



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 27, 2025

CBCA 8197-FEMA

In the Matter of PUERTO RICO INFRASTRUCTURE AND
FINANCING AUTHORITY

Leonardo J. Torres Berríos, Deputy Director, Puerto Rico Infrastructure and Financing Authority, San Juan, PR, appearing for Applicant.

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Alecia Frye, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **RUSSELL**, **KULLBERG**, and **KANG**.

RUSSELL, Board Judge, writing for the Panel.

The applicant, Puerto Rico Infrastructure and Financing Authority (PRIFA), seeks arbitration of a denial by the Federal Emergency Management Agency (FEMA) of public assistance (PA) funding for costs to restore the World Plaza Building, a PRIFA-owned and operated building damaged by Hurricane Maria. FEMA denied funding because PRIFA completed project repairs prior to affording FEMA an opportunity to complete its environmental, historic, and preservation (EHP) review and, then, failed to adequately

participate in an after-the-fact EHP review. We conclude that PRIFA is ineligible for PA funding based on its failure to comply with EHP consultation requirements.

Background

On September 20, 2017, Hurricane Maria struck Puerto Rico with “heavy rain, high winds, flooding, and mudslides” which caused extensive damage throughout Puerto Rico. Request for Arbitration (RFA), Exhibit 5 at 1. On September 20, 2017, the President issued a major disaster declaration (FEMA-4339-DR-PR) authorizing PA funding for all seventy-eight of Puerto Rico’s municipalities. *Id.*

PRIFA owns and operates the twenty-three-story World Plaza Building (facility) which, at the time of the hurricane, was more than eighty-percent leased to other government agencies. RFA at 1. The facility was constructed in 1971 (or 1972), and due to its age, was eligible to be listed in the National Register of Historic Places (National Register). RFA, Exhibit 5 at 1; RFA, Exhibit 6 at 1.¹ The facility is located in San Juan’s central business district, referred to as *La Milla de Oro* (the Golden Mile). RFA, Exhibit 5 at 1.

Because of the facility’s historic significance, any repair work had to comply with section 106 of the National Historic Preservation Act (NHPA), which states, “The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department . . . having authority to license any undertaking, prior to approval of the expenditure of any Federal funds on the undertaking . . . shall take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108 (2018); *see also* RFA, Exhibit 5 at 1.

Following Hurricane Maria, PRIFA repaired the facility’s glass-domed skylight and glass panels in offices of the judicial court system, all damaged by the hurricane, and, subsequently, requested PA funding to cover the costs of the repairs. RFA at 3; *id.*, Exhibit 5 at 1. FEMA approved \$2,152,338.36 in funding under project worksheet (PW) 07918/Grants Manager Project (GMP) 82074 for the costs of the repairs. RFA, Exhibit 5 at 1. During a September 2019 site visit, FEMA discovered that work to replace the skylight and glass panels had not been completed in-kind (i.e., using the same materials) as stated in the statement of work (SOW) and had been completed before the required EHP reviews were performed. *Id.* In order to fund the project, FEMA conducted an “after-the-fact” section 106 review and consultation. *Id.* As part of this process, FEMA followed steps outlined in its

¹ The EHP Site Visit form (RFA, Exhibit 6) states that the facility was constructed in 1972, but, FEMA, in its First Appeal Analysis, states that the facility was constructed in 1971.

amended statewide programmatic agreement (programmatic agreement) with the Puerto Rico State Historic Preservation Officer (SHPO) and the Puerto Rico Central Office for Recovery, Reconstruction and Resiliency, the grantee in this matter. *Id.* The programmatic agreement had been negotiated between FEMA and the Advisory Council on Historic Properties and governed resolution of adverse effects from the repair work. *Id.* n.3; *see also* 36 CFR 800.14(b) (2024). Consistent with the requirements of the programmatic agreement, FEMA confirmed with the SHPO that the facility was historic and that the replacement of the skylight and glass panels adversely affected the historic nature of the facility. RFA, Exhibit 5 at 1-2. FEMA next determined that an “after-the-fact” consultation was feasible in part because PRIFA had not intentionally circumvented NHPA requirements. *Id.* at 2.

FEMA subsequently met with the SHPO and PRIFA to discuss measures to resolve the adverse effects of the non-in-kind repair work on the facility, and, of the options discussed, PRIFA decided to design a public exhibition highlighting the history and significance of the *La Milla de Oro* district. *Id.* PRIFA’s design proposal was subsequently rejected as an appropriate measure to mitigate the adverse effects on the facility because rather than highlighting the district’s historic significance, the proposed exhibit was limited solely to a poster showing before and after images of the facility’s skylight. *Id.* As an alternative, FEMA proposed that PRIFA prepare a National Register nomination of the district as a treatment measure. *Id.* FEMA set a deadline of March 15, 2022, for PRIFA to indicate whether PRIFA accepted the proposed treatment to resolve the adverse effects or, if it did not accept the proposed measure, to recommend a commensurate measure with a consultation process designed to reach agreement on the alternate measure. *Id.* On March 24, 2022, PRIFA rejected FEMA’s proposed treatment measure but did not propose an alternate measure. *Id.* Consequently, FEMA determined that GMP 82074 was non-compliant with the NHPA. Based on this conclusion, on September 23, 2022, FEMA issued a determination memorandum denying \$2,152,338.36 in PA funding for the GMP. *Id.* FEMA stated that PRIFA failed to actively participate in the consultation process to resolve the adverse effects to the facility. *Id.*

By letter dated November 16, 2022, PRIFA appealed FEMA’s determination arguing that: (1) FEMA did not consider what PRIFA characterized as conflicting regulations that precluded in-kind replacement of the skylight, i.e., the replacement skylight was designed to comply with environmental regulations; (2) PRIFA was precluded from replacing the glass windows in-kind because of market unavailability; (3) FEMA failed to timely coordinate the section 106 review or notify PRIFA of the consequences of noncompliance; and (4) PRIFA was first notified that its failure to comply with the historic reviews would jeopardize PA funding on November 5, 2019, after the work was complete. *Id.* at 3. PRIFA also objected to FEMA’s National Register proposal as overly broad because the proposal would involve nominating fifteen buildings, several of which were privately owned. *Id.* PRIFA asserted that the proposal was infeasible as an alternative treatment measure because PRIFA is

precluded from using public funds to benefit private parties. *Id.* On July 11, 2024, FEMA denied the appeal, concluding that PRIFA failed to provide FEMA the opportunity to complete its EHP review prior to starting the skylight and glass panel repairs and that PRIFA neither proposed nor implemented a treatment measure to resolve the adverse effects resulting from noncompliance consistent with section 106 of the NHPA. *Id.* at 5.

On September 9, 2024, PRIFA submitted a request for arbitration. In its request, PRIFA made similar arguments to the ones that it made in its appeal to FEMA and also averred that its decision to start repairs prior to the EHP review was due to emergency circumstances. In its request, PRIFA stated that asbestos in the facility's ceiling was affected by the hurricane due to wind and rainfall intrusions and that the temporary measures to address the intrusions were ineffective due to the constant winds buffeting the facility. RFA at 5. Additionally, PRIFA asserts that, after meeting with local manufacturers, the circular dome original design option would have been insufficient to withstand winds of 170 miles per hour or greater, which, according to PRIFA, is a factor necessary to achieve FEMA's resiliency requirements. *Id.* at 6. PRIFA argues that, consistent with environmental laws and building codes, it undertook measures necessary to adequately address the extraordinary circumstances with which it was faced, presumably by installing the non-in-kind skylight components. *Id.* at 6-7. PRIFA also states that the offices of the Judicial Court system where the damaged glass panels were installed were assigned to a judge with special needs who uses a wheelchair. *Id.* at 7. PRIFA asserts that, under the Americans With Disabilities Act and its contract agreement for the leased space, PRIFA was required to expeditiously repair the glass panels in the judge's offices. *Id.* at 7. In its request for arbitration, PRIFA also questions FEMA's recommendation to nominate the district for the National Register as a treatment measure to address historic preservation law requirements, reiterating its concerns that such a nomination would require PRIFA to use public funds for privately-owned property. *Id.* at 11-12.

In its response to the RFA, FEMA argues that the panel should deny the claim because PRIFA failed to comply with FEMA's EHP review when it commenced work before FEMA had an opportunity to conduct the review and because PRIFA failed to implement any treatment measures to rectify the adverse effects of the non-compliant work. *See generally* FEMA's Response to PRIFA's RFA. FEMA also disputes PRIFA's assertion that the repairs undertaken were emergency measures, noting that PRIFA had received PA funds for emergency work repairs under a separate PW. FEMA's Sur-Reply Letter at 2-3.

The parties have submitted this case to be decided on the written record as a "paper hearing" pursuant to Board Rule 611 (48 CFR 6101.611 (2024)).

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. With respect to EHP reviews, applicants are required "to make every effort to afford FEMA the opportunity to perform [such] reviews prior to the start of construction for any Permanent Work project." Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 85. "Proceeding with Permanent Work before FEMA completes EHP reviews jeopardizes PA funding." *Id.*

Given that FEMA provided PRIFA an opportunity for an after-the-fact (after repair) EHP consultation, we find that PRIFA's stated reasons for the non-compliant repairs (exigency), the timing of the repairs (i.e., prior to PRIFA requesting PA funding and prior to any EHP consultation), the type of repair (permanent as opposed to emergency), and the use of non-in-kind materials for repairs are not relevant to the question of whether PA funding should be awarded. FEMA agreed to this consultation even though FEMA's own guidance states that *generally* the agency "cannot conduct [an EHP] consultation with resource agencies after the Applicant initiates work on a project because those agencies lose the ability to consider alternatives that would avoid, minimize, or mitigate adverse effects to the environment or historic properties." PAPPG at 86. FEMA essentially provided PRIFA an exception to the general rule. Thus, the record is clear that receipt of PA funding in this matter was not foreclosed by PRIFA's completion of the skylight and glass panel repairs prior to the EHP consultation and its use of non-in-kind materials for repairs.

We determine, however, that PRIFA's receipt of PA funding is foreclosed by its failure to timely and meaningfully engage in the after-the-fact EHP consultation process. We cannot fault FEMA for rejecting PRIFA's initial treatment measure. PRIFA committed to a public exhibition highlighting the history and significance of the *La Milla de Oro* district as a treatment measure but instead produced a single poster with images of the skylight. Next, FEMA proposed nominating the district for the National Register as a treatment measure which PRIFA rejected. PRIFA, in this arbitration, characterizes FEMA's proposal as infeasible, but, critically, PRIFA failed to timely propose an alternative measure. Thus, PRIFA's own actions undermine its argument that FEMA's denial of PA funding was unreasonable.

Further, we conclude that PRIFA's argument based on FEMA's alleged failure to explain to PRIFA the implications of non-compliance with the EHP consultation requirement lacks merit. As an initial matter, PRIFA completed the project repairs even before applying

for PA funding and receiving an approved SOW. PRIFA's actions precluded a timely EHP consultation with FEMA, which should have occurred prior to commencement of the repair work. Also, PRIFA bears some responsibility for knowing the applicable EHP laws and requirements regarding its application for disaster relief. The language in the readily-accessible PAPPG is clear that an applicant jeopardizes receipt of PA funding for failure to complete the EHP review prior to starting construction on a project. PAPPG at 85. Thus, we are unpersuaded by PRIFA's argument based on lack of knowledge of the implications of failing to participate in a timely EHP review.

Decision

PRIFA's request for PA funding is denied.

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Jonathan L. Kang

JONATHAN L. KANG

Board Judge