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MEMORANDUM

September 22, 2023

TO: TRIBAL HOUSING CLIENTS

FROM: Edmund C. Goodman & Cari L. Baermann
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RE: *U.S. Department of Energy Tribal Programs; HUD’s Build America, Buy America requirements; and other Tribal Housing Updates*

This memo provides a synthesis of information presented during meetings with the U.S. Department of Energy (DOE) and U.S. Department of Housing and Urban Development (HUD) Office of Native American Programs (ONAP) at a Northwest Indian Housing Association (NWIHA) conference.

I. Department of Energy Programs

Stephanie Bostwick, Tribal College and University (TCU) Coordinator for the DOE’s Office of Indian Energy Policy and Programs (OIE), provided an overview of the OIE’s efforts to support tribal energy sovereignty. The OIE provides financial assistance to support tribal energy development; provides no-cost technical assistance to advance tribal energy and infrastructure projects; and supports education and internal capacity building to develop energy projects and navigate energy markets. Below is a short overview of each. A copy of the OIE’s presentation slides with additional information can be found here: [DOE Funding Opportunities](#).

OIE provides a number of tribal energy funding opportunities, included the ones in the chart below. Additional information on OIE funding opportunities can be found [here](#).

Deadline	Program	Type of funding	Agency	Focus Area
2023/09/27	American-Made Solar Prize Round 7 – \$4 Million	Prize	DOE	Solar; Supply Chain
2023/09/28	DOE Solar District Cup Class of 2023 - 2034	Competition	DOE	Education; Solar; Workforce Development
2023/09/29	Powering Affordable Clean Energy (PACE) Program – \$1 Billion	Loans	USDA	Rural Communities; Clean Energy; Battery Storage

One of the OIE programs is the [Tribal Home Energy Rebate Program](#), authorized under Section 50122 of the Inflation Reduction Act. This rebate program provides \$225 million for tribes, and the funding is available through September 30, 2031. The intent of the rebate program funding is to assist tribes in developing, implementing, and subsidizing residential electrification and appliance upgrade projects for tribal and Alaska native households. The program helps tribal households enjoy lower energy bills. It also makes it easier to access and implement residential energy improvements by decreasing costs through instant point of sale rebates. The program is designed to help tribes attract, train, and retain qualified workforce to provide energy upgrades to single-family, multi-family, and manufactured housing units. The rebates can be used for improvements such as electric heat pump HVAC units, electric heat pump water heaters, electric circuit panel upgrades, and electric wiring upgrades.

The OIE also provides free technical assistance to tribes to advance tribal energy and infrastructure projects. The OIE's technical analysis generally involves providing high level analysis and modeling, expert review, transmission and/or utility assessment, market access, and energy efficiency. OIE also provides financial analysis to tribes, intended for decision makers in the early stages of development, including in developing an economic or market analysis. It may include modeling for payback periods, net present value, and levelized cost of energy. OIE also provides strategic energy planning, which can consist of virtual or in-person workshops facilitated by tribal energy experts to assist tribal leaders, elders, and staff develop an energy plan.

More information on the OIE funding opportunities, technical assistance, and other information can be found [here](#).

II. HUD Programs and Updates

Jad Atallah, ONAP Director of Performance and Planning, and other ONAP staff joined the NWIHA meeting to conduct a consultation on the new Build American Buy American ("BABA") requirements and to provide an update on ONAP and HUD programs. ONAP's slides on the BABA are attached to this memorandum.

a. BABA Tribal Consultation

1. BABA Overview and Applicability to Tribes

The Build America, Buy America Act (BABA) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58). BABA establishes a domestic content procurement preference ("Buy America Preference," or "BAP") for Federal infrastructure programs. On August 23, 2023, OMB published a final rule to implement BABA, located at [2 CFR Part 184](#) and, incorporated into 2 CFR 200. Because the BABA is intended to be construed very broadly, it could have significant impacts for tribes and TDHES, as explained further below.

The BABA requires that no later than 180 days after November 15, 2021, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by

HUD unless it has taken steps to ensure that all iron, steel, manufactured products, and construction materials used in a project are produced in the United States. Projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.” The BAP applies to *all sources* of Federal Financial Assistance (FFA) provided to tribes, TDHEs, and other tribal entities (collectively “Tribal Recipients”) involving infrastructure projects. FFA programs include:

- Federal Grants
- Cooperative agreements
- Direct appropriations
- Loan guarantees
- Other financial assistance.

BABA likely applies to infrastructure projects funded under the following ONAP grants:

- Indian Housing Block Grant (IHBG) Formula
- IHBG Competitive
- Indian Community Development Block Grant (ICDBG)

However, the following ONAP grants are excluded from BABA requirements (BABA “pre and post disaster or emergency response expenditures”):

- IHBG-CARES
- ICDBG-CARES
- IHBG-ARP
- ICDBG-ARP
- ICDBG-Imminent Threat

Mr. Atallah noted that Section 184 grants will not likely be subject to BABA requirements, because that program involves mostly privately-owned homes. However, the Title VI Loan Guarantee program is probably covered. HUD is currently debating with OMB on whether homes that are privately occupied, used for private use, but are owned by tribes would be subject to BABA.

HUD had previously published a one-year general applicability–public interest waiver (“Waiver”) of the BAP, effective May 14, 2022, in connection with HUD funding provided to Tribal Recipients, in order to provide HUD with sufficient time to complete the tribal consultation process. HUD then determined that the prior one-year Waiver period was insufficient to fully consult and assess the impacts that the BAP will have on HUD’s Tribal Recipients. HUD therefore published a [notice](#) (“Extension Notice”) on April 7, 2023 extending the previously issued Waiver for an additional period of one year (“Final Waiver”). The Final Waiver is effective May 23, 2023 for HUD tribal FFA obligated by HUD on or after the effective date of the Final Waiver. In addition, in the case of FFA obligated by HUD in tribal programs on or after May 14, 2023 but prior to the effective date of the Final Waiver, the Final Waiver applies to all expenditures incurred on or after the effective date of the Final Waiver. The BABA therefore will not apply to tribes until May of 2024. Mr. Atallah commented that sometime before May 2024, HUD will either issue a new extension or a plan for a phased implementation for tribes. He noted that HUD will consider issuing a waiver that would state that BABA would

not apply to tribes until 2025. HUD is seeking tribal input as HUD moves forward with deciding when and how to implement the BABA requirements for HUD grants for Tribal Recipients.

Mr. Atallah commented that the definition of infrastructure is very broad, and covers appliances (e.g. microwaves, stoves, etc.) and fixtures in housings. Because the definition is construed so broadly, this could have massive impacts on tribal and TDHE housing projects. Additionally, infrastructure projects are defined to include the construction, alteration, maintenance, or repair of:

- Buildings and real property;
- Utilities;
- Water systems (both drinking water and wastewater)
- Electrical transmission facilities and systems;
- Broadband infrastructure;
- Transportation related-infrastructure (roads, highways, bridges), and more.

The definitions of iron and steel are also to be construed broadly enough to potentially impact many aspects of tribal housing projects. The U.S. Office of Management and Budget (OMB) proposes define iron and steel as any items that "consist wholly or predominantly of iron, or steel, or both." Further, all parts of the manufacturing processes for iron, steel, and construction materials, from initial melting stage through application of coating, must occur in the United States. Construction materials covered by BABA include:

- Non-ferrous metals (e.g. lead, stainless steel, tin, brass, aluminum)
- Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables)
- Glass (including optic glass)
- Fiber optic cable
- Optical fiber
- Lumber (All manufacturing processes, from initial debarking through treatment and planning, must occur in the United States.)
- Drywall (All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, must occur in the United States.)
- Under OMB proposed rule, also includes coating (paint), brick, engineered wood

Manufactured products are materials, articles or supplies incorporated in an infrastructure project that are not iron/steel and not one of the listed construction materials. OMB's proposed rule would mean that all manufactured products must have been manufactured in the United States. One of the tribal participants at the consultation noted that is going to be very difficult to find out where the products are made. This will be especially true for manufactured products, where the manufacturer does not specify where the individual components were made. Mr. Atallah responded that this is a common theme amongst those already subject to BABA, and many builders have the same difficulty.

The tribal participants discussed how the BABA requirements will affect international purchasing agreements (i.e. Canada and Puerto Rico), and whether those would still be intact and

apply to this BABA requirement. One of the participants asked where people will be able to purchase products that are not readily available in the United States. Mr. Atallah noted that these issues will be covered by waivers.

The tribal participants also raised concerns about how BABA will impact the tribal and Indian preference requirements under the Native American Housing Assistance and Self-Determination Act. They noted that if a Native American company cannot or does not buy only American-made products, then the tribes and TDHEs cannot use those tribal companies, which will completely undermine the Indian preference requirements.

2. Waivers of BABA Requirements

If a project costs too much because of BABA compliance, HUD can issue waivers to tribes and TDHEs that would waive the BABA requirements. Section 70914 of BABA establishes the scope, criteria, and process for issuing waivers. HUD must obtain OMB approval of the waivers. Additionally, the waivers must be published in the federal register for fifteen days. One of the participants asked what the deadlines will be for HUD to submit waiver requests to the OMB for review, noting that if the HUD waiver review process takes a long time, it could cause tribes to miss tribal grant deadlines for procurement. Mr. Atallah responded that those timeline requirements have not yet been set, and HUD welcomes tribal feedback on what timelines would make sense. He further noted that BABA officially applies to tribes and TDHEs, HUD will not apply BABA retroactively, so it will not apply to grants funded last year that tribes are only now implementing. It would only apply to future grants not yet awarded.

There are two types of waivers: (1) general applicable (broad scope) and (2) project specific. Mr. Atallah commented that OMB has not issued guidance on how long waivers would last, but that it would be for a limited duration. He noted that for the non-tribal entities already subject to BABA, the general duration of generally applicable waivers has been about five years. For project specific waivers, there would be no timeline because the waiver is only for that project.

A waiver may be issued on the following grounds:

- Public interest;
- Non-availability of materials (not available in the quantity or not available at the quality); or
- Results in an increase in the cost of the “project” by more than 25 percent.

HUD can issue a waiver if the product is not available in the United States in adequate quantity, or if the American-made product is not a good enough quality. Currently HUD has issued the following waivers. HUD is seeking tribal feedback on whether these thresholds be higher for Tribal Recipients, and if so at what level should they be set:

1. Exempts grants that are equal to/under \$250,000;
2. Exempts projects equal to/under \$250,000;
3. Exempts 5% of procurements above \$250,000 as long as the 5% does not exceed \$1 million; and
4. Exempts certain activities based on exigent circumstances, such as curing exigent health/safety issues; likely covers ICDBG-Imminent Threat grants with no declared disaster.

One of the participants asked whether HUD would actually waive grant funds, an entire project, or whether HUD would waive certain pieces and parts of a construction project. Mr. Atallah commented that HUD could issue both a waiver of general applicability or project-specific waiver. For project-specific waivers, HUD would grant the waiver for the entire project. However, if a project is funded by multiple federal agencies, the Tribal Recipient would need to obtain waivers from each agency.

Some of the participants recommended that instead of only issuing waivers, HUD should revise its regulations or policies to limit BABA's requirements for Tribal Recipients. They noted that waivers should not be the end solution, as a change in the federal administration could lead to HUD deciding not to issue any waivers. Tribes need a more definitive, permanent plan in order to respect tribal sovereignty.

3. Increased Costs for Tribes and TDHEs

The participants also discussed the increased costs that tribes and TDHEs will face in meeting BABA requirements. They noted that many small tribes have only two housing staff members and do not have in-house legal counsel or grant writers. Even before meeting BABA requirements, small tribes often do not have the resources to apply for or obtain funding grants. Going through the arduous process of determining where steel, iron, construction materials, and manufactured products are made will take significant time and resources. Requiring this of small tribes just adds one more barrier to those tribes attempting to obtain HUD grants. Additionally, tribes in rural counties are going to have a difficult time locating contractors that can find American-made materials. This could lead to small tribes being entirely priced out of being able to obtain federal grants.

The participants noted the burden and costs that tribes will face in having to hire additional staff to monitor their projects for BABA compliance. They asked what steps Tribal Recipients will be required to take to monitor their own contractors to make sure the products are American-made, to what extent will Tribal Recipients have to prove that products are American made, and what documentation will be required for the same. Mr. Atallah responded that OMB will not be monitoring BABA compliance, and that this will be monitored and enforced by HUD through the regular IHBG and ICDBG programs. HUD has not yet determined how compliance will be monitored and will at some point be releasing guidance on this and on how to comply with BABA. One potential option is to allow contractors to certify that they have bought all American-made products. HUD will also consider which processes of BABA compliance are working for the non-tribal programs already subject to BABA.

One of the participants asked whether TDHEs will be given funding allocation increases to cover the increased costs that tribes and TDHEs will face in meeting BABA requirements. Mr. Atallah noted that a funding allocation increase must be decided by Congress. He therefore recommended that tribes and TDHEs raise these concerns with their Senators and Representatives, noting that BABA is a new unfunded mandate that require tribes to bolster American jobs and products. Doing so comes at a cost, and tribes need more money to comply with this new mandate. Mr. Atallah also noted that the increased costs of a project due to BABA requirements is very relevant, and that tribes and TDHEs should therefore document everything.

HUD is seeking tribal feedback to determine whether to create a broad public policy waiver for HUD to give to tribes. HUD needs to know why the BABA requirements are burdensome on tribes, in comparison to other counties and entities subject to BABA (e.g. trust responsibility, tribal sovereignty, Indian preference). BABA requirements are burdensome on everyone subject to it, so OMB is not sympathetic to arguments on general burdens. Instead, Mr. Atallah emphasized the importance of tribes and TDHEs commenting on how and in what ways is BABA more burdensome on tribes and TDHEs than it is on non-tribal entities. Those arguments will be more compelling for HUD to take to OMB to argue that Tribal Recipients should receive broader waivers from BABA requirements.

One of the participants asked whether HUD will increase the allowable maximum rent for rental units. They noted that TDHEs' administrative costs will increase because of BABA compliance, so TDHEs should be allowed to increase rent requirements to compensate. Mr. Atallah responded that HUD will consider this. Another participant asked whether HUD will increase total development costs (TDC). Mr. Atallah responded that HUD should definitely consider this, noting that either TDCs should go up or HUD should provide more exceptions to allow tribes to exceed TDCs.

Another participant asked how many positions will HUD create to handle BABA. Mr. Atallah commented that they are still determining that, but that OMB has already created an entirely new office to implement BABA. HUD is expecting to receive thousands of waiver requests nationally.

4. HUD Consultations and Tribal Feedback

HUD will be conducting more tribal consultations through December 2023. HUD is seeking tribal feedback on when and how to phase in the BAP for FFA provided to Tribal Recipients. HUD will also solicit Tribal feedback on other related issues, including how to effectively implement the BAP for extremely remote communities, such as remote Native Alaskan Villages, that are more disconnected from traditional supply chains, have an extremely short construction seasons, are located off the road system, and are reliant on barges to ship construction materials. Tribes and TDHEs can send, feedback, comments, and questions to consultation@hud.gov or to BuildAmericaBuyAmerica@hud.gov. Additionally, HUD is seeking feedback on the following specific questions.

1. What are the expected impacts of BABA on construction and infrastructure development?

2. Do you know whether the iron, steel, construction materials, and manufactured goods you currently buy are made in the US?
3. Do you have access to viable American suppliers of iron, steel, construction materials, and manufactured goods?
4. Do you anticipate that BABA will increase the cost of construction of infrastructure projects?
5. Should HUD consider a different de minimis threshold requirement when BABA applies to Tribal infrastructure projects?
6. When should HUD begin to require Tribes and TDHEs to comply with BABA requirements?
7. How would BABA impact general infrastructure projects under ICDBG, e.g. road and sewer?

Additional resources on BABA can be found at the following websites: [Office of Management and Budget Guidance and Other Resources](#) and [HUD BABA Webpage](#).

b. ONAP Updates

The ONAP staff provided a grants management update. ONAP is moving away from using the Epic system for grants management and will be transitioning to use Grants Evaluation and Management System (GEMS). Additional information can be found [here](#).

There is still quite a bit of COVID-19 funding available under the IHBG-ARP, ICDBG-ARP, IHBG-CARES, and ICDBG-CARES. A [Notice of Funding Opportunity \(NOFO\)](#) for the ICDBG is still open. Applications are due **October 5, 2023**. HUD will release the NOFO for FY 24 IHBG competitive grants soon.

Conclusion

If you have any questions, please contact Ed Clay Goodman (503-242-1745 or egoodman@hobbsstrauss.com) or Cari L. Baermann (503-242-1745 or cbaermann@hobbsstrauss.com).