UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 16, 2024

CBCA 7952-FEMA, 7997-FEMA

In the Matter of CITY OF ST. CLOUD, FLORIDA

Daniel F. Mantzaris, City Attorney, Orlando, FL, and Lindsay Moczynksi, City Attorney, Tampa, FL, counsel for Applicant; and Jason Miller, Fire Chief/Emergency Manager, Office of Public Safety, and Jeanne Devlin, Consultant, St. Cloud, FL, appearing for Applicant.

Stephanie Stachowicz (Twomey), General Counsel, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Marija Diceviciute, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Maureen Dimino and 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 **KULLBERG**, **CHADWICK**, and **KANG**.

CHADWICK, Board Judge, writing for the Panel.

Applicant sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute or disputes with the Federal Emergency Management Agency (FEMA) regarding public assistance for municipal labor costs sought under two project worksheets. (The number of disputes is important, as discussed below.) The Board docketed CBCA 7952-FEMA, concerning the first worksheet, in December 2023 and docketed CBCA 7997-FEMA, concerning the second worksheet, in January 2024. In February 2024, the current panel (which had been assigned the first arbitration) granted applicant's unopposed request to

consolidate the two matters. The parties completed the briefing on a consolidated basis and elected a written hearing. *See* Board Rule 611 (48 CFR 6106.611 (2023)).

The parties, but mainly applicant, made this proceeding more complicated than it needed to be. We conclude, over FEMA's objection, that the issues presented in the two project worksheets comprise a single dispute suitable for arbitration, so it does not matter whether applicant is "in a rural area" so as to qualify for the lower dollar threshold in 42 U.S.C. § 5189(d)(3). By statute, the Board arbitrates disputes, not project worksheets as such. We otherwise reject applicant's position regarding the significance of consolidating the two arbitrations, however. Consolidation did not automatically merge the arbitrations into a single dispute. Further, we lack statutory authority to address a third, apparently related project worksheet that applicant mentions but did not bring before the Board for arbitration. Finally, we reject applicant's primarily legal and policy arguments regarding the costs in dispute and find them ineligible.

Proceedings Before FEMA[1]

In both project worksheets at issue, applicant seeks straight-time and overtime labor costs it attributes to its responses to the COVID-19 pandemic. Applicant asserts, and we find it plausible, although not crucial to our resolution, that applicant and grantee divided the requests for public assistance into separate worksheets to facilitate analysis because different union agreements and fringe rates applied. *See* Applicant's Consolidated Reply at 12.[2]

In July 2021, applicant submitted a streamlined application for reimbursement of (1) straight-time pay of seven parks employees, (2) straight-time and overtime pay of four police department employees, and (3) straight-time and overtime pay of one employee of the city manager's office, from March 17, 2020, to either June 5 or July 17, 2020, depending on the employee. *See* Applicant's Exhibit (CBCA 7952-FEMA) 25 (documentation). After correspondence, FEMA denied all of the costs in a determination issued in May 2021. Applicant's Exhibit (CBCA 7952-FEMA) 28.

In December 2021, applicant submitted a streamlined application for reimbursement of fire department costs incurred between March 16, 2020, and April 9, 2021, including straight-time and overtime pay and costs of two vehicles. *See* Applicant's Exhibit (CBCA

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[1] In some instances, we cannot trace the parties' record citations to the exhibits we have. We cite our record.

[2] As the reply lacks independent pagination, we cite the PDF pages.

7997-FEMA) 43 (documentation). After correspondence, FEMA denied all of these costs in a determination issued in October 2022. Applicant's Exhibit (CBCA 7997-FEMA) 35.

Applicant appealed both denials. FEMA denied the appeal regarding the first application in October 2023 and denied the appeal concerning the second application in November 2023 (so the timelines were starting to converge). Applicant's Exhibit (CBCA 7952-FEMA) 29; Applicant's Exhibit (CBCA 7997-FEMA) 37. The two appeal decisions used similar reasoning. FEMA stated that its policy generally forbids reimbursement of straight-time pay of permanent employees and that, with regard to the other labor and vehicle costs, applicant provided general documentation but did not explain how the costs arose directly from the performance of eligible work in response to the pandemic.

Proceedings Before the Board

Applicant sought arbitration with respect to the October 2023 appeal decision in December 2023. The amount in dispute was $104,139.56. In the initial conference in that matter (CBCA 7952-FEMA), the parties did not mention other applications in dispute. They agreed that the issues for arbitration were, as memorialized by the panel, "(1) whether the applicant is 'in a rural area' for purposes of the [$100,000] dollar amount in 42 U.S.C. § 5189a(d)(3), and (2) the eligibility in principle of the disputed costs for public assistance (not the exact amount of eligible costs)."

Applicant could have sought arbitration with respect to the November 2023 appeal decision at the same time it requested the first arbitration, but it waited until mid-January 2024 to do so. The amount in dispute in the second arbitration (CBCA 7997-FEMA) was $454,235.40. On February 8, 2024, in an initial conference in the second arbitration, applicant proposed (as later clarified by email) to "consolidate for consideration in a single arbitration" the two pending arbitrations as well as "an impending appeal [sic] on a third application," which applicant proposed to bring before the Board "on its natural due date of April 1, 2024." FEMA did not object.

The Board referred the consolidation request to this panel, in CBCA 7952-FEMA, the first-filed arbitration. On February 9, 2024—by which time FEMA had filed its Rule 608 response in the first arbitration—we consolidated the two pending arbitrations and added in the order, "Applicant refers to a third arbitration, not yet filed. That matter is **NOT CONSOLIDATED** and likely will not be, if applicant waits until the 'natural due date' of April 1 to seek the third arbitration, per its motion." As ordered, FEMA responded to the arbitration request in CBCA 7997-FEMA on February 26, and applicant filed a consolidated reply on March 15. FEMA filed a surreply, with a motion for leave to file it, on March 22. We accept the surreply.

Discussion

The Eligibility Dispute Involves $558,374.96

Both arbitration requests individually involve more than $100,000 but less than $500,000; combined, they involve $558,374.96. As noted, we stated in the first arbitration that we would need to decide whether applicant is a rural applicant entitled to arbitration of a dispute concerning less than $500,000. *See* 42 U.S.C. § 5189a(d)(1), (3). We need not decide that issue now. The dispute before us relates to the aggregate amount of $558,374.96. Neither party properly analyzes this threshold issue.

Applicant effectively offers no analysis of the issue (and makes no effort to show that it is "in a rural area" per the statute). Applicant relies, instead, on the fact that we granted consolidation. It asserts that this means it may "consider[] the question of project consolidation to be closed" and may seek the combined dollar amount without addressing the urban/rural issue that we set for decision in CBCA 7952-FEMA. *See* Applicant's Consolidated Reply at 13. Applicant misunderstands what consolidation entails.

Consolidation is a procedural step, not a substantive one. *Cf.* Rule 2(f) (48 CFR 6101.2(f)).[3] Matters are sometimes consolidated when they are effectively the same—in which case, they are "merged" as well as consolidated.[4] More often, adjudicators may consolidate matters that do not merge.[5] Board arbitration decisions illustrate this distinction.

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[3] The Board's rules for contract disputes do not govern FEMA arbitrations, except as incorporated in 48 CFR part 6106, but are illustrative.

[4] *See, e.g.*, *Cablevision Systems Development Co. v. Motion Picture Ass'n*, 808 F.2d 133, 135–36 (D.C. Cir. 1987) (all parties had one merged deadline to appeal a consolidated judgment "disposing of all the cases," regardless of what the deadlines would have been in separate cases); *CSI Aviation, Inc. v. Department of Homeland Security*, CBCA 6581, et al., 20-1 BCA ¶ 37,519, at 182,228 ("These [consolidated] appeals are, at bottom, exactly the same matter, complicated only by jurisdictional issues unique to the schedule contracting environment.").

[5] *See Hall v. Hall*, 584 U.S. 59, 66 (2018) ("Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted [consolidation] to mean the joining together—but not the complete merger—of constituent cases."); *Jita Contracting, Inc. v. Department of Transportation*, CBCA 7269, et al., 23-1 BCA ¶ 38,431, at 186,779 & n.1 (noting separate pleadings in consolidated appeals); *Avant Assessment, LLC*, ASBCA 58867, 16-1 BCA ¶ 36,436, at 177,601 (distinguishing consolidation from merger).

Compare Santa Cruz County Service Areas, CBCA 7879-FEMA, 24-1 BCA ¶ 38,507, at 187,159 (merging two project worksheets for arbitration absent "material differences between the projects") *with City of Lakeport, California*, CBCA 6728-FEMA, 20-1 BCA ¶ 37,671, at 182,885 (dismissing two low-dollar projects from arbitration, after a consolidated FEMA appeal decision in which each project was separately "addressed by [FEMA's] consolidated analysis"); *see also Ocean Hammock Property Owners Ass'n*, CBCA 6409-FEMA, et al., 19-1 BCA ¶ 37,360 (one decision in two consolidated arbitrations involving different applicants)*; cf. Monroe County Engineer*, CBCA 7404-FEMA, et al., 23-1 BCA ¶ 38,237, at 185,688 n.1 (2022) (deciding together but "not formally consolidat[ing]" two arbitrations that shared "common factual and legal issues"). We did not resolve the issue that applicant says we did by consolidating the arbitrations.

FEMA, meanwhile, asserts that applicant "cannot combine separate disputes being adjudicated in separate arbitrations" to meet a dollar threshold. FEMA's Response (CBCA 7997-FEMA) at 10.[6] That is not categorically accurate. Congress authorized the Board to conduct "arbitration . . . for a dispute" about grant eligibility or repayment, subject to conditions.[7] Applicants may seek arbitration only after receiving a first appeal decision (or waiting 180 days in vain for one), 44 CFR 206.206(b)(3)(B), but this does not necessarily limit our arbitration authority to one application, appeal, or docketed arbitration at a time. Instead, an eligibility "dispute" within our authority could, depending on the circumstances, encompass more than one FEMA decision or Board docket number.

Again, past decisions are instructive. In *Santa Cruz County Service Areas*, two project worksheets covered the same kinds of construction at the same locations but at different times. 24-1 BCA at 187,158–59. Over FEMA's objection, the panel treated the dispute as involving a single project captured in two worksheets for convenience. *Id*. The panel surely would have had the same view had the Board for some reason assigned separate docket numbers to each worksheet. *Cf. Ocean Hammock Property Owners Ass'n*, 19-1 BCA at 181,662 (resolving a common eligibility issue in two separately docketed, consolidated arbitrations). In *City of Lakeport*, by contrast, the construction work recorded in three worksheets happened at different places, for somewhat different reasons, and at different times, so the panel agreed with FEMA that each worksheet addressed a separate dispute

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[6] FEMA cites only *Santa Cruz County Service Areas* and *City of Lakeport*, neither of which supports FEMA's categorical assertion.

[7] "[A]n applicant for assistance under this subchapter may request arbitration to dispute the eligibility for assistance or repayment of assistance provided for a dispute of more than $500,000 for any disaster that occurred after January 1, 2016. Such arbitration shall be conducted by the Civilian Board of Contract Appeals." 42 U.S.C. § 5189a(d)(1).

subject to its own dollar threshold, notwithstanding that FEMA had issued a consolidated appeal decision. 20-1 BCA at 182,884–85. Each panel looked to the substance of the underlying dispute or disputes, rather than to the procedural posture.[8]

The number of disputes is arguably less clear here than in *Santa Cruz County Service Areas* or *City of Lakeport*, as applicant's costs are not as obviously linked to discrete locations or tangible results as were the costs in the other matters. But we perceive, in essence, one dispute as to the eligibility of costs, mostly of labor, that applicant attributes to responding to COVID-19. There is enough commonality that it is logical to examine the costs on a unified basis. *Cf.* 44 CFR 206.201(i) ("A *project* is a logical grouping of work required as a result of the declared major disaster or emergency."). The whole dispute concerns more than the $500,000 minimum under 42 U.S.C. § 5189a(d)(1).

We lack arbitration authority, however, as to the third project worksheet that applicant mentioned when it sought consolidation. It appears from applicant's reply that it may have misconstrued our scheduling of a consolidated reply to mean we had included the third worksheet in the arbitration, although we expressly said we had not. *See* Applicant's Consolidated Reply at 13 ("The City presents in this filing our 'one consolidated reply' including the third section of their [sic] grant application, Project 242331."). That would not be a reasonable reading of the consolidation order.

Applicant Does Not Establish Eligibility

Turning to the merits, we do not differ with FEMA's eligibility decisions. *Cf. New York Foundling*, CBCA 7810-FEMA, 23-1 BCA ¶ 38,439, at 186,828 ("We have much the same difficulty . . . as FEMA has had."). Applicant makes legal and policy arguments and insists that it would be impossible to provide more detailed records than applicant has provided. We are unpersuaded.

Some of applicant's arguments seem to rest on a mistaken view of the nature of FEMA public assistance. Applicant discusses general principles of federal grant funding that apply *after* an agency awards a grant for a given purpose.[9] That is not the posture of this dispute. FEMA awards public assistance for disaster costs. *See* 42 U.S.C. §§ 5170b, 5172.

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[8] Because arbitration decisions are "not precedential," Rule 613, it is not strictly necessary to harmonize *Santa Cruz County Service Areas* and *City of Lakeport*, but we see no conflict between them.

[9] Applicant discusses, e.g., 2 CFR part 200, subpart E, Cost Principles, and FEMA's guidance on determining the reasonableness of otherwise eligible costs.

To receive assistance, applicant must show that the COVID-19 disaster caused the costs it seeks—i.e., that applicant incurred the costs only because of the pandemic. *See* Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19 (eligible work must be "required as a result of the declared incident"); *Tunica County Board of Supervisors*, CBCA 7907-FEMA, 24-1 BCA ¶ 38,546, at 187,355 (finding "work related to . . . regular operations" ineligible under COVID-19 policy). In short, "cause and effect must be established." *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,387.[10]

Straight time

The causation requirement explains why straight time of permanent, "budgeted" employees—whom applicant would have employed and paid anyway—is ineligible work. *See* 44 CFR 206.228(a)(2)(iii); PAPPG at 23–24. The only exception is if a budgeted employee is recalled to work as "backfill" on a regularly scheduled day off to replace an employee who is performing eligible work. PAPPG at 24–25. This makes sense since, normally, the pay of a permanent employee would not result from a disaster. Applicant does not identify any "unbudgeted" employees in its cost pool or any straight time used for backfill. Rather, applicant asks us to disregard the PAPPG's guidance on budgeted employees as confusing and "contradictory." Applicant's Consolidated Reply at 26. We do not find it to be so. Accordingly, none of the claimed straight-time pay of applicant's employees is eligible for public assistance.

Overtime

FEMA policy permits government applicants to receive overtime costs attributable to a list of eligible COVID-19 responses during the incident period in 2020 and 2021.[11] Applicant questions how FEMA's September 2021 policy on safe opening and operation (2021 O&O Policy) could apply retroactively. Applicant's Consolidated Reply at 28.[12] This was explained in *New York Foundling*, 23-1 BCA at 186,827–28. The 2021 O&O Policy

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[10] Applicant's argument that requiring cost causation conflicts with FEMA's statutory authority is far outside the scope of arbitration. *See, e.g.*, *Board of Trustees of Bay Medical Center*, CBCA 7826-FEMA, 24-1 BCA ¶ 38,492, at 187,097.

[11] Policy 104-21-0003, *Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance (Interim)* (Version 2) (Sept. 2021) at 1, 5, *quoted in Tunica County*, 24-1 BCA at 187,355.

[12] Applicant also faults FEMA for not submitting copies of its policies for the arbitration record. That is unnecessary, as the policies are online.

comprehensively summarized FEMA's policies on funding COVID-19 protective measures in the incident period. *See id.* As *New York Foundling* also explained, while overtime costs may be reimbursable, "it requires some special explanation to show that" the overtime was "caused by instituting" eligible protective measures and not by other circumstances. *Id*. at 186,828. "We . . . 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." *Id*.; *cf. Joint Meeting of Essex & Union Counties, New Jersey*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, at 185,643 ("These increased costs were directly related to eligible emergency actions . . . for a limited time period (twenty-one days), and the costs were also tracked and clearly documented.").

Applicant's presentation of its overtime costs lacks the necessary evidence of causation. Applicant's assertions that circumstances were atypical and that applicant tried to satisfy FEMA do not suffice. *See, e.g.*, Applicant's Request for Arbitration (CBCA 7952-FEMA) at 5 ("The City [applicant] asserts all COVID-19 related work is described on the work reports as requested by FEMA . . . . Just because FEMA disputes . . . eligibility . . . does not mean the City did not produce information and documentation [of] such, as requested."); Applicant's Consolidated Reply at 20–23. In the mass of time logs in the record, applicant does not point to discrete hours of overtime caused solely by eligible tasks. Applicant criticizes FEMA's decisions but does not help us to find eligibility. *See* Rule 609 ("[P]arties should provide the panel with everything it needs to make a decision."); *School Board of Bay County, Florida*, CBCA 7889-FEMA, 24-1 BCA ¶ 38,518, at 187,224 ("We ask primarily whether applicant is right and not whether FEMA is wrong."). Applicant seemingly refuses to guide us through its records. *See* Applicant's Request for Arbitration (CBCA 7997-FEMA) at 4–5 ("[I]f lack of . . . detail is truly the basis of [FEMA's] funding denial[,] there is no point . . . reading any further than [Applicant's]. . . cost claim documentation. No other actual cost document exists for a correct claim, nor could it.").

We examined the time records submitted in each arbitration. The exhibits run more than 2000 pages in total. We see that employees of the police and fire departments and the city manager's office worked overtime. We see that in many instances, the employees performed what may have been emergency protective measures or filled in for other employees. Yet, like FEMA, we see no way to isolate or to estimate with any confidence the time spent on eligible work. The activity categories are simply too vague. Much of the time is charged as "COVID 19 Prep, Response & Support," "COVID 19 daily duties," or similarly, but these categories alone do not tell us what the employees were doing or how that work differed from their usual duties. We cannot simply presume that work recognized as eligible under FEMA policy caused the overtime, as applicant, in effect, invites us to do. *E.g.*, Applicant's Consolidated Reply at 22 ("FEMA is incorrect in requiring . . . the level of detail FEMA now requires for work validation three and four years after the fact.").

The parties devote considerable attention to the overtime sum sought for permanent firefighters who backfilled for co-workers who were assigned to a "COVID-19 task force." We agree with FEMA that the supporting records are imprecise and appear to contain costs of ineligible work, including regularly scheduled workdays, as well as unexplained "COVID Award Pay." *See* FEMA's Response (CBCA 7997-FEMA) at 15–18. Applicant replies that it "does not understand FEMA's difficulty." Applicant's Consolidated Reply at 14. We do. Applicant's mere assertion that it "filled the vacated . . . slots with otherwise qualified City firefighters, incurring great overtime," *id.*, does not help to identify any specific hours of eligible overtime. General references to eligible or potentially eligible work by employees cannot demonstrate the actual, marginal hours or costs of eligible work. As a result, "we cannot find any eligibility." *New York Foundling*, 23-1 BCA at 186,829.

Vehicles

FEMA provides public assistance for the actual hours that an applicant uses equipment to perform eligible protective measures, based on hourly rates. PAPPG at 26. Applicant seeks costs of fire vehicles used by (1) employees performing COVID-19 protective measures, and (2) backfill employees performing regular work. Applicant's cost documentation for its fire vehicles shares the infirmities of its other records. As FEMA writes, the records show "[each] employee who used the equipment, date the equipment was used, the number of usage hours, and the total cost per line item, but [no detailed] description[s] of the work." FEMA's Response (CBCA 7997-FEMA) at 18. Applicant asserts that it has provided enough information and that "[t]his method of cost calculation and work description has been used by FEMA for many years." Applicant's Request for Arbitration (CBCA 7997-FEMA) at 15–17. Again, as applicant offers no way to segregate the costs of eligible vehicle usage from ineligible usage, we can find no eligibility.

Decision

The costs at issue in these two arbitrations are ineligible.

Kyle Chadwick

KYLE CHADWICK
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Jonathan L. Kang

JONATHAN L. KANG
Board Judge