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MAY 04 2012

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)
STAFF DIRECTOR, DEFENSE LOGISTICS AGENCY
INSTALLATION SUPPORT ENVIRONMENT (DS-E)

SUBJECT: Defense and State Memorandum of Agreement (DSMOA) Program Eligibility

In accordance with this office's memorandum of December 19, 2008, "Clarification of Eligibility for Reimbursement of State Activities for the Department of Defense and State Memorandum of Agreement (DSMOA) Program," DoD and state representatives met and developed consensus recommendations on guidance on DSMOA funding eligibility. My office reviewed these recommendations and determined that they are consistent with current policy. The attached guidance is hereby adopted as DSMOA program eligibility policy. My office will incorporate this guidance in the next revision of DoD Manual 4715.20, Defense Environmental Restoration Program (DERP) Management.

My point of contact on this matter is Mr. Terry Bowers, at 703-693-9447,
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John Conger
Assistant Deputy Under Secretary of Defense
(Installations and Environment)

Attachment:
As stated

CLEARED
For Open Publication

May 05, 2017

Department of Defense
OFFICE OF PREPUBLICATION AND SECURITY REVIEW

17-S-1663

May 05, 2017

**DEFENSE STATE MEMORANDUM OF AGREEMENT (DSMOA)
POLICY FOR ELIGIBILITY OF STATE SERVICES**

Department of Defense
OFFICE OF PREPUBLICATION AND SECURITY REVIEW

The Department of Defense (DoD) requires States apply for a Cooperative Agreement (CA) in order to obtain funding for services in support of Defense Environmental Restoration Program response actions at eligible DoD installations.

States can obtain reimbursement for environmental restoration services at installations listed on the State's CA DoD Installations Covered by Agreement (Attachment A) using obligated funds identified on the CA Procedure for State Reimbursement (Attachment B), as agreed in the Joint Execution Plan (JEP) between the DoD Component and the State. The Attachment A is part of the scope of the CA and lists only those installations identified by the DoD Component where eligible work is planned during the CA period. Changes to the Attachment A can be made at any time during the performance period by means of a bilateral modification to the CA. Bilateral modifications are made between the State and the U.S. Army Corps of Engineers (USACE) Grants Office, following mutual concurrence of the State and DoD Component to the change.

The DSMOA Attachment A and the CA Attachment A do not need to be identical or agree with each other. The DSMOA Attachment A is a static document and is not modified for administrative changes. The CA Attachment A is the living document, including all modifications to date, that sets forth the list of installations covered by the Cooperative Agreement and listing them by DoD Component, fund type, and installation name.

Eligible State Services

Cost associated with providing State services are eligible for DSMOA reimbursement if the services are 1) incorporated in the current CA, 2) identified as eligible in the State's DSMOA, and (3) agreed in a JEP for the site. A summary of the typical eligible services, consolidated from the States' DSMOAs, is provided below. To be eligible, the State services listed below must be in furtherance of DERP funded DoD environmental restoration (ER) activities at installations listed on Attachment A.

There are three "levels" of requirements for state activities eligible for reimbursement under the DSMOA: (1) statutory; (2) the DSMOA as implemented in accordance with the Department of Defense Grant and Agreement Regulations (DoDGARs)(32 CFR Parts 21-37, DoD 3210.6-R); and (3) the CA. To be eligible for reimbursement under the DSMOA, services provided by a state must meet the requirements of all three levels, as well as, certain general Federal requirements, such as those contained in Office of Management and Budget Circulars A-87, A-110, and A-128.

The DSMOAs are based on the authority of 10 U.S.C. § 2701(d) to obtain, by agreement, services from certain other entities to assist the DoD in carrying out the responsibilities of the Secretary of Defense under section 2701. One requirement of section 2701(d) is that the State services received must be in furtherance of the responsibilities of the Secretary of Defense under

10 U.S.C. § 2701, not in furtherance of the responsibilities of the other party. This limitation only allows payment under section 2701(d) of costs of regulatory activities sought by the DoD. Any service that is not in furtherance of the Secretary's responsibilities under the DERP would be ineligible for reimbursement. One important factor indicating that a service may be within the Secretary's responsibilities under the DERP is that the actions at the site are eligible for funding from one of the five environmental restoration accounts or from one of the two Base Realignment and Closure (BRAC) accounts. A second requirement of section 2701(d) is that the DoD must receive services that address a responsibility of DoD. Section 2701(d) only provides for payments to an otherwise eligible entity for activities that qualify as a service in furtherance of the DERP.

The following four sections provide listings of eligible services within the categories of DSMOA/CA Administration, Environmental Responses, Property Transfer, and Other. The fifth and final section lists Ineligible State Services.

1. *DSMOA/CA Administration*

Preparation, administration, and determination of scope and applicability of the DSMOA, CAs, and Joint Execution Plans (JEP), excluding any costs which may be incurred in anticipation of litigation against the U.S. Government.

2. *Environmental Responses*

- Technical reviews, comments, and recommendations on all documents or data submitted to the State under an agreement for such review between the State and a DoD Component, all documents or data that a DoD Component requests the State to review, and all documents or data that are provided by a DoD Component to the State for review as a result of a request from the State made under applicable State law.
- Identification and explanation of State applicable, or relevant and appropriate cleanup requirements related to response actions at installations. (40 CFR 300.5)
- Site visits to review DoD response actions.
- Participation with DoD in public education and public participation activities in accordance with applicable cleanup requirements for public involvement. This includes services provided at the request of DoD in connection with participation in Restoration Advisory Boards and Technical Review Committees.
- Technical reviews, comments, and recommendations on all documents and data regarding prioritization of sites pursuant to Section II.B of the DSMOA.
- Performance of independent quality assurance/quality control (QA/QC) efforts by the State associated with DoD sampling activities.

- Land use control (LUC) implementation reviews and participation in 5-year reviews, where performed by a DoD Component.

3. *Property Transfer*

- Property transfer documents or data are generally not prepared for DoD to carry out response actions on ER sites; review of these documents may not be eligible. Nevertheless, technical reviews, comments, and recommendations of sections of the following property transfer documents or data that concern ER actions may be requested by a DoD Component because they address DERP funded issues, and, if requested and included in a JEP, may be eligible under a DSMOA:
 - Environmental Baseline Survey (EBS)
 - Environmental Condition of property (ECP)
 - Finding of Suitability to Transfer (FOST)
 - Finding of Suitability to Lease (FOSL)
- Technical reviews of sections of a Finding of Suitability for Early Transfer (FOSET)/Covenant Deferral Request (CDR) documents or data addressing DERP funded issues.
- Technical review of an Environmental Services Cooperative Agreement (ESCA) and, where DoD retains direct responsibility for conducting ER activities, services provided to implement an ESCA. Where the ESCA transfers the implementation responsibility to a non-DoD entity, the ESCA also provides funding to the recipient to cover future State support services; such services would not be eligible under the DSMOA.
- Clean Parcel Determination. State review of sections of the document addressing DERP funded actions may be eligible under these limited circumstances: (1) DoD had a reasonable basis to believe that environmental contamination may have occurred on the subject parcel, (2) the DoD Component generated written materials as a result of an investigation that supports no contamination on the parcel; and (3) such written materials were not previously provided to the State to give the State an opportunity to review and comment on the issue of whether a release has occurred that requires a response action.
- Drafting Administrative Orders on Consent (AOC) that are not being prepared for enforcement purposes, but to document agreed ER actions to be taken. This may be eligible if in support of DERP activities and at DoD request (e.g. early transfer). Not eligible if related to enforcement against DoD or any other party.
- Technical review of Operating Properly and Successfully (OPS) documentation.
- Review of a LUC Implementation Plan describing a land use notice, covenant, environmental easement, or equivalent, developed by the DoD as part of the remedial selection process.

4. *Other Services*

- Other State services as set out in the State-specific DSMOA.
- Participation in any DoD established committee, sub-committee, or workgroup as set out in the State-specific DSMOA.
- Training may be eligible when it provides technical knowledge to a State to assist DoD in carrying out DERP funded DoD activities for an installation listed on the Attachment A, is not otherwise covered by state overhead, is requested in advance by a DoD Component and included in a JEP, and is not otherwise ineligible.
- Formal and informal dispute resolution.
- State participation in internal State meetings/actions that do not include representatives of the DoD Component may be eligible when they are conducted in furtherance of a DoD response action that is DERP funded (e.g. technical meetings that assist the State to review a document submitted by DoD for their review). There are a number of external meetings that may or may not be eligible. As a general rule, attendance at external meetings would need to be DERP related, facility relevant, and requested by a DoD Component to be eligible.
- Review and comment on prioritization of eligible sites if included in Section II B. of the State's DSMOA.
- Interpretation and implementation of interagency agreements between the State and DoD concerning the conduct of ER actions by DoD (e.g., Federal Facility Agreement's, installation-specific agreements, State/DoD Component voluntary agreements).

5. Ineligible State Services

- Activities not associated with projects funded by ER or BRAC funds.
- Activities related to regulatory enforcement. Examples include:
 - preparation of stipulated penalties assessment.
 - preparation of an enforcement order, unless that enforcement order is an AOC as set forth above, such that it is in support of DERP activities and at the DoD's request (e.g. early transfer).
 - preparation of a Notice of Violation (NOV).
 - costs incurred in anticipation of and preparation for litigation, or the preparation or submission of a claim.
- Services that could be performed by a contractor under a government contract in accordance with the Federal Acquisition Regulation (e.g., well drilling or landfill cover maintenance or repair).

- Services associated with projects at an installation not listed in the State's current CA Attachment A.
- Services that create a conflict of interest, or appearance of a conflict of interest, between DoD and the State or a private sector entity.
- Any activities constituting project execution required to be performed by DoD.
- Regulatory activities associated with the development or promulgation of State regulations, development of State guidance documents, or other State regulatory issuances.
- Sampling and monitoring activities (other than independent QA/QC by the State).
- Activities which are disallowed under Federal law, the DoDGAR, or under any OMB Circular applicable to grants and CAs with States, including Circulars A-87, A-133, or any other guidance or regulation published at 2 CFR Subtitles A or B.
- State support services related to response actions undertaken by parties other than DoD, except for those remediation services performed for DoD under a procurement contract issued by a DoD Component.
- Real Property Transfer Documents – National Environmental Policy Act Record of Decision (ROD), Environmental Impact Statements (EIS), Environmental Assessments (EA), or deeds and any other real property conveyance instruments except that portion of a deed or conveyance document that includes a LUC.

The Grants Officer is normally the final authority in determining whether State support services are eligible or ineligible. States may dispute Grants Officer's decisions using the formal dispute resolution process in the DSMOA and appealed in accordance with the DoDGARs.