



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 29, 2024

CBCA 8099-FEMA

In the Matter of CITY OF PACIFIC JUNCTION, IOWA

Korrena Nepl, City Clerk of City of Pacific Junction, Pacific Junction, IA; and Meredith Sanders of Tetra Tech, Houston, TX, appearing for Applicant.

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

Anthony Homer and Shahn Timer 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 **BEARDSLEY** (Chair), **CHADWICK**, and **NEWSOM**.

CHADWICK, Board Judge, writing for the Panel.

The City of Pacific Junction, Iowa (applicant or the City), sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) about public assistance for road, culvert, and ditch damage that applicant attributes to a major flood disaster declared in March 2019. This decision "is the final action by the Executive Branch" on the arbitrated matter. Board Rule 603 (48 CFR 6106.603 (2023)). As we explain, we find the costs at issue ineligible for public assistance.

Background

We write “primarily for the parties” and omit unnecessary details. Rule 613; *see Diamond v. Shulkin*, 692 F. App’x 637, 637 (Fed. Cir. 2017). In March and April 2019, severe storms and flooding from the Missouri River inundated the City for approximately a month to a maximum depth of several feet (estimates in the record vary). According to an engineering memorandum applicant received in February 2022, “As water eventually subsided, heavy truck traffic from debris removal operations *and utility vehicles* (electrical, water supply, *and other* utilities) crushed and severely damaged the [street] surfacing and saturated subbase material. The flooding also deposited silt in the street side ditches and plugged culverts . . .” (emphasis added).

Representatives of FEMA and applicant held a scoping meeting and performed inspections in July and August 2019 to document claimed damage to roads and culverts. Applicant showed FEMA damage at twenty-five or twenty-six pavement locations and two culverts. FEMA eventually issued a project worksheet that described both the road repairs and the two culvert repairs as “citywide.”

In May 2020, applicant’s City Clerk asked FEMA’s program delivery manager by email whether applicant could “fix[] the streets after the total destruction of them once the demolition takes place.” The FEMA official responded in part, “[T]he [current] city roads project . . . , we can go ahead and push that, you can always adjust for future damages if you wait until the demo work is complete before repairing the roads.”

Almost 200 houses in the City had to be demolished. We gather that at least some were replaced. The debris removal took more than three years, possibly more than four. Applicant wrote to grantee in July 2023 that “[t]here is still heavy equipment in town . . . removing debris and the last home was removed in June of 2023.”

The present dispute took shape when applicant sought to expand the scope of work in April 2022, three years after the disaster. Applicant submitted, through grantee, a request to add repair work on an “estimated” ninety culverts and approximately 45,000 linear feet of roadside ditches, including additional street resurfacing, which would roughly quadruple the estimated project cost from \$382,801.54 to \$1,575,743.34.

In a May 2023 determination memorandum (which is not in our record) and a March 2024 decision on applicant’s appeal, FEMA (1) denied the additional funding and (2) deobligated the \$382,801.54 it had authorized for the work applicant had identified in the summer of 2019. FEMA concluded that, to the extent any of the newly identified damage predated the initial 2019 meeting, applicant failed to claim such damage within sixty days thereafter as required by 44 CFR 206.202(d)(ii) (2018) and that, in any event, applicant did

not provide either (1) “information required to distinguish between damage [to streets and culverts] caused by eligible debris removal work and damage caused by ineligible . . . work” or (2) “sufficiently detailed documentation to demonstrate [either] the predisaster condition of the facilities claimed or the specific damage caused by equipment while engaged in debris removal operations.” FEMA funded none of the work at issue.

Applicant timely sought arbitration. All agreed in the initial conference that “[t]he principal issue for arbitration is the threshold eligibility of the costs at issue” rather than “specific dollar amounts.” The parties filed briefs and discussed the dispute with the panel in a virtual conference.

Discussion

We need not decide whether we agree with FEMA that applicant failed to identify some damage related to the disaster, but not to the cleanup, within the time allowed by the regulation. We might have resolved that issue in applicant’s favor, since FEMA’s manager told applicant a year after the disaster that applicant could “always adjust” the project scope “for future damages” after all “demo[lition] work [wa]s complete.” FEMA contends that by “future damages” the manager meant damage possibly caused—not just discovered—in the future. That nuance might not have been obvious to applicant. Timeliness is immaterial, however, given our other conclusions on eligibility.

“FEMA awards public assistance for disaster costs” and only for such costs. *City of St. Cloud, Florida*, CBCA 7952-FEMA, et al., 24-1 BCA ¶ 38,559, at 187,409 (citing 42 U.S.C. §§ 5170b, 5172); *see also* 44 CFR 206.223(a)(1); Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 19. “It is the applicant’s responsibility to identify eligible repair work by showing that the disaster caused the damage—not FEMA’s duty, or the Board’s, to rule out alternative causes of damage.” *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,684. “[T]he passage of time and limited evidence” can, however, “make it difficult to attribute damage to a given cause.” *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,388. Unsystematic “observations,” even by eyewitnesses, and post-disaster photographs may be “of limited value in determining when the damage may have occurred and what may have been the cause.” *Id.*; e.g., *City of Liverpool*, CBCA 6593-FEMA, 20-1 BCA ¶ 37,497, at 182,170.

We do not doubt that the inundation in 2019 worsened the condition of applicant’s streets, culverts, and ditches. But that is the beginning of a determination of work eligibility, not the end. Indeed, because roadways typically erode and degrade with time even if maintained, “[d]etermining causation for [particular roadway] damage . . . can, in many ways, be more difficult than for damage resulting from many other types of disasters.” *Monroe County Engineer*, CBCA 7288-FEMA, et al., 22-1 BCA ¶ 38,142, at 185,260. FEMA pays

to repair only the increment of damage caused by a disaster or by eligible disaster responses. *See* PAPPG at 19–20, 83, 116. Here, assessing the arbitration record independently, we cannot distinguish damage caused by the flood and the years of cleanup work from damage attributable to other causes, such as the predisaster age and condition of the roads, heavy post-disaster traffic other than for debris removal, and, importantly, the time between the disaster and the creation of the visual evidence.

We start with the photographs in the original application. Those July 2019 images show portions of streets that appear to be strewn or stained with mud and that in most instances have worn areas, potholes, or gashes, some of which contain standing water. We would not say, as laypeople, that the pavement seems to be in good repair. But we also do not know how it looked or functioned at the end of the winter in 2019, just before the disaster, and that is the problem. It is common knowledge, for example, that potholes often open in the winter and are filled in the spring. Applicant lost the records of its maintenance worker in the flooding and asserts that he regularly maintained and repaired the streets after they were repaved in 2014. Some of the damage visible in July 2019 was probably caused by the disaster in March and April, but how much of it? Any effort on our part to fill the evidentiary gap by imagining, for comparison’s sake, how the streets would have looked or functioned at the locations shown in the photographs had the disaster never happened would be pure speculation.

Regarding the two culverts that applicant caused to be inspected in August 2019, we have only map locations, rough drawings, and notations of “DAMAGED.” This is not evidence that the disaster itself, rather than circumstances before or after the disaster, damaged the culverts.

Applicant’s other post-disaster evidence consists mainly of photographs taken two to five years after the disaster (2021 to 2024) and the February 2022 engineering memorandum. In the years after the inundation event, applicant’s streets were in unusually heavy use, without being fully repaired, for purposes not limited to debris removal, including utility work and home repairs. The more recent visual evidence is, therefore, even less helpful to applicant than is the older evidence. We find no way to separate the “damage caused by the declared incident” or debris removal from damage and deterioration we would expect to see in the same time period for other reasons. *See* PAPPG at 19; *cf.* *City of Hattiesburg*, 22-1 BCA at 184,684 (“We cannot ignore the passage of time . . . , a recurring issue for much of the damage”). Applicant’s engineering firm opined in 2022 that “ditches have been filled in with silt left behind from the flood waters,” but nothing in the record explains either (1) how an engineer (or we) could determine the extent to which such blockage had occurred three years earlier and not more recently, or (2) whether the drainage system had been maintained to the City’s prior standards while all of the post-disaster work was taking place.

To be clear, we need not give credence to, or even reach, arguments raised by FEMA's counsel concerning negligent installation or deferred maintenance preceding the disaster. Nor do we reach issues of cost reasonableness. We conclude that we lack enough before-and-after evidence to link any particular amount of work included in the proposed project directly to the declared disaster for purposes of finding work eligibility.

Decision

The costs at issue are ineligible for public assistance.

Kyle Chadwick

KYLE CHADWICK
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Elizabeth W. Newsom

ELIZABETH W. NEWSOM
Board Judge