



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 22, 2010

CBCA 1800-FEMA

In the Matter of MOSS POINT SCHOOL DISTRICT

Henry P. Pate, Pascagoula, MS, counsel for Applicant.

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

Janice Williams-Jones, and Linda D. Litke, 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 **STERN**, **DRUMMOND**, and **WALTERS**.

Applicant, the Moss Point School District (MPSD), filed an arbitration request with this Board on November 16, 2009, seeking award of a grant under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5172 (2006), from the Federal Emergency Management Agency (FEMA), through the grantee, the Mississippi Emergency Management Agency (MEMA). The present case involves damages caused in 2005 by Hurricane Katrina to the Magnolia Junior High School in Moss Point, Mississippi. The circumstances surrounding the instant dispute were described more fully as part of our earlier decision, dated February 2, 2010, on a FEMA motion to dismiss for lack of jurisdiction.

In early 2009, MPSD contracted with an architect and an engineering consultant and, by August 2009, MPSD was prepared to move forward with a project funded by FEMA to repair the junior high school. It was unable to proceed with construction, however, because its application to the City of Moss Point for a building permit was refused. As explained in

our earlier decision, this refusal was premised on the repair project being in violation of a new city ordinance enacted by the City of Moss Point on February 17, 2009, in implementation of a federal requirement of the National Flood Insurance Program (NFIP) administered by FEMA. The junior high school fell within a designated flood plain and the finished building elevations throughout the junior high school structure fell below the base flood elevation (BFE) for the area. As the repair project would constitute a “substantial improvement” under the definitions set forth in the NFIP regulations and city ordinance, the city would not permit MPSD to go forward without MPSD either raising the elevation of the entire school structure or its first taking measures to protect the existing building against future flooding – either floodproofing the structure or erecting a flood wall around the building to an elevation one foot above the BFE.¹

The MPSD’s architect and consulting engineer advised that implementation of any such protective measures was not achievable. Thus, in October 2009, MPSD asked MEMA to seek FEMA reconsideration of its repair/replacement decision, since repairs, in the view of MPSD, were no longer feasible in light of these new circumstances. FEMA, by letter to MEMA dated October 23, 2009, refused to reconsider the repair/replacement issue, but indicated to MEMA that it would entertain a proposal to fund a flood wall or other mitigation measures, pursuant to section 406 of the Stafford Act. MEMA forwarded this response to MPSD, which then filed the current request for arbitration. Although the parties are in agreement that neither raising the building elevation nor floodproofing the building would be feasible, they have been in disagreement regarding the feasibility of constructing a flood wall. FEMA has acknowledged that it is willing to fund 100% of the costs of a flood wall or any other hazard mitigation measure under section 406 of the Stafford Act.

An arbitration hearing was conducted by the panel on February 23-24, 2010. The primary issue to be resolved at the hearing was the feasibility of constructing a flood wall and, in turn, the feasibility of the previously-approved repair project at the junior high school, which flood wall construction would make possible. At the conclusion of proceedings, FEMA requested a further period of time within which to investigate the feasibility, placement, and configuration of a flood wall. The panel allowed both parties sixty days within which to perform any further investigations and to develop further any proposals the parties may have for flood wall configuration. The panel also urged the parties to confer with one another during that period to attempt to resolve the matter short of a

¹ Originally, because the junior high school had been listed by the City as a critical facility, those measures would have had to proceed to four feet above the BFE. All MPSD schools, however, were subsequently removed from the critical facilities list.

decision by the panel, and required them to submit status reports at the conclusion of the sixty days.

The parties submitted their posthearing reports, together with their respective flood wall proposals. Each submitted a posthearing brief as well. Subsequently, the panel sought further input from FEMA regarding the use and storage of certain of its proposed flood wall components. FEMA submitted the requested information, and MPSD submitted a response. At this stage, since the parties have not resolved their differences, we issue the following decision.

Discussion

During the hearing and as part of its posthearing report, MPSD maintained that construction of a flood wall along the perimeter of the school property (some forty to fifty feet from the edge of the school building) would not be feasible, raising several concerns about such a wall. At the hearing and as part of its posthearing report, FEMA suggested, as an alternative, the construction of a flood wall ten feet from the edge of the school building. Such a wall would eliminate most of MPSD's concerns. Nevertheless, the panel finds that such an alternative flood wall would be unworkable. This is so because, to afford adequate means of ingress and egress to the school facilities, the flood wall would have to include thirty-three removable floodgate sections/panels.

By FEMA's admission, in some (and perhaps most) instances, it would require two men to maneuver the sections/panels, which are 40" high, 34"-48.5" wide, and weigh 72-89 pounds (an average of 80.67 pounds). As FEMA envisions it, each of the thirty-three sections/panels would be lifted from storage positions on hooks on the inside of the flood wall, using top handles, moved into place in their mounting frames in the flood wall, and secured by pins and latch bolts that are slid into holes in the mounting frames. Wider gate openings (which would range up to 225" – or 18.75 feet – in width and which would average 8.05 feet in width) would require multiple sections/panels joined together (up to five sections/panels per opening, depending on opening width) and supported by hefty diagonal rods (sometimes multiple rods for an opening) which must be attached to the sections/panels and anchored to plates in adjacent concrete pavement.²

² From the photos accompanying FEMA's posthearing report, it appears that diagonal rods of some sort are also used to keep the sections/panels in place even when they are stored on their hooks. These rods could pose a safety hazard for the school children.

Not only do we find that the task of lifting and maneuvering sections/panels and assembling and anchoring floodgates to be daunting, particularly under the pressure of an oncoming hurricane, but MPSD submits that the school does not employ full-time maintenance workers to undertake such a task. Therefore, even putting aside a variety of safety and other issues raised by MPSD regarding FEMA's alternative wall proposal, in light of just these problems associated with floodgate assembly, we cannot agree with FEMA that a flood wall constructed ten feet from the edge of the building structure would be a viable solution.

Decision

For the reasons stated above, the panel finds that construction of a flood wall around the Magnolia Junior High School is not feasible. As a result, the proposed repair project is not feasible. Accordingly, FEMA is to fund the replacement cost of the school.

RICHARD C. WALTERS
Board Judge

JAMES L. STERN
Board Judge

JEROME M. DRUMMOND
Board Judge