



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 22, 2019

CBCA 6114-FEMA

In the Matter of ST. BERNARD PARISH GOVERNMENT

Michael G. Gaffney and Christopher M. Gaffney of Gaffney & Gaffney, Metairie, LA; Charles V. Cusimano, III, of Cusimano Law Firm, PLC, Metairie, LA; and Nolan P. Lambert, New Orleans, LA, counsel for Applicant.

Lynne Browning, Assistant Deputy Director, Danielle Aymond, Executive Counsel, Carla Richard, Executive Officer, and Jaron Herd, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Brock Pierson, 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 **SHERIDAN, KULLBERG, and SULLIVAN.**

The St. Bernard Parish Government (SBPG) sought arbitration over the denial by the Federal Emergency Management Agency (FEMA) of its request for funding for efforts to evaluate and then repair damage to the storm drain system throughout the parish. FEMA denied SBPG's request because it was untimely and SBPG had failed to provide sufficient information regarding the damaged elements of the drain system. For the reasons that follow, we uphold FEMA's determination and deny SBPG's claim.

Background

Storm and Recovery Efforts

On August 29, 2005, Hurricane Katrina struck St. Bernard Parish. During the storm, water overtopped the levees and the entire parish was flooded. There was standing water in the parish for two weeks.

During the recovery, residents cleaned out their houses and left debris for pick-up in the right-of-way space between private property and the street. Often, storm drain lines, sewer lines, and water lines as well as electric and gas lines are located in the right-of-way. SBPG demolished 8500 houses, a third of all homes in the parish. SBPG and its contractors were careful not to damage the drain and other utilities lines located in the right-of-way during demolition and debris collection efforts. Despite this care, SBPG believes that storm drain lines were damaged as a result of these activities.

Drain Line System

The parish had a functioning storm drain system prior to Hurricane Katrina and a maintenance crew dedicated to drain line cleaning. After the storm, SBPG twice cleaned the storm drain lines throughout the parish to remove muck and debris swept into the system by the storm. In the first effort that finished in December 2005, SBPG cleaned more than 620,000 linear feet of drains. In the second effort that finished in May 2008, SBPG cleaned an additional 133,000 linear feet of drains that had been inaccessible or not cleaned during the first effort. FEMA obligated a total of \$12 million for both of these efforts after the work was complete. As part of the second funding authorization, FEMA denied SBPG's request for funds for closed-circuit television (CCTV) inspection of the storm drain lines. SBPG did not use all of the funds obligated for the second effort because there were locations that were blocked and could not be cleaned. There were approximately 64,000 linear feet that could not be cleaned. SBPG knew of these locations in 2008.

FEMA funded projects to repair parts of the storm drain system, including pump stations, catch basins, and canals. FEMA also funded the repair of several sections of drain lines. Witnesses testified that whenever SBPG discovered a broken or damaged drain line under the road way or in the right-of-way as part of a road repair project, FEMA made an eligibility determination and funded the repair of that drain line. Witnesses also testified that drain line problems may take years to manifest themselves as blockages and other problems cause soil to erode around the lines.

The drain line system includes 691 outfalls, which are the end of a drain line through which the water empties into canals located in the parish. Many outfalls were damaged by Army Corps of Engineers contractors charged with removing debris from the canal after the disaster. Documentary evidence in the record suggests that some of the outfalls were damaged by contractors for the Natural Resource Conservation Service (NRCS) performing the same canal debris removal work. No one testified as to the condition of these outfalls prior to Hurricane Katrina. SBPG does not know whether the Corps of Engineers was notified of the damage caused by its contractors and SBPG did not seek to recover from the Corps or NRCS for the damage to these outfalls. FEMA funded the repair of approximately eighty outfalls during road repair or canal crossing projects.

Prior to submitting the request for arbitration, SBPG conducted a survey of 125 of the outfalls and found that eighty-two of them were damaged. Based upon this result, SBPG extrapolated in its arbitration request that 386 of the 690 outfalls are damaged and in need of repair. In May 2018, subsequent to submitting its request, SBPG performed a further survey of the outfalls. The panel was shown pictures of one damaged outfall taken during this survey.

With the exception of the outfall and canal crossings, SBPG did not show the panel visual evidence of damage. Instead, SBPG described four types of locations where SBPG believes that drain lines are damaged: 1) locations where there were debris pick-ups and house demolitions; 2) locations where the sewer lines were replaced; 3) outfalls damaged by contractors cleaning out the canals; and 4) locations of blocked drain lines that could not be cleaned in 2008. SBPG also provided the log of 590 complaints of drainage issues that the parish received from 2011 through 2017. SBPG mapped these locations on a single map, marked as demonstrative exhibit one, to show that it needs funds to conduct CCTV inspections of the entire storm drain system and then repair or replace any drain lines that are found to be damaged. Most of the drain lines that are the subject of SBPG's request are located in the right-of-way. The SBPG witnesses who testified about these locations reported experience with finding damage at these types of locations, but acknowledged that the scope of the damage cannot be determined until the locations are investigated further, either through the use of CCTV or physically excavating the sites of reported problems.

SBPG also highlighted the fact that FEMA has funded the repair of drain lines in neighboring parishes, including Slidell Parish and City of New Orleans, both of which suffered less flooding damage than St. Bernard Parish. SBPG elicited FEMA testimony that New Orleans had provided CCTV inspection results for fourteen lines in the city and that FEMA made eligibility determinations based upon New Orleans documenting specific damages and locations. Another witness testified that FEMA determined that Slidell's drain

lines were damaged due to hydrostatic pressure, but provided no explanation as to how this damage was shown or documented.

SBPG's Request for Funding

In February 2013, FEMA and the Louisiana Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) convened a final recovery meeting (FRM) with SBPG and other applicants with outstanding projects. At that meeting, FEMA requested that SBPG submit within sixty days any requests for funding for newly discovered damage. SBPG asserts in its request for arbitration that it identified the storm drains as "uncaptured damage" at this meeting, but provided no documentary evidence or testimony to support this contention.

In April 2013, FEMA sent a letter to GOHSEP reiterating the sixty-day deadline that was set at the FRM meeting in February. Also in April 2013, SBPG submitted an extension request for the sixty-day deadline to submit new version requests for "Jean Lafitte Drainline" and "Drain line repairs."

In August 2013, FEMA sent a letter to GOHSEP that discussed the progress of the FRM process for SBPG and warned that SBPG had another thirty days to submit requests for project worksheets (PWs) for new damage:

If [SBPG] has any further versions for PWs on the [applicant satisfaction report], or any other version 0 PWs, they must submit a FRM extension request to GOHSEP within 30 days of the date of this letter. The FRM extension request should be accompanied with a detailed claim for additional eligible work, an identification of the supporting documentation [SBPG] plans to provide and a time line for supplying that documentation for FEMA to review. If [SBPG] does not meet the requirements established to get an extension of the FRM initiative, then FEMA will not accept version 0 PWs [from SBPG] after this date.

FEMA Exhibit 14 at 2.

Ten days later, SBPG submitted a new project worksheet request that it labeled as "STMDRN V.0" and described as "Parishwide Storm Water Collection System Inspection and Repair." FEMA Exhibit 15. SBPG described the damage to the sewer system as "consistent with the current damages found throughout the storm water collection system." *Id.* at 3. In describing the scope of the project worksheet to be written, SBPG described the

need to repair storm drain lines that were blocked during the drain line cleaning conducted in 2005 and 2007-2008:

This PW is being written at the applicants [sic] request to repair storm drain lines that were found to be broken, blocked, or otherwise inaccessible for cleaning during the emergency response effort to remove debris and silt from the storm water collection system funded by PW 3658. The locations currently identified by the Applicant as needing urgent repair are along Jean Lafitte Parkway, between W. Judge Perez Drive and the 40 Arpent Canal as it is posing safety hazards and street flooding to connecting streets during rain events. Other problem areas parish wide will be identified and submitted at a later date.

Id. at 4. In the scope of work, SBPG provided a description of the damage and estimate of repairs to the drain line on Jean Lafitte Parkway. SBPG did not provide any specific information, dimensions, or descriptions of damage regarding the parish-wide storm drain system or issues with sinkholes in the right of way areas or a time line on which information regarding this damage would be provided. SBPG indicated that it had both attached and had maintained in its files additional information regarding the request.

In September 2013, FEMA acknowledged receipt of SBPG's August 2013 request and advised GOHSEP that it considered "the FRM initiative for [SBPG] complete." FEMA Exhibit 16. FEMA intended this letter to tell SBPG that it would not accept work for newly identified damages. FEMA Exhibit 1 at 4. In August 2016, FEMA obligated \$4 million for the cleaning, repair, and CCTV costs for the Jean Lafitte Parkway lines.

Three years later, SBPG requested that FEMA prepare a version 2 project worksheet for SBPG storm drains "to capture the estimated costs for scope to perform drain line cleaning, CCTV inspection services, and point repair for Parish wide minor storm drains." FEMA Exhibit 21 at 1. SBPG warned that "[t]hese storm damaged elements, if not properly assessed and repaired, will cause damage by subsidence to previously repaired infrastructure including roadways and other utility facilities as well as adversely affect the intended hydraulic capacity of the drainage system." *Id.* SBPG promised to estimate the scope of work and cost in a subsequent version. *Id.* at 6.

Following a meeting in January 2017 between senior FEMA and SBPG personnel, FEMA sent SBPG a request for information seeking a detailed cost estimate of the additional funds sought and a "detailed explanation and time line of any extraordinary circumstance(s) that prevented [SBPG] from documenting and reporting these damages during the previously FEMA-funded cleaning processes." FEMA Exhibit 22 at 2.

In March 2017, SBPG submitted its estimate of \$147 million, broken down into \$17 million for the cleaning, CCTV inspection, engineering analysis, and field monitoring and inspection services, and \$130 million for the actual repair costs. SBPG explained that it was requesting funding to inspect the entire system and repair any damaged element:

the Parish is requesting funding to perform a completed [sic] comprehensive flushing and CCTV inspection of the drainage system to ensure drainage infrastructure is restored to its pre-disaster condition, capacity and function, verify previously repaired sections, identify remaining disaster-related damage in need of repair, and to clear the system of potentially hazardous and detrimental foreign materials which pose flood and public health/well-being risks.

FEMA Exhibit 23 at 9. SBPG noted that its request included “any Parish owned and maintained minor drainage pipe outfalls into primary ditches, canals, and waterways potentially clogged with debris and/or damaged by the channel debris clearing scope performed by various agencies due to Katrina.” *Id.*

In April 2017, SBPG replied to FEMA’s request for information (RFI) regarding the timeliness of its request, explaining that flushing the entire drain system and conducting a CCTV inspection at an earlier time would have been a “financial and administrative burden” upon the parish. FEMA Exhibit 24 at 10-11. SBPG also requested a time extension until November 18, 2018, to perform the eligible scope of work. FEMA sought further information about SBPG’s request in RFIs sent in October 2017 and February 2018.

By letter dated March 15, 2018, FEMA denied SBPG’s request for \$96 million for work to repair storm drains throughout the parish.¹ FEMA asserted that the 2016 request was an untimely request for newly identified damage. FEMA Exhibit 1 at 4. FEMA also contended that the request was “not based upon actual identified damages, but rather [was] an approximation of damages that may be discovered upon CCTV inspection.” *Id.*

On May 4, 2018, SBPG requested arbitration of FEMA’s denial of its request. In its request, SBPG seeks \$203 million to repair damage to the storm drain system. SBPG’s estimate of the cost to repair the damage increased in the request for arbitration because SBPG spent more time identifying damage and analyzing the estimated costs. SBPG also

¹ In response to a RFI, SBPG reduced its estimate of linear feet to be repaired, which reduced the estimated costs.

included an estimate of “soft costs,” which had not been included in its original request to FEMA.

The record before the panel consists of SBPG’s request for arbitration, GOHSEP’s statement in support of that request, FEMA’s response to the request, and all of the documents that accompanied these submissions. The record also includes the transcript of the hearing convened by the panel on November 13-15, 2018. To help explain their positions and the evidence presented, the parties also submitted demonstrative exhibits during the hearing and post-hearing briefs.

Discussion

SBPG’s Request for Parish-Wide Storm Drain Repairs Is Untimely

FEMA contends that SBPG’s funding request was untimely because it was submitted after the deadline established by the regional director for the submission of funding requests for previously unidentified damage. SBPG counters that its submission did meet the deadline and that FEMA officials conveyed a desire to focus upon the repairs to the Jean Lafitte Parkway before addressing funding for any other drain line repairs.

FEMA’s regulations governing public assistance requests provide that “[t]he applicant will have sixty days following its first substantive meeting with [FEMA] to identify and to report damage to” FEMA. 44 CFR 206.202(d)(1)(ii) (2017). The FEMA regional administrator has the authority to extend this time limitation upon written request from a grantee, as long as the need for the extension is for reasons beyond the control of the applicant or the grantee. *Id.* 206.202 (f)(2).

FEMA waived the sixty day deadline for projects related to Hurricane Katrina because of the magnitude of the damages that resulted from Hurricanes Katrina and Rita. FEMA sought to re-institute these deadlines and bring the public assistance application process to a close with the creation of the FRM process in 2013. FEMA’s regional director possessed the authority to create this process and the associated deadlines within the regulatory authority to adjust deadlines.

With its August 2013 letter to GOHSEP, FEMA advised that any requests for new damage had to be submitted within thirty days and had to be accompanied by a detailed description of the damage, as required by 44 CFR 206.202(d)(1)(i). While SBPG’s submission later in August 2013 described drain line damage throughout the parish and mentioned the need to repair the lines that could not be cleaned in 2008, SBPG only provided a detailed description of the damage for the drain line repairs to Jean Lafitte Parkway.

SBPG also asserted, with witness testimony, that FEMA representatives asked the parish to defer work on the remainder of the drain line system and focus upon Jean Lafitte Parkway. This testimony is counter to the documented effort by FEMA to wrap up the recovery projects.

SBPG also asserts that FEMA waived the deadlines imposed by the FRM process by never mentioning timeliness and working to develop the request. As noted above, FEMA did mention timeliness in its first request for information, asking SBPG to explain why this newly-identified damage had not been brought forth in previous efforts to clean the drain lines. Rather than explaining that FEMA had asked the parish to defer the request, SBPG explained that a request would have been a burden to the parish given its focus upon other recovery priorities. While FEMA did not explain why it continued to seek substantive information on the request if it believed that the request was untimely, the panel does not find that FEMA waived the deadlines that it had imposed in the FRM process.

Notwithstanding our determination that SBPG's request was untimely, we also address SBPG's challenge to the merits of FEMA's determination.

SBPG Has Not Provided A Sufficient Description of the Damage

FEMA also denied the merits of SBPG's request, finding that SBPG has only identified where damage to the drain lines is likely and is requesting funds to investigate the damage further, a purpose for which FEMA does not provide funds. SBPG counters that it knows that the system is damaged in these locations and it seeks CCTV to determine the extent of the damage and the best method of repair.

The Stafford Act authorizes FEMA to provide grant assistance "to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster." 42 U.S.C. § 5172(a)(1)(A) (2012). FEMA's regulations provide that "[t]o be eligible for financial assistance, an item of work must . . . [b]e required as the result of the emergency or major disaster event." 44 CFR 206.223(a)(1). FEMA will not provide assistance to an applicant "for damages caused by its own negligence." 44 CFR 206.223(e); *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,1980.

In a public assistance request, the applicant through its authorized local representative must "ensure that the applicant has identified all eligible work and submitted all costs for disaster-related damages for funding." 44 CFR 206.202(d)(1). Then, either the applicant or FEMA will prepare a project worksheet that "must identify the eligible scope of work and must include a quantitative estimate for the eligible work." *Id.* 206.202(d)(1)(i). FEMA's

Public Assistance Guide further directs that “the applicant is responsible for all work that is required as the result of a disaster.” FEMA Public Assistance Guide at 63. FEMA policy guidance addresses requests for CCTV efforts, stating that “FEMA does not provide funds for random surveys to look for damage, such as TV inspection of sewer lines. If disaster-related damage is evident, however, FEMA may pay for inspection to determine the extent of damage and method of repair.” FEMA PA Policy Digest (2001) at 128.

SBPG seeks funds to conduct CCTV inspections of the drain line system and then repair any damage that is found. FEMA is not required to fund CCTV inspections in locations that SBPG suspects are damaged.

The evidence that SBPG provides of damage to the drain lines shows where SBPG expects to find damage, based upon past experience with projects to repair roads and canal crossings. However, in those projects, FEMA funded the repairs to the drain lines after SBPG exposed the damaged section of drain line and asked FEMA for an eligibility determination. Regarding the proximity to sewer lines that were repaired, no one testified as to what caused the damage to the sewer lines. SBPG witnesses did testify about damage to the road panels caused by the saturated soils, but most of the drain lines that SBPG believes are in need of repair are located in the right-of-way, not under the road surfaces. Further, it appears that FEMA funded most, if not all, of the damaged drain lines running under damaged roads. SBPG’s belief that the weight of the debris on the right-of-way and the demolition trucks transversing the right-of-way caused damage to the drain lines is contrary to the testimony that SBPG and its contractors worked to protect the drain lines and other utilities in the right-of-way when conducting these recovery operations.

Regarding the outfalls, SBPG made an effort to survey and document damage to outfalls after the request for arbitration was filed. Putting aside the timeliness of this damage survey, we are troubled by the fact that these outfalls were reportedly damaged in 2005, during the initial efforts to clear debris out of the canals. As SBPG’s own funding request makes clear, problems with the drainage system, left unaddressed, create greater problems. Given SBPG’s failure to identify and address the damage for thirteen years after it happened, we are concerned that the damage FEMA is asked to fund is as much the result of neglect of these problems as it is related to damage by contractors. Coupled with the fact that no one from SBPG established the condition of the outfalls before the disaster, we find that SBPG has failed to meet its obligation to timely identify and describe damage that is directly related to the disaster.

Similarly, the locations that were blocked in 2008 when the second cleaning was conducted have not been addressed for ten years. It is unknown how these blockages have led to greater problems than might have existed if it had been addressed in 2008. Moreover,

SBPG requested funding for CCTV inspection of these locations in 2008, a request that FEMA denied. The mere passage of time does not render these locations now eligible for CCTV inspection and repair with public assistance funds.

Decision

FEMA's March 15, 2018, determination is sustained.

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge