



**ACQUISITION
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**OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000**

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**MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH)**

SUBJECT: Clarification of Eligibility for Reimbursement of State Activities for the Department of Defense and State Memorandum of Agreement (DSMOA) Program

The Department of Defense (DoD) Environmental Restoration Program (DERP) relies upon our relationships with state (and territorial) governments to ensure quality cleanups in a timely and cost effective manner. The DSMOA Program has been successful in supporting the DERP program through partnerships with states. We are striving to improve the DSMOA program. We are providing this guidance to assist in the executing agent's determination of which state activities are eligible for reimbursement under the DSMOAs and supporting cooperative agreements. This guidance provides a structure to determine eligibility for services provided. Types of state services that might be eligible for reimbursement include reviews by states of certain DERP documents, participation in guidance development, and participation in meetings.

The goals of this guidance are to ensure that states receive the full reimbursement for their services to which they are entitled under the DSMOA program and to clarify and communicate policy and procedures for requests for reimbursement. To this end, we plan to establish a committee of DoD and state representatives to provide additional uniformity and clarity among all interested parties. Details will be forthcoming in future correspondence.

We have prepared guidance (Attachment 1) to ensure an understanding of the principles underlying reimbursement of eligible state services, to clarify eligibility for reimbursement for certain state services, to provide proper policy framework, to ensure that reimbursement of state costs is consistent with law and the implementing agreements, and to avoid potential fiscal law violations. Much of the guidance is based on applicable law, and consequently, does not allow for significant variation. Attachment 2 provides statutory and DSMOA provisions relevant to support the guidance. Our review indicates that the single factor most affecting reimbursement may be administrative in nature. That is the need to ensure all otherwise eligible reimbursable services are clearly included and properly characterized in the Joint Execution Plan (JEP) for each location. We presume that services properly included and characterized in the JEP and subsequently performed will be reimbursed under the DSMOA Program.

Attachment 1 provides general guidance to the grants officer in making determinations as to the eligibility for reimbursement of certain state services. This is an area of significant



complexity, and this guidance is written with the assumption that the reader has a detailed understanding of the subject. This guidance is not intended to be nor is it all-inclusive. Nor is it intended to address every permutation that might arise. Because of the great variety present in the DSMOA program and in environmental restoration, there are certain to be exceptions to these general rules.

In recognition of the clear need for more detailed guidelines that provide the maximum assistance to the states and DoD Components in developing their JEPs, the first meeting of the new committee will be dedicated to seeking input from the states. The DSMOA grants officer should be prepared to assist my office during that meeting and any necessary subsequent meetings to work with the states to formulate these guidelines. The guidelines must conform to the principles in this guidance but should also provide an administrative process for the states and DoD Components that avoids the need to develop individual site-specific references to describe eligible services in the JEP.

This guidance is intended only to address issues of reimbursement eligibility under the DSMOA program. It does not address other issues such as Defense Environmental Restoration Program eligibility, disputes resolution, and enforcement actions.

We remain committed to partnering with states and using the DSMOA program to reimburse states for eligible services. It is my belief that the practical application of this guidance will result in greater reimbursement of state expenses than previously allowed due to more consistent understanding of eligibility. My point of contact for DSMOA is Mr. Terry Bowers, phone: 703-693-9447 and email at terry.bowers@osd.mil. Please contact him if you have any questions or need additional information.



Alex A. Beehler
Assistant Deputy Under Secretary of Defense
(Environment, Safety & Occupational Health)

Attachments:

1. DSMOA Guidance for Reimbursement of State Services
2. Relevant Statutory and DSMOA Provisions

CC:
DASN(E)
SAF/IEE
DLA

DSMOA GUIDANCE FOR REIMBURSEMENT OF STATE SERVICES

OVERVIEW

This guidance addresses certain types of state activities that may be eligible for reimbursement under the Department of Defense and State Memorandum of Agreements (DSMOAs) and their supporting Cooperative Agreements (CAs). While there is some variation in the DSMOAs and their CAs, this guidance will address the standard DSMOA and CA.

The U.S. Army Corps of Engineers (USACE), acting on behalf of the Department of the Army, the Department of Defense's (DoD) executing agent, manages the DSMOA program. The DSMOA program began in the late 1980s and practices and procedures evolved over the succeeding years. With the accumulation of experience over time, concerns have been raised by various states regarding specific aspects of the DSMOA program. Although the concerns vary in detail, the common theme expressed is the need for states to have some funding predictability in order to effectively manage their programs.

This guidance does not address the subject of payment of proper state fees under the various waivers of sovereign immunity. Nor does it address issues associated with the DSMOA program, such as exhaustion of dispute resolution procedures or suspension or termination of payments due to breach of a DSMOA, that are not directly associated with the subject of reimbursement eligibility.

In this guidance, references to the term "states" includes territories and to the term "installation" includes Formerly Used Defense Sites (FUDS) and Base Realignment and Closure (BRAC) installations. While the DSMOA uses the term "installations", the Defense Environmental Restoration Program (DERP) authorizing statute, chapter 160 of title 10, United States Code, uses the term "facility". There is no distinction for purposes of this guidance.

GUIDANCE

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.

1. STATUTORY REQUIREMENTS

The DSMOAs are based on the authority of 10 U.S.C. § 2701(d)(see Attachment 2) 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. The Secretary's authority under section 2701(d) has been delegated to the Secretaries of the Military Departments by paragraph 5.6.1 of DoD Instruction 4715.7, *Environmental Restoration Program*.

One requirement of section 2701(d) is that the 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 activity is eligible for funding from one of the five environmental restoration accounts or from one of the two BRAC accounts.

A second requirement of section 2701(d) is that the DoD must receive services. 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 numerous activities that could constitute services in furtherance of the DERP might include soil testing for contamination, soil removal and disposal, monitoring, attending meetings at the request of the DoD, engaging in dispute resolution (but not regulatory enforcement), and certain public outreach activities. A service must be something that the DoD would not otherwise be entitled to receive. The following section on DSMOA Requirements discusses services specific to that program.

The statutory requirements discussed in this section apply to any agreement entered into under 10 U.S.C. § 2701(d).

2. DSMOA REQUIREMENTS

In addition to the basic statutory requirements, the DSMOA applies additional requirements upon activities eligible for reimbursement. For purposes of this discussion, the most notable are that the DSMOA applies to one or more of those installations listed in its Attachment A (see, e.g., 57 FR 28837) and to a descriptive list of types of services eligible for reimbursement (see Attachment 2). This list varies depending on the specific DSMOA. Consequently, services eligible for reimbursement in one state may be treated differently in another state. Any such state services must meet the requirements of the state's DSMOA to be reimbursable. Generally, reimbursable services must be related to preparation and administration of the DSMOA or CA or associated with installations listed on the Attachment A of the DSMOA or CA. Services applying to several installations may be apportioned accordingly (if also listed on the Joint Execution Plan (JEP) for each of those installations). For instance, the provision of personnel and supporting facilities is not a service specific to any installation; their training and support facilities, while likely a contributing factor in calculating any overhead rate for billing purposes, would not normally be separately

billable services. In short, the DSMOA allows reimbursement of eligible costs that are associated with specific installations and the general administration of the DSMOA and CA process, including any authorized overhead rate, as opposed to general costs of state agency administration.

As noted above, for a state activity to be eligible for reimbursement under the DSMOA, it must be a service. A service must be sought by the DoD, not an action imposed by the state. Nor can the DoD be entitled to the action as a matter of right. As an example, review of environmental documentation by a state regulatory agency, to the extent the agency has a statutory obligation, as opposed to a negotiated obligation such as in a Federal Facility Agreement, to provide that review and to do so within a legally specified timeframe, would not qualify as a service. However, if the DoD wishes to have that review expedited to advance its restoration program by seeking from the agency a higher priority for review than the DoD would otherwise receive; it would be receiving a service beyond the normal obligations of the regulatory agency. (Other variations could also qualify as services; expedited service is used as the example here because it is integral to the DSMOA framework.) The DSMOA was and is premised on the expectation that state regulators will, due to DSMOA payments, be able to provide the DoD with higher priority in their participation in the DERP, thereby increasing the efficiency of the DERP (see, e.g., DSMOA Preamble in Attachment 2). It is that expedited action that the DoD sought and receives as a service under the DSMOA. Generally speaking, this requirement means that when the DoD seeks higher priority review of a document or seeks participation at a meeting associated with one or more installations on the Attachment A and in furtherance of the DERP, and the state agency is not specifically required to engage in these actions pursuant to its own laws, such review or participation would qualify as a service, and hence eligible for reimbursement. Accurate characterization of state services to ensure they qualify for reimbursement is critical to effective operation of the DSMOA program.

3. CA REQUIREMENTS

The standard CA contains three requirements:

- (1) The requirement that all eligible installations and facilities must be listed on the DSMOA's Attachment A is reiterated in paragraph 6 of the supporting CA.
- (2) The CA only provides for reimbursement of costs that reflect agreed upon work under the JEP. The JEP will, of course, vary from state to state and from location to location. It cannot be emphasized enough that the state and the DoD Component need to be rigorous in ensuring all services are listed in each appropriate JEP. This is the most effective way to avoid misunderstandings and disagreements during each CA period.
- (3) Funds must be available and obligated.

In addition, the CA refers to the DSMOA/CA Program Guide, *Working Together to Achieve Cleanup: A Guide to the Cooperative Agreement Process (Interim)*, July 2006 (which notably provides that it is not binding guidance).

SUMMARY

The goals of this guidance are to ensure that the states and territories receive the full reimbursement for their services to which they are entitled under the DSMOA program and to

clarify and communicate policy and procedures for requests for reimbursement. To further enhance the Department's efforts, we plan to establish a committee of DoD and state representatives to provide additional uniformity and clarity among all interested parties.

The requirements controlling the reimbursement eligibility of various types of state services under the DSMOA program are primarily governed by (1) whether the service is in furtherance of the responsibilities of the Secretary of Defense under the DERP, (2) whether the activity is legitimately a service, (3) whether it is associated with a specific installation, and (4) whether the service is listed on the JEP.

While other factors also apply, these are the four most salient to any determination of eligibility. Of course, nothing in this memorandum should be interpreted as a decision on any particular claim for reimbursement. Such a specific matter is within the province of the grants officer who is in a position to review the particular facts and circumstances and apply the law in formulating a determination. Other than the discussion of statutory requirements, it should be kept in mind that this guidance relates only to eligibility under the DSMOA program. Other agreements under 10 U.S.C. § 2701(d) could be broader in scope and deal with other types of services than those focused upon by the DSMOA. Nor does this guidance address the payment of statutory fees pursuant to, e.g., the Solid Waste Disposal Act.

RELEVANT STATUTORY AND DSMOA PROVISIONS

Statutory Provisions—10 U.S.C. § 2701(d)

(d) Services of other entities.

(1) In general. Subject to paragraph (3), the Secretary may enter into agreements on a reimbursable or other basis with any other Federal agency, any State or local government agency, any Indian tribe, any owner of covenant property, or any nonprofit conservation organization to obtain the services of the agency, Indian tribe, owner, or organization to assist the Secretary in carrying out any of the Secretary's responsibilities under this section. Services which may be obtained under this subsection include the identification, investigation, and cleanup of any off-site contamination resulting from the release of a hazardous substance or waste at a facility under the Secretary's jurisdiction. (Emphasis added.)

(2) Cross-fiscal year agreements. An agreement with an agency under paragraph (1) may be for a period that begins in one fiscal year and ends in another fiscal year so long as the period of the agreement does not exceed two years. This two-year limitation does not apply to an agreement funded using amounts in the Department of Defense Base Closure Account 1990 or the Department of Defense Base Closure Account 2005 established under sections 2906 and 2906A of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(3) Limitation on reimbursable agreements. An agreement with an agency under paragraph (1) may not provide for reimbursement of the agency for regulatory enforcement activities. An agreement under such paragraph with respect to a site also may not change the cleanup standards selected for the site pursuant to law. (Emphasis added.)

(4) Definitions. In this subsection:

(A) The term "Indian tribe" has the meaning given such term in section 101(36) of CERCLA (42 U.S.C. 9601(36)).

(B) The term "nonprofit conservation organization" means any non-governmental nonprofit organization whose primary purpose is conservation of open space or natural resources.

(C) The term "owner of covenant property" means an owner of property subject to a covenant provided by the United States in accordance with the requirements of paragraphs (3) and (4) of section 120(h) of CERCLA (42 U.S.C. 9620(h)), so long as the covenant property is the site at which the services procured under paragraph (1) are to be performed.

(5) Savings clause. Nothing in this subsection affects the applicability of section 120 of CERCLA (42 U.S.C. 6920) to the Department of Defense or the obligations and responsibilities of the Department of Defense under subsection (h) of such section.

DSMOA Provisions**57 FR 28837 (June 29, 1992)****Model DSMOA, Preamble:**

In order to expedite the cleanup of hazardous waste sites on Department of Defense (DoD) installations and Formerly Used Defense Sites meeting certain criteria within the State/Territory of XXXXX and ensure compliance with the applicable [State/Territorial] laws and regulations, DoD and the [State/Territory Agency name] on behalf of the [State/Territory] of [State/Territory name] enter into this Agreement.

Model DSMOA, Section I, Subsection A, Paragraph 1:

Installations covered by this Agreement are those owned by the Federal government on the effective date of the Agreement including installations with sites on the National Priorities List (NPL) and installations with sites not on the NPL. This Agreement also includes those installations identified on the Base Realignment and Closure (BRAC) I list (Pub. L. 100-526, dated October 24, 1988) and Base Realignment and Closure (BRAC) II list (Pub. L. 101-510, dated November 5, 1990), as well as Defense Logistics Agency's stock funded installations (DLASF). Coverage under this agreement for BRAC I and BRAC II installations extends to only Defense Environmental Restoration Program (DERP) remedial actions. These installations will be included in attachment A but will not be subject to the provisions in section II (A and B). This Agreement also covers Formerly Used Defense Sites (FUDS) These installations will be included in attachment A and are subject to the provisions in section II (A and B).

Model DSMOA, Section I, Subsection A, Paragraph 3:

DoD agrees to seek sufficient funding through the DoD budgetary process in accordance with section II and to pay the State/Territory of _____ for the services specified in paragraph B for all ER,D and BRAC funds activities at installations covered by this Agreement, subject to the conditions and limitations set forth in this section.

Model DSMOA, Section I, Subsection B:**B. Services**

State/Territorial services that qualify for payment under this Agreement include the following types of assistance provided by the State/Territory commencing at site identification and continuing through construction, as well as any other activities that are funded by ER,D or BRAC:

(1) Technical review, comments and recommendations on all documents or data required to be submitted to the State/Territory under an agreement between the State/Territory and a DoD component, all documents or data that a DoD Component requests the State/Territory to review, and all documents or data that are provided by a DoD Component to the State/Territory for review as a result of a request from the State/Territory made under applicable State/Territorial law.

(2) Identification and explanation of State/Territorial applicable or relevant and appropriate requirements related to response actions at DoD installations.

(3) Site visits to review DoD response actions and ensure their consistency with appropriate State/Territorial requirements, or in accordance with site-specific requirements established in other agreements between the State/Territory and DoD Component.

(4) Participation in cooperation with DoD in the conduct of public education and public participation activities in accordance with Federal and State/Territorial requirements for public involvement.

(5) Services provided at the request of DoD in connection with participation in Technical Review Committees.

(6) Preparation and administration of a cooperative agreement (CA) to implement this Agreement, including the estimate of State/Territory costs.

(7) Preparation and administration of the DSMOA and amendments.

(8) Technical review, comments and recommendations on all documents and data pursuant to section II.B. of the DSMOA and CA application.

(9) Determination of scope of agreements, determination of legal and technical applicability of agreements, and assurance of satisfactory performance of interagency agreements, but excluding any costs which may be incurred preparing for litigation against the U.S. Government.

(10) Costs associated with independent quality assurance/quality control (QA/QC) efforts by the State/Territory of up to ten (10) percent of samples collected by either the State/Territory, the installation, or both at each DoD installation and FUDS covered by this Agreement.

(11) Other services that the State/Territory will provide that are set out in this agreement or are included in installation-specific agreements.” (Model DSMOA, Section I, Subsection B, 57 FR 28835 (June 29, 1992)).