



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 16, 2023

CBCA 7717-FEMA

In the Matter of HOUSING AUTHORITY OF THE CITY OF
LUMBERTON, NORTH CAROLINA

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Jonathan Ekblad and Will Polk, Office of the General Counsel, North Carolina Department of Public Safety, Raleigh, NC, counsel for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Anthony Homer, 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 **BEARDSLEY** (Chair), **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge, writing for the panel.

The applicant, the Housing Authority of the City of Lumberton, North Carolina, sought arbitration of a dispute with the Federal Emergency Management Agency (FEMA) in accordance with section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. § 5189a (2018). The issue before us is whether the applicant is entitled to the costs of replacing, rather than repairing, public housing units in accordance with FEMA's "fifty-percent rule." We find that the applicant is only eligible for the costs of repairing the housing units, not the costs for replacement.

Background

The applicant seeks public assistance (PA) funding for thirty units in its Turner Terrace housing facility, which is a public low-income housing facility located in Robeson County, North Carolina. The panel conducted a hearing on June 14, 2023.

From October 4 to 24, 2016, Hurricane Matthew caused storms and flooding in Robeson County and other parts of North Carolina. The units in Turner Terrace were flooded as a result of the storm. On October 17, 2016, the applicant contracted with ServPro and K&S Builders for cleanup and remediation of the units.¹ ServPro completed its work on November 18, 2016. K&S Builders completed its work on August 17, 2017. The costs for cleanup and remediation were included in FEMA project worksheet (PW) 20 for ServPro and PW 315 for K&S Builders. The scope of work in PW 20 was to restore the condition of the Turner Terrace housing facility, which included general construction, demolition, water extraction, and remediation of mold. Exhibit 21 at 9–10. The scope of PW 315 was cleanup and remediation—to “remove contamination . . . to eliminate or reduce the immediate threat of significant damage”—which was accomplished by removal of debris. Exhibit 22 at 8. Neither PW 20 nor PW 315 included costs for asbestos removal. Ultimately, the costs for PW 20 and PW 315 were paid as emergency work projects under category B funding to eliminate or lessen threats to lives, public health, or safety, or threats of damage to public or private property in a cost effective manner. Public Assistance Program and Policy Guide (PAPPG) (Jan. 2016) at 57.

In February 2017, the applicant hired Matrix Health and Safety Consultants, L.L.C. (Matrix) to inspect the units for asbestos and lead. Exhibits 15, 16. Matrix found asbestos in both the ceiling texture and the tan floor tile and mastic. Exhibit 15 at 5. The applicant also supplied an inspection report, seemingly completed during 2021,² which found asbestos to be “oozing” through the tile floor and recommended removal. In 2017, the applicant claims it obtained a quote to remediate the asbestos present in the units at issue and at other nearby housing units not the subject of this dispute. The applicant asserts that it divided that quote by the total number of units, which resulted in an average cost of \$22,751.76 per unit. Applicant’s Reply at 21-22. The applicant then adjusted the unit cost for inflation, to \$23,234.88. See Exhibit 19 at 3, line 33.

¹ ServPro was used for insured units while K&S Builders was used for uninsured units.

² The report is undated. FEMA notes that “metadata suggests the report was completed sometime in 2021.” FEMA’s Sur-Reply at 5 n.4.

FEMA denied the asbestos abatement costs, finding the work not eligible. FEMA determined that asbestos abatement was not needed to repair the flooring because “the floor tile in the housing units was covered with a second layer of vinyl tile to encapsulate asbestos,” which FEMA found was a common method of asbestos protection. Exhibit 3 at 6 & n.14. The applicant’s director of operations of public housing at the time of Hurricane Matthew testified during the arbitration hearing that moisture present in the units due to the flooding caused the second layer of vinyl tile to start popping up and that, as a result, the tile and black mastic were cracked, exposing the asbestos material.

In April 2017, the applicant provided a sworn statement as to proof of loss for the thirteen insured units. Exhibit 20. FEMA’s initial PW 1385 was submitted on May 13, 2017, and mistakenly only captured the damage to the nine housing units that were uninsured. This PW reported flooding from six to twenty-four inches, which caused mold damage. It also stated that the kitchen countertops and cabinets, electrical receptacles, and interior doors and hardware needed to be replaced, the walls needed to be remediated, and the vinyl and ceramic tile flooring needed to be patched and repaired. The PW stated further that there would be an attempt to salvage the heating, ventilation and air conditioning (HVAC) system, hot water heaters, cast iron tubs, sinks, and toilets. Exhibit 7.

In September 2018, Hurricane Florence flooded the facility in Turner Terrace again. In June and October 2019, over two years after Hurricane Matthew, the applicant hired the Wooten Company to provide an estimate on the cost to repair thirty-two units³ due to the damage from Hurricane Matthew. The repair cost was greater than fifty percent of the replacement costs for each of the thirty units. Based on the Wooten Company’s estimates, the applicant submitted a request to change the scope of work to include: increasing the damaged facilities captured from nine to all thirty-two units; asbestos abatement for vinyl floor tiles; replacing undamaged cast iron bathtubs; upgrading the electrical wire runs and receptacles; interior wall trim and painting; exterior wall insulation replacement; and HVAC. Exhibit 13. PW 1385 was updated with new cost estimates. Exhibits 2, 13. The work included installing new doors, walls, kitchen cabinets and sinks, and vinyl floor tiling and a new water heater. Thus, the applicant requested that the units be deemed eligible for replacement rather than repair. *See* Exhibit 13.

³ The applicant appealed the fifty-percent calculation on thirty-two units, but before the Board, the applicant amended its position and no longer requested the replacement costs of two of the thirty-two units.

Discussion

The applicant argues that FEMA's fifty-percent calculation, which concluded that each of the thirty units was only eligible for repair costs, did not include all eligible costs. We review the fifty-percent rule de novo and are not bound by FEMA's prior determinations. *City of Hattiesburg, Mississippi*, CBCA 7017-FEMA, 22-1 BCA ¶ 37,986, at 184,457 (2021).

Pursuant to the PAPPG at 96, the fifty-percent rule is “[t]he comparison of the repair cost to the replacement costs . . . with the repair cost as the numerator and the replacement costs as the denominator.” Not included in the repair cost are upgrades of non-damaged elements even if required by standards, demolition beyond that which is essential to repair the damaged elements, site work, soft costs, contents, hazard mitigation measures, and emergency work. PAPPG at 96–97. Not included in the replacement cost is demolition, site work, soft costs, contents, hazard mitigation measures, and emergency work. *Id.* at 97.

The applicant does not accept FEMA's determination that the repair cost does not exceed fifty percent of the replacement costs. First, the applicant argues that FEMA should have used the actual quantities in the insurance proof of loss statement rather than the quantities FEMA used. Second, the applicant believes that FEMA should approve costs for asbestos remediation and that those costs should be included in FEMA's fifty-percent-rule calculation. Third, FEMA's fifty-percent-rule calculation did not include the costs for water and mold remediation.

The applicant also argues that regardless of the fifty-percent-rule calculation, repair is not feasible, and, therefore, the project should be deemed eligible for replacement.

Actual Proof of Loss

Costs are only eligible if, among other things, the costs are “[d]irectly tied to the performance of eligible work” and “[a]dequately documented.” PAPPG at 21. For work to be eligible, it must (1) be required as a result of the disaster; (2) be located within the disaster area, with the exception of sheltering and evacuation activities; and (3) be the legal responsibility of an eligible applicant. PAPPG at 19. “The [a]pplicant is responsible for providing documentation to demonstrate its claimed costs are reasonable.” *Id.* at 22.

According to the applicant, FEMA's estimated costs contain inaccurate quantities for several damaged elements which decreased the repair value, as FEMA used quantities which were inconsistent with the quantities listed in the proof of loss. For example, in the unit at 309 Myrtle Court, the proof of loss listed 692.5 square feet of insulation compared to the 484 square feet listed in FEMA's cost estimate. *Compare* Exhibit 20 at 125 (proof of loss) *with*

Exhibit 10 at 27–28 (FEMA cost estimate). These differences appear throughout the two documents. FEMA provides no reason why the quantities differ and even indicates in its reply that FEMA’s cost estimators will review the differences and make changes, if warranted. FEMA’s Sur-Reply at 2 n.1. We find that the applicant has adequately documented the costs in the proof of loss statement. However, in order to prevail and achieve replacement status for any of the units, the applicant must prove additional eligible repair costs to achieve the required values under the fifty-percent rule. *See Applicant’s 50 Percent Rule Demonstrative; Exhibit 26.*

Asbestos Abatement

The applicant asserts FEMA should have approved the costs for asbestos abatement and included them in the fifty-percent calculation, while FEMA maintains that costs for asbestos abatement are not eligible work. According to FEMA, asbestos abatement was not required as a result of the disaster because photographs of the units’ floors and the insurance proof of loss do not indicate damage to the underlying asbestos. In addition, vinyl tiling containing the asbestos was encapsulated under a second layer of vinyl tiling.

We find the applicant has shown the need for asbestos abatement as a result of the disaster. If the inspection report recommending the asbestos abatement, which was conducted after another hurricane and subsequent flooding, was the only evidence before us, we would not find the applicant had shown the asbestos abatement was eligible work. However, the inspection report is supported by the 2017 asbestos and lead test which discovered asbestos in the floor tile and mastic and the statements of a witness who told the panel that immediately following the storm she found asbestos material to be “oozing” out of the tile and mastic.

Even though we find the need for asbestos abatement was the result of the disaster, FEMA is correct that asbestos abatement is not an eligible cost because the applicant has not adequately documented or supported the costs. The applicant’s claimed asbestos abatement costs are based on a 2017 quote adjusted for inflation⁴ that includes costs for remediation of asbestos present in the units at issue and in other units. The applicant, however, failed to provide the quote or any other documentation to support the costs claimed but, instead, only mentioned the cost in two lines in its adjusted cost estimating formula, comments in its reply brief, and at the hearing. *See Applicant’s Reply Brief at 21–22; see also Exhibit 19 at 3, lines 33–34.* There is no information provided on the quantities, hours, or materials that support the costs. *See id.* There is also no evidence in the record as to whether the per-unit

⁴ The applicant has not sufficiently explained why the 2017 quote should be adjusted for inflation instead of obtaining a more recent quote.

cost is a reasonable reflection of the asbestos abatement costs for the units in Turner Terrace. Because the applicant has failed to adequately document its costs, we find the costs for asbestos abatement are ineligible costs.

Water and Mold Remediation

The applicant asserts that remediation for water and mold was improperly excluded from both the numerator and the denominator in the fifty-percent calculation. FEMA excluded the water and mold remediation because FEMA classified it as emergency work, which is not included in the fifty-percent calculation. While not clear, the applicant's argument appears to be that because the flood waters remained standing in the housing units for over two weeks, instead of immediately receding, the remediation of these units cannot be classified as emergency work.

Under FEMA regulations, emergency work is defined as “work which must be done immediately to save lives and to protect improved property and public health and safety, or to avert or lessen the threat of a major disaster.” 44 CFR 206.201 (2022). Emergency work is performed to “[e]liminate or lessen an immediate threat of additional damage.” PAPPG at 42. An “immediate threat” is defined as “the threat of additional damage or destruction from an event which can reasonably be expected to occur within five years.” 44 CFR 206.221(c). FEMA emergency work is funded through category A (debris removal) or category B (emergency protective measures) grants. PAPPG at 43, 57. Here, the water and mold remediation work began about three weeks after the flooding receded. This work was done to protect the property until additional repairs could be completed. Both the applicant and FEMA agree the water and mold remediation was funded through PW 20 and PW 315, which were paid as emergency work projects under category B. This work is clearly within the definition of emergency work and is therefore excluded from the fifty-percent calculation.

Feasibility

It must also be feasible to repair the facility. A facility is feasible to repair when “it can perform the function for which it was being used as well as it did immediately prior to the disaster.” 44 CFR 206.226(f)(1).⁵ If a facility is “not repairable . . . approved restorative work may include replacement of the facility”—even if the repair cost does not get over the replacement threshold under the fifty-percent rule. 44 CFR 206.226(f)(2).

⁵ Similarly, a facility is feasible to repair if “it can perform the pre-disaster function as well as it did prior to the incident.” PAPPG at 96.

The applicant argues that the facility is not repairable because of the high cost of flood proofing the homes through elevation or another means and that, therefore, it must be replaced. Little evidence was provided to show either that the homes need to be elevated to be able to house people again or what the total repair costs would be. As such, we do not find that the units are infeasible to repair.

Decision

We conclude that the units at issue are ineligible for replacement costs, as the cost to repair does not exceed fifty percent of the cost to replace the units.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge