



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 19, 2017

CBCA 5393-FEMA

In the Matter of OFFICE OF FACILITY PLANNING AND CONTROL

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Mark Riley, Deputy Director, Lynne Browning, Assistant Deputy Director, and Carla Richard, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

John Ebersole, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Charles Schexnaildre, 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 **HYATT**, **VERGILIO**, and **CHADWICK**.

The Louisiana Office of Facility Planning and Control (OFPC) elected arbitration under 44 CFR Part 206 (2015) of a determination by the Federal Emergency Management Agency (FEMA) deobligating about \$4 million under a public assistance grant. FEMA concluded that a settlement obtained by the State in litigation arising from the destruction of the roof of the Superdome in New Orleans by Hurricane Katrina constituted a duplication of benefits provided by FEMA to restore the roof. The parties agree that no hearing is necessary. We sustain FEMA's determination.

Background

In summarizing the facts, we rely heavily on the affidavit of Brent R. Barriere, who represented the State in the Superdome lawsuit as a partner in the law firm Phelps Dunbar, and on the State's pleadings in that litigation, but all of the evidence of record is consistent.

The Superdome (a famed venue currently branded the Mercedes-Benz Superdome) is owned by the Louisiana Stadium and Exposition District (LSED), a “subdivision of the State of Louisiana composed of all of the territory in the Parishes of Orleans and Jefferson.” La. Const. Ann. art. 14, § 47 (2016). LSED leases the Superdome to OFPC, a component of the executive branch of Louisiana’s government, located within the Division of Administration in the governor’s office. *See* La. Stat. Ann. §§ 36:4.B, 39:4, 39:113 (2016).

Hurricane Katrina hit New Orleans in August 2005. The Superdome’s roof had been replaced about three years earlier. The hurricane essentially tore it off, causing damage from flying debris as well as water damage to the exposed interior of the facility. In January 2006, Louisiana’s governor designated OFPC as the State’s subgrantee for grants to the State from FEMA for repairs to state property under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2012). In March 2006, FEMA obligated approximately \$16.4 million to OFPC to demolish and replace the Superdome’s roof. FEMA later added grant money to repair the Superdome’s interior.

In August 2006, LSED, the State of Louisiana, and two subrogated insurance companies sued a long list of entities who had been involved with replacing the roof in 2002. The plaintiffs pleaded contract and tort claims, and sought relief “for any and all damages, of whatever nature, and under all theories of liability, suffered due to the failure of the Louisiana Superdome’s roof during Hurricane Katrina.” The litigation ended in multiple settlements totaling approximately \$35 million. Under an allocation agreement between the plaintiffs, the State was entitled to \$4,055,464.09. Mr. Barriere, whose law firm represented all of the plaintiffs jointly, says that “the State and LSED ultimately agreed that LSED would be credited with the entire recovery payable to LSED/State,” but that LSED would then pay the State approximately the full amount of the State’s share (\$4,054,131.35) to cover insurance premiums that LSED owed the State’s Division of Administration, Office of Risk Management (ORM). *See* La. Stat. Ann. § 39:1528 (ORM organic statute). In March 2010, the law firm wired both LSED’s and the State’s shares (\$17,332,075) to OFPC. OFPC disbursed more than \$9 million of that amount, including the amount of the State’s settlement share, to ORM, on LSED’s behalf, and disbursed the remainder to LSED.

Although FEMA advised LSED in August 2010 that the proceeds disbursed to LSED from the Superdome litigation did not duplicate the grant funding that FEMA had provided LSED for emergency protective measures at the Superdome, FEMA determined in writing on June 5, 2016 (a Sunday), that the settlement amount “provided to [OFPC] for damages to the Superdome” represented a duplication of benefits under the Stafford Act and must be deobligated. OFPC mailed the Board a timely request for arbitration on July 6, 2016, the twenty-ninth day after OFPC received FEMA’s determination on Tuesday, June 7.

Although OFPC initially requested a hearing, the parties agreed during a telephonic conference in August 2016 to submit the matter to the panel in writing.

Discussion

The Stafford Act provides that “[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.” 42 U.S.C. § 5155(c). OFPC and the Governor’s Office of Homeland Security and Emergency Preparedness (GOHSEP), appearing as the grantee, challenge FEMA’s deobligation of funds, based on FEMA’s finding of duplication of benefits, on five grounds, all unpersuasive.

First, OFPC and GOHSEP argue that OFPC received no benefits from the lawsuit about the roof failure because OFPC was “not a party” to that case. This argument, for which these parties cite no authority, is unfounded and is akin to arguing that, for example, an office within the federal General Services Administration is “not a party” to a suit filed by the United States. A sovereign acts through its agents. The State of Louisiana, through its Department of Justice, *see* La. Stat. Ann. § 36:701, filed the lawsuit as the “lessee” of the Superdome, the exact function that the State carries out through OFPC. GOHSEP asserts that “ORM [not OFPC] sued the contractors in the Superdome litigation,” but, first, ORM was not the facility’s “lessee,” and, second, this assertion undercuts the argument that OFPC was “not a party” to the lawsuit, since ORM was not a named “party” either. In any event, “party” status is not the test. A lawsuit by the State can benefit components of the State.

Relatedly, GOHSEP argues that OFPC “did [not] receive any settlement funds from the litigation. It merely received the settlement funds on behalf of the Plaintiffs and then disbursed them to LSED and ORM.” We cannot agree. The State was entitled to a share of the settlement proceeds and decided where its share went. The State’s share was available to the nominal lessee, OFPC, even though the State ultimately chose to direct the money elsewhere. “How a [recipient] *spends* [money] has nothing to do with what those proceeds represent” for purposes of analyzing duplication of benefits. *Columbus Regional Hospital v. Federal Emergency Management Agency*, 708 F.3d 893, 900 (7th Cir. 2013).

OFPC and GOHSEP both argue that the settlement proceeds did not duplicate any FEMA benefits because the FEMA subgrant and the settlement funds were not “for the same purpose.” 42 U.S.C. § 5155(c). They argue that the lawsuit “sought to recover los[t] revenue and damages for breach of contract for a defective roof. Nothing in the petition sought relief for repair [or] renovation of damages [to] the Superdome.” We see no such limiting language in the State’s pleading, however. Instead, the State sought “recovery of [all of] the massive damages arising from the [roof’s] total failure,” under both contract and negligence

theories. Any limitations on liability would have been in the nature of defenses, not inherent in the State's claims, which were, in the end, settled and partly paid.

OFPC further argues that the settlement proceeds did not duplicate benefits because the proceeds were not "assistance" to the State within the meaning of 42 U.S.C. § 5155(c). According to OFPC, "the plain language of the Stafford Act and its legislative history reveal an unambiguous meaning of 'duplication of benefits' as insurance benefits or other similar financial assistance or aid." We reject this argument and agree with the courts that have read the statutory words "from another source" as clearly including any other source. *See Public Utility District No. 1 of Snohomish County, Washington v. Federal Emergency Management Agency*, 371 F.3d 701, 712 (9th Cir. 2004) (applying statute to proceeds of sale of scrap metal); *City of Chicago v. Federal Emergency Management Agency*, No. 08 CV 4234, 2013 WL 1222348, at *7 (N.D. Ill. Mar. 21, 2013) (sustaining determination that airline-paid fees for snow removal duplicated FEMA benefits); *see also Columbus Regional Hospital*, 708 F.3d at 899 ("The statute does not allow reimbursement if the victim has *another source of payment.*" (emphasis added)). OFPC cites no contrary authority.

OFPC belatedly raises a fifth and final argument in its reply. Citing an unreported decision of the United States District Court for the Southern District of Florida, OFPC argues that FEMA is precluded from deobligating the funds at issue by 42 U.S.C. § 5205(c), which bars FEMA from seeking "reimbursement or any other penalty" from a grantee or subgrantee government if "(1) the payment was authorized by an approved agreement specifying the costs; (2) the costs were reasonable; and (3) the purpose of the grant was accomplished." We agree with FEMA that this provision cannot reasonably be read as negating FEMA's separate authority under 42 U.S.C. § 5155(c) to recover duplications of benefits, and that, in any event, here, the relevant agreements and project worksheets preserved FEMA's right to invoke 42 U.S.C. § 5155(c). Section 5205(c) prevents FEMA from renegeing on the terms of validly approved funding agreements. *E.g., City of New Orleans, Louisiana*, CBCA 2875-FEMA, 13 BCA ¶ 35,401, at 173,691; *Baldwin County Board of Supervisors*, CBCA 2018-FEMA (Sept. 15, 2010). Every such agreement is subject to the statutory prohibition of duplication of benefits, and a grantee accepts aid with the condition that it must be returned to the extent that it becomes a duplicated benefit.

Decision

FEMA's June 5, 2016, determination is sustained.

KYLE E. CHADWICK
Board Judge

CATHERINE B. HYATT
Board Judge

JOSEPH A. VERGILIO
Board Judge