



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 21, 2024

CBCA 8152-FEMA

In the Matter of UNION COUNTY, NEW JERSEY

Bernice L. Dieter, Assistant County Engineer, Department of Engineering, Public Works & Facilities Management, County of Union, Scotch Plains, NJ, appearing for Applicant.

Captain James Boland, Bureau Chief, Lt. David Grayson, Public Assistance Unit Head, and Rosa Torres, Area Lead, New Jersey Office of Emergency Management, West Trenton, NJ, appearing for Grantee.

Rebecca J. Otey, 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), **LESTER**, and **GOODMAN**.

GOODMAN, Board Judge, writing for the Panel.

The applicant, Union County, New Jersey, has filed a request for arbitration seeking \$3,179,684.21 to replace the Irving Street Bridge (the bridge) alleging damage caused by Hurricane Ida (the hurricane) in 2021. This amount includes \$346,695, which the Federal Emergency Management Agency (FEMA) previously obligated for repairs to the bridge which FEMA determined were necessitated by damage caused by the hurricane. The parties elected to have a paper hearing pursuant to Board Rule 611 (48 CFR 6106.611 (2023)). The applicant has not proved that the damage alleged in excess of that previously determined by FEMA to have been caused by the hurricane was caused solely by the hurricane. The arbitration panel denies the applicant's request for additional costs to replace the bridge.

Background¹

The bridge, first constructed in 1895 and modified in 1924, is composed “of stone and brick arches with rusticated ashlar piers and abutments.” Applicant’s Request for Arbitration (RFA), Exhibit 1 at 1. On September 1, 2021, the hurricane struck New Jersey, including Union County. *Id.* at 4. The hurricane was declared a major disaster on September 5, 2021. FEMA’s Response to Applicant’s Request for Arbitration (FEMA’s Response) at 6. The applicant requested public assistance (PA) funding for damage to the bridge. *Id.* at 7. In February 2022, FEMA held a site inspection to assess the damage. *Id.* In December 2022, FEMA obligated \$346,695 to repair the bridge’s parapet that came off during the hurricane, which was damage identified in the site inspection through Grants Manager Project 548808. *Id.*; FEMA’s Response, Exhibit 5.

On April 17, 2023, the applicant requested a change to the project’s scope of work (SOW) to replace the entirety of the bridge and sought additional funding of \$2,832,989.21 for replacement costs. FEMA’s Response, Exhibit 7. FEMA issued a determination letter dated November 15, 2023, denying the request, stating that the applicant had not provided documentation demonstrating that the hurricane, and not pre-existing damage, was the cause of the additional claimed damage to the bridge. FEMA’s Response, Exhibit 8. The determination letter noted the engineering studies conducted before the disaster which had concluded that the bridge suffered from serious structural deficiencies, including separation between the stone and brick portion of each arch on each side. *Id.* at 1.

The applicant appealed FEMA’s denial. FEMA’s Response, Exhibit 10. FEMA issued a first appeal decision denying the applicant’s request. FEMA’s Response, Exhibit 11. FEMA concluded that multiple pre-disaster bridge inspections identified several structural deficiencies and that the bridge had been identified as requiring replacement since 2016. *Id.*; FEMA’s Response, Exhibit 9 (2017 Alternatives Study); FEMA’s Response, Exhibit 17 (2020 Bridge Re-Evaluation Survey Report). FEMA also noted that the applicant acknowledged that the bridge required replacement prior to the disaster as evidenced by its board meeting minutes from January 2016, in which the applicant authorized “the County Manager to award a Professional Engineering Service Contract . . . to provide Design, Construction Administration and Inspection Services for the Replacement of [the bridge].” FEMA’s Response, Exhibit 12 at 5.

¹ We write “primarily for the parties,” and include only those facts relevant to the resolution of the issues presented, and omit unnecessary details. Rule 613 (48 CFR 6106.613); *see Diamond v. Shulkin*, 692 F. App’x 637, 637 (Fed. Cir. 2017); *School Board of Bay County, Florida*, CBCA 7889-FEMA, 24-1 BCA ¶ 38,518, at 187,220.

The awardee of the Professional Engineering Service Contract produced a replacement design for the bridge and submitted plans to the applicant in 2019. FEMA's Response, Exhibit 13. FEMA therefore determined that, except for the specific damage that it had previously identified as having been caused by the hurricane, the bridge had been damaged prior to the hurricane to such an extent that the applicant had determined in 2016 that it was necessary to replace it. The applicant had not proven that replacement of the bridge was necessary as the result of the hurricane. FEMA found that the applicant was ineligible for PA funding above the \$346,695.00 previously obligated to repair damage which FEMA identified as specifically caused by the hurricane. FEMA's Response at 8-9; FEMA's Response, Exhibit 11 at 2.

Discussion

FEMA has obligated funds to repair the bridge based on damage that it determined was caused by the hurricane. The applicant seeks additional funding to replace the bridge. It is the applicant's burden to support its application for PA funding.

Based on the bridge's condition in 2016, five years before the hurricane, the applicant determined that the condition of the bridge was such that replacement was required. The applicant engaged a professional engineering firm to create a design for replacement of the bridge. The design was created, but the replacement did not take place. This documented engineering study clearly shows significant damage to the bridge years before the hurricane. "FEMA does not provide funding for repair of damage caused by: (1) Deterioration; (2) Deferred Maintenance; (3) The Applicant's failure to take measures to protect a facility from further damage; or (4) Negligence." Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 51-52.

After the hurricane, FEMA identified specific damage caused by the hurricane and obligated funds for repair of this damage, pursuant to 44 CFR 202.226, for "[w]ork to restore eligible facilities on the basis of the design of such facilities as they existed immediately prior to the disaster." The applicant has failed to prove additional damage by the hurricane other than that identified by FEMA.

Replacement is not allowed when "[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." 44 CFR 202.226(f)(1). FEMA awarded \$346,695.00 for repairs after the hurricane. This is the numerator of the 50 percent rule calculation, which includes only repair costs, and excludes costs such as "demolition beyond that which is essential to repair the damaged elements." PAPPG at 157. The denominator is the alleged cost of replacing the facility to its pre-disaster condition, or \$2,832,989.21, as the applicant requested from

FEMA, plus the \$346,695.00 already awarded, totaling \$3,179,684.21. *Id.* at 157-60. The quotient is therefore 10.91 percent, well below 50 percent. Accordingly, pursuant to the 50 percent rule, the bridge is repairable, not replaceable.

FEMA has obligated PA funding to repair the damage to the bridge, which it has determined was caused by the hurricane. The applicant has failed to meet its burden to prove additional damage.

Decision

The applicant's request for additional PA funding is denied.

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge