



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 6, 2023

CBCA 7865-FEMA

In the Matter of PUERTO RICO ELECTRIC POWER AUTHORITY

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Before the Arbitration Panel consisting of Board Judges **VERGILIO**, **SHERIDAN**, and **O'ROURKE**.

SHERIDAN, Board Judge, writing for the Panel.

In this arbitration, the Puerto Rico Electric Power Authority (PREPA or applicant) seeks to obtain public assistance funds denied by the Federal Emergency Management Agency (FEMA) following Hurricane Maria. FEMA denied a portion of applicant's costs after determining them to be unreasonable or not supported by adequate documentation. We agree with FEMA's determination and deny the applicant's request for public assistance.

Background

In September 2017, a declared disaster, Hurricane Maria, left Puerto Rico without power. PREPA, the Puerto Rico government agency responsible for the island's power grid, entered into a contract (original contract) with Whitefish Energy Holdings, Inc. (WEH), a small energy company out of Montana, to "provide labor, supervision, tools and equipment necessary to perform . . . power grid reconstruction." Request for Arbitration (RFA), Exhibits 11 at 1 (original contract); 18 at 1 (restated contract). Due to WEH's small size and limited resources, WEH needed to subcontract much of its workforce.

The original contract was a time and materials (T&M) contract that included a 30% cost-plus cost markup and a schedule with defined labor and equipment rates. Costs without defined rates would be billed on a T&M basis. In email exchanges involving WEH and PREPA, WEH indicated that it would require mobilization and demobilization costs to be paid in advance and that it would submit invoices with the actual costs to reconcile any differences. Such emails were contemplated in Article I of the original contract, where the parties agreed that the terms included "emergency proposals submitted by email, including but not limited to those listed on Schedule I." The original contract also stated that services would be provided "in strict accordance with the provisions of this contract," including those listed in Schedule I, which provided a rate sheet and referenced the mobilization and demobilization deposit. Schedule I included rates for different job descriptions and types of equipment but did not provide rates specifically related to mobilization or demobilization.

In October 2017, the parties entered into a second (restated) contract. The restated contract was executed to eliminate the 30% cost-plus cost markup and to add a price ceiling of \$300 million. The contracts were terminated on October 31, 2017, effective November 30, 2017. Subsequently, WEH submitted invoices and purchase orders to PREPA totaling \$144,249,543.53. PREPA sought reimbursement from FEMA for the full amount. PREPA argued that the original and restated contracts' scope of work encompassed reconstruction of the electric grid and anything necessary to perform such construction.

First, PREPA sought \$6,180,286.92 in reimbursement for hourly helicopter rates. Specifically, PREPA claimed that WEH's rate of \$15,993.60 per hour was reasonable considering PREPA's poor financial condition and the immediate aftermath of the hurricanes. FEMA compared this rate to rates proposed by other contractors, and this comparison showed that WEH's rate was approximately 60% higher than the next highest rate. Based on this information, FEMA adjusted the helicopter rate to \$10,000/hour, allowing \$3,883,000 and denying the remaining \$2,297,286.92.

In addition, PREPA submitted claimed costs for mobilization and demobilization in the amount of \$36,045,356.17 (\$28,760,506.60 for mobilization and \$7,284,849.57 for

demobilization). PREPA did not reference two invoices submitted and paid up-front toward the mobilization and demobilization costs. These invoices totaled \$8,005,000. FEMA agreed with the applicant that these advance mobilization and demobilization payments were required by the emails exchanged between PREPA and WEH.

With regard to the remaining \$28,040,356.17 (reflecting total claimed costs minus the advance payments), PREPA argued that the scope of the work under the contracts included anything necessary to reconstruct the power grid, including mobilization and demobilization costs and that FEMA agreed to pay for these costs on a T&M basis. However, FEMA determined that the original and restated PREPA contracts do not establish the rates for mobilization or demobilization and that WEH documents lacked specificity to validate the hours and costs claimed.

Finally, PREPA requested \$2,559,483.44 for standby time in labor (\$1,189,437.59) and equipment (\$312,897.45 for vehicles and \$1,057,148.40 for helicopter flights). FEMA concluded that these costs were not adequately documented and the contracts did not require that PREPA pay such costs.

On August 29, 2021, FEMA issued a determination memorandum (DM) allowing \$111,252,417, and denying the remaining \$32,897,126.53. Specifically, the denied amount contained three subsets of costs: (1) \$2,297,286.92 in helicopter costs, (2) \$28,040,356.17 in mobilization and demobilization costs, and (3) \$2,559,483.44 in standby labor and equipment costs. PREPA appealed this decision to the regional administrator on October 18, 2021.

In its first appeal, PREPA did not provide any additional information or newer documentation to address any of FEMA's concerns. In July 2022, FEMA issued a request for information (RFI) that included requests for (1) summary spreadsheets itemizing the claim for mobilization and demobilization and (2) clarification of the work performed on days individuals were on standby. In its response, PREPA provided more information and increased its total claim for mobilization and demobilization expenses to \$28,224,402.75, stating that its initial submission was not accurate regarding specific billings with WEH.

FEMA's Regional Administrator for Region II denied PREPA's appeal on June 8, 2023. The Regional Administrator found that PREPA's documentation only supported \$1,670,966.07 of its request for mobilization and demobilization costs and deobligated \$6,334,033.93. The denial of the helicopter and standby costs remained the same. On August 8, 2023, PREPA submitted its Request for Arbitration to the Board, seeking a total of \$39,415,207.04. The panel held a hearing on November 1, 2023.

Discussion

The Board is authorized by Section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a(d) (2018), to arbitrate actions between applicants and FEMA. FEMA requires that costs be, among other things, reasonable, directly tied to the performance of eligible work, adequately documented, authorized, and not prohibited by federal, state, or local laws. Public Assistance Program and Policy Guide (PAPPG) (April 2018) at 21-22.

FEMA determined that PREPA would not receive public assistance for \$39,415,207.04 of the funds requested. This number includes \$2,297,286.92 in helicopter costs, \$28,224,402.75 in mobilization and demobilization costs, \$6,334,033.93 in deobligated mobilization and demobilization costs, and \$2,559,483.44 in standby costs. Applicant argues that because FEMA's decision was contrary to FEMA's policy and guidance and applicable law, the panel should direct FEMA to reimburse the costs at issue.

Helicopter Costs

Public assistance applicants are responsible for demonstrating that the claimed costs are reasonable. A cost is considered 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 decision to incur the costs was made. 2 CFR 200.404 (2022). FEMA further evaluates the reasonableness of costs by determining if the cost is comparable to the current market price for similar goods and services in the same geographic area. *Id.* 404(c); PAPPG at 22. Based on this guidance, we conclude that the helicopter rates sought by PREPA are not reasonable.

FEMA compared WEH's rate of \$15,993.60 per hour to other contractors who performed work during the aftermath of Hurricane Maria. Although WEH paid its subcontractors \$9,500 per hour, the record does not establish that PREPA should be paid more than the \$10,000 per hour that FEMA already authorized. The invoices submitted by WEH to PREPA in support of assistance do not provide any explanation as to why \$15,993.60 per hour was reasonable. The applicant correctly notes that the operations occurred at a critical time with limited available resources and contractors. However, to receive public assistance, costs must be reasonable. The amount paid by FEMA is reasonable; the panel determines that the record does not support greater relief.

In sum, the applicant has not met its burden of showing that the \$15,993.60 per hour helicopter rate was reasonable. FEMA's adjustment of the helicopter rate to \$10,000 per hour was proper, and PREPA is not entitled to the requested additional assistance.

Mobilization and Demobilization Costs

FEMA provides funding for costs based on the terms of the contract if the applicant meets federal procurement and contracting requirements. PAPPG at 30. FEMA may reimburse reasonable, allowable, and eligible costs. Here, PREPA seeks additional mobilization and demobilization costs under its contracts.

The applicant contends that the contracts' language requiring WEH to "provide labor, supervision, tools and equipment necessary to perform transmission and distribution power grid reconstruction" accounts for WEH's anticipated mobilization and demobilization activities. FEMA recognizes that mobilization and demobilization activities would be performed. FEMA has provided public assistance for a portion of such costs to PREPA based upon charges FEMA deems reasonable and supported. However, FEMA has denied additional compensation because rates for these activities are not established in the underlying contracts. Neither contract here provides any detail regarding the payment of mobilization and demobilization, and the invoices in the record do not support the additional payments sought.

In addition, public assistance applicants are required to provide a high degree of oversight on T&M contracts to obtain reasonable assurance that the contractor is using effective and efficient cost controls. PAPPG at 32. Hence, to be reimbursable, costs must be adequately documented. 2 CFR 200.403(g); PAPPG at 21. The regulations place the burden of adequately documenting eligible activities on the applicant. Here, the applicant argues that WEH's invoices are specific enough because activity reports and the name, job title, and function of each laborer are included in the documents. However, the invoices did not include what the mobilization and demobilization entailed, the time spent by each person or piece of equipment involved, or the location of the work. Thus, PREPA did not adequately document the mobilization and demobilization activities to receive additional payment for such activities. Accordingly, we conclude that PREPA is not entitled to the requested \$28,224,402.75 in mobilization and demobilization costs.

Deobligated Mobilization and Demobilization Costs

The applicant takes issue with FEMA reducing the public assistance for mobilization and demobilization. Under section 705(c) of the Stafford Act, FEMA is barred from recovering obligated funds from a State or local government if: "(1) the payment was authorized by an approved agreement specifying the costs; (2) the costs were reasonable; and (3) the purpose of the grant was accomplished." 42 U.S.C. § 5205(c). If all three conditions are met, FEMA is prohibited from deobligating grant funds even if it later determines that it made an error in determining eligibility. *Id.*

There is no bar here to FEMA reducing the public assistance for mobilization and demobilization. The applicant overstates the situation and application of the statute. The applicant's contracts are explicit in stating that initial mobilization and demobilization amounts will be verified with supporting documentation and adjustments will be made, as needed. In such a situation, any amounts paid by FEMA were subject to final verification. Of necessity, for an applicant to receive public assistance, FEMA, not just the applicant, would make the determinations on the adequacy of the verification. The funds, therefore, were not fully obligated as the contingency for verification existed. The statute does not limit FEMA's actions given that the payments were not final obligations. We deny applicant's request to recover these funds.

Standby Costs

Standby costs are those that are not necessary to or affiliated with the accomplishment of eligible work. PAPPG at 25-26, 30. As discussed above, contract costs must be directly tied to the performance of eligible work and be contractually authorized to be reimbursable. PAPPG at 21, 30. FEMA does not have to compensate for standby costs under the Stafford Act if they are not related to personnel or equipment that performed actual work. *See* 42 U.S.C. § 5170b.

The applicant contends that WEH and subcontractor employees were not on "standby" because work activities, such as safety meetings, travel to and from work sites, preparation for work, and equipment and tool tracking, were being performed. However, the applicant does not set forth any persuasive arguments explaining how these costs are tied to the performance of the contract nor does the record contain sufficient supporting documentation proving that the equipment and crews under these costs were being used to perform actual work. PREPA also argues that the restated contract covers this work and does not expressly exclude payment for standby time. But, the restated contract is clear – it does not allow for standby costs, except if the applicant suspended the work or if the work occurred during a force majeure event, neither of which happened here. In addition, the contract allows only payment for labor, supervision, tools, and equipment necessary to reconstruct the power grid. The billed activities do not fall into this category. Hence, these costs are not recoverable under the PA program. We deny applicant's request for additional public assistance for standby costs.

Decision

The panel denies the request for additional public assistance.

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge