

U.S. Department of Education

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

1. Summary

Agency: U.S. Department of Education

Waiver: Effective February 7, 2024, the United States Department of Education (The Department) is implementing a *one-year* general applicability public interest Tribal consultation waiver of the requirements of section 70914 of the Build America, Buy America Act (BABAA) 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), including their governmental arms and instrumentalities, or Tribal organizations,¹ having determined such a 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 Tribes.

Applicability: This waiver 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 Federal Financial Assistance agreements in which the direct recipient is a Federally recognized Indian Tribe (Tribes), including their governmental arms and instrumentalities, or Tribal organizations. The waiver applies to expenditures made by such on or after the effective date of the final waiver 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 BABAA 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 (OMB)'s Guidance Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, the Department may waive the BABAA application in any case in which it finds 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 U.S. in sufficient

¹ Federal financial assistance recipients who are Tribally Controlled Colleges and Universities (TCCUs) are included in the scope of this waiver.

and reasonably available quantities or of a satisfactory quality; or (iii) the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. 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 the proposed waiver must be submitted to the OMB 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 "strengthen Nation-to-Nation relationships through regular and meaningful consultation and collaboration with Tribal communities." On August 23, 2022, the Department 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 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.

Tribal leaders expressed concerns related to undue burden the Buy America preference would place on Tribes and related entities. In response to questions about how Federal agencies can assist Tribes in meeting BABAA requirements, Tribes responded by requesting that waivers for Tribes be uniform across the Federal government. In addition, some Tribes also provided feedback to the Federal government, such as: (a) requesting from the Federal government a list of Native and non-Native owned businesses from which American made iron, steel, manufacturing products, and construction materials may be purchased; (b) ensuring that Tribes understand the process for identifying waivers and that federal agencies understand how remote geographic locations disparately impact the implementation of requirements; and (c) suggesting agencies should help build local hiring and training opportunities and assist Tribal Nations in those capacity building efforts and policies to advance such efforts.

3. Impact of Waiver to the Department of Education

The Department's [Strategic Plan](#) reflects the Administration's and Department's priorities for the direction of the Department and the future of education in the nation. The priorities, such as improving educational equity and meeting the needs of students, are highlighted and woven throughout the Strategic Plan. This Strategic Plan also reflects the commitment to and support of the Administration's priorities by placing an emphasis on equity in education opportunities and outcomes for students, especially addressing the needs of those who have been underserved, as well as placing an emphasis on the COVID-19 pandemic response and recovery. Disparities across communities have been exacerbated by the COVID-19 pandemic, and the Department will

support programs that aim to provide equitable opportunities for all students that can contribute to enhanced outcomes and improve the lives of students. Support includes programs and opportunities to advance Tribal sovereignty and consultations that inform decision making. This waiver seeks to advance the strategic goals of the Department while ongoing consultations and collaboration with Tribes continue to develop.

Since the enactment of BABAA, the Department has worked diligently to begin implementing Buy America Preferences for financial assistance agreements while simultaneously evaluating the impact of the Buy America Preference on Tribes. In FY 2022, Tribes received approximately \$109 million through Department-issued Federal financial assistance agreements across the 574 federally-recognized Tribes for a variety of projects, some of which may include infrastructure. The Department awarded an additional \$100 million to Tribally controlled colleges and universities. We anticipate making similar award amounts to Tribes for the same types of projects in future funding cycles. Length of award varies, although grants at the Department are typically up to five years.

4. Consultation Process

Pursuant to EO 13175, Consultation and Coordination with Indian Tribal Governments, and in recognition of the Federal Government’s trust responsibility, ED will further strengthen its relationship with Indian Tribes by implementing a process that ensures meaningful consultation and collaboration with Indian Tribes when developing ED policies and actions that have Tribal implications. The Department’s consultation and coordination policy is available at <https://www2.ed.gov/about/offices/list/oese/oie/tribalpolicyfinal.pdf>

The Department 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, the Department anticipates multiple consultations will be necessary throughout the waiver period, both virtually and in person, as well as in the form of hybrid events alongside national and regional Tribal conferences to engage the most Tribal leaders and representatives possible 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.

5. Waiver Justification

On January 26, 2021, the Biden-Harris Administration released 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. The Administration further elaborated on Tribal consultation expectations in a November 30, 2022, Memorandum on Uniform Standards for Tribal consultation and in EO 14112 of December 6, 2023, on Reforming Federal Funding and Support for Tribal Nations to

Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination.

Based on feedback provided from Tribes during initial consultations on BABAA implementation, the Department of Education concludes this waiver is warranted to provide additional time for ED to further consult with Tribes on the more specific application of the Buy America Preference requirements and allow sufficient time for ED to stand up technical assistance and resources to assist these recipients of federal financial assistance long-term. The duration of the waiver is one year from the effective date of the waiver.

Tribes often reside in rural, remote areas across the United States which typically result in increased project expenses due to transportation and sourcing barriers. While BABAA requirements seek to provide economic benefits for domestic made materials, including those produced on Tribal lands, Tribes may require additional resources from Federal agencies to support full implementation. A Tribal consultation waiver allows the Department time to conduct consultations while also building the capacity of Tribes through technical assistance to work towards eliminating the need for a waiver.

This waiver allows 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 source domestic materials.

For the reasons expressed above, the Department believes this targeted and time limited public interest waiver for Tribes is warranted to allow Tribal consultations to be completed. In the interim, the Department remains committed to obtaining input from Tribes and intends to continue dialogues 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.

6. 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 products.

7. Duration of the Waiver

The duration of the waiver is 12 months from the effective date of the final waiver.

8. Solicitation of Comments and Public Comments Summary

In accordance with section 70914 of BABAA, this waiver was published for a 15-day public comment period on November 16, 2023, which expired at 5:00 p.m. on December 1, 2023. A total of two comments were received in response to the proposed waiver. One commenter opposes the waiver as being contrary to the intent of BABAA. The second commenter does not clearly support or oppose the waiver. The Department thoroughly reviewed and considered each comment. After review, the Department added references to more recent Presidential policy in response to one of

the comments and made clarifying edits. At the same time, the Department believes that the waiver is still needed at this time, and thus did not make further revisions to the waiver.

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