

## U.S. Department of the Treasury

### General Applicability Waiver of Build America, Buy America Provisions for Tribal Government Recipients of the Local Assistance and Tribal Consistency Fund

**ACTION:** Notice of Final Waiver

**SUMMARY:** In accordance with the Build America, Buy America Act, this notice advises that the Department of the Treasury (Treasury) is issuing a general applicability waiver from the Buy America Domestic Content Procurement Preference (BAP) as applied to federal financial assistance provided to Tribal government recipients of the Local Assistance and Tribal Consistency Fund (LATCF), established by section 605 of the Social Security Act as added by section 9901 of the American Rescue Plan Act. This waiver will cover all iron and steel, manufactured products, and construction materials used in infrastructure projects required by the Build America, Buy America Act. This one-year Tribal consultations waiver will apply to all award agreements entered into with Tribal governments during the one-year period beginning on the effective date of the waiver. In addition, in the case of award agreements entered into with Tribal governments prior to the date of the final waiver, the Tribal consultation waiver will apply to all expenditures incurred after the date of the final waiver on an infrastructure project.<sup>1</sup> In accordance with the Build America, Buy America Act and for the reasons discussed below, Treasury believes that the Tribal consultation waiver is in the public interest.

**DATES:** Comments on the proposed waiver were due on or before December 17, 2022. The waiver is effective beginning January 17, 2023. The BAP will not apply to award agreements entered into by recipients during the one-year period following the effective date of the waiver or to expenditures incurred after the effective date of the final waiver by recipients that have entered into award agreements prior to the effective date of the final waiver.

**SUMMARY AND RESPONSE TO COMMENTS:** Treasury received one comment from the public, from a private steel manufacturing company located in North Carolina. The commenter is opposed to Treasury issuing a Tribal consultation waiver from the BAP requirements for iron, steel, manufactured products, and construction materials for infrastructure projects funded by awards made to Tribal government recipients of the LATCF. The commenter opposes the proposed waiver with

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<sup>1</sup> This waiver only applies if there is no other federal financial assistance used for such project that is subject to the Buy America Preference.

respect to steel and asserts that Treasury had ample time to implement BAP. The commenter also claims Treasury had sufficient enough time to conduct Tribal consultation on the issue due to the date of BAP's enactment, and expresses that a general applicability waiver would undermine the purpose of BAP and states that project specific waivers should instead be considered. Tribal governments have typically not submitted public comments on proposed Treasury guidance or regulations and instead preferred to engage with Treasury through Tribal consultation. Treasury has received constant communication from Tribes since opening LATCF requesting more formal Tribal consultation prior to the application of BAP to inform Treasury's implementation with regard to over 574 Tribal nations with diverse and unique geographies, markets, and internal capacity. This limited waiver is to satisfy Treasury consultation obligations and comply with Treasury's Tribal Consultation Policy which was adopted in compliance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments,". See <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/local-assistance-and-tribal-consistency-fund/buy-america-preference> for a more detailed summary of specific items that were identified in the comments submitted by the public and Treasury's response.

**FOR FURTHER INFORMATION CONTACT:**

Please submit any questions or comments to LATCF@treasury.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Build America, Buy America**

The Build America, Buy America Act was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58. The Build America, Buy America Act establishes a domestic content procurement preference, the BAP, for federal infrastructure programs. Under the Build America, Buy America Act and guidance issued by the Office of Management and Budget (OMB), the iron, steel, manufactured products, and construction materials used in an infrastructure project under a LATCF award must be produced in the United States. Section 70912 of the Build America, Buy America Act 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. The Build America, Buy America Act's requirements do not apply to expenditures using LATCF funds for infrastructure projects undertaken in response to the COVID-19 public health emergency or in

response to or anticipation of other major disasters or emergencies declared by the President under the Stafford Act.<sup>2</sup>

## **II. Local Assistance and Tribal Consistency Fund**

The American Rescue Plan Act appropriated \$2 billion to Treasury to provide payments from the LATCF to the District of Columbia, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, eligible revenue sharing counties and Tribal governments for use on any governmental purpose except for a lobbying activity. Payments are to be spread across two tranches, for fiscal years 2022 and 2023. Eligible recipients must submit a request for funding to receive their payments, and recipients must submit periodic reports to Treasury on their expenditures, but payments are made in full in advance of use by recipients, and Treasury does not pre-approve projects.

The purpose of the LATCF program is to serve as a general revenue enhancement program. Many Tribal governments have historically experienced fluctuations in their revenues, and this program is designed, in part, to supplement existing federal programs that augment and stabilize revenues for these communities. Treasury's allocations to recipients are required to take into account the economic conditions of recipients. Recipients have broad discretion on uses of funds, similar to the ways in which they may use funds generated from their own local revenue sources. Recipients may use these funds on any governmental purpose other than a lobbying activity.

Although at this point the program is limited to two tranches of funding, it is considered to be a pilot program to supplement and stabilize revenues of governments that have significant economic need. Treasury anticipates that its collection of information through program reporting as to how recipients use funds from the LATCF will inform further discussion as to whether to extend the program. Treasury also expects that this reporting will inform how, if LATCF is extended, BABA could be implemented effectively for LATCF or similar programs.

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<sup>2</sup> More specifically, as provided in OMB's guidance, the requirements of the Buy America, Build America Act do not apply to expenditures made in anticipation of or in response to an event or events that qualify as an "emergency" or "major disaster" within the meaning of the Stafford Act, 42 U.S.C. § 5122(1), (2). *See* OMB Memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (April 18, 2022) at 3-4, available at <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

### **III. Treasury's Progress in Implementation of the Act**

Since the enactment of the Build America, Buy America Act, Treasury has worked diligently to prepare to implement the BAP. This work to date has primarily been led by Treasury's Office of Gulf Coast Restoration, which administers Treasury's awards under the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act ("RESTORE Act"). The RESTORE Act Direct Component program administered by the Office of Gulf Coast Restoration is the other program administered by Treasury to which the BAP applies. As such, the LATCF will leverage the work done by the Office of Gulf Coast Restoration to implement the requirements of BABA for the LATCF program.

To allow sufficient time to build resources and internal capacity that leverage these collaborative efforts, the Office of Gulf Coast Restoration has recently issued a six-month adjustment period waiver for all requirements of the Act. This will allow Treasury to apply the lessons learned from other agencies' implementation of domestic content procurement preference requirements for iron and steel products, as well as the results of the RFI, and further ramp up staff or contractual capacity in order to minimize delays for critically important ecosystem and economic restoration projects, including activities related to disaster preparedness, mitigating climate risk, building resilience, and promoting sustainable economic development and job creation. To promote coordination with Direct Component recipients, Treasury stood up a Treasury RESTORE Act Domestic Procurement Working Group to solicit suggestions from Direct Component eligible entities to develop the best approach for implementation of these new requirements, and to fill knowledge gaps and better understand and document the demand for domestically produced iron, steel, manufactured products, and construction materials. Treasury's Office of Recovery Programs (ORP), which implements the LATCF, will leverage the experience and information developed by the Office of Gulf Coast Restoration.

### **IV. Waivers**

Under Section 70914(b) of the Build America, Buy America Act, Treasury has authority to waive the application of a domestic content procurement preference for projects undertaken by individual recipients 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 percent. 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.

**V. Public Interest in a General Applicability (Non-Product Specific) Tribal Consultation Waiver of Buy America Provisions Under the Local Assistance and Tribal Consistency Fund**

Treasury is issuing a program-wide, general applicability (non-product specific) Tribal consultation waiver for Tribal government recipients of the LATCF. The Tribal consultation waiver will apply to all award agreements entered into with Tribal governments in the one-year period after the date of the final waiver.<sup>3</sup> In addition, in the case of award agreements entered into with Tribal governments prior to the date of the final waiver, the Tribal consultation waiver will apply to all expenditures incurred on an infrastructure project after the date of the final waiver if there is no other federal financial assistance used for such project that is subject to the Buy America Preference.<sup>4</sup>

The Tribal consultation waiver is necessary for Treasury to comply with its own policies and procedures. Specifically, Treasury's Tribal Consultation Policy was adopted in compliance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and outlines the internal procedures and principles Treasury must follow when communicating and coordinating on Treasury programs and activities that affect Native American Tribes. Treasury's Tribal Consultation Policy recognizes the right of Tribes to self-government and facilitates Tribal participation and input in Treasury's implementation of programs and federal financial assistance directed to Tribal communities. For these reasons, OMB's guidance on application of the BAP provides for agencies to engage in Tribal consultations before applying BAP requirements.<sup>5</sup> Because the LATCF is the first Treasury program that includes Tribes as recipients to be subject to BAP mandated by the Build America, Buy America Act, Treasury has not had the benefit of engaging in consultation pursuant to its Tribal Consultation Policy concerning the application of the BAP to Tribes. Because of the significance and potentially wide scope of new requirements related to compliance with BAP, it is imperative that Treasury take time to engage in Tribal consultation and then fully consider information gathered through such consultation. Treasury has determined that it

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<sup>3</sup> The waiver would apply to any reallocations made pursuant to these award agreements.

<sup>4</sup> This condition would be included because under the Buy America, Build America Act and the terms of the award, if award funds that are subject to BAP are used for a project, the entirety of expenditures on that project are subject to the BAP.

<sup>5</sup> See OMB Memorandum M-22-11, *supra* n. 2 at 3.

would be contrary to the public's interest to apply the BAP prior to completion of these Tribal consultation processes. Treasury's waiver will allow sufficient time for completion of the Tribal consultation processes regarding how BAP should be applied to Tribes in Treasury's federal financial assistance programs.

As stated above, the Build America, Buy America Act's requirements do not apply to expenditures using LATCF funds for infrastructure projects undertaken in response to the COVID-19 public health emergency or in response to or anticipation of other major disasters or emergencies declared by the President under the Stafford Act.

Treasury believes that increasing domestic supply for infrastructure projects is in the long-term public interest; Treasury has already seen how supply chain disruptions have negatively impacted construction project schedules and budgets. However, in the near term, immediate application of these requirements would likely be inconsistent with the public interest for several reasons.

First and foremost, in issuing this Tribal consultation waiver, Treasury recognizes the limited capacity of Tribal government recipient governments to implement and comply with the requirements of the Act. Tribal government recipients have indicated that immediately applying these requirements would lead to project delays and not allow governments to respond to urgent needs within their communities.

Recipients have not yet had the chance to assess the application of the BAP to their use of LATCF funds. Recipients have not yet considered the process for applying for project-specific waivers.

The Tribal consultation waiver allows recipients to develop an understanding of the BAP requirements, what information they will need to determine whether they are compliant with the BAP, what information they will need to determine whether to apply for a project-specific waiver, and what resources they will need to develop to ensure compliance and apply for waivers. The Tribal consultation waiver period also allows Treasury to determine how best to provide guidance to recipients regarding compliance with the BAP. Should the program be extended, these recipients will be in a position to develop the resources needed to meet these requirements.

Although LATCF recipients may use these funds on any governmental purpose other than a lobbying activity, each infrastructure project funded using their LATCF payment could potentially involve hundreds or thousands of components qualifying as manufactured products or construction

materials, for which the timely availability of sufficient quantities of these categories of goods at a reasonable cost has yet to be determined. Treasury is issuing the Tribal consultation waiver in order to better understand recipient needs and provide sufficient time to address these gaps in Treasury's knowledge base and anticipates that without a waiver, there would be lengthy delays in recipient ability to carry out these critical projects. Over the past six months, Treasury has opened both the county and Tribal government portions of the program, which included developing and releasing allocation methodology and program guidance, determined compliance, reporting, and audit requirements, and award terms and agreement structures. During this time, Treasury concurrently engaged and conducted in outreach to stakeholders and recipients on the key details and requirements, such as relaying this is not a project-specific grant program, but a flexible revenue-sharing program.

Furthermore, the LATCF is structured as a general revenue enhancement financial assistance program rather than as a project-based grant program. As noted above, eligible recipients must submit a request for funding to receive their payments, and recipients must submit periodic reports to Treasury on their expenditures, but payments are made in full in advance of use by recipients, and Treasury does not pre-approve projects or particular expenses. This structure makes it more difficult to engage with recipients on project specific waivers and would require recipients to themselves identify when a project would be subject to the BAP, to assess how the BAP's requirements would apply to the acquisition of particular materials for that project, and to assess whether a waiver would be appropriate. This will be especially difficult for entities with less capacity to engage with Treasury and may discourage take-up of the program. Should Congress consider an extension of the program, the Tribal consultation waiver period will give Treasury the time it needs to engage with Congress on possible modifications of the program to address these challenges.

Treasury will use the Tribal consultation waiver period to engage with recipients about the types of information that could be necessary to either request waivers or demonstrate compliance with the BAP requirements, the scope of other public interest waivers (e.g., small grant waivers, de minimis waivers), recipients' capacity for implementing and complying with the new requirements, their needs for additional guidance, and what new information collections might be necessary as relates to BAP requirements should the LATCF program be extended. By learning directly from recipients, Treasury will be well-informed so that waivers from BAP will be limited, targeted, and conditional where appropriate. With knowledge of specific supply chain limitations applicable to the particular circumstances of Tribal governments and eligible revenue-sharing counties, Treasury

will be able to better plan for issuing waivers for specific items or specific periods of time to enable agencies, recipients, and the private market to build capacity. Additionally, as a result of engagement with stakeholders, Treasury will be equipped to provide recipients of LATCF payments with the opportunity to fully evaluate and comment on any proposed information collection for the implementation of the BAP requirements subject to the PRA clearance process.

In addition, Treasury considered the Office of Recovery Programs' internal capacity to implement the new requirements and how implementation may impact the Office's ability to efficiently carry out other policy and programmatic priorities in accordance with the public interest. The Office appreciates the opportunity to advance the Made in America law's objectives for the long term and will use the consultation process to determine what additional capacity would be needed should the LATCF program be extended and to request additional budget resources, as appropriate. Immediate implementation without capacity-building measures could hinder the Office's core mission to assist state, local, and Tribal governments with their responses to the public health emergency to ensure as robust and equitable a recovery as possible. The system development effort to implement BAP requirements would require substantial staff resources to ensure successful development, testing, data migration, user training, and system launch, further straining the Office's capacity to implement a major new statutory requirement.

Treasury also recognizes that Tribes have already expressed significant concerns with the application of the BAP to the LATCF program, including as relates to the following issues:

1. Supply chain issues: Many Tribes have reported that Tribal governments are facing resource scarcity because their smaller sized procurements and rurality results in suppliers often contracting with larger purchasers for their limited supplies. When supplies reach Tribal and rural areas, often the costs are four times higher. Due to these constraints, many Tribes report that time is essence in accessing goods as they face rising costs.
2. Weather: Many Tribes are located in rural areas that with severe winter weather, which limits construction season to a few months. As a result, Tribes were seeking to procure goods as soon as possible to enable construction to commence in 2022.
3. Staff capacity: The majority of Tribes have reported severe capacity constraints as a result of deaths and infection among Tribal government staff. This may mean that a single Tribal staffer is managing over 30 programs. Tribal governments with high



poverty rates are particularly impacted by these constraints and most likely to seek LACTF funds before a waiver is granted.

These concerns were included in a July 27, 2022, letter sent by the Coalition of Large Tribes and expressed in other communications with Tribal leaders. The concerns that have been raised with Treasury so far make it clear that Treasury will need to engage in a thorough consultation process. Treasury is issuing a one-year Tribal consultation waiver to allow Treasury to allow it to conduct and respond to a Tribal consultation. This period is consistent with the approach taken by other agencies. One year will allow Treasury enough time to prepare for and participate in the Tribal consultation, review and consider comments received during the consultation, and prepare to implement procedures to implement BAP, as necessary, in ways that are responsive to the needs and concerns of Tribes as provided in the consultation.

#### **VI. Assessment of Cost Advantage of a Foreign-Sourced Product**

Under section 70921(b)(2) of the Build America, Buy America Act and OMB guidance, 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 issuing a public interest waiver.<sup>6</sup> Treasury’s analysis has concluded that this assessment is not applicable to the Tribal consultation waiver, as this waiver is not based on the cost of foreign-sourced products.

#### **VII. Limited Duration of the Waiver**

The waiver is effective beginning January 17, 2023. The BAP will not apply to award agreements entered into by recipients during the one-year period following the effective date of the waiver<sup>7</sup> or to expenditures incurred after the effective date of the final waiver by recipients that have entered into award agreements prior to the effective date of the final waiver. As discussed, the Tribal consultation waiver will allow Treasury to meet the objectives outlined above.

#### **VIII. Solicitation of Comments**

As required under Section 70914 of the Build America, Buy America Act, Treasury completed the solicitation of comment from the public on this waiver. Please refer to the “DATES”,

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<sup>6</sup> See OMB Memorandum M-22-11, *supra* n. 2 at 12.

<sup>7</sup> As noted above, the waiver would apply to any reallocations made pursuant to these award agreements.

“FOR FURTHER INFORMATION CONTACT”, and “SUMMARY AND RESPONSE TO COMMENTS” sections of this notice of the final waiver.