UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 21, 2026

CBCA 8974-FEMA

In the Matter of CARE PLUS BERGEN

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Jasmyn Allen and Rebecca J. Otey, 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 **SULLIVAN**, **VOLK**, and **NEWSOM**.

SULLIVAN, Board Judge, writing for the Panel.

Care Plus Bergen (CPB) received public assistance (PA) funds for, among other costs, the premium pay it paid to its employees during the COVID-19 pandemic. At project closeout, the Federal Emergency Management Agency (FEMA) sought to recoup the funds for premium pay because FEMA determined that CPB's premium pay policy did not exist before the incident date of the COVID-19 disaster. CPB seeks to arbitrate two questions: (1) is the determination of whether a policy "pre-exists" the disaster measured by the incident date or the disaster declaration date; and (2) is FEMA precluded by section 705(c) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2024), from seeking the return of the funds? Because the policy must exist before the incident date and section 705 does not preclude FEMA from seeking return of the funds from a private, nonprofit organization, CPB must repay the public assistance amounts it received.

Background

CPB is a private, nonprofit organization that operates a healthcare facility in Bergen County, New Jersey. Request for Arbitration (RFA) at 4. The President declared the COVID-19 pandemic a disaster in New Jersey on March 29, 2020. RFA Exhibit 4 at 3. The declaration identified the incident date for the pandemic as January 20, 2020. RFA Exhibit 7 at 1.

On March 15, 2020, CPB issued a premium pay policy for its employees. RFA Exhibit 5. The policy provided for additional pay for CPB employees based upon their job position without further approvals. *Id*. CPB incurred $2,204,656.52 in premium pay costs between March 15 and June 6, 2020. RFA Exhibit 4 at 3.

In January 2021, FEMA obligated PA funds for CPB for force account labor costs incurred in responding to the pandemic. RFA Exhibit 7 at 1. These funds included reimbursement for CPB's premium pay costs. *Id*. at 2-3; RFA Exhibit 4 at 1. In August 2025, FEMA reversed its determination regarding CPB's premium pay costs and notified CPB that the amount attributable to its premium pay costs would be deobligated from the project. RFA Exhibit 1. Following CPB's first appeal, FEMA upheld the determination, finding that CPB's premium pay costs were not eligible costs because CPB paid the premium pay pursuant to a policy that did not exist prior to the COVID-19 disaster, which it defined "to mean a policy that was in effect prior to the [January 20, 2020] start of the incident period." RFA Exhibit 4 at 4.

Discussion

Premium Pay Policies Must Exist Prior to the Incident Date of the Disaster

The Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) states that FEMA will reimburse applicants for premium pay costs "based on the Applicant's pre-disaster written labor policy," *id*. at 23, provided that the policy meets three requirements.

> **Labor policies**
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> FEMA determines the eligibility of overtime, premium pay, and compensatory time costs based on the Applicant's pre-disaster written labor policy, provided the policy:
>
> - Does not include a contingency clause that payment is subject to Federal funding;

- Is applied uniformly regardless of a Presidential declaration; and
- Has set non-discretionary criteria for when the Applicant activates various pay types.

> If these requirements are not met, FEMA limits PA funding to the Applicant's non-discretionary, uniformly applied pay rates.

Id. In order for FEMA to provide public assistance, the President must issue a disaster declaration. *Id*. at 1-2. The declaration identifies an incident period, which the PAPPG defines as the "span of time during which the federally declared incident occurs." *Id*. at 2.

The term "pre-disaster," although repeatedly used, is not defined in the PAPPG. Most commonly, "pre-disaster" is used in discussing the condition of a facility before the disaster for which an applicant seeks funds happened. *See*, *e.g*., PAPPG at 84. Pursuant to statute and regulation, FEMA will only provide funds to restore a building to its pre-disaster design and function. 42 U.S.C. § 5172(e)(1)(A); 44 CFR 206.201(j) (2021). When considering the term in this context, "pre-disaster" must be defined as prior to the incident date, the date when the disaster started and damaged or destroyed the facility. To be consistent in the use of the term throughout the PAPPG, we also construe "pre-disaster" to mean prior to the incident date when considering an applicant's labor policies.

FEMA urges the panel to rely upon *Ballad Health*, CBCA 7948-FEMA, 24-1 BCA ¶ 38,596, in which that panel was also asked to determine whether a premium pay policy existed prior to the COVID-19 disaster. The panel in *Ballad Health* determined that the policy was not a "pre-disaster written labor policy" because it was not issued until after the declaration date. *Id*. at 187,634. Because the policy at issue in *Ballad Health* was issued after both the incident and declaration dates, the decision does not assist the panel in deciding which date should control.

CPB urges the panel to find that "pre-disaster" for premium pay costs is tied to the disaster declaration date. As support, CPB cites to two FEMA first appeal decisions in which FEMA denied requests for premium pay reimbursement because the policies were enacted after the declaration date of the disaster. RFA at 7-8. These decisions are inapplicable for the same reason as the panel's decision in *Ballad Health*—the policies were issued after both the incident and declaration dates. *See* RFA Exhibits 10, 13.

CPB also urges the panel to find that FEMA's clarification in its most recent version of the PAPPG, which was issued in 2025, tying "pre-disaster" to the incident date represents a change in policy. RFA at 11. CPB asserts that "[i]n changing its policy, FEMA implicitly acknowledges that the incident start date being the benchmark by which a labor policy is evaluated was not its policy prior to" the effective date of the most recent PAPPG. *Id*. We do not agree. Rather, the language in the two versions is substantially the same. *Compare* PAPPG at 23 *with* Public Assistance Program and Policy Guide (Jan. 2025) at 80. The addition of the language defining "pre-disaster" as before the incident date is a clarification, rather than a policy change. As noted above, FEMA is required by statute and regulation to determine the "pre-disaster" condition of the facility. "Pre-disaster" has always been a focus for FEMA's evaluation of requests for public assistance. FEMA simply clarified what the term meant for premium pay policies.

Finally, CPB asserts that, if the panel does not find that its premium pay policy qualifies as "pre-disaster," it still may retain the funds because the premium pay was paid pursuant to a policy that was non-discretionary and applied uniform pay rates. RFA at 14-15. CPB relies upon the last sentence of the PAPPG labor policies provision quoted above and argues that the limitation of "pre-disaster" does not apply to that sentence. CPB explains that "pre-disaster" is one of four requirements and, if any of the requirements are not met, the last sentence applies. Applicant's Response to Request for Further Briefing at 3. Again, we do not agree. CPB's interpretation is not supported by the text or structure of the provision. The policy provision lists three bulleted "requirements," not four. The requirement that the policy be "pre-disaster" applies even if these requirements are not met. CPB provides no prior decisions in which this provision has been applied to allow reimbursement of premium pay in the absence of a pre-disaster policy that pre-existed the disaster.

<u>Section 705 Does Not Preclude FEMA's Demand for Repayment</u>

CPB asserts that section 705 of the Stafford Act precludes FEMA from recovering payments made under the PA program. Section 705 provides that state and local government entities do not have to repay PA funds if three criteria are met:

> **Binding nature of grant requirements**
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> A state or local government shall not be liable for reimbursement or any other penalty for any payment made under this chapter if–
>
> (1) the payment was authorized by an approved agreement specifying the costs;
> (2) the costs were reasonable; and
> (3) the purpose of the grant was accomplished.

42 U.S.C. § 5205(c). FEMA policy states that the repayment protections in section 705 do not apply to "private-non-profit subrecipients." FEMA Recovery Policy, FP 205-081-2

(Mar. 31, 2016) at 1 & n.5 (https://www.regulations.gov/document/FEMA-2015-0020-0036 (last visited Sept. 14, 2026));[1] PAPPG at 146 ("[S]ection 705 does not apply to [private, nonprofit organizations]."). CPB is a private, nonprofit subrecipient and is therefore not protected by the limitations set forth in section 705. *Hogar Manuel Mediavilla Negrón, Inc.*, CBCA 8587-FEMA, 26-1 BCA ¶ 39,096, at 190,507.

CPB asserts that the repayment protections of section 705 apply because New Jersey, as the recipient, will have to repay the funds to FEMA. CPB's interpretation does not withstand scrutiny. States are the recipients for FEMA PA funds. PAPPG at 5. States, as recipients, disburse the funds to the subrecipients, which include local governments and private, nonprofit entities. *Id*; *see* FEMA Recovery Policy at 1 n.2. If CPB's interpretation were correct, the reference to state and local government entities in section 705 would be unnecessary because all states are responsible for reimbursing FEMA. However, since Congress included the reference, we discern that Congress intended that section 705 not apply to private, nonprofit entities like CPB.

Finally, CPB urges the panel to apply the principles of equitable estoppel and reasonable reliance to bar FEMA from deobligating the funds. As explained in prior decisions, a claimant must demonstrate at least "affirmative misconduct, leading to unfairness, on the part of a Government official" before equitable estoppel will be considered against the Government. *Vidor Independent School District*, CBCA 7260-FEMA, 22-1 BCA ¶ 38,087, at 184,976 (quoting *Hanson v. Office of Personnel Management*, 833 F.2d 1568, 1569 (Fed. Cir. 1987)). CPB has not alleged any affirmative misconduct, providing the panel with no basis upon which to apply the principles of equitable estoppel.

Decision

CPB must repay $2,204,656.52 in PA funds.

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[1] CPB asserts that we are not bound by this policy. Reply at 18. In our role as arbiters, we are to examine the facts and apply the law, regulations, and policies that guide FEMA in its determinations. *Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436, at 181,939. The FEMA Recovery Policy was subject to notice and comment, 81 Fed. Reg. 18871 (Apr. 1, 2016), and we apply it just as we do the PAPPG.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

Daniel B. Volk
DANIEL B. VOLK
Board Judge

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge