



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 23, 2013

CBCA 2918-FEMA

In the Matter of STATE OF LOUISIANA, DEPARTMENT OF NATURAL
RESOURCES, OFFICE OF COASTAL RESTORATION AND MANAGEMENT

Randal J. Robert of Kantrow, Spaht, Weaver & Blitzer, Baton Rouge, LA, counsel for
Applicant.

Mark DeBosier, State Coordinating Officer, Carla Richard, Appeals Manager for
Disaster Recovery, and William J. Patrigo, Appeals Specialist, Governor's Office of
Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency,
Department of Homeland Security, Baton Rouge, LA; and Michelle Buckalew, 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 **SOMERS**, **VERGILIO**, and
GOODMAN.

Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42
U.S.C. §§ 5121-5207 (2006), when the President declares that a natural disaster exists, the
Federal Emergency Management Agency (FEMA) may provide various types of assistance
in the affected area. Among these varieties of help are public assistance grants to states, local
governments, and certain non-profit organizations for the repair, restoration, and replacement
of damaged facilities. *Id.* § 5172; 44 CFR 206.200 *et seq.*

The applicant, the State of Louisiana, Department of Natural Resources, Office of
Coastal Restoration and Management (applicant), has asked the Civilian Board of Contract
Appeals to arbitrate a dispute with FEMA. The case is before us under authority of section

601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations.

The applicant has filed a request for arbitration which seeks approximately \$3.6 million to dredge the bottom of Bayous Yscloskey and La Loutre (the bayous) in St. Bernard Parish, Louisiana. The request for arbitration requests debris removal and states that:

the debris in question involves large amounts of sediment, mud, pilings, lumber, framing, plumbing pipes, sunken skiffs and other materials deposited on the water bottoms of [the bayous] by storm surges and wind during Hurricane Katrina. This debris has reduced the depth of the waterways causing significant navigational safety hazards and property damage to vessels that regularly navigate the two bayous for commercial and recreational purposes.

The applicant asserted that the request for debris removal is pursuant to 44 CFR 206.223 and eligible for funding pursuant to 44 CFR 206.224.

FEMA has asserted that the work which applicant requests is not eligible for funding, as it is not required as a result of a national emergency or disaster. An arbitration hearing was held on May 7-8, 2012.

Background

The applicant's mission is to preserve and enhance the nonrenewable natural resources of the state, consisting of land, water, oil, gas, and other minerals, through conservation, regulation, management, and development to ensure that the state of Louisiana realizes appropriate economic benefit from its asset base. The bayous are federally navigable waters.

On August 29, 2005, Hurricane Katrina struck the Gulf Coast states of Alabama, Mississippi, Louisiana, and Texas. On August 29, 2005, the President declared a major disaster for the Gulf Coast states, including Louisiana. The declaration authorized all categories of public assistance for state and local government entities and eligible private non-profit organizations.

On October 11, 2005, FEMA issued a mission assignment for the United States Coast Guard (USCG) to remove disaster-related debris from navigable waterways, including the bayous. On September 15, 2006, and September 26, 2007, FEMA executed intra-agency agreements with the USCG, which provided for the USCG to remove eligible storm-

generated marine debris from Louisiana's navigable waterways, inland shores, bayous, and lakes.

The removal operation relied upon information from an official from St. Bernard Parish who represented to the USCG that the average draft of a boat traversing the bayous was four feet. The USCG removed 13,496 cubic yards of debris from Bayou Yscloskey from September 19 to October 6, 2006, and 1,728 cubic yards of debris from Bayou La Loutre from October 6, 2006, to May 15, 2007. The USCG person in charge of the removal operation testified that all debris on the banks and surface of the bayous, as well as debris underwater but not imbedded under the sediment, was removed. Debris which was imbedded in the bottom of the bayous and protruding above the bottom was removed also. There was no attempt to dredge the bottom of the bayous to increase their depths or remove debris that might be completely imbedded in the bottom. However, the USCG was not constrained by the alleged four-foot draft to remove only materials six feet below the surface, the draft plus an additional clearance of two feet. The USCG confirmed by sonar that the bayous had been cleared of debris.

When the USCG completed its work, a memorandum of agreement was signed by representatives of the USCG, FEMA, and St. Bernard Parish. The agreement states:

Under the authority of [FEMA] the U.S. Coast Guard was authorized by FEMA to provide assistance with the clearance of storm generated debris from commercial waterways in St. Bernard Parish.

Work began on October 28, 2005 and has resulted in the collection of debris from 142.5 miles of waterways. Debris pickup is now greatly reduced and is at a rate of collection where the Parish resources can likely manage any further collection.

This memorandum documents completion of the FEMA debris removal mission in St. Bernard Parish as of August 18, 2007.

On September 8, 2008, Hurricane Gustav caused severe flooding throughout southern Louisiana, resulting in a disaster declaration event. St. Bernard Parish's Coastal Zone Administrator contends additional debris was deposited into the bayous at issue during Hurricane Gustav. On October 20, 2009, FEMA prepared project worksheet (PW) 5247 at a total estimated cost of \$71,400 for St. Bernard Parish, not the applicant, to remove hazardous debris from waterways due to Hurricane Gustav. The scope of work for this PW included some Hurricane Gustav debris removal for Bayou La Loutre but did not include debris removal for Bayou Yscloskey. This work has not been accomplished to date.

In May 2011, St. Bernard Parish awarded a contract for emergency work to dredge approximately one-fourth of a mile of Bayou La Loutre, as the result of receiving complaints of extensive mud and debris which was causing navigational hazards. These complaints commenced after Hurricane Katrina and increased after Hurricane Gustav. When this dredging was accomplished, various debris was found in the sediment that was removed.

On September 15, 2011, more than six years after Hurricane Katrina and three years after Hurricane Gustav, the applicant formally requested a new PW to determine the scope of work and estimated costs to identify, remove, and dispose of debris in Bayous Yscloskey and La Loutre as the result of Hurricane Katrina. No determination was provided by applicant as to what debris was actually the result of Hurricane Katrina or other subsequent storm events such as Hurricane Gustav. As part of its request, the applicant included Army Corps of Engineers hydrographic surveys conducted in 2001 and 2010 which reflect channel elevation changes for Bayous Yscloskey and La Loutre.

On January 24, 2012, FEMA prepared PW 20189 which provided zero funding for the applicant's request to remove 128,889 cubic yards (CY) of debris from Bayou La Loutre and 36,667 CY of debris from Bayou Yscloskey at an estimated total cost of \$1,360,006 for Hurricane Katrina. The request was determined ineligible for public assistance funding because all debris that was an immediate threat to life, public health, and safety had been previously removed by the USCG and the removal of any additional debris was not eligible as emergency work as it would not eliminate any significant threat to life, public health, and safety. FEMA does not include dredging as part of its public assistance program.

On August 2, 2012, the applicant filed its arbitration request with the CBCA and the parties.

Discussion

The applicant seeks to dredge the bottom of the bayous to remove sediment and the debris imbedded in the sediment allegedly deposited by Hurricane Katrina. The applicant alleges that the USCG's removal of debris in the year after Hurricane Katrina was not adequate, because incorrect information was given to the USCG with regard to the draft of boats that traverse the bayous. Therefore, the applicant asserts that the bayous must be dredged to restore them to the conditions that prevailed before Hurricane Katrina.

Applicant bases its request upon 44 CFR 206.223 and .224, which read in relevant part:

206.223 General work eligibility.

- (a) *General.* To be eligible for financial assistance, an item of work must:
- (1) Be required as the result of the emergency or major disaster event;
 - (2) Be located within the designated area of a major disaster or emergency declaration, except that sheltering and evacuation activities may be located outside the designated area; and
 - (3) Be the legal responsibility of an eligible applicant.

206.224 Debris removal.

- (a) *Public interest.* Upon determination that debris removal is in the public interest, the Regional Administrator may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters. Such removal is in the public interest when it is necessary to:
- (1) Eliminate immediate threats to life, public health, and safety; or
 - (2) Eliminate immediate threats of significant damage to improved public or private property; or
 - (3) Ensure economic recovery of the affected community to the benefit of the community-at-large; or
 - (4) Mitigate the risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired through a FEMA hazard mitigation program to uses compatible with open space, recreation, or wetlands management practices. Such removal must be completed within two years of the declaration date, unless the Assistant Administrator for the Disaster Assistance Directorate extends this period.

At the hearing, applicant presented the testimony of two commercial fishermen, who stated that they were constantly damaging their propellers and other mechanical features on the bottom of their boats because of debris floating in the bayou, such as garden hoses and mattresses. They implied that the debris had been imbedded in the sediment on the bayou bottoms by Hurricane Katrina and had floated into the water as their vessels churned the sediment in the reduced depths.

One of the fishermen also testified that he marked approximately fourteen unidentified obstructions imbedded in the sediment in the bottom of the bayous by inserting in the bottom vertical bamboo poles which protrude above the surface.

Applicant's expert witness, a coastal hydrologist, presented a summary of his investigation in which he concluded that a large amount of sediment and debris was deposited on the bottom of the bayous during Hurricane Katrina, resulting in a "soft bottom" on top of the previous bottom, which decreased the depth of the bayous.

One of the fishermen also testified that based upon dredging operations funded by St. Bernard's Parish and performed in 2011, he believes that large amounts of debris from Hurricane Katrina are imbedded in the sediment at the bottom of the bayous.

The applicant has failed to prove that the work for which it requests funding is required as the result of Hurricane Katrina or another emergency or major disaster event. With regard to debris that is floating in the water, there is no way to determine if it has emerged after being buried in sediment deposited by Hurricane Katrina in 2005 or whether it was thrown into the bayou the day before it struck a boat. As to the obstructions imbedded in the sediment that were marked by the fishermen, there was no evidence presented as to the location of the obstructions or when the obstructions were marked. It is also not clear whether these obstructions were included in the unperformed project worksheet for debris related to Hurricane Gustav, which purportedly identified sixty-three obstructions to be removed.

There is no proof as to the amount of sediment that was deposited in the bayous by Hurricane Katrina. The hydrographic surveys conducted by the Army Corps of Engineers in 2001 and 2010 were based on different measurements and conversion factors and the parties disagree as to the interpretation of the surveys. The applicant contends that the surveys indicate that the bayous were shallower in 2010 than they were in 2001. FEMA contends that the surveys indicate that the bayous were deeper in 2010 than they were in 2001. The arbitration panel cannot determine which interpretation is correct, nor is this issue determinative. Even if specific areas of the bayous were shallower in 2010 than they were in 2001, there is no proof that the present depth of any specific location in the bayous is the result of sediment deposited by Hurricane Katrina.

With regard to the debris allegedly imbedded in the sediment, it is significant that in the year after Hurricane Katrina the USCG in a FEMA-funded removal operation removed debris from the shoreline and the channels of the bayous in consultation with a representative of St. Bernard's Parish. When the operation was concluded, a memorandum was executed asserting that "[d]ebris pickup is now greatly reduced and is at a rate of collection where the Parish resources can likely manage any further collection."

In summary, the USCG performed a removal operation in the year after Hurricane Katrina to remove debris resulting from the hurricane. With regard to the work now requested by the applicant, there is no proof as to the amounts or location of sediment and unspecified debris allegedly from Hurricane Katrina that are proposed to be removed. The applicant has not proved that the difficulties encountered today by boats in the bayous are the result of sediment and debris deposited by Hurricane Katrina. The solution proposed is to dredge and increase the depth of the bayous, with the assumption that any Katrina-deposited debris will be removed. The applicant did not prove that the work requested was the direct result of Hurricane Katrina, or that such work falls within the scope of the public assistance program.

Decision

Applicant has not proved that the work requested is required as the result of an emergency or major disaster event. The proposed work is not eligible for funding pursuant to 44 CFR 206.223(a).

ALLAN H. GOODMAN
Board Judge

JERI K. SOMERS
Board Judge

JOSEPH A. VERGILIO
Board Judge