



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 3, 2010

CBCA 1772-FEMA

In the Matter of FORREST COUNTY BOARD OF SUPERVISORS

David B. Miller, Forrest County Board of Supervisors, Hattiesburg, MS, counsel for Applicant.

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

Janice Williams-Jones, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **BORWICK**, **VERGILIO**, and **KULLBERG**.

This matter involves a dispute between the Forrest County Board of Supervisors (BOS) and the Federal Emergency Management Agency (FEMA) concerning a request for public assistance related to mold remediation for the Forrest County Courthouse (courthouse) located in Hattiesburg, Mississippi. The BOS and the Mississippi Emergency Management Agency (MEMA), which supports the BOS in its request for public assistance in this matter, contend that the courthouse, a historic structure built in 1910, suffered damage from mold growth due to high interior temperatures and humidity during the nine-day loss of electrical power necessary to run the air conditioning system following Hurricane Katrina. FEMA contends that no public assistance is warranted. This matter is before the panel under

authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations.

Hurricane Katrina struck Hattiesburg, Mississippi, on August 29, 2005. In preparation for the hurricane, the doors to the courthouse were sandbagged. As a result of the hurricane-force winds and rain, four windows on the second floor of the southeast corner of the courthouse were broken, which resulted in water intrusion. Water intrusion on the first floor resulted from the loss of flashing on the east side of the courthouse. The hurricane caused the loss of electrical power throughout the surrounding area, and the courthouse was without electrical power for nine days.

Immediately following the hurricane, several measures were taken to prevent further damage to the courthouse. The broken windows were boarded up. A portable generator was available at the courthouse to provide power for some fans and equipment for vacuuming up water (wet vacs). The wet vacs were used to remove water from areas of the first and second floors where rain had leaked into the building.

Due to the loss of electrical power, the air conditioning and ventilation system for the courthouse was out of operation. No external generators of sufficient capacity were available during that power outage to run the air conditioning in the courthouse because the Unified Command Group for Mississippi determined that hospitals, nursing homes, and shelters had priority for such generators. Temperatures in the Hattiesburg area during the nine-day power outage ranged from 90 to 105 degrees with high humidity, and consequently, the interior of the courthouse was extremely hot and humid. When electrical power to the courthouse was finally restored, the air conditioning started automatically.

With electrical power restored, courthouse operations resumed. Approximately two weeks after returning to work, an employee in the county clerk's office, which was located on the first floor of the east side of the building, complained about an odor in her office that was causing sinus problems and headaches. As a result of the county clerk's complaints and the presence of a dark substance underneath some of the wallpaper in that office, the maintenance supervisor for the BOS, Curtis Elliott, contacted a FEMA representative, who advised him to have the courthouse inspected.

Dr. Michael Bonner of Bonner Analytical Testing Company was employed by the BOS to investigate the air quality within the courthouse. Dr. Bonner's investigation of the courthouse took place on October 21 and 24, 2005, December 30, 2005, and January 16, 2006. Dr. Bonner initially inspected three offices, and he later inspected the rest of the building. Dr. Bonner's written report noted that the courthouse had suffered water intrusion as a result of wind-driven rain followed by a nine-day electrical power outage.

Those conditions, according to Dr. Bonner's report, would have resulted in "extensive microbial amplification . . . within 48 hours." The report further stated that such extensive microbial amplification would have occurred "even if no pre-existing conditions contributed to the contamination." Based upon his professional experience, Dr. Bonner's report, which was issued in February of 2006, stated that the percentage of damage due to Hurricane Katrina was the following:

1. Air handling systems–Katrina damage 10%. These systems were likely contaminated prior to Katrina. The conditions were exacerbated by the storm.
2. Tear-out and build back–Katrina damage 40%. Vinyl wall covering is likely to have contributed to the contamination. Tear-out should include all visible microbial amplification to include drywall, insulation and damaged plaster.
3. Clean, disinfect and HEPA [high efficiency particulate absorbing] vacuum, pack out/move contents–Katrina damage 60%.
4. Replace porous contents or clean and test individually–Katrina damage 60%.
5. Clean, disinfect and HEPA vacuum files–Katrina damage 60%.
6. Clean, disinfect and HEPA vacuum computers–Katrina damage 60%.

On June 7, 2006, representatives from FEMA and MEMA executed project worksheet (PW) 8837, which estimated the cost of mold remediation at \$506,108.30. The PW provided a breakdown of the costs for cleaning certain parts of the building, including the air conditioning system, and replacing porous surfaces such as upholstered furniture, wallpaper, and carpeting. Also, the PW included the costs of relocation of courthouse personnel and Dr. Bonner's inspection and written report.

Beginning in the spring of 2006, courthouse personnel and offices were relocated while mold remediation took place. The work was not completed until sometime in 2007. Under two separate contracts, all contaminated furniture and porous surfaces in the building were removed and replaced. The costs related to mold remediation that the BOS was able

to document totaled \$225,381.¹ Additionally, the costs of employing Dr. Bonner totaled \$17,460. The BOS represented that additional amounts were expended for mold remediation, but documentation of those costs was not presented.

On November 3, 2006, FEMA determined that no public assistance was warranted for the mold remediation work shown on PW 8837. MEMA submitted on behalf of the BOS an appeal to FEMA's regional administrator, which was denied on January 17, 2008, and a subsequent appeal to FEMA's headquarters was denied on February 18, 2008, in which FEMA determined that no public assistance was warranted in that the mold damage was not due to Hurricane Katrina, but instead, was due to "deferred maintenance and post-storm negligence." Relying on Dr. Bonner's report that determined that only a portion of the mold damage was due to Hurricane Katrina, the BOS brought this matter for arbitration seeking forty percent of the estimated cost for mold remediation shown on PW 8837.

This matter presents the issue whether FEMA properly determined that no award of public assistance is warranted. Eligibility for public assistance requires a finding that such repairs were "required as the result of the major disaster event." 44 CFR 206.233(a)(1) (2009). Public assistance will not be "provided to an applicant for damages caused by its own negligence." *Id.* 206.233(e).

The Bonner report established that the air quality within the courthouse was unsuitable due to mold shortly after the power outage caused by Hurricane Katrina. Dr. Bonner explained during the hearing that the conditions in southern Mississippi are such that prolific microbial (mold) growth would occur in a wet building that stays wet for twenty-four to forty-eight hours. He also explained that even if water intrusion in a building is minimal, high humidity, above fifty percent, will also cause rapid mold growth. In the aftermath of the hurricane, Dr. Bonner observed similar damage due to rapid mold growth in other buildings in southern Mississippi. Additionally, Dr. Bonner acknowledged that some mold damage existed in the courthouse before Hurricane Katrina, but forty percent of the mold damage was attributable to the hurricane. A majority of the panel finds that Dr. Bonner's conclusion that forty percent of the mold damage in the courthouse was related to Hurricane Katrina was persuasive. His education, professional background, and environmental testing experience that included fifteen years of testing air quality for the presence of mold made him highly qualified to render an opinion, and a majority considers his conclusions to be soundly based.

¹ The costs that the BOS incurred for mold remediation and Dr. Bonner's report are rounded off to the nearest dollar.

FEMA argued that the courthouse was in need of repair before the hurricane due to cracks in the mortar and gaps around windows where water could have entered the building with resulting mold damage. The courthouse, however, was a usable facility before Hurricane Katrina. It was only when courthouse personnel returned to work after the hurricane that the air quality in the courthouse was such that mold remediation became necessary. Although there had been reported complaints about air quality in the courthouse before Hurricane Katrina, those complaints had been resolved by adjusting a damper or taking other actions to improve air circulation.

FEMA has not shown that the mold damage to the courthouse was the result of negligence. Before power was restored to the courthouse, reasonable efforts were taken by BOS personnel to mitigate further damage. Those efforts included boarding up the broken windows, vacuuming water, and running fans. The heat and high humidity inside the courthouse during the nine-day power outage could not be controlled. FEMA has argued the BOS should have obtained a generator to restore power to the air conditioning system, but such large capacity generators were only available for facilities such as hospitals, nursing homes, and shelters where lifesaving measures were a priority.

Additionally, FEMA cites the example of mold remediation work at the Pearl River Community College (PRCC), which included cleaning and disinfecting air conditioning systems, to show that the BOS was negligent for not having taken similar measures. The mold remediation work at the PRCC was performed by a contractor under a hurricane plan that had the purpose of resuming operations at the college as quickly as possible. The fact that such mold remediation was accomplished at the PRCC, which had over forty buildings, does not lead to the conclusion that the BOS was negligent for not having done similar work. There is no evidence that the BOS had either the opportunity or means to contract with a mold remediation contractor immediately after the hurricane in the same manner as the PRCC. It was also established at the hearing that Forrest County had an emergency management plan to coordinate lifesaving and property saving measures, and that plan did not include such details as air conditioning systems. The BOS took reasonable property saving measures using the personnel and equipment that were available in the midst of a major disaster. A majority of the panel, therefore, does not find that the BOS was negligent under such circumstances.

Decision

For the purpose of determining the amount of public assistance that should be awarded by FEMA, a majority of the panel finds that forty percent of the mold damage was related to Hurricane Katrina, and the award of public assistance shall be forty percent of proven costs for mold remediation less insurance for mold damage. The total documented

cost for mold remediation was \$225,381 and the cost for Dr. Bonner's work and written report was \$17,460. Those costs totaled \$242,841. It was acknowledged at the hearing by the BOS that there was insurance for the courthouse in the amount of \$25,000 for mold damage. Although it was unclear whether an insurance claim was submitted, the panel deducts \$25,000 from the public assistance award. The amount of public assistance to be awarded is forty percent of \$242,841, which equals \$97,136, minus \$25,000, which equals \$72,136.

It is the determination of a majority of the panel in this matter, consequently, that FEMA shall pay public assistance in the amount of \$72,136 for mold remediation costs for the Forrest County Courthouse.

H. CHUCK KULLBERG
Board Judge

ANTHONY S. BORWICK
Board Judge

“The arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage . . . for a project the total amount of which is more than \$500,000.” Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (2009)). Because I conclude that the applicant has not demonstrated that the \$500,000 threshold is satisfied to permit this arbitration panel to resolve the merits of this dispute, I do not join the majority. I conclude that the panel is not authorized to bind FEMA in this matter.

JOSEPH A. VERGILIO
Board Judge