



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 28, 2021

CBCA 7062-FEMA

In the Matter of PUERTO RICO INSTITUTE OF CULTURE

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Before the Arbitration Panel consisting of Board Judges **LESTER**, **RUSSELL**, and **GOODMAN**.

The applicant, Puerto Rico Institute of Culture, sought arbitration of its eligibility for reimbursement of \$6,321,630 through public assistance (PA) by the Federal Emergency Management Agency (FEMA) for damage incurred to Fortin San Geronimo de Boqueron (the facility) located in San Juan, Puerto Rico, by Hurricane Maria (the hurricane) in 2017.¹

¹ The Government of Puerto Rico owns the facility, but it is under the stewardship of the applicant. Located at the easternmost point on San Juan Island, the facility rests on a flattened coastal reef that is partially surrounded by water—the Atlantic Ocean to the north, the Boqueron Canal and Condado Peninsula to the east, and Boqueron Bay to the south. A stone bridge connects the facility to San Juan Island.

The panel decides this matter pursuant to the authority set forth in 42 U.S.C. § 5189a(d) (2018). As permitted under Rule 611 of the Board's rules governing this arbitration (48 CFR 6106.611 (2020)), the parties have requested a decision on the written record (a "paper hearing") without live testimony. Both parties have submitted evidentiary materials in this arbitration to support their respective positions.

Background

Applicant's Request for Public Assistance (RPA) and First Administrative Appeal

On October 13, 2017, the applicant submitted an RPA to FEMA in the amount of \$1,546,171 to repair the facility. On June 16, 2020, FEMA notified the applicant that it was ineligible to receive PA funding because the facility was not in active use or maintained at the time of the disaster, and that the applicant had not shown the claimed damage was a direct result of the hurricane.

On August 15, 2020, the applicant submitted its first administrative appeal of FEMA's eligibility determination, disagreeing with FEMA's determination that the facility was not in active use at the time of the disaster, arguing that the facility is eligible for PA funding because it had two functions: a historical monument for cultural and recreational activities, and an institutional office and storage (warehouse) space. The applicant also disagreed with FEMA's determination that the applicant did not properly maintain the facility and that any damage to the facility could not be shown to be a direct result of the disaster. The applicant also increased its request for funding from its original RPA amount of \$1,546,171 to \$6,321,630 based on a revised damage estimate.

On January 4, 2021, FEMA issued a first appeal determination, finding that the applicant was not eligible for PA funding because it did not demonstrate that the facility was in active use at the time of the disaster nor did it show that the claimed damages were caused by the hurricane rather than pre-existing deterioration. FEMA found that the applicant did not provide sufficient documentation to show the facility met FEMA's active use requirement or any exceptions for inactive facilities under 44 CFR 206.226(k)(2). Moreover, even if the facility was in active use at the time of the disaster, FEMA determined that the applicant did not distinguish damaged elements caused by the hurricane from pre-existing deterioration or deferred maintenance pursuant to 44 CFR 206.223(a)(1). FEMA denied the applicant's first appeal.

Applicant's Request for Arbitration

On March 8, 2021, the applicant filed its request for arbitration at this Board. As to FEMA's determination that the facility was not in active use at the time of the hurricane, the applicant specified evidence to support its position that the facility was in active use.

Concerning FEMA's previous assessment as to the damage to the facility as a result of the hurricane, the applicant argues that FEMA relied too heavily on a 2016 National Park Service (NPS) evaluation of the facility while giving little weight to the conclusions in the two post-hurricane NPS joint assessments. According to the applicant, the purpose of the 2016 NPS evaluation was to evaluate the facility for inclusion in the NPS System while the two post-hurricane assessments were to identify damage caused by the hurricane.

To support its claims that the hurricane caused damage to the facility, the applicant relies upon two post-hurricane assessments—the 2018 NPS/FEMA/PRHPO [Puerto Rico State Historic Preservation Office] Joint Assessment of Fortin San Geronimo and the 2018 Collaborative Report (2018 NPS Assessments)—which provided descriptions of recommended hurricane-related interior and exterior repairs due to water infiltration and the need to strip and resurface interior and exterior treatments due to the presence of black mold. The applicant also cites various hurricane-related damage to the bridge, foundation, interior and exterior walls, arches, louvered shutters, and a metal and wooden gate.

The Arbitration Hearing

The parties elected a paper hearing, and submitted witness statements, briefs, and exhibits. After reviewing the applicant's hearing submission, FEMA determined that the facility was in active use at the time of the hurricane. FEMA states in its hearing submission:

FEMA is no longer contesting the Applicant's active use of the Facility under 44 CFR § 206.226(k)(2) as it has demonstrated that it was actively using the Facility for public tours and historic and military reenactments immediately prior to Hurricane Maria.

FEMA's Hearing Submission at 3.

After reviewing the applicant's hearing submission, FEMA also determined that certain building elements could be eligible for PA funding, provided sufficient documentation was submitted. FEMA stated:

FEMA's Consolidated Resource Center (CRC) Atlantic, Public Assistance Division conducted its own analysis of the 2018 NPS Assessments in rebuttal

to specific issues highlighted in the Applicant's Paper Hearing Submission. See FEMA's Paper Hearing Response Exhibit A, Analysis of 2018 Hurricane Maria Damage Assessments ("CRC Analysis"). Specifically, William A. Heyse, PE, CRC Supervisory Emergency Manager, reviewed the 2016 NPS Report, the 2018 NPS Assessments, the Applicant's Paper Hearing Submission, compared pre and post-disaster Google Street View photos, and conducted a physical site inspection of the Facility on May 13, 2021 which he all used in his analysis. *Id.* While Mr. Heyse did not agree with most of the Applicant's claimed hurricane damage, he did observe certain damage and repair work as a result of Hurricane Maria that could be eligible for FEMA PA funding. The Applicant, however, would need to provide FEMA additional documentation, such as invoices for repairs made or quantities for FEMA reimbursement.

FEMA's Hearing Submission at 15.

FEMA described damaged building items which it deemed eligible for PA reimbursement if the applicant could demonstrate eligible work and costs:

Regarding "[t]he arches [which] are constructed of low-fired local brick that [were] sandblasted by the force of the storm," FEMA's CRC reported that pre and post-disaster photos show that there is some event related damage to the mortar coating in the two spandrels (triangular space) between the arches. *Id.* at 1. The Applicant, however, would still need to quantify the area of event related damage. *Id.*

Regarding the "paired wood louvered shutters in window openings . . . [which] were damaged in the storm and are now secured by temporary bands of wood nailed to the interior to hold them in place," FEMA's CRC confirmed damage to the louvered shutters based on pre and post-disaster photos. *Id.* at 2. The Applicant, however, would still need to quantify the amount necessary to replace the damaged/missing louvered shutters. *Id.*

Regarding "the bridge [which] appeared wavy from displacement after the hurricane . . . [and] [a]fter the storm, sizeable sections of the slab were washed away leaving large holes in its surface with loose rubble below. Water washes up from below through these voids onto the bridge and into the forecourt," FEMA's CRC confirmed through photographic evidence that a number of repairs were in progress pre-event that were completed in 2019 which could be eligible for PA funding. *Id.* at 3. The Applicant, however, would need to

submit documentation of the cost of this repair (i.e. invoices for material and labor) for FEMA reimbursement. *Id.*

Regarding a “historic metal gate, along with a wooden gate, [that] were lost in the storm,” FEMA’s CRC confirmed pre-event photos of a metal gate at the entrance to the bridge (west) which was not present in post-event pictures, and not present in May 2021. *Id.* at 5. The wooden gate at the east end appears to match the pre-event wooden gate but with now functional hinges. *Id.* The Applicant would need to submit documentation of the cost of the repairs (i.e. invoices for material and labor) for FEMA reimbursement. *Id.*

Regarding hurricane damage that “damaged the lower plaza’s guard house dome,” FEMA CRC confirmed damage as a result of the hurricane. The Applicant, however, would need to submit documentation of the cost of the repairs (i.e. invoices for material and labor) for FEMA reimbursement. *Id.* at 11, 13.

FEMA’s Hearing Submission at 17-18.

Discussion

The issue that remains to be resolved by this arbitration panel is the funding of the remainder of the alleged disaster-related damage. FEMA asserts that it may only provide PA funding pursuant to 44 CFR 206.226(k)(1) to the extent necessary to restore the immediate pre-disaster alternate purpose of the facility, a historic building for the public to visit or as an office and storage space for continuing repairs, as the applicant claims it is currently used. However, for a majority of the applicant’s claimed damage, FEMA asserts that the applicant has not provided sufficient evidence to distinguish pre-existing damage from damage as a result of the hurricane to warrant \$6,321,630 in PA funding. While FEMA understands that the hurricane affected the facility, FEMA concludes that the applicant has not met its burden to identify which specific building elements were damaged as a result of the hurricane as compared to pre-existing damage.

In order to identify and prove the damage caused by the hurricane to specific building elements, the applicant must distinguish between the pre-disaster conditions and the conditions following the disaster. *See, e.g., City of Lakeport, California, CBCA 6728-FEMA, 20-1 BCA ¶ 37,671.* The facility was originally designed in 1788 as a fortress. However, for the relevant period, the applicant has used the facility as a historic building for the public to visit or as an office and storage space for continuing repairs, as the applicant claims it is currently used.

In support of its claims that the hurricane caused extensive damage to the facility, the applicant relies on the 2018 NPS Assessments as well as its own comparative analysis of the 2016 NPS Report and 2018 NPS Assessments. Applicant's Hearing Submission at 13-22. However, FEMA has submitted information showing that numerous government agencies and other entities have documented the facility's condition and need for repairs since 1996. For example, a 1996 report that the United States Army Corps of Engineers and the applicant jointly developed concluded that the structural integrity of the facility was deteriorating due to the impact of wave action on the outer walls. Also, in 2016, NPS issued its "Fort San Geronimo Special Resource Study/Boundary Study" in which it conducted a comprehensive review of the facility's condition, which it categorized as "poor" and "severely deteriorated due to age, weathering, wave action at the foundation, lack of repair and maintenance, and inappropriate repairs." The NPS also noted that from 2012 to 2016, the facility had sustained additional structural and architectural damage. The facility's foundation, interior and exterior walls, sentry boxes, roof, cisterns, and bridge, among other features, went from being in "poor condition" in 2012 to "worse" or "severe" in 2016, and the applicant's preservation work had ceased in 2013. As of the spring of 2016, major maintenance had not begun, and NPS concluded it would not be feasible to add the facility to the National Park System because of the high cost of repairs required to address the deferred maintenance. Thus, the facility was in poor condition before the hurricane.

The applicant relies on the 2018 NPS Assessments by an historic architect, Audrey T. Tepper, and by Dr. James A. Mason, Ph.D., P.E., which were prepared to assess damage as a result of Hurricane Maria. Applicant's Hearing Submission at 13-20. For example, the applicant highlights the following statements in Ms. Tepper's assessment to demonstrate damage as a result of the hurricane:

The sand infill has washed away from walls due to continuous wave action **and from the storm surge during Hurricane Maria**; . . . The walls of the fort have a very high moisture content, **both from [the fort's] exposed location in a lagoon and from Hurricane Maria**; **The storm brought in excessive amounts of water to an already saturated environment**; . . . There is also a loss of material on the arches on the sides of the bridge. Surf has damaged this area. **This condition was made worse by Hurricane Maria.**

Id. at 14.

The applicant also relies upon Dr. Mason's assessment, asserting that he "unequivocally states that the Facility did in fact suffer damages as a result of Hurricane Maria in a section of his report titled 'General Description of Recommended Repairs due to Hurricane Maria.'" Applicant's Hearing Submission at 15. However, as FEMA notes:

In that section, Dr. Mason described the substantial negative impact on the Facility caused by Hurricane Maria especially to the inside of the Facility and on the roofs due to water infiltration and resulting black mold. *Id.* Dr. Mason further described the extensive exterior damage mainly associated with wave erosion.

While Dr. Mason's conclusions may be helpful to describe damage to the Facility that he observed in 2018 when he conducted his assessment, it is not useful in determining damage as a result of the Hurricane because there is no pre and post-disaster damage analysis of specific building elements. It is just a snap shot of the condition of the Facility in 2018 when the assessment was conducted along with Dr. Mason's professional opinion of the cause of the damage. It would have been beneficial for Dr. Mason to compare the 2016 NPS Report with his 2018 Assessment but it is unclear whether Dr. Mason was aware of the existence of the 2016 NPS Report when he prepared his assessment because it is not referenced anywhere in his 2018 Assessment. See FEMA RFA [Request for Arbitration] Response, Exhibit 5. Because the 2018 NPS Assessments do not sufficiently distinguish between pre and post-disaster damages to the Facility, FEMA cannot support its claim of \$6,321,630.00 in PA funding.

FEMA's Hearing Submission at 11-12

Also, as noted previously, FEMA's CRC did not agree with most of the applicant's claimed hurricane damage, as the applicant's information made no pre- and post-hurricane comparisons.

Having reviewed the record in this case, except for the items that FEMA has determined may be eligible for PA funding, it remains unclear to this arbitration panel whether, and to what extent, the damage for which additional funding is requested was a result of the hurricane, as the weight of evidence indicates substantial degradation prior to the hurricane. Where preexisting damage exists, applicants must distinguish that damage from disaster-related damage. The applicant has not demonstrated that the additional funding requested is required as a result of the disaster, rather than as a result of preexisting conditions and/or negligent maintenance. *See* 44 CFR 206.223(a)(1), (e). The applicant's documentation does not establish pre- and post-disaster damage to the building elements at issue. Accordingly, the arbitration panel concludes that FEMA's determination in this case is correct.

Decision

Except for those items for which FEMA has determined the applicant may be eligible for PA funding, the panel affirms FEMA's denial of the applicant's request.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge