



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 5, 2014

CBCA 3282-FEMA

In the Matter of GULF COAST COMMUNITY ACTION AGENCY

Tim C. Holleman of Boyce Holleman & Associates, Gulfport, MS, counsel for Applicant.¹

Robert R. Latham, Jr., Executive Director, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Linda D. Litke and Christie E. Rachal, 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 **STERN**, **HYATT**, and **STEEL**.

ARBITRATION DECISION

This arbitration matter is before the Board pursuant to the authority of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (2009), and regulation, 44 CFR 206.209 (2012). The Gulf Coast Community Action Agency (GCCAA) is the applicant. The Mississippi Emergency Management Agency (MEMA) is the grantee. The Federal Emergency Management Agency (FEMA) is the respondent.

GCCAA is a private, non-profit organization which is responsible for operating social services programs in Hancock and Harrison Counties in Mississippi, including nine Head Start programs, which offer preschool instruction and nutritional support to eligible children.

¹ At the time of briefing and oral argument, Ernest B. Abbott, Esq. was counsel for the applicant.

GCCAA receives funds from numerous sources, including the State of Mississippi, the United States Department of Agriculture (USDA), and the Department of Health and Human Services (HHS).

After Hurricane Katrina damaged facilities owned or maintained by GCCAA, GCCAA applied for disaster recovery funding from both FEMA and HHS. On October 5, 2005, GCCAA submitted a request for public assistance to FEMA seeking funding for some twenty-one different projects ranging from repair of a van to replacement of three centers that were demolished by the hurricane. After assessing its needs further, GCCAA decided to merge one of the three destroyed centers with the A. E. Perkins Head Start facility, and submitted “Improved Project 11134” to reflect this revision to its recovery plans. FEMA subsequently approved funding of \$6 million for these projects, and GCCAA drew down approximately \$3 million of that amount. In December 2005, Congress appropriated \$90 million in funds to HHS for disaster relief. GCCAA applied for assistance from these funds as well. On August 1, 2006, HHS awarded grant funds to GCCAA in the amount of \$16,621,891, which included grants to fund the same repairs and replacement work that had been requested and funded through grants from FEMA. GCCAA did not report the HHS funding to FEMA, nor did it report the FEMA grants to HHS.

Following an audit completed in 2011, the Department of Homeland Security Office of Inspector General (OIG) concluded that GCCAA had received \$2,724,633 of FEMA funding for the same facility damages covered by the \$16,621,891 HHS grant. The OIG therefore concluded that the HHS grant “duplicated” the FEMA grant. The remainder of the initially approved FEMA funds were never drawn down for use by GCCAA. FEMA, after its analysis of other GCCAA funding, deobligated a great majority of the unused funding in April 2012, reducing its funding by \$2,589,350.² This deobligation is not disputed. But GCCAA and MEMA oppose the deobligation of expended funds, arguing that there was no duplication of benefits; rather the expenditures for eligible projects exceeded \$20 million, funded by over \$16 million from HHS and over \$3 million from FEMA.

GCCAA argues that all duplications related to HHS and FEMA funding were resolved by a reallocation of HHS funding approved by a letter dated April 23, 2010, signed by Bobby Griffin for Regional Program Manager Marsha Lawrence. The letter states that funds allocated and expended for the repair of the A.E. Perkins Head Start Center could be reallocated to the completion of an addition to the Isiah Fredericks Head Start Center.

² On January 29, 2013, FEMA completed the deobligation of the project worksheet (PW) numbers 8072, 9012, 9015, 9222, 9262, 9407, 9691, and 9826 included in transmittal package number 748 (all the disputed PWs).

The parties agreed to submit the matter to the arbitration panel on the record, following an oral argument. Upon review of the record and consideration of the pleadings and oral argument, we conclude that FEMA is correct that there has been duplicate funding provided for the repairs and therefore find in favor of the respondent.

Discussion

Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 *et seq.*, when the President has declared a major disaster, as was the case following Hurricane Katrina in August of 2005, FEMA may provide grants for the repair, restoration, and replacement of eligible damaged facilities. Once it has evaluated the damage to an eligible facility and recorded its findings in a project worksheet (PW), FEMA makes a determination whether to approve funding for the required repair work. A PW is not a contract between FEMA and the state and/or applicant to pay federal disaster assistance and does not create any right to receive any such federal funds. 44 CFR 206.202(d).

If an eligible private, non-profit applicant such as GCCAA receives disaster assistance funding from another source that duplicates FEMA's funding, the Stafford Act and implementing regulations specifically prescribe FEMA's response. Section 312 of the Stafford Act states:

[In] administering any program providing financial assistance to persons, business concerns or other entities suffering losses as a result of a major disaster or emergency, [FEMA] shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.

....

Limitation— This section shall not prohibit the provision of federal assistance to a person who is or may be entitled to receive benefits for the same purposes from another source if such person has not received such other benefits by the time of application for Federal assistance and if such person agrees to repay all duplicative assistance to the agency providing the Federal assistance.

....

A person receiving Federal assistance for a major disaster or emergency shall be liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source.

42 U.S.C. § 5155(a), (b)(1), (c).

During a disaster, applicants may request disaster funds from multiple sources for the same purpose. These multiple sources might include other federal agency or state grants, donations, and insurance proceeds. Applicants are therefore required by FEMA, in light of these provisions of the Stafford Act, to disclose all funding sources to FEMA. As part of the application process, FEMA is required to perform a duplication of benefits analysis specific to each applicant. This analysis resulted in FEMA's demand, under the PWs at issue here, for deobligation of FEMA funds and the return of \$2,724,633 in duplicated funding.

HHS guidance regarding when prior written approval is required for reallocation of budgeted funds, available on its website (<http://www.dhhs.gov>), suggests that whenever a recipient contemplates rebudgeting or other post-award changes and is uncertain about the need for prior approval, the recipient is strongly encouraged to consult in advance with the Grants Management Officer (GMO).³ HHS Grants Policy Statement, pg. II-57, <http://www.hhs.gov/grantsnet> (FEMA Exhibit 24). HHS guidance also sets forth stringent requirements for a re-allocation request from the grantee, including, inter alia, that the request be in writing, and be clearly identified as a "prior-approval" request, and sent by or through the authorized organizational representative to the GMO who signed the notice of award. Failure to make a timely request and obtain prior approval from the GMO may result in the disallowance of costs, termination of the award, or other enforcement action. Moreover, "only responses provided by the GMO are to be considered valid. Recipients that proceed on the basis of actions by unauthorized officials do so at their own risk, and HHS is not bound by such responses." *Id.* No response or approval from the GMO has been provided to FEMA or appears in the record.

Finally, the HHS Deputy Director of the Office of Head Start submitted an affidavit to FEMA attesting that, based upon the documentation she has reviewed, GCCAA did not submit a valid reallocation request pursuant to HHS guidelines; that there is "no record of GCCAA submitting a written application for funding reallocation to the [GMO] and the Head Start Program Manager so as to initiate an appropriate review of a proposed change in funded project scope"; and that the April 23 letter was "not sufficient to constitute a valid reallocation of funds." In support of this statement, she cites 45 CFR 1309.10, which would require the submission of an application and the issuance of a revised notice of grant award signed by the GMO and the Head Start Program Manager for the specific award, as authorization for the reallocation of funds.

³ The Grants Management Office is organizationally distinct from the HHS program offices.

The proffered April 23, 2010, letter was not signed by the proper Grants Management Officer, but by the Head Start Program Manager, under the signature of the HHS Fiscal Manager. Additionally, GCCAA has not provided to FEMA or this panel a reallocation request demonstrating they properly sought approval in writing for reallocation of the grant funding, as required by HHS.

A duplication of funding occurred in this case when GCCAA sought funding from HHS and FEMA for the same scope of work for repair of Head Start facilities, primarily the A.E. Perkins facility. GCCAA argues that there was no duplication of funding because it had received approval from HHS to reallocate to new construction projects the funds for disaster repair that were allegedly duplicated by FEMA monies. Having secured approval from HHS to re-allocate HHS funds to construction of a new addition to the Isiah Fredericks facility, GCCAA asserts that FEMA's funding was not duplicative since the funds were not ultimately utilized for the same repair and construction. GCCAA has failed to provide evidence that confirms this assertion, however. The letter to which it directed our attention does not prove that it sought HHS approval for reallocation of the funds. GCCAA has not proven it complied with either FEMA or HHS regulations requiring disclosure of funding from other sources.

Decision

In light of GCCAA's failure to prove to FEMA that the HHS funds had been properly reallocated, FEMA correctly applied its own regulations regarding duplication of funding, and is entitled to recovery of the FEMA funds in the amount of the \$2,724,633 determined upon audit to be duplicative of HHS funding.

CANDIDA S. STEEL
Board Judge

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge