



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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June 9, 2023

CBCA 7553-FEMA

In the Matter of SCHOOL BOARD OF BAY COUNTY, FLORIDA

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant; and Chris Bomhoff, Disaster Policy Specialist, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, FL, appearing for Applicant.

Stephanie Stachowicz, General Counsel, and Suhail Chhabra, Senior Attorney, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Marija Diceviciute, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Christiana Cooley, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **RUSSELL**, **GOODMAN**, and **DRUMMOND**.<sup>1</sup>

**RUSSELL**, Board Judge, writing for the panel.

The applicant, School Board of Bay County, Florida (School Board), seeks arbitration of the Federal Emergency Management Agency's (FEMA) partial denial of the School Board's request for reimbursement of its actual costs to repair the Merritt Brown Middle School campus, which was damaged by Hurricane Michael in 2018. Instead of reimbursing

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<sup>1</sup> Judge Drummond was unable to participate in the panel decision.

the School Board for its actual costs for the completed repair work, FEMA, asserting that the actual costs were not well-documented and supportable, reimbursed the School Board based on a cost estimate that the agency developed.

The panel decides this matter under its authority set forth in 42 U.S.C. § 5189a(d) (2018). We conclude that the School Board has sufficiently documented its actual costs incurred to repair the Merritt Brown Middle School campus and, thus, is entitled to the requested public assistance (PA) funding for reimbursement of those costs.

### Background

#### I. The School Board's Request for PA Funding

On October 10, 2018, Hurricane Michael, with a maximum sustained wind speed of 161 miles per hour, made landfall as a Category 5 hurricane near Mexico Beach in the Florida Panhandle. The President declared the event a major disaster, FEMA-4399-DR-FL, on October 11, 2018, authorizing FEMA to provide public assistance for the resulting damage. The hurricane devastated the Merritt Brown Middle School campus, which was closed until July 2020.

FEMA prepared Grants Management Project 111607 to document the damages (designated in "damage inventory" categories, or DIs) to the various buildings and components (e.g., sheds, fences, walkways, lights, parking lights, and signs) of the school campus. FEMA's Response to Applicant's Request for Arbitration (FEMA's Response), Exhibit 1. The School Board hired multiple professional firms to conduct initial assessments of the damage caused by Hurricane Michael and to complete remediation work. The School Board subsequently hired a professional architecture firm to document non-emergency damage caused by the hurricane and develop a scope of work (SOW) to return the school campus to its pre-disaster condition. Based on the damage assessments and the SOW, the School Board issued a request for qualifications (RFQ) to procure the services of a construction manager to facilitate performance of the repair work. The RFQ was a competitively bid contract consistent with the Bay County School District's procurement policy. Request for Arbitration (RFA), Exhibit 9 at 1.

Six contractors responded to the RFQ, and the School Board awarded a guaranteed maximum price (GMP) contract on or around December 11, 2018, selecting the lowest bidder at a guaranteed maximum bid of \$16,332,140. Under this type of contract, the contractor guarantees that the contract sum will not exceed the maximum price offered. RFA, Exhibit 9 at 11.

Under the terms of the contract, all cost savings were to be returned to the Bay County school district. RFA, Exhibit 9 at 11. The contract sum was defined as the cost of the work plus the construction manager's fee of \$774,289. *Id.* Under the section titled "Unit Prices, if any," none were identified. *Id.*

The contract included FEMA's Public Assistance Applicant Procurement Compliance Checklist, the purpose of which is to ensure that a contract award is consistent with applicable federal, state, and the applicant's own procurement requirements. RFA, Exhibit 9 at 22-35. The School Board answered "Yes" to each of the following questions and statements on the checklist:

Does the **procurement** comply with the State's own procurement laws, rules, and procedures? [2 CFR] § 200.317.

....

Does the **procurement** comply with the NFE's [non-federal entity's] own procurement laws, rules, and procedures which reflect applicable **state, local, and tribal laws and regulations**? [2 CFR] § 200.318(a).

....

Note: [Sealed] [b]ids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. [2 CFR 200.320(c).]

....

The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

....

Did the NFE award a firm fixed price contract award in writing to the lowest responsive and responsible bidder?

*Id.* at 22, 26, 30-31.

The contract defined allowable "cost of the work" as "costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs . . . [could not

be] higher than the standard paid at the place of the Project except with prior consent of the Owner.” RFA, Exhibit 9 at 12. The contract identified specific allowable costs, e.g., those for labor, materials and equipment, temporary storage, and subcontractors. *Id.* at 12-14.

The School Board provided to the construction manager (contractor), via letter, a notice to proceed dated January 10, 2019. The contractor and the School Board’s hired architecture firm developed final site inspection reports (SIRs) identifying all of the disaster-damaged elements at the school campus. The School Board, its architects, and FEMA also had weekly workshops to discuss eligible damages. At FEMA’s request, in August 2020, the School Board provided a document to FEMA identifying the cost breakdown of the project. The document identified the work performed, date, invoice number, invoice amount, and cost. FEMA’s Response, Exhibit 4. FEMA also maintained a log of various issues related to the project with entries starting on February 11, 2020, and ending on July 27, 2021. *Id.*, Exhibit 3. In one entry, dated August 16, 2020, FEMA expressed concern about the School Board’s use of a GMP contract, noting that the contract was not bid in a way that aligned with how project DIs in FEMA’s Grants Management Project documentation were identified. *Id.* at 11.

The School Board’s contractor subsequently completed the work based on items included in the SIRs. The School Board requested PA funding of \$12,571,726.80 from FEMA for the actual costs to repair the damage sustained to the school campus. On March 29, 2021, FEMA issued a Determination Memorandum denying \$4,896,710.68 in contract costs due to a lack of adequate documentation and unsupported costs. RFA, Exhibit 1. On August 26, 2022, FEMA affirmed this decision in a first appeal determination. *Id.* FEMA did not award the full amount requested, instead awarding \$7,675,016.12 based on an estimate of eligible costs using RS Means, a database containing detailed data on construction costs, including equipment, labor, and material prices. In its first appeal determination, FEMA concluded that the School Board had not shown that the claimed repairs were required as a result of the disaster and had not provided sufficient documentation to support the repair costs. FEMA stated that, for certain items, it could not validate eligible damage and reasonable unit prices because the School Board did not submit actual unit prices. This arbitration followed FEMA’s denial of the School Board’s appeal.

## II. The School Board’s Request for Arbitration

The School Board is asking the panel to award the remaining \$4,896,710.86 in costs, arguing that FEMA’s estimate disregarded all of the work required to repair the damage to the school. In support of its request for arbitration, the School Board referenced an email exchange with FEMA in which the School Board specified how it would use architects and engineers to record damage to the school, noting that these licensed professionals would conduct a site inspection and would (1) receive clear guidance on capturing disaster-related

activities only, and (2) substantiate site inspections with supporting photographs that would be aggregated into a FEMA photo page with notations. RFA, Exhibit 5. The School Board asserts that the requested reimbursement amount is adequately supported by signed reports, under professional seals, from its licensed architects and electrical engineers who included, in their reports, a description, location, dimension, quantity, cause, and photograph for each damaged element.

Also with its request for arbitration, the School Board provided the panel and FEMA with “Scope of Work and Cost Matrices” spreadsheets which correlated eligible damages/repair SOW activities to incurred costs. RFA, Exhibits 111-34. The spreadsheets, with a total of over 14,000 line items, included the following categories: location of the damage, component description (e.g., roofing, gutter, paint, tile, cabinetry), “make/model/type” (e.g., plywood/laminate for cabinets, 24 x 24 for carpet tiles), description of damages and cause (e.g., high winds), quantity, unit (e.g., square foot, each), reference to the document describing/supporting damage, reference to the appropriate architect/engineer SOW, and reference to the cost supporting documentation. The latter included a notarized application and certificate for payment document (payment application) from the contractor who performed the work. The document included the following certification from the contractor:

The undersigned Contractor certifies that to the best of the Contractor’s knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and the current payment shown herein is now due.

RFA, Exhibit 110 at 1. The document also included the architect’s certificate for payment, stating:

In accordance with the Contract Documents, based on on-site observation and the data comprising this application, the Construction Coordinator and Owners [sic] Representative certify to the Owner that to the best of their knowledge, information and belief the Work has progressed as indicated, is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

*Id.*

In response to the School Board’s request for arbitration, FEMA reiterates its position that the School Board failed to meet its burden to produce documents showing that the

claimed damages are eligible for PA funding. FEMA asserts that neither the contractor's payment application nor the cost matrices submitted in this arbitration provide the necessary detail for FEMA to correlate invoiced cost with items of work in the repair SOW. FEMA also argues that the School Board is requesting a lump-sum amount not based on unit costs.

FEMA states that when it compared the repair SOW with the SIRs, it found that the repair SOW contained many items not supported by documented, disaster-related damage. FEMA noted, by way of examples, that the repair SOWs include (1) full replacement for the roofs, ceilings, and floors for most of the portable classrooms but the corresponding SIRs did not document full-footprint damage to these components; (2) removal and replacement of 4366.85 square feet of flooring, although the School Board apparently admitted that the flooring only needed refinishing, not replacement; (3) repair of exterior concrete walkways and parking, although the documented damage resulted from restoration efforts after the storm; and (4) repair for damage to the irrigation system resulting, not from the disaster, but from construction-related activity. However, at the School Board's request (according to FEMA), FEMA removed the walkway and parking lot work from the eligible items for PA funding and also removed the irrigation work as an eligible item. As for the flooring, it does appear that there is a line item for cost to "Repair Cracks and Replace Divider Strips Terrezo" in the contractor's notarized and certified payment application document. FEMA, in its brief and at the hearing, also raised concerns that the contract type used by the School Board, i.e., the GMP contract, did not comport with applicable federal procurement rules.

Because of its finding that it could not validate the approximately \$12.5 million in contract costs, FEMA performed a cost analysis providing PA reimbursement based on estimated costs.

### Discussion

To be eligible for PA funds, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), and FEMA's implementing regulations require that an eligible facility must have been damaged or destroyed by a major disaster. 42 U.S.C. § 5172; 44 CFR 206.223(a)(1) (2018). To be eligible for reimbursement, costs, among other requirements, must be directly tied to the performance of eligible work; adequately documented; consistent with the applicant's internal policies, regulations, and procedures that apply uniformly to both federal awards and other activities of the applicant; and necessary and reasonable to accomplish work properly and efficiently. Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 21-22. "A cost is 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 [a]pplicant makes the decision to incur the cost." *Id.* at 22.

“The [a]pplicant is responsible for providing documentation to demonstrate its claimed costs are reasonable.” PAPPG at 22. The documentation provided should describe the “who, what, when, where, why, and how much” for each item claimed. *Id.* at 133. The PAPPG does not require that this information be specifically contained in invoices but, instead, provides a “not all inclusive” list of documentation that can be submitted by an applicant to support claimed costs. *See id.* at 139. “If FEMA determines any of the costs to be unreasonable based on its evaluation, FEMA may disallow all or part of the costs by adjusting eligible funding to an amount it determine[s] to be reasonable.” *Id.* at 22-23.

As an initial matter, the panel addresses FEMA’s concern, raised in its brief and at the hearing, that the contract type used by the School Board did not comport with applicable federal procurement rules. FEMA was aware of the School Board’s use of the GMP contract type in August 2020 when it expressed concern that the contract was bid in a way that did not align with the DIs included in FEMA’s Grants Management Project document. Yet, FEMA based its decisions, including its first appeal determination on the School Board’s request for reimbursement, issued on August 22, 2022, on the School Board’s documentation in support of its costs, not the propriety of the School Board’s use of a GMP contract.<sup>2</sup> Accordingly, we will focus our decision on the School Board’s documentation submitted in support of this arbitration.

We find that the School Board has provided sufficient documentation to support its request for PA funding. First, the School Board hired an architect to document disaster-related activities requiring repair, a process of which FEMA was contemporaneously aware as evidenced by email communications. The architect used this information along with

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<sup>2</sup> Although, in its contract, the School Board stated that it used a firm fixed-price contract, it is unclear to the panel whether the GMP contract at issue here can be construed as materially similar to or a category of a firm fixed-price type of award. “Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both.” *See* 48 CFR 16.201(a). “Guaranteed maximum price contracts are where the contractor assumes the risk of the costs exceeding a maximum price. The contractor receives compensation for its costs until the maximum price is reached, but at that point, the contractor receives no further compensation. Under this arrangement, the contractor does not receive the benefit of the underrunning price unless there is a special cost savings clause that provides the contractor with a percentage of the underrun as a form of incentive.” 2A Bruner & O’Connor Construction Law § 6:109 (2022) (footnote omitted). The panel need not decide the issue of whether the type of contract awarded by the School Board was materially the same as a firm fixed-price contract or otherwise consistent with federal procurement rules to resolve this arbitration.

initial damage assessments completed by other professional firms to develop the repair SOW. Although FEMA raised concerns about the School Board's contract not correlating to the DIs in FEMA's Grants Management Project documentation, there is nothing in the arbitration record raising doubts about the reliability of the damages documentation work done by the professionals hired by the School Board.

Second, at FEMA's request, in August 2020, the School Board provided a project cost breakdown to FEMA. FEMA's Response, Exhibit 4. We cannot ascertain that FEMA expressed any concern about the detail provided in this submission. *See* FEMA's Response at 9.

Third, the contractor's notarized payment application included two certifications – one from the architect regarding work completed and the second from the contractor certifying that the amounts requested were owed for completed work. Further, the contractor's payment application is detailed, describing the “who, what, when, where, why, and how much” for each item claimed. For example, among many line items, the document lists for roofing work the subcontractors performing the work (e.g., the specific roofing contractors), the type of work (e.g., single-ply membrane roofing), where work was performed (e.g., the specific building), and the cost to complete the work.

Fourth, the “Scope of Work and Cost Matrices” produced by the School Board in this arbitration tie work items in the SOW to itemized costs on the contractor's payment application. FEMA argues that the School Board is requesting a lump-sum payment not based on unit prices. However, even FEMA's own applicant procurement compliance checklist evidences that an awarded firm fixed-price contract, if one had been issued here, can be based on either unit prices or a lump sum. *See* RFA, Exhibit 9 at 22-35. Along the same lines, FEMA argues that the School Board failed to submit any actual unit prices to support its incurred costs. The agency did not point to any PAPPG provision, rule, or regulation mandating such a requirement, particularly as relates to the contract at issue here, because the contract was not based on and did not set forth any unit prices. *Id.* at 11.

FEMA's examples of alleged discrepancies between the repair SOW and the contractor's payment application are insufficient to convince the panel that award of the School Board's actual costs – as opposed to PA funding based on FEMA's estimate completed after the work on the school campus was done – is not appropriate here. Indeed, the School Board withdrew from the list of items for eligible funding two items (i.e., the cost for a walkway and parking), while a third (i.e., the flooring) appears to be sufficiently supported in the contractor's payment application. Further, the record does not show that FEMA followed up with the licensed professionals who had firsthand knowledge of the project (and who certified both the work completed and amounts owed) for their input prior to FEMA's decision to reduce the amount of PA funding for the project. Accordingly, given



FEMA's limited review of SOW activities and costs (at least as reflected by the arbitration record), the panel is disinclined to rely on FEMA's estimate on what the School Board is due and concludes that the more appropriate course is to award PA funding based on the comprehensive record provided by the School Board.

Decision

The panel finds that the School Board is entitled to the additional \$4,896,710.86 in PA funding requested in this arbitration.

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge

*Allan H. Goodman*

ALLAN H. GOODMAN

Board Judge