



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 8, 2023

CBCA 7734-FEMA

In the Matter of NASHVILLE-DAVIDSON COUNTY, TENNESSEE

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Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Rebecca J. Otey 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 **LESTER**, **RUSSELL**, and **ZISCHKAU**.

RUSSELL, Board Judge, writing for the panel.

The applicant, Nashville-Davidson County, Tennessee (County), seeks arbitration of the denial by the Federal Emergency Management Agency (FEMA) of its request for \$7,159,250 in public assistance (PA) funding for police department costs for officers' overtime (referred to as "force account labor" (FAL)) and equipment costs (referred to as "force account equipment" (FAE)) following a 2020 tornado event. FEMA reimbursed costs that the County incurred during March 2020 in the immediate aftermath of the tornadoes, but it denied the County's request for continuing FAL and FAE costs incurred from April

through September 2020. For reasons explained below, we find the requested costs ineligible for public assistance.

Background

I. The County's Response to the Tornadoes

On March 3, 2020, severe storms generated tornadoes, straight-line winds, and flooding across Tennessee. The President declared the event a major disaster, FEMA-4476-DR-TN, on March 5, 2020, with a single-day incident period of the same day. The County's records reflect that, by the time the storm dissipated, ten distinct tornadoes had touched down covering more than 100 miles of Middle Tennessee and killing 25 people, destroying more than 1600 buildings (including more than 400 homes), and damaging 2700 other buildings/homes. The power was out for approximately nine days and seventeen hours, with 16,813 trouble reports, 2150 outage reports, and 61,974 total customers without power. FEMA's Post-Arbitration Hearing Sur-Reply Brief in Response to Nashville-Davidson County's Post Hearing Brief (FEMA's Post-Arbitration Hearing Sur-Reply Brief) at 4; Attachment 9 (Nashville Electric Service Outage Reports by Event).

The Metropolitan Nashville Police Department (MNPd) quickly set up a centralized incident response strategy and emergency operations center (EOC) following the event to help lessen the immediate threat of additional damage. MNPd deployed FAL and FAE to precincts across Nashville and Davidson County to provide emergency protective measures (EPMs) for citizens throughout its jurisdiction. One of the County's witnesses testified at the arbitration hearing that during March 2020, police officers were working overtime to: (1) place barriers or to provide protection near downed power lines and trees; (2) conduct search and rescue missions in the tornado-damaged area and/or missions relating to missing persons reported (including wellness checks of individuals whom family members were having difficulty contacting); (3) effectuate road closures needed for emergency utility work necessitated by the disaster; and (4) provide manual and pedestrian and traffic controls and direction within the disaster zone. The witness testified that, as a method of protecting the public, police would place themselves at damaged building sites, thereby precluding public entry until a contractor could get there to put fencing or blocking around it.

On March 23, 2020, the County closed the centralized EOC and opened smaller, separate command posts, called "Tornado Command Centers," in four of the MNPd's eight precincts—the North, Central, East, and Heritage Districts. Although planned demolitions of damaged buildings continued for some period of time, building repair and reconstruction efforts began taking place. Building permits were being issued, and police, among other duties, would conduct building checks at construction sites and businesses. According to one of the County's testifying witnesses, there were continuing utility hazards at building sites

as repairs were being made. The County described the public health and safety purposes of the work that its officers were performing beginning in April 2020 as follows:

These measures were still taken to save lives, protect public health and safety, and prevent damage to public and private property. Monitoring and maintaining a visible presence in the disaster area has become increasingly important to ensure public safety in tornado impacted zones. Throughout April and May, officers provided patrolling in schools, parking lots, churches, residential areas/neighborhoods, and businesses that sustained severe damage by the [tornadoes]. Ongoing activities also included [Utility Task Vehicle] patrol and roving within the impact zones to provide additional security/presence in the affected areas. Officers have responded to incidents of looting which require extra tornado related security to prevent theft across the precincts.

FEMA's Response to Nashville-Davidson County's Request for Arbitration (FEMA's Response), Exhibit 4 at 4.

On May 3 and 4, 2020, while the Tornado Command Centers were in operation, the same areas hit by the tornadoes were impacted by another declared event, FEMA-4550-DR-TN (derecho), the costs of which are not before this panel. The National Weather Service stated that the derecho event left Nashville with one of the worst power outages in its history.¹

The Tornado Command Centers remained open through September 2020.

II. The County's PA Funding Request

The County submitted an initial request for PA funding for FAL and FAE incurred from March 3 to September 5, 2020, to respond to the tornadoes. At the County's request, FEMA prepared two grants manager projects (GMP), the first to document the County's costs associated with the EPMs performed from March 3 through March 31, 2020, and the second to document costs for EPMs for the period from April 1 through September 5, 2020. FEMA funded the GMP for the initial twenty-eight-day period in the amount of \$5,979,263.49 based on a number of factors reflecting the necessity for law enforcement EPM work, including a ten-day power outage from the date of the disaster event, search and rescue missions in the tornado damaged area and/or missions relating to missing persons reported, road closures needed for utility work from the disaster, and manual traffic direction.

¹ See <https://www.weather.gov/ohx/20200503>.

The funding for the initial, twenty-eight-day period is not in dispute in this arbitration. FEMA denied the County's request for \$7,159,250.53 for the period covering April 1 through September 5, 2020 (specifically, the County's request for \$5,672,634.26 for FAL and \$1,486,616.26 for FAE). In an eligibility determination memorandum dated December 29, 2021, FEMA concluded that the County failed to provide adequate documentation demonstrating that the work was required due to an immediate threat, that the costs the County was seeking were not associated with eligible EPMs, and that the claimed costs represented an ineligible increased operating cost. FEMA specifically noted that "[t]he continued patrolling, security checks, and related actions represent routine law enforcement services, and not an emergency action in direct response to an immediate threat." FEMA's Response, Exhibit 3 at 4.

On February 25, 2022, the County submitted its appeal to the grantee, the Tennessee Emergency Management Agency. The County asserted that it worked with FEMA during project formulation to provide the necessary documentation in support of EPMs that included 190,000 overtime and equipment hours supported by 26,785 activity time sheets. FEMA's Response, Exhibit 4 at 2. The County further asserted that FEMA misinterpreted the provided information and/or underestimated that the immediate threat caused by the tornadoes dissipated within twenty-eight days. *Id.* at 3. On February 28, 2022, the grantee forwarded the County's appeal to FEMA along with a letter of support.

The County's documentation showed that, beginning in the month of April 2020, actions taken by the police department in the aftermath of the disaster shifted primarily to patrolling, security, and safety. *Id.* at 4. Throughout April and May, officers provided patrolling in schools, parking lots, churches, residential areas/neighborhoods, and businesses that sustained severe damage from the tornadoes. *Id.* The County stated that officers responded to incidents of looting, which required extra tornado-related security to prevent theft across precincts, and that such work was conducted by officers working in an overtime capacity. *Id.* The County stated that EPMs continued in some capacity into September 2020. *Id.*

FEMA issued its decision denying the first appeal on February 9, 2023 (FEMA Response, Exhibit 1), finding that the County had not shown that the costs claimed from April through September 2020 were specific EPMs necessitated by an "immediate threat" caused by the March 2020 tornadoes:

FEMA does not dispute the possibility that theft, vandalism, and looting may present risks to the community. However, these risks are not the direct results of the disaster, but rather ordinary risks of crime that would typically be present before or after a disaster, such as a tornado. Because the declared disaster did not directly cause theft or looting, or any similar threat, the

additional police presence to deter theft, vandalism, or looting was not required as a direct result of the declared incident. Although the Applicant incurred additional costs as a result of the incident, these were ineligible increased operating costs, and the associated work is not considered EPMs to save lives or protect public health and safety.

FEMA Response, Exhibit 2 at 4 (First Appeal Analysis (Feb. 9, 2023)) (footnote omitted).

The County submitted its request for arbitration to the Board on April 7, 2023. In this arbitration proceeding, FEMA argues that the County's funding request for increased overtime and equipment costs was devoid of "specific emergency health and safety tasks as part of emergency protective measures" and, thus, is ineligible for public assistance. FEMA's Post-Hearing Brief in Response to Nashville-Davidson County's Arbitration Hearing (FEMA's Post-Hearing Brief) at 1. FEMA additionally argues that the County failed to demonstrate that its requested increased operating costs for policing services was a direct result of the disaster. *Id.* FEMA notes that the County only requested approximately \$99,000 for FAL costs for the May 2020 declared derecho event for a period of six days, a disaster occurring within the time period in which the County claims policing costs for continuing to deal with the March 2020 tornadoes. FEMA's Post Arbitration Hearing Sur-Reply Brief at 4. The derecho event itself lasted for two days, and the power was out for approximately seven days and six hours with 84,679 trouble reports, 8646 outage reports, and 195,607 total customers without power. *Id.* at 4-5; Attachment 9. Finally, FEMA asserts that the County failed to provide the applicant's pre-disaster written labor policy for the FAL being requested. FEMA's Post Arbitration Hearing Sur-Reply Brief at 6-8.

Discussion

I. Public Assistance Essential to Meeting Immediate Threats to Life and Property

Section 403 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5170b (2018), provides that, in response to a Presidentially-declared major disaster, "Federal agencies may . . . provide" state and local governments with "assistance essential to meeting immediate threats to life and property resulting from [the] disaster," *id.* § 5170b(a), including reimbursement of costs incurred by the state or local government in reducing "immediate threats to life, property, and public health and safety." *Id.* § 5170b(a)(3)(I). FEMA categorizes "assistance" that is "essential" as "emergency work" and includes EPMs that are designed "to save lives, to protect public health and safety, and to protect improved property." 44 CFR 206.225(a)(1) (2022); *see* Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19. "In order to be eligible, [EPMs] must: (i) [e]liminate or lessen immediate threats to live [sic], public health or safety; or (ii) [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)(ii). “Security, such as barricades, fencing, or law enforcement” (including overtime labor for budgeted law enforcement personnel), is among the EPM costs eligible for PA funding. PAPPG at 58. Although security costs are generally viewed as reimbursable, an item of work is eligible only if it is “required as a result of the emergency or major disaster event.” 44 CFR 206.223(a)(1).

As for the term, “immediate threat,” under FEMA’s regulations, it is defined as “the threat of additional damage or destruction from an event which can reasonably be expected to occur within five years.” 44 CFR 206.221(c); *see also* PAPPG at 160. FEMA, in response to an inquiry from the panel, provided additional information on this regulatory provision, explaining an “immediate threat” as follows:

1. A dangerous situation caused by the declared disaster;
2. Wherein a future incident can reasonably be expected to cause additional damage or destruction within a 5-year window.

FEMA’s Post-Hearing Brief, Declaration of Mark Tinsman (July 21, 2023) at 1. FEMA further explained that “when FEMA policy states an immediate threat means imminent danger from an incident that can reasonably be expected to occur within 5 years of the ‘declared incident,’ it intends to distinguish between a future incident that has not occurred versus the underlying declared incident.” FEMA’s Post-Hearing Brief at 4. FEMA continues, as follows:

FEMA policy [provides] that while the original declared incident must have caused the immediate threat to exist, the future incident is not limited to the type of declared disaster that caused the initial damage or threat. Thus, if the Applicant had damages from a declared disaster, it should protect itself from the effects of a future incident, declared or otherwise. For example, tornadic winds damage an eligible Facility’s roof. The Applicant can be reimbursed for Emergency Work, which is usually work that is temporary in nature. If the legally responsible PA Applicant demonstrates that the condition of the roof is such that another incident would cause it to collapse, causing an immediate threat to life, public health and safety, or improved public or private property, FEMA may provide funding to temporarily stabilize and make temporary repairs to the roof as a Category B Emergency Work EPM until the Applicant can make more lasting repairs to their Facility. . . . The applicant, however, must demonstrate the existence of an immediate threat exists by submitting sufficient documentation, for example, technical reports, safety inspector reports, or photographs.

Tinsman Declaration at 1-2.

Although costs incurred for law enforcement activities required as a result of a disaster are eligible for PA funding, of relevance here, FEMA does *not* fund the increased costs of providing a service that an entity otherwise provides, even if a declared disaster causes the need for increased services, except for *short-term* increased costs that are *directly* related to specific emergency health and safety tasks within EPMs:

Increased costs of . . . providing a service are generally not eligible, 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.

PAPPG at 42. PA funding for short-term increased costs of providing a service is allowed only if: (1) “[t]he services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property”; (2) “[t]he costs are for a limited period of time based on the exigency of the circumstances”; and (3) “[t]he applicant tracks and documents the additional costs.” *Id.* at 60-61.

II. The Nature of the County’s April through September 2020 Police Services

FEMA has already funded the requested police costs that the County incurred in March 2020, in the aftermath of the tornadoes, and those costs are not at issue here. FEMA argues that additional costs incurred beginning in April 2020, after the County closed its EOC and opened its Tornado Command Centers, do not qualify for reimbursement under the PAPPG because the nature of the policing work being provided was no longer a response to the “immediate threat” of the tornadoes and instead morphed into the same type of services that the County’s police normally provided its citizens. The County, relying on 44 CFR 206.221(a) and 44 CFR 206.204, argues that there is no policy or regulatory requirement for emergency work or the immediate threat to be limited to such a duration. FEMA’s Response, Exhibit 4 at 8. The County also argues that there were many ongoing threats resulting from the actual tornadoes (e.g., hazardous debris, power outage, unsafe buildings, road closures) and that those “threats” were the sole reason its officers incurred additional overtime and equipment usage after the tornadoes. *Id.* at 9. The County additionally asserts that, although FEMA has provided funding for the initial twenty-eight days of police response to the tornadoes, these “threats” did not end at the conclusion of those twenty-eight days but continued for more than six months beyond this initial period. *Id.*

The parties have devoted much of their attention in this arbitration to the issue of whether the County’s efforts in providing police support from April through September 2020 addressed an “immediate threat” from the March 2020 tornadoes to the public health and safety. There is no dispute that costs claimed for the MNP’s work in March 2020, in the immediate aftermath of the March 3 tornadoes, was directed to that “immediate threat,” and

FEMA has already authorized reimbursement of more than \$5 million in FAL and FAE costs for that period of time. The County, at least in its original submissions to FEMA, did not dispute that, after the County closed its EOC on March 23, 2020, and opened four of what it called “Tornado Command Centers,” the nature of its police security work arising out of the March 2020 tornadoes changed, becoming more focused on “patrolling in schools, parking lots, churches, residential areas/neighborhoods, and businesses,” providing “additional security/presence in the affected areas,” and responding “to incidents of looting.” FEMA’s Response, Exhibit 4 at 4. Reviewing the daily attendance logs that the County submitted as part of the arbitration, it is clear that those logs record police officers as mostly conducting “business checks” at various locations, with a significant amount of idle time most likely spent watching locations to provide the type of security presence that the County referenced in its initial submissions to FEMA.

We need not decide whether the costs that the County incurred from April through September 2020 can be considered the costs of responding to an “immediate threat” resulting from the tornadoes. As noted above, the PAPPG makes clear that even when costs are incurred as the direct result of an incident, increased costs of providing a type of service that the applicant normally would provide are not, except in the short term when directly tied to specific EPMs, eligible for recovery. PAPPG at 42.

The record here, including the testimony at the arbitration hearing, makes clear that the type of patrolling and security presence work that the MNPDP performed between April and September 2020 is similar to the types of services MNPDP normally provides. FEMA submitted an MNPDP position description that describes the job responsibilities performed by MNPDP’s officers. Those responsibilities include patrolling either in an automobile or on foot; responding to radio messages or telephone instructions and appearing at scenes of disorder or crime; removing objects from streets that may obstruct traffic; investigating damage to property; and directing traffic. The position description and the County’s own documentation indicate that the County is seeking PA funding for its costs conducting normal law enforcement activities, including security and patrol, beyond the initial twenty-eight-day period after the tornadoes. In its first appeal memorandum, the County stated:

Beginning in the month of April, actions taken by the department in the aftermath of the disaster shifted to primarily include patrolling, security, and safety. . . . Throughout April and May, officers provided patrolling in schools, parking lots, churches, residential areas/neighborhoods, and businesses that sustained severe damage by the [tornadoes]. Ongoing activities also included [Utility Task Vehicle] patrol and roving within the impact zones to provide additional security/presence in the affected areas. Officers have responded to incidents of looting which require extra tornado related security to prevent

theft across the precincts. Work within these areas were conducted by officers working in an overtime capacity.

FEMA's Response, Exhibit 4 at 4.

Although the applicant noted that its "monitoring and maintaining a visible presence in the disaster area [were] important to ensure public safety," (FEMA's Response, Exhibit 2 at 3), PA funding for short-term increased costs related to providing services as a result of an incident is allowed only if: (1) "[t]he services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property; (2) "[t]he costs are for a limited period of time based on the exigency of the circumstances"; and (3) "[t]he Applicant tracks and documents the additional costs." PAPPG at 60-61.

In its briefing, FEMA provided an example of a discrete circumstance requiring EPM work for which PA funding could be provided:

[I]f a bridge was damaged by the tornadoes and blocked for use, but several weeks later collapses further and the debris falls into another roadway then if an officer was called out to put up a police barricade to ensure that motorists and pedestrians were not injured while the new area was blocked off, that call could be considered an eligible EPM if it was sufficiently documented.

FEMA's Response at 15.

Here, the record shows that the County's efforts from April through September 2020 generally reflect more resource-intensive but otherwise routine police activities compared to the initial period after the disaster incident during which the County was dealing with a ten-day power outage, search and rescue activities, and other matters reflecting exigent circumstances. Although the County's hearing witnesses testified that the police would provide assistance during building demolitions, repairs, and construction during this period and that such work would not have been necessary had there been no March 2020 tornadoes, the daily attendance reports that the County placed into the record do not identify any such activities. FEMA indicated both at the hearing and in its briefing that, had the County's activity sheets and time cards evidenced specific unanticipated events in April through September 2020 that were caused by the tornado (such as a building that unexpectedly collapsed as a delayed result of the tornado), it could cover the EPM costs necessary to address those specific events. None of the documentation that the County produced, however, identifies any such specific events and instead shows more generalized patrolling work to protect public safety.

It is an applicant's burden, with the grantee's assistance, to submit all documents necessary for the award of PA funds. 44 CFR 206.202(b)(4). FEMA relied on its review of the County's documentation in denying the County's first appeal. Following our own review of that documentation, we see no reason to overturn FEMA's decision denying the County's request for PA funding for its police officers' overtime and equipment costs.

The County, in support of its position, did provide a declaration, which included a list of projects from other areas of the country apparently to show that, unlike the County's project at issue in this arbitration, FEMA obligated funds for the listed projects for law enforcement work that included police overtime, security, law enforcement, and public safety. Nashville-Davidson's Reply Brief, Declaration of Deb Gallagher at ¶ 8. However, the County provided no information regarding the disasters and resulting damages at issue for the listed projects or the documentation submitted in support of the requests for funding. Without such, the project list is insufficiently probative.

As noted above, the incident at issue in this arbitration was followed shortly by a derecho in May 2020. The National Weather Service described the May 2020 derecho event as follows:

A complex of severe thunderstorms called a MCS (Mesoscale Convective System) developed across southern Kansas on Saturday night, May 2, 2020, then tracked eastward across southern Missouri and western Kentucky during the morning of May 3, 2020 before reaching Middle Tennessee in the afternoon. These storms produced widespread straight-line wind damage across nearly every county of Middle Tennessee, with numerous trees, power lines, and buildings damaged. Some of the worst damage occurred across the Nashville metro area, where winds between 60-80 mph knocked out power to over 130,000 customers – the worst power outage on record for the city. A peak wind gust of 71 mph was measured at the Nashville International Airport, which is the 5th highest on record at that location. . . . This was also likely the worst straight-line wind event across Middle Tennessee since the July 13, 2004 derecho.²

Both the tornado and derecho incidents resulted in days-long power outages – seven days for the derecho (with 84,679 trouble reports, 8646 outage reports, and 195,607 total customers without power) and nine days for the tornado event (with 18,813 trouble reports, 2150 outage reports, and 61,974 total customers without power). FEMA Exhibit 9. Yet, the MNPD daily attendance reports for the period of the derecho, which are a part of the

² See <https://www.weather.gov/ohx/20200503>.

arbitration record, show the same types and numbers of “business checks” that were recorded in the weeks before and after the derecho-affected period, all tagged as relating to the March 2020 tornadoes. Beyond that, the record is unclear as to whether the actual damage to the impacted areas after the derecho was caused by the derecho or the tornadoes that occurred approximately two months prior to the derecho, a factor in whether PA funding can be provided. *See* 44 CFR 206.223(a) (“To be eligible for financial assistance, an item of work must,” among other factors, “[b]e required as the result of the emergency or major disaster event.”). Ultimately, however, it is the County’s failure to identify specific health and emergency tasks or events in the April through September 2020 period necessitating EPMS that precludes FEMA funding.

Decision

The disputed overtime (FAL) and equipment (FAE) costs are ineligible for PA funding.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

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

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge