



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 20, 2025

CBCA 8138-FEMA

In the Matter of HOUSING AUTHORITY OF THE CITY OF FORT MYERS,
FLORIDA

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Maureen Dimino, Jasmyn Allen, 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 **RUSSELL**, **SULLIVAN**, and **KANG**.

SULLIVAN, Board Judge, writing for the Panel.

The Housing Authority of the City of Fort Myers, Florida, (Housing Authority) sought to arbitrate its request for public assistance (PA) funds for emergency and permanent repairs to seven low-income rental properties. The Federal Emergency Management Agency (FEMA) denied the Housing Authority's request because it determined that the Housing Authority did not have the legal responsibility to make the repairs and, therefore, was ineligible to receive PA funds for the work. For the reasons that follow, we deny the request for funds.

Background

In September 2022, Hurricane Ian made landfall in Lee County, Florida, where Fort Myers is located. On September 29, 2022, the President declared the event a major disaster, which authorized FEMA to obligate PA funds for the repair of buildings and other structures damaged by the storm.

In August 2023, FEMA issued two determination memos, one denying the Housing Authority's request for \$2 million for emergency protective measures (Category B) for seven properties, Request for Arbitration (RFA), Exhibit B-3 at 4, and the other denying the Housing Authority's request for approximately \$3 million for permanent work (Category E) for twelve properties.¹ RFA, Exhibit B-2 at 4. FEMA denied both requests upon finding that the Housing Authority, as the applicant, had not established that it had legal responsibility for the repairs to the properties. RFA, Exhibits B-2 at 4, B-3 at 4.

The Housing Authority appealed these determinations, and FEMA, in a decision issued in May 2024, again found that the Housing Authority had failed to demonstrate that it had legal responsibility for the repairs. FEMA Exhibit 22 at 3.

In August 2024,² the Housing Authority filed its request for arbitration, seeking funds to repair damage to seven properties that are maintained by the Housing Authority. RFA at 1.³ Although FEMA's determination memos identified five other properties (Covington Meadow, Broadway Apartments, Stella Apartments, Coconut Cove I, and Coconut Cove II (RFA, Exhibits B-2 at 2, B-3 at 2)), these properties are not included in the list of properties that the Housing Authority identified as the subject of this arbitration. Declaration of Sieglinde Chambliss (Housing Authority witness) (Nov. 19, 2024) ¶ 5.a. Thus, it appears

¹ It appears that FEMA did not evaluate a request for funds for emergency protective measures for the Renaissance Preserve I-IV properties. RFA, Exhibit B-3.

² Due to a series of extensions sought by the parties, the Board did not convene the hearing in this matter until December 9, 2024. At the hearing, the chief financial officer for the Housing Authority testified, and the parties argued their positions and answered questions from the panel.

³ The Housing Authority sought PA funds for the repair damage at four additional properties as well as the Housing Authority administration building: Horizons Apartment, Royal Palms Towers, Southward Village, and Bonair Towers. FEMA does not dispute that these buildings are owned by the Housing Authority. The PA request for these buildings is currently in insurance review and not the subject of this request for arbitration. FEMA Response to RFA at 9-10.

that the Housing Authority is not challenging FEMA's determination regarding the eligibility of these properties. In its RFA, the Housing Authority seeks funds for the Sabal Palm property, although it was not on the list of properties considered by FEMA for eligibility. Compare RFA Exhibits B-2 at 2 and B-3 at 2 with Chambliss Declaration ¶ 5.a.

The seven buildings are each owned by a single-entity limited liability corporation (LLC), whose member is either the Housing Authority or the Southwest Florida Affordable Housing Choice Foundation, Inc. (SWFAHCF):

Property Name	Property owner	Sole Member of LLC
Renaissance Preserve I	Renaissance Preserve I, LLC	Housing Authority
Renaissance Preserve II	Renaissance Preserve II, LLC	Housing Authority
Renaissance Preserve III	Renaissance Preserve III, LLC	Housing Authority
Renaissance Preserve IV	Renaissance Preserve IV, LLC	Housing Authority
Swanson Loop	Swanson Loop, LLC	SWFAHCF
Sabal Palm	Sabal Palm I, LLC	SWFAHCF
East Pointe Place	PC Redevelopment, LLC	SWFAHCF

Chambliss Declaration ¶ 12.c. The articles of incorporation for the LLCs that hold the properties list the Housing Authority or SWFAHCF as a member of the LLC. RFA, Attachment F (PC Redevelopment LLC); Attachment H (Swanson Loop, LLC); Attachments I-L (Renaissance Preserve I, II, III and IV, LLC).

SWFAHCF is a nonprofit corporation, RFA Supplement,⁴ Exhibit 14, and its sole member is the Housing Authority. RFA, Attachment A. Pursuant to a shared services agreement between the Housing Authority and SWFAHCF, the Housing Authority manages the buildings and contracts and pays for the repair of damages. RFA, Exhibit L at 1-5. However, the terms of that agreement require SWFAHCF approval for any expenditure over \$1000 and state that the Housing Authority is an independent contractor and not a legal

⁴ On November 19, 2024, the Housing Authority submitted supplemental exhibits, numbered 1-81, to its request for arbitration.

representative for SWFAHCF. *Id.* at 5, 7. Neither the ownership LLCs nor SWFAHCF have any employees. Chambliss Declaration ¶ 11. Instead, all work on the properties pursuant to the shared services agreement is performed by Housing Authority employees. *Id.*

All of the buildings were built through public-private partnerships, in which private developers provide funding for construction in exchange for tax credits available from the buildings. The developers for each of the buildings are no longer associated with the buildings, but the Housing Authority has entered into partnerships with other private investors for four of the buildings (Renaissance Preserve III and IV, East Pointe Place, and Sabal Palm).

The Housing Authority provided the partnership agreement for the investment in Renaissance Preserve III. Pursuant to that agreement, Renaissance Preserve III, LLC, is in partnership with a managing general partner and two limited partners, which are described as “tax credit equity funds.” RFA Supplement, Exhibit 23 at 1. The partnership is called Renaissance Preserve III, LLP, and its purpose is “to acquire a leasehold interest in the Land and to acquire the Project, and to develop, finance, construct, rehabilitate, own, maintain, operate and sell or otherwise dispose of the Project, in order to obtain long-term appreciation, cash income, Tax Credits and tax losses.” *Id.* at 20. The “project” is defined as “the [l]and and the 88-unit multifamily rental housing development and other improvements to be constructed or rehabilitated, owned and operated thereon by the Partnership and to be known as Renaissance Preserve Phase II Apartments.” *Id.* at 16. The agreement requires the limited partners to make capital contributions to the project in exchange for which the limited partners will be provided tax credits from the project, estimated to be valued at \$15 million. *Id.* at 24. The agreement further provides that “[n]o portion of the Project is or will be treated as ‘tax-exempt use property’” and “[n]o portion of the Project is or will be leased to tax-exempt entities.” *Id.* at 25-26. Finally, it appears that the managing partner is obligated to provide loans to the partnership if an operating deficit exists, *id.* at 51, and the partnership is authorized to take on loans “for any purpose relating to the business of the Partnership or for any of its obligations, expenses, costs or expenditures.” *Id.* at 55.

The partnership for the East Pointe property appears to be captured in an operating agreement. RFA Supplement, Exhibit 31 at 1. The agreement created a partnership, named PC Redevelopment Partners, LLC, among three entities: PC Redevelopment, LLC, the limited liability corporation that owns the property; an administrative managing member; and an investor member. *Id.* The stated purpose of the partnership is “to acquire, finance, own, construct, rehabilitate, maintain, improve, operate, lease and, if appropriate or desirable, sell or otherwise dispose of the Apartment Complex in a manner consistent with the requirements of Section 42 of the [United States] Code and to effectuate the charitable purposes of the Parent.” *Id.* at 2. The “apartment complex” is the property known as East Pointe Place and the “parent” is SWFAHCF. The partnership agreement projected that approximately \$15

million in tax credits would be available, *id.* at 21, about the same amount to be provided by the investor member. *Id.* at 129. Upon dissolution of the partnership and payment of any debts and obligations, the assets of the company were to be distributed among the members based upon their pro rata shares of the capital accounts. *Id.* at 38. The administrative managing member was assigned “all the authority, rights and powers which it deems necessary or appropriate to effect the purposes of the Company including” the authority to enter into contracts and borrow money necessary for the operation of the company. *Id.* at 47. However, the agreement requires the consent of the investor member for any contract in excess of \$25,000 or longer than twelve months. *Id.* The operating agreement provides that PC Redevelopment, LLC, would never be treated as a tax-exempt entity. *Id.* at 56.

The Housing Authority also provided the management agreements for the Renaissance Preserve I-IV and East Pointe properties.⁵ The terms of the agreements are substantially the same and are between the partnership entity and another entity called Southwest Florida Housing Management, LLC, (SFHM). *See, e.g.*, RFA Supplement, Exhibit 43 (agreement with PC Redevelopment Partners, LLC, for management of East Pointe property). The agreements describe SWHM as the manager of the property and state that SWHM is authorized to pay from the operating account of the property “[a]ctual and reasonable costs of making all repairs.” *Id.* at 20. However, if the manager is unable to pay bills from the operating account due to a shortfall, the “company” (i.e., partnership entity) is required to “promptly provide funds for” any unpaid bills. *Id.* at 22. This provision is present in all of the management agreements provided by the Housing Authority. The agreement also describes the relationship between the parties as “[SWHM] is an independent contractor hired by the Company.” *Id.* at 27. The articles of incorporation for SWHM list the Housing Authority as the authorized member and manager. RFA Supplement, Exhibit 15 at 3.

Discussion

The Stafford Act provides that PA funds may be provided to a “local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster.” 42 U.S.C. § 5172(a)(1) (2018). “Public facility” is defined as a facility owned by a State or local government. *Id.* § 5122(10). FEMA regulation provides that an applicant must establish both that it is an eligible applicant and that the

⁵ The Housing Authority did not provide any partnership, operating, or management agreements for the Swanson Loop property. It did provide the Housing Assistance Payments contract between itself and Swanson Loop LLC, identified as the owner of the property. There is nothing in the contract regarding responsibility for repairs. The Housing Authority witness testified that the Swanson Loop property was “never a tax credit deal.”

facility is an eligible facility. The Housing Authority, as a local government entity, is an eligible applicant. 44 CFR 206.222(a) (2024). For the facility to be eligible, the Housing Authority must show that it has “legal responsibility” for the item of work for which the funds are sought. *Id.* 206.223(a)(3).

“Legal responsibility” is not defined in regulation. *See* 44 CFR 206.221. FEMA policy focuses upon legal ownership as proof of legal responsibility:

When the Applicant requests PA funding to restore a facility, it is the Applicant’s responsibility to provide proof that it owns the facility. To determine ownership, FEMA may review deeds, title documents, and local government tax records.

Ownership of a facility is usually sufficient to establish the Applicant’s legal responsibility to restore the facility, provided that it is not under construction by a contractor or leased to another entity at the time of the incident.

Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 53. If a facility is leased, “FEMA reviews the lease agreement to determine legal responsibility for repair of damage caused by the incident.” *Id.* FEMA policy also provides that, for emergency work, FEMA will evaluate “whether the Applicant requesting the assistance either had jurisdiction over the area or the legal authority to conduct the work related to the request at the time of the incident.” *Id.* at 52. For permanent work, FEMA evaluates “whether the Applicant claiming the costs had legal responsibility for disaster-related restoration of the facility at the time of the incident based on ownership and the terms of any written agreements (such as for facilities under construction, leased facilities, and facilities owned by a Federal agency).” *Id.* “Written agreements” are those that “grant a possessory interest or exclusive control of the facility.” *County of Santa Cruz, California*, CBCA 7408-FEMA, 23-1 BCA ¶ 38,236, at 185,864 (2022) (citing PAPPG at 53).

The panel cannot evaluate the eligibility of the Sabal Palm property because it appears that it was not among the properties considered by FEMA. Pursuant to statute, the panel serves as a second appeal authority to resolve disputes between applicants and FEMA on requests for PA. 42 U.S.C. § 5189a; 48 CFR 6101.603. Because FEMA has not made a determination regarding the Sabal Palm property, there is no dispute for the panel to resolve.

Regarding the six other properties, the single-entity LLCs own the properties for which the Housing Authority seeks funds. *See* Fla. Stat. § 606.0110(1) (2018) (“All property originally contributed to the limited liability company or subsequently acquired by the limited liability company by purchase or other method is the limited liability company property.”). While the Housing Authority argues that it controls the LLCs as the sole

member of the LLC or SWFAHCF, which in turn controls the LLC, it cannot claim an ownership interest. *See* Fla. Stat. § 606.0110(4) (“A member of a limited liability company has no interest in any specific limited liability company property.”); *Brevard County v. Ramsey*, 658 So. 2d 1190, 1196 (Fla. 5th DCA 1995) (“It is basic hornbook law that ‘corporate property is vested in the corporation itself, and not in the individual stockholders, who have neither legal nor equitable title in the corporate property.’”).

The Housing Authority asks the panel to consider other documents which show that the Housing Authority was the entity with the authority to conduct the property repairs. The Housing Authority explains that it is the only entity with employees to conduct the work. We accept that, through the operation of the shared services agreement, Housing Authority personnel are responsible for contracting for repairs, supervising the work, and paying the bills for work completed. But, the shared services agreement only identifies the Housing Authority as an independent contractor. Moreover, the management agreements between the partnership LLCs and SWHM state that the partnership entities are responsible for funding any repairs that exceed the funds available in the operating accounts for the properties. Taken together, these documents fail to establish that the Housing Authority has an ownership interest or exclusive control necessary to demonstrate legal responsibility for the properties.

Finally, the Housing Authority relies upon Department of Housing and Urban Development (HUD) guidance that allows public housing authorities to carry out their functions through instrumentalities, and those instrumentalities are to be considered part of the public housing authority for the purposes of HUD programs. RFA, Attachment B. While HUD may treat these entities as “passive corporate structures” for the purposes of effectuating federal housing policy and programs, HUD’s guidance does not overcome state law rules that say the LLC is the property owner.⁶

Decision

The request for PA funds is denied.

⁶ FEMA, in response to the RFA, focused upon the nature of the partnerships as public-private entities, arguing that the properties are not nonprofit entities and, therefore, are ineligible for PA funds. The Stafford Act provides that FEMA may provide PA funds “to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster.” 42 U.S.C. § 5172(a)(1). But, the entities that own the properties are not the applicants for PA funds. Thus, we need not reach the eligibility of those entities.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Jonathan L. Kang

JONATHAN L. KANG
Board Judge