



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 9, 2014

CBCA 3528-FEMA

In the Matter of JACKSON COUNTY SCHOOL DISTRICT

Jack C. Pickett, Pascagoula, MS, counsel for Applicant.

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

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Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **KULLBERG**, and **ZISCHKAU**.

Jackson County School District (JCSD), supported by the Mississippi Emergency Management Agency (MEMA), filed a request for arbitration from a denial by the Federal Emergency Management Agency (FEMA) of JCSD's 2013 request to expand the scope of a project to restore school facilities destroyed as a result of Hurricane Katrina in 2005. JCSD states that the \$11 million expanded scope would allow it to use the cost under-run of over \$11 million remaining under the obligated spending cap for the improved project. We determine that FEMA properly denied the requested scope expansion because JCSD received full funding for bringing the destroyed facilities to pre-disaster functionality in 2010. JCSD has not demonstrated that the type of work covered by the proposed new expansion constitutes legitimate replacement work for the destroyed facilities. Rather, the requested scope expansions are simply desired improvements to various school facilities that are not properly reimbursable as federal public assistance disaster funding.

Background

On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast, damaging or destroying multiple JCSD facilities. From 2006 to 2008, FEMA prepared seventeen project worksheets (PWs) to cover eligible replacement costs for JCSD's St. Martin Upper Elementary School and Middle School, which were deemed totally destroyed, for a total obligated amount of \$46,223,782.29.

On May 8, 2007, JCSD submitted an improved project proposal to realign the student body at its St. Martin Attendance Center and replace the destroyed upper elementary and middle school buildings by constructing a new high school at a new location which was not in a flood hazard zone (as was the case for the two destroyed school facilities). On July 12, 2007, FEMA notified MEMA that the conceptual plan was eligible for consideration as an improved project, that public assistance funding from the destroyed upper elementary and middle school buildings could be used to construct the new high school, and that the amount of funds for the improved project would be capped at the obligated funding specified in the associated seventeen project worksheets. By a letter of December 10, 2007, JCSD formally requested an improved project consisting of a new high school for grades nine through twelve (covering the student populations of the existing junior high school and high school), while the existing junior high school facility would be converted to a new fourth and fifth grade upper elementary school and the existing high school facility would be converted to a new sixth through eighth grade middle school. On January 29, 2008, MEMA submitted to FEMA an improved project request form showing the estimated cost of the project at \$44,600,000 for the construction of the new high school, to be paid by a public assistance share of \$13,811,029.17, other FEMA funds, insurance proceeds, and district funds. It is not clear if this request included in the public assistance share any amounts for the renovations of the existing junior high school and high school facilities to convert them to a new upper elementary school and middle school.

During the period from March through June 2008, FEMA completed the revisions and obligation of public assistance funds for the seventeen PWs arising from the destruction of the upper elementary and middle school facilities. In a July 7, 2008 letter, JCSD requested a revision to the improved plan to increase the square footage of the proposed new high school gymnasium as well as to include renovations of the existing junior high school and high school facilities. The overall square footage and student capacity for the renovated facilities and the proposed new high school would exceed the prior square footage and capacities of the old facilities. In an August 7, 2008 letter, JCSD asked if the obligated eligible funds for the improved project would be "available to us in their totality to construct the proposed improved project St. Martin High School and renovate the exiting Jr. High

School and High School as described in the SOW [statement of work], or will FEMA require the funds not utilized under specific Parts of CEF [the cost estimating format] be remitted to FEMA?” On August 11, MEMA approved a revised request for the improved project, covering the new high school and renovations to the existing junior high school and high school facilities, with a FEMA funding cap of \$42,757,587.29. The estimated cost of the high school construction project was \$41,420,000. This amount matched the amount of a contractor bid accepted by JCSD’s board of education a month earlier. MEMA transmitted the revised improved project request to FEMA on August 11.

On August 18, MEMA referred to FEMA the funding question of August 7 from JCSD and also requested that FEMA make a written determination on the funding for this improved project. On August 20, 2008, construction work began on the new high school. In a September 4, 2008 response to MEMA’s August 18 letter, FEMA stated that funding for a project such as this improved project “is capped at the aggregate of the eligible costs estimated to restore the original facility or facilities to pre-disaster condition,” that “the intent of this process is to complete the applicant’s improved project scope of work, not to expend all potentially available funding,” and that “at final inspection Federal regulations and FEMA policy guidance stipulate that funding is limited to the CEF-derived costs or the actual costs of completing the project, whichever is less.” FEMA stated that under OMB Circular 133-83, if final construction costs are lower than anticipated, and total actual costs are lower than the approved eligible costs, FEMA will make an adjustment to reduce the eligible costs to the total actual costs.

On October 29, 2008, FEMA advised MEMA that it concurred in the approval of the improved project request and FEMA issued a new PW consolidating the prior seventeen PWs associated with the replacement of the old upper elementary school and middle school facilities. Later, another PW was issued by FEMA, obligating over \$5 million in additional funds for site work and ancillary costs in connection with relocating the two destroyed schools. In early 2010, the site work and ancillary costs PW was revised downward by \$512,535.20 to reduce eligible costs associated with 463 parking spaces at the new high school that JCSD claimed were required by changes in a zoning ordinance. FEMA later granted an appeal of that reduction and restored funding for the additional parking spaces.

On April 21, 2010, JCSD entered into a separate construction contract for renovations to the old junior high school and high school according to the revised improved project statement of work. The total cost of the renovations came to \$1,431,100. It appears that the old junior high and high school renovations, and construction of the new high school, were substantially completed by August 2010. The new high school opened for classes on August 5, 2010.

On June 25, 2013, JCSD requested that additional items be added to the scope of the improved project because the construction and renovation work was completed, using about \$11 million less than the FEMA-obligated public assistance available under the PWs. The savings came from insurance proceeds and other funding sources. JCSD concluded that it should be permitted to expand the scope of the improved project to use the unexpended \$11 million up to the obligated funding cap. JCSD's additional items are: (1) construction of a new kindergarten through sixth grade facility in the Latimer community to offset the "increased enrollment as a result of the shift in population to the north after Hurricane Katrina;" (2) "revamp" of the air conditioning piping at the middle school (\$400,000); (3) additional classroom wing at the upper elementary school (\$2,500,000); (4) gymnasiums for St. Martin East and North elementary schools (\$2,000,000); (5) enclose atrium at St. Martin East (\$1,000,000); (6) additional buses (\$1,280,000); (7) "update #VAC" on all other units (\$500,000); (8) construction of a field house at the middle school (\$500,000); and (9) additional classrooms at the middle school (\$2,000,000).

By letter of July 29, 2013, FEMA denied JCSD's request for further expansion of the scope of work, noting that it is bound by regulation to reduce the funding for the improved project to the actual eligible costs to complete the current approved project scope of work.

JCSD claims in a supplemental brief that in preparing its proposed improved project, it "limited its plan to obtaining adequate facilities so as to allow the return of all students from temporary facilities but omitted items that were needed to restore the School District to pre-disaster functionality and give it the 'new' facilities it was originally eligible to receive." We find no support in the record for this assertion. Rather, the record indicates that JCSD had designed and received a new state-of-the-art high school along with renovations to the old junior high and high school to make fully functioning upper elementary, middle, and high schools and provide increased student capacities and facility square footage as desired by JCSD under its realignment plan.

Discussion

FEMA moved to dismiss the arbitration request on the ground that JCSD untimely filed its request and, alternatively, that JCSD has not alleged that FEMA violated any statute or regulation. The record shows that the request was filed timely within thirty days of JCSD's receipt of the denial letter. Further, we find that JCSD interprets the applicable statutes and regulations in a manner differently from FEMA and that this dispute adequately makes the matter proper for our arbitration.

On the merits, we agree with the action taken by FEMA. JCSD prepared a comprehensive and reasonable plan to replace the destroyed upper elementary school and

middle school by renovating and converting the existing junior high and high school facilities to serve as the new upper elementary and middle school facilities with added student capacities and square footage. In addition, the bulk of the replacement public assistance funding would be used to construct a brand new, state-of-the-art high school with many new features not previously found in the existing high school, along with added student capacity and square footage. The new high school would be located very near the converted upper elementary and middle school facilities, which provided further benefits to JCSD. We have carefully reviewed the wish list of new improvements requested by JCSD nearly three years after completion of the new construction and renovation work, but conclude, as did FEMA, that JCSD has not shown that these new items are within the scope of work necessary to obtain pre-disaster functionality of the destroyed facilities. One purpose of the Stafford Act is to provide public assistance to state and local governments for repairing and restoring facilities damaged or destroyed as a result of a declared natural disaster. 42 U.S.C. § 5172 (2006). That populations in the school district shifted at some point after Hurricane Katrina, or that the school district experienced increased student populations in specific areas, is not a valid basis under the Stafford Act for federal public assistance.

JCSD's request is denied.

JONATHAN D. ZISCHKAU
Board Judge