



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 30, 2022

CBCA 7260-FEMA

In the Matter of VIDOR INDEPENDENT SCHOOL DISTRICT

Jay B. Stewart, David Pore, and Petrus Wassdorf of Hance Scarborough, LLP, Austin, TX, counsel for Applicant.

Robin Taylor, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and W. Nim Kidd, Chief, and Suzannah Jones, Deputy Chief, Texas Division of Emergency Management, Austin, TX, appearing for Grantee.

Ramoncito DeBorja and Shahnam Yazdani, 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 **LESTER, SULLIVAN, and O'ROURKE.**

Applicant, Vidor Independent School District (Vidor), submitted a request to the Board for arbitration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a(d) (2018), after the Federal Emergency Management Agency (FEMA) denied Vidor's request for \$2,035,840 to elevate the foundation of a replacement school building. Although FEMA has agreed to reimburse costs for an improved project replacement building, those costs do not include elevation of the former building's foundation. In a first-level appeal decision denying Vidor's request, FEMA asserted that improved projects, like the one at issue here, are not eligible for the type of hazard mitigation funding that Vidor seeks. After considering the parties' briefing, the hearing testimony, and the other evidence in the record of this arbitration, we deny Vidor's request for additional funding.

Background

Between August 23 and September 15, 2017, Hurricane Harvey devastated parts of Texas and caused extensive flooding. On August 25, 2017, the President declared the event, FEMA-4332-DR-TX, a major disaster.

The Oak Forest Elementary School campus in Vidor, Texas, which was originally constructed in the 1960s, consisted of a one-story, 72,244-square-foot main building and several portable classrooms and outbuildings that were not attached to the main building. Both the school's main building and the outbuildings were extensively damaged as a result of Hurricane Harvey. FEMA determined that the school was an eligible facility and that the school's owner, Vidor, was eligible for public assistance (PA).

On August 24, 2018, FEMA conducted a site visit at the school property to investigate the damage. Following that site visit, and at Vidor's request, FEMA conducted what is known as a "50% Rule" analysis to determine if Vidor was eligible for replacement of the existing school building or, instead, whether its recovery would be limited to the costs of repairing the existing building. FEMA's analysis indicated that the school met the criteria for replacement, and on February 21, 2019, FEMA obligated project worksheet (PW) 04060, version 0, documenting the scope of work (SOW) and estimated cost to replace the school and approving funding for replacement of the school building. As part of the 50% Rule repair/replacement analysis, FEMA did not include any costs associated with elevating the school above the level where it sat at the time of the disaster. From that time forward, Vidor has planned to build the replacement building at the same location as, and within the footprint of, the original school building.

In September 2019, while Vidor was working through the FEMA authorization process for the Harvey-caused damage, another event, Tropical Storm Imelda, flooded parts of the Oak Forest campus. Following that second flooding event, Vidor decided to protect its future elementary school by elevating the new building one foot above the level of the Harvey flooding. An "elevated" building is "a nonbasement building which has its lowest elevated floor raised above ground level by foundation walls, shear walls, posts, piers, pilings, or columns." 44 CFR 59.1 (2020). Vidor indicated in a letter to FEMA that "[i]t did not make sense to rebuild the school at the same elevation" following two flooding events.

Subsequently, Vidor submitted a hazard mitigation proposal seeking approval for funding to elevate the replacement building by 2.5 feet above the level of the original building's foundation. On November 17, 2020, FEMA approved that request and obligated an additional \$2,035,840 for hazard mitigation costs in PW 04060, version 1. Although it does not appear that either party included PW 04060, version 1, in the record of this matter,

Vidor wrote a letter to FEMA in which it included the following quotation from version 1, which explained FEMA's original justification for approving the hazard mitigation proposal:

As per FEMA [Public Assistance Program and Policy Guide (PAPPG)], V3.1, [April] 2018, pg 102, replacement projects (such as this one) can receive [section] 406 mitigation funding if the specific mitigation measures being applied are identified in Appendix J (100% List). Further, the mitigation being applied to a replacement project must be necessary because Codes and Standards fall short of effectively mitigating against a future similar event. For this project, 406 did not identify any Codes and Standards that require this particular facility to be elevated, because it is not within an [Special Flood Hazard Area (SFHA)] and therefore excluded from 44 CFR 60.3 criteria. Furthermore, the mitigation measure is specifically listed in the Appendix J (100% List), Section VIII.B – Dry or wet floodproof buildings. Elevation of the building is equivalent to dry floodproof building because the building will remain dry in the future, similar event. Mitigation consists of elevating the school 2.5 FT higher which includes 1 FT of freeboard above the Harvey flood of record. The proposed finished floor elevation is 23.35, 1 FT higher than Harvey Flood of Record.

Subsequently, by letter dated December 7, 2020, the Texas Division of Emergency Management (TDEM), on behalf of Vidor, requested approval from FEMA for an “improved project” under PW 04060. An “improved project” is one “that restores the pre-disaster function, and at least the same capacity, of the damaged facility and incorporates improvements or changes to its pre-disaster design not required by eligible codes or standards.” PAPPG (Apr. 2018) at 106.¹ In its improved project request, Vidor proposed to increase the size of the original main building and construct a new one-story building of approximately 101,371 square feet, primarily within the same footprint as the original facility but with a slight expansion of the foundation area. Vidor stated that the proposed facility was designed to incorporate the function and capacity of other detached, damaged campus facilities into one school building.

¹ The PAPPG states that FEMA applies version 3.1 of the guide, dated April 2018, to “incidents declared on or after August 23, 2017 or, with respect to the changes made in this version, any application for assistance that was pending before FEMA as of August 23, 2017 and has not been finally resolved as of January 1, 2018.” The incident at issue in this arbitration was declared on August 25, 2017. PAPPG version 3.1 is therefore applicable here.

The record reflects that, in a telephone conference on January 27, 2021, FEMA informed Vidor that “[m]itigation funding may get deobligated due to an Improved Project.” FEMA Exhibit 2, Attachment 6 at 100.

On May 10, 2021, FEMA issued an eligibility determination memorandum approving the improved project request. At the same time, FEMA indicated that it had made a mistake when it previously approved Vidor’s hazard mitigation request for \$2,035,840 in funding to elevate the replacement structure. It reported that elevation was not an available type of hazard mitigation under Appendix J to the applicable April 2018 PAPPG and that, even if Vidor had not requested an improved project, FEMA would have had to deobligate the PA funding for the elevation work. FEMA indicated, however, that Vidor’s request for an improved project essentially mooted FEMA’s original error because improved projects involving replacement buildings are not eligible for hazard mitigation costs:

Regarding retaining Section 406 [hazard mitigation (HM)] funds in the Improved Project, FEMA guidance states that if the capped amount for an Improved Project includes mitigation funds and the Applicant replaces the original facility, FEMA deobligates the mitigation funds (*PAPPG*, at 114). Even if the Section 406 HM funding had not been included in error within the original project cost estimate, since the Applicant’s Improved Project involves replacing the original facility, Section 406 HM funding would be deobligated. Therefore, Section 406 HM funding would still not be retained in the Improved Project. . . . Consequently, the Applicant’s request for Section 406 HM funding, in the estimated amount of \$2,035,840.00, for DI 148232 is denied.

FEMA Exhibit 3 at 128.

TDEM, upon behalf of Vidor, submitted a first-level appeal to FEMA on July 12, 2021, challenging FEMA’s denial of the request for \$2,035,840 in hazard mitigation elevation costs. FEMA Exhibit 2. FEMA issued a decision on October 4, 2021, denying the first-level appeal and stating that, “by electing to replace and take an improved project on the facility, FEMA policy does not permit [Vidor] to retain funding associated with its hazard mitigation proposal.” FEMA Exhibit 1 at 1. Vidor submitted its request for arbitration to the Board on December 1, 2021.

Discussion

I. Vidor's Request to Recover Elevation Costs As Part of Its Replacement Cost

FEMA, applying the 50% Rule calculation for determining whether to authorize building replacement costs rather than just repair costs (a calculation that did not include elevation costs), has already approved Vidor for replacement of the Oak Forest Elementary School. The only issue before the Board now is whether, in addition to those building replacement costs, FEMA should also be required to reimburse \$2 million in what Vidor originally characterized as hazard mitigation costs to elevate the foundation of the replacement building, which is largely to be constructed on the same site as the original school building.

A great deal of the testimony that Vidor presented at the hearing and virtually the entirety of Vidor's reply brief were focused on establishing that elevating the replacement school building above the flood level is work that is required by various applicable codes and standards. As such, Vidor argues, FEMA must pay for such costs as part of the replacement of the building.

To understand the issues surrounding Vidor's cost request, it may help to step back and consider how Vidor obtained authorization to recover replacement, rather than just repair, costs in the first place. The presentations at the hearing of this matter sometimes seemed to conflate replacement costs and hazard mitigation costs, even though they are two different categories of cost. Because those differences are important to the resolution of this matter and in the 50% Rule calculation that determines whether repair or replacement costs will be authorized, we address below in some detail what types of costs are included in the replacement cost calculation (and how an applicant obtains disaster relief funding to replace, rather than just to repair, a facility damaged by a major disaster) before contrasting that type of cost with hazard mitigation costs.

Replacement costs. Under section 406 of the Stafford Act, if a public facility owned by a state or local government is "damaged or destroyed by" what the President declares "a major disaster," FEMA is authorized to provide funding "for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the [state or local government]." 42 U.S.C. § 5172(a)(1)(B).

FEMA has developed rules about how to determine when repair, as opposed to complete replacement, of an existing building is warranted. "When evaluating whether a damaged facility is eligible for replacement" rather than just repair of an existing structure, "FEMA compares the repair cost with the replacement cost and evaluates the feasibility of repairing the facility." PAPPG at 100. "A facility is considered repairable when disaster

damages do not exceed 50 percent of the cost of replacing a facility to its pre-disaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.” 44 CFR 206.266(f)(1). That is, “[u]nder FEMA’s regulations, [only] if the cost of repairing the damage to the building caused by [the major disaster] exceeds fifty percent of the cost of replacing the building [would] the [applicant] . . . be entitled to recover the replacement costs.” *Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 5549-FEMA, 18-1 BCA ¶ 37,089.

“The comparison of the repair cost to the replacement cost results in a fraction that expresses repair as a percentage of replacement. The percentage is calculated with the repair cost as the numerator and the replacement costs as the denominator,” a calculation that FEMA calls the “50% Rule.” PAPPG at 100. The PAPPG details the manner in which both repair cost and replacement cost are calculated. Under the PAPPG, “[t]he repair cost (numerator) is the cost of repairing disaster-related damage only and includes costs related to compliance with codes or standards that apply to the repair of the damaged elements only (including federally required codes and standards).” *Id.* Excluded from the numerator are any costs for “[u]pgrades of non-damaged elements even if required by codes or standards (e.g., elevation of an entire facility triggered by repair).” *Id.* Also excluded from the numerator are costs for “[d]emolition beyond that which is essential to repair the damaged elements,” site work costs, “[s]oft costs,” costs of emergency work, and hazard mitigation costs. *Id.*

“The replacement cost (denominator)” under the PAPPG “is the cost of replacing the facility on the basis of its pre-disaster design (size and capacity) and function in accordance with applicable codes or standards.” PAPPG at 101; *see id.* at 101 n.259 (“[T]he term ‘replacement cost’ means the cost of replacement in accordance with applicable codes and standards.”). Like the numerator, excluded from the denominator are demolition, site work, emergency work, hazard mitigation, and “soft” costs. *Id.* at 101. Nevertheless, the replacement cost denominator must include any costs necessary for the building to meet current codes and standards, even if those codes and standards would not apply to a repaired building. *City of Hattiesburg, Mississippi*, CBCA 7017-FEMA, 22-1 BCA ¶ 37,986 (2021); PAPPG at 101 n.259. To the extent that current codes and standards require that new buildings in the area of the damaged facility satisfy certain flood protection measures, the entire cost of meeting those codes and standards for the new replacement structure must be included in the denominator. PAPPG at 101. Ultimately, “[i]f the estimated repair cost exceeds 50 percent of the estimated replacement cost, the actual replacement cost is eligible.” *Id.*

The entity seeking disaster relief funding is responsible for submitting a request for replacement funding to FEMA within one year of the major disaster declaration and, with

its request, “should include both repair and replacement cost estimates with supporting documentation.” PAPPG at 101. As we can see from the definitions in the PAPPG, any repair cost estimate should identify all costs necessary to repair “damaged elements,” but, if current codes or standards require certain upgrades to those damaged elements, the upgrade costs, *limited to upgrades for the damaged elements only*, are to be included in the applicant’s repair cost estimate. *Id.* at 100-01; *see City of Hattiesburg*. By contrast, the applicant’s replacement cost estimate should include all “cost[s] of replacing the facility on the basis of its pre-disaster design (size and capacity) and function in accordance with applicable codes or standards,” inclusive of any flood protection measures required by current codes or standards. PAPPG at 101. Although a FEMA licensed engineer/architect or certified cost estimator reviews requests for replacement to validate cost estimates, and although, in some instances, FEMA will assist in estimating costs if the applicant has not done so, *see id.* at 101, 138, it is the applicant’s job in the first instance accurately to identify what costs will be necessary for repair and replacement of its damaged facility.

Ultimately, what gets included in the repair cost and replacement cost calculations determines whether FEMA can authorize reimbursement for replacement of a building. *See Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 6469-FEMA, 20-1 BCA ¶ 37,582 (discussing how slight manipulations to various numbers can dramatically affect the result of the calculation). In performing the 50% Rule calculation, if the replacement cost denominator is less than twice the repair cost numerator, FEMA authorizes a replacement building. If it is not, FEMA can only authorize repair costs. When the costs of elevating a replacement building, if required by floodplain management ordinances or codes, are included in the 50% calculation, it can have a huge effect on the outcome because, as FEMA explains in the PAPPG, those costs are added only to the replacement cost denominator (potentially increasing that number dramatically) and are *not* included in the repair cost numerator:

The costs to comply with a local floodplain management ordinance that *requires* elevation or floodproofing of a Substantially Damaged facility in [a Special Flood Hazard Area] are eligible for PA funding. *For the purpose of the 50% Rule calculation, these costs are not included in the repair cost of the calculation, but are included in the replacement cost of the calculation.*

PAPPG at 101 (emphasis added).

In this case, the original 50% Rule calculation, based upon the then-existing estimates for repairing and for replacing the Oak Forest school building, was approximately 54%, entitling Vidor to reimbursement for a replacement building. Elevation costs were *not* included in the replacement cost denominator of that calculation, however, apparently because elevation was not viewed as being required by then-current codes and standards. If

the \$2,035,840 that Vidor now seeks to elevate the replacement building had, in fact, been added to the replacement cost denominator, Vidor would not have been approved for a replacement building absent some kind of change to the repair cost numerator.

Hazard Mitigation Costs. Hazard mitigation costs involve measures that “substantially reduce the risk of, or increase resilience to, future damage, hardship, loss, or suffering in any area affected by a major disaster,” 42 U.S.C. § 5170c(a), and “[t]o be eligible” for FEMA funding under section 406, “must directly reduce the potential of future, similar damage to the facility.” PAPPG at 99. Although potentially beneficial in the long term, hazard mitigation measures, by definition, involve costs that are “not required by applicable standards.” 44 CFR 206.226(e). That is, even though no code or standard actually *requires* the property owner to undertake certain protective measures in constructing a new building, that property owner might decide that it would *like* to take those measures to add additional protections against future disasters. Accordingly, hazard mitigation costs, under FEMA’s definition, are essentially voluntary extras or add-ons that, though potentially beneficial, are not mandated by any code or standard.

Recognizing the non-compulsory nature of hazard mitigation costs, the applicable PAPPG provides that they are generally not reimbursable for replacement buildings:

With the exception of specific projects identified in Appendix J: Cost Effective Hazard Mitigation Measures, [section] 406 hazard mitigation funding cannot be applied to replacement facilities

PAPPG at 102.

There are two exceptions to that rule. Under the first exception, as indicated in the quote above, FEMA may fund the specific types of mitigation projects that are listed in Appendix J of the April 2018 PAPPG, which FEMA has determined as a matter of policy are “cost-effective” as long as they “do not exceed 100 percent of the eligible repair cost (prior to any insurance reductions).” PAPPG at 190; *see id.* at 102. Elevating a facility’s base is not listed as a reimbursable hazard mitigation in Appendix J. Nonetheless, Appendix J allows for hazard mitigation measures to “[d]ry or wet floodproof buildings.” *Id.* at 193. Although it might seem, as Vidor argues, that elevating a building could be viewed as a form of floodproofing, the PAPPG uses the terms “elevate” and “floodproof” separately and makes clear that they are viewed as different concepts. Another part of Appendix J authorizes as reimbursable hazard mitigation the costs to “[e]levate or dry floodproof components or systems vulnerable to flood damage, including equipment controls, electrical panels; heating, ventilation, and air conditioning/machinery rooms; emergency generators; and fuel tanks.” *Id.* at 191. Another section of the PAPPG provides that an applicant must “either elevate or floodproof the lowest floor” of a building in certain instances. *Id.* at 93.

Were we to find that “elevate” is simply a form of floodproofing, we would render meaningless the distinction between elevation and floodproofing that FEMA created in the PAPPG, which we cannot do. *See Blake Construction Co.*, GSBCA 2477, 71-1 BCA ¶ 8870 (refusing to adopt interpretation that “renders part of the specification redundant or meaningless and where there is an acceptable and reasonable alternative which does not”). Accordingly, we cannot find that elevation of a replacement building falls within the hazard mitigation measures that Appendix J authorizes.

The second exception is identified in 44 CFR 206.226(e), which provides that, “[i]n approving grant assistance for restoration of facilities, the Regional Administrator may *require* cost effective hazard mitigation measures not required by applicable standards” and that “[t]he cost of any requirements for hazard mitigation placed on restoration projects *by FEMA* will be an eligible cost for FEMA assistance.” *Id.* (emphasis added). Under this regulation, if FEMA itself directs an applicant to install a particular hazard mitigation measure, the costs of that measure will be eligible for reimbursement.

In this case, neither of the exceptions to the rule precluding reimbursement for hazard mitigation costs for a replacement building apply. Elevation of the base of a replacement building is not, as discussed above, one of the exceptions identified in the applicable version of Appendix J. Further, FEMA did not direct or require Vidor to elevate its replacement building. Instead, it was Vidor that requested permission to elevate the building, rendering this basis for reimbursement inapplicable. Vidor’s statement in its reply brief that the elevation was “required by FEMA,” Applicant’s Reply (Feb. 2, 2022) at 2, is inconsistent with and unsupported by the record.

As previously mentioned, during the arbitration hearing and throughout its reply briefing, Vidor focused on establishing that elevating the replacement school building above the flood level is required by various codes and standards and that, therefore, FEMA must pay for it. Yet, if elevation is required by codes and standards, it by definition does not constitute “hazard mitigation.” As previously discussed, hazard mitigation measures are those that are “not required by applicable standards.” 44 CFR 206.226(e).

Instead, if elevation is required by current codes and standards, they should have been included in the calculation of the replacement cost of the new building. Had they been, and had the 50% Rule calculation come out in favor of replacement, they would have been recoverable as actual costs necessarily incurred in replacing the building. The problem for Vidor here is that when FEMA performed the 50% Rule calculation to determine whether Vidor was entitled to recover replacement rather than repair costs, the requested elevation costs were *not* a part of the calculation. Although we presume, based on its briefing, that Vidor will attribute to FEMA any error in failing to include the correct costs in that calculation, FEMA’s rules require *Vidor* to submit reasonable cost estimates for both repair

costs and replacement costs that FEMA can use to perform the 50% Rule calculation. Vidor did not ask FEMA to include elevation costs in its replacement cost estimate, and the approved replacement costs did not include elevating the building.

The Dilemma Created By Vidor's Request to Recategorize Elevation Costs. We express no opinion on whether it is too late for Vidor now to go back and ask FEMA to reconduct its 50% Rule calculation with the required-by-codes-and-standards elevation costs included, such that Vidor might, if the calculation still comes out in favor of replacement, be entitled to elevation costs. Nothing in the parties' briefing tells us what time frames and time limitations apply to such requests. We also make no determination as to whether elevation of this replacement building is actually required by current codes and standards, as resolution of that issue is unnecessary to the sole issue that was originally presented to us and is properly before us: whether Vidor is entitled to reimbursement of elevation costs as a hazard mitigation measure. We recognize, though, the dilemma that Vidor faces in deciding whether to pursue its required-by-codes-and-standards argument with FEMA.

Under FEMA's rules, the required-by-code-and-standards elevation costs would go into the denominator of the 50% Rule calculation, but they would not affect the numerator. The original calculation that resulted in a finding that Vidor was entitled to replacement costs, rather than repair costs, was somewhere around 54%. Had elevation costs been added to the denominator in the original 50% Rule calculation, it seems likely that FEMA could have approved Vidor only for repair costs, not a replacement building. One of Vidor's witnesses indicated his belief that the original numerator costs were wrong as well and, with various escalations in costs, should have been higher, even though Vidor provided the repair estimate that formed the basis of FEMA's investigation and calculation. *See* FEMA Exhibit 2 at 56. There is nothing in the record to tell us whether the numerator should be adjusted. Nevertheless, if Vidor requests a reevaluation, it risks the possibility that the recalculation will result in a finding that FEMA can only fund repair costs, which, given that Vidor has already demolished the school's main building, would be problematic.

Although Vidor may complain that this dilemma is unfair, it is one to which Vidor contributed by not requesting inclusion of elevation costs in the original replacement cost estimate. Because Vidor did not raise any arguments in prior proceedings before FEMA that elevation should be considered a replacement cost, coupled with the unknown but potentially negative impact that any determination could have on Vidor's ability to recoup its replacement costs, we decline to recategorize elevation costs as something other than hazard mitigation costs. To the extent that Vidor wishes to pursue such a reevaluation, it will have to approach FEMA about the feasibility of such an effort.

II. Vidor's Request to Recover Elevation Costs as Hazard Mitigation

Vidor argues that, even if elevation is not required by applicable codes and standards, it is important to elevate the new school building to protect against future disasters, given that parts of the new facility will be built on ground that Harvey's floodwaters breached. We have no reason to dispute Vidor's concerns. Here, though, Vidor elected to pursue an improved project, modernizing the school and, as part of the reconstruction, adding previously detached classrooms and a gymnasium into a single contiguous building. Paragraph VII.G.4 of the PAPPG clearly provides that, if an applicant elects to pursue an improved project, FEMA will deobligate any hazard mitigation funding previously authorized:

Retention of 406 Mitigation Funds

If FEMA approves mitigation funds as part of the capped amount, FEMA's allowance for the Applicant to retain those funds depends upon the type of capped project and the SOW being conducted.

(a) Improved Project

If the capped amount for an Improved Project includes mitigation funds and the Applicant . . . replaces or relocates the original facility, FEMA deobligates the mitigation funds.

PAPPG at 114.

Vidor argues that this provision in the PAPPG is inconsistent with 44 CFR 206.226(e), which indicates that "[t]he cost of any requirements for hazard mitigation placed on restoration projects by FEMA will be an eligible cost for FEMA assistance," *id.*, and that internal FEMA "guidance cannot invalidate the applicable and clear regulatory language." Applicant's Reply at 9. This regulation only applies, however, when FEMA *itself* "require[s] cost effective hazard mitigation measures not required by applicable standards." 44 CFR 206.226(e). As previously discussed, FEMA did not require elevation here. It is Vidor, not FEMA, that is seeking to elevate the replacement building. Accordingly, this regulatory provision is inapplicable.

Vidor also asserts that "this section of the PAPPG has no federal law or statutory regulation referenced and/or linked to it," Applicant's First Appeal Submittal (July 12, 2021) (FEMA Exhibit 2 at 12), and that "no law or regulation prohibits hazard mitigation tied to a replacement project." Applicant's Request for Arbitration (Dec. 1, 2021) at 3. Vidor further argues that Congress intended for FEMA to provide as much PA funding to local

governments damaged by Hurricane Harvey as possible. The problem with Vidor's argument is that Stafford Act funding is not necessarily intended to cover every single cost that a public entity might incur in every situation. The purpose of the Stafford Act is to "alleviate the suffering and damage which result from [major] disasters" by providing "assistance by the Federal Government to State and local governments." 42 U.S.C. § 5121(b). Yet, FEMA's resources are not limitless, meaning that it cannot fund restoration of every property damaged during a disaster. Congress, through the Stafford Act, has provided FEMA with a roadmap for use in allocating scarce resources, *Union for Reform Judaism*, CBCA 6457-FEMA, 19-1 BCA ¶ 37,452, and FEMA has necessarily developed rules and policies to assist it in determining fairly and equitably how to distribute the available resources. See 44 CFR 206.200 to .229. Although Vidor argues that policy statements like the PAPPG "are not legally binding," Applicant's Supplemental Response (Mar. 3, 2022) at 2, Vidor has not identified a statutory or regulatory source that, were we to abandon the PAPPG, would *require* payment of the elevation costs that it now seeks or full reimbursement of all costs that it chooses to incur, even where not required by applicable codes and standards.

III. Vidor's Request to Apply a New PAPPG Version Retroactively

Version 3.1 of the PAPPG, dated April 2018, is applicable to "incidents declared on or after August 23, 2017," like Hurricane Harvey. That is the version of the PAPPG that we have discussed above. In June 2020, FEMA issued a new version of the PAPPG – version 4 – that adds language to Appendix J that Vidor argues, were it applicable to this disaster, would affect the result here. Specifically, Appendix J to version 4 provides that hazard mitigation measures that "[e]levate or dry or wet floodproof buildings" are reimbursable costs. Vidor asks us to apply this PAPPG revision to its request for disaster relief.

In version 4, FEMA expressly stated that "FEMA applies this Version 4," which "supercedes Version 3.1," only "to incidents declared on or after June 1, 2020." PAPPG (June 2020) at 12. Accordingly, on its face, it is not applicable to this disaster. To the extent that Vidor has raised arguments suggesting that we could apply version 4 retroactively to this case, we need not address them because, even if we did, the result would be the same. Although version 4, unlike version 3.1, may allow for elevation of replacement buildings, version 4 contains the same preclusion on hazard mitigation funding for improved projects as does version 3.1. Because Vidor has been approved for funding for an improved project, it makes no difference which version we apply. Hazard mitigation elevation costs for improved projects are not recoverable under either version of the PAPPG.

IV. Vidor's Estoppel Argument

Although Vidor does not label its argument as such, Vidor essentially asserts that FEMA should be barred by equitable estoppel from rescinding its initial approval of hazard mitigation costs, which occurred before Vidor requested funding for an improved project. As previously discussed, FEMA originally approved hazard mitigation costs for a replacement building through PW 04060, version 1, but subsequently notified Vidor that FEMA's Region 6 team had improperly evaluated what costs would be eligible for Vidor's project, that it had made a mistake in approving mitigation funding for Vidor's replacement project, and that, even if Vidor had not requested an improved project, it would have to rescind authorization for elevation costs as hazard mitigation. Vidor presented testimony about how Vidor relied on FEMA's original approval of those costs; how, had Vidor known that FEMA would not cover them, Vidor would have taken a different approach to mitigation; and how, because of FEMA's delays in notifying Vidor of the deobligation, windows of opportunity for Vidor to apply for other mitigation funding expired. In fact, the bulk of the testimony that Vidor presented at the arbitration hearing focused on the unfairness of FEMA's approval and subsequent deobligation of that funding.

Vidor cannot prevail on an estoppel argument for at least two reasons:

First, any testimony that Vidor would have taken a different approach to mitigation had it known that it could not recover elevation costs conflicts with the evidence in the record. The evidence shows that, before Vidor committed to building an improved project, FEMA expressly warned it that an improved project could lose hazard mitigation funding. *See* FEMA Exhibit 2, Attachment 6 at 100. Further, as previously discussed, the PAPPG is clear that improved projects lose mitigation funding. Vidor's testimony about detrimentally relying on FEMA's replacement building elevation cost funding approval is not supportable.

Second, even if Vidor had reasonably relied on FEMA's original approval and had not later switched to an improved project, the Supreme Court has long held that the Federal Government "may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 60 (1984). "Because the federal government's 'fiscal operations are so various, and its agencies so numerous and scattered,' there is always a risk that misinformed agency employees and representatives may err in interpreting statutes and regulations, and even 'the utmost vigilance would not save the public from the most serious losses.'" *Wagner v. Federal Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988) (quoting *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824)). "The government could scarcely function if it were bound by its employees' unauthorized representations." *Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976). To the extent that equitable estoppel can ever be applied against the Government, "there must at least be affirmative misconduct, leading to unfairness, on the part of a

Government official,” in addition to a showing of the traditional elements of estoppel. *Hanson v. Office of Personnel Management*, 833 F.2d 1568, 1569 (Fed. Cir. 1987). A misrepresentation that is the product of negligence, rather than intentional bad faith, cannot rise to the level of affirmative misconduct. *Clason v. Johanns*, 438 F.3d 868, 872 (8th Cir. 2006). Vidor has not alleged, much less proven, that the error by FEMA’s representative in originally believing that replacement costs and hazard mitigation elevation costs were both recoverable was anything other than unintentional. Any estoppel argument fails.

Decision

For the foregoing reasons, Vidor’s request for funding to elevate its improved project replacement building is denied.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE

Board Judge