



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 17, 2011

CBCA 1850-FEMA

In the Matter of MISSISSIPPI GULF COAST COMMUNITY COLLEGE

L. Dean Holleman of Boyce Holleman & Associates, Gulfport, MS, counsel for Applicant.

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

Jordan Fried, Linda Davis, and Sabrina McBride, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS; and Valerie Rhoads, Office of Federal Management Agency, Department of Homeland Security, Atlanta, GA, counsel for Federal Emergency Management Agency.

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

After the passage of Hurricane Katrina over the Mississippi Gulf Coast, the facilities of the Mississippi Gulf Coast Community College (MGCCC) suffered significant damage. This arbitration concerns a dispute between the Federal Emergency Management Agency (FEMA) on one side, and MGCCC and the Mississippi Emergency Management Agency (MEMA) on the other, as to the reimbursable cost of emergency repairs to those facilities. The arbitration panel concludes that the grant for emergency repairs should be increased by \$818,932.70 and that there was no waiver by FEMA officials for an earlier repayment.

Background

Before proceeding to the merits, we discuss some preliminary statutory and regulatory provisions applicable to this arbitration. 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 (2004). 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). Emergency work is work which must be done immediately to save lives and to protect improved property and public health and safety. *Id.* 206.201(b). 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. *Id.* 206.201(g). 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. *Id.* 206.202(d)(1). The arbitration panel is authorized to resolve disputes between an applicant or subgrantee and FEMA regarding disputed public assistance grants. 44 CFR 206.209 (2009). In resolving these disputes we apply a *de novo* standard of review.

The eye of Hurricane Katrina passed over the Mississippi Gulf Coast area, with 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.

MGCCC comprises three campuses and three urban centers, totaling 250 acres. The largest campus, Perkinston, is thirty-two miles from the Mississippi Gulf Coast. The campus includes forty-one buildings on 158 acres and includes eight residence halls, a bookstore, a student center, library, academic halls, softball and soccer fields, a gymnasium, a swimming pool building, and a football stadium. The Jefferson Davis campus, which is 1.2 miles from the coast, is forty acres in size and contains twenty-eight structures including a campus green

and buildings for business studies, fine arts, math and science, a theater, science annex, clock tower, nursing school, library, bookstore, student services, and a tennis court. The Jackson County Campus, which is two miles from the coast, consists of twenty-four structures on forty acres. The three urban centers are the West Harrison County Center, about two miles from the coast, twenty acres in size, with eight structures; the George County Center, forty miles from the coast, also twenty acres in size, with ten structures; and the MGCCC Applied Manufacturing and Technology Center, four miles from the coast, ten- twelve acres in size, with one structure of fourteen rooms.

Before Hurricane Katrina, the college enrolled 10,500 students. Immediately after the passage of Katrina, the student enrollment dropped to 5000, but as of May 2010, the college was approaching its pre-Katrina enrollment. The college grants the associate degree.

The passage of Hurricane Katrina made all the facilities unsafe and unusable, for both the students and the faculty. For example, on the Perkinston campus, roofs were ripped off Darby, Stewart, and Denison Halls, and off the gymnasium and the swimming pool building. The press box of the football stadium, several stories high, was blown to the ground. Roofing also came off of substantial parts of structures on the West Harrison County Center and the George County Campus.

Immediately after the passage of Katrina, MGCCC hired Crochet & Borel Services (C & B) to provide what it considered emergency recovery work to make the campus safe and usable. This included drying out of all structures, emergency demolition of damaged interior materials, de-humidification, and debris removal from interior and grounds. C & B performed the work from September 2 through 20, 2005. FEMA played no part in approving C & B's contract or in evaluating the work as it was performed. In fact, FEMA's first meeting with MGCCC was on September 20, 2005, after the work was complete.

For the arbitration proceedings, MGCCC retained the services of Professional Construction Analyst (PCA), and specifically its president, Mr. Albert Paxton. Mr. Paxton had been the insurance adjuster advising MGCCC's insurance companies as to the extent of the damage to MGCCC caused by Hurricane Katrina. He evaluated the scope of damage for emergency repairs and full repair of MGCCC facilities irrespective of policy limits. Mr. Paxton is a recognized expert on estimating damage and is the author of a standard work on the subject, the National Repair and Remodeling Estimator. Additionally, Mr. Paxton from 1980-1984 served as the director of field operations for the California Individual and Family Grant program, the California equivalent of MEMA.

Mr. Paxton started his work on October 3, 2005, and spent 459 hours on the project, with his team spending 1957 hours on the project. The arbitration panel found Mr. Paxton

to be a credible witness. C & B performed extensive accelerated emergency work on MGCCC's spread out facilities. For example, as estimated by Mr. Paxton, C & B removed 150,079 square feet of suspended ceiling tile, 40,930 square feet of drywall, 174,633 square feet of carpet, 19,571 square feet of cove base molding, and 437,880 square feet of roofing from MGCCC structures.

C & B invoiced MGCCC \$8,072,120.99 for the emergency work. The college considered that amount excessive, and litigation ensued between C & B and MGCCC. FEMA was not involved in that litigation. MGCCC retained Mr. Paxton and his firm to assist in the litigation and subsequent mediation of the dispute. PCA analyzed the reasonable cost of the emergency work and estimated that cost to be \$4,801,930.96. After mediation, MGCCC paid C & B \$4,868,355.28 as full payment of the invoice. Insurance reimbursed \$3,152,089.36, resulting in a difference of \$1,716,265.92. FEMA reimbursed MGCCC \$877,058.93 for the emergency work, leaving a balance absorbed by MGCCC of \$839,206.99. In its arbitration request of January 4, 2010, MGCCC sought that additional amount from FEMA as eligible emergency work performed by C & B.

FEMA determined that, after deducting allocated amounts for insurance, the eligible work in the PWs was \$406,346.01, but of that amount only \$106,738.38 could be attributed to C & B invoices. That determination was reflected in eighty-one PWs prepared by project assistance coordinator (PAC) Ms. Jeannette Barquist. Earlier, another PAC, Mr. David Verploegen, had determined that the eligible work after insurance was about \$1.2 million, but FEMA rejected that figure because it considered him an inexperienced PAC.

FEMA granted MGCCC \$2,143,200.19 for permanent (category E) repairs to MGCCC facilities, after MGCCC had received an insurance payment of approximately \$11,000,000.

The arbitration dispute centered on the differing backward look estimates of scope and reasonable cost of emergency work performed by C & B. The estimates were prepared by PAC Barquist of FEMA and Mr. Paxton of PCA. Ms. Barquist conducted a should cost analysis of C & B's invoices, relying on FEMA's database and her long experience as a PAC, but failed to examine earlier back up documentation contained within that database compiled by Mr. Verploegen. This failure makes Ms. Barquist's analysis suspect.

Mr. Paxton's analysis confirmed his original estimate of \$4,801,930.96 as the reasonable cost for C & B's services. Although Mr. Paxton's analysis was carefully done, it also contains a fatal flaw. Mr. Paxton's analysis does not distinguish between C & B work that FEMA categorizes as permanent repair work, i.e., the tear-out of wet interior drywall, flooring, and cove base molding, and work that FEMA categorizes as emergency work.

Consequently, it cannot be determined whether authorizing a grant based upon Mr. Paxton's estimate would in effect allow a duplicate payment for work covered by the permanent repair grant of \$2,143,200.19 or the insurance payment of \$11,000,000.

The Board conducted an arbitration hearing which ended on May 12, 2010, and the arbitration panel suspended proceedings to allow the parties to exchange information and conduct settlement negotiations. The parties exchanged information contained in ten additional invoices presented by MGCCC and concluded that an additional grant of \$816,554.51, later increased by FEMA to \$818,932.70, was warranted for eligible emergency work that had not been covered by FEMA's previous grant for the emergency work at MGCCC's facilities. This amount was based upon FEMA's analysis of work as submitted to the arbitration panel on November 30, 2010, and as explained below.

FEMA accepted PCA's scope of work, adjusted labor rates to accurately reflect the type of work performed by C & B, disallowed charges such as fuel line service charges that were considered contractor overhead, and applied a profit and overhead rate of 20% to the new subtotals allowed by FEMA. The 20% rate was used both by C & B in its invoices and by PCA in its analysis. FEMA also made upward adjustments for work that previous PW writers had ascribed to permanent repair (category E) work, but that had not been reflected in category E PWs and downward adjustments in ten PWs for alleged mold remediation work in buildings that were not supported by invoices.

The parties conducted settlement negotiations from about May 12 through August 30, 2010. The parties were prepared to settle for the \$818,932.70 figure in FEMA's new analysis, but an issue arose concerning a recent demand by MEMA for MGCCC's refund of a portion of the \$877,058.93 that had already been paid. On April 9, October 28, and on November 19, 2009, FEMA de-obligated a total of \$459,158.51 from MEMA's account because insurance proceeds covered eligible costs. These de-obligations were required by statute and regulations. 42 U.S.C. § 5155; 44 CFR 206.250(c), .253(a). As FEMA notes, these de-obligations were not appealed and were not part of the arbitration. In fact, the deductions only surfaced at the settlement discussions in the summer of 2010, when MEMA advised MGCCC that MEMA's accounting showed an overpayment to MGCCC of \$459,158.51. MEMA's demand for repayment from MGCCC to reconcile FEMA's de-obligations from MEMA's grant account caused the settlement to fail.

By teleconference of October 20, 2010, the arbitration panel asked that FEMA submit additional materials by November 30, with MEMA's and MGCCC's responses due on December 30. MGCCC requested an extension of time to respond until January 15, 2011. The arbitration panel closed the record effective February 9, 2011.

Discussion

The arbitration panel concludes that FEMA conducted a careful analysis based on the additional information provided after the arbitration hearing. Furthermore, all parties accepted FEMA's figure of \$818,932.70 as the accurate and reasonable additional cost of the emergency work performed by C & B. Consequently, the arbitration panel accepts the increased figure of \$818,932.70 and directs FEMA to adjust its eighty-one PWs accordingly.

MEMA and MGCCC argue that FEMA waived repayment of the \$459,158.51 when FEMA attorneys during the arbitration represented that they would not seek repayment of \$877,058.93 that FEMA had already paid. Of course a waiver must be knowing and intentional. The statements of FEMA's attorneys concerning repayment of the \$877,058.93 figure were prospective, i.e., forward looking. There is no evidence that when FEMA attorneys made the statements, they knew that FEMA had de-obligated funds months before from MEMA's grant account or knew that the deductions had not been yet been reconciled between MEMA and MGCCC accounts. Even if there had been a waiver, it would have been ineffective, since federal officials may not authorize payments prohibited by statute and regulation. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

Decision

The arbitration panel determines that the additional cost of eligible work for emergency repair to MGCCC facilities is \$818,932.70. FEMA shall adjust the applicable PWs accordingly.

ANTHONY S. BORWICK
Board Judge

CANDIDA S. STEEL
Board Judge

RICHARD C. WALTERS
Board Judge