



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 12, 2010

CBCA 1778-FEMA

In the Matter of ST. TAMMANY PARISH

Kevin C. Davis, Parish President, and Gina P. Campo, St. Tammany Parish, Covington, LA, appearing for Applicant.

Mark Riley, Deputy Director, Lynn L. Wiltz, Appeals Specialist, and Carla Richard, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Diane L. Donley, Linda M. Davis, and Kim A. Hazel, 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 **STEEL**, **SHERIDAN**, and **KULLBERG**.

This arbitration matter involves a dispute between St. Tammany Parish, Covington, Louisiana (St. Tammany or Parish), and the Federal Emergency Management Agency (FEMA) concerning St. Tammany's request for public assistance (PA) to fund the removal of 99,000 cubic yards (cy) of debris from the Coin du Lestin (CDL) canals which are located in the Parish. St. Tammany appeals FEMA's decision to decline authorization of PA funding for removal of the debris from the canals as either emergency work or permanent work. The grantee, the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), supports applicant's request for funding.

FEMA has asked the panel to limit its review to the evidence before the agency during its own review of the matter, and to affirm the agency's determination unless we find that it lacks a reasonable basis -- i.e., it is arbitrary or capricious. For the reasons explained by another arbitration panel in *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335 (2009), this panel denies FEMA's request to limit our review. We will

consider all evidence in the record created for this arbitration proceeding, and we will review that evidence *de novo*.

Among other things, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides authority to make PA disaster grants to a state or local government to meet immediate threats to life and property, to clear debris and wreckage when it is in the public interest, and to provide grants 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. §§ 5170b, 5172, 5173 (2006).¹ The rules by which FEMA administers public assistance grants through the Stafford Act are found at 44 CFR subparts G and H (2004).

To obtain a PA grant, an applicant must establish that it meets the eligibility requirements set forth in FEMA regulations. Those regulations require that the entity seeking PA be an eligible applicant. 44 CFR 206.222. The work sought must be required as the result of the major disaster event, be located within the designated disaster area, and be the legal responsibility of the eligible applicant. 44 CFR 206.223(a)(1)-(3). Also, the type of work must be eligible.²

The CDL subdivision was developed in five phases beginning in 1965, with phase five completed in 1998. As part of the development, the existing natural waterways within or bordering a particular development phase appear to have been dug, dredged, and expanded to create canals. The subdivision contains approximately 250 residential homes, most of which are located along the approximately 3.1 miles of canals. The Parish characterizes the canals as a consolidated drainage system in part because the ditches and culverts in the subdivision run into the canals which, in turn, run into Bayou Bonfouca. The Parish says that

¹ A facility is defined as a publicly owned building, works, system, or equipment; or certain improved and maintained natural features.

² There are three general types of work that may be eligible, each with different criteria: debris removal; emergency protective measures; and permanent restoration. Debris removal and emergency work is performed to eliminate or lessen immediate threats to life, public health, and safety; or to eliminate or lessen immediate threats of significant damage to improved public or private property. 44 CFR 206.224(a)(1)-(2), .225(a)(3). Permanent work is restorative work that must be performed through repairs or replacement to restore an eligible facility on the basis of its pre-disaster design and current applicable standards. 44 CFR 206.201(g). The object of such permanent repair is to enable the facility to perform its function as well as it did immediately prior to the disaster. 44 CFR 206.226(f). Pre-disaster design means the size or capacity of the facility as originally designed. 44 CFR 206.201(h).

prior to Hurricane Katrina, the canals were also navigable and provided a recreational boating resource for homeowners in the CDL subdivision.

According to the Parish, as each development phase of the CDL subdivision was completed, it was turned over to St. Tammany for inclusion in the Parish's selective maintenance system. Under that system, the Parish says it accepted responsibility for ensuring that "all drainage ditches, culverts, and canals throughout the Parish . . . remain clear of debris and are functioning properly." The Parish represents that its employees inspect "drainage ditches, culverts, and canals in the CDL subdivision at least monthly," and they have cleared brush from the ditches and culverts, and occasionally removed some miscellaneous large debris from the canals, but have not dredged the canals as a form of maintenance. However, the Parish maintains that it does not have any pre-Hurricane Katrina records showing how or when maintenance was actually performed. It does not appear from the record that maintenance in the CDL subdivision was routinely performed. Also, certain common areas of the subdivision, such as a private boat launch, appear to have been maintained by the CDL Property Owners' Association.³ Individual homeowners maintain their own docks and bulkheads (retaining walls between the canal and a homeowner's land).

As a result of Hurricane Katrina, construction and demolition (C&D) debris, wreckage, and vegetative debris, including silt, sediment, and marsh grasses, were deposited throughout the CDL subdivision, including the streets, properties, ditches, culverts, and canals. In response to the disaster caused by Hurricane Katrina, on January 20, 2006, FEMA issued project worksheet (PW) #2914 authorizing the removal and disposal of 17,297 cy of marsh grass, silt, and mud and 69,879 cy of mixed C&D debris within the subdivision's neighborhood rights-of-way and cleared 68,526 linear feet of drainage ditches at an estimated cost of \$1,879,483. The work associated with PW #2914 was considered to be an immediate threat to public health and safety and deemed eligible by FEMA as debris removal and emergency work pursuant to 44 CFR 206.224 and .225.

By PW #2981, issued on February 6, 2006, and six subsequent versions, FEMA authorized the removal of 162 cy of vegetative debris, a car, and four submerged boats from the canals for total funding of \$34,730. The work associated with PW #2981 was also considered to be an immediate threat to public health and safety and deemed eligible by FEMA as debris removal and emergency work pursuant to 44 CFR 206.224 and .225. Subsequently, FEMA determined that additional vegetative debris removal from the canals, beyond that already provided, was not eligible emergency work because additional clearing

³ Also referred to as the CDL Homeowners' Association.

would not eliminate any significant threat to improved property and public health and safety in a five-year flood event.

On January 29, 2008, FEMA issued PW #18044, which stated that FEMA was not authorizing funding for additional debris removal in the canals. FEMA reasoned: “Applicant has not provided proof of pre-storm condition, prior maintenance, quantifiable storm related damage, or immediate threat to public health and safety.” PW #18044 documented the existence of an estimated 54,560 cy of debris in the canals, consisting of silt, sediment, and marsh grasses, which FEMA considered ineligible for removal under the PA program.

FEMA asserts that it cannot fund PW #18044 because it is unable to establish that the Parish is an eligible facility that has the legal responsibility to dredge the canals. Although it is not clear from the record the extent to which the roads, drainage ditches, culverts, and canals in the CDL subdivision are publicly versus privately-owned property, St. Tammany takes the position FEMA has already considered the CDL canals to be an eligible facility for purposes of removing debris, marsh grasses, silt, and sediment by issuing PW ##2914 and 2981, and should be bound by its earlier actions. As articulated earlier in this decision, we will consider all evidence in the record created for this arbitration proceeding, and we will review that evidence *de novo*. We are not bound by earlier FEMA actions taken on other project worksheets.

The Parish also affirmatively represents that it accepted the CDL subdivision’s roads, drainage ditches, culverts, and canals into its selective maintenance system, and in so doing, has legal and financial responsibility to maintain the CDL subdivision’s roads, drainage ditches, culverts, and canals.⁴ In order to be an eligible applicant, an applicant must be legally responsible for the damaged facility at the time of the disaster. 44 CFR 206.223(a); *see also* FEMA Public Assistance Guide (FEMA PA Guide) at 16 (Oct. 1999). Because St. Tammany affirmatively represents that it has legal and financial responsibility to maintain the CDL subdivision’s roads, drainage ditches, culverts, and canals, we find that it is an eligible applicant.

_____ FEMA also takes the position that PW #18044 should not be funded because the CDL canals are not an eligible facility for purposes of PA funding. A facility is defined as:

- any publicly . . . owned building, works, system, or equipment; or

⁴ There are indications in the record that, post-Hurricane Katrina, the CDL Property Owners’ Association represented that it owned the canals.

- certain improved and maintained natural features.

FEMA PA Guide at 16. The eligible facility must be located in the designated disaster area and must be the legal responsibility of an eligible applicant. FEMA Public Assistance Debris Management Guide at 5 (July 2007).

The Parish has not represented that it owns the roads, drainage ditches, culverts, and canals in the CDL subdivision, although it has established that it has legal responsibility for their maintenance. Regarding the issue of whether the canals may be an eligible facility as an improved and maintained natural feature, the FEMA PA Guide provides that:

The improvement of a natural feature should be based on a documented design that changes and improves the natural characteristics of the feature. Examples of such improvements include soil stabilization measures (such as terracing), channel realignment, and channel bank armoring for erosion control. The nonstructural portions of public golf courses may be considered facilities.

Examples of improvements that do not qualify as eligible facilities include agricultural lands and planted trees and shrubs.

Upon completion of an improvement, a subsequent measurable difference in the performance over the unimproved natural feature should be shown. The maintenance of this improvement must be done on a regular schedule and to standards to ensure that the improvement performs as designed. It is the improvement itself that must be maintained for the natural feature to be considered a facility.

FEMA PA Guide at 16. The Parish asserts that it does not have any pre-Hurricane Katrina records regarding the design of, or maintenance performed on, the canals.

The evidence in the record as to the design of the canals was confusing. The record refers to the canals in various ways, as being: dug, dredged, natural, natural drainage, man-made, navigable, tertiary, boating, recreational, private, public, and semi-public. It appears that as the individual phases in the subdivision were each being developed, what were originally natural waterways were expanded by being dug to form canals. Most of the houses in the CDL subdivision have frontage on the canals, which are said to have been somewhere in the range of eight to ten feet deep. No documents were submitted detailing an actual design or how the canals were constructed. The only reference in the record is a short note

written on July 24, 2006, by George B. Dunbar, the CDL subdivision's developer, which states:

In response to a telephone conversation with Mr. Lorenz, we are advising you that the canals in [the CDL] subdivision were originally dug to a depth of 9 feet and the dredging began in approximately 1965. Most of the subcontractors are dead except for Mr. Billy McCrory who dug the latest canal along Peninsula Drive which was dug to a depth of 10 feet in approximately 1994. I hope this information is helpful to you but if you need any further information, please contact me any time.

The panel is unwilling to speculate as to how the canals might have been designed or how they were constructed. Furthermore, the Parish has not reliably established that it performed any routine maintenance on the canals to maintain a documented design. The Parish offered only broad statements from its employees to establish that those employees purportedly "remove silt, sediment, and debris as necessary from the canals." No specifics were provided as to when or how such removal actually occurred. The absence of evidence showing any routine maintenance of the canals, coupled with the Parish's seeming ignorance about the design and condition of the canals pre-Hurricane Katrina, leads the panel to conclude that maintenance of the canal, if performed at all, was performed only on an as-needed basis to remove reported obstructions. While the Parish may have occasionally removed obstructions from the canal at a homeowner's request, in the panel's opinion, that did not constitute routine maintenance done on a regular schedule or to any standard. Further, the Parish presented no reliable evidence on the condition of the canals immediately prior to Hurricane Katrina other than that they were being used. We are troubled by the lack of current information on the state of the canals, and with the lack of design information are not willing to assume that the canals maintained a consistent depth of eight to ten feet from 1964 when the first phase of the CDL subdivision was built to the Hurricane Katrina disaster. Given the lack of proof on the part of the Parish, the panel is not willing to guess as to what would be a reasonable restoration for the canals.

As noted in the FEMA PA Guide: "It is the improvement itself that must be maintained for the natural feature to be considered a facility." FEMA PA Guide at 16. Because of the dearth of reliable evidence, the panel concludes that the CDL canals are not an eligible facility for purposes of receiving PA in this instance.

Even had the panel found the CDL canals to be an eligible facility it would not have found the work sought by PW #18044 to be eligible emergency work. *See* 44 CFR 206.221(c), .224(a), .225(a)(3); FEMA PA Guide at 50. The panel found the evidence supporting FEMA's position that the canals were operating at the capacity which they

operated at before Hurricane Katrina to be more compelling. We were not convinced that removal of further silt, sediment, and marsh grass from the canals would eliminate a significant threat to improved property and public health and safety in a five-year flood event. As to the work being eligible as permanent restorative work, applicant faced the deficiencies articulated earlier. For permanent work to be eligible it must be restorative work that must be performed through repair or replacement to restore an eligible facility on the basis of its pre-disaster design and current applicable standards. 44 CFR 206.223.

FEMA acknowledged that because information gained from the study of March 24, 2008, performed by Wink Companies, LLC, “showed FEMA that there was no threat of flooding due to a five-year event,” it would write version seven of PW #2981 to allow the cost of the study, which was approximately \$132,000. To the extent the Parish presented evidence and made other arguments in favor of its receiving further PA, we did not find that evidence or those arguments to be compelling.

Decision

For the reasons stated above, the panel directs FEMA to issue a new version of PW #2981 allowing for the cost of the March 24, 2008, Wink Companies, LLC study. St. Tammany’s request for public assistance under the Stafford Act for additional debris, silt, sediment, and marsh grass removal from the CDL canals is otherwise denied.

PATRICIA J. SHERIDAN
Board Judge

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge