



Framing Paper:

Tribal Consultation on Build America, Buy America Act

Thursday, December 8, 2022, 2:30 – 4:00 p.m. ET

Overarching Consultation Questions

- *What courses of action can the Federal Emergency Management Agency (FEMA) take to ensure Build America, Buy America Act (BABAA) requirements are implemented fairly, equitably, and efficiently with Tribal Nations?*
- *How will the BABAA implementation affect Tribal Nations and Tribal businesses with infrastructure projects?*
- *What additional barriers and challenges could Tribal Nations encounter when applying the BABAA requirements and the waiver process?*
- *How can FEMA improve its interim policy on BABAA and what other recommendations do Tribes propose FEMA consider as it finalizes its BABAA policy, procedures, and guidance?*

Background

The Infrastructure Investment and Jobs Act (IIJA), signed into law in November 2021 and commonly known as the Bipartisan Infrastructure Law, includes the [Build America, Buy America Act \(BABAA\)](#), which applies a new purchasing preference for American-made products that could significantly impact infrastructure projects.

In accordance with BABAA and the [Office of Management and Budget \(OMB\) Memorandum M-22-11](#), by May 14, 2022, covered federal agencies, including FEMA, must ensure that no federal financial assistance for “infrastructure” projects is provided “unless all of the iron, steel, manufactured products and construction materials used in the project are produced in the United States.”

While BABAA requirements went into effect on May 14, 2022, FEMA determined that it was in the public interest to issue a [general applicability waiver of the BABAA requirements](#) to allow for an adjustment period in order for FEMA, its recipients, subrecipients, industry partners, and other stakeholders to develop and transition to the new compliance and certification process for iron, steel, manufactured products, and construction materials. This waiver is effective from July 1, 2022, through Jan. 1, 2023. The domestic preference requirements will not apply to awards or funding obligated during this six-month waiver period and will only apply to awards or funding obligated on or after Jan. 2, 2023.

On Sept. 21, 2022, FEMA was a consulting agency that participated in the Interagency Tribal Consultations on BABAA hosted by the White House Council on Native American Affairs (WHCNA). FEMA’s December consultation is a follow up to that Interagency discussion, on Sept. 1 focusing on the impact of BABAA to FEMA financial assistance programs.

In November 2022, FEMA issued interim guidance, [FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure](#), to implement the BABAA requirements, but seeks recommendations and feedback from Tribal Nations to consider before issuing final policy, guidance, and procedures.

FEMA remains committed to its responsibility under [Executive Order 13175](#): Consultation and Coordination with Indian Tribal Nations, reaffirmed by President Biden's [January 26, 2021, Memorandum](#) on Tribal Consultation and Strengthening Nation-to-Nation Relationships, and reflected in [FEMA's Tribal Consultation Policy](#), to engage in meaningful consultation and collaboration with Tribal officials. The [2022-2026 FEMA Strategic Plan, specifically Objective 1.2: Remove Barriers to FEMA Programs through a People First Approach](#), includes a commitment to transform our service to Tribal Nations to acknowledge Tribal sovereignty and respond to the needs of each Tribal nation. In addition, [FEMA's Tribal Policy](#) outlines a framework for Nation-to-Nation relations between FEMA and Tribal Nations that recognizes Tribal sovereignty, self-governance, and FEMA's responsibilities, consistent with applicable authorities.

The purpose of the December 8, 2022, Tribal consultation is to ensure BABAA requirements are implemented effectively in Tribal Nations. The virtual consultation will be hosted on the Zoom for Government platform. Please register [here](#) to attend.

Requirements

The domestic preferences under BABAA require that:

- 1. All iron and steel used in the project are produced in the United States.**
 - a. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- 2. All manufactured products used in the project are produced in the United States.**
 - a. This means the manufactured product was [manufactured in the United States](#), and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55% of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of [domestic content](#) of the manufactured product has been established under applicable law or regulation.
- 3. All construction materials are manufactured in the United States.**
 - a. This means that all manufacturing processes for the [construction material](#) occurred in the United States.

FEMA, pursuant to, [FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure](#), requires that recipients and subrecipients subject to BABAA ensure their contracts, including purchase orders, include a required contract clause and self-certification of compliance with the BABAA requirements.

Applicability

These domestic preference requirements under BABAA apply to:

- The FEMA financial assistance programs subject to BABAA as listed in [Appendix A FEMA Financial Assistance Programs Subject to Domestic Preference](#) and also available on the FEMA BABAA website: [Programs and Definitions: Build America, Buy America Act | FEMA.gov](#);
- *Types of Program Recipients*: non-federal entities, including Tribal Nations;
- *Types of Infrastructure Projects*: projects including but not limited to structures, facilities, and equipment in the United States for 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, utilities; broadband infrastructure;

buildings; real property, and structures, facilities, and equipment that generate, transport, and distribute energy – including electric vehicle (EV) charging; and

- *Types of Products and Construction Materials:* For purposes of BABAA, “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;
 - paint; and
 - drywall.

The domestic preference requirements under BABAA do **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](#). The FEMA financial assistance programs **not** subject to BABAA are listed in [Appendix B FEMA Financial Assistance Programs Not Subject to Domestic Preference](#) and also available on the FEMA BABAA website: [Programs and Definitions: Build America, Buy America Act | FEMA.gov](#);
- *Non-infrastructure Projects:* programs or projects that do not include the development or expansion of aforementioned infrastructure projects;
- *Tools, equipment, and supplies:* products, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project; and
- *Equipment and furnishing:* products, such as movable chairs, desks, and portable computer equipment, that are used or within the finished infrastructure project but are not part of or permanently affixed to the structure.

Issuing “Buy America” Waivers

Per section [70914\(b\) of BABAA](#), FEMA may waive the application of a “Buy America” preference under an infrastructure program in any case in which FEMA finds that:

1. Applying the domestic content procurement preference would be inconsistent with the public interest (public interest waiver);
2. 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 (nonavailability waiver); or
3. 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 (unreasonable cost waiver).

For additional information on waivers, including waiver criteria, waiver types, and FEMA’s interim waiver

process, please see [FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure](#).

Tribal Feedback and Topics for Consultation

FEMA seeks Tribal input to ensure that BABAA is implemented effectively in Tribal Nations. The following topics are designed to help guide feedback and conversation of the consultation; this is not an exhaustive list.

- BABAA requirements and grant program applicability
- FEMA’s implementation of BABAA, including *FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure*
- Tribal businesses manufacturing/selling of iron, steel, manufactured products, and/or construction materials that could be used in infrastructure projects
- BABAA’s effect on Tribal infrastructure projects
- BABAA’s three (3) different types of waivers in addition to general applicability waivers:
 - Public interest waivers
 - Nonavailability waiver
 - Unreasonable cost waiver
- Tribal sourcing capabilities and technical expertise with infrastructure project components

Discussion Questions

This consultation seeks to better inform FEMA on the impact of the BABAA requirements on Tribal Nations. Below are questions for your consideration, not in order of priority and not exclusive. FEMA welcomes broader input on our activities in support of Tribal Nations.

1. **General Areas of Discussion on BABAA:**
 - a. How will implementation of BABAA affect Tribal infrastructure projects?
 - b. What barriers do Tribes anticipate they might face when implementing these BABAA requirements?
 - c. How can FEMA assist Tribes in implementing the BABAA requirements?
 - d. 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?
 - e. Does your Nation currently source any or all infrastructure project components (i.e., iron steel, manufactured products, and/or construction materials) domestically?
 - f. What financial assistance tools are you or your technical staff familiar with regarding BABAA?
 - g. Do you believe you will encounter challenges in determining what iron/steel, manufactured and/or construction materials are BABAA-compliant?
 - h. If you anticipate challenges, do you have suggestions for how FEMA could help you overcome those challenges?

2. **Public Interest Waivers**

- a. **De minimis threshold.** Construction costs in Indian Country are often higher than in non-Tribal areas.
 - If FEMA establishes a de minimis waiver, at what percent or maximum dollar amount of project costs should FEMA waive these requirements?
 - What should FEMA consider when developing a de minimis threshold for on or off Tribal lands?
- b. **Small grants.** Agencies may waive purchase preference requirements for small grants below the simplified acquisition threshold, in perpetuity or to be phased out over time.
 - Should FEMA consider utilizing the simplified acquisition threshold, currently set at \$250,000, as the basis for public interest waivers?
- c. **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 Tribal Nations and communities?
 - How often do Tribal projects include minor components?
- d. **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 BABAA? Is in-person or virtual training preferred?
- e. **Other considerations.** FEMA may consider waivers based on other considerations such as whether the project is managed by a low-resource community, resource availability, domestic job impacts, etc.
 - What other considerations should FEMA 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**

- a. **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?
 - What types of justification should FEMA recognize as acceptable when considering the development or administration of these

waivers?

- What markets do Tribal Nations currently scope when purchasing steel, iron, and related goods for infrastructure projects?

4. **Unreasonable Cost Waivers**

- a. **Cost Comparison.** Before granting this waiver, FEMA 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**

- a. **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 FEMA consider adopting?
 - What are well-established sourcing challenges that your Tribal nation or community at large faces?

6. **Other Considerations**

- a. Based on the aforementioned information and the FEMA Interim BABAA policy, what other recommendations do Tribes propose FEMA consider as it finalizes its BABAA policy, procedures, and guidance?

All consultation materials may be found at: www.fema.gov/about/Tribes/consultations. The consultation record will remain open for 30 days after the virtual session for Tribal leaders to submit feedback or comments to gpd-comms@fema.dhs.gov. Final feedback and comments are due by Monday, January 9, 2023.

APPENDIX A

FEMA Financial Assistance Programs Subject to Domestic Preference

FEMA Grant Program	Assistance Listing Number
Assistance to Firefighters Grant Program (AFG)	97.044
Building Resilient Infrastructure and Communities (BRIC)	97.047
Chemical Stockpile Emergency Preparedness Program (CSEPP)	97.040
Emergency Food and Shelter Program (EFSP – Regular & Humanitarian)	97.024
Emergency Management Performance Grant Program (EMPG)	97.042
Emergency Operations Center Grant Program (EOCGP)	97.052
Fire Prevention & Safety (FP&S)	97.044
Flood Mitigation Assistance (FMA) (including Swift Current)	97.029
Homeland Security Grant Program (HSGP)	97.067
Intercity Bus Security Grant Program (IBSGP)	97.057
Intercity Passenger Rail (IPR)	97.075
Next Generation Warning System (NGWS)	TBD
Nonprofit Security Grant Program (NSGP)	97.008
Port Security Grant Program (PSGP)	97.056
Pre-Disaster Mitigation (PDM)	97.047
Rehabilitation of High Hazard Potential Dams (HHPD)	97.041
Safeguarding Tomorrow Through Ongoing Risk Mitigation Revolving Loan Fund (Safeguarding Tomorrow RLF)	97.139
Staffing for Adequate Fire and Emergency Response (SAFER)	97.083
State and Local Cybersecurity Grant Program (SLCGP)	97.137
Transit Security Grant Program (TSGP)	97.075

Tribal Cybersecurity Grant Program (TCGP)	97.137
Tribal Homeland Security Grant Program (THSGP)	97.067
Urban Search & Rescue (US&R)	97.025

APPENDIX B

FEMA Financial Assistance Programs Not Subject to Domestic Preference

FEMA Grant Program	Assistance Listing Number
Alternatives to Detention (ATD) Case Management Pilot Program (CMPP)	97.102
Community Assistance Program – State Support Services Element (CAP-SSSE)	97.023
Community Disaster Loans (CDL)	97.030
Continuing Training Grant (CTG)	97.005
Continuing Training Grant – Mississippi Grant University (CTG-MSU)	97.005
Continuing Training Grant – National Cybersecurity Preparedness Consortium (CTG-NCPC)	97.005
Cooperating Technical Partners Grant Program (CTP)	97.045
Crisis Counseling Program (CCP)	97.032
Disaster Case Management (DCM)	97.088
Disaster Unemployment Assistance (DUA)	97.034
Emergency Management Baseline Assessment Grant (EMBAG)	97.131
Fire Management Assistance Grant Program (FMAG)	97.046
Hazard Mitigation Grant Program (HMGP) and HMGP Post Fire Assistance	97.039
Homeland Security Preparedness Technical Assistance Program (HSPTAP)	97.007
Individuals and Households Program – Housing (IHP – HA)	97.048
Individuals and Households Program – Other Needs Assistance (IHP – ONA)	97.050
National Dam Safety Program (NDSP)	97.041
National Domestic Preparedness Consortium (NDPC)	97.005

National Earthquake Hazards Reduction Program – Individual State Earthquake Assistance (NEHRP-ISEA)	97.082
National Earthquake Hazards Reduction Program – Multi-State and National Earthquake Assistance (NEHRP-MSNEA)	97.082
National Incident Management System (NIMS)	97.107
Presidential Residence Protection Assistance Program (PRPA)	97.134
Public Assistance Grant Program (PA)	97.036
Regional Catastrophic Preparedness Grant Program (RCPGP)	97.111
State Fire Training Systems Grant Program (SFTS)	97.043
Targeted Violence and Terrorism Prevention (TVTP)	97.132