



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 17, 2021

CBCA 7209-FEMA

In the Matter of LUMBEE TRIBE OF NORTH CAROLINA

Danielle McLean, Legal and Compliance Officer of Lumbee Tribe of North Carolina, Pembroke, NC, counsel for Applicant; and Tammy Maynor, Tribal Administrator of Lumbee Tribe of North Carolina, Pembroke, NC, appearing for Applicant.

Will Polk, Office of the General Counsel, North Carolina Department of Public Safety, Raleigh, NC, counsel 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), **SULLIVAN**, and **CHADWICK**.

The Lumbee Tribe of North Carolina (the Tribe) sought to arbitrate the denial by the Federal Emergency Management Agency (FEMA) of its request for public assistance (PA) funds to upgrade the Lumbee Cultural Center Dam following Hurricane Florence. Although FEMA approved funding to repair damage to the dam's spillway outlet, FEMA denied the Tribe's request for additional funds to complete code-required upgrades to the dam because the Tribe could not demonstrate either a direct relationship between upgrades to the dam's main structure and the eligible damages to the spillway outlet or that the costs of the upgrades were reasonable. We agree with FEMA's determination that the costs sought to upgrade the dam to meet state requirements are not eligible for PA funds.

Background

In 2014, the Tribe purchased the Lumbee Cultural Center, located in Robeson County, North Carolina. The Lumbee Cultural Center Dam was damaged by Hurricane Matthew in October 2016 (FEMA-4285-DR-NC), and again by Hurricane Florence in September 2018 (FEMA-4393-DR-NC). The Tribe sought PA funds for repairs to the dam following both disasters. This appeal concerns FEMA's partial denial of the Tribe's request following Hurricane Florence.

In August 2018, the Tribe submitted repair plans to North Carolina Dam Safety, a division of the North Carolina Department of Environmental Quality (NCDEQ), for damage resulting from Hurricane Matthew. In February 2019, NCDEQ informed the Tribe that the dam's appropriate hazard classification needed to be determined. In April 2019, NCDEQ notified the Tribe that it had reclassified the dam from a low-hazard dam to a high-hazard dam, referencing both an August 14, 2018, inspection and information the Tribe submitted after Hurricane Florence.

After its reclassification, the dam was subject to the requirements of the North Carolina Dam Safety Law of 1967 (NCDSL). N.C. Gen. Stat. Ann. § 143-215.25A(a)(6) (West 2021). The requirements of the NCDSL, including the regulations for high-hazard dams, are set forth in the North Carolina Administrative Code (NCAC). The NCDEQ's approval for the Hurricane Matthew repairs stipulated that the Tribe must modify the dam in compliance with NCAC requirements for "high-hazard" dams. The Tribe revised the design plans for the dam to meet the NCAC requirements.

In December 2020, FEMA determined that the dam only sustained damage to the spillway outlet as a result of Hurricane Florence and that the main structure of the dam was not damaged by the hurricane. Based upon this determination, FEMA approved funding of \$103,100 for repairs to the spillway, including stabilization, engineering, environmental permitting, erosion control, and concrete buttressing. FEMA denied the Tribe's request for an additional \$3,932,676 to upgrade the main part of the dam, finding that the upgrades the Tribe proposed to undertake—erosion control along the full length of the dam, raising the crest elevation, replacing the side gates and trash rack at the primary riser, stabilizing with gabion structure, stabilizing the head cut/eroded channel, stabilizing the outlet discharge pool at the concrete spillway, and adding an emergency spillway—were not repairs to the dam necessary as a result of Hurricane Florence. FEMA also determined that the costs of the upgrades were not reasonable when compared to the costs of the repairs to the spillway. At the hearing convened by the panel on November 15, 2021, the Tribe's expert, a professional engineer, acknowledged that the items of work for which the Tribe sought funding were all necessary as a result of the reclassification of the dam.

The Tribe appealed FEMA’s denial, asserting that the upgrades are related to the eligible disaster damages because they address the cause of the spillway damage—dam overtopping. The Tribe also argued that the dam will continue to overtop and damage the spillway if the additional work is not completed. In its appeal, the Tribe asserted that FEMA personnel in meetings had approved moving forward with the upgrade work and assured the Tribe that the project would be fully funded. Based upon these assurances, the Tribe entered into a contract to complete the repairs. Representatives of the Tribe told the panel that, if the tribe had not received these assurances, it would not have proceeded with the work until it secured another source of funding.

FEMA denied the first appeal, finding that the upgrades did not meet the regulatory requirements for funding. FEMA determined that the upgrades were not related to the eligible disaster damage to the spillway, and that the cost of the upgrades was unreasonable in comparison to the cost of the eligible (i.e., spillway) repairs. On September 13, 2021, the Tribe timely submitted its request for arbitration to the Civilian Board of Contract Appeals.

Discussion

I. Upgrades Do Not Meet Regulatory Requirements

The Tribe seeks funds to upgrade the dam to meet the regulatory codes that now apply to it as a result of its reclassification as a high-hazard dam. Under the Stafford Act, funds are available to restore a facility “on the basis of the design of the facility as the facility existed immediately before the major disaster.” 42 U.S.C. § 5172(e)(i) (2018). Funds may be made available to upgrade the design of a facility to conform with relevant codes, specifications, and standards. *Id.* § 5172(e)(ii). Pursuant to FEMA’s implementing regulations, a code or standard which changes a facility’s pre-disaster design must, in part, “[a]pply to the type of repair or restoration required” and “[b]e found reasonable, in writing, and formally adopted and implemented by the State or local government on or before the disaster declaration date.” 44 CFR 206.226(d) (2020). In addition, “to be eligible for financial assistance, an item of work must . . . [b]e required as the result of the emergency or major disaster event.” *Id.* 206.223(a)(1). FEMA determined that the scope of the work proposed by the Tribe failed to meet these requirements.

FEMA’s policy guide further explains that, “[i]f an upgrade to an entire structural or non-structural system within a building is triggered, the upgrade is only eligible if there is a direct relationship between the upgrade work and eligible damage. Only upgrade work within the same system as the damage is eligible.” Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 88 (citing 44 CFR 206.223(a)(1)). When determining whether the requested upgrade is reasonable, FEMA compares the cost of the damage to be repaired and the cost of the code-required upgrades. FEMA:

Examines the general reasonableness of the code or standard and the trigger for application of the code or standard;

Determines whether the upgrade and trigger relate to the type of restoration required by the damage and whether the upgrade and trigger are justified based on the extent of damage;

Considers whether the upgrade and the trigger are technically defensible from an engineering perspective; and

Determines whether the cost of the upgrade is reasonable.

Id. at 89. FEMA may determine that a request for large upgrade costs tied to low eligible repair costs is unreasonable. *Id.*

The spillway of the dam was damaged by Hurricane Florence. The Tribe seeks funds for work to upgrade all parts of the dam as a result of its reclassification from a low- to a high-hazard dam. Because the scope of work in dispute (code-required upgrades) is not tied to the repair of damage (spillway), FEMA properly denied the funding request. 44 CFR 206.226(d)(1); PAPPG at 88. The Tribe focuses upon the fact that the dam was reclassified following Hurricanes Matthew and Florence and argues that, “but for” those disasters, the dam would not have been reclassified. The Tribe’s focus is misplaced. Even if Hurricane Matthew had not occurred and it was solely Hurricane Florence that triggered the review, FEMA still could have properly denied the requested funds if the only damage to the dam was to the spillway. The upgrades to the main structure of the dam are unrelated to the eligible damages to the spillway outlet.

The upgrades also fail to meet the requirement that the cost of the upgrades for which funding is sought be reasonable. 44 CFR 206.226(d)(3)(i). The Tribe seeks almost \$4 million in code upgrades, while FEMA approved repairs to the spillway estimated to cost \$103,100. The cost for the eligible repairs amounts to less than three percent of the costs requested for the upgrades. FEMA properly determined these costs not to be reasonable.

Counsel for the Tribe, in a closing statement during the hearing, asked that the panel, as a form of alternative relief, direct FEMA to reopen the project worksheet for the Tribe’s PA request following Hurricane Matthew, presumably to allow the Tribe to add these costs to that worksheet. The request for arbitration submitted by the Tribe concerns the request for funds following Hurricane Florence. The panel has no basis on this record to direct FEMA to reopen a worksheet arising from another disaster.

II. The Tribe Cannot Establish A Basis for Equitable Estoppel

The Tribe also asks the panel to grant its claim because FEMA personnel assured tribal members that the funding would be approved and the Tribe entered contracts based on these assurances. Under the doctrine of equitable estoppel, a party can be prohibited from escaping liability if its statements, actions, or inactions have been detrimentally relied on by the other party. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). FEMA correctly questions whether the scope of our authority to arbitrate disputes regarding “the eligibility for assistance or repayment of assistance” would permit the panel to grant any form of equitable relief. 42 U.S.C. § 5189a(d). However, we have a more fundamental reason upon which to deny the requested relief. Equitable estoppel will not lie against the Government in cases in which government officials gave incorrect advice or guidance regarding statutory entitlements. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 420 (1990). Given this precedent, the panel cannot see how an agency administering discretionary public grants could be estopped.

Decision

The panel finds that FEMA correctly determined that the code-required upgrades to the Lumbee Cultural Center Dam did not meet the eligibility criteria for funding changes to a facility’s pre-disaster design.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge