



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 18, 2022

CBCA 7408-FEMA

In the Matter of COUNTY OF SANTA CRUZ, CALIFORNIA

Justin A. Graham of Office of the County Counsel, County of Santa Cruz, Santa Cruz, CA, counsel for Applicant.

Jennifer Bollinger, Jon Ivy, and Carl DeNigris, Governor's Office of Emergency Services, Mather, CA, counsel for Grantee; and Ryan Buras, Deputy Director for Recovery, Recovery Infrastructure Branch, Governor's Office of Emergency Services, Mather, CA, appearing for Grantee.

Ramoncito 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 **BEARDSLEY** (Chair), **KULLBERG**, and **O'ROURKE**.

The applicant, the County of Santa Cruz (County), sought arbitration of the denial by the Federal Emergency Management Agency (FEMA) of public assistance (PA) funding for post-disaster road repairs allegedly caused by a third-party contractor. The parties elected to have a paper hearing pursuant to CBCA Rule 611 (48 CFR 6106.611 (2021)). Based on our review of the record, we find the County to be an eligible applicant and the County's request to amend the damage inventory to be timely. We return the application to FEMA to determine what road repairs and costs are eligible for PA funding.

Background

Wildfires caused widespread damage throughout the State of California between August 14 and September 26, 2020 (the "incident period"). On August 22, 2020, the

President issued a major disaster declaration (FEMA-4558-DR-CA) which authorized FEMA to distribute PA disaster funds for certain areas impacted by the fires.

The California Governor's Office of Emergency Services (Cal OES) serves as the coordinating entity for disaster response and recovery for the State of California and the grantee/recipient here. After the incident period, Cal OES tasked the State of California Department of Resources, Recycling and Recovery (CalRecycle) with managing and conducting debris removal operations. CalRecycle contracted with Anvil Builders, Inc. (Anvil) to perform debris clean-up work and hazardous tree removal (Anvil Contract) within the County. The County was not a party to the Anvil Contract.

FEMA provided funding for public property debris removal (PPDR) operations under the Anvil Contract to CalRecycle through Cal OES. The Anvil Contract stated that "[r]oad and shoulder repair expenses resulting from extraordinary usage will be the responsibility of [Anvil]." It went on to say that "[d]amage to private or public property for which [Anvil] or a subcontractor is responsible, as part of the Operation, will be repaired by the Contractor at no cost to the State."

The County took steps to recover funds to repair the road damages. The County apprised Cal OES and CalRecycle of the damages, sought direction as to the path for recovery, and provided pictures, video, and other documentation to Cal OES.¹ In addition, with regard to a private road allegedly damaged by Anvil, the County involved members of Congress, along with State and local legislators, in order to try to recover from Anvil, but Anvil offered only to pay \$75,000 of the \$2.7 million estimated to repair the private road. As such, the County sought recovery through a FEMA damage inventory (DI) line item.

FEMA set a deadline of December 29, 2020, for inclusion of any additional DI line items. On April 21, 2021, the County sent a letter, photographs, and an estimated cost of repair to Cal OES for submission to FEMA as a DI line item. FEMA denied the inclusion of the additional DI line item based on the fact that the claim was submitted after the deadline and that "the damages should be paid by the State's debris removal contractor."

In a letter dated August 19, 2021, to Cal OES, the County requested an appeal of FEMA's determination, noting that the State, not the County, had the ability to obtain restitution from Anvil for road repair. The County further indicated that it would "make a good faith effort to prevent and report any possibility of duplication of funding." Cal OES forwarded the first appeal to FEMA, supporting the County's request. The first appeal

¹ In July 2021, the County provided Cal OES and CalRecycle with two years of road maintenance records.

included a summary of pavement damage attributed to the debris removal operations, including an inventory of reported damage, a proposed repair cost of \$4,417,000 based on estimates, and over 450 pages of pre- and post-incident photos of the roads. FEMA denied the appeal, and the County sought arbitration before the Board. FEMA challenges the County's application for three reasons. First, the County's request to amend the DI was untimely. Second, the County is not an eligible applicant, and third, PA funding given to the county would be a duplication of benefits.

Discussion

Timeliness

Although FEMA set a deadline of December 29, 2020, for amendments to the DI, the County had no reason to believe that in December 2020 the debris removal would result in extensive damage to its roads since the debris removal work did not begin in the County until February 2021. As the County submitted its request to amend the DI on April 21, 2021, when less than 50% of the work was complete and only some damage apparent, we find that the County has satisfied the requirement to prove extenuating circumstances beyond its control for late inclusion of a DI line item, and the delay was therefore justified under 44 CFR 206.202(f)(2).

Eligibility

To be eligible, work must meet each of the following criteria: (1) required as a result of the declared incident; (2) located within the designated area; and (3) the legal responsibility of an eligible applicant. *See* FEMA Public Assistance and Program Policy Guide (PAPPG) (June 2020) at 51; 44 CFR 206.223(a). It is uncontested that the County roads are located within the designated area of the declared incident, and the County is an eligible applicant as it is a local government. *See* PAPPG at 42 ("The following types of local governments are eligible [a]pplicants: Counties."); 42 U.S.C. § 5122(8)(A) (2018) (defining a county as a local government); 44 CFR 206.2(a)(16)(i) (same). FEMA argues that since CalRecycle contracted for the debris removal work that allegedly caused the damage to the roads, the County is not eligible to seek PA funds for restoration of the roads. We find this argument unpersuasive. CalRecycle may be another eligible applicant but that does not make the County of Santa Cruz ineligible.

As for legal responsibility, FEMA evaluates whether the applicant "claiming the costs [for permanent work] had the legal responsibility for disaster-related restoration of the facility at the time of the incident based on ownership and the terms of any written agreements (such as for facilities under construction, leased facilities, and facilities owned by a Federal agency)." *See* PAPPG at 52-54. The County had ownership of and

responsibility for the roads at the time of the incident and thereafter, regardless of who removed the debris or who funds the road repairs. *See* Cal. Streets and Highway Code § 941; *County of Kern v. Edgemont Development Corp.*, 222 Cal. App. 2d 874, 879 (2015) (finding that once county roads are accepted by a county, the responsibility and liability for their maintenance lies with the county); *see also Coppinger v. Rawlins*, 239 Cal. App. 4th 608, 615 (2015). The Anvil Contract did not shift legal responsibility to Anvil from the County primarily because the Anvil Contract did not exist at the time of the incident. Moreover, third party “written agreements” for debris removal are not the types of documents that shift legal responsibility for county roads. Unlike here, the third party “written agreements” referenced in the PAPPG as shifting legal responsibility grant a possessory interest or exclusive control of a facility, such as deeds, titles, lease agreements, and contracts for facilities under construction.² PAPPG at 53.

Turning to whether the work is required as a result of the declared incident, the repair of damage caused while conducting debris removal operations may be considered eligible as part of the respective emergency work project,³ *see* PAPPG at 138-39, if the damage was: (1) due to the severe conditions resulting from the incident; (2) unavoidable; and (3) not due to improper or excessive use. *See* PAPPG at 139. Additionally, the damage cannot be the result of deferred maintenance, negligence, or natural deterioration of the roads and must have been caused by the debris removal trucks and not other vehicles. PAPPG at 52.

It remains “the applicant’s burden to support its application for PA funding.” *Jackson County, Florida*, CBCA 7279-FEMA, 22-1 BCA ¶ 38,075, at 184,907 (citing *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,686). Although the County has provided documentation of the pre- and post- debris removal conditions of the roads, maintenance records, and cost estimates, FEMA has not yet assessed the roads or documentation to determine if the damages meet the eligibility criteria. There is nothing in the record to suggest that FEMA has determined whether the damages were incurred as a result of eligible emergency work, were incident-related, unavoidable, or not due to improper or excessive use. FEMA has also not determined the eligibility of the claimed costs. *See* PAPPG at 63-65. Without FEMA’s assessment and additional information, the Panel is not

² If the costs claimed are considered to be for “emergency work,” as the County suggests, “FEMA evaluates whether the [a]pplicant requesting the assistance either had jurisdiction over the area or the legal authority to conduct the work related to the request at the time of the incident.” PAPPG at 52. The County retained jurisdiction over the roads at the time of the incident.

³ “Although the repairs may be Permanent Work, FEMA includes it on the Emergency Work project as damage resulting from the emergency work.” PAPPG at 139 n.257.

willing or able to determine whether the damage to the roads and costs to repair are eligible for PA funding.

Prohibition on Duplication — 42 U.S.C. § 5155

FEMA misreads the applicable statute when advancing its prohibition on duplication argument. The statute, 42 U.S.C. § 5155(a), does provide for a general prohibition against duplicative funding; however, it goes on to state that:

[t]his section shall not prohibit the provision of Federal assistance to a person who is or may be entitled to receive benefits for the same purposes from another source if such person has not received such benefits by the time of application for Federal assistance and if such person agrees to repay all duplicative assistance to the agency providing Federal assistance.

44 U.S.C § 5155(b)(1). “Together, the subsections of § 5155 . . . allow a disaster victim to receive FEMA relief if it is eligible for, but has not yet received, duplicative relief.” *Hawaii ex rel. Attorney General v. Federal Emergency Management Agency*, 294 F.3d 1152 (9th Cir. 2002). As the County has yet to receive any recovery pursuant to the Anvil Contract and has agreed to repay FEMA any duplicative assistance, 44 U.S.C. § 5155 does not bar the County from receiving PA funding for the eligible work.

“A person receiving Federal assistance for a major disaster or emergency shall be liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source.” 44 U.S.C § 5155(c). The Anvil benefits, however, are not “available” to the County since it was not in privity of contract with Anvil.

FEMA asserts that the County’s efforts to obtain repair costs from Anvil were not commercially reasonable. “When a third party causes damage (e.g., an oil spill) or increases the cost of repair or cleanup and the [a]pplicant requests FEMA funding for the costs, FEMA requires the [a]pplicant to make reasonable efforts to pursue claims to recover costs it is entitled to receive from the third party.” PAPPG at 95. The County did make reasonable efforts to recover costs, given its lack of privity of contract with Anvil. The County “sought meetings with the State [Cal OES and CalRecycle] and even Anvil, exchanged numerous correspondence, e-mails, and supporting documentation and went so far as to secure the direct involvement of elected officials at the federal, state and local levels.” Applicant’s Sur-Reply at 4. “The statute requires disaster victims to seek out benefits with the perseverance and risk averseness that a party acting in a commercially reasonable manner would; however, the “commercially reasonable standard does not require a party to do whatever it takes to

acquire benefits.” *Hawaii*, 294 F.3d at 1164-65. The County acted in a commercially reasonable manner to avoid the duplication of benefits.

Decision

The panel finds that the County’s request to amend the DI was timely, the County is an eligible applicant, and 44 U.S.C. § 5155 does not bar the County’s eligibility for PA funding. It remains to be determined what road repairs and costs are eligible for PA funding.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Kathleen J. O’Rourke

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Board Judge