



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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June 18, 2025

CBCA 8405-FEMA

In the Matter of CHARLOTTE COUNTY, FLORIDA

Michelle F. Zaltsberg of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Charles Schexnaildre of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA; and Jordan Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX, counsel for Applicant.

Kelly Ann Kennedy, Deputy General Counsel, and Caleb Keller, Senior Attorney, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Cassie Sykes, Recovery Appeals Officer, and Melody Cantrell, Recovery Legal Liaison, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Rebecca J. Otey and Margaret Bushko, 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**, **SULLIVAN**, and **VOLK**.

**SULLIVAN**, Board Judge, writing for the Panel.

Charlotte County, Florida, sought to arbitrate the denial of its request for public assistance by the Federal Emergency Management Agency (FEMA) for the replacement of a bridge damaged by a hurricane. FEMA denied Charlotte County's request upon finding that pre-existing damage to the bridge contributed significantly to the damage incurred during the hurricane. Based upon the record before the panel, we determine that the bridge was damaged by the high water associated with the hurricane, but we deny Charlotte County's

request that we conclude that the requirements of the “fifty percent rule” for replacement of the bridge have been met.

### Background

In September 2022, Hurricane Ian made landfall in Florida. On September 29, 2022, the President declared the event a major disaster which authorized FEMA to obligate public assistance funds for the repair of buildings and other structures damaged by the storm.

Charlotte County requested public assistance to replace the Rotonda Bridge which was built in 1985 and which was projected to have a fifty-year lifespan. The bridge was functional prior to the disaster but was deemed unsafe following the disaster and was closed. The Federal Highway Administration inspected the bridge following the disaster and found that the south bulkhead under the bridge had washed out and collapsed, the south approach slab and abutment were undermined, the abutment piles were exposed, there was evidence of up to five feet of scour<sup>1</sup> at Bent 2, and the northeast retaining wall under the bridge had up to eighteen inches of scour. Request for Arbitration (RFA) Exhibit 4 at 1. Charlotte County obtained a report prepared by an engineering firm that provided estimates for the cost to repair the bridge (\$987,954 or \$1,245,892) and to replace the bridge (\$1,255,260 or \$1,278,842). RFA Exhibit 2. The firm also analyzed FEMA’s proposed method of repair and opined that it was not feasible; if it were feasible, the cost of repair would be \$919,720, according to an estimate obtained by the firm. RFA Exhibit 8 at 4-5.<sup>2</sup>

In July 2024, FEMA denied Charlotte County’s request for public assistance to replace the bridge upon finding that the damage to the bridge was the result of pre-existing damage to the bridge that the county had not repaired. RFA Exhibit 12. FEMA’s finding was based upon three inspection reports prepared by the Florida Department of Transportation (FDOT) in 2017, 2019, and 2021, which detailed several maintenance issues that the county had planned to repair. *Id.* at 3.

Charlotte County appealed FEMA’s determination and argued that the fish gate just upstream from the bridge allowed debris to collect and, when the fish gate broke under the weight of the accumulated debris, the rushing water caused scour underneath the slabs supporting the bridge, and the water overtopped the slabs and removed material, weakening

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<sup>1</sup> One of the engineers testifying at the hearing defined scour as the removal of material by water flow.

<sup>2</sup> Prior to issuing the determination denying the request, FEMA prepared an estimate of \$338,439 as the cost to repair the damage to the bridge. RFA Exhibit 8 at 3.

the bridge. RFA Exhibit 13. Charlotte County noted that another bridge upstream from the Rotonda Bridge “show[ed] similar damage patterns.” *Id.* In February 2025, FEMA denied Charlotte County’s appeal finding that the pre-existing, unrepaired deficiencies were a “significant contributing factor” to the damage to the bridge. RFA Exhibit 1 at 7. FEMA did not address Charlotte County’s explanation about the scour caused by the fish gate break in its appeal decision.

In April 2025, Charlotte County filed its request for arbitration. In support of its request, Charlotte County provided the declarations of two licensed engineers. One of the engineers was affiliated with the firm that provided the estimates to repair or replace the bridge. This expert testified at the hearing that the panel convened on June 4, 2025. This expert explained that the hurricane caused excessive storm water flow through the canal that caused scour at the base of the seawalls under the bridge. RFA Exhibit 19 at 3. Because the seawalls were placed at a shallow depth, this scouring caused the seawall to fall. *Id.* Once the seawall fell, the water carried away the material behind the seawall and under the bridge abutment. Charlotte County’s expert opined that the pre-existing damage noted in the FDOT inspection reports did not substantially contribute to the failure of the bridge. Even if Charlotte County had completed all of its repairs before the hurricane, in his opinion, the bridge would have suffered the same damage because of the scouring caused by the high-velocity water flow that the shallow seawalls and concrete piles could not withstand. *Id.* The second expert, an engineer for Charlotte County, agreed with this assessment. RFA Exhibit 26 at 2. In response to a question from the panel during the hearing, Charlotte County’s expert acknowledged that the estimates for the repair of the bridge included soft costs.

FEMA also presented an expert who explained that, due to the pre-existing damage, the seawall was unable to withstand the flooding and the “unrepaired openings in the slope panels left the embankment vulnerable to the scour and undermining that occurred.” Testimony of Kline at 4. FEMA’s expert opined that “the seawall, embankment protections, and embankment would have been far better suited to withstand the floodwaters from the hurricane if repairs and maintenance [had] been completed beforehand,” *id.* at 8, but acknowledged, during cross-examination, that he did not know whether, if Charlotte County had completed repairs on the bridge to address the deficiencies in the FDOT reports, the damage would have been prevented. Instead, he offered that if the pre-existing deficiencies had been corrected and the bridge had still been damaged during the hurricane, FEMA would have concluded that the damage was eligible for repair or replacement with public assistance.

### Discussion

#### Pre-Existing Damage Did Not Contribute Significantly to the Bridge Damage

FEMA policy provides: “If a facility was functioning prior to the disaster and the disaster caused damage that rendered the facility non-functional, the facility may be eligible provided the pre-disaster condition was not a significant contributing factor in the cause of failure.” Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 52. Charlotte County’s experts established that the seawall failed after the rushing stormwater scoured the material from beneath it. We also accept their opinions that, had the deficiencies identified in the FDOT inspection reports been repaired, the seawall would have still failed. Based upon the weight of the evidence, we find that the pre-disaster condition of the seawall was not a significant contributing factor in damage that occurred as a result of the hurricane.

#### Charlotte County Has Not Established that the Bridge is Eligible for Replacement

Charlotte County also asks the panel to find that, based upon the estimates for repair and replacement, the bridge is eligible for replacement under FEMA’s “fifty percent rule.” Pursuant to FEMA policy, to make a determination of whether the facility shall be repaired or replaced requires a comparison of the repair and replacement costs.

A facility is considered repairable when:

- The cost to repair the disaster-related damage does not exceed [fifty] percent of the cost to replace the facility based on its pre-disaster size, capacity, and function; and
- It is feasible to repair the facility so that it can perform the pre-disaster function as well as it did prior to the incident.

PAPPG at 157. FEMA policy further requires that costs such as soft costs and site work be excluded from the repair and replacement figures used in the calculation. *Id.* at 157-58.

The panel accepts the evidence provided by Charlotte County that FEMA’s estimate of \$338,439 for the repair of the damaged elements is too low. However, Charlotte County did not establish that the repair and replacement estimates that its expert provided were calculated in accordance with FEMA’s requirements for certain costs to be included or excluded. On this record, the panel cannot conclude that Charlotte County has established that it is eligible for the replacement cost of the bridge. We return the matter to FEMA for the parties to make that determination.

Decision

Charlotte County's claim is granted in part. The matter is returned to the parties for further development in accordance with this decision.

*Marian E. Sullivan*

MARIAN E. SULLIVAN

Board Judge

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

*Daniel B. Volk*

DANIEL B. VOLK

Board Judge