



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 10, 2022

CBCA 7296-FEMA

In the Matter of JACKSON COUNTY ENGINEER

Melissa Miller, County Engineer, Jackson County Engineer's Office, Jackson, 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 **VERGILIO**, **SHERIDAN**, and **ZISCHKAU**.

Representatives of Jackson County Engineer (applicant or subrecipient) filed this request for arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) over public assistance sought under a declared disaster involving storms and flooding. The grantee (or recipient) is represented in this matter by the Ohio Emergency Management Agency. Initially, and in a first appeal determination, FEMA denied funding for the proposed project. Specifically, the applicant, as supported by the grantee, seeks reimbursement to repair a particular portion of road and built embankment and to stabilize the integral ground associated with the area. Concluding that the purported damage is not a direct result of the disaster, FEMA declined to approve public assistance. The panel concludes that the record, slightly expanded from what was before FEMA, fails to establish that public assistance should be provided to the applicant.

A federally declared disaster event occurred in the area between February 5 and 13, 2019, based on severe storms, flooding, and landslides (incident). The applicant and grantee seek a public assistance grant in connection with the incident. The site inspection report is

from July 2019. While the report identifies surface damage and indicates slope slippage, the difficulty here is establishing that this occurred because of the disaster. The incident had rain that was less severe than the year before. That and the aged condition of the road cannot be discounted, on this record, as factors in the surface damage and the slope slippage. The record does not establish a sufficient connection between the identified damage and the incident to merit public assistance. Therefore, the panel denies the request of the applicant and grantee. We address some other concerns of the parties below.

This panel understands FEMA's use of the phrase "direct result of the disaster" to mean 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. That is an appropriate application of the FEMA Public Assistance Program and Policy Guide (PAPPG), fully in accordance with referenced published regulations.

The panel rejects the attempt of the applicant and grantee to shift the burden to FEMA to demonstrate that the damage to the facility (road and embankment) was not the result of the declared disaster. That position is inconsistent with regulations and policies. Although there is a proximity in time between the declared disaster event and the damage, that alone does not demonstrate eligibility; that is but a prerequisite. The record must demonstrate that the damage resulted from the disaster without a disqualifying cause, that is, within the meaning and application of regulations and guidelines. In particular here, earlier rain events and the conditions of the area, as well as earlier maintenance or the lack thereof, are factors, as recognized initially by FEMA. Also, FEMA does not compensate for the reduced life of a roadway. The record does not eliminate each of these elements as reasonable or likely causes. The applicant and grantee suggest that it is unfair for FEMA to require either of them, with limited resources, to show causality. However, the beneficiaries of the grants do not make the rules, just as their observations and conclusions are not determinative.

The amount of rainfall during the disaster period was not unprecedented. The conditions, however, did result in the declaration of a disaster; significant damage occurred. A portion of the roadway (including its surroundings and base) was damaged after the incident. However, the record does not demonstrate that a well-constructed and maintained embankment and road would have failed during the incident. Rather, given roadway usage and prior rainfalls, the record gives credence to the damage not being caused by the incident in a way that would enable public assistance.

The attempts to discredit the credentials of the engineer presented by FEMA are unpersuasive. The record reveals that the individual possesses knowledge and documented expertise regarding roadway damage and slope instability, and the record shows no

preconceived notions or biases in his evaluation. In contrast, the applicant utilizes its own engineer but fails to adequately support the position put forward.

While the applicant and grantee state that the damage is a result of flooding and soil saturation that occurred during the incident, the record does not bear this out. Public assistance is not warranted, as FEMA concluded.

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge