



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 28, 2019

CBCA 6434-FEMA

In the Matter of PLAQUEMINES PARISH GOVERNMENT

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

Charles Schexnaildre 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 **SOMERS**, **SULLIVAN**, and **CHADWICK**.

Plaquemines Parish Government (PPG) sought arbitration of the Federal Emergency Management Agency's (FEMA) denial of public assistance funds for the repair and restoration of Fort Jackson, a national historic landmark located in the parish. FEMA determined that PPG had demonstrated damage that directly resulted from Hurricane Katrina and obligated \$3.524 million. However, FEMA denied PPG's request for an additional \$14 million, because PPG could not demonstrate that the work for which PPG sought these funds was to repair damage caused by the storm. With the exception of the denial of funds for repairs to the water batteries at the fort, we agree with FEMA's determination.

Background

Hurricane Katrina struck Plaquemines Parish on August 29, 2005. Fort Jackson was buffeted by storm winds and inundated with sea water from the Gulf of Mexico. Numerous trees were knocked down and the water remained inside the fort for forty days.

Damage Reports. In 2002, a team from the National Park Service (NPS) inspected the fort to determine the scope of possible repairs necessary if the fort were to be made part of the Jean Lafitte National Historical Park. In the condition assessment report issued following this inspection, the fort is described as “in relative good condition,” but also in need of significant repairs “to bring the fort up to today’s preservation maintenance standards.” Request for Arbitration (RFA), Exhibit 30 at 2. The identified repairs included re-pointing all masonry features of the fort, repair of the existing drainage system and moat around the fort, and replacement or installation of water-proof protection over the casemates, galleries, and parapet walls. The team also recommended that the trees on top and around the fort be removed, the large masonry cracks be studied and repaired as needed, and the iron gates and grills be repaired and repainted.

In 2004, FEMA evaluated damage to the fort following Hurricane Ivan. FEMA obligated funds to repair these items, but the repairs were not carried out.

In November and December 2005, FEMA representatives inspected the fort for damage following Hurricane Katrina. In the reports of these inspections, FEMA inspectors noted that there was damage apparent following the storm, including “significant widening of the cracks,” missing railings and brownstone capstones, and “mortar loss indicated by small chunks that ha[d] fallen from the vaulted brick ceilings.” FEMA Response to RFA, Exhibit 31 at 3. At least one of the inspectors had been at the fort following Hurricane Ivan in 2004. However, FEMA also noted that the challenge would be to justify a level of funding for a “structure that had been already suffering from deferred maintenance for decades.” RFA, Exhibit 7.

In 2008, PPG submitted a report prepared by John Milner Associates, Inc., which described the damage to the fort, and included reports of tree and structural experts. This report described the continuing damage caused by the salt water inundation. The report stated that “there is very little information of the condition of the fort prior to Hurricane Katrina,” for key elements such as the masonry. RFA, Exhibit 33 at 20. The report also stated that “pre-existing damage that has been significantly worsened by the storm effects will be stabilized in place, but no pre-existing damage will be addressed in this program.” *Id.* at 29. At the hearing convened by the panel, PPG’s expert explained that this statement referred only to the outerworks of the fort. Transcript at 258. PPG’s expert further explained

that PPG sought to repoint only twenty-five percent of the masonry, as a “reasonable” figure, but did not explain how this percentage was determined or how it tied to damage caused by Hurricane Katrina. PPG’s expert testified that he did not recommend expensive testing to determine the levels of salt contamination remaining in the masonry. *Id.* at 248. PPG’s structural engineering expert testified only that it was “likely” that some of the pre-existing cracks widened as a result of the storm and the inundation. *Id.* at 359.

In 2009, NPS representatives returned to Fort Jackson and found that “with the exception of the tree damage and most obvious damage . . . the [2009] condition varied little visually” from the conditions depicted in pictures NPS took in 2002. RFA, Exhibit 16 at 8. They acknowledged FEMA’s 2005 report of widening cracks and other damage, but were “unable to validate [the damage] due to the lack of pre-Katrina baseline data and the length of time since the hurricane.” *Id.* at 7. The NPS team noted that the deterioration of the metal elements was “very typical of metals that have been incorporated into masonry structures situated in this environment that have not been properly maintained.” *Id.* at 6. The NPS report acknowledged the 2008 Milner report regarding salt contamination and accelerated metals deterioration, but noted that the damage caused by the salt water inundation “is impossible to measure or quantify.” *Id.* at 19.

PPG’s Request for Public Assistance Funds. In 2013, PPG submitted a revised request in which it increased the amount it sought for repairs to Fort Jackson to \$17 million.¹ In 2016, FEMA issued project worksheet 15629, version 2, in which FEMA determined that PPG should receive \$3.5 million in public assistance funds for repairs already completed at the facility. FEMA denied funding for four elements of completed work: (1) repairs to water batteries damaged by the storm because a portion of the repair was completed incorrectly; (2) replacement of a portion of the railings on Battery Ransom that FEMA found were not damaged during the storm; (3) replacement of window air conditioners with wall air conditioners because PPG had not replaced the air conditioners with in-kind equipment; and (4) fees for the survey of historic metal elements because the deterioration of those metal elements existed before Hurricane Katrina. FEMA also denied funding for all/most of the work that remains to be completed at the fort, including repointing of masonry, repairs of structural cracks, waterproofing of the casemates, and repair of the drainage system. Finally, FEMA only reimbursed PPG its architect and engineer fees based upon a percentage of the direct work funds it had obligated. PPG filed its request for arbitration on April 2, 2019, seeking review of FEMA’s determination on these unfunded items.

¹ FEMA issued several project worksheets for Fort Jackson, including for debris removal, work to stabilize the museum collections, and repairs to the athletic facilities.

Discussion

FEMA denied funding because it determined that PPG sought funds for items that were already in need of repair or restoration prior to Hurricane Katrina. PPG challenges FEMA's determination on two bases: (1) FEMA's determination ignores the reports of damage to the fort prepared by its inspectors and others; and (2) the Secretary of the Interior's Standards for the Treatment of Historic Properties (SOI Standards) mandate the funding of the restoration work for Fort Jackson. PPG also seeks to overturn FEMA's determination to limit the funds to reimburse its experts and to deny all funds for repairs to the water batteries. We take each of these issues in turn.

Analysis of Damage Reports

The standards for the grant of public assistance are well-known. 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." 42 U.S.C. § 5172(a)(1)(A) (2012). FEMA's regulations provide that "[t]o be eligible for financial assistance, an item of work must . . . [b]e required as the result of the emergency or major disaster event." 44 CFR 206.223(a)(1) (2016). This requirement means that "cause and effect [for any damage claimed] must be established." *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,199; *City of Kenner*, CBCA 4086-FEMA, 15-1 BCA ¶ 35,875, at 175,387 ("damage cannot pre-exist the hurricane").

As evidence of the damage to Fort Jackson, PPG points to the reports prepared by FEMA representatives in 2005, its own experts in 2008, and NPS representatives in 2009. From the 2005 reports, PPG highlights the portions of these reports in which FEMA representatives state what they thought was new damage to the fort, based upon previous inspections following Hurricane Ivan. However, in each of these reports, FEMA representatives highlighted the challenge presented by the condition of the fort prior to Hurricane Katrina—how to identify new damage versus the pre-existing condition of the fort.

Its own experts described the condition of the fort following Hurricane Katrina, but did not separate that damage from the pre-existing condition of the fort. While PPG's expert persuasively explained how the inundation of salt water accelerated the deterioration of the fort, PPG and its experts did not provide a basis for funding the repairs for damage that was the direct result of Hurricane Katrina.

Finally, PPG points to the 2009 NPS report as an endorsement of the findings of its experts. Read carefully, the NPS report only defers to PPG's experts regarding the effects

of the salt water inundation. The NPS experts noted that the condition of the fort had not changed significantly between 2002 and 2009.

FEMA, in response to these reports, relies upon the 2002 NPS report as evidence of the condition of the fort pre-Katrina. While noting that the fort was in “good condition,” that report identifies significant repairs to be undertaken at the fort. PPG seeks to diminish the import of this report in two ways. One, PPG through its expert’s testimony, explained that the pictures appended to the report do not provide sufficient perspective to view the true condition of the fort prior to Katrina. Two, regarding the repair recommendations, PPG explained that the NPS has greater requirements with regard to the repair and maintenance of the national monuments because properties under its control have many more visitors and much greater use than the fort had prior to Katrina, which was a parish-maintained property with roughly 10,000 visitors per year. While the NPS repair recommendation may have a greater scope, PPG does not explain why the description of the elements to be repaired is not an accurate depiction of the condition of the fort prior to Hurricane Katrina. We also note that the report states that the repair recommendations were for preservation maintenance, based upon the SOI standards. This preservation maintenance is what PPG seeks to obtain with its funding request.

In sum, PPG relies upon post-Katrina reports as its evidence of damage, without properly addressing the condition of the fort prior to Katrina. Without more, the panel has no basis upon which to overturn FEMA’s determination regarding the work to be undertaken.

SOI Standards

PPG argues that the SOI Standards require FEMA to provide funding to restore and repair Fort Jackson, a national historic monument. FEMA’s regulations governing public assistance grants provide that FEMA may fund work to bring facilities up to current codes or standards that may have changed since a facility was constructed. 44 CFR 206.226(d); Public Assistance Guide (PA Guide) 322, at 27 (1999). PPG argues that the SOI standards are applicable and must be followed because they are a “legal Federal requirement applicable to the type of restoration.” 44 CFR 206.226(d)(3)(i).

The SOI Standards “apply to all proposed grant-in-aid development projects assisted through the National Historic Preservation Fund.” 36 CFR 68.1. While FEMA uses these standards as a basis for assessing the level of workmanship for work that it does fund, these standards do not “[a]pply to the type of repair or restoration required.” 44 CFR 206.226(d)(1). Because all requirements of 206.226(d)(1)–(5) must be met before a standard has to be applied by FEMA to a project, the SOI standards do not themselves mandate the

funding PPG seeks. *See University of Southern Mississippi*, CBCA 2529-FEMA, 12-2 BCA ¶ 35,073, at 172,270.

PPG also asserts that the SOI Standards require FEMA to fund the replacement of two damaged window air conditioner units with more aesthetically pleasing wall units and the closure of the windows where the window units had been installed. FEMA denied funding for the wall units because it was only required to fund the replacement of equipment as it existed “immediately prior to the disaster,” which were window units. 44 CFR 206.226. PPG cites the preservation standards of the SOI standards, which require in part that “[t]he historic character of a property will be retained and preserved.” 36 CFR 68.3(a)(2). As explained above, FEMA is not required to fund projects based upon the SOI standards and is not required to fund the replacement of these air conditioners.

Funds for Expert Services

PPG next challenges FEMA’s reduction of the architect and engineering (A/E) fees for completed work. FEMA will pay A/E fees for projects, but the reimbursement is determined as a percentage of the amount of direct project funding. Because FEMA only funded \$3.2 million in direct dollars, PPG may only receive \$403,771 in reimbursement of A/E fees. PA Guide at 76. PPG has not challenged the calculation of the fee reimbursement. Instead, PPG argues that it should receive reimbursement of all of its a/E fees because of the complexity of the project and the level of effort needed to analyze the damage issues. FEMA counters that it has already accounted for the complexity of the project in the percentage it used to calculate the reimbursement. *See id.* (curve A applies to projects of above-average complexity and non-standard design). Because FEMA’s calculation accords with its policy, we discern no reason to disturb its determination.

PPG also seeks review of FEMA’s denial of its reimbursement request for the metals survey performed by the University of Texas. FEMA denied funding because the metal elements that were the subject of the survey were already degraded and in need of repair prior to Hurricane Katrina. The need to survey these metal elements was not the direct result of the disaster. Because the weight of the evidence supports FEMA’s finding, we leave it undisturbed.

Funds for Repair of Water Batteries

PPG challenges FEMA’s denial of funding for repair of the water batteries. It is undisputed that a portion of the work (pointing or repointing of the mortar of the wing walls) was performed incorrectly. FEMA denied funding for all of the repairs to the water batteries because the cost information that it was provided did not include the cost of this particular

portion of the work. Although FEMA's Louisiana Public Assistance Team lead testified that FEMA would have preferred to deduct only the amount tied to the incorrect work, it does not appear that FEMA sought the breakout of these costs from PPG during its evaluation.

Because FEMA acknowledges that the water batteries were damaged by Hurricane Katrina, the costs of properly repairing the batteries are eligible, provided that PPG adjusts its application to exclude the ineligible costs of incorrect repairs.

Decision

The costs of repairing the water batteries are eligible for public assistance funds, except for the costs of the incorrect repairs which remain to be determined. The remainder of FEMA's determination is sustained.

Jeri Kaylene Somers

JERI KAYLENE SOMERS

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Kyle Chadwick

KYLE CHADWICK

Board Judge