

DEPARTMENT OF AGRICULTURE

TITLE:

**TRIBAL CONSULTATION WAIVER IN THE PUBLIC INTEREST
FOR INDIAN TRIBES**

Approved: July 14, 2023

1. Summary of Waiver

The United States Department of Agriculture (USDA) finds that it is in the public interest to issue a limited, one-year waiver of the domestic preference requirements of the Build America, Buy America Act (BABAA) for Federal Financial Assistance to Indian Tribes (“Tribes”), including their governmental arms and instrumentalities, tribal organizations, or tribal entities as determined by each program's regulatory and/or statutory authority to complete the tribal consultation required in Office of Management and Budget memorandum (M-22-11). Under the *USDA Rural Development Build America, Buy America Public Interest Waiver*, approved by OMB and in effect from Aug. 4, 2022, to Feb. 3, 2023, Rural Development (RD) laid out several factors supporting its request for a 6-month public interest waiver specifically with respect to Tribal loans and grants. Among other things, RD noted the necessity of consultation with Tribal governments regarding implementation of BABAA. Because of the number of tribal nations impacted by BABAA requirements, and the need to structure implementation of BABAA in a manner that best responds to feedback garnered during that period, additional time is critically needed to uphold the Federal Government's commitment to finishing tribal consultation initiated under Executive Order (EO) 13175, *Consultation and Coordination with Indian Tribal Governments*, before the BABAA preference can be applied to Tribes participating in USDA’s programs.

2. Background

The domestic preference requirements (Buy America preference) in section 70914 of the Build America, Buy America Act (BABAA), incorporated within the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), require that 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) memorandum (M-22-11), Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, issued April 18, 2022, 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.

Additionally, M-22-11 directs agencies to consult with Tribal nations before applying a Buy America preference to a covered program that will affect Tribal communities, consistent with EO 13175. On September 21, 2022, nine federal 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 Tribal consultation hosted by the White House Council on Native American Affairs (WHCNAA) to discuss Build America, Buy America requirements and potential waivers. Following this initial consultation, Tribes were requested to provide written comments and feedback by October 20, 2022, for consideration by the federal agencies.

Comments were received by WHCNAA and distributed to the participating agencies on October 25, 2022. 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 USDA to ensure that their projects are achievable and sustainable, and Federal trust and treaty responsibilities are affirmed. Tribes requested concurrent consultations across multiple Departments to establish a consistent process for implementation. Ultimately, consultations continue to occur on a Department-by-Department basis. On August 23, 2022, the U.S. Department of Education hosted a Tribal consultation session on the Buy America preference. Consultation participants were invited to provide comments regarding: (a) how to improve the implementation of Build America, Buy America requirements; (b) the barriers they may face while implementing; and (c) what policy positions the agencies could offer to make implementation more meaningful for Tribal Nations.

On December 8, 2022, the Federal Emergency Management Agency (FEMA) hosted a Tribal consultation session to obtain feedback on FEMA's interim policy of implementing Build America, Buy America Act requirements for FEMA grants.

Tribal leaders broadly requested that Federal agencies provide the greatest maximum flexibility in allowing waivers to ensure there is Tribal participation in Federal programs. Tribes also requested agencies to: (a) provide a list of Native-owned businesses to easily identify companies that meet Build America, Buy America requirements; (b) ensure that Tribes understand the process for requesting waivers when remote geographic project locations are subject to BABAA requirements; and (c) assist Tribal Nations with local hiring and training opportunities, and other capacity building efforts. Finally, Tribes commented that it is imperative that the agencies assist in offsetting the cost differential between procuring goods manufactured in the United States versus elsewhere.

3. Additional Activity Taken to Date

During this time, USDA Rural Development's initial adjustment period waiver lapsed in February 2023, which included for a waiver of projects submitted by tribal entities. Based on the feedback received, USDA proposed a tribal consultation waiver and concluded it is in the

best interest of the Federal government and the public to issue such a waiver. A new tribal consultation waiver would allow USDA's agencies that make financial assistance awards further opportunity for ongoing consultations and capacity building in response to the requests from Tribes outlined in the previous paragraph. A USDA-wide waiver would also promote the well-being of, and equity, and environmental justice for Tribes.

USDA continues to consult with Indian Tribes to identify barriers for accessing agency infrastructure and related construction programs within the USDA. In April 2023, the USDA hosted its third annual *Tribal Consultation on Barriers and Equity* to discuss steps USDA has taken to address Tribal Leader feedback on equity issues, with targeted discussion on economic development and infrastructure considerations across Indian Country. Tribal Leaders lauded USDA for taking targeted steps in response to Tribal interests on barriers and equity. Additionally, Tribal Leaders remarked that supply chain issues remain pervasive across all industries and sectors. Based on this feedback, the Department recognizes the need for further consultation specific to BABAA to better identify solutions and flexibilities for compliance with BABAA. USDA continues to identify meaningful opportunities to engage Tribal Nations in consultation under our government-to-government relationship.

4. Impact of Waiver to the Department of Agriculture

The Department of Agriculture's Fiscal Year 2022 – 2026 Strategic Plan provides a roadmap for fulfilling the USDA's mission, achieving the vision of the Secretary of Agriculture, and addressing the priorities of the Biden-Harris Administration. This plan outlines six specific strategic goals of the USDA. The second of these six goals ensure America's Agricultural System is Equitable, Resilient, and Prosperous, while goal five strives to Expand Opportunities for Economic Development and Improve Quality of Life in Rural and Tribal Communities. Through USDA's Office of Tribal Relations, mission areas and agencies, USDA is working to advance Tribal sovereignty by continuing to host Tribal consultations to inform decision making.

The U.S. Department of Agriculture maintains trust and treaty obligations with 574 federally recognized tribes. Consulting with this number of tribes on a provision as nuanced as BABAA purchase preferences is challenging and requires multiple engagements. Additionally, the consultation provided by the White House Council for Native American Affairs resulted in broad feedback from tribal nations requesting flexibilities and technical assistance. Where BABAA applies to Indian tribes by statute, USDA is not authorized to take a sweeping action of general applicability to Indian Country and requires additional engagement with Indian tribes to facilitate greater specificity on project and supply chain implications.

Implementation of BABAA for tribal entities will have an effect on a substantial number of USDA projects. At least \$107 million in Tribal-related loans, loan guarantees, and grant obligations were funded through a variety of Rural Development programs in FY 2022 alone. Many of those projects helped to finance Tribal infrastructure needs. USDA anticipates that

programs from across its other 29 agencies that may be affected by the Buy America preference, where tribes will request consultation on purchase preference implementation.

This waiver seeks to advance the strategic goals of the USDA and BABAA while ongoing consultation with Tribes and collaboration with other Federal Agencies continue to develop.

5. Consultation Process

USDA Departmental Regulation 1350-002 (DR 1350-002) sets consultation standards for all USDA agencies pursuant to Executive Order 13175, delegating responsibility for oversight of USDA consultation practices to the Office of Tribal Relations in the Office of the Secretary. DR 1350-002 requires that tribal consultation be timely and meaningful to provide Tribal Leaders with sufficient information and time to process proposed changes to USDA policies and develop informed positions and input. As required, USDA must provide Tribal nations with at least 30 days written notice of a consultation event, as well as a 30-day written consultation comment period following any consultation session.

When USDA meaningfully engages Indian tribes, the consultation process is wildly successful; however, many of these deliberations are not resolved in single consultation events. For example, for USDA's Rural Utilities Service to effectively publish the current Substantially Underserved Trust Area (SUTA) authority for tribal infrastructure financing, USDA hosted over 30 unique consultation events around the nation. Due to these extensive conversations, RUS published a tribally informed SUTA regulation and tribal participation in RUS programs has grown considerably.

USDA recognizes tribal consultation as an iterative process and that the scenarios and feedback presented by Tribal Leaders may change over time based on the priorities of new Tribal administrations or shifting socio-economic and ecological realities faced by their communities.

Recognizing that many Tribes will be required to apply BABAA's domestic preferences for the first time, and that for others it will be the first time they have utilized a USDA program, the Department anticipates multiple consultations will be necessary throughout the waiver period. Unlike other federal departments with targeted tribal funding, Tribal nations are generally eligible for USDA programs alongside other applicants. Across all 29 USDA agencies and offices, the Department maintains 300 financial assistance lines with a handful of these programs providing for construction.

Tribal Leaders have also informed USDA that they would rather discuss USDA programs based on subject area and not by agency. For this reason, USDA has coordinated consultations, including the consultations on *Equity and Barriers* into five general categories: 1) Farming, Ranching, and Conservation; 2) Food, Safety, and Trade; 3) Economic Development; 4) Forests and Public Lands Management; and 5) Education and Research. The construction needs across each of these sectors and the corresponding supply chains surrounding these activities is often very different. In the initial quarter of BABAA tribal consultation, USDA will work to better

understand the scope of USDA infrastructure funding accessible to Tribes across each of these subject lines.

Once this initial determination is made, the Office of Tribal Relations will coordinate with the relevant USDA agencies to consult with Tribal nations, virtually and in person. Where appropriate, USDA will organize Tribal consultation sessions as hybrid events alongside national or regional tribal conferences to engage the most Tribal leaders and representatives possible across diverging or intersecting interest areas in the applicable categories described above. These consultations will continue to inform need and how USDA resources can assist Tribes to comply with BABAA across USDA's broad range of programs.

6. Waiver Justification

On January 26, 2021, the Biden-Harris Administration released a 'Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships' affirming the Administration's commitment to EO 13175. Section 6 of EO 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 on BABAA implementation, USDA concludes this waiver is critical to provide a process and resources that ensure these new requirements do not adversely affect the ability for Tribal Nations to establish procurement policies for the sovereign interests of Tribes. The duration of the waiver is one year from the effective date of the waiver.

USDA will continue to participate in various committees of the White House Council on Native American Affairs, including the Economic Development, Energy, and Infrastructure Committee, to facilitate cross-agency coordination on many topics, including the consistent implementation of BABAA for Tribes. USDA remains open to participate in interagency Tribal consultation on further BABAA implementation, should the opportunity arise.

Without such coordinated implementation, Tribal Nations may face significant barriers that could exacerbate existing inequities. 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 potential increases in anticipated project costs. While BABAA requirements seek to provide economic benefits for domestic made materials, Tribes may require additional resources from Federal agencies through increased project awards to cover any additional infrastructure construction expenses. A Tribal consultation waiver will allow USDA time to conduct consultations while also building the capacity of Tribes through

technical assistance to work towards eliminating the need for a waiver. The waiver also provides greater equity in infrastructure project development through the fulfillment of the Federal government's trust responsibility while mitigating the measures that may otherwise impede infrastructure development throughout rural communities.

This waiver will allow for a more gradual modification of processes internally as additional funding is provided and allow time for Native American businesses and partners to 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.

To further support the administration's priorities to steward investments to build a better America and promote domestic manufacturing and jobs, USDA 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. USDA 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, USDA 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. USDA intends to build on its success implementing Buy American in the Rural Utilities Service, bridging that success to BABAA requirements. USDA 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.

For the reasons expressed above, USDA issues this targeted and time limited public interest waiver for Tribes to allow Tribal consultations to be completed. In the interim, USDA, its mission areas, and agencies remain committed to obtaining input from Tribes and intend to continue dialogue with interest groups and stakeholders to work toward consistent, long-term compliance with the Buy America preference while also continuing to honor trust and treaty responsibilities to Tribes.

7. 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.

8. Duration of the Waiver

This waiver will remain effective for 12 months from the effective date of the final waiver.

9. Solicitation of Comments

The waiver is posted on the Department's [Buy America Waiver](#) website. The comment period for the proposed waiver opened on June 1, 2023, and closed on June 16, 2023.

10. Summary and Response to Comments:

USDA received two comments, one of which did not support the proposed waiver. The other comment supported the additional consultation period provided by this waiver.

The comment that did not support the waiver asserted that USDA does not need additional time for Tribal consultation(s). The commentor stated that USDA had more than 20 months since BABAA's enactment to prepare for its implementation and engage in necessary Tribal consultations. The comment also recommended using a product specific unavailability waiver or an unreasonable cost waiver where appropriate. Tribal nations are unlike other stakeholders, and USDA recognizes its government-to-government relationship and obligation to act in the interest of tribal nations for tribal self-governance and economic development interests. Through USDA's tribal consultation, held in conjunction with other Federal agencies, feedback indicated additional consultation would be in the best tribal interest. USDA's continuing consultations during this additional waiver period will be a more focused series of discussions designed to support tribal understanding of how to navigate BABAA requirements moving forward, increase tribal participation in USDA programs, and explore additional funding opportunities for the growth of the American and tribal nation economies.

Based on all the information available to USDA, it concludes that applying BABAA requirements without additional consultation would be inconsistent with the public interest and USDA's trust responsibility. A one-year waiver of the BABAA requirements for these projects is thus appropriate.

Public Inspection of Comments: All properly submitted comments and communications submitted to USDA will be made available for public inspection upon request.

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