



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 1, 2023

CBCA 7732-FEMA

In the Matter of HOBBY CENTER FOUNDATION

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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 **BEARDSLEY** (Chair), **GOODMAN**, and **O’ROURKE**.

O’ROURKE, Board Judge, writing for the panel.

Applicant, Hobby Center Foundation (Hobby Center), is a private, nonprofit (PNP) organization in Houston, Texas, which seeks to restore \$753,339 in previously approved and distributed hazard mitigation funding for its Zilkha Theater Complex, which experienced significant flooding during Hurricane Harvey. FEMA recouped the funds during the closeout process after a duplication of benefits analysis reduced eligible repair costs to \$0. We grant the application in part because we conclude that the hazard mitigation costs remained eligible for FEMA funding, but should be reduced by the amount available to Hobby Center through a Small Business Association loan.

Background

In 2017, Hurricane Harvey struck Hobby Center's Zilkha Theater Complex causing extensive flooding in the facility. As a PNP organization, Hobby Center sought public assistance and hazard mitigation funding to help repair the damages and prevent future damage. FEMA documented eligible costs for repairing the facility in the amount of \$771,645.41 based on four separate project worksheets, one of which also contained a hazard mitigation proposal. FEMA determined that the mitigation measures were eligible and approved hazard mitigation costs in the amount of \$753,339.

As a PNP that does not provide critical services during disasters, Hobby Center was required by the Stafford Act to apply for a Small Business Administration (SBA) loan to cover its costs. Hobby Center applied for an SBA loan on November 3, 2017, in the amount of \$910,550.¹ Hazard mitigation costs were not included in Hobby Center's loan application. The SBA approved the loan in the amount of \$621,200. FEMA applied the SBA loan across all four repair projects until the total amount of the SBA loan was exhausted. Of the \$771,645.41 in eligible repair costs, \$150,445.41 remained, and that amount was covered by flood insurance.

FEMA performed a duplication of benefits analysis on Hobby Center's application for public assistance, subtracting the SBA loan (\$621,200) and the insurance proceeds (\$150,445.41) from the total eligible repair costs (\$771,645.41). FEMA reduced the eligible repair costs under each project worksheet to \$0 since the SBA loan, together with the insurance proceeds, completely covered the repair costs.

Hobby Center maintained four insurance policies, three of which were for flood insurance. Eventually, Hobby Center received \$1,142,272.75 in insurance proceeds. Hobby Center's insurance policies did not cover hazard mitigation projects, and Hobby Center did not include a request for hazard mitigation funds in its SBA loan application—which it could have done. Hobby Center ultimately decided not to accept the SBA loan. However, that decision did not impact the duplication of benefits analysis.

Hobby Center sought the hazard mitigation funding from FEMA. The Texas Division of Emergency Management (TDEM) raised concerns that Hobby Center's \$0 in eligible repair costs made Hobby Center ineligible for hazard mitigation. As a precaution, TDEM queried a FEMA policy team about this concern. The policy team issued a white paper that concluded that a duplication of benefits analysis which reduces eligible repair costs to \$0

¹ In its SBA loan application, applicant requested \$578,000 for machinery and equipment, \$20,000 in inventory, and \$312,500 in leasehold improvements.

does not affect eligibility for hazard mitigation funding. Additionally, FEMA's Public Assistance Group Supervisor twice thereafter communicated to Hobby Center that hazard mitigation project funding was eligible despite FEMA's determination of \$0 in eligible repair costs. Consequently, FEMA obligated public assistance funding for hazard mitigation to TDEM which, in turn, disbursed the funds to Hobby Center.

On October 27, 2021, TDEM requested final approval from FEMA to close out the hazard mitigation supporting Hobby Center's actual costs in the amount of \$761,803.27. On June 16, 2022, FEMA *reversed* its position and recouped the hazard mitigation funds it had previously approved and disbursed. This time, FEMA found the project ineligible for hazard mitigation funding based on the fact that FEMA granted \$0 in repair work to Hobby Center. Hobby Center appealed FEMA's decision. On February 1, 2023, FEMA denied the appeal, and on April 3, 2023, Hobby Center filed its request for arbitration with the Board, which docketed the matter as CBCA 7732-FEMA. Pursuant to Board Rule 611 (48 CFR 6106.611 (2022)), the parties submitted the dispute for a decision on the written record.

Discussion

The first issue we consider is whether duplication of benefits reductions that reduce a repair project to \$0 render otherwise eligible damages, such as hazard mitigation costs, to be ineligible. This question is one of first impression over which the arbitration panel exercises de novo review. *See Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980.

The Stafford Act states that the President may make contributions to a PNP facility only if:

- (i) the facility provides critical services (as defined by the President) in the event of a major disaster; or
- (ii) the owner or operator of the facility—
 - (I) has applied for a disaster loan under section 636(b) of title 15; and
 - (II) (aa) has been determined to be ineligible for such a loan; or
 - (bb) has obtained such a loan in the maximum amount for which the Small Business Administration determines the facility is eligible.

42 U.S.C. § 5172(a)(3)(A) (2018).

FEMA regulations echo this provision of the Stafford Act. When a non-critical PNP “[h]as eligible damages greater than the maximum amount of the loan for which it is eligible, . . . the excess damages are eligible for FEMA assistance.” 44 CFR 206.226(c)(2)(ii). This is also addressed by FEMA policy: “FEMA only provides funding for eligible [p]ermanent

[w]ork costs that an SBA loan will not cover.” Public Assistance Program and Policy Guide (PAPPG) at 17 (Apr. 2018). With regard to hazard mitigation funding, FEMA regulations state: “[T]he cost of any requirements for hazard mitigation placed on restoration projects by FEMA will be an eligible cost for FEMA.” *Id.* 206.226(e).

FEMA’s position is that a repair project and a hazard mitigation project go hand in hand. There is no mitigation funding without restoration funding. You cannot sever them. “Section 406 [hazard mitigation program (HMP)] funding cannot be separated from FEMA funding for eligible disaster repairs because Section 406 HMP costs are only eligible in the context of a restoration project,” FEMA argues. FEMA’s Response to Applicant’s Request for Arbitration at 13. Thus, FEMA contends that, when the duplication of benefits analysis reduced eligible repair costs to \$0, the hazard mitigation costs became ineligible because there was no longer a concomitant restoration project to which FEMA could attach the hazard mitigation funding.

Hobby Center, on the other hand, argues that the hazard mitigation project survives the duplication of benefits analysis and remains eligible for FEMA funding. Hobby Center points to FEMA’s regulations, policy guide, and previous FEMA decisions in support of its position. Here, the SBA loan did not fully cover the costs to repair Hobby Center’s eligible damages and, according to the PAPPG, hazard mitigation projects are included in the definition of “permanent work.” *See* PAPPG at 19 (“FEMA provides: Grant funding for permanent restoration of damaged facilities, including cost-effective hazard mitigation to protect the facilities from future damage (Permanent Work).”). Even though the remaining repairs were covered by insurance, Hobby Center maintains that the hazard mitigation project constituted unfunded permanent work which FEMA can fund.

For its part, FEMA admits that a conflict exists between its regulations and the PAPPG on the definition of permanent work:

While FEMA acknowledges that the PAPPG states that hazard mitigation is included in permanent work eligibility, the PAPPG is in direct conflict with FEMA’s regulations at 44 C.F.R. § 206.201(i) which defines permanent work as “restorative work that must be performed through repairs or replacement, to restore an eligible facility on the basis of its predisaster design and current applicable standards.”

Despite this conflict, FEMA urges the panel not to include hazard mitigation as part of its analysis in determining whether the SBA loan covered “all permanent disaster-related repair costs.” FEMA asserts that the regulation’s definition of permanent work prevails over the PAPPG’s definition, and since the regulation makes no mention of hazard mitigation, the panel should not read it in.

Hobby Center also refers to Figure 8 on page 18 of the PAPPG, a decision tree entitled “SBA Loan Outcomes”:

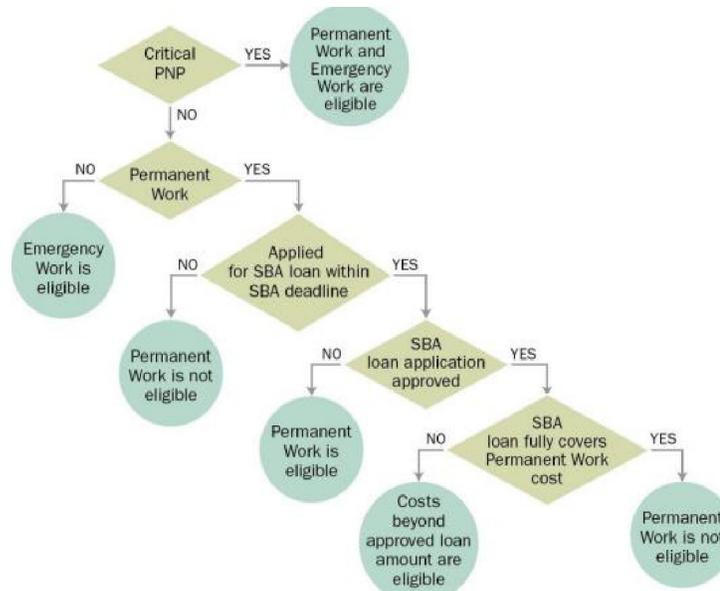


Figure 8. SBA Loan Outcomes

Figure 8 makes no mention of hazard mitigation, but it does ask whether the SBA loan fully covers the costs of the permanent work. Setting aside for a moment the dispute over whether permanent work includes hazard mitigation projects, Hobby Center points out that the SBA loan did not cover all of Hobby Center’s repair work. Approximately \$150,000 in eligible damages remained after the loan was applied, which, according to the Stafford Act and FEMA’s regulations, made Hobby Center eligible for hazard mitigation funding. Hobby Center also notes that because Figure 8 does not include insurance in its analysis, it means that PNP eligibility for hazardous mitigation funding is determined *prior* to consideration of any insurance proceeds.

Hobby Center argues that its position is consistent with past FEMA decisions. For example, in *Lincoln City Transportation & Utilities Department*, FEMA 4420-DR-NE (July 31, 2023), high winds and surface water flooding damaged a waste water treatment facility in 2019. Eligible repairs amounted to \$1,550,932. After conducting a duplication of benefits analysis, the repairs were fully covered by insurance, reducing eligible repair costs to \$0. Nonetheless, FEMA funded the hazard mitigation project in the amount of \$349,705. Similarly, in *Escambia Community Holdings, Inc.*, FEMA DR-4177-FL (Nov. 19, 2019), FEMA obligated \$220,177 in restoration funding based on flood damage, then subsequently reduced the funding by that same amount when actual insurance proceeds were applied through a duplication of benefits analysis. Like in the previous case, however, FEMA had approved a hazard mitigation project which, despite eligible repair costs being

reduced to \$0, was funded in the amount of \$1,150,331. In response, FEMA states that “[its] prior decisions in the administrative process are not relevant here because the CBCA considers this matter *de novo* as if the case was being heard for the first time.”

We agree that our standard of review is *de novo*, but we do not agree that FEMA’s prior decisions are irrelevant, especially in situations like this one where FEMA’s regulations conflict with its own policies. Although we are not obligated to follow FEMA’s administrative decisions, we find that they provide some insight into how FEMA interprets this issue. We also note that FEMA provided no contrary examples. Furthermore, we are not persuaded that simply because a restoration project is ineligible for FEMA funding because it was funded by other sources, such as an SBA loan or insurance policy, that any related hazard mitigation project is ineligible. The regulation simply states that “the cost of any requirements for hazard mitigation placed on restoration projects by FEMA will be an eligible cost for FEMA.” 44 CFR 206.226(e). Here, FEMA approved hazard mitigation project costs on a restoration project. The plain language of the regulation makes those costs eligible. For the foregoing reasons, we find that duplication of benefits reductions that reduced the repair project to \$0 did not render the hazard mitigation costs to be ineligible for FEMA funding.

SBA Loan Reduction

SBA regulations permit funding of hazard mitigation measures by increasing the loan up to an additional 20% of either the cost of the damages or the cost of the hazard mitigation, whichever is less. 15 U.S.C. § 636(b)(1)(A). However, FEMA must offset duplicative benefits received from the SBA. 44 CFR 206.191. “[D]uplicative benefits include[] not only those received by an applicant, but also ‘any duplicative relief that was available to it, whether that relief was received or not.’” *In the Matter of Orleans Parish School Board and Louisiana Recovery School District*, CBCA 5457-FEMA, 18-1 BCA ¶ 36,929, at 179,923 (2017) (quoting *Hawaii v. Federal Emergency Management Agency*, 294 F.3d 1152, 1160 (9th Cir. 2002)).

In cases where an applicant is approved for, but does not accept, an SBA loan, FEMA will reduce funding by the amount of the loan the applicant did not accept. *See Ocean Grove Camp Meeting Ass’n*, FEMA 4086-DR-NJ (Dec. 19, 2013). Here, Hobby Center’s application for a disaster repair loan from the SBA was approved for \$621,200, but Hobby Center failed to request a 20% increase for hazard mitigation. Nevertheless, as noted above, the panel may reduce eligible public assistance from duplicative benefits that were available to the applicant. Given that Hobby Center could have received up to 20% of the lesser cost of its damages or hazard mitigation, this arbitration panel will reduce the cost of hazard mitigation (\$753,339) by 20%, which makes Hobby Center eligible to receive \$602,671.20 in hazard mitigation funding.

Decision

The request is granted in part. FEMA shall restore \$602,671.20 to applicant for eligible hazard mitigation funding.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge