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MEMORANDUM

December 13, 2024

TO: TRIBAL HOUSING CLIENTS

FROM: ~~Ed Clay~~ Goodman, Cari L. Baermann, and Julie C. Van Winkle
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RE: ***Multi-Agency Tribal Build America, Buy America Act (BABA) Waiver***

On December 13, 2024, the U.S. Department of Interior (DOI) published a proposed [Multi-Agency Tribal Public Interest Build America Buy America \(BABA\) Waiver](#) (“Tribal BABA Waiver”) in the Federal Register. In summary, the Tribal BABA Waiver would (1) exempt awards and subawards to tribes and tribally designated housing entities (TDHEs) of \$2.5 million or less from BABA requirements for five years; and (2) exempt manufactured products from BABA requirements between the effective date of the Tribal BABA Waiver and September 30, 2026, regardless of the federal award amount. We provide more details on these exemptions below.

The DOI will accept public comments on the proposed Tribal BABA Waiver for 15 calendar days from December 13, 2024, with the comment period closing on **December 28, 2024 at 5:00 PM EST.** Tribes and TDHEs can submit public comments via email to DOI_Grants_BuyAmerica_Waiver@ios.doi.gov. The comment email should reference “Indian Tribes” in the subject line of the email. Please let us know if you would like assistance in drafting comments.

a. BABA Overview

BABA requires federal agencies to ensure that none of the funds made available for infrastructure projects may be obligated unless all iron, steel, manufactured products, and construction materials used for the infrastructure project are made in America (i.e. the “Buy America Preference” or “BAP”).¹ Infrastructure projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.”² 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 involving Infrastructure Projects. Affordable housing has been determined to be an Infrastructure Project.

The various Buy America Preference requirements of BABA apply to the procurement of three types of materials used in the construction of infrastructure: (1) iron and steel; (2)

¹ Build America Buy America (BABA) Pub. L. 117–58 § 70914(a).

² Pub. L. 117–58 § 70912(7).

construction materials; and (3) manufactured products. Manufactured products probably involve the most difficult compliance issues, as such products often have multiple components, and each and every one of those components must be determined to be made in America.

b. Tribal BABA Waiver

If adopted, the Tribal BABA Waiver would apply a general applicability, public interest waiver for all tribes, including their TDHEs, governmental arms and instrumentalities, and tribal organizations (collectively, “Tribes”), under the following two circumstances:

1. If the grant being provided to Tribes for an infrastructure project is at or less than \$2.5 million for the life of the grant, it is exempt from BABA requirements. This waiver would be in effect for five years.
2. Manufactured products would be exempt from BABA requirements, regardless of the size of the grant. This exemption would be in place until September 30, 2026.

The Tribal BABA Waiver would apply to federal financial assistance provided by the following federal agencies: DOI; Department of Housing and Urban Development (HUD); Department of Agriculture (USDA); Department of Education (ED); Department of Energy (DOE); Environmental Protection Agency (EPA); Federal Emergency Management Agency (FEMA); and Department of Commerce (DOC).

The Tribal BABA Waiver would create a limited timeframe during which the BABA requirements would apply to awards that are obligated by a federal agency after September 30, 2024 (HUD’s original tribal waiver) and before December 28, 2024 (the new Tribal BABA Waiver effective date). However, the Tribal BABA Waiver states that “[f]or Federal financial assistance issued prior to the effective date of the final waiver, the waiver would apply to funds not yet expended.” That appears to mean that BABA would only apply to funds obligated between September 30, 2024 and the effective date of the Tribal BABA Waiver if the Tribe expends those funds prior to December 28, 2024. Tribes that received federal financial assistance obligated by a federal agency between September 30, 2024 and December 28, 2024 may want to consider waiting to expend those funds until after December 28, 2024 so as to avoid application of BABA requirements.

Conclusion

We will continue to provide updates on the proposed Tribal BABA Waiver, as well as any HUD Office of Native American Programs (ONAP) guidance and other updates regarding BABA’s applicability to Tribal housing projects. 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), Cari Baermann (cbaermann@hobbsstrauss.com), or Julie Van Winkle (jvanwinkle@hobbsstrauss.com). They may also be reached at 503-242-1745.