



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 12, 2024

CBCA 7872-FEMA

In the Matter of SCHOOL BOARD OF BAY COUNTY, FLORIDA

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Stephanie Stachowicz (Twomey), General Counsel, Deziree Elliot, Senior Attorney, and Matthew Toplak, Recovery Attorney, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Marija Diceviciute and Cassie Sykes, Appeals Officers, Melissa Shirah, Recovery Bureau Chief, and Melody Cantrell, Recovery Legal Liaison, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Ramoncito J. deBorja, 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 **VERGILIO** (Panel Chair), **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge, writing for the Panel.

The School Board of Bay County, Florida (Bay County) sought to arbitrate its request for public assistance (PA) funds by the Federal Emergency Management Agency (FEMA). After Bay County filed its request for arbitration, FEMA agreed that Bay County established eligibility for additional items; however, the parties still dispute the eligibility for seven items totaling \$396,871.24. Although the value of the items to be decided is below the statutory

threshold, we determine that we retain the authority to decide the arbitration and grant Bay County's request for reimbursement, in part.

Background

On October 10, 2018, Hurricane Michael made landfall in Bay County. On October 11, 2018, the President declared the event a major disaster, which authorized FEMA to obligate PA funds for the repair of buildings and other structures damaged by the storm. The hurricane damaged several buildings on the Mosley High School campus, located in Bay County. Request for Arbitration (RFA) at 5.

Bay County sought \$2.6 million in PA funds to repair buildings at the school. RFA, Exhibit 1 at 1. FEMA denied approximately \$850,000, finding that Bay County had failed adequately to document its claimed costs or prove that they were reasonable. *Id.* at 8. Bay County filed a first appeal, seeking the amount that FEMA had denied. RFA, Exhibit 6 at 1. FEMA assembled its own reasonable cost estimate after determining that Bay County had not adequately documented its costs. *Id.* at 4-5. Based upon its estimate, FEMA obligated \$668,996.50 for the repair of the school buildings. *Id.* at 6.

Bay County filed its request for arbitration with the Board, seeking \$1,372,059.63. RFA at 2. In the process of preparing its response to the request, FEMA reviewed additional documentation provided by Bay County and identified \$306,191.89 in additional costs for which Bay County could be reimbursed. FEMA's Response to Request for Arbitration at 16-17. FEMA continued to dispute Bay County's eligibility to be reimbursed an additional \$396,871.24 because Bay County has not provided sufficient documentation. *Id.* at 17.

Discussion

I. The Panel Retains Authority To Resolve The Dispute

As discussed, after Bay County requested arbitration, FEMA identified additional costs for which Bay County may be reimbursed, reducing the amount in dispute to \$396,871.24. Because the current amount in dispute is below the \$500,000 amount in dispute threshold, FEMA seeks dismissal of the request for arbitration.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), provides a right of appeal to applicants for public assistance within sixty days of being notified that the request for PA has been denied. *Id.* § 5189a(a). Following a first appeal, applicants have two possible routes for a second-level review. One, applicants may file a second appeal to FEMA headquarters within sixty days of the first

appeal determination. 44 CFR 206.206(b)(2) (2023). Two, applicants may request arbitration before a panel of judges from this Board. 42 U.S.C. § 5189a(d)(1). To obtain review by the Board, the amount in dispute must exceed \$500,000. *See id.* (“[A]n applicant under this subchapter may request arbitration to dispute the eligibility for assistance or repayment of assistance provided for a dispute of more than \$500,000.”). FEMA regulations define “the amount in dispute” as “the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible.” 44 CFR 206.206(a).¹

The panel retains authority to resolve this dispute because the amount in dispute at the time the request for arbitration was filed was greater than \$500,000. Although FEMA has agreed during the arbitration proceedings that Bay County is eligible for additional public assistance funds, FEMA has not issued a formal determination regarding that entitlement. The last determination that FEMA issued was the first appeal decision in which FEMA determined that Bay County was entitled to only \$668,996.50. To find otherwise would create a disincentive for applicants to work with FEMA to resolve claims after arbitration requests are filed. Discouraging applicants to work with FEMA seems contrary to the statutory direction which permits applicants to submit “all original and additional documentation, testimony, or other such evidence supporting the applicant’s position at any time during arbitration.” 42 U.S.C. § 5189a(d)(2). Also, dismissal at this point in the proceedings would foreclose Bay County’s statutory right of review of the first appeal decision because FEMA regulation requires that second appeals be filed within sixty days of receipt of the first appeal decision. 44 CFR 202.206(b)(2)(ii).²

¹ FEMA promulgated this definition in 2021, after the disaster at issue here but before the filing of the request for arbitration. 86 Fed. Reg. 45660 (Aug. 16, 2021). Because the statutory limitation on the panel’s authority is described in terms of “dispute,” the panel believes that it is appropriate to rely upon this definition, which was promulgated before the dispute arose. *See also First Presbyterian Church, Panama City, Florida*, CBCA 7282-FEMA, 22-1 BCA ¶ 38,084, at 184,955.

² FEMA’s definition of amount in dispute also serves to distinguish the panel decision in *Metropolitan St. Louis Sewer District*, CBCA 6821-FEMA, 20-1 BCA ¶ 37,696, upon which FEMA relies. In that case, the applicant voluntarily reduced the amount that it was seeking, without any agreement or action by FEMA, thereby reducing the difference between the amount of public assistance that it sought and the eligibility amount that FEMA had granted. 20-1 BCA at 183,008, 183,012-013.

II. Bay County Shall Be Reimbursed Additional Costs

The Stafford Act provides that a local government entity may obtain PA funds “for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government.” 42 U.S.C. § 5172(a)(1)(A). Costs incurred must “be necessary and reasonable” and “be adequately documented.” 2 CFR 200.403(a) and (g). Applicants for PA funds bear the burden of substantiating the claim. Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 133. 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 decision to incur the costs was made.” 2 CFR 200.404.

The panel is left to decide whether Bay County has provided adequate documentation to support its reimbursement request for the following seven items:

Building 1 - Drywall/Stucco/Acoustic Ceiling Tile (ACT)

Bay County seeks \$305,765 for this item, but the cited cost support totals only \$230,500. RFA Exhibit 5-78 at 4-5 (four lines for drywall labor, drywall material, ACT labor and ACT material). Bay County provides the bid scope for the drywall contractor, RFA, Exhibit 5-60 at 15-18, which matches the eligible scope set forth in the damage, description, and dimensions (DDD). FEMA Exhibit D at 74-108. FEMA asserts that it is unable to determine the cost of the work because it is lumped together in these four line items. While bidding documents provide the scope of the drywall and ACT repairs in building 1, Bay County has failed to submit documentation to support its request. Bay County has not provided a basis to receive more than \$173,722.46, the amount that FEMA determined was reasonable for this scope of work in its first appeal determination. FEMA Response to the Request for Arbitration at 22.

Building 1-Electrical

Bay County’s engineer reported damage to various electrical components. RFA, Exhibit 5-26. FEMA included these damages in the DDD report. FEMA Exhibit D at 1-45. Bay County provides the electrical subcontractor’s pay application, asserting that lines 21A1, 21B1, 21B2, and 21B3 on that application comprise the claimed cost, Reasonable Cost Schedule (RCS) at 1, but these line items only total \$168,795. RFA, Exhibit 5-78 at 7. The electrical subcontractor’s pay application includes additional line items that add to the total cost sought. Line item 21S1 is a \$4000 credit for lightning protection. *Id.* at 8. Line item 21S3 is for a rooftop code requirement and totals \$8499. *Id.* Line item 21S6 is for the electrical work on air handler unit number six and totals \$2919. *Id.* Finally, line item 21S8

is for the electrical work on air handler unit number four and totals \$1576. *Id.* Adding line items 21S1, 21S3, 21S6 and 21S8 to line items 21A1, 21B1, 21B2 and 21B3 (the line items Bay County uses to support its claimed cost) totals \$177,789, the amount that Bay County seeks.

FEMA asserts that Bay County failed to document adequately the costs that are lumped together in line items without an explanation of the scope of work. For example, line item 21B2 is described simply as “Bldg #1–Electrical.” However, other line items provide sufficient detail. For example, line items 21S6 and 21S8 describe the electrical work performed on the air handler units. We find that Bay County adequately documented its electrical costs at building 1. The electrical subcontractor based its competitive bid on the electrical components identified in the DDD. *Compare* FEMA Exhibit D at 2-45 (identifying eligible electrical repair work) *with* RFA, Exhibit 5-72 at 35-38 (showing the same eligible electrical repair work as part of the electrical bid package). The electrical cost matrix for building 1 shows that the total claimed cost corresponds with the scope approved in the DDD. *See* RFA, Exhibit 16 at 1-7. Bay County shall be reimbursed \$177,789 for this scope of work.³

Building 1 - General Conditions

In its final submission to the panel, Bay County reduced its request for general conditions costs to \$48,621.40, which it calculated to be 4.25 percent of the total subcontractor costs incurred to repair building 1. Reasonable Cost Schedule at 1-2. Bay County obtained this percentage from FEMA’s guide for pricing and evaluating large projects. Cost Estimating Format (CEF) for Large Projects Instructional Guide (Sept. 2009). The CEF guide recommends use of this percentage for general conditions costs but cautions that the percentage should not be applied if the costs have been included in any unit costs or bid prices. *Id.* at 5-2. FEMA asserts that payment of this fee would duplicate amounts that FEMA has already included in its determination of the reasonable cost for the claimed eligible work.

The panel cannot tell what is being reimbursed—Bay County’s actual costs or FEMA’s estimate of reasonable costs—because the parties have not been precise in their submissions and the figures have changed numerous times as Bay County’s request has

³ FEMA determined that \$47,895.13 was the reasonable cost for this scope of work. Based upon the panel’s determination that Bay County may be reimbursed its actual costs, Bay County shall be reimbursed an additional \$129,893.87 (\$177,789 - \$47,895.13 = \$129,893.87).

proceeded through reviews. If the figures for what Bay County shall be reimbursed are FEMA's estimates, the panel would be duplicating costs that FEMA has already included in its estimates. Because it is incumbent upon Bay County to provide the documentation and basis for its claim, we deny Bay County's request for these fees.

Building 1 - Construction Management Fee

In its final submission to the panel, Bay County increased its request for the construction management fee to \$146,950, which it calculated to be 14.7 percent of the total subcontractor costs incurred to repair building 1. Bay County obtained this percentage from FEMA's CEF guide. The guide recommends use of 7.7 percent to cover a contractor's home office overhead and seven percent to cover a contractor's profits on projects costing between \$1 and \$3 million. CEF at 7-1 to 7-2. Although the CEF guide does not contain a caution about ensuring that home office overhead and profit have not been included in other costs, FEMA asserts that payment of these fees would duplicate amounts that FEMA has already included in its determination of the reasonable cost of the claimed eligible work.

Again, the panel cannot tell what is being reimbursed—Bay County's actual costs or FEMA's estimate of reasonable costs—because the parties have not been precise in their briefings and the figures have changed numerous times as Bay County's request has proceeded. Given that it is Bay County's burden to provide the documentation and basis for its claim, we deny Bay County's request for overheads and profit.

Building 3 - Electrical

Bay County's engineers reported damage to a weatherproof receptacle and a panelboard. RFA, Exhibits 5-32 at 2, 5-72 at 40. FEMA did not include this damage in the DDD report but noted that it had asked for further information about how the electrical equipment was damaged from water exposure. FEMA Exhibit D at 46-47. The record does not include any explanation from Bay County regarding how the damage occurred or how it determined that the electrical items needed repair. Bay County has not met its burden to provide adequate documentation and cannot obtain reimbursement for this item.

Building 4 - General Trades

Bay County requests reimbursement of \$2050 for the repair of aluminum flashing for seven doors in building 4. RFA, Exhibit 14. FEMA challenges this cost as excessive based upon the estimated cost in RSMeans. FEMA Response at 30. In response, Bay County only explains that the scope of work was competed and that the subcontractor selected was the lowest bidder for the entire scope of general trades work. Bay County Reasonable Cost

Schedule at 3. This evidence is not sufficient to overcome FEMA's specific challenge to the cost of this scope of work. Bay County has not provided a basis to receive more than \$122.06, the amount that FEMA determined was reasonable for this scope of work in its first appeal determination. FEMA Response at 30.

Building 4 - Electrical

Bay County's engineers reported damage to the overhead electrical service at building 4. RFA, Exhibit 5-36 at 2. While FEMA included this damage in the DDD report, FEMA also requested additional details on the damage to the building 4 electrical feeder. FEMA Exhibit D at 48. FEMA questions whether the photos and electrical inspection report show damages that would cost \$7303 to repair. FEMA Response at 32-34. Bay County did not respond with any additional information and has failed to carry its burden. Bay County has not provided a basis to receive more than \$581.38, the amount that FEMA determined was reasonable for this scope of work in its first appeal determination. *Id.* at 34.

Decision

Bay County shall be reimbursed \$1,105,082.26.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

VERGILIO, Board Judge, writing separately.

I part company with the other panel members on the analysis and resolution of some of the issues. I conclude that the amount in dispute at the time the arbitration request was filed satisfies the statute and does not require further analysis. Further, I conclude that the record does not support awarding the applicant public assistance for an amount greater than that determined by the Federal Emergency Management Agency (FEMA). Although the

applicant incurred the costs, the record does not identify sufficient details of the costs to warrant relief.

Amount in dispute

At the time the applicant filed the arbitration request, the amount in dispute exceeded \$500,000. The applicant satisfied the dollar threshold for non-rural applicants. After FEMA reviewed the arbitration request, including the additional information it contained, FEMA concluded that it would increase the public assistance; the result is that less than \$500,000 is now in dispute. FEMA contends that: (1) the Board lacks authority to resolve the arbitration because the amount now is below the minimum; (2) the applicant does not qualify as a rural applicant (which has a reduced dollar threshold); and (3) the applicant has provided no basis to explain why the additional information submitted with the arbitration request was not provided earlier, particularly when it would have supported the first appeal request and seemingly was available for the applicant to submit.

I focus on the amount in dispute at the time the applicant opted for arbitration. My rationale differs from that of the other panel members. The arbitration authorizing statute specifies that a non-rural applicant may request arbitration, to dispute the eligibility for assistance, if the amount in dispute exceeds \$500,000. 42 U.S.C. § 5189a(d)(1) (2018). When the applicant filed its request, after FEMA resolved the first appeal, the amount in dispute satisfied the dollar threshold. There is no suggestion that the dollar amount was other than a legitimate figure. My inquiry ends there, mooting the question FEMA raises regarding the alleged non-rural status of the applicant.

Despite the urging of FEMA, the amount now in dispute does not control the panel's arbitration authority. FEMA refers to no statute, regulation, or FEMA guidance to support its present interpretation that continuing with arbitration is dependent upon FEMA's various iterations and conclusions regarding the dollar value of public assistance it will provide and/or the timing of the applicant's submission of information. The parameters of the relevant dispute are established at the time of the request for arbitration, not thereafter. Although formally issued after the declared disaster, regulation both defines the "amount in dispute" to mean "the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible" and specifies that an applicant may request arbitration when the amount satisfies specific thresholds. 44 CFR 206.206(a), (b)(3)(i) (2021).

In establishing the dollar threshold for an applicant to obtain arbitration, statute does not address an applicant's failure to provide information to FEMA before a first appeal

determination and the impact, if any, on calculating the amount in dispute. FEMA maintains that the amount in dispute should be recalculated after FEMA has considered the additional information. The statute expressly requires the panel to consider information proffered before the arbitration record closes. 42 U.S.C. § 5189a(d)(2) (2018) (the panel “shall consider from the applicant all original and additional documentation, testimony, or other such evidence supporting the applicant’s position at any time during arbitration”). Although now-effective regulations specify that for both a first and second appeal (arbitration is an alternative to a second appeal) the appeal is to “[c]ontain all documented justification supporting the applicant or recipient’s position,” 44 CFR 206.206(b)(2), supplementing the record is not prohibited and may occur with an appeal submission or in response to FEMA requests for information. Given the statutory language expressly permitting an applicant to supplement the record for an arbitration, it is not for me to grapple with or resolve whether it would be beneficial to the resolution process to preclude additional submissions after an applicant submits a first appeal and/or responds to any requests for information. It is useful under the present process for FEMA to consider additional information and provide input during an arbitration; such consideration and input does not alter the determination of the amount in dispute at the time an applicant requested arbitration.

Particular items in dispute

In an arbitration, the applicant can receive additional compensation only if the panel concludes that the record demonstrates that the work is eligible and the costs sought are reasonable. FEMA has found the record insufficient to support payment of public assistance in excess of \$975,188.39. I reach the same conclusion as FEMA and disagree with the other panel members who award additional assistance.

A few items are of note, from my perspective. The applicant suggests that contracts and subcontracts were entered into at arm’s length, and the costs reflect reasonably incurred amounts. Having incurred the expenses, the applicant seeks public assistance for its costs. This notion relies in part on a basic eligibility statement found in the applicable Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018): “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 Applicant makes the decision to incur the cost.” PAPPG at 22. However, “FEMA may disallow all or part of the costs by adjusting eligible funding to an amount it determines to be reasonable.” PAPPG at 23. FEMA is to determine cost reasonableness in the process of providing public assistance. That an applicant, through its contractor, incurs costs does not automatically lead to the conclusion that costs are reasonable. FEMA looks to items procured and their pricing.

For electrical work, the applicant chose a contractor, and the contractor entered into subcontracts with lump sum pricing. For electrical work, FEMA has priced the items of work which it increased by a percentage to attain reasonable costs for arbitration purposes for which it is providing public assistance, \$47,895.13. The applicant seeks a total of \$177,789 for this item. Pay applications by the subcontractor and contractor demonstrate the costs the applicant incurred. But, those documents do not demonstrate reasonableness. FEMA properly sought detailed information which would demonstrate costs and any mark-ups by the subcontractor and contractor to establish that public assistance greater than FEMA's calculated amount is warranted. The line items of billings are for building mobilization, anixter, electrical, lighting protection, roof to code, and air handlers. The record lacks sufficient details on the awarding of the underlying contract and subcontract concerning these items and the actual costs incurred for specific items by the subcontractor. I have no confidence that the requested additional payment reflects a reasonable cost. Accordingly, increasing public assistance is not warranted.

The applicant similarly has failed, in my view, to validate additional payment of public assistance for the other items. What is lacking in this record is a sound basis to conclude that the disputed costs are reasonable.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge