



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 19, 2020

CBCA 6728-FEMA

In the Matter of CITY OF LAKEPORT, CALIFORNIA

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David Gillings, State Public Assistance Officer, California Governor's Office of Emergency Services, Mather, CA, appearing for Grantee.

Christiana Cooley, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and John Dimos 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 **GOODMAN**, **SHERIDAN**, and **SULLIVAN**.

Background

California was struck by severe winter storms in February of 2017. *See* <https://www.fema.gov/disaster/4308>. The applicant, the City of Lakeport (Lakeport), California, experienced significant flooding from the storms. In particular, the storms flooded Lakeport roads adjacent to Clear Lake, where the rains and overflow from Clear Lake combined to cause significant road inundation. In response to the storms a major disaster was declared (DR-4308) from February 1 through February 23, 2017. Lakeport sought public assistance funds to repair roads after the flood. The Federal Emergency Management Agency (FEMA) created three project worksheets (PWs) in response to these requests:

PW 369 – Lakeport claims damage to three streets—Green Street, Sayre Street, and Loch Drive. Lakeport also claims that the streets were damaged when traffic was diverted onto these streets—in order to reach schools and otherwise inaccessible parts of town—while main roadways remained inundated. Lakeport seeks \$342,419.34 in public assistance funds.

PW 412 – Lakeport claims damage to the intersection of Esplanade Street and E Street, which was inundated for an extended period of time. Lakeport seeks \$29,591.33.

PW 1252 – Lakeport claims damage to the intersection of Esplanade Street and Konocti Avenue. Lakeport seeks \$20,013.

The amount in dispute is \$392,023.67. The flooded areas are within Lakeport and are less than two miles apart from each other.

Lakeport submitted the PW requests on September 14, 2017 (369), September 20, 2017 (412), and November 8, 2017 (1252). FEMA denied funding of these PWs independently. Lakeport then appealed the PWs on October 17, 2018, January 11, 2018, and January 8, 2019, respectively. In response to Lakeport’s first appeal, FEMA combined all three PWs into a single First Appeal Analysis Memo, where FEMA denied all three PWs. Lakeport has appealed this denial to the CBCA, pursuant to the authority granted in 42 U.S.C. § 5189a (2018).

Discussion

Right of Appeal – PW 412 and PW 1252

FEMA has filed a motion to dismiss Lakeport’s claims for funding under PW 412 and PW 1252, arguing that these PWs do not meet the \$100,000 appeal threshold at 42 U.S.C. § 5189a(d)(3), which is required for CBCA arbitration authority. For the reasons set forth below, we grant this motion.

Section 5189a of Title 42 provides, in part, that: “[f]or an applicant for assistance in a rural area under this subchapter, the assistance amount eligible for arbitration pursuant to this subsection shall be \$100,000.” 42 U.S.C. § 5189a(d)(3). “[T]he term “rural area” means an area with a population of less than 200,000 outside an urbanized area.” 42 U.S.C. § 5189a(d)(4). The parties agree that Lakeport falls within this rural area classification, but FEMA argues that PW 412 and PW 1252 should be dismissed for each failing to meet the minimum \$100,000 eligibility requirement. FEMA also argues that PW 412 and PW 1252 should not be considered as part of a cumulative claim with PW 369 to enable Lakeport to

meet the dollar threshold. In evaluating FEMA's argument, we do not review FEMA's use of PWs to administer disaster relief, nor do we review FEMA's practices under administrative procedure authority. *See Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436. However, we do examine whether the PWs define the limits of Lakeport's appeal rights under 42 U.S.C. § 5189a.

The term "project worksheet" does not appear in 42 U.S.C. § 5189a, but FEMA's regulations do define and outline the purpose of PWs. "A project is a logical grouping of work required as a result of the declared major disaster or emergency. The scope of work and cost estimate for a project are documented on a Project Worksheet (FEMA Form 90-91)." 44 CFR 206.201(k); *see also* 44 CFR 206.202(d)(1)(i) ("We or the applicant, assisted by the State as appropriate, will prepare a Project Worksheet (FEMA Form 90-91) for each project. The Project Worksheet must identify the eligible scope of work and must include a quantitative estimate for the eligible work.").

FEMA details how PWs are created in its policy guide and other publications. FEMA Public Assistance and Policy Program Guide, *Public Assistance Program and Policy Guide*, FP 104-009-2 (Apr. 1, 2017) (hereafter "PAPPG"). "A Project Worksheet (PW) is the form FEMA uses to document the details of the Applicant's project and costs claimed." *Id.* at 39, n. 149. "FEMA uses the Project Worksheet . . . as the Subaward Application." *Id.* at 134. "The PW (FEMA Form 90-91) is the primary form used to document the location, damage description and dimensions, scope of work, and cost estimate for each project." *Id.* at 164. "If the project involves multiple locations, FEMA may use site sheets to differentiate damage, work, and costs by site within the PW." *Id.* at 134. "FEMA and the Recipient work with the Applicant to formulate incident-related damage and work into projects (i.e. subawards) based on logical groupings of the damage and work." *Id.* at 134.

Based upon regulation and policy, it appears that FEMA has substantial flexibility in the creation of PWs. *See* 44 CFR 206.202(d)(1)(i); PAPPG at 134 ("This process [PW formulation] is a collaborative effort beginning at the Kickoff Meeting and concluding with an Exit Briefing."); *see also* Public Assistance Program Field Operations Pocket Guide, FEMA P-1011, at 12 (Apr. 2014). Some reasons for this flexibility are clear. For example, in this disaster, FEMA created more than 4000 PWs for damage across the northern part of California. The site inspectors who initially document the associated damages are drawn from a variety of organizations. In this disaster, site inspectors were FEMA employees, State of California employees, and contractors. The three sites in this appeal were first inspected by two different site inspectors, and each PW was created by a different individual, with a different position.

Because the PWs in this appeal share similar facts, the repair work could be grouped into one PW. The grouping of PWs and site inspections is briefly addressed in the PAPPG

and the Public Assistance Program Field Operations Pocket Guide, FEMA P-1011. In both publications, applicants and FEMA are directed to work together to form logical groupings for PWs. “The intent of such groupings is to minimize the number of PWs necessary to provide assistance for that Applicant.” Pocket Guide, FEMA P-1011, at 12.

All of the PWs involved here result from the flooding of Lakeport roads. All of the PWs involve similar pre-existing damage. But the separation of the PWs is also not unreasonable; the PWs took place at different locations, and PW 369 alleges different damage causation. PWs 412 and 1252 seek public assistance for two areas of flooding on Esplanade Street a few blocks away from each other, at E Street and Konocti Avenue. PW 369 similarly pursues public assistance for the across-town flooding of Green Street, Sayre Street, and Loch Drive; and it also alleges vehicular damage from the use of these streets as an emergency detour route.

Notably, all of the PWs were submitted and evaluated at different times. On April 13, 2017, FEMA conducted the first inspections of the damage for PWs 412 and 1252; the inspection of the damage for PW 369 followed on June 27, 2017. The timelines of PWs 412 and 1252 diverge quickly after, with Lakeport submitting different damage description and dimension forms beginning in May of 2017, and PW 369 was not submitted until June 27, 2017. Lakeport submitted PW 369 for review on September 14, 2017, and submitted PWs 412 and 1252, on September 20, 2017, and November 8, 2017, respectively. FEMA began its initial review process on different dates, and different FEMA officials reviewed the PWs. After funding was declined, Lakeport filed the first appeals on different dates. FEMA did not consider the PWs together until the analysis of the first appeal.

There is no evidence that the three different PWs were created to limit the dollars sought, thereby limiting Lakeport’s appeal rights. Instead, it appears that Lakeport submitted the PWs separately, each according to its own timeline, and FEMA initiated its reviews as each PW was submitted. Lakeport did not voice any concerns about the structure of the PWs and what was included. Thus, while there is some commonality in the operative facts of these PWs, consolidation of the PWs to maintain arbitration authority would be inconsistent with the choices that the parties made prior to this appeal.

Lakeport argues that the appeals should be considered together because the PWs were consolidated by FEMA in the first appeal analysis into a single determination. Under 44 CFR 206.206, “[a]n eligible applicant, subrecipient, or recipient may appeal any determination previously made related to an application for or the provision of Federal assistance.” In the analysis document, FEMA provided a written determination discussing the reasons the PWs were not eligible for public assistance funds. The analysis specifically addressed elements of each PW, including the different appeal amounts, dates, descriptions, and reasons for appeal denial. The analysis also consolidated some information. We do not

think that this consolidation of PWs changes the appeal structure. The individual PWs were each sufficiently addressed by the consolidated analysis. FEMA convincingly argues that consolidating appeals increases administrative efficiency. The CBCA has held that applicants may consolidate more than one appeal to be heard before the CBCA for the purposes of efficiency. *See St. Stanislaus College*, CBCA 2316-FEMA, 11-1 BCA ¶ 34,755.

We reject Lakeport's contention that the consolidation of the three appeals into a single analysis is sufficient to combine the PWs for the purposes of overcoming the monetary threshold for appeal. Because PWs 412 and 1252 fall below the arbitration eligibility threshold of \$100,000, we grant FEMA's motion to dismiss these PWs.

Entitlement – PW 369

Regarding PW 369, Lakeport seeks public assistance funding to repair damage to Green Street, Sayre Street, and Loch Drive. Due to heavy flooding from Clear Lake during and after the rains, Lakeshore Boulevard, the main roadway that carries traffic to the northern end of Lakeport and the town's schools, became impassable. Lakeport designated portions of Green and Sayre Streets as detour routes. Traffic increased on Loch Drive as local residents sought to avoid the traffic on Green and Sayre Streets.

These three roads are residential streets and were not designed for the volume of traffic which resulted from the disaster. The traffic was also different from customary residential traffic, with heavy trucks and schoolbuses forced to use the residential roads. It was the weight of the large vehicles, according to Lakeport's expert, that damaged the residential streets. Buses, in particular, because of their size and weight distribution over the front axle, can cause significant problems. Moisture can also cause or contribute to road damage. When Green Street and Sayre Street were designated and used as the detour route, the subsurface of the streets remained wet from the rain and floods. While Loch Drive was close in proximity to the two streets, Loch was elevated and was not flooded, though it had similarly experienced heavy rainfall.

Lakeport concedes that road surfaces were in poor condition prior to the disaster. Both the City's managing official and the expert witness acknowledged that there was cracking and that sub-optimal conditions existed in the asphalt of the roads. In fact, Lakeport was previously aware of the surface issues. Due to a limited budget, the City spent most of its resources maintaining the larger arterial roads through town rather than the smaller side streets. However, Lakeport argues that the road structures were stable before the flooding, and that these structures were damaged by the disaster when the roads became main traffic arteries.

FEMA argues that the road repairs are ineligible because the repairs are not required as a direct result of the disaster. FEMA regulations require that funding is only provided in response to a disaster. 44 CFR 206.223(a) (“*General*. To be eligible for financial assistance, an item of work must: (1) Be required as the result of the emergency or major disaster event”). Similarly, regulations prohibit reimbursement of damages that occurred as a result of Lakeport’s negligence. 44 CFR 206.223(e) (“*Negligence*. No assistance will be provided to an applicant for damages caused by its own negligence.”). Lakeport did not distinguish between the pre-disaster conditions of the roads and the condition of the roads following the disaster, and therefore has not proven that the damage was caused by the disaster.

FEMA highlights satellite images of the roads from June 2012 that show pre-existing damages. FEMA also points to a third-party road condition survey, titled the Lakeport Pavement Management Program Update Report, that indicated poor pavement condition on many of Lakeport’s roads prior to the disaster, including those at issue here. Lakeport contends that this report only provides an analysis of the road surface conditions based on visual assessments and, therefore, it does not provide a reliable indicator of the prior structural condition of the roads. Lakeport, however, is unable to provide alternate evidence of the prior structural condition of the roads. FEMA also notes that because of Lakeport’s lack of road maintenance records, there is little information on any road improvements prior to the disaster.

Lakeport has not demonstrated that the funding is required as a result of the disaster, rather than as a result of preexisting conditions and/or negligent maintenance. *See* 44 CFR 206.223(a)(1), (e). It remains unclear the extent to which the surface conditions indicated subsurface or structural problems pre-existing the disaster. It also remains unclear to this panel whether or not, and to what extent, the resulting damage to the roads was a result of flooding and vehicular traffic compared to the progression of the roadways’ deteriorating conditions. Lakeport’s arguments require considerable speculation by the panel, whereas the weight of evidence indicates substantial degradation of the road conditions prior to the disaster.

Decision

Lakeport's appeals of PW 412 and 1252 are dismissed. Lakeport's appeal of PW 369 is denied.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge