UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 21, 2024

CBCA 8147-FEMA

In the Matter of MONROE COUNTY SHERIFF'S OFFICE

Wendy Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Charles Schexnaildre and Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA; and Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX, counsel for Applicant.

Caleb Keller, Senior Attorney, and Suhail Chhabra, Deputy General Counsel, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; Cassie Sykes, Recovery Appeals Officer, and Melody Cantrell, Recovery Legal Liaison, 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, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **KULLBERG**, **CHADWICK**, and **NEWSOM**.

CHADWICK, Board Judge, writing for the panel.

The Monroe County (Florida) Sheriff's Office (applicant) sought arbitration under 42 U.S.C. § 5189a(d) (2018) after the Federal Emergency Management Agency (FEMA) denied public assistance for costs applicant had described as COVID-19 response costs in two project worksheets. FEMA denied two first appeals involving the worksheets on the grounds that the appeals were not timely filed. We find that the appeals were timely, adopting the reasoning of prior arbitration panels. We also reject FEMA's other challenges to our authority, but we find the costs at issue to be ineligible for public assistance.

Background

We assume familiarity with the COVID-19 emergency declaration and the evolution of FEMA's policy on public assistance for COVID-19 response costs, which have been summarized by numerous arbitration panels.

Applicant operates a county jail. In August 2022, applicant finalized an application for $620,504.97 in public assistance for contracted, COVID-19-related labor, equipment, materials, and supply costs through July 1, 2022, reimbursable at a 100% federal cost share. In December 2022, applicant applied under a new project number for $89,446.73 in similar costs from July 2, 2022, until the end of the incident period, with a 90% federal cost share. Following correspondence, FEMA denied most of the costs in four separate determinations issued in June, July, and October 2023. Applicant's Exhibits 3, 4, 5, 6.

Applicant sent grantee, a state agency, a first appeal regarding the first application in August 2023 and another first appeal regarding the second application in September 2023. Applicant's Exhibits 7, 8. Due to what grantee described at the hearing as an employee error, grantee did not email the appeals to FEMA until February 23, 2023, which was 177 days and 154 days, respectively, after receiving them. Applicant's Exhibits 9, 10.

FEMA, through the Regional Administrator, acted on both appeals in May 2024. In two, virtually identical letters, FEMA advised applicant that because grantee did not forward the appeals to FEMA within sixty days after appellant received the initial determinations, applicant's "first appeal rights ha[d] lapsed," but that "Applicant may elect to" email second appeals to grantee, which the Regional Administrator would "transmit . . . to FEMA headquarters" if FEMA received them within sixty days. "Alternatively," the letters added, "in lieu of a second appeal, an arbitration process is available to any Applicant meeting the statutory criteria. . . . Please consult 44 C.F.R. § 206.206(b)(3) and 48 C.F.R. part 6106 for arbitration eligibility and procedural requirements." Applicant's Exhibits 11, 12.

Applicant requested arbitration in July 2024, stating that the costs in dispute in the two projects total $447,933.99. In the initial conference under Rule 607 (48 CFR 6106.607 (2023)), all agreed that "the issues to be arbitrated include[d] the timeliness of the first appeal[s] and, if that issue is resolved for applicant, eligibility of the work categories." FEMA said it might also contend that applicant seeks arbitration of two disputes, not one, and that applicant is not rural. FEMA has not made the latter argument. Applicant submitted new evidence on eligibility, including a declaration of the sheriff and written and live testimony of the office's chief of staff.

Discussion

FEMA Decided the First Appeals

Despite the agreement reached in the initial conference, FEMA belatedly raised another issue. FEMA argues that we lack statutory authority to arbitrate—even, apparently, to decide whether the first appeals were timely—because the determinations issued in July and October 2023 became final decisions in the absence of timely appeals, meaning that applicant never gained the right under 42 U.S.C. § 5189a(d)(5) to seek arbitration after a first appeal. FEMA Response at 13.

The record does not support FEMA's new argument. When FEMA denied the first appeals, the agency told applicant it had no right to review—but FEMA did *not* say that FEMA's earlier determinations had become final. Instead, the Regional Administrator issued formal decisions in both appeals and advised applicant that it could still submit *second* appeals. The appeal decisions also referred to the right of arbitration. FEMA relies on a regulation currently in effect, which defines an initial "decision of FEMA" as the "[f]inal agency determination . . . if the applicant or recipient does not submit a first appeal within the time limits provided" by regulation. 44 CFR 206.206(a)(1). Setting aside any retroactivity concerns that might arise in applying this rule (see below), FEMA clearly did not apply any such rule that could have rendered the initial determinations procedurally final. The Regional Administrator opted, instead, to issue new decisions triggering new deadlines. *See id.* 206.206(b)(1)(ii)(C). That the new decisions addressed only timeliness does not change the fact that they were first appeal decisions by FEMA.

Thus, applicant timely sought arbitration "after the completion of the first appeal[s]" and "before the Administrator . . . ha[d] issued . . . final agency determination[s]." 42 U.S.C. § 5189a(d)(5)(B). This suffices to establish applicant's "procedural eligibility" to obtain arbitration. *See Board of Trustees of Bay Medical Center*, CBCA 7826-FEMA, 24-1 BCA ¶ 38,492, at 187,096 ("[W]hether applicant has followed all of the procedural steps necessary to bring the dispute before us . . . could [be classified as] *procedural eligibility*.").

The Dispute Is Fully Arbitrable, As It Involves $447,933.99

FEMA argues that applicant's costs after July 1, 2022, are not arbitrable because each project worksheet is a separate "dispute," and the second project does not meet the $100,000 threshold for arbitration for an applicant from a rural area. FEMA Response at 13-14; *see* 42 U.S.C. § 5189a(d)(1), (3) (authorizing arbitration "for a dispute of" at least $100,000). We disagree. The dispute as a whole involves $447,933.99 of the same types of costs incurred at one facility at different times; the parties agree that applicant prepared two project

worksheets only to reflect a different federal cost share, not based on distinctions affecting eligibility. In similar circumstances, panels have found two projects to involve one arbitrable dispute. *City of St. Cloud, Florida*, CBCA 7952-FEMA, et al., 24-1 BCA ¶ 38,559, at 187,409 (finding "in essence, one dispute" in two projects "that applicant attributes to responding to COVID-19"); *Santa Cruz County Service Areas*, CBCA 7879-FEMA, 24-1 BCA ¶ 38,507, at 187,159 (merging two projects for arbitration absent "material differences between the projects"). As discussed in the hearing, FEMA's position that "project" and "dispute" are synonyms finds no support in statute or regulation.

The First Appeals Were Timely

Regarding the timeliness of the first appeals, we adopt, in relevant part, the reasoning of *Larimer County, Colorado*, CBCA 7450-FEMA, 23-1 BCA ¶ 38,256, at 185,785 (citing *City of Beaumont, Texas*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018, at 184,632) and reject FEMA's position that the appeals were untimely because grantee did not timely forward them to FEMA after timely receiving them from applicant. A 2021 regulatory amendment replaced language in 44 CFR 206.206 on which the *Larimer County* and *City of Beaumont* panels relied. *See* 86 Fed. Reg. 45,660, 45,663–64 (Aug. 16, 2021). For this arbitration, however, we read the 2021 amendment as applying only to disasters declared after 2021, *see id*. at 45,660 ("This rule is effective on January 1, 2022."), as FEMA did not acknowledge the relevant change in the regulation and was unprepared to address in the hearing applicant's argument that the new language on timeliness should not "retroactively" apply to appeals concerning COVID-19. *See* Applicant's Reply at 5-6 (citing 42 U.S.C. § 5165c (certain FEMA policies implemented by notice and comment "shall apply only to a major disaster or emergency declared on or after the date on which the policy is adopted")).

Applicant Does Not Specifically Identify Eligible Work

As noted, the parties asked us to decide the eligibility of the work categories if we decided timeliness and other threshold issues in applicant's favor, as we have. Eligible work is work required by eligible responses to the pandemic. *See* Public Assistance Program and Policy Guide (Apr. 2018) at 19 (eligible work must be "required as a result of the declared incident"); *City of St. Cloud*, 24-1 BCA at 187,409; *cf. Miami-Dade County, Florida*, CBCA 7204-FEMA, et al., 22-1 BCA ¶ 38,017, at 184,627 ("[I]ncreased costs of operating a facility or providing a service are generally not eligible, even when directly related to the incident.").

FEMA denied assistance at the Recovery Division level upon finding that applicant seeks "increased cost[s] of providing governmental services" that are not "specifically related to performing eligible emergency actions." *E.g.*, Applicant's Exhibit 4 at 4. We reach the same conclusion on the basis of the arbitration record.

Applicant seeks costs in three categories: (1) cleaning and disinfection, (2) disposable food containers, and (3) waste disposal. Applicant's Reply at 14-24. Arbitration panels have denied assistance for COVID-19 costs absent a basis in the record to segregate work that is eligible under FEMA's COVID-19 policies from ineligible work, including other pandemic responses. *E.g.*, *City of St. Cloud*, 24-1 BCA at 187,410 ("General references [in the record] to eligible or potentially eligible work by employees cannot demonstrate the actual, marginal hours or costs of eligible work."); *Tunica County Board of Supervisors*, CBCA 7907-FEMA, 24-1 BCA ¶ 38,546, at 187,355 ("The record does not show how [certain cleaning] tasks . . . were emergency protective measures."); *New York Foundling*, CBCA 7810-FEMA, 23-1 BCA ¶ 38,439, at 186,828 ("On this record, given applicant's inability or failure to segregate any [eligible] costs . . . from its other staffing costs, we cannot find any eligibility."). COVID-19-related work found by panels to be eligible has typically comprised well-documented "emergency protective measures . . . taken . . . to reduce immediate threats to public health and safety for a limited period of time." *City of Miami Beach, Florida*, CBCA 7878-FEMA, slip op. at 4, 6 (Oct. 24, 2024).

Applicant's evidence has weaknesses that have caused panels to deny assistance. Applicant's chief of staff testified that applicant hired contractors in lieu of inmates to clean and disinfect the jail and started serving food in containers rather than on trays to mitigate the spread of COVID-19. We do not doubt the reasonableness of those actions. We lack evidence, however, that, in taking the precautions, applicant incurred identifiable, increased costs to implement the types of protective measures that FEMA considers eligible. *See* FEMA Policy 104-21-0003, version 2 (Sept. 2021) at 1, 5, *quoted in Tunica County*, 24-1 BCA at 187,355. Maintaining the jail and feeding inmates are operating costs for applicant, not costs caused generally by the pandemic. Such costs do not become eligible for public assistance simply because the pandemic caused them to increase. As in *New York Foundling*, even assuming the costs at issue here "included" costs of eligible protective measures, "[w]e cannot determine . . . that any such costs are attributable directly or solely" to eligible work, rather than to running the facility in general. 23-1 BCA at 186,828.

With regard to the third category of costs, medical waste disposal, applicant does not persuade us that it is a primary medical facility under FEMA policy (an assertion applicant made only late in the arbitration) or, in any event, that the record suffices to segregate any disposal costs caused directly by eligible COVID-19 responses from disposal costs applicant would have incurred in the ordinary course of providing on-site health services.

Decision

The costs at issue are ineligible for public assistance.

Kyle Chadwick
KYLE CHADWICK
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge