



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 14, 2023

CBCA 7589-FEMA

In the Matter of CITY OF BRENHAM, TEXAS

Robert J. Wagman, Jr. of Bracewell LLP, Washington, DC, counsel for Applicant.

Julie Masek, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and W. Nim Kidd, Suzannah Jones, and Joshua Bryant, Texas Division of Emergency Management, Austin, TX, appearing 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 **BEARDSLEY** (Chair), **LESTER**, and **VERGILIO**.

BEARDSLEY, Board Judge, writing for the Panel.

The applicant, City of Brenham, Texas, seeks \$4,999,991 in denied Federal Emergency Management Agency (FEMA) public assistance (PA) funds to repair its raw water intake structure and facility (facility). FEMA initially determined that the facility was eligible for a PA grant pursuant to section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018). However, upon uncovering previously undisclosed information about pre-existing damage at the facility, FEMA rescinded its eligibility determination and denied the PA funds. FEMA found that the applicant had not demonstrated that the damage to the facility was a result of the disaster. We conclude that FEMA can rescind its PA eligibility determination and deny PA funding.

Background

Between May 22 and June 24, 2016, severe storms hit the state of Texas. The President declared a major disaster (FEMA-4272-DR-TX) on June 11, 2016. The applicant claims that these storms caused flooding and high water wave action that resulted in damage to the city's raw water intake structure and facility.

Six months prior to the disaster, a city engineer observed erosion at the facility, and the city engaged an engineering consulting firm to determine what repairs were necessary to address the erosion and instability of the existing slope. The firm observed failures primarily near the intake and pump station structures, consisting of washouts and basket mesh failures. The firm prepared a proposal for this repair work, but the storms occurred before the city engaged a contractor to perform the work.

After the storms, the damage to the facility was described as storm damage that "resulted in erosion and scouring that threatens future operations" of the facility. Applicant's Attachment B, Exhibit 7 at 82. In February 2017, the city awarded the firm an engineering support contract on a sole-source basis to oversee the necessary repairs to the facility. The proposed repairs to the facility pre-disaster (\$427,770) were the same proposed repairs post-disaster (\$427,800), with the exception of an additional \$30 cost for desilting the intake structure post-disaster. *Cf.* Applicant's Attachment B, Exhibit 6 at 43-44 to Exhibit 7 at 92. The pre-disaster and post-disaster scopes of work also were nearly identical except that the pre-disaster scope of work would "[e]stablish more accessible maintenance road to pump station," and the post-disaster scope of work would "[r]e-establish access maintenance road to pump station." *Cf.* Applicant's Attachment B, Exhibit 6 at 52 to Exhibit 7 at 91. The firm developed both the pre- and post-disaster estimates and scopes of work without subsurface investigation, surveying, geotechnical analysis, or structural review. "During the site visits there was no way to tell what was going on under the gabions." Applicant's Attachment B, Exhibit 7 at 56.

The city applied for FEMA PA funding in an initial amount of \$479,223.90 to reimburse its costs to repair the damage resulting from the disaster and to restore the facility to its pre-disaster condition. After completion of FEMA site visits and preparation of the project worksheet (PW) 585, version 0, a second engineering firm specializing in gabion systems investigated the facility and determined that "seeking to restore the Facility to its pre-disaster condition would be technically challenging and present environmental complications." Request for Arbitration at 6. Originally, "it was believed the damaged gabion baskets and failed embankment could be repaired or replaced along with reestablishment of the maintenance access road," but additional inquiry "concluded [that] the base under the existing baskets was failing and settlement/slope failure was progressing." Applicant's Attachment B, Exhibit 3 at 13.

In June 2018, the engineer proposed three alternative solutions and identified the installation of a soldier pile wall with a cost of \$1,174,924 as the lowest cost alternative. The applicant requested a scope and cost modification to install a new soldier pile wall rather than to restore the damaged elements to pre-disaster design and function. FEMA approved the applicant's proposed change in the scope of eligible work in October 2019.

By letter dated July 22, 2020, the applicant requested a cost overrun modification from FEMA to increase the total project cost to \$4,999,991, due to higher than expected costs to install a soldier pile wall to repair the facility. After receiving this request, FEMA again reviewed the facility's claimed damages and discovered "pre-existing damage through a search of Brenham city council meeting minutes which included an engineering firm's proposal for shoreline restoration and [an] erosion protection project for the pre-existing damage dated February 25, 2016." Applicant's Attachment A at 6. Thereafter, FEMA asked the city whether the facility had damage prior to the disaster in the claimed area. The city responded that "the conditions noted were in the same general areas, however, [they] were in no way comparable to the extent seen following the declared 2016 event." Applicant's Attachment B, Exhibit 16 at 20. The city stated that "[a]ll conditions noted in the February field observations . . . were not considered damage or deteriorated conditions that threatened the operation and stability of the overall facility." *Id.* The city also maintained that, before FEMA made the eligibility determination, it disclosed the pre-disaster damage at the facility to FEMA in order to justify the sole source award to the engineering consulting firm.¹

In February 2021, FEMA initiated an investigation of the project by the Department of Homeland Security's Office of Inspector General (OIG), alleging that the city failed to disclose the facility's pre-disaster damages to FEMA. Although the OIG substantiated FEMA's allegations, the United States Attorney's Office "declined prosecution in lieu of administrative action by FEMA." Applicant's Attachment L at 4.

The work on the facility was substantially completed on September 21, 2021. Administrative closeout of PW 585, however, has not yet occurred.

On March 17, 2022, FEMA denied the applicant's previously approved PA funding request because the city had failed to disclose pre-existing damage to FEMA, and the applicant was unable to substantiate any disaster-related damage to the facility. In this

¹ The city points to a February 2017 accounting firm's compliance testing report, which states that the engineering consulting firm "was previously contracted out with the City of Brenham to perform repairs on a pre-existing condition, in result [sic], the City of Brenham drafted a new contract to solicit services for the immediate recovery of their facility after the disaster declaration." Applicant's Attachment B, Exhibit 9 at 2.

arbitration, the applicant argues that, as a result of the finality provisions in 44 CFR 206.206 (2021), FEMA cannot subsequently change its eligibility determination. The applicant argues further that it had timely disclosed the pre-disaster damage to the facility to FEMA.

FEMA asserts that it maintains a right and duty to audit PA grants and deobligate funds as necessary pursuant to the Stafford Act and that nothing in the Stafford Act or FEMA's regulations precludes FEMA from reconsidering and rescinding this erroneous eligibility determination.

Discussion

Pursuant to 44 CFR 206.206(c), Appeals and Arbitrations, “[a] FEMA final agency determination or a decision of the Assistant Administrator for the Recovery Directorate on a second appeal constitutes a final decision of FEMA. Final decisions are not subject to further administrative review.” That provision does not preclude FEMA from rescinding its eligibility determination or withdrawing funding from this previously approved project in the circumstances here. The finality referenced in section 206.206(c) refers to the effect of a FEMA decision on an applicant once the applicant has exhausted its appeal and arbitration rights. It does not refer to FEMA's ability to reconsider its eligibility decision or payment decision.² FEMA's review of the PA application was ongoing here, as FEMA continued to consider the latest requests for increased funding, and FEMA had not closed out the project for payments made, as audits and reviews remained incomplete.

Section 705(c) of the Stafford Act, Disaster Grant Closeout Procedures, limits FEMA's ability to deobligate or require reimbursement of PA funds from the applicant when “(1) the payment was authorized by an approved agreement specifying the costs; (2) the costs were reasonable; and (3) the purpose of the grant was accomplished.” 42 U.S.C. § 5205(c). That limitation does not apply, however, if the recipient fails to disclose information to FEMA that would have a material impact on eligibility, as explained in FEMA's Recovery Policy:

² Notwithstanding that the arbitration decisions are not precedential, the cases cited by the applicant—*Town of Elizabethtown, North Carolina*, CBCA 7064-FEMA, 21-1 BCA ¶ 37,842; *U.S. Virgin Islands Department of Public Works*, CBCA 7345-FEMA, 22-1 BCA ¶ 38,132; and *Sewerage & Water Board of New Orleans*, CBCA 1760-FEMA, 10-1 BCA ¶ 34,448—involve only an applicant's failure timely to appeal a FEMA determination and, therefore, do not apply here.

If the recipient or subrecipient fails to provide all necessary information to FEMA that materially impacts FEMA's determination regarding: 1) the eligibility of the project; 2) the cost of the approved scope of work described in the PW; or 3) compliance with terms and conditions of the award; then Section 705(c) does not apply and FEMA will take all appropriate actions to recover payments to remedy the . . . failure to provide the subject information, as appropriate.

FEMA Recovery Policy, *Stafford Act Section 705, Disaster Grant Closeout Procedures*, FP 205-081-2 at 7 (Mar. 31, 2016).

Here, the applicant failed to provide FEMA with information regarding pre-existing damage at the facility. The reference to the engineering firm repairing a pre-existing condition was not sufficient to put FEMA on notice that pre-disaster damage had been identified and not repaired. Moreover, costs to complete the project cannot be reasonable if there was a project eligibility error. *Id.* As a result, section 705(c) does not preclude FEMA from rescinding its eligibility determination and recovering funds from the applicant.

Based upon the record in this matter, the facility is not eligible for PA funding. The record fails to demonstrate that the damage was a result of the disaster. 44 CFR 206.223(a)(1) ("To be eligible for financial assistance, an item of work must . . . [b]e required as the result of the emergency or major disaster event."). Other panels have considered this language. "[C]ause and effect [for any damage claimed] must be established." *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,199 (quoting *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,387). "It is the applicant's burden to establish that the declared disaster caused the claimed damage to the public facility." *Monroe County Engineer*, CBCA 7251-FEMA, et al., 22-1 BCA 38,061, at 184,801 (citing Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 9, 19); see PAPPG at 133 ("[I]t is the Applicant's responsibility to substantiate its claim as eligible."). As is evident by the almost identical estimates and scopes of work for pre- and post-disaster repairs, the damage to the facility predates the declared disaster event. The applicant, therefore, has not substantiated that the claimed damage to the facility resulted from the disaster. Accordingly, the record does not provide a basis for the panel to permit the applicant to retain funds or obtain additional funds for an ineligible project.

Decision

The panel denies the relief sought by the applicant. The applicant must repay funding received and is not eligible to receive the additional funding sought.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge