



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 28, 2022

CBCA 7377-FEMA, 7381-FEMA, 7382-FEMA, 7434-FEMA

In the Matter of MONROE COUNTY ENGINEER

Amy M. Zwick, County Engineer, Office of the Monroe County Engineer, Woodsfield, OH, appearing for Applicant.

Anne Vitale, Ohio Emergency Management Agency, Ohio Department of Public Safety, Columbus, OH, counsel for Grantee.

Charles Schexnaildre, Office of Chief 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 **LESTER**, **RUSSELL**, and **VERGILIO**.

This decision addresses four separate requests for arbitration from the Office of the Monroe County Engineer (the County). In each request, the County seeks public assistance (PA) funding under section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), for damages to roads and supporting embankments allegedly caused by severe rains that fell in Monroe County, Ohio, between February 5 and 13, 2019, an event that the President declared a major disaster in DR-4424-OH (84 Fed. Reg. 19,793 (May 6, 2019)).¹

¹ We are issuing a single combined decision in these four arbitration matters, even though the matters are not consolidated, because they share common parties, common factual issues, and common legal arguments.

In three of these four arbitration matters, the County seeks PA funding for road repairs even though the Federal Emergency Management Agency (FEMA) found that cracking in the roads was not caused by the February 2019 rains but instead reflected alligator or fatigue cracking resulting from heavy usage. In each of the four arbitration matters here, the County seeks funding to address alleged soil instability and to replace or repair embankments supporting the roads, even though FEMA's inspectors could find no evidence of embankment damage.

FEMA does not contest that the County meets the statutory definition of a "rural area" or that amounts sought in each of these matters exceed the threshold for rural area arbitration eligibility. *See* 42 U.S.C. § 5189a(d)(3), (4). Each of these matters was submitted for decision on the written record with a paper hearing.

Background

Mile 8.19 of County Road 29 (CBCA 7377-FEMA)

At mile 8.19 of County Road 29 (CR 29-8.19), also known as Sunfish Creek Road, is a twenty-one-foot-wide, two-lane asphalt road constructed on a natural slope. The County alleges that soil saturation and surface water flooding from the February 2019 rainfall caused 169 feet of damage to the road surface and base, plus a twenty-one-foot drop in the adjacent embankment and culvert. The County sought PA funding to repair the road surface, stabilize the adjacent embankment, and replace the culvert.

FEMA created project 108373 to capture the claimed damages of \$468,700. During a site inspection, FEMA observed fatigue (alligator) cracking and wheel rutting, Applicant Exhibit 1 at 3, which it viewed as signs of deterioration from heavy use rather than from rainfall but no evidence of site instability or damage to the culvert. FEMA issued an eligibility determination memorandum (DM) on October 14, 2020, denying PA funding because of a lack of evidence of damage from the February 2019 rainfall. FEMA Exhibit 3 at 234.

The County submitted a first-level appeal to the grantee/recipient, the Ohio Emergency Management Agency (OEMA), which forwarded the appeal to FEMA on January 27, 2021. By decision dated February 16, 2022, FEMA's Region V Regional Administrator denied the appeal, finding that "the Applicant did not provide sufficient documentation or evidence demonstrating the Facility was damaged or made unstable by a landslide or slope failure triggered by the declared disaster." FEMA Exhibit 1 at 1.

FEMA stated that, during its inspection, the road was open to the public and that the County had not performed any temporary stabilization measures or imposed traffic controls

to address a claimed instability. *Id.* at 7. It also represented that neither its inspectors nor an expert that FEMA later hired, Dr. Timothy Stark, could find any signs of embankment instability. *Id.* Dr. Stark concluded that the claimed road damage was alligator cracking formed longitudinally in the direction of traffic flow, instead of tension cracking that could have been caused by slope movement. *Id.* Dr. Stark also analyzed Light Detection and Ranging (LiDAR) data predating the February 2019 storms, which he said revealed that the surface cracking existed prior to the declared event. *Id.*

The County received the first-level appeal decision on March 7, 2022, and timely submitted an application for arbitration to the Board on April 14, 2022. The Board docketed this application as CBCA 7377-FEMA. After the parties submitted this matter for decision on the written record pursuant to Board Rule 611 (48 CFR 6106.611 (2021)), the County and OEMA filed a joint response to FEMA's arbitration position on October 13, 2022, concluding the briefing in this arbitration matter.

Mile 2.04 of County Road 59 (CBCA 7381-FEMA)

The County does not claim that the February 2019 storms caused any damage to the road at mile 2.04 of County Road 59 (CR 59-2.04), a twenty-foot-wide, two-lane gravel road constructed on a natural slope. Nevertheless, the County has asserted that soil saturation from those storms damaged the sloped embankment adjacent to the road, citing to a slip area with a length of seventy-six feet, a width of nine feet, and a depth of three feet.

FEMA created project 114626 to capture the claimed damages of \$138,125. After conducting a site inspection and obtaining documentation from the County, FEMA issued a DM on October 30, 2020, in which it denied PA funding because, following its inspection at that site, it could not find any evidence of site instability. FEMA Exhibit 3 at 34.

The County timely submitted its first-level appeal to OEMA, which forwarded the appeal to FEMA on December 23, 2020. By decision dated March 15, 2022, FEMA's Region V Acting Regional Administrator denied the appeal, finding that, although "the Applicant claimed slope failure and damage to the natural, unmaintained embankment adjacent to the Facility," FEMA could find no evidence of any embankment damage or soil instability. FEMA Exhibit 1 at 6.

The County received the first-level appeal decision from FEMA on March 26, 2022, and timely submitted a request for arbitration to the Board on April 21, 2022. The Board docketed this application as CBCA 7381-FEMA. The parties agreed to submit this matter for decision on the written record with a paper hearing pursuant to Board Rule 611, and the County and OEMA filed a joint response to FEMA's arbitration position on October 12, 2022, concluding briefing in this matter.

Mile 0.74 of County Road 58 (CBCA 7382-FEMA)

At mile 0.74 of County Road 58 (CR 58-0.74), also known as Krieg Road, is a twenty-foot-wide asphalt rural connector road constructed on a slope. The County reported that soil saturation from the February 2019 storms caused damage to the road surface and base and destabilized the embankment. It alleged tension cracking in the road surface measuring 120-foot-long by twelve-foot-wide and a seven-inch drop in the embankment.

FEMA created project 100460 to capture the claimed damages of \$360,000. After conducting two site inspections and obtaining documentation from the County, FEMA issued a DM on October 13, 2020, in which FEMA denied funding because the information was insufficient to “substantiate that the [road] damage was directly caused by the declared event and that the sloped embankment became unstable as a result of the disaster.” Applicant Exhibit 1 at 3.

The County submitted a first-level appeal to OEMA, which forwarded the appeal to FEMA on December 23, 2020. By decision dated March 15, 2022, FEMA’s Region V Acting Regional Administrator denied the appeal, asserting that “[t]he types of damage observed on the road are more commonly a result of a combination of factors, such as age of the road surface, the amount of traffic flow and usage, rain events throughout the year, and seasonal freeze/thaw impacts.” FEMA Exhibit 1 at 6. He stated that “[t]he cracks’ positioning in the vehicle wheel path, and ‘chicken wire’ or ‘alligator cracking’ patterns . . . suggest that the damages [to the road itself] are not related to a disaster event, but rather due to regular or heavy use and the age of the pavement.” *Id.* at 7. As for alleged damage to the embankment, he indicated that the FEMA inspectors who visited the site had seen no evidence of site instability at that location. He acknowledged that the inspectors had seen “indications of a scarp, or eroded section, along the embankment, but not immediately adjacent to the [road at issue]” but that those indications did not affect the stability of the integral ground supporting the road and were not caused by the February 2019 rainfall. FEMA Exhibit 1 at 3.

The County received the first-level appeal decision on March 31, 2022, and timely submitted an application for arbitration to the Board on April 21, 2022. The Board docketed this application as CBCA 7382-FEMA. The parties submitted the matter for decision on the written record with a paper hearing pursuant to Board Rule 611, and the County and OEMA filed a joint response to FEMA’s arbitration position on September 30, 2022, concluding the briefing in this matter.

Mile 2.09 of County Road 29 (CBCA 7434-FEMA)

At mile 2.09 of County Road 29 (CR 29-2.09) is a twenty-foot-wide, two-lane gravel road constructed on a natural slope. The County determined that soil saturation from the February 2019 storms damaged the road surface and base, causing the roadway to drop approximately twenty-seven inches and displaced a corrugated metal pipe culvert under the road. The County sought PA funding to repair the road, replace the culvert, and stabilize the embankment.

FEMA created project 108365 to capture the claimed damages of \$365,510. During two site inspections, FEMA inspectors “observed no damage attributable to the disaster or any slope instability” and stated that the road was open to traffic at the time of inspection without any temporary stabilization measures or traffic controls in place. Applicant Exhibit 1 at 1; FEMA Exhibit 1 at 7. FEMA issued a DM on November 5, 2020, denying PA funding based upon “insufficient documentation to substantiate that the claimed facility damage became unstable as a result of the disaster.” FEMA Exhibit 3 at 149.

The County submitted its first-level appeal to OEMA, which forwarded the appeal to FEMA on December 24, 2020. By decision dated May 6, 2022, FEMA’s Region V Regional Administrator denied the first-level appeal, finding that “the Applicant did not provide sufficient documentation or evidence demonstrating the Facility and embankment were damaged or made unstable due to the declared disaster.” FEMA Exhibit 1 at 1. FEMA relied in part on an expert analysis prepared at FEMA’s request by Dr. Stark. Dr. Stark consulted historical terrestrial data, LiDAR data, and rainfall data for the area, as well as a site inspection report, site photos, and appeal documentation. Dr. Stark concluded that there had been settlement at CR 29-2.09 (including of the culvert) prior to the February 2019 rainfall, as evidenced by an elevation profile in October 2015 showing a dip of two feet (twenty-four inches) in the same location that the County was now noting a drop of twenty-seven inches. FEMA Exhibit 3 at 480. He determined that this settlement was not associated with a slope failure because no scarp or accompanying tension cracks were present in the roadway. FEMA Exhibit 1 at 6. FEMA concluded that “[t]he Applicant did not provide sufficient documentation or evidence to demonstrate that the Facility was damaged or made unstable by a landslide triggered by the declared disaster, or that the road surface and embankment were damaged due to the declared disaster.” *Id.* at 11.

After receiving the first-level appeal decision on May 24, 2022, the County timely submitted an application for arbitration to the Board on June 9, 2022. The Board docketed this application as CBCA 7434-FEMA. The parties have submitted this matter for decision on the written record pursuant to Board Rule 611, and briefing concluded when the County and OEMA filed their joint response to FEMA’s arbitration position on September 29, 2022.

Discussion

To be eligible for PA funding, the applicant bears the burden of establishing the fact of damage to an eligible facility. FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19. It also must establish that the damage was the result of the declared disaster. *Monroe County Engineer*, CBCA 7288-FEMA, et al., 22-1 BCA ¶ 38,142, at 185,259. “Prior arbitration panels of the Board have construed this [second] requirement to mean that ‘cause and effect [for any damage claimed] must be established.’” *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,199 (quoting *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,387). Further, the applicant must show “that it was a particular declared disaster that caused the damage, rather than a cumulative effect of contributions from earlier events.” *Monroe County Engineer*, CBCA 7410-FEMA, slip op. at 3 (Nov. 22, 2022); see *Jackson County Engineer*, CBCA 7296-FEMA, 22-1 BCA ¶ 38,141, at 185,255 (damage must be “tied to the disaster without an intervening or disallowing cause, such as improper maintenance or pre- or post-existing conditions that would serve to disqualify the repair of the damage from public assistance”).

FEMA recognizes that, when dealing with damage to roadways, “distinguishing between pre-existing damage and damage caused by the incident is often difficult.” PAPPG at 116. “[R]epeated and separate rainfall events at a location may each cause minor damage to a particular roadway,” but, under the PAPPG, “PA funding is available only if a particular disaster event is the specific cause of the damage for which funding is being sought.” *Monroe County Engineer*, CBCA 7329-FEMA, slip op. at 3 (Oct. 7, 2022).

In all of these four cases, FEMA could not find any damage caused by the February 2019 rainfall event. In the three matters in which the County alleged damage to the road surface and base, FEMA determined that all of the cited road cracking was fatigue cracking associated with usage, not tension cracking that would indicate soil instability. For each of the County’s allegations of embankment damage, FEMA could not find any evidence of instability or damage and, in the one instance in which it saw some settlement, recognized that the damage predated the February 2019 rainfall and did not affect the road’s stability. Even if we were to assume damage in every instance that the County alleges, there is nothing in the record to show that, for each instance of alleged damage, it was caused by the February 2019 rainfall and was not the cumulative effect of numerous preceding events.

The evidence that the County has presented to rebut FEMA’s inspections and analysis is little more than a request that we take the County’s word that damage exists and that it was caused by the February 2019 storms. The County’s position lacks credible support, particularly in light of the evidence put forward by FEMA. Although we do not discount the Monroe County Engineer’s experience and training in matters relating to roadway engineering, that is not enough, by itself, to require FEMA to pay out hundreds of thousands

of dollars in situations in which FEMA, after review such as done in these cases, finds no evidence of damage caused by the declared disaster itself.

Decision

For the foregoing reasons, we deny the County's PA funding requests in these four arbitration matters.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge