UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 8, 2020

CBCA 6469-FEMA

In the Matter of ROMAN CATHOLIC CHURCH
OF THE ARCHDIOCESE OF NEW ORLEANS

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Lynne Browning, Assistant Deputy Director, Veronica Howard Sizer, Executive Counsel, and Jaron Herd, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

John Dimos and Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **BEARDSLEY**, **LESTER**, and **RUSSELL**.

This arbitration matter is essentially a sequel to a prior arbitration, which we decided in July 2018. *See Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 5549-FEMA, 18-1 BCA ¶ 37,089. Following our prior remand of the issues raised in this matter to the Federal Emergency Management Agency (FEMA), the Roman Catholic Church of the Archdiocese of New Orleans (ANO) submitted a new request for arbitration pursuant to section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), and its implementing regulations, 44 CFR 206.209 (2019), challenging FEMA's remand decision.

Background

In the prior arbitration, the issue before us was whether, in accordance with what is known as the "50 Percent Rule," the ANO was entitled to recover the costs of replacing a former convent building that was damaged during Hurricane Katrina or, instead, was limited in its recovery to the costs of repairing the existing building. As we discussed in our prior decision, "[u]nder [Federal Emergency Management Agency (FEMA)] regulations implementing the [Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5296 (2006)], an applicant is eligible for reimbursement of the costs of replacing, rather than merely repairing, a damaged facility if the cost of repairing the disaster-damaged elements of that facility to their 'predisaster condition' exceed fifty percent of the cost of facility replacement." *Roman Catholic Church*, 18-1 BCA at 180,563 (citing 44 CFR 206.226(f) (2017)).

The ANO claimed in the prior arbitration that the cost of restoring the convent building, which the ANO hopes to use as a homeless shelter called "Hotel Hope," to its predisaster condition exceeds fifty percent of the cost of replacing the facility, entitling the ANO to the replacement cost. FEMA, through an analysis reflected in Project Worksheet 11678 Version 6 (PW 11678-v6 or v6), came to a different conclusion, determining that the repair costs to which the ANO was entitled were far less expansive than the ANO wanted and finding that the repair-to-replacement cost ratio was 37.65%. At the conclusion of the prior arbitration, we denied the ANO's request for replacement costs, but did so without prejudice. We found that, in conducting its calculations, FEMA had incorrectly excluded certain repair costs in the numerator and sometimes in the denominator of its fifty-percent calculation, and we directed FEMA to reconsider repair and replacement cost values for various items in accordance with the findings in our decision. *Roman Catholic Church*, 18-1 BCA at 180,570. Familiarity with our prior arbitration decision is presumed.

After we issued our arbitration decision, FEMA prepared a new project worksheet, Project Worksheet 11678 Version 7 (PW 11678-v7 or v7), reflecting the results of its new analysis. In conducting that analysis, FEMA decided to remove from its v7 repair cost assumptions certain costs—particularly, painting and ceiling repair costs for the second floor of the convent building—that it had authorized in PW 11678-v6, stating that the Board in its arbitration decision had indicated that those costs were not reimbursable. Based upon its new v7 analysis, FEMA again found that the cost of repairing the former convent was only 37.76% of the building's replacement cost, far below the necessary fifty-percent threshold, and again denied the ANO's request for replacement costs. Nevertheless, the amount of reimbursable repair costs that FEMA obligated in v7 increased from those obligated in v6 by $296,678.08, making the ANO eligible for repair costs totaling $1,285,318.97.

The ANO then filed its arbitration request with the Board, challenging FEMA's v7 analysis and, once again, asking us to find that it is entitled to replacement costs for the former convent. The ANO provided the Board with a list of the various alleged errors that it had identified in FEMA's replacement model and described how it believed FEMA had misinterpreted and misapplied the panel's prior arbitration decision. FEMA responded to the ANO's submission, and the arbitration panel subsequently conducted a two-day hearing during which the parties each presented witnesses to support their respective positions. At the hearing, to ensure a full evidentiary record, the panel elected to incorporate the record from the prior arbitration, CBCA 5549-FEMA, into the record of this arbitration. Subsequently, because it was having difficulty comparing the parties' competing estimating models for repair and replacement costs, the panel requested after the hearing that the parties present a joint chart that, in simple terms, identified the cost estimates upon which the parties agreed, those upon which they disagreed, and the specific dollar amount by which they disagreed. The development of that chart proved somewhat difficult, but the chart that the parties eventually submitted, though somewhat difficult to understand, eventually provided great assistance to the panel.

Discussion

We review the fifty-percent calculation de novo, rather than through a deferential standard of review. *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335, at 169,579-80 (2009). Accordingly, we are not bound by FEMA's prior determinations and do not provide any deference to its views of what the ANO's costs should be. *City of New Orleans*, CBCA 5684-FEMA, 18-1 BCA ¶ 37,005, at 180,199.

With that standard of review in mind, we make the following observations about the repair and replacement cost assumptions that support either the ANO's or FEMA's 50% repair-versus-replacement cost calculation:

First, we do not understand the basis under which FEMA, after authorizing second-floor ceiling repair and painting in its v6 repair cost analysis, renounced authorization for those costs in v7. FEMA says that, in our arbitration decision addressing PW 11678-v6, we held that the ANO had not proven that Hurricane Katrina damaged the second floor of the convent building, meaning that FEMA should not have awarded the ANO any second-floor costs for painting or ceiling repair. Yet, the second-floor damage that we addressed in our prior decision was directly tied to the damaged elements that FEMA had challenged—mainly second-floor doors and windows. We did not consider, address, or reject second-floor painting or ceiling work because it was not at issue—FEMA had already conceded causation for those repairs. In light of acknowledged roof damage to the convent caused by Katrina and the humidity effect of hurricane waters sitting inside the building for

a long period of time after Katrina hit, FEMA's concession was not unreasonable. Had FEMA wanted to contest entitlement to second-floor painting and ceiling costs, the time to do that was in the first arbitration. FEMA should restore authorization for those repair costs, which we found to be $15,935.40 for painting and $12,314.72 for ceilings. Although the ANO asserts that heating, ventilation, and air-conditioning (HVAC) diffusers should also be added, FEMA has shown that it accounted for those costs elsewhere in its repair cost calculation.

Second, we reject FEMA's position that the ANO, when it restores the existing convent building, will be able to continue to use the second-floor hallway as a return air plenum for the HVAC system. FEMA has repeatedly maintained (both in this and the prior arbitration) that, because the second-floor hallways were used as plenums when the building originally served as a convent and then as a homeless shelter, both the state and local governments would permit the ANO to continue that use when the convent building is restored. At the end of the first arbitration, we remanded this issue for further development. At the hearing in this arbitration, the ANO presented definitive evidence—including testimony from Zachary Smith, the Director of the Department of Safety and Permits for the City of New Orleans—that such a use is considered dangerous and unacceptable under today's applicable codes (and the codes as they existed when Hurricane Katrina hit) and that the ANO, before local officials will allow individuals again to occupy the convent building (either as a convent or as a homeless shelter), will have to create a new plenum system in the building consistent with current safety codes. Beyond conjecture, FEMA presented nothing to challenge this evidence. We reject FEMA's argument that the ANO would be able to use the building's current return air plenum system if it repaired the convent building.

That does not mean, however, that the estimated $86,640.60 cost of creating a new return air plenum (through installation of new ducting) to comply with existing codes is included in the numerator of the 50% repair-versus-replacement cost calculation. The FEMA policy in place at the time of the Katrina disaster provided that the repair cost numerator "equals the cost of repair of damaged components only" and "<u>does not</u> include codes and standards upgrades, demolition, site work, or applicable project management costs." Public Assistance Policy Digest FEMA-321 (Oct. 2001), at 106; *see* Public Assistance Guide FEMA-322 (Oct. 1999), at 29 ("*Repair cost* includes only those repairs associated with the damaged components, . . . not upgrades triggered by codes and standards, . . . even though such costs may be eligible for public assistance."). FEMA has identified a slight exception to the exclusion of code-triggered upgrades from the repair cost calculation: such costs will be considered in the repair costs if, and only if, a particular required upgrade is an integral part of a disaster-damaged element or component within a covered building. As such, FEMA's policy treats triggered codes *inside* a damaged element differently than triggered codes *related to* but *outside* a damaged element. An example that FEMA provided of such

a situation was a window in a damaged building that has to be replaced: if current codes require the glass in new windows to be impact-resistant, the cost of replacing the windows as part of the building repair would include the price of impact-resistant glass, rather than regular glass, as there is no way to segregate impact resistance from the glass itself. Here, though, the ducting that the ANO needs to install to create a new return air plenum is not one of the HVAC components that Katrina damaged. Although the plenum is plainly *related* to the rest of the HVAC system, the plenum itself is a separate part of that system, was not damaged by Katrina, and would not have to be reconstructed in a new manner but for the codes that now apply to HVAC systems in buildings such as the one at issue here. *See Webster's New Twentieth Century Dictionary of the English Language Unabridged* 372 (2d ed. 1975) (defining "component" as "a part; a constituent; an ingredient"). As one of FEMA's witnesses, Eddie Williams, testified during the hearing, FEMA's role in Stafford Act cases is to repair disaster-related damage, "not to come in and try and replace every old building that ha[s], over the years, not been brought up to compliance." Hearing Transcript, Vol. 2, at 316. Although the ANO refers to more recent revisions to FEMA policy documents as evidencing a more accurate interpretation of the manner in which FEMA is supposed to address triggered code and upgrade costs in the numerator calculation, we simply cannot agree, after reading those revisions, that FEMA's policy, even if we were to apply it retroactively, has changed in the manner that the ANO alleges. Accordingly, although the ANO would be entitled to receive the costs of creating a new return air plenum as a triggered code cost, which is added at a later stage of FEMA's total repair-cost reimbursement calculation, it cannot include that amount in the "repair cost" numerator of its fifty-percent repair/replacement calculation.

Third, in its replacement cost denominator (but not the repair cost numerator), FEMA included $51,030.56 for adding an elevator to the building, even though the building has never had an elevator, because, according to FEMA, a new structure would be required to have an elevator to comply with the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. FEMA asserts that, because the bedrooms in the building are exclusively on the second floor, the ADA requires any replacement building to have an elevator to allow bedroom access to disabled individuals. Under FEMA policy, FEMA defines the replacement cost as "the cost of reconstructing the facility and includes current codes and standards upgrades." PA Policy Digest at 106. Such codes and standards upgrades are *not* included in the repair cost calculation, however. *See id.* Accordingly, if the ADA mandates that a replacement building would have to have an elevator to operate, FEMA includes the cost of that elevator only in its replacement cost calculation. Further, because "FEMA will restore an eligible facility to its pre-disaster design," the "design capacity of the facility, either as originally designed or as modified by later design, will govern the extent of eligible work when a facility is being replaced." PA Guide at 28-29. FEMA acknowledged during the hearing, however, that the ADA would not require construction of an elevator if, prior

to Katrina, there had been sufficient ADA-compliant bedrooms and services on the first floor of the building to accommodate individuals who might need them. *See* Hearing Transcript, Vol. 2, at 167-68, 200. Although FEMA cites to the original design drawings for the convent from the early 1960s to indicate that there are no first-floor bedrooms, we find it more likely than not that, when the building was operating as a homeless shelter prior to Katrina, the first floor was used as a bedroom site to accommodate individuals who needed it. Further, the ANO has indicated that, because of its concern about putting an elevator in a building that is being used to accommodate children, it has no intention of installing an elevator. We discount FEMA's concern that any pre-Katrina first-floor bedroom use needed to be ADA-compliant, given that virtually *nothing* in the pre-Katrina building was ADA-compliant. We remove the $51,030.56 elevator construction cost addition from FEMA's replacement cost denominator.

Fourth, in its replacement cost estimates, FEMA uses upgrades and other improvements based upon the anticipated uses of the building that differ than what was in the building prior to Katrina—examples include wall-hung toilets rather than the floor-mounted toilets that were originally in the building (for what the ANO contends is an unnecessary price increase in the replacement cost estimate of approximately $18,000), the addition in FEMA's replacement model of thirteen showers that did not exist in the original building rather than the three showers that the ANO proposes, the use of a "finned tube" heating system rather than the same type of boiler heating system currently in place (allegedly a $11,000 difference). FEMA's stated "goal is to estimate the reasonable cost of the damaged facility restored to what's the same function and capacity, restored using current codes and standards." Hearing Transcript, Vol. 2, at 24. FEMA asserts that, in estimating replacement costs, it does not replace the pre-existing damaged building exactly the way that it existed, but attempts to "restore the facility based on the pre-disaster design with a modern day version of that, meaning that, whatever codes and standards affect the function or capacity in the building that existed prior would be implemented in the replacement." *Id.* FEMA's reliance on such upgrades and improvements in quality and/or quantity does not fit the apples-to-apples comparison upon which FEMA purports to want to rely, yet it can unnecessarily increase the divide between the numerator and the denominator in the 50% repair-versus-replacement cost calculation. We are wary of including such unnecessary improvements and upgrades in the replacement cost denominator.

Fifth, in reviewing the various cost calculations that each of the parties has presented both in this arbitration and the prior one, it is clear that there is a great deal of discretion and judgment that goes into the process of creating the repair and particularly the replacement cost estimates. Both parties have relied in their estimating on RSMeans, which "is a cost estimator that accounts for regional differences in labor and materials costs by using zip codes to factor in the specific costs of nearly any type of construction in a particular area of

the country," *In re CertainTeed Fiber Cement Siding Litigation*, 303 F.R.D. 199, 205 (E.D. Pa. 2014), and "is a generally accepted method of calculating building costs." *In re Chinese-Manufactured Drywall Products Liability Litigation*, MDL No. 2047, 2017 WL 1421627, at *11 (E.D. La. Apr. 21, 2017). Nevertheless, "[e]stimations . . . are still merely estimations," and at least one court (citing to a leading treatise, *Standard Estimating Practice*, from the American Society of Professional Estimators) has found that, even using RSMeans, "variations even among several competitive [cost estimates for the same construction work] can reach up to 30% with an average of a 17% difference." *Chinese-Manufactured Drywall Products*, 2017 WL 1421627, at *14 n.1; *see* Department of Defense, *Unified Facilities Criteria Handbook: Construction Cost Estimating*, UFC 3-740-05, ¶ 2-4.2 (Nov. 8, 2010) ("Estimates made with this method [using RSMeans] can be expected to be accurate between -15% to +25% notwithstanding abnormal market conditions"), available at https://www.wbdg.org/ffc/dod/unified-facilities-criteria-ufc/ufc-3-740-05 (last visited Apr. 8, 2020).

It appears fairly easy to manipulate whether the repair cost exceeds the replacement cost by fifty percent or more, or to render it less than fifty percent, by giving greater credit here, taking away credit there, or using a higher- or lower-grade product in this place or that place. This is borne out by the fact that, when we asked the parties to provide a joint chart to help us compare their competing cost estimating models, FEMA noted that a number of its estimated replacement costs were in "a category where the replacement model [that FEMA was using] is high," but that the use of overstated costs in one category "partially offsets other categories where the replacement model is low," without detailing all of the costs or the amount of such costs that it thinks it underestimated in its replacement model.

In the end, we have to evaluate the evidence before us as best we can. We have full confidence that everyone involved in these matters and in the estimating of the various costs worked in good faith to attempt to come to proper estimating numbers, as is evidenced by the detailed record before us and the large number of hours that numerous FEMA and ANO representatives clearly have put into efforts to estimate these costs. Having evaluated all of the evidence presented in this matter and its predecessor, while recognizing the fluidity in and discretionary nature of some of the cost numbers used in the cost models, we believe that the cost of repairing the convent building, using only those repair costs that are appropriate under FEMA's 50% repair-versus-replacement cost calculation formula, is at least fifty percent of the building's replacement cost. Accordingly, we direct FEMA to provide funding to the ANO for replacement, rather than repair, of the convent building.

Decision

The arbitration panel determines that the ANO is eligible for the costs of replacing, rather than merely repairing, the convent building at issue in this matter.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge