



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 4, 2025

CBCA 8101-FEMA

In the Matter of BUENA VISTA COUNTY CONSERVATION BOARD

Brian Shust of Nyemaster Goode, P.C., Cedar Rapids, IA; and Keith Duffy of Nyemaster Goode, P.C., Des Moines, IA, counsel for Applicant.

Dennis T. Harper, Alternate Governor's Authorized Representative, Iowa Homeland Security and Emergency Management Department, Windsor Heights, IA, appearing for Grantee.

Maureen Dimino 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 **GOODMAN**, **SHERIDAN**, and **NEWSOM**.

GOODMAN, Board Judge, writing for the Panel.

Buena Vista County Conservation Board (applicant or BVC) has filed a request for arbitration (RFA) related to the Federal Emergency Management Agency's (FEMA) denial of its first appeal, on March 14, 2024, seeking public assistance (PA) funding for damage to Linn Grove Dam and Park (together, the Linn Grove Recreation Area, separately the dam and park) located in the City of Linn Grove, Buena Vista County, Iowa.

Applicant alleges that the damage is the direct result of two disasters that occurred in July 2018 and March 2019. The RFA seeks PA funding in the capped amount of \$7,563,137.44, the full amount of the projects that FEMA de-obligated in denying the first

appeal.¹ In its reply to FEMA's response to the RFA, applicant has reduced the scope and amount of its request for reimbursement to \$6,068,422.99. The parties have submitted the case to be decided on the written record as a "paper hearing" pursuant to Board Rule 611 (48 CFR 6101.611 (2023)).

Background²

The Disasters and Requests for PA

Applicant owns the majority of the Linn Grove Recreation Area and manages the entire area. From June 6 through July 2, 2018, weather events occurred resulting in a major disaster declaration, FEMA-4386-DR-IA (DR 4386), authorizing FEMA to provide PA to applicant. Applicant requested PA for damages caused by severe flooding to the dam and park, including damage to the parking lot, restroom, roads, and several park sites that suffered embankment erosion and additional PA for debris removal. RFA at 3-6. From March 12 through June 15, 2019, before FEMA obligated any PA funding with regard to DR 4386, additional weather events occurred resulting in another disaster declaration for Iowa, FEMA-4421-DR-IA (DR 4421). DR 4421 authorized FEMA to provide PA to applicant. RFA at 8.

Applicant sought PA funding for damage to the dam and park, asserting that the damage to the dam was neither pre-existing nor the result of deterioration or deferred maintenance and that the damage to the park was also not pre-existing, as the park was improved land with a restroom and parking lot that had been previously maintained. RFA at 2. The RFA contains a detailed description of the damage which applicant asserts was caused by the disasters. RFA at 8-9.

Within a few months of DR 4421 and while DR 4386 was still being processed by the parties, FEMA asked applicant to withdraw all permanent work projects from DR 4386 and re-create all projects under DR 4421. This allowed for any reported damage to the dam and

¹ The applicant states that it sought an increase in the capped amount for reasons that are unrelated to its PA eligibility. The RFA is only for the de-obligated capped amount of \$7,563,137.44. RFA at 1 n.1.

² We write "primarily for the parties" and omit unnecessary details. Rule 613; *see Diamond v. Shulkin*, 692 F. App'x 637, 637 (Fed. Cir. 2017); *School Board of Bay County, Florida*, CBCA 7889-FEMA, 24-1 BCA ¶ 38,518, at 187,220. The extensive record contains detailed descriptions of the disasters, alleged damage, and prior history of submissions to FEMA which have been considered by the panel and referenced herein.

park from DR 4386 that was not yet restored to pre-disaster condition to be captured by the projects for DR 4421. RFA at 11; Applicant's Exhibits 5 at 00075, 6 at 00081.

Applicant initially consulted an engineering firm, ISG, Inc. (ISG), to help design and construct repairs to the dam and park. ISG sent scope of work (SOW) estimates for the dam (Grants Manager Project 92087 - Project Worksheet (PW) 1288) and park (Grants Manager Project 92096 - Project PW 1273) to applicant in late 2019 and early 2020, which documents were forwarded to FEMA. When applicant and FEMA determined that the original SOW and cost estimates were missing critical work items, applicant retained another engineering firm, Emmons and Oliver Resources, Inc. (EOR), to document necessary work items and to create itemized cost estimates to restore both projects back to pre-disaster conditions. Applicant's Exhibit 6 at 00081. Applicant sent EOR's amended SOW report and cost estimates to FEMA for both projects in February 2021. RFA at 12.

FEMA Obligates PA Funding

On August 31, 2021, FEMA obligated PW 1288 for the dam in the amount of \$3,106,446.40 and PW 1273 for the park in the amount of \$4,456,691.04, totaling \$7,563,137.44. RFA at 12. On October 19, 2021, the Iowa Homeland Security and Emergency Management Department (the recipient) forwarded applicant's request to FEMA to administer both PWs as alternate projects. By so doing, the funds would be capped at the estimated amounts in projects which might be awarded for purposes other than the restoration of the dam and park to pre-disaster condition. *Id.* at 12-13.

Applicant Seeks Additional Funding

On May 10, 2022, applicant, through the recipient, sought a version change in the capped amount of approximately \$1,970,753.20 in additional funds based on FEMA's alleged error in using the wrong cost estimating documents related to PA for the park, as well as increased costs due to inflation based on FEMA's delays in processing and obligating the projects. RFA at 13.

FEMA Moves Project Worksheets to Alternate Project

On September 2, 2022, FEMA moved PW 1273 to an alternate project so its funds could supplement PW 1288, and on December 1, 2022, FEMA approved applicant's request to change PW 1288 to an improved project, and the whole project would be capped at the obligated amount of \$7,563,137.44. RFA at 14.

FEMA Determination Memorandum Denying Version Change, Applicant's Appeal, and FEMA's Requests for Information

On October 25, 2022, FEMA issued a determination memorandum (DM) denying applicant's May 10, 2022, version change request. *Id.* On February 6, 2023, the recipient sent applicant's appeal of the DM to FEMA. On May 5, 2023, FEMA sent to applicant its Requests for Information (RFIs) regarding its appeal allegations, as well as new questions about applicant's eligibility for PA funding. On June 29, 2023, applicant sent a response to FEMA's RFIs (RFI Response). In its RFI Response, applicant alleged that the damage to the dam caused by the disasters was neither pre-existing nor the subject of previous repairs, with the exception of minor revetment (i.e., riprap) on the embankments. Further, applicant stated that the park and dam were "intertwined, overlapping features, and therefore must be considered together for restoration to pre-disaster conditions." Applicant's Exhibit 17 at 00496; RFA at 14-16.

FEMA's Denial of Requested Increases in PA Funding and De-Obligation of Previous PA Funding

On March 14, 2024, FEMA denied applicant's requested increase to the capped amount and de-obligated all project funding due to eligibility issues. FEMA concluded that applicant's documentation showed that damage to the dam was "a result of pre-existing damages, insufficient repairs, and inadequacies" rather than "a direct result of the disaster." Applicant's Exhibit 6 at 00099. FEMA also determined that, besides damages to the south entry road, hydrants, and water line, the park land was unimproved ground and the pre-disaster condition of the restroom and parking lot could not be established. *Id.* at 00099-100.

Discussion

Standard of Review

"In arbitration matters, the panel reviews FEMA eligibility determinations de novo." *University of Southern California*, CBCA 8121-FEMA, 24-1 BCA ¶ 38,695, at 188,125. "This review extends to determinations of issues of fact." *Id.* "It is the applicant's burden to support its application for PA funding." *Id.*

FEMA's Position

FEMA maintains that the dam is ineligible for FEMA PA funding because the dam suffered from severe design flaws, faulty repairs, deferred maintenance, deterioration, and negligence as explained in EOR's engineering report (EOR Report). Public Assistance

Program and Policy Guide (April 2018) at 19-20; FEMA Exhibits 12, 13; FEMA’s Response at 2, 17-24.

FEMA asserts that the repair work to the park is ineligible for PA funding because the plan was to repair unimproved natural features, which are not eligible facilities under the PA program. FEMA’s Response at 24-26. However, FEMA acknowledges that some facilities are potentially eligible for PA funding, and FEMA will make that determination if applicant responds to pending RFIs.

Applicant’s Request for Reimbursement in the RFA

Applicant sought the following reimbursements in its RFA:

Dam	\$3,106,446.40	PW 1288
Park	\$4,456,691.04	PW 1273
Total	\$7,563,137.44	

Applicant’s Revised Request for Reimbursement

In its reply to FEMA’s response to the RFA, applicant revised the scope of its request for reimbursement by eliminating certain damage inventories from the park, resulting in a revised total request for PA funding as follows:

Dam	\$3,106,446.40	PW 1288	(no reduction from RFA)
Park	\$2,961,976.59	PW 1273	(reduced from RFA) ³
Total	\$6,068,422.99		

Applicant’s Reply at 1-2.

The Dam is Eligible for PA Funding

FEMA substantially relies on the EOR Report to support its contention that the dam repair work request is ineligible for PA funding because the dam suffered from severe pre-existing design flaws, faulty repairs, deferred maintenance, deterioration, and negligence. FEMA states that “[a]pplicant’s expert report details significant pre-existing conditions and damages which existed within the dam including: faulty builds and additions; “comical” and

³ The remaining and eliminated damage inventories for the park will be detailed later in this decision.

“faulty” repairs over the decades; long-term deterioration; deferred maintenance; and general negligence in maintaining its dam.” FEMA Exhibit 12 at 5-6.

The EOR Report states that the dam “ultimately failed due to insufficient design as a dam, as evidenced by its long history of repeat[ed] failings and required fixes” and that the dam was an “aging, maintenance-prone, and [a] vestigial⁴ structure” prior to the disaster. FEMA Exhibit 12 at 1. FEMA’s response to the RFA states further:

The EOR expert report also relays that, ‘[g]iven the long history of repairs and dam modifications following nearly every high-water event since the first dam was originally constructed it is safe to claim that the original dam was poorly planned, as were some of the historical repairs.’

In fact, the Applicant’s own documentation, the EOR [Report] and the RFI Response, both document the pre-disaster history of frequent issues requiring repetitive, ineffective repairs—especially after high-water events—some of which were never resolved. Examples of these issues and negligent repairs include a cavity in 1987, followed by another in 1989, followed by flood damage in 1993, bank erosion in 1997, and a large void in 2000. The Applicant’s documentation also states that, on July 5, 1989, annotation of repairs noting that ‘sheet-piling was cost prohibitive-difficult to dewater the cavity for a fix-trying to float fabric form bags through leak area and fill with concrete-partially successful which then caused blow outs to other areas’ with no known adequate repair listed to address this issue. In multiple comments, the Applicant’s engineer noted severe pre-disaster conditions such as flawed design, deterioration, inadequate repairs/deferred maintenance.

FEMA’s expert agrees with the EOR engineering report. FEMA also specifically notes that the dam is ineligible for FEMA PA due to pre-existing conditions such as faulty design, significant pre-disaster damage, lack of maintenance, and lack of documentation supporting the Applicant’s request that damages to the dam were a direct result of the disaster versus deterioration, deferred maintenance, or negligence.

FEMA’s Response at 19-21 (internal citations omitted).

⁴ “Vestigial” is an adjective mostly used in biology to refer to a structure in an organism that has lost all or most of its original function in the course of evolution, such as human appendixes. https://en.wiktionary.org/wiki/vestigial_structure#English.

The Record Supports Applicant's Request for PA Funding for the Dam

The EOR Report recounts the history of the dam and the events impacting it from its origin, finding that “the core of the dam is apparently a wood dam from the 1800s” and opining that the original dam was “poorly planned” and had an “insufficient original design.” FEMA Exhibit 12 at 4. The EOR Report states further:

EOR has also completed a hydraulic model of the site including pre-disaster conditions. The data shows that the annual mean discharge in the Little Sioux River has doubled in the last 50 years based on the continuous daily record from 1972 to the present. To account for the increasing discharge and the breaches experienced during previous flood events, the dam has been extended southward several times, apparently as attempts to correct the problem that the dam was not originally built wide enough for the river setting. The floodplain at the dam location is about 1100' wide, whereas the original concrete dam was around 140' wide. Around the 1970s the dam was extended 90' southward. In 1987 another 90' extension made of sheetpile with a concrete cap was added, further repairs in 1994 and 95 were funded in part by FEMA. The last extension was conducted after a proposal to add an entire additional and separate dam structure to the south was rejected for unknown reasons. . . . The most recent extension was at a higher elevation, so the existing normal flow of the dam is about 230'. The event that breached the earthen floodplain to the south of all previous dam extensions was about 16% less the 100-year discharge. Comparing observed extreme event flows to the width of the overall structure and height of the bounding embankment (north side, none exists on the south side) suggests that the structure was never designed wide enough, or with two solid embankments high enough, to safely pass high flow events, much less any increased flows anticipated with the changing climate given the context of increasing river discharge. These factors support the claim that this dam was simply never planned and sized appropriately for this location.

The typical 'design life' of standard concrete low head dams is about 50 years according to the Association of State Dam Safety Officials. The original portion of the Linn Grove Dam is about that old ([circa] 1960's) and the core of the dam is apparently a wooden dam from the 1800's. Multiple studies have been conducted on the dam by drilling and analyzing core material, including an effort by Terracon in 2020. The studies have found areas of wood inside the dam, open voids, sediment, and several layers of concrete of varying strengths. Two borings found thick wood members about 18 inches from the top of the concrete. Multiple historical interests exist in and near the

dam site, indeed one study suggests that the remnant wood within the dam structure itself is of cultural interest, which is one reason that complete removal or replacement may be challenging. While historically significant, the current structural integrity of the dam is extremely questionable.

Based on background information and analysis conducted, EOR does not recommend restoration of the dam and park as they were pre-disaster as they are simply not sustainable.

Id. at 3-4.

Applicant counters FEMA's assertion of deferred maintenance, emphasizing that the EOR Report does not contain allegations of deferred maintenance:

EOR has never asserted that the damages caused by the disaster were the result of deferred maintenance. EOR was simply opining in its report that 'the flood was much larger than the dam was designed for,' including modern flooding and catastrophic river flows. Specifically, EOR found that the flow rate of the Dam doubled in the past 50 years. The fact that the environment changed over 50 years does not mean that BVC knew or should have known that the Dam could not sustain the epic water flows experienced during the disasters or that the Dam was poorly maintained.

RFA at 35-36 (footnotes omitted).

In contrast to FEMA's reliance on the EOR Report to support ineligibility for PA funding, applicant interprets the EOR Report as supporting eligibility:

As [applicant's RFA] details, EOR's intent in its report was to demonstrate that the Dam should be an alternate project because restoring the Dam to pre-disaster condition without improving it would not prevent future flooding.

Applicant's Reply to FEMA's Response at 6.

Applicant states further in its reply to FEMA's response at 7, n.28 (internal citations omitted):

However, FEMA cites to other damage to the Dam noted in BVC's historical maintenance records as proof of a '*documented* history of significant problems arising from the dam.' . . . FEMA uses this documented history to say that the Dam was damaged over its lifespan, thereby deteriorating it to a point that the

disasters did not exacerbate or cause. A different conclusion that is actually supported by the evidence is that the Dam was damaged by natural events and that BVC performed maintenance to remedy damages and restore functionality after each event.

Applicant emphasizes that far from being a “vestigial structure,” the dam was maintained and functional until the disasters occurred:

In other words, FEMA argues that the fact [that] BVC performed regular maintenance shows deterioration, but then also argues that BVC did not perform regular maintenance. This logical fallacy is the heart of FEMA’s position on Dam eligibility. If BVC were to have performed daily maintenance and kept pristine records, FEMA would seemingly argue that the mere fact that BVC maintained the Dam proved that it ‘deteriorated.’ If BVC provided no maintenance records, FEMA would have argued this was a case of ‘deferred maintenance’ or ‘negligence.’ FEMA’s position appears to imply that BVC should have demolished and rebuilt the Dam each time it has needed maintenance, rather than try to fix the Dam, which is, of course, an illogical result and not required by law. . . .

The Dam was functional in 2018 pre-disaster. However, the two disasters caused the Dam to lose its functionality. No amount of maintenance could have prevented the catastrophic damage and loss of functionality levied by the two disasters. . . . FEMA now asks the Board to ignore the years of communications between the Parties wherein they agreed to improve, rather than restore, the Dam and its environs.

Applicant’s Reply to FEMA’s Response at 7-8 (emphasis added).

We find that EOR’s opinion that the original plan for the dam was insufficient and poorly designed does not negate the dam’s continued use since its inception. A review of the record shows continual maintenance by applicant which provided a functioning dam until the two disasters destroyed its functionality. The EOR Report indicates that the magnitude of the disaster was the cause of the failure, not lack of maintenance. The dam was obviously not a “vestigial” structure as characterized by EOR. Even if the dam initially had not been designed to withstand the unforeseen increasing climate effects over the dam’s lifespan, we do not find that the original design was defective. Applicant has met its burden to show that the damage to the dam is the result of the two disasters and is entitled to PA funding for repairs to the dam.

Applicant's Revised Request for PA Funding for the Park

There are five damage inventories for park facilities under Grants Manager Project 92096 - PW 1273. In its reply to FEMA's response to the RFA, applicant reduced the amount of reimbursement sought for the park in its RFA, \$4,456,691.04, to the revised total of \$2,961,976.59 by eliminating two damage inventories, 283305 (\$1,429,132.80), for duplication of embankment erosion, and 283309 (\$65,581.65) for debris removal.

The three remaining damage inventories for which reimbursement is requested are:

\$2,782,079.56	283310	Parking Lot and Gully Water Hydrants, Water Line
\$26,585.69	283312	Restroom
\$153,311.34	283232	South Entrance Road
\$2,961,976.59		Total for the Park

Applicant's Reply at 1-2.

FEMA asserts that "the majority of the Applicant's requested park land is an unimproved natural feature, which is not an eligible Facility under law, regulation, and FEMA policy." FEMA's Response at 17, 24. Even so, FEMA acknowledges that what remains at issue are the items in the three remaining damage inventories:

Although the majority of the park is an ineligible unimproved natural feature, the Applicant did identify and request repair work for 4 facilities on the park land mass besides the ineligible dam: 1) the south road entrance; 2) the parking lot [and gully]; 3) hydrants/waterlines; and 4) a pit latrine restroom. These facilities are the only potentially eligible facilities on the park land mass. No other known facilities exist on the unimproved park land mass and the Applicant requested repair work to no other facilities in its PWs.

It is the Applicant's responsibility to demonstrate that its damage and subsequent repair work was required as a result of the disaster through its documentation, which it failed to do for all of its facilities as explained in detail below in [sections] a-c [of FEMA's Response]. It is the Applicant's burden, along with assistance from the Recipient, to submit all documents necessary for the award of grants.

FEMA's Response at 26-27 (footnote and internal citations omitted).

FEMA has deemed the repair to the water hydrants, water line, and south road entrance road potentially eligible pending submission of additional information, which applicant appears to be in the process of submitting. Applicant has not submitted additional argument with regard to these items in this arbitration, and we therefore do not address these items. As to the parking lot, gully, and restroom, applicant contends it has submitted sufficient information to meet its burden that these are eligible for PA funding, but FEMA states that insufficient information has been submitted for it to make a determination of eligibility. It states:

Although some facilities are potentially eligible for PA reimbursement once the Applicant aptly responds to its pending RFI, so FEMA can develop a project with a new DDD, SOW, and cost estimate using RSMMeans - the Applicant failed to provide such a response since March 20, 2024.

FEMA's Sur-Reply Letter at 1.

The panel reviews FEMA eligibility decisions "de novo." *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,579 (2009). However, FEMA has not made eligibility determinations with regard to the park items that remain at issue. Rather, FEMA has sought additional information from applicant in order to make a determination. We therefore do not have initial determinations to review with regard to these facilities. Our de novo review cannot substitute for FEMA's initial determination process.

Decision

The repairs to the dam are eligible for PA funding.

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

Elizabeth W. Newsom

ELIZABETH W. NEWSOM

Board Judge