



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 5, 2015

CBCA 4086-FEMA

In the Matter of CITY OF KENNER

Michael G. Gaffney and Christopher M. Gaffney of Hurndon & Gaffney, New Orleans, LA; and Patricia S. LeBlanc of LeBlanc Butler, LLC, Metairie, LA, counsel for Applicant.

Mark Riley, Deputy Director, and Mark DeBosier, State Coordinating Officer, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Charles Schexnaildre and Richard M. Exnicios, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the arbitration panel consisting of Board Judges **SOMERS**, **VERGILIO**, and **WALTERS**.

The City of Kenner (applicant) and the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) (grantee) dispute the determination by the Federal Emergency Management Agency (FEMA) that the City of Kenner may not obtain financial assistance for the repair of particular panels of residential streets (here referencing roads, curbs, and sidewalks) available under the Stafford Act for damage relating to Hurricanes Katrina and Rita. The applicant maintains that debris removal following the hurricanes caused damage to particular portions of those streets. The applicant seeks financial assistance for the repair. To be eligible for assistance, an item of work must be required as the result of a major disaster event. The record reveals that the damage is consistent with the age of the roads, the minimal, if any, repair or maintenance, and the regular traffic of garbage trucks over the roads. The panel concludes that the record fails to demonstrate that the work is required because of the hurricanes. Accordingly, the applicant does not prevail.

Background

This arbitration matter is before the Board pursuant to the authority of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164, and regulation, 44 CFR 206.209 (2014). On August 29, 2005, the President issued a major disaster declaration arising from Hurricane Katrina. The applicant is within the affected area. Public assistance is available for, among other things, the repair of disaster-related damages to public facilities, which include non-federal streets and roads. 42 U.S.C. § 5122(10)(B) (2012); 44 CFR 206.221(h). The applicant has at times alluded to Hurricane Rita as a cause for debris removal and basis of relief; however, that disaster occurred during the debris clean-up following Katrina, and is not treated separately.

To be eligible for financial assistance, an item of work must be required as a result of the declared disaster. 44 CFR 206.223(a)(1). This means that cause and effect must be established. The record here is lacking in proof positive to establish the connection between (a) the hurricane and debris removal and (b) the damage. The record, through photographs and descriptions, reveals street panels damaged with cracks or broken pavement; that damage must be causally linked to the disaster for financial assistance to be permissible. That is, damage cannot pre-exist the hurricane and cannot have been caused by events other than the disaster or related events.

In 2001, the applicant had its roads inspected, as it established a repair and maintenance plan. The roads, as rated according to recognized rating criteria, generally ranged from good to excellent. These ratings and the record contain no specifics as to particular panels on a given road. The applicant did not complete all of the suggested repairs identified in the plan, spending but a small portion of the suggested dollars required for the work. Most of the roads in question were at least twenty years old in 2001, and could have been ten or more years older than that. Of the roads in question, all but one is a concrete pavement over compressed clean sand; the other pavement is asphalt. The nominal thickness of the concrete pavement is six inches and of the sand is twenty-four inches.

At the end of August 2005, the city was hit by Hurricane Katrina and its aftermath. Flooding subsided within a few days; however, trees were uprooted, buildings and other property were destroyed or damaged, and debris clean-up ensued over approximately eighteen months. The total recorded debris (vegetative and construction and demolition) for the city was approximately 1.35 million cubic yards, with approximately 40,000 haul tickets for the city. A variety of heavy equipment was used to move, pick up, and remove debris. Vehicles passed over the approximately 200 miles of the city roads. Through other requests by the applicant, FEMA has determined that financial assistance is available for some

claimed hurricane-related damage to some of the roads; some of those requests have been denied.

For inclusion in the project worksheet underlying this dispute, the applicant sought \$18,342,733.43 to repair all damage to 2483 specific panels or segments of twenty-four roads (including curbs and sidewalks) said to arise from debris removal. FEMA determined that for 519 of these locations, the damages were causally connected to the hurricane, and obligated \$1,511,224.03 on the project worksheet. Those locations are not here at issue. This arbitration concerns the remaining 1964 sites, particular panels or segments of residential streets, some of which are feeder-streets over which traffic would pass to more major arteries to dispose of debris. FEMA has concluded that these sites were not damaged or that the damage has not been shown to be a result of the declared disaster. FEMA does not pay for either road maintenance or the loss of the useful life of a road. FEMA pays for the repair of damage.

Discussion

This case is resolved by detailing a few of the factors which do not permit the panel to conclude that damages were related to the hurricane. The factors focus on the actual conditions of the pavement pre- and post-Katrina, the lack of maintenance, the age of the pavement, the impact of equipment used to transport debris, and other potential causes for damage.

Credible evidence of the actual conditions at the specific locations is lacking at the pre-Katrina time (through August 2005) and during the post-Katrina time until several years after debris removal ceased. FEMA and the applicant or its representatives walked city streets at various times post-Katrina without identifying the damages here at issue. Various casual observations detailed during the hearing are of limited value in determining when the damage may have occurred and what may have been the cause. Also, hurricanes and lesser storms, occurring prior to and after Katrina before the presently alleged damages were documented, resulted in flooding and instances of debris removal over these streets. Although these incidents did not generate the volume of Hurricane Katrina debris, the passage of time and limited evidence make it difficult to attribute damage to a given cause.

The limited repairs and maintenance for the years prior to the hurricane and the lack of maintenance after the hurricane through the present has left cracks open in the pavement. A lack of joint and crack sealant permits water to enter and potentially wash out underlying sand and support. With a space under the pavement, cracks may widen and breaks can occur with routine road usage over time. Further, dirt and other materials may fill the void between pavement slabs. With this material, which lacks the properties of a sealant, temperature

variations may cause adjacent pieces of pavement to buckle resulting in further damage. The effects of the lack of maintenance were captured on charts and detailed in testimony, particularly with the age of the pavements in question. The condition of the pavement would undergo an accelerated decline without proper upkeep. As a result, damage cannot simply be attributed to the 2005 hurricane and related debris removal operations.

Pavement does not have an unlimited life. The applicant has not firmly established the age of any piece of pavement; however, the parties are in agreement that the roads presently are at least thirty to forty years old. The record lacks credible, documented evidence and therefore does not support a conclusion that the roads in question are any more damaged than other residential roads of a similar age in the city that might have had lesser debris traffic.

The applicant has identified various debris generating incidents, such as downed trees or buildings or portions thereof that were removed, located within the vicinity of the damaged pavement locations at issue here. However, the existence of such debris has not been shown to automatically translate into damaged pavement. The record does not establish that use of heavy equipment on the residential streets was outside of the design tolerances. (In contrast, FEMA has concluded that equipment used for debris removal was beyond the design tolerances of adjacent sidewalks, curbs, and driveways, and has found related damage to be required as a result of the hurricane, with the applicant entitled to relief; those determinations are reflected in the “paid” portion of the project worksheet not here at issue.)

The record shows that a garbage truck would have a greater impact on a road than each of the debris trucks used; this is because of weight load distribution over the axles. While the applicant correctly posits that testimony of a FEMA witness and modeling analysis regarding traffic over eight-inch thick concrete pavement (the analysis was developed based on now-current city standards, when the applicant had not identified the age or construction design of the streets) has not been shown to represent or extrapolate to the actual conditions of six-inch thick pavement, the record does not permit the Board to conclude that the vehicle traffic over the actual pavement would have caused damage. The applicant bears the burden of proof. Persuasive proof is lacking to support the applicant.

Neither the actual volume or weight of debris transported nor the number and type of vehicular traffic over the portions of the streets at issue have been established in this record. The total 1.35 million cubic yards and related weight of debris and traffic reflected by the 40,000 haul tickets did not traverse any street or panel here at issue. Because the record lacks particulars, one element in demonstrating a causal link between debris removal and damage has not been established.

The record establishes that roads subsided (dropped in elevation) as a result of the pumping of groundwater. This pumping and subsidence, unrelated to the hurricane, itself could lead to cracking and other damage. The applicant has not established a basis to discount subsidence as a cause of the damage at any particular location.

Decision

The applicant has failed to satisfy its burden of proof. By not showing that the damage was caused by the hurricane or the pickup and transport of the resulting debris, the applicant does not prevail.

JOSEPH A. VERGILIO
Board Judge

JERI K. SOMERS
Board Judge

RICHARD C. WALTERS
Board Judge