



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 7, 2022

CBCA 7407-FEMA

In the Matter of JOINT MEETING OF ESSEX AND UNION COUNTIES,
NEW JERSEY

Elnardo J. Webster II of Inglesino, Webster, Wyciskala & Taylor, LLC, Parsippany, NJ, counsel for Applicant.

Lieutenant Michael Gallagher, Unit Head, Public Assistance Unit, New Jersey Office of Emergency Management, West Trenton, NJ, appearing for Grantee.

Shahnam Thompson, 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**, **ZISCHKAU**, and **CHADWICK**.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), the applicant, the Joint Meeting of Essex and Union Counties, New Jersey, seeks public assistance (PA) funding in the amount of \$1,188,616.44 for overtime costs incurred to allow it to continue providing essential wastewater treatment services in March 2020 during the beginning of the coronavirus disease 19 (COVID-19) pandemic.

Early in the pandemic, the applicant created a temporary residency plan through which reduced contingents of its wastewater treatment facility workers would work on-site in contained quarantined groups for fourteen to twenty-one days, with full twenty-four-hour shifts each day, and then quarantine at home for four more days before returning to regular work schedules. The Federal Emergency Management Agency (FEMA) argues that these overtime costs are ineligible for PA funding because (1) the applicant failed to identify an

immediate threat caused by COVID-19 that jeopardized wastewater treatment services and required implementation of the staffing plan; (2) the applicant's pre-disaster pay policy did not allow for the applicant's residency plan; and (3) version 2 of FEMA Policy FP-104-21-0003 (Sept. 2021), titled "Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim)" (O&O policy), limits recovery for safe operations at facilities to items like the purchase of masks and the cost of COVID-19 tests. For the reasons stated below, we find that the applicant's work is eligible for PA funding and remand to FEMA for a cost determination.

Background

On June 1, 1926, pursuant to New Jersey State Law (N.J.S.A.) 40:63-68, the applicant was formed through the affiliation of eleven municipalities. The municipalities include the City of East Orange, the Township of Hillside, the Town of Irvington, the Township of Maplewood, the Township of Milburn, the City of Newark, the Borough of Roselle Park, the Village of South Orange, the City of Summit, the Township of Union, and the Township of West Orange. The applicant owns and operates sewage truck lines within Essex and Union Counties and owns and maintains a wastewater treatment facility in Elizabeth, New Jersey (facility).

In 2016, the applicant, through a union agreement with its employees, established a policy that in part entitled employees to receive overtime pay if they worked more than eight hours on a particular day or more than forty hours in a particular week:

[A]ll work performed in excess of eight (8) hours in any one (1) day and forty (40) hours in any one (1) week shall be considered overtime and compensated for at the rate of one and one-half times his regular hourly rate. . . . The employee's supervisor must authorize overtime before the employee works overtime.

FEMA Exhibit 6 at 0052. Consistent with that policy, any employee who was called back to work after having completed his or her regularly scheduled shift or called in early before the start of a shift would "be compensated at time and one-half of the straight-time hourly rate of pay for time worked." *Id.* at 0065.

On March 13, 2020, the President declared the COVID-19 pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia under section 501(b) of the Stafford Act, entitling those entities to apply for public assistance. The next day, FEMA released its own COVID-19 Emergency Declaration, HQ-20-01-FactSheet (Mar. 14, 2020) (available at <https://www.fema.gov/press-release/20210318/covid-19-emergency-declaration>), providing

that for entities with a FEMA-State/Tribal/Territory Agreement, “eligible emergency protective measures [EPMs] taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of the agency’s [PA] program.”

FEMA then issued a fact sheet on March 19, 2020, titled “Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures” (available at <https://www.fema.gov/news-release/20200514/coronavirus-covid-19-pandemic-eligible-emergency-protective-measures>), for work performed from January 20 to September 15, 2020. In it, “FEMA urge[d] officials to, without delay, take appropriate actions that are necessary to protect public health and safety pursuant to public health guidance and conditions and capabilities in their jurisdictions.” The fact sheet indicated that, under the President’s emergency declaration, FEMA “may provide assistance for [EPMs] including, but not limited to,” a variety of activities listed in the fact sheet, including (1) management, control, and reduction of immediate threats to public health and safety; (2) emergency medical care; (3) medical sheltering; (4) household pet sheltering and containment; (5) purchase and distribution of food, water, and personal protective equipment (PPE); (6) security and law enforcement; and (7) “[r]eimbursement for state, tribe, territory and/or local government force account¹ overtime costs.” The fact sheet also stipulated that FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) provided “[f]urther information about eligible [EPMs].”

That same day, the applicant’s Board of Directors, in an effort to reduce the immediate health threat that COVID-19 posed to the applicant’s employees and to attempt to increase the likelihood that wastewater treatment services could continue uninterrupted, voted to adopt Resolution 032/20, declaring a local emergency. The resolution provided that “[o]rders, rules and regulations are to be promulgated to protect the health, safety and welfare of the employees of the Joint Meeting of Essex and Union Counties and address conditions which may be presented by the COVID-19 emergency.” Additionally, the resolution authorized the applicant’s Executive Director to “utilize all available resources to respond and recover from the COVID-19 emergency.”

Under the authority of Resolution 032/20, the applicant’s Executive Director implemented a COVID-19 residency plan to provide for “the continued operation of the facility while isolating staff from potential infection.” Applicant’s Exhibit E at 1. The plan stipulated that up to fifty-two essential employees would remain at the wastewater treatment

¹ FEMA refers to an applicant’s personnel as its “force account.” Public Assistance Program and Policy Guide (Apr. 2018) at 22. “FEMA reimburses force account labor based on actual hourly rates plus the cost of the employee’s actual fringe benefits.” *Id.*

facility (in clustered quarantine groups) twenty-four hours per day for between fourteen and twenty-one days. After remaining at the facility, each employee would then quarantine at home for four days before returning to a normal work schedule.

The employees were to receive thirty-two hours of pay for every twenty-four hours worked, equating to time-and-a-half overtime pay, and were to receive eight hours of pay for each of the four at-home quarantine days. The Executive Director believed that “[l]imiting the resources any further will expose the staff and the infrastructure, which will result in impact on public health and safety.” *Id.* The plan went into effect on March 21, 2020.

On March 25, 2020, the President issued a major disaster declaration (DR-4488-NJ) focused exclusively on the impact of COVID-19 on the State of New Jersey. This report found that “emergency conditions in the State of New Jersey resulting from the [COVID-19] pandemic beginning on January 20, 2020, and continuing, are of sufficient severity and magnitude to warrant a major disaster declaration.” This declaration authorized public assistance (PA) funding at a seventy-five-percent federal funding level for Category B EPMS throughout the state of New Jersey.

FEMA issued a guidance document (FEMA Policy FP 104-009-19) titled “Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim)” on September 1, 2020. It applied only to “work performed on or after September 15, 2020.” This guidance document arguably narrowed the EPMS that would be eligible for PA funding, indicating that “[o]nly work associated with the performance of EPMS specifically listed in this policy is eligible for PA in COVID-19-declared events.”

The new list of reimbursable EPMS included medical care, food purchase and distribution, non-congregate medical sheltering, the operation of emergency operations centers, mass casualty management, and the purchase and distribution of PPE. Unlike the March 19, 2020, fact sheet, this new guidance document did not expressly list “[r]eimbursement for state, tribe, territory and/or local government force account overtime costs” as an eligible PA category. Though the September 1 policy was not retroactive, it expressly indicated that, for work performed prior to September 15, 2020, “policies in place when the work was completed apply.”

On January 21, 2021, the President issued a memorandum to increase reimbursement and other assistance to states, directing that FEMA “make available under Category B of the [PA] program such assistance as may be required by States . . . , local governments, and Tribal governments to provide for the safe opening and operation of eligible schools, child-care facilities, healthcare facilities, non-congregate shelters, . . . and other eligible applicants,” inclusive, but not limited to, “funding for the provision of [PPE] and disinfecting services and supplies.” 86 Fed. Reg. 7481, 7481, § 3(a) (Jan. 21, 2021). This memorandum

also announced that “FEMA shall make assistance . . . available at 100 percent Federal cost share until September 30, 2021.” *Id.* § 3(b). In a second memorandum, dated August 17, 2021, the President further extended that deadline and expressly made the January 21, 2021, memorandum retroactive and applicable to all work “performed from January 20, 2020, through December 31, 2021.” 86 Fed. Reg. 46759, 46759 (Aug. 17, 2021).

The applicant submitted a COVID-19 streamlined project application to FEMA on May 14, 2021. This application sought PA reimbursement for force account labor (FAL) overtime costs that it had incurred in March and April 2020 for work to continue to operate the facility under the applicant’s COVID-19 residency plan. To support its application, the applicant submitted FAL summaries, labor pay policies, and benefit calculation worksheets. Based on this information, FEMA established Grants Managers (GM) Project #174929, reflecting \$1,188,616.44 in claimed costs.

On September 8, 2021, FEMA issued another policy document, FEMA Policy 104-21-0003, version 2, titled “Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim)” (O&O policy), which “retroactively extend[ed] the period of work eligibility to the beginning of the incident period,” providing that “work conducted from [January 20, 2020,] through December 31, 2021 will be reimbursed at federal cost share of 100 percent.” FEMA Exhibit 1 at 1. Its list of eligible activities for the safe opening and operating of facilities included only the purchase and distribution of PPE, cleaning and disinfection, COVID-19 testing, screening and temperature checks, and the acquisition of temporary barriers. *Id.* at 5. The O&O policy from September 8, 2021, also provided that “[w]ork that is otherwise eligible under [O&O policy issued September 1, 2020,] remains eligible for assistance.” FEMA Exhibit 1 at 3.

As was stated previously, the September 1, 2020, guidance document provided that, for work performed prior to September 15, 2020, “policies in place when the work was completed [inclusive of the March 19, 2020, FEMA fact sheet titled ‘Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures’] apply.”

FEMA issued a determination memo on October 20, 2021, denying the applicant’s request for PA funding on the basis that the work was not tied to the performance of eligible emergency work for the declared event or an approved activity under the September 8, 2021, O&O policy.

On December 17, 2021, the applicant filed a first appeal of FEMA’s denial, requesting \$1,188,616.44 in FAL overtime costs. FEMA denied this appeal on March 24, 2021, on the basis that the claim sought ineligible increased operating costs. In denying the first appeal, FEMA stated that (1) the applicant had failed to identify an immediate threat caused by COVID-19 that jeopardized wastewater treatment services; (2) the applicant’s pre-disaster

pay policy did not allow for the applicant's residency plan; and (3) the O&O policy, which applies retroactively to the beginning of the incident period, precludes the costs incurred by the applicant because they are not approved activities under the O&O policy.

On May 23, 2022, the applicant filed its request for arbitration with the Board.

Discussion

The Immediate Threat Addressed by the Residency Plan

To be eligible for PA funding, work must be required as the result of a declared emergency or major disaster. 44 CFR 206.223(a) (2019); PAPPG at 19. "The Applicant is responsible for showing that work is required [d]ue to an immediate threat resulting from the declared incident (for Emergency Work); or [t]o address damage caused by the declared incident." PAPPG at 19. EPMs conducted before, during, or after an incident are eligible for PA funding if they either (1) "[e]liminate or lessen immediate threats to live[s], public health, or safety"; or (2) "[e]liminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective." 44 CFR 206.225(a)(3); PAPPG at 57. Costs incurred for such purposes are considered reasonable "if, in [their] nature and amount, [they do] 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." PAPPG at 22. Where exigent circumstances existed, "FEMA evaluates the length of time the circumstances existed compared to the length of time costs were incurred." *Id.*

Under FEMA general policy, increased costs of operating a facility or providing a service are generally not eligible for PA funding. PAPPG at 42. Nevertheless, "short-term increased costs that are directly related to accomplishing specific emergency health and safety tasks as part of [EPMs] may be eligible." *Id.* FEMA recognizes that an applicant "may incur additional costs related to operating a facility as a result of the incident because of an increased demand for the services the facility provides." PAPPG at 60. Short-term increased costs in such circumstances are eligible for PA funding if: (1) the services involved specifically relate to eligible emergency actions to save lives or protect public health and safety or improved property; (2) the costs are for a limited time period based on the exigency of the circumstances; and (3) the applicant tracks and documents the additional costs. *Id.* at 60–61.

We believe that the FAL overtime costs here were incurred to address an "immediate threat" consistent with 44 CFR 206.225(a)(3). The costs at issue arose from a plan through which employees would remain and work continuously at the facility for twenty-one days, which was beyond the normal eight-hour day and forty-hour workweek contemplated by the

applicant's pre-existing labor plan. The overtime costs were incurred as an emergency action taken by the applicant in response to the unprecedented and unanticipated COVID-19 emergency. That action eliminated an immediate threat to public health and safety by ensuring that wastewater treatment services would not shut down. The continuation of services was possible only because the applicant ensured that specially-trained wastewater treatment plant employees were quarantined and able to operate the facility continuously while minimizing the possibility that they would be exposed to the virus and taken out of commission. These increased costs were directly related to eligible emergency actions to protect public health and safety, allowing the applicant to operate the facility continuously and safely in the face of an unprecedented and unanticipated global health emergency. The costs were for a limited time period (twenty-one days), and the costs were also tracked and clearly documented.

FEMA does not dispute that, in appropriate instances, short-term increases in operating costs can be eligible for PA funding but argues that, under its PAPPG, eligibility is limited to short-term operating cost increases resulting from "an increased demand for the services the facility provides." PAPPG at 60. According to FEMA, because the applicant's temporary operating cost increase resulted from the need to keep employees from becoming infected with COVID-19 while they kept wastewater treatment services operating, rather than from "an increased demand" for wastewater treatment by the public, the PAPPG precludes the costs from being eligible for PA funding.

It seems somewhat awkward to attempt to apply the PAPPG to the type of disaster that is before us now, as the PAPPG clearly was not written with a pandemic in mind. FEMA's regulations define a "major disaster" as any "natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) or . . . any fire, flood, or explosion" that the President determines warrants major disaster assistance. 44 CFR 206.2(a)(17); *see* PAPPG at 2. The PAPPG provisions are written with these types of weather-based and physical land-based disasters in mind, addressing such problems as flooded building structures, the loss of electrical power, and the need for shelter.

It is true that the PAPPG, although without using the words "pandemic" or "epidemic," contains a paragraph addressing the possibility of an "infectious disease event" but that paragraph simply refers questions about such an event to a separate fact sheet from FEMA's Office of Response and Recovery. PAPPG at 72. This fact sheet guidance makes clear that FEMA anticipated any infectious disease event being declared an emergency rather than a major disaster, with little attention devoted to how or what activities would be funded. *See* FEMA Office of Response & Recovery Fact Sheet, FP 104-009-001, Infectious Disease Event (May 2016) (available at www.fema.gov/sites/default/files/2020-10/fema_infectious-disease-fact-sheet_orr_05-13-

2016.pdf); *see also* 44 CFR 206.2(a)(9) (defining “emergency” as any occasion or instance in which the President determines a need “to save lives and to protect . . . public health and safety” or “to lessen or avert the threat of a catastrophe”). In any event, it is clear that the PAPPG was written with natural disasters, fires, and floods in mind rather than a pandemic like COVID-19.

Given the necessity of protecting the public fisc, we understand that FEMA cannot fund everything and needs to impose reasonable parameters on how and when PA funding is made available. Nevertheless, in the circumstances here, FEMA’s insistence on using a strict and narrow interpretation of the PAPPG’s imposition of an “increased demand” requirement, which is not found in the implementing statute, seems to conflict with the intent behind the original COVID-19 disaster declaration and the early guidance implementing it. Absent the actions that the applicant took here in creating its residency plan, it appears likely that the wastewater treatment services that the applicant provided would, at least temporarily, have ceased. That was not a viable option, as the elimination of services would have significantly risked public health and safety. The short-term residency plan that the applicant created seems very much in line with meeting the goals behind the PA program and is consistent with the President’s emergency declaration and subsequent major disaster declaration. In these circumstances, PA funding should be available for this short-term EPM.

The Applicant’s Pre-Disaster Written Policy

Under FEMA policy, FEMA determines the eligibility of FAL overtime costs based on an applicant’s pre-disaster written labor policy. PAPPG at 23. The PAPPG provides that an applicant’s pre-disaster labor policy must (1) not include a contingency clause that payment is subject to federal funding; (2) be applied uniformly regardless of a Presidential declaration; and (3) set non-discretionary criteria for when an applicant activates various pay types. PAPPG at 23. For EPMs, only overtime labor is eligible for budgeted employees. PAPPG at 24; *see* 42 U.S.C. § 5170b(d)(1)(B); 44 CFR 206.228(a)(2)(iii).

FEMA argues that, because the applicant’s residency plan was not adopted until mid-March 2020, after the COVID-19 pandemic began, PA funding is not available. Yet, before the COVID-9 pandemic began, the applicant had a well-established overtime pay policy in place that entitled an employee to overtime pay for “work performed in excess of eight (8) hours in any one (1) day and forty (40) hours in any one (1) week.” FEMA’s Exhibit 6 at 0052. The residency plan that the applicant created provides thirty-two hours of pay for every twenty-four hours worked – the equivalent of eight hours of regular pay and sixteen hours of time-and-a-half pay each day. That pay equals what each employee who was required to work on-site, in a quarantined status, for twenty-four hours per day over the course of up to twenty-one days received under the residency plan. Accordingly, the residency plan mirrors with the applicant’s pre-pandemic overtime pay policy. The applicant

had an overtime pay policy in place prior to COVID-19 that is consistent with the actions that the applicant took to address COVID-19. We see no merit in FEMA's argument that the applicant also had to have a specific prior plan in place to deal with an unexpected pandemic.

Even if the residency plan created in response to COVID-19 could be viewed as somehow modifying the applicant's pre-pandemic overtime policy, it would not preclude PA funding. FEMA's PAPPG provides that if any of the requirements for a pre-disaster policy are not met, "FEMA limits PA funding to the Applicant's non-discretionary, uniformly applied pay rates." PAPPG at 23. The PAPPG, therefore, would still allow the applicant to recover eligible FAL overtime costs up to what these costs would be if calculated using the non-discretionary and uniformly applied pay rates contained in the applicant's pre-disaster labor policy.

The Supplemental, Rather Than Superceding, Nature of the O&O Policy

FEMA argues that the FAL costs at issue here are barred by the O&O policy that it issued on September 8, 2021. We disagree.

The original COVID-19 PA guidance that FEMA published on March 19, 2020, titled "Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures," was made applicable to work performed by covered entities from January 20 to September 15, 2020. In that guidance, FEMA indicated that it could provide assistance for EPMs "including, but not limited to," a variety of activities, including "[m]anagement, control and reduction of immediate threats to public health and safety" and "[r]eimbursement for state, tribe, territory and/or local government force account overtime costs." The list of covered activities in that guidance was clearly intended to be broad and inclusive of EPMs, regardless of whether they were specifically listed. FAL overtime costs were expressly mentioned in the guidance, the same type of costs incurred by the applicant here in April and May 2020. These costs are eligible for PA funding.

FEMA later issued a new guidance document (FEMA Policy FP 104-009-19) that applied only to "work performed on or after September 15, 2020." Arguably, the list of EPMs for which PA funding would be made available was reduced, and the "including, but not limited to" language was removed. Nevertheless, that guidance made clear that for work performed prior to September 15, 2020, "policies in place when the work was completed apply." Accordingly, the March 19, 2020, guidance remained in effect for work performed between January 20 and September 14, 2020.

FEMA argues that the O&O policy issued on September 8, 2021, retroactively changed, and apparently reduced, the EPMs that FEMA would reimburse. In that O&O policy, FEMA states that it may provide assistance to applicants "for the following measures

implemented to facilitate the safe opening and operation of all eligible facilities in response to COVID-19 declared events,” all of which relate to COVID-19 testing costs, the acquisition and distribution of PPE, screening and temperature scanning, and the installation of temporary physical barriers like plexiglass screens and dividers. FEMA correctly notes that the O&O policy was made retroactive to January 20, 2020, and covers the March and April 2020 period of time at issue here. However, FEMA does not cite to the part of the O&O policy which provides that “[w]ork that is otherwise eligible under FEMA Policy 104-009-19 . . . remains eligible for assistance.”

FEMA Policy 104-009-19 made clear that, for work performed prior to September 15, 2020, “policies in place when the work was completed apply.” That includes the March 19, 2020, policy that expressly allowed for PA “[r]eimbursement for state, tribe, territory and/or local government force account overtime costs.” Contrary to FEMA’s argument, the O&O policy was clearly not intended to supercede, eliminate, or reduce the availability of PA funding for activities authorized by the March 2020 fact sheet but instead was intended to supplement it. FEMA’s argument to the contrary ignores the express language of the O&O policy.

Decision

The FAL overtime hours incurred by the applicant in response to the COVID-19 public health emergency were Category B EPMS that are eligible work for PA funding. These overtime costs are reimbursable using the non-discretionary and uniformly applied pay rates contained in the applicant’s labor policy. We remand to FEMA to determine, with the cooperation of the applicant, the precise amount of EPM funding to be reimbursed.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

CHADWICK, Board Judge, writing separately.

I would deny the application, as I believe our role as arbitrators is “not to make public policy.” *Louisiana Department of Natural Resources*, CBCA 4984-FEMA, 16-1 BCA ¶ 36,321, at 177,088 (citing *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 672, 673, 675 (2010)), *motion for reconsideration denied*, 16-1 BCA ¶ 36,394. The labor costs at issue were not incurred “because of an increased demand for the services the [water treatment] facility provides,” as was required. Public Assistance Program and Policy Guide (Apr. 2018) at 60. Were further analysis necessary, I would also not find the costs “*specifically* related to eligible *emergency* actions to save lives or protect public health and safety.” *Id.* at 61 (emphasis added).

Kyle Chadwick

KYLE CHADWICK
Board Judge