



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 16, 2020

CBCA 6848-FEMA

In the Matter of VIRGINIA DEPARTMENT OF EMERGENCY MANAGEMENT

Catherina F. Hutchins, Office of the Attorney General of Virginia, Fairfax, VA; Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA; and Wendy Huff Ellard and Parker Wiseman of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant.

Ramoncito J. deBorja and Christiana Cooley, 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 **SOMERS**, **GOODMAN**, and **CHADWICK**.

The Virginia Department of Emergency Management (VDEM) sought arbitration of the eligibility for reimbursement by public disaster assistance of \$11,261,250 that VDEM paid a contractor, DRC Emergency Services, LLC (DRC), for the last three days of a seven-day contract, after VDEM ended up needing DRC for only four days during Hurricane Florence in 2018. The panel held a two-day hearing under Board Rule 611 (48 CFR 6106.611 (2019)). This decision “is the final administrative action on the arbitrated dispute.” Rule 613. We write “primarily for the parties” and omit unnecessary background. *Id.*

We find the amount in dispute eligible for reimbursement by the agency (FEMA). During the hearing, both parties acknowledged that the panel need not reach some issues that were briefed. The parties agree that we need not decide whether the DRC contract had a termination for convenience clause, as VDEM acknowledges that it would not have invoked such a clause after DRC started performing the seven-day order, and FEMA did not conclude

that the arguable absence of such a clause rendered the per-day cost of the DRC contract unreasonable or the contract costs categorically ineligible for reimbursement. Counsel for FEMA stated that “contracting and procurement arguments are beside the point” since “FEMA is not arguing that” the disputed amount “is ineligible for funding because the DRC contract did not contain termination for convenience or remedies clauses.” The parties now further agree that we may view the DRC contract, notwithstanding VDEM’s arguments in the arbitration, as purchasing seven days of food, sleeping, and hygiene “services” at certain shelters, rather than as buying a fixed quantity of supplies. FEMA’s counsel stated, “The services versus commodities [issue], all of that, none of that matters. What’s really at issue here is . . . whether the three days for which the Applicant is currently seeking funding are eligible emergency protective measures under FEMA’s . . . regulation.”

The latter issue reduces, in the panel’s view, to a single question, the one we invited the parties to brief after the hearing—whether it was reasonable for VDEM to award a contract with a minimum order of seven days.

FEMA argues that we should not reach the level of *cost* eligibility in FEMA’s eligibility pyramid, on the grounds that the *work* of the last three contract days was ineligible because, once the shelters closed after the fourth day, “there was no eligible work being performed to eliminate or lessen a threat from the disaster,” citing 44 CFR 206.225(a)(3) (2017). This is only another way of arguing, however, that it is always unreasonable for an applicant to order more emergency services than it ultimately uses.

To sharpen the point, let us consider the situation if (1) rather than ending on the fourth day, the state of emergency for Hurricane Florence had ended suddenly at noon on the first day, so that no one used the shelters, and (2) the contract was priced per day, as FEMA says it prefers. Would the contract price for the first day be ineligible for reimbursement because “no eligible work was performed”? Would FEMA argue that the contract should have been terminable for convenience on a *hourly* basis, to ensure that VDEM did not pay for any part of a day that it did not need? We believe not. A contract for services generally has some minimum duration. It could be reasonable to pay for a day of ordered services even if the need for those services did not materialize. The issue in this arbitration is only the same issue extended in time: whether it was reasonable for VDEM to place the initial order for a duration of seven days. FEMA’s categorical argument that it can *never* reimburse an applicant for contract time when no eligible work was performed is not supportable, as its logic leads to the implausible conclusion that it could *never* be reasonable for an applicant to order a duration of work that is even slightly longer than an emergency turns out to last.

We assess reasonableness under 2 CFR 200.404, which is substantially identical to the test in the Federal Acquisition Regulation. *See, e.g., Kellogg, Brown & Root v. Secretary of the Army*, ___ F.3d ___, 2020 WL 5167353 (Fed. Cir. Sept. 1, 2020). FEMA reimbursed

VDEM for the full price of the first four days of the DRC contract, finding that DRC's services were eligible work and that the per-day price was reasonable. FEMA's coordinating officer for the disaster testified that "no one is questioning that it was a good decision" to open the shelters, an effort he called "heroic." It is also clear, however, that, having delayed the award until days before the emergency, with the hurricane approaching, and with only one bidder, VDEM was in no position to bargain aggressively. *See* 2 CFR 200.404(b) (reasonableness factors include "sound business practices" and "arm's-length bargaining").

Other evidence supports VDEM's position that seven days is a common and reasonable minimum order for this type of contract, and no evidence suggests the opposite. VDEM reasonably paid for seven days of DRC's services in order to receive at least the four days of delivered services. DRC's president testified without cross-examination or impeachment by FEMA on the point that, typically, "when we mobilize, we're coming for seven days, whether it's needed or not." VDEM provided us with a Federal Supply Schedule contract for contingency and "base camp" services which was in effect in 2017 and which priced food, hygiene, and sleeping services in units of weeks. Finally, although the basis of his knowledge was left unexplored, FEMA's coordinating officer testified that for FEMA itself to use a seven-day minimum term when ordering shelter services "makes good sense." FEMA, in response, merely speculates that, had VDEM started the procurement sooner, VDEM "could have been able to negotiate more favorable terms in the event that it did not need seven days of sheltering services" and repeats its circular insistence that "contracting for seven days of sheltering when only four days were needed . . . was unreasonable."

The arbitration record indicates that seven days was a reasonable initial order and that, therefore, paying DRC for all seven days under the contract even though only four days of services were ultimately needed was likewise reasonable.

Decision

The \$11,261,250 at issue is reimbursable as part of the reasonable cost of the eligible work.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge