



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 10, 2024

CBCA 7990-FEMA

In the Matter of ST. MARK'S EPISCOPAL CHURCH

Stewart L. Robinson, Project Manager of St. Mark's Episcopal Church, Palatka, FL, appearing for Applicant.

Stephanie Stachowicz (Twomey), General Counsel, and Dezirée T. Elliott, Senior Attorney, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Shahnam 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 **SHERIDAN**, **ZISCHKAU**, and **O'ROURKE**.

SHERIDAN, Board Judge, writing for the Panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), St. Mark's Episcopal Church (St. Mark's or applicant) seeks \$133,881.48 in public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) for costs associated with exterior and interior damage caused by Hurricane Irma. For the reasons stated below, we grant the applicant's request in part.

Background

In September 2017, Hurricane Irma, a category four hurricane, struck the southern United States and caused widespread destruction throughout Florida's peninsula. On September 10, 2017, the President declared the event a major disaster, FEMA-4337-DR-FL, entitling eligible entities to apply for public assistance under section 501(b) of the Stafford Act. The incident period for Hurricane Irma's disaster declaration was September 4 through October 18, 2017.

St. Mark's is in Palatka, Florida, a small town of fewer than 75,000 residents located in central Florida. St. Mark's property consists of five buildings, four of which were damaged in Hurricane Irma: (1) the main Church Building (P1); (2) Parish Hall (P2);¹ (3) the Old Rectory, which is used as a "maintenance workshop" that stored tools and materials (P3); and (4) James House, another storage facility (P5).² Applicant's Reply at 2. P3 was not being used by St. Mark's at the time of the disaster. St. Mark's claims that during Hurricane Irma all four of these buildings sustained exterior roof damage, causing leakage. Additionally, the applicant states that due to a combination of roof leakage and a power outage, the interior walls and ceilings of P1 developed condensation that led to mold forming. However, the applicant has admitted that its pre-disaster HVAC unit was oversized for the dimensions of P1. Request for Arbitration (RFA) at 4.

Shortly after the hurricane, on October 3, 2017, the applicant's insurance adjuster arrived at the church's property to inspect the damage caused by the storm. The initial report consisted of photographs of the property damage. FEMA's Exhibit 3. For P1, the images showed that all of the leaks occurred near flashing on the roof³ and confirmed the condensation accumulation in the interior of the facility. *Id.* at 6-12. The photos taken of P2, P3, and P5 revealed wind damage to the roof's shingles. *Id.* at 40-43, 89-90, 114-19. This report was revised in 2018 and 2020 to include estimated repair costs that were omitted from

¹ St. Mark's does not provide details in its briefs about the function of Parish Hall. However, St. Mark's website indicates that Parish Hall is used to host receptions and other social gatherings. St. Mark's Episcopal Church, *Fellowship*, <https://stmarkspalatka.org/fellowship/> (last visited Apr. 9, 2024).

² There is no mention of the building that would be known as "P4" in the parties' briefs, but the insurance adjuster's report shows that P4 is the church's office building. FEMA's Exhibit 3 at 108. This claim does not address any damage to P4.

³ Roof flashing is used to direct water away from critical areas of the roof, wherever the roof plane meets a vertical surface like a wall or dormer. Flashing is typically made from a thin layer of galvanized steel to prevent water from finding its way inside.

the initial report. FEMA's Exhibit 1 at 3. The damages were also documented in a "Damage, Descriptions, and Dimensions" (DDD) report prepared by FEMA. FEMA's Exhibit 10.

Subsequently, St. Mark's requested price proposals from contractors to determine what the cost would be to replace each building's asphalt shingle roof with a metal roof and to install a moisture reduction system in P1 that includes an underfloor spray-foam barrier, ductwork, and a modification to the HVAC control system. During the pre-installation inspection by the applicant's contractor, the contractor noted signs of "age" showing on P1's roof. RFA at 41.

In early 2020, St. Mark's began the process of submitting a Hazard Mitigation Proposal (HMP) to FEMA. RFA at 12. On June 25, 2020, the Florida Division of Emergency Management (FDEM or recipient), on behalf of St. Mark's, sent FEMA an amended HMP that requested \$126,035.84 in mitigation funding—\$11,624 for a moisture reduction system in P1 and \$110,911.84 for full roof replacements for P1, P2, and P3.⁴ *Id.* at 13; FEMA Exhibit 4 at 3. FEMA denied \$118,749 of the requested amount in a determination memorandum (DM), concluding that only \$7785.86 of the costs were eligible for reimbursement. FEMA's Exhibit 4 at 3. In doing so, FEMA concluded that a majority of the damage to the buildings resulted from deferred maintenance rather than Hurricane Irma. *Id.* at 9. St. Mark's appealed this determination by letter on October 1, 2020, requesting \$112,945.⁵ Exhibit 9 at 10-20. FEMA issued a first appeal decision on September 9, 2021, partially granting the appeal but returning the case to the FEMA Region IV Public Assistance Branch to recalculate the eligible mitigation costs. FEMA's Exhibit 1 at 7.

FEMA issued a second DM on August 4, 2022, that, among other things, determined that P3 did not qualify as an eligible facility and analyzed whether each building's roof replacement was cost-effective. FEMA's Exhibit 12. Again, FEMA denied a majority of the requested costs, and St. Mark's appealed. In response to the second appeal by the applicant, FEMA issued a request for information (RFI) to St. Mark's seeking documentation that would support the eligibility of P3, information that would establish eligibility for the metal roof replacements, and clarification on the amount in dispute. FEMA's Exhibit 6 at 1-3. Instead of responding to FEMA's RFI, St. Mark's withdrew its appeal on January 18, 2024, and filed a request for arbitration (RFA) at the Board seeking \$133,881.48 in

⁴ Neither the applicant nor FEMA addresses why P5 was not included in the HMP.

⁵ It is not clear from the record why St. Mark's only appealed \$112,945.15, \$5804.83 less than the amount FEMA denied in its initial DM.

reimbursement costs for two mitigation measures: (1) installation of a moisture reduction system in P1, and (2) full metal roof replacements for P1, P2, P3, and P5. The RFA described the costs as:

1. P1 Roof Replacement: Roof Contract Amount (\$87,387) - Cost to Repair In-Kind (\$10,272.89) = \$77,114.11.
2. P2 Roof Replacement: Roof Contract Amount (\$61,600) - Cost to Repair In-Kind (\$42,341.27) = \$18,658.73.
3. P3 Roof Replacement: Roof Contract Amount (\$27,600) - Cost to Repair In-Kind (\$14,265.83) = \$13,334.17.
4. P5 Roof Replacement: Roof Contract Amount (\$20,750) - Cost to Repair In-Kind (\$7,599.53) = \$13,150.47.
5. P1 Moisture Reduction System: Underfloor Spray-Foam Barrier (\$2,924) + Duct Work (\$3,500) + Modification of HVAC Controls System (\$5,200) = \$11,624.

See RFA at 7.

Prior to the arbitration, FEMA submitted a number of documents in support of its position, including a report titled “Evaluation on Storm Related Damages and Repair Alternatives” (Consolidated Resource Center (CRC) Report) that was produced by a staff professional engineer (PE). FEMA’s Exhibit 11. This report was prepared to “review the claimed damages and cause to each of the claimed facilities” and “to evaluate the technical feasibility and cost-effectiveness of the proposed mitigation measures per FEMA policy.” *Id.* at 2. The CRC Report provided an overview of each claim as well as FEMA’s benefit-cost analyses for P1 and P2. St. Mark’s submitted its own benefit-cost analysis in appendix J of its RFA. RFA at 51. FEMA also provided its PE’s testimony, which gave insight into the calculations and conclusions included in the CRC Report.

Discussion

The Board is authorized by the Stafford Act, 42 U.S.C. § 5189(d), to arbitrate actions between applicants and FEMA. To be eligible for financial assistance, the applicant must provide documentation to support the four basic components of eligibility: (1) applicant; (2) facility; (3) work; and (4) cost. FEMA Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 9. FEMA does not dispute St. Mark’s status as an eligible applicant, as St. Mark’s is considered a private non-profit (PNP) organization or institution that owns

or operates a PNP facility.⁶ *Id.* at 10-11; 44 CFR 206.222(b). Here, FEMA is challenging the three other components of eligibility, including (1) that two of the buildings in St. Mark’s request for PA—P3 and P5—are not eligible facilities; (2) that the damage to those buildings was not caused directly by Hurricane Irma; and (3) that St. Mark’s mitigation-related repairs were not cost-effective. *See* PAPPG at 10-11, 13-15, 97-99.

Eligibility of St. Mark’s Facilities

When an applicant operates multiple facilities, each building must be evaluated independently, even if all are located on the same grounds. PAPPG at 15. An eligible PNP facility is one that “provides educational, utility, emergency, medical, or custodial care, including for the aged and disabled, and other essential social-type services to the general public.” *Id.*; *see also* 42 U.S.C. § 5122(11)(a). A PNP facility is considered to provide services to the general public if: (1) the facility is not limited to a certain number or defined group of individuals; (2) facility access is not prohibited with gates or other security measures; and (3) any membership fee is nominal, is not large enough to exclude a significant portion of the community, and could be waived if an individual can show inability to pay the fee. PAPPG at 11. However, other than “custodial care facilities and museums, administrative and support buildings essential to the operation of the PNP’s non-critical services are not eligible facilities.” *Id.* at 13.

Here, P1 and P2 are used for the church’s worship services and other social gatherings. There is no evidence that St. Mark’s excludes any members of the community from these events. As such, P1 and P2 are facilities that are open to the general public and, thus, constitute facilities that provide eligible non-critical services. However, FEMA contends that P3 and P5 are ineligible facilities because they function as administrative and support buildings. The record shows that the applicant describes P3 and P5 as storage facilities or buildings used for the support of the PNP. There is no evidence in the record that these buildings are open to the public. Applying the guidance in the PAPPG to these facts, P3 and P5 are not eligible facilities.

St. Mark’s asserts that the exception for administrative and support buildings should not apply because it is only included in the PAPPG and not listed in the Stafford Act, as amended in 2019. *See* 42 U.S.C. §§ 5121-5207 (2019). Specifically, St. Mark’s contends that, because the Stafford Act’s most recent amendments did not include the exception, the PAPPG now “conflicts” with the Act. This argument has no merit. In determining eligibility for PA funding, the Board looks to and applies FEMA policies, including the PAPPG. We

⁶ “Houses of worship” is listed as an eligible type of PNP applicant that provides non-critical, essential, social-type services. PAPPG at 13.

are tasked “to determine whether FEMA has properly applied its policies in the factual circumstances presented to us.” *New York Society for the Relief & the Ruptured & Crippled Maintaining the Hospital for Special Surgery*, CBCA 7543-FEMA, 23-1 BCA ¶ 38,268, at 185,810. Thus, we consider the PAPPG in determining eligibility for PA funding.

Accordingly, we deny PA funding for costs associated with P3 and P5 because they are ineligible PNP facilities. The following sections address only P1 and P2 since they are the only two facilities eligible for hazard mitigation.

St. Mark’s Hazard Mitigation Efforts

The Stafford Act provides for hazard mitigation funding in two provisions. Section 404 (42 U.S.C. § 5170(c)) is intended to protect facilities that are subject to recurring weather-related damages without reference to a specific disaster. *Non-Flood Protection Asset Management Authority*, CBCA 4980-FEMA, 18-1 BCA ¶ 37,078, at 180,485. Section 406 (42 U.S.C. § 5170(e)(1)(A)(ii)) covers hazard mitigation funding for facilities that were damaged by the disaster to protect them in future events. *Non-Flood Protection Asset Management Authority*, 18-1 BCA at 180,485. The key difference in these sections is that section 406 is a PA program, while section 404 is a Hazard Mitigation Assistance (HMA) program.

Because we are determining whether St. Mark’s is eligible for PA funding, the mitigation measures must satisfy the requirements listed in section 406. Here, St. Mark’s is requesting funding for two mitigation measures: (1) a moisture reduction system for P1, including a new underfloor spray-foam barrier, new ductwork, and a modification of HVAC controls, and (2) a full roof replacement for P1, P2, P3, and P5. As stated above, P3 and P5 are not eligible facilities and will not be considered in this section.

1. Moisture Reduction System

First, FEMA argues that the installation of a new moisture reduction system in P1 is not an eligible mitigation measure under section 406 because “the underfloor area, [ductwork], and HVAC controls” were not damaged by Hurricane Irma. FEMA’s Response at 18. The applicant argues, conversely, that “all installed moisture control measures are additive and designed to prevent loss of the building . . . due to moisture . . . [that was caused by] the loss of offsite power.” Applicant’s Reply at 13-14. Generally, to be eligible for PA funding, the applicant must prove that costs are directly tied to the performance of eligible work by showing that the damage was a direct result of the declared incident. PAPPG at 19, 21-23. This is also true for hazard mitigation measures. “FEMA has the authority to provide PA funding for . . . hazard mitigation measures for *facilities damaged by the incident.*” *Id.* at 97 (emphasis added). However, PA funding is not available for costs associated with

pre-existing damage, deterioration, deferred maintenance, or the applicant's negligence. *Id.* at 19-20. Hence, St. Mark's has the burden to prove that the damage caused by the interior moisture accumulation in P1 was caused directly by Hurricane Irma and not by issues already present in the building.

The DDD prepared by FEMA states that the damage to P1's interior was caused by "condensation from rain leaking in from [the] roof." FEMA's Exhibit 10 at 1-2. Nevertheless, multiple pieces of evidence show that the roof had pre-existing damage. Notably, the photos taken by the insurance adjuster immediately following the hurricane show that the leaks happened near the flashing areas of P1's roof. FEMA's Exhibit 3 at 9-11. The insurance adjuster did not find damage at any other portions of the roof, which indicates pre-existing damage or deterioration to the flashing. *See id.* at 6-12. The applicant's contractor also noted signs of "age" during its inspection of the roof. RFA at 41. Furthermore, the applicant admits that its pre-disaster HVAC unit was oversized for the dimensions of the facility and that, as a result, parts of the building did not receive proper air circulation. RFA at 4. FEMA's PE agreed, stating that when an HVAC unit is oversized, it does not cool the space gradually, "which can be detrimental to the HVAC components." FEMA's Exhibit 11 at 7. St. Mark's has not provided maintenance reports or other evidence to refute FEMA's position that the aforementioned issues contributed to the leakage or abundance of condensation that accumulated in the building post-hurricane. While it is true that Hurricane Irma caused some leakage and a power outage, we find that St. Mark's has not satisfied its burden of proof in showing that an ineffective HVAC unit, pre-existing damage, deterioration, or deferred maintenance *did not* contribute to the damage of P1. Therefore, the installation of a new moisture reduction system in P1 does not qualify as a hazard mitigation measure that is eligible for PA funding.

2. Roof Replacements

FEMA also contends that a full roof replacement for P1 is not considered cost-effective. For a mitigation measure to be eligible for PA funding under section 406, the measure must be considered cost-effective. PAPPG at 98. Mitigation measures will be considered cost-effective if any of the following are met: (1) the cost for the mitigation measure does not exceed fifteen percent of the total eligible repair cost (prior to any insurance reductions) of the facility (fifteen-percent rule); (2) the mitigation measure is listed in Appendix J of the PAPPG, titled "Cost-Effective Hazard Mitigation Measures," and the cost does not exceed 100% of the eligible repair cost (prior to any insurance reductions) (Appendix J rule); or (3) the applicant can demonstrate through an acceptable benefit-cost analysis that the measure is cost-effective. *Id.* A benefit-cost analysis is accomplished by comparing the total eligible cost of the mitigation measure to the total value of expected benefits. *Id.*

As previously mentioned, FEMA submitted a CRC Report that reviewed each of St. Mark's claims. FEMA's Exhibit 11. The amounts utilized in the CRC Report for the calculations are the same as the applicant uses in its RFA. First, for the fifteen-percent rule, the parties stipulate that the cost to repair P1's asphalt shingles without a full roof replacement would have been \$10,272.89, and the contracted cost for the metal roof replacement is \$87,387. *See id.* at 10-11; *see also* RFA at 7 & Exhibit J. Hence, the cost for the mitigation measure equals \$77,114.11 (\$87,387-\$10,272.89), and the total eligible repair cost is \$10,272.89. To drive home this point, we note that \$77,114.11 is 750.65% of \$10,272.89 and, thus, is not considered cost-effective under the fifteen-percent rule. Second, while Appendix J of the PAPPG includes pre-approved mitigation measures for roofs, St. Mark's proposed measure of a metal roof replacement is not listed. PAPPG at 193.

Both parties have submitted separate benefit-cost analyses. FEMA's Exhibit 11 at 12; RFA at 51-52. For a measure to be considered cost-effective in a benefit-cost analysis, the benefit-cost ratio must be greater than 1.0. St. Mark's asserts that the replacement of P1's roof has a benefit-cost ratio greater than one.⁷ Applicant's RFA shows that it produced this number using calculations made without using an outside tool. RFA at 51-52. FEMA, conversely, used its publicly available benefit-cost analysis online calculator. The use of this tool resulted in a benefit-cost ratio of 0.50. Exhibit 11 at 6, 9. Additionally, the testimony of FEMA's PE asserted that the applicant's calculations were skewed based on several incorrect assumptions, such as that "incident-related damages result in an entire roof replacement" and that a "comparison to the life cycle of each type of roof" (metal or asphalt shingle) was proper. FEMA's Written Testimony at 4-5. St. Mark's did not successfully rebut this assertion during the live arbitration nor has it shown how its benefit-cost analysis calculations are more accurate than FEMA's online benefit-cost analysis calculator. It is for these reasons that we will use FEMA's benefit-cost analysis calculations in determining the benefit-cost ratio for P1. Because 0.50 is less than one, the full roof replacement of P1 is not considered cost-effective. Hence, the metal roof replacement of P1 is not a cost-effective mitigation measure and, thus, is not eligible for PA funding under section 406 of the Stafford Act.

Finally, FEMA concedes that a full roof replacement of P2 is eligible for reimbursement under the PAPPG because the damage was caused directly by Hurricane Irma and the replacement is considered cost-effective. We agree. Similar to P1, the roof replacement of P2 is not considered cost-effective when using the fifteen-percent rule or the Appendix J rule. However, FEMA's online benefit-cost analysis tool resulted in a benefit-cost ratio of 2.96, which is greater than the required 1.0. FEMA's Exhibit 11 at 6, 12.

⁷ The applicant does not provide an exact number for this calculation, only the following equation: $(\$46,582 \times 4 / \$87,387)$. RFA at 51.

Additionally, the photos taken by the insurance adjuster show considerable wind damage to the roof's shingles. FEMA's Exhibit 3 at 40-43. Thus, the damage to P2's roof was directly caused by the hurricane, and the metal roof replacement is a cost-effective mitigation measure under section 406. Accordingly, St. Mark's is entitled to reimbursement of \$18,865.73 in PA funding.

Decision

We grant the application in part. FEMA shall pay St. Mark's \$18,865.73.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge