



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 28, 2023

CBCA 7610-FEMA

In the Matter of VIRGIN ISLANDS HOUSING FINANCE AUTHORITY

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Adrienne L. Williams-Octalien, Director, Office of Disaster Recovery, Virgin Islands Public Finance Agency, St. Croix, VI, appearing for Grantee.

Shahnam Thompson 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 **BEARDSLEY** (Chair), **DRUMMOND**, and **SHERIDAN**.

BEARDSLEY, Board Judge, writing for the Panel.¹

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,

¹ After the arbitration hearing in this matter concluded and the record closed, Judge Drummond, unexpectedly, had to take extended leave and was, therefore, unable to participate in the arbitration decision. Nonetheless, the two remaining panel members, Judge Beardsley and Judge Sheridan, form a panel majority and may render the arbitration decision without Judge Drummond's participation. This decision is the final administrative action on the arbitration dispute. Rule 613 (48 CFR 6106.613 (2021)).

Virgin Islands Housing Finance Authority (VIHFA or applicant), seeks public assistance (PA) funding under the Shelter and Temporary Essential Power (STEP) Pilot Program for costs resulting from Hurricanes Irma and Maria. The costs include \$77,207,034.85 in contract costs which the applicant identifies as “cost of money” (COM), \$1,757,896.93 for storage and security of excess materials, \$182,603.38 in lodging per diem, \$368,470.50 for short-term rental leases, \$48,419.79 in fuel receipts, \$214,995 in meals, \$15,082.20 associated with shipping manifests, and \$19,740.81 in other costs.² We determine that some costs claimed are eligible for PA funding.

Background³

In September 2017, Hurricanes Irma and Maria struck the territory of the United States Virgin Islands (USVI). The President declared two disasters, FEMA-4335-DR-VI and FEMA-4340-DR-VI, on September 7 and September 20, 2017, respectively. These major disaster declarations authorized PA funding for all islands comprising the USVI.

In October 2017, the Federal Emergency Management Agency (FEMA) authorized the STEP program under section 403 of the Stafford Act, by which FEMA provided funding to state, territorial, or local governments that repaired (or contracted to repair) owner-occupied homes so that survivors could safely shelter in place. The STEP program allowed for emergency assistance to protect public health and safety, including emergency shelter (generally categorized as “emergency work”). Similar to other PA programs, FEMA provided STEP funding on a reimbursement basis.

The STEP Program in USVI

On October 27, 2017, FEMA outlined the STEP program for USVI in a policy entitled, “Sheltering and Temporary Essential Power (STEP) Pilot Program for FEMA-4335-DR-VI and FEMA-4340- DR-VI.” The STEP program authorized two phases of work. Phase I provided funding for minor emergency repairs, and phase II provided funding for the permanent repair or replacement of damaged roofs. Both phases were intended to repair homes so that the homes could serve as emergency shelter.

² These categories of costs are set forth in the applicant’s request for arbitration. The Federal Emergency Management Agency (FEMA) did not segregate costs in this way but, instead, denied all of the costs by reference to the invoice as a whole.

³ A more detailed history of this dispute can be found in FEMA’s first appeal decision. Request for Arbitration (RFA), Exhibit 6.

Funding for the STEP program for USVI was split into two project worksheets (PWs)—PW 100, which identified STEP construction costs, and PW 273, which identified other STEP program and project management costs.

STEP Contracts and Subcontracts

USVI designated VIHFA to facilitate the STEP program on its behalf. In turn, VIHFA contracted with AECOM Caribe, LLP (AECOM) and APTIM Environmental and Infrastructure, Inc. (APTIM) for construction and professional services and hired Witt O'Brien (WOB) to assist with aspects of STEP project management and PA grant administration. During the course of the STEP program, the USVI hired Ernst and Young Global Limited (EY) to assist with documentation review and submission to FEMA. AECOM subcontracted security services for staff and construction materials at offices, warehouses, and laydown yards to Falken USVI, LLC (Falken).

The AECOM and APTIM contracts both allowed for certain “pass through costs,” including “Cost of Money such as financing costs and fees.” Request for Arbitration (RFA), Exhibits 11 at 82 (Exhibit 7 to the VIHFA-AECOM contract), 12 at 118 (Exhibit 7 to VIHFA-APTIM contract). Both contracts state that “[p]ass through costs may be submitted as incurred” and identified a ten percent “administrative handling fee” to be applied as the mark up on certain pass through costs. RFA, Exhibits 11 at 9-10, 12 at 11. Both contracts also stated that continuation of the contract was contingent upon “the appropriation and release of funds by FEMA.” RFA, Exhibits 11 at 10, 12 at 12. If FEMA did not provide sufficient funding, each party could terminate its contract, in which case the contractors would be paid for services rendered plus reasonable termination and demobilization costs. RFA, Exhibits 11 at 10, 12 at 12.

The original period of performance (POP) deadline⁴ for the project was March 20, 2018. During performance, the applicant requested and FEMA approved four POP extensions, bringing the new deadline for the completion of the work to March 31, 2019. On March 12, 2019, the applicant requested a fifth POP extension to cover project closeout, and FEMA extended the deadline for a final time to April 15, 2019. The applicant requested further extensions of the POP for follow-on work and delays, but FEMA approved no further extensions during the course of the project. After March 2019, AECOM, APTIM, and VIHFA continued to extend the contracts for certain non-construction activities, without FEMA approval. In October 2019, AECOM assigned to VIHFA its contract with Falken to

⁴ This is the deadline FEMA sets by which all work must be done in order to be eligible for PA funding.

store and secure excess materials. VIHFA extended the Falken contract until January 17, 2021.

Determination Memo, First Appeal, and Second Appeal

At the project's inception, FEMA developed a cost estimate for PW 273 in the amount of \$530,321,197. Ultimately, the applicant submitted a total claimed project cost of \$594,383,145.84 for PW 273. On August 24, 2021, FEMA issued a determination memorandum denying \$85,380,199.37 in costs associated with PW 273. The determination memorandum also extended the POP to October 15, 2019. After appealing to FEMA, FEMA issued a first appeal decision approving an additional \$8,543,658.91 in funding and denying \$76,836,540.47 in costs.

On December 12, 2022, the applicant submitted its RFA to the Board seeking \$79,814,243.46.⁵ An arbitration hearing was held on February 28 and March 1, 2023.

Discussion

Cost of Money (\$77,207,034.85)

The applicant requests reimbursement of \$77,207,034.85 in contract costs that it defines as COM.⁶ We find that these contract costs are, instead, a penalty for late payment of invoices, did not result from the disaster, and, therefore, are ineligible for PA funding.

Under FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018), "FEMA provides PA funding for contract costs based on the terms of the contract if the applicant meets Federal procurement and contracting requirements." PAPPG at 30. FEMA's regulations provide that, to be eligible, costs must be directly tied to the performance of eligible work and adequately documented. *Id.* at 21. "To be eligible for financial assistance, an item of work must . . . [b]e required as the result of the emergency or major disaster event." 44 CFR 206.223(a)(1) (2022). This requirement has been construed to mean that cause and effect must be established for PA funding. *See City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,199 (citing *City of Kenner*, CBCA 4086-FEMA,

⁵ The applicant has decided not to arbitrate several categories of costs denied in the first appeal; however, the contract costs identified as COM have continued to accrue causing an increase in the costs sought in this arbitration compared to the amount denied in the first appeal. RFA at 2 n.1.

⁶ We are not determining whether these costs can be recovered under the contract, but we are determining whether these contract costs are eligible for PA funding.

15-1 BCA ¶ 35,875, at 175,387). Typically, contract costs are reimbursable because they are associated with eligible work that resulted from the disaster. However, the contract costs claimed here are not costs directly associated with eligible work, and, as such, these costs must independently result from the disaster to be eligible.

The applicant argues that the costs claimed resulted from the disaster because the contract costs (defined by the applicant as COM) were a bargained-for term in the APTIM and AECOM contracts. The APTIM and AECOM contracts, however, only gave general examples of what might be included as COM, such as financing costs and fees. The contracts did not provide any specifics or essential terms for the COM, such as a financing rate, fee amount, or accrual date.

Neither AECOM or APTIM characterized the contract costs claimed as a cost or fee incurred during contract performance to finance construction. Instead, AECOM and APTIM calculated the contract costs claimed as COM in different ways and using different rates or fees and accrual dates. AECOM defined the costs as an 8.5% rate charged on any unpaid invoices. AECOM's claimed contract costs began to accrue starting fifteen days after the non-payment of invoices and stopped accruing once the invoices were paid. Transcript, Vol. 1, at 101, 120. APTIM defined the claimed contract costs as the 15% fee it paid when it sold its unpaid, outstanding invoices to CitiGroup, Inc. on January 15, 2020. *Id.* at 141-42; RFA, Exhibit 28A. As defined by AECOM and APTIM, the costs at issue are not what the contract calls COM (e.g., financing costs or fees) but are instead penalties for late payment of invoices. The contract costs claimed are unrelated to any work and were solely incurred as a result of VIHFA failing timely to pay its invoices. Had FEMA promptly reimbursed VIHFA so that it could timely pay AECOM's and APTIM's invoices, the costs claimed by the applicant would not have been incurred. Transcript, Vol. 1 at 101 ("And, you know, our contract said that we will be paid within 15 days of every approved invoice. If that would have happened then there would have been no cost of money."); RFA, Exhibit 28A ("This transaction and the resultant costs of money/out of pocket finance costs were directly as a result of the late payment of invoices on the STEP program contract.").

We understand that the applicant did not have the money to pay the disaster-related costs and required that the contractors advance the money necessary to repair the damage to the USVI caused by two category five hurricanes in short succession. However, the costs at issue are ineligible because they are not contract costs that resulted from the disaster nor are they tied to any eligible work. Instead, the contract costs are penalties charged as a result of USVI's failure timely to pay its contractors.

Storage and Security of Excess Materials (\$1,757,896.93)

FEMA objects to the costs associated with the storage and security of excess materials because the costs were incurred outside of the POP for the project and, therefore, were deemed ineligible for reimbursement. FEMA, however, has authority to extend the POP beyond the expected time frames if extenuating circumstances justify additional time. PAPPG at 141-42. Here, extenuating circumstances justified extending the POP for the limited purpose of paying for the storage and security costs of excess materials, and we, therefore, conclude that those costs are eligible for PA funding.

The POP for PW 273 ended on October 15, 2019. On December 1, 2019, FEMA found that the costs of the excess materials were ineligible for PA funding, requiring the applicant to authorize AECOM, which technically owned the material, either to sell or to use the excess materials. Transcript, Vol. 2, at 207-08. Because the materials in question were specially milled to adhere to various building regulations and could not easily be obtained through another source, the applicant, in the interest of efficiency, chose a third option—to transfer the materials to a Department of Housing and Urban Development (HUD) program which needed and was willing to take the materials. Unfortunately, the applicant could not transfer the materials to the HUD program unless FEMA determined that the materials were eligible for PA funding. 2 CFR 200.314(a); PAPPG at 29-30. While the applicant disputed FEMA's eligibility determination, the applicant stored and secured the materials.

It was not until December 31, 2020, after an extensive dispute resolution process, that FEMA approved reimbursement of the cost of the excess materials and permitted the transfer of the materials to the HUD program. Transcript, Vol. 2, at 208. FEMA's change of decision was not based on any new information to FEMA but, rather, on FEMA revisiting its interpretation of its regulations. *Id.* at 208-09. However, because the POP ended in October 2019, FEMA refused to pay for the costs to store and secure the excess materials from October 15, 2019, to January 2021, when the applicant finished transferring the materials to the HUD program. FEMA refused retroactively to extend the POP a sixth time. RFA, Exhibit 6 (First Appeal) at 14-15.

These storage and security costs were incurred directly as a result of FEMA's delayed approval of the reimbursement for the excess materials. FEMA's changed eligibility determination that resulted from a lengthy dispute resolution process qualify as an extenuating circumstance that made it reasonable for FEMA to extend the POP for the limited purpose of allowing for the reimbursement of the costs of storing and securing the

excess materials. The storage and security costs claimed, therefore, are eligible for PA funding.⁷

We note that the limited extension of the POP to include the costs for the storage and security of the excess materials does not extend to other costs incurred after October 31, 2020. To the extent that travel, meals, shipping, or lodging costs were incurred after October 31, 2020, these costs are ineligible for PA funding.

Travel and Shipping Costs

To the extent that lodging and travel costs are associated with local hires, these costs are ineligible for PA funding. In its briefing, FEMA pointed to one example of a local hire seeking lodging costs, but, at the hearing, the applicant demonstrated that the individual was not actually a local hire. Transcript, Vol. 1, at 218. FEMA has failed to demonstrate that any lodging costs claimed are associated with a local hire and, therefore, ineligible.

Additionally, to the extent that per diem costs claimed are duplicative of actual costs already reimbursed, those costs are ineligible for reimbursement. The applicant alleges that there is no duplication here, and FEMA has failed to provide any instances in which duplication is the reason for denial. *Id.* at 213.

A. Lodging Per Diem (\$182,603.38)

The applicant claims lodging costs paid to the contractors' employees on a per diem rather than an actual cost basis. FEMA, however, argues that these costs are inadequately supported by the record, denying the costs on the basis that the applicant did not provide receipts. RFA, Exhibit 6 at 17-18 (First Appeal Analysis).

Lodging costs may be charged on a per diem or an actual cost basis. 2 CFR 200.475(a). The applicant-provided affidavits from the contractors' regional financial officers provide adequate support to determine which employees were paid per diem, what rate was paid, and the days on which the per diem was paid. RFA, Exhibit 37. The lodging per diems are therefore eligible for reimbursement under 2 CFR 200.475(a).

All costs must be reasonable in order to be reimbursed. PAPPG at 22; 2 CFR 200.403(a). The applicant's contractors paid the maximum lodging per diem for the USVI as set by the United States Department of Defense's Defense Travel Management Office.

⁷ Unless otherwise noted, the Board is only determining eligibility, and FEMA still must verify the amounts claimed.

See, e.g., Maximum Per Diem Rates Outside the Continental United States, Virgin Islands (Jan 2019)⁸ (identifying maximum lodging per diem for St. Thomas during the applicable time period to be \$339/day). Therefore, the per diem lodging rates paid were reasonable and eligible for PA reimbursement in the amount of \$182,603.38.⁹

B. Short-Term Rental Leases (\$368,470.50)

The applicant seeks \$368,470.50¹⁰ for costs associated with short-term rentals leased by WOB to house its employees while working on the STEP program. RFA at 90. In support of its claimed costs, the applicant provided a statement of account from the lessor which indicates a \$860,126 balance. Exhibit 28. The applicant, however, does not identify which of the lodging costs on the statement comprise the amounts claimed. The applicant has also failed to provide leases, time sheets, travel logs, or other documentation to support the claimed costs or confirm that the rental costs were incurred while the WOB employees worked on this project. Without adequate documentation to demonstrate that the claimed costs are reasonable or eligible, these costs are ineligible for PA funding. PAPPG at 22.

C. Fuel Receipts (\$48,419.79)

FEMA argues that a receipt marked “pre-pay” without a description of what was purchased does not support PA reimbursement for fuel. We agree. Because “pre-pay” usually relates to fuel, it is reasonable to conclude that fuel was purchased. However, without a cost per gallon or a number of gallons purchased, it cannot be determined if the fuel purchase was reasonable. The applicant has failed to provide proof or a basis for us to determine if these costs are reasonable. PAPPG at 22; 2 CFR 200.403. The costs are, therefore, ineligible for PA reimbursement.

⁸ Available at <https://www.travel.dod.mil/Travel-Transportation-Rates/Per-Diem/Per-Diem-Rate-Lookup/>.

⁹ The applicant’s RFA and subsequent filings identify \$182,603.38 as the amount claimed. However, the applicant’s invoices in the record for lodging per diem totaled \$189,090. *Compare* RFA at 84 to RFA, Exhibits 6-5, 37.

¹⁰ In the RFA, the applicant reduced the amount claimed for short-term rental leases to \$108,199, as a result of a credit from WOB.

D. Meals (\$214,995)

Approximately \$198,000¹¹ of this claim is for Interlink, which provided catered meals to personnel working on the project. Catered meals provided by the contractor can be reimbursed. PAPPG at 63; 2 CFR 200.475(b). In order to be eligible, the individuals must not already be receiving per diem and one of the following circumstances must be true: (1) the meals must be required based on a labor policy; (2) the conditions must constitute a level of severity that requires abnormal, extended work hours; or (3) food or water must not be reasonably available for employees to purchase. PAPPG at 63.

FEMA's only objection to these costs is that they could not determine if the costs were duplicative of per diem already given to employees. RFA, Exhibit 6 at 20-21 (FEMA's First Appeal Decision). Interlink has stated that the catered meals were not provided to individuals receiving per diem. RFA, Exhibit 40. Due to FEMA's inability to identify any specific instance of duplication, we determine that the statement from Interlink is sufficient to support a finding that there was no duplication with per diem. Therefore, these costs are eligible. We return these claimed costs to FEMA to determine the exact amount owed.

The rest of the approximately \$16,000 of this claim is associated with "meals, per diem, water, ice, etc." Applicant's Closing Brief at 24. Without more information, these costs are ineligible for PA funding. PAPPG at 22.

E. Shipping Manifests (\$15,082.20)

To the extent that the shipping manifests include information that "building/construction materials" were being shipped to the USVI, the costs are allowable as they can be tied to eligible construction work and have adequate support in the record. This includes the following invoices:

- December 20, 2018, invoice from AirCargo Carriers for \$1877.28 for "2 paletas tornillos" (two pallets of screws).
- December 17, 2018, invoice from AirCargo Carriers for \$87 for "construction material."

¹¹ The exact amount of this claim was not provided to the panel.

The following invoices are ineligible for reimbursement as they are not adequately supported:

- December 19, 2018, invoice from M&N Aviation, Inc. for \$87. There is no indication as to what was being shipped and whether \$87 would be a reasonable amount for the shipment.
- December 19, 2018, invoice from AirCargo Carriers for \$87 for “construction material.” This appears to be a duplication of the December 17, 2018, invoice with only the date changed, and the applicant provided no basis in the record or at the hearing for the panel to conclude otherwise.
- December 29, 2018, invoice from United Parcel Service for \$11,413.49. There is no basis for us to determine whether \$11,413.49 is a reasonable amount because there is no indication as to what was being shipped.
- May 6, 2019, invoice from Montimber International LLC for \$1850. There is no basis for us to determine whether \$1850 is a reasonable amount because there is no indication as to what was being shipped.

F. Other Costs (\$19,740.81)

We cannot assess the eligibility for these costs without knowing what the costs are. FEMA made determinations denying the applicant’s funding request without specifying which line items in the invoice it was denying. We, therefore, require that FEMA identify the costs that were denied and provide the reason for each denial.

Decision

We reach the following determinations on eligibility but return the items that are eligible for PA funding to FEMA to determine whether the costs claimed are reasonable:

- “Cost of Money” costs – **Ineligible**
- Storage and Security of Excess Materials – **Eligible**
- Short-Term Rental Leases – **Ineligible**
- Fuel Receipts – **Ineligible**
- Meals – **Eligible and Ineligible**
- Shipping Manifests - **Eligible and Ineligible**

Additionally, we determine that the applicant's costs of \$182,603.38 associated with the lodging per diem are reasonable and eligible for PA funding.

We return the \$19,740.81 in "other costs" to FEMA to identify which costs were denied and the reasons for the denials.

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge