



U.S. DEPARTMENT OF  
**ENERGY**

# Build America, Buy America and Davis Bacon Act

TRAINING FOR TRIBES

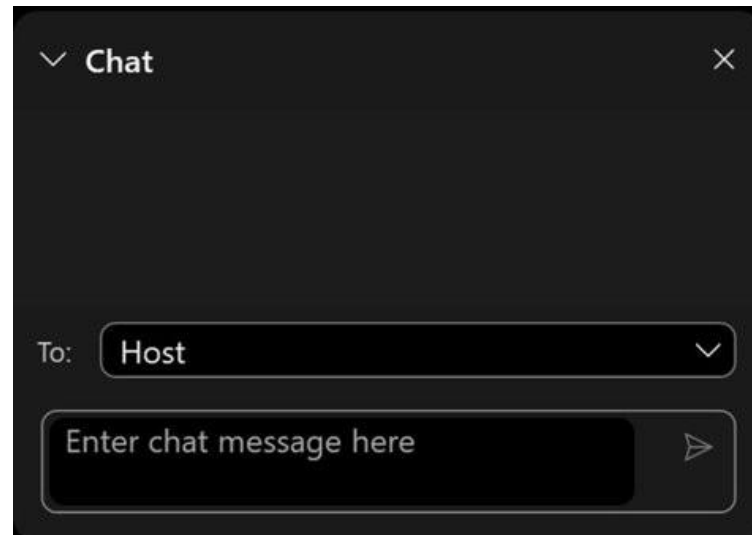


# Housekeeping

## Questions?

Please submit all presentation questions through the chat box.

If you have technical questions – please put them in the chat box for the host.

A screenshot of a dark-themed chat window. At the top, it says "Chat" with a downward arrow on the left and a close "X" button on the right. Below this is a large empty space for messages. Further down, there is a "To:" label followed by a dropdown menu showing "Host" with a downward arrow. At the bottom, there is a text input field with the placeholder text "Enter chat message here" and a send button with a right-pointing arrow.

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# Agenda

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- **Build America Buy America (BABA)**
  - Requirement
  - Applicability
  - Tribal Consultation Waiver and other DOE waivers that may apply to Tribal projects
  - Continued BABA compliance support for Tribes
- **Davis Bacon Act (DBA)**
  - DBA and Tribes
  - Compliance when applicable
    - Paper certified payroll process
    - Software (LCPtracker) process

# Build America Buy America (BABA) Requirements

- 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 and steel, manufactured products, and construction materials** used in the project are produced in the United States
- BABA Waivers can be approved if:
  - In the public interest
  - Nonavailability of specific items
  - Cost is unreasonable
  - An urgent need in an unforeseen and exigent circumstance

# BABA Domestic Manufacture Requirements

## Iron and Steel

- All manufacturing processes, from the initial melting stage through the application of coatings, must take place in the U.S.

## Manufactured products

- Product was manufactured in the U.S., and the cost of the components of the product that are mined, produced, or manufactured in the U.S. is greater than 55% of the total cost of all components of the product.

## Construction materials

- All manufacturing processes for the construction material occurred in the United States.

Tribes will be required to obtain a certification from the manufacturer of an applicable item that the item meets the requirements above.

# BABA Key Points



**Applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project**



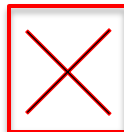
**Does not include tools, equipment, or supplies**



**Does not apply to other items that are not an “integral part” of the infrastructure, or which are not permanently affixed to the structure. Example = movable chairs**



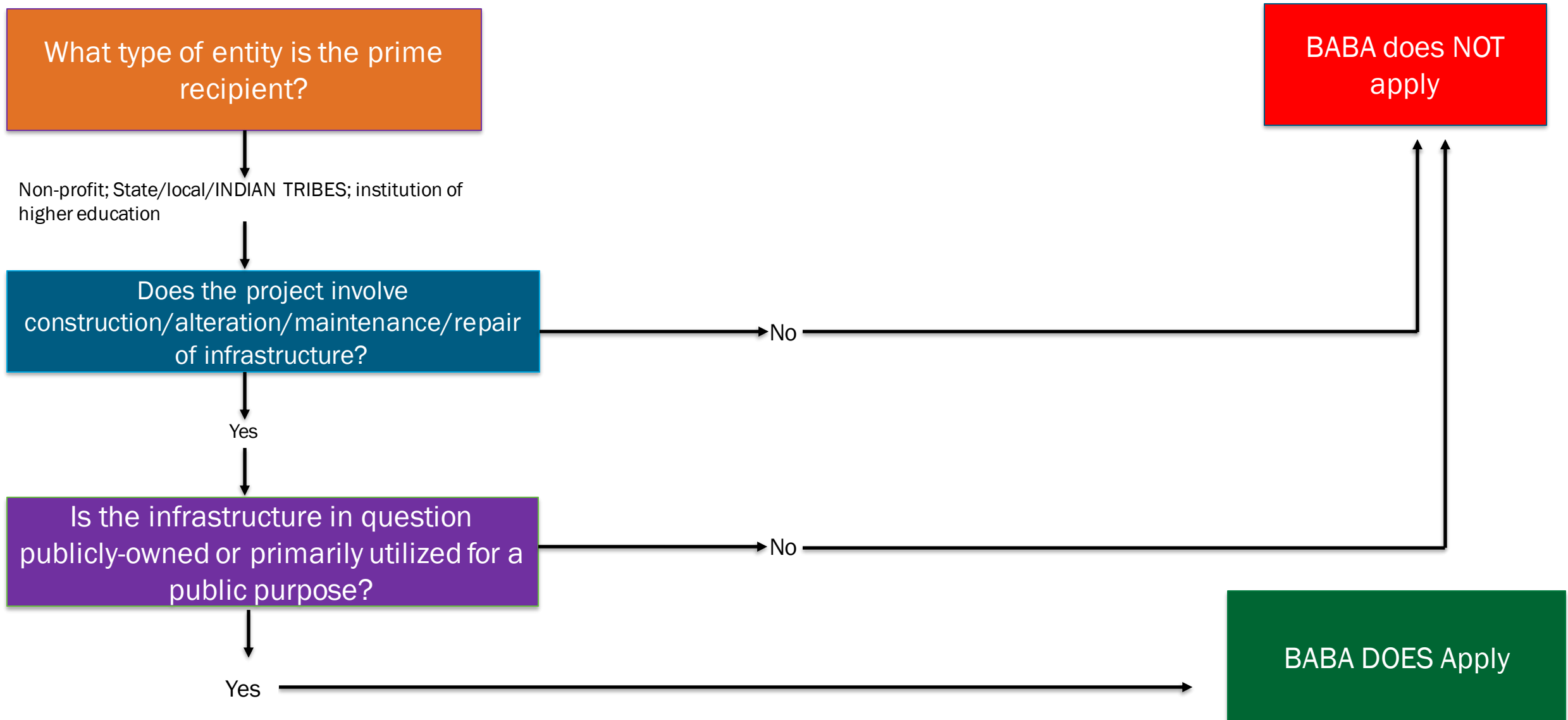
**Applies to all Federal financial assistance—it is not limited to projects funded via the Infrastructure, Investment, and Jobs Act (IIJA or BIL)**



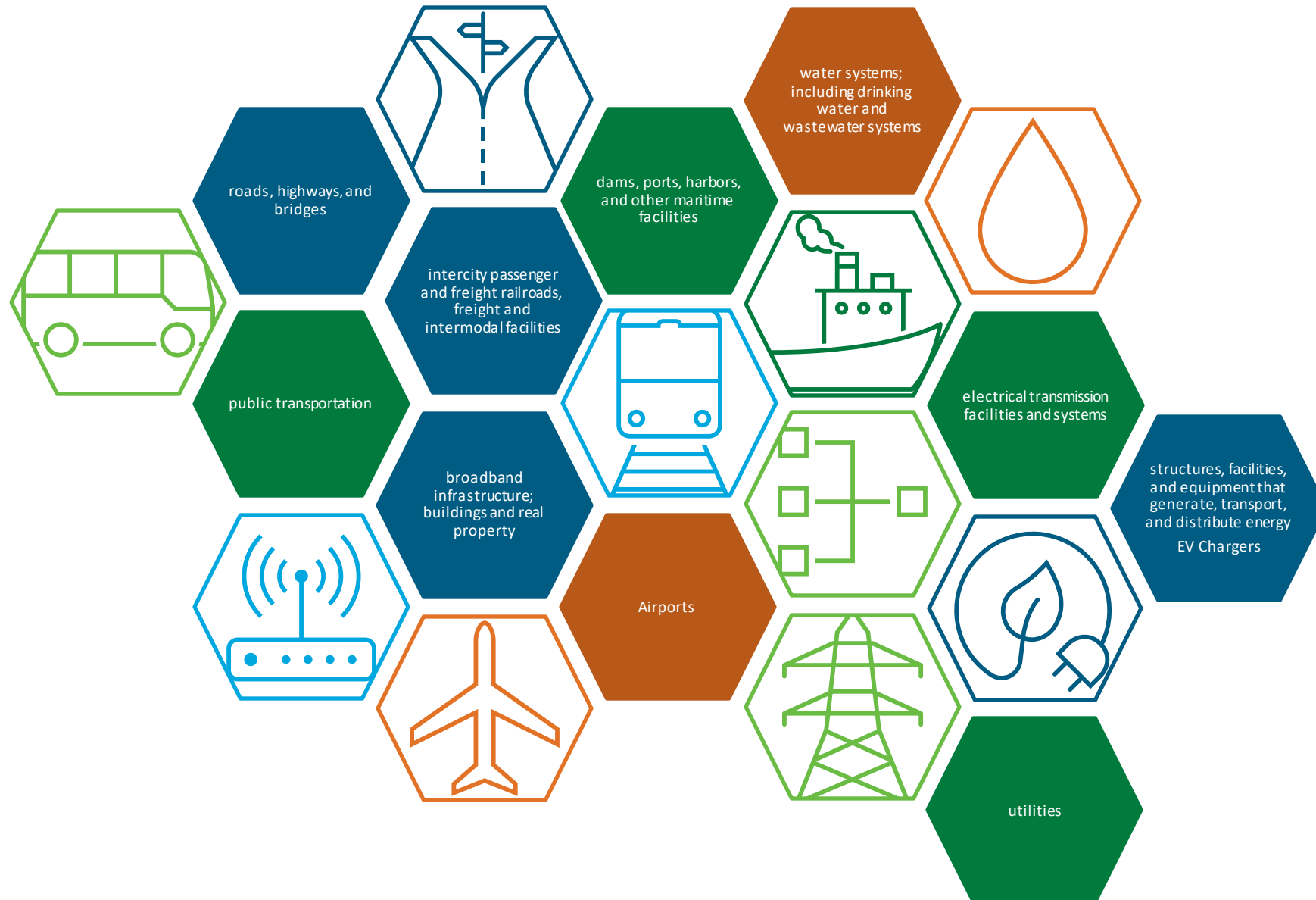
**There is no sunset date. It is a permanent new requirement**



# BABA Applicability



# What is an infrastructure project?



# “Infrastructure Project”

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- Serve a public function? Publicly owned and operated?
- Privately operated on behalf of the public or a place of public accommodation?
- In some cases, there may be privately-owned infrastructure that is primarily utilized for a public purpose; for example, a hydroelectric dam owned by a private group, but its only purpose is putting electricity onto the grid.
- Projects consisting solely of the purchase, construction or improvement of a private home for personal would NOT constitute public infrastructure

# Important BABA Waivers

## **Tribal Consultation: 8/18/2023-2024 ( 1 year)**

- Only for activities during the consultation period, does not apply to entire project duration if outside 1 year period

## **General Applicability 7/28/2023-2028 (Five Years)**

- **Small grants** less than \$250K (does not apply to subrecipients)
- **De Minimis** 5% or less of the total applicable project costs (\$1M max)
- **Minor Component** no more than 5% of the total material cost of the iron or steel

## **FYI- Pacific Island Territories: 8/18/2023 - 2/18/2025 ( 1 year and 6 months)**

- Commonwealth of Northern Mariana Islands, Guam, and American Samoa

# Continued BABA Support for Tribes

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- **Planned Waiver submissions to MIAO**
  - DOE-led interagency Solar Module (panel) Waiver
  - \$250K for Subrecipients
- **Market Research**
  - Posting of waivers ex. Project specific for LEDs in schools
  - Exploring ways to identify BABA-Compliant certified items

# DBA Background

- BIL Section 41101 requires all laborer and mechanics performing construction, alternation or repair shall be paid wages at rates not less than those prevailing on similar projects in the locality, commonly referred as the “Davis Bacon Act”.
- DBA and Tribes
  - DBA do not apply when Self-Governance Tribes performing work with their own employees.
  - DBA applies to all Tribal contractors and subcontractors.
    - Include the DBA clauses and applicable wage determination(s) in the contract(s), and the contractor and subcontractors performing work on the project would have to pay weekly prevailing wage rates to their construction workers

# DBA Compliance: Paper process

- This process is for when tribes are unable or limited in ability to use or access LCPtracker (e.g., no or limited Internet access)
- Hardcopy WH-347 certified payroll forms mailed to DOE
- If/when Tribe does subsequently achieve access, cannot retroactively upload previously submitted payroll into LCPtracker for validation and re-certification. Instead, upload completed certified payroll as records.
- Certified paper payrolls must be physically stored for 3 years after end of project.

# DBA Compliance: Software process

- DOE have secured DBA compliance services to include a DOE approved uniform, third-party electronic payroll validation software system to easily review all recipient compliance submissions = LCPtracker
- Access to LCPtracker is provided to Tribes (and subrecipients) at no cost
- **Benefits**
  - Flagging mathematical errors or omission discrepancies for the recipient to correct on a report prior to certification.
  - 24/7, Electronic certification and storage: No more paper submittal and storage
  - Centralized compliance & metrics: jobs, locations, apprentices/trainees



# DBA and Tribes

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- While a project may be performed on tribal land, the applicable Wage Determinations is based on Counties: ex Apache, Cochise, Gila, Graham, Greenlee, La Paz, Navajo and Santa Cruz Counties in Arizona.
- While a tribe's work may not be subject to DBA they are still identified in LCPtracker as the “prime”, which allows monitoring their subcontractors.

# Q&A

# Thank you!



[www.energy.gov/gdo/grid-resilience-statetribal-formula-grant-program](http://www.energy.gov/gdo/grid-resilience-statetribal-formula-grant-program)



[GDOTribalAssistance@hq.doe.gov](mailto:GDOTribalAssistance@hq.doe.gov)

# Backup Slides

# BABA Waiver Process Overview

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1. Tribe Submits waiver
2. DOE and Tribe collaborate if additional information/clarification needed
3. DOE share with OMB Made In America Office
4. DOE makes publicly available (15-30 days) on DOE's BABA website with a detailed written explanation for the proposed determination to issue the waiver
5. After the public comment period, DOE shares with OMB for final approval.
6. Finally, we post the finalized waiver to our website and it takes effect.

# BABA Waiver Contents

- Waiver type (Public Interest, Non-Availability, or Unreasonable Cost);
- Recipient name and Unique Entity Identifier (UEI);
  - Award information (Federal Award Identification Number, Assistance Listing number);
  - A brief description of the project, its location, and the specific infrastructure involved;
  - Total estimated project cost, with estimated federal share and recipient cost share breakdowns;
  - Total estimated infrastructure costs, with estimated federal share and recipient cost share breakdowns;
  - List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the recipient seeks to waive from the Buy America Preference, including name, cost, quantity(ies), country(ies) of origin, and relevant Product Service Codes (PSC) and North American Industry Classification System (NAICS) codes for each;
  - A detailed justification as to how the non-domestic item(s) is/are essential the project;
  - A certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers;
  - A justification statement—based on one of the applicable justifications outlined above—as to why the listed items cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach, cost analysis, cost-benefit analysis) by the recipient to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy America-compliant bids received for domestic products in response to a solicitation; and
  - Anticipated impact to the project if no waiver is issued

# Roles within LCPtracker

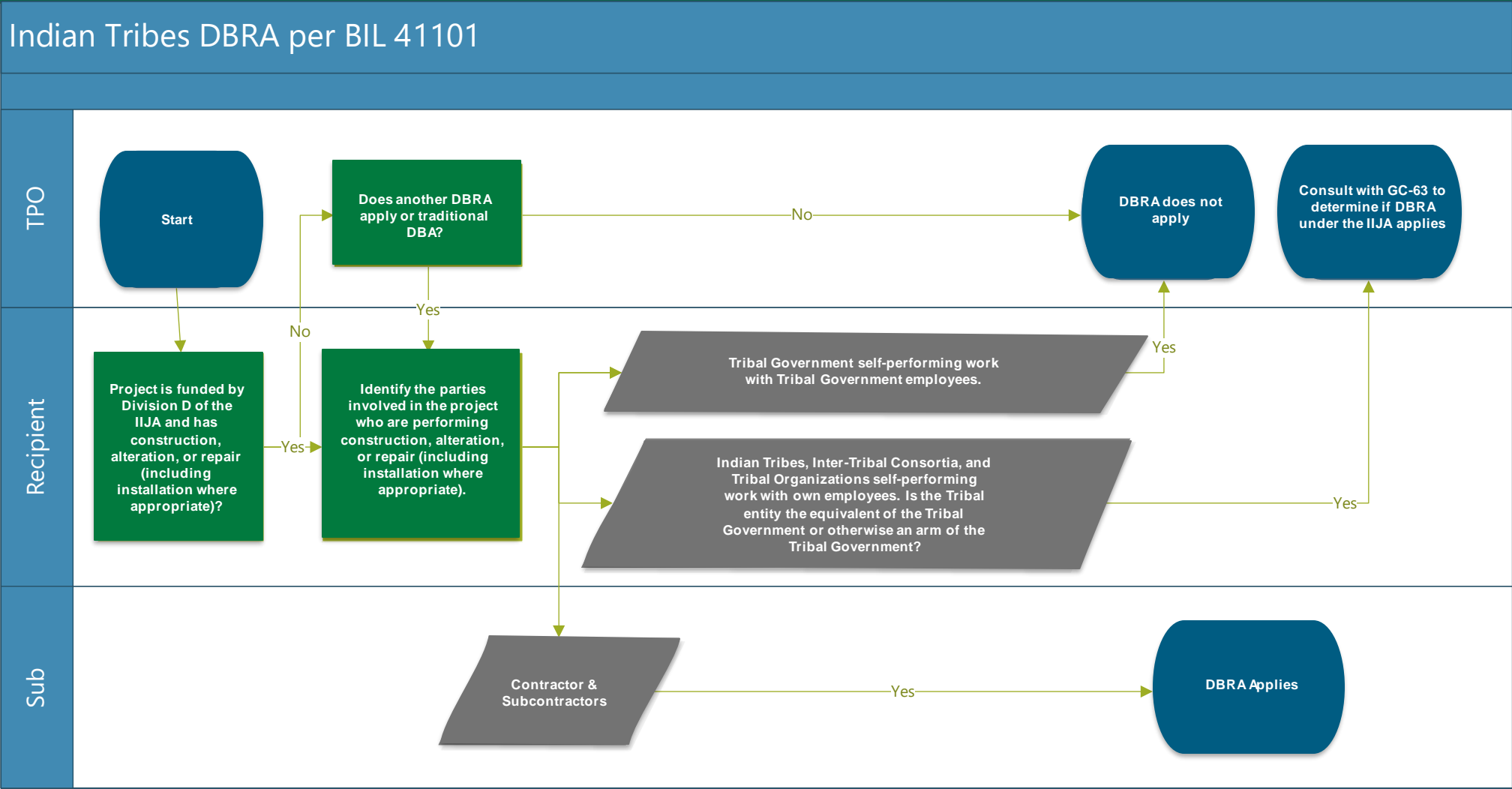
- **Accessing LCPtracker**
  - Prime Recipient: Set up by DOE
  - Lead Subrecipient/Contractor: Set up by the Prime Recipient
  - First Tier Contractor/Subcontractor: Set up by the Prime Recipient or Lead Subrecipient/Contractor
  - Lower Tier Subcontractor: Set up by the Lead Contractor/Subrecipient
- **Implementing LCPtracker**
  - Roles in LCPtracker determine abilities and restrictions
  - The Prime Recipient has Administrator role in LCPtracker and sets up subrecipients/subcontractors who in turn can assign other contractors.
  - On demand and live training

# Set-up within LCPTracker

- **Set-up a new project in LCPtracker = DOE DBA Compliance Support Team**
- **Add new users to LCPtracker**
  - TPO/GO/CO provides their Names
  - Recipient provides their Names
  - DOE DBA Compliance Support Team virtually meets with individuals and grants access to project
- **Wage Determination(s) attached to projects**
  - DOE or Recipient identifies wage determination
  - DOE DBA Compliance Support Team provides to LCPtracker
  - LCPtracker uploads



# Flow Chart



Section 41101 of the IIJA: All laborers and mechanics employed by contractors or subcontractors in the performance of construction, alteration, or repair work on a project assisted in whole or in part by funding made available under this division or an amendment made by this division shall be paid wages at rates not less than those prevailing on similar projects in the locality, as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code (commonly referred to as the “Davis-Bacon Act”).