



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 31, 2012

CBCA 2546-FEMA

In the Matter of THE UNIVERSITY OF SOUTHERN MISSISSIPPI

E. Truett Roberts and Jon Mark Weathers, Office of University Counsel, The University of Southern Mississippi, Hattiesburg, MS, counsel for Applicant.

Thomas Mike Womack, Executive Director, Mississippi Emergency Management Agency, Pearl, MS; and Allison Killibrew, Senior Counsel, Mississippi Recovery Office (MSRO), Biloxi, MS, appearing for Grantee.

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 **STERN**, **POLLACK**, and **KULLBERG**.

The University of Southern Mississippi ("USM" or "applicant") files this request for arbitration under the authority of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (2009), and regulation, 44 CFR 206.209 (2010). The parties have elected to dispense with an oral hearing and submit this case to the panel on the written record.

In January 2005, USM leased 22,000 square feet of space in a facility known as the Old Garden Park Hospital Building to house applicant's school of nursing. The owner and lessor of the building was the University of Mississippi Research Foundation. Occupancy was to begin in September 2005. The lease was to terminate on June 30, 2010. The lease specifically stated, "The University or the Foundation may cancel this agreement in writing with a six-month notice at any time."

On August 29, 2005, Hurricane Katrina struck the area and caused extensive damage to the applicant's campus. FEMA agreed to fund the temporary relocation of administrative offices and facilities into the leased hospital building. As a result of the storm, insurance, utility, and maintenance costs increased. In the early months, the lessor absorbed the costs. During April 2007, applicant agreed to pay the lessor additional rent for the leased space, effective July 2007. Applicant agreed to a rent increase to \$16 a square foot from the \$10 set forth in the original lease.

FEMA prepared a project worksheet (PW) in connection with the lease that is the subject of this arbitration. In PW 7823, version 4, FEMA did not recognize the \$6 per square foot increase in rent agreed to by applicant and the lessor on July 1, 2007.

On April 13, 2010, applicant and the lessor executed an additional lease covering the period from July 1, 2010, to June 30, 2012, at a rate of \$16 per square foot for the space. PW P7823 did not address this lease. FEMA allocated \$821,666.67 to this PW, representing the amount that FEMA calculates, at \$10 per square foot, is due USM for the period from November 1, 2006, to August 31, 2011. Applicant seeks \$1,246,666.67.

Applicant asks this panel to find that it is entitled to be paid \$16 per square foot for the leased space, under both leases.

FEMA's Motion to Dismiss

FEMA moves to dismiss that portion of USM's request for arbitration related to the April 13, 2010, lease. FEMA argues that it has not reviewed this lease under PW 7823 and thus has made no determination with regard to the second lease. FEMA submits that applicant has not complied with the regulatory requirement that FEMA first review the claim before it can be submitted to arbitration before this Board.

Applicant argues that FEMA received the April 13, 2010, lease and the failure to include it in the PW is a determination by FEMA not to recognize it. USM argues that it is entitled to be paid the \$16 per square foot amount that it has agreed to in this new lease.

Pursuant to the regulations, an applicant may request arbitration before this Board of a determination made by FEMA on an application for public assistance. 44 CFR 206.209(b).

We find the evidence insufficient that the April 13, 2010, lease was presented to FEMA for consideration or that FEMA actually made a determination regarding this lease. Since there has been no FEMA determination regarding the April 13, 2010, lease, it is not

properly before this panel for arbitration. The request for arbitration of any issue regarding this lease is dismissed, without prejudice.

Discussion of PW 7823 Regarding Additional Lease Costs

FEMA argues that it should not be obligated to pay any lease costs above \$10 per square foot, the amount set forth in the original lease executed in 2005. FEMA submits that applicant was not legally responsible to pay any amounts in excess of \$10 per square foot and that FEMA is therefore not obligated to pay the additional amounts claimed by USM.

Applicant argues that the parties to the lease had the right, under the terms of the lease, to terminate the lease, upon six-months notice. USM argues that the lessor could have canceled the lease if applicant had not agreed to the increase in rent. Given the nature of the disaster and the increased costs that the lessor absorbed, USM claims that the cancellation would have been justified. Thus, USM concludes, the change it voluntarily agreed to in rental costs was justified.

Under the facts in this case, we agree with FEMA. Applicant had a binding lease obligating it to pay \$10 per square foot for the rental property. Though the lessor had an apparent legal right to terminate the lease under certain circumstances (that may or may not have been present here), the fact remains that this right was not invoked. There was no legal requirement that the lease had to be renegotiated. We recognize that there may be situations where an applicant could be obligated to make additional payments due to a change of circumstances, even though it had what appeared to be a legally binding lease. But here, applicant has made no showing that termination of the lease by the lessor was imminent or that it could not have enforced the \$10 rate through the remainder of the lease. Applicant had no legal obligation to pay an amount in excess of \$10 per square foot. We find that when it agreed to pay more, it did so as a volunteer. FEMA is not obligated to reimburse USM for such payments. As a result of our determination, we need not decide the reasonableness of the increased rental payments that applicant agreed to make.

Decision

The panel dismisses that part of USM's claim pertaining to the April 13, 2010 lease. The panel finds that applicant is not entitled to recover the additional lease costs it seeks through the period covered by the lease that terminated on June 30, 2010.

JAMES A. STERN
Board Judge

HOWARD A. POLLACK
Board Judge

H. CHUCK KULLBERG
Board Judge