



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 24, 2019

CBCA 6202-FEMA

In the Matter of FACILITY PLANNING AND CONTROL,
STATE OF LOUISIANA

Richard F. Zimmerman, Jr., Randal J. Robert, and Julie M. McCall of Kantrow, Spaht, Weaver & Blitzer, Baton Rouge, LA, counsel for Applicant.

Lynne Browning, Assistant Deputy Director, Danielle Aymond, Executive Counsel, Carla Richard, Executive Officer, and Jaron Herd, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Charles Schexnaildre and Frank E. Bruscato, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the arbitration panel consisting of Board Judges **SOMERS** (Chair), **LESTER**, and **O'ROURKE**.

The Facility Planning and Control, State of Louisiana, (FP&C) sought arbitration over the denial by the Federal Emergency Management Agency (FEMA) of FP&C's request for funding additional repairs to Bienville Hall, a former student dormitory located on the campus of the University of New Orleans (UNO).¹ FP&C seeks damages not addressed in

¹ Disaster-related claims for Bienville Hall involve two eligible applicants. As the end-user, UNO operated the facility at the time of the disaster and had claims involving emergency work and contents replacement. FP&C is the designated state agency with legal

prior PWs issued with regard to Bienville Hall. Relying upon an assessment analysis prepared by an architectural firm, FP&C asserts that it will cost approximately \$17 million to complete the additional work.

FEMA obligated only \$511,829 as eligible repairs in response to FP&C's request. FP&C appealed FEMA's determination pursuant to 44 CFR 206.206. After the Regional Administrator denied its first appeal, FP&C filed its arbitration request in lieu of filing a second level appeal under 44 CFR 206.209.

For the reasons that follow, we uphold FEMA's determination and deny FP&C's claim.

Background

Bienville Hall Pre-Katrina

Bienville Hall is located on the campus of the UNO in New Orleans, Louisiana. Built in 1969, Bienville is an eight-story building with a façade of brick veneer and approximately 270 exterior windows. The building consists of two separate wings which are separated by a common vertical core. The heating, ventilation, and air conditioning (HVAC) system is composed of a two-pipe system with two water-cooled centrifugal chillers and two gas-fired heating boilers.

In declarations and at the hearing, witnesses provided additional details about the HVAC system. Witnesses explained that Bienville Hall did not have centralized or dedicated air handling units serving entire zones or floors. Instead, Bienville Hall has over 190 independent fan coil units (FCUs). The typical layout of each floor is comprised of six independent FCUs serving dedicated common areas, such as corridors and lobby areas. Each pair of dorm rooms had its own dedicated FCUs. With the exception of shared hydronic piping, each of these units operates independently. There is no ducted connection or air flow between the units.

responsibility for the facility with claims involving emergency work and permanent repairs. FEMA has approved a combined total of \$2,821,052.70 in emergency protective measures and permanent repairs. For FP&C, FEMA has approved \$2,186,179.57 in project worksheets (PWs) 5722, 10900, 14413, and 16290. This appeal concerns PWs 5722, 10900, and 14413.

The building has asbestos-containing fireproofing on all structural members and intermittent floors on the underside of the metal floor decking. It also has asbestos-containing insulation on the chilled water and heating water piping system located in vertical chases with fireproofing overspray affecting sewer and domestic water lines.

Bienville Hall continuously served as a dormitory for students attending UNO, with the first floor occupied by administrative housing offices until Hurricane Katrina hit. While acknowledging that the building had sustained normal wear and tear and had certain structural issues identified in a report prepared by Ehlinger and Associates in 2000, and, later, an analysis conducted by Carubba Engineering, Inc., in 2003,² FP&C asserts that Bienville Hall did not have any significant water intrusion events prior to Hurricane Katrina.

Storm and Related Damages

On August 29, 2005, Hurricane Katrina, through its high winds, wind driven rain, and storm surge, damaged Bienville Hall. Flooding on the first floor completely inundated the mechanical, electrical, and plumbing systems. The upper floors received serious wind damage, smashing almost 100 windows. Rain water saturated the entire building. High winds caused 50% of the west wing roof cap to blow off and damaged the remaining roof. The damaged roof conditions allowed rain water to permeate the upper floors until temporary roof repairs could be undertaken. Prolonged power outages and the inability to access the building resulted in mold forming in Bienville Hall and other storm-related problems.

Efforts to Remediate and Repair Bienville Hall after Katrina

After the storm, FEMA authorized temporary roof and window repairs, which were performed within approximately four to six weeks after the storm. FEMA obligated funding for these repairs under PW 16290, version (v) 0. Later, FEMA approved a complete re-roofing of the building (pursuant to PW 5722), which a contractor completed by August 2006.

² The reports advised FP&C to repair the structure to stabilize the building, to replace windows with those designed to resist Category III hurricane force winds, and to replace rusted masonry support angles, among other recommended improvements and repairs.

Project Worksheets

FEMA obligated PW 14413v0 on October 18, 2006, for mold remediation of Bienville Hall. Approved costs totaling \$686,490 included FP&C's claimed amount for mold remediation work performed by Ascension Environmental Services, Inc. (AES) and related services performed by AIMS Group, Inc. (AIMS). The remediation work began in January 2006 and was completed by March 2006. An interoffice memorandum dated September 29, 2006, provided by FP&C during PW formation, stated that all remediation for Hurricane Katrina-related damage was complete.³ FEMA issued version 1 to document final costs of \$662,223.01 for the remediation work based on FP&C's documentation. Several versions followed to document various revisions to contract costs, insurance purchase requirements, and other financial information.

FEMA approved \$405,347.28 in PW 10900v0 on August 17, 2006, for Bienville Hall mechanical repairs. The total amount representing eligible costs for this PW was \$441,563.20.

FEMA initially approved \$883,066 in PW 5722v0 on May 31, 2006, for permanent restoration of Bienville Hall. Eligible work included replacement of interior finishes, mold remediation, water extraction, and roof repairs. Several versions were issued. Version 8 accounted for all completed work and actual costs according to FP&C's request and documentation.

Post-Repair Events

Students returned to Bienville Hall in the fall of 2006, and the building continued to serve as student housing until the fall of 2007, when FP&C moved students from Bienville Hall to a newly constructed dorm. Afterwards, university employees and student groups used the first four floors of Bienville Hall as office and activity space. Floors five through eight remained vacant.

As one FP&C witness explained, after Bienville Hall was reoccupied in 2006, maintenance issues became much more challenging. One of the biggest problems involved

³ AIMS mold remediation specifications appeared to require it to follow, among other things, EPA's "Mold Remediation in Schools and Commercial Buildings," which included a "Checklist for Mold Remediation." The checklist required the contractor to "consider the possibility of hidden mold" and to "check inside air ducts and air handling units."

water leaks, which randomly occurred in a sporadic fashion within the plumbing systems located behind building walls. Inspectors examined the building on a regular basis, repairing leaks and plumbing as necessary. Ultimately, in mid-2008, FP&C elected to bypass chilled water and hot water lines servicing floors five through eight, which allowed UNO to shut off water to the unoccupied upper floors while maintaining necessary water systems on floors one through four. Subsequently, after employees working on the first two floors of Bienville Hall complained of the air quality, FP&C contracted with AIMS to investigate the air quality on the first floor.

In a report dated March 10, 2009, AIMS recommended the employees relocate due to elevated mold spore counts and suggested that a comprehensive mold investigation be conducted on the HVAC system. Under contract, AIMS examined the HVAC system in August 2009. While it determined that airborne mold spores existed, AIMS did not perform swab sampling within the HVAC ducts, citing concerns about the presence of asbestos. In September 2009, AIMS recommended that all areas with elevated mold spore counts be cleaned and decontaminated, to include the HVAC system. AIMS also recommended abatement of all asbestos spray-on fireproofing above the ceiling.

FP&C elected not to implement AIMS's recommendations, but, instead, abandoned the building and decommissioned it in January 2010. Four years later, in October, 2014, FP&C attempted to reenergize Bienville Hall. This resulted in major water leakage from the plumbing system.

When FEMA agreed that the removal and replacement of the ductwork in another building located on UNO, which included a cafeteria and student space (the Commons), would be covered as FEMA-eligible expenses, UNO began to discuss with the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) and FEMA capturing additional damages that had not previously been authorized by FEMA for Bienville Hall in PWs 5722, 10900 or 14413. The entities met in July 2013, and personnel conducted a site visit in August 2013. Discussions continued in late 2013 and early 2014.

In May 2014, FP&C engaged Holly & Smith Architects (H&S) to prepare a damage assessment, scope alignment, and report analyzing the damage to Bienville Hall. The November 10, 2014, report identified additional damages and deterioration resulting from mold contamination, deoccupancy, and building inactivity:

[H&S] performed an analysis of existing FEMA project worksheets and an investigation of the current condition of Bienville Hall This report identifies damages that are a direct result of Hurricane Katrina and considers systemic issues which have occurred, and are currently occurring within

Bienville Hall This report evaluates the existence of mold within the air distribution system, which caused the facility to be initially decommissioned. Emphasis has also been placed on further damages which have occurred as a result of deoccupancy transpiring from mold contamination. Building inactivity has caused further deterioration.

The H&S report included an estimated base cost, which FP&C included in its request.

Thus, in a version request dated December 9, 2014, FP&C requested that FEMA approve work and costs of \$17,050,320 for additional damage not previously claimed. FP&C sought to consolidate PWs 5722, 10900, and 14413. FP&C's claim explains:

Additional damage has been identified at UNO Bienville Hall. An inspection was conducted by the architect retained by FP&C, Holly & Smith Architects, and damage not identified in previous [PWs] for this building has not been documented and a cost analysis prepared. . . . FP&C is requesting that a new PW be written to consolidate several [PWs] associated with UNO Bienville Hall. These [PWs] are PW 5722, PW 10900, and PW 14413. A time extension and project timeline has been provided in Time Extension Request.

To evaluate the mold damage and remediation claim, FEMA retained the services of a certified industrial hygienist to provide an independent expert opinion on the source of mold contamination and its relevance to Hurricane Katrina. The expert concluded that the mold was not the direct result of Hurricane Katrina:

This expert report was prepared to render an independent fact-based expert opinion on Bienville Hall mold contamination and potential for exposure to mold as a result of Hurricane Katrina-related damages and events that occurred post-Hurricane Katrina. A Certified Industrial Hygienist (CIH) reviewed available information, analyzed existing data, and conducted a site visit. Based on the available information, the CIH concluded that the mold conditions cited in 2009 were not directly related to Hurricane Katrina related damages. The conditions were the result of lack of asset protection, lack of repair and maintenance of the facility post-Katrina recovery, and building deficiencies that existed before Hurricane Katrina.

FEMA Memorializes Katrina Specific Guidance

In November 2006, FEMA issued fact sheet 9580.100, which memorialized Hurricane Katrina-specific guidance issued in late 2005. This fact sheet provided guidelines for sub-

grantees to be eligible for reimbursement for the cost of pre- and post-remediation mold sampling and for the actual remediation. Potentially eligible activities included cleaning contaminated heating and ventilation, including ductwork. The fact sheet placed responsibility on the sub-grantee “to take reasonable measures to prevent the spread of mold contamination to a facility” or “the rehabilitation and repair of the additional contaminated area will not be eligible for federal assistance.”

FP&C’s Request for Funding

Ultimately, FEMA obligated \$511,829 under PW 5722v9 for additional disaster-related work and denied \$16,538,491 of the \$17,050,320, contending that: (I) the HVAC system was not contaminated with mold and thus replacement was not necessary; (ii) even if contaminated, any such contamination was caused by lack of maintenance and repair and not Hurricane Katrina; (iii) replacement of hydronic piping was not Katrina related; (iv) complete asbestos abatement of the building was not warranted or necessary; and (v) recommended code upgrades were not sufficiently documented and/or were not eligible.

FP&C appealed, seeking the full amount of \$17,050,320. When FEMA denied the first-level appeal on the grounds that FP&C had failed to demonstrate that the work in question is required as a direct result of the disaster pursuant to 44 CFR 206.223(a)(1), FP&C requested arbitration.

Discussion

The Stafford Act authorizes FEMA to provide grant assistance “to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government.” 42 U.S.C. § 5172(a)(1)(A) (2012) FEMA’s regulation 44 CFR 206.223(a)(1) states in relevant part that “[t]o be eligible for financial assistance, an item of work must . . . [b]e required as a result of the . . . major disaster event.” FEMA cannot grant assistance for damage that is caused by something other than the declared disaster event, including pre- and post-disaster damage or negligence. 44 CFR 206.223(e). In addition, an applicant must identify and provide sufficient documentation to substantiate disaster-related damage. 44 CFR 206.202(d), 209(e)(1). Here, for FP&C to succeed, it must prove that mold contamination exists within the 190 individual FCUs and associated ductwork and that moisture in Bienville Hall and the HVAC system is the result of Hurricane Katrina.

After examining the record, including the expert witness reports and the testimony presented at the hearing, we find that FP&C failed to meet its burden of proof because it did

not establish that mold actually contaminated the HVAC systems.⁴ None of its witnesses or documentary evidence proved actual mold contamination in the individual 190 units. FP&C claims that mold “existed or may have existed above the ceilings (in the ceiling chases) in the entire eight story Bienville Hall complex,” but acknowledges that the HVAC system ductwork and 190 FCUs were never inspected or remediated following Hurricane Katrina. FP&C blames the absence of inspection on FEMA, which it contends would not authorize ductwork cleaning and/or replacement at the time. The problem with FP&C’s theory is that it bears the burden “to take reasonable measures to prevent the spread of mold contamination to a facility.” Nothing prohibited FP&C from inspecting the ductwork at the time of the initial remediation work that had been authorized by FEMA. Indeed, the record shows that all disaster-related repairs and remediation work necessary to restore functionality to Bienville Hall were completed within eight months following the disaster.

AIMS does not state in either of its reports that the HVAC systems are contaminated with mold. While AIMS took multiple air samples throughout the building, the lack of swab samples taken directly from within the HVAC systems make it impossible to definitively conclude that elevated air samples were the result of mold contamination within the HVAC systems. Finally, as to the 190 individual units, evidence established that no ducting or piping connects the units. Even if mold samples had been taken from within some of the FCUs and showed elevated levels of mold contamination, those results would only indicate that mold occurred in the units tested, not the entire system, and would not allow us to find that the mold was anything other than the result of the UNO’s decision to abandon this building for an extended period of time during which it was not being properly maintained.

We find most persuasive the expert witness report and testimony of FEMA’s expert witness, who opined, “with a reasonable degree of professional and scientific certainty that the substantial contributing factors for the current mold and asbestos issues are not directly related to Hurricane Katrina.” She also concluded that there is “inadequate evidence to support the recommendation that all spray-on fireproofing must be removed prior to HVAC decontamination.”

Other Claims

FP&C sought replacement of the hydronic piping and plumbing system, replacement of the delaminating vinyl composition tile flooring, funding for the demolition of a concrete

⁴ FEMA does not dispute FP&C’s claim that there is currently mold inside Bienville Hall. It disputes the alleged cause and extent of the mold.

masonry unit in order to meet “code compliant clearances,”⁵ sanding and painting of several areas, as well as replacement of power connections. Insufficient evidence has been presented to support these claims, some of which FEMA notes are duplicative with previous PWs. Without more, we cannot grant FP&C’s claims.

Decision

FEMA’s July 22, 2016, determination is sustained.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Kathleen J. O’Rourke
KATHLEEN J. O’ROURKE
Board Judge

⁵ FP&C does not identify which code applies.