

PDAT Contract Compliance Review  
Maryland Department of General Services (DGS)  
Emergency Debris Removal for Statewide Contract  
Date: June 13, 2019

Document(s) Reviewed: Invitation for Bids Solicitation No. MDDGS31036317 (IFB) (180 pages); Emergency Debris Removal for Statewide Contract with Ashbritt Environmental (13 pages); Blanket Purchase Order for Emergency Debris Removal for Statewide Contract with Ashbritt Environmental (13 pages)

**Please note:** Any guidance provided in this review is not legal advice, and the review is not a FEMA approval. There are no guarantees of reimbursement since there are many other rules that apply beyond the procurement standards. The entity should consult its own legal counsel to determine if it has complied fully with the Federal procurement standards, any other applicable Federal law, and its own State laws, as required under the Federal procurement standards.

FEMA performed a high-level compliance review of the above-mentioned documents to flag any potential non-compliance issues with the federal procurement standards at 2 C.F.R. §§200.318 – 200.326. FEMA was not provided with any other information or documentation other than the above-mentioned documents.

This review did not include a review of any potential contract end user's procurement policies or procurement systems. This review only considered whether the use of the Emergency Debris Removal for Statewide Contract ("Contract") between Maryland Department of General Services (DGS) and Ashbritt Environmental ("Contractor") complied with the Federal requirements at 2 C.F.R. §§200.318-200.326 and was not a review to determine if the Contract complied with applicable state and local laws and regulations. DGS, a state entity, wishes to allow political subdivisions of the state to include non-state entities to use the Contract. PDAT reviewed this contract to identify potential violations of the Federal procurement standards for non-state entities.

Compliance with the federal procurement standards is just one part of an entity's responsibility under a Public Assistance grant; each entity must also follow the Cost Principles found in 2 C.F.R. Part 200, Subpart E, to ensure that all costs are reasonable and other relevant federal regulations that relate to Public Assistance grants. This review does not provide any information about the cost reasonableness of the contract or compliance with any other federal requirements associated with grants.

PDAT recommends that DGS as well as any other contract end users review their contract file with their legal counsel as compliance with the federal procurement standards requires that state and non-state entities comply with state and local standards as well as federal procurement standards. FEMA's review is not a fully comprehensive review but rather highlights some of the issues found within the document(s).

## **Applicable Federal Procurement under Grant Standards:**

If non-state entities wish to utilize the Contract with the Contractor, the Contract must have been procured in compliance with the following rules under the federal procurement standards; 2 C.F.R. §§ 200.318-200.326:

1. Follow its own documented procurement procedures which reflect applicable state, local laws and regulations, provided that the procurement conforms to applicable Federal law and the procurement standards set forth at 2 C.F.R. §§ 200.318 to 200.326 (2 C.F.R. § 200.317);
2. Comply with the general procurement requirements at 2 C.F.R. § 200.318;
3. Comply with the competition requirements at 2 C.F.R. § 200.319;
4. Comply with the requirements at 2 C.F.R. § 200.320 based on the procurement method chosen;
5. Comply with the requirement to take all necessary affirmative steps to assure that small and minority businesses, women's business enterprises, and labor surplus area firms are used when possible in accordance with 2 C.F.R. § 200.321;
6. Comply with the procurement of recovered materials requirement as set forth in 2 C.F.R. § 200.322;
7. Comply with the cost or price analysis requirements found in 2 C.F.R. § 200.323;
8. Comply with the requirements allowing Federal awarding agency or pass-through entity review in accordance with 2 C.F.R. § 200.324;
9. Comply with the bonding requirements found in 2 C.F.R. § 200.325;
10. Ensure its contract includes any clauses required by 2 C.F.R. §200.326 Contract provisions (found in Appendix II to Part 200 of 2 CFR), as well as any additional FEMA required provisions.

## **Contract Analysis**

### **Procurement Procedures**

If a non-state entity is going to enter into the contract, it must ensure that the contract was procured in compliance with its own documented procurement procedures which reflect applicable state, local laws and regulations, provided that the procurement conforms to applicable Federal law and the procurement standards set forth at 2 C.F.R. §§ 200.318 to 200.326. Non-state entity users should also consider whether they complied with all applicable procurement standards regarding its procurement policy and during the entire procurement award process.

### **Full and Open Competition**

The Federal procurement standards require that non-state entities conduct all procurement transactions in a manner providing for full and open competition.

Page 1 of the IFB, DGS has a “Notice to Bidders/Offerors” which states in red font:

**SMALL BUSINESS RESERVE PROCUREMENT**

This is a Small Business Reserve Procurement for which award will be limited to certified small business vendors. Only businesses that meet the statutory requirements set forth in State Finance and Procurement Article, §§14-501 —14-505, Annotated Code of Maryland, and that are certified by the Department of General Services Small Business Reserve Program are eligible for award of a contract. See RFP Section 1.44 for additional information.

Page 25 Section 1.44 “Small Business Reserve (SBR) Procurement/ Small Business Preference (SBP) Procurement” further explains that this procurement is a Small Business Reserve for which the award will be limited to certified small business vendors and also applies small business percentages below:

- State-certified small business (not a veteran-owned or disabled veteran-owned Small business) 5%
- State-certified, veteran-owned small business 7%
- State-certified, disabled veteran-owned small business 8%

To be eligible for the preference, your company must have a current small business certification from the Maryland Department of General Services. The small business size standards in Maryland are different than the Federal standards, so you cannot substitute an SBA 8(a) certification or VetBiz verification for State small business certification.

The above limitations on vendors and the associated preference percentages are a restriction on competition and a violation of the Federal procurement standards because for bidders to qualify for this contract award, they must be a “certified small business vendor.” Non-state entities must ensure that their procurement transactions do not unduly restrict competition.

On page 31, section 2.1 describes the minimum qualifications for contractors wishing to compete for the award. Non-state entity applicants must ensure that the contractor experience requirements listed in this section are appropriate for the work they wish to use the contract for. If the experience required within this section is beyond what is required for the non-state entity’s work, it could be viewed as unduly restrictive of competition, thus being violation of the Federal procurement standards.

Geographic Preferences

Page 89, Section 4.5 provides instructions for “Reciprocal Preferences.” The Federal procurement standards at 2 C.F.R. § 200.319 prohibit the use of geographic preferences in the evaluations of bids or proposals for non-state entities. If DGS applied a geographic preference pursuant to Section 4.5, use by a non-state entity may risk noncompliance with the Federal procurement under grant standards.

### Time and Materials Contract

Page 35-36, Section 3.1 of the IFB proposes a time and material format for Tiers 1 and 2 of the contract(s), which is a contract type that is not generally encouraged because it does not incentivize cost controls or labor efficiency. The federal procurement rules at 2 C.F.R. § 200.318(j) limits the use of time and materials contracts for non-state entities to instances when no other contract type is suitable. In addition, the rules require that there be a ceiling price that the contractor exceeds at its own risk and that the contract end users maintain a high level of oversight. As such, the use of time and materials contract is limited to the amount of time during which the scope of work cannot yet be determined. As such, non-state entity end users must ensure that any potential contract resulting from this IFB complies with these requirements.

### Cost Plus Percentage of Cost

Page 46, Section 3.2.2 of the IFB provides a “Payroll Burden” option for the contractor. The section states that, “The CONTRACTOR shall receive the following indirect costs at the applicable percentage of the certified hourly pay rate: Social Security Tax; Medicare Tax; Unemployment Taxes; Worker’s Compensation Insurance; Contractor’s Public Liability Insurance; Contractor’s Property Damage Liability Insurance.” Further down in the section, DGS states that, “Instead of submitting an itemization for (c), the CONTRACTOR may elect to receive for Payroll Burden an amount equal to twenty percent (20%) of the certified hourly pay rate.”

In addition, the contractor is permitted to charge potential contract end users “18 percent of the actual cost of materials” and 5 percent of any invoiced amount of any equipment they may have to rent. These provisions appear to be cost-plus-percentage-of-cost (CPPC) type pricing structures. Non-state entities are prohibited from entering into a CPPC contract type pursuant to 2 C.F.R. § 200.323(d).

### Socio-Economic Steps

DGS did not provide documentation supporting that they took the six affirmative steps in relation to the target firms pursuant to 2 C.F.R. § 200.321. If non-state entities wish to use this Contract, they must ensure that DGS complied with this Federal procurement under grant requirement.

Step 6 of the affirmative steps requires that prime contractors, if subcontracts are to be let, require that subcontractors take the previous five affirmative steps in relation to the target firms described in 2 C.F.R. § 200.321. DGS did not provide documentation supporting this requirement on prime contractors.

### Contract Provisions

State and non-state entities contracts must contain the necessary contract provisions pursuant to 2 C.F.R. 200.326. If a state or non-state entity contract fails to include the necessary contract provisions, the contract is in violation of the Federal procurement standards. Please see the

FEMA PDAT contract provisions template for additional information. While it is permissible to copy and paste general language from the FEMA PDAT template, DGS must make sure that it fills in the blanks where indicated to customize the form. Below please find a summary of the contract clauses that are **missing or arguably deficient**:

- Equal Employment Opportunity: This clause applies to all federally-assisted construction contracts. If the contract involves federally-assisted construction work, DGS must include this contract provision.
- Contract Work Hours and Safety Standards Act: This provision must be included in contracts over \$100,000 that involve the employment of mechanics or laborers. If the contract involves employment of mechanics or laborers, DGS must include this contract provision.
- Clean Air Act and the Federal Water Pollution Control Act: DGS must include this clause for contracts over \$150,000.
- Debarment and Suspension: This clause applies to all contracts. DGS must include this clause in the contract.
- Byrd Anti-Lobbying Amendment: DGS must include this clause and, for awards over \$100,000, contractors must include a signed certification. Although DGS provided a draft Byrd Anti-Lobbying Amendment Certification in the IFB, PDAT was not provided with a signed version of the Byrd Anti-Lobbying Amendment Certification. The clause and certification must be included in the contract file.
- Procurement of Recovered Materials. If this procurement involves the procurement of recovered materials, DGS must include this contract provision.
- Access to Records: Clause not required but recommended by FEMA.
- Changes and modifications: Clause not required but recommended by FEMA.
- DHS Seal, Logo, and Flags: Clause not required, but recommended by FEMA.
- Compliance with Federal Law, Regulations, and Executive Orders: Clause not required, but recommended by FEMA.
- No obligation by Federal Government: Clause not required but recommended by FEMA.
- Program Fraud and False or Fraudulent Statements or Related Acts: Clause not required but recommended by FEMA.

### Emergency and Exigent Circumstances

If non-state entity users wish to use this contract to alleviate an emergency or exigency circumstance, the non-state entity must ensure it carefully documents the emergency or exigent circumstances it believes justify conducting a non-competitive procurement and includes that documentation in its procurement file.

Emergency is defined as an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. It involves a threat to life, public health or safety, improved property, and/or some other form of dangerous situation that requires *immediate* action to alleviate the threat. Exigency is defined as necessary in a particular situation that requires or demands immediate aid or action to avoid, prevent or alleviate serious harm or

injury, financial or otherwise, to the applicant. The Federal emergency period means the amount of time that an emergency or exigency exists.

To appropriately use a non-competitive procurement under the emergency or exigent exception, the non-state entity end user must demonstrate a need to sole source from a contractor by using the emergency or exigency exception to full and open competition found at 2 C.F.R. § 200.320(f). In order to use this exception, the non-state entity end user must:

1. Establish that an emergency or exigency exists;
2. Define the specific time period for the emergency or exigent circumstance; and
3. Show that, once the emergency or exigent period ended, the end user transitioned into procurement by competitive proposals.

Non-state entities should be mindful that they may only seek reimbursement under an emergency or exigent procurement for goods or services rendered during a period of actual emergency or exigency. Non-state entities must be prepared to justify their proposed emergency or exigent period and include documentation of this timeframe in its contract file in order to comply with the Federal procurement standards. Finally, the non-state entity must transition to procurements by competitive proposals once this period ends.

In addition, there are other requirements that apply to non-competitive contracts. For example, the non-state entity should ensure it conducted a cost or price analysis pursuant to 2 C.F.R. §200.323 for any procurements above the Simplified Acquisition Threshold (currently \$250,000).

Responsible Contractors:

DGS must document that it awarded these contracts to responsible contractors and include proof in its contract file. DGS must also ensure that none of the contractors are suspended or debarred by checking on SAM.gov.

**Resources:** For additional information on the Federal procurement standards, please visit the [PDAT Website](#).

**NOTE:** This review is not intended to serve as legal advice or FEMA's approval of this procurement or contract and FEMA makes no guarantee that adherence to these recommendations will result in full reimbursement. This review did not include a review of the procurement policies or procurement system for the applicant. This review only considers the Federal requirements; we did not review the procurement documents to determine if they comply with applicable State or local laws and regulations. The applicant should consult its own legal counsel to determine if this procurement or contract complies fully with the Federal procurement standards, any other applicable Federal law, and its own State laws, as required under the Federal procurement standards.

**DISASTER DEBRIS PLANNING TASK FORCE**

Wednesday, September 18, 2019

9:30 A.M.

Web Meeting

**MINUTES**

**1. REVIEW OF MINUTES FROM MARCH 20, 2019 MEETING**

There were no comments on the minutes.

**2. UPDATE ON FEMA PUBLIC ASSISTANCE ALTERNATIVE PROCEDURES PILOT PROGRAM FOR DEBRIS REMOVAL**

Amanda Faul and Ed Budnick provided some background on the changes to the FEMA Public Assistance Alternative Procedures Pilot Program for Debris Removal:

- FEMA is extending the performance period of the Public Assistance Alternative Procedures Pilot Program for Debris Removal
- FEMA has also updated Recovery Policy FP 104-09-12, Public Assistance Alternative Procedures Pilot Program for Debris Removal to reflect the following changes:
  - Elimination of the 180-day time frame for debris removal activities. Applicants must complete work within established regulatory timeframes in accordance with 44 CFR § 206.204.
  - Elimination of the requirement to request time extensions through the Assistant Administrator of Recovery. Time extension requests shall be in accordance with 44 CFR § 206.204.
  - Discontinuing use of the Debris Management Plan Procedure due to lack of participation and insufficient data to demonstrate the procedure is meeting its intended outcome. The Straight Time Force Account Labor Procedure, however, remains in effect. (So, the option to request an additional 2% reimbursement for one event has been discontinued).

Mr. Budnick noted that FEMA Region III has the most completed debris plans of any FEMA region, and he is looking into getting the Debris Management Plan Procedure program extended.

### **3. UPDATE ON ISSUES RELATED TO FEMA PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT)**

MEMA and DGS are working together to review the crosswalk of state versus local entity contract requirements under PDAT that BMC procurement staff prepared.

Ms. Faul noted that FEMA legal counsel reviewed the state contract and had comments that it sent to DGS. DGS is working on responses to the comments.

Ms. Faul said that if a local jurisdiction uses the state contract for a short term, they would likely be approved for reimbursement; if the contract is used for a longer term, the jurisdiction may need to do its own procurement.

She added that local jurisdiction legal and procurement departments should review the state contract to see if it adheres to their local procurement rules.

Rhody Holthaus added that Anne Arundel County would reference using the state contract in its debris plan.

Ed Budnick provided procurement-related documents that are attached:

- Procurement under Grants
- PDAT Contract Provisions Template
- Top 10 Procurement under Grant Mistakes
- FEMA Fact Sheet: Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances
- FEMA Fact Sheet: Public Assistance: Purchasing Goods or Services Through Cooperative Purchasing Programs

He also provided a paper on the US Army Corps of Engineers Debris Mission Information, also attached.

### **4. STATUS OF STATE AND LOCAL DEBRIS ACTIVITIES**

No updates from last meeting.



Entity	Debris Plan Status	Pre-event Contracts in Place	Debris Management Sites
Annapolis	Included in Anne Arundel Co plan but also preparing their own plan	Contract in place with Anne Arundel Co (tonnage limited) & Waste Management (tonnage limited) to deliver & dispose non-haz waste from emergency & non-emergency events. Contracts in place with Anne Arundel & Prince George's cos to deliver and process yard and wood waste (tonnage limited) from emergency and non-emergency events.	
Anne Arundel Co	Submitted recently updated debris plan to FEMA for review, received comments. When plan is accepted by FEMA, county will be able to take a one-time 2% increased reimbursement for an event in which the debris portion is at least \$20 million event	Roll-off dumpster & hauling contractors. Hoping to use state debris contract.	
Baltimore City	Plan being circulated for review/update		Will identify at least 1 temp site in Plan update
Baltimore Co	Plan accepted by MEMA and FEMA		
Carroll Co	Draft		
Harford Co	Approved (incl aerial shots & site layouts; marine section for shoreline debris clearance; logistics section for temporary housing, food & other needs for county emergency workers impacted by event)	Full-service debris contractor under contract (DRC as primary; Ash Britt as secondary); 10-year contract	Approved plan includes debris management sites with aerial shots and site layouts
Howard Co	Draft Debris Plan sent to OEM; draft plan to be reformatted to meet FEMA 325 PA Debris Management Guide	<ul style="list-style-type: none"> <li>• Selected contractor for emergency grinding contract.</li> <li>• County plans to do monitoring contract</li> </ul>	
State – DGS		Debris contracts are available at <a href="http://www.dgs.maryland.gov">www.dgs.maryland.gov</a>	
State – DNR	Plan in review, covers waterways & public lands	Contractor list stays updated	Approved Plan includes Debris Mgmt Sites

Entity	Debris Plan Status	Pre-event Contracts in Place	Debris Management Sites
ACOE, N Atl Div.		Recently finalized pre-event debris contract for 5-year term w/CERES Environmental Svcs, covers Maine to Virginia. Has monitoring contract	

## 5. OTHER BUSINESS

**Future presentations of interest:** At a previous meeting, there was a suggestion to invite the state debris contractors to present to the group. Eileen Singleton will work with DGS to contact the contractors and invite them to present, one per meeting, on the following items:

- lessons learned from responding to debris-generating events
- what should state and local agencies know/provide to contractors that would facilitate debris response

**DGS Emergency Supply List:** Mr. Gladden said that he has issued an RFI to update the DGS emergency supply list. The RFI closes September 27<sup>th</sup>; he will update and post the updated list as soon as he can.

**Upcoming meetings:** schedule for 2019: June 19, September 18, and December 11.

## ATTENDEES

### **Members**

Sara Bender, Maryland Emergency Management Agency  
 Stephen Blake, Carroll County Dept. of Public Works  
 Ed Budnick, Federal Emergency Management Agency  
 Jeff Dannis, Howard County Dept. of Public Works  
 Amanda Faul, Federal Emergency Management Agency  
 Calvin Gladden, Department of General Services  
 John Harding, Maryland Emergency Management Agency  
 Mark Harris, Maryland Dept. of Transportation  
 Rhody Holthaus, Anne Arundel Co Dept. of Public Works  
 Eleanor Lagola, Maryland Emergency Management Agency  
 Mike Pappafotis, Maryland Emergency Management Agency  
 Marcia Patrick, Annapolis Dept. of Public Works  
 Jim Pittman, Dept. of Public Works  
 Jeff Schoenberger, Harford Co Dept. of Public Works

### **Staff**

Debbie Groat, Baltimore Metropolitan Council  
 Eileen Singleton, Baltimore Metropolitan Council