



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 20, 2022

CBCA 7341-FEMA

In the Matter of BAY COUNTY BOARD OF COUNTY COMMISSIONERS

Donald J. Banks of Bay County Attorney's Office, Panama City, FL; and Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant.

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

Shahnam Thompson, 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**, **DRUMMOND**, and **SHERIDAN**.

The applicant, Bay County Board of County Commissioners (Bay County), sought to arbitrate the denial by the Federal Emergency Management Agency (FEMA) of its request for public assistance (PA) in the amount of \$731,518 to replace the roofs at the Bay County Water Treatment Plant (WTP) administration building, laboratory building, collections building, and distribution building (facilities), following Hurricane Michael in 2018.¹ FEMA denied Bay County's PA request, concluding that (1) Bay County failed to provide adequate documentation demonstrating that full roof replacements were required as a direct result of the disaster; (2) the damages were the result of deferred maintenance and Bay County's

¹ The applicant's original request included costs related to mold remediation. The applicant is no longer pursuing mold remediation costs.

failure to properly maintain the roofs; and (3) Bay County misinterpreted section 706.1.1 of the Florida Building Code and its applicability under FEMA's Public Assistance and Program Policy.

The panel decides this matter pursuant to the authority set forth in 42 U.S.C. § 5189a(d) (2018). The panel conducted the arbitration in accordance with Board Rule 611 (48 CFR 6106.611 (2021)). Because the record supports FEMA's determination denying the requested public assistance, we uphold that determination.

Background

The WTP is a multi-building complex that provides the communities of Bay County with sixty million gallons of clean drinking water per day. The administration and laboratory buildings were constructed in 1990, but the roofing was reinstalled during an expansion around 2003. The distribution and collections building were constructed in 1965 and 1980 respectively, but the roofing was reinstalled during the mid-1980s. According to Bay County, standing seam metal roofs like those of the administration and laboratory building have a fifty-year life expectancy and require little routine maintenance. Bay County admits that it does not utilize a written maintenance plan for these roofs, and in-house staff conducts annual inspections during routine pressure washing.

In October 2018, Hurricane Michael made landfall as a Category 5 hurricane near Mexico Beach in the Florida Panhandle with heavy rainfall and strong winds. The President declared the event a major disaster for the State of Florida on October 11, 2018 (FEMA-4399-DR-FL), and authorized PA funding for emergency and permanent work. The roofs at the WTP administration, collections, distribution, and laboratory buildings sustained damages as a result of the hurricane. In the weeks following the disaster, the representatives from Bay County's insurer inspected the buildings and recommended repair and replacement of nearly 2000 square feet of metal roofing.

FEMA conducted site inspections of the damaged roofs at the WTP facilities on May 14, 2019. The photographs taken by the site inspector show superficial roof damage, including dents, cracks, tearing at joints, and wind uplift. The inspector noted that the photographs contained within the inspection report were the only photographs taken with FEMA in attendance and that rooftop inspection of the distribution and collections buildings was not feasible at the time. The inspector also noted that a contract for roof replacement for the distribution and collections building had already been awarded and completed without previously documenting the disaster-related damage. Following the FEMA inspection, Bay County retained Carollo Engineers, Inc. (Carollo) for an assessment and facility plan to identify the repair needs of the facility. Carollo's engineers performed a walk-through of the facilities on November 29, 2018, January 9, 2019, and January 28, 2019, "to visually assess

the condition of assets and equipment at the WTP.” While the assessment does note roof damage and the need for roof repairs, it focuses primarily on the operational capacity of the facility and its equipment.

FEMA issued a determination memorandum (DM) on September 22, 2020, denying \$177,057.08 in PA funding for roof repairs at the WTP facilities. FEMA found that the photographs taken by its site inspector do not display any roof damage, contrary to Bay County’s engineer’s report. Following receipt of the DM, Bay County engaged Inland Construction and Engineering, Inc. (ICE), a general contracting firm, for a roof report in an attempt to further substantiate its claims for roof damages. On October 20, 2020, ICE produced a “roof inspection report,” which included photographs of the damage and recommended “the complete reroof of both” the administration and laboratory buildings. FEMA found the report narrative lacked specificity and adequate justification for roof repair, let alone roof replacement.

Bay County submitted its first-level appeal on November 17, 2020, disputing FEMA’s denial and arguing that numerous licensed professionals—CDR Maguire, Carollo, and ICE—conducted site inspections and determined that roof replacement was necessary. While Bay County awaited FEMA’s response to its first-level appeal, it asked Carollo to analyze whether Hurricane Michael’s windspeeds exceeded the design values of the roofs on the administration and laboratory buildings. Carollo engineers determined that the roofs were designed to withstand windspeeds of 100 miles per hour (mph) and that Hurricane Michael’s 129 mph winds exceeded this threshold.

On June 23, 2021, FEMA issued a request for information (RFI), advising Bay County to establish the pre-disaster condition of the roofs and requesting additional documentation. Bay County responded that the WTP maintenance budget ranged from about \$65,000 to \$170,000 annually in the three years prior to Hurricane Michael; that a standing seam roof has a fifty-year life expectancy and requires little routine maintenance; and that Bay County does not have a written maintenance plan but “uses in-house force account labor, equipment, and materials for most preventative maintenance and minor repairs, including building exteriors and roofing.” Bay County also noted that the “buildings are pressure cleaned” annually and at that time are inspected for irregularities or damage, most recently “in the summer of 2018.” Bay County further stated that Florida Building Code’s 25% Rule required full replacement, because more than 25% of the roofs were damaged, as determined by licensed professionals.

On January 6, 2022, FEMA denied Bay County’s first-level appeal, stating that Bay County failed to establish the pre-disaster condition of the roofs, Bay County failed to provide evidence showing disaster-related damage to the collections and distributions buildings, and the photographs of the administration and laboratory buildings did not show

damage warranting full roof replacement. In response to FEMA's denial, Bay County contracted with ICE to perform another roof inspection on the administration and laboratory buildings on April 1, 2022. ICE reported "significant damage to all components of the roofs of the two buildings," including hurricane-related damage. Bay County now appeals FEMA's denial to the Board and presents to us the totality of its documentation in support of full roof replacement for the four WTP buildings.

Discussion

Bay County asks us to find that the cost of roof replacements at the WTP, totaling \$731,518, is eligible for PA funding. In order to be eligible for PA funding, an item of work must be the result of an emergency or major disaster, be located within the designated area of a major disaster or emergency declaration, and be the legal responsibility of an eligible applicant. 44 CFR 206.223(a) (2020). FEMA determines eligibility based on four elements: (1) applicant eligibility, (2) facility eligibility, (3) work eligibility, and (4) cost eligibility. *See id.* 206.220 to .228. FEMA will provide funding to restore a facility to its pre-disaster design and function in accordance with applicable codes and standards. *Id.* 206.201(j), .203. No assistance will be provided for damages caused by an applicant's own negligence. *Id.* 206.223(e). Applicants must take prudent measures to protect a facility from further damage and to mitigate known damage to facilities. The cost of repairs of damage caused by deterioration or deferred maintenance is ineligible for PA funding.

In order to be eligible for PA funding for full roof replacement, Bay County must demonstrate that its roofs sustained damage sufficient to impair the facilities' pre-disaster functionality and are not repairable in accordance with applicable regulations. 44 CFR 202.226(f). FEMA determined, based on the available photographs and reports, that Bay County failed to demonstrate that the roofs were sufficiently damaged so as to impair the buildings' functionality. The record supports FEMA's position. Bay County submitted twelve photographs of the administration building's roof and eight photographs of the laboratory building's roof. *See* FEMA Exhibit 3. Both sets of photographs show dings and dents on the roofs but fail to demonstrate the need for replacement. Bay County did not submit any photographs of the roofs of the collections and distributions building but did provide photographs taken from the ground level to display damage to the sides of the buildings, including a damaged loading bay door.

We agree with FEMA's expert witness that the photographs are insufficient to determine whether the damage could cause leaks or otherwise compromise the functionality of the roofs. For example, FEMA's witness testified that applicants will typically demonstrate that a roof has cracked by taking a photograph of an object, such as a playing card, placed between the damaged parts of the roof. Bay County has submitted no such photographs. Further, FEMA's expert noted that the photographs do not show debris on the

roofs, which would typically result from hurricane winds sufficient to damage a standing seam metal roof. According to FEMA's expert, photograph 263057 of FEMA Exhibit 3, which displays the tearing of a seam on the laboratory roof, provided the most salient example of roof damage but still failed to demonstrate any degree of penetration. The photographs similarly fail to demonstrate roof damage caused by wind uplift. FEMA's expert explained that standing seam metal roofs damaged by wind uplift would not return to the state displayed in the photographs. Rather, the uplift damage would be more apparent. Finally, the photographs fail to display damage to the clips, which provide the roof panels with flexibility and structural support. Bay County included in its submission a video of an employee pulling up on the roof panels to demonstrate damage. However, as FEMA's expert explained, the video instead displays the intended flexibility of the roof panels and that the clips are still in place.

Bay County attempted to bolster its photographic documentation with a series of expert reports produced by ICE and Carollo, but these too lack the specificity and analysis sufficient to demonstrate the damage caused by the hurricane. For example, ICE's roof report consists primarily of boiler plate language with a small narrative specific to the roofing at issue here and makes no mention of the collections or distributions building. Similarly, the Carollo letter only pertains to the administration and laboratory buildings. More importantly, the reports and letter do not sufficiently explain why the roof's functionality was so impaired as to require replacement. We, therefore, agree that FEMA correctly denied Bay County's application because it could not determine whether the four roofs required replacement to restore pre-disaster functionality.

Bay County infers that because the roofs were not designed to withstand the wind speeds recorded during Hurricane Michael, any damage must have been caused by the hurricane. However, the record here does not sufficiently document whether the roof designs could withstand the 129 mph wind speeds. As FEMA's expert explained, the ICE and Carollo reports draw conclusions about the wind speed capacity of the roofs that are more presumptive than analytical. The Carollo letter contains assumptions about the wind speed capacity of the type of standing seam roofs at the facility and concludes, based on wind speed recorded at a different location, that Hurricane Michael caused the roof damage. FEMA is not required to defer to the assessments by ICE and Carollo.

Even if Bay County had provided sufficient documentation of damage caused by the hurricane, FEMA cannot sufficiently interpret the documentation of the post-disaster condition of the roofs without more documentation about their pre-disaster condition. We agree with FEMA that Bay County has not established whether the roof damage was a result of the hurricane or from deterioration and/or deferred maintenance. Bay County has affirmatively stated it does not maintain a written maintenance plan nor does it utilize outside contracted work for inspection and maintenance. Instead, it tasks its employee responsible

for annually pressure washing the roofs to report any needed maintenance. Accordingly, we do not have any maintenance records to compare the pre- and post-disaster conditions of the roofs or to determine whether Bay County sufficiently maintained the roofs.

FEMA finally argues that Bay County misinterpreted section 706.1.1 of the Florida Building Code and its applicability under FEMA's PA grant program. Known as the "25% Rule," that section states:

Not more than 25 percent of the total roof area or roof section of any existing building or structure shall be repaired, replaced or recovered in any 12-month period unless the entire existing roofing system or roof section is replaced to conform to requirements of this code.

Fla. Building Code – Existing Building § 706.1.1 (2017). Bay County argues the code applies because at least 25% of each roof was damaged, relying on the photographs and reports discussed above in support of its contention. FEMA claims Bay County has misinterpreted the code to refer to the percent of damage rather than the percent requiring repair. We need not resolve that issue here. As stated above, we are not persuaded that Bay County has put forth sufficient evidence demonstrating that even 25% of the roofing required repair or replacement. The few photographs merely display dents and dings, and the ICE reports state 40% of the roofs warrant replacement without any further information as to which roofs they refer or how the firm reached its conclusion.

Decision

The panel finds that FEMA correctly determined Bay County has not established that complete roof replacement of four buildings at its WTP was necessary as a result of Hurricane Michael. As a result, roof replacement is not eligible for PA funding. Accordingly, we deny Bay County's application.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge