



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 22, 2024

CBCA 7933-FEMA

In the Matter of ORANGE COUNTY, TEXAS

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Julie A. Masek, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and W. Nim Kidd, Chief, Joshua Bryant, Division Chief–Recovery, and Daniel Stuckert, Recovery and Mitigation Supervisor, Texas Division of Emergency Management, Austin, TX; and Michelle Ellis, Regional Section Chief, and Karen Hershey, Section Chief, Texas Division of Emergency Management, Houston, TX, appearing for Grantee.

Brock Pierson and Christiana Cooley, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and 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 **BEARDSLEY** (Chair), **RUSSELL**, and **KULLBERG**.

RUSSELL, Board Judge, writing for the Panel.

The applicant, Orange County, Texas (the County), requested arbitration of the Federal Emergency Management Agency's (FEMA's) denial of the County's request for public assistance (PA) funding in the amount of \$873,795 for debris removal. The panel

decides this matter under its authority set forth in 42 U.S.C. § 5189a(d) (2018). For the following reasons, we remand this matter to FEMA for possible further review.

Background

In August 2020, Hurricane Laura made landfall causing damage that required an immediate response from the County. As part of this response, the County executed a contract with Asbritt, its previously procured debris removal contractor, and also employed Tetra Tech, a debris monitoring firm, to assist in debris removal. Between September 14 and October 6, 2020, the County's debris removal contractor removed 11,631 limbs from the County.

Throughout the removal process, Tetra Tech created load tickets and supplied photographs for every limb removed from the County's rights-of-way (ROWs) or improved public property. The photographs document each limb before and after the cut, as well as the limb measurement at the point of the cut. The tickets include the date, time, GPS coordinates, address (if available), contractor crew number, Tetra Tech monitor name, debris quantity, qualifying measurement, and type of hazard removed.

On December 9, 2020, the President declared Hurricane Laura a major disaster with an incident period of August 22–27, 2020. To date, FEMA has obligated over \$64 million in PA funding for Texas' Hurricane Laura response efforts, including more than \$45 million to reimburse applicants for eligible contracted debris removal work conducted after Hurricane Laura.

The County submitted an application requesting over \$14 million in PA funding for debris removal work in Grants Manager (GM) Project Number 175451. FEMA validated over \$13 million in costs for eligible work. However, FEMA could not validate the County's claimed work related to its contractor's removal of hazardous trees and limbs. To avoid delays in funding for eligible work, FEMA created GM Project Number 663932 to separate the validated work from the work in dispute.

On June 22, 2022, FEMA issued a determination memorandum denying \$873,795 in claimed costs under Project 663932. In its memorandum, FEMA concluded that the work performed by the County was not an eligible emergency protective measure but, instead, private property debris removal (PPDR). Applicant's Exhibit 1. On August 26, 2022, the County appealed FEMA's determination to the Texas Department of Emergency Management (recipient), claiming the work completed was not PPDR and asserting that the work completed involved removal of limbs from ROWs and improved public property and only removal of hangers on private property if they threatened public ROWs. On September 13, 2022, the recipient transmitted the appeal to FEMA.

On March 15, 2023, FEMA issued a request for information (RFI) to the recipient and the County, and on April 11, 2023, the County responded with load tickets and photos, a declaration from a Tetra Tech project manager describing the debris monitoring process in removing eligible debris, a memorandum explaining the documentation pertaining to FEMA requirements, and a video presentation of the removal documentation prepared by Tetra Tech that included an interactive hazardous debris removal map documenting the location within the ROW or public property for every limb removed.

On September 14, 2023, FEMA issued its first appeal determination, finding that “no picture or combination of pictures establish that any limbs of adequate circumference at the break, were on public land or, if on private land, over a public ROW and also posing an imminent threat.” FEMA’s Response at 8. It further found that “the photos provided do not demonstrate 1) the break location overhanging a ROW, such as a road, or public property and/or 2) a break that demonstrates an immediate threat.”¹ *Id.* On November 13, 2023, the County filed its request for arbitration with the Board. On February 13, 2024, the panel held a hearing on the County’s request.

Discussion

The Stafford Act authorizes FEMA to make PA funding for “[p]erforming on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including . . . debris removal.” 42 U.S.C. § 5170b(a)(3)(A). FEMA may only provide PA funding for debris removal that is in the “public interest.” 44 CFR 206.224(a) (2019). Two situations that would deem debris removal to be in the public interest are “when it is necessary to: (1) [e]liminate immediate threats to life, public health, and safety; or (2) [e]liminate immediate threats of significant damage to improved public or private property.” *Id.* Relevant here, the Public Assistance Program and Policy Guide (PAPPG) defines Category A debris removal activities as including, but not limited to, removing vegetative debris. PAPPG (June 2020) at 99. The PAPPG also lists the documentation requirements necessary to support the eligibility of contracted work to remove hazardous limbs:

¹ FEMA similarly concluded that the map provided in the RFI “shows a series of points inside of a residential neighborhood, which alone does not visually support eligibility.” Applicant’s Exhibit 1 at 4. In making this determination, FEMA sampled some of the geographical points provided and found that there was a mix “of public ROW and private land plot points,” which was insufficient to establish eligibility. *Id.* at 4-5. However, as discussed herein, it is the County’s failure to produce the photographic evidence required by the PAPPG that is the basis for the denial of the County’s request for PA funding.

The Applicant must retain, and provide when requested, all of the following documentation to support the eligibility of contracted work to remove tree limbs, branches, stumps, or trees that are still in place:

- Specifics of the immediate threat with the location (geographical coordinates in latitude, longitude) and photograph or video documentation that establishes the item is on public property (required, FEMA reviews a representative sample);
- Quantity removed . . . (required);
- Quantity, location, and source of material to fill root-ball holes (required); and
- Equipment used to perform the work (required).

Id. at 103.

FEMA disputes the County's eligibility under the first reporting requirement of the PAPPG, regarding photographic documentation. The County, however, asserts that the photographs submitted are sufficient to establish eligibility. The County reasons that, in conjunction with the geographic location and other information submitted, the photographs are sufficient to determine that the hazardous limbs are near enough to public ROWs or improved public property to be considered eligible. However, while the documentation was voluminous, taken as a whole, there did not seem to be a representative sample that adequately demonstrated that the hazardous limbs threatened public ROWs or improved public property. Indeed, many of the photographs only showed the top of the trees without also showing the public ROW or improved public property.

To support its claim, the County also relies on *Village of Pinecrest, Florida*, CBCA 7298-FEMA, 22-1 BCA ¶ 38,196, for authority that photographs of every branch is not required to support reimbursement. However, the photographs examined in *Pinecrest* showed that the hazardous limbs "obstructed roadways, blocked traffic signs, and endangered utilities such as power lines." 22-1 BCA at 185,496. Here, there was not a collection of photographs sufficient to compose a representative sample that depicted threats to the public ROW or improved public property. While many of the load tickets depicted hazardous limbs, it was not clear that they, comparable to the evidence in *Pinecrest*, persuasively showed "immediate threats of significant damage to improved public or private property." 44 CFR 206.224(a)(2). Because photographic documentation showing that the limbs removed posed "immediate threats" to public ROWs or improved public property is required

for PA funding, we find this lack of representative photographs to be dispositive. *Id.*; PAPPG at 103.

Additionally, the County asserts that its GPS data is sufficient to substantiate that the hazardous limbs are near public ROWs or improved public property. However, again, without photographic evidence of the hazardous limbs endangering public ROWs or improved public property, the GPS coordinates are insufficient to establish eligibility. PAPPG at 103.

Decision

It is the applicant's burden to produce documentation to support PA eligibility of contracted work for removal of hazardous limbs, trees, and stumps. PAPPG at 103. Among the over 11,000 tree limbs at issue in this arbitration, there is the possibility that there are photographs in the existing record that the County can identify consistent with the findings in this decision. Accordingly, we remand this matter to FEMA to provide a specific date to the County by which the County, if it so chooses, can identify to FEMA photographs among those produced in this arbitration which the County believes are consistent with this decision. The County must also show that any subsequent production to FEMA meets other eligibility requirements, including the threshold amount required for receipt of PA funding. *See id.*; *see also* 44 CFR 206.202(d)(2); Notice of Adjustment of Minimum Project Worksheet Amount, 84 Fed. Reg. 55319 (Oct. 16, 2019).

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge