



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 27, 2010

CBCA 1741-FEMA

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

Richard F. Zimmerman, Jr., and Randal J. Robert of Kantrow, Spaht, Weaver & Blitzer, PLC, Baton Rouge, LA; and P. Raymond Lamonica of Louisiana State University System, Baton Rouge, LA, counsel for Applicant.

Paul W. Rainwater, Executive Director, Louisiana Recovery Authority, Baton Rouge, LA; and Mark S. Riley, Chief of Staff, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Kristen Shedd, Kim A. Hazel, and Chad T. Clifford, 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 **DANIELS** (Chairman), **VERGILIO**, and **KULLBERG**.

Charity Hospital in New Orleans, Louisiana, was severely damaged by Hurricanes Katrina and Rita, which struck the Gulf Coast in August and September of 2005, and the flooding which ensued. The hospital is owned by the State of Louisiana, Facility Planning and Control (FP&C). This case involves a request by FP&C that the arbitration panel direct the Federal Emergency Management Agency (FEMA) to award as a public assistance grant \$491,884,000 for replacement of the hospital, rather than the \$126,142,709 which FEMA has estimated to be the cost to repair the facility's disaster-related damage. The case is before the panel under authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations.

From the end of 2005 until the spring of 2008, the parties engaged in lengthy discussions as to the scope of work necessary to repair disaster-related damage to the structure. In July 2008, FP&C presented to FEMA a claim based on work by a team of architects and engineers headed by Blich Knevel Architects (BKA). The claim was in the amount of \$491,884,000, which the BKA team concluded was the cost to replace the hospital. FEMA responded in December 2008 with version 3 of Project Worksheet 2175, which concluded that the cost to repair items damaged by wind was \$15,380,926.47, the cost to repair items damaged by flooding was \$57,861,580.53, and FP&C should receive not only these sums, but also \$51,000,000 for “repairs approved by DHS [Department of Homeland Security] and FEMA leadership.” Each party believes today that the position it took in 2008 is correct and should be adopted by the panel.

The panel must determine what damage was caused by the disasters, place a value on repair of that damage, and compare that value with the value of replacing the structure, all in accordance with FEMA regulations and policy. The key issue to be decided is whether FP&C has met the test prescribed by the FEMA regulation at section 206.226(f) of title 44 of the Code of Federal Regulations which delineates when a public assistance grant should be made for repairs to a facility and when such a grant should be made for replacement. This section provides:

- (1) A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.
- (2) If a damaged facility is not repairable . . . , approved restoration work may include replacement of the facility.

The panel bases its analyses of the matter on lengthy statements submitted by FP&C and FEMA (and a short statement submitted by the State of Louisiana), documents submitted by the parties in conjunction with their statements, and testimony taken during a five-day arbitration hearing.

FP&C has presented three separate studies which show that the cost to repair Charity Hospital would exceed fifty percent of the cost of replacing the structure. A November 2005 report by the ADAMS company estimated that repair would cost \$257.7 million and replacement would cost \$395.4 million. Thus, ADAMS saw the cost of repair as sixty-five percent of the cost of replacement. The July 2008 BKA report, on which FP&C’s claim is based, estimated that the base cost of repair (the cost excluding a contractor’s job site cost,

contract cost, and overhead and profit) would be \$152,332,984.76 and the base cost of replacement would be \$190,265,025. Thus, BKA saw the cost of repair as eighty percent of the cost of replacement. A June 2008 report by RSMeans Business Solutions estimated the cost of repair (excluding general contractor's mark-up and design fees) as \$162,670,940 and the cost of replacement (again excluding mark-up and fees) as \$238,458,620. Thus, RSMeans saw the cost of repair as sixty-eight percent of the cost of replacement.

FEMA maintains that repairs of items damaged by the hurricanes and subsequent flooding would cost \$126,142,709 and replacing the hospital would cost \$474,750,898. Thus, FEMA sees the cost of repair as twenty-seven percent of the cost of replacement.

At the hearing held by the panel to take testimony about this claim, members of the BKA and RSMeans Business Solutions teams gave testimony regarding their reports. The BKA team consisted of highly experienced, licensed professionals who made a careful study of the entire hospital. Their report is based in part on information which they compiled, and revised pursuant to comments by FEMA, regarding each of the more than four thousand rooms in the hospital and as to the hospital's systems (primarily mechanical, electrical, plumbing, and heating, ventilation, and air conditioning). The RSMeans team was similarly composed of highly experienced, licensed professionals, and it was headed by an individual who is an expert in construction costing. This team performed its analysis independently, relying on several sources of data, including the detailed information prepared by the BKA team.

The FEMA representatives who testified at the hearing were less experienced and less credible than the BKA and RSMeans representatives. They had spent far less time in the building than had the BKA witnesses. Unlike the BKA and RSMeans witnesses, most of them were unlicensed. To the extent that FEMA relied on information in making the estimates on which version 3 of Project Worksheet 2175 was based, at least some of that information was incomplete; FEMA witnesses acknowledged that their estimates were subject to increase if FP&C presented appropriate proof that the facility's dimensions and disaster-related damages were greater than assumed by FEMA. While FEMA's witnesses and documentary record expressed skepticism as to whether certain damages were disaster-related, the witnesses and record offered inadequate support to make the skepticism reasonable. An example: When the basement flooded, toxic wastes inundated the piping system for potable water, up through an indeterminate number of floors. The system had been modified over time, and because as-built drawings were lost in the flood, the number and location of dead ends was unknown. The BKA engineers determined that the entire system had been compromised and had to be replaced, since they could not be certain that if the system were flushed and cleansed, water re-introduced into it would be safe to drink. FEMA witnesses questioned whether the piping on the upper floors had been contaminated;

they thought it possible that this piping could be re-used. These witnesses did not know, however, on how many floors piping might be safe to re-use, or, given the large number of unknown dead ends, whether one could say with any confidence that flushing the system would really render it capable of carrying potable water -- a problem anywhere, but especially in a health care facility. On the whole, the record supports the FP&C position as to disaster-related damage.

FEMA maintains that some of the costs of repair which are included in the various estimates advanced by FP&C do not pertain to disaster-caused damage. The costs, FEMA contends, encompass repairs to systems which were in need of repair or replacement prior to the hurricanes and repairs which were necessitated by the failure of FP&C to protect the building subsequent to the storms. FEMA also asserts that the BKA report, in particular, cannot be reviewed because its analysis of architectural damages is based on a zone-by-zone study, rather than the room-by-room data earlier compiled by BKA and revised per FEMA comments. FP&C counters that the documents on which FEMA bases its assertions of pre-existing needs, 2002 and 2003 ADAMS reports, merely list necessary future capital improvements; the hospital was fully accredited and fully functioning at the time of Hurricane Katrina, and the systems cited in the report worked (even if not perfectly). FP&C notes additionally that it did take many actions to protect the structure subsequent to the storms; its witnesses consistently testified that the great majority of the damages included in their analyses occurred within the first four months after the hurricanes and that damages which occurred thereafter were not significant. FP&C obtained from FEMA witnesses, on cross-examination, testimony that the analysis of architectural damages in the BKA report is reviewable with respect to the room-by-room data because the zone-by-zone study includes drawings which key each zone to a group of rooms.

The panel concludes that the costs of repair of disaster-caused damage to the hospital would exceed fifty percent of the costs of replacing the facility. We find that the analysis of disaster-related damage prepared by the BKA team is credible -- although it may be a bit overstated because it admittedly includes some damage which occurred well after the disasters struck. We find additionally that the repair cost estimates prepared by the BKA and RSMMeans teams are far better grounded than the repair cost estimates prepared by FEMA and reflected in version 3 of Project Worksheet 2175. FEMA did not present a sound basis for challenging or even discounting in any material way the expert analyses presented by FP&C.

We agree with FP&C that the systems which were damaged by the hurricanes and the flooding were functioning (some, albeit, at a sub-optimal level) before the storms occurred, were rendered inoperative by the disasters, and were not susceptible to cost-effective repair; thus, replacement of these systems is appropriately considered in the calculation of repair costs. Although FP&C's asset protection after the storms may not have been perfect, we are

persuaded that it did not contribute in a significant way to the repair costs included in the estimates presented by FP&C. In this regard, FP&C obtained from the highest-ranking FEMA witness at our hearing an acknowledgment that at least for the first year after the hurricanes, FP&C's asset protection was reasonable and not negligent. We note that if the BKA repair cost estimate were to be reduced by thirty-seven percent (from \$152,332,984.75 to \$95,132,513), it would still exceed fifty percent of the BKA replacement cost estimate; and if the RSMeans repair cost estimate were to be reduced by twenty-six percent (from \$162,670,940 to \$119,229,311), it would still exceed fifty percent of the RSMeans replacement cost estimate. Even though these repair cost estimates include some money for repairs to damage which occurred well after the disasters occurred and may have resulted from less than perfect asset protection, we do not believe that those sums are anywhere near as great as the amounts by which the estimates exceed the numbers sufficient to qualify the applicant for replacement rather than repair of the facility.

Very little attention was paid during the hearing to the estimates of the cost of replacing the hospital. This was appropriate, since the estimates submitted by FP&C (\$491,884,000) and FEMA (\$474,750,898) were within three percent of each other. (Both of these figures were calculated in accordance with FEMA's cost estimating format; the parties disagreed as to base costs -- part A -- and mark-ups -- parts B through H -- but their final figures are very close.) One element of disagreement between the parties relates to medical equipment. FP&C has not satisfactorily demonstrated either what medical equipment was both affixed to the building and damaged by the disaster, or the repair and replacement costs of that equipment. Regarding the overall building replacement cost, we are not persuaded that FEMA's estimate is flawed. We therefore determine that FEMA's estimate is the best approximation available of the cost of replacing Charity Hospital with a new facility. We note that FEMA and the tenant of the hospital, Louisiana State University, are discussing another project worksheet which covers items of medical equipment owned by the tenant. Our conclusion as to the cost of replacing the hospital should have no bearing on those discussions.

The panel understands that differences of opinion exist in New Orleans as to whether the public is better served by rebuilding Charity Hospital in its present location or by constructing a new hospital elsewhere in the city. This issue is not relevant to our determination in this case, and we did not consider it in the course of our deliberations. How to proceed with the rebuilding or new construction is a matter for decision by other authorities.

The panel directs FEMA to issue a new version of Project Worksheet 2175, in lieu of version 3, which awards to FP&C \$474,750,898 as a public assistance grant for the replacement of Charity Hospital.

STEPHEN M. DANIELS
Board Judge

JOSEPH A. VERGILIO
Board Judge

HAROLD C. "CHUCK" KULLBERG
Board Judge