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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: AshBritt Inc.

File: B-297889; B-297889.2

Date: March 20, 2006

William J. Spriggs, Esq., Stephen A. Klein, Esq., and Sharon M. Mills, Esq., Spriggs & Hollingsworth, and David J. Taylor, Esq., Tighe Patton Armstrong Teasdale, for the protester.

Shannon M. Elliott, Esq., Lanny R. Robinson, Esq., and Henry H. Black, Esq., U.S. Army Corps of Engineers, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that an agency improperly included a Mississippi set-aside in a solicitation for cleanup efforts in Mississippi associated with damage resulting from Hurricane Katrina is denied where a provision of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), 42 U.S.C. § 5150, requires the agency to provide a preference in debris removal contracts to firms residing, or primarily doing business, in the area affected by a major disaster, and a review of the statute and its legislative history does not show that the use of a set-aside to provide that preference, or the decision to provide the preference only to firms residing, or primarily doing business, in Mississippi--to the exclusion of firms located in other states affected by the same natural disaster--was an abuse of the agency's discretion to implement the statute's scheme.

2. Contention that a Justification and Approval (J&A) does not properly support an agency's decision to limit a competition for debris cleanup under the Stafford Act to firms residing, or primarily doing business, in Mississippi is denied where the agency's J&A reasonably explains and justifies the actions taken, and where the record shows that those actions are within the discretion provided by the Stafford Act, even though the protester correctly points out minor errors in the J&A.

DECISION

AshBritt Inc. protests the terms of solicitation No. W912EE-06-R-0005, issued by the U.S. Army Corps of Engineers for demolition and debris removal from public,

commercial, or private residential properties located in the state of Mississippi. The cleanup efforts covered by this solicitation are associated with damage to certain areas in Mississippi resulting from Hurricane Katrina, which were declared a major disaster area by the President on August 29, 2005, under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. § 5121 et seq. (the Stafford Act).

AshBritt argues that the Corps's decision to limit the competition for this work to Mississippi firms improperly exceeds the authority granted under a provision of the Stafford Act (codified at 42 U.S.C. § 5150) to provide a preference to firms residing, or primarily doing business, in the area affected by a major disaster. AshBritt also argues that the solicitation is ambiguous in its guidance about what constitutes a Mississippi firm, anticipates an improper multiple-award contract, and fails to provide an estimate for the amount of demolition that will be required under this contract.

We deny the protest.

BACKGROUND

The storm that is now known as Hurricane Katrina--and is widely described as the most destructive natural disaster in U.S. history--began as a tropical depression near the Bahamas around August 23, 2005.¹ Two days later, August 25, the storm made its first landfall in the United States, near the border separating the Florida counties of Miami-Dade and Broward. By this point Katrina had become a category 1 hurricane.² After crossing the southern end of Florida, Hurricane Katrina entered the Gulf of Mexico, where it became a category 5 hurricane by August 28, when it was positioned approximately 250 miles south/southeast of the mouth of the Mississippi River.

On the morning of August 29, Hurricane Katrina made landfall at Louisiana's Plaquemines Parish--a parish that forms a peninsula that juts into the Gulf of Mexico. The hurricane made a second landfall later that morning near the border of

¹ The summary information about the progression of Hurricane Katrina set forth in this decision was obtained from the website of the National Hurricane Center within the National Weather Service, which is within the Department of Commerce, National Oceanic & Atmospheric Administration. Among other information, the website provides a monthly summary of tropical weather in the Atlantic Ocean. See http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT_aug.shtml?

² Hurricane intensity is rated by numerical categories using a construct known as the Saffir-Simpson scale. The ratings range from 1 to 5, indicating increased intensity, with a rating of 5 reserved for hurricanes with winds in excess of 155 miles per hour. See <http://www.nhc.noaa.gov/aboutsshs.shtml>.

Louisiana and Mississippi. By the time of its second landfall, Katrina was a category 3 hurricane with winds near 125 miles per hour. Hurricane Katrina caused substantial damage to the coastlines of Louisiana, Mississippi, and Alabama, with damage extending along the Gulf coast of Florida. In addition, as the hurricane traveled inland, it caused significant damage in non-coastal areas of Louisiana, Mississippi, and Alabama. Much of the damage caused by Hurricane Katrina was later exacerbated when Hurricane Rita made landfall east of the Texas/Louisiana border on September 24, and caused significant flooding in many of the same areas flooded by Katrina.³

When a natural catastrophe like Hurricane Katrina overwhelms the ability of a state to provide aid, assistance, and emergency services, and to reconstruct and rehabilitate devastated areas, the process by which the federal government provides assistance is set out in the Stafford Act. 42 U.S.C. § 5121. Upon a request from the governor of the affected state, the President can declare an “emergency” or a “major disaster” under the Stafford Act; both terms are defined at 42 U.S.C. § 5122. The type of request and declaration triggers specific types of federal relief. This bid protest decision involves a contract that provides disaster relief.⁴

A governor’s request to the President for federal disaster relief must be accompanied by a finding “that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.” 42 U.S.C. § 5170. When a governor makes such a request, and the President declares that a “major disaster” exists, federal assistance follows. Id.

The first Presidential Declaration of a Major Disaster under the Stafford Act in response to Hurricane Katrina was dated August 28.⁵ This Declaration determined that damage in certain areas of the state of Florida, beginning on August 24, and continuing, was of sufficient severity and magnitude to warrant a major disaster declaration under the Act. AR, Tab 5a. In particular, the initial Declaration determined that the Florida counties of Broward and Miami-Dade had been affected by a major disaster, and federal assistance for debris removal and emergency

³ See http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT_sep.shtml?

⁴ Federal emergency relief is generally limited to \$5 million, although the Stafford Act anticipates a process by which additional emergency assistance can be provided. 42 U.S.C. § 5193. As set forth in greater detail below, the disaster cleanup efforts covered by the solicitation here will total hundreds of millions of dollars. RFP at 2.

⁵ All Presidential Disaster Declarations, and all of the amendments to those Declarations, are set forth at the Federal Emergency Management Agency (FEMA) website (www.fema.gov). For ease of reference, this decision will cite to copies of the initial and amended Presidential Declarations provided in the Agency Report (AR) at Tabs 5a (Florida), 6a (Louisiana), 7a (Mississippi), and 8a (Alabama).

protective measures were authorized for those two counties.⁶ As events unfolded, the Declaration for Florida was amended on August 30, September 4, and twice on September 6. At the end of this process two more counties at the southern tip of Florida—Collier and Monroe—and seven counties along the Gulf of Mexico in Florida’s “panhandle” region had been declared major disaster areas. Id.

On August 29, the President issued Declarations of a Major Disaster for Louisiana, Mississippi, and Alabama (in response to requests from the governors of those states). AR, Tab 6a, 7a, 8a. With respect to Louisiana, the initial Declaration was amended 10 times; ultimately, every parish in the state was declared a disaster area. AR, Tab 6a. With respect to Mississippi, the initial Declaration was amended 12 times; ultimately, every county in that state was declared a disaster area. Id., Tab 7a. With respect to Alabama, the initial Declaration was amended 8 times, and ultimately 22 of 67 counties in Alabama were declared disaster areas. Id., Tab 8a.

In Mississippi, where the cleanup work covered by this solicitation is to occur, 775,000 residents, nearly 55 percent of the population, were left without power after the storm. The initial estimate was that more than 530 homes had been destroyed and another 30,000 damaged, with more than 1,000 businesses damaged; the Corps estimated that approximately 6,000 of these structures would have to be demolished, and 2.1 million cubic yards of material removed. Contracting Officer’s (CO) Statement at 1. In response to this need, the Corps activated a previously awarded contract under what the agency terms its “Advance Contracting Initiative” (ACI); AshBritt was an ACI contractor and it was deployed to Mississippi to immediately begin helping in the cleanup effort. Id.

The CO explains that shortly after AshBritt was deployed to Mississippi, the agency realized that its initial estimates were too low, and that its ACI contracts were inadequate for the volume of cleanup work that would be required. Id. at 2. Shortly thereafter, the Corps held a competition for a new contractor, and on September 15, AshBritt won that award as well. Thus, AshBritt has been performing these services since shortly after Hurricane Katrina struck the state. The current AshBritt contract covers all FEMA-related work⁷ for debris removal in Mississippi and has a ceiling of \$500 million, with an option for an additional \$500 million. Protester’s Comments at 3.

Between the time that AshBritt received the current Mississippi cleanup contract, and the issuance of the instant solicitation on December 17, 2005, the record here reflects numerous complaints about the award of this contract to a non-Mississippi

⁶ We note for the record that AshBritt’s home office is located in Broward County, Florida. Protester’s Comments at 2, 10.

⁷ FEMA assigned the mission of debris removal to the Army Corps of Engineers on August 30, 2005. Id. at 1.

firm. For example, the protester has provided copies of three articles from the Clarion-Ledger newspaper in Jackson, Mississippi (Protester's Comments, exh. D, E, and I), and one article from the Washington Post (Id., exh. C), detailing the complaints of Mississippi political and business leaders about the award of this contract to an out-of-state company. In addition, the protester provided the transcript of a hearing before the House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, Oct. 19, 2005. During this hearing, a member of the Mississippi Congressional delegation urged the Secretary of the Department of Homeland Security to follow the requirement of the Stafford Act and "redirect" the cleanup contracts in Mississippi and Louisiana to local firms. Protester's Comments, exh. J.

Approximately 2 months later, on December 17, the Corps issued the solicitation here. The RFP, as amended, anticipates a competition for the award of three indefinite-quantity contracts—one unrestricted as to size, one reserved for Historically Underutilized Business Zone (HUBZone) small businesses, and one reserved for 8(a) small businesses. In addition, the RFP limits competition for these three contracts "to firms residing or doing business primarily in the State of Mississippi pursuant to the Stafford Act." RFP, amend. 7, at 2-3.⁸ The RFP explained that the maximum contract amount for the unrestricted portion of the work would be \$150 million; the maximum contract amount for the HUBZone set-aside portion would be \$125 million; and the maximum contract amount for the 8(a) set-aside would be \$25 million. Id. at 3.

Four days later, on December 21, the Assistant Secretary of the Army approved a Justification and Approval (J&A) document authorizing less than full and open competition for this procurement. AR, Tab M. The Assistant Secretary's Approval Statement indicates that the J&A is based on authority provided pursuant to 10 U.S.C. § 2304(c)(5) (2000), and the Stafford Act. Id. The Federal Acquisition Regulation (FAR) provision implementing the statutory authority at 10 U.S.C. § 2304(c)(5) expressly identifies the Stafford Act as one of the statutes that may be used to support a decision to use other than full and open competition in a federal procurement. FAR § 6.302-5(b)(5).

On January 17, 2006, 1 day prior to the due date set for the receipt of proposals, AshBritt filed the instant protest, which was amended on January 30 to address changes to the solicitation made after the initial protest was filed. AshBritt's amended protest also challenged the terms of the J&A, which the Corps provided to

⁸ The solicitation as initially issued limited the competition "to firms primarily doing business in the State of Mississippi pursuant to the Stafford Act." RFP at 2. While the Corps has tinkered with this wording over the course of several amendments, the concept has not changed—the competition is limited to Mississippi contractors. The quotation in the text of the decision is the RFP's most recent version of the set-aside language.

AshBritt, and to our Office, on January 24. On February 14, 1 day prior to the due date for the agency's report in answer to this protest, the agency issued another amendment to the solicitation. In the agency's view, this most recent amendment addresses AshBritt's challenges to the multiple-award nature of this RFP, and addresses the protester's assertions that, among other shortcomings, the solicitation provides inadequate guidance on what constitutes a Mississippi firm. As AshBritt does not accept the agency's characterization of the effect of this amendment, we set forth below our resolution of all the issues before us.⁹

DECISION

AshBritt's Challenges to the Mississippi Set-Aside

AshBritt argues that the agency's decision to limit this competition to Mississippi firms exceeds the authority granted by the Stafford Act. Specifically, AshBritt contends that the "preference" envisioned by the Act does not include the authority to use a set-aside, and that the use of a set-aside, without express statutory authority, violates the Competition in Contracting Act. AshBritt also argues that the Stafford Act does not permit limiting the preference to firms located in only one state, to the exclusion of firms located in other states similarly affected by the same major disaster, in this case, Hurricane Katrina. Finally, AshBritt argues that the J&A prepared here does not support the agency's decision to limit competition to Mississippi firms.

A threshold matter that must be addressed--and that relates to all that follows--is AshBritt's contention that the agency's decision to even conduct this competition, as well as its decision to limit the competition here to Mississippi firms, was, in essence, an abdication of its responsibilities in the face of Congressional pressure. In support of its contention, AshBritt points to evidence in the record, some of which is discussed above, related to criticism of the agency by certain Mississippi political leaders for the agency's use of out-of-state contractors to clean up disaster-related debris in Mississippi, and for not making full use of the Stafford Act authority to provide a preference for local contractors in cleaning up debris related to a major disaster.

While the record here--especially documents produced by the agency late in our protest process--suggests that the inquiries and concerns expressed by Congressional representatives played a role in the agency's decisions, there is nothing per se improper about an agency decision made in response to views expressed by members of Congress. See Kenco Assocs., Inc.; Air Product and

⁹ At the request of the agency, we have handled this protest using our express option procedures set forth at 4 C.F.R. §§ 21.9 and 21.10 (2005). As a result, this decision addresses the initial protest, and all supplemental protest issues, within 65 days of the date the initial protest was filed.

Chem., Inc., B-297503, B-297503.2, Jan. 25, 2006, 2006 CPD ¶ 24 at 4; Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 9-10; Lackland 21st Century Servs. Consolidated—Protest and Costs, B-285938.6, July 13, 2001, 2001 CPD ¶ 124 at 5. Rather, the standard of review we apply is whether the agency's procurement action complies with applicable procurement statutes and regulations, like those at issue here. Lackland 21st Century Servs. Consolidated—Protest and Costs, *supra*. For the reasons set forth below, we think it did.

The Competition in Contracting Act (CICA) of 1984, 10 U.S.C. § 2304(a)(1), generally requires the use of full and open competition in federal procurements; however, CICA expressly anticipates that procedures other than full and open competition may be used when a statute expressly authorizes or requires that an acquisition be made from a specified source. 10 U.S.C. § 2304(c)(5). The Federal Acquisition Regulation (FAR) provisions implementing this authority expressly identify the Stafford Act, and cite to 42 U.S.C. § 5150, as one example of such a statute. FAR § 6.302-5(b)(5).

In its entirety, the Stafford Act provision at issue here states:

Use of local firms and individuals

In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency. This section shall not be considered to restrict the use of Department of Defense resources in the provision of major disaster assistance under this chapter.

42 U.S.C. § 5150 (emphasis added).

We turn first to AshBritt's contention that the use of a set-aside is beyond the authority provided agencies by the Stafford Act.

Generally, our Office will not question an agency's implementation of a statutory procurement requirement unless the record shows that the implementation was unreasonable or inconsistent with congressional intent--a matter best determined by the words of the statute itself, or by the statute's legislative history. See Harris Corp. Broadcast Div., B-255302, Feb. 10, 1994, 94-1 CPD ¶ 107 at 6. With respect to statutory procurement preferences, we have held that where a statute does not specify a particular way to give a provided preference to a class of potential contractors, agency acquisition officials have broad discretion in selecting the way to effectuate the statutory mandate. American Multi Media, Inc.--Recon., B-293782.2,

Aug. 25, 2004, 2004 CPD ¶ 158 at 5 (preference for nonprofit institutions concerned with the blind and other physically handicapped persons); HAP Constr., Inc., B-280044.2, Sept. 21, 1998, 98-2 CPD ¶ 76 at 4 (preference for firms doing business in a disaster area under the Stafford Act); Appalachian Research Council, B-256179, May 20, 1994, 94-1 CPD ¶ 319 at 15-16 (preference for agencies with demonstrated experience with the needs of youth in outreach contracts under the Job Training Partnership Act); and U.S. Def. Sys., Inc., B-251544 et al., Mar. 20, 1993, 93-1 CPD ¶ 279 at 4-5 (preference for U.S. firms in the award of contracts for guard services at overseas embassies).

As we noted in our decision in HAP Constr., and as we have seen again here, neither the language of the statute, nor the legislative history of the Stafford Act, defines the terms “preference,” “feasible,” or “practicable.” HAP Constr., Inc., supra, at 5. Without specific definitions to guide our review, we look to whether the agency’s interpretation is contradicted by the plain meaning of the words used in the statute. In our view, it is not.

The primary meaning of the word “preference” in Black’s Law Dictionary 1217 (8th Ed. 2004) is “[t]he act of favoring one person or thing over another....” Our review of the bid protest decisions above, and other materials, shows that agencies have used a continuum of possible preferences to implement statutes that provide one class of contractor a preference over others. For example, in the U.S. Def. Sys., Inc. decision, cited above, the agency provided a preference in the form of five evaluation points to be added to an offeror’s technical evaluation. In contrast, FEMA has opted to implement the provision of the Stafford Act under review here by providing a 30 percent price preference. 48 C.F.R. § 4452.217-70. While we have not previously seen a protest involving an agency decision to implement a preference using a set-aside, we think a set-aside can be viewed as, in effect, an absolute preference, located at one end of the continuum of possible preferences an agency might adopt.¹⁰

In our view, we have no basis for questioning the broader definition of “preference” inherent in the agency’s position in this case. Moreover, we think AshBritt misses the point when it argues that some form of preference short of a set-aside also implements the Stafford Act’s preference for using local businesses to clean up disaster-related debris. The question here is not whether some lesser form of preference might have satisfied the Act’s intent, but whether the preference chosen

¹⁰ AshBritt points out that Congress knows how to draft a set-aside statute when that is its intention, as evidenced by several statutory mandates for set-asides, such as those applicable to small businesses; in AshBritt’s view, since Congress did not specify a set-aside here, the agency does not have authority to conduct a set-aside. In our view, there is considerable difference between mandating a set-aside, and drafting a statute that permits, but does not require, one. See HAP Constr., Inc., supra, at 6.

was an abuse of agency discretion. Since the language in the statute does not specifically restrict the application of the preference, and since the use of a set-aside is consistent with the statutory goal of assisting firms in the affected area, we do not view the Corps's decision to implement the Stafford Act preference with a set-aside as an abuse of the agency's discretion to implement this statutory scheme. See id. at 6; Appalachian Research Council, supra, at 16.

We turn next to AshBritt's contention that the Stafford Act does not envision providing a preference (in this case, a set-aside) only to firms doing business in a particular state, to the exclusion of firms located in other states affected by the same natural disaster.

As an initial matter, it is fair to note that AshBritt's interpretation of the geographic reach of 42 U.S.C. § 5150 appears to be supported by the portion of the statute that requires this preference be provided to firms "residing or doing business primarily in the area affected by such major disaster or emergency." To conclude, however, that the Corps abused its discretion by limiting the competition here to firms within a single state would require us to ignore the overall scheme of the Stafford Act, the legislative history of the Act explaining what Congress was trying to accomplish with this provision, and the simultaneously enacted title of the preference provision in the Act (which is now reflected in the U.S. Code). While we think an agency reasonably might elect not to adopt the kind of restriction used in this procurement, see, e.g., HAP Constr., Inc., supra, we do not agree that the Corps acted improperly here by limiting this competition to Mississippi firms.

The entire scheme of the Stafford Act contemplates a process by which states interact with, and seek assistance from, the federal government; this interaction does not cross state lines. For example, federal assistance under the Stafford Act is triggered by a governor's finding that a major disaster has overwhelmed the state's ability to provide aid, assistance, and emergency services, and to reconstruct and rehabilitate devastated areas. 42 U.S.C. §§ 5121, 5170. When a governor presents such a finding to the President, and the President agrees, the President declares that a major disaster exists. 42 U.S.C. § 5170. This declaration identifies the specific areas within the state eligible for disaster relief, and specifies the type of relief available. 44 C.F.R. § 206.40; see also AR, Tabs 5a, 6a, 7a, and 8a. In addition, the statute, on its face, identifies the limits of federal cost-sharing available to the state for different types of relief activities. See, e.g., 42 U.S.C. §§ 5170b(b), 5170c(a), 5173(d). Moreover, as shown by the record in this protest, there are separate Presidential declarations for each state, see AR, Tabs 5a (Florida), 6a (Louisiana), 7a (Mississippi), and 8a (Alabama); there is no unified disaster declaration addressing all damage done by Hurricane Katrina, which would be more along the lines of the scheme AshBritt posits.

We turn next to the legislative history of the Stafford Act's preference provision. In this regard, we note that section 5150 of Title 42 was first enacted, in substantially similar form, as section 204 of the Disaster Relief Act of 1970. Pub. L. No. 91-606,

84 Stat. 1744, 1748. The Senate Committee on Public Works, the committee that proposed the language, crafted this provision to favor the use of local businesses to perform debris clearance. The committee's report on the bill explained the provision as follows:

Section 204 provides that in the expenditure of Federal funds, for example, for debris clearance and reconstruction of public facilities, preference is to be given to persons or firms who work or do business in the disaster area. One outstanding feature of the aftermath of a great disaster is the lack of ready cash. A Federal assistance program should be designed to revitalize the community by infusions of cash through the use of local people and business firms.

S. Rep. No. 91-1157, at 12 (1970) (emphasis added). Based on our review of the language above, we think the agency's actions are supported by the legislative history of the provision.

As a final matter, we note that section 5150 of Title 42 was enacted with a title, which we included with the provision when it was quoted above. Specifically, the title of this section was, and remains, "Use of Local Firms and Individuals." Moreover, FEMA's regulations interpreting the Stafford Act repeat the enacted title of the statute in its implementation of the Act. 44 C.F.R. § 206.10. Similarly, FEMA's contract clause implementing the regulation and statute describes the preference as available to "local firms" in the area affected by the disaster. 48 C.F.R. § 4452.217-70.

We recognize that AshBritt, too, appears to be located in an area that was declared a major disaster by the President because of damage caused by Hurricane Katrina. Nonetheless, when we consider that the drafters of the Stafford Act fashioned this provision to help revitalize communities by using local businesses to clean up debris related to major disasters, we will not conclude that the agency abused its discretion to implement this preference by limiting the competition for cleaning up debris in Mississippi to Mississippi firms.¹¹

Finally, AshBritt mounts several challenges to the J&A used here to justify the agency's decision to limit competition. Specifically, AshBritt contends that the J&A does not fully comply with FAR requirements, contains factual errors, and does not logically support the limited competition approach selected by the agency. We have

¹¹ We do not reach, in this protest, the question of whether it would be improper to limit a competition for the award of debris cleanup under the Stafford Act to firms residing, or primarily doing business, anywhere within a single state if not all parts of the state were affected by the disaster. Since every county in Mississippi was eventually identified by the President for some form of disaster relief, see AR, Tab 7a, this issue does not arise here.

reviewed each of AshBritt's contentions in this area, and find that none of them lead to a conclusion that the agency has acted improperly here.

The FAR regulations that implement CICA expressly anticipate limiting full and open competition to accommodate the Stafford Act's preference for using local businesses to clean up debris resulting from a major disaster. FAR § 6.302-5(b)(5). The FAR does not require the generation of a J&A when a statute expressly requires that a procurement be made from a specified source; rather, the FAR advises that "when the statute authorizes, but does not require, that the procurement be made from a specified source" the agency must prepare a J&A. FAR § 6.302-5(c)(2)(ii). As we hold in this decision, the Stafford Act authorizes, but does not require, that a procurement be made from specified sources (*i.e.*, firms within the area affected by a major disaster). Accordingly, a J&A was required here.

When a J&A is required to justify limiting full and open competition, the FAR sets out a general list of requirements about when a J&A must be prepared (FAR § 6.303-1), a list of the minimum amount of information the J&A must contain (FAR § 6.303-2), and the level at which the document must be approved (FAR § 6.303). These requirements generally apply without regard to which exemption from full and open competition resulted in the need to prepare a J&A. See generally FAR § 6.303. Among information that must be provided with each J&A is a contracting officer's certification that the justification is accurate and complete. FAR § 6.303-2(a)(12).

As an initial matter, we note that the list of the minimum amount of information that must be provided in all J&A documents, mandated by FAR § 6.303-2, contains several items that simply do not fit well with the situation where competition has been limited as authorized or required by statute. For example, item number 11 on the list, FAR § 6.303-2(a)(11), requires the justification to provide a "statement of the actions, if any, the agency may take to remove or overcome any barriers to competition before any subsequent acquisition for the supplies or services required." Here, the agency simply advised that in the future--presumably after the time period stated in the disaster declarations has passed, see FAR § 26.201(b) (stating that the authority to provide a preference applies only to acquisitions conducted during the term of a major disaster declaration made by the President)--it would resume using full and open competition.

Where, as here, a statute authorizes or requires that a procurement be made from a specified source, as anticipated by FAR § 6.302-5, there is little an agency can say about how it will avoid the situation in the future. Simply put, we fail to see how the J&A's statement about future competitions is, in any way, inadequate under the circumstances here. See PacOrd, B-238366, May 11, 1990, 90-1 CPD ¶ 466 at 3-4 (an agency's failure to perform a market survey and describe the survey in its J&A, as required by FAR § 6.302-2(a)(5), did not provide a basis for overturning a sole source procurement where a Memorandum of Understanding between the United States and other nations, in essence, required the sole-source procurement by mandating that the item be purchased from a specified source).

Similarly, AshBritt points to alleged “inaccuracies” in the J&A, including several which it says are found within the portion of the J&A document AshBritt describes as “the crux of the agency’s justification.” Protester’s Comments at 12. This passage states:

Currently major mission (debris, roofing, and temporary public buildings) obligations are in excess of \$440,000,000. Of this amount, approximately 80% is going to contactors who reside or are doing business outside of the State of Mississippi. The majority of prime contractors are either complying with or making a good faith effort to subcontract to local contractors. However, many local contractors have recovered from the initial impacts of the hurricane and are now eligible and willing to compete as prime contractors. Limiting competition to contractors residing in or doing business primarily in the State of Mississippi will ensure compliance with the Stafford Act.

AR, Tab M (J&A), at 3. In this regard, AshBritt argues that this statement wrongly includes obligations for roofing and temporary building contractors as part of the justification for awarding a new contract for debris removal, and wrongly implies that local contractors were not ready to compete earlier but are ready now—even though AshBritt claims that two of the three large Mississippi contractors that the J&A identifies as able to compete here, in fact, submitted proposals in the earlier competition that AshBritt won.

AshBritt’s disagreement with the representations in the J&A described above does not raise questions about whether the agency acted properly here. The preference for local businesses in debris cleanup contracts in the Stafford Act is not tied to any amount of obligations. Whether the current obligations exceed \$500 million, \$50 million, or \$1 million sheds no light on whether the agency acted properly in electing to provide the preference, or in justifying it. See AAI ACL Techs., Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243 at 7 n.5 (the existence of a technical error in a J&A does not necessarily result in a conclusion that the J&A is defective). Moreover, it does not appear that this justification is inaccurate in any meaningful way since we have been advised by the Corps during the course of this protest that it is nearing the ceiling amount of AshBritt’s base contract, or \$500 million. As a result, the Corps advised that it is exercising its option with AshBritt to order additional debris cleanup; the option amount contains an additional \$500 million maximum. Thus, the real problem with the J&A may be that the stated obligations were too low, not too high.¹²

¹² We also note for the record that we have heard no suggestion from AshBritt that the exercise of this option by the Corps was improper or not needed because the Corps had wrongly determined that it was approaching the \$500 million ceiling applicable to AshBritt’s base contract.

We also disagree with AshBritt's contention that the J&A here does not justify limiting this competition because the Corps has only identified three large Mississippi businesses that can compete for the unrestricted award anticipated by this solicitation. As indicated above, the Stafford Act requires that agencies provide this preference to the extent "feasible" and "practicable." Given that the Corps has identified at least three large Mississippi businesses that it expects to compete for the work, we think the agency can reasonably justify its decision that providing the preference here is feasible and practicable. Cf. HAP Constr., Inc., supra, at 4-5 (agency reasonably concluded that recent procurement histories for disaster relief services in the areas involved did not provide a basis for concluding that there would be competition among local firms that would ensure reasonable prices). Since AshBritt has not argued that the agency erred in its conclusion about the amount of competition it will achieve (as opposed to AshBritt's assertion that three large Mississippi contractors is insufficient to support a limited competition), we need not consider this matter further.¹³

Other Challenges to the Solicitation

AshBritt raises three other challenges to the solicitation here. First, it contends that regardless of whether the agency acted within its discretion in conducting this procurement as a Mississippi set-aside, the solicitation is improperly ambiguous because it fails to provide clear guidance on what constitutes residing, or primarily doing business, in that state. Second, AshBritt argues that the agency has failed to comply with the FAR regulations that govern the use of multiple-award contracts. Third, AshBritt contends that the solicitation impermissibly fails to include an estimate for the demolition work that will be covered by the contract.

AshBritt's initial contention that this solicitation is ambiguous about how the agency will decide whether a firm resides, or is primarily doing business, in Mississippi, has been addressed by the agency in amendments to the solicitation. As first issued, the RFP here stated only that this competition would be "limited to firms primarily doing business in the State of Mississippi pursuant to the Stafford Act." RFP at 2. After the protest was initially filed, this language was deleted and ultimately replaced with language that stated that the competition would be limited "to firms residing or doing business primarily in the State of Mississippi, pursuant to the Stafford Act." RFP, amend. 6, at 2. In addition, the agency added the following section to the solicitation:

¹³ AshBritt's challenge to the agency's conclusion about the presence of competition relates only to the unrestricted portion of the work. The Corps has located even more Mississippi businesses that will compete for the portions of the work reserved for the HUBZone and 8(a) small businesses.

Guidance on What Constitutes a Firm Residing or Primarily Doing Business in the State of Mississippi

In order to assist the offerors' understanding of what constitutes a "firm residing or primarily doing business in the State of Mississippi" the following **non-exclusive** list of factors which may be considered is provided:

- (a) If incorporated, in which state is the firm incorporated and the date of incorporation;
- (b) In which state(s), if any, does the firm maintain a permanent office(s) (if a permanent office is located in Mississippi, when was that office established);
- (c) Does the firm have existing Mississippi state licenses, how many and for how long;
- (d) What is the firm's record of past work in the state of Mississippi, how much and for how long; and what is the contractual history does [sic] the firm have with subcontractors and/or suppliers in the state of Mississippi;
- (e) What percentage of the firm's gross revenues are attributable to work performed in the state of Mississippi;
- (f) How many permanent employees does the firm have in the state of Mississippi;
- (g) Is the firm a member of any state organizations (i.e. Mississippi Economic Council, Blueprint Mississippi, Local Chamber(s) of Commerce);
- (h) Any other evidence submitted by an offering firm tending to establish that the firm resides or primarily does business in the State of Mississippi.

If these factors establish by a preponderance of the evidence that the firm in question resides or primarily does business in the State of Mississippi, then said firm shall be categorized as such.

Id. at 7-8 (emphasis in original). In its supplemental protest and comments, AshBritt renews its challenge to this guidance on the grounds that the guidance improperly lumps together the criteria for establishing that a firm resides, and is primarily doing business, in Mississippi; improperly provides a non-exclusive list of factors that will

be used by the agency; and impermissibly includes factors unrelated to the goal of the Stafford Act—such as the factors that consider where a firm is incorporated, where it holds licenses, how long it has held such licenses or has performed work in the state, and how many permanent employees it has within the state.

In our view, the agency’s identification of some of the factors it will use to assess whether a firm falls within the scope of the Mississippi set-aside in this solicitation adequately addresses any concern that the solicitation here is ambiguous. The non-exclusive list of factors, quoted above, appears to provide sound and specific guidance to potential offerors about whether they will be able to qualify under the set-aside used here. In addition, we are aware of no requirement that the guidance contain an exhaustive list of the factors that will be considered. As stated in the last factor quoted above, the agency is willing to consider any other evidence that an offeror submits that will establish that it is eligible for award under the terms of the set-aside.

With respect to AshBritt’s complaint that the factors in the solicitation are unrelated to the goal of the Stafford Act, we again disagree. While we have no doubt that the magnitude of AshBritt’s current cleanup contract is sufficiently large that the company may argue that its “primary” business now occurs in Mississippi, we think the factors included in the solicitation will allow the agency to reach a considered judgment about whether AshBritt is a business that can reasonably claim to be “residing or doing business primarily in” the state. Since we have concluded that the use of a Mississippi set-aside was within the agency’s discretion to provide a preference to local firms in the area affected by the disaster, we think the guidance here has been properly drawn to help the agency give effect to that preference.

AshBritt next argues that the agency has failed to comply with the requirements of FAR §§ 16.504(c)(1)(ii)(B)(3)-(4) governing the use of multiple-award contracts. These provisions are part of the FAR’s implementation of a preference in the Federal Acquisition Streamlining Act of 1994, 10 U.S.C. § 2304a(d) (2000), for awarding multiple task or delivery order contracts for the same or similar services or property; they establish criteria for determining whether multiple-award contracts would not be in the best interest of the government. One Source Mech. Servs., Inc.; Kane Constr., B-293692, B-293802, June 1, 2004, 2004 CPD ¶ 112 at 3. In particular, the cited provisions state that a contracting officer should not use a multiple-award approach if the expected cost of administering multiple award contracts outweighs the expected benefits of making multiple awards (§ 16.504(c)(1)(ii)(B)(3)), or if the projected task orders are so integrally related that only a single contractor can reasonably perform the work (§ 16.504(c)(1)(ii)(B)(4)).

AshBritt’s contention in this area is based on the premise that the agency is making multiple awards so that it will later be able to hold mini-competitions for this cleanup work. Under this rubric, AshBritt argues that the FAR restrictions above should have led the agency to conclude that it could not reasonably make multiple awards under this solicitation.

While it is technically correct that the Corps is using a single solicitation here to make three distinct awards (and in that limited sense, the agency is making multiple awards), there is nothing in this record to suggest that the awards are overlapping in any way, that the agency intends to hold mini-competitions among the awardees for the award of task orders, or that any of the policy implications of FAR Subpart 16.5 are at issue here. Instead, the solicitation anticipates awarding one contract to a large business, one to a HUBZone small business, and one to an 8(a) small business. In addition, the solicitation anticipates using each of these three contracts in a separate and discrete geographic area. RFP, amend. 7, at 2-3. Specifically, the RFP advises that “Contract Number 1”--the contract which is unrestricted in size--“is for work in the counties of Hancock and Harrison only”; “Contract Number 2”--the contract reserved for HUBZone small businesses--“is for work in the county of Jackson only”; and “Contract Number 3”--the contract reserved for 8(a) small businesses--“is for work in Covington, Forrest, Lamar, Lincoln, and Perry (Northern Counties) only.” Id.

Not only is AshBritt’s underlying premise at odds with the language and structure of the solicitation, as shown above, but the agency explains that even if the identified FAR provisions applied to the situation here, there are beneficial effects associated with awarding three separate contracts for this work. Specifically, the agency explains that, among other benefits, these awards will help ameliorate the negative effect of Hurricane Katrina on the state’s economy, lower the unemployment rate, and ensure that the agency has acted in compliance with the Stafford Act. AR at 16. In short, we see nothing in this record that leads us to conclude that the agency has violated the FAR restrictions AshBritt identified relating to multiple-award contracts.

Finally, AshBritt complains that the solicitation here improperly fails to contain estimates for the amount of demolition work that will be required under each contract (as opposed to estimates for the amount of debris removal, which are provided in the RFP). According to AshBritt, “such quantity estimates are mandatory in order to permit the Agency to evaluate its total overall costs by applying unit prices to quantity estimates.” Protester’s Comments at 15. In support of its contention, AshBritt relies on our recent decision in Department of Agric.--Recon., B-296435.12, Nov. 3, 2005, 2005 CPD ¶ 201.

The Corps explains that it was able to provide overall estimates of debris in the RFP for each of the three contracts, but that it is not able to estimate the amount of demolition that will be required under each contract. AR at 20-23. It also pointed out that these estimates, together with the “detailed information on the type of work to be performed and the manner in which it is to be carried out,” id. at 23, provided sufficient information to enable the offerors to compete intelligently and on a relatively equal basis. In addition, the Corps points out that AshBritt mischaracterizes the above-cited decision when it argues that the decision mandates that agencies prepare detailed quantity estimates in order to evaluate costs. We agree.

As a preliminary matter, in the case AshBritt cites, we sustained a protest challenging the agency's evaluation of proposed prices under a solicitation for mobile food services at various locations. We concluded that the agency's evaluation method was flawed because, by considering only unit prices for the different services being procured, the price evaluation failed to reflect the actual cost to the government of different offerors' proposals. Contrary to AshBritt's position, we did not conclude that the agency was required to develop detailed quantity estimates; rather, we recommended that the agency reevaluate proposals using a price evaluation method that allows comparison of the relative cost to the government of the offerors' competing proposals. Department of Agric.--Recon., supra, at 4-5.

Also, contrary to AshBritt's contentions, our decision expressly recognized the difficulty involved in developing estimates in certain types of situations. Id. at 5. Consistent with this view, we have held that an agency may properly impose a certain amount of risk on contractors, and offerors are expected to use their professional expertise and business judgment in anticipating risks and preparing their offerors. AT&T Corp., B-270841 et al., May 1, 1996, 96-1 CPD ¶ 237 at 8. The risk imposed on offerors under this RFP appears to affect all offerors equally, although we note that AshBritt, the incumbent providing these services, should be particularly able to calculate the risk factor in preparing its proposal. ARAMARK Servs., Inc., B-282232.2, June 18, 1999, 99-1 CPD ¶ 110 at 5. In sum, on the record here, we see no basis to conclude that the solicitation is defective because it does not contain detailed estimates for the amount of demolition work required.

The protest is denied.

Anthony H. Gamboa
General Counsel