



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 14, 2025

CBCA 7924-FEMA

In the Matter of TOWN OF PARADISE, CALIFORNIA

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Before the Arbitration Panel consisting of Board Judges **GOODMAN**, **SHERIDAN**, and **O'ROURKE**.

O'ROURKE, Board Judge, writing for the Panel.

The applicant, Town of Paradise, California, seeks reimbursement for costs of hazardous tree removal services on private property in the wake of widespread damage caused by the 2018 wildfires known as the Camp Fire. Although the work was initially approved by FEMA as eligible for public assistance (PA) funding, the applicant's request to change the scope of work to account for thousands of additional hazardous trees was submitted years after the project's initial scope of work was completed and funded and, consequently, was untimely.

Background

Between November 8 and 25, 2018, the Camp Fire caused catastrophic damage in California throughout Butte, Los Angeles, and Ventura Counties. The fire burned 150,000 acres, destroyed 19,000 structures including homes, schools, and businesses, and took the lives of eighty-five people. It was the deadliest and most destructive wildfire in California history.

Presidential Disaster Declaration

Four days after the fire started, the President issued a major disaster declaration (FEMA-DR-4407) under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2018), for the affected areas, authorizing individual assistance, public assistance, and state-wide hazard mitigation. The declaration specifically authorized debris removal and emergency protective measures under the PA program. The fire burned for another two weeks before it was contained. Heavily treed areas, including the Town of Paradise (the Town), were devastated by the fire, prompting a massive debris removal and clean-up effort that ultimately removed 7.3 billion pounds of ash, debris, metal, concrete and contaminated soil from affected areas.

FEMA's Approval of California's Private Property Debris Removal Request

The State of California has broad legal authority to remove hazardous and toxic debris from private property when it poses an immediate threat to the public health and safety of the community. These authorities include the California Health and Safety Code, the State's Emergency Powers Act, the State's police powers, and a number of local ordinances and regulations that authorize State and local agencies to enter onto private property without a court order or consent from the land owner to abate hazards and to mitigate the effects of the disaster.

In the wake of the Camp Fire, thousands of fire-damaged trees on private property presented a significant health and safety threat to the public given their close proximity to public rights of way (ROW) and other types of improved public property, such as utility infrastructure. Applicant's Request for Arbitration (RFA), Exhibit 21 at 1-3. To ameliorate this threat, the State sought assistance from FEMA. By letter dated November 28, 2018, the California Office of Emergency Services (Cal OES) requested FEMA's assistance with removing fire-damaged tree debris on private property to eliminate immediate threats to life, public health, and safety. *Id.* at 8.

On December 6, 2018, FEMA approved the request pursuant to 44 CFR 206.224(a)(1) (2018). RFA, Exhibit 21 at 62. In the approval letter, FEMA specifically authorized the

removal of trees on private property “that pose[d] a safety hazard to debris removal crews and the public at large” and acknowledged that the State “unconditionally agree[d] to indemnify the federal government against any claim arising from debris removal,” which the federal law requires. *Id.* at 63; *see* 42 U.S.C. § 5173(b) (2018). The approval letter further acknowledged the State’s position that “although it [the State] has authority to enter onto private property to remove dangerous debris without homeowner consent by means of its nuisance abatement, condemnation, or police powers, the [S]tate will use these powers only as a last resort and will first attempt to obtain a Right of Entry from the owner.” RFA, Exhibit 21 at 63.

Finally, FEMA’s approval letter addressed the statutory requirement to avoid duplication of benefits while undertaking the debris removal. FEMA warned that property owners could not receive public assistance from FEMA *and* collect insurance settlements that cover the same work and further explained that the State had a duty to “facilitate recovery of insurance benefits and credit them against eligible costs.” *Id.* at 64.

Hazardous Tree Removal Through the State Program or By Individual Homeowners

The State program was a private property debris removal (PPDR) program approved for the eradication of hazardous debris caused by the Camp Fire. Through the State program, private homeowners signed a right of entry, allowing the State’s contractors to remove hazardous trees from their property. RFA, Exhibit 7 at 15. Homeowners who did not grant the State a right of entry onto their property could remove any hazardous trees at their own expense. RFA at 12. After an initial hazardous tree assessment was conducted by the Town, the homeowners would either be required to cut down the hazardous trees at their own expense or opt-in to the State program and have CalRecycle, the State’s contractor, remove the hazardous trees at the State’s expense. RFA, Exhibit 7 at 16-17; RFA at 12. For those not enrolled in the State program, the Town had to follow up and verify that the hazardous trees were removed by the homeowners. If the trees had not been removed as required, the Town was allowed to pursue abatement methods consistent with its legal authority. RFA at 12.

The Town’s Request to FEMA for Approval of a Town-Administered PPDR Program to Remove Hazardous Trees

Despite the fact that FEMA already approved the hazardous tree removal program, the Town reached out to Cal EOS by letter, dated July 1, 2019, stating that, although “ongoing debris removal operations are a first step on the road to recovery . . . , the enormity of the standing burnt trees throughout the town will need to be addressed before rebuilding

will be possible.”¹ RFA, Exhibit 21 at 74. To that end, the Town requested “FEMA’s approval of the Town’s program for administering the PPDR program for removal of standing burnt trees,” and “[Cal OES’s] assistance in the contracting and performance of the removal of the trees.” *Id.* The Town explained that the cost of removing standing burnt trees on private property often exceeded the value of the property itself, a fact that would discourage rebuilding of homes, which, in turn, would impede the generation of tax revenue essential to the recovery effort. The Town also commented that removing standing burnt trees would be a daunting task for property owners, resulting in leaving the trees where they were—which would only prolong the public safety threat. *Id.* at 78.

In its follow-up request, the Town proposed the following approach to administering the PPDR hazardous tree removal program. The Town would manage: (1) homeowner intake, including collecting the rights of entry (ROE) from homeowners; (2) communication with the public about the program; (3) performing due diligence/property assessments to facilitate a determination of whether a property qualifies for the program; (4) duplication of benefits prevention functions; and (5) coordinating with the State to remove the standing burnt trees for properties in the State program or under abatement. RFA, Exhibit 21 at 78. The Town assured the State and FEMA that the Town’s request met the requirements for a voluntary program under 44 CFR 206.223, *General Work Eligibility*, since the work/program requested was: (1) required as a result of the disaster, (2) located within the designated disaster area, and (3) was the legal responsibility of the eligible applicant. *Id.* at 74.

Cal OES’s Letter Seeking Confirmation and Approval of FEMA PPDR Program for Hazardous Tree Removal and FEMA’s Response

Cal OES reviewed the Town’s latest request and forwarded it to FEMA, along with the State’s own letter, dated August 22, 2019, endorsing the Town’s request. Cal OES’s letter to FEMA acknowledged FEMA’s support of the PPDR program already underway but reiterated its concerns about the standing burnt trees, due to the *substantial number* of burnt trees on private property. *Id.* at 2. “The fire-damaged trees are so widespread . . . the public health and safety as well as the economic recovery of the Town and County continue to be threatened unless these trees can be removed and disposed of in an expeditious manner.” *Id.* at 1.

Cal OES asked FEMA to confirm and approve “the removal and disposal of all hazardous fire-damaged trees on private properties that are a threat to the public at large,

¹ The record includes an estimate of 58,000 fire-damaged trees across 11,500 properties that present a public safety hazard and must be removed before any meaningful rebuilding is possible. RFA, Exhibit 21 at 76.

including public rights of way (ROWs).” *Id.* at 2. Cal OES added that the trees along local “orphan roads” were also a public safety risk.² *Id.* at 3. FEMA’s response, dated September 19, 2019, confirmed its approval of hazardous tree removal “on private property under the 2018 PPDR grant *as incidental to the mission* to abate hazardous debris and ash.”³ RFA, Exhibit 12 at 2 (emphasis added). By this time, however, FEMA recognized that the abatement work was nearly complete, yet no trees had been removed. Although the primary rationale for approving the tree removal had disappeared with the debris (the potential harm to debris abatement crews), FEMA nonetheless approved the request for public assistance since the trees remained a threat to public safety. *Id.* FEMA’s approval was not without limitations, however. The following specifications applied:

Removal and disposal of hazard[ous] trees on private property that pose an imminent threat of falling on the public ROW, or other improved property, are eligible for PPDR assistance. For any tree removed under the approval granted by this letter, a subject matter expert’s opinion will be required to substantiate that the tree was in fact an eligible hazard tree (so damaged by the Camp Fire that it posed an imminent threat of falling onto public ROW or other improved public property). A tree that does not meet this requirement is not eligible because it cannot be considered “debris.” This grant applies to all private properties in the Town of Paradise or Butte County where eligible hazard trees are located without regard to whether that property would have previously been eligible for the 2018 PPDR Program.^[4]

Id. at 2-3 (internal footnote omitted). Finally, FEMA reiterated that the PPDR program for removing hazardous trees must be *mandatory*, not voluntary. *Id.*

² Orphan roads are roads that are not maintained by a public agency but which are traveled and used every day by the public in carrying out their regular business. Examples include children who walk to school or ride the bus, residents commuting to work and running errands, and first responders and public utility crews responding to emergencies.

³ Removing fire-damaged trees was considered incidental to the larger debris removal operation because fire-damaged trees could have fallen on the abatement crews while the crews worked to remove other debris.

⁴ According to FEMA, only properties containing completely-destroyed residences, or specifically approved commercial structures, were eligible for the 2018 PPDR program.

FEMA's Response to Removing Hazardous Trees on Orphan Roads

Regarding the Town's request for public assistance for the removal of fire-damaged trees that threatened private roads, FEMA explained that the PA program "is limited to assistance that benefits the public interest." RFA, Exhibit 12 at 3. FEMA "may grant this request if Cal OES can provide additional information supporting that the roads are frequently traveled by the public, and therefore, in the public's interest." *Id.* This included evidence that demonstrated how removing the trees on orphan roads was in the public interest. FEMA also required documentation from a subject matter expert that: (1) identified trees that were eligible for removal because the trees "pose[d] an immediate threat of falling on the orphan roadway" and (2) explained "why other cost-effective means to mitigate the threat, such as rerouting school bus routes, [was] impractical."⁵ *Id.* Five months later, after much back and forth, FEMA determined that a number of the orphan roads were "potentially eligible for FEMA assistance" while others remained ineligible. RFA, Exhibit 15 at 1.

Project Worksheet 219

FEMA granted PA funding for project 97307 for the Town's arborists to assess hazardous trees and limbs in its ROW. RFA, Exhibit 20 at 1. Project Worksheet (PW) 219 was written and obligated on February 20, 2020, for that work. *Id.* at 4. The "Damage, Descriptions, and Dimensions" section of PW 219 stated, "Town of Paradise, a public ROW, 4760 each of damaged trees marked for removal only." *Id.* at 1. The scope of PW 219 was limited to an arborist assessment, which involved *identifying and marking* the 4760 hazardous trees for removal. *Id.* at 2. The scope did not include the actual removal or disposal of the trees. According to the project notes portion of the PW, "removal of hazardous trees will be performed by the State of California's tree removal mission and captured in future project(s) written for California Department of Resources, Recycling, and Recovery. *Id.* "No debris removal was done." *Id.*

PW 219 also noted that the arborist assessment work was completed by contract between May 22 and September 25, 2019, and the money for the work (\$92,620) had been obligated. RFA, Exhibit 20 at 1. Subsequent to the obligation of PW 219 in February 2020, thousands of properties were identified as failing to participate in the State program. Thus, the work continued beyond the period of performance specified in PW 219. Weekly team meetings were held between the Town, County, Cal OES, and FEMA to review progress for more than 7000 properties.

⁵ Immediate threat is defined as "the threat of additional damage or destruction from an event which can reasonably be expected to occur within five years." 44 CFR 206.221(c).

The Town's Multiple Extension Requests

COVID-19 became a national emergency around the same time that hazardous tree removal operations were ramping up. The onset of the pandemic delayed recovery efforts in Paradise and elsewhere in California. To address this and other delays, the Town sought various extensions from FEMA, including in June and November 2019, May and August 2020, and May 2021. FEMA did not respond to any of the extensions but continued to work with the various agencies to ensure that hazardous tree removal operations continued.

PW 219 - Requests for New Version and Change in Scope to the Statement of Work

In addition to submitting multiple extension requests, the Town and Cal OES began drafting a new version of PW 219 to capture the work and costs for hazardous tree removal that took place after the obligation of PW 219. The Town formally requested a version change for PW 219 by letter, dated July 11, 2022. RFA, Exhibit 13. One month later, the Town also requested a change to the scope of the statement of work (SOW) for PW 219. RFA, Exhibit 14. In the scope change request, the Town sought: (1) \$955,000 for the arborist, Tetra-Tech, to inspect private properties and to mark hazardous trees; (2) \$177,178.26 for project management costs; and (3) \$7,002.55 for postage. *Id.* at 3.

FEMA denied the SOW change request for PW 219 on March 1, 2023, stating that the period of performance for PW 219 expired in May 2019, rendering the SOW change request untimely. The Town appealed this determination on April 6, 2023.

FEMA's Denial of the Town's Appeal

In denying the Town's appeal, FEMA argued that the work was not eligible because it was not performed by the applicant—the Town. Instead, the work was performed by the Town's contractor, Tetra-Tech. "Consequently, because debris removal was not performed [by the Town], the site assessment arborists costs, and any other costs associated with, or in support of the assessment of claimed debris removal, are ineligible for PA funding, including previously approved funding." RFA, Exhibit 4 at 6. FEMA also stated that the appeal should be denied because FEMA never approved the "Town Program." FEMA's Response to RFA at 12. Lastly, FEMA argued that the SOW change was untimely because it was submitted years after the disaster was declared. FEMA's Response to RFA at 13-15. FEMA then corrected its previous eligibility determination and denied the request. The applicant filed a request for arbitration at the Board.

Discussion

Before the arbitration panel are three issues: (1) whether the applicant performed eligible work; (2) whether FEMA approved the Town program; and (3) the timeliness of the applicant's extension requests and SOW change request. The panel conducts reviews of FEMA eligibility determinations on PA grants de novo. *Monroe County, Florida, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980.*

Work Eligibility

Debris removal on private property is generally the responsibility of the individual homeowners. However, “[i]n limited circumstances, based on the severity of the impact of an incident, FEMA may determine that debris removal from private property is eligible under the PA program.” Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 54. “If debris on private property is so widespread that it threatens public health and safety, or the economic recovery of the community, FEMA may provide PA funding for debris removal from private property.” *Id.* In those circumstances, FEMA policy requires that the debris removal be “in the public’s interest not merely benefitting an individual or a limited group of individuals within the community.” *Id.* An applicant seeking PA funding for PPDR must also have the legal authority to perform the work. *Id.*

In this case, FEMA determined that the applicant’s request for PA funding met all of the above requirements when it approved two separate requests by the applicant for PPDR work related to hazardous tree removal. The second approval letter from FEMA specifically addressed the Town program, finding that “removal and disposal of hazardous trees on private property that pose an imminent threat of falling on the public ROW, or other improved property, are eligible for PPDR assistance.” RFA, Exhibit 12 at 2. FEMA’s approval letter also addressed arborist assessments, stating: “[F]or any tree removed under the approval granted by this letter, a subject matter expert’s opinion will be required to substantiate that the tree was in fact an eligible hazard tree.” *Id.* Nothing in FEMA’s approval letter specifically required the Town to remove and dispose of the trees. Rather, the letter simply approved “the removal and disposal” of hazardous trees and required that any tree removed under FEMA’s grant of approval be certified as eligible by a tree expert.

FEMA’s position is that debris removal only encompasses *removing and disposing* of hazardous trees (the primary work) and that everything else—conducting arborist assessments, compliance inspections, and duplication of benefits analyses—is secondary. FEMA distinguishes costs in the same way. Costs to support tree *removal and disposal* are considered *direct* costs, whereas costs associated with secondary work are *indirect costs*. FEMA argues that when the direct costs of the work are not funded by FEMA, the indirect

costs are *ineligible* for PA funding. FEMA explained that in such cases, FEMA has no eligible project to which it can attach any indirect costs.

The applicant, on the other hand, asserts that the issue is not whether the PPDR work was funded by FEMA but rather whether the work was eligible PPDR work. We agree with the applicant. We find nothing in the statute, regulations, or PAPPG that ties PA funding to which entity performed the debris removal. What matters is whether the work performed was eligible work. See *Hobby Center Foundation*, CBCA 7732-FEMA, 23-1 BCA ¶ 38,467, at 186,972 (where the panel found that reducing project repair costs to \$0 after performing a duplication of benefits analysis did not render the project ineligible for hazard mitigation funding). Here, removal and disposal of hazardous trees was deemed eligible PPDR work under FEMA's grant of approval, and the work was carried out pursuant to FEMA's grant of approval. All of the work required to effect that debris removal, including the required expert determination that a tree identified and marked for removal was, in fact, a hazardous tree, was also eligible work. For these reasons, we conclude that FEMA's initial determination that the work was eligible is correct.

Timeliness of Extension Requests and Change in Scope Request

"FEMA only provides PA funding for work completed and costs incurred within regulatory deadlines. The deadline for emergency work is six months from declaration date." PAPPG at 141. Applicants may request extensions in writing that include documentation substantiating that the delays were beyond the applicant's control, providing a status of the project and a project time with the expected project completion date. *Id.* The recipient (here, the State) has the authority to extend project deadlines for six months. FEMA has the authority to extend individual project deadlines beyond six months in extenuating circumstances. 44 CFR 206.204(c)(2). The PAPPG lists circumstances that would generally be considered beyond an applicant's control, such as historical preservation permitting or inclement weather. PAPPG at 141-42. The PAPPG likewise lists circumstances not outside an applicant's control, such as a lack of funding, compilation of documentation, its own permit delays, or administrative challenges such as cost accounting system changes. *Id.* at 142.

Even if FEMA found the magnitude of the Camp Fire and the added complication of contending with a worldwide pandemic during the recovery phase of a devastating disaster to be sufficient justification for delays in project completion, the record contains no evidence that FEMA approved continuing requests. Arguably, FEMA's approval of the Town's program in September 2019 substantiated FEMA's approval of the prior extensions, especially in light of the extent of the damage and the thousands of hazardous trees that remained standing at that time. FEMA even requested additional information before approving PA funding for certain orphan roads, then subsequently approved a number of

those roads after the Town supplied the requested documentation. Furthermore, FEMA has acknowledged that wildfires are different from other natural disasters. They typically have longer incident periods, which impact the timeline between a disaster declaration and project formulation, execution, and completion. We conclude that these facts sufficiently demonstrate FEMA's approval of continuing work.

The record is less clear regarding FEMA's stance on the Town's much later extension requests in August 2020 and May 2021. The Town's requests were submitted, but FEMA did not respond to them and now asserts the requests were not approved. We realize that FEMA was working side-by-side with the applicant and the recipient on the ground, attending weekly meetings and keeping track of the tens of thousands of hazardous trees identified, marked, removed, and disposed of under a grant of approval. We also recognize that FEMA, as the steward of the PA funding program, must verify compliance with myriad requirements and procedures before, during, and after a disaster and, therefore, that individual applicants must ensure that they obtain the necessary approvals during project performance when circumstances require prior approval.

However, under the circumstances here, the Town's request for a change in scope to the SOW was untimely. The record shows that the Town understood that PW 219 was completed and obligated in early 2020, yet the Town waited two years to officially request the scope change. Even if the Town had sufficient evidence of FEMA's assent to the Town's various extension requests, it would nonetheless be inadequate to meet the timeliness requirements to change the scope of the SOW under PW 219. The Town submitted that request in July 2022, more than one year after the last extension request and three years after the project's documented period of performance under PW 219 had ended.

Years after the incident, the work to identify, remove, and dispose of hazardous trees continued. Yet, the period of performance and scope of work documented in PW 219 did not reflect that work. How and why that happened is unclear, but the burden of obtaining approvals for new projects, additional versions, and scope changes is on the applicant. "If, during [performance], an applicant discovers additional, hidden damage, it must report this damage with a description of the damage and an explanation of how the [disaster] caused the damage." *School Board of Bay County, Florida*, CBCA 7665-FEMA, 24-1 BCA ¶ 38,701, at 188,168 (citing PAPPG at 136-37). Any requests to fund the additional work should be made before taking action. In general, Federal regulations provide that "the recipient of a federal award is 'required to report deviations from budget or project scope or objective, and request prior approvals from Federal awarding agencies for budget and program revisions.'" *City of Longview, Texas*, CBCA 8123-FEMA, 24-1 BCA ¶38,706, at 188,188 (quoting 2 CFR 200.308(b)).

Decision

The applicant's request for PA funding is denied.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge