



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 11, 2025

CBCA 8019-FEMA

In the Matter of CHEMUNG COUNTY, NEW YORK

Jeffrey Walker, Assistant Attorney, Chemung County Law Department, Elmira, NY, counsel for Applicant, and Andrew P. Avery, Commissioner, Chemung County Department of Public Works, Horseheads, NY, appearing for Applicant.

Rayana Gonzales, Deputy Commissioner for Disaster Recovery Programs and Alternate Governor's Authorized Representative, and Joseph Stinson, Section Chief of Recovery Administrative Support, New York State Division of Homeland Security and Emergency Services, Albany, NY, appearing for Grantee.

Maureen Dimino 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**, **ZISCHKAU**, and **CHADWICK**.

ZISCHKAU, Board Judge, writing for the Panel.

Chemung County, New York (Chemung or applicant), seeks public assistance (PA) funds under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), for replacing a damaged gabion basket wall with a sloped earthen embankment. Chemung and the Federal Emergency Management Agency (FEMA) had initially agreed to replace the gabion basket wall with a sheet pile wall, and a project worksheet was approved. FEMA, as required under the Stafford Act, performed environmental and historical preservation reviews under federal standards, *id.* § 5159, and according to the New York Statewide Programmatic Agreement (programmatic agreement). During the process, Chemung's engineers determined that a sloped earthen embankment was

the best solution and less expensive than the sheet pile wall. After proceeding through federal and state permitting procedures for the embankment project, Chemung submitted an alternative project to the New York Department of Homeland Security (NYDHS), as grantee, and began constructing the sloped earthen embankment. FEMA and NYDHS later determined that the change should proceed as a scope of work (SOW) change request to FEMA. Delays by NYDHS resulted in the request not being submitted to FEMA until project construction was essentially complete. FEMA's environmental and historical preservation (EHP) office attempted to conduct an after-the-fact EHP review, but one of the three solicited local tribal nations declined to participate. As a result, FEMA determined that the project was non-compliant with the National Historical Preservation Act (NHPA), a decision that also meant applicant's project was not EHP-compliant. Based on this determination, FEMA denied Chemung's PA request. During this arbitration, FEMA also claims that Chemung's PA request should be denied because the damaged gabion basket wall was only eligible for repair, not replacement. For the reasons stated below, we conclude that Chemung's sloped embankment project is ineligible for PA.

Background

In 2018, severe flooding damaged Berwick Turnpike, a roadway in Chemung County, New York. Joint Stipulations Timeline at 1. The flooding damaged Berwick Turnpike's shoulder, guiderail, asphalt, and a gabion basket retaining wall used for erosion control. FEMA's Exhibit 20. The gabion retaining wall measured 200 feet long, five feet wide and twelve feet high. FEMA's Exhibit 2 at 1. After the President declared the flooding a major disaster, Chemung requested PA, and FEMA created grants manager project 74846, project worksheet 332 (PW 332) for the repair of Berwick Turnpike. Joint Stipulations Timeline at 1.

When reviewing the project, NYDHS and Chemung discussed a cost-saving alternative of using a sloped earthen embankment instead of repairing the damaged gabion basket wall. Joint Stipulations Timeline at 1. A home was located very close to and in front of the gabion basket wall, and the proposed alternative was to purchase the home, demolish it and the gabion basket wall and then replace them with the sloped earthen embankment. Applicant's Exhibit E. On June 27, 2019, NYDHS contacted FEMA asking about the feasibility of pursuing the sloped embankment scope. Grantee's Revised Exhibit 18. The FEMA representative responded that he would "take a look." *Id.* It is not clear whether the FEMA representative ever responded to NYDHS, but the record does indicate a number of communications between FEMA and NYDHS concerning the project.

Moving forward with the sloped embankment project, Chemung passed a resolution approving the purchase of the home adjacent to Berwick Turnpike. Joint Stipulations

Timeline at 1. By December 11, 2019, applicant had purchased the home and was preparing it for demolition. Grantee's Revised Exhibit 18.

On January 13, 2020, NYDHS communicated with Chemung, stating that it had spoken with FEMA about the "Berwick Turnpike Road and [g]abion basket [w]all issue" and explained that to pursue the sloped embankment scope, the applicant needed to create a new project dedicated to replacing the gabion basket wall and then submitting the sloped embankment scope as an alternative project. Applicant's Exhibit F. Chemung followed NYDHS's direction, and, by January 22, 2020, NYDHS had forwarded—to FEMA—Chemung's request to create a new project for replacing the gabion basket wall. Joint Stipulations Timeline at 1.

FEMA created grants manager project 12734, project worksheet 243 (PW 243) for replacing the gabion basket wall. Joint Stipulations Timeline at 1. After inspecting the gabion basket wall on January 27, 2020, the parties identified PW 243's SOW as replacing the gabion basket wall with a sheet pile retaining wall. *See id.*; Grantee's Exhibit 12; FEMA's Exhibit 2 at 2. NYDHS believed that FEMA needed to approve the sheet pile retaining wall SOW before requesting to further change the scope of PW 243 to incorporate the less expensive and technically superior sloped embankment scope. Statement of Joseph Stinson at 5. Consequently, FEMA completed its EHP review for PW 243 with the understanding that the applicant was replacing the gabion basket wall with a sheet pile retaining wall. FEMA's Exhibit 61.

As part of FEMA's EHP review, it assessed whether the New York programmatic agreement, which streamlines compliance with Section 106 of the NHPA, required FEMA to consult with local tribal nations before approving PW 243. FEMA's Exhibit 58 at 2-3. Since the sheet pile retaining wall SOW did not expand beyond the footprint of the existing gabion basket wall (which was intended to stabilize hazardous slopes in a transportation right-of-way and would have confined excavation work to a natural slope of fifteen percent or greater in an area with low archeological sensitivity), FEMA concluded that it did not need to consult with the tribal nations before approving PW 243. *Id.*; FEMA's Exhibit 48 at 56, 61. For the remaining components of the EHP review, FEMA found that the project complied with the other federal environmental laws, including the Clean Air Act, Coast Barrier Resources Act, Clean Water Act, Coastal Zone Management Act, Endangered Species Act, Farmland Protection Policy Act, Migratory Bird Act, Wild and Scenic Rivers Act, Magnuson-Stevens Fishery Conservation and Management Act, as well as state environmental regulations and federal executive orders. FEMA's Exhibit 61. Finding no violations, FEMA determined the sheet pile retaining wall SOW was EHP-compliant. FEMA's Exhibit 2 at 6.

Evidenced by all parties signing PW 243, as of April 3, 2020, the approved scope for PW 243 was to replace the damaged gabion basket wall with a sheet pile retaining wall. FEMA's Exhibit 2 at 7. Furthermore, the EHP section of PW 243 explained that any change to the sheet pile retaining wall SOW would "require re-evaluation for compliance with NEPA [National Environmental Policy Act] and other [l]aws and [e]xecutive [o]rders." *Id.* at 6. On June 9, 2020, Chemung demolished the home adjacent to Berwick Turnpike. Joint Stipulations Timeline at 2. On October 29, 2020, Chemung submitted the sloped embankment scope to NYDHS as an alternative project for PW 243. Applicant's Exhibit R. Although the record does not detail the chronology of the work done after October 29, 2020, Chemung completed the fill and grading of the slope embankment project on March 23, 2021. Joint Stipulations Timeline at 2.

After Chemung submitted the alternative project request, NYDHS focused its efforts on the Coronavirus (COVID-19) pandemic recovery efforts. As a result, it was not until March 15, 2021, shortly before project completion, that NYDHS contacted Chemung and explained that to pursue the sloped embankment scope, Chemung needed to submit a SOW change request, not an alternative project request. Joint Stipulations Timeline at 2. The next day, Chemung submitted the SOW change request to NYDHS. *Id.* NYDHS did not forward applicant's SOW change request to FEMA until April 7, 2021, approximately two weeks after Chemung completed construction on the sloped embankment scope. *Id.*

FEMA initially denied the SOW change and PA funding request for PW 243. Joint Stipulations Timeline at 2. During the first appeal process, FEMA attempted an after-the-fact EHP review. The sloped embankment work expanded the width of the footprint by approximately fifty feet. Because of the footprint expansion, under the New York programmatic agreement, the project did not qualify for the same exemptions as the sheet pile retaining wall scope, and FEMA needed to consult with local tribal nations for NHPA compliance. FEMA contacted three tribal nations for the after-the-fact consultation. FEMA's Exhibit 12. Two of the tribal nations had no objection to the project. The third, Seneca Nation, responded to FEMA that it would not participate because Chemung had already completed the sloped embankment, stating that an after-the-fact consultation was not meaningful. FEMA's Exhibit 6. Consequently, FEMA's EHP review staff deemed the after-the-fact tribal consultation infeasible. Since this determination meant Chemung's SOW change request was non-compliant with NHPA, FEMA's EHP staff determined that Chemung's SOW change request was NHPA non-compliant. Based on EHP's determination, FEMA's Regional Administrator denied applicant's first appeal.

Thereafter, Chemung filed a request for arbitration with the Board.

Discussion

FEMA denied Chemung its requested PA because the sloped embankment project did not achieve EHP compliance. FEMA now also contends that the damaged gabion basket wall was only eligible for repair, not replacement. We address FEMA's bases for denial below.

The Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) explains that a damaged facility is eligible for replacement if the estimated repair cost is greater than fifty percent of the estimated replacement cost. PAPPG at 101. FEMA's newly submitted report claims that the damage to the gabion basket wall was minor and easily repairable. Also, based on an email from Chemung's engineer stating that gabion basket retaining walls are not to be used in areas prone to flooding, FEMA claims Chemung wanted to replace the gabion basket wall regardless of whether it was eligible for replacement.

Based on the record before us, including the contemporaneous determinations at the time the damage was incurred, we find that the gabion basket wall was eligible for replacement. Through PW 243, FEMA approved the replacement of the gabion basket wall with a sheet pile retaining wall. This determination was made after a joint site visit on January 27, 2020, and based on contemporaneous engineering analyses. In contrast, FEMA's new report relies on site photos and postdates the damage-causing disaster by almost six years.

EHP reviews ensure that PA projects comply with NEPA, NHPA, as well as other federal and state environmental and historical preservation laws, regulations, and executive orders. PAPPG at 166. If an applicant wants to change the scope of a permanent work project, applicant must notify FEMA and provide FEMA with an opportunity to perform an EHP review. *Id.* at 136-37. When an applicant changes scope prior to FEMA conducting an EHP review, FEMA loses the ability to consider changes to the project that would ameliorate adverse effects to the environment and historical properties. *Id.* at 86. Nevertheless, the regulations, agreements, and executive orders included in an EHP review permit an after-the-fact review process. The New York programmatic agreement expressly permits an after-the-fact review process. FEMA's Exhibit 48. If an applicant "initiated an [u]ndertaking without willful intent to avoid the requirements of this Agreement or Section 106 of NHPA" and the undertaking requires review, then FEMA's EHP review staff determines the feasibility of an after-the-fact tribal consultation. FEMA's Exhibit 48 at 27-28. If it deems the after-the-fact tribal consultation infeasible, it communicates this determination to the applicable FEMA funding program. *Id.* The applicable FEMA funding program then considers this determination when deciding whether to fund the project. *Id.* at 28.

Here, NYDHS submitted Chemung's SOW change request after Chemung completed the sloped embankment scope. Although the timing of the submission jeopardized funding, FEMA followed the procedures explained above to pursue an after-the-fact tribal consultation. When the Seneca Nation refused to participate, FEMA determined that applicant's project did not comply with NHPA. This determination also meant applicant's project would not meet EHP compliance. Since Chemung's project did not achieve EHP compliance, FEMA denied applicant's PA request.

Chemung and NYDHS argue that FEMA shares responsibility for the delayed EHP review. NYDHS's June 27, 2019, email exchange with FEMA asking about the sloped embankment scope's feasibility and NYDHS's January 13, 2020, email to applicant stating that NYDHS had spoken with FEMA about how to approve the sloped embankment scope provide evidence that NYDHS and Chemung communicated with FEMA about the sloped embankment scope well before FEMA received applicant's SOW change request in April 2021. While NYDHS and FEMA did not communicate well on the change to a sloped embankment project and Seneca Nation had been consulted for historical preservation on an earlier project from 2012 involving this same area, we are not inclined to disturb the determination by the Regional Administrator. Although we do not find any of the other EHP criteria as precluding eligibility, Seneca Nation's objection prevented NHPA compliance and was not resolved by NYDHS, Chemung, or FEMA to allow for EHP compliance.

Decision

Chemung's request for PA funding is denied.

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge