UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 17, 2017

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), requested arbitration of a determination by the Federal Emergency Management Agency (FEMA) denying reimbursement of legal and accounting fees under a public assistance grant. The arbitration panel issued two previous decisions. In September 2014, we denied FEMA's motion to dismiss, ruling that the Parish's arbitration request contained "sufficient [information] to state a claim upon which relief could be granted." *St. Tammany Parish Government*, CBCA 3872-FEMA, 14-1 BCA ¶ 35,735, at 174,905. In July 2016, after the parties supplemented the record and filed prehearing briefs, we ruled, on an interlocutory basis, 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 [Office of Management and Budget] Circular A-87 are otherwise satisfied." *St. Tammany Parish Government*, CBCA 3872-FEMA, 16-1 BCA ¶ 36,420, at 177,565. We held a two-day hearing in December 2016. This is the panel's "final decision, binding on all parties." 44 CFR 206.209(k)(3) (2016).

As we explain, we have changed our minds about the Parish's threshold entitlement to reimbursement, based primarily on an argument that FEMA did not squarely raise until the hearing. Specifically, we defer to FEMA's interpretation of its own grant regulation as allowing for reimbursement only of costs incurred for work required as a "direct result" of a covered natural disaster. FEMA's regulation does not compel this reading, but neither does it rule it out. We agree with FEMA that the Parish incurred the expenses at issue as an *indirect* result of Hurricane Katrina. In addition, we decline to arbitrate, as unripe, an alternative theory of entitlement to partial reimbursement that the Parish first raised during the arbitration. Accordingly, we sustain FEMA's determination.

Background

We need only briefly summarize the facts. Hurricane Katrina hit the Gulf Coast in August 2005. In September 2005, the Parish engaged a contractor, Omni Pinnacle (Omni), to remove debris from the Parish's rights-of-way and dispose of the debris at a landfill. Omni, in turn, awarded at least twenty-two subcontracts, and the "subcontractors then entered into their own subcontracts, resulting in hundreds of entities being involved in the debris removal project." *St. Tammany Parish*, 14-1 BCA at 174,804.

The Parish also contracted with Shaw Environmental and Infrastructure, Inc. (Shaw) to monitor the debris removal for compliance with Omni's contract. Monitors working for Shaw created the documentation ("tickets") of debris disposal that Omni then attached to its invoices to the Parish. Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2012), the Parish received subgrants for the costs of both the debris removal and Shaw's monitoring, from the grantee, the State of Louisiana, through the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP).

Starting in early 2006, an internal Parish auditor and an accounting firm retained by the Department of Homeland Security, Office of the Inspector General, reviewed Omni's and Shaw's invoices and questioned a number of them. The Parish withheld payments totaling about $12 million from Omni and Shaw, and retained outside counsel. The payment disputes ripened into lawsuits by Omni, some of Omni's subcontractors, and Shaw against the Parish. All of the suits were eventually settled. In September 2012, the Parish submitted to GOHSEP a request for additional subgrant funding of $2,767,603 for expenses incurred in resolving the disputes. Almost all of the expenses were fees paid to the Parish's law firm. The remainder were fees paid to two accounting firms, for assistance with auditing and mediation, respectively. GOHSEP forwarded the application to FEMA.

On April 29, 2014, FEMA determined that "the legal fees included in the version request are not an eligible expense. Per 44 C.F.R. §13.36(b)(11), 44 C.F.R. §206.223, and OMB Circular A-87 Appendix C, the legal fees were not directly tied to the performance of eligible work or incurred as a necessary expense . . . of the Public Assistance grant. As such, these costs . . . are not eligible." Howard Stronach, an official in FEMA's Public Assistance Division, later told the panel by declaration that, at least since 2000, FEMA has not, to his knowledge, "considered legal fees associated with contractual disputes between a Subgrantee and its contractor[s] as eligible costs for Public Assistance funding." FEMA's determination did not say anything about the accounting fees. The Parish timely elected arbitration of FEMA's determination under 44 CFR 206.209(b) in May 2014.

The procedural history of the arbitration helps explain the difference between our July 2016 decision, in which we held that the fees at issue were allowable in principle, and this decision. In March 2016, after a stay, the panel granted the parties' joint motion to supplement the record and to file supplemental prehearing briefs. In those 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 [Stafford Act]." *St. Tammany Parish*, 16-1 BCA at 177,564. To support its position that the fees at issue are *categorically* not reimbursable, FEMA relied in its supplemental brief on "44 C.F.R. § 13.36(b)(11), . . . the FEMA State Agreement[,] and case law precedent." Although FEMA's April 2014 determination had relied, in addition, on 44 CFR 206.223, FEMA cited that regulation on just one page of its supplemental brief and, there, noted only that the regulation states that grant work must be "required as the result of the disaster."

The panel rejected FEMA's categorical arguments based on 44 CFR 13.36(b)(11), the FEMA state agreement, and case law applying the cost allowability principles of OMB Circular A-87. *St. Tammany Parish*, 16-1 BCA at 177,564-65. Among the factual issues we expected to be addressed at the hearing were whether and, if so, to what extent the legal and accounting fees were reasonably required as a result of Hurricane Katrina.

At the hearing and, more directly, in its post-hearing brief on eligibility, FEMA clarified its argument that the fees at issue are ineligible costs under 44 CFR 206.223. We now address that argument, and the Parish's response to it, for the first time.

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." 42 U.S.C. § 5172(a)(1)(A) (emphasis added). The FEMA regulation at issue,

published pursuant to notice and comment, states in relevant part that "[t]o be eligible for financial assistance, an item of work must . . . [b]e required as a result of the . . . major disaster event." 44 CFR 206.223(a)(1).

At a minimum, this statutory and regulatory language "means that cause and effect must be established." *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,387 (finding applicant did not prove that Hurricane Katrina damaged pavement); *see also State of Louisiana, Department of Natural Resources, Office of Coastal Restoration and Management*, CBCA 2918-FEMA, 13 BCA ¶ 35,325 (finding applicant did not prove that Hurricane Katrina deposited sediment or debris that applicant proposed to dredge from bayous). This arbitration raises a further issue: what kind of causation suffices? FEMA's answer relies on its interpretation of 44 CFR 206.223(a). The agency argues that grant-eligible work must not only be, as the regulation states, "required as a result of" a disaster—the work "must be the *direct* result of the disaster." According to FEMA, because the Parish's disputes with its contractors were a *direct* result of the Parish's refusal to pay the contractors' invoices—rather than a *direct* result of Hurricane Katrina—the Parish's legal and accounting fees, "whether [considered] direct or indirect costs, [are] not eligible for reimbursement because the underlying [dispute-related] work is ineligible."

Provided that it "reflects 'the agency's fair and considered judgment on the matter,'" and is not opportunistic, FEMA's "interpretation of its own regulation is controlling unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 462-63 (1997)). The conditions for *Auer* deference are met here.

First, we are satisfied that FEMA's gloss of 44 CFR 206.223(a), reading "result of" to mean "direct result of," is the agency's considered view and not a mere litigating position. *See Gose v. United States Postal Service*, 451 F.3d 831, 838 (Fed. Cir. 2006) ("An 'interpretation' . . . advanced by the agency for the first time before the Board . . . is . . . no more than a litigation position to which no deference is due."). To be sure, we have not been shown that FEMA *clearly* articulated this interpretation before our hearing. FEMA cites Public Assistance Guide 322 (1999), where it explained, "Generally, costs that can be directly tied to the performance of eligible work are eligible. Such costs must be reasonable and necessary to accomplish the work." That guidance required a direct connection between eligible *costs* and eligible work. It did not define "eligible work," much less say that eligible work must result directly from a disaster. FEMA cites other agency publications for the maxim that "the work must be eligible for the costs to be eligible," but this similarly does not tell us what makes a particular item of work "eligible" in the first place.

Nonetheless, FEMA cited 44 CFR 206.223 as one of its grounds for denying the Parish's application in April 2014, and it submitted evidence that it does not treat the costs of contract disputes as eligible for grant support. These are indications that FEMA's reading of its regulation as excluding the costs at issue here has been consistent. The Parish does not suggest that FEMA developed its interpretation of the regulation during this arbitration, for the purpose of prevailing, nor do we think FEMA did that. *Compare Boyd v. Office of Personnel Management*, No. 2016-1078, 2017 WL 1046221, at *4 & n.2 (Fed. Cir. Mar. 20, 2017) (denying *Auer* deference where, among other things, "the position taken in [agency's] brief differ[ed] from the position [agency] took" in underlying action) *with Mason v. Shinseki*, 743 F.3d 1370, 1375 (Fed. Cir. 2014) (deferring to agency regulatory interpretation "reflected in the Secretary's position on appeal" and a manual).

Second, FEMA's interpretation of 44 CFR 206.223(a) is permissible. "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). To say, as FEMA's regulation does, that grant-eligible work must be "required as a result of" a disaster leaves open the question whether the result can be other than direct. That is a gap or an ambiguity that someone must resolve. *Auer* entrusts the resolution to FEMA's considered judgment.

Indeed, the Parish states that its "main disagreement" with FEMA "lies in the application of" 44 CFR 206.223(a) to the current facts, rather than in the interpretation of the regulation as such. The Parish argues that "[i]t defies logic" not to consider the legal and accounting work at issue a "direct result" of the hurricane, given that:

> Katrina caused extensive debris in St. Tammany Parish, necessitating assistance for removal of the debris; the Parish had a duty to submit only eligible expenses from its debris contractors under the terms of the Public Assistance grant . . . ; discrepancies were noted in the invoices received from those contractors; the Parish conducted an audit . . . and withheld payment . . . ; litigation ensued when the contractors failed to pay their subcontractors; and, as a result, the Parish retained counsel to assist with resolving the discrepancies and to represent it in the litigation.

The Parish adds that "FEMA has provided . . . no bright[-]line test or factors to consider" in deciding whether such a chain of causation is "direct." "Indeed," the Parish argues, "if eligibility required that the work be an immediate effect of the disaster . . . , arguably debris removal monitoring," for which the Parish received funding, "would not be eligible [work]," since the monitoring was required only "to ensure compliance with the applicable law."

We need only apply FEMA's regulatory interpretation to the facts before us. We agree with FEMA's premise that work is not necessarily required as a direct result of a disaster simply because the work would not have occurred *but for* the disaster. For example, FEMA pays public assistance subgrantees an "administrative allowance," calculated as a sliding percentage of otherwise eligible costs, to cover certain "necessary" costs, such as the costs of requesting and administering the grants themselves, that are not direct costs of eligible work. *See* 44 CFR 206.228(a)(2)(D)(ii), 207.2, 207.9(b)(2). FEMA and the Parish agreed in their prehearing briefs that the administrative allowance cannot be used to defray the expenses at issue here. We cite the allowance only to illustrate that FEMA's regulations expressly recognize that some disaster-related work may be reasonable and necessary, but only as an indirect result of the disaster and the FEMA grant process.

By similar logic, while we agree with the Parish that it "was fulfilling its duties under the program in denying payment [to Omni and Shaw], and legal counsel was necessary to obtain the documentation necessary [for payment] and to handle the litigation that ensued," we also agree with FEMA that the work necessary to resolve the disputes was not required as a direct result of Hurricane Katrina. As the Parish's own summary of events shows, a series of things had to occur to cause the Parish to retain the lawyers and accountants. Unlike the work required to remove the debris, the legal and accounting work associated with the Parish's disputes with its contractors cannot be blamed *directly* on the hurricane. This fact precludes recovery of the Parish's legal and accounting fees as project costs under FEMA's interpretation of 44 CFR 206.223(a), to which we defer.

In the course of discussions between the parties aimed at resolving this arbitration, the Parish offered an alternative basis for reimbursement of at least some of its attorney fees. The Parish set forth this theory in a letter to FEMA in December 2015, and pursued it at the December 2016 hearing. In short, as a fallback, the Parish argues that FEMA could defray $807,232.91 of its legal fees under the direct administrative cost/closeout incentive (DAC/COI) program that FEMA launched in 2012, pursuant to 42 U.S.C. § 5156b and its regulations, and has refined in several guidance letters since then. Without delving deeply into the details of DAC/COI eligibility, we accept the Parish's description of the DAC/COI application process as requiring the direct involvement of the State of Louisiana, the grantee. As the Parish states in part, "The grantee (in this instance, GOHSEP) [must] validate that [the] work [for which direct administrative costs are claimed] is eligible, reasonable, and [for] an eligible project . . . . [T]he grantee [must then] certify that the . . . costs were for eligible tasks as identified in [an attachment to FEMA's] November 30, 2015 guidance letter." *See* Letter from Gregory W. Eaton, Director, Recovery Division, FEMA, to Mark S. Riley, Deputy Director–Disaster Recovery, GOHSEP (Nov. 30, 2015).

The Parish presented no evidence that GOHSEP "validate[d]" or "certif[ied]" the Parish's alternative DAC/COI claim. Louisiana, for its part, has filed nothing in this arbitration since 2014. A GOHSEP lawyer appeared at the hearing, but the State offered no evidence or argument. This panel's mandate is to conduct "arbitration of a determination made by FEMA on an application for Public Assistance." 44 CFR 206.209(b) (2013). The determination at issue is FEMA's April 2014 denial of the Parish's version request, which did not include a request for funds designated as DAC/COI. In 2016, we granted a joint motion to supplement the record. With no objection by FEMA, we were prepared to address, as necessary, both parties' factual arguments based on the documents and testimony that the Parish offered during the arbitration to support reimbursement of the fees. We decline, however, to address an entirely new theory of recovery, which the grantee has not asserted to FEMA, and on which FEMA has not provided the grantee a determination.

Decision

FEMA's April 29, 2014, determination is sustained.

KYLE CHADWICK
Board Judge

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge