



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 24, 2022

CBCA 7299-FEMA

In the Matter of NEW YORK STATE OFFICE OF PARKS, RECREATION
AND HISTORIC PRESERVATION

Christopher S. Holmes, Director of Emergency Management, New York State Office of Parks, Recreation and Historic Preservation, Albany, NY, appearing for Applicant; and Jennifer Maglienti, General Counsel for New York State Office of Parks, Recreation and Historic Preservation, Albany, NY, counsel for Applicant.

Rayana Gonzales, Deputy Director for Disaster Recovery Programs & Alternate Governor's Authorized Representative, and Joseph Stinson, Deputy Chief of Public Assistance, New York State Department of Homeland Security and Emergency Services, Albany, NY, appearing for Grantee; and Kristine Hoffman, Associate Counsel, New York State Department of Homeland Security and Emergency Services, Albany, NY, counsel for Grantee.

Maureen Dimino, 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 **CHADWICK**.

The applicant, the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), sought arbitration under 42 U.S.C. § 5189(a)(d) (2018) in its dispute with the Federal Emergency Management Agency (FEMA). OPRHP has requested public assistance (PA) funding to restore a 1600-foot stone revetment on the shore of Lake Ontario at Four Mile Creek State Park. FEMA denied OPRHP's request for PA funding and subsequent appeal, finding that the revetment was not an eligible facility but an improved natural feature that had not been maintained and that the damage could not be determined to have been caused by the disaster. The Board held a one-day hearing and finds that the revetment is not eligible for PA funding because OPRHP failed to show the disaster caused

damage to the revetment or the shoreline. We do not determine if the revetment is an improved and maintained natural feature or a facility.

Background

Four Mile Creek State Park, bordering the southwestern edge of Lake Ontario, consists of 2000 feet of natural shoreline, hillsides, and slopes. In 1972, OPRHP designed and built a 1600-foot “rubble mound revetment” on the shoreline of Lake Ontario within the park to protect the shoreline and park from erosion and deterioration. The revetment consisted of a shaped slope with ground cover, an armor rock structure, a filter layer, and toe protection.

From May 2 to August 6, 2017, flooding caused severe damage throughout western New York. The President declared a major disaster on November 14, 2017, authorizing PA funding in Niagara County, where the park is located. OPRHP seeks PA funding to restore the 1600-foot revetment and to protect the park’s shoreline. OPRHP describes the damage caused by the flooding as “significant stone displacement, multiple mature trees toppled near-simultaneously, and additional erosion.” Applicant’s Statement in Reply to FEMA’s Expert Report at 3. OPRHP asserts that “once the placed stone feature [revetment] was extensively damaged by the declared event and failed to serve its original purpose,” the shoreline and mature trees suffered damage. Applicant’s Exhibit 16.

Discussion

To be eligible for PA funding, the applicant must demonstrate that the required PA work resulted from the declared disaster. 44 CFR 206.223(a)(1) (2020); FEMA Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19; *see City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,684 (“It is the applicant’s responsibility to identify eligible repair work by showing that the disaster caused the damage.”). FEMA does not provide PA funding for repair of damage caused by 1) deterioration; 2) deferred maintenance; 3) negligence; or 4) failure to protect the facility from further damage. PAPPG at 19-20; *see City of Liverpool*, CBCA 6593-FEMA, 20-1 BCA ¶ 37,497, at 182,169 (The applicant has the burden to distinguish between pre-disaster and disaster-related damage to a facility to establish that the damage was a result of the disaster rather than deterioration or deferred maintenance.).

OPRHP has failed to demonstrate that the declared disaster damaged the revetment or shoreline, and therefore, the requested new shoreline protection is not eligible for PA funding. According to OPRHP, “the stone shoreline protection served its intended function and required no repairs from the time it was constructed in 1972 until it was damaged” by the disaster. Applicant’s Exhibit 7 at 3. To support an argument that the revetment performed as designed pre-disaster, OPRHP’s engineer asserts that the revetment did not require repairs because “repairs are not performed unless displacement of stones would

cause[] erosion.” Applicant’s Exhibit 16. He states that the declared event “is the first storm” to require repairs since construction of the revetment. *Id.* The assertion that there was no displacement of stones in forty-five years that caused erosion or required repairs or affected the revetment’s performance is unsupported.

FEMA-provided aerial photos from 2013 and 2016 suggest that stones had been displaced prior to the disaster that resulted in fallen trees, vegetative debris on the shoreline, and gullies. The pre-disaster conditions in these photos mirror the conditions in the 2020 site inspection report photos, taken three years after the disaster. FEMA Expert Report at 9 (“The damages to individual and rock group displacements defined in the [site inspection report] were also identified in the 2013 aerial pictures.”). Moreover, OPRHP has not shown that fallen, mature trees identified in photos are attributable to the 2017 flooding or damaged the revetment as a result of that flooding. FEMA Expert Report; FEMA Exhibit 1.

We cannot reasonably conclude that the 2017 flooding caused the claimed damage to a revetment built over forty-five years ago and never maintained, repaired, or inspected, except to remove trash, debris, and hazardous objects. OPRHP’s 2016 and 2018 aerial photos of the site fail to show that the disaster caused damage to the revetment or the shoreline. Applicant’s Hearing Exhibit 19. OPRHP’s hand-drawn sketch marking the type of damage along the shoreline as minor, moderate, or major also does not meet its burden to show the condition prior to the disaster. Applicant’s Exhibit 7 at 5. OPRHP has not adequately attributed the claimed damage to the disaster.

Decision

The requested repairs are not eligible for PA funding because OPRHP failed to establish that the damage resulted from the disaster.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge