UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 29, 2012

CBCA 1741-FEMA, 2874-FEMA

In the Matter of STATE OF LOUISIANA, FACILITY PLANNING AND CONTROL

Richard F. Zimmerman, Jr., Randal J. Robert, and Julie M. McCall of Kantrow, Spaht, Weaver & Blitzer, PLC, Baton Rouge, LA; and P. Raymond Lamonica of Louisiana State University System, Baton Rouge, LA, counsel for Applicant.

Mark S. Riley, Deputy Director, and Mark DeBosier, State Coordinating Officer, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Kristen Shedd, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and George Cotton, Louisiana Recovery Office, Federal Emergency Management Agency, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **VERGILIO**, and **KULLBERG**.

Charity Hospital in New Orleans, Louisiana, was severely damaged by Hurricanes Katrina and Rita, which struck the Gulf Coast in August and September 2005, and the flooding which ensued. In October 2009, the State of Louisiana, Facility Planning and Control (FP&C), asked that an arbitration panel direct the Federal Emergency Management Agency (FEMA) to award as a public assistance grant $491,884,000 for replacement of the hospital, rather than the $126,142,709 which FEMA has estimated to be the cost to repair the facility's disaster-related damage. The request was docketed as CBCA 1741-FEMA.

The parties and the panel focused their attention on the facts relevant to the test established by FEMA at section 206.226(f) of title 44 of the Code of Federal Regulations,

which delineates when a public assistance grant should be made for repairs to a facility and when such a grant should be made for replacement. The panel issued its decision on January 27, 2010. *State of Louisiana, Facility Planning & Control*, CBCA 1741-FEMA, 10-1 BCA ¶ 34,441. We found that the cost of replacement would exceed fifty percent of the cost of repair, so the applicant was entitled to the cost of replacement.

Each side advanced an estimate of the cost of replacing the building. Each estimate included what the party proposing it deemed "fixed equipment." FEMA's definition of "fixed equipment" was narrower than FP&C's; it included only equipment that was structurally integrated into the facility's design. FP&C's broader definition included all equipment that was attached to the building; if one were to turn the building upside down, FP&C said, anything that did not fall would be considered fixed equipment.

The panel addressed replacement cost solely in the following paragraph:

> Very little attention was paid during the hearing to the estimates of the cost of replacing the hospital. This was appropriate, since the estimates submitted by FP&C ($491,884,000) and FEMA ($474,750,898) were within three percent of each other. (Both of these figures were calculated in accordance with FEMA's cost estimating format; the parties disagreed as to base costs – part A – and mark-ups – parts B through H – but their final figures are very close.) One element of disagreement between the parties relates to medical equipment. FP&C has not satisfactorily demonstrated either what medical equipment was both affixed to the building and damaged by the disaster, or the repair and replacement costs of that equipment. Regarding the overall building replacement cost, we are not persuaded that FEMA's estimate is flawed. We therefore determine that FEMA's estimate is the best approximation available of the cost of replacing Charity Hospital with a new facility. We note that FEMA and the tenant of the hospital, Louisiana State University,[1] are discussing another project worksheet which covers items of medical equipment owned by the tenant. Our conclusion as to the cost of replacing the hospital should have no bearing on those discussions.

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[1] We have learned from the parties that our characterizations of Louisiana State University as the tenant of the hospital and of FP&C as the owner are not correct. Actually, the Board of Supervisors of Louisiana State University Agricultural and Mechanical College is the owner of both the building and what FP&C has labeled the fixed equipment in the building. Under an order of the governor of Louisiana dated January 19, 2006, FP&C is the applicant for public assistance grants on behalf of that board.

Subsequent to our decision, FEMA issued a project worksheet obligating the amount of money directed by the panel.

The project worksheet stated, "The grant is not inclusive of all equipment for the hospital. FEMA will address disaster-damaged equipment in Charity in a separate PW [project worksheet]." This statement was consistent with comments made by counsel for FEMA in CBCA 1741-FEMA. In writing, counsel said that a separate worksheet was being prepared for "other fixed institutional equipment that is attached, but not structurally integrated into the building," which FEMA believed to be appropriately classified as "contents" in the context of 44 CFR 206.226(h) (a regulation which we address below). Orally at our hearing, counsel said that this other worksheet covered "virtually most of this same equipment that is included in [FP&C's] estimate" of fixed equipment.

In March 2010, FP&C asked FEMA to make a grant in the amount of $95,050,380 to cover the cost of "fixed equipment not included in the building damages of Charity Hospital Main Building." Over the next two years, FP&C and FEMA worked together on a new project worksheet. As of March 2012, FP&C believed that the cost of this equipment (including mark-ups, as contemplated in FEMA's cost estimating format) was $62,123,575 and FEMA believed that the cost was $49,306,099.94.

In May 2012, however, FEMA denied FP&C's request in full, on the ground that "the decision of the CBCA is final and establishes the total award for the replacement of Charity Hospital, including fixed equipment. FP&C then asked for arbitration of the matter. This new case has been docketed as CBCA 2874-FEMA.

At the same time, FP&C also filed a "Motion for Clarification of the January 27, 2010 Arbitration Decision and Request for Supplemental Relief." In the motion, FP&C –

> respectfully ask[s] the arbitration panel to endorse by supplemental declaratory relief its January 27, 2010, decision to make it clear that fixed medical equipment was not included (except for limited items identified in FEMA's $474 million replacement value calculation) and that FP&C is not foreclosed from seeking to recover for medical equipment by the subject arbitration decision and said medical equipment should be handled in a separate project worksheet as directed by the arbitration panel in the subject arbitration decision.

FEMA has moved the panel to dismiss both the new request for arbitration and the motion for clarification. According to FEMA –

> There is only one question that needs to be answered in order to decide FP&C's requests in this case: was the valuation of fixed equipment in Charity Hospital at issue in CBCA-1741? As described below, the answer is "yes," and FP&C's attempt to reopen this case is contrary to law and must be dismissed.

With specific reference to the motion for clarification, FEMA maintains that the panel's earlier decision is final and cannot be changed. The agency points to 44 CFR 206.209(k)(3), "Finality of decision," which provides, "A decision of the majority of the panel shall constitute a final decision, binding on all parties. Final decisions are not subject to further administrative review. Final decisions are not subject to judicial review, except as permitted by 9 U.S.C. 10." The agency also calls to our attention 9 U.S.C. § 12, which states, with regard to arbitration decisions, "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award if filed or delivered."

We agree with FEMA that a motion for clarification of our January 2010 arbitration decision is inappropriate and untimely. We dismiss that motion.

To resolve the agency's motion to dismiss the new request for arbitration, however, further comment on the earlier decision is necessary. FEMA's understanding of that decision is fundamentally flawed. Although FP&C – like FEMA – did include equipment it believed to be "fixed" in its estimate of the replacement value of Charity Hospital, that fact is (as FP&C maintains) irrelevant to the question of whether the panel may hear the current request.

Under FEMA's regulations for public assistance grants, eligible applicants may receive grants not only to cover restoration of damaged buildings, but also to cover "equipment and furnishings [which] are damaged beyond repair." 44 CFR 206.226(h). When the panel directed payment for the replacement value of the hospital, it did not expressly decide which party's definition of "fixed equipment" was correct. In accepting FEMA's determination of the value, however, the panel made an award which implicitly encompassed within the "facility" only the agency's relatively limited definition of fixed equipment. All equipment which was encompassed within FP&C's definition, but not FEMA's, was effectively considered "equipment and furnishings" which could be addressed under a separate project worksheet.

Indeed, that is how FEMA comprehended our 2010 decision, in written and oral comments during proceedings in CBCA 1741-FEMA, in revising the project worksheet for the building, and in discussions with FP&C over a period of two years.

FEMA notes that FP&C in 2010 placed a replacement value on the building – including all "fixed equipment" per FP&C's definition – at $491,884,000, but now seeks much more than that for the building plus what it calls "fixed equipment." Specifically, FP&C seeks $62,123,575 in addition to the $474,750,998 it has already received, or a total of $536,874,473 for those items. This figure, as FEMA observes, is $44,990,473 more than FP&C originally requested. Whether $62,123,575 is the appropriate valuation for the equipment that was encompassed within FP&C's definition of "fixed," but not FEMA's, is a question which calls into issue the validity of FP&C's original estimate. The fact that the numbers raise concerns, however, is not cause for dismissing the arbitration request. It is instead a matter for analysis by the panel as the case proceeds. Ultimately, the applicant must demonstrate that specific equipment belongs in the project worksheet and that the equipment is properly valued.

Decision

We grant FEMA's motion to dismiss as to the motion for clarification of our decision in CBCA 1741-FEMA. We deny the agency's motion to dismiss the new request for arbitration which has been docketed as CBCA 2874-FEMA.

FEMA has requested that if we deny the motion to dismiss CBCA 2874-FEMA, we allow the agency fifteen days to submit comments on the merits of that case. We grant that request. Accordingly, FEMA's comments on the merits of CBCA 2874-FEMA would be due on or before Thursday, September 13, 2012. We recognize that this decision is being issued while a new hurricane is battering the Gulf Coast, however, and that FEMA personnel are being called on to address problems arising from the storm, which are of much greater

immediate concern than is a response to the arbitration request. We will consequently look favorably on any reasonable request for an enlargement of the period of time in which the agency must provide its comments.

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STEPHEN M. DANIELS
Board Judge

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JOSEPH A. VERGILIO
Board Judge

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HAROLD C. "CHUCK" KULLBERG
Board Judge