



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 15, 2010

CBCA 2018-FEMA

In the Matter of BALDWIN COUNTY BOARD OF SUPERVISORS

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Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **VERGILIO**, and **KULLBERG**.

This matter is before the panel under authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations. The Baldwin County Board of Supervisors (Baldwin County) and the State of Alabama Emergency Management Agency (AEMA) have requested that the arbitration panel determine whether the Federal Emergency Management Agency (FEMA) can retroactively disallow \$439,767 in tipping fees from a previous grant of public assistance for debris removal after Hurricane Katrina plus require payment of accrued interest in the

amount of \$83,274.¹ FEMA seeks to disallow a portion of the tipping fees that were paid at county-owned landfills at a rate of \$4.15 per cubic yard (CY) of debris. Baldwin County and AEMA contend that the tipping fee was a reasonable rate charged for debris brought to landfills, and FEMA's action to retroactively reduce this grant of public assistance is unwarranted and contrary to law.

Hurricane Katrina struck Baldwin County on August 29, 2005. Afterward, Baldwin County entered into a contract for debris removal with Crowder-Gulf, a joint venture that already had a contract with the city of Daphne, the largest city in Baldwin County. The county had entered into similar contracts, with FEMA's approval, for debris removal after Hurricanes Ivan (September 15, 2004) and Dennis (July 10, 2005).

Included with the rates charged by Crowder-Gulf for debris removal was a tipping fee of \$4.15 per CY. The volume of debris was determined as the trucks entered the landfill. The \$4.15 tipping fee, which had been in effect since 1996, was a charge for the operation of the landfills owned by Baldwin County, and that fee represented the average cost for the disposal of debris over an extended period of time. Baldwin County landfill operations were financed exclusively by the tipping fees, and under Alabama law, tipping fees could not be used by the county for any purpose other than landfill operations.

FEMA prepared a project worksheet (PW) for debris removal after Hurricane Katrina that included reimbursement of the \$4.15 tipping fee that was charged at Baldwin County's landfills. The record indicates that FEMA personnel had determined that the tipping fee rate of \$4.15 per CY was reasonable. As a result of discussions between Baldwin County and FEMA officials, Baldwin County did not maintain records of costs specifically attributable to processing Katrina-related debris because such costs were covered by the tipping fee.

After completion of debris removal, a final version of the PW was prepared that showed an actual documented cost of \$2,917,201.61 for debris removal. Included within that amount was \$944,367.02 for tipping fees at the rate of \$4.15 per CY. FEMA conducted a final inspection with regard to the PW, which was signed on October 25, 2006, and FEMA approved public assistance for Baldwin County's documented cost of debris removal.

Subsequently, FEMA determined that it had overpaid Baldwin County for debris removal. The agency made three principal conclusions. First, the county should be compensated for tipping fees for the quantity of debris which was deposited in the landfills

¹ FEMA contends in its posthearing brief that the amounts at issue are \$451,296.97 in tipping fees plus \$65,982.05 in interest.

rather than the quantity which was brought to these sites. Some of the debris was reduced by burning before being deposited, and FEMA claimed entitlement to the fees attributable to the quantity which it estimated had been reduced. Second, the county should be compensated for the costs it could prove that it incurred in burning the debris, but because the county had no records of these costs, it could retain nothing for whatever resources it devoted to the burning. Third, the county must repay the agency for interest it accrued on the money it had improperly received due to the first two conclusions.

Relevant to this discussion is whether Baldwin County has met its burden of showing that FEMA lacks adequate grounds under law to require reimbursement of tipping fees that FEMA now deems excessive. Baldwin County contends that FEMA accepted as reasonable the \$4.15 per CY tipping fee in lieu of requiring actual cost records of labor and equipment for the purpose of preparing the PW in the aftermath of Hurricane Katrina as well as two previous hurricanes. Additionally, Baldwin County contends that FEMA's present action to disallow a portion of those tipping fees is contrary to the limitations on the liability of a recipient of public assistance as set forth in section 705 of the Stafford Act, 42 U.S.C. §§ 5121-5207 (2006), which states the following:

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.

Id. § 5205(c).

Baldwin County has shown that all three of the conditions precluding reimbursement of public assistance payments are present in this matter. Payment for debris removal was subject to an approved agreement between FEMA and the State of Alabama, which was the public assistance grant. Although Baldwin County was not one of the parties to that grant agreement, payment for debris removal was by public assistance that was obtained from the State of Alabama under its agreement with FEMA. The tipping fee of \$4.15 per CY was reasonable. FEMA policy in effect after Hurricane Katrina defined a tipping fee as “a fee based on weight or volume of debris dumped that is charge[d] by landfills or other waste management facilities to cover their operating and maintenance costs.” Baldwin County has

established that the tipping fee of \$4.15 CY was an average operating cost for county-owned landfills, and that fee cannot be used for any other purpose. Prior to the debris removal at issue here, FEMA had agreed that the fee was a reasonable approximation of the costs of operating the landfills, and we received no evidence which indicates that this determination was incorrect. The agency's recent emphasis on proof of actual costs seems inappropriate, not only because of the prior agreement that records of actual costs need not be kept, but also because operation costs include a reserve for constructing landfill areas to replace those which accept hurricane debris and that reserve is by its very nature a product of estimation. Finally, the purpose of the grant was met in that debris was picked up and placed in Baldwin County landfills. Payment pursuant to the PW was made upon FEMA's final inspection. FEMA, therefore, has no legal ground under the Stafford Act for demanding that Baldwin County return any portion of the public assistance previously paid.

FEMA is not entitled to interest as there are no excessive tipping fees. As discussed above, the panel does not find that the tipping fees were excessive, and, consequently, there are no excessive fees on which to compute interest. We also find no merit in FEMA's contention that Baldwin County had a "windfall" from interest earned on tipping fees. Baldwin County established at the hearing that landfill expenses, which had to be financed by a line of credit, exceeded any revenue from the tipping fees collected by Baldwin County's landfills in the aftermath of Hurricane Katrina.

Decision

Pursuant to 44 CFR 206.209(k)(3) (2009), a majority of this panel makes the findings above and concludes that FEMA is not entitled to recover from the previous grant of public assistance for debris removal any of the tipping fees and accrued interest that it has demanded.

H. CHUCK KULLBERG
Board Judge

STEPHEN M. DANIELS
Board Judge

JOSEPH A. VERGILIO
Board Judge