



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 12, 2024

CBCA 7955-FEMA

In the Matter of BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Danielle M. Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Nannie Reed, General Counsel, Alabama Emergency Management Agency, Clanton, AL, counsel for Grantee; and Jeff Smitherman, Director, and Kelli Alexander, Public Assistance Section Chief, Alabama Emergency Management Agency, Clanton, AL, appearing for Grantee.

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 **VERGILIO, O'ROURKE**, and **KANG**.

KANG, Board Judge, writing for the Panel.

Applicant, the Baldwin County Electric Membership Corporation (BEMC), sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) as to eligibility for public assistance (PA) funding for emergency power restoration base camp services following Hurricane Sally in 2020. FEMA previously granted, in part, BEMC's request for PA funding but denied some costs for freight and meals as unreasonable. We find applicant eligible for reimbursement of some additional meal costs but ineligible for reimbursement of the remaining costs requested.

Background

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the statutory authority for FEMA’s federal disaster response activities. Congress enacted the Stafford Act to provide “assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [major] disasters.” 42 U.S.C. § 5121(b). The Stafford Act is “designed to assist the efforts of [eligible entities affected by major disasters] in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas.” *Id.* § 5121(a).

BEMC is a not-for-profit electric cooperative serving Baldwin and Escambia counties in southwest Alabama. In September 2020, Hurricane Sally struck southern Alabama, causing power outages to ninety-seven percent of the customers served by BEMC. Request for Arbitration (RFA) at 6. On September 20, 2020, the President issued a major disaster declaration in Alabama as a result of damage resulting from Hurricane Sally (FEMA-4563-DR-AL).

Following the power outages, BEMC established base camps in Foley and Bay Minette, Alabama, to provide services for workers engaged in emergency electrical restoration services. The base camp services were provided by Storm Services, LLC under a work authorization order issued by applicant on September 16, 2020, pursuant to a “Master Agreement” contract previously established between BEMC and its contractor in August 2020. The work authorization order called for base camp services for 1500 workers, including lodging, shower and sanitation facilities, and meals. Foley camp, which had a maximum occupancy of 1200 workers, operated from September 17 to 26, 2020, and Bay Minette camp, which had a maximum occupancy of 300 workers, operated from September 17 to 24, 2020.

In March 2022, FEMA issued a determination memorandum (DM) that granted part of applicant’s request for PA in connection with the base camps. Relevant here, the DM found that some costs for freight and meals were unreasonably high and therefore ineligible. Applicant requested reimbursement for freight based on a rate of \$4.50/mile. Applicant’s Exhibit 1 at 6. FEMA rejected the rate as unreasonably high, finding that a lower rate of \$2.40/mile was reasonable based on the average of other rates approved by the agency in connection with Hurricane Sally and because the rate was duplicative of other costs. *Id.* With regard to meals, the agency found that applicant was eligible for reimbursement

of 25,474 (17,222 meals and 8252 box lunches) of the 41,874 meals invoiced by its contractor.¹ *Id.* at 6-7.

On May 25, 2022, applicant filed a first-level appeal of the DM. FEMA's first appeal decision, issued on October 10, 2023, upheld the reduction of the freight costs to \$2.40/mile but found that an additional 7840 meals were eligible for reimbursement. Applicant's Exhibit 2, First Appeal Analysis at 11, 13.

On December 6, 2023, applicant requested arbitration, seeking an additional \$565,468.73 in PA funding for freight and meal costs.² The parties elected to conduct the arbitration on the basis of the record submitted to the panel.

Discussion

In arbitration matters, the panel reviews FEMA eligibility determinations de novo, including those on challenged PA grants. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980. Such reviews extend to determinations of issues of fact, such as cost reasonableness. *Harris County, Texas*, CBCA 6909-FEMA, 21-1 BCA ¶ 37,754, at 183,268 (2020).

Applicants seeking PA must provide documentation demonstrating that the claimed costs are reasonable. Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 65.³ If costs are found to be unreasonable, they may be disallowed in full or in part "by adjusting eligible funding to an amount . . . determine[d] to be reasonable." *Id.* at 68. A cost is reasonable if, "in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the Applicant makes the decision to incur the cost." *Id.* at 65.

¹ For all references to the number of meals invoiced, we cite to the tables in FEMA's first appeal decision. *See* Applicant's Exhibit 2, First Appeal Analysis at 12.

² Applicant states that it seeks \$565,468.73 in additional costs but does not specify how that amount is allocated between the freight and meal costs. We deem the amounts sought to be those costs denied in FEMA's first appeal decision, i.e., \$475,646.10 for mileage and \$89,822.63 for meals.

³ This version of the PAPPG applies to declared disasters after June 1, 2020. PAPPG at 12.

I. Freight Rate

BEMC seeks \$475,646.10 in additional PA funding for freight costs based on the difference between its requested rate of \$4.50/mile and FEMA's approved rate of \$2.40/mile. Applicant primarily argues that its incurred cost of \$4.50/mile is reasonable because the rate was included in the Master Agreement contract with its contractor, which was competitively awarded. FEMA does not dispute that applicant is entitled to freight costs, but it contends that the rate of \$4.50/mile is unreasonably high.

First, to the extent applicant contends that FEMA is required to accept its proposed rate of \$4.50/mile because it was the agreed-upon rate in a competitively-awarded contract to Storm Services, we disagree. Although the PAPPG states that FEMA "generally" considers costs derived from competitively procured contracts to be reasonable, this provision does not preclude consideration of additional information. *See* PAPPG at 66. Moreover, no applicable statute, regulation, or FEMA guidance requires the agency to accept as dispositive a cost contained within a competitively awarded contract.

Next, FEMA contends that applicant's requested rate is unreasonable because it is higher than the \$2.40/mile average of other rates for heavy equipment approved by FEMA for PA in connection with Hurricane Sally. FEMA also argues that applicant's costs reflect improper duplicative charges because BEMC's contractor also charged separately for freight and for mobilization and demobilization. In support of its position, FEMA cites a decision by another arbitration panel, in connection with a different disaster, which found that a \$4.50/mile rate for freight was unreasonably high because the contractor had separately charged for mobilization and demobilization and for fuel.⁴ *See Florida Keys Electric Cooperative*, CBCA 6822-FEMA, 20-1 BCA ¶ 37,747, at 183,200-01. FEMA contends that using the average rate of \$2.40/mile is reasonable because, in effect, it encompasses an adjustment to account for these duplicative mobilization and demobilization costs.

Applicant argues that FEMA's average rate of \$2.40/mile is unreasonable because it was calculated based on a wide range of heavy vehicles, including non-freight vehicles such as bucket trucks. Applicant states that, in contrast, "[t]he majority of the equipment delivered to the base camps arrived via tractor trailers hauling either 53-foot flatbed trailers,

⁴ Decisions by other panels in other Stafford Act arbitrations are not binding precedent. Rule 613 (48 CFR 6101.613 (2023)) (Arbitration decisions under the Stafford Act are "primarily for the parties, [are] not precedential, and should concisely resolve the dispute."). We recognize the relevance of this information, however, and note that applicant does not dispute FEMA's finding that its freight costs are duplicative of the mobilization and demobilization costs.

53-foot box trailers or 53-foot refrigerated trailers.” Applicant’s Exhibit 3 at 29. With regard to tractor trailers, applicant notes that FEMA’s average included only one rate for a tractor trailer, at the identical rate of \$4.50/mile. *See* Respondent’s Exhibit 2 at 16.

We agree with applicant that FEMA’s data relies on a wide range of vehicles, not all of which appear to be for freight transport. On the other hand, applicant does not provide sufficient information or documentation about the vehicles used by its contractor, such as the identity of the vehicles used or how they compare to the vehicles that comprised FEMA’s average calculations. Applicant’s representation that the “majority of the equipment” transported by the contractor to the base camp locations arrived via tractor trailers is too general to establish eligibility for a higher rate. Even if we accept this representation, it only addresses the “equipment delivered,” rather than the actual trucks used. In addition to this lack of documentation, applicant does not respond to FEMA’s contention that the rate is duplicative of charges for mobilization and demobilization.⁵

In sum, we find that applicant does not demonstrate that a rate greater than that approved by FEMA is reasonable. We therefore deny applicant’s request for additional costs for freight.

II. Meals at Base Camps

Applicant seeks \$89,822.63 for the cost of additional meals served at the two base camps. For the reasons discussed below, we find that costs for some additional meals are eligible for reimbursement.

The work authorization order issued by BEMC to Storm Services did not specify how meals would be invoiced at each dining service (catered breakfast, boxed lunch, and/or catered dinner) nor did it specify a minimum or maximum number of meals to be served. The record shows that the contractor invoiced applicant for a specific number of meals at each dining service. As noted above, neither of the camps reached the maximum occupancy on any day.

⁵ Applicant also submitted what it contends are two quotes for freight from local contractors that are higher than \$4.50/mile as well as evidence that FEMA reimbursed two contractors at rates equal to or higher than \$4.50/mile. *See* Applicant’s Exhibits 5, 11-12, 14. None of these examples are in connection with Hurricane Sally, and all are from either years before or years after that disaster. Moreover, the examples lack relevant information about the type of work quoted or performed. For these reasons, the information does not meet applicant’s burden of demonstrating that the costs it seeks for freight were reasonable under the circumstances.

FEMA's DM initially granted costs for meals based on actual occupancy (one meal per worker per dining service), plus an additional ten percent. The agency's ruling on applicant's first appeal increased the allowable costs for invoiced meals up to the daily contractual maximum of 1500 workers for each dining service. This resulted in a maximum eligibility of up to 3600 meals per day at Foley camp (up to 1200 meals at each of three dining services per day) and of up to 900 meals per day at Bay Minette camp (up to 300 meals at each of three dining services per day). The agency, however, denied costs for meals charged at each dining service in excess of the maximum occupancy for the camp where the meal was served. This methodology found that only 33,314 of the 41,874 invoiced meals were eligible for reimbursement.

A. Justification for Meals in Excess of Maximum Occupancy

FEMA denied reimbursement for meals invoiced at dining services in excess of the maximum occupancy for the base camps. The agency explains that the excess meals were not reasonable because applicant did not justify the higher number and that meals in excess of occupancy reflected waste or a lack of control by the contractor.

Applicant argues that the actual number of meals invoiced should be reimbursed because: (1) workers often skipped dining services and ate more than one meal at a different dining service, and (2) the date the meals were invoiced does not necessarily reflect the date the meals were served. We find no merit to the first argument but find evidence supporting the second argument that makes applicant eligible for reimbursement of some additional meals.

With regard to the first argument, applicant represents that workers often skipped certain dining services and ate multiple meals at other services: "The utility workers are conducting exhausting work and often skip meals to return [to work] as fast as possible. When crews do get an opportunity to re-set at the base camp, each often will eat two or three meals to fill-up." RFA at 19. This representation, however, is not reflected in the record.⁶ The record does not show, for example, that there were days where fewer meals were invoiced than the number of camp occupants at some dining services, followed by services where meals were invoiced for two-to-three times the number of occupants in a manner that would account for the excess meals denied by FEMA. We therefore find no support for extra meals based on this argument.

⁶ For example, during the peak occupancy at Foley camp on September 19 to 22, 2020, the camp never reached its maximum of 1200 workers. Despite the less than full occupancy, for each day the contractor invoiced 1725 catered breakfasts and 1725 catered dinners, along with a varying number of boxed lunches.

Applicant's second argument contends that the contractor's invoicing of a meal on a particular day does not necessarily mean the meal was served on that day. For this reason, excess meals invoiced for some dining services were improperly excluded from reimbursement because they were actually served at other dining services. We find the record supports applicant's argument in two areas based on apparent anomalies in the invoicing of boxed lunches.⁷

First, for the three-day period from September 20 to 22, 2020, the camp occupancy was 1169, 1179, and 1150 workers. During that period, the contractor invoiced for 2940, 900, and 600 boxed lunches, respectively, each day. The 2940 boxed lunches invoiced on September 20 was far in excess of what was invoiced on any other day, and the average number of boxed lunches for these three days is roughly consistent with the number invoiced on other days. This pattern of invoices supports applicant's representation that the boxed lunches invoiced on September 20 were not all served on that day. This apparent invoicing anomaly had an effect on applicant's eligibility for reimbursement. At Foley camp, the number of eligible boxed lunches that were invoiced on September 21 (900) and September 22 (600) was lower than the daily maximum (1200) for each of those days. We find it reasonable to attribute the boxed lunches invoiced on September 20 to the full three-day period from September 20 to 22, thereby increasing the total eligible boxed lunches for those days to the maximum eligible of 1200 per day (adding 300 to September 21 and 600 to September 22). We therefore find that applicant is eligible for additional costs of 900 Foley camp boxed lunches.

A second invoicing anomaly is apparent at Bay Minette camp for the three-day period from September 17 to 19, 2020, where the occupancy was 205, 232, and 236 workers. The contractor invoiced 720 boxed lunches on September 17, but zero boxed lunches on the following two days. As with the prior example, the invoices support the representation that the meals were invoiced on the first day and served over the course of three days. Because all 720 boxed lunches were invoiced on September 17, this amount exceeded the 300 maximum meals for that dining service, resulting in the disallowance of 420 meals. The average number of boxed lunches for those three days is roughly consistent with the number invoiced on other days, and attributing the 720 meals over three days would not cause applicant to exceed the maximum allowed boxed lunch amount for any of those days. We attribute the boxed lunches invoiced on September 17 across the three days. Applicant is

⁷ While other invoicing anomalies could have been present in connection with other dates and dining services, applicant did not present specific arguments or evidence to identify them. We therefore limit our decision here to those invoicing anomalies that are readily apparent and adequately supported by the record.

therefore eligible for additional costs of 420 Bay Minette camp boxed lunches, bringing the total to 1320 additional boxed lunches eligible for reimbursement for the two camps.⁸

B. Additional Meals for BEMC Employees

During this arbitration, applicant argued for the first time that it is eligible for reimbursement of meals for 200 of its own employees. Applicant contends that serving meals to these employees explains some of the higher meal counts and therefore justifies increasing the maximum number of eligible meals at each dining service from 1500 to 1700.

To be eligible for funding for reimbursement of meal costs, an applicant's employees must not be receiving per diem expenses and one of the following circumstances must apply: (1) meals are required based on a labor policy or written agreement that meets the requirements set out in the PAPPG, (2) severe conditions require "employees to work abnormal, extended work hours without a reasonable amount of time to provide for their own meals," or (3) "[f]ood or water is not reasonably available for employees to purchase." PAPPG at 117.

Applicant contends that its contractor was required to provide meals for BEMC employees because a handwritten note at the bottom of the work authorization order stated that the contractor would "provide meals for ___ BEMC employees" at each worker camp, with the number of employees left blank. Applicant's Exhibit 15 at 1. Applicant submitted an affidavit from Alan Schott, the BEMC Vice President of Finance and Accounting, who stated: "I can confirm that the 200 employees were working at least 12-hour shifts, most working 16 hours or more during the base camp activation." Supplemental Affidavit of Alan Schott (Feb. 15, 2024) ¶ 7.a.⁹ Mr. Schott further states that "between COVID-19 closures and the loss of power there were not meals reasonably available" for workers. *Id.* ¶ 7.b.

⁸ FEMA's first appeal decision calculated the cost for boxed lunches based on the invoiced rate of \$20/boxed lunch, plus applicable taxes—which appear to be different at each of the base camps. Applicant's Exhibit 2, First Appeal Analysis at 13. As the parties do not offer any other method to calculate costs, FEMA shall reimburse applicant based on the method set forth in the first appeal decision.

⁹ Mr. Schott also stated that "FEMA has ample documentation of this [in] another matter for this event pending before the CBCA[.] *In the Matter of Baldwin County Electric Membership Corp.*, CBCA 7914, documents at least 80 of the employees' overtime." Schott Supplemental Affidavit ¶ 7.a. This assertion does not support applicant's position because the alleged information was not provided to this panel, nor was the panel directed to how it could be found within the record in the other arbitration.

Despite Mr. Schott's representations, applicant does not provide evidence that meals were actually served to BEMC employees. The handwritten note on the work authorization is not a requirement to provide meals for a specific number of BEMC employees. Applicant does not provide information regarding the days and hours its employees worked or the locations where the meals were served. Further, applicant does not address whether its employees received per diem during the time period. In light of the undefined term of the work order and the absence of other supporting information about the employees, applicant is not eligible for reimbursement of meals it contends were served to its employees.

Decision

Applicant is eligible for reimbursement of costs for an additional 1320 boxed lunches. The costs for freight and the remaining meals are not eligible for reimbursement.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge