



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 10, 2025

CBCA 8264-FEMA

In the Matter of CITY AND COUNTY OF DENVER, COLORADO

Wendy Huff Ellard and Yann Kaufman of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Charles Schexnaildre of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Jennifer H. Hunt, Office of the Attorney General, Colorado Division of Homeland Security and Emergency Management, Ralph L. Carr Colorado Judicial Center, Denver, CO, counsel for Grantee.

Maureen Dimino, Rebecca J. Otey, and Jasmyn Allen, 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 **SHERIDAN**, **ZISCHKAU**, and **VOLK**.

SHERIDAN, Board Judge, writing for the Panel.

The applicant, the City and County of Denver, Colorado (City), requested arbitration pursuant to the Robert T. Stafford Disaster Relief and Emergency Management Act (Stafford Act), 42 U.S.C. § 5189a(d) (2018), to recover public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) for the de-densifying of congregate shelters. FEMA filed a motion to dismiss, deeming the City's request for arbitration (RFA) untimely. For the reasons stated below, we deny FEMA's motion on timeliness and find that the City is ineligible for PA funding for de-densifying congregate housing. However, because FEMA and the City agree that certain opening and operations (O&O) costs incurred by the City in operating these shelters may be eligible for PA funding, the City may provide

documentation to FEMA seeking to recover costs pursuant to FEMA's safe opening and operation policy.

Background

On March 13, 2020, the President issued an emergency declaration for the COVID-19 pandemic. On March 28, 2020, Colorado declared the COVID-19 pandemic a major disaster (FEMA-4498-DR-CO). RFA at 7. This enabled eligible entities to apply for PA funding under the Stafford Act and allowed the federal government to reimburse eligible Category B emergency protective measures (EPM) costs. 42 U.S.C. §§ 5121-5207; Colorado COVID-19 Pandemic (DR-4498-CO), <https://www.fema.gov/disaster/4498> (last visited Jan. 22, 2025). Colorado's COVID-19 incident period dated back to January 20, 2020, and continued through May 11, 2023. RFA at 7.

Prior to the major disaster declaration, the Colorado Department of Public Health and Environment (CDPHE) established an emergency operations center to respond to the pandemic, and the City established its own emergency operations center. RFA at 6. The Colorado governor also issued an executive order declaring Colorado in a state of disaster emergency, and there was an additional local state of disaster emergency declared in Denver. *Id.* at 7. The CDPHE then issued public health order 20-24 which called for a reduction of in-person nonessential work by fifty percent and extreme social distancing. FEMA's Exhibit 18.

In the Denver metropolitan area there were over six thousand people without housing at the start of the pandemic. Applicant's Exhibit 8. Prior to the pandemic, there were four homeless shelters in the Denver metropolitan area operated by private non-profits. Applicant's Exhibit 25 at 1. There were no facilities operated by the City. *Id.* In response to the pandemic and in order to de-densify the existing shelters, the City partnered with the Denver Rescue Mission and Catholic Charities of Denver to open three shelters: 4600 East 48th Street, the Denver Coliseum, and Elati. *Id.*

FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) states, "FEMA may provide assistance for the rescue, evacuation, and movement of persons; movement of supplies, and care, shelter, and other essential needs of affected human populations. Any assistance provided by FEMA in response to an infectious disease event is done in coordination with the [Centers for Disease Control and Prevention (CDC)]." PAPPG at 72. On March 19, 2020, FEMA's COVID-19 fact sheet, *Public Assistance: Non-Congregate Sheltering Delegation of Authority*, outlined guidance allowing FEMA to grant PA funding for non-congregate sheltering. FEMA's Exhibit 2. That same day, FEMA issued guidance on eligible EPMs and explained that in order to be eligible for reimbursement, all medical sheltering must meet CDC guidelines and that non-congregate

sheltering specifically is subject to additional FEMA approval, must be deemed “necessary to address public health needs,” and cannot last longer than the Public Health Emergency. FEMA’s Exhibit 1. The target population for medical non-congregate sheltering was:

[T]hose who test positive for COVID-19 who do not require hospitalization but need isolation (including those exiting from hospitals); those who have been exposed to COVID-19 who do not require hospitalization; and asymptomatic high-risk individuals needing social distancing as a precautionary measure, such as people over 65 or with certain underlying health conditions (respiratory, compromised immunities, chronic disease).

FEMA’s Exhibit 3 at 1-2.

In September 2020, FEMA issued an additional COVID-19 policy which superseded the March 19, 2020, version. FEMA’s Exhibit 4. This policy dictated that as of September 15, 2020, only non-congregate medical sheltering would be eligible for PA funding. *Id.* at 3. In April 2021, the Denver Department of Public Health and Environment rescinded a March 2021 order that stated that non-congregate sheltering should be made available by all reasonable steps necessary. Applicant’s Exhibit 19 at 1. Then, on July 8, 2021, Colorado ended its COVID-19 state of emergency and recovery efforts were prioritized. Applicant’s Exhibit 23.

FEMA created a project worksheet (PW) for the City’s July 8, 2021, to July 1, 2022, congregate sheltering PA request in December 2022. FEMA’s Exhibit 29. This was on top of the \$125 million previously obligated to the City by FEMA for sheltering in a previous PW. FEMA’s Exhibit 8. FEMA issued a determination memorandum in November 2023 and found that the City was not eligible for congregate sheltering costs for this period. Applicant’s Exhibit 1. On January 8, 2024, the City submitted its first appeal to the recipient. Applicant’s Exhibit 2. FEMA denied the City’s first appeal on August 21, 2024, and notified the City via email and through the grants manager portal. FEMA’s Exhibit 5. The City did not confirm its receipt of the first appeal decision until September 17, 2024. *Id.* The City then emailed FEMA to clarify when the clock started to submit the appeal. It asked if the clock started on August 21, 2024, the day the City received notice of the first appeal response, or on September 17, 2024, the day the City acknowledged receipt of the first appeal response. *Id.* In response, a FEMA official stated that “FEMA will accept” September 17, 2024, as the date that starts the sixty-day clock for the City to submit a second appeal or request arbitration. *Id.* Thereafter, the City submitted its RFA on November 15, 2024, to the Board.

Discussion

At issue in this decision is whether the City's RFA was timely and, if timely, whether the congregate sheltering costs undertaken by the City was an EPM and therefore eligible for PA funding. For the reasons stated below, the Board finds that the City's RFA was timely, but congregate housing was not an eligible EPM, and therefore the City is not entitled to reimbursement for those costs.

City's Request for Arbitration Was Timely

The Board accepts timely filed FEMA arbitrations. The Stafford Act instructs that a decision pertaining to assistance eligibility "may be appealed within 60 days after the date on which the applicant for such assistance is notified of the award." 42 U.S.C. § 5189a(a). In lieu of a second appeal to FEMA, an applicant may request arbitration. *Id.* § 5189a(d). Under 44 CFR 206.206(b)(3)(iii)(B)(1) (2024), "[a]n applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision."

The City submitted its November 15, 2024, arbitration request more than sixty days after August 21, 2024, the date of the first appeal decision. While acknowledging that the first appeal decision was both sent by FEMA and received by the City on August 21, 2024, the City relies on the email exchange in which a FEMA official stated that "FEMA will accept" September 17, 2024, as the date when the clock began to run for a second appeal or arbitration request.

The sixty-day time limit for requesting arbitration is a claim processing rule, not a jurisdictional bar. *See Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). FEMA may waive or extend this deadline. *See City of Beaumont, Texas*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018, at 184,632-33. In this case, by stating that it would accept September 17, 2024, as the date on which the sixty-day clock started, FEMA agreed to extend the City's deadline for a second appeal or arbitration request. Therefore, the City timely filed its November 15, 2024, arbitration request within the agreed period.

De-Densifying Congregate Housing is Not Eligible for Public Assistance

The City requested PA for de-densifying congregate housing in response to the COVID-19 pandemic during the time period of July 8, 2021, to July 1, 2022. To be eligible for PA, work undertaken must "be required as the result of the emergency or major disaster event." 44 CFR 206.223(a)(1). For major disasters that are infectious diseases, the PAPPG instructs that FEMA's public assistance response be done in accordance with the CDC. PAPPG at 72. Following this advice, FEMA issued updated policies in response to changing

CDC guidance as the pandemic evolved. For the July 8, 2021, to July 1, 2022, time period, the FEMA guidance in place was *Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim)*, (FEMA Policy FP 104-009-19). Applicant's Exhibit 15. This policy was applicable to work performed in response to the pandemic on or after September 15, 2020. *Id.* The guidance stated "[i]n accordance with sections 403 and 502 of the Stafford Act, emergency protective measures necessary to save lives and protect public health and safety, may be reimbursed under the PA program." *Id.* However, the work eligible for EPM designation was limited. The policy explained that FEMA can only provide assistance for the listed EPMs. *Id.* For sheltering, the only eligible type listed was non-congregate medical. *Id.*

The City argues that congregate shelters are eligible for PA based on provisions discussed in the Stafford Act, regulations, and the PAPPG. The City states that FEMA can reimburse costs associated with preserving health and safety, which includes sheltering. *See* 42 U.S.C. 5170b(a)(3). The City also cites to the PAPPG, asserting that PA is allowed for congregate sheltering. PAPPG at 66-67. Despite this, because of FEMA's September 1, 2020, policy, the Panel does not find this support persuasive. To reiterate, the September 2020 policy superceded the March 2020 policy, which means that as of September 15, 2020, it was the only effective COVID-19 FEMA policy. *See* Applicant's Exhibit 15. This new policy stated that *only* non-congregate medical sheltering would be eligible which means that the blanket "medical sheltering" eligibility in FEMA's *Eligible Emergency Protective Measures* Fact Sheet issued on March 19, 2020, would no longer apply. The Panel must take into account only the policies in effect during the July 2021 to July 2022 period in question.

The City's efforts to de-densify homeless shelters by opening additional congregate shelters is not the same as providing non-congregate sheltering. Non-congregate is defined as "locations where each individual or household has living space that offers some level of privacy (e.g., hotels, motels, casinos, dormitories, retreat camps, etc.)." PAPPG at 66. The City provided no evidence that the three newly-opened shelters matched this criteria.

The City also fails to establish that the sheltering was medical. The City offered medical transportation to and from hospitals and shelters, and medical services such as triaging and temperature screens were provided at the shelters. However, the FEMA guidance on medical non-congregate sheltering instructs that medical sheltering "address[es] the specific needs directly resulting from this Public Health Emergency." FEMA's Exhibit 3. Additionally, the guidance states that "FEMA will consider non-congregate sheltering for health and medical-related needs, such as isolation and quarantine resulting from the public health emergency." *Id.* Here, the preventative triaging and temperature screens would not be deemed medical sheltering because if a shelter resident was found to have COVID-19, they would have been housed elsewhere and quarantined, not placed in a de-densified shelter. The guidance provided echoes this sentiment by describing the target population for medical

non-congregate sheltering. Although reasonable minds may differ on the issue, the Panel does not find the homeless population to be the “at-risk” population that FEMA deems the target population for non-congregate sheltering. It is acknowledged that some homeless people may have underlying conditions that makes them eligible for non-congregate medical sheltering because they are more susceptible to COVID. However, the blanket homeless population itself is not the vulnerable population that the guidance addresses.

Potential Recovery for Opening and Operations Expenses

Although the Board cannot award funds for the City’s congregate sheltering expenses, it is acknowledged by both FEMA and the City that certain O&O costs were incurred by operating these shelters. Costs such as purchase and distribution of face masks, cleaning and disinfection, purchase and distribution of necessary supplies and equipment in excess of regularly budgeted costs, COVID-19 diagnostic testing, screening and temperature scanning, acquisition and installation of temporary physical barriers, and purchase and storage of personal protective equipment may be eligible for reimbursement according to FEMA’s *Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim)*. FEMA’s Exhibits 6, 41. FEMA argues that the City has not adequately documented these costs. The City argues that it has made an adequate showing for an eligibility determination. Considering FEMA’s concession that at least some of the City’s claimed O&O costs are likely eligible, we return the matter to FEMA for a further evaluation of the City’s claimed O&O costs. If the City provides adequate documentation to show “the ‘who, what, when, where, why, and how much’ for each item claimed,” PAPPG at 133, it may be entitled to reimbursement of costs tied to eligible work performed and listed in the O&O policy.

Decision

The City timely filed its appeal of FEMA’s determination of its PA request; however, the City is not eligible to recover costs for the de-densification of congregate housing. If the City provides sufficient documentation to FEMA, it may be entitled to recover the costs for safe O&O work as outlined in FEMA’s Safe O&O Policy.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Daniel B. Volk
DANIEL B. VOLK
Board Judge