



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 20, 2010

CBCA 1951-FEMA

In the Matter of HANCOCK COUNTY, MISSISSIPPI SCHOOL DISTRICT

R. Mark Alexander, Jr., and Paul J. Delcambre, Jr., of Balch & Bingham LLP, Gulfport, MS, counsel for Applicant.

Thomas M. Womack, Executive Director, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Janice Williams-Jones, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **GILMORE**, **STEEL**, and **KULLBERG**.

This matter is before the panel under the authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations. Hancock County, Mississippi School District (Hancock County) and the Federal Emergency Management Agency (FEMA) have requested that the arbitration panel determine whether Hancock County should be reimbursed the additional amount of \$494,365, for the purchase of fourteen new school buses, after Hurricane Katrina destroyed a substantial number of its buses. FEMA's position is that Hancock County was only authorized to purchase used buses, that used buses of "like kind and quality" were available at the time Hancock County purchased new buses, and that Hancock County did not receive prior approval from FEMA to purchase new buses. FEMA, thus, argues that

Hancock County is entitled to only the estimated cost of fourteen used buses of like kind and quality, and not the costs expended to purchase new buses. FEMA also argues that Hancock County did not provide documentation showing exactly what internet searches were made to locate used buses, and the names of the vendors contacted, and did not present letters from the vendors contacted stating that there were no used buses similar in quality to those destroyed. Finally, FEMA argues that the destroyed buses had seventy-one seats and the new buses have seventy-seven seats and that FEMA should not pay for buses that have a seating capacity greater than the destroyed buses. Hancock County's position is that it made an internet search and telephone calls which failed to locate used buses with similar specifications as the destroyed buses and that it also asked the same bus supplier who assisted other Mississippi school districts in locating buses, to assist it in locating used buses, and he too was unable to locate used buses of "like kind and quality" to those destroyed. Hancock County additionally argues that it properly followed FEMA's published guidelines applicable to purchasing replacement vehicles.

Hurricane Katrina struck Hancock County, Mississippi, on August 29, 2005. Twenty-four of the approximately eighty school buses that serviced Hancock County were totally destroyed by the hurricane. Because schools were scheduled to open in early October, Hancock County immediately began searching for replacement buses. Hancock County's transportation director contacted several bus companies and was unable to locate used buses meeting the age, condition, mileage, and mechanical specifications of the buses destroyed. FEMA agreed to reimburse Hancock County for the purchase of ten new buses because the school year was starting (authorized under Project Worksheet (PW) 8252). FEMA and Hancock County agreed that the purchase of the additional fourteen buses would be handled under a separate PW. Hancock County again searched for used buses to replace the additional fourteen buses and still could not locate buses meeting similar age, mileage, condition, and specifications as the destroyed buses. On February 16, 2006, the Hancock County Superintendent of Education wrote a letter to the director of the Mississippi Emergency Management Agency (MEMA) advising him that the county had continued to search for replacements and had not been able to secure used buses. Hancock County also contacted Mr. Hawkins, a sales representative with Waters Truck and Tractor Company (who had over forty years of experience in the bus transportation business, and was assisting other Mississippi school districts in their bus searches) to assist Hancock County in its search. Mr. Hawkins advised the Hancock County transportation director, by letter dated February 17, 2006, that he diligently searched for used buses and could not locate any used buses that met the required specifications. Hancock County, having failed to locate used buses meeting the specifications of the destroyed buses, purchased new buses on March 1, 2006, at a cost of \$63,313 each. This cost per bus was \$1256 less than the cost of the ten new buses Hancock County initially purchased.

The initial version of PW 7122, dated May 23, 2006, and drafted by FEMA to address the purchase of the additional fourteen buses, authorized \$372,237 to purchase “used” buses. PW 7122 stated that “[t]his cost estimate was generated by locating like kind and quality buses of those damaged. In the case that an exact make, model, year, mileage, etc. could not be located, the next closest available bus was used in the estimate.” FEMA used the blue book value of each destroyed bus to calculate the cost estimate, not the cost of a used bus that had actually been located as a suitable replacement. Version 2 of PW 7122 was written by FEMA on June 19, 2008, to adjust the amount earlier determined as the replacement cost, to deduct the insurance amount paid for the destroyed buses. FEMA continued to take the position that there were used buses available at the time the new buses were purchased and that Hancock County had not provided proper documentation to show that used buses were not available.

Version 3 of PW 7122 was written on September 9, 2009. Hancock County, FEMA, and MEMA representatives signed version 3, which obligated the costs of fourteen new buses with seventy-seven seats (instead of seventy-one), stating that Hancock County had memos in the file showing that the seventy-seven-seat passenger buses were the most cost effective models that could be found at the time of purchase. Version 3 of PW 7122 obligated \$494,365 for the new buses, which represented the cost of the buses, minus the insurance and the previously obligated amount. However, when version 3 was submitted to FEMA’s leadership for final review, FEMA reverted to its earlier position that PW 7122 was originally written because “like and in kind buses were located” and, therefore, disallowed the costs for new buses.

FEMA’s policy that controls the replacement of equipment, including vehicles, is set forth in Public Assistance Guide 322, published in October 1999. Page 57 of that guide states as follows:

When equipment, including vehicles, is not repairable, FEMA will approve the cost of replacement with used items that are approximately the same age, capacity, and condition. Replacement of an item with a new item may be approved only if a used item is not available within a reasonable time and distance.

At the arbitration hearing, Mr. Hawkins, the sales representative for Waters Truck and Tractor Company, provided the names of some of the vendors he contacted in his search for used buses and the specifications he gave to the vendors. We find his testimony to be credible – that he contacted a large number of vendors nationwide in his search for used buses and that he provided the specifications of the fourteen buses destroyed to the vendors and was unable to locate used buses of like kind and quality to those destroyed. The

evidence also establishes that Hancock County also called several vendors and made an internet search and was unable to locate used buses similar to the condition and age of those destroyed. A memo in the record authored by one of MEMA's project officers stated that Hancock County had not found any buses on the used market that satisfied Hancock County's standards.

The FEMA policy advisor who reviewed version 3 of PW 7122 (which had recommended reimbursement) stated at the hearing that the documentation Hancock County had earlier provided when it purchased ten new buses was sufficient but the documentation was not sufficient for FEMA to approve the purchase of the additional fourteen buses. He disapproved version 3 and FEMA issued another version of PW 7122 allowing only the estimated costs for used buses. FEMA's policy advisor further stated that the other two Mississippi counties that were reimbursed the cost of their new buses received the funding because they were able to "persuade" FEMA that used buses could not be located.

We find, however, that the documentation Hancock County provided to FEMA was similar in nature to the earlier documentation it provided to FEMA to purchase the ten new buses and similar to the documentation that Pascagoula, Mississippi school district provided to FEMA. Pascagoula sent a letter to FEMA which, like Hancock County's, did not provide the specific names of the vendors that were contacted or provide the exact specifications that were related to the vendors for their searches. Pascagoula's letter simply advised FEMA that Mr. Hawkins (who was the same sales representative assisting Hancock County) had performed a search by calling many vendors and had found few suitable buses, due to high mileage, age, and condition. FEMA did not question Pascagoula's documentation and reimbursed Pascagoula the cost of purchasing new buses. Another Mississippi school district that was searching for used buses after Hurricane Katrina also was unable to locate used buses for its fleet during this same time frame and FEMA reimbursed that school district for the costs to purchase new buses. As to FEMA's argument that the other two Mississippi school districts received reimbursement for new buses because they had received "pre-approvals" for their purchases, the governing FEMA regulations do not provide that reimbursement is allowed only if purchases have been pre-approved by FEMA. The test is whether the purchases met the conditions stated in the regulations for the purchase of new vehicles, not whether FEMA had pre-approved the purchases.

In the arbitration proceeding, FEMA provided a list of used buses that FEMA found on the internet in May 2006, with the assistance of MEMA project officers, consisting of twenty-five pages, with the specifications listed for each bus (year, mileage, type of engine, seating capacity, etc.). It appears that FEMA relied upon this list in its initial determination that used buses of like kind and quality were available. One of FEMA's project officers stated at the hearing that he found one used bus on the list meeting the specifications of one

of the destroyed buses, but could not specifically identify the bus on the list during the hearing. He believed that if he was able to identify one used bus on the list, that was enough to show that used buses were available to replace the fourteen buses. In addition to the fact that the FEMA presenters could not identify one bus on the list that met the specifications of any of the fourteen destroyed buses, the panel finds the list to be of little evidentiary value, since the record does not establish that the used buses listed in May 2006 were available when Hancock County performed its search several months earlier.

This panel concludes, from the weight of the evidence presented, that Hancock County made a diligent search for used buses meeting specifications similar to the buses destroyed by Hurricane Katrina prior to its purchase of new buses in March 2006, and was unable to locate buses of like kind and quality. When Hancock County made its initial search for used buses in October of 2005, it was unable to locate used buses meeting the specifications, and FEMA reimbursed Hancock County for the purchase of the ten new buses. Two other Mississippi school districts were also unable to locate used buses in their searches during the same time period that Hancock County was searching, and FEMA reimbursed those districts for the purchase of new buses. Hancock County provided credible evidence that it again attempted to locate used buses meeting specifications similar to the fourteen destroyed buses, and additionally sought the assistance of a knowledgeable sales representative with extensive experience in the bus industry, who also was unable to locate used buses meeting the required specifications. As to FEMA's argument that the fourteen new buses purchased exceeded the scope of the specifications of the destroyed buses, this fact was not established during the arbitration proceeding. The evidence shows that the fourteen new buses had the same chassis, same transmission, and same drive train and wheel base as the destroyed buses. We find it to be irrelevant that the fourteen buses had six more seats than the destroyed buses since the cost per bus was \$1256 less than the seventy-one-seat capacity buses purchased earlier.

Decision

Pursuant to 44 CFR 206.209(k)(3) (2009), this panel makes the findings above and concludes that Hancock County met the FEMA guidelines for the purchase of new vehicles and is entitled to reimbursement of the full amount it expended for the purchase of fourteen new buses in March 2006. PW 7122 should be revised to obligate the additional amount of \$494,365 for the purchase of the fourteen new buses.

BERYL S. GILMORE
Board Judge

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge