



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 24, 2020

CBCA 6822-FEMA

In the Matter of FLORIDA KEYS ELECTRIC COOPERATIVE

Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA; and Wendy Huff Ellard and Parker Wiseman of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant.

Allison McLeary, Compliance, Appeals and Special Projects Manager; and Sherin Joseph, Appeals Officer, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and John Dimos, 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**, **DRUMMOND**, and **RUSSELL**.

Applicant, Florida Keys Electric Cooperative (FKEC), claims entitlement to \$4,359,203.34 for costs FKEC incurred to establish two full-service base camps in the Florida Keys to support recovery and power restoration efforts immediately following Hurricane Irma in 2017. The Panel held a two-day arbitration pursuant to Board Rule 611. The Board rules that FKEC is entitled to partial reimbursement for costs in an amount to be calculated by the parties in accordance with this decision.

Background

FKEC is a private, non-profit utility serving 33,000 member-owners in a geographic area ranging from the upper to the middle portion of the Florida Keys. The Florida Keys consist of a string of small islands that extend from the southeastern tip of the Florida peninsula to the Dry Tortugas and lie between the Gulf of Mexico and the Atlantic Ocean. US Highway 1, consisting of forty-two bridges, connects the islands to each other and the mainland. All of the Florida Keys are located in Monroe County. The FKEC service area extends from the Dade/Monroe County line to the southern end of Marathon, Florida.

In early 2015, FKEC orally solicited bids from an unknown number of base camp vendors from a list provided by the Florida Electric Cooperative Association (FECA). FKEC was attempting to find and pre-qualify a base camp vendor that could provide lodging, showering, sanitation and laundry facilities, meals, medical care, generators, refueling, and other services for a large contract workforce brought to the FKEC service area to restore power in the aftermath of a major hurricane. Only two vendors replied in writing to FKEC's solicitation, and FKEC determined that only one of the two could provide the services it would need. FKEC ultimately entered into an agreement with Storm Services, LLC (SSLLC) that locked in SSLLC's rates but did not guarantee that FKEC would provide work to SSLLC or that SSLLC would accept a work authorization from FKEC. The agreement stated:

It is understood and agreed this Contract does not guarantee any work to SSLLC. FKEC may, at its sole discretion, authorize work to be performed by SSLLC hereunder, contract any portion of the work with other contractors, or perform the work by other means.

SSLLC may decline to accept any Work Authorization.

....

FKEC agrees to pay SSLLC for the performance of the above referenced work in accordance with the sample pricing schedule attached or as may be mutually agreed upon in writing for a specific work assignment.

This agreement with SSLLC was renewed in 2016 and 2017, with no substantial changes to the language of the agreement (the 2017 agreement).

On September 4, 2017, it seemed likely that Hurricane Irma would directly hit the Florida Keys. On September 6, 2017, Florida's governor issued a mandatory evacuation of the Keys. That same day, FKEC engaged SSLLC under a work authorization order pursuant to the 2017 agreement (the work authorization). Under the terms of the work authorization,

SLLC erected two 150-person, full service base camps for the purpose of sleeping 300 workers, feeding 400 workers, and providing medical care to all workers aiding FKEC in restoring power throughout the service area. The work authorization stated:

All requirements furnished by authorization of this Work Authorization shall be furnished in accordance with the terms and conditions of the contract effective August 1, 2017 between **Storm Services, LLC** and **Florida Keys Elective Cooperative, Inc.**, of which this Work Authorization is a part thereof.

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Fees will be based on Storm Services, LLC 2017 Price sheet (attachment 4 of the MASTER AGREEMENT).

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Costs will not exceed \$10,000,000.

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Start Date: 9/8/2017

Completion Date: On or before 10/8/2017

On September 8, 2017, before Hurricane Irma hit the Florida Keys, SLLC transported its equipment and workers from York, Alabama, to Daytona, Florida, in order to be able to mobilize faster to the location of the base camps and remained pre-positioned in Daytona during the storm. Hurricane Irma landed in the Florida Keys on September 10, 2017, with wind gusts exceeding 150 miles per hour. On the morning of September 11, 2020, ninety percent of FKEC's members were without power. In order to restore power to the FKEC service area, FKEC secured the services of forty-five distribution crews, five transmission line crews, twenty tree crews, and twelve damages assessment teams, increasing FKEC's restoration workforce by more than 350 professionals. SLLC established camps in Islamorada (northern end of FKEC's service area) and Marathon (southern end of FKEC's service area) in order to provide a home base for and feed personnel. The base camps provided sleep trailers, shower trailers, toilets, linen, laundry trailers, kitchen facilities, dining facilities, three meals a day, water, ice, light towers, generators, refueling services, and first aid services. The base camp in Islamorada became fully operational on September 12, 2017, and the base camp located in Marathon became fully operational one day later. Both camps were demobilized beginning on the morning of September 23, 2017, after most of the power in the FKEC service area was restored.

FKEC submitted two requests to FEMA for public assistance reimbursement of costs incurred while operating the base camps. In total, FKEC sought to recover \$4,359,203.34 for the two base camps. FKEC paid SLLC \$3,528,595 for labor, equipment, materials, and food, and \$466,527 for freight and fuel. The FKEC base camps incurred about \$40,000 in expenses associated with fresh/grey/black water, \$79,000 associated with first aid services, and \$364,080 in mobilization and demobilization costs. FKEC's per-day, per-worker cost was \$1273. The travel distance (approximately 900 miles each way), the pre-staging, and the time required for mobilization and demobilization to a remote area, with unique topography, and limited space contributed to these costs. FKEC also established two base camps due to the size of the FKEC service area, and the travel time between the north and south base camps on one main road. FEMA, however, determined that FKEC was ineligible for any public assistance citing FKEC's failure to comply with Federal procurement law and FEMA's procurement policies.

On May 22, 2020, FKEC filed a request for arbitration with the Board. As part of the arbitration, FEMA indicated that it had discretion to reimburse FKEC for reasonable costs for the base camp services using comparable rates from other contractors. In total, FEMA determined that \$866,250 of the total cost was eligible for reimbursement.

Discussion

The issue before the Board is the reasonableness of SLLC's costs for the base camps provided to FKEC after Hurricane Irma struck the Florida Keys. There is no dispute that the applicant and work are eligible for public assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C.A. § 5189a(d) (West 2019). Although FEMA determined that partial funding in the amount of \$866,250 was reasonable, under the Stafford Act, the Board reviews the evidence de novo and is not bound by FEMA's determination. *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005. While we agree that only partial funding of the base camp services is warranted, the amount of the funding remains to be determined as discussed below.

FEMA asserts that FKEC failed to follow its own or FEMA's procurement policies when it executed the 2015, 2016, and 2017 agreements. Although these agreements were called contracts, the agreements were not contracts because they lacked consideration, an essential element of a contract. "To constitute consideration, a performance or a return promise must be bargained for." Restatement (Second) of Contracts § 71(1) (Am. Law Inst. 1981); *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002). These agreements established no performance or return promise and were nothing more than a prequalification of SLLC to aid in the procurement of future requirements. FEMA policy supports a finding that such a prequalification agreement is not a contract.

Prequalified lists, however, are not contracts. They are tools to aid in the procurement of future requirements by allowing NFEs [Non-Federal Entities] to review the qualifications of prospective contractors prior to contract award of an anticipated future need.

Public Assistance Procurement Disaster Assistance Team (PDAT) Field Manual Supplement at VI-6 (June 21, 2016). FKEC, however, did not engage in a full and open competition in its efforts to prequalify base camp services vendors.

Even if FKEC's prequalification of SLLC was improper, however, FKEC's use of noncompetitive procedures to award the work to SLLC in the face of the imminent arrival of Hurricane Irma was acceptable. "Procurement by noncompetitive proposals . . . may be used only when . . . [t]he public exigency or emergency for the requirement will not permit a delay resulting from a competitive solicitation." 2 CFR 200.320(f)(2). There was no time to compete a solicitation for base camp services as Hurricane Irma threatened the Florida Keys.

Federal regulations allow for noncompetitive procurements under certain circumstances, including when a non state applicant determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. This represents an exception to requirements for full and open competition.

FEMA Fact Sheet, *Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances* (Jan. 19, 2018). FKEC also complied with its own procurement procedures.

In cases of emergency, impacting continuity of service to members and to protect the Cooperative, it may be necessary for the Chief Executive Officer to make purchases of materials, equipment, and services without prior Board approval and without following established purchasing procedures.

FKEC Policy Bulletin 207.3, I(C) (Emergency Purchase Rule). "However, the use of noncompetitive procurements does not relieve non state applicants from complying with other procurement requirements or from ensuring that costs are reasonable." FEMA Fact Sheet, *Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances*.

FEMA argues that FKEC's procurement process for its 2015, 2016, and 2017 agreements and work authorization were flawed because even in exigent circumstances, FKEC had to do an independent cost estimate and a cost and price analysis before contracting with SLLC. FKEC counters that it did complete an adequate independent cost

estimate and cost and price analysis when it considered the location of the camps, the need for one or two camps, the logistics of staging the base camps, the proposals of two base camp vendors, and the establishment of a cost ceiling. FKEC also, prior to executing the work authorization, attempted to verify the reasonableness of SSSLIC's pricing by confirming that SSSLIC's pricing was the same as SSSLIC's pricing for FEMA-ordered base camps in Houston days earlier. Federal regulations and FEMA's Public Assistance Program and Policy Guide (PAPPG) recognize that "[t]he method and degree of [cost or price] analysis depends on the facts surrounding the particular procurement situation." 2 CFR 200.323(a); PAPPG at 32. Although FKEC may have failed to adequately analyze or compare SSSLIC's costs and pricing when it prequalified SSSLIC in 2015, 2016, and 2017, FKEC's efforts to confirm the reasonableness of SSSLIC's pricing during and after the emergency circumstances of Hurricane Irma satisfy the Panel that FKEC did attempt to analyze SSSLIC's costs and pricing. Moreover, the fact that the base camps and base camp services were successfully established and effectively utilized, combined with the remote locale, the simultaneous demand for these services, and the emergency and exigent situation encountered merits award of necessary and reasonable costs, despite any procurement irregularities.

Rather than disallow all costs incurred through noncompliant procurement procedures, FEMA policy allows reimbursement of costs it finds fair and reasonable. 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 decision was made to incur the cost. FEMA will generally analyze cost reasonableness by use of historical documentation for similar work, average costs for similar work in the area, and published unit costs from national estimating databases and FEMA cost codes.

FEMA Second Appeal Decision, City of Tallahassee, 1785-DR-FL (May 11, 2015); *see also* FEMA Job Aid, *Public Assistance: Reasonable Cost Evaluation* at 3-6 (Oct. 13, 2018). FKEC's contracting processes that were inconsistent with federal procurement law, however, make it difficult to determine if SSSLIC's costs were reasonable.

In support of its costs and to prove that its costs were reasonable, FKEC points to a base camp services contract with SSSLIC that FEMA procured in September 2017 for the Hurricane Harvey recovery in Texas. After receipt of quotes from five vendors, FEMA procured the base camp services using SSSLIC's same standard itemized unit priced rate sheet that FKEC used. The base camp in Beaumont, Texas, was open for approximately fourteen days, and FEMA only purchased sleeping services from SSSLIC. However, like FKEC, FEMA did insist on trailers instead of tents due to space limitations and the need for a more secure alternative. FEMA also paid the same charge of \$4.50 per mile for expedited freight, ten percent of the total freight charge, similar mobilization and demobilization fees,

and a five percent administration fee. Ultimately, FEMA paid SLLC higher rates for SLLC's sleeping services (\$383 per person, per day paid by FEMA compared to \$300 per person, per day paid by FKEC). FEMA also either paid SLLC for days when the base camps were not in use, or paid SLLC for four days of demobilization. FEMA argues that the contract with SLLC for Hurricane Harvey is not comparable to FKEC's contract with SLLC because the Texas contract involved a "different authority" and involved different factors. We find that the Texas contract between SLLC and FEMA informs the Panel's determination of the reasonableness of FKEC's costs and makes them more reasonable.

To determine if the base camp costs were reasonable, FEMA advocates comparing the costs of the project with a "properly procured contract for a project with a similar scope of work in the same geographic area under similar circumstances." FEMA Job Aid at 5. "Factors to consider . . . are: events and a scope of work of comparable magnitude; contracts of a similar nature; and any applicable market factors and/or any other unique circumstances that may impact either of the costs respectively." *Id.* If no cost or price analysis was done, FEMA should "identify elements that would otherwise have been a part of a cost or price analysis." *Id.* Accordingly, FKEC compares its costs to the average cost for SLLC for base camps deployed in the Florida Panhandle and Georgia following Hurricane Michael in 2018, one year later. These camps involved other rural electric cooperatives, involved a similar geographic area, were similar in size, and supported electrical repair work. FEMA questions the comparison because the vendor was SLLC, and the average cost for FKEC's base camps was \$1273 per worker, per day and the average cost for SLLC base camps following Hurricane Michael equaled \$710 per worker, per day. FKEC attributes the difference in price to the remote environment, unique topography, limited available space in the Florida Keys, and FKEC's resultant need for two small camps instead of one larger camp, to include nursing stations, fresh water, disposal of black and grey water, and trailers instead of tents for each. After adjusting FKEC's costs for these factors, the FKEC base camp adjusted cost was \$789 per worker, per day. Again, this informs the Panel as to the reasonableness of FKEC's costs, and makes them more reasonable. Another comparison for FKEC's incurred costs is to the cost incurred for base camps by an investor-owned entity, Florida Power and Light (FPL), whose territory borders FKEC's territory. FPL paid higher rates to Emergency Disaster Services (EDS) for Hurricane Irma base camps with the same services that were provided to FKEC. EDS's rates were notably higher due to the need for smaller-sized base camps for shorter durations than FKEC required.

FEMA alleges that the only comparable rate for the FKEC base camps is the per-person, per-day pricing of \$205 provided by the State of Florida's contractor, OK's Cascade. Monroe County also accessed the State of Florida's rates through OK's Cascade and paid

\$223.45 to \$256.15 per day, per person for Hurricane Irma base camps.¹ FKEC claims that this pricing is not reasonable as a comparison here because (1) nothing in the record indicates that FKEC could have accessed this state contract pricing; (2) the services provided were not the same services as those provided by SLLC; (3) in CBCA 6716-FEMA, FEMA challenged the pricing structure of OK's Cascade's contract; (4) this pricing was based on a thirty-day-minimum term, which lowered the per-person, per-day rates accordingly; (5) OK's Cascade's base camp deployment for the State of Florida and Monroe County was nineteen times larger than FKEC's base camps; (6) the per-person, per-day rate for Monroe County ranged depending on size and duration of the camp; (7) OK's Cascade provided 93,000 base camp beds to Monroe County and the State of Florida following Hurricane Irma, compared with the 4800 base camp beds provided by SLLC; (8) OK's Cascade provided sleep tents and SLLC provided sleep trailers; (9) OK's Cascade was not on FECA's vendor list from which FKEC identified potential vendors, did not reply to FKEC's request for base camp providers, and was unknown to FKEC at the time of the disaster; and (10) none of the State of Florida or Monroe County's base camps were operational until September 15, 2017, several days after FKEC's base camps opened. While these costs also inform the Panel as to the reasonableness of FKEC's costs, the inaccessibility of this vendor to FKEC, the difference in the size of the base camps, the type of services provided, and the timing of the services render this comparable less relevant to the Panel's determination as to reasonableness.

Mobilization and Demobilization Costs

FEMA recommends that we accept the State of Florida's rates for mobilizing and demobilizing a base camp in the Florida Keys as a result of Hurricane Irma. The State of Florida's set rate for mobilization and demobilization of a 500-person base camp was \$265,000. Proportionally, the cost of mobilizing and demobilizing a 150-person base camp would be \$79,500 ($(\$265,000/500) \times 150$) each. In *Monroe County Florida*, CBCA 6716-FEMA, the Board found that mobilization and demobilization fees in the amount of \$315,000 for SugarLoaf School base camp and \$289,000 for the Marathon base camp were both necessary and reasonable, and did not vary based on the size of the base camp. FEMA

¹ After Hurricane Irma hit, Ashbritt, a debris removal contractor, and its subcontractor, OK's Cascade, established two base camps – one at Marathon airport for 250 people (fully operational on September 15, 2017) and the other at Sugarloaf School for 100 people (substantially complete on September 20, 2017) – for Monroe County, Florida, using the rates negotiated with OK's Cascade by the State of Florida plus a nine-percent markup for Ashbritt. In *Monroe County Florida*, CBCA 6716-FEMA (Sept. 11, 2020), FEMA challenged Monroe County's request for reimbursement of the costs incurred for the base camps.

challenged these mobilization and demobilization costs because Monroe County's costs for mobilization and demobilization were higher than what the State paid. The Board, however, found these higher amounts reasonable because the County "established its camps first, when the road and bridge conditions along the single highway that connects the Florida Keys were extremely poor." Similarly, we find that FKEC's costs of \$364,080 for mobilization and demobilization of both camps are reasonable because SLLC traveled over five hundred miles to the Florida Keys before the Hurricane in order to establish the camps as soon after the hurricane as possible – three days before Monroe County's camps were fully operational – under very poor conditions. This cost is significantly less than the costs for mobilization and demobilization paid by Monroe County. However, the cost for expedited freight and the ten percent fuel adjustment seem to be additional mobilization and demobilization charges that are especially high. Even though FEMA paid these same rates for the freight and fuel adjustment for the Texas SLLC contract, we find that these charges are not reasonable and FKEC should not be reimbursed \$466,527 for the expedited freight costs and fuel adjustment.

Cost-Plus-Percentage-of-Cost Contract Elements

FEMA characterizes certain provisions of the SLLC contract as prohibited cost-plus-percentage-of-cost contract elements. FKEC counters this argument by pointing to the fact that the costs in SLLC's contract were not subject to SLLC's unilateral adjustment once the seven-day minimum was met, FKEC limited SLLC's entitlement to eleven days plus five days for mobilization and demobilization, and the contract had a \$10,000,000 cost ceiling. For the reasons posited by FKEC, we find that the contract was not a prohibited cost-plus-percentage-of-cost contract. However, there are cost-plus-percentage-of-cost elements that must be deducted from the amount reimbursed. This would include the thirty-percent markup for medical supplies, the thirty-percent markup for propane, the thirty-percent markup for nurse hotel rooms, and the five-percent administration fee.

These cost-plus-percentage-of-cost elements obligated FKEC to pay SLLC an amount, undetermined at the time of contract award, to be incurred in the future based on a percentage of future costs. FEMA prohibits cost-plus-percentage-of-cost contracts because they incentivize the contractor to incur additional, unnecessary expenses to earn a larger profit, thus inflating costs.

Even if a state complies with its own policies and procedures when procuring services or property under a FEMA award, FEMA will not provide full reimbursement of a state's third-party contract costs if FEMA determines the costs do not conform to the cost principles. For example, FEMA will not provide full reimbursement in the case of cost-plus percentage of cost or cost-

plus percentage of construction cost contracts, as FEMA considers the percentage of cost portion of the contract to be unreasonable.

PDAT Field Manual Supplement at III-2.

Decision

We grant the application in part. FEMA shall pay FKEC \$4,359,203.34, minus \$466,527 (for expedited freight and fuel expenses); the thirty-percent markup for nurse hotel rooms, propane, and medical supplies; and the five-percent administration fee for each base camp.

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Jerome M. Drummond

JEROME DRUMMOND

Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge