



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 8, 2024

CBCA 8040-FEMA

In the Matter of CITY OF AUSTIN, TEXAS

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Julie A. Masek, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and W. Nim Kidd, Chief, Michelle Ellis, Regional Section Chief, Daniel Stuckert, Recovery and Mitigation Supervisor, Jennifer Charlton-Faia, Acting Division Chief – Recovery, Brandi Ashby, Assistant Chief – Region 8, and Bruce Clements, Section Chief – Region 8, Texas Division of Emergency Management, Austin, TX, appearing for Grantee.

Brock Pierson and Shahnam Thompson, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **GOODMAN**.

GOODMAN, 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), the City of Austin, Texas (applicant) filed a request for arbitration (RFA) seeking reversal of the Federal Emergency Management Agency's (FEMA's) refusal to approve and obligate public

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assistance (PA) funding for the full actual costs applicant incurred for emergency non-congregate sheltering (NCS) to provide private spaces for individuals in response to the coronavirus 2019 (COVID-19) pandemic.

Background

Pandemic Declarations and NCS Criteria

On March 13, 2020, the President declared the pandemic a nationwide emergency. On that same date, the President, under the authority of the Stafford Act, issued formal emergency declarations for every State and Territory. Thereafter, each State and Territory was granted a Major Disaster Declaration for the pandemic, including the State of Texas on March 25, 2020. The major disaster and emergency declarations for the pandemic allowed PA applicants to seek reimbursement for FEMA's PA Program Category B emergency protective measures directly related to COVID-19. FEMA's Exhibit 1 (FEMA Fact Sheet, *Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures* (Mar. 19, 2020)) at 1. Among them, FEMA listed emergency "medical sheltering" and "Non-congregate medical sheltering" as a potentially eligible emergency protective measure. *Id.* at 2; *see also* FEMA's Exhibit 2 (FEMA Frequently Asked Questions, *Coronavirus (COVID-19) Pandemic: Non-Congregate Sheltering* (Mar. 21, 2020)). Among the examples of target populations for NCS, FEMA included "asymptomatic high-risk individuals needing social distancing as a precautionary measure, such as people over 65 or with certain underlying health conditions (respiratory, compromised immunities, chronic disease)." FEMA's Exhibit 2 at 1.

While FEMA generally does not provide PA funding for NCS, *see* FEMA Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 66-67, FEMA recognized that NCS may be necessary to save lives from COVID-19, to protect property and public health, and to ensure public safety, as well as to lessen or avert the threat of the virus. FEMA's Exhibit 4 (FEMA Fact Sheet, *Public Assistance: Non-Congregate Sheltering Delegation of Authority* (Mar. 19, 2020)). For NCS during the pandemic to be considered an eligible emergency protective measure, FEMA established certain criteria that applicants needed to meet. FEMA established that the NCS "must be at the direction of and documented through an official order signed by a state, local, tribal, or territorial public health official." *Id.* For target populations, FEMA provided certain examples, such as "those who test positive for COVID-19 who do not require hospitalization but need isolation . . . ; those who have been exposed to COVID-19 who do not require hospitalization; and asymptomatic high-risk individuals needing social distancing as a precautionary measure." FEMA's Exhibit 2 at 1. Ultimately, sheltering specific populations in NCS was required to "be determined by a public health official's direction or in accordance with the direction or guidance of health officials by the appropriate state or local entities." *Id.*

Approval of NCS and Documentation Required

FEMA's authority to approve NCS was delegated to its Regional Administrators. FEMA's Exhibit 3. Within those approvals, the Regional Administrators set the conditions of cost reimbursement for the activities to limit funding to "that which is reasonable and necessary to address the public health needs of the event." FEMA's Exhibits 3, 4.

Pursuant to general federal grant costs principles, to be eligible, work and costs must be, among other things, adequately documented. 2 CFR 200.403(g) (2023). FEMA requires applicants to provide documentation specifying the "who, what, when, where, why, and how much" for each request. PAPPG at 133. Applicants have responsibility to substantiate their funding request as eligible; if applicants do not provide sufficient documentation to support their request as eligible, FEMA cannot provide PA funding for the work. *Id.*

Applicant's Request for Reimbursement of NCS Costs

Applicant sheltered 325 individuals in NCS between March 28 and September 30, 2020, with varying durations of individual stays. Applicant states that these persons "(1) were confirmed to be at high risk of serious COVID-19 illness due to an underlying health condition or being over 65 years of age; and (2) did not have other means to social distance due to a lack of housing." RFA at 3.

On November 4, 2021, applicant submitted its reimbursement request to FEMA in the amount of \$8,013,774.67 for sheltering the 325 individuals. On September 20, 2022, FEMA issued a Determination Memorandum, which found that applicant's request for reimbursement did not abide by FEMA's COVID-19 NCS guidance and the Regional Administrator's limited approvals and denied the reimbursement request. Applicant appealed this determination. FEMA's Response to RFA (FEMA's Response) at 5-6.

On November 20, 2022, applicant submitted its first appeal to FEMA. On July 11, 2023, FEMA issued a request for information informing applicant that there was concern that the current administrative record was insufficient. FEMA requested supporting documentation that demonstrated how the applicant met the criteria for emergency NCS of asymptomatic high-risk individuals. FEMA also requested details pertaining to the individuals in NCS, including the number of individuals sheltered, population type, average length of stay and costs, location of stay and dates, underlying need and health condition, description of services provided, and details as to the actual costs and justification for NCS of individuals for more than fourteen days. FEMA's Response at 6.

On August 10, 2023, applicant provided its response as well as some additional documentation, clarifying that it had provided a cumulative total of 32,151 shelter days for the 325 individuals at a rate of \$249.25 per day, per individual. Applicant provided a

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summary that indicated that all of the 325 individuals were “high-risk” but without further context as to any specific underlying health conditions that might justify stays longer than fourteen calendar days. FEMA’s Response at 6-7.

On January 10, 2024, FEMA denied the appeal, stating that applicant’s documentation failed to identify whether the individuals in NCS suffered from any underlying health conditions that would qualify them as “high-risk.” FEMA also found that allowing long-term stays was contrary to FEMA’s emergency NCS approval requirements. FEMA’s Response at 7.

Applicant’s RFA

On March 11, 2024, applicant filed its RFA in this proceeding, asking that the arbitration panel (panel) confirm that the total claimed costs of \$8,013,774.67 for emergency NCS are eligible for PA funding. RFA at 3. When applicant filed its RFA, it only identified the specific underlying health conditions that qualified eighty-eight individuals out of the 325 it had identified as high-risk and housed in NCS during the applicable time period. *Id.* at 24.

In its April 10, 2024, response to the RFA, FEMA states that it had previously denied reimbursement of applicant’s full alleged costs because of applicant’s failure to provide adequate supporting documentation. FEMA’s Response at 6. FEMA asserts that applicant, in its RFA, had established for the first time the specific underlying health conditions needed to identify individuals as high risk and eligible for shelter, but it had only presented documentation for eighty-eight of its 325 sheltered individuals and failed to demonstrate that the remaining 237 had health conditions that met the criteria. *Id.* at 7, 12-15. FEMA states that when the RFA was filed, among the eighty-eight individuals whose underlying health conditions were documented, nine did not meet the high-risk criteria based on their listed health conditions. *Id.* at 18-20. For the remaining seventy-nine individuals whose high-risk status was supported, FEMA alleged that applicant failed to provide sufficient documentation to allow FEMA to validate whether the shelter activities lessened or eliminated an immediate threat from coronavirus. *Id.* at 20. Additionally, FEMA asserted that applicant had failed to provide a justification for stays longer than fourteen calendar days for any individual. Thus, FEMA initially determined that applicant had not established that it provided an eligible emergency protective measure in response to the pandemic. *Id.* at 20-23. FEMA requested that this panel uphold FEMA’s previous ineligibility determination.

FEMA’s Subsequent Acknowledgment of 120 Eligible Individuals

By letter dated May 9, 2024, after applicant had filed its April 17, 2024, reply, FEMA advised the panel:

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Upon review of the Applicant's latest documentation, filed with its Reply, FEMA finds costs associated with the sheltering of 79 individuals for up to 14 days eligible for PA. As stated in FEMA's Response, the Applicant has yet to provide documentation justifying stays longer than 14 days, as required by the Regional Administrator, and only these 79 individuals met the "high-risk" criteria established by the Applicant's health official. Costs associated with the sheltering of the remaining 246 shelter[ed] [individuals] remain ineligible because the provided documentation either showed no underlying conditions or showed conditions that did not qualify the individuals as "high-risk."

Letter from FEMA to Panel (May 9, 2024).

By letter dated May 20, 2024, FEMA advised the panel before the arbitration hearing was held:

On May 9, 2024, the Applicant filed its Exhibit 23 which included the underlying health condition of an additional 48 shelter[ed] [individuals]. FEMA has reviewed the document and determined that 41 of those shelter[ed] [individuals] could be considered "high-risk," as their underlying conditions met the criteria set out by the Applicant in its Exhibit 13. The remaining seven are ineligible and are listed in FEMA's Exhibit 9

As a result, FEMA's eligibility determination has changed as follows:

Ineligible Individuals Due to Lack of Documentation of Their
Underlying Condition[:] **189**

Ineligible Individuals Due to Their Underlying Conditions Not Meeting
the Applicant's "High- Risk" Criteria[:] **16**

Eligible Individuals for Shelter Stays Up To 14 Calendar Days[:] **120**

Total[:] 325

Letter from FEMA to Panel (May 20, 2024).

FEMA's May 9 and 20, 2024, letters both contained FEMA's request that the panel remand the eligible portion of applicant's PA request to FEMA for cost validation and stated FEMA's position that the remainder of the request was still ineligible and would be addressed during the arbitration hearing. Thus, at the time the arbitration hearing was held on May 21, 2024, FEMA's position was that PA funding was available at an undetermined amount for 120 individuals (representing the initial seventy-nine individuals it found eligible

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plus an additional forty-one) for NCS of up to fourteen days. The panel closed the record at the conclusion of the hearing.

Applicant's Request to Supplement the Closed Record

By letter dated May 31, 2024, applicant requested leave to file what it characterized as an “updated claim summary” that included what it alleged to be “the confirmed high risk underlying health conditions for an additional 99 [individuals] . . . that were not available at the time of the May 21, 2024 hearing.” Letter from Applicant to Panel (May 31, 2024). Applicant explained that, immediately following the hearing, it was “able to work with local Emergency Medical Services agencies and community health organizations to obtain additional confirmation of the underlying health conditions” of these ninety-nine individuals. The updated claim summary adds this group of individuals confirmed with high risk conditions to the list that was submitted with applicant’s May 9, 2024, supplement to the record. Applicant concludes that the addition of these ninety-nine individuals brings to 235 the total number of individuals with confirmed high risk underlying health conditions that meet FEMA’s documentation requirements.

By letter dated May 31, 2024, FEMA objected to applicant’s request for leave to file its updated claim summary, emphasizing that the panel had closed the record at the conclusion of the hearing on May 21, 2024, and that FEMA interprets Board Rule 608 (48 CFR 6106.608) as requiring the panel to exclude as untimely evidence submitted after the arbitration has closed.

We deny applicant’s request to supplement the record as to the additional ninety-nine individuals allegedly meeting the high-risk criteria. This information was submitted after the record was closed.

Discussion

Applicant's Totality of Circumstances Argument

Despite applicant only being able to find partial documentation for eighty-eight individuals when it submitted its RFA, applicant attempted to justify its request for total costs, incurred over varying periods of time, for 325 individuals as follows:

Based on the totality of the circumstances – the referral and screening process using [Centers for Disease Control and Prevention (CDC)] recommended High Risk Criteria; declarations of two members of the waitlist management team; the actual, verified underlying health conditions for 88 of the sheltered individuals; and the sample screening analysis spreadsheet make it abundantly

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clear that only individuals at high-risk of severe COVID-19 illness were admitted to . . . NCS in accordance with FEMA policy.

RFA at 26.

Applicant's "totality of circumstances" argument as support for the PA funding requested for the 325 individuals ignores FEMA's specific requirements to document each individual's underlying condition as high risk and to further justify NCS in excess of fourteen calendar days. FEMA's Regional Administrator issued six letters to applicant from November 2, 2020, through January 5, 2021, in which he retroactively approved reimbursement of costs relating to emergency NCS for specified periods of time from March 25 through October 28, 2020, based on FEMA's review of applicant's supporting documentation and information provided. Applicant's Exhibits 1a-1f. Five of the six FEMA Regional Administrator letters also stated:

Reimbursement for the sheltering of individuals that exceeds 14 calendar days will require justification upon submission of request for reimbursement that identifies that the length of sheltering for individuals is based on health guidance and is limited to what is needed to address the **immediate** threat to public health and safety. The intent of emergency NCS is not to substitute as a mechanism for long-term housing. As a reminder, the CDC guidance recommends a 14-day isolation or quarantining period for those that test positive or have been in contact with a person that tested positive.

Applicant's Exhibits 1a (Nov. 2, 2020) at 3, 1c (Nov. 18, 2020) at 2, 1d (Dec. 18, 2020) at 2, 1e (Jan. 4, 2021) at 2, 1f (Jan. 5, 2021) at 2. Accordingly, applicant's "totality of circumstances" argument lacks merit. Applicant did not submit sufficient documentation to support the underlying condition as high risk for any individuals other than the 120 ultimately found eligible by FEMA. We therefore conclude that the record supports PA for only those 120 individuals.

Length of Stay Limited to Fourteen Calendar Days

To resolve the question of available PA for the lengths of stay of the 120 individuals whom FEMA has now deemed eligible, we are guided by the direction of the Regional Administrator, which limits the length of stay to fourteen calendar days for each individual, absent sufficient justification for a longer period. The Regional Administrator also emphasized that use of emergency NCS was not intended to be a long-term solution:

Length of sheltering for individuals is based on health guidance and should be limited to what is needed to address the immediate threat to public health and safety. A reasonable amount of time to house one individual for the purposes

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of medical isolation and quarantining for this pandemic is generally 14 days, based on health guidance from the CDC. Social distancing, through the usage of emergency NCS, is not intended to be a long-term solution to address the immediate threat.

Applicant's Exhibit 1b (July 24, 2020) at 4.

Even though the Regional Administrator required applicant to justify its requests for reimbursement for sheltering individuals in excess of fourteen days, applicant failed to do so. When requesting reimbursement, applicant did not attempt to justify lengths of sheltering that exceeded fourteen days, nor did it claim that extended sheltering was based on health guidance or to address immediate threats. Rather, applicant appears to have treated NCS as other than an immediate or temporary solution to the declared emergency, as evidenced by the length of stays of the individuals for whom applicant seeks PA. Of the 120 individuals deemed high risk and not now disputed by FEMA, at least fifty had a total length of stay in NCS of 100 or more days, and several in excess of 300 and 400 days. *See* Applicant's Exhibit 16 at 1-5. The total length of stays of those individuals for whom no specific health documentation was provided were, on the whole, even greater, with many in excess of 300, 400, and 500 days. *Id.* at 5-10.

Timely requests for lengthier stays in NCS in excess of approved periods of fourteen calendar days, along with supporting information from applicant, would have focused the parties on the situation such that alternatives, if any, could have been considered. The lack of information does not assist applicant, nor is its argument as to the "totality of the circumstances" a sufficient substitute. While applicant has submitted and the panel has heard additional information and argument as to alleged justification for reimbursement in excess of fourteen days, applicant was required to provide that information initially to FEMA in its request for PA, or at least at the time of its first appeal. The panel is not the initial decider in these matters.

The burden is not on FEMA to refute the request for PA. Rather, the record must demonstrate that PA is appropriate within the guidelines of statute, regulation, and FEMA guidance. PAPPG at 133. Although high-risk conditions existed for 120 individuals during the period claimed (as supported by documentation), there is insufficient information demonstrating a need for any individual to remain in NCS in excess of fourteen calendar days or reflecting an appropriate alternative solution in response to the threats of the pandemic. The record does not address whether any alternatives existed or why FEMA should reimburse applicant for costs beyond the fourteen-day period specified in the guidance, for which any extension required a timely request and approval.

Applicant is therefore entitled to reimbursement for the 120 individuals for whom FEMA has determined the requirements are met, for up to fourteen days for each individual.

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FEMA Has Not Determined Costs for Eligible Stay

While applicant has calculated and requests reimbursement of a specific amount per day per eligible individual for NCS, FEMA has not yet fully reviewed or made a final determination of allowable costs. FEMA requests that the panel remand the matter to FEMA to make such a determination; however, remand is not appropriate in arbitration. Having concluded that PA is available for each of the 120 individuals FEMA has found eligible for stays up to and including fourteen days within the period approved by the Regional Administrator, the issues presented in this arbitration are resolved.

Decision

Applicant is to receive PA funding for NCS for 120 individuals for up to fourteen calendar days during the period approved by FEMA's Regional Administrator. Applicant has failed to demonstrate that it should receive PA for any additional sheltered individuals. FEMA made a correct determination on the record, as expanded by this arbitration.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge