



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 10, 2021

CBCA 7189-FEMA

In the Matter of LEE COUNTY SCHOOL DISTRICT, FLORIDA

Michelle Zaltsberg of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC, counsel for Applicant.

Sherin Joseph, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Shahnam Yazdani, 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 **BEARDSLEY** (Chair), **LESTER**, and **SHERIDAN**.

In late 2017, the Lee County School District (Lee County) in Florida began the process of fully replacing the roofing at Estero and Mariner High Schools to repair damage that it asserts was caused by Hurricane Irma. Although insurance covered much of the construction, Lee County, because of the deductibles in its insurance contracts, had to pay a total of \$5,330,749.08 for the roof replacements. After it began replacing the roofs at the schools, Lee County requested public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) under the auspices of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), to cover its deductibles. FEMA denied the request, and Lee County then sought arbitration under

42 U.S.C. § 5189a(d). Because Lee County has failed to establish that the roofs at the two multi-building schools, some of which even Lee County's own expert indicated in his expert report were not damaged by the hurricane, needed complete replacement rather than repair, we deny Lee County's application.

Background

Estero High School and Mariner High School are owned by Lee County. Each of the two high schools is comprised of a complex of at least a dozen buildings. There are two types of roof shapes on the various buildings at each school: the majority of the buildings have sloping roofs, while some of the buildings, such as the schools' auditoriums, have flat roofs. Prior to 2017, there were two different types of roof coverings on the various buildings at each school: (1) the buildings with sloping roofs were covered with concrete tile roofing materials; and (2) the buildings with flat roofs were covered in rolled asphalt roofing materials. Although Lee County contends that each school's buildings had one single, contiguous, inter-connected roof, it is clear from photographs of the two schools, testimony at the hearing, and other evidence in the record that they did not. Although many of the roofs on the various buildings are connected, the roofs cover what are clearly separate buildings. Where roofs of separate buildings are connected, they are connected only by flashing, trusses, and ridge boards, meaning that they are not a singular roof. The various roofs on different buildings have different pitches and different heights, and the materials covering them (whether rolled asphalt or concrete tile) vary from building to building, meaning that some type of flashing or other roof-connecting material has to be used to tie the different roofing materials together. In addition, roofs over single-story buildings and walkways at the schools are not connected to the two-story building roofs at all. Accordingly, the record shows that the various buildings at Estero and Mariner High Schools each have separate roofs, even if some of them are connected through flashing and other roofing construction mechanisms. All of the roofs at both of the schools were replaced in 2006 or 2007 and were supposed to have a life span of at least twenty, if not thirty or more, years.

In mid-September 2017, Hurricane Irma carried heavy rainfall and strong winds across the Florida peninsula, including up to seventeen inches of rain in portions of Lee County. Lee County suffered nearly three-quarters of a billion dollars in damage. The President declared a major disaster for the State of Florida on September 10, 2017 (FEMA-4337-DR-FL), and authorized PA funding for both emergency and permanent work.

Immediately after Irma passed, Lee County identified damage caused by the hurricane at several of its facilities, including roof and interior water damage at Estero and Mariner High Schools. Upon inspection at both schools, Lee County employees observed some visible roof damage on some of the school buildings, as well as numerous and widespread

leaks caused by water intrusion that made it through to ceiling tiles in some buildings. Given the necessity of continuing school operations for students attending the schools, that damage required immediate attention.

At some point, Lee County decided that the roofs of the two high schools could not be repaired and needed to be replaced. FEMA has provided the Board with invoices from contractors with pre-existing repair contracts with Lee County showing that, by September 19, 2017 (within nine days after Irma hit), Lee County had already begun initial steps to replace the roofs at the two schools. Lee County contends that the initial work identified in those contracts was only for temporary protective measures to preclude further leaks and that the decision to replace, rather than repair, the roofs was made later. The record contains no evidence showing how, when, or why the decision to replace the roofs was made. There is no dispute, however, that, by mid-November 2017, Lee County had decided to replace, rather than repair, the roofs.

The absence of any information about the steps leading to the decision to replace, rather than repair, the damaged roofs is problematic. The record shows that the roofs of some of the buildings – specifically buildings B, K, and N at Estero High School and buildings H, K, and N at Mariner High School – suffered no or minimal damage from Irma, a fact reflected in reports from Lee County’s expert witness. *See Exhibit 29 at 5-6; Exhibit 30 at 5.* Other buildings experienced water intrusion, as evidenced by photographs of ceiling tiles inside the high schools that clearly had water damage, but the record contains no evidence showing how Lee County decided that the leaks in those buildings were so significant that repairs to the roofs would not resolve the leakage problems. Lee County stated at the hearing of this matter that building employees who were knowledgeable about the buildings recommended roof replacement, but we do not know who those employees were, what their expertise was, what they recommended, what steps they took to identify roof damage, or why repair was not feasible. There is no evidence that outside consultants evaluated the roofs and recommended replacement rather than repair. Whatever the reason for the roof replacements, it was not documented.

When Lee County decided to replace the roofs, it also decided to change the type of roofing material that would cover the roofs, from concrete tiles to a standing-seam metal roofing that was viewed as more resistant to future weather (including hurricane) events. In directing that the schools’ roofs be replaced, Lee County did not limit replacement to those roofs damaged by Hurricane Irma but required replacement of all roofs at the two schools, including roofs that Lee County’s expert indicated had suffered no noticeable damage as a result of Irma.

In December 2017, after full roof replacement had begun, representatives from Lee County's insurance carrier visited Estero and Mariner High Schools to assess damage, take photographs, and prepare notes for the insurance claim. Following the inspection, the insurance carrier approved Lee County's claim for roof replacement at both schools. Nonetheless, because of its insurance policy deductible, Lee County was still responsible for \$2,130,373.50 in costs for the roof replacement at Estero High School and \$3,200,375.58 in roof replacement costs at Mariner High School.

FEMA performed site inspections at Estero High School in February 2018 and at Mariner High School in March 2018, more than four months after the roof replacements had commenced. When FEMA saw the schools, the schools' roofs had essentially already been replaced, meaning that FEMA was unable to observe or note any roof damage resulting from Irma. Nevertheless, FEMA was able to document water-related damage to the interior of several buildings at both schools.

On February 11, 2020, FEMA issued determination memoranda denying roof replacement costs for each school, finding that Lee County had failed to provide adequate documentation of roof conditions prior to Hurricane Irma and of roofing damage immediately following the storm to justify its decision to replace, rather than repair, the roofs of the two schools. Lee County submitted a first-level appeal of FEMA's denial, but, before FEMA issued a decision on the appeal, Lee County submitted its request for arbitration to the Board.

Discussion

Lee County asks us to find that the costs of roof replacements at the Estero and Mariner High Schools, which were undertaken after Hurricane Irma caused extensive damage in the area in which the schools are located, are eligible for PA funding. Lee County's insurance carriers covered the roof replacements, finding the roofs sufficiently damaged by Hurricane Irma to warrant replacement. Having been compensated through insurance for the bulk of its roof replacement costs, Lee County has asked that FEMA reimburse it for deductibles that it had to pay that its insurance did not cover. Despite the determination by Lee County's insurers, FEMA does not believe that Lee County has shown that Hurricane Irma caused sufficient damage to require roof replacement and has denied PA funding for Lee County's deductibles.

FEMA's first argument in support of its decision denying roof replacement cost reimbursement is that any water damage at the two high schools resulted from Lee County's lack of preventative roof maintenance over the years, rather than from Hurricane Irma. The record contains no viable support for FEMA's position. It is clear from the testimony and the evidence in the record that the roofs at the schools were well-maintained and that Irma

caused damage to the roofs of at least some of the buildings. FEMA's attempt to find some excuse other than Irma for the bulk of the water damage that occurred is wholly unfounded.

Despite that fact, we agree with FEMA that the record in this matter lacks any evidence establishing that the roofs of every single building at the two schools were damaged by Irma. As discussed above, neither of the two high schools at issue is a single building with a single roof. Each high school is comprised of a complex of at least a dozen buildings, many of which are connected through walkways or otherwise, and each building has its own roof (or roofs, as some buildings have multiple levels, side porches, and attached outdoor walkways) that, in some instances, might touch or be connected to other buildings' roofs through flashing, expansion joints, or other methods. Contrary to Lee County's argument, the roofs of the dozen or more buildings at each site are not all connected in a way that makes them one interconnected roof. They plainly do not all need to be replaced together or at the same time as a matter of safety. As previously mentioned, several of the buildings suffered no or minimal roof damage from Irma, a fact reflected in the reports from Lee County's expert witness. Although, at the hearing, two of Lee County's witnesses (including its expert) testified that there is no way of knowing whether there might have been some undetected damage to the roofs of those buildings following a hurricane, that type of speculation is not a basis for replacing the entirety of those buildings' roofs or, more importantly, for requiring FEMA to reimburse roof replacement costs.

The only possible rationale for requiring replacement of the roofs of *all* of the buildings is tied to Lee County's interpretation of the "25% Rule" for roof replacements from the 2014 version of the Florida Building Code in effect when Irma hit, a code provision that reads as follows:

Not more than 25 percent of the total roof area or roof section of any existing building or structure shall be repaired, replaced or recovered in any 12-month period unless the entire roofing system or roof section conforms to requirements of this code.

2014 Fla. Existing Building Code § 708.1.1. Under that code provision, if more than 25% of a roof or roof section on a building is damaged during a one-year period, it must be replaced rather than simply patched or repaired. *See, e.g., Sunflower Condominium Ass'n v. Everest National Insurance Co.*, No. 19-CV-80743, 2020 WL 4501805, at *7 (S.D. Fla. Apr. 28, 2020) (discussing the rule); *Noa v. Florida Insurance Guaranty Ass'n*, 215 So.3d 141, 142-43 (Fla. Dist. Ct. App. 2017) (same). Focusing on the part of the code provision that addresses "the total roof area," Lee County argues that, because 25% of the total combined roof area of all of the buildings at each school was damaged by Irma and needed

to be replaced, Lee County had to replace “the entire roofing system” for each school, inclusive of the roofs for every building.

FEMA argues that it should not have to reimburse total replacement costs under a state law requiring replacement if 25% of a roof is damaged because FEMA’s regulations only provide for replacement if there is a 50% loss. *See* FEMA’s Response Brief (Sept. 16, 2021) at 31. We need not resolve that issue because, even if state law were to control, Lee County’s argument ignores alternate language in the cited section of the Florida Building Code addressing repair and replacement of “roof section[s]” that undermines Lee County’s position. The definitional section of the 2014 Florida Building Code identifies a “roof section” as “[a] separating or division of a roof area by existing expansion joints, parapet walls, flashing (excluding valley), difference of elevation (excluding hips and ridges), roof type or legal description; not including the roof area required for a proper tie-off with an existing system.” 2014 Fla. Existing Building Code § 202. The photographs of the two high schools clearly show that the roofs of the various buildings that comprise each school, to the extent that they are connected, remain a series of roof sections (if not a series of completely separate roofs). Nothing in the 2014 Florida Building Code’s “25% Rule” would require the schools to replace all of the roof sections for the entirety of the school buildings simply because some buildings’ roofs or roof sections might have needed replacement. Plainly, Lee County cannot require FEMA to reimburse it for replacing roofs of buildings that were not damaged by Hurricane Irma.

That leaves us with the remaining buildings, where it seems clear that Irma caused at least some damage to the roofs. The record contains evidence of water damage in ceilings in portions of those buildings, some of it significant. Other than at two locations at each school that Lee County acknowledges had some pre-existing leak issues that it was attempting to remedy before Irma hit, there is no viable evidence that the water issues existed before Irma. The damage that resulted might have entitled Lee County to assistance with roof repair costs at particular buildings, depending on the extent of the necessary repairs, and roof replacement costs if the roofs of particular buildings needed replacement. Unfortunately, nothing in the record shows that the roofs at any of the buildings suffered so much damage that they could not have been repaired.

Specifically, nothing in the record shows (1) how the decision to replace the roofs in those buildings was made; (2) what type of analysis of the roof damage was conducted to determine the extent of the damage to the roofs and whether it could be repaired; or (3) beyond a reference to the fact that the school district directed that the roofs be replaced, who made the decision to replace the roofs and what evidence that person or those persons relied on in making that decision. Despite the massive expense involved in replacing the entirety of the roofs at these schools, no contemporaneous documents provide any kind of

evidentiary trail establishing why the school district thought damage to roofs could not be repaired. Although Lee County's expert indicated that he was aware that the school's building, supervisory, and maintenance staff had looked at the roofs and quickly concluded that they needed to be replaced, nothing in the record supports that assertion. No statements from the individuals who conducted any such investigation are in the record, and none of them testified at the hearing.¹ In fact, the people who supposedly decided that the roofs could not be repaired and required replacement are not even identified in the record.

In lieu of evidence regarding the reasonableness of the original roof replacement decision, Lee County has provided photographs taken after Irma hit, which show wet ceiling tiles in various places inside the schools but very little evidence of actual damage to the roofs. We recognize that there could be roof damage underneath the roofs' concrete tiles, perhaps caused by wind uplift, that photographs might not show, but we cannot know from the interior photographs alone whether water damage came through one roof leak within each of the affected buildings that ran down and spread across various locations within a particular building or, instead, whether numerous and irreparable roof leaks caused separate interior water events in each building. Although a limited number of photographs were taken while workmen removed the tiles and roofing material from the old roofs before they were completely replaced, those photographs do not depict any serious damage to the materials underneath the tiles.

Lee County must have known when it was removing the roofs at Estero and Mariner High Schools, an expedited effort that began within weeks after Irma hit, that it was going to ask FEMA to reimburse its roof replacement costs. Yet, it did not make any serious effort to document the original investigation of the roofs at the schools, if it undertook one, to establish a need for replacement rather than repair or to document its actual decision to replace rather than repair. Any documented replacement-versus-repair analysis was conducted only *after* the decision to replace had already been made and, in fact, *after* the roofs were being removed. This lack of documentation occurred even though Lee County knew that FEMA had not yet been to the sites and that Lee County would have to support its replacement decisions. The fact that Lee County cannot even identify who recommended replacement rather than repair or what investigatory findings led to the replacement decision leaves us no basis for finding that roof repairs would not have been sufficient or that roof replacement in damaged buildings was necessary. The mere fact that the school district, in

¹ Although Lee County presented testimony from Mariner High School's former principal and Estero High School's assistant principal about damage that they saw from Irma, neither of them is an expert in roof construction or was responsible for investigating whether the roofs could be repaired.

an expedited manner, decided to replace rather than repair the roofs is insufficient evidence of reasonableness, particularly where there is no documentation or even explanation about why or how that decision was made. FEMA was not required simply to take Lee County's word for it that replacement was necessary.

Lee County argues that it would have been irresponsible, if not impossible, for Lee County to have conducted the type of roof leak investigation that FEMA envisions because the written roof warranty that Lee County obtained when the roofs were originally installed warns against letting anyone walk on the concrete tiles. The cited warranty warns that "[r]oof top traffic can be detrimental to any type of roofing material." Exhibit 33 at 3. Nevertheless, that warranty also indicates that the "tiles are extremely strong and well able to withstand the traffic of *professional roofers*," even if it is "better that others stay off." *Id.* (emphasis added). Lee County has not explained why it would have been inappropriate to have had professional roofers investigate its roof leaks, as the written warranty suggests, and document their findings to support roof replacement.

Lee County also argues that, because its insurance adjuster recommended coverage for the entire roof replacement project and its insurers actually paid for the roof replacement (less deductibles), FEMA should defer to that recommendation. In support, Lee County has provided us with recent FEMA first and second appeal decisions in other matters in which, according to Lee County, "FEMA relied on the insurance adjuster's report to determine whether roof replacement was warranted." Applicant's Submission (Oct. 20, 2021) at 1 (citing, among others, FEMA's First Appeal Analysis, FEMA-4337-DR-FL, *Roman Catholic Archdiocese of Miami* (Oct. 14, 2021), and FEMA's Second Appeal Analysis, FEMA-4332-DR-TX, *Baptist Hospitals of Southeast Texas* (Oct. 6, 2021)). The cited FEMA decisions do not go as far as Lee County contends. At best, they support the notion that insurance company assessments are a piece of evidence in FEMA's overall analysis. They do not show that FEMA is required to defer to an insurance adjuster's or insurance company's assessment of whether roof replacement is, or was, necessary.

The record here does not establish why the Lee County school district, within weeks after Hurricane Irma, decided to replace and authorized replacement of the entirety of the roofs at these two high schools. At the very least, roofs on the undamaged buildings still had ten or more years of life left in them. It is also unclear why Lee County's insurers, despite the availability of documents showing that several of the buildings had no or minimal roof damage, elected to pay for complete roof replacement for all buildings at Estero and Mariner High Schools (less Lee County's deductibles). We need not delve into or evaluate either the school district's or the insurer's reasons because FEMA is not bound by those decisions. FEMA only provides reimbursement for damage caused by a disaster. It is Lee County's failure to establish the reasonableness of its roof replacement decision and the necessity of

roof replacement as a result of Hurricane Irma, in lieu of (where necessary) roof repair, that precludes PA funding.

Decision

Lee County has not established that complete roof replacement of buildings at Estero and Mariner High Schools was necessary as a result of Hurricane Irma. As a result, roof replacement is not eligible for PA funding. Accordingly, we deny Lee County's application.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge