



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 8, 2022

CBCA 7325-FEMA

In the Matter of MONROE COUNTY ENGINEER

James L. Peters, Monroe County Prosecutor's Office, Woodsfield, OH, counsel for Applicant.

Anne Vitale, Ohio Emergency Management Agency, Ohio Department of Public Safety, Columbus, OH, counsel for Grantee.

Charles Schexnaildre, 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 **LESTER**, **RUSSELL**, and **VERGILIO**.

This arbitration matter is one of several that the Office of the Monroe County Engineer (the County) has recently filed seeking public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) under the auspices of section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018). In each case, the County alleges that a February 2019 rainfall event, which the President declared a major disaster, 84 Fed. Reg. 19,793 (May 6, 2019), caused damage to roadways in Monroe County.

The claim at issue in this particular case involves damage at mile 0.43 of County Road 38 (CR 38-0.43), also known as Headley Ridge Road, which was originally constructed in 1919. That two-lane road has an asphalt surface and is twenty feet wide, with an upslope on one side and a twenty-five-degree downslope on the other. The County asserted that a slope movement during or following the February 2019 rainfall led to a slope failure that directly affected the integral ground at this location. It sought \$615,000 for repair and

stabilization of the roadway and embankment at CR 38-0.43. In an eligibility determination memorandum for project no. 100251, dated October 28, 2020, FEMA approved costs of \$59,942.90 to repair the roadway surface and base at that location, but it determined that costs to repair and stabilize the embankment were ineligible because there was no indication of disaster-related embankment damage. In its first-appeal decision, dated December 27, 2021, FEMA determined that the County had not provided sufficient documentation or evidence demonstrating that the embankment had been damaged or made unstable by a landslide or slope failure triggered by the February 2019 rainfall or, in fact, that there was any slope failure at all. FEMA further determined that its prior decision to authorize PA funding to repair the roadway surface and base was made in error, but it recognized that section 705(c) of the Stafford Act, 42 U.S.C. § 5205(c), precluded it from deobligating those previously-awarded funds. FEMA declined to provide any additional funding for CR 38-0.43.

The Board conducted an arbitration hearing that commenced on June 2, 2022, and, because of the original unavailability of a witness, was continued for a second day of testimony on August 1. At the hearing, it became clear that an extended longitudinal crack along the middle of the roadway at CR 38-0.43, which, despite several attempts at repair and repaving, has repeatedly reestablished itself (both before and after the February 2019 rainfall),¹ is most likely the result of a weakness in the subgrade base, not evidence of slope instability. In their investigation of the site, neither FEMA nor its expert saw evidence of *any* slope instability or embankment failure at this location, and we see nothing of sufficient probative force in the record to cause us to question that observation. Although the County, as it has indicated in various filings, has limited resources available to it for investigating and documenting the cause of damage at its roadway sites, it is ultimately the “responsibility [of the applicant seeking PA funding] to substantiate its claim.” FEMA Public Assistance Program and Policy Guide (Apr. 2018) at 133. Here, we have identified no basis for overturning FEMA’s decision not to fund stabilization work at this location.

¹ Although the County alleges that the long roadway crack was originally caused by the February 2019 rainfall, photographs taken in 2014 (FEMA’s Hearing Exhibit (June 2, 2022) at 9 (figure 7)) and video footage taken in 2018 (FEMA’s Exhibit 3-24) evidence that the long crack and/or the soft subgrade conditions predated February 2019.

Decision

For the foregoing reasons, the County's request for PA funding in CBCA 7325-FEMA is denied.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge