



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 30, 2024

CBCA 7812-FEMA, 7813-FEMA, 7814-FEMA, 7815-FEMA, 7816-FEMA

In the Matter of DIOCESE OF BEAUMONT, TEXAS

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Ramoncito J. deBorja and Anthony Homer, 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 **LESTER**, **KULLBERG**, and **KANG**.

KULLBERG, Board Judge, writing for the Panel.

Applicant, the Diocese of Beaumont, Texas (Diocese), seeks review of the denial of its claims for public assistance (PA) for the replacement of five hurricane-damaged buildings at the Holy Family Retreat Center (retreat center)—the Herbert Conference Center (conference center), the Central Office and Chapel (chapel), and the Nold, Koehler, and Casey Guest Houses (guest houses). The Federal Emergency Management Agency (FEMA) determined, on the basis of a mixed-use facility analysis, that all of the space in the conference center and more than fifty percent of the space in the chapel and guest houses were used for ineligible services and, consequently, did not meet the eligibility requirements for noncritical, essential social services as set forth in its Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018). The Diocese contends that FEMA improperly applied

a mixed-use analysis, and the chapel, conference center, and guest houses are houses of worship (HOWs) and it is entitled to recover PA in the amount claimed. For the reasons set forth below, the panel finds, in accordance with FEMA policy, that the chapel and conference center are HOWs and eligible for PA, but the three guest houses are not HOWs and, therefore, ineligible for PA. However, the question of whether the Diocese is entitled to the replacement cost of the chapel and conference center, or, in the alternative, the cost of repairs, is remanded to FEMA for such a determination consistent with this decision.

Background

Hurricane Harvey struck southeastern Texas on August 23, 2017, and the President declared a disaster for the affected area on August 25. The prolonged flooding aftermath continued for several weeks, to September 15, 2017. The retreat center, which is located in Jefferson County, Texas, and is a tax-exempt religious institution there, suffered storm damage that included flooding to a depth of seven feet. The Diocese submitted requests for PA for replacement of the conference center (\$1,935,455.26), the chapel (\$920,576.02), and the three guest houses, Nold (\$1,455,995), Koehler (\$1,455,944.77), and Casey (\$1,455,944.77). The applicant contends that the cost of repair exceeded fifty percent of the replacement cost of each building. The Diocese did not pursue requests for PA for the administrator's residence and the shop and laundry building, which were also damaged. While this matter was pending, the Diocese made temporary repairs to the five buildings in order to return them to safe use.

The record shows that the retreat center operated every week of the year except for holidays, and ninety percent of the scheduled activities were ACTS (an acronym for "adoration, community, theology, and service") retreats. The duration of such retreats varied from overnight to three-to-five days, and clergy took part in eight-day retreats. Participants engaged in worship services and also individual worship. Communion services were conducted in not only the chapel but also the conference center and the three guest houses. Rooms in the guest houses were furnished simply and consisted of only basic necessities for the purpose of the retreat. The rooms lacked televisions and radios. The Diocese did acknowledge that, on occasion, a private business had used the retreat center, and the Diocese's witness represented that use of the retreat center was not restricted to any one religious denomination.

FEMA performed a mixed-use analysis of each of the five buildings at the retreat center. In general, FEMA's analysis compared the size of those areas that it deemed were used for eligible and ineligible services, but common areas such as bathrooms, hallways, lobbies, foyers, and storage closets were not included in the comparisons. Such mixed-use analysis conditioned entitlement to public assistance on a finding that eligible services were provided in fifty percent or more of the area of each building.

With regard to the conference center, FEMA determined that the building provided only ineligible services, such as dining, vending, or conference space. FEMA denied the Diocese's request for PA. The Diocese's request for arbitration was docketed by the Board as CBCA 7812-FEMA.

Regarding the chapel, FEMA determined that only thirty-one percent of the chapel area was used for eligible services, which included the library, chapel, and sacristy. The remaining sixty-nine percent of the area of the chapel consisted of ineligible services, such as administration, support, and storage, and FEMA denied the Diocese's request for PA. The Diocese's request for arbitration was docketed as CBCA 7816-FEMA.

FEMA's mixed-use analysis of the three guest houses, which were all built according to a similar design, found that more than fifty percent of the area of each building was used for ineligible services. The only portion of each building that provided eligible services was a meeting area for worship and prayer, which constituted twenty-one percent of the area of each. The remaining seventy-nine percent of the area of each, which consisted of dormitory rooms with connected bathrooms and a kitchen, provided ineligible services. The Diocese filed requests for arbitration for each guest house, which the Board docketed as CBCA 7813-FEMA (Nold), CBCA 7814-FEMA (Koehler), and 7815-FEMA (Casey).

The three-judge panel conducted a remote hearing of all five consolidated requests for arbitration, and the parties submitted briefs. After receipt of the parties' briefs, the panel determined that additional information was required with regard to FEMA's August 19, 2021, letter to "church authorities in Puerto Rico," which was referenced in *First Presbyterian Church, Panama City, Florida*, CBCA 7282-FEMA, 22-1 BCA ¶ 38,084 ("FEMA noted that it 'distinguishes an administrative building that stands alone to support a HOW facility at another location from eligible administrative space within a HOW facility.'"). The panel directed FEMA to respond first to the order by providing a copy of the August 19, 2021, letter, relevant documentary evidence, and a supplemental brief. Upon receipt of those documents and FEMA's brief, the panel directed the applicant to submit a supplemental brief in response.

Along with its brief, FEMA submitted to the panel a copy of its August 19, 2021, letter to the Roman Catholic Church of Puerto Rico (ICAR),¹ FEMA-4339-DR-PR (exhibit A), and a subsequent cover letter to ICAR, dated May 10, 2022, along with a determination memo (DM) (exhibit B) that partially approved ICAR's request for PA. FEMA's May 10, 2022, DM addressed damage to a two-story HOW that included a priest's residence. Those areas of the HOW that FEMA deemed eligible for PA included the temple,

¹ "ICAR" is FEMA's acronym for Iglesia Católica Apóstolica y Romana.

two chapels, sacristy, administrative/priest offices, conference room, and basement storage. Areas that were ineligible included the priest's residence, the kitchen, the dining room, garage, and two rooms that were deemed for support essential to the facility. FEMA represented that "the August 19, 2021, guidance letter is consistent with FEMA's current policy." Subsequently, the applicant filed a supplemental brief.

Discussion

At issue is whether FEMA properly denied PA for the chapel, conference center, and three guest houses, which comprise the retreat center. In its initial ruling as to the authority of this Board to hear arbitrations of claims for PA, the panel stated that it reviews these matters "de novo." *Bay St Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,577 (2009). Our authority in these matters is pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018). With regard to private nonprofit (PNP) facilities, the Stafford Act provides the following:

(A) In General.—The term "private nonprofit facility" means private nonprofit educational (without regard to the religious character of the facility), center-based childcare, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations, as defined by the President.

(B) Additional Facilities.—In addition to the facilities described in subparagraph (A), the term "private nonprofit facility" includes any private nonprofit facility that provides essential social services to the general public (including museums, zoos, performing arts facilities, community arts centers, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, food banks, broadcasting facilities, houses of worship, and facilities that provide health and safety services of a governmental nature), as defined by the President. No house of worship may be excluded from this definition because leadership or membership in the organization operating the house of worship is limited to persons who share a religious faith or practice.

Id. § 5122(11). Additionally, the Stafford Act provides for contributions for damage to a PNP as follows:

(a) Contributions

(1) In general

The President may make contributions—

....

(B) subject to paragraph (3), to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person.

....

(3) Conditions for assistance to private nonprofit facilities

....

(C) Religious facilities

A church, synagogue, mosque, temple, or other house of worship, educational facility, or any other private nonprofit facility, shall be eligible for contributions under paragraph (1)(B), without regard to the religious character of the facility or the primary religious use of the facility. No house of worship, educational facility, or any other private nonprofit facility may be excluded from receiving contributions under paragraph (1)(B) because leadership or membership in the organization operating the house of worship is limited to persons who share a religious faith or practice.

Id. § 5172(a)(1)(B), (3)(C).²

² The above-cited sections of the Stafford Act were amended to add language regarding HOWs, 42 U.S.C. §§ 5122(11)(B) (last sentence), 5172(a)(3)(C), as part of the

In addition to the Stafford Act, the panel applies the relevant sections in Title 44 of the Code of Federal Regulations (CFR) and version 3.1 (April 2018) of the PAPPG.³ The CFR provides the following with regard to the definition of a PNP:

(e) *Private nonprofit facility* means any private nonprofit educational, utility, emergency, medical, or custodial care facility, including a facility for the aged or disabled, and other facility providing essential governmental type services to the general public, and such facilities on Indian reservations. Further definition is as follows:

.....

(7) *Other essential governmental service facility* means museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature. All such facilities must be open to the general public.

(f) Private nonprofit organization means any nongovernmental agency or entity that currently has:

(1) An effective ruling letter from the U.S. Internal Revenue Service, granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954, or

(2) Satisfactory evidence from the State that the nonrevenue producing organization or entity is a nonprofit one organized or doing business under State law.

44 CFR 206.221(e), (f) (2018).

The PAPPG classifies PNP eligible facilities as either “critical” or “non critical.” PAPPG at 12-13 tbls.1 & 2. HOWs are included among the various “PNP Eligible Non-Critical, Essential Social-Type Services.” *Id.* at 13 tbl.2. A caption at the bottom of

Nonpartisan Budget Act of 2018, Pub. L. No. 115-123, § 20604, 132 Stat. 64, 85-86. Those amendments were retroactively effective as of December 31, 2016. *Id.* § 20607, 132 Stat. at 88.

³ Version 3.1 of the PAPPG applies to declared disasters on or after August 23, 2017. PAPPG at vii.

Table 2 provides that “[w]ith the exception of custodial care facilities and museums, administrative and support buildings essential to the operation of PNP non-critical services are NOT eligible facilities.” *Id.*

Additionally, the PAPPG provides that, “[i]f a PNP operates multiple facilities, or a single facility composed of more than one building, FEMA must evaluate each building independently, even if all are located on the same grounds.” PAPPG at 15. Additionally, the PAPPG defines a “mixed-use” facility as one “that provide[s] both eligible and ineligible services.” *Id.* at 16. In such a case, the following applies:

Eligibility of mixed-use PNP facilities is dependent on the *primary* use of the facility, which is determined by the amount of physical space dedicated to eligible and ineligible services. “Primary use” is the use for which *more* than 50 percent of the physical space in the facility is dedicated. FEMA evaluates the entire structure when determining primary use; it does not separately address individual areas, such as floors, basements, or wings. Common space, such as bathrooms, hallways, lobbies, closets, stairways, and elevators, is not included when calculating mixed-use space.

Id. The PAPPG also requires an evaluation of the time used for eligible and ineligible services and provides the following:

In cases where the same physical space is used for both eligible and ineligible services, the primary use is the use for which more than 50 percent of the operating time is dedicated in that shared physical space. If space is available for use, but the Applicant cannot support that it is used for eligible services for more than 50 of the percent of operating time, this criterion is not met.

Id.

With regard to a community center that provides multiple services, the PAPPG states that “FEMA reviews additional items to determine the primary service that facility provides.” PAPPG at 11. Such items include documentation from the Internal Revenue Service, charters and bylaws that predate the disaster, and evidence of longstanding routine use. *Id.* “Facilities established or primarily used for political, athletic, recreational, vocational, or academic training, conferences, or similar activities are not eligible (see Table 3).” *Id.* Table 3 lists “conferences” as one of the various PNP ineligible services under the heading “other community services.” *Id.* at 14 tbl.3.

The panel finds that FEMA has recognized a distinction between an eligible administrative space within a HOW as opposed to a separate administrative building, which

is ineligible. FEMA recognized that distinction in its August 19, 2021, letter which was referenced by FEMA in *First Presbyterian Church, Panama City, Florida*, 22-1 BCA at 184,956. Additionally, FEMA's May 10, 2022, letter provided additional guidance with regard to ICAR, and the panel finds such guidance to be relevant to this matter. FEMA has acknowledged in its supplemental brief that the August 19, 2021, letter represents current FEMA policy.

The Diocese is entitled to PA for the chapel and conference center because those buildings are HOWs. It is not entitled to PA for the three guest house because they are not HOWs. Although the above-cited sections of the Stafford Act, regulation, and PAPPG do not specifically define a HOW, the panel finds that such a definition, in general, would mean “[a] building or place set apart for and devoted to the holding of religious services or exercises or public worship.” *House of Worship*, Black's Law Dictionary (11th ed. 2019) (Westlaw). Testimony and the retreat center's schedules establish that ninety percent of the events are ACTS retreats and other religious events that are either overnight or last for three-to-five days and, for clergy, eight days. Any other nonreligious events are infrequent and do not alter the primary use of the retreat center. The panel does not find merit in FEMA's argument that the retreat center was used primarily for ineligible services such as conferences, meetings, and lodging. However, the panel also finds that entitlement to PA requires an examination of each building separately to determine whether it provides eligible or ineligible services.

The majority of the chapel space, exclusive of common areas, provides eligible services; it is therefore a HOW. The chapel's eligible spaces include the chapel room, sacristy, library, and administrative and supply rooms. While the PAPPG deems administrative and support buildings as ineligible, there is no similar provision that deems an administrative or supply room in a HOW as ineligible. Rather, FEMA's August 19, 2021, letter and its May 10, 2022, DM to ICAR support the finding that such administrative and supply rooms provide eligible services. FEMA, consequently, errs in limiting eligible space in the chapel to only the chapel room, library, and sacristy. Only a small area of the chapel—the kitchen—would be deemed ineligible based upon FEMA's DM regarding ICAR. The remaining areas of the chapel, which include the hallway, bathrooms, mechanical room, foyer, and janitor's closet, are common areas.

The majority of the space in the conference center is used for only eligible services. Those eligible areas include the conference room, which is also used for meals, a smaller conference room, and an audiovisual storage room. A review of the retreat schedule shows that the large conference room is used throughout the morning, afternoon, and evening for various sessions. Although the conference room is also used for dining, the retreat schedule shows that tables are taken down between meals and the room is then mostly used for various eligible activities. The rooms in the conference center that provide ineligible services include

the kitchen, dishwashing room, and vending area. The common areas include the vestibule, foyer, bathrooms, mechanical room, closet, and janitor's closet.

FEMA errs in its contention that the conference center provides only ineligible services, which include conferences, dining, and vending. As discussed above, the PAPPG deems a conference center as ineligible if it is used for community services, but the conference center at the retreat center does not operate as a community service that provides such activities as educational or vocational sessions. The community center is used for ACTS retreats the vast majority of the time.

The majority of the spaces in the three guest houses do not provide eligible services, and, therefore, the Diocese is not entitled to PA for those buildings. FEMA's August 19, 2021, letter and its May 10, 2022, DM to ICAR determined that the priest's residence was an ineligible service. The same result would apply in this matter because housing, whether for a long or short period of time, would be an ineligible service. Although the Diocese argues that religious activity takes place in the guest houses, the panel does not find that a majority of the area of the guest houses is used for that purpose, but rather, the majority of the space is for housing participants in the retreat.

The panel finds that the matter of the amount of PA remains to be determined. The Diocese has claimed the cost of replacing the retreat center buildings, which include the chapel and conference center, but those buildings have also been repaired. The panel does not find the record to be sufficiently developed to make any finding as to the cost of repair, as opposed to the cost of replacement, of the two buildings for which the Diocese is entitled to receive PA. This matter, accordingly, is remanded to FEMA for such a determination.

Decision

The panel finds that the Diocese is entitled to PA for the chapel and the conference center and denies the claim for PA for the Nold, Koehler, and Casey Guest Houses. This matter is remanded to FEMA for a determination of the amount of PA to be provided in accordance with this decision.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

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

Jonathan L. Kang
JONATHAN L. KANG
Board Judge