



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 2, 2022

CBCA 7244-FEMA, 7245-FEMA

In the Matter of CONSOLIDATED NORTH COUNTY LEVEE DISTRICT

Kevin L. Wibbenmeyer and Brandee D. Iannelli of Wibbenmeyer Iannelli Law, LLC, St. Charles, MO, counsel for Applicant.

Nathan S. Weinert, General Counsel, Missouri Department of Public Safety, Jefferson City, MO, counsel for Grantee.

Ramoncito DeBorja, 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 **DRUMMOND**, **SHERIDAN**, and **KULLBERG**.

Applicant, the Consolidated North County Levee District, requested arbitration of its claims for public assistance from the Federal Emergency Management Agency (FEMA) in the amount of \$2,655,460.30 for project number 130416 for debris removal (docketed as CBCA 7244-FEMA) and \$1,259,974.87 for project number 130428 for labor costs (docketed as CBCA 7245-FEMA) resulting from flooding and flood control efforts in the applicant's district. An arbitration panel conducted a hearing of these matters on March 9, 2022, and the panel advised the parties at the conclusion of the hearing that the applicant had shown entitlement under project number 130416 for certain costs that included sandbags and plywood and the cost of debris removal at a unit price of \$222.12 per cubic yard. The panel's order, which was dated March 10, 2022, directed the parties to attempt to resolve these matters subject to the panel's findings or, in the alternative, file post-hearing briefs. Both parties submitted briefs because they were not able to resolve the issue of the cost of debris removal. The applicant is no longer pursuing its claim for labor costs under project

number 130428. In addition, the parties have resolved the applicant's claim for the cost of sandbags and plywood. The only issue remaining before the panel, therefore, is the applicant's claim under CBCA 7244-FEMA for debris removal costs.

Background

Beginning on April 29, 2019, the state of Missouri experienced a series of severe storms, tornadoes, and flooding. The President declared a major disaster on July 9, 2019, which included the flood control area managed by the applicant. The applicant contracted for debris removal, which began on July 15, 2019, along a forty-one-mile levee in St. Charles County, Missouri. The debris largely consisted of sandbags and plywood that had been placed on top of the levee during flooding, and the contractor hauled debris at a unit price of \$222.12 per cubic yard. The contract required debris removal be performed in accordance with FEMA guidelines. Daily records of hauling showed the number of loads carried by each truck in use that day along with a total number of loads. The applicant's contractor removed 2010 truckloads of debris during the period from September 10, 2019, to January 31, 2020. The record does not show a precise quantity of debris removed, but applicant's witness established that each truck had a minimum capacity of six cubic yards, and no truck carried a load that was less than that amount. Consequently, 2010 truckloads of debris at six cubic yards per truckload would have amounted to 12,060 cubic yards of debris.

Discussion

The issue before the panel is whether the applicant has produced sufficient evidence to establish the cost of removing debris. The applicant contends that its contractor carried 2010 truckloads that were between six and seven cubic yards of debris, and therefore, its costs should be based upon 2010 truckloads that consisted of six-and-one-half cubic yards each instead of six cubic yards per truckload. This total quantity of debris claimed, 13,065 cubic yards, would result in an entitlement to costs in the amount of \$2,901,997.80, which is more than the applicant's claim, but the applicant also requested that "the Board apply a discount factor of no more than 20%." FEMA, however, contends that the applicant is entitled to only \$27,036.45 for nonburnable debris. With regard to burnable debris, FEMA contended that the applicant had not properly documented the weight or volume of debris, but rather, the applicant had only provided the number of truckloads.¹

¹ FEMA previously raised two other arguments that it did not renew in its brief. First, FEMA questioned whether the applicant had properly procured debris removal services. The record shows that the applicant consulted three potential contractors and awarded the contract to a company with extensive knowledge about the forty-one-mile levee.

The Stafford Act provides for “an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters.” 42 U.S.C. § 5121(b) (2018). Under that statute, this Board has authority to arbitrate disputes of eligibility for public assistance for a disaster that occurred after January 1, 2016, where the disputed amount exceeds \$500,000. *Id.* § 5189a(d)(1). The Board’s arbitration panel “will make independent determinations of the extent of the damage, taking into account the submissions of all parties to the arbitration. However, the burden of proving the claims by a preponderance of the evidence remains with . . . the applicant and grantee.” *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335.

The panel finds that the applicant has met its burden of proof in establishing entitlement to the cost for the removal of 12,060 cubic yards of debris. The applicant’s more recent claim that it removed 13,065 cubic yards of debris, based on six-and-one-half cubic yards for each truckload, is speculative. The applicant’s evidence showed that each truckload carried, at minimum, six cubic yards, and the panel finds no basis to assume a greater amount. Testimony at the hearing and affidavits established that the truckloads of debris consisted of no more than six cubic yards. At the rate of \$222.12 per 12,060 cubic yards, the cost of removal of debris equaled \$2,678,767.20. The applicant has acknowledged that a discount factor of up to twenty percent could be applied to the amount of its recovery. Accordingly, the panel reduces the amount of the applicant’s recovery of \$2,678,767.20 by twenty percent, which is \$535,753.44, for a total recovery of \$2,143,013.76.

Decision

The applicant’s claim is granted in the amount of \$2,143,013.76.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Second, FEMA contended that while the applicant filed a timely appeal, the grantee, State Emergency Management Agency, Missouri, was not timely in forwarding the appeal. The Board has previously rejected FEMA’s request to dismiss an applicant’s request for arbitration on such grounds. *City of Beaumont, Texas*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018.

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge