



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 22, 2010

CBCA 1757-FEMA

In the Matter of MISSISSIPPI STATE PORT AUTHORITY

Paul J. Delcambre, Jr. of Balch & Bingham LLP, Gulfport, MS, counsel for Applicant.

Thomas M. Womack, Executive Director, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

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Before the Arbitration Panel consisting of Board Judges **SOMERS**, **POLLACK**, and **DRUMMOND**.

This matter involves a dispute between the Mississippi State Port Authority (MSPA or applicant) and the Federal Emergency Management Agency (FEMA) concerning MSPA's request for public assistance to fund the replacement of two large refrigerated warehouse storage facilities, buildings 14 and 15, located in Gulfport, Mississippi. The applicant's request is supported by the grantee, the State of Mississippi.

The MSPA owns buildings 14 and 15. These buildings had been initially constructed as pre-engineered metal buildings in the mid-1970's and were later modified to operate as cold storage facilities. MSPA used building 14 for short-term storage of frozen poultry. It contained 1,937,225 cubic feet of refrigerated space and 44,895 cubic feet of additional blast freezers. Building 15, which contained a total of 473,000 cubic feet of refrigerated space, was used for short-term storage of refrigerated cargo comprised primarily of fruits. The refrigeration systems comprised less than 50% of the interior space in each building.

On August 29, 2005, Hurricane Katrina severely damaged the two buildings. Lanier and Associates (Lanier), an engineering firm, inspected the buildings and prepared damage assessment reports for MSPA. For building 14, Lanier concluded that, due to the extensive damage, the building would need to be demolished. For building 15, Lanier estimated damage to the structure to be approximately 40% to 50%, stating that “with the exception of the extreme north end wall and associated canopy, the structural frame appears to be sound, and the deck appears to be in pre-storm condition.” Lanier deemed building 15 to be repairable. Ultimately, however, MSPA demolished both buildings due to safety concerns.

MSPA presented the Lanier reports to FEMA and sought funding to restore both buildings to their pre-disaster state. FEMA responded in March 2008 with version 0 of project worksheets (PWs) 8909 and 9836. PW 8908 estimated the costs to replace building 14, including the refrigeration systems, as \$44,318,755, and PW 9836 estimated the costs to repair building 15, including replacing the refrigeration system, as \$12,714,755. The combined eligible costs totaled \$57,033,510. The parties considered this amount a reasonable approximation for both repair and replacement costs. The panel accepts this figure as reasonable. After some discussion between MSPA and FEMA, FEMA issued another set of PWs, with combined eligible costs totaling \$52,338,225.

MSPA seeks replacement costs for both buildings pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), which provides the President the authority to make public assistance disaster grants to a state or local government for repair, reconstruction, or replacement of public facilities on the basis of the design of a 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 (2009). This matter is being arbitrated pursuant to regulations set forth in 44 CFR 206.209.

Section 206.226(f) of title 44 of the CFR addresses when a public assistance grant should be made for repairs to a facility and when such a grant should be made for replacement. This section provides:

- (1) A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.

- (2) If a damaged facility is not repairable . . . , approved restoration work may include replacement of the facility.

FEMA asserts that funding for buildings 14 and 15 should be based on separate cost estimating format (CEF) factors for the structures and refrigeration systems. FEMA agrees that building 14 should be replaced. For building 15, FEMA asserts that the structure is eligible for repair and that the refrigeration system is eligible for replacement. It applied the 50% rule calculation to compare the former building's estimated repair costs to the replacement cost. FEMA states that because the refrigeration components are equipment, they are eligible for only limited application of CEF factors.

MSPA submits that the refrigeration systems are integral to the structures and should be considered as such when estimating the replacement costs for both buildings. Further, MSPA asserts that FEMA misapplied the CEF factors. MSPA contends that it is entitled to recover additional non-construction management and engineering costs, as well as overhead. It seeks, in total, \$63,137,902 for replacement of both buildings.

Based on the record as a whole, including the testimony presented at the arbitration hearing, the weight of the evidence leads us to agree with MSPA that the refrigeration systems must be considered as integral to the structures for estimating the replacement costs for both buildings. Thus, the record shows that the costs to repair building 15 would exceed 50% of the costs of replacing that facility. We reject as unsupported by the evidence FEMA's argument that the work could be performed by separate contractors, one for the construction of the buildings, and the second for the installation of the refrigeration systems. In addition, we dismiss FEMA's cost estimates to the extent that they are based on the assumption that the refrigeration systems and building costs should be calculated separately.

We also find that, based upon the evidence presented, the first versions of project worksheets 8909 and 9836, dated March 3, 2008, provide the best estimate for the costs of replacing the buildings and refrigeration systems as integrated cost storage facilities, which would be consistent with the design of the facilities as they existed immediately before the major disaster. The evidence does not support MSPA's claim for additional non-construction costs.

Decision

For the reasons stated above, the panel directs FEMA to issue new versions of project worksheets 8909 and 9836 which award MSPA \$57,033,510, the costs of replacing buildings 14 and 15 as integrated cold storage facilities.

JEROME M. DRUMMOND
Board Judge

JERI KAYLENE SOMERS
Board Judge

HOWARD A. POLLACK
Board Judge