted by the White House Council on Native American Affairs (WHCNA) to consult with Tribal Nations on discretionary Buy America Preference provisions and the waiver categories characterized in the OMB memorandum. The Department of Education attended this consultation but was not a consulting agency). Separate agencies' tribal consultations were held by ED (August 23, 2023 and June 13, 2024), FEMA (December 2022), HUD (10 separate consultations from June 2023 through November 2023), USDA (May 2024), DOC (July 2024), and DOI (June 10 through July 15, 2024). Feedback from these consultations is summarized below:

Tribal Compliance Burden: Across the consultations, Tribes consistently provided feedback that the BABA compliance is overly complex and excessively burdensome. Tribes stated that BABA compliance would limit Tribes' ability to secure contracts and financing for high priority needs. Specific examples include:

- Solicitations with restrictive requirements often go unfulfilled, and restrictions in solicitation documents such as requiring BABA compliance could result in lack of contracts for critical Tribal infrastructure projects.
- Information on domestic sourcing is rarely available until the time of delivery. In the event a product arrives and does not meet BABA requirements, Tribes would need to consider refusing delivery or re-order and re-deliver products. This would put Tribes in a position to choose between significant cost and time delays or being in noncompliance with BABA.
- National market research generally does not consider costs for products or services in Indian Country, which tend to be higher for reasons of remoteness and project size.
- Tribes experience a disproportionate negative impact from BABA compliance due to limited administrative capacity.
- Tribes rely on contractors and subcontractors to source materials for infrastructure and housing projects and expressed substantial concerns with their ability to ensure and monitor whether contractors are sourcing American-made materials.
- Tribes that compete with private entities for financing, such as those competing with private developers for tax credits, are concerned that BABA requirements will prevent Tribes from successfully competing for critical sources of financing.

Inter-agency Complexity: In various consultations, Tribes raised major concerns with complying with BABA across infrastructure projects. Tribes often need to use funding from multiple agencies for a single project and thus would be required to navigate waiver processes across each funding agency. Specific examples include:

- Tribes requested that Tribal waivers be uniform across the Federal government.
- Tribes indicated that the current \$250,000 Small Grants and De Minimis BABA waiver thresholds are exceedingly too low and should be set much higher for Tribal Recipients.
 - The small grant waiver threshold should be set higher to reduce administrative burdens on small Tribes that receive less Federal Financial Assistance. The de minimis threshold should be set higher to ensure that smaller infrastructure projects can be carried out without the additional challenge of sourcing materials from American manufacturers.
- The category of manufactured products was consistently identified by Tribes as a major challenge.
 - While identifying iron, steel, and to a lesser extent construction materials seems relatively straightforward, Tribal Recipients consistently noted that knowing what a manufactured product was and determining whether it is manufactured in the United States was particularly difficult. Manufactured products are made up of component parts and materials – often sourced from different sources across the globe. Tribes requested additional time and relief from having to comply with BABA with respect to manufactured materials. While domestic preferences for materials such as iron and steel in Federal projects have existed for many years, the category of manufactured products is new and identifying whether a

manufactured product is manufactured domestically remains challenging – particularly for Tribal Recipients who already face daunting challenges sources compliant materials and attracting contractors.

- Tribes noted that many of their infrastructure projects have multiple agency funding sources adding to the complexity of navigating BABA compliance. While some sources are exempt from BABA requirements (e.g., 638 ISDEAA funding), other sources are not.

Unique Tribal Circumstances: In several consultations, Tribal members expressed that BABA requirements limit the ability to address economic and basic public service needs by increasing costs, delaying the construction of critical infrastructure, or hindering the ability to secure contracts or financing.

- Lack of infrastructure was identified as the number one barrier to developing affordable housing for Tribal families.
- Particular circumstances of tribal areas, (e.g., remoteness, lack of infrastructure, and complex legal and other constraints related to land ownership) make it extremely difficult to improve housing conditions in those areas.

Other specific examples of challenges in Indian Country include:

- Tribal Nations face challenges in accessing materials and managing construction costs due to their remote locations and logistical barriers.
- While infrastructure materials may be available domestically, they are often not accessible to many Tribes, especially those in isolated regions.
- Construction costs in Tribal areas are higher, exacerbated by short building seasons, severe weather, and the need to transport materials by air or barge.
- Specialized equipment for extreme climates, particularly in Alaska, is often not produced domestically, creating further supply chain issues.
- Alaska Tribes have made efforts to obtain cost comparisons between BABA-compliant and non-compliant projects and contractors have been unable to provide meaningful cost comparisons due to the unavailability of many materials required for housing projects, which are not made in the U.S.

Tribes also noted that BABA requirements may limit Tribal ability to address severe housing deficiencies. According to HUD’s 2017 Native American Housing Needs Study, based on Census data: “the U.S. average share of households with plumbing deficiencies was 1 percent, but [the] study’s household survey shows the share for AIAN populations in tribal areas was 6 percent; the share with heating deficiencies was 2 percent for the United States but 12 percent for AIANs in tribal areas; the share that was overcrowded was 2 percent for the United States but 16 percent for AIANs in tribal areas”. Lack of infrastructure was identified as the number one barrier to developing affordable housing for Tribal families. Particular circumstances of tribal areas— remoteness, lack of infrastructure, and complex legal and other constraints related to land ownership—make it extremely difficult to improve housing conditions in those areas.

In some consultations, Tribes expressed that self-determination provides Tribes the right to govern themselves and make decisions that best suit their communities,³ including decisions impacting their procurement policies such as BABA. With consideration for self-determination, Tribes have recommended that BABA compliance be determined by Tribal self-governance policies on the best ways to meet Tribal communities' needs.

In response to questions about how Federal agencies can assist Tribes in meeting BABA requirements, Tribes responded by requesting that waivers for Tribes be uniform across the Federal government. Some Tribes also provided feedback such as: (a) requesting a list of Native-owned businesses to provide easier ways to identify companies that provide BABA-compliant products; (b) ensuring that Tribes understand the process for identifying waivers with Agency understanding of how remote geographic locations impact the implementation of BABA requirements; and (c) requesting agencies to help build local hiring and training opportunities, assist Tribal Nations in those capacity building efforts, and institute policies to advance such efforts. Finally, Tribes commented that it is imperative to assist in offsetting of the cost differentiation between procuring goods manufactured in the United States versus elsewhere.

Participating Tribal leaders broadly requested that Federal agencies provide for maximum flexibility in allowing waivers of tribal participation in covered federal programs. Based on the feedback received, the participating Federal agencies began working jointly to coordinate and collaborate on waivers for Tribes. Through cross-agency collaboration, it was determined that a waiver for Tribes is in the public interest to allow Tribes ample opportunity to continue building their capacity through technical assistance, and ultimately eliminating the need for a waiver.

3. Impact of Waiver to the Federal Agencies

Since the enactment of BABA, the Agencies have worked diligently to begin implementing Buy America Preferences BABA requirements for financial assistance agreements while simultaneously evaluating the impact of BABA requirements on Tribal recipients. The Agencies issued a six-month waiver to allow time for adjusting to the new Buy America Preference for infrastructure projects while meeting existing deadlines. This period also provided time to begin the Tribal consultation process before applying the preference to programs affecting tribal communities.

After the enactment of BABA, the White House Council on Native American Affairs (WHCNA) recognized the ongoing tribal requests for increased inter-agency collaboration and coordination of BABA, including consultations. Rather than federal agencies consulting with tribes separately, WHCNA invited Tribal Leaders to consult with the participating agencies in a joint, inter-agency consultation that occurred on September 21, 2022. In addition to this convening, many Agencies determined it was in the public interest to issue Tribal consultation waivers of the Buy America preference requirements, to allow additional time to conduct robust Tribal consultations and take steps to be responsive to concerns raised by Tribal leaders prior to the Buy America preference requirements going into effect for these recipients. A summary of

³ See President Nixon's Special Message on Indian Affairs (July 8, 1970): "We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them."

the one-year tribal consultation waivers and the resulting findings of the consultations are provided above.

4. Waiver Justification

OMB Memorandum M-24-02 encourages agencies to consider whether it is in the public interest to waive BABA requirements for equity purposes. The Agencies have identified a need for such a waiver for Tribal communities, many of whom face a number of unique economic and social circumstances in terms of geography and acute critical infrastructure needs. Additionally, the Agencies would need to dedicate significant staff and contractor time to assist Tribal communities in rural or remote areas with implementing domestic sourcing requirements for the first time and to support with increased workload to process project-specific waivers.

This waiver would allow Tribal governments, in collaboration with federal agencies, to build the capacity needed to implement these requirements. Tribal nations are disproportionately located in rural, remote areas of the United States, which leads to higher project costs due to transportation and material sourcing challenges. This situation puts Tribal communities at a significant disadvantage in accessing BABA-compliant products and services at competitive prices that meet their basic needs.

Tribal leaders also emphasized the importance of a waiver to prevent cost increases and project delays. A waiver would help avoid these cost increases for current projects while allowing time to identify domestic supply sources for future projects.

Without a waiver, Tribal leaders expressed concerns that ongoing and planned projects could face significant delays due to the time needed to research and locate domestic materials, restructure contracts, and process waivers when domestic materials are unavailable. A waiver would ensure that critical infrastructure needs are met during the transition to compliance.

Additionally, a waiver would ease the administrative burden on Tribes, allowing for a more gradual internal process adjustment as additional funding becomes available. It would also help Native American businesses and partners build the capacity to source domestic materials.

For the reasons expressed above, the Agencies have determined that this waiver of the Buy America Preference for Tribes in specific circumstances is in the public interest.

5. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-24-02, Federal agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. This assessment is not applicable to this waiver as this waiver is not based on the cost of foreign-sourced

6. Solicitation of Comments

Proposed Waiver: This notice posted for fifteen (15) days on December 13, 2024, and closing on December 28, 2024, satisfies the requirement to publish any proposed BABA waiver and provide

the public with a reasonable period of time for notice and comment. The Agencies seek public and industry comment from all interested parties. Relevant information and comments will help the Agencies understand the facts and impacts surrounding this waiver request. This notice will be closed for comments on December 28, 2024. Comments can be sent to DOI_Grants_BuyAmerica_Waiver@ios.doi.gov. Please reference “Indian Tribes” in the subject line of the email. Comments received prior to the public comment closing date will be reviewed and considered by the Agencies.

For more information on the Buy America Preference, please reference www.doi.gov/grants/buyamerica or MadeinAmerica.gov.