



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 11, 2022

CBCA 7204-FEMA, 7205-FEMA, 7206-FEMA

In the Matter of MIAMI-DADE COUNTY, FLORIDA

David M. Murray of the Miami-Dade County Attorney's Office, Miami, FL, counsel for Applicant.

Sherin Joseph, Appeals Officer, and Melissa Shirah, 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, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **SHERIDAN, KULLBERG, and O'ROURKE.**

During the week of September 4, 2017, Miami-Dade County (MDC) prepared for Hurricane Irma. As part of its preparations MDC opened shelters and an emergency operations center (EOC), mobilized to evacuate residents, and activated resources to deal with the aftermath of the storm. On September 10, 2017, the President declared a disaster in Florida, DR-4337-FL, for the incident period of September 4 through October 18, 2017. Several project worksheets (PWs) were created for various forms of public assistance (PA) from the Federal Emergency Management Agency (FEMA). The three requests for arbitration before us involve funding for category B emergency protective measures (EPMs) MDC claims it took for which FEMA has denied full PA.

These three requests for arbitration involve PWs for EPM work associated with the Miami-Dade Corrections Department (MDCR) (PW 78894), Miami-Dade Fire Rescue (MDFR) (PW 06328), and Miami-Dade Water and Sewer Department (WASD) (PW 07394). The requests for public assistance (RPAs) that are the subject of these arbitrations relate to

\$2,145,542.56 in overtime pay for MDCR employees; \$3,311,411.26 in overtime pay for MDRF employees; and \$1,961,008.02¹ in overtime pay and supply costs for WASD.

MDC argues that it, and each of these subrecipients, provided adequate documentation to prove that its EPM disaster related work was eligible for PA grant funding. FEMA posits that in order for MDC to be eligible for PA, it must both specifically identify its eligible work and adequately document the costs related to the disaster. To prove eligible work, MDC must show how its employees were engaged in eligible force account labor (FAL)² overtime work due to the event (not normal operations unrelated to the disaster). FEMA also maintains that both MDCR and WASD received partial PA funding for their adequately documented costs for FAL, force account equipment (FAE),³ and supplies via FEMA's determination memorandums. For the remaining request, FEMA argues that MDC failed to show specific eligible EPM work performed outside its normal operations, and therefore the remaining requested costs were deemed by FEMA to be ineligible.

Background

Hurricane Irma made landfall in Florida on September 10, 2017. The President declared a major disaster, FEMA-4337-DR-FL, the same day. Due to the hurricane, MDC closed all its government offices from September 7 through September 15, 2017, and all employees received administrative pay for this time period for their regular work schedule. As MDC stated in an October 19, 2018, letter, "During this time frame [9/7-9/15], since the County is 'closed for business,' it stands to reason all employees working are doing so only in response to the Emergency and outside their normal duty." MDC employees that conducted work in addition to the eight hours per day of administrative leave time for their normal work schedule received full pay at the overtime rate for the hours worked.

MDC used emergency daily activity reports (EDARs) to track costs, including FAL overhead work associated with the hurricane. The EDAR is separate from the payroll system maintained to track non-emergency payroll and is reconciled against the payroll system prior to submitting the applicable EDARs for PA funding. According to MDC, "[a]n EDAR indicates the employee assigned to an emergency, the hours worked with respect to the emergency work, the date of the work, and the location of the work."

¹ This amount was reduced to \$447,302.72 prior to the arbitration hearing.

² FEMA refers to an applicant's own personnel (staff) as FAL. Public Assistance Program and Policy Guide V3.1 (PAPPG) (Apr. 2018) at 23, 160.

³ FEMA refers to an applicant's own equipment and purchased equipment as FAE when directly tied to eligible work. PAPPG at 26, 160.

During the hearing, MDC participants testified that MDC is not seeking PA for the time its employees performed their normal duties (even though they were being paid for doing so on an overtime basis).

1. Miami-Dade Corrections Department, CBCA 7204-FEMA

MDC submitted its RPA to FEMA for MDCR. FEMA took the position that the EDARs, by themselves, were not sufficient to show that eligible EPM work was performed. Several emails were exchanged, and ultimately FEMA sent MDC a determination memorandum that partially granted its request for FAL overtime, FAE, and supplies associated with eligible EPMs. FEMA paid MDC for eligible EPM work in the amount of \$104,200.98 and denied \$2,974,665.81 in requested FAL overtime, FAE, and supply costs not adequately documented because MDC did not show its employees performed eligible EPM work.

MDC appealed FEMA's refusal to pay MDCR's PA request of \$2,145,542.56 for FAL overtime, contending that its work included FAL overtime reimbursement to "maintain order in the detention center, to respond and deescalate situations as they occurred, [and] to provide support." FEMA sent MDC a response which denied the request for FAL overtime, stating that MDC had failed to show how its request was for disaster related eligible EPM work versus normal operational work of a jail. Specifically, FEMA stated:

[MDC] has not submitted any supplemental documentation on appeal to show that the claimed FAL was utilized to complete eligible EPM work. Specifically, the record lacks the clarification of: call-back time verses regular time; hours actually being claimed; duty rosters; and night pay and Alpha/Bravo pay. Further, the record lacks detailed logs or time sheets that include specific duties performed by each employee. [MDC's] 511F forms for its FAL employees do not clearly indicate the performance of eligible EPMs, and [MDC] has not provided documentation necessary to clarify the activities completed by its employees on appeal; thus, the FAL costs on appeal remain ineligible.

MDC submitted its request for arbitration, in lieu of a second appeal, to the Civilian Board of Contract Appeals (CBCA), where it was docketed as CBCA 7204-FEMA. In its request, MDC disputed FEMA's denial of \$2,974,665.81 in PA funding for FAL, FAE, and supplies.⁴

⁴ MDCR and MDFR only appealed the FAL overtime denials; WASD appealed all three categories (FAL overtime, FAE, and supplies).

2. Miami-Dade Water and Sewer Department, CBCA 7205-FEMA

MDC submitted its RPA to FEMA for WASD FAL overtime, FAE, and supplies. Several emails were exchanged, with FEMA requesting more specific documentation. FEMA informed MDC that it was an eligible applicant for FEMA PA funding and approved certain work and costs it could tie to EPMs. FEMA approved \$187,271.25 of MDC's request and denied \$1,981,015.63.

MDC appealed FEMA's denial of \$1,981,015.63 for WASD PA funding, stating that it had provided adequate documentation for its request. FEMA denied MDC's appeal, stating:

[MDC] provided a narrative in support of its appeal that described the roles and responsibilities of personnel in each division; however, the narrative did not state the specific work that was performed. [MDC's] narrative also did not specify which employees performed the claimed work. Overall, it remains unclear if/when [MDC's] employees performed their typical, everyday responsibilities versus eligible work performed directly as a result of the disaster. Specifically, the administrative record lacks clarifying documentation (e.g., work logs, activity logs, call logs, duty rosters, etc.) which could demonstrate the performance of eligible work. Therefore, the FAL, FAE, and [supply] costs on appeal remain ineligible. . . . [MDC] has not provided sufficient documentation demonstrating that the claimed FAL, FAE, [materials] costs on appeal are associated with the performance of eligible EPMs. Therefore, the costs are ineligible for PA funding.

MDC submitted its request for arbitration, in lieu of a second appeal, to the CBCA, where it was docketed as CBCA 7205-FEMA. In its request, MDC disputed FEMA's denial of \$1,961,008.02 in PA funding for FAL, FAE, and supplies.

3. Miami-Dade Fire Rescue, CBCA 7206-FEMA

After MDC submitted its RPA to FEMA for MDRFR costs, FEMA notified MDC that it was an eligible applicant for FEMA PA but denied the request, stating that it could not reconcile MDC's FAL overtime, FAE, and [supply] documentation.

MDC appealed FEMA's denial of the FAL overtime amount of \$3,311,411.26. FEMA again denied MDC's request, stating:

The documentation provided by the subrecipient does not adequately explain the work performed by each employee. The additional narrative documents

submitted on appeal describe what an employee might have been doing when conducting evacuation and sheltering activities, but the records provided do not contain enough detail to determine if the employees were actually engaged in emergency activities. Similarly, it is unclear when the subrecipient's employees performed their typical, everyday responsibilities versus eligible emergency work as a direct result of the disaster. . . . The administrative record remains insufficient to support the costs claimed for FAL; thus, the associated costs remain ineligible.

MDC submitted its request for arbitration, in lieu of a second appeal, to the CBCA, where it was docketed as CBCA 7206-FEMA. In its arbitration request, MDC disputed FEMA's denial of FAL overtime costs and requested \$3,331,411.26.

Discussion

1. Public Assistance

To be eligible for PA funding, an item of work must be the result of the emergency or major disaster. 44 CFR 206.223(a) (2020). In pursuing PA for eligible emergency work, an applicant must prove that the EPMs it takes either (i) eliminate or lessen immediate threats to lives, public health, or safety; or (ii) eliminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective. *Id.* 206.225(a)(3). It is an applicant's burden, with the recipient's assistance, to submit all documents necessary for the award of grants. *Id.* 206.202(b)(4). To be eligible, costs must be "[d]irectly tied to the performance of eligible work" and "[a]dequately documented." *Id.* 206.225(a)(3); 2 CFR 200.403(g) (2021).

2. The Public Assistance Program and Policy Guide (PAPPG)

Not all work that is the result of a disaster is eligible for PA grant funding. At a minimum, work must "[b]e required as a result of the declared incident." PAPPG at 19. "[R]esult of the declared incident" means that for emergency work the "[a]pplicant is responsible for showing that the work is required [d]ue to an immediate threat resulting from the declared incident." *Id.* Verified eligible work is a precursor to assessing costs. *Id.* at 21. Thereafter, costs must be "[d]irectly tied to the performance of eligible work" and "[a]dequately documented" to be eligible for PA. *Id.* Additionally, category B EPMs must "eliminate or lessen immediate threats to lives, public health, or safety." *Id.* at 57. Critically, an applicant's requested costs should not be for increased operating costs. *Id.* at 42; 61.

A. Force Account Labor (FAL)

The eligibility of FAL overtime costs is based on an applicant's pre-disaster written labor policy. PAPPG at 23. For FAL overtime pay requests for EPMs, the work must be identified eligible work and attributed to an individual to show how eligible FAL overtime accrued. *Id.* at 23-25, 139. The eligibility criteria is based on the type of employee and the work performed. *Id.* at 23-25. For EPMs, only overtime labor is eligible for budgeted employees. *Id.* at 24; Robert T. Stafford Disaster Relief and Emergency Assistance Act § 403(d)(1)(B), 42 U.S.C. § 5170b (2018); 44 CFR 206.228(a)(2)(iii). For unbudgeted employees performing emergency work, both straight-time and overtime labor are eligible. PAPPG at 24.

B. Force Account Equipment (FAE)

FEMA refers to an applicant's own equipment and purchased equipment as FAE when directly tied to eligible work. PAPPG at 21, 26. FEMA provides PA funding for the use of applicant-owned equipment "only [for] the time the Applicant is actually operating equipment [for eligible work]." *Id.* at 26.

C. Supplies (Materials)

A supply is defined as "[a]ny tangible personal property other than that meeting the definition of equipment," or is colloquially known as materials. PAPPG at 165. Supplies are only eligible if required to conduct eligible EPM work. *Id.* at 21, 63. The cost of supplies, including materials, is eligible if they were purchased and justifiably needed to respond effectively to and/or recover from the incident, or taken from an applicant's stock and used for the incident. *Id.* at 28.

D. Increased Operating Costs

Increased operating costs of operating a facility or providing a service are generally not eligible for PA funding, even when directly related to the incident. PAPPG at 42, 60-61.

Some short-term increased costs, that are directly related to accomplishing specific emergency health and safety tasks as part of EPMs, may be eligible. PAPPG at 42. If an applicant incurs additional costs related to operating a facility as a result of the incident because of an increased demand for the services the facility provides, these additional costs are *only* eligible if:

- The services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property;

- The costs are for a limited period of time based on the exigency of the circumstances; and
- The applicant tracks and documents the additional costs.

Id. at 60-61. Examples of ineligible operating costs include, but are not limited to, costs for:

- Patient care, except as noted in Chapter 2:VI.B.9
- Administrative activities
- Provision of food, except as noted in Chapter 2:VI.B.5, 7, and 8
- Obtaining electrical power from an alternate source
- Obtaining water from an alternate source
- School make-up days, including contracted costs for bus service for make-up days
- Provision of fuel for school bus service

Id. at 61.

3. Right to Arbitration, CBCA 7205-FEMA

Shortly before the arbitration hearing in this matter, MDC informed the Panel that its WASD request for PA had dropped from \$1,961,008.02 to \$447,302.72. During the arbitration, FEMA moved to dismiss CBCA 7205-FEMA, arguing that the request was below the \$500,000 statutory threshold set by the Stafford Act, 41 U.S.C. § 5189a(d)(1) (2018). The Panel allowed MDC to respond to the motion. The Panel reviewed the brief, and considered earlier, but non-precedential findings in similar FEMA cases. *See Metropolitan St. Louis Sewer District*, CBCA 6821-FEMA, 20-1 BCA ¶ 37,696; *City of Lakeport, California*, CBCA 6728-FEMA, 20-1 BCA ¶ 37,671. We granted FEMA's motion to dismiss because the WASD request for PA fell below the arbitration eligibility threshold set forth in the Stafford Act. We also note that FEMA has substantial flexibility in the creation of PWs, and absent a finding that different PWs are created arbitrarily or to limit arbitration, we see no reason to consolidate PWs in order to meet jurisdictional thresholds. *City of Lakeport*.

4. Eligibility, CBCA 7204-FEMA and CBCA 7206-FEMA

It is clear to the Panel that during the period in issue, MDC employees performed both normal work and work associated with EPMs. What is not made clear through the evidence is what type of work a particular employee was performing.

For PA reimbursement of EPM FAL overtime, FEMA regulations and guidance require that MDC employees be engaged in discernible, documented, eligible EPM work

related to the disaster. MDC must also provide proof that individual employees were providing actual EPM work as opposed to performing normal work functions. This differentiation is important because FAL overtime accrues to an individual employee for his or her eligible EPM work based on the employee's pay rate.

The EDARs relied upon by MDC did not typically provide sufficient bases for PA eligibility because, in large part, the EDARs failed to depict eligible EPM work. Further, MDC tended to rely solely on the EDARs and failed to provide other compelling documentary evidence specifying eligible EPM work. To be eligible for PA funding, FAL overtime pay requests should show how an individual employee accrued overtime pay for engaging in specific eligible EPM work *outside his or her normal duties*. MDC has failed to make this showing and except where additional PA funding is noted in this decision, is denied further PA funding for MDCR.

A. Miami-Dade Corrections Department, CBCA 7204-FEMA

In its request for arbitration, MDC failed to show eligible, adequately documented EPM work for its request in accordance with regulation and FEMA policy. Although FEMA granted part of MDCR's request for FAL overtime, FAE, and supplies request, for the most part, MDCR failed to show who, if any, of its employees were brought into the facility because of EPM work related to the disaster. The normal operations of running a jail require 24/7 inmate supervision, regardless of a disaster. Thus, individuals supervising inmates are conducting normal operations, with overtime pay being an ineligible increased operating cost. MDCR also did not discern which employees would be normally scheduled for work versus any extra employees brought in specifically to engage in eligible EPM work.

MDCR largely failed to show an "increased demand for the services" of inmate supervision due to the hurricane. It instead showed employee shifts changing from three eight-hour shifts to two twelve-hour shifts that led to increased operating expenses of extra overtime pay.⁵ Thus, MDCR appears to be requesting ineligible FAL overtime pay for normal operations, or prison guards engaging in their normal inmate supervision responsibilities. Such increased costs of operating a facility or providing a service are generally not eligible, even when directly related to the incident.⁶

⁵ Although MDCR alleges that additional staff were brought into the jail facilities, MDCR did not discern which employees were in the facilities providing EPM work and operating outside their normal duty of inmate supervision.

⁶ Only two MDCR employees appeared to engage in specific EPM work through reassignment to hurricane "shelter security," which previously FEMA funded.

Less clear in terms of reimbursement, however, are those hours reported as “hurricane prep, Irma prep, pre-storm coordination, and logistics prep for storm.” These activities are easily distinguishable from normal duties, yet FEMA pointed out that not all hurricane-related work is eligible for reimbursement. The work must also qualify as a category B EPM. The example FEMA gave is that if the hurricane preparation further stated “filling sandbags,” then it would have been eligible for reimbursement. MDCR acknowledged the list of EPMs in FEMA’s PAPPG but pointed out that it was not an all-inclusive list. MDCR further stated that seeking reimbursement is not foremost on its mind when preparing for major hurricanes. Rather, the safety and well-being of the inmates and staff are of primary concern. We interpret this statement as an explanation for why the documentation does not consistently reflect the emergency nature of work performed. This approach is understandable in light of the damage caused by the hurricane, but when an applicant ultimately requests PA disaster funding, FEMA’s duty is to ensure that the request meets statutory, regulatory, and policy requirements. The regulations place the burden of adequately documenting eligible activities on the applicant. Based on the testimony at the hearing, as well as the information contained in MDCR’s EDARs, we find that MDC should be reimbursed for work hours identified as EOC work and shelter security work, as those hours are related to the disaster at issue and are considered EPMs. We remand the case to the parties to determine the value of those hours.

As for MDC’s request that MDCR receive PA funding for FAE and supplies, there is insufficient evidence to tie these costs to EPMs taken by MDCR, and they are denied.

B. Miami-Dade Fire Rescue, CBCA 7206-FEMA

Upon a review of MDC’s documentation prior to this arbitration, FEMA found that \$243,909.33 was eligible for FAL overtime related to the EOC, evacuation, sheltering, public information, and other specifically enumerated EPM work. FEMA has requested the Panel to consider granting this amount to MDC’s MDFR. Based on the testimony of FEMA’s witness, the Panel finds MDC eligible for the \$243,909.33 in PA funding for MDFR.

For MDC’s remaining FAL overtime request, MDFR failed to show who, if any, of its employees engaged in eligible EPM work related to the disaster. The operational need of running a fire department is 24/7 staffing to answer fires, medical events, car accidents, and other issues unrelated to the disaster. On the MDFR spreadsheet of EDARs, it appears MDFR requested reimbursement of FAL overtime for employees for various dates between September 5 and September 26, 2017, but unlike where FEMA did find eligibility, MDFR did not specify eligible EPM work. Stating that an employee is engaged in “technology support” or “special operations” is not evidence of a specific eligible EPM for the hours allegedly worked. Moreover, MDFR’s extended timeline requires more information as to what EPMs occurred before and after the disaster, particularly since many of the entries were

for “regular time” or generic “rescue” and provide no indication of specific eligible EPM work. The run log submitted by MDFR shows no evidence of specific EPM work; it merely shows normal operational responses unrelated to the disaster. Neither the run log nor the EDAR spreadsheets show how MDFR employees conducted eligible EPM work.

MDC has not shown any additional eligible EPM work in the submitted documentation outside the \$243,909.33 calculated by FEMA for the EOC, evacuation, sheltering work, public information, and other enumerated EPM work. Except for \$243,909.33, MDC’s request for EPM PA funding is denied.

Decision

In CBCA 7204-FEMA, we find MDC eligible for work hours identified in MDCR’s EDAR as EOC work and shelter security work and remand the case to the parties to determine the value of those hours.

We dismiss the arbitration in CBCA 7205-FEMA because the amount in dispute does not meet the eligibility threshold in 41 U.S.C. § 5189a(d).

In CBCA 7206-FEMA, we find MDC eligible for an additional amount of \$243,909.33.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge