



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 24, 2014

CBCA 3320-FEMA

In the Matter of UNIVERSITY OF SOUTHERN MISSISSIPPI

Mark W. Garriga of Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Ridgeland, MS, and Jon Mark Weathers, G. Truette Roberts, and Paul Walters, University of Southern Mississippi, Hattiesburg, MS, counsel for Applicant.

Allison Killebrew and Robert R. Latham, Jr., Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Linda D. Litke and Christie E. Rachal, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS, counsel for FEMA.

Before the Arbitration Panel consisting of Board Judges **VERGILIO**, **STEEL**, and **KULLBERG**.

This arbitration matter is before the Board pursuant to 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 (2012). The University of Southern Mississippi is the applicant. The Mississippi Emergency Management Agency is the grantee. The Federal Emergency Management Agency (FEMA) is the respondent. In 2005 Hurricane Katrina damaged the Gulf Coast Research Laboratory/J.L. Scott Marine Education Center (Marine Education Center) located on a portion of what is here referred to as the Point Cadet property in Biloxi, Mississippi. To resolve a separate arbitration case arising from the hurricane, these parties entered into an arbitration agreement in which FEMA approved the applicant to recover eligible costs for the replacement of that building subject to the availability of funding. Now the applicant seeks a determination that it is eligible for relocation assistance (which could cover costs of property and the construction of ancillary facilities such as roads and utilities) associated with that building. It estimates the relocation assistance at \$2,429,550, while it claims no property costs. FEMA concluded that the applicant is not eligible for improved project or relocation benefits because it had failed to demonstrate its legal responsibility for the property through proof of ownership or authority under a lease.

FEMA reached the result supported by the record. Any purported possession, ownership, or authority over the underlying property by the applicant ceased prior to the damage by the hurricane. This is evidenced by a 2002 agreement by and between the State of Mississippi, City of Biloxi, the applicant (Board of Trustees of State Institutions of Higher Learning (IHL) acted on its behalf), and others. The applicant did not own the underlying land, which the State of Mississippi and City of Biloxi held as a tenancy in common as public trust property. The State is not the applicant; the applicant is not the State. Thereafter, and at the time of the hurricane, the applicant was to be a lessor for a fixed, but extendable, period of time, with a right to the use and occupancy of the property for educational purposes. FEMA policies specify that a lessor of property is not entitled to recover relocation costs. The applicant has not shown its eligibility to recover relocation costs. Accordingly, the Board denies relief to the applicant.

Background

The focus of this dispute is the possession or control of the land underlying the Marine Education Center. Prior to Hurricane Katrina, the facility was located on a portion of what here is referenced as the Point Cadet property. The State of Mississippi, City of Biloxi, Board of Trustees of State IHL (in its own capacity and on behalf of the applicant, Gulf Coast Research Laboratory, and the J.L. Scott Marine Education Center), and Isle of Capri Casinos, Inc. and Riverboat Corporation of Mississippi entered into the 2002 Point Cadet Compromise and Settlement Agreement. This was a legally binding, court-approved document.

The agreement recognized that, at the time of the agreement, the IHL (an official body of the State of Mississippi) was in the exclusive possession of the portion of the Point Cadet property held for the use and benefit of, and occupied by the Marine Education Center. With the effective date of the agreement, before Hurricane Katrina, IHL's possession of the property ceased. From that date, the State of Mississippi and the City of Biloxi held the Point Cadet property as a tenancy in common as public trust property. The right of IHL to occupy any part of the Point Cadet property was governed by the 2002 agreement, which specified that the State and City will execute a lease to IHL for the use and benefit of the Marine Education Center. The stated purpose of the lease was to be limited to the use by the Gulf Coast Research Laboratory to further its mission and purposes, and specifically for the operation and expansion of the Marine Education Center and/or other educationally sound programs, operations, or facilities. The agreement directed that the term of the lease shall be for a fixed term with an option to renew, unless sooner terminated by the failure to use the lease premises for the permitted purposes. Despite the mandatory nature of the language in the agreement, the State and City did not execute a written lease with IHL.

Following the hurricane and damage to the building, the agency reevaluated and reclassified the site of the building to denote that it was subject to repetitive damages as it was located in a special high hazard area. Given the location, the rebuilding could not practically occur on the same site (a twenty-five foot elevation for the structure was never considered a workable solution), and seemingly not elsewhere on the Point Cadet property. The applicant determined to relocate the facility to a site elsewhere in Mississippi; the new site was not classified with the same risks as the original site. No purchase costs for the property at this new location are involved. However, the applicant seeks to recover improved project and relocation funding, which it estimates at just under \$2.5 million, to cover what it deems to be its eligible costs of roads, utilities, and other items.

Under Mississippi law, the applicant may receive and hold all real estate and personal property conveyed or given to it. Miss. Code Ann. § 37-119-1 (2013).

A FEMA Public Assistance Guide, FEMA 322, recognizes that applicable federal, state, or local standards, or FEMA, may require that a damaged facility be relocated away from a hazardous area. “FEMA will provide assistance for the relocation project only if it is cost effective and not barred by any other FEMA regulations or policies.” FEMA has set forth its policy regarding permanent relocation in a fact sheet, 9580.102. Two of the questions and answers in this policy are as follows:

Number 3.

If the applicant owns the structures, but does not own the land on which the facility is situated will FEMA provide funding to acquire new land and ancillary facilities [which include, but are not limited to roads, parking lots, sidewalks and utilities necessary to make the relocated facility operational]?

No. In land lease type situations where the applicant owns the building but not the land or the ancillary facilities, FEMA will only provide funding for the cost of constructing the new facility, not the land or of [sic] ancillary facilities.

Number 4.

Will FEMA reduce the amount of funding for the relocated project if the Applicant sells the original property?

Yes. While the subgrant is open, FEMA will reduce the grant for the relocated project by the net proceeds from the disposition of property. While the applicant’s proceeds derived from the sale of the land, buildings, or ancillary

structures on which the damaged facility was originally located will not impact the funding of the reconstruction of the actual damaged facility at the new site, it will offset the permanent relocation costs associated with land acquisition and the construction of ancillary facilities such as roads and utilities. This is in recognition of the fact that the ancillary facilities at the original location have a real dollar value which is included in the sale price of the damaged facility's property.

Discussion

The applicant seeks a determination that it is entitled to relocation funding in connection with the Marine Education Center. Although the full factual and legal arguments raised by the parties have been considered, resolution hinges on a few material facts and agency regulations and policies.

This applicant did not own the property underlying the damaged facility. The State is not the applicant; the applicant is not the State. A lease interest is not equivalent to ownership. FEMA acted consistently with its policy. As a purported lessor (the lack of a written lease does not give the applicant any greater interest in the property than specified in the agreement), the applicant is not entitled to recover relocation costs. The fourth question and answer in the policy also suggests that, because the applicant lacked property to sell, it could not recover relocation costs. Had it owned the property, any recovery would have been limited by a subsequent sale.

Under the published policy, the applicant may not recover its relocation costs.

JOSEPH A. VERGILIO
Board Judge

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge