



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 7, 2024

CBCA 7968-FEMA

In the Matter of CARROLL ELECTRIC MEMBERSHIP COOPERATIVE

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Before the Arbitration Panel consisting of Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **O'ROURKE**.

O'ROURKE, Board Judge, writing for the Panel.

Applicant, Carroll Electric Membership Cooperative (CEMC), seeks reimbursement of costs for base camp services that were procured to accommodate emergency crews from out of town who helped to restore power in the wake of Hurricane Zeta. FEMA determined that some of the costs were eligible for reimbursement but denied the remaining costs after determining that they did not meet the "necessary and reasonable" requirements of the applicable regulation, 2 CFR 200.403 (2023), and FEMA's Public Assistance Program and Policy Guide (PAPPG) (June 2020). FEMA found that CEMC significantly overestimated

the number of personnel who required base camp lodging services because CEMC did not consider the impact of the COVID-19 pandemic on worker availability and then failed to terminate the base camp services contract for convenience once CEMC learned that base camp lodging services would not be needed. FEMA maintains that it correctly denied the costs since unused lodging is, by definition, unnecessary and FEMA already funded hotel accommodations for the responding workers. After reviewing the record and considering arguments by both parties, we find that most, but not all, of the remaining base camp costs were necessary and reasonable and, thus, eligible for reimbursement.

Background

On October 29, 2020, Hurricane Zeta hit the State of Georgia, causing widespread damage and power outages in the seven counties that CEMC serves. CEMC has been in operation since 1963, and its service territory covers 1100 square miles, 5491 miles of line, twenty-five electrical distribution stations, and 54,000 electrical meters, 94% of which are residential. In the five days leading up to the disaster, CEMC tracked the storm and its potential impact on its customers. Two days before the hurricane's arrival, CEMC recalled members of its workforce who were out assisting mutual aid partners with their power restoration challenges. CEMC also requested additional labor support from those same partners to facilitate power restoration efforts by CEMC.¹ Outside crews began arriving the day before the storm.

Using historical data from the previous two major local disasters, as well as initial damage assessments caused by Hurricane Zeta, CEMC developed a restoration estimate using a sampling of broken poles, downed power lines, and "right-of-way work." CEMC's technically advanced metering and monitoring equipment enabled it to conduct reliable damage assessments within hours after the storm had passed. That information, along with data from past restoration efforts, was entered into a formula that measures the average time and crew-hour estimates for each type of repair work. This calculation yielded an estimate of 2239 crew hours to complete the repairs. When translated into the number and type of crews required, CEMC determined that forty-one construction crews and eight right-of-way crews (or 327 individual crew members) could fully restore power in three to five days.

¹ CEMC engaged with its partners in the area in the practice of both sending and receiving restoration crews to assist with restoration projects in localities without enough laborers to complete projects on their own. Funding for the costs of mutual aid actions may be granted by FEMA. *See* PAPPG at 85 ("When the Applicant does not have enough resources to respond to an incident, it may request resources from another jurisdiction through a 'mutual aid' agreement.").

At this time, the COVID-19 pandemic was still a major global threat. Vaccines had yet to be distributed to the general public, and social distancing was a primary strategy to minimize exposure to the virus. CEMC prioritized non-congregate shelters and procured as many hotel rooms as possible to protect the health and safety of emergency repair workers coming from out of town. By October 28, 2020—just one day before the hurricane hit—CEMC had only been able to secure twenty-one hotel rooms. CEMC reserved an additional thirty-three rooms by the following morning. However, the hotel rooms secured could only shelter the approximately 100 workers who would arrive that night. Since CEMC’s projections required 200 additional workers to completely restore power, CEMC turned to congregate shelters to accommodate them. In addition to providing shelter to non-local crews, CEMC had to provide meals, shower and sanitation services, parking for personal vehicles and utility trucks, a central resupply post, and an operations center to organize and dispatch crews on a twenty-four-hour cycle. To meet these requirements, CEMC signed a task order (the contract) with Storm Services, LLC (Storm Services), for a base camp.

Georgia Transmission Corporation (GTC) is an electric membership cooperative (EMC) owned by thirty-eight of Georgia’s EMCs, including CEMC. GTC established a master services agreement (MSA) by conducting annual award competitions for emergency services contracts. The awards are made using full and open competition procedures to ensure competitive pricing and timely services. EMCs can place orders for emergency services using GTC’s MSA. When Hurricane Zeta struck, emergency services contractors were in high demand due to that year’s very active hurricane season. Since damage and labor projections remained steady, CEMC entered into a contract with Storm Services on October 29, 2020, the first day of the hurricane. The contract was for base camp services to accommodate 250 personnel, including lodging and catering services, restrooms, showers, and public utilities (mainly water). Although workers continued to arrive at the site through October 31, 2020, CEMC quickly learned that base camp services for lodging would not be needed and immediately communicated this fact to Storm Services.² As a result, CEMC was only charged for one day of lodging services. Despite this change in lodging requirements, the base camp was actively operating for other functions for the full, five-day contract period, including serving as a central command post for restoration activities, a dining facility, a

² According to an affidavit in the record, potential emergency workers took COVID-19 tests before travel, and an entire crew would not be permitted to report if any member of the crew tested positive. As a result, only 160 workers ultimately responded to CEMC’s request for crew support compared with the 327 workers that CEMC had expected would respond.

resupply station, and a restroom/sanitation facility for workers. The base camp was demobilized on November 2, 2020, the same day that full restoration of power was achieved.

On January 12, 2021, the President declared Hurricane Zeta a major disaster (FEMA-4579-DR-GA). An eligible private nonprofit (PNP), CEMC applied for public assistance (PA) funding in the amount of \$2,071,422.40. FEMA issued a determination memorandum (DM) granting \$1,345,877.16 for eligible labor, equipment, materials, and contract costs for the restoration of power efforts, including the cost of the hotel rooms. However, FEMA denied all costs related to the base camp, totaling \$725,545.24. CEMC appealed this determination, and FEMA issued a partial denial, finding that only the costs associated with the catering were reasonable and necessary and therefore eligible. As such, FEMA granted an additional \$194,239.45, but denied the balance of \$531,305.79. CEMC then timely filed a request for arbitration with the Board to recover the remaining costs.

Discussion

The Stafford Act authorizes the President to “make contributions to a private nonprofit facility . . . only if . . . the facility provides critical services (as defined by the President) in the event of a major disaster.” 42 U.S.C. § 5172(3)(A) (2018). PA funding can only be provided for costs that are directly connected to performance of eligible work, adequately documented, necessary, and reasonable. 2 CFR 200.403; PAPPG at 65. There is no dispute that the applicant and work are eligible for public assistance under the Stafford Act. The only issue before the panel is whether the costs of base camp services were necessary and reasonable. FEMA denied the majority of the costs after determining that the costs did not meet those requirements. Under the Stafford Act, however, the Board is not bound by FEMA’s determinations. The Board reviews the evidence de novo. *Florida Keys Electric Cooperative*, CBCA 6822-FEMA, 20-1 BCA ¶ 37,747, at 183,198-99.

FEMA argues that CEMC failed to prove that its base camp costs were necessary and reasonable because: (1) the sole purpose of the base camp was for lodging; (2) CEMC’s labor projections failed to account for the impact of the COVID-19 pandemic on the number of responding workers; and (3) CEMC should have terminated for convenience its entire contract with Storm Services when it was evident that additional workers would not be arriving to support restoration efforts.

Base Camp Services

CEMC does not dispute that the lodging went unused. Instead, CEMC contends that it procured the base camp to provide a wide variety of services to workers, not just lodging. Under CEMC’s contract with Storm Services, the base camp was to provide—in addition to

lodging—catering, restrooms, showers, and public utilities (water) for the workers. FEMA’s argument fails to acknowledge the full scope of base camp services in the contract, as well as documentation in the record demonstrating that the base camp was used for operations, meals, restrooms, and other purposes consistent with the contract. Moreover, by granting funds to CEMC for the cost of providing meals to workers, FEMA undermines its own assertion that the base camp’s sole purpose was for lodging.

CEMC’s Labor Projections

We find FEMA’s second argument—that CEMC could have, and should have, considered that there would be fewer available workers due to COVID-19—unpersuasive. CEMC could not have predicted how many workers would be impacted by the pandemic. This was a rural area in the southeast region of the United States where much of the work would be performed outside, in round-the-clock shifts. Dining options and supply stores, along with other services, were severely limited as a result of the pandemic. Unemployment was surging. These facts substantiate the need for base camp services to mitigate many of the pandemic’s effects. This need for mitigation, along with CEMC’s projections based on previous labor requirements for disaster support, demonstrate that CEMC acted prudently to secure lodging before it was known exactly how many workers would come. Once it was evident that fewer than the projected number of workers were coming, CEMC immediately requested, and was granted, a cost adjustment for the lodging portion of the base camp services. CEMC did not make that same request for shower units. Since workers lodged in hotels and not at the base camp, it is unlikely that the shower units at the base camp were needed, and nothing in the record offers evidence to the contrary.

Termination for Convenience

FEMA’s third argument is that CEMC is not eligible for PA funding for the base camp costs because it could have terminated its contract with Storm Services for convenience when it realized that it would not need base camp lodging for emergency workers. The MSA includes a termination for convenience clause, which applies to CEMC’s contract with Storm Services. CEMC asserts that it would not have been able to terminate the lodging services portion of the contract without terminating the entire contract, as it did not allow for partial terminations. However, the termination clause does not expressly prohibit partial terminations, and the contract is structured in a way that is responsive to the uncertain nature of disasters, making partial terminations fairly simple. Each service is priced separately and most services include a daily rate. When Storm Services credited CEMC for four days of lodging, the result was similar to a partial termination of the contract.

Furthermore, as CEMC pointed out in its reply brief, under the contract, any claim based upon a termination for convenience entitles the contractor to the following:

(i) contract prices for labor, materials, equipment and other Services expended or incurred by Contractor; (ii) reasonable costs incurred in preparing to perform the terminated portion of the Services; (iii) reasonable costs of settling and paying claims arising out of the termination or assignment of subcontracts or orders; and (iv) reasonable costs of demobilization, including transportation of crews and equipment to their home base of operations.

This provision ensures that the contractor is compensated for costs incurred when the contract is terminated for convenience, yet it also prevents the contractor from receiving a windfall. CEMC did not attempt to mitigate the costs of the unused shower units as it did with the lodging services. Based on the above-quoted provision of the contract, as well as the fact that half of the contract's performance period had already elapsed when CEMC realized that many workers would not come, CEMC argues that, even if it had terminated the contract for convenience, CEMC would have been required to pay all of the base camp costs anyway, including the shower units. CEMC did not prove that position through calculations or other evidence, however, and unsupported assertions are insufficient to meet CEMC's burden to prove its costs.

Necessary and Reasonable Costs

Having addressed FEMA's arguments for denying base camp costs, we turn to the "necessary and reasonable" requirements of the costs at issue to determine whether CEMC's cost application has met these requirements. If a cost is found to be necessary, the cost must also be reasonable in order to be eligible for reimbursement. A cost is considered reasonable when "it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the Applicant makes the decision to incur the cost." PAPPG at 65. "The Applicant is responsible for providing documentation to demonstrate its claimed costs are reasonable." *Id.* at 68.

Storm Services' invoice for base camp services was divided into eight sections: (1) sleep tent—\$260,443.40 (three 40-by-100 tents with lighting, flooring, and sidewalls, HVAC generators, fuel, cots, linens, and towels); (2) catering service—\$194,239.45 (cooking labor, kitchen trailers, fuel, refrigerated trailers, dry storage trailers, and required food costs); (3) shower units—\$53,859.40 (shower heads, shaving stations, junction box, 3000-gallon water bladder, fresh water pressure system, grey/black water pressure system, and daily cleaning labor); (4) sanitation—\$19,811.60 (two restroom trailers and fuel); (5) ice truckload—\$14,495.90 (5850 bags of ice, fuel, three pallets, and one refrigerated trailer);

(6) back-up equipment—\$51,347.40 (power between 5 kw and 200 kw, plus fuel); (7) miscellaneous—\$22,534.50 (three support campers for labor plus fuel); and (8) site labor—\$36,420.35 (one site manager, five additional laborers, three support vehicles, and fuel). Each of these base camp service categories listed on the invoice included a description of the item or service (plus charges for mobilization, demobilization, and freight), a quantity, a unit cost, the period of performance (one day or five days), and the total charges. The sub-totals for each category were added up, resulting in a grand sub-total of \$653,152, to which a \$32,657.60 administrative fee and \$39,735.64 in sales tax were added. The total amount of the invoice was \$725,545.24. FEMA granted \$194,239.45, for catering services, but the balance of \$531,305.79 for the cost of the other base camp services remains in dispute.

In evaluating whether the incurred costs were necessary and reasonable, we make the following determinations. The base camp services were provided under a competitively awarded contract. The rates and amounts are not in dispute. CEMC was charged for only one day of lodging-related charges, with Storm Services crediting CEMC for the other four days. There was no evidence that the shower unit services were necessary, as the hotel accommodations included showers. Despite the language and structure of the contract, CEMC did not seek to terminate or otherwise reduce those charges. FEMA already reimbursed CEMC for the catering costs. While certain eligible costs, such as site labor, may have included some work related to lodging and showers (e.g., cleaning), the invoice does not indicate how much of the total labor cost was dedicated to each type of service. Nonetheless, we find it reasonable to reimburse the full costs of labor since there were multiple other base camp services that required the labor and no indication that labor was underutilized.

The only question left unanswered by these determinations is whether *unused* services for which CEMC was charged (one day of lodging and five days of shower units) should be reimbursed. FEMA argues that unused services are, by definition, unnecessary. The Board addressed this issue directly in *Virginia Department of Emergency Management*, CBCA 6848-FEMA, 20-1 BCA ¶ 37,689. In that case, the contract for emergency services (food, hygiene, and sleeping services) contained a seven-day minimum performance period, yet only four days were ultimately needed. *Id.* at 182,982. The Board found that FEMA's argument lacked merit since it would mean that "it is always unreasonable for an applicant to order more emergency services than it ultimately uses." *Id.* at 182,983. The Board observed that "it could be reasonable to pay for a day of ordered services even if the need for those services did not materialize." *Id.* We find this observation especially compelling since FEMA's policy considers a cost to be reasonable when "it does not exceed that which would be incurred by a prudent person *under the circumstances prevailing at the time the Applicant makes the decision to incur the cost,*" not after the fact. PAPPG at 66 (emphasis added).

By their very nature, natural disasters and pandemics are unpredictable. Nonetheless, public officials must make difficult decisions to manage them. One of those decisions involves developing a labor projection. Even if the pandemic undermined that projection here, CEMC could not have predicted the degree of the pandemic's impact. FEMA's arguments were formulated with the benefit of hindsight, whereas CEMC was faced with making decisions about critical services using estimates and predictive formulas. Because we find that CEMC's labor projections were sound under the circumstances, we also find the contracted base camp services to support those projections were necessary.

As we already noted, however, even if a service was necessary, in order to be eligible for reimbursement, a cost must also be reasonable. That means the quantities and rates must also be reasonable. While the quantities and rates are not disputed, we find that CEMC missed opportunities to mitigate its costs which it now asks FEMA to cover. Specifically, CEMC made no effort to mitigate the unused shower services through partial termination or informal negotiations with Storm Services, nor did it show that the showers were fully utilized such that the costs should be paid. In addition, CEMC did not demonstrate that a partial termination would have resulted in the same cost. FEMA already paid for the hotel rooms that included showers. Paying twice for showers for all five days is unreasonable. As with the lodging services, we believe one day of shower services was necessary and reasonable. Thus, with the exception of shower services for four days, CEMC's remaining costs are eligible for reimbursement.

Decision

In accordance with this arbitration decision, FEMA will reimburse CEMC for all of the remaining costs for the base camp services (\$531,305.79), except for four days of base camp shower services (\$43,087). The total eligible reimbursable cost is \$488,218.79 (\$531,305.79 - \$43,087). This amount does not take into account any required reduction in sales tax or other claimed costs due to the elimination of four days of shower services.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge