



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 19, 2022

CBCA 7314-FEMA

In the Matter of CITY OF PANAMA CITY, FLORIDA

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Jordan T. Corbitt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Houston, TX, counsel for Applicant.

Sherin Joseph, Appeals and Compliance Supervisor, Marija Diceviciute, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Ramoncito deBorja and Kristina Pett, 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 **ZISCHKAU**, **O'ROURKE**, and **CHADWICK**.

The applicant (the City) sought arbitration of a dispute with the Federal Emergency Management Agency (FEMA). The panel held a two-day hearing under Board Rule 611 (48 CFR 6106.611 (2021)). We must decide whether FEMA's "50% Rule" supports funding the cost of fully replacing, rather than repairing, the City's Marina Civic Center. *Cf. City of Hattiesburg, Mississippi*, CBCA 7017-FEMA, 22-1 BCA ¶ 37,986, at 184,457 (2021). The panel majority agrees with FEMA's position on the issue.

Background

We write "primarily for the parties" and omit unnecessary details. *See* Rule 613. Hurricane Michael struck the City in October 2018. The City filed its first appeal concerning the issue before us in July 2021 and sought arbitration in January 2022.

The City “is eligible for reimbursement of the costs of replacing, rather than merely repairing” the Civic Center “if the cost of repairing the disaster-damaged elements of that facility to their ‘predisaster condition’ exceed[s] fifty percent of the cost of facility replacement.” *Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 5549-FEMA, 18-1 BCA ¶ 37,089, at 180,563 (citing 44 CFR 206.226(f) (2017)). The City bears the burden to support its application. *See City of Liverpool*, CBCA 6593-FEMA, 20-1 BCA ¶ 37,497, at 182,169.

The parties seemed to agree during the hearing that it would cost roughly \$16,638,000 to replace the Civic Center, but FEMA increased its replacement-cost estimate to \$17,841,841.92 in response to demolition invoices the City submitted during the hearing.¹

FEMA now accepts estimated repair costs of approximately \$7.1 million. The panel directed the parties to focus their post-hearing briefs on significant categories of costs in dispute. FEMA states that “the key differences” are in the estimated costs to repair the heating, ventilation, and air conditioning (HVAC) system and the fire suppression (or protection) system. The combined differences between the parties’ estimates for HVAC and fire system repairs exceed \$3.1 million, which would swing the 50% calculation decisively in the City’s favor if we agreed with the City.²

Our analysis below effectively renders disagreements about estimates of costs unrelated to the HVAC and fire suppression systems immaterial, since, collectively, the other disputed amounts could not add up to enough to increase FEMA’s repair-cost estimate to more than 50% of the lower estimate of replacement cost.³

The City writes, “Multiple reports and professional engineers’ testimony confirmed [that HVAC] components were inundated with wind-driven rain and saltwater, and therefore require replacement.” The City cites similar kinds of evidence in arguing that the fire

¹ The City told the panel that two of the five new exhibits it submitted on day two of the hearing included invoices for “\$2,037,246.07 in actual costs for completed demolition.” FEMA reviewed the exhibits and points out that they include quotations together with invoices. According to FEMA, the invoices total \$885,831.04, or 43% of the amount the City told us. The City neither disputes nor acknowledges FEMA’s correction of the City’s misstatement of “actual costs.”

² That is, the agreed \$7.1 million plus \$3.1 million equals \$10.2 million, which far exceeds 50% of any replacement-cost estimate in the record.

³ The City’s cost estimates to repair the ceiling, electrical system, roof, and walls exceed FEMA’s estimates by approximately \$810,000.

suppression system “requires replacement as a result of Hurricane Michael.” FEMA maintains that “[d]isaster[-]related damage to the entire HVAC system ha[s] not been demonstrated” and “the observed damage” to both systems “was likely caused by deterioration over time while” system elements were “not maintained” and were “in less-than-ideal conditions.”

Discussion

Because the panel majority essentially agrees with FEMA’s view of the evidence as to the extent of the hurricane damage to the HVAC and fire suppression systems, we need not address other costs in dispute. “We cannot ignore the passage of time between the [disaster] and subsequent inspections” on which the City relies. *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,684. The majority is strongly influenced by the fact that, for at least six months after the hurricane—up to and including the April 2019 report commissioned by the City from EDT Forensic Engineering & Consulting (EDT)—we lack evidence that any inspectors supported the positions now taken by the City regarding the need to replace the portions of the HVAC or fire suppression systems that FEMA does not agree were damaged in the disaster. The “Synergy log”—which the City first emailed to FEMA the weekend before the hearing and added to the record the day before the hearing—shows that, during those six months, there occurred roughly six HVAC inspections, two visits by insurance adjusters, and a “Siemens walk through” in January 2019, in which Synergy and Siemens discussed “a complete cleaning of all ducting and [HVAC] equipment” and “repair/replace” as necessary.⁴ In all this time and with all this activity, we have no evidence that anyone opined that the systems at issue would require the extensive replacements about which the City and FEMA now disagree.

The City incorrectly writes that the April 2019 EDT report “confirm[s] that ductwork *throughout* the Civic Center was wet *as a result of* Hurricane Michael’s wind-driven rain *and requires replacement.*” Applicant’s Closing Brief at 3 (emphasis added). The EDT report says no such thing. It states, instead, that the uninsulated ducts near the air handlers were dry and that any “insulated ducts *that became wet as a result of the storm* require *either replacement or* an approved method of encapsulation [i.e., repair].” FEMA Exhibit 8 at 5, 8 (emphasis added). EDT did not opine as to the extent or the causes of duct damage or the need for replacement versus repair. EDT relied on statements by another contractor that ducts had been wet in the months since the disaster “as a result of roof damage.” *Id.* at 8.

⁴ Applicant’s Exhibit 47. It appears that Siemens followed up by offering to replace “the damaged [HVAC] control system” for \$247,655 “due to warranty issues that may arise in the future.” FEMA Exhibit 6. Siemens did not describe or diagnose existing damage.

We agree with FEMA that the EDT report is not persuasive evidence in favor of replacing all of the Civic Center ductwork as a result of damage that occurred during the hurricane.

EDT also reported no visible damage, six months after the disaster, to the chillers, pumps, air handlers, or HVAC controls. *Id.* at 9–11. Significantly, EDT observed no remaining “indications” that “the chiller and pump room” on the ground floor, which also houses the HVAC control system and an air handler, had “flooded as a result of the storm” (whether or not such flooding occurred). *Id.* at 8. The City’s first hearing witness, Mr. Robinson, aptly summarized the thrust of the EDT report regarding the HVAC controls as, “We didn’t see any damage” to the control system, “try to get it to run, and we’ll see what happens next.” EDT did not assess the fire suppression system.

The panel majority is unpersuaded that the rest of the City’s evidence, which was developed at the City’s behest between seventeen months and two and a half years after the hurricane, either deserves greater weight than the EDT report or causally connects HVAC or fire system damage back to the disaster. Contrary to the City’s description in its post-hearing brief, the March 2020 report of the Mott MacDonald engineering firm equivocates as to whether damage occurred during Hurricane Michael or afterward. Applicant’s Exhibit 14 at 6, 11, 14 (“*Additional damage continues to occur . . . Damages have led to extensive mold and mildew due to the prolonged exposure to water and moisture and the lack of airflow . . . [A]s a direct result of the storm and post-storm building conditions, damages and issues [sic] to the HVAC interior and exterior equipment and duct work occurred. . . . The fire system, equipment and components were . . . subjected to extreme environmental conditions during and after the disaster.*” (Emphasis added.)).

The clearest statement of the hurricane damage alleged by the City is undoubtedly the March 2021 System Service & Engineering (SSE) report, FEMA Exhibit 15. This is also the report furthest removed in time from the disaster twenty-eight months earlier. By the time of SSE’s visual inspection, the Civic Center had been “inundated with mold” and apparently uninspected for roughly a year. *See* FEMA Exhibit 10 at 4. SSE’s opinions that the hurricane, rather than intervening events, damaged the system components that are now at issue are stated in conclusory fashion without specific evidence or engineering reasoning to back them up. The majority also finds it significant that the SSE engineer testified that air handlers 1 through 5 showed visible signs of water damage—whereas EDT’s report twenty-two months earlier had said the opposite. “It is the applicant’s responsibility to . . . show[] that the disaster caused the damage—not FEMA’s duty, or the Board’s, to rule out alternative causes of damage.” *City of Hattiesburg*, 22-1 BCA at 184,684. Especially given the stark absence of support in the record for the City’s position in the weeks and months immediately after the disaster, the majority does not find the SSE report or the author’s hearing testimony in April 2022 persuasive as to the extent of water damage that occurred in October 2018.

50% Rule Summary

FEMA explains that it “validated the Applicant’s Scope of Work based on the Mott MacDonald and EDT reports” and urges us not “to rely on test reports two years post-disaster to support complete replacement” of HVAC or fire suppression system components. FEMA Post-Hearing Brief at 3. Because we see no grounds to depart from the April 2019 and March 2020 reports to increase FEMA’s cost estimates for repairing the two systems, the application cannot meet the 50% threshold. As discussed, even if we agreed with the City as to the remaining \$810,000 in dispute, the estimated repair costs would be less than \$8 million, i.e., less than 50% of the lowest estimate of replacement cost in the record, which exceeds \$16.6 million.

Decision

For the reasons given above, we deny funding to replace the Marina Civic Center pursuant to the 50% Rule.

Kyle Chadwick

KYLE CHADWICK
Board Judge

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge

ZISCHKAU, Board Judge, writing separately.

To obtain replacement funding under FEMA’s 50% Rule, the applicant had to show damages of approximately \$1.5 million beyond the \$7.1 million agreed to by FEMA. I find the arbitration exhibits and hearing testimony compellingly demonstrate that the applicant showed damages well over the \$1.5 million threshold, even if we only considered the damages to the HVAC system. The fire protection system damages and the electrical system damages obviously add to the total damages, but addressing them is unnecessary because the HVAC system damages alone were sufficient. The HVAC ductwork also need not be considered since the HVAC mechanical systems and controls alone comprise more than \$1.5 million. Beyond the applicant’s very credible professional engineers who testified at the

hearing, even FEMA's only site inspector to assess the mechanical systems agreed that the mechanical systems and controls had to be "removed and replaced."

The panel majority faults the applicant in hiring multiple engineering consultants in 2019, 2020, and 2021 to assess and quantify the damages. A major problem in doing an assessment of the damage to the HVAC equipment, controls, and electrical systems was that the electric utility company would not allow power to be restored to the building after the storm for the obvious reason that the rain and salt water infiltration from the hurricane had irreparably compromised the electrical system. In fact, power was never restored to the building. The applicant's 2019 and 2020 engineering consultants had recommended testing of the equipment and controls but did not conduct that testing themselves. As part of consultations with FEMA and a 2021 FEMA request for information (FEMA was too occupied elsewhere to send any site inspectors to the building until February 2020 and June 2021), it was agreed that the applicant would test the HVAC equipment and controls. That testing was performed by SSE in April 2021, using temporary power brought into the mechanical room, and the eyewitness testimony at the hearing was un rebutted that the equipment did not function, and electrical systems and controls emitted smoke indicating a not insignificant electrical problem.

The FEMA management and the panel majority ignore FEMA's own site inspector who was the only FEMA representative to ever survey the damage to the civic center mechanical systems, and this was done two months after the testing was completed by SSE. The FEMA site inspector agreed with the unanimous and un rebutted testimony and findings of the applicant's engineers, equipment manufacturers, and local code authority that all of the main HVAC equipment and electrical controls had been damaged by wind-driven rain (and salt water) from the hurricane, and had to be "removed and replaced." One prior FEMA site inspection report from March 2020 records that hurricane force winds caused "4 to 6 ft storm surge, saltwater intrusion, ~2" flooding inside building, rainwater entered through broken windows/wall front entrance curtain, and roof." Although the panel majority selectively excerpts language from some of the earlier engineering reports to demonstrate the HVAC equipment was not damaged or that there were ambiguities as to the cause of damage to the HVAC equipment, a careful reading of the reports shows that 2019 consultant (EDT) only performed a visual inspection of the mechanical equipment, found no evidence of "standing water" in the mechanical room from the hurricane, and recommended testing and startup for the equipment. This report gave no opinion on whether any of the mechanical equipment would function if power were restored. The engineering reports (including the two FEMA site inspection reports) and hearing testimony show that: (1) the hurricane caused extensive damage to the roof, louvered openings and air intakes, and exterior walls, which allowed wind-driven rain and salt water to infiltrate throughout the interior of the civic center, including the mechanical rooms; (2) the remediation contractor had the shell of the building repaired promptly after the hurricane to prevent subsequent rain damage from any

later storms; (3) the remediation contractor removed throughout the building water-soaked drywall, flooring, insulation, wall tiles, and ceiling tiles, and used fans to dry up as well as possible the rain and salt water deposited on the HVAC equipment, electrical controls, electrical panels and circuits, and the fire protection system; (4) the force of the hurricane winds damaged significant portions of interior walls, including metal stud walls and even interior concrete masonry walls; (5) there is no evidence in the record that any subsequent storm caused damage to any part of the building or the building equipment (the majority's reference to the report citing damage caused by the "storm and post-storm building conditions" means that the equipment damage was caused by the hurricane's wind-driven rain and salt water deposited on and in the electrical, mechanical, and other systems, *not* that some subsequent storm further saturated the building's equipment and controls); and (6) FEMA's only site inspector who assessed damages to the civic center's mechanical systems (after SSE's testing and reports) agreed that the HVAC equipment had to be "removed and replaced" due to damage from the hurricane's "wind driven rain."

The arbitration record shows that the effects of the wind-driven rain and salt water from Hurricane Michael caused the damages to the HVAC system and that there was no other cause for those damages. Accordingly, I would find that the applicant satisfied the 50% threshold for replacement funding.

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge