



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 18, 2024

CBCA 7907-FEMA

In the Matter of TUNICA COUNTY BOARD OF SUPERVISORS

John Keith Perry, Jr., and Garret T. Estes of Perry Griffin, PC, Southaven, MS, counsel for Applicant.

Morgan A. Middleton, General Counsel, Mississippi Emergency Management Agency, Pearl, MS, counsel for Grantee; and Stephen C. McCraney, Executive Director, Clayton C. French, Jr., Chief Recovery Officer, and John M. Siler, Director, Office of Public Assistance, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Christiana C. 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**, **O'ROURKE**, and **CHADWICK**.

KULLBERG, Board Judge, writing for the Panel.

The applicant, Tunica County Board of Supervisors (Tunica), requests public assistance (PA) funding in the amount of \$386,519.11 for costs related to sanitizing and cleaning various county buildings and facilities in response to the COVID-19 pandemic. The Federal Emergency Management Agency (FEMA) contends that costs for spraying and fogging, which was one of the initial sanitizing services, are Tunica's only eligible costs and Tunica is not entitled to any additional PA. For the reasons stated below, the panel denies Tunica's request.

Background

On June 29, 2020, Tunica awarded a contract to H&S Commercial and Industrial Supplies and Services (H&S) for initial disinfecting and nightly maintenance services, personal protection equipment (PPE), and temperature scanners in response to the COVID-19 pandemic. H&S submitted quotations to Tunica for initial disinfecting and nightly maintenance services of various buildings and facilities. Those services included the following:

Initial Disinfecting Services	Nightly Maintenance Services
Spray/Fog all surfaces Wipe high touch areas Deep clean walls Deep clean base boards Vacuum with HEPA filtered vacuum Wipe Waste Cans Clean sinks and faucets Sweep and Mop floors Wipe Furniture and Fixtures	Clean & Disinfect floor coverings Empty waste baskets and waste containers Replace trash bags Clean sinks and faucets Fill soap dispensers Fill towel dispensers Sweep and Mop floors Vacuum Carpet Dust surfaces Wipe High touch surfaces (doorknobs and light switches)

The above-listed services were to be performed at the following buildings and facilities: (1) courthouse, (2) aquatic center, (3) county administrators office, (4) GW Henderson Recreation Center, (5) workforce and development, (6) fire department, (7) public works, (8) sheriff department, (9) planning and development, (10) Tunica Battle Arena, (11) Tunica River Park, and (12) wellness center.

H&S then contracted with OST Global, Inc. (OST) to perform the contract work, which included initial disinfecting services and nightly maintenance services from July to October 2020. Although Tunica had previously employed a janitorial staff, the majority of those employees were laid off and did not perform maintenance work after March 2020. Tunica acknowledges that several of the twelve buildings and facilities, including Tunica River Park, Tunica Battle Arena, and the aquatic center, were not in regular use between July and October 2020. FEMA contends that Tunica's invoice records for this period of time only show maintenance for seven locations: (1) courthouse, (2) county administrators office, (3) workforce and development, (4) fire department, (5) public works, (6) sheriff department, and (7) planning and development.

Tunica sought PA funding from FEMA for the cost of cleaning and disinfecting that OST had performed during the period from July 7 to October 31, 2020. Although H&S had quoted costs for temperature scanners and PPE, those items were either returned or not ordered, and H&S did not invoice for those costs. FEMA's May 27, 2022, eligibility determination memorandum denied Tunica's request in full because it lacked any showing of which measures had been taken "to address immediate threat to life, public health, or safety."

Tunica then submitted its first appeal of FEMA's May 27, 2022, determination and subsequently provided additional information to FEMA. On August 15, 2023, FEMA determined that Tunica was entitled to recover PA funding in the amount of \$176,165.34 for spraying and fogging of surfaces, which was one of the initial disinfecting services. Tunica then requested arbitration before the Board for additional PA of \$386,519.11. The panel conducted a hearing, and the parties submitted briefs.

Discussion

The issue in this matter is whether Tunica is entitled to any additional PA funding, beyond spraying and fogging, for the costs of its initial disinfecting and nightly maintenance services contract. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), provides our authority to conduct arbitrations. *Id.* § 5189a(d). FEMA is statutorily authorized to provide PA "essential to meeting immediate threats to life and property resulting from a major disaster." *Id.* § 5170b(a). Eligibility for PA funding requires a showing that such work was "required as the result of the emergency or major disaster event." 44 CFR 206.223(a)(1) (2019). FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) provides that an applicant is entitled to PA for "emergency protective measures and debris removal" and "restoration of damaged facilities." *Id.* at 19. Accordingly, in this matter, Tunica's burden of proof requires it to establish that the work performed by OST amounted to emergency protective measures.

In response to the pandemic, FEMA issued Coronavirus (COVID-19) Pandemic: Safe Opening and Operation Work Eligible for Public Assistance, FEMA Policy 104-21-0003 (Sept. 8, 2021) (O&O). The O&O provided the following:

FEMA may provide assistance to all eligible PA Applicants, including [state, local, tribal, and territorial governments (SLTTs)] and eligible [private nonprofit organizations (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.
- vi. Purchase and storage of PPE and other supplies listed in this section should be based on projected needs for the safe operating and operation of the facility.

Id. at 5. In general, the O&O also provided that “[a]ll work must be required as a direct result of the emergency or major disaster in accordance with 44 CFR § 206.223(a)(1).” *Id.* at 4.

The panel finds that Tunica has not met its burden of proof in establishing entitlement to any additional PA because its request is for work related to its regular operations – the maintenance and cleaning of various buildings and facilities – as opposed to emergency protective measures. An increase in the cost of operation is not an eligible cost for receipt of PA. *See Tri-County Electric Cooperative, Inc.*, CBCA 7719-FEMA, 23-1 BCA ¶ 38,385, at 186,514. FEMA determined, under the guidance of the O&O, that Tunica was entitled to only the cost of spraying and fogging, which was part of the initial sanitizing of buildings and facilities, in response to the COVID-19 pandemic.¹

¹ FEMA, citing 2 CFR 459(a), also raised the issue as to whether Tunica had contracted for the work performed by OST by conditioning payment upon receipt of funding from FEMA and the Mississippi Emergency Management Agency. Having already determined that Tunica has not met its burden of proof, the panel does not deem it necessary to address that issue.

Tunica has not shown how the work performed by OST, with the exception of spraying and fogging, amounted to anything other than routine maintenance and cleaning. The record does not show how the other tasks performed by OST were emergency protective measures. Although Tunica contends that it faced a number of challenges because of the pandemic, those challenges do not establish an entitlement to PA.

Decision

Tunica's request for additional PA is denied.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge