

**DEPARTMENT OF THE INTERIOR**

**TITLE:**

**GENERAL APPLICABILITY PUBLIC INTEREST TRIBAL CONSULTATION  
WAIVER FOR FINANCIAL ASSISTANCE AGREEMENTS TO INDIAN TRIBES**

**1. Summary**

Agency: Department of the Interior

Waiver: The Department of the Interior (DOI) is issuing a *one-year* general applicability 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 Assistance agreements in accordance with 2 CFR 200 awarded to Federally recognized Indian Tribes (Tribes), having determined such waiver to be in the public interest. This waiver is critical in keeping with the Federal Government's commitment to follow consultation policies established through Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, before applying Buy America Preference to programs that affect tribal communities.

Applicability: This waiver action permits the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may otherwise be prohibited under section 70914(a) during the specified period of time for Department of the Interior Federal Financial Assistance agreements in which the direct recipient is a Federally recognized Indian Tribe as defined in in Part 83 of Title 25 of the Code of Federal Regulations.

The waiver will remain in effect for a period of one year from the date of final approval.

**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(b), and in accordance with the Office of Management and Budget's (OMB) April 18, 2022 initial implementation guidance memorandum on the subject (M-22-11), the Department of the Interior 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 submit the proposed waiver to the Office of Management and Budget Made in America Office for review to determine if the waiver is consistent with policy.

OMB's M-22-11 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 (U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Housing and Urban Development, U.S. Environmental Protection Agency, U.S. Department of Homeland Security, U.S. Department of Energy, U.S. Department of Transportation, U.S. Department of Commerce, and U.S. Small Business Administration) participated in a consultation hosted by the White House Council on Native American Affairs to consult with Tribal Nations on discretionary Buy America Preference provisions and the waiver categories characterized in the OMB memorandum. 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.

The comments received from the Tribal leaders in response to these consultations expressed concerns about the undue burden the Buy America Preference would place on Tribes. Further the Tribes expressed that agencies need to be cognizant that Tribes should have the opportunity to dictate which materials can be procured on their land and Buy America Preferences undermine Tribal sovereignty and threaten delays of infrastructure projects and established budgets for Tribal Communities. Tribes also anticipate an increased total project cost for materials and acquisitions leading to some projects being rendered as unviable. Finally, they expressed that they have limited access to a wide variety of products, supplies, and personnel and that the Buy America Preference will impact critical future projects, such as housing infrastructure, where Tribes already face challenges due to lack of funding and remote locations. Rising inflation and ongoing supply chain issues will continue to disproportionately affect Tribes unless a waiver process is implemented specifically for Tribes.

In response to questions about how Federal agencies can assist Tribes in meeting the Buy America Preference, Tribes responded by requesting that waivers for Tribes be uniform across the Federal government. In addition some Tribes also provided feedback such as: (a) requesting a list of Native-owned businesses to provide easier ways to identify companies that meet Buy America Preference; (b) ensure that Tribes understand the process for identifying waivers with Agency understanding of how remote geographic locations impact the implementation of requirements; and (c) agencies should help build local hiring and training opportunities and assist Tribal Nations in those capacity building efforts and policies to advance such efforts. Finally, Tribes commented that it is imperative to assist in the 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 in an effort to uphold the Nation's responsibilities between the Federal government and Federally recognized Tribes. Through cross-agency collaboration, it was determined that a waiver for Tribes is in the best interest of the DOI and public to allow ample opportunity for ongoing consultations while also building the capacity of Tribes through

technical assistance to work towards eliminating the need for a waiver. Furthermore, DOI plans to engage Tribes, conduct consultations to provide training and technical assistance to build Tribal capacity to comply with Build America, Buy America requirements. 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. Impact of Waiver to the Department of the Interior**

The Department of the Interior's Fiscal Year 2022 – 2026 [Strategic Plan](#) provides a roadmap for fulfilling the Department's mission, achieving the vision of the Secretary of the Interior, and addressing the priorities of the Biden-Harris Administration. This plan outlines four specific strategic goals of the Department. The first of these four goals is to promote well-being, equity, and justice for Tribes, American Indians, Alaska natives, Native Hawaiians, and Insular communities. This includes enabling programs and opportunities that advance tribal sovereignty, tribal consultations to inform decision making, and coordinated Federal Government-wide engagement. This waiver seeks to advance the strategic goals of the Department while ongoing consultations and collaboration with the tribes and other Federal Government Agencies continues to develop.

Since the enactment of the Build America, Buy America Act, DOI has worked diligently to begin implementing Buy America Preferences for financial assistance agreements while simultaneously evaluating the impact of the Buy America Preference to Native American Tribes. In July 2022, the DOI issued a six-month temporary adjustment period waiver to allow the agency adequate time to adjust to the new Buy America Preference for various infrastructure projects while still maintaining current project deadlines and milestones. This six-month adjustment period also allowed time to initiate the Native American consultation process before applying Buy America Preference to programs that affect tribal communities. DOI's temporary adjustment period waiver expired on January 12, 2023.

After the enactment of the Buy America Preference, the White House Council on Native American Affairs (WHCNA) recognized the ongoing tribal requests for increased inter-agency collaboration and coordination of the Buy America Preferences, 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. DOI was a participant of that consultation and continues to be in coordination with the WHCNA regarding on-going consultations. Based on the results of the consultation that occurred in September 2022, and on-going discussions still taking place with tribes, a determination was made it would be contrary to the public's interest to apply the Buy America Preference to financial assistance agreements awarded to Tribes until at least an initial one-year waiver period to allow for ongoing tribal consultations and the building of Tribal capacity to meet domestic procurement requirements.

Based on prior fiscal year data, Native American tribes received about \$850 million through DOI federal financial assistance agreements across the 574 Federally recognized tribal entities for a variety of projects, many of which may include infrastructure. During the waiver period, the DOI will continue to participate in Tribal consultations and will work with tribes to identify where

more narrow project or product specific waivers may be necessary to eliminate the need for a general applicability waiver going forward.

#### **4. Waiver Justification**

With the enactment of the Buy America Preference, Federal Financial Assistance agreements with Tribes must now comply with the requirements of the Build America, Buy America Act that were not previously required. 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 an Indian 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 the flexibility, as appropriate, to support program access, recognize Tribal Nations as sovereign entities, and facilitate Tribal economic development interests.

Based on feedback provided from tribes during initial consultations, a waiver is critical to ensure these new requirements do not adversely impact the ability for Tribal nations to establish procurement policies for Tribal sovereign interests. Tribal nations often reside in rural, remote areas across the United States which typically result in increased project expenses due to transportation and sourcing barriers. In addition, tribes often do not maintain a tax-base necessary to offset additional expenditures, including increases in anticipated project costs. The Buy America Preference seeks to provide for targeted economic benefit for domestic made iron, steel, manufactured products, and construction materials and realizes cost savings in many cases. However, in the event that the domestic purchase of products increases infrastructure construction expenses, Federal agencies may not be able to provide for increased project awards covering any additional expenses. The provision of a general waiver provides for greater equity in infrastructure project development through the fulfillment of the Federal government trust responsibility while mitigating additional cost prohibitive measures that may otherwise impede infrastructure development throughout rural communities.

Input from Tribal leaders also expressed the importance of a waiver to prevent increased costs to projects and project delays. Implementation of the Build America, Buy America Act will likely result in ongoing and planned projects being subject to cost increases associated with re-scoping projects, finding new sources of supply, and associated administrative costs. A waiver will help to ensure these current planned projects are not subject to cost increases while working toward identifying domestic sources of supply for future projects. Absent a waiver, Tribal leaders expressed concerns that ongoing and planned projects may experience substantial delays in project implementation and completion due to the additional time required to research and locate domestic sourced materials, restructure contracts, and submit and process waivers when domestic materials are not available. A waiver will help to keep these projects moving forward during the transition toward compliance.

A waiver will also help to reduce the increased burden for Tribes who now must expend additional administrative efforts to identify and maintain domestic sources of supply. This will

allow for a more gradual modification of processes internally as additional funding is provided. Finally, a waiver will help Native American businesses and partners build capacity and resources to source domestic materials. This will help to alleviate the concern of alienating local contractors and the cascading impacts to Tribal economies.

For the reasons expressed above, a determination has been made that it would be contrary to the public's interest to apply the Buy America Preference to Tribes until sufficient time has been allotted to allow for ongoing tribal consultations and the building of Tribal capacity to meet domestic procurement requirements. During the one-year period of the waiver, DOI plans to implement an engagement plan to facilitate opportunities to address the concerns by Tribes based on their feedback to the consultation hosted by the White House Council on Native American Affairs on September 21, 2022, to discuss Build America, Buy America requirements. DOI will host Tribal consultations to receive more tailored feedback from Tribes, deliver training and technical assistance on financial assistance, Build America, Buy America provisions, and share tools and resources. The DOI Tribal Consultation waiver will allow DOI time to consult with Tribes and enhance their capacity to access DOI financial assistance programs and comply with Build America, Buy America requirements. DOI will utilize the information from the Tribal consultations to assess the need for targeted waivers in the future to address the address diverse needs of Tribes.

In the interim, the Department of the Interior, 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 to honor Trust responsibilities to 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 OMB Memorandum M-22-11, 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. Summary of Comments**

Waiver: This notice was posted on July 31, 2023, to satisfy the requirement under section 70914 of BABA to publish any proposed BABA waiver and provide the public with a reasonable period of time for notice and comment. The Department of the Interior sought public and industry comment from all interested parties and received two (2) public comments in response to the proposed waiver. This notice closed for comments on August 15, 2023. A summary of the public comments received are as follows:

- One (1) entity expressed support for the waiver and sought clarification that the waiver would apply to infrastructure projects funded under the Inflation Reduction Act.

- One (1) entity disagreed with the waiver in its entirety indicating the proposed waiver was not in the public interest and suggested a product specific nonavailability waiver be used when appropriate as an alternative approach.

In our response to the first entity, DOI clarified that the waiver will apply to all DOI financial assistance agreements for infrastructure projects, including those projects funded by the Bipartisan Infrastructure Law and/or the Inflation Reduction Act, where a Federally Recognized Tribe is a direct recipient.

In our response to the second entity, DOI disagreed with the comment that the proposed waiver be denied because it is not in the public interest, and that it is not necessary to allow additional time for Tribal consultations. We acknowledged but found these comments inconsistent with the Buy America statutory authority which expressly contemplates waivers of domestic content procurement preference if doing so would be in the public interest. DOI noted that the comment failed to address the increased project expenses faced by Tribes due to transportation and sourcing barriers; and that the waiver is limited in duration to twelve months and factors in the unique public interest considerations and economies of Tribes.

After reviewing and responding to these comments, DOI is issuing the waiver with no substantive changes.

DOI will review the waiver as often as necessary to evaluate its continued need.