



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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July 9, 2018

CBCA 5549-FEMA

In the Matter of ROMAN CATHOLIC CHURCH  
OF THE ARCHDIOCESE OF NEW ORLEANS

Michael G. Gaffney of Gaffney & Gaffney, Metairie, LA, counsel for Applicant.

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

Michelle Buckalew, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and John Dimos, 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 **BEARDSLEY**, **LESTER**, and **RUSSELL**.

As Sister Mary Lou Specha describes it, Hotel Hope, a non-profit organization that she leads, has extensive plans for the reuse of a two-story building, formerly known as St. Matthias Convent, located in the Broadmoor neighborhood in New Orleans, Louisiana.<sup>1</sup>

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<sup>1</sup> In a prior decision, we mistakenly referred to the convent building as "Hotel Hope." See *Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 5549-FEMA, 17-1 BCA ¶ 36,892, at 179,784-85. In reality, Hotel Hope is a non-profit entity that would like to take residency within the building, rather than the current name of the building itself.

Before Hurricane Katrina devastated the area in 2005, Catholic Charities had used the building as a homeless shelter for women. Hurricane Katrina caused severe damage to the building, and, for the past thirteen years, the building was left unused and essentially unattended but for some minor repair and roofing work. Hotel Hope now intends to use the building as a shelter that would provide temporary housing and a safe space for women and their children who are in need of shelter, as well as job training, child care, and other services designed to assist those residents' transition towards self-sufficiency in permanent residences.

Hotel Hope has already obtained from the Roman Catholic Church of the Archdiocese of New Orleans (ANO), which owns the convent, a lease that would allow Hotel Hope to use the building as a shelter into the foreseeable future. Nevertheless, the damage to the long-vacant building is severe, and it will take a large infusion of funds to restore the building to a habitable state. The ANO, through this arbitration, is seeking to obtain at least some of those funds through entitlements authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2006).

FEMA does not dispute that the ANO, which is sponsoring the request for funding and this arbitration, may recover certain repair costs for the building through a grant under the Stafford Act. There is a dispute, however, as to the scope of funding that should be available for this project. Under FEMA's regulations, if the cost of repairing the damage to the building caused by Hurricane Katrina exceeds fifty percent of the cost of replacing the building, the ANO would be entitled to recover the replacement costs. The ANO believes that it has met the requirements to allow it to recover the full cost of replacing the facility.

The ANO submitted a request for arbitration (RFA) to the Board pursuant to section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), and its implementing regulation, 44 CFR 206.209 (2017), and we conducted a four-day hearing during which the parties presented testimony in support of their positions, followed by post-hearing briefing on specific topics. As FEMA recognized during the hearing, there is no question as to the desirability of the project that Hotel Hope is pursuing or its value to the community that it will serve. Yet, we cannot allow the merits of the proposed project to affect our interpretation or application of the rules applicable to disaster relief.

In the end, based upon the evidence before us, we cannot currently find that the repair costs for damage shown to be caused by Hurricane Katrina exceed fifty percent of replacement costs, meaning that we cannot award the ANO its full calculated replacement costs. Nevertheless, because there were several errors in FEMA's original cost inputs, and because there are documents supportive of costs that we cannot consider because they were

not included in the record before us, we remand this matter to FEMA for further factual investigation and analysis regarding the ANO's ability to recover certain repair costs, in accordance with our guidance below, after which it should make a new comparison of repair-versus-replacement costs.

### Background

The two-story building at issue here is configured in an L-shape, with 6509 square feet of internal space. It was constructed around 1960 as a convent.

Beginning in March 1984, the building was used as a homeless shelter to house women in crisis and their children, which was called the Crisis and Residential Emergency (CARE) Center and run by Catholic Charities. Residents in the CARE Center would stay for up to thirty days.

On August 29, 2005, six feet of sea water flooded the first floor of the building as a result of Hurricane Katrina. The parties agree that the first floor of the facility suffered significant damage as a result of the inundation of the brackish water. The ANO also contends that winds from Hurricane Katrina peeled the roof from the building, allowing rainwater to cause extensive damage to the roof insulation, ceiling, and floors on the second floor. FEMA maintains that the second floor sustained only minor damage.

FEMA received its first request for disaster assistance associated with the convent in 2005, soon after Katrina. That request related solely to the contents of the building, which Catholic Charities asserted were damaged by the hurricane. FEMA created its first project worksheet (PW) for this building – PW-11678, version 0 (V-0) – at that time, but it only addressed the contents of the first floor of the building (including furniture), for which FEMA, on October 12, 2006, obligated \$65,765.22. When developing V-0, FEMA toured the convent building and, in its written V-0 report, stated that “[t]he second level [of the convent building] was not damaged by Hurricane Katrina,” although the purpose of the written V-0 PW was “to capture contents damaged as a result of flooding from Hurricane Katrina to the 6,250 [square foot] Care Center.”

In 2010, five years after Hurricane Katrina, Hotel Hope was created as a non-profit entity with the goal of creating a shelter for women and children, along with job training and other support services for residents. At some point soon thereafter, the ANO leased the building to Hotel Hope for the extended future. Hotel Hope wants to restore the building and use it for purposes very similar to those in place when the Catholic Charities' CARE Center was operating there in 2005. Although the ANO has an interest in Hotel Hope, which is run by Sister Mary Lou Specha, the ANO has retained ownership of the building.

On April 2, 2014, nine years after Hurricane Katrina struck, the ANO submitted its first request for disaster assistance to repair damage to the building itself. That request resulted in FEMA's development and obligation in 2015 of version 5 (V-5) of PW-11678, which reflected FEMA's initial cost estimate to repair the damage that Katrina caused to the building. After considerable discussions between FEMA, the ANO, the Governor's Office of Homeland Security and Environmental Preparedness (GOHSEP), and the ANO's architect, FEMA issued version 6 (V-6) of PW-11678, which reflected FEMA's updated cost estimate of \$407,147.19 (not including costs associated with mandatory state- and city-required building code upgrades) to repair the disaster-related damage to the building and its cost estimate for replacement of the entire facility of \$1,081,511.81. FEMA denied the ANO's request for replacement costs because the repair-cost-versus-replacement-cost ratio was less than fifty percent, but obligated funding for repairs, including reimbursable code upgrades, of \$913,331.92. V-6 is the version of the PW before the Board for consideration.

The ANO engaged a local architectural firm to assess and quantify the damage caused by Hurricane Katrina to the building. That firm ultimately estimated a cost to repair the damage that the hurricane caused to the facility of \$997,051 and, in addition, estimated a cost to replace the facility of \$1,572,112.89. GOHSEP prepared its own analysis of the cost to repair the disaster damage, which identified a repair cost of \$997,220, and did not question FEMA's replacement cost estimate.

On November 18, 2016, the ANO submitted a twenty-two-page RFA to the Board, requesting that an arbitration panel find that the cost of the repairs necessary to restore Hotel Hope to its pre-Katrina condition is greater than fifty percent of the replacement cost of the building, which would entitle the ANO to a public assistance grant in the amount of the building's replacement cost rather than simply the cost of repair. In the RFA, the ANO identified what it described as errors in FEMA's analysis of costs, alleging that, in conducting the fifty-percent analysis, FEMA improperly applied specific requirements of its Cost Estimating Format (CEF) for Large Projects Instructional Guide and its CEF Standard Operating Procedure. In addition, the ANO described the manner in which FEMA allegedly had improperly estimated the cost of a proposed cost savings project in particular rooms in Hotel Hope rather than (as the ANO alleged FEMA should have done) estimating the cost of disaster damage; had misapplied its CEF escalation factor in calculating disaster damage; had assumed that the Louisiana Office of State Fire Marshal would waive certain life-safety codes in any repair of the homeless shelter; had determined that the ANO and GOHSEP had intermingled "union shop" and "open shop" labor rates in an inconsistent manner in their repair and replacement estimates; had failed to recognize certain costs associated with complying with the Americans with Disabilities Act (ADA); had misapplied certain building codes in its estimates; had failed to take into account increased repair costs required under the National Historic Preservation Act and the Department of the Interior's Standards for the

Treatment of Historic Properties; and had determined that particular damages were not caused by Hurricane Katrina, but, instead, by other factors. Accompanying the RFA were fifteen exhibits, which included, among other things, cost estimates from the local architectural firm that the ANO used and from GOHSEP, a copy of the relevant project worksheet (PW 11678, V-6) identifying the costs at issue, and a side-by-side comparison of the FEMA and GOHSEP CEFs.

We subsequently denied a motion that FEMA filed seeking to dismiss the RFA, *see Roman Catholic Church*, 17-1 BCA at 179,786, and conducted a four-day hearing at which the parties presented witnesses to testify about the scope of damage to the convent building. Unfortunately, neither party was able to present any witnesses who had first-hand knowledge of the building's condition either before or within a few years after Hurricane Katrina hit. Little repair work had been performed on the building as of the date of the hearing, beyond the removal of a boiler, removal of cabinets and appliances, and removal of mud and sediment that entered the facility.

### Discussion

#### Standing

Pursuant to the Stafford Act, the President has the authority to make public assistance disaster grants “to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, reconstruction, or replacement of the facility” on the basis of “the design of the facility as the facility existed immediately before the major disaster” and “in conformity with codes, specifications, and standards . . . applicable at the time at which the disaster occurred.” 42 U.S.C. §§ 5172(a)(1)(B), (e)(1)(A) (2012). FEMA does not dispute that the building is an eligible nonprofit facility damaged by Hurricane Katrina, that the ANO owns that eligible facility, or that the ANO is an eligible applicant for public assistance funding. During the arbitration proceeding, though, FEMA repeatedly raised questions about the identity of the true party pursuing arbitration, suggesting that it is Hotel Hope, which did not exist when Katrina struck and lacks standing to pursue this matter, that is the entity pushing for recovery here. *See* Public Assistance Guide (FEMA-322) (PA Guide) at 25 (Oct. 1999) (applicant may be reimbursed for work to repair damaged property only if the work was “the legal responsibility of the applicant at the time of the disaster”). Although it is clear that Hotel Hope has a vested interest in, has provided the ANO with extensive assistance during, and is likely the driving force behind this arbitration, the ANO, not Hotel Hope, is the applicant, and Hotel Hope is acting in this arbitration only at the behest of and on behalf of the ANO. To the extent that FEMA has raised a challenge to the applicant's standing, it is denied.

Documents Introduced During and After the Hearing

Pursuant to 44 CFR 206.209, an applicant is to include in the RFA that it submits to the Board “all documentation supporting the position of the applicant” upon which the applicant will rely during the arbitration. *Id.* 206.209(e)(1). It may include “supporting documentation not previously included in the project worksheet or the application to FEMA,” and “[t]here is no limit on the amount of documentation that may be provided.” 74 Fed. Reg. 44761, 44763 (Aug. 31, 2009). There is no need to limit the submission to documents previously presented to FEMA because, in this type of arbitration, we are not deferentially reviewing FEMA’s decision for abuse of discretion, but instead review matters de novo without deference to FEMA’s prior findings. *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,577 (2009).

During the hearing, the ANO brought to the Board’s attention and sought to introduce several documents – invoices supporting costs for (among other things) a boiler and roofing work, an old architectural drawing of the property, and documents from the files of the City of New Orleans addressing the building’s occupancy code – that were not previously included in the ANO’s RFA, but that supported its case. We marked those documents as Hearing Exhibits 5, 9, and 10, but deferred ruling on whether they would be admitted into the record. FEMA, citing to 44 CFR 206.209(h)(3), objects to the Board’s acceptance of any of the documents that the ANO attempted to introduce at the hearing, as well as additional documents dealing with an occupancy code issue that the ANO discovered in the files of the City of New Orleans after the hearing and attached to its post-hearing brief.

FEMA’s regulations governing these arbitration proceedings provide that a party, when presenting its case at a hearing, may only “reference documents [previously] submitted pursuant to paragraph [206.209(e)]” and “may not provide additional paper submissions at the hearing.” 44 CFR 206.209(h)(3). Yet, the same regulations also allow the arbitration panel, in its discretion, to “request additional materials from either or both parties,” as well as to seek input from expert witnesses. *Id.* For reasons that will become clear later in this decision, we exercise our discretion to accept these documents, as it will not prejudice FEMA. With regard to the invoices, we review all matters de novo, making prior review by FEMA not of absolute importance, and it was clear at the hearing that the invoices were authentic and that FEMA did not seriously question that they represented actual incurred costs. The architectural drawing is similarly authentic. With regard to the documents from the City of New Orleans, FEMA will have an opportunity to consider them when it prepares a new project worksheet.

### The ANO's Request for Replacement, Rather Than Repair, Costs

The ANO asks us to find that it is entitled to reimbursement of the full replacement cost of the building, rather than merely the costs of repairing disaster-related damage in the facility.

Under FEMA's regulations implementing the Stafford Act, an applicant is eligible for reimbursement of the costs of replacing, rather than merely repairing, a damaged facility if the cost of repairing the disaster-damaged elements of that facility to their "pre-disaster condition" exceed fifty percent of the cost of facility replacement:

- (1) A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its pre-disaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.
- (2) If a damaged facility is not repairable in accordance with paragraph (f)(1) of this section, approved restorative work may include replacement of the facility.

44 CFR 206.226(f). In its October 1999 PA Guide, FEMA further defines the manner in which it calculates repair versus replacement costs in what it calls the "50 Percent Rule":

#### **Repair vs. Replacement (50 Percent Rule)**

FEMA will restore an eligible facility to its pre-disaster design. Restoration is divided into two categories: repair or replacement. If a facility is damaged to the point where the applicant thinks the facility should be replaced rather than repaired, the following calculation, known as the "50 Percent Rule," should be used to determine whether replacement is eligible:

IF	$\frac{\text{Repair Cost}}{\text{Replacement Cost}}$	< 50%	THEN only the repair cost is eligible
IF	$\frac{\text{Repair Cost}}{\text{Replacement Cost}}$	$\geq$ 50%	THEN the replacement cost is eligible

PA Guide at 28-29.

In applying the “50 Percent Rule,” the ANO begins with FEMA’s V-6 figures for pre-upgrade repair cost (\$407,147.19) and replacement cost (\$1,081,511.81), placing them respectively in the numerator and denominator positions, and then adding additional costs to the repair cost numerator that it contends were incorrectly removed or reduced in FEMA’s calculations. Viewing FEMA’s \$1,081,511.81 replacement cost denominator as a fixed number, the ANO argues that, if it can show that repair costs will exceed \$540,755.91 (or fifty percent of the stipulated replacement cost amount), the ANO will have shown entitlement to replacement cost under the “50 Percent Rule.” The problem with the ANO’s theory is that, because the ANO’s approach would result in something other than an “apples to apples” comparison of costs, FEMA’s replacement cost estimate cannot be the static number that the ANO suggests. Both the repair and replacement cost estimates are equally dependent upon the cost of materials that will be used in the project as FEMA identified and input them when creating its cost calculations. As an example, the building walls are made of plaster placed on horsehair. In creating its repair and replacement cost estimates, FEMA elected to estimate the cost of gypsum board walls, which it viewed as an adequate substitute for the existing plaster-on-horsehair walls. If, as the ANO argues in this arbitration, it is entitled to repair the existing walls using the same type of plaster-on-horsehair materials that currently exist, FEMA’s repair cost estimate would necessarily increase because plaster on horsehair is significantly more expensive than gypsum board. Yet FEMA, to permit an “apples to apples” comparison, used gypsum board in *both* its repair *and* replacement cost calculations. If we were to increase FEMA’s repair cost estimate to account for a switch from gypsum board to plaster, we similarly would have to increase the replacement cost calculation in the same manner. *See, e.g.*, Transcript at 4-167 (testimony of Eddie Williams, Infrastructural Branch Director, Louisiana Recovery Office, FEMA: “If we were to include plaster in the repair, then we would have to reciprocate that into the replacement and it actually increases the replacement cost that you see here.”). We must treat FEMA’s replacement cost calculation as a number as susceptible to fluctuation, depending upon changes to the types and costs of materials that were used to create the calculation, as is the repair cost calculation.

Given that FEMA’s replacement cost calculation is not an unbending fixed number, and in light of the manner in which Hurricane Katrina damaged this particular building, we cannot find, based upon the evidence presented during the arbitration, that the cost of repairing the disaster-damaged elements of the facility would be more than fifty percent of the facility’s replacement cost. The ANO’s main factual argument in support of meeting the “50 Percent Rule” is that Katrina caused serious water damage to *both* the first and second floors of the building – the first floor by flood waters, and the second floor by rainwater that seeped through a damaged roof and left, according to the ANO, two inches of water on the second floor. There is no question, and FEMA does not contest, that Katrina caused significant damage to the first floor, and FEMA has authorized the repair/replacement of

walls, doors, and other aspects of rooms on the first floor. For the second floor, though, there is no contemporaneous evidence of significant damage from Katrina, other than some roofing damage that was quickly fixed. Although it is clear that, by 2014, the second floor had been seriously damaged by water and weather, no witnesses with first-hand knowledge testified about, and no contemporaneous photographs showed, how Katrina caused any such damage in 2005. As FEMA indicated during the hearing, there have been at least sixty-two serious intervening weather events causing heavy rains in New Orleans since Hurricane Katrina. The only photographs in the record showing water damage on the second floor of the building were taken in 2015, ten years after Katrina hit. The only contemporaneous post-Katrina documentation – FEMA’s PW-11678, V-0, from October 2006 – expressly stated that there was no damage to the second floor.<sup>2</sup> We cannot find that second floor water damage was caused by Katrina, and, without being able to include second-floor repair costs in the disaster-related repair cost numerator, the repair-cost/replacement-cost calculation will not surpass the fifty-percent mark in the circumstances here.

The ANO argues that it might be able to hit the fifty-percent target if we add the cost of complying with current safety codes to its repair cost. In applying the “50 Percent Rule,” though, FEMA includes in the repair cost “only those repairs associated with the damaged components” and not “upgrades triggered by codes and standards, demolition, site work, or applicable project management costs, even though such costs may be eligible for public assistance.” PA Guide at 29; *see* FEMA Response & Recovery Directorate Policy No. 9524.4, “The Eligibility of Facilities for Replacement Under 44 CFR 206.226(d)(1) (Sept. 24, 1998) (repair cost portion of equation does “not includ[e] code triggered upgrades”). Conversely, the replacement cost portion of the calculation “includes the costs for all work necessary to provide a new facility of the same size or design capacity and function as the damaged facility in accordance with current codes and standards.” PA Guide at 29. Because upgrade costs triggered, or necessitated, by current code requirements are excluded from the repair cost but not the replacement cost portion of the “50 Percent Rule” calculation, they do not assist the ANO in getting the cost of its repairs to the fifty-percent mark.

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<sup>2</sup> Further, two of FEMA’s witnesses noted that, when they visited the building in 2015, there were shallow pools of standing water on the second floor. Transcript at 4-173, -174, -181. Damage from water still standing in 2015 could not have been caused by Hurricane Katrina unless, over the course of the ten years since the event, the ANO had failed to take proper corrective action to stop roof leakages, a failure that would preclude the applicant’s recovery for the resulting damage. *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,198-99; *see* 44 CFR 206.223(e) (FEMA will not provide assistance “for damages caused by [the applicant’s] own negligence”).

Although we are not able to find in the ANO's favor on the current record, we believe that further development of the record is appropriate. As discussed below, we find errors that may affect both the repair and replacement cost computations, but others that would appear to increase only the repair cost computation. In such circumstances, we believe it appropriate to direct FEMA to allow the ANO to supplement its written submission with additional cost information, to the extent that it wishes to do so, and to issue a new project worksheet that incorporates the directions that we provide below regarding specific repair cost calculations and reconsiders whether, applying revised cost figures, the ANO's repair cost exceeds fifty percent of the replacement cost.

### FEMA's Challenges to the ANO's Repair Costs

#### I. Code Triggers

Normally, repair costs to restore disaster-damaged elements are reimbursed for work necessary to return the facilities to "the design of such facilities as they existed immediately prior to the disaster." 44 CFR 206.226. Nevertheless, although excluded from the "50 Percent Rule" analysis, certain costs required to upgrade disaster-damaged elements of a building may be reimbursed in certain instances as part of a facility's repair cost, even though it "change[s] the predisaster construction of [the] facility," if a local standard or code triggers the mandatory upgrade. *Id.* 206.226(d). Reimbursement for such triggered costs is available only if, among other things, the local code or standard is "appropriate to the predisaster use of the facility." *Id.* 206.226(d)(2); *see State of Louisiana, Facility Planning and Control*, CBCA 1768-FEMA, 10-1 BCA ¶ 34,452, at 169,993 ("The object of repair is to enable the facility to perform the function for which it was being used as well as it did immediately prior to the disaster.").

There has been a great deal of confusion in these proceedings about code triggers. FEMA originally argued that Hotel Hope intends to change the use of the facility from a convent to a homeless shelter and that, since it did not intend to restore the building to use as a convent, no code triggers were reimbursable. For much of this proceeding, neither the ANO nor the Board understood FEMA's argument, given that, when Katrina struck in 2005, Catholic Charities had been using the building as a homeless shelter for more than twenty years. FEMA represented that there was no evidence that Catholic Charities had ever obtained a certificate of occupancy converting the building's use from a convent residence to a homeless shelter and that, therefore, the use of the building from 1984 to 2005 was illegal. Because the last legal use of the building was as a residence for members of a religious community, the ANO would need to be restoring the building to that use for code triggers to come into play.

During the arbitration, FEMA was able to clarify what it really meant: that the ANO will be changing the occupancy classification of the building and that it is the change in classification, rather than the change in the type of resident, that will trigger mandatory code upgrades. The building code for the City of New Orleans is, with certain amendments, the International Building Code (IBC), which establishes the code requirements for construction. Section 310 of the IBC identifies the residential Group R occupancy requirements and includes everything from a boarding house, to a congregate living facility, to a dormitory, to a group home, to a place for personal care services, to transient housing. Within the Group R, there are sub-occupancies: Type R-1 deals with transient housing, such as “[b]oarding houses (transient) with more than 10 occupants,” while Type R-2 is for nontransient housing, such as convents and “[b]oarding houses (nontransient) with more than 16 residents.” Similarly, the National Fire Protection Association (NFPA) Life Safety Code, 1981 edition, made applicable through the Louisiana Code, identifies several occupancy categories, including IBC R-1, which applies to “Hotels, Motels (transient use),” and IBC R-2, applicable to “Dormitories” and “Apartments.”

We understand that, when St. Matthias Convent was first built and occupied by a group of religious community members, it received a Type R-2 occupancy classification. FEMA believes that, when the building’s use was converted to a homeless shelter in 1984, Catholic Charities should have obtained, but did not obtain, a change in the occupancy classification to Type R-1. Because Hotel Hope will use the building as a homeless shelter, FEMA asserts, it must be classified as Type R-1. Under article 502 of the 1980 City of New Orleans Building Code, no change in “the use of any building which would place the building in a different Group of Occupancy” can be made “unless such building is made to comply with the minimum requirements of this Code for that Group.” FEMA argues that, because code upgrades necessary to use the facility as a Type R-1 shelter are triggered only because there is a change in the building’s occupancy classification, any mandatory code upgrades are not a result of Katrina, but instead are required because Hotel Hope is changing the occupancy classification from R-2 to R-1.

When the ANO realized during the hearing what FEMA’s argument was, it attempted to obtain documents from the City of New Orleans to establish that Catholic Charities’ twenty-one-year use of the building as a homeless shelter was compliant with city requirements. The only documents that the ANO was able to gather in the short time allotted were documents showing City inspections or permit approvals while the building was being used as a shelter. Attached to the ANO’s post-hearing brief were additional similar documents indicating that the building was approved as a home for the “aged, infirm, [and] indigent,” along with information that it says it was able to obtain after the hearing. It is unclear the extent to which there may be other public records in existence, though not in our record, from the period when the building began to be used as a shelter.

The record here is less than clear as to what occupancy classification the building currently has or whether, since Catholic Charities (as we understand it) provided shelter to residents for extended periods of time (rather than single overnight stays), the proper occupancy classification differs from its original R-2 categorization. We cannot rely on new information in the ANO's post-hearing brief without providing FEMA a full opportunity to evaluate and respond to it, and, even then, the information about the proper occupancy classification for the building, including what it should be when Hotel Hope occupies it, is uncertain. In these circumstances, we remand this issue to FEMA for further evaluation and development. We recognize that, ultimately, the ANO, as the applicant, has the burden of proving its claims, *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,389, but we cannot fault the ANO for not understanding FEMA's position prior to the hearing. Although FEMA has argued that, even if Hotel Hope will be using the currently existing occupancy classification for the building (whatever that is), there may be no code-triggered upgrades, we think it more appropriate to request a more thoughtful and thoroughly developed record on this issue than to guess at its impact.

## II. Specific Repair Costs

Items 1 and 2:<sup>3</sup> Asphalt (Pitched) Roof and Flat Roof Repairs. FEMA has obligated \$10,944 that the ANO has already incurred for repairs to the building's asphalt (pitched) roof and \$2241.69 for repairs to a flat roof on the back of the building. Two invoices that the ANO submitted in support of these roof repair costs show payment by the ANO of \$30,630 and \$11,300, respectively, and the ANO seeks the unreimbursed portions of these invoices. However, the roofing invoices were not just for the building, but also included work on other ANO buildings. *See* FEMA Exhibit 24. The ANO presented no evidence allocating the costs that were for the roof work at the building at issue here or segregating them from those costs applicable to roof work on the other listed buildings. FEMA made its own adjustment, attempting to create a reasonable allocation of the amounts, Transcript at 3-122, and we find no basis for adjusting that estimate. We accept FEMA's estimates.

Item 3: Plaster Walls. The building was constructed with Portland cement plaster walls with a thickness of two-and-a-half inches. Those walls – on both the first and second floors of the building – extend nine feet and three inches from floor to ceiling, framed out with 1/8th-inch deep sixteen-gauge metal studs at sixteen inches on center with an expanded metal lath on both sides. There is no cavity inside these walls, but electrical wiring is concealed in recessed junction boxes.

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<sup>3</sup> Our reference to item numbers here and later in this decision matches the numbering contained in Hearing Exhibit 1.1.

FEMA proposes to replace these walls with 5/8ths gypsum board, which the ANO contends is not of equivalent quality to the existing walls. The ANO finds the current plaster walls of far superior durability, strength, rigidity, abrasion resistance, and sound control than gypsum board. The ANO presents evidence that the plaster walls provide a sound transmission coefficient (STC) rating of up to fifty-two, to which FEMA's proposed gypsum board replacement does not come close. The ANO proposes to increase FEMA's repair cost calculation by \$54,568.43 to allow for reconstruction of the first floor walls using a three-coat cement plaster. FEMA contends that the ANO is not entitled to compensation for rebuilding existing walls using the wall's original materials, but instead must apply "modern means and materials," as directed in a FEMA policy paper. Because plaster-on-horsehair walls are not the modern way, according to FEMA, the ANO is only entitled to the cost of replacing the existing walls with drywall, which FEMA says is comparable to what was originally there.

Without addressing whether FEMA's internal policy direction regarding "modern means and materials" is consistent with FEMA's published policy directives, we find no basis upon which to require the ANO to use gypsum board to replace its existing walls. Plaster walls are listed in RS Means, their cost can be estimated, and there is nothing inherently antiquated about plaster walls. Transcript at 3-245, -253; see *Abercrombie v. Allstate Insurance Co.*, 891 S.W.2d 838, 839-41 (Mo. Ct. App. Dec. 27, 1994) (permitting insured to recover actual cost that it would have taken to restore house to its pre-fire condition, including the cost of repairing lathe and plaster walls to their original condition). Further, as one of FEMA's witnesses acknowledged, gypsum board is unlikely to have the same sound insulation qualities as the existing walls. We accept the ANO's estimate for the cost of repairing or replacing the first floor walls. To the extent that the ANO is also seeking costs associated with the second floor walls, we find insufficient evidence to attribute the damage on that floor to Katrina.

FEMA has suggested that the ANO's request to use plaster walls should not be granted because it represents a change in the ANO's original position. When the ANO made its original request for compensation, its architect indicated that the ANO would use gypsum board walls in the facility, which FEMA thought was reasonable. As FEMA acknowledges, though, the ANO subsequently changed its request to plaster. Because FEMA has not identified any kind of estoppel or other theory that would preclude the ANO from making that change, FEMA cannot hold the ANO to its original request simply because FEMA prefers it. The ANO's original request does not create any kind of presumption against its current request for plaster.

Item 4: Floor Tile in Kitchen. The parties disagree about whether quarry tile was damaged by the flooding. FEMA has allocated costs for cleaning the tile, but not for

replacing it with a new floor. According to FEMA, the only reason to replace the tile is because it would need to be ripped up to allow access to the plumbing beneath it, which FEMA contends is not a disaster-related damage. Transcript at 3-164, -165. The ANO has not established that the flooding necessitates replacement of the quarry tile or that FEMA's estimate is too low.

Item 5: Metal Windows. The current exterior windows for the convent building are steel-framed double-hung windows. FEMA has estimated replacement costs for wood double-hung windows with metal cladding. Further, FEMA's estimate assumes stock windows of three-and-a-half-feet by five-feet-six-inches, which will not fit the varying window frame sizes that will necessarily have to be custom-built. We agree with the ANO that FEMA's proposed replacement framing does not possess the same longevity as the existing windows in a humid environment like New Orleans. *See* Transcript at 4-252. FEMA has agreed to fund \$22,709.40, but we find the ANO's estimate of \$45,498.40 more appropriate.<sup>4</sup>

To the extent that there are additional code triggers for fire safety upgrades to windows that FEMA believes will be required only because the ANO is changing the approved occupancy use of the property, *see* Transcript at 3-166 to -171, FEMA shall reevaluate that position in its next project worksheet. To the extent that the ANO is seeking replacement of windows on the second floor, we find insufficient evidence to warrant reimbursement of those costs.

Item 6: Stained Glass Window Refurbishment. On the first floor of the building, there are eight pairs of operable out-swinging casement windows in industrial steel sashes, all of which contain stained glass. Flooding from Katrina covered approximately seventy percent of the stained glass windows and rusted the framing. FEMA is willing to fund replacement of the windows with regular glass, but not to repair the stained glass itself.

We find that, in the circumstances here, FEMA should fund the repair of the stained glass elements of these windows in the amount of \$8956.32 that the ANO claimed.<sup>5</sup> We

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<sup>4</sup> Both parties agree that the windows, because of code upgrade requirements, will need impact-resistant glass. Transcript at 2-48, -49, -51. Because such glass needs to be part of a tested assembly, it increases the cost of the framing. *Id.* at 2-52.

<sup>5</sup> Although we believe that repair funding for the stained glass is appropriate here, we reject the ANO's argument that certain historical preservation requirements applicable to these windows affect reimbursement entitlements. We cannot find that any such historical preservation requirements exist. Further, the ANO sought to increase the cost sought for

specifically asked FEMA to provide us with post-hearing briefing directing our attention to FEMA's regulations or policies – whether it be the October 1999 PA Guide, its October 2001 Public Assistance Policy Digest (PA Policy Digest), or something else – that would help us understand FEMA's reimbursement obligations for the type of windows at issue. In response, FEMA informed us that, although it restores facilities to predisaster design, function, and capacity (as set forth on page 88 of its PA Policy Digest), the stained glass at issue is a remnant of the building's former life as a convent, that “[s]tained glass is not a requirement for a homeless shelter to function,” and that “[c]lear glass, as provided in FEMA's repair estimate, serves the function of a homeless shelter.” FEMA's Post-Hearing Brief at 14. Beyond a lengthy discussion of the limits of the Board's authority in arbitrations, FEMA cited no other reason justifying replacement of the stained glass with clear glass. Although FEMA's stated reason for denying stained glass repair focuses on its function within a homeless shelter, FEMA does not discuss why the stained glass is not a part of the predisaster design of the windows. Without further explanation from FEMA, we cannot accept that the stained glass is not a predisaster design element that should be restored.

There may be other provisions within FEMA's policy statements that would normally affect reimbursability of stained glass window repairs. We note that, in its October 2001 PA Policy Digest, FEMA indicates that it will not replace one-of-a-kind art objects, although it may “fund stabilization efforts” so that the art “can function in the same capacity as it did prior to the disaster.” PA Policy Digest at 8. In effect, repair of the stained glass could be viewed as a stabilization effort of an artistic element. To the extent that there are limitations on this type of stabilization funding, FEMA did not rely upon or cite to them in its post-hearing briefing, so we do not address them here. We direct FEMA to fund the stained glass repairs.

Items 7, 8, and 9: Doors and Frames. The doors on the first floor of the building were an inch-and-three-quarters solid core doors and were heavily damaged by floodwater as a result of Katrina. In pricing new doors, FEMA developed an estimate assuming the use of hollow core doors, with a thin veneer over a frame, rather than solid core doors of the thickness that previously existed. Further, FEMA assumed use of standard size doors, even though those would not necessarily fit all of the door frames that exist on the first floor of the building. The hollow core doors that FEMA proposes do not offer the same sound attenuation, safety, and security as the damaged solid core doors. The ANO is entitled to reimbursement for solid core doors. We find the ANO's estimate of \$43,000 for those doors more appropriate than FEMA's estimate of \$21,822.16.

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stained glass repair during the hearing, but could not cite any record evidence to support that increase. We do not consider the cost increase request here.

To the extent that there was water damage to the second floor doors, we cannot find that the damage was caused by Hurricane Katrina. If there are additional code triggers for fire safety upgrades to doors that FEMA believes are required only because the ANO is changing the approved occupancy use of the property, FEMA shall reevaluate that position in its next project worksheet.

Item 10: Ceilings. The building currently has a twelve-inch 2x2 z-frame ceiling. FEMA proposes to reimburse the ANO for the cost of a 2x4 lay-in ceiling suspension system, including a washable ceiling in the kitchen area, at an estimated cost of \$15,872.04. The ANO has proposed replacing the existing 2x2 system to match what currently exists. We see no reason for FEMA's change from 2x2 to 2x4, although the cost difference is apparently negligible. Further, the ANO contends that FEMA's estimate does not include the cost of restoring those areas within the ceiling that meet with windows, which the ANO says will require a four-and-seven-eighth-inch channel with a cross member (a different method of attachment than the rest of the suspension ceiling). The ANO asks to increase FEMA's estimate by an additional \$16,718.96, for a total first-floor ceiling cost of \$32,591. We grant the ANO's request.

Item 11: First Floor American with Disabilities Act (ADA) Upgrades. FEMA has estimated \$11,937.11 in recoverable expenses for changes or upgrades to disaster-damaged elements required by the ADA, but the ANO's estimate is \$31,484.01. The differences appear to relate to changes that the ANO would like to make to create a more accessible building – for example, raising the floor level in a bathroom to allow wheelchair access, as well as plumbing, sewer, and water upgrades – that FEMA contends is not related to damage caused by Katrina. The ANO has not shown that, even if Katrina caused a need to conduct certain repairs to the first-floor bathroom, the repair would trigger a code necessitating changes to plumbing fixtures, piping, and floor levels to comply with the ADA.

Items 12, 13, and 14: HVAC System. The building had a central air handling unit installed in a mechanical room on the first floor, along with a cooling tower that served as a heat transfer mechanism. FEMA does not dispute entitlement to replacement costs, but does not believe it appropriate to pay for certain code-triggered upgrades because the trigger occurred only, according to FEMA, because the ANO is changing occupancy classifications from a convent to a homeless shelter. For the reasons previously discussed, FEMA shall reevaluate this position in its next project worksheet after receiving additional information about the building's Type R-1 or R-2 classification.

Another disputed element of the HVAC system involves the duct work and the diffusers themselves. The issue is whether the ANO is entitled to the cost that it would have incurred to clean them or, instead, to the cost of replacing them throughout the building. The

ANO contends that, because of problems associated with mold in ducts and the manner in which mold spores migrate through a building, it is less expensive and more reliable to replace the ductwork than to try to remediate mold in the ducts. FEMA believes that a mold report is necessary to confirm the presence of mold and to establish that the mold is a direct result of, rather than pre-dated, Hurricane Katrina. In considering this cost claim, we recognize that the first floor of this building was, because of Katrina, filled with brackish water for an extended period of time in a humid environment. Further, the building prior to Katrina housed, and once it is restored will once again house, a large number of children for extended residencies, lessening the appropriateness of experimenting with the use of only a bleach wash to clean the duct work, as FEMA proposes. Considering the prior and future use of the facility, we find the evidence here sufficient to warrant replacement of the duct work and diffusers throughout the building.

A final issue associated with the HVAC system in the building deals with its design. The old system was designed to use the corridors in the building as a plenum, through which the return air runs through the hallways before entering a grill back to the air system handling unit. That type of design is barred by current codes because, if there is a fire in the building, the means of return air handling creates a likelihood that fire will spread faster down hallways than with a ducted supply return air handling system. FEMA speculates that the ANO may not be required to change the current corridor plenum system if it uses the building as a homeless shelter, Transcript at 1-170, a belief that seems unlikely given the safety issues, *see id.* at 1-202, or, if the system has to be changed, the change would result from a code trigger caused by an occupancy code change, which FEMA asserts would not be reimbursable. The record here is too undeveloped to allow us to evaluate this issue. In its next project worksheet, FEMA should reevaluate the costs associated with fixing the plenum issue once it has additional information about whether Hotel Hope would require a changed occupancy code and the extent to which there are code-triggered upgrades in this project.

Items 15 and 16: Kitchen Hood and Cabinets. FEMA asserts that the kitchen hood, which was stainless steel, was not damaged by the hurricane because it was above the flood waters, but FEMA has agreed to refurbish the existing hood at a cost estimate of \$3300. Transcript at 3-183 to -184. The ANO's request for kitchen hood replacement costs totaling \$11,730 is not supported by the record. As for kitchen cabinets, there is no reliable record of what cabinets were in the kitchen at the time of Hurricane Katrina, as they were ripped out long ago, but FEMA has created a replacement estimate of \$8108 based on what it asserts is the best available information. *Id.* at 3-184. We find FEMA's estimate reasonable.

Item 17: Boiler Demolition and Remediation of Asbestos. The ANO is relying on an invoice from October 2015 (Hearing Exhibit 5, Invoice 3654) for removal of the boiler

and asbestos on the first floor in the amount of \$3900.<sup>6</sup> Although FEMA questions whether a small portion of that money might have been attributed to asbestos removal unrelated to disaster-damaged items, it acknowledges that the heating piping that went to the boiler was insulated with asbestos materials. Transcript at 3-185. The ANO is entitled to this funding.

Item 18: Boiler. FEMA has authorized \$25,540 of the ANO's requested \$33,757.54 for the cost of a replacement boiler. The ANO's request is supported by an invoice, and we grant the ANO's request for reimbursement.

Item 19: Electrical Underground Service. Although the ANO is seeking authorization for electrical underground service, FEMA was informed when it met with the ANO's design team that Entergy New Orleans, the public service utility, would no longer permit the ANO to reinstall underground service and wanted equipment panels installed outside the building. FEMA has agreed to include funds to provide for overhead service. Transcript at 3-186.

Item 20: Store Room Electrical Demolition. The ANO seeks an additional \$881.08 for electrical demolition. FEMA disputes that anything is missing from its \$2180.80 estimate. Transcript at 3-191, -192. The ANO has not established any deficiencies in FEMA's estimate.

Item 21: Other Electrical Demolition. The ANO is no longer claiming costs associated with this category.

Item 22: Telephone Line Service Throughout the Building. Neither the ANO nor FEMA identified damage to previously existing phone lines in its original cost calculations. Transcript at 2-131, 2-132, 3-172 to -175. Nevertheless, it became clear at the hearing, after the parties realized that FEMA had placed a sum for communications wiring in its replacement cost calculation but not its repair cost calculation, that these repair costs had been overlooked. The ANO estimates a cost of \$7290.08. At the hearing, FEMA did not dispute that the cost was reasonable, and we direct FEMA to authorize the cost.

Item 23: Water-Cooled AC Units Demolition. The ANO has withdrawn its request for this cost.

Item 24: Blocking for New Doors (First Floor). FEMA believes that the door estimates otherwise detailed in item 7 cover the \$2477.25 in costs claimed here for the

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<sup>6</sup> The invoice also identifies \$4950 in asbestos removal costs for the second floor, but that work was not shown to be necessitated by disaster-caused damage.

framing necessary for the blocking of first-floor doors and that no additional costs are necessary. Transcript at 3-193. The ANO did not establish these costs at the hearing.

Item 25: Paint (Unit Cost Difference). FEMA acknowledges that, in light of the manner in which painting is procured in New Orleans, the price of \$33,243.31 that the ANO has quoted for first-floor painting is reasonable. Transcript at 3-193. FEMA believes, though, that the dollar amount includes preparation of the wall surface for painting, which FEMA believes is unnecessary because the surfaces should be drywall, and that paint prices in New Orleans are too high. Accordingly, FEMA has only obligated \$18,706.54 for painting. *Id.* at 3-193. Because we previously allowed the ANO to replace its plaster walls with plaster, we reject FEMA's reduction based upon drywall. Further, the ANO is entitled to the reasonable costs of painting as those costs exist in the New Orleans area. Because FEMA did not viably challenge the reasonableness of the ANO's estimate, we accept that estimate.

Item 26: Building Exterior Cleaning. Although the ANO seeks \$6207.38 for cleaning the exterior of the building,<sup>7</sup> FEMA has granted only \$779.10. FEMA asserts that the building is twelve feet high, but that the flood water was only six feet and that FEMA can only authorize cleaning of the bottom six feet of the building. Transcript at 3-195. We can find no basis upon which to question FEMA's estimate.

Item 27: Selective Demolition and Construction Material Not Captured Elsewhere. FEMA claims that it does not know what costs for repair of eligible disaster-damaged items would not be captured elsewhere in the ANO's claim. Testimony at the hearing suggested that this category of costs is a bit of a "catch-all" for costs that the ANO might otherwise have overlooked. Transcript at 4-281, -282. The ANO has not supported recovery of such undefined costs.

### Decision

For the foregoing reasons, the ANO's request for replacement costs is denied without prejudice. FEMA shall create a new version of PW-11678, taking into account the discussion about repair costs above, after providing the ANO an opportunity to investigate and attempt better to define the occupancy classification issues discussed above. In its new

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<sup>7</sup> The ANO originally claimed \$8507.38, but reduced the amount during the hearing. Transcript at 4-280.

version of PW-11678, FEMA shall reconsider whether the ANO's repair costs are greater than fifty percent of replacement costs under the "50 Percent Rule."

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.

Board Judge

*Erica S. Beardsley*

ERICA S. BEARDSLEY

Board Judge

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge