



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 5, 2024

CBCA 7811-FEMA

In the Matter of BALDWIN COUNTY ELECTRIC
MEMBERSHIP CORPORATION

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Before the Arbitration Panel consisting of Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **GOODMAN**.

GOODMAN, Board Judge, writing for the Panel.

The applicant, Baldwin County Electric Membership Corporation (applicant or BEMC), a not-for-profit electric cooperative in southwest Alabama, has sought arbitration with regard to FEMA's denial of reimbursement of a portion of its costs incurred by a single contractor for cleaning up vegetative debris after Hurricane Sally. At the request of the parties, the case has been decided on the written record.

Background

On September 15, 2020, Hurricane Sally made landfall in southern Alabama, the first major hurricane to hit the state in over fifteen years. The applicant states that Sally “decimated BEMC’s service territory, causing significant damage to BEMC’s electric distribution infrastructure and knocking out power to 97% of its over 80,000 meters.” Request for Arbitration at 1. The high winds left vegetative debris throughout the applicant’s power line rights-of-way (ROW). *Id.* at 6. The applicant’s hiring of a sufficient number of ROW workers was made difficult by the lingering effects that Hurricane Laura, which hit the southeast the prior month, was having on the utility industry. The applicant had sent its own workers and equipment to assist with Laura’s effects for several weeks and had to recall those crews in order to assist with Sally. Also, the COVID-19 outbreak was impacting hiring. *Id.* at 8.

To clean the debris from the ROW, the applicant non-competitively hired nine contractors and received assistance from two mutual aid agreements. Five of the hired contractors had participated in the applicant’s pre-qualification process earlier in 2020, which had pre-qualified ten contractors. FEMA’s Response to Request for Arbitration (FEMA’s Response) at 2-3. Through this effort, the applicant “mobilized approximately 1,500 line construction and ROW workers, in addition to its internal 100 workers, to respond and restore electricity to all homes and facilities that could safely restore power” – 77,654 locations – “within nine days of landfall.” Request for Arbitration at 6-7.

FEMA determined that the category of costs at issue – cleaning the debris from the ROW – was eligible for reimbursement and reimbursed the costs of eight contractors, whose average labor rate per hour ranged from \$40.84 to \$98.81, and whose average daily rate ranged from \$2332 to \$5325. These eight contractors performed 26,557 hours of work, costing a total of \$1,625,165.99. FEMA also reimbursed the costs of the two mutual aid agreements, with average labor rates per hour of \$30.74 and \$90.86, which performed 1291.6 total hours, costing a total of \$61,441.32.

The issue in this arbitration is the reasonableness of the costs paid to the ninth contractor, ABC Professional Tree Services (ABC), a socioeconomic (minority) firm, that had participated in the applicant’s pre-qualification process earlier in 2020 and had been hired when the applicant was unable to procure additional workers to clean the ROW. ABC performed the clean up with an average labor rate per hour of \$132.49 and an average daily rate of \$12,650. ABC performed 8760.62 hours of work, costing a total of \$1,160,674.62. FEMA’s Response at 3.

The applicant did not engage ABC until it had exhausted all other, lower cost resources first and found that it still required additional support to restore power to its system

in order to perform other work to protect the public health and safety, save lives, and protect property. When BEMC determined it needed ABC, it was available in the region and had workers and equipment that could immediately support the monumental effort of ROW clearance, as well as the ability to ramp up with additional crews quickly. Request for Arbitration at 17.

On October 5, 2021, FEMA issued a determination memorandum denying a portion of ABC's costs, deeming ABC's costs of \$132.49 per hour unreasonable. FEMA explained that, "while it generally considers contract costs reasonable when a [public assistance] applicant adheres to full and open competition, it must perform a cost reasonableness analysis when the contract is noncompetitively procured." FEMA calculated that the average cost for the other eight contractors and two mutual aid agreements was \$61.32 per hour, less than half of ABC's rate, and determined that the applicant also failed to provide justification for ABC's substantially higher rate. FEMA therefore reduced the claimed rate for ABC's labor of 8760 hours to the average rate of \$61.32 per hour, allowing \$537,233.70 of the claimed labor costs of \$1,160,674.62 for ABC and denying the remaining \$623,440.92. The applicant appealed this decision. FEMA's Response at 3-4.

The applicant submitted its first appeal through the Alabama Emergency Management Agency in a letter dated December 3, 2021, asserting that "ongoing response and recovery from [Hurricane Laura] and the effects of the COVID-19 pandemic impeded its efforts to procure other contractors, that it procured under emergency and exigent circumstances, and that ABC's ability to start work immediately justified the higher rate." The applicant also argued that "FEMA's focus on equity in disaster recovery means that using socioeconomic firms, like ABC, to assist in disaster recovery may result in increased costs because of higher overhead and start-up expenses." FEMA's Response at 4.

On May 2, 2023, FEMA again deemed ABC's \$132.49 per hour rate unreasonable, asserting that –

the Applicant did not provide documentation to substantiate its claims of a labor shortage or the necessity of ABC to complete the work. Further, . . . even under emergency and exigent circumstances, Federal procurement requirements concerning cost reasonableness are still in effect. Finally, concerning the socioeconomic firm argument, . . . the two other socioeconomic firms [woman owned] on the list submitted lower bids than ABC, including the lowest one at \$40.84/hr.

FEMA's Response at 5.

The applicant filed this request for arbitration on June 30, 2023, seeking reimbursement of \$623,440.92, which FEMA had not reimbursed as unreasonable costs.

Before FEMA filed its response to the arbitration request, it reviewed again the applicant's claim and increased the allowable rate for ABC from \$61.32 per hour to \$98.81 per hour, equal to the highest rate of the other eight contractors procured. The result was that FEMA increased what it considered to be the total reasonable amount for ABC's labor to \$865,636.86 of the \$1,160,674.62 claimed, with the remainder of \$295,037.76 in dispute in this arbitration. FEMA's Response at 5.

Discussion

FEMA's Position

As to the \$295,037.76 that remains at issue, FEMA's position is essentially the same as that before the arbitration was filed. FEMA relies upon the general principle that "[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." 2 CFR 200.404 (2020). When determining cost reasonableness, FEMA must consider many factors, including current "[m]arket prices for comparable . . . services for the geographic area." *Id.* 200.404(c).

To establish the current market price, FEMA may look at the average costs in the area. Public Assistance and Program Policy Guide (PAPPG) (June 2020) at 66–67. FEMA maintains that it may calculate the average cost in the area in different ways. In this instance, FEMA compared the requested costs with other applicants' projects involving similar work and circumstances, "such as event impacts, magnitude, comparable shortages, market factors, and any other unique circumstances that may impact either of the costs." *Id.* at 67.

As to ABC's rate, FEMA states that "ABC's rate of \$132.49/hr is not similar to the current average market price of \$61.32/hr based on the other contractors procured under the same project; ABC offered no unique services or extraordinary level of effort as compared with the other contractors performing the same work; and [t]he applicant was able to procure other post-disaster contractors" – not pre-qualified by the applicant – "that had lower rates than ABC." FEMA's Response at 12.

FEMA notes that the applicant asserts "that it had to procure ABC due to labor shortages as a result of a previous hurricane and the COVID-19 pandemic, that their higher costs are reasonable because they are a minority-owned business, and that its participation in the project resulted in the project finishing two days ahead of schedule and costs savings."

However, FEMA dismisses these arguments, stating that they are not substantive and do not support ABC's costs as reasonable. FEMA's Response at 12.

FEMA further asserts that applicants are responsible for demonstrating that the claimed costs are reasonable. FEMA's Response at 12; *see* PAPPG at 68. Therefore, they must provide documentation "showing current market prices for similar services" (i.e., historical documentation, average costs in the area, or published unit costs); "supporting [the] necessity of unique services or extraordinary level of effort"; and "supporting shortages, challenging procurement circumstances, and length of time shortages or procurement challenges existed, such as news stories or supply chain vendor reports." PAPPG at 68.

FEMA maintains that the applicant failed to meet its burden of proof as it has not provided documentation to show that a labor shortage existed at the time. It emphasizes, first, that the applicant was able to procure four contractors via sole sourcing that had not participated previously in its pre-disaster, pre-qualification procedure and that had significantly lower costs than ABC. Second, while federal procurement rules require entities to take affirmative steps to ensure that small businesses, minority-owned businesses, women-owned business enterprises, or labor surplus area firms are used, when possible, this does not negate or waive the cost reasonableness requirement. *See* 2 CFR 200.321, .404. FEMA notes that two other socioeconomic firms performed work under the same project and had lower rates than ABC. Finally, FEMA states that "speculative future overall cost savings are not a factor when analyzing if the costs are reasonable under the Federal rules." FEMA's Response at 12-13.

FEMA concludes:

The straightforward issue presented in this arbitration is answered in an equally straightforward fashion: No, the Applicant's requested costs for ABC are not reasonable. ABC's rate is: higher than the average market price; not related to unique services or extraordinary level [of] effort; and not the result of shortages or challenging procurement circumstances.

Accordingly, FEMA adjusted ABC's rate to the pricing of another properly procured and selected contractor that the agency found reasonable and will obligate the additional reasonable funds at the outcome of this matter.

FEMA's Response at 14.

The Applicant's Position

While FEMA has determined that \$295,037.76 of the \$1,160,674.62 incurred by ABC for removing debris from the ROW is not reasonable, the applicant contends that it acted prudently and that the cost was reasonable:

FEMA has not properly evaluated the decision to engage ABC – a decision made by highly experienced professionals in the electric industry – or the extreme circumstances confronting BEMC at the time the costs were incurred. ABC was among a group of pre-qualified contractors and was brought in to assist when BEMC's highly experienced management team and others involved in the intense restoration effort determined they were required after other lower priced vendors either declined the work or had joined the mission but were inadequate to meet the need.

Request for Arbitration at 1.

With regard to the pre-qualified vendors, the applicant notes that it was “fighting for shortages in disaster response resources as the entire southeast United States was dealing with a very active hurricane season” and the impact of COVID-19. Request for Arbitration at 19. The applicant states further that its pre-qualified list also gave it pre-disaster competitive prices, and it therefore “was able to receive competitive pricing as well as [a] list of qualified and responsible contractors [upon] which it could rely under emergency circumstances.” *Id.* at 21. Despite its attempt to pre-qualify contractors, the applicant states that it needed even more contract support than the contractors on the list could provide. Of note, five of the ten contractors on the list were contacted but either could not respond or could not respond timely due to their location. “Nonetheless, the list, and specifically the prices provided by those on the list, provided an excellent ability for BEMC to confirm the costs of these additional emergency contracts as reasonable.” *Id.* at 15.

The applicant's vice president of finance and accounting stated that “[o]ut of the 10 pre-evaluated [ROW] contractors, several stated they would not be able to deploy . . . within the required time-frame” and that the applicant “called in the most affordable contractors first,” but that after calling them, “the cooperative was still short” of the number of workers needed. As a result, the applicant “had no choice but to utilize ABC” because they were the only contractor that could provide the required workers. Applicant's Exhibit 6, Affidavit of Alan Schott (June 27, 2023) at 3.

The applicant's chief executive officer confirmed that the applicant “pulled all contractors available for ROW clearance for this reason, using ABC after others were fully utilized or did not respond.” Applicant's Exhibit 2, Affidavit of Karen Moore (June 27,

2023) at 3. The applicant asserts further that the work was extremely time sensitive and that, while ABC provided 25% of the ROW labor, not hiring ABC would have resulted in a delay to removal of debris in the ROW and additional immense cost. Request for Arbitration at 25. Applicant's vice president of finance and accounting stated:

BEMC[']s use of ABC is reasonable because . . . [this] provided sufficient ROW crews to allow for the completion of the initial restoration of power within 10 days. According to FEMA's Methodology for Establishing Value of Loss of Service per day, the daily cost for damages to BEMC infrastructure from Hurricane Sally impacts was \$36,551,970 per day. I estimated that without the additional ROW support of ABC, the initial restoration would have extended for at least an additional two days. Based on the average cost per day for line repair Mutual Aid and contractors of \$1.874 million per day, even a one-day delay in the initial restoration effort clearly shows the rates charged by ABC are reasonable given the circumstances in place. When compared to the increased cost of ABC FEMA is now denying in this matter . . . the cost savings is enormous.

Applicant's Exhibit 6, Schott Affidavit at 4-5.

The applicant challenges FEMA's cost analysis. It states that in FEMA's first appeal determination, FEMA averaged the rates of the eight vendors, other than ABC, to determine what it believed to be a reasonable cost, then reduced ABC's cost to reflect that average. According to the applicant, this method was not logical, as it erroneously assumed the eight vendors had additional capacity, which they did not, which was the reason why ABC was hired. Accordingly, the average rate of the eight vendors was not an attainable rate under the circumstances. Applicant's Reply to FEMA's Response at 1-2.

The applicant also does not agree with the methodology in FEMA's response, in which it revises its analysis and concludes that "the rate of the next highest vendor should be the 'reasonable' rate applicable to work performed by ABC," as again this "assumes that the next highest vendor was available and could have done the work performed by ABC." This also ignores the fact that BEMC "turned away higher costing contractors and many other contractors could not perform the work." Applicant's Reply to FEMA's Response at 2.

The applicant also takes issue with FEMA's argument that ABC was not unique and so there is no reason BEMC should have agreed to pay what it knew was a higher price than others had offered. It argues that FEMA has ignored the fact that "ABC was unique in that it was the only vendor capable of providing the crews and equipment necessary to support BEMC's effort to return life-saving power to the community." Applicant's Reply to FEMA's Response at 2-3 (footnote omitted).

The Reasonableness of ABC's Rates

We find that ABC's costs are reasonable in nature and amount, as the costs do not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. 2 CFR 200.404. ABC's labor costs were reasonable given the circumstances that prevailed after Hurricane Sally and the time-sensitive nature of the restoration that was required.

The applicant states that "[t]he most prudent person in the world cannot consider a price that is not available." Applicant's Request for Arbitration at 28. The applicant explained that the more affordable contractors "were contacted but could not respond and/or could not respond timely due to their location." *Id.* at 15. The applicant also stated that it "did not engage ABC until it had exhausted all other lower cost resources first and found that it still required additional support to restore power to its system." *Id.* at 17.

As stated previously, FEMA dismisses the applicant's assertions that it had to procure ABC due to labor shortages as a result of a previous hurricane and the COVID-19 pandemic, that their higher costs are reasonable because they are a minority-owned business, and that its participation in the project resulted in the project finishing two days ahead of schedule and costs savings. FEMA's refusal to give credence to these assertions is contrary to the circumstances that prevailed at the time.

The applicant's chief executive officer and vice president both affirm that the applicant procured the services of ABC, despite the significantly higher labor rates, only after it determined that it could not procure additional services from the eight other contractors that it had hired or from other contractors. Thus, according to the applicant, the labor market left the applicant no other alternative but to hire ABC. FEMA's conclusion that the rate of the next highest contractor was the reasonable rate ignores the reality that the next highest contractor and all of the other contractors hired did not have additional capacity nor could the applicant find another contractor other than ABC.

With regard to documentation of a labor shortage, we also find the affidavits of the applicant's chief executive officer and vice president sufficient to prove the labor shortage. The PAAPG allows applicants to prove reasonableness of costs by:

Documentation supporting shortages, challenging procurement circumstances, and length of time shortages or procurement challenges existed, such as news stories or supply chain vendor reports.

PAAPG at 68. The PAAPG does not, however, restrict documentation to the types suggested, i.e., news stories or supply chain reports. Shortage of workers to clear ROW

debris may not be newsworthy to the point that there are any published stories in the press, nor may there be vendor reports available. First hand knowledge by those responsible to respond to the emergency and conduct procurement, by affidavit, is persuasive.

The applicant's vice president affirms that because of the time factor, each day in delay of restoration of power would cost the applicant millions of dollars and states that the additional cost of hiring ABC was reasonable when compared to costs of delay. We do not consider this estimate of additional cost speculative but based upon the applicant's knowledgeable assessment of the per-day cost of delay. The costs at issue, \$295,037.76, are reasonable to alleviate even one day at this per-day cost of delay.

Decision

We find that the costs at issue are reasonable and reimbursable.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge