



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 9, 2021

CBCA 7066-FEMA

In the Matter of SCOTLAND MEMORIAL HOSPITAL, INC.

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Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Frank Bruscato, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **RUSSELL**, **GOODMAN**, and **ZISCHKAU**.

The applicant, Scotland Memorial Hospital, Inc., sought arbitration of its eligibility for reimbursement of \$1,024,056, through public assistance by the Federal Emergency Management Agency (FEMA), for damage incurred behind the brick walls of its main hospital.¹ The panel decides this matter pursuant to the authority set forth in 42 U.S.C. § 5189a(d) (2018). As permitted under Rule 611 of the Board's rules governing this arbitration (48 CFR 6106.611 (2020)), the parties have requested a decision on the written

¹ In its first appeal to FEMA, the applicant sought \$1,814,400 for damage incurred behind the hospital's brick walls and for roof leaks. However, in this arbitration, the applicant has reduced the amount it is seeking to \$1,024,056 due to receipt of insurance funds which covered roof restoration costs.

record (a “paper hearing”) without live testimony. Both parties have submitted evidentiary materials, including witness statements, in this arbitration to support their respective positions.

The issue before the panel is whether Hurricane Florence, which made landfall along the southeastern coast of North Carolina on September 14, 2018, and continued to about September 17, 2018, caused damage behind the main hospital’s south and west brick walls’ through-wall flashing,² such that the applicant is eligible for public assistance to cover the repair cost for the structural damage. FEMA argues that the damage was not the result of Hurricane Florence and asks the panel to deny the applicant’s request. Because we find that the submitted evidentiary materials—even those submitted by the applicant—amply support FEMA’s determination denying the requested public assistance, we uphold that determination.

Background

Subject to certain eligibility requirements, the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (2018), authorizes FEMA to provide public assistance “to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person.” 42 U.S.C. § 5172(a)(1)(B). A facility that “provides critical services . . . in the event of a major disaster” satisfies one of the eligibility requirements for receipt of public assistance. 42 U.S.C. § 5172(a)(3)(A)(i).

To be eligible for public assistance, an item of work must be (1) required as the result of the emergency or major disaster event; (2) located within the designated area of a major disaster or emergency declaration, except that sheltering and evacuation activities may be located outside the designated area; and (3) be the legal responsibility of an eligible applicant. 44 CFR 206.233(a) (2020). In addition, FEMA does not provide public assistance for damage caused by an applicant’s negligence, 44 CFR 206.223(e), nor damage caused by deterioration, deferred maintenance, or the applicant’s failure to protect the facility from further damage. FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19-20.

² “Through-wall flashing is used to divert moisture, which has entered [a] wall, to the outside, before it can cause damage.” https://www.copper.org/applications/architecture/arch_dhb/arch-details/flashings_copings/wall_flashing.html (last visited Aug. 6, 2021).

FEMA recognizes that “[f]or buildings and building systems, distinguishing between damage caused by the incident and pre-existing damage may be difficult.” PAPPG at 118. Before making an eligibility determination, FEMA considers each of the following: (1) the age of the building and systems; (2) evidence of regular maintenance or pre-existing issues such as water damage from a leaky roof; and (3) the severity and impacts of the disaster. PAPPG at 118.

Scotland Memorial Health Care System is a community-owned and -controlled, not-for-profit organization that includes Scotland Memorial Hospital, Scotland Physicians Network with sixteen medical practices, Scotland Regional Hospice, Scotland Family Counseling Center, and Scotland Memorial Foundation. The health care system is located in Scotland County, North Carolina. FEMA recognizes the applicant as an eligible private, non-profit organization that operates a facility that provides critical medical services to the public during a major disaster. *See* 42 U.S.C. § 5172(a)(3)(A)(i).

The main hospital building walls, at issue in this arbitration, are part of the original hospital construction and were previously damaged by Hurricane Matthew in 2016. FEMA funded the applicant’s request for public assistance for the damage caused by Hurricane Matthew and required the applicant to obtain and maintain insurance for subsequent disasters.

Applicant’s Request for Public Assistance to FEMA

In September 2018, Hurricane Florence made landfall as a category 1 storm. As a result of the hurricane, the President declared a major disaster in the state of North Carolina (FEMA-4393-DR-NC). On October 19, 2019, the applicant requested public assistance for disaster-related damage to the main hospital’s south and west walls.

Subsequently, on January 25, 2019, FEMA conducted a site inspection of the applicant’s facilities. FEMA’s Response to Scotland Memorial Hospital, Inc.’s Request for Arbitration (FEMA’s Response Brief), Exhibit 5. The inspection report states, “There are no storm damages to the building other than water getting in There are no numbers associated with how many windows may have leaked” *Id.* at 00047.

In January 2020, FEMA issued a request for information to the applicant requesting an engineer’s report to verify that flashing deterioration to the main hospital building was at fault for water penetration at window locations. *See* FEMA’s Response Brief, Exhibit 8 at 00056. The applicant provided an engineer’s report of flashing repairs from Strickland Waterproofing Co., Inc., dated December 2, 2019, which states:

During these repairs, we observed deteriorated through-wall flashing that were fabricated from kraft-faced copper flashings and #15 roofing felt. . . . Over time the asphalt in the felt oxidizes and the felt becomes more and more brittle with time and cracks. #15 roofing felt is at best, a water-resistant material and was never intended as a waterproofing material. . . . Numerous cracks have been observed in mortar joints and through the brick masonry. Cracks, even very thin cracks, are direct pathways for bulk water to get into the cavity behind the brick masonry.

Id., Exhibit 7 at 00051.

By letter dated June 23, 2020, FEMA denied the applicant's request for public assistance, concluding that the applicant failed to prove that the damage to its flashing was caused by Hurricane Florence. FEMA's Response Brief, Exhibit 8 at 00053. FEMA noted that its own engineering report showed that the through-wall flashing had deteriorated and water had penetrated the exterior cavity wall due to a combination of failed joint sealants and deteriorated masonry joints. *Id.* at 00057. FEMA concluded that the water penetrating the cavity wall had overwhelmed the deteriorated through-wall flashing system. *Id.* Accordingly, FEMA found that the work to restore the flashing at the main hospital was ineligible for public assistance. *Id.* at 00057-58; *see also* PAPPG at 19 (public assistance is ineligible to repair damage caused by deterioration). Following receipt of FEMA's denial of the applicant's request for public assistance, the applicant submitted its first appeal of the denial through the grantee, North Carolina Emergency Management. FEMA's Response Brief, Exhibit 9.

Applicant's First Appeal to FEMA

In its first appeal to FEMA, the applicant asserted that it provided FEMA with a twenty-eight-page maintenance report showing weekly maintenance from August 31 to November 28, 2018; that the through-wall flashing that was fabricated from kraft-faced copper flashing and #15 roofing felt, although deteriorated, was acceptable when the roof and components were initially installed; and that the building was in working condition with no structural failures prior to the storm, so it could be assumed that the damage was caused by the storm. The applicant added, "While Scotland Memorial admits the flashing and roof failed to keep water from entering the facility due to the amount of rain and wind during the declared event, there was no obligation on the part of Scotland Memorial to replace the flashing prior to its failure. At the time of the installation of the flashing, it was deemed acceptable. . . ." FEMA's Response Brief, Exhibit 9 at 00067. The applicant did note, however, that its insurer denied a claim for damage to the hospital's second floor along the south and west elevations of the hospital building. The applicant's insurer, in a letter dated December 14, 2020, in response to appellant's insurance claim, stated:

It was our opinion that the cause of the reported water intrusion at the [second] floor brick facade along the south and west elevations was consistent with wind-driven rain in combination with long-term deterioration of the brick veneer mortar, felt weather-resistive barrier, and flashing near the base of the exterior wall. Contributing to this condition was the quality of the materials and workmanship of the brick veneer, felt, and flashing used in the construction of the building.

Id., Exhibit 12 at 00076.

In its response to the applicant's first appeal, FEMA explained that, "[b]efore making an eligibility determination [for public assistance], FEMA seeks evidence of regular maintenance or pre-existing issues. If [an applicant] does not provide sufficient documentation to support its claim as eligible, FEMA cannot provide [public assistance] funding for the [repair] work." FEMA's Response Brief, Exhibit 10 at 00072. FEMA noted that the December 2, 2019, engineering report provided by the applicant identified "pre-existing conditions which impacted the integrity of the brick masonry and flashing, including: 1) numerous cracks observed in mortar joints and through the brick masonry, 2) deteriorated through-wall flashing, 3) oxidation and cracking of asphalt in the flashing facer and mastic sealant, and 4) failed sealant joints." *Id.* FEMA found that, although "the through-wall flashing material was acceptable when the roof and associated components were initially installed, . . . deterioration occurs over time and the flashing material itself had oxidized and become brittle." *Id.* at 00072-73. FEMA further noted that:

In addition to the deteriorated condition of the flashing, the outer brick facade had pre-event deficiencies and masonry issues that allowed bulk water to enter the cavity wall system. The exterior sealant, a polyurethane-based sealant that generally has a useful service life of 5-7 years in the southern climate, had deteriorated over time. Additionally, the mortar joints and brick itself displayed signs of cracking. Brick is a porous material, so water penetration is expected. With cracks in the mortar and brick, coupled with no water repellent observed on the brick, water had a straight pathway to intrude through the cavity wall. The [applicant] has not provided any records to demonstrate preventive maintenance had been performed on the outer brick wall to prolong its useful life cycle. Accordingly, damage to the flashing was due to deterioration and deficiencies on the outer brick wall, and was not a direct result of the disaster.

Id. at 00073.

FEMA therefore rejected the applicant's first appeal, concluding that the applicant had not demonstrated that flashing repairs to the main hospital building were required as a direct result of Hurricane Florence. FEMA's Response Brief, Exhibit 10 at 00068.

The Arbitration

In this arbitration, the applicant reiterated its request for public assistance, asserting that FEMA (1) "did not have before it evidence of preventive maintenance on the walls and joints," which were explained in an affidavit submitted in this arbitration; (2) "failed to recognize that as constructed, the through-wall flashing (black felt paper) met applicable building codes and could not be maintained without destruction of the outside walls"; and (3) "failed to consider that despite the age and condition of the facilities there were no leaks or through wall infiltration until Hurricane Florence." Applicant's Request for Arbitration at 5.

Here, FEMA does not dispute that Hurricane Matthew similarly damaged the hospital's facade; that FEMA provided public assistance to repair that damage; and that, in this arbitration, the applicant is seeking public assistance for similar damage, but "for the opposite side walls of the Main Hospital building." FEMA's Response Brief, at 10. FEMA additionally recognizes that through-wall flashing is physically behind a brick-and-mortar barrier inside a wall. FEMA explains that "[t]he function of through-wall flashing is to divert moisture, which [enters a] wall through the brick Therefore, flashing gets wet when diverting moisture—that is its specific function—prevent moisture from entering a building." *Id.* at 11. FEMA added that, "[c]onsequently, due to its location and function, any sort of wind-driven rain should not cause 'behind the brick' flashing to fail it, unless the wall it is behind is already compromised." *Id.* FEMA referenced engineering reports submitted as evidence in this arbitration that showed that the south and west walls already had significant pre-existing deterioration prior to Hurricane Florence.

Relying on an engineering report from JSH Engineering Services dated May 31, 2019, which was actually completed for appellant's insurer, FEMA disputes the applicant's assertion that the bricks of the building at issue cannot be inspected or maintained without destroying the building. The report states that

[p]hotographs of *an exploratory opening* . . . provided in the facade investigation and restoration proposal, dated March 20, 2017 [i.e., following Hurricane Matthew but before Hurricane Florence], prepared by Weatherproofing Technologies, Inc. note the condition of the weather-resistive felt paper and flashing near one [second] floor exterior wall window well. The felt paper was deteriorated near the base of the wall, penetrated by a fastener, and torn along the wall corner. We did not observe through-wall flashing to

extend past the exterior face of the brick, which may prevent water from draining properly to the exterior.

FEMA's Response Brief, Exhibit 16 at 5 (emphasis added). After these findings (i.e., after Hurricane Matthew but before Hurricane Florence), the applicant, according to FEMA, engaged in significant repair work to the brick veneer and added all new flashing on the north and east side of the buildings, yet the applicant left the west and south walls of the original construction unexplored and unrepaired. FEMA's Response Brief at 12. Thus, FEMA asserts that "[i]t was entirely predictable that a subsequent disaster would cause water infiltration to the [west and south sides] of the deteriorated building." *Id.* at 13. According to FEMA, the applicant's request for funding to address what is essentially deferred maintenance is ineligible for public assistance as the deterioration to the building was not the result of Hurricane Florence. We agree.

Not only does FEMA's own engineering report submitted in this matter support evidence that the applicant is seeking funding for negligence, deterioration, deferred maintenance, or the applicant's own failure to protect the facility from further damage, *see* PAPPG at 19-20, but the engineering reports produced for the applicant and provided by FEMA in this arbitration also support this finding. Even Scotland Memorial Hospital's former director of engineering, in a witness statement submitted in this arbitration, admitted that "[p]erhaps some deterioration of the flashing or its connection to the walls at some points due to its age could have contributed or maybe it was not properly connected or installed in some places" and that the hospital, after Hurricane Matthew, attempted extensive maintenance to the south and west walls but the waterproof sealant failed. Affidavit of David Biles (Apr. 29, 2021) ¶ 13.

We find that the documentation presented in this arbitration is persuasive evidence that the applicant is seeking public assistance for deterioration of the buildings, deferred maintenance, or the applicant's own failure to protect the facility from further damage after Hurricane Matthew.

Decision

Accordingly, the panel affirms FEMA's denial of the applicant's request for public assistance.

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge