



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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October 21, 2022

CBCA 7414-FEMA, 7415-FEMA

In the Matter of EARLY EDUCATION AND CARE, INC.

Adam T. Ferguson, Miami Beach, FL, counsel for Applicant.

Stephanie Stachowicz (Twomey), General Counsel, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Melissa Shirah, Recovery Bureau Chief, and Marija Diceviciute, Appeals Officer, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Maureen Dimino and Stanley Thompson Jr., 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 **GOODMAN**, **ZISCHKAU**, and **SULLIVAN**.

On May 26, 2022, Early Education and Care, Inc. of Panama City, Florida (applicant), filed two requests for arbitration (RFAs) concerning the decision of the Federal Emergency Management Agency (FEMA) to deny its requests for public assistance (RPAs) for the replacement of two of its buildings that applicant alleged were damaged in April 2018 as a result of Hurricane Michael, which was declared a disaster by FEMA. FEMA denied funding because the applicant had not demonstrated that (1) the facilities were damaged as the result of the disaster or (2) were eligible for replacement under FEMA regulation and policy. In addition to arguing that the panel should uphold its decision, FEMA asserts that the panel lacks authority to decide the arbitration docketed as CBCA 7414-FEMA because the amount in dispute does not meet the statutory threshold for arbitration before the Board. The parties elected to have a paper hearing pursuant to CBCA Rule 611 (48 CFR 6106.611 (2021)). Based upon our review of the record, we find that we have authority to decide both disputes and uphold FEMA's determinations.

### Background

Applicant is organized under Florida law as a section 501(c)(3) private, non-profit (PNP) facility for children, in Panama City, Florida. Panama City is located in Bay County, Florida. Panama City Demographics, City of Panama City, Florida (located at <https://www.pcgov.org/200/Panama-City-Deographics> (last visited Oct. 16, 2022)). The census data for April 2020 shows that the population of Bay County, Florida, at that time was 175,206. Quickfacts: Bay County, Florida, United States Census Bureau (located at <https://www.census.gov/quickfacts/baycountryflorida> (last visited Oct. 16, 2022)).

Hurricane Michael caused damage throughout Florida in October 2018. Applicant sought public assistance funding to replace East Portable 3 Facility (Portable 3) (CBCA 7414-FEMA), a one-story modular classroom, and Bayou George Facility (Bayou George) (CBCA 7415-FEMA), a one-story building, both of which applicant asserts were damaged sufficiently to warrant replacement. Applicant seeks \$192,437 to replace Portable 3 and \$595,474 to replace Bayou George.

### Portable 3

After Hurricane Michael, applicant did not protect Portable 3 from the elements and did not repair it. In March 2019, DBI Construction Consultants (DBI) prepared a report (DBI report) on three of applicant's buildings, including Portable 3, on behalf of applicant's insurance carrier. The DBI report stated that Portable 3 was damaged during the storm but was left open to the elements after the storm. Applicant's Exhibits to RFA (CBCA 7414-FEMA), Exhibit 1 at 0010-11. The DBI report included photographs showing a partially damaged, open roof that had no covering. *Id.* at 0301. The DBI report did not identify any specific damage caused by the storm, provide a list of individual items of damage or estimated cost for repairing individual items of damage, or identify any reason why Portable 3 could not be repaired instead of replaced. DBI estimated the cost of replacement to be \$124,281, with additional line items designating the costs to replace kitchen equipment, a washer, and a dryer. *Id.* at 0116.

On or about April 22, 2019, applicant demolished Portable 3. In June 2019, after the demolition of Portable 3, Gulf Engineers & Consultants (GEC) inspected applicant's campus and issued a report on other existing structures at the site. In October 2020, FEMA denied applicant's RPA for replacement costs because applicant had not provided documentation to support eligibility for replacement. FEMA noted that applicant had demolished the facility before FEMA had had an opportunity to inspect. Applicant asserted in its appeal of FEMA's determination that although Panama City did not issue a formal notice to demolish Portable 3, representatives of the Panama City Building Department required the removal of Portable 3 due to the obvious and documented state of devastation resulting from the disaster.

Applicant argued that photographs taken in January 2019, together with other documentation, provided sufficient support for its request for replacement. Applicant's Exhibits to RFA (CBCA 7414-FEMA), Exhibit 2-A at 0013. In the alternative, applicant maintained that FEMA could determine the disaster-related damages (i.e., quantity and dimensions) solely from the photographs. *Id.* at 0015.

In considering the appeal, FEMA requested additional documents, including: (1) pre-disaster photographs or documentation that clearly demonstrated the pre-disaster condition of the facility and its structural components; (2) a post-disaster inspection report or damage assessment that explicitly described the disaster-related damage, along with an assessment explaining why a full replacement was necessary; (3) a detailed damage description and dimensions (DDD) report, to include measurements or an identified scope of work that may include additional photographs clearly showing the claimed damage, identification of required repair work and calculations of the quantities, and an estimated cost for repair; and (4) the fifty-percent rule calculation used in support of the appeal, including the numerator and denominator used, with a breakdown of costs by work categories and elements. Applicant's Exhibits to RFA (CBCA 7414-FEMA), Exhibit 2-B at 0185-86.

In response, applicant provided pre-disaster aerial Google Earth images and several undated photographs of interior rooms that applicant stated predated the disaster. Applicant's Exhibits to RFA (CBCA 7414-FEMA), Exhibit 2-B at 0124-25, 0132, 0186. Additionally, applicant supplied: (1) employee assignments for September 2017 for the Early Education Center, which comprises two other buildings in addition to Portable 3; (2) logs documenting children's attendance for August 15–31, 2018, and October 1–8, 2018, titled "East Ave HS Classroom 3," *id.* at 0136-37, 0186; and (3) a proposed August 25, 2021, DDD<sup>1</sup> and a resubmission of the DBI report. *Id.* at 0175-80, 0186. Applicant provided no new photographs of the internal components of the building prior to the disaster.

In March 2022, FEMA denied applicant's appeal. Applicant's Exhibits to RFA (CBCA 7414-FEMA), Exhibit 2-B at 0181-82. FEMA stated that applicant had not established the pre-existing condition of Portable 3 and reiterated that the building had been demolished before FEMA had an opportunity to conduct a site inspection. FEMA was unable to substantiate that any damage was the direct result of the declared disaster. FEMA additionally found applicant had not (1) substantiated any repair costs were eligible for public assistance (PA) funding; (2) provided an itemized breakdown of replacement costs necessary to determine eligibility; or (3) sufficiently detailed the repair versus replacement

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<sup>1</sup> The proposed DDD contained an itemized description of damage but no calculations of repair costs. The document does not state who prepared it or when it was prepared.

work being claimed to allow for a fifty-percent repair-versus-replacement calculation. Therefore, FEMA was unable to make a fifty-percent repair-versus-replacement determination. FEMA found it was unable to substantiate whether the damages were the direct result of the declared incident or that replacement costs were eligible for PA funding and denied the requested demolition and replacement costs as not eligible for PA funding. *Id.* at 0187-88.

### Bayou George

On January 11, 2019, applicant submitted its RPA to FEMA for damages to Bayou George. On March 19, 2019, FEMA conducted a Recovery Scoping Meeting. FEMA Exhibit 3. Applicant performed emergency work to protect the building, including repairs, tarping, and mold remediation that was funded by FEMA in excess of \$200,000. FEMA Exhibit 17.

The March 2019 DBI report included a discussion of an inspection of Bayou George. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 1 at 0014, 0026. The report made assumptions regarding the facility's pre-existing items because all interior finishes and fixtures had been removed. As a majority of the roof cover and sheathing had also been removed, DBI included allowances in its repair estimate to replace the roof system in its entirety. DBI did not state that the disaster damaged the roof cover but only that applicant removed some or all of the roof cover and sheathing. The repair estimate included replacing nearly all items relating to the exterior, interior, mechanical, electrical, and plumbing, without considering repair or damages. *Id.* at 0026-27.

Applicant did not provide photographs of any internal components of the building before it was stripped down for remediation. While DBI's repair estimate itemized the proposed work, it did not identify the damage caused by the hurricane. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 1 at 0226-0253. The report included a replacement cost estimate of \$278,338.64, which was a total of line item repair estimates, even though the interior had been stripped before DBI inspected the facility. *Id.* at 0224. The DBI repair estimate included allowances to repair the porch and certain non-facility-related items at the overall site (i.e., gazebo shelters, sun shades, and playground equipment). *Id.* at 0027.

In June 2019, GEC inspected applicant's campus and issued a report (GEC report) on the site's existing structures. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 4 at 0004. The GEC report "observed that all of the wall and ceiling drywall ha[d] been removed and wood studs and trusses [were] exposed to the rain and elements." It then noted general damages to the exterior and the interior walls, floors, and ceiling, but similar to the DBI report, it did not break down or delineate the purported disaster-related damages. The GEC report recommended that Bayou George be replaced with a new structure that meets

applicable codes and standards instead of repairing and requesting applicable upgrades. *Id.* at 0012. GEC's report based these findings on the extent of damage it saw over eight months later as well as the pre-existing "lack of proper drainage under the foundation." *Id.* GEC did not state that the damage was caused directly by the hurricane. FEMA asserts that neither the GEC report nor applicant explained the torn tarps, standing water, wet floors, and new mold growth after FEMA funded significant costly mitigation measures to prevent further deterioration.

In March 2020, FEMA requested an explanation of the disaster damages for the purpose of building a scope of work and a certification/stamp attesting that the facility needed to be demolished or condemned due to the disaster. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 6 at 0001. In response, applicant provided the GEC report. *Id.*, Exhibit 1 at 0001. In April 2020, FEMA inquired as to what authority indicated the facility should be demolished. Applicant responded that the decision to demolish was made by a structural engineer pursuant to the GEC report. FEMA Exhibit 11.

In March 2021, FEMA denied the requested PA funding for the facility. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 1. FEMA found that applicant had not provided documentation identifying the damage to the facility (i.e., type of damage, size/scope of damages, etc.), nor had it allowed FEMA to assist in quantifying the disaster-related damages through a site inspection to corroborate the requested scope of work. *Id.* at 0003.

In May 2021, applicant appealed FEMA's determination and requested approximately \$385,000<sup>2</sup> as the replacement costs for the facility, including mitigation work and upgrades pursuant to applicable codes and standards. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 1 at 0008. Relying upon the DBI and GEC reports and the DDD report that it had submitted, applicant asserted it provided sufficient documentation for FEMA to ascertain the specific disaster-related damages, descriptions, and dimensions. Noting that FEMA had approved emergency remediation work and temporary facility costs previously, applicant argued that, if emergency work was eligible as disaster-related, then certain permanent work should be eligible as well. *Id.* at 0012.

In March 2022, FEMA denied the first appeal. Applicant's Exhibits to RFA (CBCA 7415-FEMA), Exhibit 1 at 0441. FEMA found that applicant had not established the pre-existing condition through its own documentation and had demolished Bayou George before FEMA had an opportunity to conduct a site inspection. FEMA stated that it was unable to verify the need for demolition of the facility, and observed that while information

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<sup>2</sup> Applicant increased this amount to \$594,474 in its RFA.

submitted alleged that Bayou George had likely been compromised by the disaster, applicant had provided no evidence that all of the damages claimed were a direct result of the disaster. *Id.* at 0445–46.

### Proceedings in Arbitration

In this arbitration, applicant offers declarations of its executive director and Head Start director, with attached documentation that generally alleges the two facilities were functioning and had been properly maintained before the hurricane. Applicant’s Exhibits to RFA (CBCA 7414-FEMA), Exhibits 3, 4. Applicant makes general allegations that both facilities had to be demolished to provide a safe campus and that a commonsense review of the totality of information provided leads to the conclusion that the facilities damaged by the hurricane required total demolition.

### Discussion

#### The Panel Has Authority to Decide Both Disputes

Pursuant to the Stafford Act, an applicant “may request arbitration to dispute the eligibility for assistance or repayment of assistance provided for a dispute of more than \$500,000 for any disaster that occurred after January 1, 2016.” 42 U.S.C. § 5189(d) (2018). This threshold is lower for applicants located in rural areas. “For an applicant for assistance in a rural area under this subchapter, the assistance amount eligible for arbitration pursuant to this subsection shall be \$100,000.” *Id.* The Stafford Act defines “rural area” as “an area with a population of less than 200,000 outside an urbanized area.” *Id.* Applying this definition to Panama City and its environs, we find that applicant is located in a rural area.

The parties both provided the panel with 2010 Census data and other federal agency tools that define rural and urbanized areas. Rather than consider this information, we look to the 2020 Census data for Panama City and its environs because it is the relevant data for the time in which the dispute arose. *First Presbyterian Church, Panama City, Florida*, CBCA 7282-FEMA, 22-1 BCA ¶ 38,084, at 184,955.

#### Applicant Has Not Met Its Burden to Show Entitlement for PA Funding

It is applicant’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). For permanent work, applicant 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. A facility is considered repairable when disaster damages do not exceed fifty percent of the cost of replacing the facility to its pre-disaster condition, and it is feasible to repair the facility so that it can perform the functions for which it was being used immediately prior to the disaster. PAPPG at 100.

The engineering reports provided by applicant do not provide adequate information regarding the damage caused by the disaster or the repair costs necessary to perform the repair/replace calculation. DBI had inspected both facilities before they were demolished, and GEC had inspected Bayou George before it was demolished. As to Portable 3, DBI listed a total replacement cost with no calculations of repair costs. As to Bayou George, DBI's itemized cost estimates for proposed repairs based on assumptions after the facility had been stripped. However, with regard to both facilities, the DBI report did not identify causation with regard to the items of damage, i.e., whether the damage existed pre-disaster or was caused by the hurricane. Likewise, GEC's report as to Bayou George also lacked this information. Therefore, there was no determination as to which repairs would be necessary as the result of the hurricane or a cost estimate for such repairs.

While applicant urges that we can determine the causation of damage and eligibility for PA funding by viewing all the information in the record in its totality, the information submitted does not give this panel, as it did not give FEMA, a basis to make that determination. While the facilities were allegedly demolished for safety concerns, the demolition occurred before estimates were made to compare the cost of repair with the cost of replacement. We do not question applicant's witnesses's statements that the facilities were functioning before the hurricane, but this does not lead to the conclusion that the damage to the facilities caused by the hurricane, which was not specifically identified nor separately priced, could not be repaired.

As the record before us offers no basis to determine the damage caused by the hurricane or the estimated cost to repair such damage, there is no information upon which we might determine if the estimated cost of repair of hurricane damage is less than fifty percent of the replacement cost. As the facilities have been demolished, there is no information or methodology to make these determinations.

Decision

The panel concludes that FEMA correctly determined the applicant has not demonstrated that the replacement of the facilities is eligible for PA funding.

*Allan H. Goodman*

ALLAN H. GOODMAN  
Board Judge

*Jonathan D. Zischkau*

JONATHAN D. ZISCHKAU  
Board Judge

*Marian E. Sullivan*

MARIAN E. SULLIVAN  
Board Judge