



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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June 13, 2023

CBCA 7671-FEMA

In the Matter of MIDDLESEX COUNTY UTILITIES AUTHORITY

William W. Northgrave of McManimon, Scotland & Baumann, LLC, Roseland, NJ, counsel for Applicant.

Lieutenant Sean Talty, Unit Head, Public Assistance Unit, New Jersey Office of Emergency Management, West Trenton, NJ, appearing for Grantee.

Anthony Homer, Maureen Dimino, and Shahnam Thompson, 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), **SHERIDAN**, and **SULLIVAN**.

**BEARDSLEY**, Board Judge, writing for the Panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), the applicant, Middlesex County Utilities Authority, seeks public assistance (PA) funding in the amount of \$687,313.95 for overtime costs incurred as a result of adjusting its employees' schedules from January 8, 2021, through April 2, 2021, in order to limit their exposure to the coronavirus (COVID-19). The panel finds that the applicant's overtime costs are ineligible for PA funding.

### Background

The applicant is a twenty-four hours per day, 365 days per year wastewater treatment plant in New Jersey. On March 25, 2020, the President issued a major disaster declaration, FEMA-4488-DR-NJ, which authorized PA funding for Category B emergency protective measures (EPMs) throughout the state related to the COVID-19 pandemic.

To reduce the immediate public health threat posed by COVID-19, the applicant implemented work schedule adjustments for its employees. The applicant divided its workforce into four teams—two teams worked the first week of the pay period rotating every twelve hours and the other two teams were off but asked to limit exposure. The second week of the pay period, the four teams switched. The purpose of the adjusted schedule was to reduce the employees' exposure to COVID-19 in order to keep the employees healthy and the plant operating. The applicant implemented the adjusted schedule from January 8, 2021, through April 2, 2021.

### FEMA Policies

On September 1, 2020, FEMA issued a policy titled “Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim)” (FP 104-009-19), for work performed on or after September 15, 2020. FEMA Exhibit 1. The policy superseded the FEMA Fact Sheet dated March 19, 2020, titled “Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures” (Fact Sheet). *Id.* at 1. The policy, in pertinent part, stated that “[o]nly work associated with the performance of emergency protective measures specifically listed in this policy is eligible for PA in COVID-19-declared events.” *Id.* at 3 (C.3). The policy stated further that “FEMA may provide assistance *only* for the following [EPMs] in response to COVID-19 declared events” and listed those EPMs—(1) medical care, (2) the purchase and distribution of food, (3) non-congregate medical sheltering, (4) operation of Emergency Operations Centers, (5) communications to disseminate public information regarding health and safety measures, (6) mass casualty management, and (7) purchase and distribution of personal protective equipment (PPE). *Id.* at 3-4 (C.4) (emphasis added). The policy further provided that FEMA *may* provide public assistance for “force account<sup>[1]</sup> overtime costs . . . associated with performance of eligible [EPMs],” but “only when necessary to perform otherwise eligible emergency work listed in C.4” of FP 104-009-19 identified above. *Id.* at 4 (C.5).

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<sup>1</sup> FEMA refers to an applicant's personnel as “force account.” FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 23.

On September 8, 2021, FEMA issued another policy, FEMA policy 104-21-0003, version 2, titled “Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim)” (O&O policy). FEMA Exhibit 2. The O&O policy applied to all work conducted since the beginning of the emergency. *Id.* at 1. The policy stated that “FEMA may provide assistance to all eligible PA Applicants . . . for the following measures implemented to facilitate the safe opening and operation of all eligible facilities in response to COVID-19 declared events,” such as (1) the purchase and distribution of PPE, (2) cleaning and disinfection, (3) COVID-19 diagnostic testing, (4) screening and temperature scanning, (5) acquisition and installation of temporary physical barriers, and (6) purchase and storage of PPE. *Id.* at 5 (C.4.a). The O&O policy also provided that work eligible under FP 104-009-19 remained eligible for assistance. *Id.* at 3 (A.5).

### Discussion

Under FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018),<sup>2</sup> force account overtime labor costs are only recoverable if they are incurred while performing eligible EPM work. PAPPG at 23-24, 60-61. FEMA’s PAPPG, however, does not contemplate or address the situation in which the EPM is the act of adjusting employees’ schedules to attempt to mitigate the spread of COVID-19 in the facility. As the arbitration panel in *Joint Meeting of Essex & Union Counties*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, at 185,643-44, discussed in detail, this is likely due to the fact that the PAPPG was not written to address this type of disaster.

To identify the emergency work that was eligible for PA funding for non-medical facilities, FEMA published two COVID-19 policies that apply here—FP 104-009-19 and the O&O policy. The purpose of these policies was to:

[D]efine[] the framework, policy details, and requirements for determining the eligibility of work and costs under the PA Program to ensure consistent and appropriate implementation across all COVID-19 and major disaster declarations.

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<sup>2</sup> Version 3.1 of the PAPPG applies to COVID-19 work. FEMA Exhibits 1 at 1, 2 at 3 (A.6).

FEMA Exhibit 1 at 1; *see also* FEMA Exhibit 2 at 3 (similar language). Even if we were to determine that the schedule adjustments<sup>3</sup> were an eligible EPM under the PAPPG,<sup>4</sup> FEMA’s applicable published policies for COVID-19 EPMs render these costs ineligible for reimbursement.<sup>5</sup>

Under FP 104-009-19, FEMA only provides PA funding for specifically listed EPMs. Exhibit 1. This policy does not list force account overtime costs or schedule adjustments made to mitigate the spread of COVID-19 as a covered EPM. *See id.* at 3-4 (C.4). This policy does state that force account overtime costs may be reimbursed but only if the overtime costs are necessary to perform otherwise eligible EPMs listed in C.4 of the policy. *Id.* at 4 (C.5). The O&O policy also listed eligible EPMs, but, again, force account overtime costs or schedule adjustments to mitigate the spread of COVID-19 were not listed. FEMA *See* Exhibit 2. Because the force account overtime costs are not identified as EPMs in either policy, the costs claimed here are not eligible for PA funding.

### Decision

The force account overtime costs incurred by the applicant are not eligible for PA funding.

*Erica S. Beardsley*

ERICA S. BEARDSLEY

Board Judge

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<sup>3</sup> The schedule adjustments, made one year into the pandemic, are a simple restructuring of the applicant’s shifts—not the type of emergency measure taken at the beginning of the pandemic that included employees sleeping at their work site.

<sup>4</sup> The PAPPG requires the labor costs to have been incurred “because of an increased demand for the services the facility provides.” PAPPG at 60. In addition, the costs must have been “specifically related to eligible emergency actions to save lives or protect public health and safety.” *Id.* at 61. Emergency work must also not only address an “immediate threat” but be “necessary to cope with the threat.” 44 CFR 206.225(a) (2020).

<sup>5</sup> While arbitration decisions are not precedential, the applicant points to *Joint Meeting of Essex* in support of its position. However, the Fact Sheet relied on in *Joint Meeting of Essex* does not apply to the overtime costs incurred here in early 2021, because the Fact Sheet was superseded by FP 104-009-19.

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

*Marian E. Sullivan*  
MARIAN E. SULLIVAN  
Board Judge