



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 7, 2024

CBCA 7956-FEMA

In the Matter of BOARD OF TRUSTEES OF BAY MEDICAL CENTER

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

Stephanie Stachowicz (Twomey), General Counsel, Dezirée T. Elliott, Senior Attorney, and Matthew Toplak, Recovery Attorney, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Cassie Sykes, Appeals Officer, Melissa Shirah, Recovery Bureau Chief, and Melody Cantrell, Recovery Legal Liaison, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Rebecca J. Otey 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 **SHERIDAN**, **KULLBERG**, and **KANG**.

KULLBERG, Board Judge, writing for the Panel.

The applicant, Board of Trustees of Bay Medical Center (BMC), requests public assistance (PA) for repairing damage to the BMC outpatient clinic (OPC). BMC's previous request for arbitration in this matter was heard only on the issue of timeliness, and upon finding that the request was timely, the panel remanded this matter to the Federal Emergency Management Agency (FEMA) to address the merits of the request. *Board of Trustees of Bay Medical Center*, CBCA 7418-FEMA, 22-1 BCA ¶ 38,202. FEMA contends that BMC's

request for PA is based on an estimate that was inconsistent with its earlier damage, description, and dimensions (DDD) report. FEMA also contends that it has properly estimated the cost of repair for an amount less than BMC's estimate.¹ BMC contends that it is entitled to an increased amount of PA based upon its estimated cost of a modified bitumen roof, curtain wall windows, vinyl wall covering, and waste removal. Additionally, BMC contends that some of its estimated costs are necessary in order to comply with various building requirements under the Florida Building Code (FBC).² For the reasons stated below, the panel denies BMC's request for additional PA.

Background

On October 10, 2018, Hurricane Michael, a category five event, struck the Panama City, Florida, area, and the combination of 155-mile-per-hour winds and rain caused damage to the OPC, a one-story concrete block structure that was part of a larger medical center. The structure's roof, interior walls and finishes, and windows were among the areas damaged. The OPC provided various types of radiological services and other medical services, such as lab draws. The record does not show that hospital patients were housed in the OPC, but testimony established that hospital patients were sent there. On September 24, 2020, BMC submitted to FEMA its DDD report, which described damage to seventy-three rooms and the roof of the clinic.

On October 21, 2020, BMC submitted to FEMA its estimated cost of repair using FEMA's cost estimating format (CEF) in the amount of \$3,489,455.09, which it later reduced to \$3,239,816.39. BMC's estimate consisted of hard costs for construction (estimate part A) and soft costs (estimate parts B through H).³ FEMA determined that BMC's estimate

¹ FEMA contended in its response to BMC's request for arbitration that BMC was not eligible to receive PA because it was not legally responsible for repairs under its lease of the facility to a for-profit entity. In a separate arbitration in which BMC was the applicant, the panel addressed that same argument and held that BMC was not relieved of its obligation to perform repair work. *Board of Trustees of Bay Medical Center*, CBCA 7826-FEMA, 24-1 BCA ¶ 38,492, at 187,098. FEMA did not renew its argument as to legal responsibility at the hearing or in its brief, and the panel deems the argument to have been withdrawn.

² The FBC has been revised several times since the events related to this matter, but the parties have relied upon the 2017 version of the FBC as relevant to this matter.

³ The soft costs, parts B through H, included the following: general requirements and general conditions (part B), construction cost contingencies (part C),

improperly duplicated soft costs in part A. FEMA also determined that BMC's roofing system estimate did not provide a breakdown of the individual components. In general, FEMA found BMC's estimate to be inconsistent with its previously submitted DDD.

On July 23, 2021, FEMA issued its eligibility determination memorandum (DM), which noted that FEMA had sent BMC a request for information (RFI) that sought additional information about the applicant's estimate. In general, the RFI sought clarification about duplication of soft costs in part A, items in the estimate that were not in the DDD, and the absence of a breakdown of roofing costs. FEMA did not deem the applicant's response to the RFI to have been adequate and noted that BMC's estimate did not match the DDD. FEMA estimated the cost of repairs to the OPC as \$1,018,733.

BMC submitted its first appeal, and FEMA issued its determination on October 10, 2023. FEMA noted that BMC had not provided any additional information in support of its estimate. Subsequently, the applicant submitted to the Board its request for arbitration in which it sought PA in the amount of \$2,221,083.31. In its request for arbitration, BMC contended that FEMA's estimate did not include all of the costs required for repairs to interior walls, the roof, vinyl wall protection, and windows, which were necessary to comply with Florida's building codes. BMC also sought PA for disposal of construction waste, which included both dumpster rental and tipping fees for waste removal from the construction site. FEMA filed a response to BMC's request for arbitration, and BMC supplemented the record.

BMC's supplement to the record included its counsel's narrative, a revised estimate, a declaration by its witness (an architect who prepared the estimate), and various documents with descriptions of construction materials. BMC contended that it was entitled to the cost of a modified bitumen roof to withstand certain wind speeds and uplift forces, installation of curtain wall windows throughout the building, impact resistant vinyl wall coverings, and waste handling and tipping fees. BMC asked the Board to determine that it was entitled to a total funding for PA in the amount of \$2,727,691. The parties agree that the amount of PA paid by FEMA in this matter will not be used for the repair of the OPC but rather for some other purpose not identified in the record. The panel conducted a virtual hearing, and the parties subsequently filed briefs.

general contractor's overhead and profit (part D), cost escalation factors (part E), plan review and permit construction cost (part F), applicant's reserve for change orders (part G), and applicant's project management and design costs (part H).

Discussion

At issue is which of the two estimates, FEMA's or BMC's, should the panel accept for the purpose of determining BMC's entitlement to any additional PA for repairs to the OPC. In the Board's initial ruling as to our authority to hear arbitrations of claims for PA, the panel stated that it reviews these matters "de novo." *Bay St Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,577 (2009). "However, the burden of proving the claims by a preponderance of the evidence remains with the . . . applicant and grantee." *Id.* at 169,580. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018), provides our authority to conduct arbitrations. *Id.* § 5189a(d). FEMA is statutorily authorized to provide PA "essential to meeting immediate threats to life and property resulting from a major disaster." *Id.* § 5170b(a). Additionally, the Stafford Act provides the following:

(A) In general—For the purposes of this section, for disasters declared on or after August 1, 2017, or a disaster in which a cost estimate has not yet been finalized for a project, or for any project for which the finalized cost estimate is on appeal, the President shall estimate the eligible cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility—

(i) on the basis of the design of the facility as the facility existed immediately before the major disaster;

(ii) in conformity with the latest published editions of relevant consensus-based codes, specifications, and standards that incorporate the latest hazard-resistant designs and establish minimum acceptable criteria for the design, construction, and maintenance of residential structures and facilities that may be eligible for assistance under this chapter for the purposes of protecting the health, safety, and general welfare of a facility's users against disasters (including floodplain management and hazard mitigation criteria required by the President or under the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)).

Id. § 5172(e)(1)(A).

The Code of Federal Regulations (CFR) provides that eligibility for PA funding requires a showing that such work was "required as the result of the emergency or major disaster event." 44 CFR 206.223(a)(1) (2018). To the extent that eligibility for PA includes the cost of compliance with building requirements, the CFR provides the following:

(d) *Standards.* For the costs of Federal, State, and local repair or replacement standards which change the predisaster construction of facility to be eligible, the standards must:

(1) Apply to the type of repair or restoration required;

(Standard may be different for new construction and repair work)

(2) Be appropriate to the predisaster use of the facility;

(3)(i) Be found reasonable, in writing, and formally adopted and implemented by the State or local government on or before the disaster declaration date or be a legal Federal requirement applicable to the type of restoration.

44 CFR 206.226(d).

FEMA's Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) provides "PA funding to restore facilities on the basis of pre-disaster design and function in conformity with current applicable codes, specifications, and standards." PAPPG at 87. With regard to eligibility for PA, the PAPPG states the following:

Upgrades required by Federal, State, Territorial, Tribal, or local repair or replacement codes or standards are eligible only if the code or standard:

- Applies to the type of restoration required;
- Is appropriate to the pre-disaster use of the facility;
- Is reasonable, in writing, formally adopted by the State, Territorial, Tribal, or local government, and implemented by the Applicant on or before the declaration date, OR is a legal Federal requirement;
- Applies uniformly; and
- Was enforced during the time it was in effect.

Id. at 87-88. In addition, "[i]f an upgrade to an entire structural or non-structural system within a building is triggered, the upgrade is only eligible if there is a direct relationship between the upgrade work and eligible damage." *Id.* at 88.

FEMA's Public Assistance Program Applicant Quick Guide (Jan. 10, 2019) (guide) provides applicants with guidance for preparing a DDD, which consists of "a comprehensive record of incident-related damage that includes the cause of the damage; the dimensions, materials, and design of damaged components; and work conducted to date (if any)." *Id.* The DDD is "the basis of the cost reimbursement." If the damage is not in the DDD, "**the cost to repair that damage will not be included in the project.**" *Id.*

BMC's request for PA consists of four separate items: the roof, windows, vinyl wall covering, and waste disposal. The panel addresses those items below.

Roof

The panel does not find that BMC has met its burden of proving entitlement to PA for the cost of a modified bitumen roof. BMC contends that its estimate for that type of roof was based upon the requirements of the FBC. Both the PAPPG and 44 CFR 206.226(d) require that repairs be appropriate to the "pre-disaster use of the facility." BMC's witness contended that the OPC was subject to the requirements applicable to a hospital, which is under risk category IV of table 1604.5 (table) of the FBC. However, the only structures listed under the table's category IV related to medical services are "occupancies having surgery or emergency treatment facilities." Applicant's Exhibit 20 at 1. The OPC does not fit that description because nothing in the record shows that the OPC was used for surgery or emergency treatment, and the OPC did not house patients.

Although BMC's witness stated that the OPC was licensed as a hospital, that contention does not prove that the OPC was subject to the building requirements of a category IV structure under the FBC. Along with BMC's brief, BMC's witness filed a supplemental declaration that the same requirements for a category IV structure would also apply to a category III structure. The panel does not find such evidence persuasive, and such a statement undermines the previous testimony of BMC's witness. None of the structures listed in category III of table 1604.5 is an outpatient facility such as the OPC. *Id.* The only category III structure listed in the table related to health care is a resident care facility for more than fifty people. *Id.* BMC has shown, at best, a lack of certainty as to what risk category applies to the OPC under the FBC, and the panel finds that BMC has not shown that its estimated cost for the OPC roof is pursuant to the building code requirements of the FBC.

Windows

BMC's request for PA for curtain wall windows throughout the OPC lacks merit. The DDD, which BMC prepared, showed only a curtain wall window in the vestibule of the OPC, with the rest of the OPC containing commercial grade single-hung windows. The person

who prepared the DDD did not testify, but BMC's witness claimed that he had observed curtain wall windows throughout the building. BMC's witness had no contemporaneous notes or other documentary evidence to support his observation. FEMA's DDD guide states that a failure to include an item in the DDD precludes a later request for that item. Moreover, BMC failed to provide any documentary evidence that would have shown curtain wall windows in other locations in addition to the vestibule. The panel finds that BMC has not offered persuasive evidence to show that the OPC had curtain wall windows in any location other than the vestibule, and BMC is not entitled to additional PA for windows in the OPC.

Vinyl Wall Coverings

The panel does not find support for BMC's request for impact-resistant vinyl wall coverings. The DDD did not show that impact-resistant vinyl wall coverings had been used in the OPC but, instead, decorative vinyl wallpaper. BMC's witness stated that the impact-resistant vinyl wall coverings were for "patient traffic." BMC contends that the impact resistant vinyl wall covering is required by appendix A2.1-7.2.3 (appendix) of Guidelines for Design and Construction of Hospitals, Facility Guidelines Institute (2018) (FGI). FEMA has shown that chapter 35 of the FBC did not incorporate the appendix into the FBC, even though the FBC adopted other FGI sections. Although BMC argues that the panel should find that the appendix applies to this matter, it offers no evidence that the state of Florida adopted the appendix into the FBC. Because BMC has failed to show that the appendix was incorporated into the FBC, the panel finds that BMC is not entitled to PA for the cost of the impact-resistant vinyl wall covering.

Waste Disposal

The panel finds that BMC has not supported its request for additional PA for dumpster rental and tipping fees. FEMA's witness established that his estimate for dumpster rental for twenty-six weeks during repair work was reasonable in light of the record. BMC did not provide FEMA with a construction schedule for repair work, and, in the absence of such a schedule, BMC had no grounds to justify a longer period of time for dumpster rental. In addition, FEMA's witness established that the need for both dumpster rental and tipping fees—which is removal of waste by other means from a site—is necessary only if access to landfills is limited. In the case of Florida, landfills are available. BMC has not offered any persuasive evidence or argument to justify additional PA for waste disposal. Accordingly, BMC is not entitled to PA for its estimated cost of waste disposal.

Decision

BMC's request for additional PA is denied.

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

Jonathan L. Kang

JONATHAN L. KANG

Board Judge