



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 25, 2022

CBCA 7390-FEMA

In the Matter of CITY OF LUBBOCK, TEXAS

Jeff Hartsell, Office of the City Attorney, Lubbock, TX, counsel for Applicant.

W. Nim Kidd, Chief, Erica McDowell, Regional Section Chief, Suzannah Jones, Deputy Chief, and Michelle Ellis, Recovery Coordinator, Texas Division of Emergency Management, Austin, TX, appearing for Grantee; and Robin Taylor, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee.

Stanley Thompson, Jr., and Maureen Dimino, 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 **VERGILIO, KULLBERG, and SULLIVAN.**

The City of Lubbock, Texas (applicant), filed a notice of arbitration under 42 U.S.C. § 5189a(d) (2018) disputing the determinations by the Federal Emergency Management Agency (FEMA) denying, initially and in a first appeal, public assistance for added power charges incurred while operating two pumping stations that ensured water supply in the area before, during, and after a declared disaster. The parties, including the Texas Division of Emergency Management (grantee or recipient), submitted the arbitration matter on a written record under Board Rule 611 (48 CFR 6106.611 (2021)). The panel resolves the arbitration, considering the entire record and issues this opinion. The decision is the final administrative action on the arbitrated dispute. Rule 613.

The issues, as stated by the applicant: (1) Are the increased costs of utilities for operating two pump stations eligible for public assistance; and (2) should the applicant be reimbursed for such costs? The panel answers each question with a “no” as the applicant continued to utilize the pump stations to ensure water availability and undertook no particular measures that warrant public assistance. The amount sought reflects increased charges for

a period of time for the operations of the pump stations; that is, charges for power consumption based upon the applicant's agreements when purchasing power. Public assistance is not available for increased utility charges in such instances.

Background

On February 19, 2021, the President issued a major disaster declaration for Texas because of damage resulting from winter storms beginning on February 11. This enabled FEMA to provide public assistance pursuant to statute, regulations, and guidelines. The applicant operates two water pumping stations as part of a network to supply water. It kept the two stations operational before, during, and after the disaster period, while other aspects of the network were shut down, on generator power, or of an unknown status because communications were not available during portions of the disaster incident. The record does not reveal power consumption before, during, or after the incident, or the output of each pump during any particular day.

The applicant (supported by the grantee) seeks public assistance funds to cover surcharges levied by power companies seemingly for all of the power used by the two stations but not specified in terms of the period covered. The charges total \$778,743.61, which is the sum of \$283,598.13 (a bill from one company, described as an additional charge "because of the increased cost of wholesale power during February's Winter Storm Uri, pursuant to the Agreement for Electric Service between [the company] and the City of Lubbock") and \$495,145.48 (a bill from another company, described simply as "power cost billing-adjustment winter storm Uri balance). In deciding the first appeal, FEMA denied these requested costs, concluding: "The wholesale power costs incurred by the Subrecipient [i.e., the applicant here] for service to its pumping stations are increased operating costs and, therefore, ineligible costs." As explained below, that conclusion is fully in keeping with the record then presented to FEMA and the slightly, but not materially, expanded record before this panel.

Discussion

The applicable FEMA Public Assistance Program and Policy Guide (PAPPG) specifies:

Increased costs of operating a facility or providing a service are generally ineligible, even when directly related to the incident. However, short-term increased costs that are directly related to accomplishing specific emergency health and safety tasks as part of emergency protective measures may be eligible, as discussed in Chapter 7:II.F. *Expenses Related to Operating a Facility or Providing a Service.*

PAPPG (June 2020) at 96. The applicant seeks the increased costs for operating the facility during the emergency. The record does not reveal that those costs were incurred or directly related to accomplishing specific emergency health and safety tasks; maintaining a water supply with the pumping stations was not a specific emergency task but reflects the normal actions of the facility, even if at times for greater capacities. Moreover, the simple billing statements by the power companies are increased charges without particulars of days or calculations. The increased costs simply represent escalated operating costs that the applicant had agreed to when signing on for electrical power. Water usage charts do not establish costs as occurring solely in connection with the event and are not linked specifically to each pumping station. Various portions of the water supply system were closed down or taken off of the power grid, revealing another aspect of how the applicant has failed to demonstrate that its overall power usage for the period at issue actually increased. The water pumping stations seemingly provided additional water during the event, but there are no specific indications of emergency actions; the systems acted as designed, and keeping the two pumps working was “prudent,” as the applicant repeatedly states. The assertions by the applicant that it could have shut down the pumping stations and avoided the costs or that keeping the stations open was a response to the emergency situation and declared disaster are unpersuasive arguments to qualify for public assistance.

Decision

The record demonstrates that the applicant should not receive public assistance for the costs in dispute.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge