



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 13, 2010

CBCA 1759-FEMA

In the Matter of SEWERAGE & WATER BOARD OF NEW ORLEANS

Jason Higginbotham, Director of Emergency Management, Gerard M. Victor, Special Counsel, and Brian A. Ferrara, Deputy Special Counsel, Sewerage & Water Board of New Orleans, New Orleans, LA, appearing for Applicant.

Mark S. Riley, Deputy Director, and William J. Patrigo, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Chad T. Clifford, John B. Patterson, Linda M. Davis, and Kim A. Hazel, 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 **GILMORE**, **STERN**, and **SHERIDAN**.

This matter involves a dispute between the Sewerage and Water Board of New Orleans (S&WB or applicant) and the Federal Emergency Management Agency (FEMA) concerning the S&WB's request for funds to install a four-megawatt generator as a permanent back-up source of power at the East Bank Waste Water Treatment Plant (Plant), which the S&WB operates. The funds are being sought pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5172 (2006). FEMA administers the Stafford Act. FEMA denied the S&WB's request for \$330,000 under project worksheet (PW) 13231 for an engineering assessment report, and its request for \$5,935,000 under PW 18528 for the design, procurement, and installation of a generator.

This matter is being arbitrated under Section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 (2009). The regulations governing the arbitration are set forth at 44 CFR 206.209 (2009). The State of Louisiana supports the applicant's request.

Hurricane Katrina (Katrina) hit New Orleans, Louisiana, on August 29, 2005. On that same day, the President issued a major disaster declaration for the State of Louisiana. Katrina caused extensive damage to the Plant. The Plant at that time was operating under a water discharge permit issued by the Louisiana Department of Environmental Quality (LDEQ) which required it, in general, to have an alternate source of electric power or pumping capability to allow continuity of operation during power failures. The permit stated that acceptable methods of providing alternate sources of power include (a) the connection of at least two independent power sources such as substations; (b) portable or in-place internal combustion equipment which generates electrical or mechanical energy; and (c) portable pumping equipment when only emergency pumping is required.

At the time of Katrina, the S&WB was utilizing method (a), specifically, feeder lines from two substations, as its alternate power source. The feeder lines were powered by Entergy New Orleans (Entergy), a private energy company. The S&WB did not have a generator at the Plant prior to Katrina. When Katrina hit New Orleans, both of the feeder lines to the Plant were damaged, causing the Plant to lose electrical power which, in turn, caused untreated sewerage to be discharged into the Mississippi River. FEMA authorized emergency funding for seven generators to power the Plant so that it could resume operations. In November 2005, Entergy restored one feeder line to the Plant. Three of the temporary generators were removed on December 31, 2006, and four remained until March 2007, when Entergy permanently restored both of the feeder lines to the Plant.

On January 10, 2006, the United States Environmental Protection Agency (EPA) issued an order to the S&WB which included a direction to the S&WB to "provide adequate and stationary auxiliary power for the effluent pump, other critical units, and the treatment facilities so that said units and facilities will remain functional in weather events." The S&WB interprets this provision in the EPA order as a requirement to have a permanent on-site generator installed at the Plant as its back-up power source. At the time of this arbitration, the S&WB had not installed a generator at the Plant, and had not been cited for violation of the LDEQ permit.

After additional power outages occurred in 2008, as a result of Hurricanes Gustav and Ike, the S&WB, on September 22, 2008, requested funding under the Stafford Act for a permanent four-megawatt generator, contending that the feeder lines were no longer a reliable option for back-up power in major disasters, and that a permanent generator is now

required for it to be in compliance with the LDEQ permit. FEMA denied the S&WB's application for funding on the basis that the regulations governing public assistance grants under the Stafford Act provide that an eligible facility may apply for financial assistance to restore the facility on the basis of the design of such facility as it existed immediately prior to the disaster, and that the Plant did not have a generator at the site prior to Katrina.

The S&WB contends that even though the generator was not at the Plant at the time of Katrina, financial assistance is available under the "codes and standards" provisions of the regulations implementing the Stafford Act, at 44 CFR 206.226(d), because a back-up generator is a legally required upgrade that resulted from Katrina. The S&WB also contends that the "hazard mitigation" provisions set forth in 44 CFR 206.226(e) allow financial assistance since a back-up generator will mitigate future damage to the Plant's operations because the Plant would not lose power in future disasters.

The Stafford Act and the implementing regulations provide that facilities are eligible for financial assistance to replace or restore the facility on the basis of the design of the facility as it existed immediately prior to the disaster. 42 U.S.C. § 5172(e)(1)(ii); 44 CFR 206.226. The intent of the Stafford Act is to assist the applicant in restoring the facility to its pre-disaster design -- not to assist in adding a new design or function to the facility that did not exist before the disaster. The arbitration panel finds that because the generator was not a part of the design of the Plant prior to Katrina, S&WB's application for funding to install a new permanent back-up generator at the Plant is denied.

To be eligible for funding under the "codes and standards" provisions of the Stafford Act, the upgrades requested must be required by codes or industry standards that were applicable to the damaged element of the facility at the time of the disaster. The S&WB argues that the "damaged element" at the facility was the back-up power method it utilized at the time of Katrina, which it argues is no longer reliable. However, the back-up power lines to the facility cannot qualify as a "damaged element" of the facility, because the power lines were not a part of the facility but were supplied by Entergy, a private energy company. Additionally, the back-up power method employed by the S&WB, the two feeder lines, was in compliance with the methods allowed under the LDEQ permit before the date of the disaster, and the permit requirements had not changed by the date of the disaster. With regard to the EPA order issued to the S&WB on January 10, 2006, to "provide adequate and stationary auxiliary power . . . so that the facility will remain functional in weather events," there is no compelling evidence that only a permanent back-up generator at the site would satisfy the requirements of this order. Four years have passed since the EPA order was issued and a generator has not been installed at the Plant. In light of the above, public assistance to install a generator based upon the "codes and standards" provisions is also denied.

To be eligible for funding under the “hazard mitigation” provisions, the S&WB must show that the generator would eliminate or reduce the threat of future damage to the facility damaged during the disaster. As stated in the Public Assistance Policy Digest FEMA-321 (Oct. 2001) at 61: “The measures must apply only to the damaged elements of a facility rather than to other, undamaged parts of a facility or to the entire system.” Here, the S&WB is requesting the installation of a new power source that was not at the Plant before Katrina and was not a damaged element of the facility. Thus, public assistance to install a generator at the Plant based upon the “hazard mitigation” provisions is also denied.

The S&WB’s request for public assistance under the Stafford Act to install a back-up generator at the Plant is denied.

BERYL S. GILMORE
Board Judge

JAMES L. STERN
Board Judge

PATRICIA J. SHERIDAN
Board Judge