



FEMA

February 6, 2023

Re: General Applicability of Build America, Buy America Provisions as Applied to Tribal Recipients and Subrecipients of FEMA Federal Financial Assistance Programs for Infrastructure

AGENCY: Grant Programs Directorate, Federal Emergency Management Agency (FEMA)

ACTION: Notice

SUMMARY: In accordance with the Build America, Buy America Act (BABAA), this notice advises that FEMA grants a general applicability waiver for six months to the Buy America Domestic Content Procurement Preference (“Buy America preference”) as applied to Tribal recipients and subrecipients (Tribes). In accordance with BABAA, FEMA has found that this general applicability waiver is in the public interest as it provides FEMA with the opportunity to first engage in consultation, as described in *FEMA Policy #101-002-02, FEMA Tribal Consultation Policy*, regarding the potential application of the BABAA requirements.

DATES: This waiver is effective upon approval date, which is **February 6, 2023**, and will remain in effect for all awards or funding obligated to Tribal recipients and subrecipients of FEMA federal financial assistance infrastructure projects for six months from the date of final approval, which is **August 6, 2023**.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (BABAA) was enacted on Nov. 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58. BABAA establishes a domestic content procurement preference, the Buy America preference, for federal infrastructure programs. Section 70914(a) of BABAA establishes that no later than 180 days

after the date of enactment, FEMA must ensure that none of the funds made available for infrastructure projects may be obligated by FEMA unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, BABAA further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

II. FEMA’s Progress in Implementation of BABAA

Since the enactment of BABAA, FEMA has worked diligently to implement the Buy America preference. FEMA coordinated with the Department of Homeland Security to produce a report that identifies and evaluates all of FEMA’s federal financial assistance programs with potentially eligible uses of funds that include infrastructure as defined by BABAA. Pursuant to OMB Memorandum M-22-11, ([Initial Implementation Guidance on Application of Buy America Preference in Federal financial assistance Programs for Infrastructure](#)), FEMA has developed a website where stakeholders can learn about the requirements of BABAA and it is also where FEMA will list proposed waivers for public comment. FEMA has issued a Grant Alert notifying internal and stakeholders of the requirements of BABAA. The alert provides a link to where they can access the list of [FEMA financial assistance programs for infrastructure subject and not subject to the requirements of BABAA](#) (also included as *Table A: FEMA Federal financial assistance Programs Subject to BABAA Buy America Preference*). FEMA has also established an intra-agency working group to coordinate developing official FEMA Policy and processes to fully implement the

requirements of BABAA.

III. Waivers

Under section 70914(b), FEMA has authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest; (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality; or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25%. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. Information on this waiver may be found at the webpage at this link: <https://www.fema.gov/grants/policy-guidance/buy-america>.

IV. Public Interest in a General Applicability Waiver of Buy America Provisions for Tribal Recipients and Subrecipients

FEMA received comments on the proposed general applicability waiver of the BABAA requirements to FEMA's Federal financial assistance awards to provide the Agency with sufficient time to comply with FEMA's Tribal consultation process. FEMA's Tribal Consultation Policy outlines internal procedures and principles that FEMA must follow when communicating and coordinating on FEMA programs and activities that affect Tribes. FEMA's Tribal consultation policy recognizes the right of Tribes to self-governance and facilitates Tribal participation and input in FEMA's implementation of programs and Federal financial assistance directed to Tribal communities.

In Fiscal Year 2021, Tribes received approximately \$16,656,907 in funding either as direct recipients or subrecipients of FEMA financial assistance programs that are now subject to the Buy America preference under BABAA. Based on reported Fiscal 2019 figures, that number may increase to approximately \$30 million. Because of the significance and potentially wide scope of the new BABAA requirements on Tribal governments, FEMA has determined that it would be contrary to the public interest to apply the BABAA requirements before the completion of the Tribal consultation process.

FEMA believes the Tribal consultation process is key to the successful implementation of the BABAA requirements across its covered federal financial assistance programs funding infrastructure projects. A full and meaningful Tribal consultation process will allow FEMA to determine the potential impact of the Buy America preference requirements on Tribal governments and communities and will inform a tailored implementation for Tribal recipients that recognizes the sovereignty and unique status of Tribal governments.

During the waiver period, FEMA will continue to engage and coordinate Tribal Consultations with OMB's Senior Policy Advisor for Native Affairs at the Domestic Policy Council to include FEMA in cross agency Tribal consultations.

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

Under OMB Memorandum M-22-11, 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. FEMA has concluded that this assessment is not applicable to this waiver, as this waiver is not based in

the cost of foreign-sourced products. FEMA will perform additional market research during the duration of the waiver and consult with International Trade Administration to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

VI. Limited Duration of Waiver

FEMA is committed to the successful implementation of the important Buy America preference across its programs providing covered federal financial assistance for infrastructure projects and will move swiftly towards completion of the processes outlined in this notice. This waiver is effective as of approval date, **February 6, 2023**, and will remain in effect for all Tribal recipients and subrecipients of federal financial assistance for infrastructure projects for six months, until **August 6, 2023**. The Buy America preference requirements will not attach to awards or funding obligated for tribal recipients and subrecipients during the six-month waiver, and the Buy America preference requirements will only attach to any awards or funding obligated after the waiver expires.


VII. Public Comments

As required under Section 70914 of BABAA, FEMA solicited comments from the public on the waiver. In particular, FEMA invited interested parties to comment on the length, purpose and scope of the waiver to allow FEMA to make an informed final determination on this waiver. A total of three comments were received in response to the proposed waiver, with one comment not being relevant to the waiver itself. FEMA thoroughly reviewed and considered each of the comments in determining to move forward with the issuance of this waiver as published in this Final Notice.

One commenter opposed the six-month adjustment period waiver for Tribal recipients, noting that BABAA requirements have been enacted since November 2021 with an intended implementation timeline of May 2022. The commenter notes that FEMA recipients already had a six-month grace period and noted that affording more time undermines BABAA requirements already set forth. FEMA appreciates the perspectives the commenter provided and believes that implementing a General Applicability Waiver for Tribal recipients alleviates inequitable burden BABAA requirements may have on this subset of recipients. Additionally, granting this waiver provides FEMA adequate time to consult with tribal recipients regarding BABAA requirements, as required by FEMA’s Tribal Consultation Policy.

Additionally, one commenter expressed opposition to BABAA due to projected cost burdens associated with domestic materials. The commenter noted that waivers helped alleviate the burden, however their continued efforts to progress cost-beneficial projects may result in challenges in project delivery due to BABAA requirements. FEMA appreciates the input the commenter provided and will continue to evaluate how BABAA requirements may place financial burdens and challenges for its partners, however, at this time, FEMA and other required federal agencies must adhere to requirements set forth by BABAA. At this time, after reviewing the submitted comments, FEMA is issuing this General Applicability Waiver for Tribal Subrecipients with no substantive changes described herein and with other minor, inconsequential grammatical revisions.

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Pamela S. Williams
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FEMA

Attachment: *Table A: FEMA Federal Financial Assistance Programs Subject to BABAA Buy America Preference*

Table A: FEMA Federal Financial Assistance Programs Subject to BABAA Buy America Preference

#	FEMA Grant Program Office	Assistance Listing Number	FEMA Grant Program
1.	GPD	97.044	Assistance to Firefighters Grant Program (AFG)
2.	FIMA	97.047	Building Resilient Infrastructure and Communities (BRIC)
3.	NPD	97.040	Chemical Stockpile Emergency Preparedness Program (CSEPP)
4.	ORR	97.024	Emergency Food and Shelter Program (EFSP – Regular & Humanitarian)
5.	GPD	97.042	Emergency Management Performance Grant Program (EMPG)
6.	GPD	97.052	Emergency Operations Center Grant Program (EOCGP)
7.	GPD	97.044	Fire Prevention & Safety (FP&S)
8.	FIMA	97.029	Flood Mitigation Assistance (FMA) (including Swift Current)
9.	GPD	97.067	Homeland Security Grant Program (HSGP)
10.	GPD	97.057	Intercity Bus Security Grant Program (IBSGP)
11.	GPD	97.075	Intercity Passenger Rail (IPR)
12.	NCP	TBD	Next Generation Warning System (NGWS)
13.	GPD	97.008	Nonprofit Security Grant Program (NSGP)
14.	GPD	97.056	Port Security Grant Program (PSGP)
15.	FIMA	97.047	Pre-Disaster Mitigation (PDM)
16.	FIMA	97.041	Rehabilitation of High Hazard Potential Dams (HHPD)
17.	FIMA	97.139	Safeguarding Tomorrow Through Ongoing Risk Mitigation Revolving Loan Fund (Safeguarding Tomorrow RLF)
18.	GPD	97.083	Staffing for Adequate Fire and Emergency Response (SAFER)
19.	GPD	97.137	State and Local Cybersecurity Grant Program (SLCGP)
20.	GPD	97.075	Transit Security Grant Program (TSGP)
21.	GPD	97.137	Tribal Cybersecurity Grant Program (TCGP)
22.	GPD	97.067	Tribal Homeland Security Grant Program (THSGP)
23.	ORR	97.025	Urban Search & Rescue (US&R)

Legend for FEMA Grant Program Offices:

- FIMA- Federal Insurance and Mitigation Administration
- GPD- Grant Programs Directorate
- NCP- National Continuity Programs
- NPD- National Preparedness Directorate
- ORR- Office of Response and Recovery