UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 20, 2022

CBCA 7228-FEMA

In the Matter of CITY OF HATTIESBURG, MISSISSIPPI

Michael G. Gaffney and Christopher M. Gaffney of Gaffney & Gaffney, Metairie, LA; and Charles V. Cusimano, III of Cusimano Law Firm, PLC, Metairie, LA, counsel for Applicant.

Clayton C. French, Jr., Chief Recovery Officer, and John M. Siler, Director, Office of Public Assistance, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Maureen Dimino and Christiana Cooley, 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 **RUSSELL**, **GOODMAN**, and **CHADWICK**.

The applicant timely sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) over proposed costs to repair a softball field complex that was hit by a tornado in January 2017. The panel received new documentary evidence and held a two-day hearing. This decision "is the final administrative action on the arbitrated dispute." Board Rule 613 (48 CFR 6106.613 (2020)); *see* 86 Fed. Reg. 45660, 45685 (Aug. 16, 2021) (to be codified at 44 CFR 206.206(c)(2)). We write "primarily for the parties," Rule 613, so "we include only minimal background for context." *Diamond v. Shulkin*, 692 F. App'x 637, 637 (Fed. Cir. 2017).

Except as specifically noted, the panel does not find the long and contentious history of the grant application to be relevant to our decision. Importantly, we do not view FEMA's issuance of project worksheet version 1 in 2019—which FEMA now calls an "egregious

mistake"—as having conclusively admitted the eligibility or reasonableness of any proposed costs, as the applicant invites us to determine. We do not view FEMA's mere action of listing certain costs in version 1 as affirmative evidence that FEMA should include those costs in the grant.

It was agreed in the Rule 607 initial conference that the dispute to be arbitrated had three components. We address those questions in turn, slightly reworded. We then separately address a fourth issue, hazard mitigation. We endeavored "to be fair, impartial, timely, and clear." *Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436.

1. *Did the damage to the listed facilities and their components result from the disaster?*

FEMA determined in the first appeal that the applicant sought approximately $1.74 million for proposed work that constituted either "repairs . . . [not] required as a result of the disaster" or "replacement of undamaged elements of the facility" without proper justification as hazard mitigation. The parties ask the panel to decide the scope of work. We are less suited to that task than the parties working cooperatively would be, but we find based on the evidence before us that the disaster damaged the softball complex as follows. We adopt the order in which FEMA discussed damage in the first appeal memorandum.

Press box(es). The damage report signed by representatives of FEMA, the applicant, and the grantee in May 2017 (FEMA Exhibit 18) says that the press box for fields 1–4 (also called Building 1) sustained tornado-related damage to its corrugated metal roof, twelve windows, the interior ceiling and adjacent areas, siding, one exterior air conditioner, and one public address system. The May 2017 report, completed within a few months of the disaster, is the best evidence of disaster-related damage. We find no contemporaneous evidence of damage to the other two press boxes (Buildings 2 and 3). Those buildings were "observed damaged" in later site inspections, but no evidence in the record links such damage to the January 2017 disaster. We cannot ignore the passage of time between the tornado and subsequent inspections, a recurring issue for much of the damage visible at the site. It is the applicant's responsibility to identify eligible repair work by showing that the disaster caused the damage—not FEMA's duty, or the Board's, to rule out alternative causes of damage. The bare assertions in the applicant's February 2018 programming stage report (Applicant's Exhibit 3) that aspects of the softball complex were damaged in the disaster rather than at some other time are conclusory in form and are not persuasive engineering opinions.

Public address system(s). As noted, the May 2017 consensus damage report notes damage to the public address system at Building 1. A damage assessment in October 2017 by the applicant's engineering firm noted damage to three other public address systems, but no evidence in the record persuasively links that damage to the disaster nine months earlier.

Scoreboards. The May 2017 damage report says the disaster damaged four scoreboards. The request for arbitration asserts damage to six scoreboards. Mr. Wood testified for the applicant, however, in response to leading questions on direct examination and also on cross-examination, that the applicant is "asking for" funds to repair "four scoreboards," and that "[n]othing has changed in that amount," whereas the dispute with FEMA is about cost "reasonableness." We find that four scoreboards are at issue. The May 2017 damage report does not mention damage to power cables, and no disaster-related damage to the cabling is documented in the record.

Dugouts. All agree that the disaster damaged ten dugouts.

HVAC. The May 2017 damage report documents damage to one, four-ton exterior HVAC unit (apparently a heat pump) at the main press box. The applicant included photographs of two multi-ton HVAC units in the arbitration record and insists that both units were damaged in the disaster, but the applicant did not make a clear record on this issue in its filings or at the hearing, where the issue was barely mentioned. The applicant writes that it "does not understand how FEMA could identify one [damaged] HVAC system." Nonetheless, the applicant noted only one in May 2017. No evidence in the record links damage to a second HVAC unit to the January 2017 disaster. FEMA determined in the first appeal that it should fund replacement of one heat pump and one window cooling unit.

Drinking fountain. The May 2017 damage report does not list a drinking fountain as damaged. No one mentioned a fountain at the hearing. No evidence in the record links any later-documented damage to a drinking fountain to the January 2017 disaster.

Lighting. All now agree that the disaster damaged twenty-eight wood utility poles with lighting systems as documented in the May 2017 damage report. FEMA referred in the appeal memorandum to twenty-three poles. Some hearing witnesses testified about twenty-five poles without consulting documents. We adopt the number in the record.

Fields. The immediate impact of the disaster on the playing fields is unclear. FEMA determined that "the disaster did not damage the turf and infield areas, but rather contaminated the area with debris." The May 2017 damage report notes, "The infields of fields 1 thru 4 have some small amounts of glass and other construction debris" and proposes work to "clean and dispose of broken glass, metal and other falling [sic] debris embedded into the ball fields." A FEMA reinspection in September 2019—thirty-two months after the disaster—again found glass and metal pieces "embedded in the fields" but did not describe the extent. The parties disagree as to whether "vacuuming" and overseeding the playing fields would suffice to clear them of dangerous debris or whether it is necessary, instead, to remove and replace the top two inches of soil or turf. The parties argue based entirely on opinions without reference to hard evidence. The earliest damage assessments in the record,

from spring 2017, recommend "clean[ing]" the fields. The applicant cites no persuasive evidence that a "cleaning" approach will not suffice (or would not have worked, had the applicant begun methodically removing pieces of debris four or five years ago).

Fencing. The panel is at a loss to determine how many linear feet of chain link fence the tornado damaged. The May 2017 damage report cites 2065 linear feet of fence and six chain link gates. Other footage estimates in the record vary. Witnesses for the applicant testified without citing independent support for their opinions that damage to some of the fencing effectively means the whole system of some 5500 linear feet is damaged and should be replaced. FEMA disagrees without citing a basis for its own position. Given the deficient record and the applicant's burden to support its application, we will treat the replacement of more than 2065 linear feet of chain link fence plus associated gates as falling in the category of hazard mitigation, which we discuss below.

Backstops. The panel finds the record regarding damage to backstops even more confusing. The May 2017 damage report recommended replacing 500 linear feet of backstops. FEMA's appeal memorandum says the applicant sought to replace 800 linear feet of backstops. FEMA allowed funds to replace 230 linear feet. The arbitration request seeks funds to replace more than 1000 linear feet (thirty-four backstops, each thirty feet wide). The applicant elicited testimony from Mr. Wood, however, that the applicant wishes to replace "overall 500 linear feet" of backstops, the original number. FEMA seemed to imply doubt on cross-examination about the figure of 500 feet, but FEMA did not mention backstops in its written response under Rule 608 or explain why the panel should disregard the May 2017 estimate. We adopt the first estimate of 500 linear feet. We view the applicant's proposal to replace the foul poles as proposed hazard mitigation.

Batting cages. The May 2017 damage report does not mention batting cages. No evidence in the record links any later-documented damage to batting cages to the disaster.

Bleachers. All agree that the tornado damaged twelve bleachers as documented in the March 2017 damage report.

Pavement. A witness for the applicant testified that "the majority of the damage to" paved surfaces occurred "during the cleanup efforts [in] the removal of all the obvious debris. . . . The wind from the tornado wasn't the cause." The record contains no evidence that the disaster itself damaged specific areas of pavement at the complex.

Walking trail paving. FEMA determined that it should fund 106 tons of replacement stone for the trail. There is no evidence in the record to contradict FEMA's allowance and certainly no evidence that the applicant should receive a greater amount.

Pedestrian bridges. The May 2017 damage report mentions no damage to either bridge. FEMA determined that it should fund the repair of one bridge's handrail. We see no evidence that the disaster necessitated more extensive repair work.

Picnic tables. The May 2017 damage report does not mention picnic tables. FEMA determined that it should fund replacement of one picnic table. We see no evidence to contradict that determination.

Flagpole. All agree that the tornado broke the flagpole. A witness for the applicant testified that whether the concrete flagpole base must be replaced "[d]epends [on] how deep you have to go for the sleeve" to anchor the pole.

Hydrant. The May 2017 damage report mentions no damage to a fire hydrant, which might have been hidden by debris. No evidence in the record links the slight "bend" visible in the hydrant in a September 2019 photograph to the disaster thirty-two months earlier.

Headwall. The May 2017 damage report does not mention the culvert or the headwall. We agree with FEMA's determination that post-disaster evidence including photographs does not show damage to grouted riprap at the headwall. The images of the culvert from 2019 briefly discussed at the hearing did not bolster the applicant's position.

Trash enclosure. The May 2017 damage report documents wind damage to the trash enclosure but not to the trash bins which the applicant now proposes to replace.

2. *Are the estimated repair costs reasonable?*

Here, we determine, at the applicant's request, the cost estimates to be used to fund the scope of work that we find eligible above.

FEMA asks us not to finalize the cost estimates but does not question our authority to do so. The statute that gives an applicant the right to appeal a FEMA determination regarding "eligibility for assistance" or the "amount of assistance," 42 U.S.C. § 5189a(a), also gives an applicant the option to seek arbitration by the Board of "eligibility for assistance." *Id*. § 5189a(b); *see also* FEMA Public Assistance Program and Policy Guide at 21 (Jan. 1, 2016) (PAPPG) ("To be eligible, costs must be [among other things] . . . necessary and reasonable."). The same statute (42 U.S.C.§ 5189a(d)(5)(B)) refers to the Board's arbitration proceedings as "the process established" in 2009 under Public Law 111-5, section 601, which provided that an arbitration panel "shall have sufficient authority regarding the award or denial of disputed public assistance applications" to resolve in full the disputes arbitrated under the 2009 law. 123 Stat. 115, 164 (2009). Considering these descriptions of the scope of our authority and in order to issue a "binding," final decision on

the eligibility issues raised by the applicant, 42 U.S.C. § 5189a(d)(1); *see* Rule 613, we address the reasonableness of proposed "hard" costs. Due to the passage of time since the estimates were made, we include a rough inflation cushion in our figures, recognizing that the applicant will receive only its actual costs. *See generally* 2 CFR 200.403 (2021).

The following estimates are of "hard costs" only. We address "soft costs" separately below. The applicant may, of course, perform work costing more than the work we find eligible for FEMA assistance as long as the applicant uses funding sources other than a FEMA public assistance grant. Our decision resolves only the scope of the grant.

Analysis of the estimated costs raises a procedural issue. The parties debate whether the applicant submitted a "hazard mitigation plan" to justify not merely repairing the complex to its pre-disaster condition, but improving the complex, and in what format we should expect to see a hazard mitigation plan. We need not linger over what happened in administrative phases preceding arbitration. This panel now sits as the final decision maker. Rule 613. As far as we are concerned, the applicant submitted its "plan" to us for consideration in this arbitration. *See* Rule 608. Mr. Bryan's testimony for the applicant clarified that the application includes "three hazard mitigation proposals" with a total cost of about $320,000. These ideas are (1) replacing all of the fence posts with three-inch posts, (2) replacing wood light poles with concrete poles, and (3) replacing the wood frame dugouts with dugouts with steel frames and chain link fabric walls. As explained above, we have also shifted the replacement of more than 2065 linear feet of fence, and of the foul poles, into the category of hazard mitigation for analysis. See issue 4 below for that analysis.

Main press box. We adopt the May 2017 scope of work (FEMA Exhibit 18 at 2 of 4) to repair Building 1 only. As discussed at the hearing, the applicant relies on the broader scope of work recommended by its engineering firm in February 2018 based on a fall 2017 damage assessment. FEMA asks us to "remove" the main press box from the grant work as unsalvageable due to neglected maintenance and a fire. We decline to take that step at this late stage, as the applicant might opt to combine grant money for repairs with other funds to restore the press box to use. The record does not contain a detailed cost breakdown sufficient to allow us to estimate independently the cost of the eligible scope of work. Absent such supporting evidence, we adopt FEMA's estimate of $7160.55 from the appeal memorandum but raise the estimate to $8000 to include an inflation contingency.

Four scoreboards. The applicant never explained why its latest estimate of $62,000 for six scoreboards (about $10,350 per scoreboard) is so much higher than FEMA's allowance of $23,872.56 (about $6000 per each of four scoreboards). Lacking detailed cost support—such as quotations for scoreboards similar to the damaged ones—we use FEMA's estimate for four scoreboards but raise it to $27,000 with an inflation contingency.

Ten dugouts. FEMA allowed $27,600 to replace the ten original wood dugouts. The applicant does not contest that figure but wants improved dugouts. We increase the estimate to return the wood dugouts to pre-disaster condition to $30,000 to include inflation. See issue 4 below for our discussion of hazard mitigation in relation to the dugouts.

Heat pump, window air conditioner. The applicant focused on estimating the costs to replace two heat pumps plus duct work at the main press box and did not controvert FEMA's estimate for the two replacements that we find eligible. We use FEMA's estimate of $5524.12 for this work but raise the estimate to $6100 to include inflation.

Lighting. FEMA allowed $162,233.56 on appeal for the removal, disposal, and replacement of twenty-three wood poles with no replacement light fixtures. Because the record supports a finding that the disaster damaged twenty-eight poles, we increase the FEMA estimate by 22% (5 ÷ 23) to $198,000, and further raise that estimate to $220,000 with an inflation contingency. The applicant cites no evidence (as opposed to opinion) that the lighting system must be replaced rather than repaired. Nor does the record contain evidence sufficient to estimate the cost of replacing broken lights in existing equipment. We discuss upgrading the poles to concrete as hazard mitigation in issue 4 below.

Fields. We use FEMA's estimate on appeal of $167,864.66 to "vacuum" and restore the fields but we raise the estimate to $183,000 with an inflation contingency.

Fencing. FEMA allowed $71,584.32 on appeal for the disposal and replacement of what appears from FEMA's discussion to be 1570 linear feet of chain link fence. Given the disparity of the estimates in the record of the amount of damaged fence and our endorsement above of the original estimate of 2065 linear feet, made in spring 2017, we roughly estimate $120,000 for the scope of this removal and replacement work. As noted, the applicant takes an entirely different approach than FEMA does and seeks grant funds to replace 5500 linear feet of fence. We address this idea as hazard mitigation in issue 4 below.

Five hundred linear feet of backstops. We find no estimate in the record of the cost of this length of replacement, as the number of linear feet at issue has repeatedly shifted. The applicant's cost estimate (Applicant's Exhibit 9) is simply a table unaccompanied by evidence to support the dollar figures. FEMA allowed about $76,500 for "all fence repairs" including backstops. We cannot determine a replacement cost per linear foot of backstop. Lacking a reliable number from any party, we adopt the version 1 estimate of $20,000 for backstop replacement, listed on page 15 of the arbitration request.

Twelve bleachers. The parties agree on an estimate of $15,596 for bleacher repairs. We raise the estimate, to include inflation and for our arithmetical convenience, to $17,000.

Walking trail stone. FEMA estimated $3021 for 106 tons of replacement stone, which we will call $3300. The record does not demonstrate that damage caused by the disaster necessitated any regrading or other work on the trail.

Bridge handrail. FEMA estimated $4009.68 for this repair, which we raise to $4500.

One picnic table. We raise FEMA's estimate of $179 to $195.

Flagpole. Version 1 included $9000 for flagpole repairs. We make a contingent grant decision here based on the testimony and common sense. The applicant may try to replace the flagpole without replacing the concrete base for an estimated cost of $5500. If, upon attempting the repair, the applicant provides FEMA evidence that the work reasonably necessitates replacing the base, the estimated cost of replacing the base is $4000 (limited in each case as always to actual costs reasonably incurred).

Trash enclosure. The applicant did not itemize the trash enclosure in the request for arbitration and may have included the repair costs in the picnic table costs. No one testified about the enclosure at the hearing. FEMA estimated $2342.31 to repair the enclosure, which we raise to $2600 for inflation and arithmetical convenience.

3. *Should the estimated costs include "soft cost" factors B–H?*

This issue was not well developed. *See* Rule 609 ("[P]arties should provide the panel with everything it needs to make a decision."). The applicant undertook to bolster its prior submission to FEMA to support including cost estimation factors B-H in the grant amount but apparently addressed only about 40% of the amount at issue. Mr. Marlowe testified with persuasive specificity for FEMA that the application still includes "hidden" markups and "soft costs on soft costs." The applicant did not seem to have effective cross-examination or a clear rebuttal. Given the evidence presented, we answer the third question "no" and endorse the estimated soft costs allowed in the first appeal.

4. *Are the applicant's hazard mitigation measures cost-effective*?

The purpose of a hazard mitigation plan is to show the cost-effectiveness of a proposed mitigation measure. Page 94 of the applicable PAPPG states that FEMA will consider a feasible hazard mitigation "measure" to be cost-effective without further analysis if "[t]he cost for the mitigation measure does not exceed 15 percent of the total eligible repair cost (prior to any insurance reductions) of the facility or facilities for which the mitigation measure applies." The applicant relies on this provision.

One of the definitions of "public facility" in the PAPPG (page 15) is "park." The term "total eligible repair cost . . . of the facility" on page 94 must, therefore, mean the cost to repair the softball complex (or park). FEMA does not argue that the improvements at issue are infeasible or would not actually mitigate hazards. We read the PAPPG to mean that we should examine each proposed "measure"—the fence posts, fence footage, light poles, foul poles, and improved dugouts—separately and deem each measure cost-effective if its estimated marginal cost does not exceed 15% of the total estimated cost of repairing the complex to its pre-disaster condition. The PAPPG does not limit the number of hazard mitigation measures that can be used in one project or the percentage of total project costs used for hazard mitigation.

The sum of the eligible repair costs we estimate above is approximately $650,000 plus soft costs (depending in part on how one values the contingent flagpole work). We need not be more precise as we need not calculate to multiple decimal places. A hazard mitigation measure proposed for this project passes the PAPPG cost-effectiveness test invoked by the applicant if and only if the estimated cost of the measure does not exceed $97,500 (0.15 x $650,000) plus soft costs.

Upgrading the ten dugouts plainly passes this test. The applicant's total estimated cost of new dugouts is $94,000, so the marginal cost of the hazard mitigation aspect of the work must be less than that. Similarly, installing larger fence posts and new foul poles are both cost-effective measures because the marginal cost of each measure will not approach $97,500. For the purpose of funding the grant, we adopt the applicant's estimates of the hard costs for these three measures.

By contrast, the extra cost proposed by the applicant to upgrade the light poles from wood to concrete far exceeds $97,500 and is not cost-effective under the PAPPG test the applicant selected. We also cannot find that replacing all 5500 feet of chain link fence is cost-effective, as the estimated marginal cost of fencing exceeding 2065 linear feet is apparently more than the $120,000 that we estimated to replace 2065 feet (which is less than half of 5500 feet) and is, therefore, far in excess of $97,500. The grant amount shall not

include the estimated costs of the proposed concrete poles or of more than 2065 linear feet of fencing.

Decision

As explained above, the panel has determined with finality the statement of work and the associated cost estimates to repair the damage to the softball complex shown to have been caused by the January 2017 disaster, as well as allowable and unallowable proposed hazard mitigation costs.

Kyle Chadwick
KYLE CHADWICK
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge