



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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May 17, 2024

CBCA 7953-FEMA

In the Matter of BOARD OF TRUSTEES OF BAY MEDICAL CENTER

Robert C. Jackson of Hand Arendall Harrison Sale, LLC, Panama City, FL; and Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant; and Chris Bomhoff, Disaster Policy Specialist, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, FL, appearing for Applicant.

Stephanie Stachowicz (Twomey), General Counsel, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Cassie Sykes, Appeals Officer, Melissa Shirah, Recovery Bureau Chief, and Matthew Toplak, Recovery Attorney, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee; and Deziree Elliott, Appeals Officer, Florida Division of Emergency Management, Orlando, FL, appearing for Grantee.

Shahnam Thompson, 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 **BEARDSLEY** (Chair), **GOODMAN**, and **SULLIVAN**.

**GOODMAN**, Board Judge, writing for the Panel.

The applicant, Board of Trustees of Bay Medical Center, has filed a request for arbitration (RFA) seeking reversal of the Federal Emergency Management Agency's (FEMA) first appeal determination denying costs to replace the Bay Medical Child Care Building (facility) damaged by Hurricane Michael (the hurricane) in 2018. We find that the applicant has failed to establish a basis to increase the amount that FEMA has already obligated for the project.

### Background

The facility was a single-story building with concrete-block exterior walls and an asphalt-shingled, wood truss roof. On April 17, 2019, an engineering firm retained by the applicant produced a post-hurricane structural evaluation report which stated that the facility's structural system was catastrophically damaged and that the cost to repair the facility could exceed fifty per cent of the market value before it was damaged. Applicant's Exhibit 6 at 4, 18. The report recommended that the facility be condemned. *Id.* at 18.

By email dated January 24, 2020, the applicant stated that the facility was one of six buildings that had been used before the hurricane "as storage sites for final medical archival, furnishings and equipment." Applicant's Exhibit 5. On February 20, 2020, the applicant informed FEMA that it did not store records at the facility and that it "disposed of destroyed stored equipment and furnishings through the demolition process." Applicant's Exhibit 3 at 3.

On April 20, 2020, FEMA prepared a cost estimate using RSMeans, including a "Part A" replacement estimate of \$356,659.07 and a "Part A" repair estimate. Applicant's Exhibit 10 at 22, 26. FEMA determined that the facility was eligible for full replacement costs funding. FEMA found the applicant was eligible for \$858,702 in replacement costs. Applicant's Exhibit 1 at 3, 8.

In a June 9, 2020, email, the applicant advised FEMA that it had "no intent or plans to rebuild the [facility]" or two other facilities. Applicant's Exhibit 11.

In June 2020, the applicant advised FEMA that the facility would be demolished and that the land would be cleared and only be used as open space. Thereafter, the facility was demolished. Applicant's Exhibit 1 at 8.

On July 27, 2020, FEMA obligated \$858,702 in public assistance (PA) funding to the project. Applicant's Exhibit 1 at 3, 8.

The applicant completed a cost estimate, dated September 24, 2020, with an estimated replacement cost for the facility of \$2,273,472. Applicant's Exhibit 13.

On December 7, 2022, the applicant requested an amendment to the project to obligate an additional \$1,414,770 in funding due to the difference between the amount obligated by FEMA and the applicant's cost estimate. The applicant alleged FEMA's previous scope of work and cost estimate contained errors and omissions. Applicant's Exhibit 1 at 3, 4.

On February 2, 2023, FEMA issued a determination memorandum denying additional funding and obligating \$858,702 to the project. Applicant's Exhibit 1. On April 3, 2023, the applicant filed its first appeal of the obligated amount approved by FEMA, alleging that FEMA's replacement estimate was unreasonably low based on FEMA's failure to recognize the full eligible scope of work. Applicant's Exhibit 2.

On October 2, 2023, FEMA issued its first appeal determination denying the appeal, stating that it did not make errors or omissions when developing the scope of work for the project and finding the additional work items listed in the applicant's revised cost estimate ineligible. Applicant's Exhibit 3 at 1.

On December 4, 2023, the applicant filed its RFA, seeking the additional \$1,414,770 in PA funding that FEMA had denied. Thereafter, the parties filed written submissions and, on April 23, 2024, jointly requested that this case be decided on the written record as a paper hearing pursuant to Board Rule 611. *See* 48 CFR 6101.611 (2023).

### Discussion

#### Applicant Eligibility

FEMA asserts that the applicant is ineligible for PA funding because a third party, and not the applicant, is responsible for repair work to the facility under the terms of a lease between the applicant and the third party. During FEMA's prior funding approval for the facility, FEMA had not applied this rationale.

In *Board of Trustees of Bay Medical Center*, CBCA 7826-FEMA, 24-1 ¶ 38,492, FEMA raised this identical issue, with regard to the same lease, which included the facility at issue in that case as well the facility in this case. Funding for the facility in this case was not raised in that case. The previous panel resolved the issue in the applicant's favor, finding that the applicant was an eligible grantee because the applicant remained responsible for repair work for the facilities under the lease. While FEMA's counsel acknowledges awareness of the previous decision, FEMA relies upon Rule 610, which states: "A decision is primarily for the parties, is not precedential, and should concisely resolve the dispute." FEMA therefore asserts that the prior panel's finding is not binding on this panel, maintains that the applicant is an ineligible applicant, and asks this panel to consider its arguments presented in this arbitration.

Having reviewed the parties' submissions on this issue, we find that the issue is being raised with the same facts, lease terms and legal arguments presented to the previous panel, which we will not summarize in this decision. We adopt the previous panel's reasoning and

reach the same conclusion that the applicant is responsible for repair work under the lease for the facility, and therefore the applicant is an eligible grantee.

### Determination of Replacement Value

The parties agree that the applicant is entitled to replacement costs for the facility. The applicant asserts that because it opted, and FEMA approved, to forego reconstructing the facility and instead use the eligible funding for another eligible purpose, the applicant's requested funding is based on an estimate of what it presumably would cost if the applicant were to reconstruct the facility. RFA at 10. The applicant states:

For this type of "Capped Project," "FEMA caps the amount of PA funding based on the estimated amount to restore the damaged facility to its pre-disaster design and function, including applicable and federally required codes and standards."

*Id.*

The applicant cites page 106 of FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018), which describes three types of capped projects but does not state which type would apply here or the nature of the intended alternate project. *See* RFA at 10.

The applicant seeks \$1,414,770 in addition to FEMA's previously authorized amount of \$858,702. FEMA asserts that the applicant's cost estimating formats (CEFs) are unreliable because: 1) they are based on an incorrect calculation of the square footage of the facility and 2) they include ineligible upgrades to the pre-disaster design and function. For its part, FEMA asserts that the applicant has failed to justify its increased cost calculations, which use a multiplier of 1.8 times the cost of local construction. FEMA's Response to Request for Arbitration (FEMA Response) at 13; *see* FEMA's Exhibit 6.

### Square Footage of the Facility

The parties' calculations of the square footage of the facility differ by 62 square feet (sq. ft.) – with the applicant's total as 3894 sq. ft. and FEMA's total as 3832 sq. ft. Both rely on documents created before demolition, which contain floor plans, sketches, and dimensions. The applicant bases its CEFs on its 3894 sq. ft. calculation. RFA at 5. The applicant asserts:

[T]he replacement estimate must be based on the pre-event square footage of the Facility, which is documented, and FEMA has agreed, is 3,894 [sq. ft.]. Adjusting FEMA's Cost Estimate to the correct facility square footage yields

a replacement cost of \$980,565, an increase of \$136,203 above what FEMA has currently obligated.

*Id.* at 15.

FEMA maintains that this approach is erroneous because the applicant included the portico in its total building square footage and applied an inflated (3894) square footage to all line items in its CEFs, some of which would not have been needed to reconstruct the portico. FEMA's Response at 13-19. FEMA's 3832 square footage calculation, in turn, is 3150 sq. ft. for the main building plus 682 sq. ft. for the portico. *Id.* at 19. The applicant agrees that "the 540 [sq. ft.] attributable to the portico should not be included in the square footage of the full facility replacement since it does not include all finishes required to replace interior spaces." Applicant's Reply to FEMA's Response (Applicant's Reply) at 6. The applicant deducts this amount from 3894 sq. ft. previously asserted, for a total "heated area" of 3354 sq. ft. *Id.* The applicant continues to assert a total square footage of 3894.

Thus, the applicant and FEMA differ in their calculation of the main building by 204 sq. ft. (with the applicant asserting the larger size), the portico by 142 sq. ft. (with FEMA asserting the smaller size), and the total for the facility by 62 sq. ft. (with the applicant asserting the larger size). This minimal difference of opinion as to the total building square footage does not provide a reasonable basis for adjusting FEMA's cost estimate by \$136,203 as requested by the applicant.

### Upgrades

The applicant asserts that its cost estimates justifying the increased costs that it seeks are correct, as they include upgrades required by building codes and requirements to maintain the type of equipment stored in the building before the hurricane. FEMA maintains that the applicant's cost estimates contain unnecessary and unjustifiable upgrades that are not eligible, as they exceed the pre-disaster design and function of the facility. FEMA explains:

FEMA uses RS Means to both produce cost estimates and validate the cost estimates presented by Applicants. RS Means is a software program that allows the user to input parameters regarding a facility and based on the inputs produces a line-by-line cost estimate that incorporates the requisite codes and standards and adjusts the pricing to local costs. The user can adjust the line items to tailor the cost estimate to the actual pre-disaster design and function of the Facility to produce an accurate cost estimate. To reiterate, the inputs directly impact the output. Inputting the wrong building features may inflate the entire cost estimate, as done by the Applicant in this matter . . . .

Here, FEMA inputted into RS Means medical office with **brick veneer, wood frame, sloped shingled roof with a square footage of 3,150 for Panama City, Florida**, which matches the precise description of the pre-disaster Facility. To contrast, the Applicant inexplicably inputted medical office with **concrete framing, a flat membrane roof, [Heating, Ventilation, and Air Conditioning] system equipped for a building that is 10,000 [sq. ft.] and a building square footage of 3,894** in RS Means.

FEMA's Response at 19-20 (citations and footnotes omitted).

FEMA offers the following chart to show the difference between its estimate and the applicant's as the result of the applicant's inclusion of elements differing from the original construction, extrapolating the applicant's total cost estimates for the components with the applicant's 1.8 multiplier for its alleged increase in local construction costs.<sup>1</sup>

	FEMA CEF <sup>7</sup>	Applicant CEF	Applicant CEF with 1.8
Roof	\$39,894.80	\$52,062.78	\$93,713.00
HVAC	\$16,695.00	\$51,556.56	\$92,081.81
Framing/Shell	\$51,046.60	\$210,782.22	\$379,408.00
Foundation	\$57,824.88	\$47,701.50	\$85,862.70
<b>Total Part A Costs</b>	<b>\$427,570.77</b>	<b>\$681,291.52</b>	<b>\$1,195,579.89</b>

FEMA's Response at 20.

As discussed below, the applicant fails in its burden to prove eligibility of PA funding for the increased costs for the roof, HVAC, and framing upgrades it seeks.

### Roof

The facility had a sloped asphalt-shingled roof before the hurricane. FEMA allowed for a sloped asphalt-shingled roof (i.e., a replacement in-kind), but the applicant sought replacement costs for a flat membrane roof, which costs more than an asphalt-shingled roof, as indicated in the table above. According to FEMA, a flat membrane roof would constitute an ineligible upgrade to the pre-disaster design and function of the facility. The applicant asserts that the upgrade is required "consistent with all applicable codes and standards" but offers no citation to any applicable code or standard. *See* RFA at 16. The increase in roof

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<sup>1</sup> Footnote 7 in the first column states that FEMA's foundation, framing/shell, and roof totals include items for the portico. FEMA's Response at 20 n.7.

costs sought by the applicant is also based on the applicant's argument that FEMA failed to include the portico in its roof costs. However, line items 49-55 of FEMA's cost estimate clearly indicate the costs associated with the portico, including \$6922.30 in roof costs for the portico. FEMA's Response at 21. FEMA is correct that this upgrade is not consistent with the pre-disaster design, and the calculated costs are based on the applicant's assumption that FEMA did not include the cost of roofing of the portico. Assertions of counsel as to the necessity for the upgrade because of unidentified codes and standards without support are clearly insufficient to meet the applicant's burden of proof. The increased cost for the roof sought by the applicant is therefore not eligible for additional PA funding.

### HVAC

The applicant seeks additional funding for an HVAC system larger than the one before the hurricane – a 23.3-ton HVAC unit fit for a 10,000-square-foot building, which would be almost three times the size of the facility. Applicant's Exhibit 13 at 6.

FEMA asserts that the larger HVAC system is an ineligible upgrade that deviates from the facility's pre-disaster design and function. FEMA emphasizes that while the applicant states that the "storage of medical equipment and items related to various healthcare functions requires that the space be maintained at a consistent temperature and according to a climate that will not harm or cause the premature degradation of the items," RFA at 16-17, the applicant has not provided any specification, documentation, or supporting evidence as to the actual temperature sensitive medical equipment stored in the facility. FEMA Response at 22. Additionally, FEMA asserts that "these allegedly temperature sensitive medical equipment and related items were seemingly unharmed when they were stored in the childcare facility pre-disaster with a typical HVAC unit suited for the design and function of a 3,150 square foot childcare facility. Therefore, there is no demonstrated requirement for an upgraded HVAC system that is suited for a 10,000 square foot unit to be included in a cost estimate for a 3,150 square foot childcare facility." *Id.* at 22-23.

In addition, FEMA states that the larger HVAC is not required by codes or other standards, and "the applicant fails to identify a single code or standard that requires the system be upgraded." FEMA Reponse at 22.

The applicant offers no response to FEMA's position as stated but merely refers to its position set forth in its RFA. Applicant's Reply at 9. The applicant has not met its burden to demonstrate the need for PA funding for the increased costs sought for HVAC. Again, assertions of counsel as to the necessity for the upgrade and alleged code requirements without support are clearly insufficient to meet the applicant's burden of proof.

### Framing

The applicant seeks additional funding for upgraded concrete framing even though the facility had wood framing, arguing that concrete framing is necessary per codes “for resilient construction.” The applicant has not identified the codes and standards that it references. *See* RFA at 17. Again, the applicant offers no response to FEMA’s position that the concrete framing is an ineligible upgrade and merely cites to its arguments previously asserted in its RFA. Applicant’s Reply at 9.

The applicant has not met its burden of proof to demonstrate the need for PA funding with regard to the increased costs sought for concrete framing, as it again offers only assertions of counsel as to the necessity for the upgrade and alleged code requirements without support.

### The Cost Multiplier

As for the applicant’s request for an overall increase in costs, the applicant maintains that the cost of local construction after the hurricane has increased because of labor and material shortages and the demand for construction. The applicant therefore seeks an 80% increase to its cost estimate, which FEMA characterizes as a “1.8 multiplier.” FEMA Response at 23; *see* RFA at 21. The applicant does not offer any rationale as to the derivation or calculation of its estimated 80% increase in construction costs nor does it cite any FEMA regulation or policy that justifies an estimated percentage increase in construction costs.

FEMA sampled fifteen other projects filed by other the applicants in the area for Hurricane Michael and found that none of the projects contained a 1.8 cost multiplier. FEMA Exhibit 11 (Grants Manager Cost Adjustment Factor Summary); FEMA Response at 24.

The applicant’s assertion that its estimated costs should be increased by a fixed percentage is speculative and unsupported. The applicant has failed to document and justify its request to increase its estimated costs by 80%.



Decision

The applicant is not entitled to PA funding in addition to the amount that FEMA has previously obligated.

*Allan H. Goodman*

ALLAN H. GOODMAN  
Board Judge

*Erica S. Beardsley*

ERICA S. BEARDSLEY  
Board Judge

*Marian E. Sullivan*

MARIAN J. SULLIVAN  
Board Judge