

Department of Commerce

General Applicability Public Interest Tribal Consultation Waiver for Financial Assistance Agreements to Indian Tribes

1. Summary

Agency: Department of Commerce.

Proposed Waiver: The Department of Commerce (DOC) is proposing a limited general applicability public interest Tribal consultation waiver of the requirements of section 70914 of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. No. 117-58) (Buy America preference) for Federal financial assistance agreements in accordance with 2 CFR part 200 awarded to Federally recognized Indian Tribes, including their governmental arms and instrumentalities, or Tribal organizations. This waiver is critical in keeping with the Federal Government's commitment to consult with Tribes and build Tribal capacity as established through Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, before applying Buy America preference to programs that affect tribal communities.

This proposed waiver would permit the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may otherwise be prohibited under section 70914(a) of BABA for DOC Federal financial assistance agreements in which the recipient or subrecipient is a Federally recognized Indian Tribe, including their governmental arms and instrumentalities, or Tribal organizations. The waiver would apply to awards obligated or incrementally funded on or after the effective date until September 30, 2024. In the case of awards obligated prior to the effective date, the waiver would apply to expenditures on or after the effective date of the final waiver. However, this waiver does not apply to awards made under the DOC's National Telecommunications and Information Administration's (NTIA) Broadband Equity, Access, and Deployment (BEAD) Program or Tribal Broadband Connectivity Program (TBCP). A TBCP Waiver already separately applies to awards made under TBCP funding via the June 3, 2021, TBCP Notice of Funding Opportunity (NOFO). The BABA requirements that apply to BEAD awards, or to TBCP awards made under the July 27, 2023, NOFO, are included in the relevant NOFO for each program, and any specific waiver issued for each program.

2. Background

The Buy America preference set forth in section 70914 of BABA 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(b), and in accordance with the Office of Management and Budget's (OMB) October 25, 2023 memorandum on the subject, *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (M-24-02), Federal agencies 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; provide a period of not less than 15 calendar days for public comment on the proposed waiver; and require submission of the proposed waiver to OMB's Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

OMB's 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. Since the enactment of BABA, DOC has conducted initial tribal consultations, and it participated in a Tribal consultation hosted by the White House Council on Native American Affairs (WHCNAA).¹

The comments received from the Tribal leaders in response to these consultations expressed concerns related to implementation and potential project delays. Tribal leaders also expressed a desire to work with DOC to ensure that their projects are achieved in a sustainable manner and Federal trust and treaty responsibilities are fulfilled. 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, it was determined that a waiver for Tribes is in the best interest of DOC and the public to allow ample opportunity for ongoing consultations while also building the capacity of Tribes to work towards eliminating the need for a waiver. In this way, the waiver will serve as a tool to promote investment in our domestic manufacturing base while also promoting the well-being, equity, and justice for Tribes.

3. Waiver Justification

With the enactment of BABA, Federal financial assistance agreements with Tribes must now comply with the Buy America preference requirements. On January 26, 2021, the Biden administration released a "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships" affirming the Administration's commitment to Executive Order (E.O.) 13175. Section 6 of E.O. 13175 requires each Federal agency to consider any application for a waiver by a Tribe with a "general view toward increasing opportunities for utilizing flexible approaches at the Indian tribal level" as "consistent with applicable Federal policy objectives" and "otherwise appropriate." Underpinning this provision is the Federal trust responsibility, a fiduciary obligation to provide for flexibility, as appropriate, to support program access, recognize Tribes as sovereign entities, and facilitate Tribal economic development interests.

Based on feedback provided from Tribes during initial consultations, DOC proposes that a waiver is critical to allow DOC to conduct consultations while also building the capacity of Tribes through technical assistance to work towards eliminating the need for a waiver. This waiver would allow for a more gradual modification of processes internally as additional funding is provided and allows time for Tribal businesses and partners to build capacity and resources to

¹ On September 21, 2022, nine Federal agencies, including the U.S. Department of Commerce, participated in a consultation hosted by the White House Council on Native American Affairs. Based on the consultations held, Tribes were requested to provide written comments and feedback by October 20, 2022, for Federal agency consideration. The resulting comments were received by the White House Council and distributed to agencies on October 25, 2022.

source domestic materials. A waiver will help to keep these projects moving forward during the transition toward compliance.

To further support the administration’s priorities to steward investments to build a better America and promote domestic manufacturing and jobs, DOC also recognizes the public interest in job creation, domestic supply chain resilience and the national and economic security interests inherent in robust manufacturing of key products and materials needed to build our infrastructure and clean energy future. If DOC determines a waiver is appropriate, during the period the waiver is in place, DOC will aim to collect information from projects covered by this waiver to help evaluate the domestic market availability of commonly used infrastructure products. Through this work, DOC will support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of infrastructure projects on Tribal lands. DOC supports the creation of resilient supply chains and manufacturing base for critical products here in the United States that will bring about investment in good-paying American manufacturing jobs and businesses, including jobs and businesses on Tribal lands. The creation of jobs in Tribal communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used in infrastructure but not yet made domestically.

4. Impact of the Waiver

Based on FY22 and FY23 data, entities identifying as Native American Tribes received about \$150 million through DOC federal financial assistance agreements for a variety of projects, many of which included infrastructure. DOC anticipates a similar volume of awards in FY24. During the waiver period, DOC will continue to participate in Tribal consultations and will work with Tribes to identify commonly purchased items, to eliminate the need for a general applicability waiver going forward.

Since the enactment of BABA, DOC has worked diligently to implement Buy America Preferences for financial assistance agreements while simultaneously evaluating the impact of the Buy America Preference to Tribes. DOC, in collaboration with other agencies, remains committed to obtaining input from Tribes and intends to continue dialogue with interest groups and stakeholders to continue working toward consistent, long-term compliance with the Buy America requirements while also continuing consultations and collaboration with Tribes. As consultations and collaboration efforts continue to develop, the need for ongoing waivers will be reevaluated.

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

Under 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 products.

6. Duration of Waiver

The waiver would apply to awards obligated or incrementally funded on or after the effective date until September 30, 2024. In the case of awards obligated prior to the effective date, the

waiver would apply to expenditures on or after the effective date of the final waiver. DOC will review this waiver during the waiver period to assess whether it remains necessary to the fulfillment of DOC's missions and goals and consistent with applicable legal authorities. DOC may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with MIAO.

7. Solicitation of Comments

As required under section 70914 of the IIJA, DOC is soliciting comments from the public on this proposed waiver. In particular, DOC welcomes comments on the length, purpose, and scope of the waiver to allow DOC to make an informed final determination on those aspects of the waiver, at a minimum. This notice will be open for 15 days and closed for comments on March 29, 2024.

Comments can be sent to mthompson@eda.gov with "Tribal Consultations Waiver" in the subject line of the email. Comments received prior to the public comment closing date will be reviewed and considered by DOC.

For more information on the Build America, Buy America preference, please reference DOC's Build America, Buy America [website](#) or MadeinAmerica.gov.