

DEPARTMENT OF ENERGY

General Applicability Public Interest Tribal Consultation Waiver applicable to Indian Tribes under Build America, Buy America Provisions as Applied to Recipients of Department of Energy Federal Financial Assistance.

AGENCY: Office of the Secretary, U.S. Department of Energy.

ACTION: Notice.

DATES: Comments on the proposed waiver were due on or before July 12, 2023. The waiver is effective starting [DOE INSERT EFFECTIVE DATE] for a period of 12 months ending [DOE INSERT DATE WAIVER EXPIRES]. The waiver will be periodically reviewed for continued need, and will be terminated—with appropriate public notice—if it is determined it is no longer required.

I. Summary

Waiver: The Department of Energy is proposing a one-year general applicability public interest Tribal consultation waiver of the requirements of section 70914 of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) (Buy America Preference) for federal financial assistance agreements in accordance with 2 CFR Part 200 awarded to Indian Tribes (Tribes), having determined such waiver to be in the public interest. This waiver is critical for Department of Energy to be in keeping with the Federal Government's commitment to follow consultation policies established through Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, before applying Buy America Preference to programs that affect tribal communities.

Applicability: This waiver action permits the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may otherwise be prohibited under section 70914(a) of BABA during the specified period of time for Department of Energy federal

financial assistance agreements in which the recipient is a Federally recognized Indian Tribe, Tribal organization (including a tribal energy development organization as defined in 25 USC 3501(12)), or Tribal entity.

II. Background

The Buy America Preference set forth in section 70914 of BABA requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under federal financial assistance awards be produced in the United States.

Under section 70914(b), and in accordance with the Office of Management and Budget's (OMB) April 18, 2022 initial implementation guidance memorandum on the subject (M-22-11), the Department of Energy may waive the application of the Buy America Preference, in any case in which it finds that: applying the domestic content procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than 15 calendar days for public comment on the proposed waiver; and submit the proposed waiver to the Office of Management and Budget Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

OMB's M-22-11 provides guidance to agencies to consult with Tribal Nations before applying a Buy America Preference to a covered program that will affect Tribal communities. On September 21, 2022, nine agencies (U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Housing and Urban Development, U.S. Environmental Protection Agency, U.S. Department of Homeland Security, U.S. Department of Energy, U.S. Department of Transportation, U.S. Department of Commerce, and U.S. Small Business Administration) participated in a consultation hosted by the White House Council on Native American Affairs (WHCNA) to consult with Tribal Nations on discretionary Buy America Preference provisions and the waiver categories characterized in the OMB memorandum. Based

on the consultations held, Tribes were requested to provide written comments and feedback by October 20, 2022 for Federal agency consideration. The resulting comments were received by the White House Council and distributed to agencies on October 25, 2022.

The comments received from the Tribal leaders in response to these consultations expressed concerns related to implementation and potential project delays. Tribal leaders also expressed a desire to work with the Department of Energy to ensure that their projects are achieved in a sustainable manner, and Federal trust and treaty responsibilities are fulfilled. Participating Tribal leaders broadly requested that Federal agencies provide for maximum flexibility in allowing waivers of tribal participation in covered federal programs. Based on the feedback received, it was determined that a waiver for Tribes is in the best interest of the Department of Energy and public to allow ample opportunity for ongoing consultations while also building the capacity of Tribes to work towards eliminating the need for a waiver. In this way, the waiver will serve as a tool to promote investment in our domestic manufacturing base while also promoting the well-being, equity, and justice for Tribes.

III. Waiver Justification

With the enactment of the Buy America Preference, federal financial assistance agreements with Tribes must now comply with the requirements of BABA that were not previously required. On January 26, 2021, the Biden administration released a “Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships” affirming the Administration's commitment to Executive Order (E.O.) 13175. Section 6 of E.O. 13175 requires each Federal agency to consider any application for a waiver by a Tribe with a “general view toward increasing opportunities for utilizing flexible approaches at the Indian tribal level” as “consistent with applicable Federal policy objectives” and “otherwise appropriate.” Underpinning this provision is the Federal trust responsibility, a fiduciary obligation to provide for the flexibility, as appropriate, to support program access, recognize Tribal Nations as sovereign entities, and facilitate tribal economic development interests.

Based on feedback provided from Tribes during initial consultations, the Department of Energy proposes that a waiver is critical to provide a process and resources that ensure these new

requirements do not adversely impact the ability for Tribal Nations to establish procurement policies for Tribal sovereign interests. Tribal Nations often reside in rural, remote areas across the United States, which typically results in increased project expenses due to transportation and sourcing barriers. In addition, Tribes often do not generally maintain a tax-base necessary to offset additional expenditures, including increases in anticipated project costs. While the Buy America Preference seeks to provide for targeted economic benefit for domestic made construction materials, Tribes may require additional resources from Federal agencies through increased project awards to cover infrastructure construction expenses. The provision of a Tribal consultation waiver would allow the Department of Energy to conduct consultations while also building the capacity of Tribes through technical assistance to work towards eliminating the need for a waiver. The waiver also provides for greater equity in infrastructure project development through the fulfillment of the Federal Government trust responsibility while mitigating measures that may otherwise impede infrastructure development throughout rural communities.

Input from Tribal leaders also expressed the importance of a waiver to prevent increased costs to projects and project delays. The Department of Energy notes that a waiver could be provided for projects that have already been scoped and budgeted without also covering new projects. However, in some cases, immediate implementation of BABA for Tribal entities could result in ongoing and planned projects being subject to cost increases associated with re-scoping projects, finding new sources of supply, and associated administrative costs. A waiver would help to ensure these current planned projects are not subject to cost increases while working toward identifying domestic sources of supply for future projects.

A waiver would allow for a more gradual modification of processes internally as additional funding is provided. Finally, a waiver would allow time for Native American businesses and partners build capacity and resources to source domestic materials. This will help to alleviate the concern of alienating local contractors and the cascading impacts to Tribal economies.

To further support the administration's priorities to steward investments to build a better America and promote domestic manufacturing and jobs, the Department of Energy also recognizes the public interest in job creation, domestic supply chain resilience and the national and economic security interests inherent in robust manufacturing of key products and materials needed to build our infrastructure and clean energy future. If the Department of Energy

determines a waiver is appropriate, it will aim to collect information from projects covered by this waiver to help evaluate the domestic market availability of commonly used infrastructure products. Through this work, the Department of Energy will support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of infrastructure projects on Tribal lands. The Department of Energy intends to support the creation of resilient supply chains and manufacturing base for critical products here in the United States that will bring about investment in good-paying American manufacturing jobs and businesses, including jobs and businesses on Tribal lands. The creation of jobs in Tribal communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used in infrastructure but not yet made domestically.

For the reasons expressed above, a determination has been made that it would be contrary to the public's interest to apply the Buy America Preference to Tribes until sufficient time has been allotted to allow for ongoing tribal consultations and the building of tribal capacity to meet domestic procurement requirements. In the interim, the Department of Energy, in collaboration with other Federal agencies, remains committed to obtaining input from Tribes and intends to continue dialogue with interest groups and stakeholders to continue working toward consistent, long-term compliance with the Buy America Preference requirements while also continuing to honor trust responsibilities to Tribes. The duration of the waiver is one year from the effective date of the waiver. As consultations and collaboration efforts continue to develop, the need for ongoing waivers will be reevaluated.

IV. Impact Absent the Waiver

The Department of Energy primarily supports infrastructure related tribal mission goals through its Office of Indian Energy and its Loan Program Office. The Indian Tribal Energy Development and Self Determination Act of 2005, under the Energy Policy Act of 2005, authorizes the Department of Energy's Office of Indian Energy (Indian Energy) to fund and carry out a variety of programs and projects that promote tribal energy development, efficiency, and use; reduce or stabilize energy costs; enhance and strengthen tribal energy and economic infrastructure; and electrify Indian lands and homes. Indian Energy works within the Department of Energy, across

government agencies, and with Indian tribes and organizations to promote Indian energy policies and initiatives. Indian Energy performs these functions in support of the federal government's trust responsibility, tribal self-determination policy, and government-to-government relationships with Indian tribes. Between 2010 and 2022, the Department of Energy Office of Indian Energy invested over \$120 million in more than 210 tribal energy projects, valued at nearly \$215 million, implemented across the contiguous 48 states and Alaska. The Department of Energy's Loan Program Office administers the Tribal Energy Financing Program, which is authorized to provide loan guarantees and direct loans to Tribes and tribal energy development organizations for energy projects. The Inflation Reduction Act increased the aggregate amount of loan authority under the Tribal Energy Financing Program from \$2 billion to \$20 billion and provided \$75 million to remain available through September 30, 2028, to carry out the program. The program has many applications moving forward in its queue, with proposed projects ranging from mini-grid development to green hydrogen production. Tribes may be eligible for financial assistance from other Department of Energy program offices such as the Office of Clean Energy Demonstration and Grid Deployment Office. Tribally owned entities also participate in various other Department of Energy programs to include research and development.

Since the enactment of BABA, the Department of Energy has worked diligently to begin implementing Buy America Preference for financial assistance agreements while simultaneously evaluating the impact of the Buy America Preference to Tribes. In July 2022, the Department of Energy issued a 180-day temporary adjustment period waiver (Adjustment Period Waiver) to allow the agency adequate time to adjust to the new Buy America Preference for various infrastructure projects while still maintaining current project deadlines and milestones. The Adjustment Period Waiver was effective for 180 days after its issuance and applied only to awards issued as a result of Funding Opportunity Announcements released before May 14, 2022. This 180-day adjustment period also allowed time to initiate the consultation process with Tribes before applying Buy America Preference to programs that affect Tribal communities. Additionally, the Department of Energy participated in the consultation hosted by the WHCNAA in September 2022.

Based on prior fiscal year data, entities identifying as Native American Tribes received about \$270 million through Department of Energy federal financial assistance agreements for a variety

of projects, many of which included infrastructure. During the waiver period, the Department of Energy will continue to participate in Tribal consultations and will work with Tribes to identify where narrower project or product specific waivers may be necessary to eliminate the need for a general applicability waiver going forward.

V. Assessment of Cost Advantage of a Foreign-Sourced Product

Under M-22-11, Federal agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. This assessment is not applicable to this waiver as this waiver is not based on the cost of foreign-sourced products.

VI. Duration of Waiver

The duration of the waiver is 12 months after the effective date of the final waiver. U.S. DEPARTMENT OF ENERGY will review this waiver in 6 months to assess whether it remains necessary to the fulfillment of U.S. DEPARTMENT OF ENERGY’s missions and goals and consistent with applicable legal authorities, such as the IJA, Executive Order 14005, and OMB Memorandum M-22-11. U.S. DEPARTMENT OF ENERGY may, based on the results of that review, terminate the waiver, or take action to develop a new targeted and time-limited waiver in consultation with the MIAO.

VII. Solicitation of Comments and Response

As required under section 70914 of the IJA, U.S. DEPARTMENT OF ENERGY solicited comments from the public on the proposed waiver. In particular, U.S. DEPARTMENT OF ENERGY welcomed comments on the length, purpose, and scope of the waiver to allow U.S. DEPARTMENT OF ENERGY to make an informed determination on those aspects of the Waiver, at a minimum. Comments on the proposed waiver were due on or before July 12, 2023. The U.S. DEPARTMENT OF ENERGY received two comments during the comment period, one of which was generally supportive of the waiver as written. The other opposed the waiver with multiple suggestions: in summary, U.S. DEPARTMENT OF ENERGY’s argument that

APPROVED: August 18, 2023
EXPIRES: August 18, 2024

additional time is needed for tribal consultation does not justify a public interest waiver.

Commentor states the Act was enacted on November 15, 2021, with a clear implementation date of no later than May 14, 2022 and notes 20 months' time for implementation. Commentor suggests a product specific unavailability waiver or unreasonable cost waiver can always be sought.

The U.S. DEPARTMENT OF ENERGY has carefully considered the comments received. No changes were made to the final waiver scope or duration as a result of the comments.