



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 16, 2022

CBCA 7467-FEMA

In the Matter of PUERTO RICO ELECTRIC POWER AUTHORITY

Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; Michelle F. Zaltsberg of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; and Parker Y. Wiseman and Antonio R. Pavia-Vidal of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant.

Sebastián E. Batista Bustelo and Melanie N. Negrón Rivera, Central Recovery and Reconstruction Office of Puerto Rico, San Juan, Puerto Rico, counsel 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**, **SHERIDAN**, and **ZISCHKAU**.

The Puerto Rico Electric Power Authority (PREPA or applicant) sought to arbitrate the denied reimbursement of public assistance (PA) funds by the Federal Emergency Management Agency (FEMA) following Hurricane Maria. PREPA contracted with Cobra Acquisitions, LLC (Cobra) for power restoration services and electrical grid repairs after the storm. FEMA disallowed a portion of applicant's costs after determining them to be unreasonable and duplicative of other contract costs. Except for \$5,142,945.45, we agree with FEMA's determination because these costs were unreasonable on their face and applicant did not provide evidence to demonstrate otherwise.

Background

Hurricane Maria hit Puerto Rico on September 20, 2017, just two weeks after another Category 5 storm, Hurricane Irma. The combined effects of the two hurricanes were devastating and left the entire island without power. PREPA, the public facilitator of Puerto Rico's power grid, contracted with Cobra on October 19, 2017, for the island's power restoration and grid repair.

By 2021, Cobra had invoiced for \$945,429,800 under the contract, and of that amount, FEMA disallowed and initiated deobligation of \$21,585,072.51. PREPA sought recovery of this disallowance, which was comprised of \$21,451,272.51 associated with the daily minimum rate paid under the contract and \$133,800 for apartment rental fees. This disallowance was affirmed by FEMA's Regional Administration in a first appeal decision issued on May 31, 2022, as the costs were found to be unreasonable and duplicative.

As mentioned, most of the costs at issue involve a "daily minimum amount" of \$1,563,000 that was to be paid to Cobra during the period of October 25 through November 11, 2017, as well as the rental fees of \$133,800 for apartments in San Juan that were occupied by the Cobra management team during the performance of the contract.

Applicant claims that the \$1,563,000 daily minimum rate was intended to ensure PREPA's security in the contract, given Puerto Rico's precarious financial situation. The rate encompassed a blended fee for linemen and equipment, lodging, security, logistics, and management personnel that would allow Cobra to prepare for its performance, even if it had not yet arrived on the island. In essence, Cobra did not have to actually perform any work to receive the daily minimum rate.

FEMA contends that the rate was unreasonable, particularly in light of a separate mobilization and demobilization clause in the Cobra contract. Under the cost principles set forth in 2 CFR part 200 (2017), also cited in the FEMA Public Assistance and Program Policy Guide (PAPPG) (Apr. 2017), a cost is considered reasonable if, in nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. 2 CFR 200.404

Also, as part of the contract, Cobra built out a "550-man camp" across two berthing barges to lodge its personnel. Cobra additionally rented a block of apartments in San Juan for its management team, asserting this was necessary to facilitate local meetings. FEMA found these costs, totaling \$133,800, to be duplicative, as the 550-man camp was already providing housing.

Applicant asserts that underlining both of these claims are the grant closeout procedures of the Stafford Act, 42 U.S.C. § 5205 (2012).¹ Those procedures expressly prohibit recoupment of granted PA funds which have already been obligated by FEMA and drawn down by the recipient when three conditions are met: (1) the payment was authorized by an approved agreement specifying the costs; (2) the costs were reasonable; and (3) the purpose of the grant has been accomplished. Applicant argues that each of these conditions has been met, and, thus, the funds cannot be deobligated. The “approved agreement specifying the costs” purportedly comes from EMMIE project worksheet, grants manager project 49797, as well as the FEMA-State agreement. The costs are argued to be reasonable given the disaster affecting Puerto Rico. To support this assertion, applicant presents a letter from FEMA’s Federal Coordinating Officer for the Hurricane Maria Puerto Rico disaster, stating that “[u]nder the exigent circumstances of Hurricane Maria . . . FEMA has also determined the costs under this contract to be reasonable.” Similarly, after an independent assessment of the procurement process and cost reasonableness for the PREPA-Cobra contract, the Homeland Security Operational Analysis Center (HSOAC) found that “PREPA engaged in a reasonable procurement process given the circumstances following Hurricane Maria.”

Applicant finally maintains that the purpose of the grant has been accomplished per the two grant closeout procedures factors: (1) that the PW’s scope of work is completed; and (2) that the applicant “demonstrates compliance with post-award terms and conditions . . . as described in the obligated PW and the FEMA-State Agreement.” Applicant supports these factors by noting that not only has the scope of work been completed but also that there has been no allegation by FEMA that Cobra did not complete its objections or identification of a term or condition with which applicant has failed to comply.

FEMA conversely advances that the grant closeout procedures do not apply to this situation because FEMA is not requesting that applicant reimburse FEMA for the outstanding costs but is instead denying that applicant is even eligible for the PA funding. As outlined in the FEMA Recovery Policy, “if FEMA determines that the recipient or subrecipient did not incur reasonable costs in performing the approved scope of work, Section 703(c) does not apply, and FEMA will take all appropriate actions to recover payments made for disallowed costs or overpayment, including if there was also a project eligibility error.” FEMA Recovery Policy FP 205-081-2 (Mar. 31, 2016). FEMA further argues that a deobligation is not the same as a request for reimbursement, and here, FEMA is at most denying that the minimum daily rate and apartment rental fees were eligible for PA funding.

¹ Also referred to as Section 703(c).

Discussion

A cost is considered 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 decision to incur the costs was made. 2 CFR 200.404. Neither the daily minimum rate nor the additional lodging costs claimed by PREPA were reasonable.

In anticipation of beginning a high dollar contract in a region experiencing major destruction, it is understandable that a contractor would seek assurances related to performance and payment. However, here, PREPA was already paying Cobra a separate mobilization rate that would encompass any assurances needed. Additionally, Cobra received \$15 million in the form of a deposit at the outset of the contract, so it is unclear why a separate daily minimum rate would be reasonable as a guarantee. While the circumstances following Hurricane Maria in Puerto Rico were dramatic, the mobilization rate coupled with the deposit provided appropriate financial assurances for Cobra's performance.

The daily minimum rate advocated for by PREPA is not a typical contracting device, even during emergencies, and sufficient evidence has not been provided to show justification for the payment of the rate. Cobra's actual costs in mobilizing its workforce during the disputed period of October 25 through November 11, 2017, however, an amount totaling \$5,142,945.45, are recoverable as they are reasonable and tied directly to work actually performed. These costs were incurred by the increasing number of Cobra personnel actually on the island beginning to perform the contract.

The additional lodging costs incurred by renting the apartments were also unreasonable. There is no language in the contract supporting secondary housing. To the contrary, exhibit B of the contract clearly states that lodging is to be all inclusive in the 550-man camp. Reading the plain language of the contract, the additional apartment rentals were not authorized.

Further, strong evidence as to why the apartments were necessary has not been presented. PREPA asserts that the apartments were needed because of distance, but it has not provided adequate data supporting this, such as descriptions of travel times or difficulties in transportation. Given what has been provided, it appears that executive-level employees did not want to stay on a likely less-than-glamorous boat. Coupling both the language of the contract and the minimal evidence rationalizing the apartment rentals, the Board does not find the costs of the rentals contractually authorized or reasonable.

Decision

We grant PREPA only the actually incurred costs associated with Cobra's initiation of the contract, \$5,142,945.45. PREPA's application is otherwise denied.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge