



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 26, 2024

CBCA 7879-FEMA

In the Matter of SANTA CRUZ COUNTY SERVICE AREAS

Matt Machado, Deputy Chief Administrative Officer and Director, Department of Community Development and Infrastructure, County of Santa Cruz, Santa Cruz, CA, appearing for Applicant; and Justin A. Graham and Michael J. De Smidt, Office of the County Counsel, County of Santa Cruz, Santa Cruz, CA, counsel for Applicant.

Ryan Buras, Deputy Director for Recovery, Robert Larsen, Public Assistance Officer, and Eli Owen, Assistant Director, California Governor's Office of Emergency Services, Mather, CA, appearing for Grantee; and Jennifer Bollinger, Chief Counsel, Carl DeNigris, Assistant Chief Counsel, and Michael Romero, Counsel, California Governor's Office of Emergency Services, Mather, CA, counsel for Grantee.

Christiana Cooley, 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 **BEARDSLEY** (Chair), **LESTER**, and **RUSSELL**.

BEARDSLEY, Board Judge, writing for the Panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), Santa Cruz County Service Areas, on behalf of the Davenport County Sanitation District (DCSD), seeks public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) for costs to purchase and transport potable water after a wildfire destroyed DCSD's water source. The total amount in dispute is \$300,108.43, including \$222,713.98 for project #172698 and \$77,394.45 for project #166514. For the reasons stated below, the panel denies the claim for PA.

Background

The President issued a major disaster declaration (DR-4558) on August 22, 2020, for the CZU Lightning Complex Fire, a wildfire that caused significant damage to several California counties between August 14 and September 26, 2020. The fire damaged a pipe that provides water to Davenport, California, an unincorporated community located ten miles north of the city of Santa Cruz within Santa Cruz County. The population of Davenport is approximately 388 people.

DCSD is a non-profit, fee-for-service water and sanitation district, one of eight managed, operated, and maintained by the Santa Cruz Department of Public Works (SCDPW), a municipal agency of Santa Cruz County. DCSD is a distinct legal entity and financially independent. DCSD's revenues come from assessments and fees paid by residents and businesses within Davenport, and DCSD pays SCDPW's employees to perform DCSD's administrative and operating functions.

DCSD receives water from a four-mile, above-ground pipe that sources its water from the San Vicente Creek located in the Santa Cruz mountains. The pipe delivers water to the Davenport water treatment plant for distribution to the citizens and businesses of Davenport. DCSD owns the water treatment plant and the water distribution infrastructure that provides water to the residents and businesses of Davenport, but the water pipe is owned by a private, for-profit business corporation. Because this is DCSD's only source of water, the damage to the pipe eliminated DCSD and Davenport's access to water. As a result, DCSD made bulk purchases of potable water from the City of Santa Cruz municipal utility and contracted with a third party to transport the water to the Davenport water treatment plant after the fire.

Santa Cruz County Service Areas, a subdivision of SCDPW, applied for FEMA PA funding on DCSD's behalf because DCSD does not have a Federal Employer Identification Number (FEIN), which is required by FEMA so that the agency can identify applicants for PA funding and track projects through its system. Santa Cruz County Service Areas has previously submitted requests for public assistance for several other entities in Santa Cruz County.

Approximately two months after the fire occurred, the President amended DR-4558 to increase the cost share from 75% to a 100% cost-share adjustment for emergency work completed within a period of thirty days, the time period to be determined by the state of California. The recipient, the California Governor's Office of Emergency Services (Cal OES), chose the period from August 17 to September 15, 2020, for the increased federal cost share. As a result of the increased cost share, the work was split into two projects: (1) project #166514 and (2) project #172698. Project #166514 costs total \$77,394.45 for work completed between August 17 and September 11, 2020, making it subject to the 100%

cost-share adjustment. Project #172698 includes work performed between August 16, 2020, and January 6, 2021, at a cost of \$222,713.98 and to which the 75% cost-share adjustment applied. The total cost for both projects was \$300,108.43. FEMA issued a determination memorandum (DM) for each project independently, denying the funds requested because FEMA considered the purchase of water from an alternate source to be an ineligible, increased operating cost. The applicant appealed both decisions, which were affirmed by FEMA. The applicant filed a joint request for arbitration, under the authority granted in 42 U.S.C. § 5189(a), for both project #166514 and project #172698.

Discussion

Arbitration Authority

FEMA contends that the County of Santa Cruz, not DCSD, “is the proper applicant because the County submitted the RPA [Request for Public Assistance], the County appealed both DMs, and the County filed the Request for Arbitration.” Santa Cruz County Service Areas contends that DCSD is the proper applicant because DCSD, not Santa Cruz County, purchased and transported potable water to the citizens of Davenport as a result of the disaster. Santa Cruz County Service Areas only applied for PA funding on behalf of DCSD because DCSD does not have its own FEIN.

Under FEMA’s Public Assistance Program and Policy Guide (PAPPG) (June 2020), a political subdivision of a state may submit applications on behalf of rural communities and unincorporated towns. PAPPG at 43; *see also* 42 U.S.C. § 5122(8)(C). The County of Santa Cruz is a political subdivision of California and is thus permitted to apply for public assistance funding on behalf of DCSD. DCSD is located in and funded by a rural community and unincorporated town.¹ Thus, the panel will consider DCSD the applicant for eligibility purposes.

Because DCSD is located in a rural area, the amount in dispute must be greater than \$100,000 for us to have arbitration authority. 42 U.S.C. § 5189a(d)(3). While project #172698 meets the amount in dispute requirement, project #166514 does not. For project #166514 to be eligible for arbitration, we must consider the projects together. *See id.*

¹ Davenport is a rural area per the statute, which defines “rural area” as “an area with a population of less than 200,000 outside an urbanized area.” 42 U.S.C. § 5189a(d)(4). Davenport has a population of 388 and is outside of an urbanized area – the city of Santa Cruz (population 62,956). *See* Census.gov (2020 census data); <https://www.ruralhealthinfo.org/am-i-rural> (last viewed on January 25, 2024).

A project is defined as “a logical grouping of work required as a result of the declared major disaster or emergency,” and “[t]he scope of work and cost estimate for a project are documented on a Project Worksheet” provided by FEMA. 44 CFR 206.201(k) (2022). FEMA and applicants are instructed to work together to logically form project groupings. Public Assistance Program Field Operations Pocket Guide, FEMA P-1011, at 12; PAPPG at 61. “The intent of such groupings is to minimize the number of [projects] necessary to provide assistance for that [a]pplicant.” Pocket Guide at 12. Here, the work was separated into two projects only for the purpose of maximizing the increased cost share, not because of any material differences between the projects. The projects were not completed at different locations, the applicant requested PA for the same work, and the same disaster caused the damage for both projects. The only difference in the projects is the dates on which the costs were incurred.

We reject FEMA’s contention that the applicant cannot combine project #172698 and project #166514 for a total amount of \$300,108.43 of requested PA funding in order to satisfy the arbitration threshold of \$100,000 for rural applicants. 42 U.S.C. § 5189a.

Eligibility

FEMA contends that the costs to purchase and transport potable water to Davenport are ineligible for PA reimbursement because the costs are increased operating costs to obtain water from an alternate source. The applicant argues that the costs were for “[t]he purchase of supplies and commodities required for emergency protective measures,” and instead, the costs relate to “purchasing and packaging a lifesaving and life-sustaining commodity [water] and providing it to” Davenport.

Regulations define eligible emergency work as “[e]mergency protective measures to save lives, to protect public health and safety, and to protect improved property.” 44 CFR 206.225(a). In regard to increased operating costs, the applicable PAPPG section specifies:

Increased costs of operating a facility or providing a service are generally ineligible, even when directly related to the incident. However, short-term increased costs that are directly related to accomplishing specific emergency health and safety tasks as part of emergency protective measures may be eligible.

PAPPG at 96. However, “[o]btaining water from an alternate source” is an ineligible operating cost, even for a limited time.² *Id.* at 114.

Here, the applicant is requesting increased operating costs for obtaining water from an alternate source, the City of Santa Cruz. The PAPPG expressly precludes reimbursement for such costs. While we recognize that the PAPPG allows funding for the purchase, packaging, and distribution to the impacted community of “life-saving and life-sustaining commodities” as “emergency protective measures,” PAPPG at 116-17, including water (in addition to food, ice, blankets, generators, and personal hygiene items), *id.* at 117, that part of the PAPPG does not apply here. DCSD was not accomplishing specific emergency health and safety tasks as part of emergency protective measures but, instead, was providing water (although through an alternate source) as part of its normal operations to maintain the water supply. *See City of Lubbock, Texas, CBCA 7390-FEMA, 22-1 BCA ¶ 38,161, at 185,327* (concluding that costs to cover surcharges related to supplying water after a disaster were not reimbursable because maintaining a water supply was considered a normal action of the facility, not a specific emergency task). While the panel acknowledges that DCSD continued to provide water to Davenport under difficult conditions, its claim for the cost of supplying water to its residents and businesses (a task that it was required to do) from an alternate source is an increased operating cost that is not eligible for PA funding.

Decision

The panel denies the applicant’s request for public assistance funding.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

² The applicant argues that, to be an ineligible operating cost, the service must have been provided due to an increased demand not present here. The applicant relies on the PAPPG provision allowing for the funding of increased costs “related to operating a facility or providing a service as a result of the incident because of an increased demand for the services the facility provides.” PAPPG at 113. However, an increased demand is not a predicate for operating costs to be considered ineligible under the PAPPG.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge