



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 10, 2022

CBCA 7480-FEMA

In the Matter of MONTGOMERY COUNTY SECONDARY ROADS

Karen Albert, Montgomery County Engineer, Office of the County Engineer, Red Oak, IA, appearing for Applicant.

Dennis T. Harper, Alternate Governor's Authorized Representative, Iowa Homeland Security and Emergency Management Department, Windsor Heights, IA, appearing for Grantee.

Christiana Cooley, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Frank Bruscato, 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 **BEARDSLEY** (Chair), **SULLIVAN**, and **O'ROURKE**.

Montgomery County Secondary Roads (Montgomery County) sought to arbitrate, pursuant to the authority set forth at 42 U.S.C. § 5189a(d) (2018), the denial by the Federal Emergency Management Agency (FEMA) of its request for reimbursement of funds for replacement of a culvert. FEMA denied reimbursement of the previously obligated funds because the new culvert was designed and constructed in such a manner that, in a 100-year flood, the base flood level was projected to rise more than one foot, a regulatory limit for FEMA. The Iowa Homeland Security and Emergency Management Department (IHSEMD) filed a response in support of Montgomery County's request. After considering the written record, the panel upholds FEMA's determination that Montgomery County cannot receive reimbursement.

Background

The President declared a disaster in Iowa in March 2019, following flooding rains that washed out a culvert on a rural road in Montgomery County. The county applied for public assistance funds to replace the culvert. Montgomery County indicated on its request that it planned to replace what had been a fourteen-foot culvert with a smaller, ten-foot culvert, in keeping with current Iowa road construction practice.

FEMA obligated funds against the request in April 2020, after conducting an environmental and historic preservation (EHP) review and creating a record of environmental consideration (REC). In the REC, FEMA noted that the project fell within a category applied to projects which were “functionally dependent” but “will not increase water surface elevation of the base flood more than one foot at any point within the community.” Montgomery County Reply to Request for Arbitration (RFA), Exhibit 2. FEMA did not request a hydraulic and hydrologic (H&H) study from Montgomery County to confirm this statement prior to obligating the funds.

After construction was complete, Montgomery County sought reimbursement from FEMA for the construction funds it expended in the amount of \$188,686.36. During its review of the request, FEMA requested a H&H study. Montgomery County stated that one had not been performed, but it provided an analysis from its engineering firm reporting that the depth of water for a 100-year flood event would be greater than one foot for a very short period of time and would affect only the upstream landowners. FEMA denied the request for reimbursement because a H&H study had not been prepared and the required regulatory analysis had not been completed.

After Montgomery County appealed FEMA’s determination, FEMA asked again for a H&H study. Montgomery County provided the same information from its engineer and a letter from the floodplain manager in the neighboring county, who stated that the water flow through the culvert would be well contained within the streambank and had “low damage potential and [would cause] minimal backwater impacts.” Montgomery County RFA, Letter from Adams County Emergency Management (Sept. 2, 2021). Based upon the information provided by Montgomery County’s engineer, FEMA found that it could not provide funding because the analysis showed a potential water level rise above the level permitted:

While the effects may be minimal and brief, the regulations above both prohibit a reduction in the channel’s flood carrying capacity as well as an increase in the water surface elevation of the base flood of more than one foot at any point within the community.

FEMA Response, Exhibit 4 at 6. FEMA acknowledged that it was reversing course after conducting the necessary reviews and obligating funds. It justified its actions by explaining that “FEMA has an affirmative obligation to recover grant funding that is improperly awarded.” *Id.* at 7.

Discussion

FEMA Cannot Obligate Public Assistance Funds for a Project that Violates Floodplain Standards

In granting public assistance, FEMA regulation and policy require that FEMA evaluate and seek to minimize the “harm to or within the floodplain.” Public Assistance Program and Policy Guide (Apr. 2018) (PAPPG) at 104; *see* Exec. Order No. 11,988, 3 CFR at 117 (1978) (Floodplain Management); 44 CFR 9.6 (2018). For projects constructed in a floodplain, FEMA is required to apply a set of standards to minimize the harm arising from the action. 44 CFR 9.11(d). One of these standards requires that new construction projects not increase the potential flood level more than one foot:

Until a regulatory floodway is designated, no new construction, substantial improvements, or other development (including fill) shall be permitted within the base floodplain unless it is demonstrated that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point within the community.

Id. 9.11(d)(4). “Base flood” is defined as “the flood which has a one percent chance of being equalled or exceeded in any given year (also know as a 100-year flood). This term is used in the National Flood Insurance Program (NFIP) to indicate the minimum level of flooding to be used by a community in its floodplain management regulations.” 44 CFR 9.4. “Community” is defined in national flood insurance regulations to be “any State or area or political subdivision thereof . . . which has authority to adopt and enforce flood plain management regulations for the areas within its jurisdiction.” 44 CFR 59.1.¹ The regulations require applicants for assistance to be aware of the requirements and permit FEMA to request additional information regarding the potential effects of a project. 44 CFR 9.17. But the responsibilities for ensuring that the standards, including the one quoted above, are met falls

¹ IHSEMD asks the panel to consider different definitions of community, purportedly found at 42 U.S.C. § 4004 and § 4104c, but we find no definitions in those statutory provisions.

on FEMA. 44 CFR 9.18. FEMA may not approve projects that do not meet the requirements. 44 CFR 9.2(a).

It is undisputed that the analysis provided by Montgomery County's engineering firm and reviewed by FEMA shows that the smaller culvert would raise the flood level more than one foot above the base flood level. IHSEMD argues that this standard is being misapplied by FEMA because Montgomery County does not fall within the definition of community as it does not participate in the NFIP. Montgomery County asserts that, because it does not participate in the NFIP, there is no regulatory floodway and no base flood elevation. The portion of the regulatory standard quoted above applies when there is no regulatory floodway and there has been no showing that Montgomery County cannot participate in the NFIP. Therefore, Montgomery County meets the definition of community quoted above.

Montgomery County also notes that the flooding effects are likely to be short in duration and are "acceptable to the adjacent landowners." Montgomery County Reply at 7. Both IHSEMD and Montgomery County note that the flood manager in the adjacent county decided that there would be minimal effects. Unlike other aspects of the regulatory standard which allow for consideration of alternatives, this standard appears to be a prohibition on any rise greater than one foot for no matter how long.

Montgomery County argues that FEMA's standard does not meet the standard practice in Iowa. FEMA's policy clarification makes allowances for more stringent state standards. FEMA Response, Exhibit 1. There is no provision for the use of different or less stringent standards.

IHSEMD also asserts that FEMA's analysis relies upon a single point and that a better analysis would involve several points of data to determine the effects of the action upon the floodplain. IHSEMD and Montgomery County could have prepared further analysis, but it is undisputed that the analysis already provided shows an increase of more than a foot "at any point," which is the standard.

FEMA May Recind its Obligation Decision Upon Determining that Project Violated Floodplain Standard

The Stafford Act provides that FEMA shall conduct audits to ensure compliance with the terms of the Act and may also require audits by state and local governments "when necessary to assure compliance with [the Stafford Act] or related regulations." 42 U.S.C. § 5161; *see also* 44 CFR 206.16. At least one court has interpreted this provision to create a nondiscretionary duty to try to recoup disaster funds that were erroneously granted. *See Fargo v. Federal Emergency Management Agency*, No. 19-CV-00004, 2019 WL 3082731,

at *3 (D. N. Mar. I. July 16, 2019); *see also Public Utility District No. 1 of Snohomish County v. Federal Emergency Management Agency*, 371 F.3d 701, 706 (9th Cir. 2004). FEMA’s audit authority and ability to recoup improperly obligated funds extends past project closeout. 2 CFR 200.344.²

Montgomery County and IHSEMD argue that FEMA should be held to its initial determination that the project met all environmental requirements. While we understand the unfairness of this situation—if FEMA had conducted a proper review and asked for the H&H study prior to approval, perhaps the design could have been changed—this unfairness does not provide a basis for FEMA to violate its regulatory requirements. FEMA’s ability and duty to audit provides the ability to reconsider obligation decisions made. *City of Laguna Nigel v. Federal Emergency Management Agency*, No. SAVC-09-00198, 2011 WL 13176735, at *5 (C.D. Cal. Feb. 3, 2011). FEMA cannot be required to reimburse funds for projects that violate its regulations.

Decision

The panel upholds FEMA’s determination.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge

² Many cases discussing FEMA’s right to audit cite to 44 CFR 13.51 as support for FEMA’s ability to recoup funds improperly obligated. *See, e.g., Public Utility District*, 371 F.3d at 707. In 2014, FEMA replaced these requirements with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, promulgated by the Office of Management and Budget and found in 2 CFR pt. 200. *See* 79 Fed. Reg. 75,871, 75,880 (Dec. 19, 2014).