



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 22, 2013

CBCA 2887-FEMA

In the Matter of ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

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Before the Arbitration Panel consisting of Board Judges **BORWICK**, **HYATT**, and **GOODMAN**.

The applicant, St. Bernard Port, Harbor & Terminal District (Port), seeks compensation for the cost of construction materials present on the Port's property that were destroyed by Hurricane Katrina. The materials had been placed on the property by a contractor, Bailey Enterprises, Incorporated (Bailey), that the Port's tenant, Rapid-Mat, had hired to construct a pre-engineered metal building. In the storm's aftermath, the materials were discarded as debris. Five years later, the Port filed a request with the Federal Emergency Management Agency (FEMA) seeking reimbursement for the materials in the amount of \$767,309.45. FEMA determined that the Port is ineligible for reimbursement for the costs of the materials because the Port was not legally responsible for the materials at the time of the disaster. The Port subsequently filed a request for arbitration with the Board concerning FEMA's denial of its claim.

This matter is before the arbitration panel convened under section 601 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), to determine the appropriate amount, if any, of a grant award.

For the reasons below, we sustain FEMA's determination that the Port is not eligible for reimbursement.

Background

The Port is a public corporation and political subdivision of the State of Louisiana that possesses jurisdiction to regulate all domestic, coastwise, and intercoastal commerce within the District. La. Rev. Stat. Ann. § 34:1701 (2012). The District includes all lands, waterways, rivers, lakes, and navigable bodies comprising and lying within the limits and boundaries of St. Bernard Parish. *Id.*

On May 16, 2002, the Port executed a lease agreement with Rapid-Mat for 80,000 square feet of space located in Pot Line 9, Chalmette Industrial Park, Chalmette, Louisiana, to be used for the manufacturing of fiberglass mats. Section 19 of the lease provided in pertinent part as follows:

Lessee shall not make any modifications, additions to or improvement to the Premises without the prior written consent of Lessor. All such additions, modifications, and improvements made by Lessee, its agents and employees and contractors shall become the property of Lessor unless otherwise agreed to by the parties in writing or otherwise specified in Section 21.

After executing the lease agreement with the Port, Rapid-Mat contracted with Bailey to construct a pre-engineered metal building on the foundation and floor slab work in place on site 9B of the leased property. The floor slab work in place on site 9B contained three concrete slabs approximately 520 feet long with water trenches between them.

Prior to Katrina, Bailey stored on site the materials needed to erect and enclose the superstructure, but Bailey never began the construction project. On August 29, 2005, Hurricane Katrina made landfall near New Orleans. The hurricane caused catastrophic damage, including widespread flooding throughout St. Bernard Parish. The flood damaged, deformed, and scattered the building materials that Bailey had stored. Afterwards, the damaged materials were removed from the site as storm debris.

In response to Hurricane Katrina, President Bush declared that a major disaster existed in the State of Louisiana and initiated the federal government's involvement in the hurricane

recovery effort. *See* Notice of Major Disaster Declaration for State of Louisiana, 70 Fed. Reg. 53,803-04 (Sept. 12, 2005). During its survey of the affected areas to investigate and document the extent of the storm's devastation, FEMA inspected the Port's property. Although the Port's property suffered extensive damage elsewhere, the Port did not sustain damage in three sites. FEMA issued project worksheet (PW) 2681, version 0 (PW 2681-0), and stated that the Port is not requesting FEMA assistance for the three sites, including site 9B, that had not suffered extensive damage. FEMA issued PW 2681-0 to document the state of the three properties so the applicant would not make repair claims at a later date.

On September 10, 2010, nearly five years after Katrina, the Port requested reimbursement from FEMA in the amount of \$767,309.45 for the cost to replace the materials that Bailey had stored at site 9B. The Port's claim did not request reimbursement for any damage to the concrete slabs; it sought compensation only for the cost of the materials Bailey had stored on-site. Although FEMA requested copies of the construction contract between Rapid-Mat and Bailey, the Port did not make that contract available to FEMA. FEMA subsequently determined that the Port was ineligible to receive reimbursement because, in FEMA's view, the Port was not legally responsible for the materials. The Port's request for arbitration followed.¹

Despite repeated requests by the arbitration panel, the Port did not provide the arbitration panel copies of the construction contract between Rapid-Mat and Bailey. The Port's \$767,309.45 estimate of the value of the construction materials is based upon a separate proposal of November 17, 2010, from Echo Ventures to a firm named BKI to furnish a pre-engineered metal building. The Port says in its submission that the proposal is identical to the quote provided for the construction materials before Hurricane Katrina, but Echo's quote is to furnish the building, not to provide materials for the building. Additionally, Echo's quote varies substantially from its quote of November 10, 2010, for \$1,051,330.80. The Port was unable to provide FEMA or the arbitration panel an inventory of the materials that were on-site before Hurricane Katrina or an estimated value of those materials.

FEMA denied funding of the PW for seven reasons:

1. The Port failed to provide evidence that it had legal responsibility for the materials, as required by section 406(e)(4) of the Stafford Act and 44 CFR 206.223(a), and FEMA policy.

¹ The Port's tenant, Rapid-Mat, filed for bankruptcy shortly after Hurricane Katrina.

2. Under Louisiana Civil Code articles 472 and 2695, building materials are movable items that remained the property of Rapid-Mat--the construction contractor--not the Port.
3. Article 2758 of the Louisiana Civil Code provides that a contractor possesses the responsibility for damage or destruction of materials to be incorporated into a work prior to delivery to the owner.
4. Louisiana Civil Code articles 2691 and 2692, relied upon by the Port for its eligibility for a Stafford Act grant in this matter, only apply to repairs of an existing leased facility, not replacement of materials that were to be used in a facility that had yet to be built.
5. The lease between the Port and Rapid-Mat placed legal responsibility for the materials stored on-site with Rapid-Mat, not the Port.
6. The Port had no legal responsibility for the pre-construction materials under its lease with Rapid-Mat.
7. FEMA treated the Port consistently with other similarly-situated applicants.

Discussion

The Stafford Act, 42 U.S.C. §§ 5121-5207 (2006), and the regulations promulgated by FEMA provide for federal relief to victims of natural disasters. Section 406(e)(4) of the Stafford Act provides:

In any case in which the facility being repaired, restored, reconstructed, or replaced under this section was under construction on the date of the major disaster, the cost of repairing, restoring, reconstructing, or replacing the facility shall include, for the purposes of this section, only those costs that, under the contract for the construction, are the owner's responsibility and not the contractor's responsibility.

42 U.S.C. § 5172(e)(4).

Under FEMA regulations implementing the Stafford Act, in order to be eligible for public assistance, an item of work must: (1) be required as the result of the major disaster event, (2) be located within a designated disaster area, and (3) be the legal responsibility of an eligible applicant. 44 CFR 206.223.

FEMA policy supplementing the regulation is contained in the agency's Public Assistance Guide, FEMA 322. The policy provides in pertinent part:

Typically, a facility under construction is the responsibility of the contractor until the owner has accepted the work as complete. Because a contractor is not an eligible applicant, the portion of the facility under the contractor's responsibility is not eligible for public assistance. In the event of damage to a facility under construction, FEMA must determine if the applicant is responsible for repairs before granting assistance. Repairs are eligible if the contract under which the work is being performed places responsibility for damage on the applicant during the construction period. Repairs are also eligible if, prior to the disaster, the applicant had accepted the work and had, therefore, assumed responsibility. If the applicant had accepted responsibility for a portion of the site, repairs to only that portion of the site would be eligible.

The guidance also provides that repairs are not eligible if the work is the responsibility of the contractor at the time of the disaster.

The Port, relying upon section 19 of its lease with Rapid-Mat, argues that it owned the construction materials, and thus qualified under 42 U.S.C. § 5172(e)(4) and 44 CFR 206.223 for a disaster grant. The arbitration panel disagrees. Section 19 of the lease placed ownership in the Port for additions, modifications, and improvements to the leased premises. Loose construction materials lying next to or on concrete slabs simply do not qualify as additions, modifications, or improvements to the premises.

The Port argues that Louisiana law supports its position. In reality, Louisiana law supports FEMA's position. The Louisiana Civil Code provides that "[m]aterials gathered for the erection of a new building or other construction . . . are movables until their incorporation into the new building or after construction." La. Civ. Code Ann. art. 471 (2012). Since the loose construction materials were movables, they do not constitute additions, modifications, or improvements to the existing concrete slab premises.

Other provisions of Louisiana law support FEMA's position as well. The Louisiana Civil Code provides:

When the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified to do so.

La. Civ. Code Ann. art. 2758. Under that article, in the absence of the agreement of the parties, the risk of loss in a construction contract is on the contractor. *S & W Investment Co. v. Sharp*, 124 La. 158 (1965). The contractor, or undertaker, here is Bailey.

Furthermore, since we do not have the construction contract between Rapid-Mat and Bailey, we do not know if the materials had been delivered to Rapid-Mat under that contract, or if they were still in Bailey's possession. The terms and conditions of the contract control passage of title of materials, but the jurisprudential rule is that absent a contrary contract provision, contractors are considered the purchasers and ultimate consumers of construction materials. *Regional Mechanical Contractors, Inc. v. McNamara*, 536 So. 2d 818 (La. Ct. App. 1988) (discussing who bears the burden of Louisiana's use tax). Since the risk of loss appears to be on Bailey, it appears to be the legally responsible party, not Rapid-Mat, or for that matter, the applicant.

Additionally, as FEMA noted in its oral argument of December 11, 2012, there is no evidence that the applicant suffered damage to its existing facilities or any monetary loss arising from the destruction of the loose construction materials at site 9B.

The applicant relies upon Louisiana Civil Code articles 2691² and 2692³ in support of its grant eligibility. The applicant's reliance on those articles is misplaced. Those articles speak to repair of damage to existing leased premises, not, as in this case, to construction of a new building on those premises.

Finally, even if the applicant met the legal tests for eligibility, its estimate of the value of the construction materials has no basis in reality. The applicant does not know what materials were placed on-site prior to Katrina or their value. The applicant's use of a proposal to build a structure on the concrete pads from another contractor five years after the event is no substitute for actual knowledge of the identity, amount, and value of the destroyed construction materials. Furthermore, given the discrepancies between Echo's proposal of November 10, and its later proposal of November 17, those proposals are unreliable and

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That article provides: "During the lease, the lessor is bound to make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the lessee is responsible."

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That article provides: "The lessee is bound to repair damage to the thing caused by his fault or that of persons who, with his consent, are on the premises or use the thing, and to repair any deterioration resulting from his or their use to the extent it exceeds the normal or agreed use of the thing."

suspect. FEMA would have been correct in rejecting the PW on the sole ground that the applicant did not prove the cost of materials.

Decision

The arbitration panel determines that FEMA was correct in denying reimbursement for the destroyed construction materials.

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge