



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 31, 2012

CBCA 2529-FEMA

In the Matter of THE UNIVERSITY OF SOUTHERN MISSISSIPPI

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Before the Arbitration Panel consisting of Board Judges **SOMERS**, **SHERIDAN**, and **STEEL**.

Under the authority of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164 (2009), and regulation, 44 CFR 206.209 (2010), the University of Southern Mississippi (USM or applicant) requested arbitration of its claim for additional funding of \$3,599,302¹ under the Federal Emergency Management Agency (FEMA) public assistance program. A hearing was held on December 12-13, 2011, and briefing in the matter was completed on April 3, 2012.

¹ Since the amount in dispute exceeds \$500,000, this arbitration panel has jurisdiction to hear the matter. 44 CFR § 206.209.

USM argues that FEMA erred in denying funding for historic preservation improvements for Hardy Hall and that FEMA failed to properly estimate the costs of the repairs it did fund.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), at 42 U.S.C. § 5172 (West Supp. 2011), provides the President the authority to make public assistance disaster grants (through FEMA) to a state or local government for repair, reconstruction, or replacement of public facilities, based on the design of the facility as it existed immediately before the major disaster.

USM suffered significant and extensive damage to its Gulf Coast campus and buildings during Hurricane Katrina on August 29, 2005. In particular, Hardy Hall, a three-story building built in 1921, sustained heavy damage from wind and flood. The entire first floor, its windows, and internal structures were severely damaged by water. Damage also occurred in areas of the second and third floors.

To fund a project, FEMA must approve the scope of eligible work and issue an itemized cost estimate.² FEMA determined in 2006, via PW6675 version 1 (PW6675-V1), that USM was eligible for reimbursement of funds for repair of Hardy Hall. Initially, in PW6675-V1, FEMA estimated the eligible repair costs for Hardy Hall to be \$2,284,022. Two other buildings on USM's Gulf Coast campus, Lloyd Hall and the Administration Building, were also found eligible for FEMA repair funding.

Ultimately, FEMA estimated the total repair costs for Hardy Hall would be \$5,131,697.52. As USM recovered \$1,770,166.38 through its insurance on Hardy Hall, on March 31, 2011, FEMA issued PW6675-V4 obligating \$3,361,531.14 in public assistance funds for the repair of Hardy Hall.

USM hired Dale Partners Architects P.A. (Dale) to independently evaluate the amount of damage to Hardy Hall and the costs of repair. Dale initially estimated that it would cost approximately \$7,766,362.52 to repair Hardy Hall, which was \$2,634,665 more than the amount estimated by FEMA. Dale also recommended that the Administration Building be

² FEMA approves work and its funding by issuing what it refers to as project worksheets (PWs). PWs are then amended by FEMA by issuing successive versions to reflect the most current information on the scope of the work and estimates for its completion. Five versions of the PW were ultimately issued for this project.

demolished and that the funds USM was eligible to receive from FEMA to repair the Administration Building be used instead in the Hardy Hall repair and renovation.³

To proceed with its plans, USM was required to take steps to address the historic preservation aspects of the buildings that would be affected. Section 106 of the National Historic Preservation Act, codified at 16 U.S.C. § 470f (2006), requires that any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted “undertaking,” prior to expenditure of any federal funds, must consider the undertaking’s effect on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register of Historic Places. Regulations establish a procedure for compliance with section 106, including identification of historic properties, assessment of whether there are adverse effects on those properties, and the resolution of such effects, often resulting in a memorandum of agreement (MOA) reflecting the understanding of the federal agency, the state’s historic preservation office(s), and other involved parties, as to how properties are to be managed.

As it was obliged to do, FEMA notified the Mississippi Department of Archives and History (MDAH) as well as the federal Advisory Council on Historic Preservation (ACHP), and invited those entities, USM, and other interested parties to participate in a section 106 consultation process. Over the course of several months, USM, FEMA, and the state historical agencies participated in at least five section 106 consultation meetings held to review and determine the adverse effects that the USM plans would have on the historic properties on the Gulf Coast campus, and to discuss mitigation of any adverse effects. The culmination of the meetings was an MOA that included a number of historic treatment measures for the repair and renovation of Hardy Hall to compensate, at least in part, for the adverse effects of demolishing the Administration Building.

As a result of the section 106 consultation process and as set forth in the MOA, USM enhanced its plans for the rehabilitation and renovation of Hardy Hall. These plans included improvements such as adding a wing to the building for a kitchen and bookstore, replacing contemporary inexpensive windows (a hybrid of storefront and aluminum) with more expensive historically correct windows (like the windows which existed when the building was first constructed in 1921), and removal of a veranda or loggia across the front of the building (to conform to the original facade).

³ After demolition of the Administration Building, Hardy Hall and other campus buildings would be used to support the functions provided by the Administrative Building. Upon receiving the Dale damage assessment, FEMA determined that the demolition of the Administration Building would likely have an “adverse effect” on the historic properties of the USM’s Gulf Coast campus.

In June of 2011, USM requested that FEMA find eligible and fund the costs of the historic preservation requirements as outlined in the MOA. On July 11, 2011, FEMA responded to USM's request for funding by stating that the historic preservation requirements for Hardy Hall set forth in the MOA were not eligible for funding under the FEMA public assistance program.

USM's plans for the rehabilitation and renovation of Hardy Hall were considerably more extensive and expensive than the repairs approved by FEMA. For example, USM decided to replace all the windows existing before the Katrina landfall, not only on the first floor where they were all destroyed, but also on the second and third floors where many of the rooms suffered no damage. USM sought bids for the renovation, and the low bid was \$8,731,000, which sum included an alternate for historic doors and windows in the amount of \$891,000.

USM argues that it is entitled to reimbursement from FEMA for the historical improvements it agreed to in the MOA. In support of its position, it argues that FEMA is obligated to cover the historical improvements because the measures it agreed to take are required by the Secretary of the Interior's Standards for Rehabilitation under section 106. FEMA responds that its denial of funding for historic preservation measures not related to disaster-damaged elements is in strict compliance with FEMA regulations and the MOA. FEMA also posits that the Secretary of Interior's Standards set forth at 44 CFR 206.221(i) are not technical or prescriptive, but are guidelines for the states regarding the issues to be considered when evaluating renovation of historic properties.

We find that the standards referred to by USM are not related to public assistance funding for a construction or repair project, but rather are guidance provided to state and federal entities to insure the historic integrity of a renovation. They are a common sense guideline on how to improve a building while still retaining its historic character. It was MDAH that used those guidelines to establish the requirements USM had follow to maintain the historic quality of Hardy Hall, in the face of USM's desire to demolish the Administration Building. MDAH alone has the authority to regulate the mitigation of adverse effects to historic properties under Mississippi law. FEMA is only responsible for ensuring that the section 106 process occurs when the undertaking at issue involves a landmark designation; that agency has no responsibility for dictating or funding the agreed-upon historic treatment measures. It is not constrained by the Secretary of Interior's standards to fund historical improvements.

We find that both the State of Mississippi and USM understood that USM would be responsible for the cost of these improvements when they agreed in the MOA that the installation of the windows could be phased in over time. In addition, section VI(B) of the

MOA states, “USM shall be responsible for the repair and rehabilitation of Hardy Hall.” By law, FEMA may assist with the cost of repairs, but USM is solely responsible for any improvements, of whatever character, historic or not, it chooses to undertake. Had USM not decided to demolish the Administration Building, it would be required to renovate Hardy Hall only to pre-disaster conditions, for which repair it is eligible for 100% FEMA funding. It was USM’s own decision to demolish the Administration Building that led to the negotiated, enhanced historic preservation measures for Hardy Hall reflected in the MOA. FEMA is not required to fund these enhanced historic preservation measures.

We turn now to the estimation of funding. USM initially argued that FEMA erred in its determination of the square footage of Hardy Hall. However, it became clear at the hearing, and we so find, that by the time PW6675-V4 was prepared, FEMA’s square foot calculation of the affected areas and USM’s calculation for the first floor square footage were the same, because by PW6675-V4 FEMA’s initial calculations were corrected to reflect a first floor square footage of 15,023 square feet. The remaining differences in the parties’ respective calculations result from USM using the “historic” square footage from the second and third floors for its estimation. In any event, since the repairs for those floors do not cover the entire square footage, the alleged difference does not change the funded amount authorized by FEMA for repair.

Decision

The panel denies USM’s claim for additional funding for historic improvements and for alleged erroneous estimation of square footage of Hardy Hall. The panel finds that applicant is not entitled to recover additional public assistance funds for the repair of Hardy Hall.

CANDIDA S. STEEL
Board Judge

JERI K. SOMERS
Board Judge

PATRICIA J. SHERIDAN
Board Judge