



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 26, 2022

CBCA 7199-FEMA

In the Matter of DE LUZ COMMUNITY SERVICES DISTRICT

Matthew L. Green and Ward H. Simmons of Best Best & Krieger LLP, San Diego, CA, counsel for Applicant.

David Gillings, Public Assistance Officer, Governor's Office of Emergency Services, Mather, CA, appearing for Grantee.

Ramoncito DeBorja, 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 **LESTER**, **RUSSELL**, and **VERGILIO**.

In this arbitration, the applicant, De Luz Community Services District (District), challenges the denial by the Federal Emergency Management Agency (FEMA) of the District's request for public assistance in the amount of \$523,454.07 for what the District describes as cost overruns incurred on eight roadway projects. FEMA denied the District's request, concluding that the District (1) failed to obtain the necessary approvals from FEMA and the California Governor's Office of Emergency Services (Cal OES or grantee) before undertaking the work, resulting in the cost overruns; (2) finished the work before FEMA had the opportunity to complete the environmental and historic preservation reviews required by applicable statutes, regulations, and FEMA's policies; and (3) failed to provide adequate documentation supporting the requested funding.

The panel decides this matter pursuant to the authority set forth in 42 U.S.C. § 5189a(d) (2018). The panel conducted the arbitration in accordance with Board Rule 611 (48 CFR 6106.611 (2020)). Because the record supports FEMA’s determination denying the requested public assistance, we uphold that determination.

Background

Statutory, Regulatory, and Policy Framework

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207, authorizes FEMA to provide public assistance to states, localities, tribes, and territories (SLTTs) through its Public Assistance (PA) program. The PA program provides funding for emergency work to prevent immediate threats to life and property and permanent work for the repair, restoration, reconstruction, or replacement of disaster damaged public facilities (like roads, the type of facility at issue in this arbitration). FEMA provides this assistance through discretionary PA grants to SLTTs and certain non-profit organizations. In California, Cal OES is the recipient of all grants provided under the PA program, and Cal OES awards subgrants to eligible applicants or “subrecipients.”

When awarding PA funding, FEMA may prepare project worksheets, the purpose of which is to provide FEMA with sufficient information necessary for its personnel to review and approve a statement of work (SOW) and related project costs. Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 142-43. If the SOW has a potential of impacting environmental or historic resources, FEMA’s environmental staff review the SOW to determine if modifications would reduce potential impacts. *Id.* at 142. The PAPPG is also clear that, if an applicant begins work prematurely, it will jeopardize PA funding:

While proceeding with [a] project, the [a]pplicant must ensure that it uses PA funding only for eligible work. The [a]pplicant should engage the [r]ecipient and FEMA as soon as it identifies a change to the SOW to allow FEMA time to review changes for eligibility and [federal environmental and historic preservation] (EHP) compliance requirements prior to commencement of work. If the [a]pplicant begins work associated with a change before FEMA review and approval, it will jeopardize PA funding.

Id. at 136-37.

If an applicant undertakes a project to restore a facility to its pre-disaster function and also incorporates improvements or changes to the pre-disaster design, the applicant must obtain approval from the grantee for the work (i.e., the improved project) to be eligible for PA funding. PAPPG at 108; 44 CFR 206.203(d)(1).

The District's Request for PA Funding

On May 1, 2019, the President declared that the damage to certain areas in the state of California resulting from severe winter storms, flooding, landslides, and mudslides during the period of February 13 to 15, 2019, were of sufficient severity and magnitude to warrant a major disaster declaration under the Stafford Act. The declaration included Riverside County, where the District is located. The District is a government district responsible for the maintenance of a total of eighty-six miles of public highway.

In this arbitration, the District challenges FEMA's denial of the District's request for public assistance in the amount of \$523,454.07 for what it describes as cost overruns incurred under eight project worksheets for road repair. FEMA had approved \$444,469.23 in funding for the projects based on an estimate of eligible costs, but, at the completion of the project, the District had incurred actual costs totaling \$967,923.30, resulting in the cost overruns. The grantee has recommended no payment in addition to what FEMA has previously approved.

The District argues that the costs at issue, specifically those for design, engineering, and inspection services, were necessary in order to comply with local codes and standards required to complete the approved disaster projects. The District asserts that the FEMA inspection team reviewing the projects did not include these standard California costs in the project obligation amounts but that a FEMA representative assured the District that the costs would be reimbursed through the project close-out process. The District adds that it has provided invoices supporting its request for funding for the cost overruns and avers that all incurred costs were "reasonable and within industry standard." In support, the District relies on an analysis completed with the grantee on each project's approved and funded SOW compared to the actual work performed and the requested overrun costs. The analysis presented on a spreadsheet, referred to as the Validation Workbook, either validated additional work within the SOW or did not validate work outside the SOW. In total, the Validation Workbook "validated" \$362,621.39 of the \$523,454.07 in claimed cost overruns.

FEMA argues that the Board should uphold the agency's determination denying the requested public assistance funding for three reasons. First, FEMA argues that the applicant's claimed costs derive from a scope of work outside of the original SOW, and, therefore, the work constitutes an improved project for which the District did not receive prior approval from the grantee. *See* 44 CFR 206.203(d)(1) ("If a subrecipient desires to make improvements, but still restore the predisaster function of a damaged facility, the recipient's approval must be obtained."). Notably, the grantee, in its recommendation to FEMA, did not support the District's request, concluding that the amount sought was for an unapproved improved project. Second, FEMA argues that the District failed to notify the grantee, and subsequently FEMA, that the applicant intended to make SOW changes. Thus,

FEMA was unable to conduct the required environmental and historic preservation review on the applicant's changes to the SOW. And finally, FEMA asserts that the applicant did not provide sufficient documentation to allow FEMA to determine whether the claimed costs were even associated with eligible work under FEMA public assistance policy.

We agree with FEMA. Indeed, the case lends itself to a simple resolution. The applicant states that it incurred various costs. Although some of those costs have been "validated," the record supports only the conclusion that the costs sought may have been incurred but not that any would be compensable under a request for public assistance. The applicant, without a reasoned explanation, seeks more than the validated costs, and even those validated costs are not supported as appropriate for public assistance by FEMA or the grantee. The applicant has failed to demonstrate that it should receive public assistance in an amount greater than what FEMA has already approved.

As for FEMA's specific arguments, we start by noting that federal funding for improved projects is "limited to the Federal share of the *approved* estimate of eligible costs." 44 CFR 206.203(d)(1) (emphasis added). Here, the District's request for the additional funds (\$523,454.07) is ineligible because the amount exceeded the approved estimate of eligible costs (\$444,469.23). Further, the District failed to obtain the required approval from the grantee prior to starting work on the improved projects. Thus, FEMA's determination to deny funding based on the District's failure to obtain the necessary approval before proceeding with the improved projects was reasonable. The District's assertion that FEMA personnel provided assurances that the costs at issue would be approved during the closeout process is unavailing. FEMA, in making its determination denying funding, relied on applicable regulations and its policies, all of which are publicly and readily available. Accordingly, the District's argument based on alleged receipt of misleading information is unpersuasive.

Additionally, because the District failed to notify the grantee and FEMA of the SOW changes before starting the improved projects, FEMA was unable to complete the necessary work to comply with applicable federal environmental laws and implementing regulations, including those related to historic preservation, environmental impacts, and conservation of endangered species and critical habitats. The agency argues, and the District does not dispute, that FEMA has consistently held that "when an [a]pplicant makes improvements or changes to a project's SOW without obtaining prior approval or allowing FEMA the opportunity to complete the required [environmental] reviews, those changes are ineligible for PA funding." We agree in the circumstances of this case that the lack of notice to the grantee and FEMA, along with the nature of the improvements that the applicant made, precluded FEMA from being able to make necessary evaluations to ensure compliance with preservation, environmental, and habitat laws and regulations.

Finally, the District asserts that, at a minimum, it is entitled to \$362,621.39 for professional services provided in connection with the approved SOW. The District bases this entitlement on the findings in Cal OES's Validation Workbook. However, neither the District's brief nor its statements at the hearing explain why the Validation Workbook should be an authority that supersedes Cal OES's ultimate recommendation that FEMA decline to fund the additional work.

Based upon this record, we conclude that the District is not entitled to additional funding for the work beyond the approved SOW, a holding that coincides with determinations by FEMA and the grantee.

Decision

The applicant has failed to demonstrate that it is entitled to additional compensation. FEMA correctly denied the funding in dispute.

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge