



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 31, 2024

CBCA 8121-FEMA

In the Matter of UNIVERSITY OF SOUTHERN CALIFORNIA

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, and Charles Schexnaildre of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant; and Chris Bomhoff, Disaster Policy Specialist, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, FL, appearing for Applicant.

Carl DeNigris, Assistant Chief Counsel, and Michael Romero, Counsel, Governor's Office of Emergency Services, Mather, CA, counsel for Grantee; and Eli Owen, Assistant Director, Fan Jia, Infrastructure Branch Chief, Robert Larsen, Public Assistance Officer, and Courtney Day, Associate Governmental Program Analyst, Governor's Office of Emergency Services, Mather, CA, appearing for Grantee.

Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR; and Shahnam Thompson, 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 **RUSSELL**, **SULLIVAN**, and **KANG**.

KANG, 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), applicant, the University of Southern California (USC), seeks public assistance (PA) funding for

providing non-congregate sheltering (NCS)¹ in connection with the COVID-19 pandemic. For the reasons stated below, we find that the costs are ineligible for PA funding.

Background

The Stafford Act provides the statutory authority for FEMA’s federal disaster response activities. Congress enacted the Stafford Act to provide “assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [major] disasters.” 42 U.S.C. § 5121(b). The Stafford Act is “designed to assist the efforts of [eligible entities affected by major disasters] in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas.” *Id.* § 5121(a)(2).

On March 13, 2020, the President declared the COVID-19 pandemic a nationwide emergency and issued emergency and disaster declarations for each state and territory under the Stafford Act. For California, FEMA issued notices on March 13, 2020, and March 22, 2020, which established the disaster incident period as January 20, 2020, to May 11, 2023. *See* FEMA DR-4482-CA, <https://www.fema.gov/disaster/4482> (last visited Oct. 30, 2024); FEMA EM-3428-CA, <https://www.fema.gov/disaster/3428> (last visited Oct. 30, 2024). The grantee here is the California Office of Emergency Services (Cal OES).

On March 7, 2020, the California Department of Public Health (CDPH) issued guidance, titled “Higher Education Guidance on Novel Coronavirus or COVID-19,” which provided several recommendations for institutes of higher education (IHEs) in responding to the COVID-19 pandemic. Applicant’s Exhibit 9. On July 29, 2020, the Los Angeles County Department of Public Health (LADPH) issued its own guidance, titled “Protocol for COVID-19 Exposure Management in Institutes of Higher Education.” Applicant’s Exhibit 15.

Relevant here, the LADPH guidance instructed IHEs to engage in “Exposure Management Planning,” which included the following direction: “Required: Adequate supply of housing for students and faculty to safely isolate or quarantine when needed.” Applicant’s Exhibit 15 at 1. When IHEs identified one case of COVID-19, they were required to report the positive case to LADPH and to “assist with identifying housing for students and faculty to safely isolate or quarantine when needed.” *Id.* at 3. When two cases were identified within a fourteen-day period, IHEs were required to follow the requirements that apply when one case was identified; it was also recommended that IHEs perform an

¹ NCS is, generally, housing for the purpose of isolating an individual with a private room and bathroom. *See* Request for Arbitration at 7.

assessment of the links between the affected individuals. *Id.* at 3. When three or more cases were identified within a fourteen-day period, IHEs were required to report the cases to LADPH and seek further instructions. *Id.* at 3-4.

USC is a private not-for-profit (PNP) university in Los Angeles, California. The university includes the Keck School of Medicine, which operates hospital facilities. From March 3 to July 11, 2020, applicant provided NCS for approximately forty-five USC students and “hundreds” of Keck School of Medicine healthcare workers. Request for Arbitration (RFA) at 10; Applicant’s Exhibit 3 at 1. NCS was provided at the USC Hotel, which is owned by the university, as well as two other hotels under contract with USC. RFA at 10. Additionally, at the request of Los Angeles County, USC provided NCS for county healthcare workers at the USC Hotel, beginning in April 2020. Applicant’s Exhibit 3 at 11.

Applicant submitted a request for PA funding to FEMA on October 9, 2020, seeking reimbursement for costs incurred in providing NCS and food for USC students and NCS for USC healthcare workers.² FEMA’s Exhibit 3, Enclosure 1, Attachment 3 at 1, 14. FEMA denied the request on June 29, 2023, finding that applicant was ineligible for PA funding because it did not have the legal responsibility to provide NCS for its students and healthcare workers. *Id.*, Enclosure 1, Attachment 1 at 8.

Applicant filed a first-level appeal through the grantee, Cal OES. The grantee’s letter to FEMA forwarding the appeal stated that Cal OES did not support USC’s appeal because applicant did not establish that it had legal responsibility to provide NCS for its students and healthcare workers. FEMA’s Exhibit 3 at 4-5. On April 8, 2024, FEMA denied the first-level appeal, again finding that applicant was not legally responsible for providing NCS for its students and healthcare workers. Applicant’s Exhibit at 1 (First Appeal Determination Letter), 6 (First Appeal Analysis).

USC filed its request for arbitration with the Board on June 7, 2024. Applicant seeks a determination that it is eligible for \$830,746.33 in PA funding to reimburse the following costs: \$37,096.25 for NCS and food for USC students and \$793,650.08 for NCS for USC hospital healthcare workers. RFA at 11.

Discussion

In arbitration matters, the panel reviews FEMA eligibility determinations de novo. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980. This review extends to determinations of issues of fact. *Harris County, Texas*, CBCA 6909-FEMA, 21-1

² Applicant initially sought funding for providing NCS for Los Angeles County healthcare workers but does not pursue those costs in this arbitration. RFA at 11.

BCA ¶ 37,754, at 183,268 (2020). It is the applicant's burden to support its application for PA funding. *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,685.

To be eligible for PA funding, an “item of work must: (1) Be required as the result of the emergency or major disaster event; (2) Be located within the designated area of a major disaster or emergency declaration . . . ; and (3) Be the legal responsibility of an eligible applicant.” 44 CFR 206.223(a) (2020); *see* Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19.³ PNPs, such as USC, are generally eligible for reimbursement of costs for emergency protective measures only if they are “associated with preventing damage to an eligible facility and its contents.” PAPPG at 60. In contrast, emergency services, such as fire and rescue activities, animal control, emergency ambulance evaluation, or “other similarly urgent governmental services,” are “usually” the responsibility of state, local, tribal, or territorial (SLTT) governments. *Id.*

Because “PNPs are generally not legally responsible” for emergency services, “FEMA does not provide PA funding to PNPs for the costs associated with providing those services.” PAPPG at 60. An exception to this general rule arises when a SLTT government transfers legal responsibility to a PNP to perform the emergency service. *Id.* The PAPPG states that responsibility is transferred “[w]hen a PNP provides emergency services at the request of, and certified by, the legally responsible government entity,” in which case, “FEMA provides PA funding through that government entity as the eligible Applicant.” *Id.*

USC raises two primary arguments in support of its application for PA funding: (1) applicant had independent legal responsibility to provide NCS for its students and employees, and no transfer of legal responsibility from a SLTT government was required; and (2) even if applicant did not have independent legal responsibility to provide NCS, the CDPH and LADPH transferred that responsibility to USC. We find no merit to either contention.

A. USC Did Not Have Independent Legal Responsibility to Provide NCS

Applicant argues that, under California law, it has an independent legal responsibility to provide NCS for its students and healthcare workers and that, thus, there was no requirement for a SLTT government to transfer such responsibility. In support of its position, applicant cites a decision by the Supreme Court of California, *Regents of the University of California v. Superior Court of Los Angeles County*, 4 Cal. 5th 607 (2018), which addressed the duty of care under California law for public and private colleges and

³ This version of the PAPPG applies to declared disasters after August 23, 2017, but before June 1, 2020. PAPPG at vii.

universities to protect students from certain acts by third parties. The decision concerned a student who was attacked by another student during class under circumstances where the university had been providing psychological treatment to the attacking student. The court explained that, “[c]onsidering the unique features of the collegiate environment, we hold that universities have a special relationship with their students and a duty to protect them from foreseeable violence during curricular activities.” *Id.* at 613. The court, however, limited the scope of this special duty of care, explaining that “[c]olleges are in a special relationship with their enrolled students only in the context of school-sponsored activities over which the college has some measure of control.” *Id.* at 626.

As discussed, PA funding may be granted only where the applicant has the legal responsibility to provide the “item of work.” 44 CFR 206.223(a)(3); *see* PAPPG at 19. The special duty of care set forth in the *Regents of the University of California* decision did not impose on USC the legal obligation to protect students from the harms of a global pandemic through the provision of NCS, the item of work for which USC seeks reimbursement here. Specifically, USC does not demonstrate that the pandemic was a harm within the scope of school-sponsored activities, over which it had some measure of control.⁴

B. USC Was Not Transferred Legal Responsibility to Provide NCS

Applicant contends that the “Higher Education Guidance on Novel Coronavirus or COVID-19” issued by CDPH and the “Protocol for COVID-19 Exposure Management in Institutes of Higher Education” issued by LADPH transferred legal responsibility to USC to provide NCS for its students and healthcare workers. In addition to these documents, applicant also argues that Los Angeles County implicitly directed USC to provide NCS for the school’s healthcare workers. This argument relies on a “Frequently Asked Questions [FAQ]” document issued by FEMA regarding NCS in response to the COVID-19 pandemic, which stated: “Non-congregate sheltering of healthcare workers and first responders who require isolation may be eligible when determined necessary by the appropriate state, local, tribal, or territorial public health officials and when assistance is not duplicated by another federal agency.” Applicant’s Exhibit 13 at 1-2. Applicant argues that because Los Angeles County requested that USC provide NCS for the county’s medical workers, it is reasonable to infer that the county must have also determined that USC should provide NCS for its own workers. *See* Applicant’s Reply at 22-23.

⁴ We also note that the *Regents of the University of California* decision concerns a special standard of care for students. Even if we found that the special duty of care applicable to students obligated USC to provide NCS for its students in response to the COVID-19 pandemic, applicant does not explain why this special duty of care should extend to the university’s healthcare workers.

FEMA contends that none of the guidance, orders, protocols, or actions cited by applicant constituted a transfer of the legal responsibility to provide NCS from a SLTT government to USC. We need not resolve this matter because, regardless of whether there was a request from a SLTT government to USC to provide NCS, there was no satisfaction of the requirement that the responsible SLTT government certify the request.⁵ See PAPPG at 60.

Although the PAPPG does not define the term “certify” in the context of the transfer of legal responsibility for emergency services, certification clearly means something other than a request by the SLTT government. PAPPG at 60 (“[A] PNP provides emergency services at the request of, *and certified by*, the legally responsible government entity.” (emphasis added)). FEMA explained during the arbitration hearing that certification by the SLTT government requires the entity to assume liability for the PNP’s performance of work and expenditure of funds. For this reason, FEMA argues that it would be improper to find an applicant eligible for PA funding under circumstances where the state grantee does not support the application.

In an analogous situation, an arbitration panel addressed a state grantee’s obligation during the project and reconciliation closeout phase of PA program administration to certify that an applicant’s work “is in compliance with provisions of the FEMA–State Agreement, and that the payments [f]or the project have been made in accordance with [federal procurement regulations].” *Metropolitan St. Louis Sewer District*, CBCA 7438-FEMA, 22-1 BCA ¶ 38,231 at 185,661. The state grantee opposed the application for PA funding because the grantee considered the information provided by appellant to be insufficient to permit certification of the work. *Id.* at 185,661-62. The panel found that the grantee’s opposition to the application was a factor that weighed in favor of finding applicant ineligible for PA funding.⁶ *Id.*

⁵ A significant point of disagreement between applicant and FEMA concerns whether the LADPH guidance required IHEs to identify, or provide, NCS for students and employees. Although we need not resolve this aspect of the dispute, we note that a statement from LADPH on this matter would have been helpful to understand the guidance. This further underscores the importance of the PAPPG’s requirement that a SLTT government certify a transfer of responsibility for emergency services to a PNP.

⁶ In *Metropolitan St. Louis Sewer District*, the panel majority explained that where FEMA and a state grantee were in agreement as to the dispositive issues of fact regarding an applicant’s eligibility for PA funding, “the majority considers the grantee’s total opposition to eligibility to be a decisive factor” in finding an applicant ineligible. 22-1 BCA at 185,661. A separate opinion by the panel minority concluded that while the grantee’s opposition to the applicant’s eligibility for PA funding “is a factor to consider in resolving

Here, based on the information provided by the parties and our review of the PAPPG, we understand the requirement for certification by a SLTT government to mean a statement confirming that the request was made to a PNP and that the work was performed per the SLTT government's directions and applicable FEMA requirements. *See* PAPPG at 60, 144-45. As discussed above, the grantee advised FEMA in its letter forwarding USC's first appeal that it did not support the appeal because applicant did not demonstrate that a SLTT government transferred legal responsibility to provide NCS.

Applicant does not contend that a SLTT government certified that USC was requested to provide NCS to its students and healthcare workers or that the work was performed. Instead, applicant contends that the FAQ document issued by FEMA regarding NCS in response to the COVID-19 pandemic effectively waived the PAPPG's requirement for certification. Applicant's Reply at 8. The FAQ document stated as follows:

Must the Centers for Disease Control and Prevention (CDC) or state/local public health officials direct the use of non-congregate sheltering? Is it okay if another state/local official (e.g., emergency management office) directs the use?

The non-congregate sheltering must be at the direction of and documented through an official order signed by a state, local, tribal, or territorial public health official or be done in accordance with the direction or guidance of health officials by the appropriate state or local entities, in accordance with applicable state and local laws.

Applicant's Exhibit 13 at 2.

Applicant argues that the phrase "or be done in accordance with the direction or guidance of health officials by the appropriate state or local entities, in accordance with applicable state and local laws" meant that guidance of health officials—by itself—was sufficient for PA funding eligibility. *See* Applicant's Response at 8. The question above, however, concerned whether NCS must be approved by SLTT government health officials, as opposed to other emergency management officials. The question did not concern the requirements for a PNP to be eligible for PA funding, and the answer did not state, as

a cost eligibility dispute," the opposition, alone, should not be "a decisive factor." *Id.* at 185,662 (O'Rourke, Board Judge, writing separately). In light of the absence of a certification by LADPH of USC's provision of NCS, we need not resolve whether Cal OES's opposition to USC's eligibility is a "decisive factor" for this arbitration. However, we agree that at least some weight is due to the grantee's position and that Cal OES's opposition to USC's application weighs against finding in applicant's favor.

appellant contends, that general guidance from a health official is sufficient to transfer legal responsibility for NCS to a PNP. Nothing in the FAQ document shows that FEMA abrogated the PAPPG's requirements that SLTT governments certify the work done by a PNP.

Alternatively, applicant contends that another arbitration panel of the Board found that a PNP was eligible for PA funding for providing emergency services, despite the fact that it had not been transferred legal responsibility for such services by a SLTT government.⁷ The panel in *Baldwin County Electric Membership Corp.*, CBCA 7914-FEMA, 24-1 BCA ¶ 38,618, explained that the terms "usually" and "generally" in the PAPPG do not set forth absolute prohibitions on eligibility of PNPs to recover costs for providing emergency services in the absence of a request by a SLTT government to perform the work. *Id.* at 187,723-24. The panel found that the electrical power services provided by applicant were not the responsibility of the SLTT government, and, thus, no transfer of responsibility was required. *Id.* at 187,724. Additionally, the record showed that FEMA had approved PA funding for similar power utilities under similar circumstances without a request and certification by a SLTT government. *Id.* For those reasons, the PAPPG's provisions requiring transfer of legal responsibility and funding through the SLTT government did not apply and did not bar applicant's eligibility for PA funding.

Here, in contrast, USC does not establish that it had independent legal responsibility to provide NCS for its students and healthcare workers. Accordingly, there is no basis to depart from the presumption in the PAPPG that NCS emergency services are the legal responsibility of the SLTT government entities.

Decision

Applicant is not eligible for reimbursement of the costs in dispute.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

⁷ Decisions by other panels in other FEMA arbitrations are not binding precedent. Rule 613 (48 CFR 6106.613 (2023)) (Arbitration decisions under the Stafford Act are "primarily for the parties, [are] not precedential, and should concisely resolve the dispute."). We consider the decisions by other panels cited herein to be persuasive authority.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge