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## MEMORANDUM

September 24, 2024

TO: TRIBAL HOUSING CLIENTS

FROM:  Ed Clay Goodman & Cari L. Baermann  
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***ONAP Build America, Buy America Act (BABA) Training***

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On September 23, 2024, the United States Department of Housing and Urban Development (HUD) Office of Native American Programs (ONAP) hosted a virtual training on the Build America, Buy America Act (BABA). This memorandum provides a summary of the training.

### I. BABA Overview

ONAP Specialist Daniel Cox, ONAP Specialist Kristen Arnold, and ONAP Specialist Matthew Niegocki gave a presentation and answered tribal questions on BABA. The ONAP staff stated that ONAP intended the September 23, 2024 training to provide a broad overview of BABA and the already existing BABA materials. ONAP is planning on holding more-detailed trainings on BABA in the future.

Mr. Cox provided an overview of BABA and the BABA requirements for tribes and tribally designated housing entities (TDHEs). BABA was enacted on November 15, 2021, and establishes a domestic content procurement preference (“Buy America Preference,” or “BAP”) for federal infrastructure programs. BABA requires federal agencies to ensure that none of the funds made available for infrastructure projects may be obligated unless the federal agency has taken steps to ensure that all iron, steel, manufactured products, and construction materials used in an infrastructure project are produced in the United States. Projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.” The Buy America Preference applies to *all sources* of federal financial assistance, as defined in 2 CFR Section 200.1, provided to tribes, TDHEs, and other tribal entities (collectively “Tribal Recipients”) involving infrastructure projects. “Infrastructure Project” means any activity related to the construction, alteration, maintenance, or repair of Infrastructure in the United States regardless of whether Infrastructure is the primary purpose of the project. Additional information on the BABA requirements and terminology is available in the BABA regulations, located at [2 CFR Part 184](#).

On May 14, 2022, HUD published a one-year general applicability public interest waiver (“Waiver”) of the Buy America Preference in connection with HUD funding provided to Tribal Recipients. That Waiver period will end on **September 30, 2024**. The Buy America Preference

applies to any federal financial assistance obligated after **October 1, 2024**. ONAP has indicated that it interprets “obligated” as the date that the ONAP official signs the grant agreement.

The U.S. Office of Management and Budget (OMB) will be regulating and enforcing the BABA requirements, through its Made in America Office (MIOA). Mr. Cox noted that on August 23, 2023, OMB published a final rule to implement BABA, located at 2 CFR Part 184 and, incorporated into 2 CFR 200. October 25, 2023 OMB published an “[Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#)” (OMB Implementation Guidance”), which provides an overview of many of the BABA requirements.

## II. ONAP BABA Guidance

### a. General BABA Requirements

ONAP will create a BABA-specific website that will provide guidance and additional information for Tribal Recipients. ONAP will hold a subsequent training once other agencies have provided additional BABA guidance. The ONAP BABA implementation notice (“ONAP Implementation Notice”) is still forthcoming.

Mr. Cox stated that the Buy America Preference applies to infrastructure projects funded under the following ONAP grants:

- Indian Housing Block Grant (IHBG) Formula
- IHBG Competitive
- Indian Community Development Block Grant (ICDBG) single purpose
- Native Hawaiian Housing Block Grant (NHHBG)
- Title VI loan guarantees

Mr. Cox stated that the Buy America Preference does not apply to infrastructure projects funded under the following ONAP grants (pre- and post-disaster or emergency response expenditures):

- IHBG-Coronavirus Aid Relief and Economic Security Act (CARES)
- ICDBG-CARES
- IHBG-American Rescue Plan Act (ARP)
- ICDBG-ARP
- ICDBG-Imminent Threat
- NHHBG-ARP

In addition, Mr. Cox stated that the Buy America Preference does not apply to federal financial assistance for programs that do not fund public infrastructure projects. ONAP has interpreted this to mean that the Buy America Preference does not apply to the Tribal HUD-VASH, since that funding is specifically for rental assistance and associated administrative fees in mostly non-public housing and is not public infrastructure. Mr. Cox noted that Section 184 grants will not likely be subject to BABA requirements, because the Section 184 program funding is used to finance the acquisition, construction, or rehabilitation of single-family housing for private use.

Mr. Cox provided a brief overview of some of the initial responsibilities of Tribal Recipients implementing projects subject to the Buy America Preference, as follows:

- Determine if the federal financial assistance from a covered program was obligated on or after October 1, 2024. Federal financial assistance obligated by the federal agency after October 1, 2024 is subject to the Buy America Preference.
- Determine if the project is an infrastructure project that serves a public function.
- Determine if iron, steel, construction materials, or manufactured products will be used in the infrastructure project.
- Determine if any of the HUD general waivers (exigent circumstances, de minimis, and small purchase waivers, described more below) apply to the public infrastructure project.

Tribal Recipients can reach out to the ONAP points of contact for each region about questions about BABA. Here is a chart of those contacts:

Region	Name	Email
AONAP	Carla Vance	<a href="mailto:Carla.T.Vance@hud.gov">Carla.T.Vance@hud.gov</a>
AONAP	Katie Cruthers	<a href="mailto:Katie.Q.Cruthers@hud.gov">Katie.Q.Cruthers@hud.gov</a>
EWONAP	Nathaniel Johnson	<a href="mailto:Nathaniel.Johnson@hud.gov">Nathaniel.Johnson@hud.gov</a>
EWONAP	Elton Jones	<a href="mailto:Elton.Jones@hud.gov">Elton.Jones@hud.gov</a>
NPONAP	Elisabeth Altazan	<a href="mailto:Elisabeth.A.Altazan@hud.gov">Elisabeth.A.Altazan@hud.gov</a>
NPONAP	Michelle Rogers	<a href="mailto:Michelle.B.Rogers@hud.gov">Michelle.B.Rogers@hud.gov</a>
NWONAP	Angelique Adams	<a href="mailto:Angelique.M.Adams@hud.gov">Angelique.M.Adams@hud.gov</a>
NWONAP	Maya Urban	<a href="mailto:Maya.N.Urban@hud.gov">Maya.N.Urban@hud.gov</a>
Southern Plains	Virginia Fredman	<a href="mailto:Virginia.L.Fredman@hud.gov">Virginia.L.Fredman@hud.gov</a>
Southern Plains	Sheridan Pickering	<a href="mailto:Sheridan.A.Pickering@hud.gov">Sheridan.A.Pickering@hud.gov</a>
Southern Plains	Tamara Hudgins	<a href="mailto:Tamara.M.Hudgins@hud.gov">Tamara.M.Hudgins@hud.gov</a>
SWONAP	Karin Grandon	<a href="mailto:Karin.A.Grandon@hud.gov">Karin.A.Grandon@hud.gov</a>
SWONAP	Tammie Mirabel	<a href="mailto:Tammie.L.Mirabal@hud.gov">Tammie.L.Mirabal@hud.gov</a>

*b. Waivers*

1. General Waivers

Ms. Arnold then provided an overview of the existing HUD general applicability waivers available to Tribal Recipients. There are currently three such waivers:

- **Exigent circumstances waiver:** This waiver applies when there is an urgent need by a grantee to immediately complete an infrastructure project because of an exigent circumstance, or a threat to the life, safety, or property of residents or the community.
- **De minimis waiver:** The Buy America Preference requirements do not apply to a de minimis portion of an infrastructure project, waiving BABA requirements for a

cumulative total of no more than 5% of the total cost of the Iron or Steel Products, Manufactured Products, and Construction Materials, up to a maximum of \$1 million.

- **Small purchase waiver:** For Infrastructure grants and expenditures for which the total cost is equal to or less than the current Simplified Acquisition Threshold of \$250,000, set in the Federal Acquisition Regulations (FAR) at 48 CFR part 2.

These three HUD waivers are in effect through November 23, 2027, or for a shorter time as HUD may determine. A Tribal Recipient does not need to apply for these three waivers. However, if a Tribal Recipient determines that one of these waivers applies to their project, they must maintain documentation to support the use of the waiver.

## 2. Project-Specific Waivers

Ms. Arnold also commented that Tribal Recipients can also request project-specific waivers from the Buy America Preference on a limited, case-by-case basis. There are three project-specific waivers available to Tribal Recipients for federal financial assistance from all federal agencies:

- **Non-availability waiver:** The product needed is not produced in the United States in sufficient quantities or of a satisfactory quality.
- **Unreasonable cost waiver:** The inclusion of a product made in America will increase the cost of the overall project by more than 25%.
- **Public interest waiver:** Requiring the use of the American made product would be inconsistent with the public interest.

However, Tribal Recipients must submit a waiver request for these waivers in order for the waiver to apply and waive the applicability of the Buy America Preference to an infrastructure project. HUD provides instructions for submitting specific waivers on the [What If I Need A Waiver](#) webpage. Tribal Recipients can apply for a waiver through HUD's BABA Waiver Portal, located at <https://babawaiver.hud.gov/s/>. Ms. Arnold noted that only direct Tribal Recipients can submit a waiver request to HUD. If a tribe or TDHE provides federal financial assistance to a subrecipient or contractor on an infrastructure project subject to BABA, the main Tribal Recipient will need to coordinate with the subrecipients to obtain the information and documentation needed to support a waiver request. Each specific waiver request requires supporting documentation demonstrating the need for the waiver.

HUD will review each waiver request through a multi-step process. First, the HUD Office of the Chief Financial Officer (OCFO), the HUD Office of General Counsel (OGC), and ONAP will all conduct separate reviews of the waiver request. HUD could deny the request or require additional information during any of these initial reviews. Tribes and TDHEs should contact the regional ONAP points of contact for assistance in correcting requests, providing clarification, and navigating the BABA request system. After all of those HUD departments have reviewed and approved the waiver request, HUD will then publish the waiver request in the federal register for fifteen days for public comment. After the public comment period, HUD will submit the waiver request to OMB for its final waiver determination and approval. Ms. Arnold stated that until OMB issues its final approval of the waiver request, a Tribal Recipient should

not procure any materials on an infrastructure project subject to BABA unless those materials comply with the Buy America Preference.

Additional information on the BABA requirements is available in HUD's [Grantee User Manual](#). Tribal Recipients can preview the information needed to submit a waiver request through the [Build America Buy America Waiver Request](#). Additionally, Ms. Arnold commented that the HUD Implantation Notice will include BABA checklists and samples for tribes and TDHEs to use on their projects.

### III. Questions and Answers

The ONAP staff then fielded questions from the training participants. The participants' questions are noted below, along with ONAP staffs' response provided directly below the participant's question.

- Aside from the exigent circumstances waiver, what protections are in place to regulate the potential price gouging of BABA-compliant versus non-BABA compliant materials?
  - ONAP Response: Tribal Recipients can also apply for an unreasonable cost waiver if a contractor charges unreasonable prices.
- How long does it take for completion of the waiver request process?
  - ONAP Response: ONAP has not yet received a waiver request, and HUD has only received a few but has not fully processed those waivers. As a result, HUD does not know how long the typical waiver request process will be.
- If a tribe uses IHBG funding (obligated after October 1, 2024) for land acquisition, does that mean entire project is subject to BABA?
  - ONAP Response: HUD will answer this question in future.
- If a Tribal Recipient uses IHBG funding (obligated after October 1, 2024) for soft costs, such as project planning, management, architect and engineering costs, etc., would the entire project be subject to BABA?
  - ONAP Response: HUD will answer this question in future.
- Will ONAP provide a BABA compliance certification? How does a Tribal Recipient check to make sure the project is BABA compliant?
  - ONAP Response: ONAP is waiting for the ONAP Implementation Notice to be approved before it creates and publishes any compliance forms or notices.
- Does BABA apply to office supplies or other items that a Tribal Recipient purchases?
  - ONAP Response: BABA only applies to iron or steel, construction materials, and manufactured products used in the construction of infrastructure projects funded in whole or part by federal financial assistance.
- If a TDHE purchases materials from local outlets (e.g. Home Depot), is the Tribal Recipient still responsible for complying with BABA?

- ONAP Response: Yes, BABA applies regardless of where a Tribal Recipient purchases the materials.
- If a TDHE provides documentation in the form of two side-by-side bids, is that sufficient to show that a project's cost has increased by 25% due to complying with the Buy America Preference? Or is there a longer, more cumbersome, and administratively burdensome process that a tribe or TDHE must use?
  - ONAP Response: This information will be available in the Implementation Notice.
- If a project has multiple stages, will these multiple stages all be considered one project?
  - ONAP Response: This information will be available in the Implementation Notice.
- Will ONAP provide waivers/exclusions for specific types of projects?
  - ONAP Response: OMB must approve any waivers or exclusions, so ONAP is limited on what waivers it can provide.
- Are there any lists of BABA-compliant contractors or suppliers for TDHEs to use?
  - ONAP Response: No lists are currently available, but HUD is looking into working with other federal agencies to develop such lists.
- If multiple entities (e.g., a tribe and the tribe's TDHE) each receive and provide federal financial assistance for a project subject to BABA, does each entity need to apply for a waiver?
  - ONAP Response: This information will be available in the Implementation Notice.
- Will the internal documentation procedures for BABA be included in monitoring?
  - ONAP Response: ONAP will work on creating a BABA monitoring plan once the Implementation Notice is approved.
- What does a TDHE do if no contractor responds to a project bid because all local contractors determine that BABA is too burdensome or costly for the contractors? Can the TDHE apply for a non-availability waiver?
  - ONAP Response: ONAP is still determining the appropriate way to handle such a situation.
- Does the Buy America Preference apply to materials purchased with non-federal funds for an infrastructure project in which federal financial assistance (subject to BABA) are used?
  - ONAP Response: Yes. This information will be available in the Implementation Notice.
- If a Tribal Recipient includes BABA compliance requirements in its contract documents and a contractor fails to comply with those requirements (but certifies that it has), will the Tribal Recipient be held harmless from a compliance perspective?



- ONAP Response: The HUD General Counselor will answer this question in the future.
- Is there funding available for tribal lumber enterprises for improvements such as grading the lumber, to enter open market distribution?
  - ONAP Response: Tribes can look at various funding sources to see if a tribal lumber project would be eligible for funding.
- How is Section 184 different from IHBG funds used for rental projects in which the rental unit is only occupied by the tenant?
  - ONAP Response: HUD will address this in the future.

### ***Conclusion***

If you have any questions about this memorandum or any of the topics discussed in this memorandum, please contact Ed Clay Goodman ([egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com)) or Cari Baermann ([cbaermann@hobbsstrauss.com](mailto:cbaermann@hobbsstrauss.com)). Both may also be reached at 503-242-1745.