



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 25, 2011

CBCA 2374-FEMA

In the Matter of HANCOCK COUNTY BOARD OF SUPERVISORS

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Before the Arbitration Panel consisting of Board Judges **HYATT**, **SHERIDAN**, and **KULLBERG**.

This matter involves a dispute between the Hancock County Board of Supervisors (HCBOS) and the Federal Emergency Management Agency (FEMA) concerning a request for public assistance related to the repairs of various county roads that were damaged as a result of Hurricane Katrina. The HCBOS and the Mississippi Emergency Management Agency (MEMA), which supports the HCBOS in this matter, contend that FEMA should pay additional public assistance in the estimated amount of \$15,075,545. FEMA contends that no additional public assistance is warranted. This matter is before the panel under authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164, and section 206.209 of title 44 of the Code of Federal Regulations.

Hurricane Katrina struck Hancock County on August 29, 2005. The resulting storm surge, which was twenty-seven feet above sea-level, flooded much of the southern half of the county. Numerous roads in Hancock County suffered damage due to the flooding. Inundation resulted in damage to both road surfaces and the underlying road structures. An assessment team consisting of representatives from FEMA, MEMA, and the HCBOS conducted a survey of county roads, which was completed by December of 2006.

On December 8, 2006, FEMA prepared project worksheet (PW) 10603 version 0 for the repair of 360 county roads¹ with an estimated public assistance in the amount of \$6,418,492. FEMA classified road repairs under PW 10603 as either level one or two. Level one repairs involved patching, and level two repairs involved a complete overlay of the road. An overlay repair consisted of laying a continuous mat of hot asphalt over the existing road surface with no repairs to the base of the road. One hundred twenty of the roads under PW 10603 were repaired by the overlay method.

After FEMA issued PW 10603, the HCBOS contracted with Compton Engineering, Inc. (Compton) for various services in connection with the repair of county roads. Compton conducted additional inspections of county roads and determined that PW 10603 did not adequately address the full extent of the damage. In its analysis, Compton also noted that damage to some of the roads had been overlooked.

On November 27, 2007, representatives from FEMA, MEMA, the HCBOS, and Compton met to discuss repairs to roads under PW 10603. Among those matters discussed was whether all of the 360 roads listed on PW 10603 needed to be surveyed a second time. Before the meeting, a small number of roads had been resurveyed. Compton also provided a list of 213 county roads in need of repair that had not been included in PW 10603.

On December 7, 2007, FEMA requested that the HCBOS provide information regarding the issuance of general obligation public improvement bonds for repairs to public facilities, including roads, which had been issued on March 8, 2005. In a letter dated January 17, 2008, to MEMA, FEMA's infrastructure chief expressed concern as to whether reimbursement for road repairs by FEMA would constitute a duplication of benefits. By letter dated February 15, 2008, the HCBOS provided a list of roads that were paved by the use of funding from the bond issue.

¹ The estimated number of roads in Hancock County is 1000.

As a result of discussions among FEMA, MEMA, and the HCBOS, additional roads were surveyed. Version 2 of PW 10603 was prepared on August 21, 2008, because FEMA determined that eighty-three of the roads listed under version 0 of that PW required additional repairs. That version of PW 10603 also removed thirteen roads that had been repaired with funds made available through the issuance of bonds before Hurricane Katrina. There is nothing in the record that contradicts the previous determination that those thirteen roads had been damaged as a result of Hurricane Katrina.

PW 11078 was prepared on September 10, 2008, with an estimated cost of \$261,662, for repairs to Old Kiln Picayune Road. That road had been damaged from the hauling of debris. Version 0 of PW 11090, with an estimated value of \$3,905,141.85, was prepared on September 19, 2008, to provide for repairs to an additional 213 roads that had been identified by the HCBOS. Version 2 of PW 11090 reduced that number of roads to 179.

In a memorandum dated November 5, 2009, FEMA informed MEMA that after more than four years, it was no longer possible to accurately identify damage related to Hurricane Katrina, and any damage that had not been previously identified would not be included in outstanding or new PWs unless an exception was granted by the infrastructure section chief. In a letter dated October 1, 2010, the HCBOS submitted to MEMA a list of fifty-five roads that had not yet been evaluated for repair under any previous PWs and 163 roads that had been evaluated for repairs under the previously issued PWs. MEMA forwarded the list to FEMA, and on February 23, 2011, FEMA denied the HCBOS' request for additional public assistance.² MEMA forwarded FEMA's denial of its request to the HCBOS by letter dated March 1, 2011.

On April 5, 2011, the HCBOS requested arbitration of this matter before the Board. The estimated amount of additional public assistance sought by the HCBOS totaled \$15,075,545. That amount included: \$6,947,678 for the cost of level two (overlay) repairs for roads under PWs 10603 (sixty roads), 11090 (sixty-nine roads), and 11087 (Old Kiln Picayune Road); \$4,843,855 for the cost of repairing roads rejected by FEMA in its February 23, 2011, letter (rejected roads); and \$667,595³ for the thirteen roads that FEMA removed from PW 10603 (bond roads). The panel finds no merit in the HCBOS' request for public assistance for additional level two repairs and the rejected roads. In the case of the

² FEMA also found that nine of the fifty-five roads had been previously evaluated in either 2006 or 2008, and only forty-six of the roads were newly identified.

³ That amount included \$625,205 for the cost of roads already paved using funds from the bond, and \$42,390 for the estimated cost to complete repairs.

bond roads, the panel finds that FEMA improperly removed those thirteen roads from PW 10603.

The first part of the HCBOS' request for additional public assistance seeks \$6,947,678 for overlay repairs for roads that were patched under the PWs issued by FEMA. The HCBOS contends that repairs by patching were only "immediate short term" repairs, and overlay repairs are now necessary to restore those roads to the design that existed before Hurricane Katrina. Such a contention is not supported by the record. There is no documentary evidence contemporaneous with the preparation of any of the PWs that would show that patching was ever intended to be an intermediate short term repair. The record shows that the decision to use either a level one or level two repair depended on the condition of the road, and patching, if properly done, will last for the remaining life of the road. Both level one and two repairs, for example, were included under PW 10603, and out of the 360 roads included under that PW, 120 of those roads received level two repairs. The panel finds no basis for concluding that the repairs provided under the PWs were not adequate.

Additionally, the HCBOS has provided no objective engineering standard by which the panel could now determine that any particular road should have received an overlay repair as opposed to patching. The HCBOS contended that repairs by patching could result in an uneven road surface that causes drainage problems, but those concerns relate to a possible problem in the future. Such concerns were not quantified in the record, and the panel finds no grounds for awarding additional financial assistance based upon speculation as to the future condition of county roads that were patched.

The second part of the HCBOS' request for additional public assistance seeks \$4,843,855 for repairs to the fifty-five rejected roads. Public assistance can only be recovered for damage due to a disaster event. 44 CFR 206.223(a)(1) (2008). FEMA argues that it had set November 5, 2009, as a deadline for new requests for public assistance due to Hurricane Katrina, but the HCBOS request was not submitted until October 1, 2010. The HCBOS offers no sound reason why damage to those additional fifty-five roads was not detected until more than five years after Hurricane Katrina. The process of surveying roads and the issuing of PWs for road repairs took several years, and that effort included the combined efforts of FEMA, MEMA, and the HCBOS. Although the HCBOS contends that those roads now show damage due to Hurricane Katrina, the record provides no objective means to connect Hurricane Katrina with that road damage. The passing of five years after Hurricane Katrina represents one-fourth of the life of a road, and the HCBOS has not provided a credible means by which the Board can differentiate damage related to Hurricane Katrina from normal wear to a road. The HCBOS has not met its burden of proof in showing that any of the rejected roads were damaged by Hurricane Katrina.

Finally, the third part of the HCBOS' request for public assistance seeks to restore the cost of repairs to the bond roads, \$667,595, to PW 10603. FEMA contends that the bond roads were damaged before Hurricane Katrina, and reimbursement for such damage is prohibited under the Stafford Act, 42 U.S.C. § 5172 (2006). The HCBOS has established that the bond measure, which was issued before Hurricane Katrina, was a general project that included repairs to various public facilities, which included roads. No specific roads were identified for repairs before the bond was issued. There is also no dispute that the HCBOS, MEMA, and FEMA determined that the thirteen bond roads included under PW 10603 had been damaged by Hurricane Katrina. The panel finds no basis for questioning the efficacy of that process in which FEMA was a participant. The HCBOS has provided credible testimony that the repair of the bond roads at issue was not planned before the bond was issued, and the panel has no reason to conclude otherwise. Additionally, the bond funds were of a general nature and not disaster-related, so the bond was not a prohibited duplication of benefits due to Hurricane Katrina under the Stafford Act. 42 U.S.C. §5155(a). Accordingly, FEMA had no grounds for removing the bond roads from PW 10603, and those funds shall be restored to that PW.

Decision

FEMA shall restore the amount of \$667,595 to PW 10603. The remainder of the HCBOS' request for public assistance is denied.

H. CHUCK KULLBERG
Board Judge

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge