UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 12, 2024

CBCA 7889-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-Twomey, General Counsel, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Marija Diceviciute, Appeals Officer, Melissa Shirah, Recovery Bureau Chief, and Kelly Welch, Legal Intern, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **ZISCHKAU**, **O'ROURKE**, and **CHADWICK**.

CHADWICK, Board Judge, writing for the Panel.

Applicant sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) about the reasonableness of costs incurred to repair an elementary school. Eligibility is not otherwise in dispute. Applicant elected a written hearing. FEMA asks us to dismiss the arbitration on the grounds that the amount in dispute is less than the applicable dollar threshold. We adopt as binding FEMA's prior advice to applicant that applicant had the option to request Board arbitration, but we agree with FEMA that applicant has not shown that the amounts still in dispute are reasonable.

Background

We write "primarily for the parties" and omit unnecessary details. Rule 613 (48 CFR 6106.613 (2022)); *see Diamond v. Shulkin*, 692 F. App'x 637, 637 (Fed. Cir. 2017). Following Hurricane Michael, which struck Florida in October 2018, applicant needed to repair several public schools. Applicant retained a general contractor, Childers Construction Company, which, in turn, awarded lump-sum, fixed-price subcontracts to subcontractors. *See generally* Applicant's Reasonable Cost Schedule and exhibits cited therein.[1] The work included repairing five buildings at Callaway Elementary School, for which applicant originally sought public assistance totaling $341,123.56. Applicant's Exhibit 1 at 3. FEMA denied $57,359.54 of that amount. *Id*. Applicant appealed.

The scope of the dispute began to grow. In July 2023, after considering applicant's responses to information requests, FEMA not only denied the first appeal but concluded that "the reasonable cost [of repairs] is $197,391.66 less than the Applicant's revised claim, and $218,181.90 less than [the currently] obligated amount" under the grant. Applicant's Exhibit 6 at 9. "[N]o more than $105,885.53 can be reasonably assumed to have been expended for eligible repairs." *Id*. at 10. FEMA developed and relied on its own estimates of reasonable costs because, FEMA wrote, "[t]he contract costs are based on lump sum amounts by trade, and invoicing was completed using a schedule of values developed [by the general contractor] after the contract was signed," denying visibility into the reasonableness of individual line items on the invoices. *Id*. at 7.

FEMA's letter transmitting the first appeal decision advised applicant that it was "entitled to" pursue a second appeal and added, using FEMA's standard language for such letters, "Alternatively, the Applicant may seek arbitration pursuant to Section 423 of the Stafford Act, as amended . . . . To determine eligibility for arbitration, see Title 44 Code of Federal Regulations (44 C.F.R.) § 206.206, *Appeals*." Applicant's Exhibit 6 at 3.

Applicant timely sought arbitration. The arbitration request seemed to suggest that the amount in dispute was not the $218,181.90 FEMA had said it would deobligate, but either $419,763.67 or $317,462.27. *See* Applicant's Request for Arbitration at 15, 17 ("[Applicant] respectfully requests that the . . . Panel . . . find that the full $419,763.67 in claimed costs . . . are eligible . . . . [Alternatively, FEMA's estimate of] reasonable costs plus

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[1] Although applicant does not say so, we presume that *School Board of Bay County, Florida*, CBCA 7553-FEMA, 23-1 BCA ¶ 38,352, at 186,248, describes the retention of this general contractor on a "guaranteed maximum price" basis.

ten percent equals $317,462.27."). Given FEMA's funding decisions regarding the project to that date, neither of those figures represented an amount then genuinely in dispute.

FEMA's response to the arbitration request was more helpful. FEMA explained that, partly as a result of continuing discussions, the amount that FEMA intended to deobligate was $160,974.06, based solely on disagreements about cost reasonableness. FEMA's Response to Request for Arbitration at 10–11. FEMA also raised an objection to applicant's eligibility for arbitration, which we address below. *Id*. at 8–10.

The panel twice sought supplemental briefing of the evidence of cost reasonableness. Applicant has conceded some of FEMA's points and identifies the amount now in dispute as $106,095.53. Applicant's Reasonable Cost Schedule at 2 ("This remaining amount in dispute is $54,878.53 less than previously claimed[.]"). FEMA maintains that the costs sought are unreasonable, essentially for the reasons it gave in the first appeal decision. FEMA's Response to Applicant's Supplement Filing at 2–3.[2]

Discussion

FEMA Already Determined That Applicant Could "Seek Arbitration"

FEMA argues, first, that we should "dismiss the arbitration as being outside [our statutory] authority" because, according to FEMA, applicant is not a rural applicant that can obtain arbitration of disputes involving less than $500,000. FEMA's Response at 10 (citing 42 U.S.C. § 5189a(d); 44 CFR 206.206(a) (2022)). Applicant denies that it is from an urban area. This is not an appropriate arbitration in which to reach this issue. FEMA formally notified applicant in July 2023 that applicant could "seek arbitration" of FEMA's decision to deobligate $218,181.90. This official guidance would be accurate only if FEMA had deemed applicant to be from a rural area. *See* 42 U.S.C. § 5189a(d)(3).

If FEMA intended the next sentence of the July 2023 letter—regarding how "to determine eligibility for arbitration" under the regulation—to negate or qualify the preceding sentence stating that applicant "may seek arbitration," FEMA's language was far too vague for that purpose. Applicant waived its right to a second appeal and elected arbitration, having been officially told it "may seek arbitration." *See* 44 CFR 206.206(b)(2)(ii). It is too late for FEMA to reverse its decision regarding the dollar threshold. As FEMA knows, it has raised this issue in several Board arbitrations—including with regard to applicant's own city.

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[2] Applicant paginated its supplemental filings non-consecutively. We cite to the pdf pages.

See First Presbyterian Church, Panama City, Florida, CBCA 7282-FEMA, 22-1 BCA ¶ 38,084, at 184,955 ("[W]e decline FEMA's request that we look back to the population of Panama City prior to the disaster and instead rely upon the population figures as of the time the dispute arose."); *see also Metropolitan St. Louis Sewer District*, CBCA 6821-FEMA, 20-1 BCA ¶ 37,696, at 183,009–10; *Municipality of Cabo Rojo*, CBCA 6590-FEMA, 20-1 BCA ¶ 37,517. FEMA should not mislead applicants about its position on the urban/rural issue and then collaterally attack its own advice in arbitration after it is too late for applicants to change course and obtain further agency review.

Should FEMA start using different language in its letters transmitting first appeal decisions—and stop advising applicants that they "may seek arbitration" when there is a chance FEMA may change its mind—the issue may come to arbitration in a different posture.

Applicant Does Not Show That Invoiced Costs Are Reasonable

We turn to cost reasonableness. "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." Public Assistance Program and Policy Guide (Apr. 2018) at 22. The analysis involves such familiar considerations as "sound business practices," "arm's-length bargaining," and "[m]arket prices." 2 CFR 200.404(b), (c) (2022); *see, e.g., Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,979–81.[3]

Applicant now seeks more funding for ten items of work at four buildings, plus general conditions and a fee for its general contractor. FEMA found a total of $29,489.51 of the claimed costs to be reasonable, using FEMA's estimates. Applicant says its reasonable costs for the work total $135,585.04, leaving the $106,095.53 difference in dispute. Each of the ten work items was performed either by applicant's general contractor or by one of four subcontractors. In each case, applicant contends that the amount invoiced for the work by the general contractor was based on "a competitive subcontract bid for the agreed upon scope of work items." Applicant's Reasonable Cost Schedule at 4–8.

As noted, the panel focused the parties' attention on cost reasonableness and away from the eligibility of the scope of work, which the dispute may originally have seemed to

[3] Because the standard of reasonableness of grant costs tracks the reasonableness test under the Federal Acquisition Regulation (FAR), 48 CFR 31.201-3 (2022), the panel also brings to bear our experience in assessing reasonableness in contract cases under the FAR.

concern but which is not at issue.[4] The briefing ultimately showed that the parties' disagreement is conceptually simple. FEMA says the costs in dispute are simply too high, as compared to estimates generated by commercially available software. Applicant, in essence, says the costs are reasonable because the lump-sum subcontracts under which the amounts were paid were awarded by the general contractor via competitive bidding. Neither side fully addresses the factors we must consider to assess cost reasonableness.

To be specific, the dispute plays out as follows with respect to each subcontract.

1. Southern Blue[5] repaired drywall, stucco, and ceiling tiles in multiple buildings at Callaway Elementary for a fixed price of $104,210. Applicant's Exhibits 5-45 at 10, 5-61 at 2. A bid sheet indicates that the general contractor received three lump-sum bids for this subcontract and selected Southern Blue's price as the lowest. Applicant's Exhibit 5-45 at 1, 10.[6] The parties dispute the reasonableness of the costs of such work at buildings 9 and 11. FEMA does not dispute the eligibility of this work, or of any work still at issue. *See* FEMA's Response to Request for Arbitration at 10–11. FEMA determined that the reasonable costs are $5668.97 for Southern Blue's work at building 9 and $8448.26 for its work at building 11. FEMA Exhibit 3. Applicant seeks an additional $9730.11 for repairs at building 9 and $12,671.74 for repairs at building 11 (for a total of $22,401.85). Applicant's Reasonable Cost Schedule at 2. Applicant derives these amounts from the sums of line items in the general contractor's final invoice. *Id*. at 4, 6 (citing Applicant's Exhibit 5-70).

Because the general contractor subcontracted on a fixed-price, lump-sum basis, the itemized tasks were not separately put out for bids, and the subcontract contained no unit prices (e.g., per square foot) that we could apply to this work. *See* Applicant's Second Supplemental Briefing at 2 ("[N]either the Southern Blue subcontract nor the [general contractor's] Pay Application contain[s] the actual quantities for drywall, stucco, and [ceiling

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[4] Applicant asserts that *School Board of Bay County*, 23-1 BCA ¶ 38,352, addressed "a separate but very similar issue." Request for Arbitration at 12. As we read that decision, it addressed whether the eligible scope of work could be traced through to the general contractor's invoices and did not directly analyze the reasonableness of the costs paid by applicant, through the general contractor, for specific items of work.

[5] We use the company names the parties use, which may not be complete.

[6] Specifically, each awarded subcontract was for work at several schools, including Callaway Elementary. We assume that each low bid for a subcontract contained the best price for the work just at Callaway, but we have not verified this assumption, as, ultimately, it does not affect our analysis.

tile] work or unit prices applied to these quantities."). The amounts invoiced by the general contractor and sought by applicant reflect the lump-sum subcontract price allocated across the *bid* quantities. *See id*. at 4–5.

Applicant argues that the extra costs it seeks are reasonable because its overall procurement strategy was reasonable. "[A] prudent person," it argues, "would procure lump sum contracts [sic] . . . to get the best pricing while also ensuring efficient coordination of repairs across campuses. . . . FEMA [and the Board] should evaluate the contract costs as a whole because that is the [type of] cost [applicant] chose to incur, not the individual costs per eligible facility." Request for Arbitration at 19–20. FEMA, for its part, does not say whether the total subcontract price seems reasonable in context. "The problem for FEMA continues to be the manner in which the Applicant has claimed the costs. The . . . lump sum [general] contract and the methodology used for billing result[] in different [unit] prices for the same work" at different buildings and unit prices that are multiples of estimates generated by RSMeans estimating software (in the case of drywall, about 2.5 times higher than the commercial estimate). FEMA's Response to Applicant's Supplemental Filing at 2. Applicant replies, "Regulations require only that incurred costs be reasonable; [they do] not require more granular examination as to the consistency of unit cost pricing." Applicant's Second Supplemental Briefing at 15.

2. This same disagreement recurs with regard to each subcontract. RCM Interiors performed eligible painting at the school for a fixed price of $60,583.55. Applicant's Exhibit 5-49 at 10. A bid sheet indicates that the general contractor received three lump-sum bids for this subcontract and selected the RCM Interiors bid as the lowest priced. *Id.* at 1, 10. Applicant seeks an additional $6002.68 for painting at building 9, $8871.44 for painting at building 10, and $16,365.61 for painting at building 11, over the amounts that FEMA funded as reasonable. Applicant derives the claimed amounts from six line items in the general contractor's final invoice. Applicant's Reasonable Cost Schedule at 4, 5, 6 (citing Applicant's Exhibit 5-70). Again, "neither the . . . subcontract nor the . . . Pay Application contain[s] the actual quantities for painting work or unit prices applied to these quantities," and "the quantities for the claimed painting work are [from] the bid documents," with the total price allocated to bid quantities. Applicant's Second Supplemental Briefing at 4–5. Applicant relies on the reasonableness arguments summarized above. FEMA states that the "claimed [painting] costs come in at 5 times FEMA's cost for Building 9, 6.5 times FEMA's cost for Building 10, and 6.4 times FEMA's cost for Building 11," and the unit prices vary by building. FEMA's Response to Applicant's Supplement Filing at 2–3.

3. Childers Construction, the general contractor, supplied "general trades" at the school for a fixed price of $58,174. Applicant's Exhibit 5-34 at 19. It received another responsive, lump-sum bid for this work but selected its own "bid" at a lower price.

Applicant's Exhibit 5-51 at 1, 14. Applicant seeks an additional $7930.16 for trades at building 10, $4900.11 for trades at building 11, and $2954.55 for trades at building 13, which are the amounts by which the charges in the general contractor's invoice exceed the amounts FEMA funded as reasonable estimates for each building. Applicant's Reasonable Cost Schedule at 4, 5, 6 (citing Applicant's Exhibit 5-70). As above, "neither the . . . subcontract nor the . . . Pay Application contain[s] the actual quantities or types for general trades work or unit prices applied to these quantities." Applicant's Second Supplemental Briefing at 8–9. Applicant argues that this should not matter, given price competition; FEMA stands by its RSMeans estimates and points out that the $2600 invoiced for trades at building 13 relates to repairing only "half a square foot of brick veneer." FEMA's Response to Applicant's Supplement Filing at 3 (citing Applicant's Exhibit 12 at 2).

4. Fort Walton Glass repaired windows at the school for a fixed price of $5700. Applicant's Exhibit 5-44 at 5. The general contractor received three lump-sum bids for this work and accepted the lowest priced. *Id.* at 14. Applicant seeks an additional $913.08, above FEMA's estimate, for window work at building 10, based on a line item in the general contractor's final invoice. Applicant's Reasonable Cost Schedule at 5 (citing Applicant's Exhibit 5-70). Again, the work was not priced by unit (e.g., per window), and the cited evidence of reasonableness is the competitive award of the subcontract.

5. Kelly Brothers performed heating, ventilation, and air conditioning (HVAC) work for a fixed price of $72,000. Applicant's Exhibit 5-53 at 13. The general contractor received three lump-sum bids for this work and accepted the lowest priced. *Id.* at 1, 13. Applicant seeks an additional $13,565.64 for HVAC work at building 10 (FEMA funded $2934.36) based on a line item in the general contractor's final invoice. Applicant's Reasonable Cost Schedule at 7 (citing Applicant's Exhibit 5-70). Again, the work was not priced by unit, and the evidence of reasonableness is the competitive award of the subcontract.

Neither party fully or adequately addresses cost reasonableness. "The standard for assessing reasonableness is flexible, allowing [a fact finder] to consider many fact-intensive and context-specific factors." *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1360 (Fed. Cir. 2013). For a government contract, a "competitive [award] is firm evidence that the price obtained was reasonable," *Hearthstone, Inc. v. Department of Agriculture*, CBCA 3725, 15-1 BCA ¶ 36,105, at 176,272 (citing *Astro-Space Laboratories, Inc. v. United States*, 470 F.2d 1003, 1018 (Ct. Cl.1972)*; Rhocon Constructors,* AGBCA 86-125-1, 91-1 BCA ¶ 23,308, at 116,894 (1990)), but the bids here were selected by a private third party, the general contractor, and we received no direct evidence—as distinct from assertions of counsel—illuminating the subcontract solicitation or award process. Despite FEMA's reasonable inquiries about cost reasonableness, we do not know, for example, the

going rates for similar work nearby at the same time, or to what extent, if any, the general contractor was motivated to obtain low prices on applicant's behalf or was rewarded for doing so.[7]

For its part, FEMA seems at times to suggest that costs cannot be reasonable if they far exceed estimates generated by RSMeans, which is not true either. We do not typically rely on "industry factors" or other estimating guides to determine reasonable costs unless an expert explains in some detail that the estimates rest on "reliable empirical data." *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 17-1 BCA ¶ 36,739, at 179,081 (citing *Herman B. Taylor Construction Co. v. General Services Administration*, GSBCA 15421, 03-2 BCA ¶ 32,320, at 159,904). We have no such detailed explanation here—which would be important for pricing work procured after a disaster, which might lead to labor shortages and higher market prices—and the panel has reservations as to whether some of the RSMeans categories used by FEMA apply to some of the work.

As arbitrators, we focus on whether applicant is persuasive. *See, e.g.*, *Jackson County, Florida*, CBCA 7279-FEMA, 22-1 BCA ¶ 38,075, at 184,907 (citing *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029). We ask primarily whether applicant is right and not whether FEMA is wrong. FEMA had reasonable grounds to inquire about cost reasonableness. Although the existence of multiple lump-sum bids is probative of competition and, thus, of reasonableness, we do not find the evidence of competing bids dispositive here. We would have needed more evidence of actual market conditions to agree with applicant that the lump-sum subcontract prices accepted by the general contractor were facially reasonable, even where the resulting charges for some work items seem distinctly high in hindsight. We urge parties in future arbitrations to paint fuller pictures for the panels when cost reasonableness is in dispute.

Applicant also seeks markups and general conditions as percentages of the costs in dispute. Applicant's Reasonable Cost Schedule at 2, 8. These amounts are not reasonable or eligible because we do not find the underlying, disputed hard costs to be reasonable.

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[7] The discussion of the general contractor's contract type in *School Board of Bay County*, 23-1 BCA at 186,250 n.2, does not suggest that the general contractor's incentives regarding subcontract prices were necessarily aligned with applicant's interests.

Decision

The $106,095.53 remaining in dispute is ineligible based on reasonableness.

Kyle Chadwick
KYLE CHADWICK
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge