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## MEMORANDUM

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TO: TRIBAL HOUSING CLIENTS

FROM:  Ed Clay Goodman, Cari L. Baermann, and Julie C. Van Winkle  
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RE: ***ONAP Build America, Buy America Act (BABA) Guidance***

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On October 11, 2024, the United States Department of Housing and Urban Development (HUD) Office of Native American Programs (ONAP) issued [Implementation Guidance for Tribal Recipients, Notice PIH 2024-35](#) (“ONAP BABA Guidance”) for the Build America, Buy America Act (BABA). Of particular note for tribes and tribally designated housing entities (TDHEs), the BABA Guidance includes examples that may justify a waiver of the Buy America Preference (“BAP”) based on unique tribal conditions that restrict the availability of the American-made products. This memorandum provides a summary of the ONAP BABA Guidance.

### I. BABA Overview

BABA was enacted on November 15, 2021, and establishes a domestic content procurement preference – BAP, for federal infrastructure programs. BABA requires federal agencies to ensure that none of the funds made available for qualifying infrastructure projects (“Infrastructure Project”) 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. Infrastructure Projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.” The BAP 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 refers to any activity related to the construction, alteration, maintenance, or repair of Infrastructure in the United States. The ONAP BABA Guidance comments that the term “infrastructure” encompasses, among other things, the structures, facilities, and equipment for “buildings and real property.” ONAP BABA Guidance at 3. 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 BAP in connection with HUD funding provided to Tribal Recipients. That Waiver period ended on **September 30, 2024**. The BAP applies to any federal financial assistance obligated after **October 1, 2024**. ONAP has indicated that it interprets “obligated” as the date that the Area ONAP Administrator signs the grant agreement. *Id.* at 9.

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

## II. ONAP BABA Guidance

The ONAP BABA Guidance outlines the BABA requirements for all HUD Tribal Recipients when applying the BAP to covered projects. The ONAP BABA Guidance also clarifies which ONAP “grants are subject to BABA, how to determine if the BAP is applicable to a project, which HUD general waivers may apply to a project, how to document BAP compliance, and how to submit a specific waiver request for approval.” *Id.* at 1. Additionally, the ONAP BABA Guidance provides a checklist to help Tribal Recipients determine whether a project is subject to BABA. *See* ONAP BABA Guidance Appendix C.

### a. General BABA Applicability and Requirements

The ONAP BABA Guidance clarifies that the BAP applies to Infrastructure Projects funded under the following ONAP grants (“Covered Program”):

- 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 under the Native American Housing Assistance and Self-Determination Act of 1996 (Title VI).

The ONAP BABA Guidance states that the BAP 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 in cases involving Presidentially declared disasters or emergencies.
- NHHBG-ARP

In addition, the ONAP BABA Guidance informs tribes that ICDBG-imminent threat grants made to address imminent threats or emergencies not covered under a declared disaster or emergency declaration are still exempt from the BAP under HUD’s Exigent Circumstances waiver, discussed below. *Id.* at 5 n.2. The ONAP BABA Guidance further states that the BAP does not

apply to federal financial assistance for programs that do not fund public Infrastructure Projects. *Id.* at 5. ONAP has interpreted this to mean that the BAP 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. The ONAP BABA Guidance clarifies that Section 184 grants will not 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. *Id.*

The ONAP BABA Guidance provides examples of the types of projects that could be subject to BABA. These include building tribal facilities such as a community center or health and nutrition clinic, water and sewer facilities, or electrical transmission facilities and systems. *Id.* at 6, 11–12. Tribal Recipients can reach out to the ONAP points of contact for each region about whether a certain project would be subject to BABA.

The ONAP BABA Guidance provides a brief overview of the responsibilities of Tribal Recipients implementing projects subject to the BAP, as follows:

- Determine if the project will involve federal financial assistance from a Covered Program.
- 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 BAP. Grants that HUD obligated on or before September 30, 2024 are not subject to BABA.
- Determine if the Infrastructure Project 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.
- Determine if the procurement of iron, steel, manufactured products, or construction materials falls under the Native American Housing Assistance and Self-Determination Act (NAHASDA) *de minimis* exemption (described further below).
- If an Infrastructure Project is subject to BABA, ensure that all procurements, subrecipient agreements, cooperative agreements, purchase orders, contracts, and subcontracts incorporate terms and conditions requiring contractors, subrecipients, subcontractors, or other expending parties to comply with BABA. *Id.* at 7–9. The ONAP BABA Guidance also provides sample language to include in contracts. *See* ONAP BABA Guidance Appendix B.
- Maintain adequate records documenting compliance with BABA requirements.

The ONAP BABA Guidance provides a description of what that documentation must be retained to support a determination whether BABA applies to a project and evidence that the iron, steel, manufactured products, or construction materials were made in America. The ONAP BABA Guidance also provides examples of the types of information and documentation that Tribal Recipients can maintain to demonstrate BABA compliance. ONAP BABA Guidance at 13–14. This includes examples of market research and product sourcing to show whether a product was

unavailable domestically and examples of documentation to show that a product was made in America. *Id.*

b. *Waivers*

1. General Waivers

The ONAP BABA Guidance provides a description of the three existing HUD general applicability waivers available to Tribal Recipients. These three HUD waivers are in effect through November 23, 2027, or for a shorter time as HUD may determine. HUD may establish additional waivers or extend the duration of existing 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 BAP 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 grants waiver:** HUD's small grants waiver applies to infrastructure grants 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). HUD's small grants waiver also applies to Infrastructure Projects for which the total cost is equal to or less than the current simplified acquisition threshold, currently at \$250,000. However, if the Tribal Recipient combines the federal financial assistance provided by HUD with federal financial assistance from another federal agency, and the total amount of federal financial assistance in a single Infrastructure Project is greater than the simplified acquisition threshold, then the small grants waiver will not apply to HUD's federal financial assistance. *Id.* at 10. The ONAP BABA Guidance further states that “[i]f the Infrastructure Project includes the use of Force Account Labor, the cost of labor is excluded from the associated acquisition of Covered Materials required to accomplish work, and therefore would not be included as part of the above calculations.” *Id.*

In addition to the three waivers above, certain procurements may also fall under the NAHASDA *de minimis* exemption. The NAHASDA *de minimis* exemption applies to any procurement of \$5,000 or less using IHBG funds. Pursuant to Section 203(g) of NAHASDA (25 U.S.C. § 4133(g)),<sup>1</sup> any procurement using IHBG funds under \$5,000 is exempt from BABA, even if it is used for an Infrastructure Project.

A Tribal Recipient does not need to apply for the three waivers described above or the NAHASDA *de minimis* exemption. However, if a Tribal Recipient determines that one of these

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<sup>1</sup> “Notwithstanding any other provision of law, a recipient shall not be required to act in accordance with any otherwise applicable competitive procurement rule or procedure with respect to the procurement, using a grant provided under this chapter, of goods and services the value of which is less than \$5,000.” 25 U.S.C. § 4133(g).

waivers applies to their project, they must maintain documentation to support the use of the waiver. The ONAP BABA Guidance emphasizes that Tribal Recipients cannot artificially subdivide an Infrastructure Project in order to fit procurements within the scope of the small grants or *de minimis* waivers or *de minimis* exemption above. The ONAP BABA Guidance states that “HUD will evaluate the total cost of the infrastructure project as ‘the activity, or a group of integrally related activities, designed by the recipient to accomplish, in whole or in part, a specific objective.’”

## 2. Project-Specific Waivers

Tribal Recipients can also request project-specific waivers from the BAP 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 BAP to an Infrastructure Project. The ONAP BABA Guidance provides details on how to submit a project-specific waiver. *Id.* at 16. Additional instructions for submitting specific waivers is available on HUD’s [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/>. Only direct Tribal Recipients can submit a waiver request to HUD. *Id.* 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. 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. 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 BAP. *Id.*

## 3. Non-Availability Waivers for Unique Tribal Conditions

The ONAP BABA Guidance states that Tribal Recipients can apply for a non-availability waiver, based on unique tribal conditions that restrict the availability of the American-made

products. *Id.* These unique tribal conditions waivers will be particularly beneficial for Tribal Recipients, and they address a number of the concerns that tribes and TDHEs have communicated to ONAP. Tribal Recipients should provide HUD with strong evidence demonstrating any of these unique tribal conditions, as detailed in the ONAP BABA Guidance. The ONAP BABA Guidance provides examples of some unique Tribal conditions that may justify a non-availability waiver:

- A. **Short construction season/extreme weather or environmental conditions** make it impractical to purchase BAP-compliant materials in a timely manner.
- B. **Shipping restrictions**, such as shipment by barge, air cargo, or other limited/extreme means of transportation, make it impractical to purchase BAP-compliant materials in a timely manner
- C. **Lack of vendors** prevents effective access to BAP-compliant materials, where vendors will not ship the materials to remote locations, will not respond to material inquiries, or cannot provide cost estimates.
- D. **Lack of contractors** prevents effective access to BAP-compliant materials, where, after repeated attempts, an insufficient number of bids were collected from available contractors due to BAP requirements.
- E. **Compliance with Indian preference** (25 U.S.C. § 5307(b)) **or tribal preference** (e.g., 25 U.S.C. § 4111(k)) contracting requirements prevent compliance with BAP, demonstrated by lack of qualifying bids received.
- F. **Due to conditions beyond the control of the Tribal Recipient**, BAP-compliant material is not readily available.

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](#).

### ***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)), Cari Baermann ([cbaermann@hobbsstrauss.com](mailto:cbaermann@hobbsstrauss.com)), or Julie C. Van Winkle ([JVanWinkle@hobbsstrauss.com](mailto:JVanWinkle@hobbsstrauss.com)). They may also be reached at 503-242-1745.