



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 8, 2024

CBCA 7969-FEMA

In the Matter of CITY OF FELLSMERE, FLORIDA

Warren Dill of Dill, Evans & Rhodeback, Sebastian, FL, counsel for Applicant; and Mark D. Mathes, City Manager, Claudia Magallon-Alvarado, Finance Director, and Andy Shelton, Public Works Director, City of Fellsmere, Fellsmere, FL; and Carter Hamill, Disaster Consultant, DIR Consulting, Jeffersonville, IN, appearing for Applicant.

Stephanie Stachowicz (Twomey), General Counsel, and Matthew Toplak, Recovery Attorney, Florida Division of Emergency Management, Tallahassee, FL; and Dezirée T. Elliott, Senior Attorney, Florida Division of Emergency Management, Orlando, FL, counsel for Grantee; and Cassie Sykes, Appeals Officer, Melody Cantrell, Recovery Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Anthony Homer, 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 **LESTER**, **RUSSELL**, and **KULLBERG**.

RUSSELL, Board Judge, writing for the Panel.

The applicant, City of Fellsmere, Florida (applicant or City), seeks arbitration over the denial by the Federal Emergency Management Agency (FEMA) of the City's request for public assistance (PA) funding in the amount of \$1,619,322.18 for the repair of unpaved roads which the City argues were damaged by Hurricane Irma. FEMA denied the City's request for several reasons, including that the City failed to demonstrate that the claimed

damage was a direct result of the hurricane and failed to provide adequate documentation demonstrating that the roads were not deteriorated or subject to deferred maintenance prior to the hurricane.

The parties agreed to a hearing on the written record pursuant to Board Rule 611 (48 CFR 6106.611 (2023)). For the following reasons, we uphold FEMA's determination and deny the City's claim.

Background

I. The Disaster

On September 10, 2017, Hurricane Irma made landfall in Florida and caused damage to communities throughout the state. Request for Arbitration (RFA), Exhibit 1, First Appeal Analysis at 1.¹ That same day, the President declared the event a major disaster, designated as FEMA-4337-DR-FL. *Id.*

II. The Damage

The City reported damage caused by surface water flooding and high velocity water flows along several unpaved roads, claiming that it lost six inches of road surface material along the entire length and width of the roads. Exhibit 1, First Appeal Analysis at 1, 3.

A. Site Inspection Report

In October 2017, FEMA sent site inspectors to the City, who inspected nineteen sites on October 30 and twenty-three sites on October 31. *See* Exhibit 4. Each site consisted of an unpaved road or a segment thereof in the City. *Id.* The reports from these inspections indicated potential damage due to overland flooding for all forty-two sites. *Id.*

B. Photo Review

In December 2021, as part of its review, FEMA examined photographs of the roads taken after the hurricane. Exhibit 1, First Appeal Analysis at 1. The photographs are

¹ All exhibits are from the RFA unless otherwise noted.

included in the arbitration record. *See* Exhibit 7.² For the road shown in Photo 1, FEMA determined:

It appears that there was base rock as seen in the photo. However, it doesn't matter to the issue of damage or not. Even if the coquina mix was "deteriorated" over the years, that is deferred maintenance, not storm damage. Second, the pictures do not show any major damage. They show runoff of rock or topping into the ditches/swales but never does it impair the ability of the drainage to perform [its] function. This photo clearly shows damage at the [corrugated metal pipe (CMP)] area. That is where any damages took place.

Id.

For the road shown in Photo 2, FEMA determined that the photo "show[ed] repair at the CMP" but "no or minimal debris in the drainage area." Exhibit 7. FEMA added that "[t]he repair to the components around the pipe could be eligible." *Id.*

For the road shown in Photo 3, FEMA determined:

This is a swale filled with debris from the road. The debris does not reach the pipe and there is a high amount of "old" or existing debris/overburden before the entrance of the pipe. This amount does not indicate 6" of road rock missing over the entire intersection, it indicates minor seepage (as designed [sic]) into the swale. The eligible cost would be to remove the debris and replace that amount on the roadway. The pipe is designed to take a certain amount of debris. As grass can be seen at the pipe entrance, that appears to be existing before the rains of Irma.

Exhibit 7.

For the road shown in Photo 4, FEMA stated that the photo "shows some runoff into the ditch" but that the runoff "was not excessive and [wa]s taken into account for the design." Exhibit 7. For the road shown in Photo 5, FEMA stated that the photo showed "clean swale except for [the] area that was cut to relieve water on [the] street. Debris is minor and swale performed as designed. No debris can be seen on [the] walls of swale. Clearly 6" of

² Although these photos were originally provided in a spreadsheet, the document provided to the Board is a PDF composed of screenshots from the original document. In this decision, because the PDF document does not have page numbering, we will reference the photos by number according to the order in which they appear in Exhibit 7.

rock/dirt was not lost on [the] roadway.” *Id.* FEMA stated that the road in Photo 6 showed minimal debris. *Id.* For the road shown in Photo 7, FEMA determined that there was damage around a pipe that would be eligible for repair but that there was “no perspective of the rest of the road to make a judgement to the full extent of damage.” *Id.* FEMA stated that the road shown in Photo 8 contained minimal debris and was largely intact and driveable. *Id.* And for the road shown in Photo 9, FEMA stated that there was minor side debris, the road was intact and driveable, and it “[a]ppears to be [the] pre-disaster condition.” *Id.*

C. Maintenance Record

The City states that, prior to Hurricane Irma, it “maintained a minimum level of Stabilizer on [its] unpaved roadways, enough to ensure grader operations could create road surfaces that have smooth planes and positive drainage (all city roads being graded twice per month at minimum).” RFA at 8. In late 2017, the City obtained estimates from a contractor to grade and compact the existing stabilizer and apply a new six-inch layer of stabilizer on all of the affected roads. Exhibit 6 at 4-5. The City forwarded this information to FEMA. In early 2018, a FEMA program delivery manager (PDMG)³ and FEMA costing specialist discussed the estimates, and the costing specialist indicated that the estimates “look[ed] like . . . quit[e] an upgrade from what [the City] had going on before.” *Id.* at 2. The costing specialist further indicated that the maintenance information the City had provided was not sufficient for FEMA to evaluate the City’s claim for funding, because these records did not show “how and when [the City] add[ed] surfacing” prior to the event. *Id.*

In support of its first appeal and this request for arbitration, the City submitted a 577-page PDF entitled “Historical Maintenance Record” (maintenance record). Exhibit 3. As FEMA indicated in the first appeal, this document consists of a “summary of [the City’s] Public Works Department’s monthly hours spent on various activities between September 2014 through December 2017,” a “ledger showing all expenditures for fiscal years 2005 through 2021,” “[i]nvoices, purchase orders, and cancelled checks showing expenditures for engineering services, material purchases, and equipment,” “[g]rant funding applications and contractor payments for post-event projects such as public park improvements, sidewalk additions, [a] skate park, and road paving,” and an “[a]nnual summary of expenditures by category for fiscal years 2013 through 2017.” Exhibit 1 at 5-6.

³ The PDMG is the point of contact that FEMA assigns to each applicant to provide assistance to the applicant throughout the PA grant development process. *See* www.fema.gov/sites/default/files/2020-07/fema_pa_delivery-model_factsheet.pdf (last visited July 2, 2024).

The panel notes the following about the maintenance record. First, most of the pre-disaster expenditures categorized as “street repair” do not identify which road was repaired. *See* Exhibit 3 at 66, 68, 70, 72, 74-75, 79-81, 85-86, 88, 90, 94, 96, 98, 100. *But see id.* at 78 (“corner of Alabama and Oleander”), 81 (“101st street”), 100 (“89th and Broadway” and “S Maple St”). Five of those six named roads are sites for which the City seeks reimbursement. *See* Exhibit 4 at 2–3 (Oleander), 11–13 (South Maple and Broadway) 16 (Alabama and 89th). However, the maintenance record for these roads reflect work done well before the hurricane, Oleander (2007) and 101st Street (2009), or after the hurricane, 89th and Broadway (Oct. 13, 2017) and South Maple Street (Sept. 10, 2018). Exhibit 3 at 78, 81, 100.

Second, just over half of the pre-disaster expenditures categorized as “right-of-way” identify which road was affected.⁴ *See* Exhibit 3 at 75 (“Hickory Street” and “Orange Street” swales; record for these sites from 2005 and 2006, respectively), 80 (“Wyoming and Oak St” culvert pipe; record from 2007), 88 (“N Pine Street” road repair⁵ and “Magnolia St to New York Ave” culvert replacement; record from 2012 and 2017, respectively), 90 (“North Orange St” and “Orange Ave” culvert pipe; records from 2013), 92 (“Virginia Ave & S Magnolia St” pipe and culvert; record from 2014), 94 (“Louisiana” culvert replacement and “NY & Maple” ditch survey; record from 2014 and 2015, respectively), 96 (“S Pine St” swale work and “89th St” ditch sod repair; record from April 2016 and May 2016, respectively), 99 (“Virginia Ave” pipe repair; record from 2017). *But see id.* at 75, 77, 80, 82, 84, 86 (no road identified). All of the roads named in relevant right-of-way jobs were sites for which the City seeks reimbursement in this application except for New York Avenue. *See* Exhibit 4 at 3-6 (North Maple, North Magnolia, North Orange, North Hickory, North Oak, Wyoming, and North Pine), 11-16 (South Maple, South Magnolia, South Orange, South Pine, South Hickory, South Oak, Louisiana, Virginia, and 89th).

Third, three other expenditures in other categories appear relevant. *See* Exhibit 3 at 74 (“Elm Street” drainage improvement; record from 2005), 77 (same; record from 2006), 117 (stabilizer to repair draining issues on “S. Bay;” record from September 2016). The City is seeking reimbursement for both of these roads. *See* Exhibit 4 at 4 (North Elm), 14 (South Bay and South Elm).

⁴ “Right-of-way” jobs include some work irrelevant to this arbitration, such as tree removal. The panel has only considered those expenditures which are, or appear to be, relevant to the arbitration (including for context), e.g., installation of culverts, repair of swales, and ditch surveys.

⁵ This job was categorized as “right-of-way” despite its “road repair” description.

Fourth, of the forty-two sites for which the City seeks reimbursement, eighteen do not have any relevant entries in the maintenance record at all. *See* Exhibit 4 at 4-7 (North Bay, North Lime, North Mulberry, “1st Pl. (100th Pl.) (East Street),” 100th, South Carolina, Idaho, Oregon, and Colorado), 12 (South Cypress), 14–17 (South Lime, South Mulberry, Tennessee, Michigan, Maryland, Massachusetts, and California).

Fifth, the only expense after the hurricane that related to culverts was a “professional services” expense to produce and update a “culvert atlas.” Exhibit 3 at 123.

III. Procedural History

By a determination memorandum dated August 4, 2022, FEMA denied the City’s claim for PA funding to repair the City’s unpaved roads following Hurricane Irma. Exhibit 2. The City subsequently filed its first appeal, which FEMA denied on November 6, 2023. Exhibit 1. In its decision denying the appeal, FEMA found that the documentation submitted by the City in support of its claim failed to tie the alleged damage to Hurricane Irma but instead suggested that any damage was the result of normal deterioration and deferred maintenance. *Id.*; *see* FEMA’s Response to RFA (FEMA’s Response) at 1-2. The City timely filed its RFA with this Board on December 27, 2023, disputing that its documentation was insufficient to show a tie between the alleged damaged roads and the declared event and alleging prejudice and discrimination on the part of FEMA in processing its request for PA funding. RFA at 2-3, 10-11.

In support of its response to the RFA, FEMA provided the declaration of Charles Donaldson, a professional engineer with nine years of experience working in the PA field. FEMA’s Response, Declaration of Charles Donaldson (Jan. 29, 2024). According to Mr. Donaldson, “[f]or unpaved roads, FEMA would, at a minimum, expect to see regular road material replenishment, grading and leveling, and other work to address normal wear and tear to the roads.” *Id.* ¶ 6. He added that the City “claims 6” worth of fine road material was lost, resulting in stability issues, yet the [City’s] photographs provide no evidence of such loss and the [City] provides no additional documentation to support this claim.” *Id.* Mr. Donaldson stated that “[t]o determine a quantity of fine material lost and/or any subsequent stability issues, if any, would require geotechnical reports, before and after the disaster to demonstrate the accuracy of the quantities claimed and disaster as the cause.” *Id.* In addition, Mr. Donaldson opined that “the post-disaster photographs either show little or no loss of material or insufficient evidence of actual disaster damages.” *Id.* ¶ 7.

Discussion

At issue is whether FEMA properly denied PA funding for the repair of the City's unpaved roads. Our authority in this matter is pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), and we review the matter de novo. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980.

Eligibility for PA funding requires that eligible facilities be “damaged . . . by a major disaster.” 42 U.S.C. § 5172(a)(1)(A); *see also* 44 CFR 206.223(a)(1) (requiring work be “the result of the emergency or major disaster”). Although roads are eligible facilities, FEMA does not provide PA funding to repair damage caused by deterioration, deferred maintenance, the applicant's failure to take measures to protect the facility from further damage, or negligence. Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19-20. Further, FEMA policy guidance states:

[An] incident may cause minor damage . . . similar to that which may occur over time from other causes, such as the age of the road, traffic flow, and frequent rain. Therefore, distinguishing between pre-existing 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.*

When evaluating eligibility of reported road damage, in addition to evaluating how the incident caused the damage, *FEMA reviews maintenance records or documentation establishing that the Applicant has a routine maintenance program.* In the absence of maintenance records, FEMA reviews material purchase invoices and activity logs and inspects other sections of the Applicant's road system to confirm the performance of normal maintenance activities.

Id. at 116 (emphasis added).

As an initial matter, we find that the City has not provided sufficient evidence on its asserted loss of six inches of fine particulate matter from the unpaved roads. Mr. Donaldson's declaration is persuasive on this point, i.e., that determinations on such loss, at least for those of a probative nature, are made as a result of geotechnical studies. Here, the City has provided neither such a study to support its claim nor any other evidence, such as affidavits or declarations from anyone with the requisite technical expertise. Further, none of the photographs shows evidence of disaster-related road damage, although there is some indication that other types of damage (e.g., to the pipes) may have occurred. In light of the

lack of evidentiary support, we are unable to find that the claimed damage was a result of the hurricane.

Even assuming that there was damage (and the City urges that FEMA’s site inspection reports evidence such, RFA at 8), the City’s maintenance record fails to demonstrate that routine maintenance was conducted on the roads leading up to the event. *See* PAPPG at 116. First, the fact that almost half of the inspected sites are not mentioned in the maintenance record eliminates any possibility that these sites would be eligible for funding. Second, what was produced were various general ledger documents, receipts, contractor applications for payment, and other materials showing that a majority of the street or right-of-way work was performed either well before or after the disaster. Third, the maintenance record does not show that the City undertook replenishing, grading, or leveling of the unpaved roads before the declared event. *See* FEMA’s Response, Donaldson Declaration ¶ 6. And fourth, the City did not provide documentary evidence to tie its maintenance record to a routine maintenance program or explain, through declarations or other probative material, how the maintenance record evidenced the existence of a routine maintenance program. In *Bossier Parish Police Jury*, CBCA 6651-FEMA, 20-1 BCA ¶ 37,557, a panel of this Board relied upon the applicant’s “road-by-road documentation on maintenance activities” along with documentation of a “three-year-cycle road program” to find that road damage was caused by the disaster. 20-1 BCA at 182,355. Although a small city like Fellsmere obviously might not have the same resources as the local government in *Bossier Parish*, “activity logs showing repair work” are “the types of documents that even a small local public roads department . . . should be able to produce.” *Monroe County Engineer*, CBCA 7288-FEMA, et al., 22-1 BCA ¶ 38,142, at 185,261. The City’s record falls far short of the documentation required for the Board to find that the damage at issue was disaster-related.⁶

Lastly, we note that, although the City alleges “prejudice” and “discrimination” by FEMA in processing the City’s request for PA funding, RFA at 6 and 11, it has provided no facts to support the allegation. We find the allegation conclusory and, thus, lacking merit.

⁶ FEMA concedes that, based on the photographs, there is damage to at least two CMP culverts as a result of the storm, and the photo review indicated that repairs to these culverts could be considered eligible expenses. However, this issue is not before the panel.

Decision

Based on the record, the panel finds that the roads at issue in this arbitration are ineligible for PA funding.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge