



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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August 27, 2024

CBCA 8067-FEMA

In the Matter of FAYETTEVILLE PUBLIC WORKS COMMISSION

Helen L. Miller, Disaster Recovery Specialist of H. Miller Consulting, LLC, Cary, NC; and Ike Copeland, Director of Risk, Compliance and Contracts, Fayetteville Public Works Commission, Fayetteville, NC, appearing for Applicant.

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Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR; and Anthony Homer, 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 **RUSSELL**, **CHADWICK**, and **KANG**.

**RUSSELL**, Board Judge, writing for the Panel.

Applicant, the Fayetteville Public Works Commission (PWC), sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) as to eligibility for public assistance (PA) funding to reimburse costs relating to sequestering its employees during the early stages of the COVID-19 pandemic. FEMA denied PWC's request for public assistance (PA) funding, concluding that the incurred costs were not in support of an eligible emergency protective measure. For reasons stated below, the panel finds that PWC's costs are ineligible for PA funding.

## Background

### I. FEMA's COVID-Related Policies

On March 13, 2020, the President declared the COVID-19 pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia under section 501(b) of the Stafford Act, entitling those entities to apply for public assistance. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

On March 19, 2020, FEMA released its “Fact Sheet, Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures,” in which it “urge[d] officials to, without delay, take appropriate actions that are necessary to protect public health and safety pursuant to public health guidelines and conditions and capabilities in their jurisdictions.” Request for Arbitration (RFA), Exhibit 6 at 1 (March 19, 2020, Fact Sheet). This fact sheet stated that “eligible emergency protective measures taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of FEMA’s Public Assistance Program.” *Id.* Such PA-eligible emergency protective measures *included, but were not limited to*, the following categories, if not funded by another federal agency: management, control, and reduction of immediate threats to public health and safety (e.g., emergency operation center costs, training specific to the declared event, disinfection of eligible public facilities, and technical assistance to state, tribal, territorial, or local governments on emergency management and control of immediate threats to public health and safety); emergency medical care; medical sheltering; household pet sheltering and containment actions; purchase of consumable supplies, including personal protective equipment and hazardous material suits; security and law enforcement; movement of supplies and persons; public health communications to the public; search and rescue activities; and reimbursement for state, tribe, territory and/or local governments for force account (i.e., personnel) overtime costs. *Id.* at 1-2. The fact sheet also stated that FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) provided “[f]urther information about eligible emergency protective measures.” *Id.* at 2.

FEMA Policy FP 104-009-19 (Sept. 1, 2020), titled “Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim),” superseded the March 19, 2020, Fact Sheet for “work performed on or after September 15, 2020.” *See* RFA, Exhibit 7 at 1. For work “[p]rior to this date, policies in place when the work was completed [would apply].” *Id.* at 2. On April 5, 2021, FEMA issued Policy FP 104-21-0003, titled “Coronavirus (COVID-19) Pandemic: Safe Opening and Operation [(O&O)] Work Eligible for Public Assistance (Interim).” *See* RFA, Exhibit 8. This policy applied to work conducted from January 21 to September 30, 2021. *Id.* at 2. On September 8, 2021, FEMA issued a second version of this policy, retroactively extending the period of work eligibility to the beginning of the incident period. FEMA’s Response to the RFA, Exhibit 3 at 1 (September

2021 O&O policy). However, the policy stated that “[w]ork that is otherwise eligible under FEMA Policy 104-009-19 *Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance* (Interim) remains eligible for assistance.” *Id.* at 3.

## II. PWC’s Request for Funding

PWC is a public utility based in Fayetteville, North Carolina. Among other services, PWC operates two water treatment plants, two wastewater treatment plants, and a dispatch center that responds to emergency services calls. RFA at 3-4. PWC provides these services twenty-four hours a day, seven days a week. *Id.* at 4.

During the early stages of the pandemic, PWC began to detect a COVID outbreak among its own employees and became concerned that an outbreak among its specialists could endanger its capacity to provide essential community services. *Id.* at 7-8. In response, PWC opted to sequester its specialists at its treatment facilities and dispatch center from April 14 to June 15, 2020. *Id.* at 8.

On December 28, 2022, PWC submitted project number (PN) 700771 to FEMA, seeking reimbursement for its force account labor costs, RV rental and related supplies, and meals and laundry services for its employees. RFA, Exhibit 1. On June 28, 2023, FEMA denied this application on two grounds. RFA, Exhibit 2 at 3-4. First, relying on its September 2021 O&O policy, FEMA found that \$45,339.20 in costs for laundry, meals, and supplies were ineligible because they represented increased operating costs of providing routine services rather than work “necessary for the performance of eligible emergency protective measures related to Covid-19.” *Id.* Second, FEMA found that PWC failed to provide sufficient documentation to show its \$331,813.94 in force account labor as eligible for PA funding. *Id.* at 4. While FEMA denied the entirety of the claim in the amount of \$675,017.08, the agency left \$298,724.37 in expenses related to rental and use of RVs unaddressed.

On August 29, 2023, PWC submitted a first-level appeal for PN 700771. RFA, Exhibit 3 at 1. On March 11, 2024, after FEMA did not issue its first-level appeal decision within 180 days, PWC withdrew its appeal effective March 4, 2024. RFA, Exhibit 4. On April 2, 2024, PWC requested Board arbitration. In its RFA, “PWC asserts that the sequestration and resulting overtime labor and rental of RVs, and other supplies, etc. associated with the sequestration, constitute eligible work and costs since they consisted of eligible Category B emergency protective measures. In addition, [PWC asserts that] the [disputed] work . . . was performed at the beginning of the disaster, and for a limited time period.” RFA at 12.

In its RFA, PWC also relies on an April 17, 2020, advisory guidance document issued by the Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security, identifying essential critical infrastructure workers during the COVID-19 response. RFA at 5-6. The purpose of this guidance was to provide support to state, local, tribal, and territorial governments, as well as industries, by identifying critical infrastructure sectors and essential workers required to be operational during the COVID-19 pandemic response.<sup>1</sup> Water and wastewater operations were included among the identified critical infrastructure sectors.

Among other arguments in its response to the RFA, FEMA asserts that PWC’s request for PA funding should be denied because PWC’s incurred cost did not arise from increased demand for the services that PWC provides. FEMA’s Response to RFA at 1. FEMA also argues that “stand-by costs are not available to [PWC] because the employees’ isolation was not in preparation for or directly related to actions necessary to save lives and protect public health and safety in response to the pandemic.” *Id.*

### Discussion

#### I. Applicable Legal Provisions and Policies

The Stafford Act authorizes FEMA to make PA funding for “[p]erforming on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including . . . reduction of immediate threats to life, property, and public health and safety.” 42 U.S.C. § 5170b(a)(3)(I). To be eligible for public assistance funding, work must be required as the result of a declared emergency or major disaster. 44 CFR 206.223(a)(1) (2023); PAPPG at 19.

Eligible emergency work can consist of either debris removal (Category A) or emergency protective measures (Category B), which is applicable here. PAPPG at 42. Emergency protective measures conducted before, during, or after an incident are eligible for public assistance funding if they either (1) “[e]liminate or lessen immediate threats to live[s], public health or safety”; or (2) “[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); *see* PAPPG at 57. While the PAPPG provides examples of emergency protective measures and costs that are eligible without other conditions attached, “expenses related to operating a facility or providing a service” are singled out as

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[https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_1.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf) (last visited Aug. 26, 2024).

among the few types of protective measures that are only situationally eligible. PAPPG at 58. The PAPPG states:

The Applicant may incur additional costs related to operating a facility as a result of the incident because of an increased demand for the services the facility provides. These additional costs are only eligible if:

- The services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property;
- The costs are for a limited period of time based on the exigency of the circumstances; and
- The Applicant tracks and documents the additional costs.

*Id.* at 60-61.

Here, while FEMA attempts to argue the applicability of the September 2021 O&O policy to this arbitration, *see, e.g.*, FEMA’s Response to RFA at 4, FEMA misstates what the policy retroactively covered. The September 2021 O&O policy provided that “[w]ork that is otherwise eligible under FEMA Policy 104-009-19 . . . remains eligible for assistance.” FEMA’s Response to RFA, Exhibit 3 at 3. FEMA Policy 104-009-19, in turn, made clear that, for work performed prior to September 15, 2020, “policies in place when the work was completed apply.” RFA, Exhibit 7 at 2. In this case, the March 19, 2020, Fact Sheet and the 2018 PAPPG were the applicable policies, and the September 2021 O&O policy does not retroactively override those policies. Further, although PWC urges the panel to look to CISA’s advisory guidance in considering this matter, there is no language in that guidance or any other document referenced by PWC mandating its applicability to PA eligibility determinations.

## II. PWC’s COVID-Related Measures

In its March 19, 2020, Fact Sheet, FEMA provides a non-exhaustive list of emergency protective measures for which the agency may provide PA funding. RFA, Exhibit 6. However, this fact sheet also states that further information regarding eligible emergency protective measures can be found in the PAPPG. *Id.* at 2. Notably, there is nothing in the fact sheet indicating that its provisions regarding eligibility modifies, supersedes, or waives application of the PAPPG. Accordingly, we must also look to the PAPPG to determine eligibility in this arbitration.

As explained above, the PAPPG includes a non-exhaustive list of emergency protective measures without conditions attached that are eligible for PA funding. PAPPG at 58. Under the category “Saving Lives and Protecting Public Health and Safety,” such

measures include, but are not limited to, transporting and pre-positioning equipment and other resources for response, flood fighting, emergency operation center-related costs, supplies and commodities, medical care and transport, child care, safety inspections, animal carcass removal, demolition of structures, search and rescue activities, fire fighting, security, and use or lease of temporary generators. *Id.* Although PWC argues that its activities here fit within this category, *see, e.g.*, Applicant’s Reply Brief to FEMA’s Response at 2, PWC’s activities more clearly fall under the category of “operating a facility.” Critically, though, PWC has not indicated that it seeks reimbursement for costs arising from an increased demand for the services provided by its facility, as required by the PAPPG. *See* PAPPG at 60-61. Without such increased demand, we cannot find that PWC engaged in a PA-eligible emergency protective measure.

Although PWC urges the panel to apply the majority’s opinion in *Joint Meeting of Essex & Union Counties*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, RFA at 21-22, we decline to do so. FEMA decisions issued by other panels are considered persuasive, not binding, authority. *See Dameron Hospital Assoc’n*, CBCA 8052-FEMA, 24-1 BCA ¶ 38,604, at 187,663 n.2. As explained herein, we find nothing in the applicable March 19, 2020, Fact Sheet to indicate a waiver of the PAPPG’s requirement that a facility must show “increased demand” for its operational activities to qualify for PA funding. While the majority panel in *Joint Meeting of Essex & Union Counties* suggests that “a strict and narrow interpretation of the PAPPG’s imposition of an ‘increased demand’ requirement, which is not found in the implementing statute, seems to conflict with the intent behind the original COVID-19 declaration and the earlier guidance implementing it[,]” that earlier guidance, *i.e.*, the March 19, 2020, Fact Sheet, identifies the 2018 PAPPG as the document providing “further information about eligible protective measures.” RFA, Exhibit 6 at 2. If FEMA intended a waiver of any of its provisions in this guidance or an expansion of the activities that would be considered emergency protective measures due to the COVID pandemic, it could have done so either in the March 19, 2020, Fact Sheet or another policy document. However, the agency did not modify its policies in this way, and, thus, this panel will abide by the applicable provisions of the PAPPG.

Separately, we find the PAPPG’s provisions on stand-by time inapplicable. *See* PAPPG at 25-26. PWC does not argue that its employees were on standby during the time period at issue but, instead, that it incurred costs to ensure continued operation of its normal activities. RFA at 14-15.

Decision

Because PWC's sequestration effort does not represent eligible work, its request for PA funding is denied.<sup>2</sup>

*Beverly M. Russell*

BEVERLY M. RUSSELL  
Board Judge

*Kyle Chadwick*

KYLE CHADWICK  
Board Judge

*Jonathan L. Kang*

JONATHAN L. KANG  
Board Judge

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<sup>2</sup> Because of our findings herein, we do not address the parties' other arguments presented in their briefing.