



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 15, 2022

CBCA 7438-FEMA

In the Matter of METROPOLITAN ST. LOUIS SEWER DISTRICT

Victor H. Essen, II and Debbie S. Champion of Rynearson, Suess, Schnurbusch & Champion, L.L.C., St. Louis, MO, counsel for Applicant.

Nathan S. Weinert, General Counsel, Missouri Department of Public Safety, Jefferson City, MO, counsel for Grantee.

Charles Schexnaildre, 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 **DRUMMOND, O'ROURKE,** and **CHADWICK.**

The applicant, Metropolitan St. Louis Sewer District (MSD), sought arbitration of a dispute with the Federal Emergency Management Agency (FEMA) regarding the eligibility for reimbursement of costs of addressing flooding. FEMA approved the scope of work but deobligated the amount in dispute during the closeout phase of the grant, citing insufficient documentation, a result with which the grantee, unusually, agrees. The panel majority denies reimbursement because (1) the state grantee (or recipient) expressly disavows seeking the disputed funds, (2) the grounds for the grantee's position are factual rather than legal, and (3) the record supplies a good faith basis for the grantee's desire not to receive the funds.

Background

Heavy rainfall in late 2015 into early 2016 caused flooding in the St. Louis area. The flooding damaged MSD facilities, including the waste water treatment plant that is the subject of this dispute. MSD prioritized and authorized emergency work contracts to restore

the plant's functionality. The contracts for emergency work contained minimal details about the work to be accomplished.

After a presidential disaster declaration, MSD applied for public assistance grant funding for (1) the emergency work, (2) repairs to multiple plant facilities, and (3) other projects to mitigate risks. At the time of MSD's application, the emergency work was complete at a cost of nearly \$1.7 million, whereas the permanent work had not begun. In January 2018, FEMA approved a project worksheet but warned MSD that the grant was "subject to proper documentation and justification at close out."

Work proceeded over the next three and a half years. In May 2021, MSD submitted a final request for about \$742,000 in repair costs and \$270,000 in mitigation costs. This process required MSD to provide to FEMA, through the State Emergency Management Agency (SEMA), the grant recipient, documentation tying the expenditures to the scope of work approved in January 2018. *See* 44 CFR 206.205(b)(1) (2020).

After reviewing the information submitted by MSD, SEMA determined that it was deficient and described the documents as vague, sparse, disorganized, and impossible to connect to specific tasks in the scope of work. When MSD did not cure SEMA's concerns, SEMA wrote to FEMA in July 2021 that SEMA, as the grantee, could not certify the costs and recommended that FEMA *disallow all funding* sought by MSD under the project worksheet.

FEMA agreed with SEMA. In August 2021, FEMA issued findings that (1) MSD did not sufficiently document how the money was spent or even show that the scope of work was actually completed; (2) some of the restoration work was outside the approved scope of work, such as the installation of new sinks, toilets, cabinets, doors, and other finishes in plant facilities; (3) MSD did not maximize use of insurance funds; and (4) MSD exceeded the approved scope of work for the mitigation project.

MSD responded that the nature of the emergency work did not allow for drafting a detailed scope of work prior to starting the urgent repairs and that FEMA had already approved the emergency contracts as written prior to including them in the project worksheet. MSD also assured FEMA, among other things, that work deemed to be outside the approved scope was not included among the items for which MSD sought public assistance funding.

Rejecting MSD's arguments, FEMA deobligated the grant funds in October 2021. MSD appealed the decision and later sought arbitration by the Board. MSD stands by its positions that the thousands of pages in the record suffice to show that MSD does not seek reimbursement for improved or changed work. FEMA and SEMA both say FEMA's decisions have been correct. The panel held a hearing in September 2022 and thereafter

accepted limited briefing on the significance of the grantee's recommendation that we find \$0 of eligible costs.

Discussion

FEMA notes, "Missouri, as Grantee," through SEMA, "has advised they do not want the grant funding, and they do not wish to expend their own funds as part of the non-federal cost share." FEMA's Post-Hearing Brief at 4. SEMA argues that "[b]ecause the State cannot certify the expenditures that Applicant has incurred, approving [the funding] would be legally impermissible, make the arbitration self-defeating, and be unlawfully coercive." Grantee's Post-Hearing Brief at 1. We need not reach—and, therefore, we express no views on—most of the arguments in FEMA's and SEMA's post-hearing briefs, some of which are constitutional. The panel majority is persuaded that, as arbitrators of grant "disputes," *see* 42 U.S.C. § 5189a(d)(5)(A) (2018), we should stop when we find the *grantor and grantee* in rational agreement on dispositive issues of fact, as FEMA and SEMA are here.

To be clear, we do not question the Board's legal authority to resolve this dispute between MSD and FEMA, or even to resolve the dispute differently. MSD, the applicant, is the entity invoking arbitration. *See* 42 U.S.C. § 5189a(d)(1) ("[A]n applicant for assistance under this subchapter may request arbitration[.]"); Board Rule 604(a) (48 CFR 6101.604(a) (2021)); 44 CFR 206.206(b) ("An eligible applicant may request arbitration to dispute the eligibility for assistance or repayment of assistance."); *see also* 44 CFR 206.201 (defining "applicant," "recipient," and "subrecipient"). Indeed, it has been the case since the Board began arbitrating disputes about Hurricanes Katrina and Rita in 2009 that applicants bring the disputes before us. *See* 44 CFR 206.209(b) ("An applicant or subrecipient (hereinafter 'applicant' . . .) may request arbitration[.]"); *but cf.* Rule 605 ("The parties to an arbitration are the applicant, the grantee (if not the applicant), and FEMA.").

Notwithstanding who is allowed to initiate the arbitration process, we should not disregard the substantive position of the grantee/recipient—"the government to which a grant is awarded, and which is accountable [to FEMA] for the use of the funds provided." 44 CFR 206.201(m); *see also id.* 206.201(o) (a subrecipient "is accountable to the recipient"). As SEMA emphasizes, when closing out a large project, a state recipient of a FEMA grant must independently "certify that reported costs were incurred in the performance of eligible work, that the approved work was completed, that the project is in compliance with provisions of the FEMA–State Agreement, and that the payments or the project have been made in accordance with [federal procurement regulations]." *Id.* 206.205(b)(1). We view the grantee's recommendation as a factor to consider in resolving a cost eligibility dispute. In this particular dispute—in which the facts bearing on eligibility are paramount—the majority considers the grantee's total opposition to eligibility to be a decisive factor.

“It is an applicant’s burden, with the recipient’s assistance, to submit all documents necessary for the award of grants. To be eligible, costs must be ‘[d]irectly tied to the performance of eligible work’ and ‘[a]dequately documented.’” *Miami-Dade County, Florida*, CBCA 7204-FEMA, et al., 22-1 BCA ¶ 38,017, at 184,625 (citations omitted). The panel reviewed MSD’s exhibits and testimony and finds, without need of elaboration, that the other two parties’ concerns about the adequacy of the documentation are, at a minimum, warranted. SEMA’s objections, in particular, are within its purview as the grant administrator and could rationally cause SEMA not to certify the costs. Under the circumstances presented, the panel majority will not give further consideration to awarding grant money that the recipient/grantee says it does not want.

Decision

We find the costs in dispute ineligible.

Kyle Chadwick

KYLE CHADWICK
Board Judge

Jerome M. Drummond

JEROME M. DRUMMOND
Board Judge

O’ROURKE, Board Judge, writing separately.

I concur with the outcome but would deny the application based on insufficient documentation and the applicant’s failure to obtain approval for changed work. While I agree that the grantee’s recommendation is a factor to consider in resolving a cost eligibility dispute, *see De Luz Community Services District*, CBCA 7199-FEMA, 22-1 BCA ¶ 38,030, at 184,690, I would not go so far as my colleagues and say that a grantee’s total opposition to eligibility is a decisive factor.

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge