



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 29, 2013

CBCA 2875-FEMA

In the Matter of CITY OF NEW ORLEANS, LOUISIANA

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Mark Riley, Deputy Director, Mark DeBosier, State Coordinating Officer, and William J. Patigo, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Kristen E. Shedd and Michelle L. Buckalew, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, New Orleans, LA; and George Cotton, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **HYATT**, **STEEL**, and **ZISCHKAU**.

On June 29, 2012, the City of New Orleans, Louisiana, filed a request for arbitration of a May 24, 2012 determination by the Federal Emergency Management Agency (FEMA) regarding reimbursement of one third of the city's regular time salary costs for its police, fire, and emergency medical services (EMS) first responders who performed emergency disaster response work during the first four months after Hurricane Katrina struck the city. The city and the state argue that the costs were previously approved, obligated, and paid by FEMA under project worksheet (PW) 11 version 2 in November 2006, and reaffirmed in PW 11 versions 3 and 4 in 2007 and 2009, and that FEMA's action to deobligate the amount

in PW 11 version 5 violates section 705(c) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. ch. 68 (2006). FEMA argues that its prior payment of one third of the first responders' regular time pay was illegal under 44 CFR 206.228(a)(4) (2005) and FEMA policy and thus the agency properly deobligated the amount in 2009. We conclude that FEMA's initial obligation was not illegal under 44 CFR 206.228(a)(4) and FEMA policy. Accordingly, FEMA shall reobligate the \$10,844,690.83 amount deobligated in PW 11 version 5.

Background

On August, 29, 2005, Hurricane Katrina struck the Gulf Coast states of Alabama, Mississippi, Louisiana, and Texas. High winds, heavy rain, and flooding in the City of New Orleans, Louisiana, caused the levees in New Orleans to fail, which in turn led to the flooding of approximately eighty percent of the city to depths as high as twenty feet. More than ninety percent of the city's population had evacuated prior to the hurricane striking the city as part of a mandatory evacuation plan. Of those who failed to evacuate, more than 1000 died, and tens of thousands required emergency rescue. The emergency response effort fell to the first responders, including the city's police, fire, and EMS personnel, as well as state and federal military and civilian response organizations.

In the aftermath of the devastation in New Orleans, the city was financially crippled and faced the prospect of bankruptcy, lacking cash reserves and population or commerce available to pay taxes. As the President had declared the affected area to be a major disaster, the city could receive various types of federal assistance as determined by the President, 42 U.S.C. § 5170, including grants for public assistance under the Stafford Act. Under section 403 of the Stafford Act, FEMA is authorized to "provide assistance essential to meeting immediate threats to life and property resulting from a major disaster," including financial assistance to state or local governments carrying out emergency services. FEMA categorizes "essential assistance" as "emergency work" under the public assistance program. Emergency work includes debris removal and protective measures for purposes of eliminating or reducing immediate threats to life, public health, or safety, or to eliminate or reduce an immediate hazard that threatens significant additional damage to improved public or private property. 44 CFR 206.225(a)(3).

As the city had no significant sources of cash to pay for emergency response operations, FEMA advanced the city \$102 million of immediate needs funding under PW 11 version 0 for public assistance to meet immediate threats to life and property resulting from the disaster as well as debris removal. The project worksheet's scope of work description states that the city's police, fire, and other first responders were undertaking extensive response actions to alleviate immediate threats to the health and safety of the general public. These response actions were to be funded under the PW. They included the labor,

equipment, and other costs necessary to barricade roadways, control traffic, conduct search and rescue operations, and to provide security for infrastructure, critical facilities, and threatened populations. The cost estimate line items mentioned “overtime labor, equipment, and materials.” On September 7, 2005, just over one week after the hurricane struck, the disaster recovery manager responsible for managing the FEMA assistance programs approved this initial project worksheet and funding.

After nine days of the city’s first responders performing emergency response duties under very difficult circumstances, the city placed its police, fire, and EMS personnel on administrative leave rotations lasting up to five days, in order to safeguard their health and promote their ability to continue further disaster recovery work.

During September, it became clear that with nearly all of the city evacuated and major portions under water, the city would not have the financial means to continue city services, including even the emergency work of its first responders. FEMA and city officials repeatedly discussed the problem at their meetings. FEMA officials agreed with the city that it would be unwise to lay off the first responders who were clearly performing critical and eligible disaster-related functions. FEMA officials committed to find a way to reimburse regular time pay of the first responders, given the exceptional nature of the disaster and the resulting financial collapse of the city. It was recognized by FEMA, the city, and the state that it would be significantly more expensive to lay off the first responders and have FEMA hire them back as contractors. (Contracted services were reimbursable by FEMA.) Because of the widespread destruction throughout the Gulf Coast caused by the hurricane, it was difficult and far more expensive to find suitable outside contractors to provide the kind of work the city’s police, fire, and EMS personnel were performing.

By mid-October 2005, the city reduced its workforce (excluding police, fire, and EMS workers) by 62 percent due to lack of tax revenue. In FEMA Information Sheet 003, dated October 24, 2005, entitled “Overtime Pay Policy Clarification,” there are a number of points about applicants claiming overtime pay for eligible disaster recovery work. The first sentence of the document reads: “For debris removal and emergency protective measures, only overtime labor is eligible for permanent employees, regardless of normal duties or assignments.” At the end of the document there is the following notation: “Because this document is not exhaustive, either in topics or in detail, information should be verified with FEMA Public Assistance Program officials before becoming the basis for decision making.” Notwithstanding FEMA’s general policy about not reimbursing regular time of permanent employees, the city and FEMA officials agreed that rather than lay off the city’s first responders who were performing critical disaster response work, the city would retain its first responders and FEMA would find a way to reimburse the city for the regular pay costs during the initial period of the emergency response effort because these costs were effectively incremental emergency costs that the city would not have incurred but for the

disaster.

Consistent with this position, adopted by multiple FEMA public assistance program officials from fall 2005 through the end of 2006, FEMA decided to reimburse one-third of the regular time pay of the city's police, fire, and EMS personnel for the period September 3 through December 31, 2005, and in early 2006, began preparing PW 11 version 2 which would reimburse the city for that portion of the regular time pay of the city's first responders. The state's personnel involved in dealing with FEMA and the city were aware of this decision by FEMA and worked on implementing it. The state conducted an extensive audit of the city's actual final payroll amounts for those four months and concluded that the one-third portion of the police, fire, and EMS pay representing incremental emergency costs totaled \$10,844,690.83. FEMA does not dispute the amount or the reasonableness of the regular pay rates. In PW 11 version 2, dated April 2006, the scope of work states in part: "Both [the emergency pay differential] and 1/3 of the regular time paid by the City of New Orleans are eligible for 100% reimbursement under 44 CFR 13 as extraordinary costs incurred as a result of the hurricane. (Ref. Response and Recovery Directorate Policy Number 9525.7 attached)" Audited final incurred costs are identified separately for police, fire, and EMS personnel. The record indicates multiple levels of FEMA reviews and approvals in August through October 2006, with PW 11 version 2 amounts being fully obligated on November 6, 2006.

PW 11 version 3 repeated the same language from version 2 regarding the reimbursement of one-third of the regular time of the first responders with reviews and approvals in early 2007 and a date of obligation of February 22, 2007. FEMA began preparing PW 11 version 4 in 2007. Version 4 again repeated the language from version 2 regarding the reimbursement of one-third of the regular time of the police, fire, and EMS personnel. In the scope of work, this version adds that PW 11 paid overtime and "1/3 regular time at regular rate of pay," that version 2 "did not explain how the 1/3 regular payment was derived and what it was intending to cover," and that this version (version 4) "follows the precedence set by version 2 of PW 11 which was reviewed, approved, and obligated" Version 4 shows a date of obligation of August 19, 2009.

PW 11 version 5 was prepared in 2009 and shows a date of obligation of October 6, 2009. In this version of PW 11, FEMA deobligated the one-third regular pay for the police, fire, and EMS personnel, stating in relevant part:

Version #2 and Version #4 (obligated for zero and put into Version #5) of PW 11 documented that both OEPYW [Official Emergency Pay, Working] and 1/3 of the regular time paid by the City of New Orleans is eligible for 100% reimbursement under 44 CFR 13 as extraordinary costs incurred as a result of the hurricane (Ref. Response and Recovery Directorate Policy Number:

9527.7 attached). At this time FEMA can not verify such a policy directorate or authorization that 1/3 of the regular time paid by the City of New Orleans is eligible for 100% reimbursement. Costs for 1/3 of regular time equaling \$10,944,688.83, included in previous versions have not been calculated into this version due to insufficient backup documentation at the time of this version. However, if documentation is found providing the previously referenced FEMA Response and Recovery Directorate Policy confirming that the City of New Orleans is to receive reimbursement for 1/3 of the regular time paid to employees by the City of New Orleans, a version will be written to obligate these specific costs.

In February 2012, a FEMA representative advised city representatives by email that “FEMA has found the existing FEMA policy and regulations do not allow the funding of regular time.” On March 6, 2012, the city submitted a request that FEMA re-obligate the one-third regular time labor costs for its first responders. In a decision letter of May 24, 2012, FEMA declined to re-obligate the funds.

Discussion

We address the city’s request for arbitration of the dispute pursuant to section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 (2009).

Sections 403 and 407 of the Stafford Act authorize the President to use federal agencies to provide grants and other assistance essential in meeting immediate threats to life and property resulting from a major disaster, including debris removal, search and rescue, emergency medical care, emergency shelter, movement of supplies and persons, clearance of roads, temporary restoration of essential public facilities and services, and reduction of immediate threats to life, property, and public health and safety. 42 U.S.C. §§ 5170b, 5173. Although the Stafford Act was recently amended to allow reimbursement of regular pay of permanently employed state and local government personnel (prompted by the disaster declaration for Hurricane Sandy), in prior years these sections of the Stafford Act were silent on whether the expenses incurred by state and local governments included base wages or regular time salaries of state or local government employees. Although FEMA reimbursed base wages in the early years after passage of the Stafford Act, FEMA issued a proposed regulation in 1992 that would make regular time salaries ineligible for reimbursement. In the summary explanation section for the regulation, FEMA stated:

We propose that some of the labor costs of an applicant’s regular employees performing certain disaster recovery work will not be allowable in disaster assistance claims. The change is proposed to make FEMA disaster assistance

conform to the intent of the Stafford Act which is that disaster assistance be supplemental to the efforts of State and local governments.

.....

Assistance under the Stafford Act is intended to be supplementary to the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused by a major disaster.

When an applicant for disaster assistance performs response or recovery work using regularly employed personnel, it is using its pre-disaster existing resources. The term for this practice is “Force Account Labor.” Considering just the straight or regular time salaries of these employees, there is no incremental cost to the applicant because of the disaster. This salary cost, including normal fringe benefits, would be incurred whether or not the disaster occurred. In the aftermath of a disaster, an applicant will generally perform debris clearance and emergency protective measure activities with its own regular employees. Thus, no incremental cost is incurred by an applicant for the regular time portion of those salaries of their personnel engaged in these types of activities. However, overtime wages of regular employees, including fringe benefits, and both regular and overtime wages for extra employees hired to perform eligible work, do represent an incremental disaster related cost to the existing regular time labor resources of the applicant.

57 Fed. Reg. 18,442 (Apr. 30, 1992). The resulting FEMA regulation, codified at the time of Hurricane Katrina, 44 CFR 206.228(a)(4) (2005), provided as follows:

Force Account Labor Costs. The straight- or regular-time salaries and benefits of a subgrantee’s permanently employed personnel are not eligible in calculating the cost of eligible work under sections 403 and 407 of the Stafford Act. 42 U.S.C. 5170b and 5173. For the performance of eligible permanent restoration under section 406 of the Act, 42 U.S.C. 5172, straight-time salaries and benefits of a subgrantee’s permanently employed personnel are eligible.

In 2000, FEMA issued Response and Recovery Directorate Policy Number 9525.7, entitled “Labor Costs – Emergency Work,” with the purpose of providing guidance to FEMA personnel making eligibility determinations for the public assistance program on the eligibility of labor costs for an applicant’s permanent employees who perform emergency work subject to the Stafford Act. In the background section of the policy, FEMA states that

this policy “will be amended in the coming months to address the eligibility/ineligibility of the costs of backfill employees” and that “[i]n the interim, questions on that topic should be forwarded to FEMA headquarters.”

Policy paragraph 7.A states that the “cost of straight time salaries and benefits of an applicant’s permanently employed personnel are not eligible in calculating the cost of eligible emergency work.” Paragraph 7.E states that the “costs of salaries and benefits for individuals sent home or told not to report due to emergency conditions are not eligible for reimbursement. However, extraordinary costs for essential employees who are called back to duty during administrative leave to perform disaster-related emergency work are eligible if the costs were provided for in the written policy prior to the disaster.” Paragraph 7.H states that “[p]ermanent employees who are funded from an external source (e.g., by a grant from a Federal agency, statutorily dedicated funds, rate-payers, etc.) to work on specific non-disaster tasks may be paid for emergency work. However, the FEMA region is to consult with FEMA headquarters before approving payment.”

FEMA Policy 9525.7 was cited in FEMA’s PW 11 version 2, which approved and obligated the one-third of the first responders’ regular pay. Although FEMA argues that policy provisions 7.E and 7.H are not applicable to the city’s first responders for various reasons, FEMA does acknowledge that these policy clarifications do establish circumstances allowing the reimbursement of straight- or regular-time pay. FEMA agrees that these exceptions to the general rule of ineligibility are based on the same principle stated in FEMA’s summary section in 57 Fed. Reg. 18,442, namely, that regular time pay is ineligible where the assumption is that the applicant is using pre-disaster existing resources to meet payroll and thus there is no incremental cost incurred by the applicant. Stated differently, regular time pay of an applicant’s employees is reimbursable where the pay represents an incremental cost to the applicant that would not have been incurred but for the major disaster. This is the clear and logical meaning of FEMA’s regulation and its policy statements.

When we apply these principles to the situation involved in this arbitration matter, it follows that the FEMA’s determination reflected in PW 11 version 2 to reimburse the city for one-third of the regular pay of the police, fire, and EMS personnel for the period September 3 through December 31, 2005, was a legitimate and cost-effective decision consistent with FEMA regulation and policy. We do not agree that FEMA’s action in 2006 to approve and obligate the \$10,844,690.83 for reimbursement was an illegal act. To the contrary, FEMA’s approach to have the city retain its first responders even though the city did not have funds to meet their payroll, rather than hiring contractors to perform the same emergency work, was a prudent and economically advantageous decision for both FEMA and the city.

We agree with the city applicant and state grantee that the cited regulation, and the FEMA policy, did not prohibit FEMA from reimbursing regular time pay where the pay represented an incremental cost that would not have been incurred by the city but for the disaster. The city has made a convincing case that but for FEMA's agreement to fund part of these costs, it would have had to lay off the first responders. The record demonstrates that the regular pay at issue was an incremental cost incurred by the city in performing emergency work in response to the unprecedented disaster conditions caused by Hurricane Katrina. FEMA properly approved and obligated funds to reimburse the city. Because the funds were legitimately obligated and paid pursuant to an approved agreement, the costs were reasonable, and the purpose of the grant was accomplished, FEMA could not retroactively de-obligate those funds without violating section 705(c) of the Stafford Act, 42 U.S.C. § 5205(c). *See Baldwin County Board of Supervisors*, CBCA 2018-FEMA (Sept. 15, 2010).

Decision

Based on the facts and law described above, the panel concludes that FEMA properly approved, authorized, and obligated public assistance funds in 2006 to reimburse one-third of the regular pay of the city's police, fire, and EMS personnel as extraordinary incremental costs in performing emergency response work resulting from Hurricane Katrina. Accordingly, FEMA shall re-obligate those funds for the city applicant.

JONATHAN D. ZISCHKAU
Board Judge

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge