



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 22, 2022

CBCA 7410-FEMA

In the Matter of MONROE COUNTY ENGINEER

Amy M. Zwick, County Engineer, Office of the Monroe County Engineer, Woodsfield, OH, appearing for Applicant.

Anne Vitale, Ohio Emergency Management Agency, Ohio Department of Public Safety, Columbus, OH, counsel 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 **LESTER**, **RUSSELL**, and **VERGILIO**.

At mile 6.84 of County Road 29 (CR 29-6.84), also known as Sunfish Creek Road, in Monroe County, Ohio, is a two-lane gravel road with an upslope on one side and a downslope side that runs alongside Sunfish Creek. On May 24, 2022, the Office of the Monroe County Engineer (the County) submitted a request for arbitration under section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), seeking public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) for repairs to the road surface and base at CR 29-6.84, as well as to the embankment supporting that road. The County alleges that the damage at CR 29-6.84 was caused by a February 2019 rainfall event that the President declared a major disaster in DR-4424-OH (84 Fed. Reg. 19,793 (May 6, 2019)).

FEMA, although denying requested funding for road surface and base repairs, originally agreed to fund a portion of the requested embankment repairs after FEMA

inspectors determined that the February 2019 rainfall had washed out part of the embankment. Later, though, FEMA notified the County that it was deobligating the embankment repair money after determining that the washout was caused by issues predating the February 2019 disaster. In addition to challenging FEMA's denial of PA funding for road and site stability repairs, the County also asserts that FEMA should not be allowed to deobligate the monies for embankment repairs that it had previously authorized.

Background

From February 5 to 13, 2019, Monroe County and nineteen other counties in Ohio were subject to flooding and landslides as a result of severe storms. When the President on April 18, 2019, declared the February 2019 incident a major disaster, it rendered PA funding available to eligible local government entities like Monroe County.

After the February 2019 storms, the County notified FEMA that overland flooding and soil saturation from the rainfall had caused 157 linear feet of damage to the road surface and base at CR 29-6.84 and had destabilized the sloped embankment supporting the road there. FEMA created project 108349 to capture the claimed damages.

Following a site inspection on August 20, 2019, and after obtaining documentation from the County, FEMA issued an eligibility determination memorandum (DM) on February 3, 2021, partially approving and otherwise denying the County's request for more than \$400,000 in funding for repairs at CR 29-6.84. FEMA Exhibit 3-9 at 77. Specifically, FEMA denied the County's request for funding to repair the surface and base of the road because its inspectors saw no damage to the road. Nevertheless, FEMA represented that its inspectors had validated a disaster-related washout of a portion of the embankment (measuring 157-feet-long by four-feet-wide by three-feet-deep) along the shoulder of the roadway, and it found that particular embankment repair eligible for \$5837.78 in PA funding. *Id.* FEMA denied any additional PA funding for embankment or site stability work, finding that, beyond the portion of the embankment that was washed out, there was no evidence that the sloped embankment was now unstable or that the embankment was otherwise impacting the structural integrity of the road. *Id.*

On February 9, 2021, the County submitted a first-level appeal for project 108349 to the grantee/recipient, the Ohio Emergency Management Agency (OEMA), which forwarded the appeal to FEMA on April 12, 2021, along with its recommendation that FEMA approve funding for road repairs and for the portion of the site stability work that FEMA had previously disapproved. FEMA Exhibit 3-16 at 100-01. OEMA indicated that, in its opinion, photographs of the area, which it stated showed drops in the area of the roadway, provided visual evidence of a landslide having occurred adjacent to the roadway. *See, e.g., id.* at 106, 109-10, 216-17.

By decision dated March 21, 2022, FEMA’s Region V Regional Administrator denied the first-level appeal, finding that “the Applicant did not provide sufficient documentation or evidence to establish that the road surface and adjacent embankment were damaged and became unstable due to the declared disaster.” FEMA Exhibit 1 at 1. FEMA represented that it had obtained an expert analysis from Dr. Timothy Stark, who, after consulting historical terrestrial data, Light Detection and Ranging (LiDAR) data, and rainfall data for the area, had determined that the retrogressive slope that the County was seeking to stabilize at CR 29-6.84 was visible in a 2014 color infrared aerial photograph and the 2018 LiDAR imagery. Those images showed three successive scarps¹ evidencing slope movement towards Sunfish Creek, all of which pre-existed the February 2019 rainfall event. FEMA Exhibit 1 at 16, 20; FEMA Exhibit 3-18 at 223. Based upon that evidence, FEMA denied the County’s request for PA funding for CR 29-6.84 and, further, deobligated funding for the embankment stabilization work that it had previously authorized. FEMA Exhibit 1 at 16.

The County received the first-level appeal decision by certified mail on March 28, 2022, and timely submitted an application for arbitration to the Board on May 24, 2022, which the Clerk docketed as CBCA 7410-FEMA. The parties submitted this matter for decision on the written record with a paper hearing pursuant to Board Rule 611 (48 CFR 6106.611 (2021)) and completed briefing on October 13, 2022.

Discussion

Eligibility for PA Funding

To be eligible for PA funding, damage must be a result of a declared disaster. *Monroe County Engineer*, CBCA 7251-FEMA, et al., 22-1 BCA ¶ 38,061, at 184,800. “Prior arbitration panels of the Board have construed this requirement to mean that ‘cause 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 show that an eligible facility was damaged and that it was a particular declared disaster that caused the damage, rather than a cumulative effect of contributions from earlier events. *Monroe County Engineer*, CBCA 7288-FEMA, et al., 22-1 BCA ¶ 38,142, at 185,260.

¹ A scarp, as explained by FEMA’s expert, “is created by slope movement that creates tension cracks because there is a pulling away of the downslope area from the upslope materials, which may be accompanied by a downward vertical offset, i.e., scarp.” FEMA Exhibit 3-18 at 221.

With regard to the County's request for PA funding to address slope stability, neither party disputes that there is slope instability at the site. To receive slope stability assistance, the slope must be part of the integral ground of the roadway, and the applicant must show that there was no evidence of predisaster instability after the roadway was constructed. *Monroe County Engineer*, CBCA 7303-FEMA, 22-1 BCA ¶ 38,172, at 185,383; FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 128. Here, the aerial image from 2014 and the LiDAR imaging from 2018 show significant slope instability predating the February 2019 rainfall. Although it is possible that the February 2019 rainfall exacerbated the erosion and caused some washout in the embankment, the evidence that FEMA presented shows that scarping and erosion were well underway prior to the February 2019 rainfall. Given that evidence of predisaster instability, the PAPPG precludes PA funding for soil and embankment stabilization. *See Monroe County Engineer*, CBCA 7329-FEMA, slip op. at 2 (Oct. 7, 2022) (“[R]epeated and separate rainfall events at a location may each cause minor damage to a particular roadway but . . . PA funding is available only if a particular disaster event is the specific cause of the damage for which funding is being sought.”).

With regard to the County's request for PA funding to repair the road surface and base at CR 29-6.84, FEMA inspectors could not identify any damage to road surface or base, although it appears clear that there was some edge cracking that washed gravel from the road down into the embankment either prior to or during the February 2019 rainfall. Although somewhat confusing from the paper record, there appears to be a dispute between FEMA and the County about the original width of the road at CR 29-6.84. The County appears to assert that the road was actually seven or eight feet wider before the February 2019 storms than it is now and that what FEMA thinks is an eroded partially-washed-out embankment at CR 29-6.84 (repairs for which FEMA originally agreed to fund) was actually part of the roadway itself but completely washed away during the storms. For purposes of this decision, we need not resolve that apparent disagreement. The damage at CR 29-6.84, inclusive of any lost roadway, any edge cracking in the remaining road, and any embankment erosion, is, for the reasons explained above, more likely than not the result of scarps that formed and erosion that began predisaster rather than the February 2019 rainfall, making repairs ineligible for PA funding.

FEMA's Ability to Deobligate Funding

FEMA originally authorized but later deobligated PA funding for repair of what it viewed as the washed-out portion of the embankment at CR 29-6.84. Section 705(c) of the Stafford Act limits the extent to which FEMA, once it has authorized PA funding for a particular project, can deobligate that funding:

A State or local government shall not be liable for reimbursement or any other penalty for any payment made under this chapter if —

- (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) (2018). Because the first two elements—payment authorization and reasonable costs—are not at issue here, we need address only the third element.

That third element—that “the purpose of the grant was accomplished”—is satisfied once the work that FEMA purported to authorize has been performed. *Baldwin County Board of Supervisors*, CBCA 2018-FEMA, slip op. at 4 (Sept. 15, 2010). Here, though, FEMA indicated in its first-level appeal decision that, while the grantee/recipient had drawn down funds for the project on March 29, 2021, the County had stated that no work had started on the project. FEMA Exhibit 1 at 9-10; *see* FEMA Exhibit 3-20 at 299 (the County’s statement to FEMA that the work deemed eligible “will need to wait until the appeal process is complete before starting”). “Nothing in [section 705(c)] prevents de-obligation of funds awarded in error where the error is caught prior to completion of the work.” *South Florida Water Management District v. Federal Emergency Management Agency*, No. 13-80533-CIV, 2014 WL 4805856, at *10 n.23 (S.D. Fla. Sept. 18, 2014).

The County has provided us with no evidence that the authorized embankment repair work at CR 29-6.84 has been performed. Since that repair work has not begun, much less been completed, the purpose of the grant has not been accomplished. Accordingly, section 705(c) of the Stafford Act does not preclude FEMA from deobligating funding for that work.

Decision

For the foregoing reasons, we deny the County’s request for PA funding in this matter. FEMA is entitled to deobligate funding for project 108349.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge