

PUBLICATION

CBCA 6822-FEMA; In the Matter of FLORIDA KEYS ELECTRIC COOPERATIVE Emergency Procurement; Reasonable Costs

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Documentation Critical to Florida Utility's FEMA Reimbursement Arbitration

A Panel consisting of Judges Beardsley, Drummond, and Russell has determined the Florida Keys Electric Cooperative is entitled to partial reimbursement of its costs incurred to establish two full-service base camps to support recovery and power restoration efforts immediately following Hurricane Irma in 2017. Based on data included in the Decision, the Cooperative will recover approximately 84 percent of the costs incurred, compared to a full denial going into the arbitration and a subsequent determination by FEM that approximately 20 percent of the costs were eligible.

The Panel focused on reasonableness of the costs incurred. Presumably based on the notion that a properly procured contract is indicative of the reasonable cost of the associated work, the Panel first considers FEMA's position that the contract was not compliant with the Cooperative's or FEMA's procurement requirements. In doing so, the Panel determined that the contract was actually not a contract, it lacked consideration and did not bind the base camp vendor, Storm Services, LLC (SSLLC), or the Cooperative. Both entities had the option to walk away, the Cooperative could give work to others and the vendor was not obligated to do the work if later requested. The "contract" was instead a prequalification to do work. The Panel determined however that "Even if [the Cooperative]'s prequalification of SSLLC was improper...[the Cooperative]'s use of noncompetitive procedures to award the work to SSLLC in the face of the imminent arrival of Hurricane Irma was acceptable."

The Panel next analyzed whether the Cooperative had completed a sufficient cost analysis and adequately supported the claimed costs as reasonable, finding that "the fact that the base camps and base camp services were successfully established and effectively utilized, combined with the remote locale, the simultaneous demand for these services, and the emergency and exigent situation encountered merits award of necessary and reasonable costs, despite any procurement irregularities." The Panel denied expedited freight and fuel charges as unreasonable, confirming the importance of efforts to obtain more explanation and support for these type costs. The Panel also determined that, while the contract was not a prohibited cost-plus-percentage-of-cost contract, it did include prohibited elements and therefore denied funding of markups on this basis. The Panel determined FEMA must reimburse all other costs claimed by the Cooperative.

The Panel clearly conducted a detailed analysis of all information presented in an effort to determine the reasonable cost of the work. The level of detail in the Decision confirms that it is absolutely critical that applicants document contracting decisions and maintain documentation of efforts to evaluate and support the reasonableness of costs – especially when entering into contracts procured under emergency or exigent circumstances. Documentation of costs will be even more critical for future disasters as FEMA's Public Assistance and Policy Guide no longer indicates that FEMA will fund the reasonable costs of work in the event there are contracting irregularities; for more on this change, see [here](#).

Please contact [Wendy Huff Ellard](#), or any member of [Baker Donelson's Disaster Recovery Group](#) for any questions.

