



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 24, 2024

CBCA 7878-FEMA

In the Matter of CITY OF MIAMI BEACH, FLORIDA

Freddi Mack, Senior Assistant City Attorney, and Henry J. Hunnefeld, First Assistant City Attorney, City of Miami Beach, Miami Beach, FL, counsel for Applicant; and Juan Ramón Mestas, Deputy Chief of Fire Department Operations and Emergency Manager, City of Miami Beach, Miami Beach, FL, appearing for Applicant.

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

Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **VERGILIO**, **GOODMAN**, and **ZISCHKAU**.

ZISCHKAU, Board Judge, writing for the Panel.

The City of Miami Beach, Florida (applicant or city), seeks public assistance (PA) funds pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), for three categories of expenses incurred during the coronavirus 2019 (COVID-19) pandemic. The Federal Emergency Management Agency (FEMA) denied PA funding, finding that the work represented “preventative measures” and not emergency action in direct response to an immediate threat; reflected

ineligible increased operating costs of providing routine government services; and was not “specifically related to performing eligible emergency actions.” For the reasons stated below, we find that the applicant’s work constituted emergency protective measures in direct response to the COVID-19 pandemic and is eligible for PA funding.

Background

On March 13, 2020, the President declared the pandemic a nationwide emergency. The President, under the authority of the Stafford Act, issued formal emergency declarations for every state and territory. Thereafter, each state and territory was granted a major disaster declaration for the pandemic, including the state of Florida on March 25, 2020. The major disaster and emergency declarations for the pandemic allowed PA applicants to seek reimbursement under FEMA’s PA program category B emergency protective measures directly related to COVID-19. FEMA Fact Sheet, Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures (Mar. 2020) (COVID-19 Fact Sheet) at 1.

On July 22, 2021, the city applied for reimbursement for: (1) overtime labor and equipment expenses of its “Mount Sinai Unit” in which fire department personnel operated out of an emergency operations center in a local hospital to provide dedicated response to calls involving suspected COVID-19 infections; (2) equipment expenses for its “Committed Rescue Unit” which used fire department vehicles to respond to medical emergencies involving suspected COVID-19 cases; and (3) equipment expenses for the “Ocean Rescue Unit” which assigned fire department lifeguards to patrol beaches and parks to enforce local ordinances that required social distancing and restricted sizes of groups. The city requested a total of \$814,551.69, which was documented on applicable FEMA forms, written narratives of each activity, and detailed tables showing the COVID-19-related calls for the Mount Sinai and rescue units. For the force account equipment (FAE) requests,¹ the city used FEMA’s “Force Account Equipment Record” form to describe the equipment used, the operator, the unit used to measure reimbursement (i.e., hourly), the FEMA-provided rate per unit, and the dates on which the equipment was used. For the force account labor (FAL) request, the city used FEMA’s “Force Account Labor Record” form to identify each employee by name and position, along with the dates worked in the period and the employee’s regular and overtime rates. The amount of funds requested from all three units was summarized in FEMA’s “Cost Summary Roll-Up” form. The city supplemented these forms with additional documentation consisting of narrative descriptions of each project and logs for the Mount Sinai Unit which listed the first responder calls conducted by its firefighters by date and time as well as identifying whether the call was in response to a suspected COVID-19 incident.

¹ FEMA refers to an applicant’s personnel as its “force account labor” and to an applicant’s equipment as “force account equipment.” Public Assistance Program and Policy Guide (PAPPG) (April 2018) at 23, 26.

Each of the three projects received some funding through Coronavirus Relief Fund (CRF) payments from Miami-Dade County as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, based on a finding that the costs for the work were necessary due to the public health emergency. The work reflected in the CRF payments are not duplicated in the present PA request.

Mount Sinai Unit

The Mount Sinai Unit was established in the early months of the pandemic as a dedicated response unit for calls from persons suspected of having a COVID-19 infection in order to minimize exposure of first responders to the virus and subsequent exposure to the general public from first responders. To meet this objective, the team operated out of an emergency operations center in Mount Sinai Hospital located in the city. Personnel from the Miami Beach Fire Department staffed the unit twenty-four hours per day, working in twelve-hour shifts for seven days at a time. The unit's operations included screening incoming and outgoing personnel; decontaminating and cleaning transport unit; disinfecting medical and ancillary equipment; ordering, inventorying, and restocking equipment and personal protective equipment (PPE); dressing in full PPE for calls; responding to calls where there was a known or suspected case of COVID-19; evaluating patients and providing appropriate medical care; transporting patients to a medical facility when required; decontaminating crew members and equipment after every call; and completing patient care reports for incidents. The city received CRF payments from Miami-Dade County for regular (i.e., non-overtime) labor hours for the Mount Sinai Unit. In addition, FEMA previously granted public assistance funds to the Mount Sinai Unit covering the period January 20 through March 31, 2020, for the same types of costs sought here.² Thus, this arbitration only concerns the overtime labor and equipment expenses incurred by that unit from April 1 through May 18, 2020. The city requested reimbursement for overtime hours amounting to \$407,328.79 (1872 hours in April 2020 and 1224 hours in May 2020) and equipment usage totaling \$46,450.04 (\$29,648.60 in April 2020 and \$16,801.44 in May 2020).

The city states that the overtime hours were incurred for eligible emergency protective measures to save lives and protect public health and safety, citing FEMA's Public Assistance Program and Policy Guide (PAPPG) (April 2018) and COVID-19 Fact Sheet, which provides a non-exhaustive list of eligible emergency protective measures and authorizing reimbursement for force account overtime labor for the period January 20 through September 15, 2020. Under the COVID-19 Fact Sheet, emergency protective measures include:

² The prior public assistance grant by FEMA is not in dispute in this arbitration.

Management, control, and reduction of immediate threats to public health and safety:

- Emergency Operation Center costs
- Training specific to the declared event
- Disinfection of eligible public facilities
- Technical assistance

Emergency medical care:

- Non-deferrable medical treatment of infected persons in a shelter or temporary medical facility
- Related medical facility services and supplies
- Temporary medical facilities and/or enhanced medical/hospital capacity
- Use of specialized medical equipment
- Medical waste disposal
- Emergency medical transport

. . . .

Movement of supplies and persons

. . . .

Reimbursement for state, tribe, territory and/or local government force account overtime costs

COVID-19 Fact Sheet at 1-2. FEMA argues that the city has not shown that the work was directed toward COVID-19 patients, that the activities of the unit's firefighters were routine and ordinarily performed, and that the costs incurred are, therefore, ineligible increased operating costs.

We conclude that the overtime hours were incurred for eligible emergency protective measures that were reasonably taken by the city to reduce immediate threats to public health and safety for a limited period of time based on the exigencies of the pandemic. The unit was specifically established to deal with the increasing number of COVID-19 related calls that the city was receiving, and when even this unit was insufficient to meet the demand, the city established the Committed Rescue Unit to help handle the surge in COVID-related cases. The Mount Sinai Unit was dedicated to COVID responses. The work activities listed above – including triage, responding to calls, treating patients, transporting patients, the cleaning and decontamination effort, and the equipment and PPE related procedures – were uniquely

dedicated to responding to the COVID-19 pandemic. Based on the record, we also find that the force account equipment was dedicated to this COVID-19 unit and used only for COVID-related transport and triage.

Although not raised in its prior determinations, FEMA now argues that the city has not supported its request with adequate documentation. In our view, the documentation adequately supports the applicant's request. The city submitted the request for PA funding on FEMA-issued force account labor record forms, showing employee names, date, overtime hours worked, hourly rates, and unit and total costs. Additionally, the city has provided textual narratives of its activities and detailed tables of results of the COVID-19 related calls, showing dates and time, crew, location zones, and symptoms presenting in the patients. Although FEMA claims that it could not verify if those calls were "actual COVID-19 exposures or infections," this is not a requirement under FEMA's COVID-related policies. *See* COVID-19 Pandemic: Medical Care Eligible for Public Assistance, FEMA Policy 104-21-0004 (Mar. 2021), at 3 ("Work . . . includes both confirmed and suspected cases of COVID-19."). The city has also certified that the amounts it seeks does not include work or costs covered by insurance or assistance from another source. The city submitted the equipment funding request on FEMA-issued force account equipment record forms, showing equipment name, operator's name, equipment code, date, hours, equipment rate, and cost totals. We find the city's documentation is sufficient. *See* PAPPG at 21, 60-61. In sum, we conclude that the unit's work was in direct response to the COVID-19 pandemic and constituted eligible emergency protective measures under both the PAPPG and FEMA's COVID-19 policies.

Committed Rescue Unit

The Committed Rescue Unit was created because the volume of suspected COVID-19 calls was greater than the Mount Sinai Unit was able to handle. Committed Rescue Unit workers, unlike the Mount Sinai Unit workers, were not housed separately and were not paid overtime hours; rather, the committed rescue team was made up of regular on-duty firefighters with increased personal protective equipment (PPE) and disinfecting supplies. This unit operated from April to June 2020. The city received CRF payments from Miami-Dade County for the labor hours of the Committed Rescue Unit. What is at issue here is the city's request for reimbursement for force account equipment associated with this project through PA funding in the amount of \$4056.23.

FEMA raises the same arguments for denying funding for the equipment costs of the Committed Rescue Unit – namely, the work should not be considered eligible because the expenses represent merely increased operating costs and the work was inadequately documented.

The Committed Rescue Unit's work was incurred to address the surge in COVID-19 cases from April to June 2020 and its work falls within FEMA's requirement that the emergency protective measures save lives and protect public health for a limited period of time. PAPPG at 60-61. The emergency triage and medical transport directly addressed this time period's surge of COVID-19 cases – a surge that required the city to dedicate this unit (with all of the unique safety protocols and decontamination procedures) to protect public health and prevent the spread of COVID-19. The requested force account equipment is adequately supported in the record for the same reasons as discussed above for the Mount Sinai Unit, and we, therefore, find these items eligible for reimbursement.

Ocean Rescue Unit

The Ocean Rescue Unit assigned fire department-employed lifeguards to provide security and set up barricades for seven miles of beach in the city's jurisdiction. During this time, the lifeguards enforced beach closure, social distancing, and group restriction orders issued by the state, county, and city. Later, lifeguards were also assigned to patrol city parks to enforce the same policies. The Ocean Rescue Unit used city-owned vehicles to conduct its patrols.

The city received CRF payments from Miami-Dade County for the labor hours of this unit based on a determination that this was work directly tied to responding to the COVID-19 public health emergency. Accordingly, the city is only requesting PA funding for equipment used to conduct the patrols (i.e., the vehicles), which it would not otherwise have incurred but for enforcement of the COVID-19-related state and local orders and ordinances. The amount requested for this unit is \$371,224.

FEMA's general policies permit "[s]ecurity, such as barricades, fencing, or law enforcement" as emergency protective measures if those measures "[e]liminate *or lessen* immediate threats to lives, public health, or safety." PAPPG at 57–58 (emphasis added). FEMA's COVID-19 Fact Sheet also lists "[s]ecurity and law enforcement" as a category of emergency protective measures that may be eligible for FEMA public assistance if not funded by the United States Department of Health and Human Services, including the Centers for Disease Control and Prevention, or other federal agencies.

FEMA argues that the city's barricades and enforcement of governmental orders and ordinances regarding group restrictions and social distancing are not eligible activities because they are not a direct result of the disaster. We do not agree. In early 2020, closure orders and group restriction ordinances were issued to address the immediate threat of COVID-19. *See* PAPPG at 19. These actions "lessen[ed] immediate threats to lives [and] public health." *Id.* at 57. These health emergency actions by the Ocean Rescue Unit were far different from the rescue activities the unit would normally perform. The labor has

already been reimbursed based on the COVID-19 emergency. Based on the record, we find that the requested equipment that was used by the unit in performing its emergency work is eligible for public assistance.

We have considered FEMA's other arguments, including that the "intentional or negligent act[s]" of individuals violating social distancing or beach closure orders are "causes outside of the declared disaster," but we conclude that the equipment used by the unit for this emergency work is eligible for PA funding. Based on our review of the record, we find the equipment associated with the security and enforcement activities was adequately documented and directly tied to preventing the spread of COVID-19 and constituted emergency protective measures consistent with the PAPPG and FEMA's COVID-19 policies. *See* PAPPG at 21, 60-61.

Decision

We conclude that the city's requests for the Mount Sinai Unit, the Committed Rescue Unit, and the Ocean Rescue Unit are eligible for public assistance.

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge