



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 9, 2017

CBCA 4980-FEMA

In the Matter of NON-FLOOD PROTECTION
ASSET MANAGEMENT AUTHORITY, LOUISIANA

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Before the Arbitration Panel consisting of Board Judges **ZISCHKAU**, **SOMERS**, and **HYATT**.

On September 16, 2015, the Non-Flood Protection Asset Management Authority (Authority) of Louisiana filed a request for arbitration of an August 17, 2015 determination by the Federal Emergency Management Agency (FEMA) regarding mitigation funding for an airport flood control system. The Authority seeks mitigation funding as a public assistance grant under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2012).

On December 12, 2016, FEMA filed a motion to dismiss for lack of subject matter jurisdiction. Specifically, FEMA argues that the Authority's floodwall project design and cost estimate, updated on November 29, 2016, is so different from the originally submitted project design and cost estimate as to render the original request for arbitration moot, and constitutes a new project on which FEMA has not yet made a determination. For the reasons explained below, we find that the arbitration panel has jurisdiction over the arbitration request, as updated, and we deny FEMA's request for dismissal.

Background

On August 29, 2005, Hurricane Katrina (Katrina) struck the state of Louisiana. A combination of high winds, storm surge, and wave action from Lake Pontchartrain severely damaged most of the structures at the New Orleans Lakefront Airport, located on a peninsula in the lake. As part of the Airport rebuilding plan and to mitigate future hurricane damage, the Authority developed a proposal to restore and enhance the existing floodwall surrounding the airport facilities.

The Authority submitted the project proposal to FEMA under revised project worksheet (PW) 19266 in February 2015, seeking section 406 hazard mitigation funding. The proposal included construction to what the Authority argues is the existing floodwall and berm on the north, east, and west sides of the airport. FEMA contends that the existing structure did not actually constitute a floodwall and thus the proposal was for new construction.

The proposal outlined construction of three main elements for the flood control system. The proposal called for construction of a "T-wall" on the west side of the airport and a rapid deploy barrier on the north side, for a total length of 6,500 linear feet, estimated at \$7,000 per linear foot, for a total cost of \$45,500,000. The proposal also called for construction of 4,700 linear feet of "I-wall" on the east side of the airport, at \$2,000 per linear foot, for a total cost of \$9,400,000. Additional costs were included for a pump station (\$3,000,000), valves (\$1,500,000), design costs (\$3,267,000), project management-direct administrative costs (\$2,714,265), and soft/contingency costs (\$5,981,265), for a total estimated project cost of \$71,362,530. The Authority's listed total (\$65,381,265) did not include the soft/contingency costs. As per FEMA policy, the Authority provided a Benefit-Cost Analysis (BCA) comparing the benefits of the mitigation project to the costs of the proposal to show that the project is cost effective.

FEMA denied the request for section 406 funding on August 17, 2015. Among the listed reasons was FEMA's determination that (1) the project is the type of "new construction" in a coastal high-hazard area prohibited by FEMA regulations at 44 CFR

9.11(1) (2014); (2) the proposed costs exceed the benefits (FEMA determined that some of the benefits included in the Authority's BCA are not allowable under applicable FEMA policy) of the Authority's proposed flood control system; and (3) the proposed design would not prevent future flood damage.

On September 16, 2015, in its request for arbitration, the Authority submitted a revised construction proposal and cost estimate to the Board. This proposal called for construction of approximately 6,500 linear feet of T-wall along the west side of the airport at approximately \$4,196.29 per linear foot, for a total cost of \$27,275,900. The proposal also included a rapid deploy wall along the north side at a total cost of \$9,343,865, and construction of 4,700 linear feet of I-wall along the east side at approximately \$1,671.07 per linear foot, for a total cost of \$7,854,006. Additional costs were again included for a pump station (\$3,191,307), valves (\$360,000), design costs (\$3,121,630), project management-direct administrative costs (\$2,881,505), and contingency costs (\$10,805,642). The Authority arrived at a total estimated project cost of \$64,833,855.

On October 15, 2015, at the request of FEMA, the United States Army Corps of Engineers (USACE) submitted an engineering assessment of the project and provided recommendations for ensuring feasibility of the construction. The assessment concluded that the Authority's design and location of the T-wall was reasonable, but that the construction of the I-wall may be impractical due to the location of existing buildings and facilities at the airport. In its report, USACE recommended that 3,700 feet of I-wall be replaced with T-wall, reducing the approximate \$1,761.84 per linear foot cost of the remaining 1,000 linear feet of I-wall to \$1,761,838, and raising the costs of T-wall to \$55,309,472. Based on the location of the rapid deploy wall, the report recommended using heavier structural members to resist impact forces to the rapid deploy wall, raising the cost of the rapid deploy wall to \$15,118,092. The report also recommended added costs for "scour protection" on all three types of walls, and an increased contingency fee of \$22,722,212.70. The report accepted the proposed costs for the pump station and valves in the request for arbitration, but recommended higher costs for design (\$4,923,146.09), and project management-direct administrative (\$4,544,442.54), bringing USACE's estimate of total costs of construction to \$107,930,510. The USACE report was provided to the Authority.

The Authority retained an expert to analyze the USACE report and to provide engineering assistance with the technical aspects and estimated costs for the flood control system around the airport. The Authority submitted a supplemental expert report on November 29, 2016, revising aspects of the project design and estimated cost. The proposed changes included a replacement of the I-wall with additional T-wall, the USACE-recommended increased costs to the rapid deploy wall at a total cost of \$19,140,000, and a decreased cost to the T-wall based on the expert's opinion that less robust and less expensive

T-walls would be needed than those used in the USACE cost estimate, for a new total T-wall cost of \$31,480,000. The cost of the pump station was decreased to \$3,060,000, while the cost of valves remained the same. The expert report also added a taxiway gate at \$500,000, three roadway gates at \$1,050,000, two railroad gates at \$1,000,000, railroad insurance at \$1,000,000, and costs of \$3,000,000 for contract phasing due to FAA and railroad restrictions. The design costs (\$3,940,000), project management/direct administrative costs (\$3,640,000), and the contingency costs (\$15,200,000) were all increased, bringing the total estimated costs of the project to \$83,370,000. The increased contingency costs account for roughly one quarter of the increases to the cost estimate.

FEMA subsequently filed its motion to dismiss on December 12, 2016. FEMA's bases for the motion are (1) by submitting a revised project design, the Authority implicitly admits that FEMA correctly denied funding of the project as originally proposed, rendering the request for arbitration moot, and (2) the revisions are so extensive as to render it a completely new project, upon which FEMA has not made a determination under 44 CFR 206.209. In a telephone status conference held on January 18, 2017, FEMA made the additional argument that any design or cost changes, including the changes made in the request for arbitration, require FEMA to review the application anew and thus divest the arbitration panel of jurisdiction. According to FEMA, both the cost changes in the request for arbitration, and the design updates and estimated cost changes in the November 29, 2016 submission, had the effect of divesting the panel of jurisdiction.

The Authority responded to FEMA's motion on December 16, 2016. In opposing the motion to dismiss, the Authority denied any admission of the project's unworkability. The Authority stated that it revised its design to address the issues raised by USACE in its evaluation, which it argued is standard procedure for FEMA proposals where initial designs are generally conceptual in nature. The Authority also maintains that the key disputes in the arbitration, namely the project's eligibility for section 406 funding, whether the project is "new construction," and which types of benefits are appropriate for inclusion in a BCA, remain unaffected by revisions made to the project design and estimated cost. According to the Authority, the panel can decide these issues, leaving finalization of the design to the parties.

Discussion

The Stafford Act provides the President the authority to make public assistance disaster grants to state or local governments for repair, reconstruction, or replacement of public facilities on the basis of the design of the facility as it existed immediately before the major disaster. 42 U.S.C. § 5172(a)(1)(A) (2012). FEMA administers the public assistance disaster grants authorized by the Stafford Act and has published implementing regulations

at 44 CFR pt. 206. FEMA administers grants on a “project” basis, which is defined as “a logical grouping of work required as a result of the declared major disaster or emergency.” 44 CFR 206.201(*l*) (2015). FEMA must approve the scope of eligible work and an itemized cost estimate before funding a project. *Id.* 206.201(*l*)(1).

Section 601 of the American Recovery and Reinvestment Act of 2009 (ARRA) granted the President authority to establish an arbitration panel to resolve disputed public assistance applications for certain enumerated disasters. Pub. L. No. 111-5, 123 Stat. 115, 164 (2009). Under this grant of authority, the Board may arbitrate “a determination made by FEMA on an application for Public Assistance.” 44 CFR 206.209(b). The panel applies a *de novo* standard of review in resolving these disputes. *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335 (2009).

44 CFR 206.209(b) sets forth the panel’s arbitration jurisdiction: “An applicant or subgrantee (hereinafter ‘applicant’ for purposes of this section) may request arbitration of a *determination* made by FEMA on an application for Public Assistance.” *Id.* (emphasis added). FEMA maintains that it has not made a determination regarding the revised project design and requests that this panel dismiss the Authority’s request to arbitrate a grant amount as to this project.

The arbitration panel agrees with the Authority that the panel retains jurisdiction over the arbitration request. Applicants for FEMA grant funding may update their project proposals as long as such a revision does not constitute an entirely new project. *Cf. The University of Southern Mississippi*, CBCA 2546-FEMA, 12-1 BCA ¶ 34,933, at 171,751 (finding no jurisdiction when applicant presented for arbitration a new lease unrelated to a previously presented lease in the original PW). We have previously held that a PW can be amended to include additional work not previously included. In a 2010 decision in *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA (Feb. 1, 2010), the panel determined that “a PW is a living document until project completion. Furthermore, nothing in the language of the PWs or any other document of record suggests that an applicant waives rights to seek further assistance should the necessity for additional assistance become apparent at any time.” Slip op. at 4 (finding jurisdiction when a reinspection resulted in amended PWs adding roof, siding, and window replacements, thus also changing the cost). In a similar case, *State of Louisiana, Facility Planning and Control*, CBCA 1768-FEMA, 10-1 BCA ¶ 34,452, the applicant asked that additional sites in a park damaged by Katrina be added to the original PW after FEMA had omitted them. *Id.* at 169,995. The panel allowed the PW to be amended “to include additional work not included previously” and determined that such an addition did not divest the panel of jurisdiction over the revised PW. *Id.*

FEMA has already made a determination on the proposed floodwall project, and the Authority's proposed design revisions and updated cost estimate do not amount to a new project. Both the request for arbitration and the November 2016 expert report include an update to the original floodwall proposal submitted under PW 19266. The changes made to the original floodwall proposal were submitted to address the issues raised in USACE's report prepared at FEMA's request. These design improvements and accompanying cost estimate changes augment the existing proposed project; they did not create a new project. The project remains a flood control system for the airport.

The changes made are part of the project, which, as defined by regulation, is a logical grouping of work required as a result of a declared major disaster. The regulations require an applicant to identify "all eligible work" and "all costs for disaster-related damages for funding" in a PW. 44 CFR 206.202(d)(1). As the project develops from an initial conceptual design phase, it is reasonable that there may be changes as the design process advances. We are aware of no FEMA regulation that requires a stated level of design maturity in a proposal.¹ *See* 44 CFR 206.200-206.210. Therefore, these project design revisions and cost estimate updates do not divest the panel of its jurisdiction.

Further, it would make no sense for the arbitration panel to send the project, with the revised design elements, back to FEMA for another determination, because the key issues in dispute would remain unresolved. Dismissing the current arbitration matter now would only result in an unnecessary elongation of an already lengthy proceeding.

Decision

For the foregoing reasons, FEMA's motion to dismiss for lack of jurisdiction is denied.

JONATHAN D. ZISCHKAU
Board Judge

JERI K. SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge

¹ FEMA regulations require only that "[FEMA] must approve a scope of eligible work and an itemized cost estimate before funding a project." 44 CFR 206.201(l)(1).