



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 2, 2022

CBCA 7401-FEMA

In the Matter of BAY COUNTY BOARD OF COUNTY COMMISSIONERS

Donald Banks, County Attorney, Bay County Board of County Commissioners, Panama City, FL; and Wendy Huff Ellard and Michelle Zaltsberg of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant.

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

Christiana Cooley, Office of General Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Frank Bruscato, Office of General Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **GOODMAN**, **DRUMMOND**, and **SHERIDAN**.

The applicant, Bay County Board of County Commissioners (Bay County), sought arbitration of a dispute with the Federal Emergency Management Agency (FEMA). FEMA had denied Bay County's request for public assistance (PA) in the amount of \$9,817,412.39 to replace wastewater treatment lift station pumps in the Bay County Sanitary Sewer Collection System following Hurricane Michael in 2018. FEMA concluded that Bay County failed to provide adequate documentation to demonstrate that Hurricane Michael caused damage to its lift station pumps. The panel held a two-day hearing under Board Rule 611 (48 CFR 6106.611 (2021)). The panel agrees with FEMA's position and denies the applicant's request.

Background

Bay County is a local government entity located in Florida. Hurricane Michael struck Florida on October 7, 2018. The President declared the event a major disaster on October 11, 2018 (FEMA-4399-DR-FL). Bay County claims that fifty-seven lift stations, including sixty-four pumps, at its wastewater treatment facilities sustained damage from Hurricane Michael.

Bay County submitted a request for PA, arguing that the pumps are eligible for replacement under FEMA's "fifty percent rule" and alleging that Hurricane Michael caused two sources of damage: (1) abnormal fluctuations in the electricity powering the system (dirty power), and (2) infiltration of foreign materials and debris exceeding the system's design capacities. FEMA conducted site inspections of select lift stations in August 2019 and January 2021. FEMA also confirmed with Bay County officials that all lift stations stayed functional. FEMA determined that the requested replacement pumps were ineligible for PA funding and issued a determination memorandum on April 5, 2021. FEMA found that Bay County failed to provide adequate supporting documentation to substantiate its assertion of damage.

Bay County submitted its first-level appeal with FEMA on June 3, 2021. Bay County argued that disaster-related power outages and sediment infiltration caused system-wide damages that necessitated the replacement of all the lift station pumps. On March 24, 2022, FEMA issued a request for information in response to Bay County's first appeal to substantiate disaster-related impacts. On May 17, 2022, Bay County filed a request for arbitration with the Board.

Discussion

It is Bay County's burden to support its application for PA funding. *See Jackson County, Florida*, CBCA 7279-FEMA, 22-1 BCA ¶ 38,075, at 184,907 (citing *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029). For an item of work to be eligible for financial assistance under the PA program, it must be required as a result of the emergency or disaster. 44 CFR 206.223(a)(1) (2018). For permanent work, Bay County must demonstrate that the damage was caused directly by the declared incident. Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19. PA funding is based on pre-disaster design and function. PAPPG at 84-85.

To be eligible for PA funding for replacement of its lift station pumps, Bay County must establish that Hurricane Michael directly caused damage to those pumps and that replacement is needed to restore the system to its pre-disaster condition. To support its claim

of dirty power¹ damage, Bay County provided preliminary assessment reports (AAG assessments) of twenty-two pumps. To support its claim of infiltration damage, Bay County provided a sewer system evaluation survey (SSES) and comparative pre- and post-disaster run time data for each lift station. FEMA asserts that this documentation does not substantiate Bay County's claim that Hurricane Michael directly caused the alleged dirty power and infiltration nor does it demonstrate that dirty power and infiltration decreased the pumps' operational capacity. Bay County disagrees.

Bay County's AAG assessments tested twenty-two of sixty-four pumps. The assessments indicated that some pumps had megOhm readings² below the manufacturer's recommended range. FEMA argues that while the AAG assessments concluded that some pumps should be serviced, they did not attribute the deficiencies to any specific cause nor recommend replacement. The AAG assessments do not attribute the results to Hurricane Michael nor do they demonstrate the system's condition prior to Hurricane Michael.

Bay County's SSES consisted of a "smoke test" to identify breaks in the system and a "midnight flow" test to identify leaks in the system. The smoke test identified 375 openings in the lift station service areas. The midnight flow test identified leaks in "over 100 runs of pipe" and 0.1 million gallons per day of infiltration, which the SSES noted is "very small." The SSES also provided that some manholes are in "serious condition" and may need repair. The SSES does not identify Hurricane Michael as the cause of upstream manhole and sewer line damage nor does it provide records of historical maintenance.

FEMA argues that a comparison of pre- and post-disaster run-time data shows that the pump run times have decreased since Hurricane Michael. The applicant argues that run-time data is population-specific and explains that run times have increased despite a post-disaster decline in population.

Additionally, in its reply in support of its request for arbitration, Bay County provided as an exhibit the full set of 2017 preventative maintenance records (supplementing the sample Bay County provided to FEMA). Bay County, however, did not provide any maintenance records from immediately before the disaster nor did it provide such records for the intervening two-and-one-half years between the time of the disaster and the time of the AAG assessments.

¹ Dirty power is a term commonly used to describe erratic spikes and surges in electrical energy which produces a reduction in power quality.

² MegOhm readings are simply a measurement of insulation resistance.

We agree with FEMA that Bay County has not established whether the pump damage resulted from Hurricane Michael, Hurricane Sally (a hurricane that occurred after Hurricane Michael but before the applicant's pump testing), deferred maintenance, prior deterioration, negligence, or something else. The record supports FEMA's position that Bay County has not adequately demonstrated the pre-disaster condition of the pumps nor established that Hurricane Michael caused the damages. Accordingly, we find that Bay County has not provided sufficient documentation to meet its burden.

Decision

The panel concludes that FEMA correctly determined the applicant has not demonstrated that its lift stations are eligible for PA funding.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge