



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 5, 2024

CBCA 7638-FEMA

In the Matter of CITY OF PORT ARANSAS, TEXAS

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Julie Masek, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and W. Nim Kidd, Vice Chancellor, Suzannah Jones, Deputy Chief, Judy Lucio, Unit Chief for Recovery & Mitigation for Region 3, John Ovalle, Section Chief for Recovery & Mitigation for Region 3, Texas Division of Emergency Management, Austin, TX, appearing for Grantee.

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Before the Arbitration Panel consisting of Board Judges **RUSSELL**, **KULLBERG**, and **O'ROURKE**.

RUSSELL, Board Judge, writing for the Panel.

In this arbitration, the applicant, City of Port Aransas, Texas (the City), challenges the Federal Emergency Management Agency's (FEMA's) denial of the City's request for public assistance (PA) funding to replace a fire station damaged by Hurricane Harvey. The City had sought funding to replace the fire station under FEMA's regulations providing the requirements for repair versus replacement funding. 44 CFR 206.226(f) (2017). FEMA denied the City's request for replacement funding, finding instead that the City was entitled to funding for its repair costs. For reasons stated below, we find that the City has not

provided sufficient documentation to support its request for replacement funding, and, therefore, we deny the request. However, we return this matter to FEMA for the agency to determine the PA funding to which the City is entitled in order to repair the fire station at the required elevation.

Background

I. Damage

Starting in August 2017, Hurricane Harvey devastated the State of Texas with high winds and heavy rains, causing catastrophic flooding across the state. The President declared the hurricane a major disaster on August 25, 2017, for several counties in Texas, including Nueces County where the City is located. 82 Fed. Reg. 42691 (Sept. 11, 2017). The hurricane destroyed the City's fire station (also referred to as the "facility"), described as a prefabricated metal framed building with eleven rooms (including closets) constructed in 1969.¹ FEMA's Response to the City of Port Aransas, Texas' Request for Arbitration (FEMA's Response), Exhibit 2, Eligibility Determination Memorandum at 1. Because the building met the definition of "critical action" under FEMA's regulation (i.e., it functions as an emergency operations center in the event of a disaster), FEMA concluded that the building could not be moved out of the AE flood zone and needed to be elevated to the 500-year flood zone.² Exhibit S-13.

The City had an engineering firm conduct a damage assessment of the building. *See* Exhibit S-6, Letter from Munoz Engineering to City of Port Aransas (Sept. 15, 2017). Based on visual observations, the firm noted that the concrete slab foundation showed no damage but that the northside, eastside, and southside walls showed visible structural damage. *Id.* at 1. The firm also noted that the westside overhead doors appeared to be damaged, other

¹ The record includes various documents discussing the square footage of the fire station. The original square footage of the fire station has been described as both 4536 square feet (sq. ft.) and 5642 sq. ft. RFA, Exhibit 3; Exhibit S-14, Cost Estimate, REPAIR – Fire Station, Port Aransas, Texas (Jan. 11, 2023) (exhibits with a "S-" prefix indicate an applicant supplemental exhibit); FEMA's Response, Exhibit 2 at 1. As explained herein, the parties have agreed to a square footage of 6518.65 for the restored or rebuilt fire station. Letter from Michael G. Gaffney to the Panel at 1 (Nov. 10, 2023).

² "Flood Zone Designations are geographic areas as having different levels of flood risk." FEMA, How to Read a Flood Map at 4 (Jan. 2022) (available at <https://www.fema.gov/sites/default/files/documents/how-to-read-flood-insurance-rate-map-tutorial.pdf> (last visited June 3, 2024)). Zone AE is categorized as a high risk area. *Id.* at 4, 12.

doors were missing, and the sheathing and secondary framing members were damaged. *Id.* The firm determined that the fire station “sustained over 65% of structural damage to the building’s sheathing and secondary framing.” *Id.* at 2. Based on the significant flood damage to the building, the firm concluded that the building was “beyond economical repair and [would] need to be replaced entirely including its foundation” and recommended that the “foundation be elevated above the FEMA base flood elevation.” *Id.* The engineering firm’s report did not discuss any damage to the roof.

II. FEMA’s Project Worksheets and Determination Memorandum

FEMA initially prepared project worksheet (PW) 03655 to document the disaster-related damage to the fire station and the associated statement of work (SOW) and costs to restore the fire station to its pre-disaster design, function, and capacity, including any eligible upgrades for codes and standards. *See* Request for Arbitration (RFA), Exhibit 1, First Appeal Analysis at 001. On October 25, 2018, FEMA prepared an evaluation of whether the project was eligible for repair or replacement funding under the “50 Percent Rule evaluation [(the 50% Rule)].” *Id.* at 003. Under the 50% Rule, “[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)(1). For PW 03655, FEMA relied on the information provided by the City and determined that the facility was eligible for replacement at 73% [(\$213,626.26 (Repair)/\$291,301.92 (Replacement))], based on a 4536 sq. ft. facility. RFA, Exhibit 1, First Appeal Analysis at 003; *see* Exhibit S-13.³

The City and FEMA subsequently exchanged several rounds of communication primarily due to the City’s multiple requests for scope of work (SOW) changes, which included multiple changes to the proposed square footage of the fire station. RFA, Exhibit 1, First Appeal Analysis at 003-4. In December 2021, based on a review of the codes and standards submitted by the City, FEMA recalculated the repair and replacement costs and found that the fire station was only eligible as a repair project after the 50% Rule calculation

³ For large construction projects, FEMA uses its cost estimating format (CEF) methodology to determine the cost of eligible permanent work. As detailed in the FEMA Instructional Guide, the CEF has eight parts – Part A through Part H. https://www.fema.gov/sites/default/files/documents/fema_pa-cef-instructional-guide.pdf (last visited June 28, 2024). The repair and replacement cost analyses for the City’s fire station only involve part A costs, which consist of base construction costs for labor, equipment, and materials required to perform eligible work. *See, e.g.*, RFA, Exhibit 3 at 001.

determined the cost of repair was 26.9% of the replacement cost (i.e., \$224,276.71 (repair)/\$833,727.41 (replacement)). *Id.* at 005.

After another round of requests for information from FEMA and a response from the City, FEMA issued a determination memorandum on March 21, 2022, denying the City's request for funding to replace the fire station. RFA, Exhibit 1, First Appeal Analysis at 005; *see also* FEMA's Response, Exhibit 2. FEMA found that, although the initial project was obligated as a replacement facility, the additional documentation provided by the City on claimed codes and standards did not support this result. RFA, Exhibit 1, First Appeal Analysis at 005. Instead, FEMA determined that, based on the additional documentation, as well as FEMA's own codes and standards of review for the fire station (which included a room-by-room analysis of the codes and standards that the City claimed were required and eligible for funding), the facility was eligible for repair but *not* replacement costs under the 50% Rule. *Id.* at 005-11; *see also* FEMA's Response, Exhibit 4, FEMA, Port Aransas Fire Station Codes and Standards Review (July 2021). Specifically, based on the final eligible size of 6518.65 sq. ft., FEMA found that the repair costs only equaled 26.9% of the replacement costs (i.e., \$224,276.71 (repair)/\$833,727.41 (replacement)). RFA, Exhibit 1, First Appeal Analysis at 005, Exhibit 3 at 001, 025.

III. The City's First Appeal

In June 2022, the City submitted its first appeal through the grantee/recipient, the Texas Division of Emergency Management. RFA, Exhibit 1, First Appeal Analysis at 006. In its appeal, the City argued that FEMA incorrectly determined that the fire station should be repaired and not replaced. *Id.* The City contended that it was not feasible to repair a demolished fire station. It also pointed out that the fire station needed to meet certain local codes and standards and had to be elevated to comply with FEMA's elevation requirements. Finally, the City stated that its costs were reasonable in light of the remote location of the fire station and limited access to supplies. *Id.*

In November 2022, FEMA denied the City's first appeal, finding that the City did not show that enforceable codes and standards supported the additional square footage for the facility being sought by the City and that FEMA's recalculated repair cost estimate accounting for codes and standards, including elevation, was less than 50% of the replacement cost. RFA, Exhibit 1, First Appeal Analysis at 001.

IV. This Arbitration

A. The City's Position

The City filed its RFA in January 2023. The City argues that FEMA erred in its calculation under the 50% Rule by (1) failing to recognize that it is not feasible to repair a fire station which no longer exists; (2) failing to complete its Damage Description and Dimensions (DDD) analysis; (3) failing to include the cost of compliance with codes and standards to repair damaged elements in the numerator of the 50% Rule calculation; (4) improperly estimating part A costs for the repair numerator (\$224,276.71 rather than the \$882,360.29 requested by the City); and (5) and improperly estimating part A costs for the replacement denominator (\$833,727.41 rather than the \$1,386,970.01 requested by the City). RFA at 6.

The City also argues that FEMA, in its funding determination, improperly ignored the local engineer and floodplain manager's structural damage determination and substantial damage determination and improperly calculated the total cost for the replacement fire station, which the City maintains was \$3,899,295 (inclusive of parts A through H costs). RFA at 6-7; *see also* RFA, Exhibit 4 at 025.

The City supports its position in this arbitration with architectural, structural engineering, and cost estimating analyses. Mr. Rolando Rubiano, a licensed professional engineer (P.E.), was engaged by the City to assess damage from Hurricane Harvey and design the replacement fire station. Letter from Rolando Rubiano, P.E. to the Panel at 1 (Nov. 10, 2023) (Rubiano Letter). Mr. Rubiano opined that the fire station building "sustained significant structural damage from Hurricane Harvey winds and floodwaters which racked the superstructure, destroyed the walls, and twisted the columns which both frame the walls and support the roof of the structure." *Id.* at 2. He also opined that "[t]he replacement fire station must be hardened during its design and construction to such a level that it is resilient and can not only survive a disaster such as a hurricane, but function safely during a future disaster." *Id.* at 3. Regarding the required codes, he opined:

The roof, the structural walls, and the windows must be replaced to withstand 163 mph winds pursuant to the [International Building Code (IBC)] wind codes as [the fire station] is a Risk Category IV facility. All glazed openings need to be rated to withstand wind borne debris impact meeting the enhanced missile requirements of ASTM E1886 (Standard Test Method for Performance of Exterior Windows, Curtain Walls, Doors, and Impact Protective Systems Impacted by Missile(s) and Exposed to Cyclic Pressure Differentials) and ASTM E1996 (Standard Specification of Performance of Exterior Windows, Curtain Walls, Doors, and Impact Protective Systems Impacted by Windborne Debris in Hurricanes). The exterior roof, walls and windows must be secured

during a future disaster to meet the structural wind load performance requirements of ASTM E330 and ASTM E1592 as prescribed by the IBC. These are minimum building safety requirements required by the IBC which FEMA requires to be met in any structure.

Id. at 3-4.

Mr. Raymond Gignac, an architect engaged by the City, opined that the “fire station was damaged beyond repair” and that “the damaged fire station presented a danger to the youth in [the] community.” Letter from Raymond Gignac to the Panel at 2 (Apr. 19, 2023) (Gignac Letter). Mr. Gignac provided the same opinion as Mr. Rubiano about the need to harden the fire station during its design and construction to protect the station against future disasters. *Id.* at 3. He also opined that “[t]he roof, the structural walls, and the windows must be replaced to withstand 170 mph winds pursuant to the IBC wind codes.” *Id.* at 4. He added,

Furthermore, the roof and the walls . . . will have to meet the International Energy Conservation Code which is part of the 2012 [International Existing Building Code (IEBC)] Chapter 13 by reference. Thus, the roof and walls must be insulated to meet the Energy Conservation Code. The City of Port Aransas is located in climate zone 3A Therefore, when repaired or replaced, the roof must meet or exceed U-.048 or R-21. When repaired or replaced, the walls must meet or exceed U-110 or R-9.

Id. at 4.

Messrs. Rubiano and Gignac both noted in their reports that, in applying 44 CFR 206.226(d) regarding the eligibility of repairing or replacing a facility to code:

- They only applied codes required for the type of restoration, and since the fire station was a new construction, they only applied building codes that apply to new construction; if a repair was done, the code would apply to the repair.
- The codes applied were all appropriate to the pre-disaster use of the facility as a fire station.
- The building codes are reasonable and are not unique to Port Aransas. The codes are in writing and were formally adopted and implemented by the City of Port Aransas at the time of Hurricane Harvey or they are Texas state or federal laws.

- The City’s building codes apply uniformly to all similar types of facilities.
And
- The City’s building codes are and have always been enforced.

See Rubiano Letter at 3; Gignac Letter at 3.

The City also engaged Jerome Stock, a construction cost estimator, to assess the cost to repair and replace the fire station. Letter from Jerome Stock to the Panel (Apr. 18, 2023) (Stock Letter). Mr. Stock explained that he spoke to Mr. Gignac, among others, regarding the applicable Port Aransas building code and, based on that conversation, prepared a cost estimate in RSMeans for the repair and replacement of the facility.⁴ *Id.* at 1. He opined that, based on his “cost estimates and the FEMA 50% guidelines, the damage to the Port Aransas Fire Station exceeds 50% and the damaged facility is entitled to replacement.” *Id.* at 2. He estimated a repair cost of \$882,360.29 and a replacement cost of \$1,386,970.01. Exhibits S-14, Cost Estimate, REPAIR – Fire Station, Port Aransas, Texas (Jan. 11, 2023); S-16, Cost Estimate, Fire Station – Port Aransas, Texas (Jan. 13, 2023). As for the former, almost \$800,000 of the \$882,360.29 amount was for the repair of the “existing damaged foundation to support the fire apparatuses and the wind load requirements” and “[r]epairs to [the] entire steel structure to meet wind load requirements.” Exhibit S-14 at 2-4. Mr. Stock noted that his “cost estimate [was] prepared by building component as opposed to a room-by-room approach.” Stock Letter at 3.

Mr. Stock explained that he reviewed the part A portion of the cost estimate prepared by FEMA and attributed the difference in cost largely to an adjustment he made to reflect the cost of construction on the island where Port Aransas is located, as opposed to Corpus Christi. Stock Letter at 3. He noted that there have been significant increases in costs of construction since 2020. *Id.* He stated that he provided his “RS Means Part A cost estimate using Corpus Christi to David Putnam who adjusted it for Port Aransas and then input the information into FEMA’s Cost Estimating Format (CEF) program to estimate the total estimated cost for FEMA’s purpose.” *Id.*

As noted in Mr. Stock’s letter, Mr. David Putnam, a cost estimator with experience in FEMA disaster management and civil construction inspection, assisted with the preparation of the City’s repair and replacement cost estimates. Letter from David Putnam to the Panel at 1 (Jan. 27, 2023) (Putnam Letter). Mr. Putnam opined that “the scope of work

⁴ RSMeans is a database with construction cost data for materials, labor, and equipment. <https://www.rsmeans.com/info/contact/about-us> (last visited July 3, 2024). It includes over 92,000 line items for over 970 locations. *Id.*

along with the method of repair and means and methods proposed to comply with the IBC codes and standards set forth in the cost estimate prepared by the Stock Consulting Group is reasonable” and that the cost estimate “was prepared in compliance with FEMA’s 50% Rule guidance.” *Id.* at 2.

The City requests that the panel find the fire station eligible for replacement funding under FEMA’s 50% Rule and that the panel provide PA funding in the amount of \$3,899,295 for the project (part A–H costs). RFA at 19-20. After the filing of the RFA, the parties agreed on a replacement cost of \$1,386,970 for the 50% Rule calculation. FEMA’s Post Hearing Brief at 3; Applicant’s Post-Hearing Reply Brief at 1 n.1, 3, 13. The parties also agreed that the square footage of the replacement fire station is 6518.65 sq. ft., the same as that provided in FEMA’s CEF fact sheet, revised on December 14, 2021, and slightly above the 6454 sq. ft. estimate provided by the City’s expert. Letter from Michael G. Gaffney to the Panel at 1 (Nov. 10, 2023); Stock Letter at 2; *see also* RFA, Exhibit 3 at 001.

B. FEMA’s Response

In its response to the RFA, FEMA argues that the City is only entitled to repair costs. FEMA’s Response at 8. Using 2024 RSMeans costs, FEMA revised its calculation of the repair costs to be \$259,040.55, a slight increase from the \$224,276.71 amount discussed in its determination memorandum but still insufficient under the 50% Rule to support PA funding for replacement costs, which the parties have agreed is \$1,386,970. *Id.*; FEMA’s Post Hearing Brief at 3. FEMA states that its 50% Rule calculation resulted in an 18% repair-to-replacement cost. FEMA’s Post Hearing Brief at 3.

Additionally, FEMA disputes the City’s assertion that the DDD report did not account for all damages, especially because the applicant “was involved in the development of the DDD and was responsible for identifying damages to the facility, and ultimately approved the DDD prior to the development of any SOW and associated cost estimate.” FEMA’s Response, Exhibit 3, Declaration of Cliff Cotillier (Feb. 16, 2023) ¶ 8. The agency also disputes the City’s assertion that FEMA relied solely on the DDD document when calculating the 50% Rule number. *Id.* ¶ 9. FEMA explains that it considered the damages claimed by the City and “the actual line items listed in the CEF Part A which FEMA used when determining the total dollar amount for repair and replacement costs.” *Id.* FEMA notes that these actually “aligned with the eligible scope of work and the proper square footage, which the [a]pplicant now concurs with.” *Id.*

As relates to the City’s claims regarding wind loading, FEMA notes that “until this RFA, the [City had] not requested or provided information to FEMA regarding damages or triggered codes in relation to: (1) a new wind load requirement for the roof; (2) a superstructure, skin and walls for the structure with a new IBC minimum load requirement;

nor (3) the building foundation.” FEMA’s Response at 11. FEMA asserts that, prior to the filing of this RFA, the City had not documented damages to the roof and the foundation, “despite approving the DDD which did not include any of the damages claimed and/or reference to a triggered code.” *Id.*

In response to the City’s argument that FEMA failed to adequately consider the City’s damage determination, FEMA argues that the City’s substantial damage determination is inapplicable to the 50% Rule analysis and, further, that the determination did not follow substantial damage development guidelines as the required calculation was not conducted or performed by the floodplain manager. FEMA’s Response at 12-13; *see* Cotillier Declaration ¶ 10.

As for the City demolishing the fire station prior to funding issues being resolved, FEMA asserts that what an applicant ultimately decides to do with a facility “is not tied to FEMA’s determination regarding repair vs. replacement” funding. Cotillier Declaration ¶ 6. The agency argues:

Applicant chose to demolish the Facility while eligibility of scope and costs were still under review, as a result of Applicant’s continued change[s] to its own request. Policy identifies, “If the Applicant begins work associated with a change before FEMA review and approval, it will jeopardize PA funding.” [Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018)] V3.1, Page 136. Had the Applicant provided all relevant codes and standards information to FEMA in its original request, the Facility would have been found eligible only for repair funding to begin with.

Cotillier Declaration ¶ 5.⁵

FEMA also notes that the City “was provided temporary facilities to operate out of, funded by FEMA, . . . so there was no immediate need to demolish the Facility.” FEMA’s Response at 14.

In its post-hearing brief, FEMA explained that, “[i]f the Panel agrees with FEMA that the [fire station] is only eligible for repair, then FEMA will take the next step, and work with the [City] to develop a new cost estimate to add elevation costs to the eligible repair cost total. If that updated cost to repair and elevate the facility is greater than the replacement cost, the repair cost will be capped at the replacement cost in accordance with FEMA

⁵ FEMA applies Version 3.1 of the PAPPG to incidents declared on or after August 23, 2017. PAPPG at vii.

policy” FEMA’s Post-Hearing Brief at 4. At the time of the filing of its post-hearing brief, FEMA had determined that “the cost to elevate per city flood plain standards with a new facility at the established square footage would [be] \$1,327,932.16,” *id.* at 3, which is very close to the \$1,386,970.01 replacement cost to which the parties have agreed in this arbitration.

Discussion

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the statutory authority for FEMA’s federal disaster response activities. Congress enacted the Stafford Act to provide “assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [major] disasters.” 42 U.S.C. § 5121(b) (2018). The Stafford Act is “designed to assist the efforts of [eligible entities affected by major disasters] in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas.” *Id.* § 5121(a).

There are four components of PA eligibility: the applicant, the facility, work, and costs. PAPPG at 9. Through the PA program, FEMA provides funding for emergency protective measures and debris removal, and, relevant here, for permanent restoration of damaged facilities. *Id.* at 19. The purpose of permanent work is to restore a facility to its pre-disaster design and function in accordance with applicable standards. 44 CFR 206.201(j); PAPPG at 84.

There is no dispute that the City is an eligible applicant and that the fire station is an eligible facility. However, as explained below, the City’s evidence as to the project work and its cost is insufficient for the panel to find that the City is entitled to PA funding for the facility’s replacement cost under the 50% Rule.

I. The Work

As relates to project work and cost, FEMA and the grantee work with the applicant to “formulate incident-related damage and work into projects (i.e., subawards) based on logical groupings of the damage and work.” PAPPG at 133. FEMA, the grantee, and the applicant “should reach agreement on the [DDD], emergency protective measures, and debris impacts before proceeding with SOW development.” *Id.* at 134. FEMA uses the PW as the subaward application “to document details of the [a]pplicant’s project, including a detailed description of the disaster-related damage and dimensions [or DDD] and the associated [SOW] and costs.” *Id.* at 133. Ultimately, however, it is the applicant’s responsibility to substantiate any claimed item as eligible for PA funding. *Id.* “If the

[a]pplicant does not provide sufficient documentation to support its claim as eligible, FEMA cannot provide PA funding for the work.” *Id.*

Almost \$800,000 of the \$882,360.29 of the City’s claimed repair costs is for “[r]epairing the existing damaged foundation to support the fire apparatuses and the wind load requirement” and “[r]epairs to [the] entire steel structure to meet wind load requirements.” Exhibit S-14 at 2-4. However, as FEMA notes, prior to this RFA, the City had not documented damage to the fire station’s foundation and roof. FEMA’s Response at 11. The omission is particularly telling given (1) that the City was involved in developing and approving the DDD, and (2) the subsequent rounds of communication between FEMA and the City regarding the SOW for the fire station. *Id.* at 10; Cotillier Declaration ¶ 8 (applicant was involved in development of the DDD and responsible for identifying damages to the facility). In light of the City’s active involvement in detailing the project scope, the lack of pre-RFA documentation discussing specific damage to the fire station’s roof and foundation undermines the City’s position. The engineering firm hired by the City to conduct a post-disaster damage assessment determined – based on a visual observation – that the concrete slab foundation showed no visible damage and did not opine on any damage to the roof. *See* Exhibit S-6.

And, even in this arbitration, while the City’s experts found that the building sustained significant structural damage and that certain building components needed to comply with codes, they did not provide any details on the damage to the foundation and roof or provide any details on the state of those two structural items after the storm. *See* Gignac Letter; Rubiano Letter. Accordingly, given the absence of sufficiently probative documentation as to damage to the roof and the foundation, the panel does not have a basis to find the City’s repair cost estimate to be reasonable. Lacking a supported repair cost estimate (i.e., an amount for the numerator for a 50% Rule calculation), the panel is unable to consider whether the City is entitled to replacement cost under the 50% Rule.

II. The Cost Estimate

A. Lack of Certification and Detail Supporting Cost Estimate

Prior to this arbitration, FEMA and the City went through multiple rounds of communication trying to determine part A base construction costs for the purpose of a 50% Rule calculation but were unsuccessful. *See, e.g.*, RFA, Exhibit 3. As previously mentioned, the parties were able to agree in this arbitration on a replacement cost of \$1,386,970. However, they have been unable to agree on a repair cost number. In its response to the arbitration, FEMA revised its repair number to \$259,040.55, slightly above the \$224,276.71 presented in the CEF fact sheet, and that formed the basis for FEMA’s determination

memorandum. FEMA's Post Hearing Brief at 3; RFA, Exhibit 1 at 012. The City, for its part, calculated a repair cost of \$882,360.29. Exhibit S-14 at 4.

Even if we assume that the foundation and roof were damaged for the purpose of conducting a 50% Rule evaluation, the City has not provided the type of documentation on its repair costs for the fire station that FEMA could use, or on which FEMA could rely, to determine PA eligibility. Specifically, FEMA will use an applicant's cost estimate to find PA eligibility if it: (1) is prepared by a licensed professional engineer or other estimating professional who certifies that the estimate was prepared in accordance with industry standards; (2) includes certification that the estimated cost directly corresponds to the repair of the agreed upon damage; (3) is based on unit costs for each component of the SOW and not a lump sum amount; (4) contains a sufficient level of detail for FEMA to validate that all components correspond with the agreed-upon SOW; and (5) is reasonable. PAPPG at 138.

The City's cost estimate provided in this arbitration does not include the requisite certifications. In addition, we are not certain that the components listed in the estimate correspond with the agreed-upon SOW, particularly since elements of the components are presented for the first time in this arbitration. Stock Letter; Putnam Letter; Exhibit S-14; FEMA's Response at 11 ("[U]ntil this RFA, the [City had] not requested or provided information to FEMA regarding damages or triggered codes in relation to: (1) a new wind load requirement for the roof; (2) a superstructure, skin and walls for the structure with a new IBC minimum load requirement; nor (3) the building foundation."). In light of PAPPG requirements related to cost estimates, we decline to rely on the City's estimates.

B. Lack of Detail Supporting City's Position on Codes

Putting aside the issues with the lack of certification and detail relating to the City's cost estimate discussed above, the panel has other concerns with the estimate, including the City's application of codes in its cost estimate. Under FEMA's regulations, the cost to repair or construct a facility to conform with minimum codes, specifications, and standards may be eligible for reimbursement under the Stafford Act as long as such codes, specifications, and standards: (1) apply to the type of repair or restoration required; (2) are appropriate to the pre-disaster use of the facility; (3) are found reasonable, in writing, and formally adopted and implemented by the State or local government on or before the disaster declaration date or are a legal requirement applicable to the type of restoration; (4) apply uniformly to all similar types of facilities within the jurisdiction of the owner of the facility; and (5) must have been enforced during the time it was in effect (as for any standard in effect at the time of a disaster). 44 CFR 206.226(d); *see also id.* 206.401.

Although the City's experts addressed the building codes that must be applied to the repair or replacement of the fire station and what must be done to ensure that the building

could withstand a future disaster, *see, e.g.*, Gignac Letter, the panel cannot discern whether the City's position on the applicability of certain codes is consistent with FEMA regulations and guidance. The arbitration record contains conclusions on the appropriateness of certain codes but insufficient analysis for the panel's needs. *See* Rubiano Letter; Gignac Letter.

Mr. Stock, the City's cost estimator, explained that he spoke to Mr. Gignac, among others, regarding the provisions of the Port Aransas building code, and based on those conversations, he prepared a cost estimate in RSMeans for the repair and replacement of the facility. Stock Letter at 1. The City provided no further detail on the discussions between Mr. Stock and the City's other experts regarding applicable codes. Mr. Stock also stated that his cost estimate, unlike FEMA's, "was prepared by building component as opposed to a room-by-room approach." *Id.* at 3. However, as mentioned, the record does not include documentation tying a code to a component or group of components or explain why the application of the code is appropriate. Further, Mr. Stock attributed the difference in his and FEMA's cost estimate to an adjustment he made to reflect the cost of construction on the island where Port Aransas is located. *Id.* However, he did not elaborate on these differences. Thus, based on review of the expert opinions presented in the arbitration concerning codes and the City's cost estimates, the panel is unable to determine how – or if – the codes identified by the City's experts impacted the values listed in the City's repair cost estimate. *See* Exhibit S-14.

C. The 50% Rule

Because of the issues that we find with the City's repair cost estimate, the panel cannot use the City's number for the purpose of a 50% Rule calculation (i.e., cannot use the City's number as the numerator) and therefore cannot determine whether the City is entitled to replacement costs. Accordingly, we find that the City has not met its burden of showing entitlement to PA funding for the replacement cost of restoring its fire station.

We find that the City's other arguments relating to the 50% Rule and PA funding lack merit. Regarding the City's argument that FEMA failed to complete its DDD, RFA at 6, the PAPPG is clear that an applicant, FEMA, and the grantee are involved in developing the DDD. PAPPG at 133-34. That happened here. FEMA explained that the City "was involved in the development of the DDD and was responsible for identifying damages to the facility, and ultimately approved the DDD prior to the development of any SOW and associated cost estimate." Cotillier Declaration ¶ 8. Thus, given the City itself was involved in the development of the DDD, its argument about the incompleteness of the DDD by FEMA is not persuasive. The City's assertion that FEMA ignored the local engineer and floodplain manager's structural damage determination and substantial damage determination is also unavailing. The PAPPG states that "[a] floodplain manager's Substantial Damage determination," part of the National Flood Insurance Program eligibility process, "is separate

and distinct from FEMA’s 50% Rule.” PAPPG at 100. Thus, the City’s engineer and floodplain manager’s determinations are inapplicable to the PA funding issues raised in this arbitration. Regarding the City’s position that it is entitled to replacement costs because the fire station was demolished, we disagree. FEMA’s explanation on that point was reasonable – what an applicant does to a facility “is not tied to FEMA’s determination regarding repair vs. replacement” funding. Cotillier Declaration ¶ 6. Thus, although the City demolished the fire station (perhaps for good reason, *see* Gignac Letter at 2 (discussing safety concerns with the damaged fire station)), FEMA’s process for determining PA funding eligibility under its “repair versus replacement” regulations and policies is nevertheless the same. As explained in this decision, based on FEMA’s regulations and the record, the panel finds that the City has not shown that it is entitled to replacement costs.

Decision

The City is not entitled to the cost of replacing the fire station. We return this matter to FEMA for the parties to develop a new repair cost estimate and to add elevation costs to the eligible repair costs.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge