



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 30, 2014

CBCA 3608-FEMA

In the Matter of LIVINGSTON PARISH

Hilary S. Cairnie, William T. DeVinney, Maria R. Coor, Lauren A. Deeb, and Robert T. Razzano of Baker & Hostetler LLP, Washington, DC, counsel for Applicant.

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

Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS; and Brock Pierson and Caroline Hong, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **SOMERS**, and **KULLBERG**.

Livingston Parish, Louisiana, has asked that a panel of the Civilian Board of Contract Appeals determine, through arbitration, that the Parish is eligible to recover \$59,183,143 from the Federal Emergency Management Agency (FEMA), as a public assistance grant under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 et seq. (2006). This figure represents, according to the Parish, the cost of clearing debris created by Hurricane Gustav in September 2008, in addition to amounts the Parish has already received from FEMA for this effort. The total consists of three components: \$14,096,899 for pruning or removing trees hanging or leaning over public areas or improved

property, \$44,002,901 for clearing debris from waterways, and \$1,083,344 in direct administrative costs.¹

We consider this case under the authority of section 565 of the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 565, 127 Stat. 198, 381 (2013). In a previous decision, the panel determined that it has jurisdiction over the case because all requirements of that section are met. *Livingston Parish*, CBCA 3608-FEMA, 14-1 BCA ¶ 35,517.

The panel received voluminous explanations of position and documentation from both the applicant, Livingston Parish, and FEMA. We also listened to testimony from many witnesses – seventeen from the Parish and eleven from FEMA – over five days. We considered all of the arguments and evidence in reaching our conclusions.

Public Assistance Grants for Debris Removal

The Stafford Act authorizes FEMA to make public assistance grants for “[performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including . . . debris removal.” 42 U.S.C. § 5170b(a)(3)(A). FEMA has implemented this statute by prescribing, in regulation, that if it determines that debris removal is in the public interest, it –

may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters. Such removal is in the public interest when it is necessary to:

- (1) Eliminate immediate threats to life, public health, and safety; or
- (2) Eliminate immediate threats of significant damage to improved public or private property.

44 CFR 206.224(a) (2008).²

¹ We note that the total of the components is actually one dollar more than the total amount sought.

² The regulation lists two other instances in which debris removal is in the public interest; neither is at issue here.

The agency has also prescribed in regulation general requirements for public assistance grants, which apply to grants for debris removal:

To be eligible for financial assistance, an item of work must:

- (1) Be required as the result of the major disaster event,
- (2) Be located within a designated disaster area . . . , and
- (3) Be the legal responsibility of an eligible applicant.

44 CFR 206.223(a). An applicant “is responsible . . . for ensuring that the applicant has identified all eligible work and submitted all costs for disaster-related damages for funding.” *Id.* 206.202(d)(1).

Through published guidance, FEMA has further explained the parameters of public assistance grants for debris removal. In Public Assistance Guide 322, the agency has stated:

In general, debris on public property that must be removed to allow continued safe operation of governmental functions or to alleviate an immediate threat is eligible. Debris that is blocking streets and highways is a threat to public health and safety because it blocks passage of emergency vehicles or it blocks access to emergency facilities such as hospitals. Debris in a natural stream or flood channel may cause flooding from a future storm. If such flooding would cause an immediate threat of damage to improved property, removal of the disaster-related debris only to the extent necessary to protect against an immediate threat would be eligible.

In Public Assistance Debris Management Guide 325, FEMA has provided this explanation regarding removal of tree debris, which is of particular relevance to this case:

Hazardous Trees

Removing a hazardous tree may be eligible for Public Assistance grant funding. A tree is considered hazardous if its condition was caused by the disaster; it is an immediate threat to lives, public health and safety, or improved property; it has a diameter breast height of six inches or greater; **and one or more of the following criteria are met:**

- It has more than 50 percent of the crown damaged or destroyed;

- It has a split trunk or broken branches that expose the heartwood;
- It has fallen or been uprooted within a public-use area; and/or
- It is leaning at an angle greater than 30 degrees.

....

Hazardous Limb Removal (Hangers)

Removing hanging limbs may be eligible for Public Assistance grant assistance. Limbs must be:

- Located on improved public property;
- Greater than two inches in diameter at the point of breakage; and
- Still hanging in a tree and threatening a public-use area

Only the minimum amount of work necessary to remove the hazard is eligible. Pruning, maintenance trimming, and landscaping are not eligible. . . .

....

Documentation required for Public Assistance grant consideration:

- Describe the immediate threat, e.g. photos of hanging limbs or leaning trees;
- Clearly define the scope of work to remove the immediate threat;
- Specify the improved public property location by recording the nearest building address and/or GPS [global positioning system] location; and
- Denote date, labor (force account or contract), and equipment used to perform the work.

Leaners and Hangers

The Parish's contractors made about 88,000 cuts on 16,000 trees which individuals monitoring the work of the contractors considered to be leaning or hanging over public areas or improved property, such that the cuts qualified for a public assistance grant as debris removal. The documentation of this work – “tree tickets,” narrative diaries, and photographs made by the monitors – has been subject to extensive review.

FEMA initially analyzed 20% of the documentation, concluded that 34% of the leaners and 16% of the hangers qualified, and made a public assistance grant to the Parish for that much of the asserted work. Later, the engineering company which was responsible for the monitoring analyzed all of the documentation and concluded that 89% of it was eligible for payment. Because FEMA's policy is to make a public assistance grant for all of the work if 80% or more is eligible, the Parish believes that the engineering firm's study supports its entire request for payment.

FEMA later made a second analysis of the documentation, reviewing a sample selected by the State of Louisiana's Governor's Office of Homeland Security and Emergency Preparedness which that Office alleged was statistically significant. This time, FEMA concluded that only 19% of the leaners and 13% of the hangers were eligible.³ At the request of the Parish president, the Louisiana Legislative Auditor made an independent review and concluded that only 7% of the photographs submitted were consistent with FEMA guidance. After the Parish asked for arbitration, FEMA engaged a licensed arborist in Louisiana, Scott Courtright, to perform yet another independent review of the documentation. Mr. Courtright examined 70% of FEMA's 20% sample – 16,000 photographs – and determined that only about 5% of the leaners and 5% of the hangers met FEMA requirements as established in regulation and guidance.

The panel finds Mr. Courtright's analysis particularly compelling. As he found, much of the data presented by the Parish is deficient. This data does not demonstrate that cuts were on public property or over a right of way, rather than on private property; that the damage to the trees was caused by Hurricane Gustav; that the tree trunks or cuts were greater than the minimum prescribed diameters; or that breaks were present on branches which were cut. Additionally, the data show that some of the branches were cut multiple times and that others were cut at places which damaged the trees themselves.

The panel concludes that the public assistance grant made by FEMA to Livingston Parish for work on leaners and hangers was more generous than the documentation supports. The Parish should not be given an additional grant for this work.

³ One of the Parish's witnesses asserted that FEMA's spreadsheet which showed the agency's data was replete with errors. As a FEMA witness explained, the allegation is based on an incomplete understanding of how the agency documented its analysis.

Work in Waterways

Much of Louisiana is low-lying and contains many waterways, and Hurricane Gustav was declared a disaster area for the entire state. Despite these facts, as a result of the hurricane, only three parishes in Louisiana requested public assistance grants for removing debris from waterways. The amounts sought and received were \$300,000 for one parish, \$5,000,000 for another, and more than \$44,000,000 for Livingston Parish. We also know that Gravity Drainage District 1, a taxing authority which maintains waterways within about 8% of Livingston Parish, sought and received \$231,000 for removing Gustav-generated debris from its waterways. The relatively high figure claimed by Livingston Parish caused FEMA to review carefully this parish's request.

The Parish's contractor cleared a considerable amount of debris from waterways. The Parish has not demonstrated, however, what portion of that debris was generated by Hurricane Gustav. In virtually all the waterways which were cleaned, the contractor cleared all debris from bank to bank, rather than simply removing debris which could reasonably have been thought to have been deposited by the hurricane. The Parish did not provide any maintenance logs to show the condition of the waterways prior to the event. Due to its essentially flat geography and innumerable waterways, Livingston Parish has flooded frequently both before and after Gustav, whenever rain has fallen heavily. The panel is not convinced that the hurricane-caused debris appreciably increased the likelihood of flooding.

The panel found particularly instructive as to this matter testimony by Professor Richard Keim of Louisiana State University, a forest hydrologist who was presented as an expert witness by FEMA. Dr. Keim explained that although the hurricane increased the amount of debris in the waterways, the hydraulic effect of that debris was generally negligible. Most debris piles, he found after careful examination, resulted in blocking less than half of a stream. In some places, the contractor actually increased the amount of debris in the waterways, by using heavy equipment which pushed trees into the water and damaged the banks. Many of the contractor's actions modified and reshaped channels, instead of removing debris. These actions made significant ecological and hydrological changes to the streams, and may even have exacerbated flooding problems in that cleaning the streams upstream increased the efficiency of drainage there, creating flooding downstream during rain events.

We do not find credible the surveys performed by FEMA's "tiger team" which the agency points to as support for the decision not to provide any funding for waterway debris removal. Nevertheless, the Parish's utter failure to provide a rational basis for concluding that any particular portion of the waterway cleanup actually removed debris generated by the hurricane precludes the panel from finding that any sum should be paid by the agency as a

public assistance grant for this purpose.⁴ To the extent that the Parish might be due some grant money for removing hurricane-generated debris from waterways, we believe that the sum has already been amply covered by FEMA's overpayment for removal of leaner and hanger debris.

Decision

The panel affirms FEMA's determinations regarding the public assistance grants at issue.

During the course of the hearing, it became apparent to us that there is considerable controversy in Livingston Parish as to who is responsible for various matters – the Parish government (and if so, the president, council, or emergency preparedness director), any of three Gravity Drainage Districts, the school district, the park district, the Parish's contractor, the Parish's monitor of the contractor's operations, and/or private land owners. The panel

⁴ We also note that the Parish relies heavily on statements made by FEMA's debris task lead for the State of Louisiana, at a meeting in November 2008, in asserting that the agency promised to cover as a grant the costs the Parish might incur in clearing waterways. The task lead, Jeffery Jones, stated, "[I]f you have debris that's storm-generated that's in your canals and ditches that's preventing drainage and can be an immediate threat against your citizens, then you can remove that debris. You can remove that debris without FEMA seeing it first. You can take photographs and GPSs, and that will be fine. FEMA will accept that." The panel believes that Mr. Jones' statement was consistent with agency regulation and guidance, but that the Parish removed vastly more debris than was deposited by the hurricane. Mr. Jones also stated, in the course of the meeting, "The [Army] Corps [of Engineers] has nothing to do with this." The Parish has taken this comment to be a commitment that the Corps would not require permitting for any actions the contractor might take in clearing waterways of debris. The panel finds that this interpretation is unreasonable; it distorts the meaning of the statement by taking it out of context. Mr. Jones had no authority to bind the Corps; his comment, reasonably understood, was simply to the effect that the Corps had nothing to do with FEMA's determinations of eligibility for public assistance grants.

does not express an opinion on this subject. We restrict our views to the sole matter raised by the request for arbitration – the amount of public assistance grants to be made by FEMA to the Parish for debris removal.

STEPHEN M. DANIELS
Board Judge

JERI KAYLENE SOMERS
Board Judge

H. CHUCK KULLBERG
Board Judge