



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 8, 2013

CBCA 2925-FEMA, 2961-FEMA, 3028-FEMA

In the Matter of THE ADMINISTRATORS OF THE TULANE EDUCATIONAL
FUND

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

Brock J. Pierson, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and George M. Cotton, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **SOMERS**, **SHERIDAN**, and **KULLBERG**.

These three consolidated matters, CBCA 2925-FEMA, 2961-FEMA, and 3028-FEMA, involve similar disputes between the applicant, the Administrators of the Tulane Educational Fund ("applicant" or "Tulane"), and the Federal Emergency Management Agency (FEMA). The applicant operates Tulane University in New Orleans, Louisiana. At issue is FEMA's deobligation of funds from project worksheets (PWs) that were issued to provide public assistance for the costs of processing or cataloging books and other materials from the university's library that were either destroyed or damaged as a result of Hurricane

Katrina (Katrina). These matters are before the panel under authority of section 601 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, 164, and section 206.209 of title 44 of the Code of Federal Regulations. The grantee, the Governor's Office of Homeland Security and Emergency Preparedness, supports the applicant's position in these three matters. In addition to arguing that the deobligation of funds was proper, FEMA also argues that the panel lacks jurisdiction in these matters and requests dismissal.

Katrina struck the city of New Orleans, Louisiana, on August 29, 2005, and flooding occurred throughout the city, which included the campus of Tulane University. Flooding up to a depth of eight feet caused damage or loss to portions of library collections in the lower levels of Howard-Tilton Memorial Library (HTML) and Joseph M. Jones Hall (JMjH). Over one hundred thousand print or audio-visual materials and more than one million microform (microfilm or microfiche) materials were either damaged or destroyed. Printed materials lost or damaged included books, government documents, and music scores. Also damaged were Tulane's archive collection in JMjH of the personal papers of prominent persons in history and politics.

At the time Katrina struck, Tulane's library collection was insured under an inland marine fine arts policy. Under the terms of that policy, the insurer agreed "to insure against loss, including but not limited to associated expenses specified herein, if any, to the extent provided in this Policy." The general terms of the policy agreed to insure "Fine Arts of every description being the property of the insured or others." The coverage under the policy was up to \$66,802,080. In the aftermath of Katrina, Tulane contracted with Belfor USA (Belfor), which was located in Dallas, Texas, to recover and restore library materials. Library materials were removed from the flooded library buildings and immediately frozen. The frozen materials were then shipped to Dallas to be dried, decontaminated, and restored. Those library materials were then returned to Tulane. Although some materials were returned to either HTML or JMjH, a large portion of library materials remain in storage while permanent library space is under construction.

After the return of restored materials from Belfor, it was still necessary to process those materials. Newly acquired materials that replaced those destroyed by flooding needed to be cataloged. Tulane then entered into a contract with Library Associates Companies (LAC) for the processing and cataloging of restored and replaced materials. Processing entailed such work as sorting and organizing materials for temporary storage and checking those items against the existing entries in the cataloging system. Other books and materials, which were purchased to replace those that were destroyed, were cataloged by LAC. During normal library operations before Katrina, processing and cataloging were performed by

library employees. Tulane, however, contracted with LAC to accomplish that work because of the extent of the damage from Katrina.

FEMA issued two PWs for processing library materials and one PW for cataloging materials. A total of \$2,055,268.95 was obligated under PWs 15649 and 15795 for processing library materials. Under PW 15957, FEMA obligated \$3,030,465.43 for the cataloging of library materials.

Tulane submitted a claim to the underwriters who had issued the fine arts policy, but much of its claim for damaged and destroyed library materials was denied.¹ An action was filed against Tulane in federal district court by the underwriters that sought a declaration that the fine arts policy did not cover library research and reference materials “including but not limited to books, periodicals, microfilm, and government documents.” Tulane then filed a civil action in the state of Louisiana against the underwriters and other persons associated with the acquisition of the policy. Among other things, Tulane’s petition for damages alleged that the underwriters were liable under the policy. In the alternative, Tulane alleged that if it was determined that the underwriters were not liable, then certain defendants who had acted on Tulane’s behalf in obtaining the fine arts policy were liable on grounds of negligence and breach of fiduciary duty.

On March 30, 2008, both the federal and state civil actions involving Tulane were settled. Under the agreement, Tulane received a payment of \$37,000,000. The agreement included a mutual release of all claims between the two parties. The settlement agreement stated that Tulane’s fine arts claim “included property damage to certain library collections, including but not limited to books, periodicals, microforms or microfilms, music collections, and government documents, as well as other property in which it holds an insurable interest according to the terms of the Policy.”

FEMA became aware of the settlement regarding Tulane’s fine arts policy and determined that the costs of processing and cataloging library materials were covered by the settlement and, consequently, duplicated public assistance that had been obligated for that purpose.² Subsequently, FEMA deobligated all funds previously obligated under PWs 15649, 15795, and 15957. The three above-referenced matters, CBCA 2925-FEMA, 2961-FEMA, and 3028-FEMA, were filed as a result of FEMA’s deobligation of funds and

¹ Tulane’s insurer initially paid \$5.6 million for losses related to Katrina that were not disputed.

² FEMA and Tulane were in agreement that the costs of replacing or restoring library materials by Belfor were covered by the settlement of Tulane’s claim.

were consolidated for further proceedings. A hearing was held on January 29-30, 2013, and the parties filed briefs after the hearing.

The issue before the panel is whether FEMA properly deobligated funds for processing and cataloging of library materials because those costs have been duplicated as a result of Tulane's settlement with its insurer. Public assistance for processing and cataloging of library materials are costs that are eligible for public assistance. 44 CFR 206.226(i) (2012). Tulane and FEMA have offered conflicting views as to whether the costs of processing and cataloging were paid or should have been paid under the settlement. Also, FEMA argues, as a preliminary matter, that the panel does not have jurisdiction in this case and requests that it be dismissed.

We address, first, FEMA's request for dismissal. FEMA argues that it is beyond the jurisdiction of this panel to decide this case because the "only dispute is over the interpretation of an insurance policy." Under section 601 of ARRA, this panel has been granted "sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than \$500,000." 123 Stat. at 164. These matters are decided in accordance with rules drafted by FEMA, which are codified at 44 CFR 206.209.

The requirements for jurisdiction have been met in this case, and, accordingly, we deny FEMA's request for dismissal. It is well established that a panel of this Board has authority to review a case, such as the one before us, *de novo*, and such authority has been construed broadly. *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,579 (2009). In that decision, the panel noted that the "Supreme Court [has] observed, ' . . . arbitrators . . . have completely free rein to decide the law as well as the facts and are not subject to appellate review.'" *Id.* (quoting *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968)). This case involves a dispute over the award of public assistance in excess of \$500,000, so it is within the panel's jurisdiction. Rendering a determination entails fact finding and applying the law to determine whether a duplication of benefits occurred.

In this matter, we consider whether the costs of processing or cataloging library materials were duplicated as a result of Tulane's settlement with its insurer. Statute, 42 U.S.C. § 5155(a) (2006), provides, in pertinent part, the following:

The President, in consultation with the head of each Federal agency administering any program providing financial

assistance to persons, business concerns, or other entities suffering losses as a result of a major disaster or emergency, shall assure that no such person, business concern or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.

Under 42 U.S.C. § 5155(c), “[a] person receiving Federal assistance for a major disaster or emergency shall be liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source.” Regulation provides that “[a]ctual and anticipated insurance recoveries shall be deducted from otherwise eligible costs, in accordance with this subpart.” 44 CFR 206.250(c). Our inquiry, therefore, is whether the costs of processing and cataloging library materials were part of the settlement between Tulane and its insurer and whether the recovery of such costs under the fine arts policy was available.

We find no evidence that Tulane actually recovered the costs of processing and cataloging library materials as a result of its settlement with its insurer. The documentary record before the panel shows that Tulane filed a civil action to recover under its fine arts policy for the costs of replacing or restoring “books, periodicals, microforms or microfilms, music collections, and government documents.” Nothing is mentioned about cataloging and processing library materials in Tulane’s petition for damages. The settlement agreement between Tulane and its insurer reiterates the fact that the dispute regarding the fine arts policy was whether it extended to books and other materials. The attorney who represented the insurer testified that processing and cataloging of library materials were not discussed during settlement negotiations. The panel finds that the evidence is more than sufficient to show that Tulane did not receive any costs of processing or cataloging library materials as a result of its settlement.

The issue of whether there was a duplication of benefits also requires that the panel examine whether Tulane is liable under 42 U.S.C. § 5155(c) for not recovering the costs of processing and cataloging library materials in the settlement with its insurer. The Ninth Circuit Court of Appeals has held that a disaster victim is only required to reimburse FEMA under section 5155(c) for duplication of benefits when the recipient of such aid failed to reach a settlement with its insurer in a commercially reasonable manner. *Hawaii v. Federal Emergency Management Agency*, 294 F.3d 1152, 1158 (9th Cir. 2002). The court rejected in that case FEMA’s argument that the state of Hawaii was liable for any benefits that it “could possibly have received under its insurance policy, without regard to whether the state actually received these benefits in its settlement or whether the state’s decision to settle with its insurer would have been reasonable had FEMA not been in the picture.” *Id.* With respect

to the disaster victims, the court noted that section 5155(c) was intended to insure that they would have “incentive to assure that insurers bear their fair share of disaster relief.” *Id.* at 1165. However, the court also recognized that disaster victims were not required “to pursue reckless litigation, accept settlement offers that could result in higher benefits but impose unreasonable delays, or hire expert negotiators who charge premium rates even if the high rates would probably not result in a commensurate increase in benefits.” *Id.*

We find that Tulane pursued a commercially reasonable approach in its settlement with its insurer, and there is no duplication of benefits because the costs of processing and cataloging were not part of its settlement. Given that Tulane and its insurer could not initially agree on whether most of the library materials lost or damaged were even covered by the fine arts policy, it would have been unreasonable for Tulane to pursue a claim for the cost of processing and cataloging library materials. It was established at the hearing that processing and cataloging were normally performed by members of the library staff, and such work, therefore, was part of the library’s operation. The panel needs to look no further than the words “fine arts” in the policy in order to conclude the obvious fact that the policy insured things in the possession of the library that can be defined as fine art and not the operation of the library. Although Tulane could have pursued any of a number of theories of recovery against its insurer, the panel finds that Tulane acted reasonably in reaching a settlement.

FEMA argues that the fine arts policy must be read broadly to require coverage for the processing and cataloging of those same materials. Such an argument ignores the fact that Tulane and its insurer could not even agree that the policy covered most of the library materials that were lost or damaged. The panel is not persuaded that Tulane necessarily had the stronger position in its claim and subsequent litigation. Moreover, the settlement does not prove what coverage was actually offered under the fine arts policy. The settlement only brought an end to the litigation. Although FEMA offers a possible interpretation of the fine arts policy that Tulane could have pursued, we are not convinced that it was a commercially reasonable position.

Finally, FEMA contends that if the panel rules in Tulane’s favor, then Tulane receives “a windfall of approximately \$5 million from the Federal Government.” The issue in this matter is whether FEMA properly deobligated funds for processing and cataloging. We make no finding as to the exact cost of that work. FEMA’s obligating of funds only makes those funds available. Tulane’s compensation for such work will ultimately depend upon its ability to account for the actual costs. That issue was not before the panel. Also, the issue of how Tulane uses the unspent portion of its settlement is not before the panel.

Decision

FEMA shall restore all amounts previously deobligated from PWs 15649, 15795, and 15957.

H. CHUCK KULLBERG
Board Judge

JERI K. SOMERS
Board Judge

PATRICIA J. SHERIDAN
Board Judge