



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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September 11, 2020

CBCA 6716-FEMA

In the Matter of MONROE COUNTY, FLORIDA

Robert B. Shillinger and Christine Limbert-Barrows of Monroe County Attorney's Office, Key West, FL; Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Sherin Joseph, Appeals Officer, Allison McLeary, Compliance, Appeals and Special Projects Manager, and Amanda Campen, Florida Division of Emergency Management, Recovery Bureau Chief, Tallahassee, FL, appearing for Grantee.

Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Frank Bruscato, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **VERGILIO**, **LESTER**, and **O'ROURKE**.

Applicant sought reimbursement for base camp support costs to accommodate personnel providing disaster relief in response to Hurricane Irma. FEMA determined that partial funding was warranted in this case. After reviewing the record (including witness testimony presented during the arbitration hearing) and considering the arguments by both parties, we grant the applicant's request in part.

### Background

On September 10, 2017, Hurricane Irma, a category four hurricane, made landfall in Monroe County, Florida, a 3737 square mile area which includes the Florida Keys, the Everglades, and Big Cypress National Preserve. In the days leading up to the hurricane, Monroe County officials began preparing for emergency response operations, including establishing base camps to accommodate personnel participating in recovery efforts. Base camps provide lodging, meal services, sanitation and laundry facilities, generators, emergency healthcare, refueling, and other services to local, state, and federal emergency responders rendering aid to the impacted area. Monroe County estimated that one thousand emergency response personnel would require base camp support. This estimate was based on early weather and damage forecasts, communications from emergency response groups, guidance from state and federal agencies, and the training and experience of Monroe County emergency management officials.

The President issued a disaster declaration the same day that Hurricane Irma made landfall in Florida. Decisions related to the establishment of base camps were made in the days immediately following the hurricane. The County engaged Ashbritt, Inc., its comprehensive disaster response contractor, to construct the camps. Six months earlier, Monroe County had issued a request for proposals (RFP) for disaster response and recovery services. Although the primary focus of the RFP was debris collection and disposal services, the scope of work also required “Logistical and Recovery Operations Services,” including services related to the establishment of base camps. Ashbritt’s proposal included those services, but offered them as “additional services,” rather than as part of its basic services. Ashbritt’s proposal also included a price schedule for “Disaster Response Man Camps/Comfort Services,” which consisted of three pages of detailed pricing information, broken out by service category, and further divided by camp capacity (500-, 250-, and 100-person man camps), mobilization and demobilization costs, labor, equipment units, per person/per day costs, and weekly operations costs. Ashbritt’s cost summary supplied the required attestation that “to the best of [its] knowledge all proposed prices were reasonable and customary for the services listed.”

Monroe County awarded the contract to Ashbritt on June 21, 2017. The signed contract, however, did not contain Ashbritt’s proposed pricing schedule for the man camps. Instead, Article III of the contract stated that any additional services would be provided by the contractor for an additional fee:

If Additional Services are required, such as those listed above, the COUNTY shall issue a letter requesting and describing the requested services to the CONTRACTOR. The CONTRACTOR shall respond with a fee proposal to perform the requested services. Only after receiving an amendment to the

Agreement and a notice to proceed from the COUNTY, shall the CONTRACTOR proceed with the Additional Services.

Shortly after Hurricane Irma, County officials asked Ashbritt to establish two base camps: one at Marathon Airport for 250 people and the other at Sugarloaf School for 100 people. The parties did not follow the precise procedure outlined above, but the record contains several contemporaneous email messages that documented agreements made immediately after the hurricane. In particular, an email, dated September 14, 2017, from Ashbritt to the County acknowledged “acceptance of the original notice to proceed for the 250 person base camp conditioned on the county’s acceptance that the rates would be in alignment with what the state of Florida rates would have been (approximately \$250-\$275 per person, per day) had they provided the county with these services.” The email further confirmed “the notice to proceed with a 100 person base camp under the same rate conditions.” The County responded to Ashbritt by email the next day, stating “Monroe County acknowledges and agrees to the rate conditions stipulated below and accepts these same rate conditions for the additional 100 person base camp, which is to be set up at the Sugarloaf School.” Mobilization and demobilization fees were not addressed in the emails, nor were the periods of performance for either camp.

The Marathon Airport camp was fully operational by September 15, 2017. Two days later, the County requested a surge in the camp’s capacity: from 250 to 1000 people. Just weeks before Irma, Hurricane Harvey devastated parts of Texas. As FEMA wound down relief operations in Texas, Monroe County expected that it would quickly ramp up in Florida. The Sugarloaf School base camp was substantially complete on September 20, 2017. That same day, Hurricane Maria hit Puerto Rico and the U.S. Virgin Islands. Plans quickly shifted, and demand for base camp services drastically decreased. Many personnel were diverted to support response operations in areas impacted by Hurricane Maria, and FEMA and Florida State emergency agencies decided to establish their own base camps. Monroe County ended up with excess capacity in both of its base camps. Just five days after the County sought to quadruple its capacity at Marathon Airport, the County asked the contractor to halt the surge and maintain support operations at its current level of 600 personnel.

On September 29, 2017, County officials, Ashbritt representatives, and the base camp subcontractor (Mike Holm of OK’s Cascade) discussed the costs related to the base camps. According to a documented summary of that conversation, Mr. Holm advised that the standard Florida contract has an initial minimum billing time of 30 days, and charges would be as follows for the two base camps:

<b>Marathon Airport (30 days)</b>	<b>Unit Cost</b>	<b>Extended Cost</b>
Mobilization (250 capacity)	\$170,000	\$170,000

Demobilization (250 capacity)	\$145,000	\$145,000
Mobilization (expansion to 1000)	\$119,000	\$119,000
Demobilization (expansion to 1000)	\$145,000	\$145,000
PP/PD Charges (250 x 8 days)	\$205	\$410,000
PP/PD Charges (1000 x 22 days)	\$205	\$4,510,000
<b>Total</b>		<b>\$5,499,000</b>

The base camp subcontractor agreed to reduce the Sugarloaf School billing to fourteen days, as follows:

<b>Sugarloaf School (14 days)</b>	<b>Unit Cost</b>	<b>Extended Cost</b>
Mobilization (100 capacity)	\$170,000	\$170,000
Demobilization	\$145,000	\$145,000
PP/PD Charges (100 x 14)	\$235	\$329,000
<b>Total</b>		<b>\$644,000</b>

Both camps were demobilized by October 3, 2019. The contract did not contain a termination for convenience clause, and the County accepted without question the statement of Ashbritt's subcontractor that a thirty-day minimum was standard in Florida, despite evidence in the record that other contractors who bid on the County contract proposed periods of performance for as little as seven days.

In November 2017, Ashbritt invoiced Monroe County for base camp services in the amount of \$6,470,410. The County attempted to verify the fees charged by Ashbritt as being consistent with rates paid by the State of Florida for similar services. State officials provided the County with sample invoices from their base camp contractors and a print-out from "My Florida Marketplace" reflecting the rates that other base camp vendors had charged State agencies, to include separate fees for mobilization and demobilization. The County followed up with Ashbritt to discuss the invoice, which Ashbritt asserted "reflects the exact amount charged to Ashbritt by an outside contractor plus a reasonable administrative fee as agreed to by the County and Ashbritt." The record contains no contemporaneous evidence of that fee. Nonetheless, Ashbritt agreed to reduce its fee from 20% to 9%, the latter rate being consistent with a previous Florida project. The County paid Ashbritt and then sought reimbursement from FEMA under Project Worksheet 16035. FEMA denied the base camp costs, and the County submitted a request for arbitration to the Board.

An arbitration hearing convened by telephone on June 2, 2020, during which FEMA determined that approximately \$2.4 million was appropriate for disaster assistance funding. FEMA stated that the remaining costs were ineligible for reimbursement due to flaws in the contracting process and a lack of sufficient documentation for the costs. The County argued that it could have procured the services non-competitively, using emergency procedures, and urged FEMA to be guided by whether the costs were reasonable and necessary at the time they were incurred, rather than analyzed after the fact on an “actual use” basis.

### Discussion

The Board is authorized by Section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C.A. § 5189a(d) (2019), to arbitrate disputes between applicants and FEMA as to eligibility for public assistance for a disaster that occurred after January 1, 2016, when the disputed amount exceeds \$500,000. With \$6.5 million in dispute, the Board’s jurisdictional minimum is satisfied in this case. A Presidential disaster declaration under the Stafford Act enables state and local governments to access critical disaster relief assistance and funding. However, the assistance must meet the Act’s eligibility requirements and comply with federal regulations and FEMA policies. Monroe County is an eligible applicant consistent with the Stafford Act’s requirements, which limit funding to federal, state, local, and tribal government entities. In addition to applicant eligibility, there are also three general eligibility requirements for the type of work for which an applicant seeks public assistance funding. The work must: (1) be required as a result of the declared incident, (2) be located within the designated area, with the exception of sheltering and evacuation activities, and (3) be the legal responsibility of an eligible applicant. FEMA did not challenge these requirements, and we find that based on the information in the record, these requirements were met. The President issued a disaster declaration for Hurricane Irma, base camp services were required to facilitate disaster recovery operations, they were established in the designated area, and Monroe County had jurisdiction over disaster operations in this area.

The final component of public assistance eligibility is cost. Not all costs incurred as a result of a disaster are eligible for funding. To be eligible, FEMA regulations require that costs be: (1) directly tied to the performance of eligible work; (2) adequately documented; (3) reduced by applicable credits (such as insurance and salvage); (4) authorized and not prohibited by federal, state, and local laws; (5) consistent with applicant’s policies, regulations, and procedures; and (6) necessary and reasonable to accomplish the work properly and efficiently. It is this final component upon which the parties disagree.

During the arbitration process, FEMA determined that some aspects of the County’s contracting process were inconsistent with federal procurement law and that there was a lack of documentation to support base camp costs. For these reasons, FEMA supported only

partial funding of the base camps in the amount of \$2,497,719.70. This amount represented the documented reasonable and necessary costs “directly tied” to eligible work in compliance with federal regulations and FEMA policy. 2 CFR 200.403(a), (g), 200.404 (2018); FEMA Public Assistance Program Policy Guide, FP-104-009-2, at 21-22. Specifically, FEMA identified the following costs as eligible for public assistance funding:

- (1) mobilization and demobilization costs for Sugarloaf School base camp totaling \$315,000.00;
- (2) the original mobilization cost of \$170,000.00, the second expanded capacity mobilization cost of \$119,000.00, and a single demobilization cost of \$145,000.00, for Marathon Airport base camp, totaling \$434,000;
- (3) Marathon base camp: \$406,679.00 for daily, per person costs (\$223.45 pp/pd x 250 people x 8 days = \$446,900.00) (with a 9% deduction = \$406,679.00).
- (4) Marathon base camp: \$1,342,040.70 for daily, per person costs (\$223.45 pp/pd x 600 people x 11 days = \$1,474,770.00) (with a 9% deduction = \$1,342,040.70).

Although FEMA determined that partial funding was appropriate in this case, under the Stafford Act the Board reviews the evidence *de novo* and is not bound by FEMA’s determination. *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005. Nevertheless, after reviewing the record, including testimonial evidence provided during the arbitration hearing, we agree with FEMA’s determination that partial funding is warranted in this case. The County’s procurement was conducted using full and open competition procedures. Eight proposals were submitted in response to the RFP issued in March 2017. The RFP identified the scope of work, required offerors to submit pricing schedules, and sought past performance information. Evaluation and scoring sheets reflected the reviews of each proposal by four experienced evaluators. A final tally worksheet showed that all four evaluators identified Ashbritt’s proposal as being the best value offer but varied on the rankings of other offerors. In light of the fact that the RFP required base camp support services, we do not find that such services represented a cardinal change to the contract, as represented in FEMA’s initial determination memo. On the contrary, part two of the RFP contained the scope of work. Paragraph F of that scope included “Logistical and Recovery Operations Services.” Nine line items were listed under that section, to include the base camp support functions performed by Ashbritt. All offerors were on notice that the scope of work required this capability, and, indeed, several contractors included such services in their offers. Although Ashbritt proposed base camp support services as an additional service, rather than as part of its basic services, we find that the base camp support work was within

the scope of the RFP and that the resulting contract provided a mechanism to request additional services and pay for them.

The fact that Ashbritt's price schedule for man camps was not part of the final contract prevented the County from relying on those rates when the services became necessary. Indeed, the benefit of having disaster recovery contracts pre-positioned is to avoid having to negotiate terms and conditions during or immediately following a disaster. With that opportunity lost, the County relied, in good faith, on its discussions with Ashbritt that the County would be charged the same prices for base camp services that Ashbritt's subcontractor (OK's Cascade) charged the state of Florida under a competitively procured contract for these services. In an email message to a County official prior to establishing the base camps, Ashbritt stated that "the rates would be in alignment with what the State of Florida rates would have been (approximately \$250 to \$275 per person, per day) had they provided the county with the services." The email did not address the full scope of charges for similar state contracts—only the per person, per day rate for services. The County did not press Ashbritt on this figure and later learned that there was no standard rate.

Also, the County did not use the market research already available to it from other contract proposals to challenge the contractor's assertion that a thirty-day minimum billing period was standard, and it did not attempt to negotiate for inclusion of a termination for convenience provision that could have allowed it to significantly mitigate its costs. Applying the requirements for reimbursements set forth at 2 CFR 200.326 and Appendix II to 2 CFR Pt. 200, FEMA requires that the County include such provisions, or at least make efforts to negotiate for the inclusion of such provisions, in its contracts to minimize the potential of wasted expenditures, and we agree that FEMA may take their absence into account in considering cost reasonableness and reimbursability.

Despite the procurement irregularities noted above, we agree with FEMA's determination that the type of work at issue here was eligible for funding. With regard to the reasonableness of costs, FEMA regulations state that "[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the applicant makes the decision to incur the cost." The regulations further evaluate reasonableness of costs by determining if the cost is generally recognized as ordinary and necessary for the type of work, is comparable to the current market price for similar goods and services, based on historic documentation, average cost in the area, and published unit costs from national databases. 2 CFR 200.403, 200.404; FEMA Public Assistance Program Policy Guide FP-104-009-2 at 21-22. Based on this guidance, we find that the all-inclusive, single rate of \$205 per person, per day, for base camp services was reasonable. We reach this conclusion by taking the individual rates for each category of service in Ashbritt's proposed price schedule and adding the cost of three meals, beds, and other charges, such as power and communications, which results in a price

range of \$140 to \$170 per person, per day, without the 9% fee. When considering the remoteness of the location and the simultaneous demand for these services by multiple organizations, we find that the additional costs were reasonable.

With regard to mobilization and demobilization fees, we find these costs to be both necessary and reasonable. Mobilization and demobilization costs were included in Ashbritt's proposal, as well as in other vendor proposals. They were also reflected in the market research provided by State officials, including one of the State's actual invoices for similar work by the same subcontractor: OK's Cascade. Thus, these costs appear to be standard in the provision of base camp services, and as such we find that they were necessary costs. With regard to the amounts charged to the County for mobilization and demobilization costs, we note that they were higher than what the State paid, but we also recognize that the County established its camps first, when the road and bridge conditions along the single highway that connects the Florida Keys were extremely poor. For these reasons, we find that the mobilization and demobilization rates charged by Ashbritt were reasonable, with the exception of the first demobilization fee of \$145,000 for the Marathon Airport base camp. When that camp expanded its capacity from 250 to 1000 personnel, we found nothing in the record that supported a full demobilization charge as necessary. On the other hand, we find a partial mobilization fee to achieve the expanded capacity to be necessary.

Finally, despite the County's efforts to predict the demand for base camp capacity, other disasters and the establishment of base camps at the State and Federal levels quickly rendered the County's camps superfluous. Although the camps were not fully utilized, FEMA acknowledged that their establishment was necessary and found the costs reasonable for the days that Marathon Airport base camp was actually open since there was documentation associated with those costs.

FEMA did not support any daily costs for Sugarloaf School due to a lack of documented costs. The County argued that actual use is an improper standard to measure the reasonableness of the charges. It contends that the capacity for Sugarloaf School was based on predicted use. We disagree. The fact that the camp was barely used is not the issue. Rather, FEMA requires that costs be documented. The County's contract with Ashbritt required Ashbritt to comply with the documentation requirements articulated in the regulations that FEMA applies. Any costs incurred by Ashbritt in operating that camp should have been documented and provided to the County, and, in turn, to FEMA to support the public assistance claim. While we understand the County's position that it is better to have capacity and not use it than to need capacity and not have it, FEMA need not waive its requirement for documentation of those costs. During the hearing, the County explained that documentation of costs usually improves as capabilities, such as base camps, are established and operating. That may be so, but we nonetheless find that Ashbritt's invoice, without more, does not satisfy the requirement of adequate documentation.



Decision

We grant the application in part. FEMA shall pay Monroe County \$2,497,719.70.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

I write separately from the majority of the panel, because I conclude that the applicant should receive zero reimbursement. Having considered the entire record, I make a decision I believe FEMA itself should have made upon fairly and impartially applying applicable law and FEMA policies to the evidence in the arbitration record. Here I provide a rationale, as is appropriate in an arbitration matter.

For the additional work (related to the base camps), the applicant's (that is, the county's) contract initially did not price the additional services. However, "If Additional Services are required, such as those listed above, the COUNTY shall issue a letter requesting and describing the requested services to the CONTRACTOR. The CONTRACTOR shall respond with a fee proposal to perform the requested services. Only after receiving an amendment to the Agreement and a notice to proceed from the COUNTY, shall the CONTRACTOR proceed with the Additional Services." Further, "Rates shall be inclusive of all reimbursable expenses."

As evidenced by emails, additional services were added to the contract. The applicant's contract to obtain base camps specifies that the applicant would pay rates similar to those that the State of Florida would have charged, approximated as a rate per person per day. There is no written agreement for the applicant to pay anything more than such rates, which were stated as reflecting the contractor's total charges for the ordered services, and no agreement that the applicant would provide compensation for management or other charges in excess of such rates. That contract determines the maximum amount that FEMA

should reimburse the applicant for the base camps. The contract referenced by the applicant and panel did not have base camps as an element of the competition. The pricing found in an exhibit to the contract is less than what the applicant actually paid; e.g., the exhibit identifies pricing which increases with camp size for mobilization and demobilization efforts. The record does not provide a basis for me to conclude either that the mobilization/demobilization costs were properly paid under the agreement or that the amounts were reasonable, given that the payments were approximately three and seven times the fees identified in the exhibit to the underlying contract.

The parties have paid scant attention to the actual language of the agreement. The payments made by the applicant and its contractor are not necessarily indicative of appropriate charges. The arbitration record does not contain reliable, credible evidence on what rates would have been paid by the State of Florida, the entity referenced in the applicants' agreement. Moreover, the applicant did not utilize the grantee (a party to this proceeding), which should have such information, nor did the grantee provide support for what rates the State of Florida would have charged.

FEMA's initial denial of reimbursement was appropriate, given the lack of support provided by the applicant. The applicant should have provided support with its application or first appeal. The additional information provided during the arbitration proceeding does not justify payment by FEMA. At best, the record reveals an entitlement to a per person, per day charge for use of one of the camps, at the rate the State of Florida would have paid. The record does not support a rate. The anecdotal range presented by the applicant and its contractor is not convincing that even a suggested fee of \$180 per person would be appropriate for the average daily usage by 4820 persons at the one camp actually utilized. Although the product of the rate per person and number of persons ( $\$180 \times 4820$ ) is \$867,600, payment is not appropriate because the rate is not adequately supported by the record. The applicant and grantee had the opportunity to supplement the record with specific proof; they failed to do so. The additional compensation the applicant seeks for mobilization, demobilization, and other charges is not consistent with its contract. I would not obligate FEMA to reimburse any such costs.

Joseph A. Vergilio  
JOSEPH A. VERGILIO  
Board Judge