



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 13, 2022

CBCA 7412-FEMA

In the Matter of NEW YORK–PRESBYTERIAN HOSPITAL

Deborah Kantar Gardner of Ropes & Gray LLP, Boston, MA, counsel for Applicant.

Rayana Gonzales, Deputy Commissioner for Disaster Recovery Programs, Alternate Governor’s Authorized Representative, New York State Department of Homeland Security and Emergency Services, Albany, NY, appearing for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **BEARDSLEY** (Chair), **DRUMMOND**, and **CHADWICK**.

The applicant, a nonprofit hospital system, sought arbitration of a dispute with the Federal Emergency Management Agency (FEMA) about the eligibility for reimbursement of approximately \$58.8 million in extra payments that the applicant made to certain employees during the early weeks of the COVID-19 pandemic in April and May 2020. The panel received documentary evidence and held a one-day hearing. *See* Board Rules 608, 611 (48 CFR 6106.608, .611 (2021)). We find the payments at issue to be ineligible costs.

The applicant announced to employees on April 2, 2020, that “[i]n recognition of the great effort and tremendous dedication of our patient facing employees, and those directly supporting the COVID-19 crisis, we are awarding a bonus of \$1,250” to any employee who “worked physically on site at a hospital campus or clinical office for at least one-week’s time in March through April.” On May 4, 2020, the applicant announced “a second bonus of \$1,250” for employees who “worked physically on site at a hospital campus or clinical office for at least one week in the month of April.”

The applicant argues that it was “compelled to issue the Bonuses” (which the applicant later in the proceeding labeled “hazard pay”) by an internal compensation policy that sets forth three criteria: (1) “Establish and Sustain Internal Equity,” (2) “Maintain Market Competitiveness,” and (3) “Award Individual Contribution (pay for performance philosophy).”

Applicable FEMA policy provided for reimbursement of disaster-related labor costs only when, among other things, the costs were triggered by “non-discretionary criteria for when the Applicant activates various pay types.” Public Assistance Program and Policy Guide (Apr. 2018) at 23. Here, the applicant’s decisions regarding whom to pay the extra amounts, when to pay, how much to pay, and on what basis were not dictated by its policy and involved significant discretion. Indications that the payment decisions were discretionary include, without limitation: (1) the decisions were made by the applicant’s chief executive officer (rather than at a lower administrative level under automatic criteria); (2) according to the applicant’s witness, the applicant had to consider “the [compensation] policy in total” and the “totality of the circumstances”; (3) the requirements that employees have worked one week at a facility during each period could have been set differently without obviously violating the policy; and (4) the applicant’s policy did not dictate either a specific payment amount or equal payments to all recipients regardless of their salaries or wages. The payments were not made on the basis of non-discretionary criteria.

The reasonableness of the applicant’s actions in addressing the pandemic and the specific label that should be applied to the payments are immaterial to our decision.

Decision

The payments in dispute are ineligible costs.

Kyle Chadwick
KYLE CHADWICK
Board Judge

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge