



Building communities, empowering Alaskans.

December 18, 2023

Office of Native American Programs
Department of Housing and Urban Development
451 7th Street SW, Room 4108
Washington, D.C. 20410

Re: Comments and recommendations regarding the implementation of Build America, Buy America Act (BABA) in Tribal Housing programs

Submitted via email: consultation@hud.gov

In response to HUD's request for feedback on the potential impacts on the Build America, Buy America Act (BABA), below are comments and recommendations from the Association of Alaska Housing Authorities (AAHA). AAHA's membership is comprised of fourteen regional housing authorities (RHAs) who are Tribally Designated Housing Entities (TDHEs) that provide affordable housing development and services on behalf of nearly 200 Tribes across Alaska.

First and foremost, HUD should request that OMB issue a permanent exemption to BABA for Tribes and TDHEs that are providing affordable housing development and services. This exemption should include all of HUD programs that Tribes and TDHEs are recipients of, for example Tribal Health Homes. HUD should implore OMB to consider the following justifications for this permanent exemption.

Tribes/TDHEs are developing private residential units, not infrastructure

Nothing in BABA or the final regulations promulgated thereunder defines infrastructure to include tribally owned rental housing projects operated for the benefit of private citizens. 2 CFR 184.4(d) explicitly provides that in determining whether a particular project constitutes "infrastructure," a "Federal awarding agency should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public." In its October 25, 2023 implementation guidance memorandum M-24-02, the Executive Office reaffirmed by way of example that "the purchase, construction or improvement of a private home for personal use, for example would



not constitute a public infrastructure project for purposes of BABA,” even through “real property” is specifically listed in the definition of infrastructure.

Privately leased residential property is far more similar to a “private home for personal use” than it is to the public facilities specifically delineated in the statute, which include public transportation, water and sewer, and public utility projects. Residential housing is intrinsically a private good, whose benefits are enjoyed specifically due to its private, rather than public nature. That characterization is not lost simply because the private housing may sit within a multifamily building that is itself not a place of public congregation. It is within HUD’s authority under BABA to determine that tribally developed and operated projects reserved for private residential use by individual households do not constitute infrastructure under the statute.

Increased affordable housing is a public Interest

BABA implementation should be waived for Tribes and TDHEs participating in HUD programs due to the overwhelming need for safe, sanitary, and affordable housing in tribal communities. A history of severe underinvestment in American Indian and Alaska Native (AIAN) communities coupled with unique logistical challenges mean that AIAN populations face some of the worst housing conditions in the country. HUD reported in its 2017 Housing Needs of American Indians in Tribal Areas publication that 68,000 new housing units were needed just to address the then-existing overcrowding and physically deficient living conditions in those areas.

For Alaska tribal communities, the situation is even more grim, with rates of overcrowding and physical deficiencies at least 10 times than the rest of the United States, and sometimes much higher. For example, according to a 2018 Alaska Housing Assessment conducted by the Alaska Housing Finance Corporation, the rate of overcrowding in the Yukon-Kuskokwim Delta, home to the largest concentration of Alaska Natives in the state, has an overcrowding rate of 40%, compared to the overall rate of 3% in the country.¹ Families endure housing conditions that are shocking, with nearly 25% of homes having insufficient plumbing, which usually means there is no flushing toilet.²

At the same time, the number of dollars flowing to tribal communities to address housing needs has stagnated. IHBG funding has not kept pace with either inflation (losing 25% of purchasing power since 2000) or the total budget of HUD (losing approximately 50% of its proportion of the total HUD budget since 2000). Tribes and TDHEs continue to do what they can with limited resources, but face a confluence of difficult conditions even without the additional bureaucracies and challenges that would come with BABA implementation. Under these circumstances, the overwhelming public interest in providing critically needed safe, sanitary

¹ <https://www.ahfc.us/pros/energy/alaska-housing-assessment/2018-housing-assessment/ancsa-overcrowding>

² <https://www.ahfc.us/pros/energy/alaska-housing-assessment/2018-housing-assessment/ancsa-housing-conditions>



and affordable homes in our under resourced communities provides ample support for the waiver of BABA requirements for Tribes/TDHE's housing projects.

Tribes are located in rural regions

Many tribal communities throughout the country are situated in remote locations that make housing development time-consuming and expensive. This is especially true in Alaska, where many villages are not connected to a road system. For example, the village of Savoonga is located 150 miles into the Bering Sea and is literally closer to the mainland of Russia than the mainland of Alaska. It is isolated, with no roads connecting the traditional village to the closest town in Alaska. This is true for most of the 200 villages across Alaska. Tribes/TDHE that are developing housing must have material barged to remote communities, which is prohibitively expensive. Alaska's RHAs are experts in building economies of scale across their respective region however, many traditional villages have low population which cannot support the volume and frequency required to lower transportation costs. For example, the cost of transporting the required building materials for eighteen apartments to a community of 900 people on the West Coast of Alaska equaled the cost of the materials themselves. Further, shipping delays due to material unavailability often mean that projects must be delayed for entire building seasons in Alaska, where the window to transport material on open water can be as short as 4 months.

Further, it's important to note the proximity that Alaska has to our neighboring country, Canada. Much like the Pacific Island territories that receive many of their products from suppliers that are closer in geography but not American Made, Alaska receives many goods and services from Canada.

Lack of contractors/bids and continued supply chain issues

Alaska has seen a decrease in responsive bidders on projects during the COVID years when materials were in short supply or completely unavailable. Projects that typically would receive 3-4 responses in previous cycles were instead returning with just one responsive bid, or in some cases, none at all. In addition, wait times for materials stretched project completion times. For example, one housing authority commented that every bid they requested had to be extended or put out again because they didn't get enough (sometimes zero) bids, or the bids they did receive were way too high. As an example, a housing authority estimated a cost of \$375 per square foot and the lowest bid was \$617 per square foot and another project was estimated at \$400 per square foot came in at \$975 per square foot; putting a halt to the project. These stories are not isolated incidents, as we hear there is a lack of available contractors across all communities and it continues to be prohibitively expensive to procure contractors.



Burdensome BABA sourcing compliance will likely further erode competition among bidders, particularly when coupled with additional project complexity and sourcing difficulty that makes projects less attractive to bidders in the first instance. Responding to bids, in general is administratively burdensome for contractors and there are few who respond to Requests for Proposals (RFPs). If there is an additional requirement that they certify and require all material is sourced in the USA, it will create an additional administrative requirement and higher product cost. Under the current BABA waiver process, we cannot envision a scenario where a request for waiver due to unavailability could be approved in time for a project to proceed in the intended building season.

In 2022, a housing authority, located on the road system, waited 50 weeks for emergency backup generators for its senior housing properties. This year-long wait occurred without the additional delays that would be required to ensure that the generator components met BABA sourcing. Absent a pre-existing manufacturing base, implementation of BABA requirements will delay project completion times, decreasing the ability of tribes and TDHEs to develop additional affordable housing. In Alaska particularly, the inability to source materials reliably and quickly coupled with a very short building season will inevitably result in extensive project delays.

In addition to minimum bids and supply chain issues, there is the fact that Tribes/TDHEs in Alaska would potentially not be able to utilize products that are familiar and industry proven products that work in Alaska. This can include but not be limited to hot water heaters, monitor heaters or heat pumps. These products are pivotal in ensuring our families have a heating system that is reliable when temperatures can drop to 40* below zero and there are individuals in the community who can make minor repairs, with limited resources.

Given these circumstances, HUD should consider the remote geography of Tribes/TDHEs and a lack of responsive bidders on housing related projects and continual supply chain issues as evidence to permit a waiver of BABA compliance requirements.

Alternative to permanent exemption to BABA

If HUD is not successful in obtaining a permanent exemption for Tribes/TDHE's operations of affordable Tribal Housing programs, there should be an additional waiver granted for delayed implementation until HUD is able to complete a feasibility study, similar to the research conducted by the US Department of Energy for the Pacific Island Territories in 2023.³ HUD utilized DOE's information to successfully get a waiver for the application of BABA requirement for Pacific Island territories. The waiver is for 15 months due to the locations of the economics, which require importation by sea or air and additional time was needed to

³ <https://www.energy.gov/sites/default/files/2023-08/DOE-Final-Pacific%20Island%20Territories%20Waiver-%20FINAL%208.18.2023-1.pdf>



consider the implications of BABA requirements on recipients in these territories. It was deemed to be in the public interest. HUD noted that BABA implementation in the Pacific Island territories could “increase already elevated project time and costs” and that more time is needed to better understand logistical implications and the balance of equities for recipients in these territories.

In addition to logistical challenges similar to those experienced in the Pacific Islands, the building season window in Alaska is extremely limited given the climate, and even short delays in the delivery of needed materials may require project progress to be completely stopped for many months, greatly increasing completion time and project costs. The communities in Alaska are arguably more remote or at least in a similar situation to the Pacific Island territories. The public interest waiver should be applied equally to tribal recipients of HUD programs.

While tribal recipients will almost surely experience price increases and project delays as a result of BABA, the extent of these impacts is currently unknown. AIAN recipients of HUD funding are in dire need of additional housing now, and attempting to implement BABA requirements without a full understanding of the potentially devastating effects on the US Government’s ability to fulfill its Trust responsibility to provide housing to Native Americans is difficult to comprehend. A months-long delay in implementation of BABA to ensure proper and appropriate administration could prevent a years-long wait for affordable housing for tribal families in need. HUD should waive implementation of BABA for Tribe/TDHE housing programs while it undertakes the important work of understanding the full implications of its requirements on tribal communities.

AAHA appreciates the opportunity to provide feedback on the potential implications that the BABA will have on our Tribes, THDEs, communities and families. We look forward to working alongside HUD to obtain a permanent waiver for Tribal housing program’s compliance with BABA.

Please let me know if you have any questions or would like further information. I can be reached at 907-330-8398 or cdushkin@aahaak.org.

Respectfully,

Colleen Dushkin,
Executive Director