

## Anne Cook

---

**From:** Cheylani M. Wilson <CWilson@hobbsstrauss.com>  
**Sent:** Tuesday, May 14, 2024 8:58 AM  
**Cc:** Ed Clay Goodman; Cari L. Baermann  
**Subject:** NAHASDA Update - HUD Extends BABA waiver to September 30

To our Housing clients,

HUD is going to extend the waiver for Tribal compliance with Build America, Buy America (BABA) requirements to September 30, 2024. HUD published the notice of a proposed extension on May 10. It will not formally go into effect until 30 days after publication, but this means that for all intents and purposes the current waiver will continue beyond May 22 until September 30.

[https://www.hud.gov/sites/dfiles/GC/documents/6331-N-02D\\_Tribal\\_Waiver\\_Extension.pdf](https://www.hud.gov/sites/dfiles/GC/documents/6331-N-02D_Tribal_Waiver_Extension.pdf)

Thank you,

**Cheylani M. Wilson, Legal Assistant**

T 503.242.1745 | F 503.242.1072

**HOBBS STRAUS DEAN & WALKER, LLP**  
215 SW Washington Street, Suite 200, Portland, OR 97204

**HOBBSSTRAUS.COM**



---

### Hobbs, Straus, Dean and Walker, LLP. Confidentiality Statement

This message is intended only for the use of the individuals to which this e-mail is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable laws. If you are not the intended recipient of this e-mail, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this e-mail in error, please notify the sender immediately and delete this e-mail from both your "mailbox" and your "trash." Thank you.

---

All "outgoing" email for Hobbs Straus is scanned, tested, and verified using Proofpoint Essentials.

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****[Docket No. FR-6331-N-02D]****Extension of Public Interest, General Applicability Tribal Consultation Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance**

**AGENCY:** Office of the Secretary, U.S. Department of Housing and Urban Development (HUD or the Department).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Build America, Buy America Act (BABA or the Act), this notice advises that HUD is proposing an extension to the previously issued public interest, general applicability Tribal Consultation waiver until September 30, 2024 of the Build America, Buy America Act (BABA) Domestic Content Procurement Preference (the Buy America Preference or the BAP) as applied to Federal Financial Assistance (FFA) provided to Tribes, Tribally Designated Housing Entities (TDHEs), and other Tribal Entities (hereinafter collectively, Tribal Recipients). This proposed waiver extension is critical in keeping with the Federal Government's commitment to consult with Tribes and build Tribal capacity as established through Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, before applying the Buy America preference to programs that affect Tribal communities.

**DATES:** HUD published this proposed waiver extension on its website on May 10, 2024.

Comments on the proposed waiver set out in this document are due on or before **[Insert date 30 days after date of publication in the FEDERAL REGISTER]**. HUD will consider comments received and announce any formal adoption of this proposed waiver extension through a subsequent notice. If made final, the waiver extension would apply to awards obligated or

incrementally funded on or after the effective date of the waiver extension until September 30, 2024. In the case of awards obligated prior to the effective date, the proposed waiver extension would apply to expenditures on or after the effective date of the waiver extension.

**ADDRESSES:** Interested persons are invited to submit comments on the general applicability waiver. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov). To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. **Electronic Submission of Comments.** Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. **Submission of Comments by Mail.** Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

**No Facsimile Comments.** Facsimile (FAX) comments will not be accepted.

**Public Inspection of Comments.** All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters

building, an advance appointment to review the submissions must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Copies of all submissions are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Faith Rogers, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10126, Washington, DC 20410–5000, at (202) 402–7082 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunicationsrelay-service-trs>. HUD encourages submission of questions about this document be sent to [BuildAmericaBuyAmerica@hud.gov](mailto:BuildAmericaBuyAmerica@hud.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Build America, Buy America**

The Build America, Buy America Act was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58). The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. Section 70914(a) of the Act establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, the Act further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property. Thus, starting May 14, 2022,

new awards of HUD FFA, and any of those funds newly obligated by HUD then obligated by the grantee for infrastructure projects, are covered under BABA provisions of the Act, 41 U.S.C.

8301 note, unless covered by a waiver.

## **II. HUD's Progress in Implementation of the Act Generally**

Since the enactment of the Act, HUD has worked diligently to develop a plan to fully implement the BAP across its FFA programs awarding funds to non-Tribal Recipients. HUD understands that advancing Made in America objectives is a continuous effort and believes setting forth a transparent schedule of future implementation in those programs provides industry partners and non-Tribal Recipients with the time and notice necessary to efficiently and effectively implement the BAP. HUD has announced detailed plans for the implementation of the new BAP requirements in connection with its award of FFA to non-Tribal Recipients in a manner designed to maximize coordination and collaboration to support long-term investments in domestic production. HUD continues its efforts to implement the Act in those programs consistent with the guidance and requirements of the Made in America Office of the Office of Management and Budget, including guidance concerning appropriate compliance with the BAP.

## **III. Waivers**

Under Section 70914(b), HUD and other Federal agencies have authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under section 70914(b) must be published by the agency with a detailed written

explanation for the proposed determination and provide a public comment period of not less than 15 days. Pursuant to section 70914(d)(2), when seeking to extend a waiver of general applicability, HUD is required to provide for a public comment period of not less than 30 days on the continued need such waiver.

In order to ensure orderly implementation of the BAP across HUD's FFA programs awarding funds to non-Tribal Recipients, HUD has provided public interest, general applicability phased implementation waivers and announced a corresponding implementation plan for all non-Tribal Recipients. As part of those efforts, HUD has published two general applicability, public interest waivers covering Exigent Circumstances and De Minimis and Small Grants, which can be found at

[https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america/waiver](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver).

Additionally, HUD previously published two general applicability, public interest waivers of the BAP in connection with FFA provided to Tribal Recipients<sup>1</sup> through May 22, 2024, to provide the agency with sufficient time to complete the Tribal consultation process regarding implementation of the BAP in connection with infrastructure projects, both generally and specifically in connection with FFA received from HUD. This proposed waiver extension 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 the Buy America Preference to programs that affect Tribes.

---

<sup>1</sup> For purposes of this waiver, the term "Tribal Recipients" includes all recipients of grants or loan guarantees administered by HUD's Office of Native American Programs. This includes Indian tribes and TDHEs receiving grants and loan guarantee assistance under the Native American Housing Assistance and Self-Determination Act's (NAHASDA's) Indian Housing Block Grant Program and Title VI Loan Guarantee Program, and Indian tribes and Tribal Organizations receiving Indian Community Development Block Grant funds under the Housing and Community Development Act of 1974. It also includes Federal Financial Assistance provided by HUD to the Department of Hawaiian Home Lands (DHHL) which receives annual grant funding under the Native Hawaiian Housing Block Grant (NHHBG) program.

#### **IV. Tribal Infrastructure and HUD Programs**

Many Tribal communities are without basic infrastructure such as roads, running water, and indoor plumbing. Critical infrastructure in many Tribal communities is severely deficient and in need of repair and modernization. Addressing infrastructure needs is especially difficult for Tribes due to challenges faced locating available supplies, suppliers, and construction labor necessary for development.

Some Alaska Native villages are located off the road system, have short construction seasons because of extreme weather, and must grapple with unique transportation limitations, including having to ship basic construction materials twice per year by barge or air freight at extremely elevated costs. These Tribes often report to HUD that it can be a major challenge to secure space on a barge for construction materials. At times, even when space is secured, any unexpected setbacks faced, such as loss of cargo, materials damaged through shipping, or miscalculation of the appropriate amount or quality of materials needed, can result in infrastructure and housing projects being delayed an entire construction season. A project can be delayed for six months or longer until the next barge or carrier can arrive, which results in significant cost overruns.

Annually, HUD provides over \$1 billion in FFA to 574 Federally recognized Tribal Nations. The Indian Housing Block Grant and the Indian Community Development Block Grant programs are critical funding sources that allow the Federal Government to carry out its trust responsibilities and support affordable housing and infrastructure development in Tribal communities. Under these programs, HUD provides block grants to Tribal Recipients to address housing and infrastructure needs—particularly for the benefit of low- and moderate-income families. HUD anticipates that the BAP will apply to some projects funded under these

programs. Accordingly, HUD must ensure that Tribal Recipients are able to effectively implement the BAP and transition to compliance.

## **V. HUD's Consultation Policy**

HUD's "Tribal Government-to-Government Consultation Policy," adopted in compliance with Executive Order 13175, "Consultation with Indian Tribal Governments," outlines the internal procedures and principles HUD must follow when communicating and coordinating on HUD programs and activities that affect Native American Tribes. HUD's Tribal Consultation policy recognizes the right of Tribes to self-government and facilitates Tribal participation and input in HUD's implementation of programs and FFA directed to Tribal communities.

Consistent with its Tribal Government-to-Government Consultation Policy, HUD has actively participated in consultation efforts with respect to the applicability of the BAP to Tribal Recipients. Initially, on September 21, 2022, eight agencies participated in a joint consultation hosted by the White House Council on Native American Affairs to consult with Tribal Nations on discretionary BAP provisions and the waiver categories characterized in OMB initial implementation guidance M-22-11. Tribes were initially 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.

Since that time, and in light of the comments received from the Tribal leaders and the progress the Department has made implementing the BAP in other FFA programs, HUD engaged in consultation with respect to specific plans for implementation of the BAP in HUD's FFA provided to Tribal Recipients consistent with HUD's Tribal Government-to-Government



Consultation Policy<sup>2</sup> and with President Biden’s “Tribal Consultation and Strengthening Nation-to-Nation Relationships” Memorandum<sup>3</sup>.

During the past year, HUD held a series of Tribal consultation sessions across the country to obtain feedback from Tribes on the likely impact of employing the BAP in HUD’s Tribal programs. As a result, HUD received over 100 comments from Tribes throughout the nation.

Consultation sessions were held at the following events:

- National Congress of American Indians Mid-Year session, Prior Lake, Minnesota, June 7, 2023;
- Southern Plains Indian Housing Association session, Durant, Oklahoma, July 11, 2023;
- Nevada/California Indian Housing Association, Sparks, Nevada, August 13-16, 2023;
- United Native American Housing Association conference, Salt Lake City, Utah, August 22-24, 2023;
- Northwest Indian Housing Association, Coeur d’Alene, Idaho, September 12-14, 2023;
- Affiliated Tribes of Northwest Indians Annual Meeting, Chehalis, Washington, September 18-21, 2023;
- HUD ONAP National Tribal Housing Summit, Saint Paul, Minnesota, October 31-November 2, 2023;
- National Congress of American Indians Conference, New Orleans, Louisiana, November 12-17, 2023;
- Alaska BIA Provider’s Conference, Anchorage, AK, November 29, 2023.

---

<sup>2</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/regs/govtogo\\_tcp](https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogo_tcp). See also 81 FR 40893

<sup>3</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>

In addition to conducting in-person Tribal consultation sessions, HUD invited Tribes to submit written comments to HUD. HUD received written comments from HUD's Tribal Intergovernmental Advisory Committee and other Tribal grantees. HUD continues to process and evaluate the comments received during this process.

#### **VI. Public Interest in an Extension of HUD's General Applicability Waiver of the BAP for FFA provided to Tribal Recipients**

This proposed waiver extension 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) of BABA for HUD Federal financial assistance agreements with Tribal Recipients. The proposed waiver extension would apply to awards obligated or incrementally funded on or after the effective date of the proposed waiver extension until September 30, 2024. In the case of awards obligated prior to the effective date, the proposed waiver extension would apply to expenditures on or after the effective date of the final waiver. HUD is seeking comment on the granting of a limited extension to HUD's existing public interest, general applicability waiver of the BAP in connection with HUD's FFA to Tribal Recipients for HUD to conduct additional Tribal Consultations. HUD proposes this limited extension to allow the Department sufficient time to both complete its own evaluation of comments received through the consultations described above consistent with HUD's Tribal Government-to-Government Consultation Policy and provide clear guidance and technical assistance to recipients so that they understand expectations for the conclusion of the waiver, as HUD transitions to full BABA compliance in a timely manner. This approach is consistent with the policy of Executive Order 13175.

During the proposed waiver extension, HUD intends to complete its analysis of comments received during its own Tribal consultation sessions with Tribes concerning the application of the BAP and fully brief the Office of Management and Budget on all Tribal feedback received. After considering all Tribal feedback, HUD intends to publish additional programmatic guidance. The guidance will provide Tribal Recipients with additional information including how the BAP will apply to HUD's various Tribal programs, ways that Tribal Recipients can comply with the BAP, and the process that Tribal Recipients must follow to request BAP waivers. HUD will provide training resources to ensure that Tribal Recipients are in a good position to implement the BAP under HUD's Tribal programs. HUD will also use this extension period to provide additional technical assistance resources to ensure that Tribal Recipients can build capacity and be in a better position to comply with the BAP.

HUD intends to implement the BAP in a manner that advances the Made in America objectives while also ensuring that Tribal Sovereignty and Self-Determinations are respected and the treaty and trust obligations of the United States are honored. At the conclusion of this proposed limited extension, Tribal recipients will be expected to transition to full compliance with BABA requirements.

## **VII. Assessment of Cost Advantage of a Foreign-Sourced Product**

Under OMB Memorandum M-24-02, "Implementation Guidance on Application of the Buy America Preference in Federal Financial Assistance Programs for Infrastructure," published on October 25, 2023, 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 and in compliance with applicable law, before granting a public interest waiver.

HUD's analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products.

### **VIII. Limited Duration of the Waiver**

HUD remains committed to the successful implementation of the important Buy America Preference across its programs providing covered FFA for infrastructure projects, while recognizing the unique government-to-government relationship it has with Tribal Recipients receiving HUD FFA for infrastructure projects and the new directives set forth in Executive Order 14112. HUD is committed to engaging its Federal agency partners in a timely process as noted above to further this goal.

### **IX. Solicitation of Comments**

As required under section 70914 of the Act, HUD is soliciting comment from the public on the proposed waiver extension announced in this notice for a period of 30 days. If made final, the proposed waiver extension would apply to awards obligated or incrementally funded on or after the effective date of the proposed waiver extension until September 30, 2024. In the case of awards obligated prior to the effective date, the waiver would apply to expenditures on or after the effective date of the final waiver.



---

Adrienne R. Todman  
Acting Secretary

**[BILLING CODE 4210-67]**