



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 3, 2022

CBCA 7388-FEMA

In the Matter of BOARD OF EDUCATION FOR THE
PUBLIC SCHOOLS OF ROBESON COUNTY

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Will Polk and Jonathan Ekblad, Office of the General Counsel, North Carolina Department of Public Safety, Raleigh, NC, counsel for Grantee.

Maureen Dimino, Stanley Thompson, Jr., and Shahnam Thompson, 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 **DRUMMOND**, **SULLIVAN**, and **O'ROURKE**.

The Board of Education for the Public Schools of Robeson County (BERC) sought to arbitrate the denial by the Federal Emergency Management Agency (FEMA) of its request for public assistance funds to replace and relocate sixteen buildings damaged by flood waters. FEMA denied the request because it found that the cost of repair was less than fifty percent of the cost of replacement for each of the buildings. Before the arbitration panel, both BERC and FEMA relied upon estimates that had not been presented to the other party prior to the issuance of FEMA's decision in 2021. For the reasons outlined below, the panel sends the matter back to FEMA for further evaluation in accordance with the guidance provided here. Regrettably, the panel cannot reach a determination on the current record.

Background

Damage. In October 2016, Hurricane Matthew inundated Robeson County, North Carolina, with flood waters that remained in BEREC's buildings for approximately two weeks. *See* Request for Arbitration (RFA), Exhibit 3 at 5. After the water drained, BEREC found that West Lumberton Elementary School and fifteen of its central administrative buildings had sustained damage. BEREC cleaned the facilities and undertook remediation efforts to preclude mold growth while it sought public assistance funding from FEMA. In October and November 2017, the City of Lumberton determined that all of the facilities were "substantially damaged," which triggered a requirement that BEREC bring all of the buildings into compliance with local flood ordinances, as well as other current building codes and standards, if it undertook any effort to repair the buildings. *Id.*, Exhibit 8.

2017 Draft Determination Memos. FEMA created eight project worksheets (PWs) to process the request for public assistance funds. In May and June 2017, FEMA emailed to BEREC representatives draft determination memos regarding the funds for repair work to these facilities. RFA, Exhibit 3. Each of these draft determinations stated that "[i]t appears that the applicant failed to take measures to protect the facility from further damages by performing remediation" and, based upon this finding, recommended that an amount be deducted from the amount to be granted. *See, e.g., id.* at 2-3. Unlike the determination memo on appeal, these drafts did not contain full descriptions of the project, the legal authorities relied upon, or a full analysis supporting the recommendation. *Compare* RFA, Exhibit 1, *with id.*, Exhibit 3. The determinations were not forwarded with a cover letter to the grantee and applicant's representatives and did not contain a notice of BEREC's appeal rights. RFA, Exhibit 3. FEMA obligated funds on these PWs in March 2018. FEMA's Response to Request for Arbitration (FEMA's Response), Exhibit 2.

Request for Public Assistance Alternative Procedures (PAAP) and Extensions. In August 2017, BEREC requested that FEMA consider its request under the PAAP. RFA, Exhibit 9, app. A. In September 2017, BEREC sought an extension to reach an agreement with FEMA on a cost estimate for the project. RFA, Exhibit 10 at 32. On December 12, 2019, FEMA granted an extension of an unstated duration. *Id.*; FEMA's Response at 9. FEMA was considering BEREC's submission for inclusion in the PAAP program as recently as May 8, 2020. *Id.* The record contains no notice to BEREC that it is no longer eligible for the PAAP program or any request from BEREC that FEMA send BEREC's cost estimate to the expert panel created by statute for review.

2019 PWs and 2021 Determination Memo. In October 2019, FEMA assisted BEREC with preparing a new project worksheet, PW 1901, that proposed to replace and relocate all of the facilities under the PAAP program authority. RFA, Exhibit 2 at 11. In support of this new PW, BEREC obtained a new set of estimates to support the repair versus replacement

calculation. RFA, Exhibit 9 (2019 estimates). For the repair estimates, BEREC's architects used the "initial damage assessment inspections." *Id.* at 9. For the replacement estimates, BEREC's architects derived the costs based on "current function and the Codes and Standards that existed at the time [the buildings] were constructed." *Id.* Based upon these estimates, the PW demonstrated that the buildings were eligible for replacement. BEREC's architects provided a third set of estimates, described as the "full [cost estimating format (CEF)] for the replacement" of the facilities at issue. These estimates were based upon square footage "for a school with the capacity of 897 students and current industry standards for personnel and function of the other facilities at the time of the event." *Id.* at 11. At the time of the disaster, the school was designed to accommodate fewer than 400 students. The estimates also included "site development costs associated with relocation and demolition costs for the damaged buildings." *Id.* at 16. In PW 1901, the FEMA author noted that "remediation and stabilization of the facilities were done by the applicant following the event" and described the recommended deductions in the 2017 determination memos as speculation. RFA, Exhibit 2 at 12.

In June 2021, FEMA issued a final determination memo, denying BEREC's request for funds to replace and relocate the sixteen buildings. FEMA performed the 50% calculation using the 2017 PW repair figures, minus the deductions in the draft determination memos issued in 2017, as the numerator.¹ For the denominator, FEMA used the square footage figures for each of the buildings that BEREC provided in the full CEF for the replacement of all eight buildings. FEMA noted that it had not received information from BEREC or its architects regarding the "specific methodology employed by [BEREC's architects] to develop the increased square footage requirements for all the sites . . . as well as the actual number of students at this school prior to the disaster event to address the reasonableness of the code" standards applied. RFA, Exhibit 1 at 7. The determination was issued under the original project worksheet numbers, not PW 1901, and said nothing about BEREC's request to use the funds under the PAAP program. The cover letter to the determination memo advised BEREC of its appeal rights.

First Appeal and Request for Arbitration. BEREC filed its first appeal of FEMA's 2021 determination on October 7, 2021. With its appeal, BEREC submitted new estimates for the repair and replacement of its buildings, correcting errors that were made in the square footage for the buildings provided with PW 1901. RFA at 40-44; RFA, Exhibits 15, 16

¹ The repair figures denoted in the 2021 determination memo do not match the amounts set forth in the draft 2017 determination memos. *Compare* RFA, Exhibit 1 at 7, *with id.*, Exhibit 3 at 2. No FEMA witness testified about this discrepancy, and FEMA provided no further explanation regarding how the figures in either determination memo were derived.

(2021 estimates). When FEMA did not issue a decision on that first appeal and more than 180 days had elapsed since its submission, BEREC submitted its request for arbitration to the Civilian Board of Contract Appeals (CBCA), as permitted by 42 U.S.C. § 5189a(d)(5) (2018).

FEMA's Estimates. FEMA's response to the request for arbitration included a new set of estimates that it offered as the proper calculation of the 50% rule for BERECs facilities. FEMA Exhibits 8a, 8b. These figures had been generated by one of FEMA's witnesses in his initial evaluation of BEREC's 2019 submission for the full CEF for replacement. The witness prepared the analysis initially during a two-month review in 2020 and provided his analysis to others within FEMA when he transferred to a new position. He did not know what those responsible for evaluating BEREC's request did with his analysis. When preparing for the arbitration hearing, FEMA counsel learned of the witness' analysis and offered it as the basis for the 50% calculation that the panel should consider.

Prior to the hearing, the panel chair asked counsel for both BEREC and FEMA to identify which set of estimates, among the six in the record, they intended to rely upon in their presentation to the panel. BEREC chose the 2021 estimates (RFA, Exhibits 15, 16), and FEMA chose the estimates it included in its response (FEMA Exhibits 8a, 8b).

Discussion

Estimates. The panel has been asked to determine the eligible scope of work for public assistance funds for BEREC. The decision turns upon the results of the 50% calculation—whether BEREC is eligible for funds to repair or replace sixteen buildings damaged during and following Hurricane Matthew. FEMA regulation requires a comparison between the costs of repair and replacement:

Repair vs. replacement. (1) A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.

44 CFR 206.226(f) (2016). The repair cost “is the cost of repairing disaster-related damage only and includes costs related to compliance with standards that apply to the repair of the damaged elements only.” Public Assistance Program and Policy Guide (PAPPG) (Jan. 2016) at 96. Repair costs do not include upgrades of non-damaged elements even if those upgrades are required by standards (e.g., elevation of an entire facility triggered by repair). *Id.* at 96-97. The replacement cost “is the cost of replacing the facility on the basis of its predisaster design (size and capacity) and function in accordance with applicable standards.”

Id. at 97. Pre-disaster design is defined as “the size or capacity of a facility as originally designed and constructed or subsequently modified by changes or additions to the original design. It does not mean the capacity at which the facility was being used at the time the major disaster occurred if different from the most recent designed capacity.” 44 CFR 206.201(j).

The result of the 50% calculation should be easy to decide. The difficulty for the panel lies in knowing which estimates to use for that calculation. The parties generally agree upon the numerator to the calculation—the repair estimates for each of the sixteen buildings. For the denominator, the parties offered two, different sets of estimates and asked the panel to choose between them.

We cannot select FEMA’s estimates because they are predicated upon incorrect square footage amounts found in the “full CEF for the replacement estimates.” FEMA’s policy requires that estimates be based upon “the design of such facilities as they existed immediately prior to the disaster.” 44 CFR 206.206. If standards change the design of the facility, the standards must “apply to the type of repair or restoration required” and “be appropriate to the predisaster use of the facility.” *Id.* 206.206(d). Regarding estimates for schools, FEMA’s policy guide specifically requires that replacement costs be based upon the pre-disaster design capacity of the school. PAPPG at 82. As noted, FEMA did not know the basis for the square footage amounts, but did not provide evidence that it tried to obtain that information. If it had, perhaps the error would have been discovered and this appeal would not have been necessary. The estimates also included site development and demolition costs, costs that should not be included in the replacement costs when calculating whether a facility is eligible for replacement. PAPPG at 97. It is not clear that the estimates that FEMA offered for the panel’s consideration removed these costs.

In addition, FEMA’s estimates are based solely upon the FEMA witness’ work and do not appear to have been through the normal review process within FEMA. We recognize that BERCC is the source of the square footage error underlying these estimates, but errors are to be corrected through the review and appeal process. 42 U.S.C. § 5189a(d)(2) (requirement for panel to “consider from the applicant all original and additional documentation, testimony, or other such evidence supporting the applicant’s position at any time during arbitration”); 44 CFR 202.206(a), (c)(3) (provisions allowing for applicants to provide and FEMA to seek additional information during the appeal process).

We also cannot accept BERCC’s 2021 figures. Although they were prepared by a licensed architect, the panel does not have the technical expertise to review these estimates and determine that they are correct and should be used for the denominator without any adjustments. Moreover, as with the estimates that FEMA offered to the panel, these estimates have not been through the review process at FEMA. FEMA is better equipped to

review the costs and ensure that the proper costs are included. FEMA can determine why the replacement estimates generated in 2021 are roughly the same as the estimates generated in 2019, even though the square footage upon which they are based is smaller. FEMA can also examine whether the soft costs in the 2021 estimates are disproportionately large compared to the hard costs.

Feasibility of Repair. BERC also asserted that it was not feasible to repair the buildings. Feasibility is not defined in FEMA regulation or policy. Only a few cases discuss the feasibility aspect of the repair-versus-replace regulation, and those cases in which repair has been deemed not to be feasible have focused upon the technical feasibility of the repair. *Moss Point School District*, CBCA 1800-FEMA, 10-2 BCA ¶ 34,489, at 170,087; *City of Tallahassee*, 1785-DR-FL (May 11, 2015) (FEMA second appeal decision), <https://www.fema.gov/appeal/50-percent-rule-and-procurement>. FEMA's expert defined feasibility to include consideration of the cost of the effort.

FEMA did not discuss feasibility in its determination memo on review. BERC asserts that repair of its buildings is not feasible because of the cost and difficulty of bringing all of them up to current building codes and meeting flood-proofing requirements. At the hearing, the parties focused upon the feasibility of flood-proofing the school, explaining that there are three primary methods of flood-proofing: elevation, dry flood-proofing to prevent water from entering the building, and relocation. FEMA also asserted that building a levee around the school building would have been a workable option. BERC's expert disagreed with this contention, arguing that a levee could jeopardize student safety. The panel lacks a sufficient evidentiary basis to determine feasibility of repair and flood-proofing of these facilities. That issue should be examined by FEMA on remand.

2017 Determination Memos Not Binding. Although FEMA did not rely upon the calculations and determinations set forth in the 2021 determination memo, which relied upon the deductions from the 2017 determination memos, FEMA counsel reiterated, in closing, FEMA's position that these determinations were binding upon BERC because BERC had failed to appeal those determinations. Therefore, the panel reaches the issue and finds that those determinations were not final.

First, as noted, the determination memos do not bear the indicia of finality. The memos discussed "recommendations" regarding deductions and did not provide a full explanation of the scope of the project or the analysis that supported the deductions. The memos did not contain notice of BERC's appeal rights. FEMA policy guidance applicable at the time stated that final determinations would be accompanied by such notice: "When eligibility issues cannot be worked out, FEMA will issue a formal eligibility determination letter, setting forth an applicant's appeal rights, with an accompanying memorandum that explains the basis for the denial." RFA Exhibit 26, Fact Sheet: Public Assistance Appeals

(last updated April 2017) at 1. On this basis, we find that the determinations were not final and appealable and thus were not binding upon BEREC.

Regarding the substance of the deduction, numerous BEREC's witnesses testified about BEREC's efforts to clean up the buildings and mitigate further damage. Moreover, PW 1901 states that BEREC undertook remediation efforts and describes the statements to the contrary in the 2017 memos as speculation. FEMA provided no explanation to the panel regarding why the deductions were taken. On this basis, we find the deductions set forth in the 2017 draft determination memos to be unsupported.

Eligibility for PAAP and Referral to Expert Panel. The final issues presented by the parties are whether BEREC remains eligible to use funds through the PAAP program and whether FEMA is required to send BEREC's cost estimate to an expert panel for evaluation. The Stafford Act permits FEMA to approve projects under alternate procedures adopted towards the goal of reducing the costs of public assistance projects for the Federal Government while "expediting the provision of such assistance" to state and local governments. 42 U.S.C. § 5189f(a), (c). The Act requires FEMA to have an expert panel validate the estimated cost for any project under the procedures:

[I]n determining eligible costs under section 5172 of this title, the Administrator shall make available, at the applicant's request and where the Administrator or the certified cost estimate prepared by the applicant's professional licensed engineers has estimated an eligible Federal share for a project of at least \$5,000,000, an independent expert panel to validate the estimated eligible cost consistent with applicable regulations and policies implementing this section.

Id. § 5189f(e)(1)(E). FEMA's policy guide implementing this provision requires that all projects with an estimated cost of more than \$25 million shall be sent to the expert panel but only after the parties agree upon the estimated cost. Public Assistance Alternative Procedures Pilot Program Guide for Permanent Work (Mar. 2016) at 9. FEMA's policy guide dictates that the applicant and FEMA must agree upon the estimated cost within a year of the disaster, subject to extension requests, for a project to be eligible for PAAP. *Id.* at 7. Prior to preparing the estimated cost, FEMA and the applicant "must agree on the disaster-damage dimensions, description, and the scope of work for the subaward." *Id.* at 5.

FEMA asserts that BEREC is no longer eligible for the PAAP program because BEREC and FEMA did not agree upon a cost estimate within the required time period. But the duration of the required time period is unclear. FEMA counsel argued that the extension period expired on October 25, 2019, when BEREC submitted PW 1901, and that BEREC should have sought a further extension to allow time for the parties to agree. However, the record

contains references to FEMA's continued consideration of the PAAP program request after this date. Given the passage of time and the lack of agreement upon the scope of work, FEMA's policy would preclude BEREC's participation in the PAAP program. However, FEMA, upon remand, should determine when the extension period granted in December 2019 expired and provide that determination to BEREC so that BEREC's eligibility can be ascertained.

BEREC asserts that FEMA has not followed the statutory requirement to send its cost estimate to the expert panel. BEREC's failure to request that the estimate be sent is not fatal to its request because FEMA's policy dictates that estimated costs over \$25 million shall be sent to the expert panel. FEMA's policy also requires that the estimated cost be sent only after the parties have agreed upon that estimated cost. Although the statutory provision quoted above leaves open the possibility that FEMA should send the cost estimate prepared by applicant's engineer regardless of whether the parties reach an agreement on the cost estimate, we will not disturb FEMA's interpretation that the statute only requires expert panel review after the parties have agreed upon a cost estimate.

Decision

For the foregoing reasons, BEREC's request for replacement costs is denied without prejudice. FEMA shall examine BEREC's 2021 estimates, obtain any additional information needed from BEREC, and perform a new calculation to determine whether BEREC is eligible for replacement costs based upon the 2021 estimates and the guidance provided in this decision.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Jerome M. Drummond

JEROME M. DRUMMOND
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge