



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 14, 2025

CBCA 8072-FEMA

In the Matter of BALLAD HEALTH

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

Dawn D. Cummings, Deputy General Counsel, Tennessee Emergency Management Agency, Nashville, TN, appearing for Grantee.

Ramoncito J. deBorja, 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 **VERGILIO**, **ZISCHKAU**, and **CHADWICK**.

VERGILIO, Board Judge, writing for the Panel.

The panel resolves a request for arbitration brought under 42 U.S.C. § 5189a(d) (2018) by the applicant, Ballard Health, a private non-profit organization. The applicant had planned to use certain personnel to provide on-site training and assistance to implement the transition to an electronic document system for its hospitals, facilities, and practices. Instead, the applicant assigned the personnel to respond to the declared disaster of COVID-19 and engaged contractors to complete the document system transition. The applicant sought public assistance from the Federal Emergency Management Agency (FEMA) for what it says are costs caused by the disaster. FEMA denied public assistance on the grounds that the work was ineligible and the costs were operating costs.

The panel is to determine the eligibility of the work categories. Documentation provided by the applicant during the arbitration suffices to show that employees performed COVID-19-related work but also reflects that significant billed hours are not COVID-19-related. Because the record lacks specific details regarding the work done by the applicant's employees (e.g., what prevented them from working on the document system) and by contractors and fails to establish that the use of contractor labor to launch the document system was directly connected to the diversion of employees to COVID-19 responses, the applicant is ineligible for public assistance.

Background

The applicant was in the process of implementing a new electronic document system before and during the pandemic disaster. It had intended to use its own nurses and providers (force account labor) to accomplish the transition to the electronic document system. Prior to the onset of COVID-19, the applicant had scheduled 1000 personnel to assist in the transition. The applicant states that from July 1 through October 31, 2020, all of its available employees were reassigned to work in COVID-19 units. The reassignments included those nurses originally assigned to participate in the critical work needed to implement the new system. The applicant retained contractors to backfill its own personnel to test, implement, and provide training on the electronic document system. The applicant seeks \$4,303,764 in public assistance said to represent the difference between its actual contracting costs and the budgeted costs of its personnel.

FEMA denied recovery initially and in a first appeal. FEMA found that the submittals lacked specificity as to the dates, hours, and nature of the work anticipated to be performed and actually performed, e.g., pay rates, daily logs/activity reports, and time sheets. FEMA concluded that the applicant sought non-reimbursable increased operating costs of the document system transition.

The applicant has provided information in this arbitration record that previously was not before FEMA. In particular, for a representative sample of its backfilled labor, the applicant has identified, for the period at issue, the individuals by name, the days and hours of work, and associated those hours with particular codes entered contemporaneously with performance. The codes indicate (by day and hours) that employees performed COVID-19-related work such as screening, monitoring, and treating visitors, employees, and patients for COVID-19 symptoms and performing diagnostic tests of COVID-19 patients. However, a majority (about two-thirds) of the personnel worked fewer than 100 hours coded to COVID-19 work from May 1 to October 31. Significant hours were spent by the applicant's personnel on work not related to COVID-19. As evidence of how it had planned to implement the document system transition, the applicant references 2018 projected schedules and cost estimates but notes that the actual timeline changed during the course of

performance. When the applicant projected 182 full-time equivalents for the implementation and ongoing support of the electronic document system in 2018, it added caveats that network infrastructure and domain consolidation could lead to unforeseen costs and that unplanned increases in scope and/or timeline were possible.

The record does not explain in detail the intended tasks of any particular applicant personnel anticipated pre-disaster or indicate the status of the implementation or the hours anticipated to complete the process, either at the start of the disaster or as of May 2020. There is no indication of the anticipated tasks or time for any or each of the individuals to assist in implementing the document transfer, other than a reference to “super users” and estimates of twenty hours and 112 hours, respectively, for onboarding work and work related to training, rehearsals, and go-live support. The record does not specify what work was done or how much of the transition was accomplished before May 2020 or why any individual in particular could not do their previously anticipated document transition work during the period in question. From the record, the panel cannot correlate the efforts expended by applicant personnel to those of the contractors and relate them to COVID-19.

Discussion

The applicant oversimplifies the issues for arbitration, and what a record must demonstrate, when it posits that it should receive the requested public assistance if it demonstrates that its personnel performed eligible COVID-related work. Rather, as noted during an initial conference, we must determine whether the work is eligible for public assistance. To be eligible, work must be required as a result of the emergency or disaster. *See* 44 CFR 206.223 (2020); Public Assistance and Policy Guide (PAPPG) (Apr. 2018) at 19; FEMA Policy No. 104-21-0004 at 2. Moreover, increased costs of operating a facility generally are not eligible for funding, even when related to the disaster. PAPPG at 42. Thus, the applicant must show that it incurred the costs it seeks only because of the pandemic. *E.g.*, *Monroe County Sheriff’s Office*, CBCA 8147-FEMA, 24-1 BCA ¶ 38,703, at 188,184; *City of St. Cloud, Florida*, CBCA 7952-FEMA, et al., 24-1 BCA ¶ 38,559, at 187,409.

Here, the record, including additional documentation and a hearing, fails to demonstrate that the use of contractors was eligible work required because of COVID-19. This is so for various reasons. Although we conclude that the applicant provided adequate documentation showing its diverted employees performed COVID-19-related work, the applicant’s personnel also performed considerable work not related to COVID-19 during the period in question, and specific details are lacking to distinguish that work from typical work. Moreover, there are no particulars to link any individual employee with the expected numbers of hours and tasks related to the electronic document transition with the COVID-19-related work the individual did perform during the period in question. On this record, the panel does not conclude that the reassigned employees were unable to perform

the transition work (while doing COVID-19-related work or non-COVID-19-related work) during the disaster. Absent evidence that the document transition effort was directly tied to the declared disaster, public assistance is unavailable.

Decision

The costs at issue are ineligible for public assistance.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge