



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 14, 2021

CBCA 7138-FEMA

In the Matter of SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Ernest B. Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Michelle F. Zaltsberg of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; and Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX, counsel for Applicant.

Sherin Joseph, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Christiana Cooley and 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 **GOODMAN**, **SHERIDAN**, and **KULLBERG**.

The applicant, South Florida Water Management District, appeals the denial of its request for public assistance funding in the amount of \$5,007,993 for the repair of various parts of its water control facilities, which were damaged by Hurricane Irma. The Federal Emergency Management Agency (FEMA) contends that the applicant's facility is not eligible for public assistance funding because the United States Army Corps of Engineers (USACE) is responsible for such repairs. Although the parties initially requested a hearing in this matter, they represented to the Board that the only issue in this matter was an interpretation of the applicable statutes and regulations. At the request of the parties, the panel heard oral

arguments on September 14, 2021, which were followed by the submission of briefs. For the reasons set forth below, the panel denies the claim.

Background

The applicant manages water resources in the southern part of the state of Florida, which encompasses a sixteen-county area from Orlando to the Florida Keys. The water control structures within this area include 2100 miles of canals and levees, eighty-four pump stations, 778 water control structures, and 621 project culverts. The largest component of the water management system are the canals, levees, pump stations, and water control structures that were built by USACE as part of the Central and Southern Florida Project.

On September 10, 2017, Hurricane Irma struck southern Florida with high winds and heavy rainfall, which damaged some of the applicant's facilities, and the applicant sought assistance from USACE and the Department of Agriculture (USDA). The applicant's October 19, 2017, letter to USACE sought assistance for repairs to thirty-four of its facilities. By letter dated December 22, 2017, USACE denied the applicant's claim for thirty-three of those facilities on the grounds that the damage "did not impact . . . the 'adequate function of the work for flood control,' under the meaning of [Public Law] 84-99." The applicant also sought assistance from the Natural Resources Conservation Service (NRCS), which is an agency within USDA. In its September 12, 2018, letter, the NRCS denied the applicant's request as untimely, and it also noted that the applicant sought assistance for work already completed.

The applicant then submitted its claim for public assistance to FEMA in the amount of \$6,105,215 for the damage to thirteen of its facilities, but FEMA only allowed public assistance for three of those facilities in the amount of \$1,097,222. FEMA denied public assistance for the remaining ten facilities, which were also part of the applicant's October 19, 2017, claim to USACE.

The Board docketed the applicant's request for arbitration on June 1, 2021. FEMA filed a response to the applicant's request for arbitration. The applicant filed its reply to FEMA's response, and FEMA filed its "sur-reply." At the parties' request, the Board heard only oral arguments at the hearing held on September 14, 2021. The applicant contends that this matter involves an issue of interpretation of relevant statute and regulation as to whether any other agency besides FEMA has specific authority to repair those facilities listed in its claim.

Discussion

At issue in this matter is whether the applicant qualifies for public assistance from FEMA for the damage to its facilities. The Stafford Act provides for “an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters.” 42 U.S.C. § 5121(b) (2018). The terms “emergency” and “major disaster” are defined as follows:

“Emergency” means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

. . . .

“Major disaster” means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

Id. § 5122(1), (2). “Public facility” means “facilities owned by a State or local government.” *Id.* § 5122(10). Such facilities include, among others, “flood control, navigation, irrigation, . . . water supply . . . [and] watershed development.” *Id.* § 5122(10)(A).

Both USACE and USDA have statutory authority to use funds with regard to flood control. USACE “is authorized an emergency fund to be expended in preparation for emergency response to any natural disaster, in flood fighting and rescue operations, or in the repair or restoration of any flood control work threatened or destroyed by flood.” 33 U.S.C. § 701n(a)(1). Such work is to be performed at the discretion of the Chief of Engineers “for the adequate functioning of the work for flood control.” *Id.* Under that statutory authority, USACE has established the rehabilitation and inspection program (RIP) “to repair and rehabilitate flood control projects damaged by floods and coastal storm events.” 33 CFR 203.41(b) (2017). The USDA’s Secretary “is authorized to undertake emergency watershed

protection measures, including the purchase of flood plain easements for runoff retardation and soil-erosion prevention, in cooperation with landowners and land users, as the Secretary deems necessary to safeguard lives and property from floods.” 16 U.S.C. § 2203(a).

FEMA’s regulations implemented pursuant to the Stafford Act provide the following:

(a) *Assistance under other Federal agency (OFA) programs.* (1) Generally, disaster assistance will not be made available under the Stafford Act when another Federal agency has specific authority to restore facilities damaged or destroyed by an event which is declared a major disaster.

44 CFR 206.226.

In *South Florida Water Management District v. Federal Emergency Management Agency*, No. 13–80533–CIV, 2014 WL 4805856 (S.D. Fla. Sept. 18, 2014), the court addressed the issue of whether FEMA could recover funds previously obligated for repair of hurricane damage to various levees on the grounds that USACE was responsible for such funding. In ruling on cross motions for summary judgment, the court stated the following:

The implementing regulations do not prohibit the issuance of funds for the subject repair work. Rather, 44 C.F.R. § 206.226(a)(1) begins with the word “generally,” which suggests a general rule of not providing disaster assistance funds where [sic] “when another Federal agency has specific authority to restore facilities damaged or destroyed by an event which is declared a major disaster.” A general rule is subject to exception and allows FEMA to retain discretion to award disaster assistance funds where another Federal agency has authority to provide funds for restoration of a particular facility. *See* 58 [Fed. Reg.] 55021-01 [(Oct. 25, 1993)] (FEMA explaining that the reason for the adoption of 44 C.F.R. § 206.226(a)(2) is to “allow FEMA to grant assistance to public schools in major disasters without having to make a special exception for each case”). *See also id.* (“Although FEMA has broad authority under the Stafford Act to grant assistance for the repair and restoration of facilities damaged or destroyed by a major disaster, FEMA regulations provide that it will generally defer to another Federal agency’s authority . . .”).

In any event, the Court need not determine whether FEMA exceeded the discretion it allegedly imposed on itself through regulation or policy

Id. at *7. The district court recognized that no rigid rule of interpretation defines the limits of FEMA’s authority with respect to other agencies because the word “generally” allows for

exceptions. Whether those exceptions would have allowed FEMA to grant aid to the applicant in this matter turns on the question of whether FEMA properly exercised its discretion. In this case, the panel does not find that FEMA improperly exercised its discretion. Before seeking assistance from FEMA, the applicant sought assistance from USACE and USDA. Of particular importance is the fact that USACE found no evidence of any impact on the flood-control capability of any of the facilities that were part of the applicant's claim. Although the parties have sought to establish a "bright line" for determining where FEMA's authority ends and the authority of another agency such as USACE begins, statute and regulation do not draw such a line, and the panel finds it unnecessary to do so.

Decision

The applicant's claim is denied.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge