



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 1, 2010

CBCA 1739-FEMA

In the Matter of BAY ST. LOUIS-WAVELAND SCHOOL DISTRICT

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Before the Arbitration Panel consisting of Board Judges **BORWICK**, **McCANN**, and **WALTERS**.

This matter involves arbitration of a dispute between the Federal Emergency Management Agency (FEMA) and the Bay St. Louis-Waveland School District (BSWSD) concerning a disaster grant application submitted by BSWSD arising out of damage sustained due to Hurricane Katrina. The statutes and regulations which resulted in the establishment of the arbitration panel and the arbitration process are described in *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335 (2009). Familiarity with that decision is presumed. We resolve the dispute by determining that BSWSD is entitled to disaster grant assistance of an estimated \$6,988,360.59 for complete replacement of: (1) metal roofs at the BSWSD high school and middle school; (2) damaged windows at the middle and the elementary school; and (3) damaged siding at the high school.

Before proceeding to the merits, we discuss some preliminary statutory and regulatory provisions. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the President the authority to make public assistance disaster grants, using cost estimating procedures, to a state or local government for repair, reconstruction, or replacement of public facilities on the basis of the design of the facility as it existed immediately before the major disaster. 42 U.S.C. § 5172 (2006). FEMA administers the Stafford Act.

FEMA's rules implementing the statute for public assistance grants are found at 44 CFR subpt. G (2008). FEMA defines a "grant" as "an award of financial assistance" which shall be based upon the total eligible federal share of all approved projects. 44 CFR 206.201(d). A project is a logical grouping of work required as a result of a declared major disaster. *Id.* 206.201(i). "Permanent work" is restorative work that must be performed through repairs or replacement to restore an eligible facility "on the basis of its predisaster design and current applicable standards." *Id.* 206.201(g). The object of repair is to enable the facility to perform the function for which it was being used as well as it did immediately prior to the disaster. *Id.* 206.226(f). "Predisaster design" means the size or capacity of a facility as originally designed and constructed or subsequently modified by changes or additions to the original design. *Id.* 206.201(h). FEMA must approve the scope of eligible work and an itemized cost estimate before funding a project. *Id.* 206.201(i)(1).

Federal public disaster assistance is initiated through an application by prospective grantees and subgrantees as provided in 44 CFR 206.202. Grants are awarded through the use of project worksheets (PWs), which must identify "all eligible work" and "all costs for disaster-related damages for funding." 44 CFR 206.202(d)(1). The arbitration panel is authorized to resolve disputes between an applicant or subgrantee and FEMA regarding disputed public assistance grants. *Id.* 206.209. In resolving these disputes we apply a de novo standard of review. *Bay St. Louis.*

Hurricane Katrina passed over the BSWSD area on August 29, 2005, causing damage to area schools. It is not disputed that Hurricane Katrina was a major declared disaster and BSWSD and the State of Mississippi are eligible for public assistance grants arising out of Hurricane Katrina.

At issue in this arbitration is the scope of work eligible for repair of the BSWSD high school, middle school, and elementary school. Applicant sought a total of \$7,273,082.43, for replacement of metal roofs at two buildings on the high school campus and of the middle school roof, replacement of windows at the middle school and the elementary school, and replacement of siding at the high school. During the arbitration

proceedings, the parties agreed that an earlier grant of \$59,038,635 duplicated repair costs by \$447,808, thereby reducing the amount now sought to \$6,988,360.59, taking into account other minor adjustments.

FEMA determined that additional eligible work would amount to \$176,407, which would encompass patching and demolishing of portions of the affected structures' roofs and aluminum siding as well as certain interior work. FEMA determined that there was no visible damage to the roofs and that damaged siding could be repaired, not replaced. FEMA found no damage to the windows arising from Katrina. FEMA further maintains that it cannot be proven that the claimed damage was caused by Katrina. Such proof is a prerequisite to recovery. 44 CFR 206.223(a)(1).

BSWSD and the Mississippi Emergency Management Agency (MEMA) maintain that Hurricane Katrina caused damage to the roofs, siding, and windows significantly greater than FEMA has recognized. BSWSD and MEMA maintain that FEMA ignored certain damage to the roofs caused by Katrina and underestimated the damage Katrina caused to the siding, as well as to the affected windows. FEMA does not dispute the estimated replacement cost, should the arbitration panel find that replacement is necessary.

The arbitration record establishes that, before Hurricane Katrina passed over BSWSD, the roofs, windows, and siding were fully functional, neither leaking nor rattling. Before Katrina, the roofs and windows had been periodically maintained to preserve their functionality.

The record establishes that the eye of Hurricane Katrina passed directly over the BSWSD area, subjecting the structures to peak wind gusts of over 100 miles per hour (mph) from 6:00 a.m. until noon on August 29, 2005, and peak wind gusts of between 120 mph and close to 140 mph from 7:00 a.m. to 11:00 a.m. on that date. These extraordinary wind gusts exceeded the existing design capacity of the metal roofs, lifting the roofs and damaging the connections between the anchor clips and the roofs in a way that would not be immediately visible once the winds subsided and the roofs settled back in place. Indeed, an early consultant's report prepared shortly after Katrina recommended replacement of the roofs, because Katrina's winds had lifted and raised the roof panels, loosening the clips, and breaking the field seams' water-tight seal.

The evidence presented by the applicant is substantial in amount and credible. FEMA's position as to the scope of eligible work relies principally on the views of a consulting architect who reinspected the sites in the spring of 2009. In his report and in testimony, the FEMA architect opined that roof replacement was not necessary to restore

the roof to functionality. During his inspection of the site, while offered the opportunity to do so, he did not inspect the roofs himself, choosing instead to rely on a roofing contractor who had examined the roof soon after Katrina and had summarily reported, in a one sentence report, that the roof needed no repair. Other reports in the record, however, contradicted this conclusion. The architect also relied on roof manufacturers' catalog cuts and phone conversations with manufacturers. The FEMA architect also opined that continued leaking from the roofs was caused by water penetrating ridge cap vents and not by damage caused by Katrina. However, it was established that the roofs in question do not have roof cap vents. The FEMA architect's opinions as to the condition of the roofs are not credible and are satisfactorily rebutted by the applicant's experts and contemporaneous documents demonstrating that the damage to the roofs causes unacceptable leaking.

There was ample testimony that the leaking from the roofs started shortly after Katrina and has continued at the affected schools, presenting a source of danger to staff, students, and visitors.

The record also establishes that Katrina damaged windows at the high school, middle school, and the elementary school. Katrina knocked out some window panes and caused the seals of others to degrade, causing them to have a clouded appearance. Katrina's winds and storm surge led to the corrosion of the interior mechanism of the windows. This has resulted in window rattling, which has continues and which poses an annoyance and a distraction. The FEMA architect's opinion as to lack of damage to the windows is rebutted by photographic evidence and testimony presented by the applicant.

The siding at the high school shows visible damage due to Katrina. Siding panels near the roofing deck and the gym have buckled. The testimony of the applicant's witnesses established that it would be difficult, if not impossible, to patch old siding with new siding panels, because of the different interlocking connections between old and new siding. Even if the siding could be patched, whether its appearance would be acceptable is highly questionable. We find the testimony of the applicant's witnesses as to siding replacement at the high school to be credible, and that testimony similarly rebuts FEMA's position in this regard.

At the hearing, FEMA contended that the applicant had waived its rights to additional grants because the applicant had not identified roof, siding, and window replacement in the earlier PWs. This argument is without merit. This dispute arose after the applicant had requested reinspection of work at the schools that had been the subject

of earlier PWs¹. FEMA granted reinspection on June 19, 2009, which resulted in amended PWs. FEMA's public assistance branch chief admitted that a PW is a living document until project completion. Furthermore, nothing in the language of the PWs or any other document of record suggests that an applicant waives rights to seek further assistance should the necessity for additional assistance become apparent at any time.

Finally, FEMA raises two insurance-related arguments. We find neither persuasive. First, FEMA asserts that BSWSD has already received an insurance settlement of approximately \$13,000,000 from its wind insurance carriers and thus cannot recover further from FEMA for the instant disputed items, which were the result of wind damage. The panel recognizes that, under 42 U.S.C. § 5155(a), an applicant for relief from FEMA cannot obtain duplicate relief where it has already received relief from another source, such as insurance. The problem with FEMA's argument, however, is that of the approximately \$59 million FEMA has already granted the applicant, by the agreement of the parties, only \$447,808 of that amount pertained to the damage at issue in this arbitration. FEMA has deducted, however, the entire \$13,000,000 insurance payment from the earlier payment of \$59,000,000. Accordingly, the insurance payment has been fully accounted for and has no bearing on the present claim other than the aforesaid \$447,808. FEMA's contention that the applicant cannot recover the remaining \$6.9 million because it is covered by insurance makes little sense.²

Second, FEMA argues that BSWSD failed to exhaust the limits of its wind insurance coverage and to use other "available" resources to defray the replacement costs it is seeking here. This argument apparently is founded on the language of 42 U.S.C. § 5155(c), which provides for the recovery by FEMA of previously granted funds in the amount of "available" insurance, regardless of whether the applicant had received the available insurance proceeds. That statutory language, however, has been held to apply only where the applicant's insurance settlement has been found to be commercially unreasonable. *Hawaii v. Federal Emergency Management Agency*, 294 F.3d 1152, 1158 (9th Cir. 2002).

Although the limits of wind insurance coverage for BSWSD may have been \$26 million, FEMA has not established to our satisfaction that the \$13 million wind damage settlement was commercially unreasonable. Indeed, the FEMA insurance consultant testified that BSWSD acted with due diligence in settling its insurance claims without

¹ The applicant awaited the outcome of insurance litigation and subsequent settlement before pursuing further grant assistance for this damage.

² The arbitration panel reduces the award by \$447,808.

engaging in prolonged further litigation. Thus, we find that the applicant has already obtained all insurance coverage reasonably “available” for wind damage sustained by reason of Hurricane Katrina.³

Decision

The arbitration panel determines that the scope of eligible work is the complete replacement of the damaged metal roofs at the high school and middle school, the damaged windows at the middle school and elementary school; and the damaged siding at the high school that are at issue in this dispute. The estimated amount, less the previously deducted \$447,808, is \$6,988,360.59 for all of this work. Since insurance proceeds have been completely deducted from an earlier grant, there shall be no deduction for insurance proceeds. FEMA shall adjust the applicable PWs accordingly.

ANTHONY S. BORWICK
Board Judge

R. ANTHONY McCANN
Board Judge

RICHARD C. WALTERS
Board Judge

³ Furthermore, as a money recovery statute that allows FEMA to recover monies it has paid to an applicant, 42 U.S.C. 5155(c) does not apply to a determination of the scope and amount of the initial grant. *Hawaii*, 294 F.3d at 1160.