



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 2, 2022

CBCA 7356-FEMA

In the Matter of OREGON DEPARTMENT OF TRANSPORTATION

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Andrew Phelps, Director, and Julie Slevin, Recovery Section Manager, Oregon Office of Emergency Management, Salem, OR, appearing for Grantee.

Ramoncito Deborja, 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**, **GOODMAN**, and **SHERIDAN**.

The applicant, Oregon Department of Transportation (ODOT), seeks arbitration of the Federal Emergency Management Agency's (FEMA's) denial of ODOT's request for public assistance for commercial property debris removal (CPDR) activities from twenty-eight commercial properties in Lane, Marion, and Jackson counties.¹ FEMA determined that, contrary to the agency's regulations and policy as explained in its Public Assistance Program and Policy Guide (PAPPG), ODOT (1) failed to request preapproval from FEMA before removing much of the debris from the commercial properties, (2) failed to show that the

¹ ODOT initially requested reimbursement for twenty-nine properties but withdrew one of the properties in Lane County from consideration in the arbitration when ODOT found third-party funds to cover the debris removal from the property.

debris removal was in the public interest, and (3) failed to establish a satisfactory basis for a waiver of FEMA's preapproval process.

The panel decides this matter under its authority set forth in 42 U.S.C. § 5189a(d) (2018). For the foregoing reasons, we conclude that ODOT has failed to establish its entitlement to public assistance for the CPDR activities.

Background

On September 15, 2020, the President declared the wildfires in Oregon a major disaster authorizing FEMA to provide public assistance for the damage resulting from the disaster. Between November 16 and December 2, 2020, FEMA approved ODOT's requests for CPDR for twenty properties in Jackson County and eighty-two properties in Marion County. In approving ODOT's request, FEMA emphasized the large number of housing properties and businesses destroyed by the disaster in both counties, with seventy percent of the businesses and public properties destroyed in the City of Detroit in Marion County. For Jackson County, FEMA noted the significant threat to the watershed due to the fire and ash left behind, and for Marion County, FEMA noted the large number of clustered debris close to the North Santiam River that threatened the sole source of water for more than 225,000 citizens.

Subsequently, between May 11 and July 6, 2021, ODOT submitted CPDR requests for the commercial properties at issue in this arbitration—eleven properties in Lane County and seventeen properties in Jackson and Marion counties. ODOT's primary argument was that the debris and ash from the wildfires contained hazardous substances and toxic materials which are known threats to public safety, the environment, and local wildlife.

For all properties, ODOT acknowledges that it removed debris from the commercial properties prior to seeking approval from FEMA for CPDR. ODOT asserts that circumstances warranted proceeding with its debris removal activities prior to engaging the FEMA approval process because of the need to address threats to public health and safety and to ensure the economic recovery of the affected areas. Alternatively, ODOT contends that, even if the preapproval requirement is binding or a statutory requirement, FEMA has the authority to waive the requirement under Section 301 of the Stafford Act.

FEMA counters that ODOT failed to follow FEMA's preapproval process before removing the debris from the commercial properties (a point which ODOT concedes) and also failed to show that extraordinary circumstances existed to obtain federal assistance for CPDR on the properties at issue. FEMA asserts that the debris removal would benefit only a few property owners and occupants (not the general public or economic recovery for the

community at large) and, additionally, notes that ODOT failed to present documentation showing that the hazardous materials posed an immediate threat to the public.

Discussion

The Stafford Act authorizes debris removal from publicly and privately owned lands and waters whenever the debris removal is found to be in the public interest. 42 U.S.C. § 5173. In its regulations, FEMA explains that debris removal is in the public interest when it is necessary to: “(1) [e]liminate immediate threats to life, public health, and safety; or (2) [e]liminate immediate threats of significant damage to improved public or private property; or (3) [e]nsure economic recovery of the affected community to the benefit of the community-at-large.” 44 CFR 206.224(a) (2021). FEMA provides additional policy guidance on public assistance requirements for debris removal in the PAPPG. This guide further defines the policy and procedural requirements of FEMA’s public assistance program and, according to the guide, only the Assistant Administrator of Recovery at FEMA Headquarters has the authority to modify or waive the PAPPG’s policy requirements. PAPPG (June 2020) at 18.

Removal of debris from commercial properties is generally ineligible for public assistance because commercial enterprises are expected to retain insurance that covers debris removal. PAPPG at 109. In very limited, extraordinary circumstances, FEMA may provide an exception, but the applicant must request one in writing prior to removing debris from the commercial properties. *Id.* To find that debris removal is eligible for public assistance, FEMA considers “the severity of the impact of an incident and whether [the] debris on [the] private property is so widespread that it threatens public health and safety or the economic recovery of the community.” *Id.* at 107.

ODOT concedes that it failed to request approval for CPDR before removing debris from the commercial property sites at issue. But ODOT contends that FEMA should use its statutory authority to waive administrative requirements under Section 301 of the Stafford Act. Section 301 of the Stafford Act provides:

Waiver of administrative conditions

Any Federal agency charged with the administration of a Federal assistance program may, if so requested by the applicant State or local authorities, modify or waive, for a major disaster, such administrative conditions for assistance as would otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster.

42 U.S.C. § 5141. ODOT has not established that its inability to submit a written request for CPDR occurred as a result of a condition relating to the disaster. Instead, the record shows that ODOT was able to successfully obtain approval for CPDR for many properties in Oregon. Furthermore, there is no evidence in the record that state or local authorities requested a waiver of administrative conditions from FEMA.

Additionally, FEMA's decision denying ODOT's CPDR requests for failure to comply with FEMA's preapproval process comported with FEMA's policy guidelines. We see no reason to step into the role of policy decision maker on federal emergency management matters by granting ODOT's requested waiver from that process. That decision-making role is within the purview of FEMA and, according to the PAPPG, the responsibility of FEMA's Assistant Administrator of Recovery. ODOT has not persuaded us that we should usurp that policymaker's authority.

ODOT has also failed to show that the CPDR work was in the public interest, necessary to eliminate an immediate threat to life, public health, and safety, or necessary to ensure the economic recovery of the affected communities. We agree with FEMA's conclusion that ODOT failed to present persuasive evidence that the CPDR would benefit the general public or the economic recovery of the communities affected by the disaster but, instead, would significantly benefit the impacted commercial property owners. We also agree with FEMA that ODOT did not produce evidence that the substances on the properties posed an immediate threat to the public, particularly given the period between the disaster and ODOT's submission of its CPDR requests.

Decision

The panel finds that FEMA correctly determined that the CPDR work was ineligible for public assistance.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge