



U.S. DEPARTMENT OF AGRICULTURE

**USDA Tribal Consultation and Listening Session on  
Build America, Buy America Act (BABAA) Purchase Preference**

**May 22 & 23, 2024**  
2:00-5:30pm ET(Virtual)

Registration:

- Wednesday, May 22, 2024 – [Click to Register](#)
- Thursday, May 23, 2024 – [Click to Register](#)

**AGENDA**

*Consultation stop/listening session start times are subject to change.*

*USDA tribal consultations and listening sessions are closed press.*

**Tribal Caucus:** Facilitated by the Native American Contractors Association (invited)  
2:00-3:00pm ET  
1:00-2:00pm CT  
12:00-1:00pm MT  
11:00-12:00pm PT  
10:00-11:00am AKT

**Consultation:** Reserved for Duly Elected Tribal Government Officials & Proxies  
3:00-4:30pm ET  
2:00-3:30pm CT  
1:00-2:30pm MT  
12:00-1:30pm PT  
11:00-12:30pm AKT

**Listening Session:** Open to Indian Country speakers  
4:30-5:30pm ET  
3:30-4:30pm CT  
2:30-3:30pm MT  
1:30-2:30pm PT  
12:30-1:30pm AKT

**CONSULTING OFFICIALS**

- Tyson Whitney, Director, Transparency and Accountability Reporting Division, Office of the Chief Financial Officer
- Betsy Rakola, Deputy Director, Office of Tribal Relations

## **FRAMING PAPER**

**Background:** Congress enacted *Build America, Buy America Act* (BABAA) under the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58, §§ 70901-52). BABA requires that the head of each covered Federal agency ensure that none of the funds made available for a Federal financial assistance program for infrastructure are obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. The White House Office of Management and Budget (OMB) issued a *Memorandum for the Heads of Executive Departments and Agencies* which provides expectations for BABAA implementation on October 25, 2023 ([M-24-02](#)).

The BABAA statute requires agencies to conduct a three-fold test to determine whether all or part of a project is covered:

- Is the project Federal Financial Assistance to a Covered Non-Federal Entity?
- Is the project for the purchase, construction, or renovation of “Infrastructure”?
- Does the proposed project count as “infrastructure” under BABAA?

### **Applicability to Tribes, Alaska Native Corporations, Tribal Colleges, and Non-Profits**

BABAA applicability is directly tied in the statute to the definition of Non-Federal Entity (NFE) in the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*. See 2 CFR 200.1. As defined, Non-Federal Entity means a State, local government, Indian tribe, Institution of Higher Education, or a nonprofit organization. The regulations further define Indian tribe to include any federally recognized Tribe or Alaska Native village or regional or village corporation, as defined in or established pursuant to the Alaska Native Claims Settlement Act.

### **Applicability to “Infrastructure”**

“Infrastructure” as defined by 2 CFR 184.4(d) encompasses public infrastructure projects in the United States. The term includes, at a minimum, the structures, facilities, and equipment for roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle charging.

## **1. BUILD AMERICA, BUY AMERICA ACT APPLICABILITY**

### **Determining “Infrastructure”**

In determining whether an infrastructure project is covered by BABAA, OMB encourages USDA to consider whether the project is infrastructure or is for an “infrastructure” purpose.

USDA Seeks Tribal Input:

- Given the unique status of Tribal lands and Indian tribes, and given OMB’s guidance on public infrastructure, what types of projects should be excluded under the “infrastructure” test?
  - What factors should USDA consider in determining whether a Tribal project is “infrastructure” under BABAA?

### **Treatment of Tribal Corporations and Alaska Native Corporations under BABAA**

Indian tribes, including ANCs, are covered entities under the Build America, Buy America Act. BABAA does not expressly include “for profit” entities as being covered unless otherwise required by statute or contract, and even though an agency has discretion to do so. USDA is considering exempting for-profit entities in its application of BABAA unless they are otherwise required to comply by law or voluntarily opt into BABAA compliance. Where ANCs are indirectly referenced under the law, the exclusion of ANCs under BABAA is challenging.

USDA recognizes the unique legal status that Tribal corporations, such as Section 17 Corporations, and ANCs hold and thus do not fall squarely into the traditional notions of “non-profit” or “for-profit” entities.

#### **USDA Seeks Tribal Input:**

- When, if at all, should USDA seek an interpretation of Tribal Corporations and as acting as a “for profit entity” in order to be consistent with the purposes of BABAA?
  - Would interpreting Tribal Corporations in such a way be inconsistent with or impact a Tribal corporation’s eligibility under other federal programs?
  - Should for-profit subsidiaries of federally recognized tribes and Alaska Native Corporations be considered as an “Indian tribe” when interpreting BABAA?
  - Should USDA seek an amendment from OMB that would exclude ANCs from being covered under BABAA?

## **2. SOURCING OF DOMESTIC STEEL, IRON, AND MANUFACTURING MATERIAL**

BABAA necessitates that Tribal governments, Alaska Native Corporations, non-profits, and other recipients who receive federal financial assistance for infrastructure projects that are determined to serve a public function domestically source iron, steel, and construction materials for its materials consumed in, incorporated into, or affixed to its infrastructure. Where an agency provides federal financial assistance for an element covered by BABAA, in whole or in part, BABAA is then required to apply to the total project. USDA guidance and active waivers for BABAA is updated at <https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver>.

#### **USDA Seeks Tribal Input:**

- Does your Tribe currently have standard procedures and documentation that ensure any iron, steel, or manufacturing materials used in federally funded infrastructure projects is sourced from within the United States?

- What technical assistance would be beneficial to supporting Tribes in making this determination?
- Should USDA determine that a tribal project is covered under BABAA, what documentation would your tribe be able to submit demonstrating that...
  - The sourcing of domestic steel, iron, and manufacturing materials is unavailable?
  - The sourcing of domestic steel, iron, and manufacturing material would increase **the total project** cost by 25 percent or more?
  - The portion of project cost covered by BABAA is less than 5 percent of the total project cost, not to exceed \$1 million?
- Does your Tribe anticipate any administrative challenges administering BABAA that would materially impact your willingness and/or ability to pursue USDA federal financial assistance?
  - What resources or technical assistance are needed to support your Tribe in navigating these challenges?

### 3. APPLICABILITY OF WAIVERS

OMB's Made In America Office makes the determination whether a federal agency's BABAA waiver request is consistent with applicable law and policy. At this stage, there are ongoing challenges in obtaining a blanket general applicability waiver for all tribal projects, and so waivers should be narrowly framed and time-limited to support the interests of BABAA. Tribal governments may submit a waiver request to USDA if the Tribe has reasonable belief that the application of BABAA if one of the following elements applies:

- 1) applying BABAA would be inconsistent with public interest (a "public interest waiver").
- 2) the 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 (a "nonavailability waiver").
- 3) the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall infrastructure project by more than 25 percent.

#### USDA Seeks Tribal Input:

- Where USDA administers programs with short application windows, what additional time is needed to ensure Tribes can adequately consider whether a waiver may apply and subsequently draft a waiver for submission?

### 4. OMB EXPECTATIONS FOR SUBMITTING INFRASTRUCTURE APPLICATIONS

In an OMB memorandum 24-11 (M-24-11) *Reducing Burden in the Administration of Federal Financial Assistance*, OMB provided further implementation guidance to Federal agencies related to program development and Notice of Funding Opportunity (NOFO) design. OMB has built upon the existing guidance and regulations cited above to direct Federal agencies on practices they should consider moving forward.

At this stage, USDA is in the process of identifying the impact on application submission and accessibility of federal funds should USDA move forward with the recommendations. OMB encourages Federal Agencies to require applicants to: 1) submit Buy America sourcing plans as part of their application and 2) identify products they expect to procure for the infrastructure project that are not available domestically, and 3) describe their plan to comply with domestic content requirements.

USDA Seeks Tribal Input:

- Recognizing that USDA may have flexibility in whether to implement this provision, should USDA expect this level of specificity by (Tribal) applicants in a 30- or 60-day application period?
- What additional time, resources, or technical assistance is needed to ensure Tribes can adequately gather Buy America sourcing plans as described in M-24-11, should USDA implement this guidance from OMB?