



# COQUILLE INDIAN HOUSING AUTHORITY

## PROCUREMENT POLICY

### TABLE OF CONTENTS

<b>I. GENERAL PROVISIONS.....</b>	<b>3</b>
A. Purpose.....	3
B. Application.....	3
C. Procurement Authority and Administration.....	3
D. Cooperative Purchasing .....	4
E. Specifications .....	5
<b>II. PROCUREMENT METHODS .....</b>	<b>5</b>
A. Selection of Method.....	5
B. Small Purchase Procedures .....	5
C. Sealed Bidding (Purchases over \$250,000) .....	8
D. Competitive Proposals .....	10
E. Non-Competitive Proposals .....	12
F. Cost and Price Analysis .....	12
G. Cancellation of Solicitations .....	13
H. Contract Types and Options.....	14
I. Contract Administration.....	17
J. Specifications .....	17
K. Domestic Preference/Buy America Preference .....	17
<b>III. CONTRACTOR QUALIFICATIONS AND DUTIES.....</b>	<b>18</b>
A. Contractor Responsibility .....	18
B. Suspension and Debarment.....	18
C. Bonds .....	18
<b>IV. APPEALS AND REMEDIES .....</b>	<b>19</b>
A. General.....	19
B. Bid Protests .....	19
C. Contract Claims .....	19
D. Appeals .....	20
E. Protests Involving Indian Preference .....	21

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

<b>V. PREFERENCE REQUIREMENTS.....</b>	<b>21</b>
A. Small Businesses.....	21
B. Tribal and Indian Preference Requirements .....	22
<b>VI. ETHICS IN PUBLIC CONTRACTING .....</b>	<b>24</b>
A. General.....	24
B. Conflict of Interest .....	25
C. Gratuities, Kickbacks, and Use of Confidential Information .....	25
D. Prohibition against Contingent Fees .....	25
E. Consequences for Violating Code of Conduct.....	25

# COQUILLE INDIAN HOUSING AUTHORITY

## PROCUREMENT POLICY

---

### I. GENERAL PROVISIONS

#### A. Purpose

The purpose of this Procurement Policy (“Policy”) is to provide for the fair and equitable treatment of all persons or firms involved in purchasing by the Coquille Indian Housing Authority (CIHA); assure that supplies, services, and construction are procured efficiently, effectively, and at the most favorable prices available to CIHA; promote competition in contracting; provide safeguards for maintaining a procurement system of quality and integrity; and, assure that CIHA purchasing actions are in full compliance with applicable law.

#### B. Application

This Policy applies to all contracts for the procurement of supplies, services, and construction entered into by CIHA; however, nothing in this Policy shall prevent CIHA from complying with the terms and conditions of any grant, contract, gift, or bequest that is otherwise consistent with law. When both federal (e.g., U.S. Department of Housing & Urban Development (HUD)) and non-federal funds are used for a project, the work to be accomplished may be separately identified by the applicable source of funds and federal regulations applied to the work financed by federal funds, unless the terms and conditions of federal funds apply to the entire project (i.e., Build America, Buy America (BABA) domestic preference—*See* Appendix B for applicability of BABA). If it is not feasible to separate funds or the terms and conditions of the federal funds require total project compliance, then federal regulations shall be applied to the total project. The term procurement, as used in this Policy, includes both contracts and change orders for construction or services, as well as purchase, lease, or rental of supplies and equipment.

#### C. Procurement Authority and Administration

- 1. Contracting Officer.** All procurement transactions shall be administered and executed by the Contracting Officer, who shall be the Executive Director or other individual they have authorized in writing. The Executive Director shall establish operational procedures to implement this Policy. The Executive Director shall enact sanctions for violations of the ethical standards described in Section VI below, consistent with applicable law and CIHA policy.
- 2. Executive Director Duties.** The Executive Director or their designee shall ensure that:
  - a. Procurement requirements are subject to an annual review process to assure efficient and economical purchasing.
  - b. Contracts and modifications are in writing, clearly specifying the desired supplies, services, or construction and are supported by sufficient documentation regarding the history of the procurement, including at a minimum the method of procurement

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

chosen, the selection of the contract type, the rationale of selecting or rejecting offers, and the basis for the contract price;

- c. For procurement other than small purchases (“Small Purchases”) under the Simplified Acquisition Threshold, set in the Federal Acquisition Regulations (FAR) at 48 CFR part 2 (currently \$250,000; *see also* 2 CFR § 200.1), public notice is given of each upcoming procurement at least 10 calendar days before a solicitation is issued; responses to such notice are honored to the maximum extent practical; a minimum of 15 calendar days for main construction contracts and 15 calendar days for other contracts is provided for preparation and submission of bids or proposals; and, notice of contract award is made available to the public;
- d. Solicitation procedures are conducted in full compliance with federal standards stated in 2 CFR §§ 200.316–327 and 2 CFR Part 200 Appendix II, and the Indian preference requirements and methods of procurement in accordance with the applicable NAHASDA regulations, except where such standards have been superseded by Tribal law (see Coquille Tribal Code §160.220(4), Tribal preference requirements), and consistent with Appendix A;
- e. An independent cost estimate is prepared before issuance of solicitation and is appropriately safeguarded for each procurement above the Small Purchase limitation, and a cost or price analysis is conducted of the responses received for all procurement;
- f. There are sufficient unencumbered funds available to cover the anticipated cost of each procurement before contract award or modification (including change orders), work is inspected before payment, and payment is made promptly for contract work performed and accepted;
- g. A contract administration system is maintained to ensure that contractors perform in accordance with their contracts and provide for the proper inspection of supplies, services, or construction, as well as monitoring contractor performance, status reporting, and similar matters; and,
- h. CIHA complies with applicable HUD or other funding requirements, as well as applicable Tribal law and regulations and other applicable CIHA policies and procedures.

#### **D. Cooperative Purchasing**

CIHA may enter into interagency agreements to conduct direct procurement based on economy and efficiency. If used, an interagency agreement shall stipulate who is authorized to purchase on behalf of the participating parties and shall specify inspection, acceptance, termination, payment, and other relevant terms and conditions. CIHA may

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

utilize governmental excess and surplus property programs instead of purchasing new equipment and property if suitable for the purpose of the procurement.

#### **E. Specifications**

- 1. General.** All specifications shall be drafted so as to promote overall economy for the purposes intended and to encourage competition in satisfying CIHA's needs. Specifications shall be reviewed before solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicate items. Functional or performance specifications are preferred. Detailed product specifications shall be avoided when possible. Consideration shall be given to consolidating or breaking out procurement to obtain a more economical purchase. For equipment purchases, a lease versus purchase analysis should be performed to determine the most economical form of procurement.
- 2. Limitations.** The following specification limitations shall be avoided: geographic restrictions not mandated or encouraged by applicable federal law (except for architect-engineer contracts, which may include geographic location as a selection factor if adequate competition is available); unnecessary bonding or experience requirements; brand name or equal specification (unless they list the minimum essential characteristics and standards to which the item must conform to satisfy its intended use). Nothing in this Procurement Policy shall preempt applicable licensing laws. Specifications shall be scrutinized to ensure that organizational conflicts do not occur (e.g., having a consultant perform a study of CIHA's computer needs and then allowing the consultant to compete for the subsequent contract for the computers).

## **II. PROCUREMENT METHODS**

#### **A. Selection of Method**

CIHA shall choose one of the following procurement methods based on the nature and anticipated dollar value of the total requirement.

#### **B. Small Purchase Procedures**

- 1. General.** Any procurement not exceeding \$250,000 may be conducted in accordance with the Small Purchase procedures authorized in this section. Contract requirements shall not be artificially divided so as to constitute a Small Purchase under this Section (except as may be reasonably necessary to comply with Section V of this Policy).
- 2. Tribal and Indian Preference.** CIHA shall, to the greatest extent feasible, provide preference first to Tribal member-owned economic enterprises and organizations, and then to Indian-owned economic enterprises and Indian organizations in the procurement of Small Purchases.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

- 3. Petty Cash Purchases of \$100 or Less.** Small Purchases under \$100 which can be satisfied by local sources may be processed through the use of a petty cash account. Such purchases shall be distributed equitably among qualified sources. No quotation is required if CIHA considers the price to be reasonable.
- 4. De Minimis Purchases.** If CIHA utilizes NAHASDA funds, CIHA is not required to follow federal procurement regulations for Small Purchases up to \$5,000. *See* 24 CFR Part§ 1000.26(a)(11)(i). Only one price quote is required, provided the quote is considered reasonable. Obtaining the price quote need not include consideration of any applicable Tribal or Indian preference requirements. Quotes may be obtained orally (either in person or by telephone), or by catalog, fax, or email. Under no circumstances will a purchase be broken down into more than one action in order to avoid exceeding the micro or de minimis purchase ceiling (except as may be reasonably necessary to comply with Section V of this Policy). The purchase must be documented by an authorized requisition, purchase order, or contract.
- 5. Micro Purchases of between \$100 and \$10,000.** Small Purchases of less than \$10,000 are known as micro purchases (“Micro Purchases”). CIHA may increase the Micro Purchase threshold from \$10,000 to a maximum of \$50,000 through a self-certification process pursuant to 2 CFR § 200.320(a)(1), or greater than \$50,000 if CIHA has obtained HUD Office of Native American Programs (“ONAP”) approval (see HUD Notice PIH 2023-01 (Jan. 19, 2023)). For Micro Purchases, only one price quote is required, provided the quote is considered reasonable. CIHA must maintain documents to support its conclusion that the price is reasonable. *See* 2 CFR § 200.320 (a)(1)(ii). Quotes may be obtained orally (either in person or by telephone), by fax, catalog, website, email, letter, or other informal procedure. If the purchase is made for reasons other than price, the file must clearly describe the reason for the purchase. Under no circumstances will a purchase be broken down into more than one action in order to meet the micro purchase threshold (except as may be reasonably necessary to comply with Section V of this Policy). To the extent practicable, micro purchases shall be distributed equitably among qualified sources and must be documented by an authorized purchase order or contract.

  - a. If CIHA increases the Micro Purchase threshold through a self-certification process, CIHA will recertify the Micro Purchase threshold amount on an annual basis, in accordance with 2 CFR § 200.320(a)(1). CIHA will maintain documentation of any annual self-certification in accordance with 2 CFR § 200.334 and 24 CFR § 1000.552.
- 6. Small Purchases of between \$10,000 and \$250,000.**

  - a. **Obtaining quotes.** CIHA shall solicit price quotations by phone, fax, catalog, website, email, letter, or other informal procedure that allows participation by a reasonable number of competitive sources. When soliciting quotations, CIHA shall inform the sources solicited of the specific item being procured, the time by which

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

quotations must be submitted, and the information required to be submitted with each quotation. CIHA shall obtain written quotations; however, the written quotation may be confirmation of a previous oral quotation only if it is submitted within 10 days of the oral quotation or by the due date for submitting quotations. The names, addresses, and/or telephone numbers of the offerors and persons contacted, and the date and amount of each quotation shall be recorded and maintained as a public record.

- b. **Competition.** CIHA shall attempt to obtain quotations from a minimum of three qualified sources and document the procurement file with a justification whenever it has been unable to obtain at least three quotations. Solicitation of fewer than three sources is acceptable if CIHA has attempted but has been unable to obtain a sufficient number of quotations. The sole quotation received may be accepted only in unusual circumstances, such as an emergency threatening public health and safety, financial emergency, or catastrophic circumstances; for a proprietary product or service or a product or service available from only one source; when CIHA determines that the delays caused by re-soliciting would cause higher costs or unreasonable delay; or, where CIHA determines and documents that the proposal has a fair and reasonable price.
- c. **Tribal and Indian preference in award.**
  - i. **Award based on price.** For Small Purchases awarded based on price or fixed specifications (i.e. not subject to negotiations), CIHA shall make award to the qualified Tribal member-owned economic enterprise or organization with the lowest responsive quotation if it is reasonable and no more than 10% higher than the lowest responsive quotation received. If there is no such Tribal member-owned enterprise or organization, CIHA shall make award to the qualified Indian-owned economic enterprise or organization with the lowest responsive quotation if it is reasonable and no more than 5% higher than the lowest responsive quotation received. If no responsive quotation is received from a qualified Tribal member-owned economic enterprise or organization that is within 10% of the lowest responsive quotation from any qualified source, and if no responsive quotation is received from a qualified Indian-owned economic enterprise or organization within 5% of the lowest responsive quotation from any qualified source, then award shall be made to the source with the lowest quotation.
  - ii. **Award based on factors other than price.** For Small Purchases to be awarded based on factors other than price, a formal solicitation (request for proposals or request for quotations) shall be issued, including evaluation factors and a rating system to evaluate each proposal or quotation. The solicitation shall reserve 15% of the total evaluation points for providing Tribal

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

and Indian preference. Award shall be made to the best proposal or quotation in accordance with the stated rating system.

- 7. Blanket Purchase Orders and Agreements.** Blanket Purchase Orders (“Blanket Purchase Orders”) and Blank Purchase Agreements (“Blanket Purchase Agreements”) may be used for expendable supplies and routine services. For expendable supplies, CIHA shall prepare a list of products with an estimate of the volume or quantity of each product historically purchased in a one-year fiscal period. Quotes shall be obtained using the Small Purchase procedures set forth above. The maximum total value of a Blanket Purchase Order or Blanket Purchase Agreement may not exceed \$250,000.

#### **C. Sealed Bidding (Purchases over \$250,000)**

- 1. Conditions for Use.** Contracts shall be awarded based on competitive sealed bidding if the following conditions are present: a complete, adequate, and realistic specification or purchase description is available; two or more responsible bidders are willing and able to compete effectively for the work; the procurement lends itself to a firm fixed price contract; and, the selection of the successful bidder can be made principally on the basis of price. Sealed bidding is the preferred method for construction procurement. Sealed bidding should not be used for professional services contracts.
- 2. Solicitation and Receipt of Bids.**
  - a. Issuance and amendment.** An invitation for bids shall be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids. An invitation for bids shall be issued including specification of all contractual terms and conditions applicable to the procurement, and must adequately define the items or services for bid in order for the bidder to properly respond. Any amendments to the invitation shall be in writing. If it is necessary to issue an amendment within 7 calendar days of the bid opening, the bid opening shall be postponed until at least 7 calendar days after the issuance of the amendment. The invitation for bids shall state the time and place for both the receipt of bids and the public bid opening. All bids received shall be time-stamped but not opened and shall be stored in a secure place until bid opening. A bidder may withdraw its bid at any time prior to bid opening.
  - b. Restricting solicitations.** The invitation may be restricted to qualified Tribal member- and Indian-owned economic enterprises and organizations if CIHA has a reasonable expectation of receiving the required minimum number of bids from them. CIHA shall solicit bids from non-Indians as well as Tribal member- and Indian-owned economic enterprises or organizations if: CIHA decides not to restrict the solicitation; an insufficient number of qualified Tribal member- and Indian-owned economic enterprises or organizations submit responsive bids in response to a solicitation; or, a single bid is received but not accepted.



**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

3. **Bid Opening.** Bids shall be opened publicly and in the presence of at least one witness in addition to the Contracting Officer. An abstract of bids shall be recorded and the bids shall be available for public inspection.
4. **Award.** Award shall be made as provided in the invitation for bids by written notice to the successful bidder, as follows:
  - a. **Restricted solicitations.** If the solicitation is restricted to Tribal member- and Indian-owned economic enterprises and organizations, and three or more qualified Tribal member- and Indian-owned economic enterprises or organizations submit responsive bids, award shall be made to the qualified enterprise or organization with the lowest responsive and responsible bid, provided, however, that if a Tribal member-owned enterprise or organization is within 10% of the lowest responsive and responsible bid, award shall be made to that enterprise or organization if that bid is within the maximum total contract price established for the specific project or activity being solicited. If equal low bids are received, award shall be made to the Tribal member-owned enterprise or organization; if equal low bids are received from two or more Tribal member-owned enterprises or organizations, or by two or more Indian-owned enterprises or organizations, award shall be made by drawing lots or similar random method, unless otherwise provided by applicable law. If fewer than three qualified Tribal member- or Indian-owned economic enterprises or organizations submit responsive bids, all bids shall be rejected, and CIHA shall cancel the solicitation and re-solicit, inviting bids from non-Indian as well as Indian-owned economic enterprises and organizations. CIHA may accept a single bid received from a responsive and responsible bidder, subject to HUD approval where required, in unusual circumstances, such as if CIHA determines that, based on a cost or price analysis, the bid price is fair and reasonable, or CIHA determines that the delay of re-soliciting would subject the project to higher construction costs or other public exigency or emergency for the requirement will not permit a delay resulting from further solicitations.
  - b. **Unrestricted solicitations.** If the solicitation is not restricted to Tribal member-owned or Indian-owned economic enterprises and organizations, award shall be made to the qualified Tribal member-owned or Indian-owned economic enterprise or organizations with the lowest responsive and responsible bid, if that bid is within the maximum total contract price established for the specific project or activity being solicited and if the bid is no more than “X” higher than the total bid price of the lowest responsive and responsible bid from any qualified bidder, as set out in Appendix A hereto. If equal low bids are received from a Tribal member-owned enterprise or organization and an Indian-owned enterprise or organization, award shall be made to the Tribal member-owned enterprise or organization; if equal low bids are received from two or more Tribal member-owned enterprises or organizations, or by two or more Indian-owned enterprises or organizations, award shall be made by drawing lots or similar random method, unless otherwise provided

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

by applicable law. If no responsive bid by a qualified Tribal member-owned or Indian-owned economic enterprise or organization is within this range, award shall be made to the lowest responsive, responsible bidder.

- c. **Mistakes in bids.** Correction or withdrawal of inadvertently erroneous bids may be permitted by written notice received in the office designated in the invitation for bids prior to the time set for bid opening. A low bidder alleging a non-judgmental mistake may be permitted to withdraw its bid if the mistake is clearly evident on the face of the bid document but the intended bid is unclear or the bidder submits convincing evidence that a mistake was made. All decisions to allow correction or withdrawal of bid mistakes shall be supported by a written determination signed by the Contracting Officer. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of CIHA or fair competition shall be permitted.
- d. **Rejection of bids.** CIHA may reject any or all bids if there is a sound documented reason.

#### **D. Competitive Proposals**

- 1. **Conditions for Use.** Competitive proposals (including turnkey proposals for development) may be used if there is an adequate method of evaluating technical proposals and where CIHA determines that conditions are not appropriate for the use of sealed bidding. An adequate number of qualified sources shall be solicited.

#### **2. Solicitation**

- a. **General.** Requests for proposals (RFP) will be publicized, identify all evaluation factors and their relative importance, and be solicited from an adequate number of qualified sources. The RFP may be restricted to qualified Tribal member-owned or Indian-owned economic enterprises and organizations if CIHA has a reasonable expectation of receiving offers from three such entities. CIHA shall solicit proposals from non-Indian as well as Tribal member-owned or Indian-owned economic enterprises and organizations if: an insufficient number of qualified Tribal member-owned or Indian-owned economic enterprises or organizations satisfactorily respond to a restricted RFP or solicitation; or, a single proposal is received but not accepted. A mechanism for fairly and thoroughly evaluating the technical and price proposals shall be established before the solicitation is issued. Proposals shall be handled so as to prevent disclosure of the number of offers, identity of the offerors, and the contents of their proposals.
- b. **Evaluation factors.** The RFP shall clearly identify the relative importance of price and other evaluation factors and sub-factors, including the weight given to each technical factor and sub-factor. CIHA shall reserve 15% of the total number of available rating points in unrestricted solicitations for the provision of Tribal and

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

Indian preference in the award of contracts and subcontracts, and up to an additional 10% for offers containing a qualified statement regarding training and employment of Tribal members and other Indians. The proposals shall be evaluated only on the criteria stated in the request for proposals.

- 3. Negotiations.** In those situations where negotiations are deemed necessary, negotiations shall be conducted with offerors who submit proposals determined to have a reasonable chance of being selected for award, based on evaluation against the technical and price factors as specified in the RFP. Such offerors shall be accorded fair and equal treatment with respect to any opportunity for negotiation and revision of proposals. The purpose of negotiations shall be to seek clarification with regard to, and advise offerors of, the deficiencies in both the technical and price aspects of their proposals so as to assure full understanding of and conformance to the solicitation requirements. Any technical or price aspect to the RFP shall be supplied to all bidders. No offeror shall be assisted in bringing its proposal up to the level of any other proposal. Offerors shall not be directed to reduce their proposed prices to a specific amount in order to be considered for an award. A common deadline shall be established for receipt of proposal revisions based on negotiations.
- 4. Award.** After evaluation of proposal revisions, if any, the contract shall be awarded to the responsive and responsible firm whose qualifications, price and other factors considered, are the most advantageous to CIHA, provided that the price is within the maximum total contract price established for the specific project or activity. For solicitations restricted to qualified Tribal member-owned or Indian-owned economic enterprises and organizations, if two such entities submit acceptable proposals, award shall be made to the qualified Tribal member-owned or Indian-owned economic enterprise or organization with the best proposal based on the applicable criteria, provided that the price is within the maximum total price established for the specific project or activity. If fewer than two Tribal member-owned or Indian-owned economic enterprises or organizations submit acceptable proposals, CIHA shall reject all proposals and re-solicit without restricting the RFP to qualified Tribal member-owned or Indian-owned economic enterprises and organizations. CIHA may accept a sole proposal received, subject to HUD approval where required, in unusual circumstances, such as when CIHA determines that the delays caused by re-soliciting would cause higher costs, or where CIHA determines that the proposal has a fair and reasonable price.
- 5. Rejection of Proposals.** CIHA may reject any or all proposals if there is a sound documented reason.
- 6. Architectural and Engineering Services.** Architectural and Engineering services in excess of the Small Purchase limitation may be obtained by the competitive proposal method of qualifications-based selection procedures. Sealed bidding shall not be used to obtain architectural and engineering services. Under qualifications-based selection

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

procedures, competitor's qualifications are evaluated and the most qualified competitor is selected, subject to the negotiation of fair and reasonable compensation. These procedures shall not be used to purchase other types of services even though architectural and engineering firms are potential sources.

#### **E. Non-Competitive Proposals**

- 1. Conditions for Use.** Procurement shall be conducted competitively to the maximum extent possible. Procurement by non-competitive proposals may be used when the award of a contract is not feasible using Small Purchase procedures, sealed bids, or competitive proposals, and one of the following applies:
  - a. An emergency exists that seriously threatens the public health, welfare, or safety, or endangers property, or would otherwise cause serious injury to CIHA, as may arise by reason of flood, earthquake, epidemic, riot, equipment failure, or similar events. In such cases, there must be an immediate and serious need for supplies, services, or construction such that the need cannot be met through any other procurement methods, and the emergency procurement shall be limited to those supplies, services, or construction necessary to meet the emergency;
  - b. The procurement is for a proprietary product or service or a product or service available from only one source, and the Contracting Officer so certifies in writing;
  - c. After solicitation of a number of sources, competition is determined inadequate;
  - d. The funding agency, in writing, specifically authorizes or has approved the use of non-competitive proposals; or,
  - e. The total amount of the procurement does not exceed the Micro Purchase threshold.
- 2. Justification.** Each procurement based on non-competitive proposals shall be supported by a written justification for using such procedures. The justification shall be approved in writing by the Contracting Officer.
- 3. Price Reasonableness.** The reasonableness of the price for all procurement based on non-competitive proposals shall be determined by performing a cost analysis, as described in Section F below.

#### **F. Cost and Price Analysis**

- 1. General.** A cost or price analysis shall be performed for all procurement actions in excess of the Simplified Acquisition Threshold (at the time of adoption, \$250,000, but may be updated at 2 CFR § 200.1), including contract modifications. The degree of

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

analysis shall depend on the facts surrounding the procurement; as a starting point CIHA will make independent estimates before receiving bids or proposals.

- 2. Submission of Cost or Pricing Information.** If the procurement is based on non-competitive proposals, or when only one offer is received, or for other procurement as deemed necessary by CIHA (e.g., when contracting for professional, consulting, or architectural and engineering services) the offeror shall be required to submit:
  - a. A cost breakdown showing projected costs and profit;
  - b. Commercial pricing and sales information, sufficient to enable CIHA to verify the reasonableness of the proposed price, such as a catalog or market price of a commercial product sold in substantial quantities to the general public; or,
  - c. Documentation showing that law or regulation sets the offered price.
- 3. Cost Analysis.** Cost analysis shall be performed if an offeror/contractor is required to submit a cost breakdown as part of its proposal. When a cost breakdown is submitted, a cost analysis shall be performed of the individual cost elements; CIHA shall have the right to audit the contractor's books and records pertinent to such costs; and, profit shall be negotiated separately in accordance with 2 CFR 200.324. Costs shall be allowable only to the extent that they are consistent with applicable federal cost principles. In establishing profit, CIHA shall consider factors such as the complexity and risk of the work involved, the contractor's investment and productivity, the amount of subcontracting, the quality of past performance, and industry profit rates in the area for similar work.
- 4. Price Analysis.** A comparison of prices shall be used in all cases other than those described in Section II(F)(3) above.

#### **G. Cancellation of Solicitations**

- 1.** An invitation for bids, request for proposals, or other solicitation may be canceled before offers are due if:
  - a. CIHA no longer requires the supplies, services, or construction;
  - b. CIHA can no longer reasonably expect to fund the procurement;
  - c. Proposed amendments to the solicitation would be of such magnitude that a new solicitation would be desirable; or,
  - d. CIHA determines that it is in the best interest of CIHA to cancel.
- 2.** A solicitation may be canceled and all bids or proposals that have already been received may be rejected if:

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

- a. The supplies, services, or construction are no longer required;
  - b. The solicitation did not provide for consideration of all factors of significance to CIHA;
  - c. Prices exceed available funds, and it would not be appropriate to adjust quantities to come within available funds;
  - d. There is reason to believe that bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or,
  - e. CIHA determines that it is in the best interest of CIHA to cancel.
3. The reasons for cancellation shall be documented in the procurement file and the reasons for cancellation and/or rejection shall be provided upon request to any offerors solicited. A notice of cancellation shall be sent to all offerors solicited.

For solicitations that are not restricted to Tribal member-owned or Indian-owned economic enterprises or organizations, if all otherwise acceptable bids received in response to an invitation for bids are at unreasonable prices, or only one bid is received and the price is unreasonable, CIHA shall cancel the solicitation and re-solicit using a request for proposals.

#### **H. Contract Types and Options**

1. **Contract Types.** Any type of contract (pricing arrangement) which is appropriate to the procurement and which will promote the best interests of CIHA may be used, provided that the cost-plus-a-percentage-of-cost and percentage of construction cost methods are prohibited. All contracts shall include the clauses and provisions necessary to define the rights and responsibilities of the parties. A cost reimbursement contract shall not be used, unless it is likely to be less costly or it is impracticable to satisfy CIHA's needs otherwise, and the proposed contractor's accounting system is adequate to allocate costs in accordance with applicable cost principles. A time and materials contract may be used only if written determination is made that no other contract type is suitable, and the contract includes a ceiling price that the contractor exceeds at its own risk.
2. **Options.** Options for additional quantities or performance periods may be included in a contract, provided that:
  - a. The option is contained in the solicitation;
  - b. The option is a unilateral right of CIHA;

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

- c. The contract states a limit on the additional quantities and the overall term of the contract;
  - d. The options are evaluated as part of the initial competition;
  - e. The contract states the period within which the options may be exercised;
  - f. The options may be exercised only at the price specified in or reasonably determinable from the contract; and,
  - g. The options may be exercised only if determined to be more advantageous to CIHA than conducting a new procurement.
- 3. Contract Clauses.** In addition to containing a clause identifying the contract type, all contracts shall include any clauses required by federal statutes, executive orders, and their implementing regulations, such as, but not limited to, those provided in Appendix II to 2 CFR Part 200. Such clauses include, but are not limited to, the following:
- a. Termination for convenience
  - b. Termination for default
  - c. Equal Employment Opportunity
  - d. Anti-Kickback Act and Department of Labor Regulations (29 CFR Part 3)
  - e. Davis-Bacon provisions of NAHASDA
  - f. Contract Work Hours and Safety Standards Act. For Contracts in excess of \$100,000 that employ mechanics or laborers, a provision for compliance with 40 U.S.C. §§ 3702 & 3704, as supplemented by Department of Labor regulations at 29 CFR Part 5
  - g. Reporting requirements
  - h. Patent rights
  - i. Copyrights and rights in data
  - j. Examination of records by CIHA, federal agencies, Comptroller General, or duly appointed staff
  - k. Retention of records for three years after close-out
  - l. Clean air and water

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

- m. Energy efficiency standards
  - n. Bid protests and contracts claims
  - o. Value engineering
  - p. Payment of funds to influence certain federal transactions
  - q. For contracts more than the Simplified Acquisition Threshold, provisions addressing administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as deemed appropriate
  - r. Anti-Lobbying Amendments
  - s. Debarment and Suspension
  - t. Tribal/Indian Preference
  - u. Disputes Concerning Labor Standards
  - v. Drug-Free Workplace
  - w. Prohibitions on conflicts of interest
  - x. Interest of Members of Congress
  - y. Lead-Based Paint Poisoning Prevention
  - z. Prevailing Wage Requirements
  - aa. No liens
  - bb. Subcontracting with Small and Minority Firms, Women's Business, Veteran-Owned Businesses, and labor surplus area firms
  - cc. Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment
  - dd. Domestic preferences for procurements (2 CFR § 200.322)
  - ee. Procurement of recovered materials (2 CFR § 200.323)
- 4. Forms.** If all required clauses are not included on HUD forms (e.g., HUD 5370), CIHA shall attach any additional clauses to the HUD forms used in contract documents.



# COQUILLE INDIAN HOUSING AUTHORITY

## PROCUREMENT POLICY

---

CIHA shall include the contract clauses and solicitation notices for Tribal and Indian preference described in Section V of this Policy.

### **I. Contract Administration**

A contract administration system designed to ensure that contractors perform in accordance with their contracts shall be maintained. It will contain guidelines for inspection of supplies, services, or construction, as well as monitoring contractor performance, status reporting on construction contracts and similar matters.

### **J. Specifications**

Specifications shall be drafted to promote overall economy for the purposes intended and to encourage competition in satisfying CIHA's needs. Specifications shall be reviewed prior to solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicate items. Functional or performance specifications are preferred. Detailed product specifications shall be avoided when possible. Consideration shall be given to consolidating procurement to obtain a more economical purchase. For equipment purchases, a lease versus purchase analysis should be performed to determine the most economical form of procurement.

**1. Limitations.** Specification limitations that are inconsistent with applicable law and regulations, including but not limited to the following, shall be avoided:

- a. Geographic restrictions not mandated or encouraged by applicable federal law (except for architect-engineer contracts, which may include geographic location as a selection factor if adequate competition is available);
- b. Unnecessary bonding or experience requirements;
- c. Brand name specifications unless a written determination is made that only the identified item will satisfy CIHA's needs; and,
- d. Brand name or equal specifications, unless they list the minimum essential characteristics and standards to which the item must conform to satisfy its intended use.

Nothing in this Policy shall preempt any applicable State, Tribal or local licensing laws. Specifications shall be scrutinized to ensure that organizational or other conflicts of interest, as defined by Tribal Code and applicable federal laws, do not occur.

### **K. Domestic Preference/Buy America Preference**

Projects utilizing federal financial assistance must comply with the Buy America Preference (BAP) pursuant to the Build America, Buy America Act (BABA). CIHA Procedures for BABA compliance are included in Appendix B to this Policy.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

**III. CONTRACTOR QUALIFICATIONS AND DUTIES**

**A. Contractor Responsibility**

Procurement shall be conducted only with responsible contractors, i.e., those who have the technical and financial competence to perform and who have a satisfactory record of integrity. Before awarding a contract, CIHA shall review the proposed contractor's ability to perform the contract successfully, considering factors such as the contractor's integrity, including a review of the List of Parties Excluded from Federal Procurement and Non-Procurement Programs published by the U.S. General Services Administration, compliance with public policy; record of past performance, including contacting previous clients of the contractor, work previously performed for CIHA, etc.; and, financial, administrative, and technical capability to perform contract work of the size and type involved and within the time provided under the contract. If a prospective contractor is found to be non-responsible, a written determination of non-responsibility shall be prepared and included in the contract file, and the prospective contractor shall be advised of the reasons for the determination.

**B. Suspension and Debarment**

Contracts shall not be awarded to debarred, suspended, or ineligible contractors. Contractors may be suspended, debarred, or determined ineligible by HUD in accordance with HUD regulations or by other federal agencies. If warranted, CIHA may seek suspension or debarment of a contractor under applicable federal or non-federal law. CIHA may also, according to its own established procedures, suspend or debar a contractor as applicable. Documentation showing the contractor is debarred or suspended shall be maintained in the contract file.

**C. Bonds**

In addition to the other requirements of this Policy, for all construction or facility improvement contracts or subcontracts, and for all rehabilitation contracts exceeding the Small Purchase threshold (\$250,000), CIHA will apply the following bonding requirements:

1. Each bidder must provide a bid guarantee to CIHA equivalent to 5% of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond from a surety listed by the U.S. Department of the Treasury, certified check, or other negotiable instrument accompanying a bid (which instrument must be acceptable to CIHA, at CIHA's sole discretion) as assurance that the bidder will, upon acceptance of their bid, execute such contractual documents as may be required within the time specified.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

2. The successful bidder shall be required to submit one of the following forms of assurance, in accordance with the approved method set forth in the solicitation, within 10 business days after the prescribed contract forms are presented for signature:
  - a. A performance and payment bond for 100% of the total contract price from a surety listed by the U.S. Department of the Treasury;
  - b. A cash escrow deposited with CIHA of not less than 20% of the total contract price, subject to reduction at CIHA's sole discretion, during the warranty period commensurate with potential risk;
  - c. An irrevocable letter of credit for 25% of the total contract price, unconditionally payable upon demand of CIHA, subject to reduction at CIHA's sole discretion, during the warranty period commensurate with potential risk; or,
  - d. An irrevocable letter of credit for 10% of the total contract price and compliance with the procedures for monitoring and disbursements provided by the contractor, as approved by CIHA.

#### **IV. APPEALS AND REMEDIES**

##### **A. General**

It is CIHA's policy to first attempt to resolve all contractual issues informally with the Contracting Officer. When appropriate, CIHA may consider the use of informal discussions between the parties by individuals who did not participate substantially in the matter in dispute to help resolve the difference. If these informal procedures do not result in a mutually acceptable outcome, then the following formal processes may be used.

##### **B. Bid Protests**

Any actual or prospective contractor may protest the solicitation or award of a contract for serious violations of the principles set forth in this Policy. Any protest against a solicitation must be received before the due date for receipt of bids or proposals, and any protest against the award of a contract must be received within 10 calendar days after contract award, or the protest will not be considered. All bid protests shall be in writing, submitted to the Contracting Officer or designee, who shall issue a written decision on the matter. The Contracting Officer may, at their discretion, suspend the procurement pending resolution of the protest, if warranted by the facts presented.

##### **C. Contract Claims**

All claims by a contractor relating to performance of a contract shall be submitted in writing to the Contracting Officer or designee for a written decision. The contractor may

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

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request a conference on the claim. The Contracting Officer's decision shall inform the contractor of its appeal rights, if any, to the Housing Authority Board of Commissioners.

#### **D. Appeals**

- 1. Exhaustion of CIHA Remedies.** A protestor must exhaust all administrative remedies with CIHA before pursuing a protest with HUD. Note that HUD will only consider protests for matters of primarily Federal concern. Violations of law must be referred to local, state, tribal, or federal authority having proper jurisdiction. If a matter is not of primarily federal concern, or is not a violation of law, protests will be referred back to CIHA.
- 2. Informal Appeals Procedure.** For contracts of \$250,000 or less, a bidder/contractor who has a grievance with a bid, request for proposals, or other solicitation, or a procurement decision, must submit a request in writing to meet with the appropriate CIHA Contracting Officer within five (5) days of the decision being grieved. The meeting will be an informal discussion and the CIHA Contracting Officer will attempt to resolve the grievance informally. The decision of the Contracting Officer will be final.
- 3. Formal Appeals Procedure.** The following appeals procedure shall apply to solicitations/contracts of more than \$250,000.
  - a. Formal Appeal – Step 1.** Any actual or prospective contractor may appeal the solicitation or award of a contract for serious violations of the principles of this Policy by filing an appeal with the appropriate CIHA Contracting Officer. Any appeal against a bid, request for proposals, or other solicitation, or a procurement decision, must be received before the due date for the receipt of bids or proposals, and any appeal against the award of a contract must be received within five (5) calendar days after the unsuccessful bidder/proposer receives notice of the contract award, or the appeal will not be considered. All appeals shall be in writing, submitted to the Contracting Officer or designee, who shall issue a written decision on the matter. The Contracting Officer may, at their discretion, suspend the procurement pending resolution of the appeal if the facts presented so warrant.
  - b. Formal Appeal – Step 2.** If a party receives an adverse decision from the Contracting Officer, that party may appeal to the CIHA Executive Director. Any appeal against the Contracting Officer's decision must be submitted within 5 (five) calendar days after the unsuccessful bidder/proposer receives notice of the Contracting Officer's decision, or the appeal will not be considered. All appeals shall be in writing, submitted to the CIHA Executive Director, who shall issue a written decision on the matter. The CIHA Executive Director may, at their discretion, suspend the procurement pending resolution of the appeal if the facts presented so warrant. The decision of the CIHA Executive Director is final.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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**E. Protests Involving Indian Preference**

Complaints arising out of any of the methods of providing for Indian preference shall be handled in accordance with the procedures prescribed by the NAHASDA regulations at 24 CFR § 1000.48-52.

**V. PREFERENCE REQUIREMENTS**

**A. Small Businesses**

**1. Required Efforts.** To the extent consistent with and not superseded by applicable law and regulations, and specifically the Tribal preference requirements set out herein and the Indian preference requirements set out in the NAHASDA regulations at 24 CFR § 1000.48-52, CIHA shall make efforts to ensure that small and minority firms, women's business enterprises, veteran-owned businesses, labor surplus area firms, and individuals located in or owned substantially by persons residing in the area of a CIHA project are used when possible. Such efforts shall include, but shall not be limited to:

- a. Including such firms, when qualified, on solicitation mailing lists;
- b. Encouraging their participation through direct solicitation of bids or proposals whenever they are potential sources;
- c. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such firms;
- d. Establishing delivery schedules, where the requirement permits, which encourage participation by such firms;
- e. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce;
- f. Including in contracts a clause requiring contractors, to the greatest extent feasible, to provide opportunities for training and employment for lower income residents of the project area and to award subcontracts for work in connection with the project to business concerns which are located in, or owned in substantial part by persons residing in the area of the project; and,
- g. Requiring prime contractors, when subcontracting is anticipated, to take the steps listed in 1(a) through 1(f) above.

**2. Definitions**

- a. A small business is defined as a business which is independently owned, not dominant in its field of operation, and not an affiliate or subsidiary of a business

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

---

dominant in its field of operation. The size standards in 13 CFR § 121 shall be used unless CIHA determines that their use is inappropriate.

- b. A business concern located in the area of the project is defined as an individual or firm located within the relevant Section 3 covered project area, as determined pursuant to 24 CFR § 135.5 and meeting the definition of small business above. A business concern owned in substantial part by persons residing in the area of the project is defined as a business concern which is 51% or more owned by persons residing within the Section 3 covered project, considered by the U.S. Small Business Administration to be socially or economically disadvantaged, and meeting the definition of small business above.

#### **B. Tribal and Indian Preference Requirements**

1. **General.** Projects developed and operated with assistance under NAHASDA are subject to Section 7(b) of the Indian Self-determination and Education Assistance Act (25 U.S.C. 5307(b)). Section 7(b) provides that to the greatest extent feasible, preference shall be given to Indian organizations and Indian-owned economic enterprises in the award of all contracts and subcontracts. However, NAHASDA and its applicable regulations also provide that “Notwithstanding any other provision of law, with respect to any grant (or portion of a grant) made on behalf of an Indian tribe under [NAHASDA] that is intended to benefit 1 Indian tribe, the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives the benefit shall apply with respect to the administration of the grant (or portion of a grant).” (25 U.S.C. 4111(k)). The Coquille Indian Tribe has adopted Tribal contract preference requirements in its Fiscal Management Ordinance, Coquille Tribal Code, §160.220(4). Thus, the Tribal preference requirements must be applied first, and only if there is no Tribal contractor who meets those requirements would the Indian preference requirements apply. Preference must be provided in accordance with the methods set forth in NAHASDA and consistent with 2 CFR Part 200. Where Tribal and Indian preference is determined not to be feasible, CIHA shall document the procurement file with the basis for its findings. Tribal and Indian preference applies not only on Coquille Tribal Lands or elsewhere within CIHA’s jurisdiction, but also to contracts with firms that operate outside these areas. Tribal and Indian preference in the solicitation, evaluation, and award process shall be as described above.
2. **Eligibility.** To be eligible for Tribal preference, a business concern must be 51% or more owned by a Coquille Tribal member. Eligibility for Indian preference shall be established in accordance with procedures consistent with NAHASDA. If CIHA or its prime contractor determines an applicant ineligible for Tribal or for Indian preference, CIHA or the prime contractor shall notify the applicant in writing before contract award, or filling the position, or providing the desired training.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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**3. Contract Clauses and Solicitation Notices.**

- a. Solicitations shall include the following information:
  - i. A statement of the applicability of Tribal and Indian preference to the solicitation and a time before the due date for offers by which offerors must submit evidence of eligibility for Tribal or Indian preference;
  - ii. Any applicable locally imposed preference requirements properly enacted by the tribal governing body and adopted by CIHA (or advise offeror to contact the tribal governing body to determine any applicable preference requirements);
  - iii. Information as to whether CIHA maintains lists of Tribal- or Indian-owned economic enterprises and Tribal or Indian organizations by trade specialty which are available to contractors and subcontractors for use in meeting Tribal and Indian preference responsibilities;
  - iv. A requirement that offerors provide a statement describing how they will provide Tribal and Indian preference in subcontracting, training, and employment, including the number or percentage of Tribal members and Indians to be employed and trained;
  - v. CIHA's description of the information to be submitted on Tribal and Indian preference;
  - vi. The factors that CIHA will use in judging the adequacy of the Tribal or Indian preference information submitted;
  - vii. A statement that failure to submit the required Tribal and Indian preference statements on subcontracting, training, and employment shall be grounds for rejection of the offer;
  - viii. A requirement that each contractor and subcontractor submit a certification and supporting evidence to CIHA whenever it is not feasible to provide Tribal or Indian preference in subcontracting;
  - ix. For requests for proposals that are not restricted to Tribal member-owned or Indian-owned economic enterprises or organizations, the percentage or number of points set aside for Tribal or Indian preference and the method for allocating these points;
  - x. For requests for proposals that are not restricted to Tribal member-owned or Indian-owned economic enterprises or organizations, a requirement that contractors using a request for proposals to solicit subcontractors reserve 10%

## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

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of the available rating points for Tribal preference and 5% for Indian preference in subcontracting, not to be combined, and the criteria to be used in evaluating subcontractor proposals, with the award to go to the Tribal member-owned economic enterprise or organization over the Indian-owned entity if the points are otherwise the same;

- xi. A requirement that offerors submit a list of core crew employees with their offers and that contractors and subcontractors are required to provide preference to the greatest extent feasible by hiring qualified Tribal members and other Indians in all positions other than core crew positions; and,
  - xii. Requirements for the Build America, Buy America Act (BABA), if applicable. CIHA Procedures for BABA compliance are included in Appendix B to this Policy.
- b. Solicitations, contracts, and subcontracts shall include the following:
- i. A reference to the applicability of Tribal preference requirements consistent with this Policy and Coquille Tribal Code §160.220(4);
  - ii. The clause implementing Section 7(b) of the Indian Self-Determination and Education Assistance Act in connection with the development or operation of CIHA projects in accordance with 24 CFR § 1000.52 as this provision currently exists or is subsequently amended;
  - iii. The grounds for termination of a contract or the imposition of penalties for improper subcontracting or false certification as to subcontracting with Tribal member-owned or Indian-owned economic enterprises or organizations; and,
  - iv. Any additional information required because of the nature of the project.
- c. If all required clauses and provisions are not included on form documents (e.g., HUD-5369 and HUD-5370), then CIHA shall attach any additional clauses or provisions to the forms used in solicitations and contract documents.

- 4. Monitoring and Remedies.** CIHA shall monitor the implementation of Tribal and Indian preference in its contracts, subcontracts, training, and employment, and take appropriate remedial action (including cancellation of contracts and assessments of penalties) to ensure compliance.

## VI. ETHICS IN PUBLIC CONTRACTING

### A. General

CIHA shall adhere to the following code of conduct and shall comply with the limitations imposed by NAHASDA and other applicable law, consistent with 2 CFR Part 200.



## COQUILLE INDIAN HOUSING AUTHORITY

### PROCUREMENT POLICY

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#### **B. Conflict of Interest**

The Coquille Indian Housing Authority prohibits its officers, board members, employees, and agents from participating directly or indirectly in the selection or in the award or administration of any contract if a conflict, real or apparent, would be involved. Such conflict would arise when a financial or other interest in a firm selected for award is held by:

1. An officer, board member, employee, or agent involved in making the award;
2. Their relative, including father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, and half-sister;
3. Their partner; or,
4. An organization which employs, is negotiating to employ, or has an arrangement concerning prospective employment of any of the above.

#### **C. Gratuities, Kickbacks, and Use of Confidential Information**

CIHA officers, board members, employees, or agents shall not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties of subcontracts, and shall not knowingly use confidential information for actual or anticipated personal gain.

#### **D. Prohibition against Contingent Fees**

Contractors shall not retain a person to solicit or secure a CIHA contract for a commission, percentage, brokerage, or contingent fee, except for bona fide employees.

#### **E. Consequences for Violating Code of Conduct**

Employees, officers, board members, and agents of CIHA who engage in the award and administration of contracts shall abide by the provisions of this Section, which establishes a code of conduct for carrying out procurement activities.

1. **Disciplinary Action Against Employee Violating Code of Conduct.** Any employee of CIHA who violates any provision of this code of conduct will be subject to disciplinary action, up to and including termination from employment, depending on the severity of the violation.
2. **Disciplinary Action Against Officer or Agent Violating Code of Conduct.** Any officer, board member, or agent of CIHA who violates any provision of this code of conduct will be subject to disciplinary action, up to and including removal from office

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

or termination of contractual or other relationship, depending on the severity of the violation.

- 3. Civil Action to Recover Any Improper Financial Benefit from Employee, Officer, Board Member, or Agent Violating Code of Conduct.** CIHA may seek repayment from an employee, officer, or agent of the Housing Authority of any improper financial benefit that the employee, officer, or agent gained for him- or herself or for another person through such violation, which may include filing suit against the employee, officer, or agent in a court of competent jurisdiction for such repayment. Where the matter involves an employee or former employee, such action may be taken in addition to or in lieu of disciplinary action against the employee.

# COQUILLE INDIAN HOUSING AUTHORITY

## PROCUREMENT POLICY

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### APPENDIX A: TRIBAL AND INDIAN PREFERENCE

In accordance with this statement, awards shall be made under **unrestricted sealed bid** solicitations to the lowest responsive bid from a qualified **Tribal member-owned** economic enterprise or organization within the maximum total contract price established for the specific project or activity being solicited, if the bid is no more than “X” higher than the total bid price of the lowest responsive bid from any qualified bidder. The factor “X” is determined as follows:

<u>When the lowest responsive and responsible bid is:</u>	<u>X = the lessor of:</u>
Less than \$100,000	10% of that bid or \$9,000
At least \$100,000 but less than \$200,000	9% of that bid or \$16,000
At least \$200,000 but less than \$300,000	8% of that bid or \$21,000
At least \$300,000 but less than \$400,000	7% of that bid or \$24,000
At least \$400,000 but less than \$500,000	6% of that bid or \$25,000
At least \$500,000 but less than \$1 million	5% of that bid or \$40,000
At least \$1 million but less than \$2 million	4% of that bid or \$60,000
At least \$2 million but less than \$4 million	3% of that bid or \$80,000
At least \$4 million but less than \$7 million	2% of that bid or \$105,000
\$7 million or more	1% of the lowest responsive bid with no dollar limit

In accordance with this statement, awards shall be made under **unrestricted sealed bid** solicitations to the lowest responsive bid from a qualified **Indian -owned** economic enterprise or organization within the maximum total contract price established for the specific project or activity being solicited, if the bid is no more than “X” higher than the total bid price of the lowest responsive bid from any qualified bidder. The factor “X” is determined as follows:

<u>When the lowest responsive and responsible bid is:</u>	<u>X = the lessor of:</u>
Less than \$100,000	5% of that bid or \$4,500
At least \$100,000 but less than \$200,000	4.5% of that bid or \$8,000
At least \$200,000 but less than \$300,000	4% of that bid or \$10,500
At least \$300,000 but less than \$400,000	3.5% of that bid or \$12,000
At least \$400,000 but less than \$500,000	3% of that bid or \$12,500
At least \$500,000 but less than \$1 million	2.5% of that bid or \$20,000
At least \$1 million but less than \$2 million	2% of that bid or \$30,000
At least \$2 million but less than \$4 million	1.5% of that bid or \$40,000
At least \$4 million but less than \$7 million	1% of that bid or \$52,500
\$7 million or more	.5% of the lowest responsive bid with no dollar limit



**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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**APPENDIX B: BUILD AMERICA, BUY AMERICA ACT (BABA) PROCEDURES**

**I. Overview, Purpose, and Applicability**

**A. Overview**

1. BABA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (a.k.a. “Bipartisan Infrastructure Deal”) (PL 117-58 §§ 70931-70941). BABA establishes a domestic content procurement preference (the “Buy America Preference,” sometimes referred to as “BAP”) for federal infrastructure programs.
2. The Buy America Preference is the domestic content procurement preference set forth in section 70914 of BABA. The Buy American Preference:
  - a. Requires the head of each federal agency (e.g., United States Department of Housing and Urban Development (HUD)) to ensure that no funds made available for a federal award for an Infrastructure Project be obligated unless all of the (i) Iron or Steel Products, (ii) Manufactured Products, and (iii) Construction Materials incorporated into the project are produced in the United States.
  - b. Requires that all federal agencies, including HUD, ensure that any Infrastructure Project funded by federal financial assistance comply with the BABA requirements.
3. The Coquille Indian Housing Authority (CIHA) shall comply with BABA and applicable regulations, located at 2 CFR Part 184 and incorporated into 2 CFR Part 200. CIHA shall update these BABA Procedures (“Procedures”) as further guidance becomes available. In the event of a conflict between these Procedures and the applicable federal statutes or regulations, the federal statutes or regulations shall prevail.

**B. Purpose**

The purpose of these Procedures is to establish comprehensive and uniform guidelines regarding compliance with BABA. CIHA shall follow these Procedures in tandem with following the policies and procedures outlined in the CIHA Procurement Policy. In the event of a conflict between these Procedures and the Procurement Policy, these Procedures shall prevail.

**C. Applicability**

1. The Buy American Preference applies when Federal Financial Assistance, as defined herein and in 2 CFR § 200.1, is used for Infrastructure Projects, unless a waiver applies. *See* Section IV herein. This includes Federal Financial Assistance provided by any federal agency, including, but not limited to, HUD, and the United States Department of Agriculture.

2. **Projects and Federal Financial Assistance to Which BABA and These Procedures Apply.** These Procedures apply to any CIHA procurement or project for an Infrastructure Project funded in whole or in part by Federal Financial Assistance.

- a. BABA requirements apply to the entire project if any part of the project is funded by Federal Financial Assistance.<sup>1</sup>
  - i For example, if a construction project is initially started without the use of any Federal Financial Assistance covered under BABA, but CIHA subsequently uses Federal Financial Assistance for a small sub-part within the larger construction project, the entire construction project must comply with BABA.
  - ii If the only Federal Financial Assistance used in an Infrastructure Project is Indian Housing Block Grant (IHBG) funding totaling less than \$5,000, the BAP does not apply.<sup>2</sup>
- b. The BAP applies to most Federal Financial Assistance (i.e. grants) that CIHA receives from federal agencies used for Infrastructure Projects. This includes, but is not limited to, the following grants:
  - i IHBG Formula
  - ii IHBG Competitive
  - iii Indian Community Development Block Grants (ICDBG) Single Purpose
  - iv Title VI Loan Guarantees under the Native American Housing Assistance and Self-Determination Act of 1996 (Title VI)
- c. Projects subject to BABA include the construction, maintenance, alterations, or repairs of Infrastructure.

3. **Projects and Federal Financial Assistance to Which the BAP and These Procedures Do Not Apply**

- a. **Funds used for pre- or post-disaster or emergency response infrastructure spending.** BABA requirements do not apply to assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USC § 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 USC § 5170, 5191) or pre and post disaster or emergency response expenditures.

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<sup>1</sup> Office of Management and Budget, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, M-24-02 (Oct. 25, 2023) <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>

<sup>2</sup> U.S. Dept. Housing & Urban Devel., NOTICE PIH 2024-35 Build America, Buy America Act (BABA)—Implementation Guidance for Tribal Recipients, § 8(E) (Oct. 11, 2024).

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

---

- b. Federal Financial Assistance that is not subject to the BAP includes, but is not limited to, the following grants:
    - i IHBG-Coronavirus Aid Relief and Economic Security Act (CARES)
    - ii IHBG-American Rescue Plan Act (ARP)
    - iii ICDBG-CARES
    - iv ICDBG-ARP
    - v ICDBG-Imminent Threat (ICDBG-IT), in cases involving a Presidentially declared disaster or emergency<sup>3</sup>
  - c. In addition, the BAP does not apply to FFA obligated for programs that do not fund public Infrastructure Projects. This includes the following:
    - i Tribal HUD-Veteran Affairs Supportive Housing (Tribal HUD-VASH) program is not subject to the BAP since funding under that program is specifically for rental assistance and associated administrative fees and would not be considered a public Infrastructure Project.
    - ii Section 184 Indian Housing Loan Guarantee program.
  - d. **Single-Family Housing Projects.** The BAP requirements do not apply to Single-Family Housing Projects funded by HUD programs, including buildings consisting of 1-4 dwelling units. This includes the construction, maintenance, alteration, and repair of single-family properties. However, projects consisting of the construction, maintenance, alteration, or repair of multifamily housing (i.e., buildings that contain 5 or more dwelling units) are subject to the BAP.
4. Each time CIHA receives federal funding, CIHA staff will check to see if the grant qualifies as Federal Financial Assistance subject to BABA. *See* the definition of Federal Financial Assistance of these Procedures to determine whether the funding falls under Federal Financial Assistance.
5. The Buy American Preference applies to three separate product categories: (i) Iron or Steel Products; (ii) Manufactured Products; and (iii) Construction Materials. The Buy American Preference requires that all Iron or Steel Products, Manufactured Products, and Construction Materials used in a project funded by Federal Financial Assistance must be produced in the United States.

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<sup>3</sup> ICDBG-IT awards made to address imminent threats or emergencies that do not have an accompanying Presidentially declared disaster or emergency declaration may still be exempt from the BAP under the Exigent Circumstances waiver addressed in Section IV.B.2.C herein.

HUD's Office of Native American Programs (ONAP) has issued compliance guidance, "Build America, Buy America Act (BABA) — Implementation Guidance for Tribal Recipients" ("ONAP BABA Guidance"). ONAP's BAP Applicability Determination Checklist is attached as Attachment 1 to these procedures. CIHA may use the BAP Applicability Determination Checklist as a tool in implementing these Procedures.

## II. Definitions

A. The following definitions apply to the Procedures in this Appendix B. Where applicable, these definitions are taken verbatim from the BABA (PL 117–58, §§ 70901–70952) or OMB BABA regulations at 2 CFR Parts 184 and 200.

1. "*BABA*" means the Build America, Buy America Act (PL 117-58 §§ 70931-70941).
2. "*Buy America Preference*" or "*BAP*" means the domestic content procurement preference set forth in section 70914 of the Build America, Buy America Act, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an Infrastructure Project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States.
3. "*Component*" means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: a Manufactured Product; or, where applicable, an Iron or Steel Product.
4. "*Construction Material*" means articles, materials, or supplies that consist of only one of the items listed in paragraph (a) of this definition, except as provided in paragraph (b) of this definition. To the extent one of the items listed in paragraph (a) contains as inputs other items listed in paragraph (a), it is nonetheless a Construction Material.
  - a. The listed items are:<sup>4</sup>
    - i Non-ferrous metals;
    - ii Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
    - iii Glass (including optic glass);
    - iv Fiber optic cable (including drop cable);
    - v Optical fiber;
    - vi Lumber;
    - vii Engineered wood; and

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<sup>4</sup> See 2 CFR § 184.6 for further explanations on these types of Construction Materials.



**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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viii Drywall.

- b. Minor additions of articles, materials, supplies, or binding agents to a Construction Material do not change the categorization of the Construction Material.

5. *Federal Financial Assistance*

- a. “*Federal Financial Assistance*” means federal assistance that recipients or subrecipients receive or administer in the form of:
  - i Grants;
  - ii Cooperative agreements;
  - iii Non-cash contributions or donations of property (including donated surplus property);
  - iv Direct appropriations;
  - v Food commodities;
  - vi Loans;
  - vii Loan guarantees;
  - viii Interest subsidies;
  - ix Insurance; and
  - x Other financial assistance.<sup>5</sup>
- b. The following types of funding do not qualify as Federal Financial Assistance and are not subject to BABA<sup>6</sup>:
  - i Amounts received as reimbursement for services rendered to individuals.
  - ii Expenditures for assistance authorized in the Robert T. Stafford Disaster Relief and Emergency Act or relating to a major disaster or emergency declared by the President, or
  - iii Pre and post disaster or emergency response expenditures.

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<sup>5</sup> 2 CFR § 200.1; *see also*

[https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america/apply](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/apply)

<sup>6</sup> 2 CFR § 200.1; *see also*

[https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america/apply](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/apply)

6. “*Infrastructure*” includes, at a minimum, the following: buildings and real property, including housing, community and office buildings, and related structures; the structures, facilities, and equipment 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; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.
7. “*Infrastructure Project*” means any activity related to the construction, alteration, maintenance, or repair of Infrastructure in the United States regardless of whether Infrastructure is the primary purpose of the project.
8. “*Iron or Steel Products*” means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.
9. “*Manufactured Products*” means:
  - a. Articles, materials, or supplies that have been:
    - i. Processed into a specific form and shape; or
    - ii. Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
  - b. If an item is classified as an Iron or Steel Product, a Construction Material, or a Section 70917(c) Material, then it is not a Manufactured Product. However, an article, material, or supply classified as a Manufactured Product under Paragraph (a) of this definition may include components that are Construction Materials, Iron or Steel Products, or Section 70917(c) Materials. See Section III(A)(3) herein on Categorization of Articles, Materials, and Supplies for more guidance.
10. “*Manufacturer*” means the entity that performs the final manufacturing process that produces a manufactured product.
11. “*Predominantly of Iron or Steel or a Combination of Both*” means that the cost of the iron and steel content exceeds 50 percent of the total cost of all the components of the article, material, or supply. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.
12. “*Produced in the United States*” means:
  - a. In the case of Iron or Steel Products, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States. See Section III(A)(4) herein.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- b. In the case of Manufactured Products:
    - i The product was manufactured in the United States; and
    - ii The cost of the components of the Manufactured Product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the Manufactured Product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the Manufactured Product. *See* 2 CFR § 184.2(a). The costs of components of a Manufactured Product are determined according to 2 CFR § 184.5. *See* Section III(A)(4) herein.
  - c. In the case of Construction Materials, all manufacturing processes for the Construction Material occurred in the United States. *See* 2 CFR § 184.6 for more information on the meaning of “all manufacturing processes” for specific Construction Materials. *See* Section III(A)(4) herein.
13. “*Section 70917(c) Materials*” means cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. *See* BABA PL 117–58 § 70917(c).
14. “*Single Family Housing Projects*” means projects involving construction, maintenance, alteration, or repair of housing with 1 to 4 dwelling units.

### **III. Requirements**

#### **A. Overall Project Management**

1. **BABA Applies to All Phases of a Project.** CIHA shall ensure that BABA requirements are considered during and incorporated into all phases of an Infrastructure Project, including the design phase, procurement phase, and construction phase.
  - a. Before beginning a project, CIHA shall review the Federal Financial Assistance grant award(s) and granting agency’s BABA guidance to check what the BABA requirements are.
  - b. If a contractor will be overseeing the design and construction contracts, CIHA shall ensure that the contractor follows these Procedures.
  - c. CIHA shall ensure that bid/solicitation documents, other procurement documents, contracts, subcontracts, and all other project documentation clearly specify that the project is subject to BABA and what the BABA requirements are.

- d. CIHA shall monitor each stage of an Infrastructure Project funded by Federal Financial Assistance, from the planning and design phase through project completion, to ensure that the Infrastructure Project complies with BABA.

## 2. Check for Waivers

- a. Before beginning any Infrastructure Project funded by Federal Financial Assistance, CIHA shall consider whether a general applicability waiver exists that might cover the project. Below are some waivers that exist as of 2025. *See also* Section IV herein. CIHA shall review updated federal guidance and notices on each waiver before determining whether a project is covered under a waiver.
- b. Examples of current multi-agency waivers include:
  - i **Tribal BABA Waiver for awards of \$2.5 million or less:** exempts awards and subawards to tribes and tribally designated housing entities (TDHEs) of \$2.5 million or less from BAP requirements until January 10, 2030.<sup>7</sup> Awards and subawards at or below \$2.5 million are exempt from BAP requirements under the following conditions:
    - (a) The total prime award or subaward does not exceed \$2.5 million, and
    - (b) The award or subaward amount does not exceed \$2.5 million for the life of the award.
  - ii **Manufactured Products Waiver:** exempts Manufactured Products from BAP requirements between January 10, 2025, and September 30, 2026, regardless of the Federal Financial Assistance award amount.<sup>8</sup> CIHA may purchase non-compliant Manufactured Products when expending Federal Financial Assistance that is obligated on or before September 30, 2026.
- c. Examples of current HUD waivers include:
  - i **De Minimis Waiver:** for a “De Minimis” portion of an Infrastructure Project, waiving BABA requirements for a cumulative total of no more than 5 percent of the total cost of the Iron or Steel Products, Manufactured Products, and Construction Materials, up to a maximum of \$1 million.
  - ii **Small Grants Waiver:** for Infrastructure grants and Infrastructure Projects for which the total cost (including HUD funding and funding from any other

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<sup>7</sup> U.S. Dept. Interior, [General Applicability Public Interest Waiver to Indian Tribes](#), at 1 (Jan. 10, 2025) (“Tribal BABA Waiver”). The multi-agency Tribal BABA Waiver applies to Federal Financial Assistance from eight federal agencies: (1) HUD, (2) Department of the Interior, (3) Department of Agriculture, (4) Department of Commerce, (5) Department of Education, (6) Department of Energy, (7) Environmental Protection Agency, and (8) Federal Emergency Management Agency.

<sup>8</sup> Tribal BABA Waiver, at 1.

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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source) is equal to or less than the current Simplified Acquisition Threshold of \$250,000, set in the Federal Acquisition Regulations (FAR) at 48 CFR Part 2.

iii **Exigent Circumstances Waiver:** for “circumstances where undertaking the Buy American Preference-covered Infrastructure Project without delay is necessary to protect life, safety or provide necessary security to residents or community members, or to prevent the destruction of property.”<sup>9</sup>

- d. Each federal agency may have different timelines, obligations, or applicable waivers under BABA. CIHA shall check the applicable BABA requirements and guidance for each federal agency that provides Federal Financial Assistance for an Infrastructure Project.
- e. If a waiver applies, CIHA will maintain supporting documentation of its determination in the project procurement records.

**3. Categorization of Articles, Materials, and Supplies**

- a. CIHA shall categorize articles, materials, and supplies according to the following specifications.
- b. An article, material, or supply used for Infrastructure Projects shall only be classified under one BABA category: (i) Iron or Steel Products; (ii) Manufactured Products; or (iii) Construction Materials.
  - i. An article, material, or supply is classified as falling under one of those categories at the time that “it is brought to the work site for incorporation into an Infrastructure Project.”<sup>10</sup> See definition of “*Iron or Steel*,” “*Predominantly of Iron or Steel or a Combination of Both*,” “*Manufactured Products*,” and “*Construction Materials*” above.
- c. Items that consist of two or more of the listed Construction Materials that have been combined through a manufacturing process shall be treated as Manufactured Products, rather than as Construction Materials.<sup>11</sup>
- d. Items that include at least one of the listed materials in the Construction Materials definition, combined through a manufacturing process with a material that is not

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<sup>9</sup> U.S. Dept. Housing & Urban Devel., Docket No. FR-6331-N-05 Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance, 6 (Nov. 23, 2022).

<sup>10</sup> Office of Management and Budget, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, M-24-02, at 16 (Oct. 25, 2023) <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>

<sup>11</sup> <https://www.hudexchange.info/faqs/4264/how-are-construction-materials-that-are-combined-with-a-manufactured-product/>

listed, shall be treated as Manufactured Products, rather than as Construction Materials.

- i “For example, a plastic framed sliding window shall be treated as a Manufactured Product while plate glass shall be treated as a Construction Material.”<sup>12</sup>

4. **Ensure that All Articles, Materials, and Supplies are Produced in the United States.** To comply with BABA, CIHA shall ensure that, for any Infrastructure Project funded by Federal Financial Assistance, all Iron or Steel Products, Manufactured Products, and Construction Materials used in the Infrastructure Project are Produced in the United States, unless a waiver applies.

- a. In the case of Construction Materials, “*Produced in the United States*” means all manufacturing processes for the Construction Material occurred in the United States. The regulations at 2 CFR § 184.6 describe the following standards for a Construction Material to be considered “Produced in the United States.”

- i **Non-ferrous metals.** All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
- ii **Plastic and polymer-based products.** All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
- iii **Glass.** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
- iv **Fiber optic cable (including drop cable).** All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
- v **Optical fiber.** All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
- vi **Lumber.** All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.

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<sup>12</sup> <https://www.hudexchange.info/faqs/4264/how-are-construction-materials-that-are-combined-with-a-manufactured-product/>

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- vii **Drywall.** All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
- viii **Engineered wood.** All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.
- b. In the case of Iron or Steel Products, “*Produced in the United States*” means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- c. In the case of Manufactured Products, “*Produced in the United States*” means:
  - i The product was manufactured in the United States; and
  - ii The cost of the components of the Manufactured Product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the Manufactured Product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the Manufactured Product. The costs of components of a Manufactured Product are determined according to 2 CFR § 184.5:
    - (a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
    - (b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product.
- d. If it is infeasible to obtain Iron or Steel Products, Manufactured Products, and Construction Materials that are produced in the United States, CIHA may consider obtaining a waiver of BABA compliance, in accordance with Section IV herein. *See also* Manufactured Products Waiver, referenced in Section III.A.2.b.ii herein.

**B. Contractor Procurement**

1. CIHA shall update these procurement steps as necessary based on the ONAP BABA Guidance, as well as any amendments or updates thereto. CIHA may modify the BABA language specified below for bid documents, contracts, purchase orders, etc.,

depending on whether a general applicability waiver applies to a project (e.g., the Manufactured Products Waiver, referenced in Section III.A.2.b.ii herein).

2. Bid documents shall include:
  - a. The definitions of the three BABA materials (Iron and Steel Products, Manufactured Goods, and Construction Materials), and what it means to be “Produced in the United States.”
  - b. References to the BABA statute and regulations (BABA (PL 117-58 §§ 70931-70941); 2 CFR Part 184, and; 2 CFR §§ 200.322 and 200.327) and applicable federal agency guidance.
  - c. The requirement that manufacturers and suppliers will be responsible for providing individual BABA certifications for each Iron and Steel Product, Manufactured Product, and Construction Material.
  - d. An outline of the documentation and records retention requirements, including the requirement of obtaining and keeping manufacturer’s certifications for Iron and Steel Products, Manufactured Products, and Construction Materials.
  - e. The BABA provision stated in Section III.C.3 herein.
3. Bid forms shall describe the specific terms that will be in all project contracts, including the requirements that a contractor must:
  - i. Incorporate BABA requirements into bid documents and contracts, and ensure that BABA requirements are implemented during the design phase of the project;
  - ii. Create and maintain thorough records of BABA compliance;
  - iii. Conduct market research to identify and use American-made Iron or Steel Products, Manufactured Goods, and Construction Materials;
  - iv. Identify any Iron or Steel Products, Manufactured Goods, and Construction Materials that are not domestically available;
  - v. Estimate costs using American-made materials when available, and identify any instances in which using American-made materials will increase the overall project cost by more than 25 percent;
  - vi. Identify time-sensitive project deadlines that could be impacted if a product is delayed or not available domestically;



**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- vii Identify instances in which non-availability or unreasonable cost waivers may be needed and provide CIHA with the information required to draft such waivers;<sup>13</sup>
  - viii Notify CIHA when Iron and Steel Products, Manufactured Goods, and Construction Materials have arrived on site and are ready for installation;<sup>14</sup>
  - ix Inspect all Iron and Steel Products, Manufactured Products, and Construction Materials delivered to the site prior to installation, to confirm that these materials meet the BABA requirements. This entails reviewing any country-of-origin markings on the product itself and obtaining and reviewing manufacturer's certification letters;
  - x Provide all manufacturers' certifications to CIHA;
  - xi Only procure and install BABA-compliant Iron and Steel Products, Manufactured Products, and Construction Materials (unless there is a relevant waiver in place);
  - xii Reject shipments of any BABA non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials and ensure that a subcontractor does not invoice CIHA for BABA non-compliant items;
  - xiii Report any non-BABA compliant materials or subcontractors to CIHA; and
  - xiv Sign a BABA certification letter upon completion of the Infrastructure Project.
4. Bid forms shall require bidders to submit a form stating that they are familiar and will comply with the BABA requirements, as laid out in the BABA statute and regulations (BABA (PL 117-58 §§ 70931-70941); 2 CFR Part 184; 2 CFR §§ 200.322 and 200.327).
5. To locate a supplier that meets the BABA requirements, CIHA may utilize the Hollings Manufacturing Extension Partnership supplier scouting federal website, located at <https://www.nist.gov/mep/supply-chain/supplier-scouting>.

**C. Contract Requirements**

1. CIHA must include the Buy America Preference in all subawards, contracts, subcontracts, and purchase orders for the work performed, or products supplied under the Federal Financial Assistance. 2 CFR § 184.4(b). Each subaward, contract, subcontract, and purchase order must also specifically require compliance with BABA (PL 117-58 §§ 70931-70941), 2 CFR Part 184, and 2 CFR §§ 200.322, and 200.327.

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<sup>13</sup> U.S. Dept. of Treasury, Build America, Buy America Act Policies and Procedures § 3.3 (Nov. 2023).

<sup>14</sup> *Id.*

2. **Design and Engineering Projects.** For any projects involving design and/or engineering phases, the contract with the design contractor shall state the responsibilities of the design contractor regarding compliance with the requirements of BABA. These may include, but are not limited to, the following:

- a. Incorporating the BABA requirements into the project design, researching and evaluating the availability of American-made materials, and evaluating the suitability of domestically produced alternatives if only foreign-sourced materials are available;
- b. Estimating costs using American-made materials when available, highlighting any instances in which using American-made or produced materials will increase the overall project cost by more than 25 percent, and if so, creating a cost comparison between American-made materials and foreign-sourced materials; and
- c. Identifying instances in which non-availability or unreasonable cost waivers may be needed and providing CIHA with the information required to draft such waivers.<sup>15</sup>

### 3. **Contracts**

- a. **Subcontracts.** If a project will involve any subcontracts, CIHA shall include a provision in the primary contract requiring the primary contractor to ensure that all subcontractors comply with BABA. The contract provision shall further require the contractor to include a provision in every subcontract or purchase order that requires the subcontractor or vendor to comply with BABA (PL 117-58 §§ 70931-70941), 2 CFR Part 184, and 2 CFR §§ 200.322 and 200.327.
- b. **Contract language:** At a minimum, the following provision (or a substantially similar provision, depending on the source(s) of the Federal Financial Assistance) shall be included in all subawards, contracts, and subcontracts involving a project subject to the BAP:

“Pursuant to the Build America, Buy America Act (BABA), enacted as part of the Infrastructure Investment and Jobs Act (PL 117-58 §§ 70931-70941, 41 USC § 8301 note), the Tribal Recipient of the Federal Financial Assistance used to fund this Infrastructure Project is required to apply a domestic content procurement preference (the “Buy America Preference” or “BAP”) for all construction, alteration, maintenance, or repair of public infrastructure, including buildings and real property, unless application of the BAP has been waived by the applicable federal agency. Accordingly, [subgrantee or contractor’s name] shall carry out this Agreement in accordance with BABA and its implementing regulations at 2 CFR Part 184, and 2 CFR §§ 200.322, and 200.327, and Coquille Indian Housing Authority’s BABA Procedures.

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<sup>15</sup> U.S. Dept of Treasury, Build America, Buy America Act Policies and Procedures § 3.3 (Nov. 2023).

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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Pursuant to BABA and its implementing regulations, [subgrantee or contractor's name] shall ensure that all Iron and Steel Products, Manufactured Products, and Construction Materials procured for this project are made in America. Failure to comply with the BABA requirements will be considered a breach of contract.

For each Iron and Steel Product, Manufactured Product, and Construction Material procured for this project, [subgrantee or contractor's name] shall compile and submit to the Coquille Indian Housing Authority the following list of information:

- Type of covered material, (iron, steel, manufactured product, or construction material);
- Product or material procured;
- Costs per unit of product or material procured;
- Total cost of product purchase or contract;
- Manufacturer or Vendor;
- Special quality standards, if applicable; and
- Verification that the Iron and Steel Product, Manufactured Product, and Construction Material was made in America (e.g., Made in America label, product specifications, vendor or contractor certification, etc.). Verification may be in the form of a signed certification from the manufacturer of the Iron and Steel Product, Manufactured Product, and Construction Material, certifying “to the best of his/her knowledge and belief the materials comply with the Build America, Buy America Act (BABA) requirements of the Infrastructure Investment and Jobs Act of 2021 (PL 117- 58, §§ 70901-70953), or are the subject of a waiver approved by the applicable federal agency.”

It is the [subgrantee or contractor's name] responsibility to inform the Coquille Indian Housing Authority if a BABA-compliant product initially promised by the manufacturer or supplier is no longer available within the established timeframe or in the required quantity.

Additional details on fulfilling the BABA requirements can be found at [https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america).

\_\_\_\_\_ [subgrantee or contractor's name] understands and will comply with the BAP requirements applicable to this Agreement. (Contractor must initial here).”

- c. The contracts shall also require contractors and subcontractors to do the following:

- i Communicate BABA requirements in solicitations for bids to vendors for Iron and Steel Products, Manufactured Goods, and Construction Materials;
- ii Incorporate BABA requirements into bid documents and subcontracts, and ensure that BABA requirements are implemented during the design phase of the project, as applicable;
- iii Create and maintain thorough records of BABA compliance;
- iv Conduct market research to identify and use American-made Iron or Steel Products, Manufactured Goods, and Construction Materials;
- v Identify any Iron or Steel Products, Manufactured Goods, and Construction Materials that are not domestically available;
- vi Estimate costs using American-made materials when available, and identify any instances in which using American-made materials will increase the overall project cost by more than 25 percent;
- vii Create a cost comparison between American-made materials and foreign-sourced materials if American-made materials will increase the overall project cost by more than 25 percent;
- viii Identify time-sensitive project deadlines that could be impacted if a product is delayed or not available domestically;
- ix Identify instances in which non-availability or unreasonable cost waivers may be needed and provide CIHA with the information required to draft such waivers;<sup>16</sup>
- x Notify CIHA when Iron and Steel Products, Manufactured Goods, and Construction Materials have arrived on site and are ready for installation;<sup>17</sup>
- xi Inspect all Iron and Steel Products, Manufactured Products, and Construction Materials delivered to the site prior to installation, to confirm that these materials meet the BABA requirements. This entails reviewing any country-of-origin markings on the product itself and obtaining and reviewing manufacturer's certification letters;
- xii Provide all manufacturers' certifications to CIHA;
- xiii Only procure and install BABA-compliant Iron and Steel Products, Manufactured Products, and Construction Materials (unless there is a relevant waiver in place);

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<sup>16</sup> U.S. Dept. of Treasury, Build America, Buy America Act Policies and Procedures § 3.3 (Nov. 2023).

<sup>17</sup> U.S. Dept. of Treasury, Build America, Buy America Act Policies and Procedures § 3.3 (Nov. 2023).

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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xiv Reject shipments of any BABA non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials and ensure that a subcontractor does not invoice CIHA for BABA non-compliant items;

Report any non-BABA compliant materials or subcontractors to CIHA; and

xv Sign a BABA certification letter upon completion of the Infrastructure Project.

4. Contracts and bidding documents shall make clear that it is the manufacturers'/suppliers' responsibility to inform CIHA if a BABA-compliant product initially promised by the manufacturer or supplier is no longer available within the established timeframe or in the required quantity to meet the project specifications and timeline.
5. Contracts shall state that installation of materials or products that are not BABA-compliant shall be considered defective work.
6. **Purchase Orders.** The following provision (or a substantially similar provision, depending on the source(s) of the Federal Financial Assistance) shall be included in all purchase orders involving a project subject to the BAP:

“Pursuant to the Build America, Buy America Act (BABA), enacted as part of the Infrastructure Investment and Jobs Act (PL 117-58 §§ 70931-70941, 41 USC § 8301 note), the Tribal Recipient of the Federal Financial Assistance used to fund this Infrastructure Project is required to apply a domestic content procurement preference (the “Buy America Preference” or “BAP”) for all construction, alteration, maintenance, or repair of public infrastructure, including buildings and real property, unless application of the BAP has been waived by the applicable federal agency. Accordingly, [vendor/supplier's name] shall carry out this Agreement in accordance with BABA and its implementing regulations at 2 CFR Part 184, and 2 CFR §§ 200.322, and 200.327, and the Coquille Indian Housing Authority's BABA Procedures.

Pursuant to BABA and its implementing regulations, [vendor/supplier's name] shall ensure that all Iron and Steel Products, Manufactured Products, and Construction Materials procured for this project are made in America. Failure to comply with the BABA requirements will be considered a breach of contract.

For each Iron and Steel Product, Manufactured Product, and Construction Material procured for this project, [vendor/supplier's name] shall compile and submit to the Coquille Indian Housing Authority the following list of information:

- Type of covered material, (iron, steel, manufactured product, or construction material);
- Product or material procured;
- Costs per unit of product or material procured;

- Total cost of product purchase or contract;
- Manufacturer or Vendor;
- Special quality standards, if applicable; and
- Verification that the Iron and Steel Product, Manufactured Product, and Construction Material was made in America (e.g., Made in America label, product specifications, vendor or contractor certification, etc.). Verification may be in the form of a signed certification from the manufacturer of the Iron and Steel Product, Manufactured Product, and Construction Material, certifying “to the best of his/her knowledge and belief the materials comply with the Build America, Buy America Act (BABA) requirements of the Infrastructure Investment and Jobs Act of 2021 (PL 117- 58, §§ 70901-70953), or are the subject of a waiver approved by the applicable federal agency.”

It is the [vendor/supplier's name] responsibility to inform the Coquille Indian Housing Authority if a BABA-compliant product initially promised by the manufacturer or supplier is no longer available within the established timeframe or in the required quantity.

Additional details on fulfilling the BABA requirements can be found at [https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america).

\_\_\_\_\_ [vendor/supplier's name] understands and will comply with the BAP requirements applicable to this Agreement. (Vendor/supplier must initial here).”

#### **D. Procurement of Infrastructure Materials**

1. Bidding/Procurement documents shall specify that vendors/manufacturers will be required to submit manufacturer's certifications of BABA-compliance.
2. CIHA or the contractor shall collect country-of-origin information on all the materials and components of products.
3. **Manufacturer's Certifications and Documentation.** CIHA shall require manufacturers and suppliers to provide certifications or other documentation demonstrating that the products comply with BABA requirements on projects subject to BABA documentation.
  - a. Contracts and purchase orders shall specify that manufacturers and suppliers will be responsible for providing individual BABA certifications or other documentation for each Iron and Steel Product, Manufactured Product, and Construction Material. CIHA may choose to require the contractor, manufacturer, or supplier to provide one of the following:
    - i A copy of the Made in America or another label that indicates the product was made in the United States;

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- ii A copy of the product specifications that provides sufficient detail to conclude that the product complies with BABA;
  - iii A certificate or other documentation from the manufacturer or re-seller demonstrating that the product complies with BABA;
  - iv A signed certification from the contractor certifying “to the best of his/her knowledge and belief, all Iron, Steel, Manufactured Products, and Construction Materials installed on the project by the contractor and by any and all subcontractors and suppliers for the project comply with the Build America, Buy America Act (BABA) requirements of the Infrastructure Investment and Jobs Act of 2021 (PL 117- 58, §§ 70901-70953), or is the subject of a waiver approved by the Secretary of Housing and Urban Development or designee”; or
  - v A signed certification from the manufacturer of the product certifying “to the best of his/her knowledge and belief the product complies with the Build America, Buy America Act (BABA) requirements of the Infrastructure Investment and Jobs Act of 2021 (PL 117- 58, §§ 70901-70953), or is the subject of a waiver approved by the Secretary of Housing and Urban Development or designee.”
- b. If CIHA elects to use certifications, each certification, regardless of the product's categorization as Iron or Steel Product, Manufactured Product, and Construction Material, shall include the following five elements:
- i Project information (title and/or project number; location of project);
  - ii Specific product description;
  - iii Location of manufacture (city and state);
  - iv Citation of BABA requirements and assertion of BABA compliance; and
  - v Signature of an authorized representative (e.g., company representative, owner, product engineer).
- c. Certifications can also include the following:
- i Manufacturer product numbers;
  - ii A narrative description of the product; or
  - iii The cost of the components of Manufactured Products that are mined, produced, or manufactured domestically and/or certifying that the total cost of the

components of the domestic Manufactured Product is greater than 55 percent of the total cost of all components of the manufactured product.

d. Types of Manufacturers certifications

i **Manufacturer's Certification are:**

(a) Provided by a single manufacturer who was responsible for all steps of the manufacturing process, certifying that the product was made domestically;  
or

(b) Provided by the final manufacturer in a multi-manufacturer process who is willing to certify the product's BABA compliance. The manufacturer must include the name of all the manufacturers and locations where each step of manufacture was completed, and a short description of what the manufacturer did (e.g., melting, cutting, or fabrication).

ii **Step Certification:** Each entity (e.g., supplier, fabricator, manufacturer, and processor) that contributes to manufacturing the products certifies that their individual "step" in the process was performed domestically.

iii **Supplier Certification:** Suppliers can provide certifications if they know that the product was produced/manufactured domestically.

iv **Mill Certification:** A quality assurance record of the physical and chemical properties of raw material (e.g., rebar and sheet metal). A mill certification can certify that the material complies with BABA.

**E. BABA Compliance During Construction Phase**

1. CIHA shall ensure and document that all products installed during the construction phase of an Infrastructure Project comply with BABA.
2. CIHA shall take the following steps (or require the contractor/subcontractor to take these steps):
  - a. Inspect all Iron and Steel Products, Manufactured Products, and Construction Materials delivered to the site prior to installation, to confirm that these materials meet the BABA requirements. This includes reviewing any country-of-origin markings on the product itself and/or obtaining and reviewing manufacturer's certification letters;<sup>18</sup>
  - b. Only install BABA-compliant Iron and Steel Products, Manufactured Products, and Construction Materials (unless there is a relevant waiver in place);
  - c. Record all manufacturers' certifications;

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<sup>18</sup> U.S. Dept. of Treasury, Build America, Buy America Act Policies and Procedures § 3.3 (Nov. 2023).



**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- d. Reject shipments of any BABA non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials and ensure that any subcontractor/vendor does not invoice CIHA for BABA non-compliant items;
  - e. Report any non-BABA compliant materials or subcontractors to CIHA.
3. If a non-BABA-complaint material has already been installed, the contractor shall immediately notify CIHA. Installation of non-BABA-complaint material will be considered a breach of contract, and CIHA may pursue any and all available remedies, including but not limited to, if not unreasonable, requiring the contractor to remove and return the foreign product, procure the equivalent domestically-produced product, and install it, without the contractor charging for the labor to replace the product.

**F. BABA Compliance Documentation**

- 1. CIHA shall obtain, create, and maintain thorough documentation to demonstrate BABA compliance on projects subject to BABA.
  - a. This includes maintaining documentation of each quote that CIHA receives and whether or not the Iron or Steel, Manufactured Products, or Construction Materials comply with the Buy American Preference.
  - b. CIHA shall retain documentation for at least three years, or for a longer record retention period if specified in the applicable federal funding award.
  - c. CIHA shall retain copies of the following, as applicable:
    - i Bid documents; subawards; contracts/subcontracts; BABA product certifications; market research on product availability or unavailability; costs of domestic versus foreign products; price quotes; contractor and product approvals and denials; responses from manufacturers, distributors, or suppliers; any non-BABA compliant materials, contractors, or subcontractors; site visits, inspections, and other monitoring and oversight activities.
  - d. CIHA shall retain the following documentation regarding BABA waivers:
    - i Documentation of actual costs (e.g., invoices) for products and materials covered by an unreasonable cost waiver, as well as the quotes received to substantiate the unreasonable cost of domestically produced products.
    - ii BABA waiver requests and approvals, including any additional supporting documentation.

**IV. Waivers**

**A. Overview of Waivers**

1. **There are two types of waivers that may be granted by HUD or other federal agencies that have provided Federal Financial Assistance:** (1) general applicability (broad scope; applies to a project without obtaining additional federal approval) and (2) project-specific (requires additional approval process).
2. A waiver may be issued by HUD or the other relevant federal agency on the following grounds:
  - a. Public interest: Requiring the use of the American-made product would be inconsistent with the public interest.
  - b. Non-availability of materials: The product needed is not produced in the United States in sufficient quantities or of a satisfactory quality.
  - c. Unreasonable Cost Waiver: The inclusion of a product made in America will increase the cost of the overall project by more than 25 percent.
3. **Project-specific waivers**
  - a. CIHA may request a project-specific waiver from HUD and/or other federal agencies who have contributed Federal Financial Assistance.
4. **Federal Financial Assistance from Multiple Federal Agencies**
  - a. If CIHA receives Federal Financial Assistance from multiple federal agencies for the same project, CIHA must check the waiver requirements and processes for each federal agency. Each federal agency may have different BABA requirements, timelines, and waiver processes. A waiver granted by one federal agency may not exempt the project from another federal agency's BABA requirements.

## **B. General Applicability Waivers**

1. CIHA shall consider whether the Infrastructure Project funded by Federal Financial Assistance qualifies for an existing HUD or other federal agency general applicability waiver. General applicability waivers apply to a project without CIHA needing to obtain additional federal approval.
  - a. CIHA shall review updated federal guidance and notices on each waiver before determining whether a project is covered under a waiver.
2. Examples of current multi-agency waivers include:
  - a. **Tribal BABA Waiver for awards of \$2.5 million or less:** exempts awards and subawards to tribes and TDHEs of \$2.5 million or less from BAP requirements until

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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January 10, 2030.<sup>19</sup> Awards and subawards at or below \$2.5 million are exempt from BAP requirements under the following conditions:

- i The total prime award or subaward does not exceed \$2.5 million, and
  - ii The award or subaward amount does not exceed \$2.5 million for the life of the award.
- b. **Manufactured Products Waiver:** exempts Manufactured Products from BAP requirements between January 10, 2025 and September 30, 2026, regardless of the Federal Financial Assistance award amount.<sup>20</sup> CIHA may purchase non-compliant Manufactured Products when expending Federal Financial Assistance that is obligated on or before September 30, 2026.
3. Existing HUD waivers are in effect for the following circumstances:
- a. De Minimis Waiver: for a “De Minimis” portion of an Infrastructure Project, defined as a cumulative total of no more than 5 percent of the total cost of the Iron or Steel Products, Manufactured Products, and Construction Materials, up to a maximum of \$1 million.
  - b. Small Grants Waiver: for Infrastructure grants and Infrastructure Projects for which the total cost (including HUD funding and funding from any other source) is equal to or less than the current Simplified Acquisition Threshold of \$250,000, set in the Federal Acquisition Regulations (FAR) at 48 CFR Part 2.
    - i If the Federal Financial Assistance provided by HUD is combined with Federal Financial Assistance from another Federal agency, and the total amount of Federal Financial Assistance in a single Infrastructure Project is greater than the Simplified acquisition threshold (currently \$250,000) then the small grants waiver will not apply to the Federal Financial Assistance provided by HUD.<sup>21</sup>
    - ii “If the Infrastructure Project includes the use of Force Account Labor, the cost of labor is excluded from the associated acquisition of Covered Materials required to accomplish work, and therefore would not be included as part of the above calculations.”<sup>22</sup>

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<sup>19</sup> U.S. Dept. Interior, [General Applicability Public Interest Waiver to Indian Tribes](#), at 1 (Jan. 10, 2025) (“Tribal BABA Waiver”). The multi-agency Tribal BABA Waiver applies to Federal Financial Assistance from eight federal agencies: (1) HUD, (2) Department of the Interior, (3) Department of Agriculture, (4) Department of Commerce, (5) Department of Education, (6) Department of Energy, (7) Environmental Protection Agency, and (8) Federal Emergency Management Agency.

<sup>20</sup> Tribal BABA Waiver, at 1.

<sup>21</sup> BABA Implementation Guidance for Tribal Recipients at 10.

<sup>22</sup> *Id.*

- iii Projects cannot be artificially subdivided to reduce the total cost of a project for purposes of applying HUD’s small grants waiver.
  - c. Exigent circumstances: for circumstances where undertaking the otherwise Buy American Preference-covered Infrastructure Project without delay is necessary to protect life, safety, or provide necessary security to residents or community members, or to prevent the destruction of property.<sup>23</sup>
    - i Exigent circumstances include “remediation of defects impacting housing quality standards that existing HUD policy requires to be completed within 30 days or less.”<sup>24</sup>
    - ii ICDBG-IT awards that are not exempt due to a Presidentially declared disaster are exempt under the exigent circumstances waiver.<sup>25</sup>
    - iii To qualify for this waiver, the remediation must be carried out within the time period required by the applicable HUD policy.<sup>26</sup>
- 4. If CIHA determines that the project qualifies for an existing general applicability BABA waiver, CIHA shall maintain documentation demonstrating how the project qualifies for the waiver.

### C. Applying for a Specific Waiver

1. **Federal Financial Assistance from Multiple Federal Agencies.** If CIHA has a project that is being funded by Federal Financial Assistance from multiple federal Agencies, CIHA shall apply for a waiver through the Federal Agency that provided the largest amount of funding to the project.<sup>27</sup>
2. **Process of Obtaining a BABA Specific Waiver**
  - a. Before submitting a BABA waiver request to a federal agency, CIHA shall first conduct market research to determine whether BABA-compliant Iron or Steel Products, Manufactured Products, or Construction Materials are available.

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<sup>23</sup> U.S. Dept. Housing & Urban Devel., Docket No. FR-6331-N-05 Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance, 6 (Nov. 23, 2022).

<sup>24</sup> U.S. Dept. Housing & Urban Devel., Docket No. FR-6331-N-05 Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance, 6 (Nov. 23, 2022).

<sup>25</sup> U.S. Dept. Housing & Urban Devel., NOTICE PIH 2024-35 Build America, Buy America Act (BABA)—Implementation Guidance for Tribal Recipients, § 5, footnote 2 (Oct. 11, 2024).

<sup>26</sup> U.S. Dept. Housing & Urban Devel., NOTICE PIH 2024-35 Build America, Buy America Act (BABA)—Implementation Guidance for Tribal Recipients, § 8(F)(i) (Oct. 11, 2024); U.S. Dept. Housing & Urban Devel., Docket No. FR-6331-N-05 Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance, 6 (Nov. 23, 2022).

<sup>27</sup> See HUD BABA Waiver Form, [https://www.hud.gov/sites/dfiles/Main/documents/BABA\\_Waiver\\_Form.pdf](https://www.hud.gov/sites/dfiles/Main/documents/BABA_Waiver_Form.pdf).

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- b. CIHA shall prepare a waiver application using the HUD BABA Waiver Request Form or the waiver form available through the applicable federal agency.
    - i The waiver shall include detailed information on CIHA's market research, including who conducted the research, when they conducted the research, which sources they used, and the methods they used to conduct the research.<sup>28</sup>
    - ii For HUD project-specific waivers, the waiver application shall include:
      - (a) A detailed justification for the use of materials mined, produced, or manufactured outside the United States.
      - (b) "A certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers."<sup>29</sup>
  - c. CIHA shall submit the waiver application to the applicable federal agency.
    - i To submit a waiver to HUD, submit the waiver through HUD's BABA Waiver Submission Site.
  - d. The federal agency will then publish the waiver in the Federal Register for fifteen days for public comment.
  - e. After the public comment period, the federal agency will submit the waiver request to OMB for approval.
  - f. After the public comment period, OMB will decide whether to approve the waiver.
  - g. CIHA may contact the federal agency to see if they have guidance or technical assistance, as needed.
    - i For questions on a HUD grant, email HUD at BABAWaiver@HUD.gov with any waiver-specific questions or technical difficulties.
    - ii Refer to ONAP BABA Guidance, as well as ONAP for additional technical guidance.
3. **Public Interest Waiver.** To apply for a Public Interest Waiver, per HUD guidance, CIHA shall include the following in the waiver application:

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<sup>28</sup> Office of Management and Budget, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, M-24-02, at 5 (Oct. 25, 2023) <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>

<sup>29</sup> U.S. Dept. Housing & Urban Devel., CPD Implementation Guidance for the Build America, Buy America Act's domestic content procurement preference as part of the Infrastructure Investment and Jobs Act, Notice: CPD-2023-12 (Nov. 2, 2023) <https://www.hud.gov/sites/dfiles/OCHCO/documents/2023-12cpdn.pdf#page=6>.

- a. An explanation of how a waiver of the BABA requirement for the project or covered material will serve the public interest.
- b. A detailed description of the definite impacts on the CIHA housing projects and Coquille Indian Community if specific non-BABA-compliant items, products, or materials are not utilized in the Infrastructure Project.<sup>30</sup>

#### 4. **Non-Availability of Materials Waiver**

- a. To apply for a Non-Availability of Materials Waiver per HUD guidance, CIHA shall include the following in the waiver application:
  - i A detailed description of the steps that CIHA has taken to conduct market research and how CIHA has adequately considered alternative products that meet the definition of Made in America.
  - ii A description of the due diligence that CIHA “performed, including information, quotes, and/or responses from manufacturers, distributors, or suppliers.”<sup>31</sup>
  - iii Pursuant to the ONAP BABA Guidance, CIHA may also apply for a non-availability waiver from HUD for unique tribal conditions. CIHA should provide a detailed justification and provide strong evidence to support such a waiver request. The following are examples of unique tribal conditions demonstrating non-availability:
    - (a) Short construction season/extreme weather or environmental conditions make it impractical to purchase BAP-compliant materials in a timely manner;
    - (b) Shipping restrictions, such as shipment by barge, air cargo, or other limited/extreme means of transportation make it impractical to purchase BAP-compliant materials in a timely manner;
    - (c) Lack of vendors prevents effective access to BAP-compliant materials, where vendors will not ship the materials to remote locations, will not respond to material inquiries, or cannot provide cost estimates;
    - (d) Lack of contractors prevents effective access to BAP-compliant materials, where, after repeated attempts, an insufficient number of bids were collected from available contractors due to BAP requirements.

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<sup>30</sup> U.S. DEPT. HOUSING & URBAN DEVEL., WHAT IF I NEED A WAIVER? (last viewed July 23, 2024) [https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america/waiver](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver)

<sup>31</sup> U.S. DEPT. HOUSING & URBAN DEVEL., WHAT IF I NEED A WAIVER? (last viewed July 23, 2024) [https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america/waiver](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver)

**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

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- (e) Compliance with Indian preference (25 USC § 5307(b)) or tribal preference (e.g., 25 USC § 4111(k)) contracting requirements prevent compliance with BAP, demonstrated by lack of qualifying bids received.
- (f) Conditions beyond the control of CIHA make BAP-compliant material not readily available, as demonstrated by “strong evidence” submitted to HUD.

<sup>32</sup>

5. **Unreasonable Cost Waiver.** To apply for an Unreasonable Cost Waiver, per ONAP BABA Guidance, CIHA shall include the following in the waiver application:

- (i) Describe the project and related planned procurements under the project;
- (ii) Demonstrate that market research was conducted and adequately considered items that meet the definition of Made in America;
- (iii) Describe the due diligence performance including market research results, quotes from vendors, and/or responses from manufacturers, distributors, or suppliers;
- (iv) Determine additional cost of BABA-compliant products compared to other products;
- (v) Demonstrate that BABA compliance increases total project costs by more than 25 percent; and
- (vi) Determine the dollar amount to be waived.

**V. Procedures for Addressing Noncompliance**

- 1. Based on HUD guidance, CIHA shall develop and add in procedures for addressing situations in which a contractor, manufacturer, or supplier fails to comply with BABA.
- 2. If HUD develops specific guidance on how to address noncompliance, CIHA may follow that guidance.
- 3. Until HUD develops specific guidance, CIHA can follow the standard procurement procedures for addressing noncompliance:
  - a. Have a code of conduct; and
  - b. Develop procedures/policies describing the consequences for violations.

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<sup>32</sup> U.S. Dept. Housing & Urban Devel., NOTICE PIH 2024-35 Build America, Buy America Act (BABA)—Implementation Guidance for Tribal Recipients, § 13 (Oct. 11, 2024).

- i The noncompliance procedures shall state that installation of materials or products that are not BABA-compliant shall be considered defective work and a violation of the contract.
- ii The procedures shall stipulate the penalties, sanctions, and other remedies for violations/defective work.



**COQUILLE INDIAN HOUSING AUTHORITY**  
**PROCUREMENT POLICY**

Appendix B: BABA Procedures  
Attachment 1

ONAP Buy America Preference Applicability Determination Checklist

**I. Project Information** (Complete the Project Information below)

**GRANT PROGRAM:**

**GRANT NUMBER:**

**GRANT OBLIGATION DATE:** (date grant agreement signed by the Area ONAP Administrator)

**AMOUNT OF ONAP GRANT FUNDING: \$**

**AMOUNT OF OTHER FUNDING:** (if applicable)

**PROJECT DESCRIPTION:** (Type of project and the beneficiaries, e.g., Low-Income Tribal Housing)

**Number of Dwelling Units in the Project:** (Total number and type of dwelling units in the project)

**II. Applicability Determination** (Answer the following questions to determine whether and how the BAP is applicable to your project)

**1. Is the project a Public Infrastructure project, consistent with 2 CFR 184 and OMB Guidance M-24-02?**

*When determining if a particular project is considered public infrastructure that serves a public function, grantees should consider 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 private housing for personal use (i.e., a building with 1 to 4 dwelling units).*

☐ **Yes.** Continue to Question 2.

☐ **No.** The project is not a public infrastructure project. If you answer 'No', the BAP does not apply. Stop here.

**2. Is the project funded using a covered ONAP program?** Check all that apply in chart 2.a.

**2.a. Funded with BAP Covered Grant Programs**

<input type="checkbox"/>	Yes, funded with IHBG
<input type="checkbox"/>	Yes, funded with IHBG-Competitive
<input type="checkbox"/>	Yes, funded with NHHBG
<input type="checkbox"/>	Yes, funded with ICDBG Single Purpose
<input type="checkbox"/>	Yes, funded with Title VI Loan Guarantee

- ☐ **Yes.** *Continue to Question 3.*
- ☐ **No.** The Activity or Project is not funded **in any part** with BAP Covered Grant programs. *If you answer ‘No’, the BAP does not apply. Stop here.*

Note: Projects funded entirely using the following grant programs are not subject to the BAP:

- IHBG-CARES
- IHBG-ARP
- NHHBG-ARP
- ICDBG-IT
- ICDBG-CARES
- ICDBG-ARP
- Tribal HUD VASH
- Section 184 Indian Housing Loan Guarantee Program

3. Will covered materials, as defined in 2 CFR 184, be used in the project? *Check all materials in chart 3.a. that apply.*

**3.a. BAP Covered Materials Used in Project**

<input type="checkbox"/>	Yes, Iron or steel is used.
<input type="checkbox"/>	Yes, Specifically Listed Construction materials are used.
<input type="checkbox"/>	Yes, Manufactured products are used (Tribal Recipients may purchase non-compliant manufactured products with FFA obligated through 9/30/26).

- ☐ **Yes.** *Continue to Question 4.*
- ☐ **No.** The project will not incorporate any covered materials. *If you answer ‘No’, the BAP does not apply. Stop here.*

4. ☐ **Is the Grant Obligation Date of the covered program funds** (e.g., the date the grant agreement was signed by the Area ONAP Administrator) **used to purchase covered materials on or after October 1, 2024?**

- ☐ **Yes.** The Obligation Date of the covered funding used to procure the following covered materials was on or after October 1, 2024.
- ☐ **No.** The Obligation Date of the covered funding used to procure the covered materials was before October 1, 2024. *If you answer ‘No’, the BAP does not apply. Stop here.*

5. **Does the procurement of Covered Material fall within the *De Minimis* exemption under Section 203(g) of NAHASDA?**

- ☐ **Yes.** The procurement is entirely funded by IHBG funds and totals less than \$5,000.
- ☐ **No.** The procurement is funded in whole or in part by Federal funds aside from IHBG and/or the value of the procurement is more than \$5,000.

**6. Do any of the following HUD General Waivers apply to the project? Check all waivers in chart 6.a. that apply. Public infrastructure projects that meet the conditions of a general waiver may be exempt in whole or in part from the BAP.**

☐ **Yes.** The HUD general waiver(s) selected below apply to this project.

**6.a. HUD General Waivers: Small Grants, Small Purchase, and Exigent Circumstances**

☐ The total cost of the project from all sources (Federal and non-Federal) is \$250,000 or less; or the award or subaward being used to fund the activity is at or below \$2.5 million and not being combined with other funding that is subject to BABA. If checked, the Waiver applies, and the project is exempt from the BAP.

☐ There is an urgent need to immediately complete the project because of an exigent circumstance such as a threat to life, safety, or property. If checked, the Exigent Circumstances Waiver applies, and the project is exempt from the BAP.

Attach documentation of the conditions of the waiver to this checklist and retain in the procurement record. If you answered 'Yes', the BAP does not apply. Stop here.

☐ **No.** The HUD General Waivers listed above do not apply to this project. Continue to Question 7.

**7. Was the *de minimis* waiver applied to a portion of the cost of Covered Materials?**

The BAP can be waived for covered materials from foreign or unknown sources at a cost at or below the *de minimis* limit of 5 percent of the total cost of covered materials or \$1 million (whichever is less). The BAP will still apply to other covered materials used in the project.

☐ **Yes.** The *de minimis* waiver was applied to 5 percent (or \$1 million, whichever is less) of the total cost of **covered materials**, as listed in line c. in chart 7.a. below.

**7.a. De Minimis Waiver Calculation**

a. Enter the total cost of all Covered Materials:	\$
b. Multiply the cost of all Covered Materials by 0.05 (5%):	\$

c. Costs for which the BAP can be waived (the lesser of the amount in line b. or \$1,000,000)	\$
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Complete the chart above and attach a list of covered materials and their associated costs to which the *de minimis* limit has been applied. Continue to Question 8.

☐ **No.** The *de minimis* waiver was not applied. Continue to Question 8.

**8. Was the *manufactured product* waiver applied to a portion of the cost of Covered Materials?**

☐ **Yes.** The *manufactured products* waiver was applied to a portion of **covered materials** for the covered project.

**8.a.** List the manufactured products exempt from the BABA requirements and the date of procurement.

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☐ **No.** The *manufactured products* waiver was not applied. Continue to Question 9.

**9. Is there a need to request a project-specific or product-specific waiver?**

If the BAP applies to a project and general waivers are not applicable, then a grantee may consider whether to apply for a project-/product-specific waiver.

☐ **Yes.** A project-specific or product-specific waiver must be approved by the Office of Management and Budget (OMB) before it is published.

Refer to the BABA Implementation Guidance for Tribal Recipients for instructions on submitting a waiver request.

☐ **No.** The BAP is applicable to the project, and it will be procured in compliance with BABA.

\_\_\_\_\_  
Completed by

\_\_\_\_\_  
Date Completed