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Recent FEMA Public Assistance Arbitrations & Insights for 2024

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Since the Civilian Board of Contract Appeal's first arbitration under its modern statutory authority, 42 U.S.C. § 5189a(d), the Board's interpretation of the Stafford Act, FEMA regulation, and FEMA policy have diverged in subtle but important ways from FEMA's internal appellate precedent. In 2020, Nichols Liu LLP published a Briefing Paper describing the first year of these critical arbitration decisions. In this update, Nichols Liu LLP examines the most important decisions from 2022, 2023 and the beginning of 2024. Each decision relates to one of six issues that are most commonly disputed before the Board: (1) the adequacy of an Applicant's documentation of eligible work or costs; (2) the proof needed to demonstrate that damage was the 'direct' result of a disaster; (3) the extent of the Board's deference to FEMA's interpretations of policy and regulation; (4) the extent of an Applicant's eligibility for Covid-19 costs; (5) the correct interpretation of FEMA's 50% rule; and (6) the reasonableness and allowability of costs.

I. Important Board Decisions Regarding the Adequacy of Documentation.

Inadequate documentation is the most common issue raised during arbitrations before the Board. It is also a headache for Applicants, since FEMA's policies do not clearly establish the extent of documentation that is "adequate" for substantiating the eligibility of work or costs. The Public Assistance Program and Policy Guide ("PAPPG") advises:

> The Applicant is responsible for providing . . . documentation to support that its facilities, work, and costs are eligible based on the applicable laws, regulations, EOs, and policies. At a minimum, FEMA usually requires the "who, what, when, where, why, and how much" for each item claimed.
>
> The Applicant answers questions for each project, which trigger information and documentation that the Applicant needs to provide. Various documents may provide the information required; therefore, FEMA usually accepts a variety of documentation to substantiate eligibility. If FEMA requires specific information or documentation to support eligibility, FEMA specifies the requirement in checklists throughout the PAPPG; however, these checklists are not all-inclusive lists. FEMA and the Recipient work with the Applicant to evaluate submitted documentation and determine whether it supports eligibility. If the Applicant does not provide sufficient documentation to support its claim as eligible, FEMA cannot provide PA funding for the work.

PAPPG v.4 at 63-64.

For costs, the PAPPG states that the "[A]pplicant is responsible for providing documentation to demonstrate its claimed costs are reasonable." PAPPG v.4 at 68. That "[d]ocumentation may include, but is not limited to:

- Documentation showing current market price for similar goods or services, such as:
    - Historical documentation;
    - Average costs in the area; or
    - Published unit costs from national cost estimating databases.
- Documentation supporting necessity of unique services or extraordinary level of effort.
- Documentation supporting shortages, challenging procurement circumstances, and length of time shortages or procurement challenges existed, such as news stories or supply chain vendor reports.

PAPPG v.4 at 68.

What does the Board say?

In general, the Board's Panels[1] resolve inadequate documentation disputes in three ways. First, a Panel may attempt to determine what the parties considered to constitute adequate documentation during project performance. The Board's recent decision in *School Board of Bay County* is a good example of this approach:

School Board of Bay County, Florida, CBCA 7553, 2023 WL 4046061.

<u>Takeaway</u>:

The Board may look to contemporaneous evidence about FEMA's acceptance of documentation in order to determine whether that documentation was adequate to establish eligibility.

<u>Decision</u>:

FEMA denied $4,896,710.86 of a requested $12,571,726.80 that the Applicant incurred in the course of repairing hurricane damage to its school district facilities. Because FEMA found that the Applicant "had not provided sufficient documentation to support the repair costs" and "did not submit actual unit prices" for the work it performed, FEMA limited its payment to the amount that FEMA could substantiate "based on an estimate of eligible costs using RS Means, a database containing detailed data on construction costs, including equipment, labor, and material prices." *Id*. at 2-3.

[1] Each arbitration before the Civilian Board of Contract Appeals is decided by a three-judge Panel. Because the decisions of past Panels are considered persuasive but non-binding authority for future arbitrations, it is important to remember that a given Panel does not reflect the thinking of all Board judges, even though the Panel issues its decision in the Board's name. Therefore, this Update uses the term "Board Panel" or "Panel" when discussing the actions of arbitrators in a given dispute, while using the broader term "Board" when referring to past Panel decisions or generalizing about legal principles that Panels tend to consider.

Before the Board's Panel, the Applicant pointed to three forms of documentation that the Applicant thought constituted adequate documentation of its costs: (1) a contemporaneous email exchange between FEMA and the School Board "in which the School Board specified how it would use architects and engineers to record damage"; (2) contemporaneous signed engineer reports that contained "a description, location, dimension, quantity, cause, and photograph for each damaged element"; and (3) newly created "spreadsheets which correlated eligible damages/repair SOW activities to incurred costs" across 14,000 line items of work. *Id*.

The Panel found the School Board's documentation to be sufficient for three reasons: (1) both the contemporaneous documents and the new spreadsheets described in detail "the who, what, when, where, why, and how much for each item claimed"; (2) FEMA presented no evidence that it had responded to the School Board's contemporaneous emails or engineering reports with concerns about the adequacy of documentation; and (3) neither the contract, nor the PAPPG, explicitly required that costs had to be broken-down into unit prices, which was part of FEMA's rationale for finding the costs at issue to be inadequately documented.

Important Notes:

- The Panel's decision is noteworthy because the PAPPG does not explicitly require that FEMA provide contemporaneous notice that a subrecipient's documentation is insufficient. While the Panel's decision is not inconsistent with the PAPPG, it's a good example of the way that general principles of government contract law—in this case, waiver and 'course of dealing'—may influence the Board's interpretation of FEMA's rules. It might also demonstrate this Panel's interest in equity.

For another example of this type of resolution, *see Sawnee Electric Membership Corp*., CBCA 7548, 23-1 BCA ¶ 38,336, where the Panel accepted an Applicant's argument that its documentation was adequate because it was "similar in nature and quantity to [the Applicant's] submission in previous disaster applications, which were approved" by FEMA. Without comment, the Panel appeared to accept the Applicant's conclusion that since "there has been no change in the policies or regulations . . . FEMA's change in position does not stem from a change in its regulation but rather from a change in FEMA's interpretation of its regulations." Though future Panels are not bound to follow past arbitrations, *Sawnee Electric* and *School Board of Bay County* suggest that at least some Judges place significant stock on the parties' course of dealing.

In the second broad category of cases, the Board dives into the documentation itself to determine whether it is sufficient to meet the standards established by FEMA regulation and policy. The Board has substantial experience with this sort of analysis in the context of Contract Disputes Act cases, where litigants must prove their entitlement to damages based on cost records. The Board's recent decision in *Village of Pinecrest* illustrates how the Board brings this expertise to bear in FEMA arbitrations:

Village of Pinecrest, Florida, CBCA 7298, 22–1 BCA ¶ 38,196.

Takeaway:

Though the Board will examine documentation according to the standard for adequacy required by FEMA policy, it will not defer to FEMA's interpretation of that policy's requirements, or FEMA's assessment of whether documentation in a given case meets that standard.

Decision:

FEMA denied nearly $2 million in Emergency Work costs because of the Applicant's alleged failure to adequately document its work. Though the Applicant provided invoices with crew logs and daily reports—some of which included photographs and GPS coordinates of cleared trees—FEMA asserted that the Applicant needed to provide "a photograph with GPS coordinates of every limb removed" from downed trees for its work to be eligible. FEMA also faulted the Applicant for failing to document the quantity of cleared debris, and for including invoices "for large equipment, such as front-end loaders and backhoes" that were "not typically employed for cut and toss work."

The Board's Panel closely examined the Applicant's invoices and heard testimony from the Applicant about its oversight of the Emergency Work. The Panel recognized that one FEMA policy document stated that "Applicants may also submit photographs to document the number of hazardous limbs cut," but the Panel concluded that doing so was not obligatory. The Panel also distinguished between "debris clearance"—which the PAPPG did not require quantification of the amount of debris at issue—from "debris removal," which did. Finding the Applicant's cut-and-toss work to constitute "debris clearance," and further finding no prohibition against the use of front-end loaders and backhoes when necessary for debris clearance, the Panel reversed FEMA and found most of the Applicant's costs to be eligible. The Panel made a point of stating that its holding came from considering "the totality of the evidence" and "the Stafford Act, the debris removal regulations, and FEMA policy" taken as a whole.

Important Notes:

- Though the Panel found most of the Applicant's work to be eligible, it denied costs for work that was not supported by crew logs and daily reports to the same degree of detail as the majority of the work. This distinction should remind Applicants that the Board is not a 'kinder, gentler' version of FEMA that forgives contractor mistakes—it simply disagrees, sometimes, with how FEMA interprets its own rules.

When considering cases like *School Board of Bay County* or *Village of Pinecrest*, it is important to keep in mind that Applicants lose most of the inadequate documentation cases they bring to arbitration because they often cannot meet the substantive documentation requirements outlined in the PAPPG. This is the third and largest category of inadequate documentation cases that the Board hears. About half of such cases involve small Applicants who make some version of the following argument:

> FEMA's demands for specific proof . . . go too far and are impossible for a small locality with a small budget to meet. Because of the nature and volume of roadways in Monroe County, the recipient argues, there is no way for the locality to maintain up-to-date records and photographs of the condition of every mile of every roadway at all times or to support claims of embankment instability with geotechnical studies and subsurface explorations.

Monroe Cnty. Engr., CBCA 7288, 22-1 BCA ¶ 38,142. Typically, the Board expresses a willingness to consider a wide range of documentation to meet the substantive requirements of FEMA policy, but it has no sympathy for the position that documentation is simply not possible. In *Monroe County,* the Panel concluded:

> In the end, it is the applicant's burden . . . various types of documentation [can] be produced as proof of a routine maintenance program. The production of detailed maintenance records is by no means the exclusive way of showing the existence of such a program. Invoices for roadway repair work and/or activity logs showing repair work might also be sufficient proof. These are the types of documents that even a small local public roads department relying on local government funding should be able to produce.

Or, as Judge Virgilio put it more caustically in *Monroe County*:

> After a thorough review, I agree with the panel but would deny the applications much more summarily than do the other panel members. . . FEMA gets to set and apply standards for eligibility. Those used by FEMA here are reasonable, rational, and not arbitrary; the agency's analysis is supported factually and legally. . . . My sense is that the applicant's extended pursuit of recovery reflects a waste of resources (time and money) of all involved.

The other half of cases where the Board finds documentation to be inadequate tend to involve large institutional Applicants whose internal systems happen not to capture the specific details required by a given FEMA policy. The Board's decision in *Miami-Dade County, Florida,* offers a good illustration of this phenomena:

Miami-Dade County, Florida, CBCA 7204 *et al*., 22–1 BCA ¶ 38,017.

Takeaway:

Adequate documentation of Emergency Work should include contemporaneous descriptions of the tasks being performed and the hours of work associated with those tasks—timekeeping and *post hoc* declarations alone are insufficient.

Decision:

FEMA denied more than $7 million in funding for labor and equipment that Applicant's prison, fire department, and wastewater treatment staff claimed to have incurred because of a hurricane. Though the Applicant submitted time sheets from its Emergency Daily Activity Report system, a special timekeeping system distinct from the County's typical timekeeping system, these

documents did not include a description of the alleged emergency work being performed during those hours.

Before the Board's Panel, the Applicant argued that because all employees who were not needed for emergency work were furloughed during and immediately after the hurricane, those whose work was recorded in the County's Emergency Daily Activity Report System were "doing so only in response to the Emergency and outside their normal duty." The Applicant submitted narratives that described the sort of tasks that the employees would have performed during those emergency hours, but the Applicant could not produce any work logs, duty rosters, or similar documentation that demonstrated that the work at issue constituted eligible emergency work.

The Panel denied most of the Applicant's costs, both because of a lack of documents detailing "what type of work a particular employee was performing," and because some of the work narratives suggested that the employees may have been performing their normal work activities—such as guarding prisoners or treating wastewater—for increased periods of time, making their work merely "increased operating costs."

Important Notes:

- For another example of a Board Panel denying what amount to increased operating costs, *see Tri-Cnty. Electric Coop., Inc*., CBCA 7719, 2023 WL 4931264; *City of Bryan, Texas*, CBCA 7735, 2023 WL 4286784 (denying eligibility for hundreds of millions in costs incurred by Texas electricity distributors as a result of Winter Storm Uri).

Miami-Dade County demonstrates the limits of the Board's consideration of non-standard documentation. A Board Panel may be more willing than FEMA to find documentation to be adequate even if it does not represent the best practices articulated in FEMA policy, as in *City of Prineville*. A Panel might also consider otherwise marginal documentation to be adequate if the Applicant can demonstrate that FEMA considered it to be adequate during contract performance, as in *School Board of Bay County.* However, Applicants must still satisfy the substantive requirements of FEMA documentation policies so that the Panel can be confident that the work or cost at issue was not barred by FEMA policy.

II. Proving that Damage & Costs Were the "Direct Result" of a Disaster.

The second most commonly arbitrated issue before the Board concerns the attribution of damage as a "direct" result of a disaster. Though the PAPPG requires "[p]re-incident photographs of the impacted site or facility; **and/or** [d]ocumentation supporting pre-disaster condition of the facility (e.g., facility maintenance records, inspection/safety reports)," FEMA policy typically does not establish what quantity or type of photographs, reports, inspections or records are sufficient for proving eligibility in any given situation. *See* PAPPG v.4 at 52 (emphasis added).

What does the Board say?

Arbitrations concerning the adequacy of evidence are often so fact-specific as to have limited utility for Applicants looking to reference past decisions to support their own arguments. However, *City of Panama* constitutes a remarkable exception:

City of Panama City, Fla., CBCA 7643, 23–1 BCA ¶ 38,339.

Takeaway:

Because of a rare confluence of circumstances, a Board Panel articulated a uniform standard for establishing exactly how much damage a road must exhibit for the Panel to presume that the damage was the result of a disaster.

Facts:

FEMA denied $9,547,330.96 sought by the Applicant to repair city roads allegedly damaged by a hurricane and subsequent debris removal efforts. FEMA asserted that the Applicant could not show that the hurricane, rather than poor maintenance, caused the damage.

Completely by chance, the Applicant had commissioned a survey of its roads only a few months before the hurricane. This survey rated each road according to a "pavement condition index" that ranged from 100 (very good) to 0 (failed). After the disaster, the City commissioned a second survey using the same index. Before the Board's Panel, the Applicant presented this evidence and argued that since roads typically declined by only 2-3 index points per year, all roads whose condition declined by 7 index points between the surveys should be presumed to have suffered the damage as a direct result of the disaster.

The Panel ruled for the applicant in part. Importantly, the Panel adopted the Applicant's methodology with some modifications, holding that declines of at least 10 index points between studies was sufficient to demonstrate that the damage had been the result of the hurricane. However, the Panel refused to extend this presumption to roads rated below 55 index points on the first survey. Because the Panel concluded that roads rated below that threshold had been in poor condition before the hurricane, the Panel could not presume that their further deterioration—even if more than 10 points—should be attributed to the hurricane rather than poor maintenance.

Takeaways:

- *City of Panama* is the clearest a Board Panel has yet come to defining a uniform evidentiary standard for presuming damage to be the "direct" result of a disaster. Though arbitration decisions are not binding on future panels, Applicants who can analogize their evidentiary records to the pavement condition index at issue in *City of Panama* should do so.

In most cases, pre-disaster evidence is much more limited than *City of Panama*, leaving Applicants to demonstrate their entitlement by a combination of pre-disaster records and expert testimony. In this assessment, the Board gives different weight to different types of evidence, as the Board's recent decisions in *Apostolic Assembly* and *City of Belle Plaine* illustrate:

Apostolic Assembly Church of the Lord Jesus Christ, Inc., CBCA 7510, 2023 WL 5319411.

Takeaway:

In a battle of the experts, the more thorough inquiry may win over an earlier report.

Decision:

FEMA found the Applicant's facility to be ineligible for repair or replacement because of the Applicant's alleged failure to prove that damage to the facility's roof was a result of hurricane winds. The Applicant did not have pre-disaster photographs of the roof, and FEMA inspectors who visited the site after the hurricane had not been able to visibly inspect the roof due to department regulations that kept them on the ground.

The Board's Panel reversed FEMA's determination after a careful study of the Applicant's evidence. Though the Applicant did not have pre-disaster photographs or reports, the Panel noted that the builders of the facility had certified that the roof was in "compliance with the Florida building codes, state regulations, and fire prevention codes" when it was constructed three years before the disaster. The Board then considered the findings from two consultant reports that the Applicant commissioned after FEMA denied its costs. Unlike FEMA's inspectors, these consultants physically inspected the roof and concluded that the damage to the roof's trusses was caused by hurricane winds. Though FEMA experts proposed alternative explanations for the truss damage based on photographs taken by the Applicant's consultants, FEMA did not physically reinspect the site. The Panel did not find FEMA's alternative explanations to be convincing and so found the facility to be eligible for repair or replacement.

Important Notes:

- This decision demonstrates the Board's interest in examining not only the findings of different expert reports, but also their methodologies. It also demonstrates that the absence of pre-disaster photographs or studies aren't necessarily fatal to an Applicant's prospects, though the Applicant needs to provide compelling alternative evidence to overcome the deficit.

While *Apostolic Assembly* was a happy result for the contractor, *Belle Plaine* is a more typical example of the Board's assessment of pre-disaster records and expert testimony:

City of Belle Plaine, Iowa, CBCA 7652, 2023 WL 4046102.

Takeaway:

Individual Board judges weigh the adequacy of evidence differently. An Applicant should know how the members of its Panel have ruled in the past when crafting their argument.

Decision:

FEMA denied $202,152.89 for repairs to a road allegedly damaged during debris removal because of the Applicant's failure to produce pre-disaster evidence of the road's condition.

Before the Board, the Applicant sought to prove the disaster damage by introducing: (1) testimony from city personnel about the condition of the road before the disaster; and (2) testimony from engineers who inspected the road after the disaster. Judges Vergilio and Chadwick found this evidence to be insufficient, noting "an absence of formal reports" as well as a lack of "[d]etailed photographs" about conditions before and after the disaster. In dissent, Judge Zischkau stated that he would rule for the Applicant because he believed the "essentially unrebutted testimony of the licensed transportation and road engineers who actually inspected the culvert and the roads" at issue.

Important Notes:

- In most arbitrations, even consistent, expert testimony is insufficient to compensate for a lack of pre-disaster documentation.

- There are important differences between the Board's judges that come out in split decisions such as these. Just as a good attorney would research a judge's past rulings in federal litigation, attorneys must understand a judge's past arbitration decisions. The lack of binding precedent in arbitration makes this inquiry all the more important.

Between them, *Belle Plaine* and *Apostolic Assembly* offer a representative sample of how Board Panels weigh post-disaster studies against pre-disaster evidence. *Apostolic Assembly* demonstrates that it is possible for a thorough post-disaster survey to prove that damage was a direct result of the disaster, even if that study is conducted several months after the disaster itself. However, in most cases, expert testimony alone will not convince a panel, as demonstrated in *Belle Plaine*. The issue sometimes comes down to which Judges are hearing the different arguments, which makes pre-hearing preparation very important.

III. Defining the Scope of "Direct" Damage, and the Extent of the Board's Deference to FEMA.

In disputing evidence of "direct" damage, arbitrations sometimes stray into discussions of proximate cause—i.e., how "direct" disaster damage must be for Permanent Work to be eligible under FEMA policy, or how "immediate" a threat must be for Emergency Work eligibility. The answer to these questions is bound-up in the broader question of the Board's deference to FEMA's interpretation of its own regulations and policies.

What does the Board say?

In its very first arbitration decision under its modern authority, the Board discussed whether an Applicant should have to prove that its damage was a "direct" result of the disaster at issue. *Livingston Par. Govt.,* CBCA 6513, 19-1 BCA ¶ 37,436. After all, FEMA regulation 44 C.F.R. § 206.223, "General Work Eligibility," does not state that work must be required as a "direct" result of the disaster; § 206.223 mandates that the work "be required **as the result** of the emergency or major disaster event." The question of whether the Board would require damage to be the "direct" result of a disaster turned on whether Congress intended the Board to interpret FEMA's regulations

for itself, or to defer to FEMA's interpretations of its own regulations. In *Livingston Parish*, Judges Beardsley, Chadwick and O'Rourke established that they would defer to FEMA in instances "that FEMA persuades us it has resolved on behalf of the Executive Branch."

Pursuant to *Livingston Parish*, almost every Board panel has required that Applicants demonstrate that their damages were a "direct result" of the disaster. However, Panels have differed on whether to defer to FEMA in interpreting how "direct" that damage needs to be. Panels have also disagreed on the extent of deference that should be extended to FEMA depending on the issue being arbitrated. At its most deferential, the Board has adopted not only FEMA's interpretation of its own regulations as promulgated in written FEMA policies, but also FEMA's interpretations of those ambiguous written policies themselves, as in *Town of Topsail Beach*:

Town of Topsail Beach, N. Carolina, CBCA 7611, 23–1 BCA ¶ 38,345.

Takeaway:

In the absence of guidance in the PAPPG or other FEMA policy documents, the Board may defer to FEMA's testimony about its typical interpretation of ambiguous policy.

Decision:

FEMA policy limited the amount of sand an Applicant could import to restore a beach damaged in a hurricane to the estimated quantity of sand lost during the disaster. Though the policy tied this estimate to a measurement of the beach out to "the seaward edge of the sub-aqueous nearshore zone," the policy did not define where that nearshore zone ended.

Before the Board's Panel, the Applicant did not contest FEMA's policy, but it asserted that FEMA had applied it improperly in the Applicant's case by mistaking the end of the nearshore zone. In the absence of a written policy clarifying this issue, a FEMA expert testified that the Agency routinely performed the calculation in the same manner that it had in the Applicant's case. The Applicant contended such a methodology would always result in an under-estimate, and therefore defeated the purpose of the policy. Though the Applicant asserted that FEMA's policy as a whole suggested that its contrary interpretation was correct, the Applicant could not identify specific language that supported its position. Therefore, the Panel found FEMA's interpretation to be consistent with FEMA policy and ruled against the applicant.

Important Notes:

- In other cases where express FEMA policy does not define eligibility, the Board has sometimes ruled in the Applicant's favor if the Applicant proposed a different theory of eligibility that had at least some support within the PAPPG. *See Dewees Island Prop. Owners Assn*., CBCA 6439, 19-1 BCA ¶ 37,415 (finding that an otherwise ineligible wildlife refuge actually constituted an eligible facility because of its secondary use as reservoir for firefighting). The absence of an alternative theory in *Topsail Beach* may have been decisive in the Panel's decision to defer to FEMA's interpretation of its own ambiguous policy.

If *Topsail Beach* is an example of deference at its greatest, the cases that demonstrate the least amount of deference concern the Board's jurisdiction. Only six months after *Livingston Parish*, a Board Panel deliberately chose not to apply a written FEMA policy concerning Applicant eligibility for arbitration because the Panel believed the policy conflicted with the intent of the Stafford Act. *See Municipality of Cabo Rojo*, CBCA 6590, 20-1 BCA ¶ 37,517. The Board's decision in *Larimer County* in 2023 is simply the Board's latest fierce defense of its jurisdiction:

Larimer County, Colorado, CBCA 7450, 23–1 BCA ¶ 38,256.

Summary:

To the Board, a recipient's failure to forward an appeal within the 60-day deadline does not impact whether an appeal is timely.

Facts:

FEMA denied Applicant's appeal as untimely. Though the Applicant sent its appeal within 60 days of FEMA's denial as required under 42 U.S.C. § 5205(a), the Recipient did not forward the appeal within 120 as required under 44 CFR 206.206(b)(ii)(A).

Before the Board's Panel, FEMA asserted that the Board did not have jurisdiction to consider the arbitration because the underlying appeal was not timely filed under the Stafford Act. The Board Panel disagreed. Looking past FEMA's regulation, the Panel noted Supreme Court precedent establishing that "statutory time limits are not jurisdictional bars unless there is a clear congressional intent to make them such." *Id*. (citing *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Examining the Stafford Act, the Panel determined that the Recipient's 120-day forwarding requirement was merely a "claim-processing rule," and not intended to bar appeals that happen not to be forwarded by the 120 day deadline.

Important Notes:

- The Panel's decision is all the more remarkable because it concerned not only the timeliness of the appeal to the Board, but the timeliness of the appeal to FEMA. The Board essentially found that FEMA had incorrectly interpreted its own rule for the timeliness of FEMA's own internal appeals.
- This is another circumstance where the Board's background as a government contracts tribunal is evident. The classification of filing procedures as jurisdictional or not under the Contract Disputes Act is a hot topic in government contract law. While FEMA would not be apt to cite Supreme Court precedent as the foundation for its decisions, this is not the first time the Board has done so, and it won't be the last.

Much as the Supreme Court sometimes avoids contentious constitutional issues by resolving cases on the narrowest grounds possible, Board Panels sometimes avoid conflicts with FEMA policy by applying other FEMA rules. In *Nashville-Davidson County,* the Board considered the scope of what could be considered "direct" disaster-related Emergency Work performed in response to an "immediate threat" caused by the disaster. Though the Panel's decision discussed

circumstances under which events happening months after a disaster could still be constitute an "immediate threat," the Panel chose not to opine on the issue:

Nashville-Davidson Cnty., Tennessee, CBCA 7734, 2023 WL 8650312.

Takeaway:

Emergency responses that occur more than a month after a disaster and are part of normal job activities may constitute ineligible "increased operating costs," regardless of whether they were responses to an "immediate threat."

Decision:

FEMA denied $7,159,250 in labor and equipment costs that the Applicant's police department incurred to guard damaged buildings against looters and prevent the public from entering unsafe structures in the six months that followed an intense, ten-tornado strike. FEMA determined that the work was ineligible since the dangers were "not the direct results of the disaster" and not "necessitated by an immediate threat" posed by the disaster.

Before the Board's Panel, the Appellant argued that its work qualified as a response to an "immediate threat" because FEMA regulation defined "immediate threat" as "the threat of additional damage or destruction from an event which can reasonably be expected to occur within five years." The Applicant noted that looting and harm to bystanders was just such a reasonably expected result after widespread damage. FEMA disagreed, asserting that the "immediate threat" must arise directly from the disaster incident, not from intervening causes that arose from trespassing civilians.

The Panel chose not to decide whether the police's work could be considered responding to an "immediate threat" resulting from the disaster. Instead, the Panel found the work at issue to be ineligible because it constituted "increased costs of providing a service that an entity otherwise provides," which are only eligible if they are *short-term*. By this standard, the Panel determined that regardless of whether the work could be considered an "immediate threat," work after the first month of emergency response could not be considered short-term.

Important Notes:

- To the Board, the crucial factor for when the emergency response turned from short-term to long-term work was when police activity sheets and testimony no longer included search and rescue. This also demonstrates how the Board places great emphasis on contemporaneous documentation to later justify costs.

- Drawing on FEMA testimony, the Board stated if the Applicant's "activity sheets and timecards evidenced specific unanticipated events" in the months after the disaster "that were caused by the tornado (such as a building that unexpectedly collapsed as a delayed result of the tornado)," the costs of responding to such an event would be recoverable.

The issue of the extent of the Board's deference to FEMA policy is not limited to cases involving work eligibility, of course. It is also evident in the next two topics: Applicant eligibility for Covid-19 costs and the Board's interpretation of FEMA's 50% rule.

IV. Board Decisions Regarding Recovery of Covid-19 Costs.

In the course of its Contract Disputes Act litigation, Nichols Liu LLP has encountered many clients who are disappointed with the Government's refusal to pay Covid costs that the Government did all it could to encourage contractors to incur in the desperate days of the early pandemic. The same phenomenon is playing out in FEMA Arbitrations, with the additional complication arising from the fact that, as the Board wrote in a 2022 opinion: "the PAPPG clearly was not written with a pandemic in mind." *Jt. Meeting of Essex and Union Ctys., New Jersey,* CBCA 7407, 22-1 BCA ¶ 38,223.

What does the Board say?

The Board's Covid-19 decisions are often tinged with regret—nearly every case includes commentary expressing the Board's appreciation of the unique circumstances of Covid. Against the equitable arguments in favor of compensating contractors for their costs, the Board frequently reiterates that the Board may not make policy on behalf of FEMA by finding costs to be eligible that FEMA itself would deny. Pursuant to this tension between equitable entitlement and the strict terms of FEMA's policies, the Board's Covid-19 precedent includes both its most and least deferential decisions. Among the latter, none are so bold as *Essex and Union*:

Joint Meeting of Essex and Union Counties., New Jersey, CBCA 7407, 22–1 BCA ¶ 38,223.

Takeaway:

If an Applicant can point to an aspect of its work that FEMA policy makes expressly eligible, the Board may choose to look past other FEMA policies that would limit that eligibility.

Decision:

FEMA denied a wastewater treatment plant's application to recover overtime labor costs incurred during the early months of the pandemic, when staff were required to live on-site for 14-21 days at a time. FEMA found that the Applicant "failed to identify an immediate threat caused by Covid-19 that jeopardized wastewater treatment services" and that "the Applicant's pre-disaster pay policy did not allow for the Applicant's residency plan."

The Board's Panel split over the question of whether the wastewater plant faced an "immediate threat" that would make the overtime work at issue eligible for funding under 44 CFR 206.225(a)(3). Though the PAPPG recognized short-term increased operating costs as a category of eligible work caused by an immediate threat, the PAPPG explicitly limited such eligibility to that caused "because of an increased demand for the services the facility provides." *See* PAPPG v.4 at 115. Since Covid had not *increased* the public's need for wastewater treatment, Judge

Chadwick considered this limitation to preclude eligibility. Judges Zischkau and Lester, however, found the PAPPG's limitation to be inconsistent with 44 CFR 206.225(a)(3)'s characterization of an "immediate threat," in part because the Judges found that the PAPPG had not been written to apply to pandemics. Since the overtime at issue was made necessary by the pandemic, and because the facility had a written overtime policy in place before the pandemic, the Panel's majority found the facility's costs to be eligible.

Important Notes:

- This is a very important decision. The Board rarely departs from written FEMA policy, but this case demonstrates how a Panel may interpret FEMA policies as a whole in a manner that leads to a different outcome than that proscribed a specific FEMA policy.

Unfortunately, *Essex and Union* is not a typical case—it represents the outer limits of the Board's interest in departing from FEMA policy. The following cases from 2023 are more indicative of how the Board considers entitlement to Covid-19 costs:

Franciscan Alliance, Inc., CBCA 7530, 23-1 BCA ¶ 38,278.

Takeaway:

FEMA retains its discretion to deny costs that are contrary to its policy. In most cases, the Board will not, as in *Essex and Union* reinterpret that policy.

Decision:

FEMA denied $15,653,070 of straight-time labor costs that a medical nonprofit sought to recover for employees who performed Covid-relief work. The employees were medical personnel who were reassigned from non-essential departments to staff new positions established specifically to address the pandemic. While FEMA agreed that the costs would have been eligible if: (1) the costs were for overtime performed by permanent staff (called "budgeted employees"); or (2) the costs were for permanent staff called back from administrative leave; or (3) the costs were for temporary medical staff hired to care for Covid-19 patients, FEMA found that none of these criteria applied to the Applicant's labor. FEMA therefore determined that the reassigned employees were simply "budgeted employees" whose straight-time labor costs were not recoverable.

The Applicant made three arguments before the Board's Panel. First, it averred that Presidential memoranda authorizing Agencies to compensate contractors for Covid-related costs precluded FEMA from using its discretion to deny such Emergency Work costs. The Board's Panel rejected this argument since the memos "do not delineate specifically what the Category B eligible costs actually are," and contained the disclaimer that "[n]othing in this memorandum shall be construed to impair or otherwise affect ... the authority granted by law to an executive department or agency, or the head thereof."

Next, the Applicant noted that some of its employees who were not immediately reassigned to new staff positions spent up to two weeks in unpaid time off before being reclassified. The Panel

did not consider this sufficient, however, for them to qualify as permanent staff called back from administrative leave.

Finally, the Applicant asserted that its employees should not be considered "budgeted employees" because they technically qualified as "permanent employees funded from an external source," an exception recognized by the PAPPG. Improbably, the Applicant averred that the "external source" at issue was Medicare and Medicaid, whose payments to the hospital to cover the cost of patient care covered the cost of such personnel. Examining the PAPPG, the Panel concluded that it did, in fact, classify "payments from a grant from a federal agency" and "payments from a statutorily dedicated fund" like Medicare/Medicaid to constitute payments from an "external source." The Panel nonetheless determined the Applicant's costs to be ineligible because it concluded that Medicare and Medicaid "are not intended to fund budgeted employees' straight-time labor costs . . [i]nstead, they pay for patients' medical treatment."

Important Notes:

- Though *Franciscan Alliance's* arguments may strike an outsider as increasingly tenuous, they represent the contractor's effort to make every attempt to give the Board an excuse to find the Applicant's costs to be eligible. At the same time, *Franciscan Alliance* demonstrates why the Board couldn't reverse FEMA without setting a precedent that would saddle the agency with tremendous Covid-19 costs, since Franciscan Alliance's circumstance is representative of tens of thousands of health and emergency providers during Covid.
- On the narrow issue of determining "external funds," the Board's decision reads-in a requirement that looks to the '*purpose'* of those external funds, rather than their *effect*. Though this interpretation worked against *Franciscan Alliance* in this case, it could benefit future contractors.

New York Socy. for the Relief of the Ruptured and Crippled Maintaining the Hosp. for Spec. Surgery, CBCA 7543, 23–1 BCA ¶ 38,268.

Takeaway:

Though the Board is more likely than FEMA to look beyond pro-forma limitations on eligibility, the Board usually requires that the Applicant provide the substantive, underlying evidence that such pro-forma requirements seek to establish in order to find the cost at issue to be eligible.

Decision:

FEMA denied funding for bonuses that a non-profit hospital paid to staff who worked in direct contact with Covid-19 patients during April and May of 2020. In order to qualify as an eligible cost, the Applicant argued that these bonuses constituted "hazard pay." FEMA noted that the Applicant originally called the payments "bonuses" rather than "hazard pay," and that the Applicant's policy manual did not articulate any circumstances under which hazard pay would be made.

The Board's Panel dismissed FEMA's semantic argument regarding the characterization of payments as "bonuses" as opposed to "hazard pay." However, the Panel agreed that the payments were ineligible because they were not authorized by the hospital's "pre-disaster written labor policy." For payments to be eligible, the Panel noted that the policy must not only exist, it must "set non-discretionary criteria for when an Applicant activates various pay types."

Important Notes:

- As part of its decision, the Board declined to consider whether FEMA's policy on hazard payments was "inconsistent with the Stafford Act." The Panel reiterated that "we look to determine whether FEMA has properly applied its policies in the factual circumstances presented to us. . . [w]e do not set policy for FEMA."

- This is the second time the Board has denied such payments. *See New York-Presbyterian Hospital*, CBCA 7412-FEMA, 22-1 BCA ¶ 38,207.

V. Decisions Regarding the Board's Interpretation of FEMA's 50% Rule

While FEMA's 50% rule is conceptually straightforward, it can be difficult to apply in practice because of ambiguity within the PAPPG as to the proper classification of certain costs that go into the formula. The formula itself is simple: it divides the cost of repairing a structure to its pre-disaster status by the cost of replacing the structure. *See* PAPPG v. 4 at 157. If the repair cost is 50% or more of the replacement costs, FEMA will replace the facility. If not, FEMA will only fund repairs. So far so good.

The nuance behind the 50% rule lies in the deductions FEMA makes to both the numerator (repair costs) and denominator (replacement costs). FEMA excludes the costs of upgrading non-damaged elements of the facility to meet local codes or standards, even if doing so is mandated by law. *See* PAPPG v.4 at 157. FEMA also excludes the following costs *from both* the numerator and denominator:

- Site work, defined as "any exterior work at the site," including "excavation, backfill, erosion control, utility installation, paving."
- "Soft" costs, defined as "those not considered as direct construction costs, including architecture costs, engineering costs, project management costs, financing, legal fees, and other pre-/post construction expenses."
- Demolition costs;
- Costs to replace the contents of the facility at issue;
- Hazard mitigation measures; or
- Emergency Work costs.

PAPPG v. 4 at 157-58. Though these *types* of costs are the same in repair or replacement, the quantity of such costs are often dramatically different. The most commonly arbitrated disputes concerning the 50% rule arise from disagreements as to that quantity of cost, as demonstrated in *City of Hattiesburg*:

City of Hattiesburg, Mississippi, CBCA 7017, 22–1 BCA ¶ 37,986.

Takeaway:

In interpreting FEMA policy, the Board is unlikely to read policies in such a way that would exclude otherwise eligible work on arbitrary grounds.

Decision:

After initially approving replacement of a 3,200-square-foot fire station at a cost of $337,055, FEMA denied a request to increase funding for construction of a 5,900 square-foot facility. The parties disputed the additional cost for the facility, which FEMA estimated at $595,702 but the Applicant contended to be between $1,580,042 (based on historical price inputs) and $983,185 (based on FEMA's RSMeans database of prices).

Before the Board, the Applicant argued that the increased square footage was necessary under a 2016 FEMA policy, *FEMA's Public Assistance Required Minimum Standards,* which mandated that a replaced structure be built pursuant to updated International Building Code provisions if the facility had been "substantially damaged." FEMA contended that the policy did not apply because the policy document technically defined "Substantial damage" in the context of flood hazards, and the fire station at issue had been destroyed by a tornado. The Board Panel rejected FEMA's distinction and determined that "substantial damage" had occurred based on the Board's own assessment of the evidence of damage that the Applicant presented. The Panel therefore found that replacement according to a 5,900 square foot plan was eligible, though the Panel did not opine on the appropriate quantum of cost for that replacement.

Of course, if the Board is not satisfied that either arbitrating party substantiated its repair or replacement cost estimate, the Board may even choose to remand the issue to FEMA for further work, as in *Robeson County*:

Board of Education for the Public Schools of Robeson County, CBCA 7388, 22–1 BCA ¶ 38,171.

Takeaway:

The Board must have confidence in the accuracy of at least one party's estimate of repair and replacement costs in order for the Board to decide entitlement under the 50% rule.

Decision:

Over five years, FEMA and the Applicant planned several different repair projects to restore sixteen damaged school district buildings. Ultimately, FEMA denied the Applicant's request for replacement based on square-footage calculations that the Applicant had originally submitted to FEMA, but subsequently contended to be inaccurate.

Before the Board, both the Applicant and FEMA introduced new cost estimates for repair and replacement, neither of which the parties had reviewed previously. The Board Panel found

both estimates to be flawed, but the Board admitted that "it does not have the technical expertise" to determine what the correct estimate would be. The Board therefore remanded the issue to FEMA to review the Applicant's new estimate and issue a new decision memo that accounted for specific flaws in both parties' methodology that the Panel outlined.

Usually, however, the Board prefers to wade into the facts—however complicated they are—and resolve arbitrations concerning the 50% rule in the same manner that it would any other question of eligibility. The Board's most recent decision on the 50% Rule, *City of Lumberton,* is a typical example of the Board's analysis:

Housing Authority of the City of Lumberton, N. Carolina, CBCA 7717, 2023 WL 5426501.

Takeaway:

Though considered in the context of FEMA's 50% rule, questions of eligible work and adequate documentation may still dictate eligibility.

Decision:

FEMA denied eligibility for replacement of thirty units of low-income housing damaged by Hurricane Matthew in 2016 and Hurricane Florence in 2018.

Before the Board's Panel, the Applicant asserted that FEMA had erred by applying the wrong square footage for the units at issue, and by excluding costs for asbestos abatement and mold remediation. The Panel agreed that FEMA had mistakenly applied the wrong square footage and had similarly erred in excluding asbestos remediation costs. However, the Panel found that the mold remediation work was properly excluded as Emergency Work, and that the Applicant had failed to properly document its asbestos remediation costs. Without asbestos or mold remediation costs, the facilities did not exceed the 50% threshold necessary for replacement to be eligible.

VI. Decisions Regarding Cost Allocability and Reasonableness

Among other requirements, FEMA obligates Applicants to demonstrate that their costs were "necessary and reasonable to accomplish the work properly and efficiently." PAPPG v.4 at 65. FEMA assesses reasonableness pursuant to federal cost principles as defined in 2 C.F.R. Part 200 in much the way that any federal agency would evaluate costs.

The Board has decades of experience applying federal cost principles in Contract Disputes Act cases. Though an arbitrator has wide latitude in its application of the law, the reality is that the Board's judges will apply the same cost-reasonableness rules in arbitration that it uses to resolve its Contract Disputes Act cases. That makes cost reasonableness one of the only issues in FEMA arbitrations where a litigant should cite Board and Federal Circuit precedent. It also means that the Board's cost reasonableness decisions feature principles drawn from government contract law more frequently than any other area of arbitration. The Board's recent decision in Puerto Rico Electric Power Authority is an example of this phenomenon:

Puerto Rico Electric Power Authority, CBCA 7865, 23–1 BCA ¶ 38,235.

Takeaway:

In a time & materials contract, the Board places a heightened burden on the Subrecipient to prove the reasonableness of its costs.

Decision:

The Puerto Rico Electric Power Authority (PREPA) requested arbitration to recover three categories of costs incurred on time and materials contract: (1) hourly costs for helicopter operations that FEMA considered to be unreasonable; (2) mobilization costs that FEMA considered to be insufficiently documented; and (3) standby costs that FEMA determined not to be directly related to the performance of eligible work.

The Board Panel denied PREPA's entitlement in full. Because the PAPPG and 2 CFR 200.404(c) considered the cost of alternative services in the same geographic area when determining cost reasonableness, the Panel denied PREPA's claim for additional helicopter costs based on evidence that other providers offered the same services at a lower rate. The Board denied PREPA's mobilization costs because: (1) such costs were not explicitly provided for in PREPPA's contract; and (2) the mobilization invoices did not detail how the individual mobilization tasks at issue supported eligible work. Though PREPA argued that such mobilization costs could not be "de-obligated" under 42 U.S.C. § 5205(c) since the work at issue was accomplished, the Board concluded that the costs had never been obligated in the first instance since reimbursement was contingent on FEMA's verification that the funds at issue were spent correctly.

Important Notes:

- Though the PAPPG identifies several elements that indicate whether a given cost is reasonable—including exigent circumstances like those PREPA emphasized in this case—the Board's decision underlines the primacy of market data in the cost-reasonableness determination.

Of course, Stafford Act Public Assistance grants are substantially different from government contracts. That foundational difference can lead to unusual outcomes, as in *Sawnee Electric*:

Sawnee Electric Membership Corp., CBCA 7548, 23–1 BCA ¶ 38,336.

Takeaway

Cost allocation based upon a proportional representation of work performed within a disaster area is allowable if the Applicant bases the proportions on actual direct costs.

Decision

Sawnee Electric Membership Corporation requested arbitration to recover Category F costs to repair damaged electrical infrastructure and power supply. Unfortunately for Sawnee, the disaster declaration was issued retroactively, and it only covered part of the geographic area where Sawnee did repairs. To allocate costs, Sawnee calculated the total actual direct costs for all areas,

both within and outside of the disaster declaration zone. Then, Sawnee assigned percentages for each area based upon its percentage of storm related power outages. Finally, Sawnee multiplied the percentage amount of all the areas covered under the disaster declaration by the total actual direct cost of all the areas to arrive at its eligible costs.

The Board's Panel held that Sawnee's method of allocating costs was reasonable and permissible under federal government cost principles at 2 CFR 200.405(a). The Panel also noted that FEMA had already approved this exact cost allocation method for Category B costs in this case. The Panel found no reason within FEMA's policy guidance that would make the allowable methodology for Category B costs unallowable for Category F.

Important Note

- To be able to allocate costs, the Applicant must be able to point to actual direct cost data, not estimates or averages. Applicants must also have a reasonable way to allocate that cost to eligible and non-eligible items.

VII. Bonus!

Though not a typical arbitration, *City of Brenham* is worth considering as a cautionary tale. Being found ineligible for funding is not the worst thing that can happen to an Applicant.

City of Brenham, Texas, CBCA 7589, 23–1 BCA ¶ 38,323.

Takeaway:

Don't lie to FEMA.

Decision:

The Applicant appealed FEMA's decision to de-obligate funds to repair its water intake facility. FEMA had awarded these funds because the Applicant presented expert reports attributing the erosion and scouring damage to the facility as having directly resulted from the storm. Later, FEMA discovered that the expert report's findings were identical to those published in a pre-disaster report the City had commissioned. The Department of Homeland Security investigated the Applicant and concluded that the Applicant had, in fact, misled FEMA, but the Inspector General declined prosecution in lieu of administrative action by FEMA.

Before the Board's Panel, the Applicant argued that the funds at issue could not be de-oblgiated under 42 U.S.C. § 5205(c). The Panel noted that FEMA policy conditioned this prohibition against de-obligation on the Applicant's provision of "all necessary information" that "materially impacts" FEMA's decision to award the funds in the first instance. Since the Applicant had deliberately withheld information about pre-disaster damage to the facility, the Panel determined that FEMA was correct to de-obligate the funds.

Takeaways:

- Applicants should remember that public assistance applications are subject to federal fraud and abuse laws. Federal grant recipients can be, and have been, prosecuted under these laws for knowingly submitting false reports or false data to the Government.

VIII. Conclusion

It is an exciting time to arbitrate before the Board. Every year, more and more Subrecipients elect to arbitrate instead of filing a secondary appeal within FEMA. Many such arbitrations are matters of first impression under the Board's modern statutory authority, 42 U.S.C. § 5189a(d), which affords different standards of deference than the Board's previous Katrinna-era authority. We at Nichols Liu LLP believe that the volume of arbitrations will only increase with time, as more Subrecipients become familiar with the Board's decision-making. As this update demonstrates, that decision-making is not more or less favorable to the Applicant than FEMA. But we believe that it constitutes an improvement over FEMA's internal appeals system, which is too slow to issue decisions and too deferential to FEMA's own interpretations of policy and regulations.

If you have any questions or comments, please call our office in Washington, D.C. at 202-846-9800, email us at svankopp@nicholsliu.com, rnichols@nicholsliu.com, or lkemp@nicholsliu.com, or visit our website at https://nicholsliu.com.