



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 6, 2024

CBCA 7829-FEMA

In the Matter of STEPHENS COUNTY, OKLAHOMA

Jason M. Hicks, District Attorney, and Charles L. Sifers, Assistant District Attorney, Stephens County Department of Emergency Management, Duncan, OK, counsel for Applicant.

Alden Graybill, Recovery Director, and Michael Teague, Public Assistance Officer, Oklahoma Department of Emergency Management and Homeland Security, Oklahoma City, OK, appearing for Grantee.

Christiana C. Cooley and Rebecca J. Otey, 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 **RUSSELL**, **KULLBERG**, and **ZISCHKAU**.

RUSSELL, Board Judge, writing for the Panel.

In this arbitration, the applicant, Stephens County, Oklahoma (Stephens County or County), challenges the Federal Emergency Management Agency's (FEMA's) denial of the County's request for public assistance (PA) funding to address damage to multiple road sites following a severe storm in February 2021. FEMA denied the County's request, concluding that the County failed to meet its burden to demonstrate that the claimed damage was a direct result of the storm. For reasons stated below, we grant the County's application, as revised in this arbitration, for four sites and deny its application for one.

Background

Between February 8 and February 20, 2021, severe winter storms struck Oklahoma. The National Weather Service (NWS) reported that, for February 14, “[a]n impressively cold [air mass] was in place as an upper trough crossed the region [including Stephens County], bringing heavy snow to much of the area. Widespread 4–6" totals were reported, with isolated amounts approaching 10”” and that, for February 16 and 17, a “record cold [air mass] remained entrenched over the area as yet another trough approached from the west. Snowfall covered most of Oklahoma but the heaviest snow fell across southern [Oklahoma].” www.weather.gov/media/oun/stormdata/oun202102.pdf (last visited Mar. 6, 2024). The NWS also reported that “[e]xtreme and record breaking cold peaked across Oklahoma and Texas during the 14th–16th [of February], with wind chills of -20 to as low as -30 degrees reported in much of the area. Air temperatures in the -10 to -20 range [were] also common on the 16th, with [Oklahoma City] reporting its second coldest low temperature ever recorded.” *Id.*

On February 24, 2021, the President issued a major disaster declaration for Oklahoma, authorizing FEMA to provide public assistance to certain counties within the state, including Stephens County. *See* 86 Fed. Reg. 23403 (May 3, 2021). The County subsequently submitted a request for PA funding to FEMA for force account labor, force account equipment, and materials to repair its damaged roads. FEMA prepared Grants Manager project number 437271 to document the work and associated costs of \$3,018,334.71 requested by the County.

On October 19, 2022, FEMA issued a determination memorandum denying the request, finding that the County presented no supporting documentation demonstrating that the claimed damage to the roads was a result of the storm as opposed to pre-existing conditions or, alternatively, documentation distinguishing the storm-related damage from the pre-existing conditions. The County appealed, and, on June 5, 2023, FEMA denied the appeal for the same reasons set forth in its denial of the County’s initial request for PA funding.

Following FEMA’s decision denying its appeal, the County filed this request for arbitration with the Board. At the hearing, FEMA noted, and the County subsequently agreed, that there were twelve sites at issue under the project number. In post-arbitration briefing, based on the hearing testimony of its expert, the County further limited its request for PA funding to the following roads and amounts: (1) Girl Scout Road, \$53,306.02; (2) Clear Creek Road, \$64,663.29; (3) 8 Mile Road, \$146,934.73; (4) 7 Mile Road, \$110,756.08; and (5) 6 Mile Road, \$167,586.45. Thus, in this proceeding, the County has reduced its request for public assistance from \$3,018,334.71 to \$543,246.57.

Discussion

I. PA Funding Eligibility Requirements

To be eligible for PA funds, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), and FEMA’s implementing regulations require that an eligible facility must have been damaged or destroyed by a major disaster. 42 U.S.C. § 5172; 44 CFR 206.223(a)(1) (2020). Streets, roads, and highways owned by state and local governments are included among eligible facilities subject to the disaster relief provisions of the Stafford Act. 42 U.S.C. § 5122(10)(C). As for proving that damage to a road was caused by an incident, FEMA’s Public Assistance Program and Policy Guide (PAPPG) (June 2020) states:

The incident may cause minor damage to roads that result in damage similar to that which may occur over time from other causes, such as the age of the road, traffic flow, and frequent rain. Costs related to maintenance of roads are ineligible. Therefore, distinguishing between preexisting damage and damage caused by the incident is often difficult. For the repair of this type of damage to be eligible, the Applicant must demonstrate that the damage was directly caused by the incident.

Id. at 169-70.

II. Record Regarding Disaster-Related Road Damage

In his report, FEMA’s expert explained that “[c]old temperature-related distresses often appear like those from other causes Since the fundamental distress mechanism from cold temperatures is localized pavement displacement[,] and this mechanism is the same as from other structural deficiencies, such as subgrade weakness, the appearance of these distresses is . . . usually the same.” FEMA’s Exhibit 8 at 1. Thus, he opined that “post-incident damages are no more likely to have been caused by the disaster as by other non-disaster related causes.” *Id.* Many of the photographs in the record support this finding – i.e., the cause of the road damage is indeterminate. However, subsequent to the hearing, the County significantly reduced the PA amount sought in this proceeding, focusing on those roads for which it could solidly show roadway damage caused by the event.

For this arbitration proceeding, Dr. Todd A. Lynn, Ph.D., P.E., Chair, Civil Engineering, Lipscomb University, and a full-time faculty member in the instruction of civil engineering materials, construction management, and solid mechanics, as well as a principal engineer at a construction materials design and testing firm, provided an expert report and hearing testimony as a witness for the County. In his report, Dr. Lynn determined that the

storm event caused damage to the roadways. He explained that “[l]ower than usual winter-time pavement temperatures coupled with prevalent moisture, subsequent freezing and thawing resulted in rapid acute damage.” Applicant’s Notice of Additional Information and Documentation, Expert Report Prepared by Todd A. Lynn, Ph.D, P.E., Asphalt Pavement Distress Issues Pertaining to Stephens County, Oklahoma v. U.S. Department of Homeland Security, Federal Emergency Management Agency (CBCA 7829 - FEMA) (Oct. 20, 2023) at 4. He noted that the “principal form of pavement distress resulting from the event was advanced, localized low temperature cracking coupled with moisture induced damage,” *id.*, and that “[p]hotographs of Stephens County roadways show pavement distresses derived from low-temperature cracking.” *Id.* at 6. He added that “[s]ome of the instances, like the one shown . . . of Girl Scout Road, indicate rapid, acute damage. *Id.* at 2. And, “[c]onsidering the relative time of the photo (March 2021) with respect to the event (February 2021) and the debris still on the roadway at the time of the photo,” Dr. Lynn determined that “it can be concluded that the distress is attributable to the event.” *Id.*

Dr. Lynn’s hearing testimony was persuasive that the subset of roads on which he opined sustained damage due to the February 2021 winter storm.¹ In general, consistent with his report, he explained that the severe storm caused significant or acute damage to the roads, distinct from the damage that may occur on roads over time due to traffic loading. As for the specific roads at issue, in discussing the damage shown in a photograph to 7 Mile Road, he explained that a load issue event, e.g., from traffic, might require many applications of the load to manifest the particular distress shown. The damage to 7 Mile Road suggested acute distress from the February 2021 storm rather than a load-bearing manifestation occurring over time. Similarly, as in his report, Dr. Lynn opined that the acute freeze/thaw damage to Girl Scout Road was principally related to the storm. In discussing Clear Creek Road, he explained that it was true that alligator cracking was more often load-associated, but such cracking typically manifests in the wheel path under which traffic travels. In the photographs of Clear Creek Road, the alligator cracking covered a wide area, an indication of freezing and thawing action. Dr. Lynn highlighted photographs of 6 Mile Road showing large areas of damage along with debris, opining that the disintegration of the roadway was likely attributable to freeze/thaw action. Notably, Thomas Adams, P.E., a technical specialist with FEMA and the agency’s witness at the hearing, provided similar testimony that a photograph of this particular road showed pre-disaster repairs that could have been damaged by the event.

¹ From representations made by FEMA during the hearing, it seems that certain of the photographs on which Dr. Lynn relied during his testimony were produced for the first time at the hearing. Thus, it is unclear whether FEMA had access to the photographs when reviewing the County’s PA request and, if not, what impact, if any, the photographs would have had on FEMA’s decision on the County’s PA request.

In contrast to the other roads on which he provided testimony, Dr. Lynn did opine, for 8 Mile Road, that the photographic evidence was inconclusive as to the likely cause of the distress. Referencing one 8 Mile Road photograph, he highlighted the pronounced depression in the wheel path, noting that the road damage could be a load-associated distress. It would seem that the storm event would have impacted 8 Mile Road in a manner similar to the other roads. But Dr. Lynn, credibly in the panel's view, would not go so far as to say that the damage to 8 Mile Road, at least as seen in the photographic evidence presented at the hearing, was as severe as or similar to the acute damage seen in the photographic evidence of other roads. Thus, at the hearing, in considering the County's photograph of 8 Mile Road, Dr. Lynn did not opine that the damage to this road was likely caused by the storm event nor were there any photographs specifically of 8 Mile Road in Dr. Lynn's expert report evidencing that the damage to this road was attributable to the storm rather than another, non-disaster-related cause.

Mr. Adams, FEMA's witness, provided testimony that photographs are typically the most valuable pieces of documentation in showing that an event caused roadway damage. As for 8 Mile Road, neither Mr. Adams nor Dr. Lynn provided testimony suggesting that the panel could reach a determination, solely by inference, that the storm likely caused the damage to this road. Moreover, the PAPPG does not provide for determinations based on inference. Accordingly, we find that, with the exception of 8 Mile Road, the County was able to show, primarily through photographic evidence, that the February 2021 winter storm caused damage to the roads identified in the County's post-hearing request for PA.

Decision

We grant Stephens County's request for funding for the repair of Girl Scout Road, Clear Creek Road, 7 Mile Road, and 6 Mile Road and deny its request for funding for the repair of 8 Mile Road.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge