



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 23, 2023

CBCA 7810-FEMA

In the Matter of NEW YORK FOUNDLING

Peta-Gaye Daniel, Associate General Counsel of The New York Foundling, New York, NY, counsel for Applicant.

Joseph Stinson, Section Chief–Recovery Administrative Support Unit, New York State Division of Homeland Security and Emergency Services, Albany, NY, appearing for Grantee.

Charles Schexnaildre, 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 **SULLIVAN**, **O’ROURKE**, and **CHADWICK**.

CHADWICK, Board Judge, writing for the Panel.

New York Foundling (applicant) sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) as to approximately \$1.6 million in staffing costs, incurred between March 30 and August 31, 2020, that applicant attributes to the COVID-19 pandemic. The parties agreed in the initial conference that, as memorialized by the Panel, “[t]he issue for arbitration is the eligibility of the disputed labor costs, not the amount.” We find the costs ineligible for public assistance.

Background

Applicant is a private, nonprofit entity (PNP) that operates group homes for people with developmental disabilities. In December 2020, applicant filed a streamlined application for FEMA public assistance (PA) for, among other amounts, approximately \$1.3 million in overtime paid to employees and \$300,000 paid to outside service contractors during the period at issue (roughly the first five months of the pandemic). As applicant explained in its arbitration request, it contends that because its permanent and temporary staff

performed [numerous] additional duties related to COVID-19 [which applicant itemizes,] . . . the activities of the staff for which it is seeking PA reimbursement constitute emergency protective measures [(EPMs), per FEMA policy].

In addition, staff worked significant overtime hours as a result of staffing shortages when other staff members were infected by COVID-19 and could not report to work. This resulted in heavy amounts of overtime to meet . . . [the] licensed level of care for individuals who were generally medically frail, and arguably, more at risk of contracting COVID-19. . . . The included payroll timesheets are only for staff from those facilities [that reported COVID-19 infections].

Request for Arbitration at 3.

FEMA denied reimbursement of the costs in a May 2022 memorandum and a May 2023 first appeal decision. In denying applicant's appeal, FEMA cited Policy 104-21-0003, *Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim) (Version 2)* (Sept. 2021)—known as the O&O policy—and concluded: “Applicant has not demonstrated that the [overtime] hours were used to perform eligible COVID-19 EPMs” or “that the [temporary] staff were acquired to perform specific COVID-19 EPMs [or] medical care duties. Therefore, [the labor costs] cannot be attributed to eligible EPMs in accordance with FEMA’s O&O policy.” FEMA Exhibit 3 at 5. FEMA continues to maintain that the labor costs are ineligible for funding because they constitute only “increased operating costs” that applicant “would have incurred . . . simply to cover the routine duties that were necessary” for applicant to perform, using overtime and temporary labor “as a result of the staff shortage” the pandemic caused. FEMA’s Response at 6.

We discuss the parties’ positions—and, in particular, the successive FEMA policy documents on which the parties rely—in more detail below.

Policies Cited by the Parties

Applicant, grantee (a New York State agency), and FEMA cite four separate FEMA policy statements applicable to work in 2020. FEMA relies primarily on one such document. We find it helpful to discuss the policy statements in chronological order.

1. Until the President issued the COVID-19 major disaster declarations in March 2020, FEMA applied its Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018). The pre-pandemic PAPPG defined an EPM as “[a]n action taken by a community before, during, and after a disaster to save lives, protect public health and safety, and prevent damage to improved public and private property.” PAPPG at 159. As pertinent here, the PAPPG provided that “[f]or PNPs,” such as applicant, eligible EPMs were “generally limited to activities associated with preventing damage to an eligible facility and its contents,” and “operating costs are generally not eligible *even if the services are emergency services*, unless” a government agency procured the emergency services from the PNP and applied for FEMA funding for itself. PAPPG at 60–61 (emphasis added).

2. On March 19, 2020, FEMA issued the fact sheet “Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures” (available at www.fema.gov/fact-sheet/eligible-emergency-protective-measures), for work from January 20 to September 15, 2020. “In that guidance, FEMA indicated that it could provide assistance for EPMs ‘including, but not limited to,’ a variety of activities, including ‘[m]anagement, control and reduction of immediate threats to public health and safety’ and ‘[r]eimbursement for *state, tribe, territory and/or local government force account overtime costs.*’” *Joint Meeting of Essex & Union Counties, New Jersey*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, at 185,644 (emphasis added). The fact sheet also incorporated the PAPPG’s guidance on EPMs. *See id.* at 185,641.

Applicant and grantee both argue that “the eligibility of the costs in question here [is] governed by” the PAPPG and the March 2020 fact sheet. Grantee’s Supplemental Brief at 1; *see* Applicant’s Response to FEMA’s Supplemental Brief at 1-2.

3. On September 1, 2020, FEMA issued Policy 104-009-19, *Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim)*, which addressed work performed after September 15, 2020. Applicant argues that Policy 104-009-19, “although issued months after” the prior documents, “is much more specific” with regard to EPMs and may be consulted to “clarify the intent” of the March 2020 fact sheet. Applicant’s Response to FEMA’s Supplemental Brief at 2-3.

4. Finally, in September 2021, FEMA issued the O&O policy cited above. FEMA asserts categorically in its response to the arbitration request: “The relevant FEMA COVID-19 policy for this matter is the COVID-19 O&O Policy.” FEMA’s Response at 3. FEMA later added that “the [March 2020] EPM Fact Sheet (applicable to work performed prior to September 15, 2020) and the Policy 104-009-19 (applicable to work performed on or after September 15, 2020) serve as FEMA’s overarching policy and guidance listing eligible EPMs . . . *not* directly associated with the safe *opening and operation* of eligible facilities.” FEMA’s Supplemental Brief at 2 (emphasis added).

The O&O policy applies to reopening and operation “work from the beginning of the incident period.” Policy 104-21-0003, version 2, at 1. As pertinent here, the O&O policy states:

FEMA may provide assistance to all eligible PA Applicants, including . . . eligible PNPs, for the following measures implemented to facilitate the safe opening and operation of all eligible facilities in response to COVID-19 declared events:

- i. Purchase and distribution of face masks, including cloth face coverings, and personal protective equipment (PPE).
- ii. Cleaning and disinfection, including the purchase and provision of necessary supplies and equipment in excess of the Applicant’s regularly budgeted costs.
- iii. COVID-19 diagnostic testing.
- iv. Screening and temperature scanning, including, but not limited to, the purchase and distribution of hand-held temperature measuring devices or temperature screening equipment.
- v. Acquisition and installation of temporary physical barriers, such as plexiglass barriers and screens/dividers, and signage to support social distancing, such as floor decals.

Id. at 5 (footnotes omitted).

Discussion

We now understand (as we did not at first) why FEMA focused solely on the September 2021 O&O policy in the first appeal decision and in FEMA’s response to the arbitration request as the only policy under which applicant could possibly obtain funding. Of the cited FEMA policies, only the O&O policy (1) applies to the time period and (2) does not render applicant’s labor costs facially ineligible.

Applicant's and grantee's principal theory is that the labor costs in dispute are reimbursable costs of carrying out EPMs under the 2018 PAPPG and the March 2020 fact sheet. This theory does not work. The PAPPG was explicit in "generally" excluding emergency services provided to individuals by PNPs from the scope of PA grants. This would include medical care. Although the qualifier "generally" might suggest there could be exceptions, applicant and grantee offer no compelling policy grounds to depart from the PAPPG's guidance in this instance. The March 2020 fact sheet expanded on the PAPPG by specifying examples of eligible emergency work in response to the pandemic and announcing that FEMA would reimburse overtime costs associated with such work incurred by eligible entities *other than PNPs*. Grantee challenges FEMA's assertion that the fact sheet focused "primarily" on non-PNPs, but regardless of whether we would agree with FEMA on the general point, we agree that the fact sheet preserved the presumption stated in the PAPPG that PNPs should not be reimbursed for "operating costs," such as payroll, unless a PNP is paid with grant funds provided to a government applicant. We see nothing in the fact sheet that changes that policy. Grantee's reliance on *Joint Meeting of Essex & Union Counties* is misplaced, as the applicant in that matter was a governmental body, not a PNP.

Applicant invites us to conclude from both the March 2020 fact sheet and the September 2020 interim policy (which applicant concedes does not apply directly to the work at issue here) that the scope of reimbursable emergency measures is broad. With regard to the PAPPG and the policies issued in 2020, however, the issue is not the EPM definition but the policy that a PNP's "operating costs are generally not eligible even if the services are emergency services." PAPPG at 61. Applicant's labor costs, including the overtime and temporary staff costs at issue here, are unambiguously operating costs. The fact sheet also mentions "enhanced medical/hospital capacity" as a potentially eligible work category, but given the general policy against reimbursing PNPs' operating costs, we do not read this as allowing grants to PNP applicants for staff costs associated with increased capacity.

Another FEMA policy statement, which the parties do not discuss, addresses reimbursable COVID-19 medical care costs. Policy 104-21-0004, *Coronavirus (COVID-19) Pandemic: Medical Care Eligible for Public Assistance (Interim) (Version 2)* (Mar. 2021) reiterates in a footnote that the pre-pandemic PAPPG "applies to all COVID-19 declarations" and states that eligible medical services must be "directly related to the treatment of COVID-19 patients. . . . Medical care related to a non-COVID-19 illness or injury is not eligible." Policy 104-21-0004, version 2, at 1 n.2, 3. Applicant and grantee do not invoke Policy 104-21-0004. Applicant, which is not a hospital and does not say it was treating COVID-19 patients, would face similar barriers to funding under this policy as under the others discussed above.

If there were an avenue for applicant to obtain reimbursement, it would run through the 2021 O&O policy, as FEMA has consistently said. There, unlike in earlier policies,

FEMA expressly included “eligible PNPs” among the entities eligible for all O&O assistance and did not exclude their operating costs. As noted, applicant argues that its disputed costs are, in fact, costs of eligible EPMs. We have much the same difficulty with this contention as FEMA has had. Because payroll and temporary staffing are, *in the first instance*, standard categories of operating costs, it requires some special explanation to show that they are *also* costs caused by instituting EPMs. The O&O policy authorizes “assistance . . . for [the enumerated] measures.” We would need some evidence that applicant required a fairly specific number of work hours from its staff per day, per week, or per pay period, more than it would have needed, had it not taken the protective measures. Applicant’s evidence, while apparently reliable as to the hours and dollars recorded, is at a much more general level.

One of applicant’s officers explained by affidavit that “there were more people in [applicant’s facilities] during the daytime” in mid-2020 due to restrictions imposed by New York State; some staff shifts had to be covered when applicant’s employees contracted COVID-19; and “staff had many additional duties which included ongoing cleaning, amplified monitoring of residents, documentation and reporting, and all the additional steps [that] had to be taken to ensure . . . safety.” Attestation of Maria Bediako (Aug. 10, 2023) at 2–3. Accepting all of this as true, we see no way to determine what, if anything, the staff hours attributable only to EPMs cost applicant. Such time would need to be *not* attributable to covering sick leave, caring for more residents than usual, or any other ineligible work, whether routine or not. We understand that the extra staffing costs incurred during the early months of the pandemic *included* time spent on EPMs. We cannot determine, however, that any such costs are attributable directly or solely to EPMs eligible for reimbursement under the O&O policy.

We agreed to arbitrate eligibility in principle rather than a specific dollar amount. Applicant argues that it suffices for eligibility “to illustrate that staff duties . . . during the months of March 2020 to August 2020 were not the same as they had been prior to the COVID-19 emergency” and included emergency measures. Applicant’s Supplement to Request for Arbitration at 1. As we have explained, we do not agree that this is enough. On this record, given applicant’s inability or failure to segregate any costs directly attributable to EPMs from its other staffing costs, we cannot find any eligibility.

Decision

The disputed overtime and temporary staff costs are ineligible for funding.

Kyle Chadwick

KYLE CHADWICK

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge