



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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June 30, 2025

CBCA 8367-FEMA

In the Matter of CITY OF HOUSTON, TEXAS

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Jasmyn Allen 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 **SHERIDAN**, **ZISCHKAU**, and **KANG**.

**KANG**, Board Judge, writing for the Panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), the City of Houston, Texas (Houston or applicant), seeks public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) in connection with the disaster declared for Hurricane Harvey. For the reasons stated below, we conclude that the costs are ineligible for PA funding.

Background

The 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). 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)(2).

Applicant seeks PA funding to repair damage to the African American Library in Houston (library). The library is a two-story building that formerly served as the first public school for African Americans in Houston. Request for Arbitration (RFA) at 4. It is currently an archival site with galleries dedicated to the Houston African American community. *Id.*

On August 25, 2017, Hurricane Harvey made landfall in Texas bringing sustained winds of 130 miles per hour and more than 50 inches of rain. FEMA Response at 4. On August 25, 2017, the President declared the event a major disaster with an incident period of August 23, 2017, to September 15, 2017. FEMA Declaration 4332-DR-TX, [fema.gov/disaster/4332](https://www.fema.gov/disaster/4332) (last visited June 30, 2025). The declaration designated forty-seven counties as eligible for PA funding, including Harris County, which incorporates the City of Houston.

In September 2017, applicant conducted an initial survey of the library and documented leaks and other damage, including damage to the windows. Applicant Exhibit 8 at 2-8.<sup>1</sup> In January 2018, the library was inspected by applicant, its consultant Tetra Tech, and FEMA’s historic preservation specialist and site inspectors. FEMA’s historic preservation report stated that “[w]ind-driven rain resulted in several small ceiling leaks, damage to windows and casings, damage to adjacent furniture and wall components, and damage to several doors as well as their surrounding frames.” Applicant Exhibit 9 at 1. A FEMA site inspector’s report stated that the “source of the water was from the roof” which had discharge openings “with and without gutters” and that the gutters were clogged by debris. Applicant Exhibit 10 at 1.

Tetra Tech issued a report in November 2018, based on the January 2018 inspection. This report described the damage as follows:

The damage was primarily limited to one exhibit room near the northwest corner of the building. There was damage to some walls and baseboards that appeared to be caused by wind or rain. Because it is a historical building, the single-pane windows could not be replaced with more modern versions. Also,

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<sup>1</sup> Citations to exhibits are to the portable document format (PDF) pages.

the caulking around the windows and muntins was deteriorated and could be the cause of water intrusion.<sup>2</sup>

Applicant Exhibit 13 at 4.

In August 2019, FEMA's building assessment team issued a report that noted contradictory statements by Tetra Tech. FEMA Exhibit 5 at 1. Whereas the consultant stated that "[i]t is believed that the winds generated by Hurricane Harvey resulted in vibration of the window frames and leakage of wind-driven rain through the seals," the consultant also stated, as quoted above, that "the caulking around the windows and muntins was deteriorated and could be the cause of water intrusion." *Id.* The building assessment team offered its own "alternative hypothesis" that the windows leaked due to a lack of maintenance, specifically a lack of sealants such as caulk or glazing:

The [building assessment team] proposes an alternate hypothesis that this observed window condition is attributed to a lack of periodic maintenance of the windows which permitted the water intrusion during the hurricane event. Caulking and/or glazing (or any flexible or rigid sealant) requires periodic inspection and maintenance in any environment but particularly in an environment with high temperatures and an atmosphere with elevated humidity levels. This condition contrasts with the climate controlled interior spaces. This contrast in the environmental conditions in conjunction with aged wood from the original 1926 facility (which more than likely endured the same conditions during the years prior to the 2009 restoration) may have failed, not from wind driven rain, but due to the limited life cycle of building materials. This material life cycle along with potential periods of neglect and/or poor maintenance may have [contributed] to the water intrusion.

*Id.*

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<sup>2</sup> Applicant's response to questions from the Panel advises that, despite the statement that "damage was primarily limited to one exhibit room," the report did not intend to state that only windows in this room were damaged. Applicant's Response to Panel Questions at 12. Although not necessary to resolve this request for arbitration, applicant's clarification does not clearly explain why the Tetra Tech report should be understood to refer to damage to all windows in the building, rather than just those in the exhibit room. Nonetheless, as noted below, FEMA subsequently obligated funding for most of the library's windows.

In September 2020, FEMA approved a statement of work (SOW) that obligated \$397,446.66 for work that included repair of 106 of the library's 125 windows. Applicant Exhibit 16 at 9. The obligated costs were a reduced amount from the total cost estimate of \$745,925, after adjustments for insurance proceeds and the local cost share. *Id.* at 8. Also included in the obligated costs were hazard mitigation costs of \$78,469.49 for weather stripping and downspout upgrades that would prevent water infiltration and direct runoff away from the building. *Id.* at 6-8.

In November 2022, Building Engineering-Consultants, Inc. (BE-CI), a consultant retained by applicant, conducted a survey to assess the condition of the library windows. The survey recommended that the windows be replaced, rather than repaired. Applicant Exhibit 6 at 3. Based on this recommendation, applicant, in August 2023, submitted a request to FEMA for a revised SOW that provided for replacement of the windows and a \$401,767.49 increase in costs for a total request of \$1,147,693.49. Applicant Exhibit 20 at 1. The request stated that replacement of the windows was justified because repair of the wooden windows was not feasible and because new windows with metal cladding would provide an extended lifespan with reduced maintenance costs. *Id.*; *see also* RFA at 29-30.

On June 11, 2024, FEMA issued a determination memorandum (DM) that denied the applicant's request to revise the SOW and also found ineligible applicant's costs for window replacement and hazard mitigation. Applicant Exhibit 2 at 5-7. FEMA explained that the information provided by applicant showed that "the water intrusion into the facility, while driven by the hurricane event, was exacerbated by deterioration and lack of maintenance of the 106 windows . . . ." *Id.* at 6. The DM stated, however, that applicant was eligible for PA funding of \$16,955.16 for internal and external damages resulting from the incident. *Id.* at 6. The DM also found that applicant was not eligible for hazard mitigation costs of \$78,469.49, as that amount exceeded the total eligible PA costs of \$16,955.16. *Id.* at 4-6.

Applicant filed a first-level appeal of the denial of eligibility for replacement of the windows on August 24, 2024. On January 2, 2025, FEMA denied the first-level appeal. Applicant filed this request for arbitration on March 4, 2025.

### Discussion

In arbitration matters, the Panel reviews FEMA eligibility determinations *de novo*. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980. This review extends to determinations of issues of fact. *Harris County, Texas*, CBCA 6909-FEMA, 21-1 BCA ¶ 37,754, at 183,268 (2020). It is the applicant's burden to support its application for PA funding. *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,685.

PA funding is intended to restore damaged facilities to their prior design and function in accordance with applicable codes and standards. FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 84-86.<sup>3</sup> To be eligible, costs must be directly tied to the performance of eligible work and adequately documented. *Id.* at 21. An applicant has the burden to demonstrate that damage was directly caused by the disaster, rather than by [d]eterioration; [d]eferred maintenance; [t]he Applicant's failure to take measures to protect a facility from further damage; or [n]egligence." *Id.* at 9, 19-20; *see also* 44 CFR 206.223(e) (2024).

The PAPPG explains that "[f]or buildings and building systems, distinguishing between damage caused by the incident and pre-existing damage may be difficult." PAPPG at 118. In distinguishing between these types of damage, FEMA must consider "[t]he age of the building and building systems," "[e]vidence of regular maintenance or pre-existing issues, such as water damage from a leaky roof," and "[t]he severity and impacts of the incident." *Id.*

The dispute concerns whether the library windows are eligible for replacement because they were damaged directly by Hurricane Harvey, or whether the damage was caused or exacerbated by pre-existing conditions or a failure to mitigate the disaster damage. For the reasons discussed below, we conclude that applicant does not provide adequate evidence regarding the pre-disaster condition of the library and therefore does not establish that Hurricane Harvey directly caused the damage to the windows. Because applicant cannot establish that Hurricane Harvey directly caused the damage to the windows, we conclude that applicant is ineligible for PA funding to replace the windows. Additionally, we determine that applicant does not provide adequate evidence that it took measures to protect the facility after the disaster, which also renders applicant ineligible for PA funding. Finally, the hazard mitigation costs sought are not eligible because they exceed the allowable eligible PA costs.

#### I. Pre-Existing Condition of Windows

FEMA primarily contends that the documentation in the record does not show that the damage to the windows documented after Hurricane Harvey was directly caused by the disaster or that applicant maintained the library windows. FEMA Response at 13-16. Instead, FEMA argues that the available evidence shows that the damage was caused or exacerbated by a failure to perform regular maintenance. *Id.* at 16-21. FEMA states, and applicant does not specifically dispute, that wood-framed windows require regular

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<sup>3</sup> This version of the PAPPG applies to disasters declared after August 23, 2017, but before June 1, 2020. PAPPG at vii.

maintenance including cleaning, resealing, caulking, replacement of wood rot, and regular inspections. *Id.* at 18.

Applicant argues that the windows were in good condition prior to Hurricane Harvey and that the storm would have damaged even well-maintained windows. To establish the pre-disaster condition of the windows, applicant cites three primary sources of evidence: (1) the 2009 renovation of the library, which included restoration of the windows; (2) a 2012 inspection of the library, which was documented in a 2016 report; and (3) documentation which applicant characterizes as a maintenance log for the library dating from 2016-2018. For the reasons discussed below, we conclude that this information does not adequately establish the pre-disaster condition of the windows.

As a preliminary point, we note that applicant does not provide information about all of the windows for which it seeks replacement. While FEMA agreed in the 2018 DM that 106 of the library's 125 windows were eligible for repair, *see* Applicant Exhibit 16 at 4, the record provided to the Panel does not detail the basis for this conclusion, i.e., assessments of each window and their location. Applicant has provided numerous photos of windows in the library, including photos taken after the 2009 renovation, during the 2012 inspection, and during the post-disaster surveys in 2018 and 2022. Many of these photos, especially those taken prior to Hurricane Harvey, are wide-angle shots that do not show the condition of the windows. Most of the other photos showing damage to the windows cannot be distinguished based on their location, leaving the Panel unable to determine how many unique windows are represented or the condition of specific windows over the relevant time frames. The photographs provided do not provide an adequate basis to establish the pre-disaster condition of the windows, nor do they provide an adequate basis to substantiate the numbers of windows damaged or the extent of damage to each window.

#### A. 2009 Renovation

Applicant contends that prior to Hurricane Harvey in 2017, the library's windows were in "pristine condition" due in part to a 2009 building renovation. Applicant's Reply at 12. Applicant acknowledges that it does not have any documentation of the work performed on the windows in 2009.<sup>4</sup> Applicant's Response to Board Questions at 2. Instead, a declaration by the Deputy Assistant Director for the City of Houston Public Library

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<sup>4</sup> The November 2022 report prepared by BE-CI cited architectural drawings prepared in 2008. Applicant Exhibit 6 at 3. These drawings describe a proposed replacement of six windows and renovation of certain components for the remaining windows but do not show the actual work performed. *Id.* at 18; *see also* RFA at 25-26.

Department, Stephen Chamberlain, states generally that the windows were restored to “like new” condition and that the renovated windows were expected to have a “useful service life of 15 to 20 years.” Chamberlain Declaration ¶ 4; *see also* RFA at 25-26.

Even assuming applicant’s characterization of the renovation accurately describes the 2009 renovation as restoring the windows to like new condition, this would not provide adequate evidence of the condition of the windows eight years later in 2017. Additionally, applicant’s description of the windows as having a fifteen- to twenty-year useful life following the renovation raises concerns about their condition at the time of the disaster in 2017. Applicant’s description means that the windows would be due for replacement between 2024 and 2028. The PAPPG requires FEMA to consider the age of buildings for which PA funding is sought. *See* PAPPG at 118. Although we need not address whether the useful life of the windows, on its own, shows that the windows are ineligible for replacement, the information about the windows’ useful life tends to support the overall conclusion that applicant does not demonstrate the pre-disaster condition of the windows. The evidence in the record concerning the 2009 renovation does not adequately establish the pre-disaster condition of the windows.

#### B. 2012 Building Assessment Survey

Applicant contends that a 2016 building assessment report by its consultant, Parsons Corporation, establishes that the windows were “extremely well-maintained.” Applicant’s Reply at 12. The 2016 report was based on an assessment of the library conducted by Parsons in February 2012 to assess deficiencies in the building’s systems and to estimate the costs of remediation. Applicant Exhibit 30 at 1-3. A line item in the report summarizing the building systems stated that the windows were installed in 2009 and were due for renewal in 2049.<sup>5</sup> *Id.* at 7. The report states that the “Current Repair Amount” for the windows was \$0. *Id.* Aside from this line item summary, the report does not specifically address the condition of the windows, nor does it address any maintenance performed on the windows.

Applicant submitted a declaration prepared in support of the RFA by a representative of Parsons, Sam Mandola, which explains the report’s findings as follows: “Because we did not identify any deficiencies in the windows during our inspection, our Report [did] not include any repair or replacement costs related to the windows and identified that the next

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<sup>5</sup> This information appears to conflict with the information provided by applicant concerning the 2009 renovation, specifically that most windows were renovated, rather than replaced in 2009, and that they had a useful service life of 15-20 years. *See* Chamberlain Declaration ¶ 4; *see also* Applicant Exhibit 6 at 18; RFA at 25-26.

renewal was anticipated in 2049.” Applicant Exhibit 32 at 4. The declaration further states that “[h]ad the windows shown signs of deterioration (i.e., alligatoring paint, warped moldings, wood rot, mold growth, etc.) at the time of our inspection in 2012, we would have reported this damage to the City and captured the costs to rectify this damage in our Report.” *Id.*

Even assuming that the report could support an inference that the windows were in good condition as of the survey conducted in February 2012, this does not provide adequate evidence of the condition of the windows five-and-a-half years later in August 2017. The evidence in the record concerning the 2012 survey does not adequately establish the pre-disaster condition of the windows.

### C. Maintenance Records

Applicant contends that documentation of maintenance for the library from September 2016 to May 2018 shows that the windows were in good condition prior to Hurricane Harvey. *See* RFA at 26. Applicant provided a spreadsheet showing work performed at the library, including data regarding “Work Type Desc[ription],” “Request Description,” “Request Comments,” and “Closing Comments.” Applicant Exhibit 26 at 1-24. The majority of the entries prior to Hurricane Harvey are for “preventative maintenance” for the heating, cooling, and energy systems which were performed approximately every two months before the disaster. *Id.* at 1-12. Other entries are for “reactive” and “proactive” work including burned-out lights, roof leaks, temperature controls, and security alarms. *Id.* None of the entries before or after Hurricane Harvey in August 2017 address the windows or mention their condition. Applicant contends that the absence of any mention of work requests concerning the windows is evidence that they were in good condition. RFA at 27.

The PAPPG states that when distinguishing between damage caused by a disaster and pre-existing conditions, FEMA considers “[e]vidence of regular maintenance or pre-existing issues, such as water damage from a leaky roof.” PAPPG at 118. Arbitration decisions by other panels have recognized that records of regular maintenance may establish that a facility or property was in good condition prior to a disaster.<sup>6</sup> *See City of Liverpool*, CBCA 6593-FEMA, 20-1 BCA ¶ 37,497, at 182,171. Here, however, applicant does not contend that it performed regular maintenance but instead argues that the absence of requests to

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<sup>6</sup> Decisions by other panels in other FEMA arbitrations are not binding precedent. Rule 613 (48 CFR 6106.613) (Arbitration decisions under the Stafford Act are “primarily for the parties, [are] not precedential, and should concisely resolve the dispute.”). We consider the decisions by other panels cited herein to be persuasive authority.



perform work show that the windows were in good condition. The absence of the work requests is not adequate support for the conclusion that the windows were in good condition prior to the disaster.

Additionally, FEMA's requests for information in connection with applicant's requests to modify the SOW specifically addressed maintenance on the window caulking as follows: "According to FEMA's Hazard Mitigation Proposal (HMP) site inspection, the caulking around the windows w[as] deteriorated which allowed water to intrude. Please explain and provide documentation showing when the windows were last caulked." FEMA Exhibit 16 at 3. Applicant's response referred to the 2009 renovation, stating that "new sealant with backer rods w[as] installed, and sashes were repaired or replaced, as part of the overall scope of the project to those windows in need of repair." Applicant Exhibit 25 at 2. Applicant also stated in response to another question about maintenance that "[a]s far as specific maintenance to the windows, the 2009 repair work establishes that these windows are in proper order." *Id.* at 3. As these responses show, applicant does not contend that it performed maintenance on the windows.

In sum, the record does not adequately demonstrate the pre-disaster condition of the windows. Applicant does not dispute FEMA's contention that wooden windows require maintenance, nor does applicant contend that it conducted maintenance on the windows. Instead, applicant points to the 2009 renovation, the 2012 survey, and the absence of maintenance requests from May 2016 to August 2017 as evidence that the windows were in good condition prior to Hurricane Harvey. While the PAPPG does not establish a minimum degree of recency for evidence to support the pre-disaster condition of a building, we determine that the five-year gap between the 2012 BE-CI survey and Hurricane Harvey in 2017 is too long to be adequate evidence—particularly given applicant's lack of maintenance and the absence of detailed photographs showing all of the windows and their condition over time.

Applicant also emphasizes that the DM stated that "FEMA [subject matter experts] determined that wind driven rain would likely have infiltrated the windows even if they were in perfect condition." Applicant Exhibit 2 at 6. Even assuming that Hurricane Harvey would have damaged windows in good condition, this does not establish the actual condition of the windows prior to the storm. As stated, the PAPPG provides that applicant bears the burden to establish the pre-disaster condition of a building. If the windows were in a deteriorated condition prior to the disaster, applicant would not be eligible for costs to replace the windows to new condition. *See St. Augustine High School, Inc., New Orleans, Louisiana*, CBCA 6530-FEMA, 20-1 BCA ¶ 37,501, at 182,181 (applicant not eligible for costs where the age and condition of systems prior to the storm reflect that they were not damaged, or

solely damaged, by the declared disaster). For these reasons, applicant is not eligible for costs to replace the 106 windows.

## II. Failure to Mitigate Damage

In addition to the conclusion that the lack of evidence concerning the pre-disaster condition of the library precludes concluding that applicant is eligible for PA funding, we also briefly note additional concerns regarding applicant's post-disaster actions and the evidence provided to support the request for PA funding. FEMA argues that applicant failed to mitigate the damage to the library following Hurricane Harvey. In particular, FEMA notes that although the initial SOW was approved in September 2020, with costs obligated for repair of the windows, applicant did not begin work at that time and instead retained BE-CI to conduct a survey on the condition of the windows in November 2022—which was in turn the basis of the request for a revised SOW in August 2023. FEMA also cites BE-CI's summary of its survey, which stated that “BE-CI is of the opinion that the existing wood sash ha[s] continued to deteriorate in the four (4) years since FEMA and their consultant provided repair methods in July 2019.” Applicant Exhibit 22 at 1.

Applicant contends that mitigation of damage to the windows was not possible, short of total replacement of the windows, but does not support this assertion. The November 2022 BE-CI report noted some attempts at mitigation in one room, specifically “plywood installed from the interior serving as temporary repairs to allow for the continued use of the” library. Applicant Exhibit 6 at 3. At other locations, however, the report noted that “components of the wood windows were missing or severely damaged creating an opening in the exterior of the building” and that “[s]everal locations exhibited evidence of water penetration potentially from roof leaks and/or window leaks.” *Id.* The 2023 BE-CI survey summary quoted above is also persuasive evidence that after receiving guidance from FEMA concerning window sash repair methods in 2019, applicant continued to allow the wood window sashes to deteriorate. Applicant Exhibit 22 at 1.

Additionally, as noted above, the photos provided in the record are not sufficiently detailed so as to allow review of the pre-disaster condition of the windows and compare their condition to the condition of the windows documented in the 2018 and 2022 post-disaster surveys. The absence of such detailed information precludes an assumption that mitigation efforts would have been futile and would not have had an effect on the damage to the windows.

### III. Hazard Mitigation Costs

For hazard mitigation work, the PAPPG states that an applicant may seek PA funding to provide cost-effective measures to repair facilities that address long-term actions aimed at reducing or removing risks to people and property caused by natural hazards and their impacts. PAPPG at 97-99. Costs for hazard mitigation are eligible only if the costs do not exceed fifteen percent of the total eligible repair costs for the facility. *Id.* at 98.

As a consequence of our determination that applicant is ineligible for PA funding for the library windows, applicant is also ineligible for PA funding for hazard mitigation costs. The \$78,469.49 sought for hazard mitigation is more than fifteen percent of the eligible PA funding of \$16,955.16, which was approved by FEMA for internal and external damage and is not in dispute here.

#### Decision

Applicant is not eligible for reimbursement of the costs in dispute for replacement of windows or for hazard mitigation.

Jonathan L. Kang  
JONATHAN L. KANG  
Board Judge

Patricia J. Sheridan  
PATRICIA J. SHERIDAN  
Board Judge

Jonathan D. Zischkau  
JONATHAN D. ZISCHKAU  
Board Judge