

**FRAMING PAPER:
TRIBAL CONSULTATION ON BUILD AMERICA BUY AMERICA**

*hosted by the
White House Council on Native American Affairs*

Wednesday, September 21, 2022

Tribal Leader Caucus
12:30p.m. ET – 2:00p.m. ET

Tribal Consultation
2:00p.m. – 5:00p.m. ET

I. Consulting Agencies/Departments

- U.S. Department of Agriculture (USDA)
- U.S. Department of Commerce, National Telecommunications and Information Administration (NTIA)
- U.S. Department of Energy (DOE)
- U.S. Department of Health and Human Services, Administration for Native Americans (ANA)
- U.S. Department of Housing and Urban Development (HUD)
- U.S. Department of the Interior (DOI)
- U.S. Small Business Administration (SBA)
- U.S. Department of Transportation (DOT)

II. Background

- The Infrastructure Investment and Jobs Act (IIJA), signed into law in November 2021, includes the “Build America, Buy America Act” (BABA).¹
- Across all covered federal agencies, BABA requires that “none of the funds made available for a Federal financial assistance program for infrastructure...may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”
- On April 18, 2022, the Office of Management and Budget (OMB) released a [memorandum](#) to agencies on implementing BABA, including a requirement that agencies consult with tribal nations before applying BABA purchase preferences to covered programs affecting Tribal communities.
- The White House Council on Native American Affairs (WHCNA) recognizes ongoing tribal requests for increased inter-agency collaboration and coordination, including on consultations. Rather than federal agencies consulting with tribes separately, WHCNA invites Tribal Leaders to consult with the participating agencies in a joint, inter-agency consultation.

¹ P.L. 117-57 § 70901-52

III. Applicability

- This purchase preference applies to
 - **Types of Program Recipients:** non-Federal entities, including Tribal governments;
 - **Types of Federal Funding, Technical Assistance, or Donations:** grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance;
 - **Types of Infrastructure Projects:** projects including but not limited to structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems, including electric vehicle charging stations; utilities; broadband infrastructure; and buildings and real property; and
 - **Types of Products and Construction Materials:** For purposes of BABA, “construction materials” include an article, material, or supply— other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives— that is or consists primarily of:
 - non-ferrous metals;
 - plastic and polymer-based products (including polyvinylchloride, composite building materials, and
 - polymers used in fiber optic cables);
 - glass (including optic glass);
 - lumber; or
 - drywall.
- This purchase preference **does not** apply to
 - **Pre- and Post- Disaster Response:** pre- and post- disaster or emergency response expenditures under certain provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.
 - **Non-infrastructure Projects:** programs or projects that do not include the development or expansion of aforementioned infrastructure projects.

IV. Waivers

- BABA allows for three (3) different types of waivers in addition to general applicability waivers:²
 - **Public interest waivers,** when applying domestic procurement preference would be inconsistent with public interest.
 - **Nonavailability waiver,** when the types of iron, steel, manufactured products or construction materials are not produced in the United States in sufficiently and reasonably available quantities or of a satisfactory quality.

² P.L. 117-57 § 70914(c)

- **Unreasonable cost waiver**, when the inclusion of steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent.
- **General applicability waiver**. These waivers apply across multiple awards and can be “product-specific” or “non-product specific.” General applicability waivers can only stand for five (5) year periods.
- The OMB memorandum encourages agencies to consider the below principles when issuing a waiver:
 - **Time-limited**. This type of waiver is bound by a time period, e.g., when supply chain breakage points make a type of product non-available.
 - **Targeted**. Waivers outside a specific project should be limited to item(s), product(s) or material(s) or category(ies) of item(s), product(s), or material(s) necessary. Broader waivers will receive increased scrutiny from OMB.
 - **Conditional**. Agencies should issue waivers that support the policies of the Act and Executive Order 14005, *Ensuring the Future is Made in All of America by All of America’s Workers*.

V. Topics for Consultation

While the Build America Buy America purchase preference is required by law, federal agencies are able to pursue discretionary waivers in coordination with the OMB Made In America Office (MIAO).

The WHCNAA, in collaboration with participating federal agencies, seeks Tribal Leader input to ensure that BABA is implemented effectively in Indian Country. The following questions are designed to help guide the conversation of the consultation, but they are not an exhaustive list. Comments may be provided at the consultation sessions or in writing. Written comments may be sent to the following email address: whcnaa@bia.gov. All comments are due by Thursday, October 20, 2022.

Consultation Framing Questions for Discussion:

1. General Areas of Discussion on BABA

- **Implementation**. How will implementation of BABA affect tribal infrastructure projects?
- **Tribal Products**. Do you or your Tribal businesses currently manufacture or sell iron, steel, manufactured products, and/or construction materials that are being or otherwise could be used in infrastructure projects?
- **Sourcing**. Does your nation currently source any or all infrastructure project components—i.e., iron, steel, manufactured products, and/or construction materials—domestically?
- **Financial Assistance**. What financial assistance tools are you or your technical staff familiar with regarding BABA?
- **Determining Whether Products are BABA-Compliant**. Do you believe you will confront challenges in determining what iron/steel, manufactured and/or construction materials are BABA-compliant? If you anticipate challenges, do

you have suggestions for how Federal Agencies could help you overcome those challenges?

2. Public Interest Waivers

- **De minimis thresholds.** Construction costs in Indian Country are often higher than in non-tribal areas.
 - If federal agencies establish a de minimis waiver, what percent or maximum dollar amount of project costs should an agency waive these requirements?
 - What should federal agencies consider when developing a de minimis threshold for on- or off-tribal lands?
- **Small grants.** Agencies may waive purchase preference requirements for small grants below the simplified acquisition threshold,³ in perpetuity or to be phased out over time.
 - Should agencies consider utilizing the simplified acquisition threshold as the basis for public interest waivers?
- **Minor components.** Federal agencies may consider waivers for minor deviations for miscellaneous minor components within iron and steel products, comprising no more than 5 percent total material cost of otherwise domestically produced iron and steel products.
 - What are common minor components to infrastructure projects commonly utilized in Indian Country?
 - How often do tribal projects include minor components?
- **Adjustment period.** Agencies may consider a time limited waiver to allow recipients and agencies time to transition to this rule.
 - How much time is necessary for tribal nations to adopt these domestic purchase preferences for federally financed or supported infrastructure projects?
 - Should training be provided to Tribes prior to implementation of BABA?
- **Other considerations.** Agencies may consider waivers based on other considerations such as whether the project is managed by a low-resource community, resource availability, domestic job impacts, et al.
 - What other considerations should agencies consider when developing waiver standards?
 - In the event there are multiple federal funds supporting an infrastructure project which federal agency should be the responsible agency for waiver authority?

3. Nonavailability Waivers

- **Market Study/Research.** Before granting this waiver, agencies should consider whether the recipient has performed thorough market research.
 - What are standard practices that tribal nations and communities use when pursuing market research on product availability?

³ The simplified acquisition threshold is based on the Federal Acquisition Regulation, to be updated in the Federal Register. In Fiscal Year 2022, the simplified acquisition threshold is \$250,000, per 85 FR 62485.

- What types of justification should federal agencies recognize as acceptable when considering the development or administration of these waivers?
- What markets to tribal nations currently scope when purchasing steel, iron, and related goods for infrastructure projects?

4. **Unreasonable Cost Waivers**

- **Cost Comparison.** Before granting this waiver, agencies should ensure recipients provide adequate documentation that no domestic alternatives are available within the cost parameter.
 - How do tribes currently identify and manage for cost-comparisons when identifying project costs?
 - Are publicly available cost comparison data sets sufficient for the realities in cost differences that tribes encounter?

5. **General Applicability Waivers**

- **General considerations.** General applicability waivers require a public comment period and are only applicable for five (5) years pending review and renewal.
 - What product or non-product specific waiver standards should agencies consider adopting?
 - What are well-established sourcing challenges that your nation or Indian Country at large faces?