



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 4, 2023

CBCA 7643-FEMA

In the Matter of CITY OF PANAMA CITY, FLORIDA

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX; and Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Stephanie Stachowicz, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Marija Diceviciute, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR; and 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 **SHERIDAN**, **ZISCHKAU**, and **SULLIVAN**.

SHERIDAN, Board Judge, writing for the panel.

City of Panama City, Florida (applicant or city), seeks \$9,547,330.96 in public assistance (PA) funds to restore the city's roads, which were damaged during Hurricane Michael and its aftermath, including by sustained flooding and emergency response efforts. The Federal Emergency Management Agency (FEMA) denied the PA request, claiming that the applicant did not demonstrate that the roads were damaged as a result of the hurricane rather than by some other cause, such as poor maintenance. We conclude that the applicant is eligible for funds to repair a portion of the claimed road segments.

Background

In October 2018, Hurricane Michael made landfall as a category five hurricane and devastated the Florida panhandle region, causing widespread destruction to private homes, commercial buildings, infrastructure, and local public utilities. The hurricane also caused significant rain and extended flooding that overwhelmed the city's drainage system and caused water to pool on and around the city's roads.

Roadway pooling water issues were compounded by the unavoidable use of the city's roads for immediate emergency response, power restoration, and storm debris removal. Over 5.7 million cubic yards of debris was removed by the city in the period following the hurricane, which is more than the city would have expected to collect over a seventy-year period under normal circumstances. The heavy machinery required to perform this removal, combined with the effects of the water, left many of the city's roads in poor condition.

Coincidentally, a few months before the hurricane, the city contracted with Transmap to prepare a pavement management report. Transmap is a transportation industry company that analyzes roads using a pavement condition index (PCI). The PCI is a numerical condition index that measures and quantifies the severity and extent of the distress to roads. The PCI process used by Transmap rates the surface condition of a road segment on a scale of 0 to 100, where 0 is the worst and 100 is the best condition. It requires a manual survey of the pavement based on inspection and observation. Transmap used a laser to measure the cracks in particular road segments and applied its data measurements to the PCI rating scale. The PCI rating scale generally classifies road degradation in increments of fifteen points. Roads that are scored within a range of 100 to 86 are rated good; 85 to 71, satisfactory; 70 to 56, fair; 55 to 41, poor; 40 to 26, very poor; 25 to 11, serious; and 10 to 0, failed.

In June 2019, after the hurricane, the city had Transmap perform another review of the roads to assess the post-disaster condition. After the hurricane, many of the roads' PCI values had worsened, indicating damage was sustained.

The applicant submitted an application for PA funds to FEMA, claiming that thirty percent (675 road segments) of its roads had been damaged. The applicant notes that while more than the 675 road segments were damaged by the hurricane, it requested funds only for road segments with a drop of seven PCI points or more. The applicant explains that, with this limit, it seeks funds to repair only the most significantly damaged roads.

In July 2021, FEMA denied all of the applicant's requested road repair costs, stating that the applicant had not provided enough evidence to demonstrate that the damage to the roads was caused by the hurricane and not by another factor, such as poor maintenance, as required by FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018).

The applicant appealed the determination, reiterating that the damage resulted from the storm, as demonstrated by the significant PCI change just following the hurricane and subsequent debris removal. The appeal also cited a provision of the PAPPG that allows for the restoration of roads damaged by a declared disaster, including when the damage is incurred “during the performance of eligible emergency response activities or debris removal operations.” PAPPG at 83.

FEMA denied this appeal on November 22, 2022, again finding that the applicant had not proven that the damage to the roads was a result of debris removal after the hurricane and stating that FEMA does not provide PA funding for deterioration, deferred maintenance, or negligence. *See* 44 CFR 206.233(e) (2021). The applicant timely requested arbitration before the Board on January 20, 2023, and the arbitration was conducted on March 22, 2023.

Discussion

Under the PAPPG, FEMA permits PA funds to be used for road repairs. However, applicants must meet the burden of demonstrating that the damage they claim directly resulted from the declared disaster. Here, the applicant has done this to some degree. Some of the city’s roads were clearly damaged by the hurricane and the debris removal efforts, as evidenced by the change in PCI scores for road conditions in such a short period.

This case introduces a unique set of circumstances not frequently seen in PA arbitrations. The applicant can provide hard data of the conditions of the affected property—both pre- and post-disaster. Although the panel considered the Transmap information while making its decision, we do not accept the applicant’s argument that FEMA has an obligation to fund repair of all of the road segments that it claims. The Stafford Act, 42 U.S.C. § 5189a(d) (2018), only requires the PA funding to bring the affected property back to its pre-existing condition or as it was before the disaster. FEMA is not required to make property like new.

The funds we allow for each road segment depend on the condition of the segment pre- and post-disaster and what is required to bring the road segment back to its pre-disaster condition. By way of example, consider a roof. If a roof is only missing a few shingles, replacing the whole roof may not be justified. Yet, if the roof is missing many shingles and has foundational problems, a new roof may be appropriate.

It can be reasonably anticipated that some of the applicant’s road segments are in a condition that milling and overlay is necessary to match the condition of the segment before the hurricane. However, there are other road segments that do not require this level of restoration and can be brought back to their pre-disaster condition through other, less intensive repair efforts, such as patching, slurry seal, and microsurfacing. The parties need

to work together to determine what type of fix is appropriate for the particular road segment to restore the road segment back to its *pre-hurricane condition*.

According to the city's witnesses, the PCI rating for a road can be expected to decrease by two or three points per year. In instances in which a road has deteriorated more than ten points between the pre-2018 and post-2019 disaster survey measurements, it is more than likely the deterioration was due to the hurricane. We did not find that the seven-point PCI reduction proposed by the applicant adequately captured the damage attributable to the hurricane. A difference of ten points is enough for the panel to feel comfortable attributing the differential to the hurricane.

For road segments submitted by the applicant with PCI scores of 56 and above, we conclude that road segments with a ten-point decrease between the pre-2018 and post-2019 disaster survey are eligible for FEMA PA funding at a level necessary to bring the road segments back to their pre-hurricane condition. The remedy will differ between the segments, and the parties must work together to find appropriate resolutions.

Referencing the 2018, or pre-disaster, PCI scores, we find that road segments with a PCI of 55 or below are ineligible for FEMA PA funding. According to the PCI rating system, those road segments were in a poor, very poor, serious, or failing condition prior to the hurricane, indicating other reasons for their PCI score drops, including a possible lack of ongoing maintenance.

Decision

The panel determines that road segments with PCI scores of 56 and above on the 2018 pre-hurricane survey that subsequently showed a ten-point-or-greater decrease in the PCI points post-hurricane are eligible for FEMA PA funding sufficient to bring the road segments back to their pre-hurricane condition. Road segments with a PCI of 55 or below on the 2018 pre-hurricane survey are not eligible for FEMA PA funding.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge