



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 5, 2016

CBCA 3872-FEMA

In the Matter of ST. TAMMANY PARISH GOVERNMENT

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Before the Arbitration Panel consisting of Board Judges **GOODMAN**, **SHERIDAN**, and **CHADWICK**.

St. Tammany Parish Government, Louisiana (the Parish), asked the Board to arbitrate the Parish's claim for reimbursement by the Federal Emergency Management Agency (FEMA) of legal and accounting fees under a public assistance grant. We summarized the background in a September 2014 panel decision denying FEMA's motion to dismiss. *St. Tammany Parish Government*, CBCA 3872-FEMA, 14-1 BCA ¶ 35,735. Briefly stated, the Parish seeks reimbursement of the costs of hiring lawyers and accountants to analyze, defend, and ultimately settle claims against the Parish by debris removal contractors. This arbitration is scheduled for hearing on October 18 and 19, 2016.

In supplemental prehearing briefs filed in April and May 2016, both parties asked the panel to decide before the hearing the threshold issue of whether the claimed expenses are reimbursable in principle under the Robert T. Stafford Disaster Relief and Emergency

Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2012). The Parish says they are; FEMA says categorically they are not. We agree with the Parish that FEMA can reimburse legal and accounting fees in appropriate circumstances (the costs are “allowable” in principle), and we provide guidance as to the sort of evidence that will help the panel assess whether the fees claimed here were appropriately incurred and reasonable in amount.

Discussion

The Stafford Act authorizes FEMA to provide grant assistance “to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster *and for associated expenses* incurred by the government.” *Id.* § 5172(a)(1)(A) (emphasis added). FEMA’s regulations on disaster assistance appear in chapter 1, subchapter D, of title 44 of the Code of Federal Regulations (CFR). Those regulations provide that, with exceptions not relevant here, “[g]eneral policies for determining allowable costs are established in 44 CFR 13.22.” 44 CFR 206.228 (2012) (titled “Allowable costs”). The cross-referenced regulation (also titled “Allowable costs”) states, in turn, *id.* 13.22(b), that the cost principles applicable to grants to local governments are in Office of Management and Budget (OMB) Circular A-87, 2 CFR part 225 (2006).

Accordingly, we must look to OMB Circular A-87 to determine whether the legal and accounting fees claimed by the Parish are “associated expenses” that FEMA can reimburse pursuant to 42 U.S.C. § 5172(a)(1)(A). The principles of the circular closely parallel those of subpart 31.2 of the Federal Acquisition Regulation (FAR) (48 CFR subpart 31.2) for reimbursement under cost-type contracts. Thus, the circular states that reimbursable costs must be “allowable,” “reasonable,” “allocable” to a cost objective within the scope of the grant, and offset by any “applicable credits.” 2 CFR part 225 app. A ¶ C. These are familiar considerations under FAR contracts. *See, e.g., Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009) (addressing allowability of legal defense costs and settlement payment in sexual harassment lawsuit); *Boeing North American, Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002) (addressing allowability, allocability, and reasonableness of costs of defending shareholder derivative lawsuit).

The OMB circular specifically states that costs of professional services “are allowable” in principle “when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government,” and that “[l]egal expenses required in the administration of Federal programs are allowable.” 2 CFR part 225 app. B ¶¶ 10, 32.a; *see Guertin v. United States*, 743 F.3d 382, 385-86 (2d Cir. 2014). The circular further advises:

- b. In determining the allowability of [professional] costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors are relevant:
- (1) The nature and scope of the service rendered in relation to the service required.
 - (2) The necessity of contracting for the service, considering the governmental unit's capability in the particular area.
 - (3) The past pattern of such costs, particularly in the years prior to Federal awards.
 - (4) The impact of Federal awards on the governmental unit's business (i.e., what new problems have arisen).
 - (5) Whether the proportion of Federal work to the governmental unit's total business is such as to influence the governmental unit in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Federal grants and contracts.
 - (6) Whether the service can be performed more economically by direct employment rather than contracting.
 - (7) The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-Federal awards.
 - (8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, and termination provisions).
- c. In addition to the factors in subparagraph b, retainer fees to be allowable must be supported by evidence of bona fide services available or rendered.

2 CFR part 225 app. B ¶ 32. The circular also provides guidelines for assessing the reasonableness and allocability of grantees' costs, and the application of credits. *Id.* app. A ¶¶ C.2-4.

The parties should therefore address the Parish's claim at the hearing by applying the standards set forth in OMB Circular A-87. The Parish bears the burden to establish that the claimed costs are allowable, reasonable, allocable to the grant work, and properly calculated. "Each party may present its position through oral presentations by individuals designated in advance of the hearing. These presentations may reference documents [previously] submitted [but] *the parties may not provide additional paper submissions at the hearing.*" 44 CFR 206.209(h)(3) (emphasis added). In preparing for the hearing, the parties may find case law on the reimbursement of legal and other professional expenses under the FAR cost principles instructive by analogy, although not directly applicable.

FEMA argued in its briefs that the claimed expenses are categorically ineligible for reimbursement pursuant to 44 CFR 13.36(b)(11), which states that FEMA grantees "alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements." However, the cited regulation is not a cost-reimbursement regulation, and "responsible" here does not mean "financially responsible." Part 13 of CFR title 44, where the regulation appears, "establishes uniform *administrative rules* for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments." *Id.* 13.1 (emphasis added). The subsection cited by FEMA is titled "Procurement" and establishes ground rules as between FEMA and grantees for procurements conducted by grantees. As discussed above, FEMA's regulations clearly state that the standards for reimbursement of costs incurred by grantees are found elsewhere. *Id.* 206.228.

FEMA also argues that it cannot reimburse the Parish because the FEMA state agreement signed by Louisiana pursuant to 44 CFR 206.44 requires Louisiana to indemnify the United States for damages and hold it harmless "against any claims arising from [the] work" funded by a grant. FEMA Supplemental Response, Exhibit 12. But the Parish's claim is not a claim for damages arising from the debris removal; it is a claim under a grant for reimbursement of expenses incurred by the Parish in dealing with contractors. The indemnity provisions of the state agreement have no application here.

The parties have briefed additional arguments that are case-specific and that go beyond the threshold issue of the general allowability of legal and accounting fees. The panel will address those other arguments based on the full record after the hearing.

Decision

We decide here only that the Parish's legal and accounting fees are allowable in principle under FEMA's regulations and may be reimbursed if the guidelines in OMB Circular A-87 are otherwise satisfied.

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge

KYLE CHADWICK
Board Judge