



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

December 15, 2020

CBCA 6909-FEMA

In the Matter of HARRIS COUNTY, TEXAS

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Michelle Zaltsberg of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX; and Randall Smidt, Vince Ryan, and Robert Soard of the Office of the Harris County Attorney, Houston, TX, counsel for Applicant.

W. Nim Kidd and Suzannah Jones, Texas Division of Emergency Management, Austin, TX; and Julie A. Masek, Texas A&M University System, College Station, TX, appearing for Grantee.

Christiana C. Cooley and Ramoncito J. deBorja, 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 **ZISCHKAU**, **LESTER**, and **CHADWICK**.

In late 2017, Harris County incurred more than \$45 million in debris removal costs after Hurricane Harvey, a category four storm, caused massive flooding in Harris County and other nearby areas in Texas. The Federal Emergency Management Agency (FEMA) granted Harris County's request for public assistance (PA) under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), reimbursing all but \$15 million of the claimed costs. Harris County sought arbitration under 42 U.S.C.

§ 5189a(d) of FEMA's denial of that \$15 million. We grant Harris County's application in part.

### Background

The massive flooding that Hurricane Harvey caused in Harris County occurred over the course of several days beginning August 25, 2017. Thousands of residential and commercial structures were flooded, with varying degrees of inundation and damage. For Harris County, 70% of which was eventually covered in water, that flooding required that unprecedented amounts of debris be removed and disposed of in an expedited manner for public health and safety reasons. The President declared a major disaster for the State of Texas on August 25, 2017, and authorized PA funding for both emergency and permanent work for Harris County.

Prior to Hurricane Harvey, Harris County had agreements in place with two different vendors—one designated as the “primary” vendor and the other, DRC Emergency Services, LLC (DRC), designated as the “secondary” vendor—to provide emergency debris removal services for Harris County if and when they were necessary. The two vendors were selected from six that responded to a request for bids that Harris County issued in 2015 in anticipation of possible future emergencies. The agreement with each vendor provided that “work shall consist of clearing and removing any and all ‘eligible’ debris as defined by FEMA Publication 325, all applicable State and Federal Disaster Specific Guidance and policies, and/or as directed by the County.” Applicant Exhibit 21 at 23. Nevertheless, neither agreement imposed any limitations on the amount of time that debris removal services might take, something that DRC's president testified is standard in the industry because the imposition of such deadlines is considered too risky for contractors that accept these types of pre-positioned contracts. Each agreement provided that “[t]hese services will only be utilized during emergency situations” and that “funds will not be encumbered until the services are needed and the County activates the contract.” *Id.* Neither vendor could provide any services “without a Harris County Purchase Order, signed by an authorized agent of the Harris County Purchasing Department.” *Id.* at 19.

The relevant pricing terms for the debris removal services at issue in this arbitration provided for a specific unit price per cubic yard for debris removed, a unit price for each abandoned vehicle removed, a unit price for each tree or stump removed, and a unit price per pound of asbestos removed, without regard to the number of labor hours that each task required. The prices in each agreement were to “be all inclusive,” such that “[n]o price changes, additions, or subsequently qualifications will be honored during the course of the contract.” Applicant Exhibit 21 at 18. Further, unlike debris removal contracts in many other jurisdictions, each per-cubic-yard unit price in Harris County's contracts was a “cradle-

to-grave” price, meaning that the contractor was responsible for every cost involved in the debris removal, including but not limited to “tipping fees” (that is, the actual disposal costs that the contractor would have to pay the disposal site permanently to take the debris). Neither agreement contained a guarantee that *any* services would be ordered or a minimum payment obligation. The award documents indicated that “[t]he secondary vendor will be utilized when the primary vendor is unavailable or unable to fulfill the services required.” Applicant Exhibit 21 at 1.

Early estimates of the amount of debris that would be generated by flooding in Harris County, developed in part using calculations from the United States Army Corps of Engineers, exceeded 2.25 million cubic yards, an unprecedented figure for Harris County, before soon thereafter being revised upward to possibly in excess of 4.2 million cubic yards. By September 5, 2017, Harris County’s models, consistent with FEMA 329 *Debris Estimating Field Guide* (Sept. 2010), had been adjusted to estimate a likelihood of just over 3.1 million cubic yards of debris. As the flooding was occurring, public health officials immediately began insisting that expedited action would be necessary to remove construction, demolition, and vegetative debris as quickly as possible so as to minimize development of public health hazards such as mold, mosquito breeding grounds (in light of Zika virus concerns that were of particular issue at that time, as well as malaria concerns), rodents, and tetanus.

As the storm began, Harris County immediately approached its primary vendor to order debris removal services, but that vendor declined to perform in accordance with the terms of its bid. Harris County’s secondary vendor, DRC, said that it would do its best to perform with the thirty debris removal trucks that it had set aside, but that the high volume of services that Harris County was realizing it would need in an expedited time frame would overwhelm DRC’s existing capabilities. Normally, DRC represented, it might be able to add additional freelance debris removal personnel and equipment to supplement its team through short-term hires and rentals, but news of another category four hurricane, Hurricane Irma, that was about to hit Florida (a hurricane that arrived on September 9, 2017) was causing a significant migration of debris removal teams to Florida. Unlike Texas, where the bulk of debris removal needs following hurricanes typically involves construction and demolition debris, hurricanes in Florida typically leave much higher percentages of vegetative debris, the removal and disposal of which is generally viewed within the industry as being easier and faster and as ultimately providing higher pay. This migration created great concern about the adequacy of debris removal resources that would remain in Texas, and specifically the Harris County area, to deal with the massive debris removal needs in that community. The County Engineer was estimating that, with the seemingly available resources, removal of all debris could take twelve to eighteen months. Yet, Harris County had a regulatory deadline of six months (or February 25, 2018) to complete debris removal operations, 44 CFR 206.204(c)

(2017),<sup>1</sup> and, to address concerns of public health experts, believed that it needed to complete debris removal efforts by the end of the 2017 calendar year. FEMA has not contested the reasonableness of that belief.

On or about September 4, 2017, DRC suggested a solution to address the lack of existing available trained debris removal resources in the area: it could attempt to hire individuals who normally use smaller self-owned trucks to deliver sand, gravel, and similar materials in the area and train them to collect, haul, and dispose of construction and demolition debris, a process very different from sand-and-gravel hauling. Individuals who haul such materials, though, typically are paid more for their services on an hourly basis than they would make from removing debris on a cubic yard basis, given the increased time that it takes to collect different kinds of debris and haul it, sometimes for fairly long distances, to the limited number of disposal sites that would be available to them and the need for them to pay “tipping fees” to the owners of the disposal sites. DRC thought that an increased payment amount might create enough of an incentive to attract a sufficient number of sand-and-gravel haulers willing to be trained to perform debris removal on an emergency and expedited basis.

Assuming, based upon Harris County’s projection at that time, that there would likely be approximately three million cubic yards of construction and demolition debris, DRC’s president suggested offering an incentive of an additional \$5 per cubic yard, above DRC’s existing contract unit prices, to attract a sufficient number of sand-and-gravel haulers to remove all Harris County debris by the end of the 2017 calendar year. Some municipalities in Florida were, in anticipation of Hurricane Irma, offering an increase of approximately \$5 per cubic yard of debris removed, above standard industry prices, in an effort to attract debris removal contractors. The City of Houston, too, had increased its per-cubic-yard rates to deal with Hurricane Harvey, although the record does not clearly reflect the amount of that increase.<sup>2</sup> Nevertheless, the dollar figure for the Harris County incentive was a “back of the envelope” number that DRC and Harris County representatives quickly worked out on an informal basis, with the \$5 figure being somewhat of a gut feeling on the part of DRC’s president.

---

<sup>1</sup> That deadline was later extended, but Harris County did not know in September 2017 of a potential extension.

<sup>2</sup> The record suggests that the City of Houston possibly may have paid significantly more per cubic yard than Harris County, but Harris County has limited knowledge of the City’s payments, and the evidence on this point is less than fulsome. FEMA has declined to identify the City of Houston’s numbers because they are not yet fully reconciled.

Harris County immediately emailed FEMA to ask whether this incentive approach would be acceptable for purposes of FEMA reimbursement. FEMA's Emergency Management (EM) Program Specialist for Region VI responded that he had not previously seen a request to approve incentive pricing like this one, but recognized that "[r]esources are going to be hard to get and with the other Hurricane [Irma] no one knows what is going to happen." Applicant Exhibit 44 at 1. The EM Program Specialist suggested pushing the Office of Chief Counsel (OCC) and the Office of Inspector General (OIG) for an answer. Harris County's witness testified that Harris County received no responses to such inquiries.

Very quickly thereafter, on September 6, 2017, Harris County presented DRC with a contract amendment creating a series of incentive payments that looked different from what DRC had suggested. In the amendment, Harris County created a series of three one-time \$5 million payments if DRC was incrementally able to provide a specific number of hauling units by each of three specific target dates, the first of which was described as follows:

Mobilization and Use Incentive #1: Harris County will pay [\$5,000,000] if DRC provides at least 40 operational debris hauling units that have a capacity of over 60 cubic yards and at least 30 additional operational debris hauling units[] that have a capacity of any at least 30 cubic yards by 10:00 a.m. Friday, September 8, 2017,[] and maintains 80% or greater average operational rate of the sum of all required trucks stated above through all 3 passes until those passes are deemed complete by Harris County.

A second \$5,000,000 incentive payment would be made if, by September 14, 2017, DRC increased those amounts to sixty operational debris hauling units with a capacity of over sixty cubic yards and fifty units with a capacity of over thirty cubic yards. A third and final \$5,000,000 incentive payment would be made if DRC increased those numbers by September 20, 2017, to sixty-five units with a capacity of over sixty cubic yards and 100 units with a capacity of over thirty cubic yards. By the end of the third incentive period, DRC was expected to have established the capacity to remove 6163 cubic yards of debris per week.

Harris County presented no evidence in this arbitration—either testimonial or documentary—establishing how, why, or when the idea for the three-payment incentive agreement was generated. Looking at the numbers and applying the three-million-cubic-yard debris estimate about which DRC's president testified, it is easy to see that someone, presumably within Harris County's contracting office, multiplied the anticipated three million cubic yards by \$5 to come up with a total \$15 million incentive. Nevertheless, no work papers support either the calculation or the amount of the payment, and Harris County was unable to explain it. Despite the absence of such support, Harris County, relying on testimony from DRC's president, argues that the incentive payment was a creative and

ultimately successful means of obtaining services in an expedited manner that was absolutely necessary to protect the health of its citizens.

On September 10, 2017, four days after Harris County executed the incentive payments amendment, FEMA, through the FEMA Region VI Regional Administrator, issued a memorandum acknowledging that exigent and emergency conditions existed in the State of Texas that allowed both state and local governments in declared counties, including Harris County, to procure contracts for goods and services on a noncompetitive basis through October 10, 2017. Applicant Exhibit 33 at 1. In the memorandum, FEMA provided that, “[b]ecause the exception is only available for the duration of the exigent and emergency circumstances, applicants must start the process of competitively procuring goods and services for long term recovery so that they can transition to the new competitively procured contracts when these circumstances cease to exist.” *Id.* at 2.

Five days later, on September 15, 2017, the FEMA Region VI Regional Administrator issued another memorandum acknowledging that multiple locations within Texas were having problems getting debris removal contractors to perform work at the prices set under pre-existing contracts. The Administrator recommended that, to the extent a locality had to agree to a higher debris removal price, it would “be critical to include written documentation that supports the current circumstances and need for the requested price increases.” Applicant Exhibit 19 at 2. The Administrator indicated in the memorandum that “[s]peculation and unsupported price quotes are not sufficient and could open the local government to risk of loss of funding.” *Id.*

Ultimately, DRC used the incentive payments to attract and train a sufficient number of sand-and-gravel haulers to meet the targets in the amendment, and all debris was removed within Harris County even earlier than the year-end deadline that Harris County was hoping to meet. However, DRC only ended up having to remove a total of 1,129,652.73 cubic yards of debris, far less than the three million cubic yards originally anticipated.

After completing all Harvey-related debris removal activities, Harris County submitted a claim for total actual costs of \$45,865,635.40, inclusive of the \$15 million incentive payments, under the Stafford Act provision (42 U.S.C. § 5173) authorizing PA funding for debris or wreckage removal following a major disaster. In October 2019, FEMA approved payment of the entire amount requested except for the \$15 million in incentives, finding the incentive improper and unreasonable. Harris County filed a first administrative appeal to FEMA Region IV in December 2019, and FEMA denied that appeal in April 2020. Harris County submitted its request for arbitration to the Board on August 20, 2020, and the panel conducted a hearing, virtually, over the course of three business days beginning November 5, 2020.

## Discussion

### Standard of Review

FEMA correctly acknowledges that, in arbitration matters, the Board reviews FEMA eligibility determinations, including those on challenged PA grants, *de novo*. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688. Nevertheless, FEMA also argues that, because cost reasonableness is a “question of fact,” the Board “will overturn [FEMA’s] factual determinations only where [they are] clearly erroneous.” FEMA Response at 7 (citing *Kellogg Brown & Root Services, Inc. v. United States*, 742 F.3d 967, 970 (Fed. Cir. 2019)). FEMA’s proposed review standard is wrong. “As explained in the preamble to our arbitration rulemaking, ‘because an arbitration decision replaces final action by FEMA’ and a panel is not a reviewing court, ‘the arbitrators must find facts and interpret the law *independently* on behalf of the Executive Branch.’” *Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436 (quoting 84 Fed. Reg. 7861, 7862 (Mar. 5, 2019) (emphasis added)). Our *de novo* review extends to every aspect of this arbitration, including the resolution of disputed facts. *Florida Keys Electric Cooperative*, CBCA 6822-FEMA, slip op. at 4 (Nov. 24, 2020); *Monroe County, Florida*. Just like in an appeal of a contracting officer’s decision under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2018), parties that come to the Board for arbitration “start . . . before the board with a clean slate.” *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (en banc). In fact, given that the applicant is entitled to submit new evidence in the arbitration that was not originally provided to FEMA, 42 U.S.C. § 5189a(d)(2), the fact-finding deference that FEMA seeks is unworkable. We provide no deference to FEMA’s fact-finding.

### FEMA’s Arguments About DRC Contract Defects

Before we address the central issue in this matter, which is the reasonableness of Harris County’s decision to agree to \$15 million in incentive payments, we must dispose of a multitude of side arguments that FEMA seemingly tossed into this matter, hoping that something might stick. These arguments are so lacking in merit that we cannot understand why FEMA decided to raise them.

*First*, FEMA argues that Harris County’s agreement to incentive pricing is automatically unreasonable because “performance of the debris removal work was already prescribed in the original DRC contract, and DRC had agreed [in its contract] to perform the work in accordance with its bid.” FEMA Response at 28. The evidence presented in this arbitration makes clear, however, that the primary vendor had declined to perform at the prices in its contract when Harris County approached it and that DRC, although willing to perform, could not do so at the levels that Harris County needed absent incentives to obtain

debris removal services from unusual sources that DRC would need to train. The OIG reports included in the record show that Harris County was not alone, as virtually all jurisdictions in Texas and Florida responding to Harvey and Irma were experiencing the same kind of vendor refusals to meet prices set forth in similar contracts. Although FEMA asserts that Harris County should have sued its primary vendor and possibly the secondary vendor for contract breach and forced them either to perform at the contract's unit prices or to pay damages, rather than agreeing to an incentive payment with the secondary vendor, there is no basis for a breach claim in the circumstances here under Harris County's contracts as written. Although the terms of both vendors' agreements called them "contracts," their agreements neither obligated Harris County to purchase all of its debris removal requirements solely from these two vendors nor provided a guarantee that *any* minimum amount of services would ever be ordered.

The benefit of these contracts is that they pre-position Harris County immediately to be able to issue purchase orders to pre-approved contractors when an emergency arises, without the need for further responsibility and capability reviews or the issuance of new requests for proposals. Nevertheless, such contracts are illusory in nature in the sense that they create no mutuality of obligation, rendering them essentially enforceable only to the extent that, when a need arises, both parties are willing to meet the originally agreed upon terms. *See, e.g., Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923); *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998); *Torncello v. United States*, 681 F.2d 756, 761-62 (Ct. Cl. 1982). As we recently recognized in similar circumstances in another FEMA arbitration, where contracts like those at issue here "established no [mandatory] performance or return promise" arising out of mutuality of obligation, those alleged contracts are "nothing more than a prequalification of [the primary and secondary vendors] to aid in the procurement of future requirements," and the pre-approved vendors are free to choose *not* to accept a purchase order if issued. *Florida Keys Electric Cooperative*, slip op. at 4. The mere fact that the parties called the original vendor agreements "contracts" does not make them so absent mutuality. *Packer v. Social Security Administration*, CBCA 5038, 16-1 BCA ¶ 36,260.

The testimony in this arbitration indicated that it is standard practice for local governments to pre-position debris removal contracts like the primary and secondary vendor contracts here—contracts that do not obligate the local government to pay any money if services are not needed or place limits on how much can be ordered—that pre-qualify contractors to provide services and that the local government can immediately invoke without having to engage in further competitive procurement activities. In the situation before us now, Harris County would have had no basis for suing either the primary vendor or DRC for failing to honor any price commitment in their otherwise unenforceable contracts. Though both the primary vendor and DRC were pre-qualified to provide debris removal services to



Harris County, neither was *required* to perform at whatever levels of performance Harris County desired. Further, even if otherwise enforceable as a contract, the DRC agreement contained no mandatory time line or limits by which debris removal had to be completed, a practice standard in the industry, meaning that the contract provided Harris County no way to require expedited removal services. FEMA's arguments seeking to enforce the pricing terms of the original "contracts" and suggesting that Harris County should sue its vendors for breach of contract fail.

*Second*, FEMA claims that Harris County is ineligible for any additional cost recovery because the County's underlying agreement with DRC, the terms of which become incorporated into any purchase order that Harris County issues, does not contain various clauses that FEMA contends are required by the Office of Management and Budget Guidance for Grants and Agreements regulations set forth at 2 CFR 200.317, 2 CFR 200.326, and Appendix II to 2 CFR Part 200 (2017). As authority for its ineligibility argument, it relies on a remedies provision that in 2017 was located at 2 CFR 200.338(b) (2017),<sup>3</sup> which permits the government to "[d]isallow . . . all or part of the cost of the activity or action not in compliance." Without deciding the extent to which section 200.338(b) would permit disallowance of otherwise reasonable costs, we reject FEMA's arguments that any necessary clauses are missing:

1. FEMA argues that paragraph (C) in Appendix II required the Harris County/DRC contract to contain an Equal Employment Opportunity (EEO) clause compliant with 41 CFR 60-1.4(b). That requirement applies only to contracts that "meet the definition of 'federally assisted construction contract' in 41 CFR Part 60-1.3." Appendix II, ¶ C. FEMA contends that the Harris County contract, some of which involved debris removal from roads and highways, is a construction contract because 41 CFR 60-1.3 includes the "rehabilitation" of highways in its definition of "construction work." Contrary to FEMA's unsupported assertion, debris removal is *not* rehabilitation work. *See* 23 CFR 650.403(c) (roadway bridge rehabilitation involves major work to restore structural integrity); Federal Highway Administration Publication FHWA-RD-03-088 (Nov. 2003) (now superceded) (pavement rehabilitation involves resurfacing, reconstruction, the addition of lanes, and/or pavement structure alteration) (available at <https://www.fhwa.dot.gov/publications/research/infrastructure/pavements/ltpa/reports/03088/08.cfm>). Even FEMA

---

<sup>3</sup> Effective November 12, 2020, this provision has been redesignated as 2 CFR 200.339(b). *See* 85 Fed. Reg. 49,506, 49,559 (Aug. 13, 2020). In this decision, we cite to the regulation as section 338(b), referring to its location at the time of the disaster at issue.

expressly recognizes the distinction between debris removal and roadway rehabilitation at page 101 of its September 2019 Procurement Disaster Assistance Team Field Manual (2019 PDAT Field Manual) (available at [https://www.fema.gov/sites/default/files/2020-07/fema\\_procurement-disaster-assistance-PDAT\\_field-manual.pdf](https://www.fema.gov/sites/default/files/2020-07/fema_procurement-disaster-assistance-PDAT_field-manual.pdf))—a document that Harris County brought to our attention, but that FEMA neither addressed nor cited in its briefing.

2. FEMA complains that the Harris County contract did not contain a clause requiring certification consistent with the Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352. Paragraph (I) of Appendix II, upon which FEMA relies as the basis of its argument, does not require such a clause. It only requires that contractors subject to the statute actually “file the required certification,” which DRC did.

3. FEMA complains that Harris County’s contract does not comply with paragraph (B) of Appendix II, which requires that “[a]ll contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.” The Harris County contract contains a clause permitting immediate termination of any purchase order upon breach by the contractor and permitting termination without cause on thirty days’ notice. Applicant Exhibit 21 at 19-20. That satisfies OMB’s regulation. Although FEMA complains that the termination-without-cause provision should be more like the convenience termination provision in the Federal Acquisition Regulation (FAR) and allow for immediate termination without prior notice, nothing in OMB’s regulation requires that, as even FEMA’s witness on this topic acknowledged during the hearing. *See also On Time Postal Service*, PSBCA 2528, 90-2 BCA ¶ 22,698 (enforcing convenience termination provision that required sixty days’ written notice); *Executive Airlines, Inc.*, PSBCA 1452, 87-1 BCA ¶ 19,594 (same for clause requiring twenty-eight days’ written notice).

4. FEMA complains that the Harris County contract violates paragraph (A) of Appendix II, which requires the contract to “address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.” Contrary to FEMA’s assertion, the purchase order provides remedies for breach.

*Third*, FEMA argues that the contract is an improper time-and-materials (T&M) contract, in violation of 2 CFR 200.318, and that FEMA, again under the authority of 2 CFR 200.338(b), has the discretion to preclude or limit reimbursement for costs incurred under such a contract. Neither the original contract, under its original terms, nor the contract as amended is a T&M contract. At page 42 of its 2019 PDAT Field Manual, FEMA defines a T&M contract as a contract whose cost to the non-federal entity is (1) the sum of the actual cost of materials and (2) direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit, but in which (3) no fee or profit is allowed except as part of the fixed billing rate for direct labor hours. Unlike that definition, the pricing terms for debris removal at issue here provided for a specific unit price per cubic yard for debris removed, a unit price for each abandoned vehicle removed, a unit price for each tree or stump removed, and a unit price per pound of asbestos removed, without regard to the number of labor hours that each task required. That is not T&M pricing, but is more in the nature of an indefinite quantities agreement with fixed unit prices, albeit without any minimum purchase guarantee.<sup>4</sup> Further, even if the contract, either before or after the incentive pricing amendment, could somehow be interpreted as a T&M contract, FEMA's 2019 PDAT Field Manual states that there is no absolute bar to using a T&M contract "in the immediate response to an incident to protect lives or protect public health and safety," 2019 PDAT Field Manual at 43, the situation that existed here. FEMA has no basis for withholding reimbursement based upon its T&M contract argument.

*Fourth*, FEMA argues that the contract amendment adding the incentive pricing constituted a cardinal change to the original contract, a type of noncompetitive procurement that, under 2 CFR 200.320, is appropriate only in limited circumstances, such as when "[t]he public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation." *Id.* 200.320(f)(2) (2017) (relocated, effective November 12, 2020, to 2 CFR 200.320(c)(2)). We need not decide whether the amendment actually constituted a cardinal change because FEMA's argument that Harris County should have competed its additional debris removal needs and looked for other sources in the circumstances here, and that no public exigency or emergency existed when the amendment was executed, is ridiculous. FEMA issued a memorandum on September 10, 2017, expressly finding that "exigent and emergency circumstances exist" and "concur[ring], for debris removal and emergency protective measures, with the use of non competitively procured contracts through October 10, 2017, in all declared counties," including Harris County. FEMA argues that the

---

<sup>4</sup> To the extent that another part of DRC's agreement contained pricing at a combined hourly rate for equipment and operating labor, Harris County did not issue any purchase orders invoking that part of the agreement. It only purchased services that were priced by the number of cubic yards removed.

memorandum does not apply here because the contract amendment at issue was executed on September 6, 2017, four days *before* FEMA issued its memorandum finding exigent and emergency circumstances, but it is the flooding caused by Hurricane Harvey in late August 2017 that created the need for expedited action. Those circumstances did not suddenly appear on September 10, 2017, but had been mounting since the flooding began in late August 2017. Harris County could not wait to take action until FEMA issued a written acknowledgment that circumstances were dire and that time was of the essence. FEMA's contemporaneous acknowledgment of exigent circumstances in Harris County wholly undermines FEMA's argument that Harris County should have re-competed its increased debris removal requirements.

*Fifth*, FEMA, presenting an analysis from its first administrative review comparing Harris County's per-cubic-yard removal costs with the per-cubic-yard costs in other parts of Texas during the Harvey clean-up, asserts that removal costs elsewhere were cheaper than what Harris County paid and, therefore, suggests that Harris County, through the incentives amendment, overpaid. FEMA's own witness, however, testified that the analysis was comparing apples to oranges and was essentially worthless because of the differences in the localities and nature of the necessary work in those other areas. We find FEMA's cost-comparison analysis of no value.

*Sixth*, FEMA added documents to the record just before the arbitration hearing containing arguments not set forth in FEMA's original response to Harris County's arbitration request, and it is unclear the extent to which FEMA purports to rely on any of those new arguments in this arbitration. Harris County has filed a motion seeking to preclude FEMA from relying on the new arguments raised in those documents and to exclude some documents from the record, but we deny that motion as moot because, even if admitted, they would not affect the result here. FEMA asserted in one of the newly presented documents that, consistent with 2 CFR 200.318(h), Harris County should have documented DRC's integrity, compliance with public policy, record of past performance, and financial and technical resource in making a responsibility determination and that DRC was not debarred or suspended on [www.SAM.gov](http://www.SAM.gov); Harris County undertook that activity when it awarded the DRC contract in 2015. The new documents also contain an analysis indicating that DRC did not satisfy the cubic yard pick-up targets necessary for payment of two of the three \$5 million incentives, FEMA Exhibit 11 at 3; that analysis misinterprets the cumulative nature of the targets over the course of three weeks and is simply wrong. FEMA's new documents also include a report from FEMA's OIG criticizing Harris County's emergency contract procurements during Hurricane Harvey for non-debris removal services for which Harris County apparently had no pre-positioned contracts and finding them to have insufficient procurement safeguards; despite FEMA's attempt to argue that we should infer that the lack of safeguards there apply to the DRC contract, the OIG report did not involve the DRC

contract and gives us no evidentiary basis for evaluating the incentive payment reasonableness.

### FEMA's Cost Reasonableness Challenge

Having disposed of these side issues, we address the central issue in this arbitration: the reasonableness of Harris County's incentive payments. A cost is considered 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 to incur the costs was made. *Monroe County, Florida*; 2 CFR 200.404. Although exigent circumstances like those at issue here may allow an applicant to use noncompetitive methods to obtain services, the applicant is still "not relieve[d] . . . from ensuring that costs are reasonable." *Florida Keys Electric Cooperative*, slip op. at 5 (quoting FEMA Fact Sheet, *Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances* (Jan. 19, 2018)). The applicant bears the burden of establishing cost reasonableness. *St. Tammany Parish Government*, CBCA 3872-FEMA, 16-1 BCA ¶ 36,420.

It was plainly reasonable for Harris County to adopt *some* kind of incentive payment in the circumstances here. FEMA implicitly recognized that fact in its memorandum dated September 15, 2017, when acknowledging that Texas localities were losing debris removal vendors to Florida and were fairly consistently unable to get contractors with pre-positioned debris removal contracts to honor their contract pricing. FEMA's EM Program Specialist for Region VI testified at the hearing that he had seen situations in which it was tough to get trucks, but nothing to the extent of Hurricane Harvey. FEMA argues that, in its September 10 and 15 memoranda, it only acknowledged the need for noncompetitive procurements and price increases through October 10, 2017, at which point localities would have to have made arrangements for more competitively awarded removal work, but all of the incentives to which Harris County agreed were earned before that October 10 deadline. Further, Harris County was having to work out how it would deal with its disaster needs before FEMA provided that guidance and, in fact, before FEMA provided any guidance at all. FEMA has no viable basis for faulting Harris County's decision to provide an incentive when FEMA was not providing timely and necessary guidance on how to deal with the lack of available resources in the immediate disaster.

Further, we understand the logic of the specific incentive arrangement to which Harris County agreed. Assuming a need to remove three million cubic yards of debris, and assuming that a \$5-per-cubic-yard increase to DRC's existing contract unit prices was a workable incentive, Harris County front-loaded the entirety of that \$5-per-cubic-yard add-on into the first three weeks of debris removal work, rather than spreading it out over time, to provide a stronger incentive to the necessary sand-and-gravel haulers to get on the job

immediately, instead of stretching things out with haulers slowly joining in over the course of several months. Even FEMA's EM Program Specialist for Region VI agreed during his testimony that offering an extra \$5-per-cubic-yard, at least for the first thirty days of the debris removal process, was reasonable. Had Harris County's three-million-cubic-yard total estimate been correct, there would be little question as to the ultimate reasonableness of the payment.

Nevertheless, the three-million-cubic-yard estimate turned out to be wildly off. In the end, DRC only removed 1,129,652.73 cubic yards of debris—still a significant amount, but far less than the number that Harris County had originally anticipated and upon which it based the \$15 million payment. Harris County has not made it easy to decide reasonableness in light of that discrepancy. It has presented nothing—no documents, and no testimony—showing how or why the incentive payment scheme came to be or why Harris County did not adopt DRC's original suggestion of simply adding a \$5-per-cubic-yard bonus to DRC's cubic yard unit price contract amount. Had it adopted DRC's original suggestion, Harris County ultimately would have paid only an additional \$5.648 million (1,129,652.73 x \$5), rather than the \$15 million it actually paid. Would a \$5 addition to each unit price have been a sufficient incentive to get workers on site immediately? We cannot know, in part because Harris County presented no contemporaneous analysis evaluating that approach. Harris County does not even know who within its contracting office (or elsewhere) came up with the idea for the \$15 million incentive payment scheme, leaving us to guess at why someone thought the approach adopted was necessary or believed DRC's original suggestion would not work.

In light of the paucity of evidence about how DRC's unit price increase suggestion morphed into a \$15 million upfront incentive payment, we cannot find that Harris County has established that the entire \$15 million payment is reasonable. We understand that, in early September 2017, Harris County felt confident that its three-million-cubic-yard debris estimate was not only reasonable, but was probably low. In some ways, we are engaging in a type of Monday-morning quarterbacking by criticizing Harris County for not originally considering the possibility that its estimate might be too high. In the end, though, it is the absence of evidence about any alternatives that Harris County considered, which might have tied payments to the actual quantity of debris ultimately found rather than a predetermined three million cubic yard figure, and the reasons that Harris County discounted or rejected those alternatives that preclude us from finding the entire \$15 million incentive payment reasonable. FEMA's memorandum dated September 15, 2017, warned localities to ensure that, if they paid increased prices above the amounts set forth in their pre-positioned contracts, they needed to make sure carefully to document those increases. Although that memorandum post-dated Harris County's contract amendment by nine days, it was close enough in time to place Harris County on notice of FEMA's expectations. Harris County's

failure to document its decision-making process when it still could have precludes a finding that it has proven the reasonableness of the entirety of its \$15 million incentive payment.

Decision

Harris County has established that \$5.648 million of its \$15 million incentive payment was reasonable. Accordingly, we grant Harris County's application in part, allowing recovery of \$5.648 million beyond the debris removal costs that FEMA has previously reimbursed. Harris County's application is otherwise denied. Harris County's motion to limit consideration of and/or strike FEMA's late-filed documents is denied as moot.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.

Board Judge

*Jonathan D. Zischkau*

JONATHAN ZISCHKAU

Board Judge

I agree with the majority's careful description of the issue in dispute but would decide it against the applicant. I comment briefly, mainly for the benefit of parties in future arbitrations in which I am a panel member.

In my view, both parties steered this dispute off the rails by focusing on the price per cubic yard of debris. The September 6, 2017, contract amendment established three fixed incentives of \$5 million each. It did not state an increase in the price per cubic yard hauled. Had the applicant wished only to promise to pay an extra \$5 per cubic yard, in arrears, as a "sweetener" each time the vendor met one of the three milestones, the agreement could have said that, and we might have faced a different issue. Instead, the parties converted a notional increase in the price per cubic yard to three fixed payments, using an estimate of the total amount of debris, which everyone knew would be either too high or too low, as estimates always are. Several witnesses recited the *arithmetic* underlying this conversion, but no one explained why it was *reasonable to switch* from a per-cubic-yard methodology to a riskier fixed-price methodology to begin with. Moreover, I find no support in the record for the

figure of \$5 per cubic yard other than that the vendor suggested it, which may be a starting point but cannot end a price reasonableness analysis.

I also take this opportunity to exhort future parties to take Board Rule 612 seriously by “[o]mitting duplicative and immaterial evidence and arguments.” 48 CFR 6106.612(e) (2020). Here, three judges—21% of our Board—sat through two full days of virtual hearing, very little of which bore on the eligibility issue we were asked to resolve.

*Kyle Chadwick*

---

KYLE CHADWICK

Board Judge