



USET

SOVEREIGNTY PROTECTION FUND

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January 9, 2023

The Honorable Deanne Criswell
Administrator
Federal Emergency Management Agency
500 C St., SW
Washington, DC 20472

Dear Administrator Criswell,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Tribal consultation on the Build America, Buy America Act (BABAA) hosted by the Federal Emergency Management Agency (FEMA) on December 8, 2022. Included in the Infrastructure Investment and Jobs Act, BABAA established a new purchasing preference for American-made products to be utilized in all federally funded infrastructure projects. Despite ongoing federal efforts to consult with Tribal Nations as well as temporary general applicability exemptions, we are still concerned that Tribal Nations will be affected disproportionately by BABAA. Some federal agencies are seeking, and some have received, BABAA waivers for programs that Tribal Nations access. However, we strongly recommend that all Tribal Nations receive a blanket exemption from BABAA, which would be consistent with the federal government's stated commitment to uphold Executive Order 13175.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

The Federal Government Has Consistently Neglected its Infrastructure Obligations to Tribal Nations

Tribal Nations continue to experience some of the greatest disparities among all populations, especially in areas of critical infrastructure due to the federal government's failure to uphold its trust and treaty

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), , Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

obligations and fully fund programs and services for Tribal Nations. Funding of this obligation, as with others, remains grossly inadequate and is a barely discernable and decreasing percentage of department and agency budgets. This chronic underfunding of federal programs has contributed to the disastrous impacts of the COVID-19 pandemic on Tribal Nations. These chronic failures have persisted for centuries throughout changes in Administration and Congress, and the COVID-19 pandemic has only served to compound these budget and service delivery deficits. It is through the lens of this public health emergency that the failure of the federal government to uphold its most basic trust and treaty obligations has become ever more apparent. For this reason, it is critically important that infrastructure deployment in Indian Country be prioritized and permitted to proceed without impediment.

Tribal Nations Should be Exempt from the Requirements of the Build America, Buy America Act

We urge FEMA to strongly consider implementing a general applicability waiver in perpetuity for all Tribal Nation projects under BABAA. To truly support Tribal Nation rebuilding from the centuries of neglect in infrastructure funding and the ramifications of the COVID-19 pandemic, FEMA must use its full BABAA waiver authority to ensure infrastructure deployment is not further impeded for Tribal Nations. We have also requested that the Office of Management and Budget issue a blanket BABAA waiver for Tribal Nations across agencies. However, as we await further guidance from OMB, FEMA should take action in accordance with trust and treaty obligations. This action would also be consistent with upholding Sec. 6 of Executive Order 13175, which encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements.

This action will further ensure that rising inflation costs and continuing issues with the national supply chain do not disproportionately affect Tribal Nations, especially as we continue to recover from the ramifications of the COVID-19 pandemic and utilize federal funds to address our long-standing infrastructure issues. Programs and services for Tribal Nations have consistently represented a small percentage of the federal budget, yet the federal government has neglected its trust and treaty obligations to fully fund these programs and services. It is due to this failure that Tribal Nations continue to deal with dilapidated, and in some cases non-existent, critical infrastructure in our communities. This includes governmental infrastructure, such as administrative capacity to implement additional federal requirements under BABAA.

In addition to addressing the centuries of neglect in fully funding Tribal Nation services, adopting a general applicability waiver for Tribal Nations from the requirements of BABAA will also benefit FEMA since it would avoid the need to submit specific budget line items for Tribal programs to OMB. Application of BABAA purchasing requirements is likely to undermine the overall goals of advancing Tribal Nation sovereignty, self-determination, and infrastructure deployment on our lands. While Tribal Nations may purchase a product or supply consistent with the requirements of BABAA if they are widely available and affordable, we should not be subject to these requirements if they would delay an infrastructure project or go over established budgets for a project. Tribal Nations already have limited access to a wide variety of products, supplies, and personnel, and enforcing BABAA purchasing requirements would further exacerbate this issue.

Selected Issues from FEMA Framing Paper

While we urge FEMA to issue a General Applicability Waiver to all Tribal Nation projects, we offer the following comments specific to issues raised in FEMA's framing paper for consideration:

1. d. Tribal Nation Infrastructure Material Production

USET SPF has consistently advocated for greater utilization of Tribal services and products in the federal procurement process. For example, the Buy Indian Act extends only to select federal agencies and has never been properly implemented. Since the federal government has an

obligation to assist Tribal Nations with economic development and nation rebuilding, we ask that FEMA incentivize the use of these services and products under BABAAA requirements. This would have enormous benefits for Indian Country and our local economies.

2. a. De Minimus Threshold

As FEMA notes in its framing paper, construction costs in Indian Country are likely to be higher than in other places throughout the United States. With this in mind, USET SPF encourages FEMA to consider a higher de minimus threshold for Tribal Nation infrastructure projects than it might for other types of projects. Given our lengthy history of land loss and the federal government's trust and treaty obligations to Tribal Nations, this increased threshold should apply to all Tribal Nation infrastructure projects – regardless of whether they are located on or off Tribal homelands.

2. b. Small Grants

If FEMA feels that its only option to provide additional 'small grants' relief to Tribal Nations is the use of the simplified acquisition threshold, then we encourage its use. However, similar to the De Minimus Threshold, FEMA recognizes that construction costs are higher in Indian Country. In concert with its obligation to promote nation rebuilding and infrastructure development for Tribal Nations, we urge FEMA to consider a higher threshold for a 'small grants' waiver.

3. a. Market Study/Research

As discussed earlier in our comments, centuries of federal action designed to destabilize our governments has left many Tribal Nations with limited administrative capacity. With this in mind, we urge FEMA to utilize simple attestation when issuing nonavailability waivers. If this is not possible, we ask that FEMA utilize a streamlined approach in verifying that appropriate research has been conducted. In addition, FEMA should avoid requiring that overly extensive research be conducted in order to satisfy the research requirement.

4. a. Cost Comparison

Similarly, FEMA should strongly consider using Tribal Nation attestation as documentation for Unreasonable Cost Waivers. If attestation is not possible, then FEMA should seek to streamline this process, so it is not administratively burdensome for Tribal Nations.

Conclusion

We appreciate FEMA's diligence in consulting with Tribal Nations on BABAA. To better deliver upon trust and treaty obligations, as well as prevent delays in long-awaited infrastructure construction on Tribal Lands, we urge FEMA to provide a General Applicability Waiver from the requirements of BABAA to Tribal Nation projects. We look forward to continued consultation from FEMA and other federal agencies on this issue to ensure Indian Country's infrastructure priorities are addressed in all federal funding efforts. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director