UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 9, 2024

CBCA 7826-FEMA

In the Matter of BOARD OF TRUSTEES OF BAY MEDICAL CENTER

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX; Chris Bomhoff of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, FL; and Robert C. Jackson of Hand Arendall Harrison Sale, LLC, Panama City, FL, counsel for Applicant.

Caleb Keller, Mitigation Attorney, and Stephanie Stachowicz, General Counsel, 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.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Maureen Dimino, 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 **O'ROURKE**, **CHADWICK**, and **KANG**.

CHADWICK, Board Judge, writing for the Panel.

Applicant sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) as to the eligibility for public assistance of $3,813,426.06 that applicant says it would cost to rebuild a medical facility after a hurricane. We find the costs ineligible based on applicant's evidence, which does not depict or support the pervasive storm damage that applicant urges us to find. We disagree,

however, with FEMA's legal arguments as to (1) our arbitration authority, (2) the timeliness of applicant's first appeal, and (3) applicant's responsibility for the facility under a lease.

Background

Applicant owned a surgery building that sustained damage from Hurricane Michael in October 2018. In June 2019, an engineering firm retained by applicant to assess the damage concluded that the structure was so seriously damaged that it should be condemned. Applicant's Exhibit 18-1, Structural Evaluation at 3–4. Applicant later demolished the facility. The timeline of applicant's decision to do so was not disclosed to us. The building seems to have been intact until 2020.[1] Applicant seeks to apply the public assistance at issue toward replacing the facility. *See* Request for Arbitration at 41.

In July 2019—more than eight months after the disaster—representatives of FEMA and applicant conducted a joint walk-through of the facility. In a written statement, an eyewitness for applicant described this inspection as "partial," "incomplete," and rushed. Declaration of Paul Bustanji (July 18, 2023) at 4–6. The FEMA inspector described the event differently in the hearing and held firm under cross-examination. He testified that applicant had told him to expect "to find a very damaged facility that was way over 50 percent" in disrepair. Transcript at 52. That is not what he said he saw. By visual inspection of the building exterior, it appeared that shingles on a flat section of the roof with "no discernible exterior damage" had recently been patched or replaced, about eighty-three feet of gutters were missing, and three windows "had some damage." *Id*. at 55–60. When the FEMA representative was escorted inside, "[t]here was no electricity and . . . no ventilation." *Id*. at 61. Applicant's representative showed the inspector a few rooms with either no visible damage or apparently minor water or mold stains on ceilings, floors, wall coverings, or walls behind coverings, in which applicant's representative said the storm damage being claimed was "all ceilings, all walls, all flooring." *Id*. at 63. The inspector testified that after several minutes in the uncomfortable facility, he asked, "Is that what you are saying [are the damages], all the walls, all the ceilings, all the flooring?" and received an affirmative answer. *Id*. at 64. Consistent with this testimony, applicant's representative states that the FEMA

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[1] Applicant writes that it "determined" at an unstated time that "demolition and reconstruction was the only viable option . . . ." Request for Arbitration at 13. Applicant cites no evidence of such a determination; it cites only two engineering reports it had received by April 2020. *See id*. n.45. A FEMA witness testified, "It really hasn't been brought up [yet] but . . . by the time I was first assigned [to] the project [in May 2020], the facility had already been demolished." Transcript at 171. Applicant's counsel confirmed in response to a question from the panel that the facility "has been demolished." *Id*. at 186.

inspector spent "15–20 minutes" inside the building and was advised that applicant was claiming pervasive damage to "all rooms in the facility." Bustanji Declaration ¶ 11.

As discussed below, the panel shares FEMA's impressions of minimal storm-related damage based on the photographic evidence. *See* FEMA Response to Request for Arbitration Exhibit 5; Applicant's Supplemental Exhibits 1–8.[2]

In March 2021, following requests for information (RFIs), FEMA determined that applicant had shown eligible repair costs of only $16,451.94. FEMA's eligibility determination memorandum advised applicant of its right to file an appeal. Applicant's Exhibit 15a at 4. FEMA obligated the estimated repair costs of $16,451.94 to the relevant grant on August 18, 2021. *See* Request for Arbitration at 14; Applicant's Exhibits 2, 15. All agree the project worksheet did not indicate a right to appeal. *See* FEMA's Corrected Motion to Dismiss at 18 & n.9. Nonetheless, the State grantee advised applicant in the email transmitting the worksheet that applicant could "elect to file an appeal in accordance with 44 CFR 206.206 [(2020)]." Applicant's Exhibit 2.

Applicant submitted an appeal of the funding in the project worksheet to grantee on October 15, 2021. Grantee forwarded the appeal to FEMA on December 8, 2021. Applicant sought the estimated cost to replace the facility, $3,813,426.06, pursuant to the "50% rule" of 44 CFR 206.266(f)(1). Applicant's Exhibit 4 at 2. After further RFIs, FEMA advised applicant on May 22, 2023, that "[t]he appeal is denied." Applicant's Exhibit 1 at 1. FEMA found the appeal "untimely" and added that, "even if [it had been] timely, the appeal would still be denied, because the Applicant has not provided documentation to establish the predisaster condition of the Facility." *Id*.

Regarding timeliness, FEMA stated that its relevant decision on the obligated funding was the March 2021 determination, which applicant had failed to appeal by letter to grantee within sixty days as required by 44 CFR 206.206(c). Applicant's Exhibit 1, First Appeal Analysis at 4–5. On the merits, FEMA wrote that the application would "remain ineligible" even if it were timely because applicant did not provide "documentation showing a history of building maintenance, [without which] FEMA cannot determine that the damage was event-related, or verify whether portions of the Facility . . . were inspected or maintained at any point prior to the disaster." *Id*. at 5–6. FEMA stated that it did not agree with applicant

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[2] FEMA independently numbered the exhibits to its motion and to its substantive response to the arbitration request. Applicant numbered its exhibits consecutively until its final "supplement," which restarted at exhibit 1. We cite applicant's exhibits when possible and encourage parties to avoid duplicating exhibit numbers in the future.

that the reports of applicant's engineering firms supplied the necessary pre- and post-disaster comparisons. *Id*. at 6.

On July 21, 2023, applicant requested arbitration, arguing that the facility "qualifies for full replacement funding under FEMA's 50 Percent Rule" at a cost of $3,813,426.06 and that "repair is not feasible" due to extensive damage. Request for Arbitration at 41.[3]

Discussion

Applicant's First Appeal Was Timely

In a separate motion for dismissal,[4] FEMA argues that the Board lacks "authority under the Stafford Act to arbitrate arbitrability, [or] to accept arbitrations filed after an applicant failed to timely file a first appeal. As such, FEMA asserts that the proper action, and in fact the only action, this panel should take is to dismiss this matter." FEMA's Corrected Motion to Dismiss at 5–6. Alternatively, FEMA argues at length that we should "dismiss" the arbitration for lack of a timely first appeal even if we reach the timeliness issue and decide it independently. *Id*. at 6, 13–23. Applicant responds that (1) other panels have found the timeliness of an appeal to be within their authority to decide, and (2) a panel found an appeal timely in circumstances similar to these. Applicant's Reply to FEMA's Motion to Dismiss at 2–19. Applicant further argues that even if we conclude that its appeal was untimely, we have power to toll or extend the deadline and should do so. *Id*. at 19–22.

We reject FEMA's arguments and exercise our authority to find the appeal timely. It may be useful to address the issues at some length, as aspects of the following discussion reflect the evolution of views previously endorsed by members of the panel.

Four Threshold Questions

One might ask at least four threshold questions prior to reaching funding disputes in arbitration. As we explain, we ultimately focus on the question of our statutory arbitration authority as it relates to issues of timeliness within FEMA's appeal process.

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[3] We note applicant's potentially misleading use of the present tense ("qualifies," "is not feasible") in July 2023, years after the facility was demolished.

[4] The panel earlier reminded FEMA that the agency may not seek "involuntary prehearing dismissal other than on the merits except on the grounds that an arbitration request is untimely." Board Rule 610 (48 CFR 6106.610 (2022)). FEMA's arguments for dismissal are now ripe for consideration, post-hearing.

One of the four threshold questions is whether the party asking us to arbitrate a grant dispute is the type of entity that is allowed to do so—by statute, an "applicant." 42 U.S.C. § 5189a(d)(1) ("[A]n applicant for assistance under this subchapter may request arbitration[.]"); *see also* 44 CFR 206.201(a) (2022) ("Applicant" definition).[5] For convenience, we can call this the question of *standing*.[6]

A second threshold question may be whether the particular dispute that applicant wants us to resolve is among the *kinds* of disputes that the Stafford Act entrusts to the Board—that is, whether the dispute is about "eligibility for [FEMA public] assistance or repayment of assistance" of more than $500,000 for some applicants and $100,000 for others. 42 U.S.C. § 5189a(d)(1), (3); *see, e.g., Second Wind Corp.*, CBCA 7596-FEMA, 23-1 BCA ¶ 38,258, at 185,787 (panel lacks "authority to proceed" when "[t]he amount genuinely in dispute here with respect to eligibility for FEMA public assistance [in a non-rural area] certainly does not exceed $500,000"). We can call this second question the question of our *arbitration authority* or, alternatively, *arbitrability*.[7]

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[5] *See Vista on 5th Corp.*, CBCA 7691-FEMA, 23-1 BCA ¶ 38,356, at 186,269 (submission of request for public assistance made entity an "applicant" even if request was untimely); *Housing Preservation Trust, Inc.*, CBCA 7517-FEMA, 23-1 BCA ¶ 38,267, at 185,807 (finding that entity seeking arbitration was not an "applicant for public assistance").

[6] "Standing" is arguably not quite the right word, as it usually means the ability to enforce a right or claim in court, whereas FEMA grant funding is a discretionary, administrative function. *Compare Standing and Claim* (definition 2), Black's Law Dictionary (11th ed. 2019) *with City of San Bruno v. Federal Emergency Management Agency*, 181 F. Supp. 2d 1010, 1014 (N.D. Cal. 2001) ("Distributing limited funds is inherently a discretionary responsibility."). A grant application is not a "claim" based on entitlement. *But see* Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 42 ("FEMA must first determine whether the Applicant is eligible before evaluating the Applicant's claim.").

[7] *See United States Capitol Police v. Office of Compliance*, 916 F.3d 1023, 1027 (Fed. Cir. 2019); *Arbitrability*, Black's Law Dictionary (11th ed. 2019) ("The status, under applicable law, of a dispute's being or not being resolvable by arbitrators because of the subject matter."). It could be argued that applicants for public assistance must meet an applicable dollar threshold to have "standing" in arbitration. A better reading of the sentence structure of 42 U.S.C. § 5189a(d)(1) is that the dollar figures and locations are part of the description of the arbitrable subject matter. *See Metropolitan St. Louis Sewer District*, CBCA 6821-FEMA, 20-1 BCA ¶ 37,696, at 183,009.

A third threshold question that may arise is whether applicant has followed all of the procedural steps necessary to bring the dispute before us. This type of question may not have an accepted name, but it will typically—as in this case—involve *timeliness*, and we could call the issue *procedural eligibility*.[8]

A fourth question one can ask up front—and might ask even before asking questions one, two, or three, in fact—is how, in general, a panel should go about resolving a dispute. To what extent should arbitrators make up our own minds rather than accept interpretations, policy calls, or other judgments FEMA has already made? In a particular dispute, a panel can face this question more than once, and the answers may vary depending on the nature of the issues at stake and myriad other considerations. We can broadly call this fourth question the recurring question of *deference*.[9]

These four questions need not arise in this enumerated order. One could in principle, for example, decide, as one's answer to question four, that the arbitrators should *defer* to FEMA's judgment as to who is an "applicant" for purposes of question one, or to FEMA's view of whether an applicant is from an urbanized area for purposes of question two, or to FEMA's administrative decisions on timeliness under question three. The four gateway

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[8] *See, e.g.*, *Vista on 5th*, 23-1 BCA at 186,269–70 (rejecting "FEMA's current position that an applicant is an applicant only if its application is timely" but finding the request for public assistance (RPA) untimely with no extenuating circumstances); *Larimer County, Colorado*, CBCA 7450-FEMA, 23-1 BCA ¶ 38,256, at 185,785 (finding applicant's "first appeal . . . timely, notwithstanding [grantee's] delay in forwarding the appeal to FEMA"); *Municipality of Arroyo, Puerto Rico,* CBCA 7164-FEMA, 22-1 BCA ¶ 37,987, at 184,461 (2021) (finding that disaster inventory items "were not submitted by the deadline"); *City of Pine Bluff, Arkansas*, CBCA 7102-FEMA, 21-1 BCA ¶ 37,883, at 183,983 (finding request for arbitration untimely); *St. John's River Utility, Inc.*, CBCA 6903-FEMA, 20-1 BCA ¶ 37,723, at 183,114 (finding RPA untimely).

[9] *See Defer*, Black's Law Dictionary (11th ed. 2019) ("2. . . . to yield to the opinion of [another]"); *Harris County, Texas*, CBCA 6909-FEMA, 21-1 BCA ¶ 37,754, at 183,268 (2020) ("We provide no deference to FEMA's fact-finding."); *see also* Robert Nichols, Shiva Hamadinia, & Sam Van Kopp, "Planning For Coronavirus FEMA Public Assistance Program Arbitrations Before The Civilian Board Of Contract Appeals: Guidelines For Local Governments, Tribes, And Private Nonprofit Organizations," 20-9 Briefing Papers 1, 10–13 (Aug. 2020).

questions—standing, arbitration authority, timeliness, deference—can be reordered. Yet they are distinct from one another analytically.[10]

Keeping the Questions Separate

It turned out not to be entirely helpful in the long run, therefore, when the first decision issued by a Board arbitration panel in 2009 transitioned directly from rejecting FEMA's extremely weak argument that its grant determinations were deserving of "*Chevron* deference"[11] to stating the forceful views, unnecessary to that dispute, that (1) Board arbitrators owe FEMA's views essentially no deference at all, and (2) "*everything* necessary to [an] ultimate decision" on grant funding "is included in the *authority* of the arbitrators." *Bay St. Louis–Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,579–80 (2009) (emphasis added). The *Bay St. Louis* decision was illuminating for its time. It was a strong start. But it may have left a misleading impression that the answer to one threshold question—denying *Chevron* deference to FEMA's grant determinations—necessarily implies answers to different threshold questions.[12]

A 2022 decision on which applicant relies, *City of Beaumont, Texas*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018, for example, cited *Bay St. Louis* to support the conclusion that arbitrators may "decide the question of [the] timeliness" of an applicant's first appeal within FEMA because we are "not bound by a deferential standard of review." *Id*. at 184,631. This amounted to mixing and mismatching different questions. "Timeliness" and

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[10] "Jurisdiction" is not a helpful threshold issue, by contrast. It is a vague term having little to do with purely administrative arbitrations and tends to distract from other, better-focused questions relating to arbitration authority and procedures.

[11] FEMA's argument was weak because *Chevron* deference is a rubric by which courts review statutory interpretations that agencies have adopted in authoritative, final agency action. *See, e.g.*, *Power Integrations, Inc. v. Semiconductor Components Industries, LLC*, 926 F.3d 1306, 1318 (Fed. Cir. 2019) ("[W]e decline to give *Chevron* deference to . . . nonprecedential [Patent Trial and Appeal] Board decisions, which do not even bind other panels of the Board."); *see also United States v. Mead Corp*., 533 U.S. 218, 230–31 (2001). A decision on a grant application rarely, if ever, involves the highest FEMA officials or a straightforward interpretation of the Stafford Act; and the CBCA is not a court. *See Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436, at 181,939.

[12] *Bay St. Louis* did not, however, use the unhelpful term "jurisdiction."

deference are separate issues.[13] A panel might approach the agency's application of its own procedural regulations under a deferential standard or a non-deferential standard[14]—or a panel could consider whether, regardless of deference, FEMA's timeliness decisions fall outside our authority that is now published in the United States Code (as it was not at the time of *Bay St. Louis*).[15] Each threshold question stands alone and can get its own answer.

Panels cannot make headway in resolving most disputes, moreover, without deferring to FEMA's policy judgments to at least some extent.[16] The panel in *Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436, at 181,938–39, noted that FEMA interprets the key words "result of [a disaster]" in 44 CFR 206.223(a)(1) to mean "direct result of [a disaster]" and to exclude costs caused *indirectly* by disasters—which is not what the regulation actually says. *See also St. Tammany Parish Government*, CBCA 3872-FEMA, 17-1 BCA ¶ 36,715, at 178,780 (denying "recovery of [applicant's] legal and accounting fees as [actual but indirect] project costs"). "We never defer to FEMA" is not only not an answer

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[13] *City of Beaumont* properly rejected FEMA's argument that timeliness is a "jurisdictional" issue. 22-1 BCA at 184,632–33; s*ee also Sawnee Electric Membership Corp*., CBCA 7548-FEMA, 23-1 BCA ¶ 38,336, at 186,152; *Board of Trustees of Bay Medical Center*, CBCA 7418-FEMA, 22-1 BCA ¶ 38,202, at 185,528 (both citing *City of Beaumont*).

[14] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410–18 (2019), clarified this issue for courts reviewing final agency actions (which is not what Board arbitrators do). *But see United States v. Maloid*, 71 F.4th 795, 805–15 (10th Cir. 2023) (declining to extend *Kisor* to alter judicial deference to commentary of the United States Sentencing Commission on sentencing guidelines).

[15] The broad pronouncements about our arbitration authority in *Bay St. Louis* refer to legislative language that preceded our current statutory authority.

[16] In *Town of Topsail Beach, North Carolina*, CBCA 7611-FEMA, 23-1 BCA ¶ 38,345, at 186,198, to cite just one example, the panel adopted FEMA's definition of the technical term "depth of closure" as applied to a beach, even though applicant's experts used another, facially reasonable definition. An earlier panel chaired by the then–Board Chair opined that our role as arbitrators is "not to make public policy." *Louisiana Department of Natural Resources*, CBCA 4984-FEMA, 16-1 BCA ¶ 36,321, at 177,082 (citing *Stolt-Nielsen S.A. v. Animalfeeds International Corp*., 559 U.S. 662, 672, 673, 675 (2010)), *quoted in Joint Meeting of Essex & Union Counties, New Jersey*, CBCA 7407-FEMA, 22-1 BCA ¶ 38,223, at 185,645 (Chadwick, Board Judge, writing separately); *accord Franciscan Alliance, Inc*., CBCA 7530-FEMA, 23-1 BCA ¶ 38,278, at 185,868 ("[A]s arbitrators, our job is not to make public policy but to follow the applicable [FEMA] regulations and policy.").

to a standing or an arbitrability or a timeliness question, it is not even correct. It is truer to say that we usually defer to FEMA at least somewhat.

Because the Board is not a court that sits in review of FEMA, *see* 84 Fed. Reg. 7861, 7862 (Mar. 5, 2019) (CBCA notice of proposed arbitration rules), we need not describe the ways we may defer to FEMA by borrowing from the labels that federal courts use in Administrative Procedure Act (APA) cases. *See id*. (noting that Board "arbitrators have generally rejected" reliance on "judicial doctrines of deference"). In *Livingston Parish*, the panel described the arbitrators' task as

> try[ing] to make decisions that we believe FEMA itself would have made upon fairly and impartially applying applicable law and FEMA policies to the evidence in the arbitration record . . . . We [panel members] do not intend to reopen issues of statutory or regulatory interpretation that FEMA persuades us it has resolved on behalf of the Executive Branch, or to second-guess facially rational policy judgments or broad factual inferences about what typically happens in disaster situations. We will not disregard or purport to nullify written FEMA policies, as a court might under the APA. We will strive to be fair, impartial, timely, and clear.

19-1 BCA at 181,939. This panel endorses and applies that general approach to deference.

The Present Dispute

Returning to this arbitration, FEMA argues that we lack "authority" to resolve the matter and should "dismiss" it. Let us address the four threshold questions. FEMA does not raise a standing argument; applicant is plainly an "applicant" under the statute and regulations. FEMA frames its objections in terms of arbitrability, the second question. FEMA argues primarily that the dispute over whether applicant's first appeal was timely does not concern "eligibility for assistance or repayment of assistance" per 42 U.S.C. § 5189a(d)(1) and that Congress did not intend for the Board to get involved in such details.

The force of FEMA's authority arguments ultimately turns on how expansively one should read the statutory term "eligibility." One of the present panel members has supported a narrow reading like FEMA's and has resisted opining on FEMA's procedural decisions on appeals. It is clear, however, that the consensus of the Board's arbitrators is to apply a broader definition of "eligibility" that includes procedural eligibility. This reading of "eligibility" is consistent with the Stafford Act's concise grant of authority to the Board.

It is unnecessary to say more than this. Nor should we analyze the authority issue as "jurisdictional," or as implicating "deference" or a "standard of review." We have authority to reach procedural issues if—and to the extent that—they affect eligibility.

We turn, therefore, to the third question, timeliness. FEMA argues that we should "dismiss" the arbitration based on the allegedly late first appeal. We decline, however, to consider whether to "dismiss" because that it is not how FEMA handles this issue. FEMA's appeal regulation states, "If the applicant or the recipient do not meet their . . . deadlines, FEMA will deny the appeal," 44 CFR 206.206(b)(1)(ii)(A), and FEMA advised applicant in May 2023 that its first appeal was "denied," not dismissed. Applicant's Exhibit 1 at 1.[17] The fact that FEMA treats untimeliness as grounds for denying rather than dismissing an applicant's appeal lends further support to reading the word "eligibility" in the Stafford Act broadly enough to encompass procedural eligibility, as discussed above.

To decide timeliness, we substantially adopt the analysis in *Board of Trustees of Bay Medical Center*, CBCA 7418-FEMA, 22-1 BCA ¶ 38,202, at 185,528. It is clear from that decision that, in roughly the time frame at issue here, late 2021, FEMA was issuing project worksheets to this applicant with notices of appeal rights. Applicant and grantee had no apparent reason to notice the sudden omission of the verbiage here. Applicant appealed the obligation of funds within sixty days. FEMA apparently no longer includes appeal language in project worksheets, and applicant says it now knows it must appeal the first adverse funding determination. *See* Applicant's Reply to FEMA's Motion to Dismiss at 12. The first appeal was timely, and the issue should not recur, at least between these parties.

U.S. Virgin Islands Department of Public Works, CBCA 7345-FEMA, 22-1 BCA ¶ 38,132, on which FEMA relies, is distinguishable. That applicant disputed only the date that it should be deemed to have received the adverse determination and did not rely on a later funding action as appealable. *Id.* at 185,230.

Finally, like the panel in last year's *Bay Medical Center*, we see no ambiguity in FEMA's regulations and, thus, no grounds to defer to FEMA's legal position.

Applicant Was Responsible for Restoring the Facility

In a new argument raised during the arbitration, FEMA says we should deny the request because applicant's facility was the subject of a lease with a for-profit entity that

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[17] Similarly, the appeal regulation states that a denial of a first appeal provides the basis to request arbitration: "An applicant may request arbitration from the [CBCA] if: . . . [FEMA] has denied a first appeal decision [sic] or received a first appeal but not rendered a decision within 180 calendar days of receipt." 44 CFR 206.206 (b)(3)(i).

placed responsibility for repairing or rebuilding the facility on the lessee. FEMA contends that applicant is not legally responsible for repairing or rebuilding the facility and is, therefore, ineligible for reimbursement. We disagree with FEMA.

FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) states that "[o]wnership of a facility is generally sufficient to establish the Applicant's legal responsibility to restore the facility, provided it is not . . . leased to another entity at the time of the incident." PAPPG at 20. With regard to a property subject to a lease, "[i]f the lease does not specify either party as responsible, FEMA considers the owner of the facility legally responsible for the costs to restore the facility." *Id.* at 21.

In 2012, applicant leased the surgical facility (among other assets) to a for-profit entity. The lease provides in relevant part:

> If the Leased Premises or any part thereof shall be damaged or destroyed by any casualty or cause whatsoever, Lessee may, in its sole discretion: (i) restore, repair, or rebuild the Leased Premises; (ii) demolish that portion of the Leased Premises which has been damaged or destroyed; or (iii) terminate this Lease. Notwithstanding the foregoing, if within the first five (5) years after the Effective Date the Hospital shall be substantially destroyed by any casualty, Lessee shall reconstruct the Hospital (but only to the extent possible using only available insurance proceeds) . . . .

FEMA Response to Request for Arbitration Exhibit 12 at 30.

FEMA argues that because the lessee elected not to terminate the lease, that party, rather than applicant, had the obligation to repair or rebuild the facility. Applicant contends that the lease gives the lessee the option, but not the obligation, to restore, repair, or rebuild the facility. In support of its interpretation, applicant notes that the lease provides that, in the event the facility is "substantially destroyed" during the first five years of the lease term, the lessee "shall" either reconstruct the facility or pay any insurance proceeds to the lessor. Because Hurricane Michael took place after this initial period, applicant argues, the lessee "may, in its sole discretion" elect one of the three options in the provision above. Applicant further argues that the lease permits the lessee to decline to take any action.

We agree with applicant that the lease does not specifically require its lessee to restore, repair, or rebuild the damaged facility after the first five years and, instead, gives the lessee the option to do so. Under these circumstances, applicant was not relieved of its legal obligation to perform the work at issue.

Applicant Shows No Additional, Eligible Damage

We turn, finally, to the dispute about the damage. Counsel for FEMA described applicant's factual contentions as "very strange" and "baffling." Transcript at 35. We must agree. The images in the record show a facility with scattered wind-related damage, water stains, and mold after sitting unventilated in the Florida weather for some time. The panel did not see an unusable or irreparable facility. The roof appeared to be intact. The engineering opinions on which applicant principally relies are conclusory and unilluminating. One report, dated June 12, 2019, consists of one page and states, with no explication, that "100% of all ceilings and floors" and "75% of Drywall and Doors" were "damaged beyond repair" while "Roofing [was] damaged over 50%." Applicant's Exhibit 5. As discussed above, no such utter disrepair was visible when FEMA visited the facility a few weeks later. A second report, a conclusory "structural evaluation" dated June 25, 2019, may contradict the first one in part, as it says visible damage to doors was only "moderate in . . . severity" and "[w]ater and moisture damage" was "of unknown severity," not 100%. Applicant's Exhibit 18-1, Structural Evaluation at 3. This second report also asserts damage to load-bearing walls and the foundation, *id*. at 2–3, but applicant focused on the roof and interior in this arbitration and cites no visual or other evidence of damage to load-bearing elements. "Opinions alone," even those of experts, "are not evidence or facts." *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,949.

In the hearing, applicant's counsel invited us to make inferences and suppositions about the severity of the limited damage shown in photographs and viewed by FEMA. Counsel invoked alleged "codes" and standards for medical facilities that applicant has never cited to FEMA or to us. *See* Transcript at 181–82 ("[W]e believe [water infiltration in ducts] equates [to] replacement of all of the ceilings consistent with code requirements applicable to medical facilities."), 183 ("Our position is there [is] no way to dry [carpet] out reliab[l]y for use in a medical facility, the same with the tile."), 199 ("There was clearly mold in this facility, and we all know what that means."). Applicant cites no basis in law, policy, or fact to deem visible damage or mold to be more severe than it looks, simply because it occurred in a medical facility. In addition, FEMA's objection that mold could be attributable to the months in which the facility sat abandoned and unventilated, rather than to the hurricane, is well taken.[18] Applicant's assertion that "[b]y the time the power was returned to the Facility weeks after the disaster impact, the [claimed] damage had been done" is speculative and unsupported. Applicant's Reply to FEMA's Response at 20.

[18] As applicant cannot establish causation of the alleged mold damage, we need not address its arguments as to the relevance of FEMA's guidance for homeowners on mold.

In summary, we lack any reasonable basis to find that repairing the damage caused by Hurricane Michael to this facility, which no longer exists, would have cost more than FEMA determined it would have cost, or that full replacement was required.

Decision

The costs in dispute are ineligible.

Kyle Chadwick
KYLE CHADWICK
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

Jonathan L. Kang
JONATHAN L. KANG
Board Judge