



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 21, 2022

CBCA 7404-FEMA, 7405-FEMA

In the Matter of MONROE COUNTY ENGINEER

Amy M. Zwick, County Engineer, Office of the Monroe County Engineer, Woodsfield, OH, appearing 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 decision addresses two separate requests for arbitration from the Office of the Monroe County Engineer (the County) seeking public assistance (PA) funding under section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018).¹ The Federal Emergency Management Agency (FEMA) denied PA funding for stabilization of the roadways at mile 6.78 of County Road 26 (CR 26-6.78), also known as Beautiful Ridge Road, and mile 6.42 at County Road 4 (CR 4-6.42), also known as Sykes Ridge Road. The County challenges FEMA's denials, arguing that both

¹ Although the Board has not formally consolidated these two arbitration matters, the matters share common factual and legal issues. Because of these similarities, and because both matters are ready for disposition, we resolve them in a single decision.

roads were damaged following heavy rainfall from February 5 to 13, 2019, which the President declared to be a major disaster. 84 Fed. Reg. 19,793 (May 6, 2019).

As with another claim by the County arising from the February 2019 rainfall event that we recently considered, *Monroe Country Engineer*, CBCA 7303-FEMA, 22-1 BCA ¶ 38,172, FEMA does not dispute that the February 2019 rainfall event caused damage to the surface and base of the roadways at issue. Rather, FEMA's PA funding denial relates solely to the County's request for funding to stabilize the slopes supporting the roadways at these locations. Because we agree with FEMA that there is evidence of predisaster instability at both roadways, we deny the County's claims for PA stabilization funding.

Background

County Road 26-6.78 (CBCA 7404-FEMA)

CR 26-6.78 is a two-lane asphalt road constructed on a sloped embankment, adjacent to a high-volume part of Sunfish Creek that has widened over time because of erosion. The County sought PA funding to repair the road at CR 26-6.78, as well as \$400,100 to construct a retaining wall to stabilize the adjacent slope, arguing that both the roadway and the stabilization damage was caused by the February 2019 rainfall event. On January 20, 2021, FEMA issued an eligibility determination memorandum (DM) designating the request as project 100234. In its DM, FEMA recognized that in-kind repair of the surface and base of the roadway itself was eligible for PA funding as a result of damage caused by the February 2019 rainfall. Nevertheless, it denied the County's slope stabilization PA funding request, finding that the County had not demonstrated that instability at this location was the direct result of the February 2019 rainfall event.

The County filed a first appeal, which the recipient/grantee, the Ohio Emergency Management Agency (OEMA), forwarded to FEMA on March 18, 2021. In response, FEMA hired an independent technical expert, Dr. Timothy Stark, to conduct an analysis of whether the site was unstable prior to the February 2019 rainfall event. Dr. Stark, after reviewing historical terrestrial data, Light Detection and Ranging (LiDAR) data, rainfall data, the site inspection report, site photos, and appeal documentation, concluded that the roadway "experienced prior tension cracks and movement" that predated the declared incident period. FEMA's Exhibit 20 at 8. On March 21, 2022, relying upon Dr. Stark's analysis, FEMA denied the County's request for stabilization funding because of "evidence of predisaster instability and slope movement after the [roadway] was constructed, and before the [February 2019] disaster." FEMA's Exhibit 1 at 6. Additionally, FEMA deobligated \$2668.96 of PA funding that had previously been erroneously obligated to repair the road surface and base, *id.* at 1, but indicated that it would reobligate the surface and base repairs

funding once the County had stabilized the site and restored the integral ground.² *Id.* at 1, 8.

The County submitted a request for arbitration to the Board on May 19, 2022. The Board docketed the application as CBCA 7404-FEMA. The parties subsequently submitted that matter for decision on the written record pursuant to Board Rule 611 (48 CFR 6106.611 (2021)).

County Road 4-6.42 (CBCA 7405-FEMA)

CR 4-6.42 is a two-lane asphalt road constructed on a natural slope. The County sought PA funding to repair and stabilize the road, alleging that this damage was caused by the February 2019 rainfall. FEMA issued a DM on January 20, 2021, designating this matter as project 100236, and awarding \$49,810 for surface and base repair but denying PA funding for stabilization because the County had not demonstrated that the instability was caused by the February 2019 rainfall event. The County filed a first appeal, which was forwarded by the recipient/grantee, OEMA, to FEMA on March 18, 2021. In its first appeal decision dated May 2, 2022, FEMA denied the \$218,750 sought by the County for stabilization of the embankment based upon “evidence of predisaster instability,” FEMA’s Exhibit 1 at 1, citing to an analysis from Dr. Stark concluding that the roadway “experienced tension cracks and movement that predate” the February 2019 rainfall event. *Id.* at 5. FEMA deobligated the PA funding previously obligated for surface and base repair because it could not be obligated until the roadway was stabilized. *Id.* at 1.

The County submitted an application for arbitration to the Board on May 19, 2022. The Board docketed the application as CBCA 7405-FEMA. The parties have submitted that matter for decision on the written record pursuant to Board Rule 611.

Discussion

The issue here is not whether the slopes beneath the roadways at CR 26-6.78 and 4-6.42 are unstable. Both FEMA and the County agree that they are. The only issue is whether it was the February 2019 rainfall disaster that caused that instability.

“FEMA has long held that the integral ground making up the slope beneath a facility and the portion of the slope essential to support the structural integrity of a facility, such as a road, is only eligible for PA [funding] if it was stable *prior* to the disaster.” *Monroe*

² “Integral ground refers to only the ground necessary to support a facility.” FEMA’s Public Assistance Program and Policy Guide (Apr. 2018) at 128.

County Engineer, CBCA 7303-FEMA, 22-1 BCA ¶ 38,172, at 185,383 (quoting *Noble County, Ohio*, CBCA 6575-FEMA, 19-1 BCA ¶ 37,443, at 181,959 (footnote omitted)) (emphasis added). When a roadway “is located on a slope and is damaged as a result of a landslide or slope instability triggered by [a declared disaster], FEMA looks to the stability of the slope that supports the facility before it approves PA funding to restore the facility.” *Id.* FEMA, through its Landslides and Slope Stabilization Policy, has provided the following guidance:

- If the site is stable, permanent restoration of the facility and its integral ground is eligible.
- If the site is unstable and there is no evidence of predisaster instability after the facility was constructed, permanent restoration of the facility and its integral ground is eligible, including measures to stabilize the integral ground.
- If the site is unstable and there is evidence of predisaster instability after the facility was constructed, restoration of the facility’s integral ground is not eligible. Restoration of the facility is eligible only upon the Applicant stabilizing the site and restoring the integral ground.

FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 128.

Here, similar to the situation in the earlier *Monroe County Engineer* matter, the County has not established that the integral ground beneath CR 26-6.78 and CR 4-6.42 was stable before the February 2019 rainfall event. With regard to CR 26-6.78, a 2018 LiDAR image shows tension cracking and erosion on the slope that supports the roadway, FEMA’s Exhibit 1 at 13-14, and a color infrared (CIR) aerial photograph from 2014 shows soil moisture that likely led to the roadway damage and instability identified in the 2018 LiDAR image. *Id.* at 14. With regard to CR 4-6.42, an undated photograph from the County shows a “significant thickness of asphalt pavement” having been placed in the area of a tension crack over a lengthy course of time, likely as a result of the embankment moving downslope, *id.* at 14, which, according to Dr. Stark, indicates “that downslope movement had been occurring before the most recent re-paving in the Spring of 2014.” *Id.* A 2018 LiDAR image of CR 4-6.42 also shows roadway damage and instability prior to the February 2019 rainfall event. *Id.* at 6.

The County has not established that the slopes at the two sites were stable before the February 2019 disaster. In accordance with bullet three of the PAPPG guidance noted above, the County is not eligible to receive PA for the restoration of either facility’s integral ground.

Decision

For the foregoing reasons, we deny the County's requests for PA funding for stabilization in both matters.

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