



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 20, 2024

CBCA 7904-FEMA

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

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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),
SULLIVAN, and **KANG**.

KANG, Board Judge, writing for the Panel.

Applicant, the Housing Authority of the City of Lumberton, North Carolina (HACL),
sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal
Emergency Management Agency (FEMA) as to eligibility for public assistance (PA) funding
in connection with Hurricane Matthew. FEMA previously granted part of HACL's request
for PA funding to repair thirty-three buildings, comprising sixty-eight housing units, but
denied applicant's request to fully replace them. We find the buildings are not eligible for
replacement.

Background

HACL owns and operates the Lumbee Homes Public Housing Community (Lumbee Homes) in Robeson County, North Carolina. The buildings at issue here include standalone and duplex one-, two-, three-, and four-bedroom units. In October 2016, Hurricane Matthew struck the eastern coast of the United States, including Robeson County. The Lumbee Homes buildings experienced flooding from the storm's rainwater, followed by additional flooding from a levee failure. On October 10, 2016, the President issued a major disaster declaration (FEMA-4285-DR-NC) for Hurricane Matthew.

In December 2016, FEMA approved emergency work for repairs to certain Lumbee Homes buildings, including asbestos testing and remediation, which was conducted from February through August 2017. In July 2017, FEMA prepared permanent work project worksheets (PWs) for repairs at Lumbee homes: PW 1368, which had an initial project cost of \$524,743, and PW 1370, which had an initial project cost of \$515,242.

In June 2019, Anderson Consulting, a consultant retained by HACL, prepared an estimate of repair and replacement costs.¹ Based on this estimate, applicant requested that FEMA add repair costs to PWs 1368 and 1370 and find the buildings eligible for replacement because the added costs increased the overall value of the repairs to more than fifty percent of the estimated costs of replacement. In July and August 2020, Anderson Consulting provided FEMA itemized estimates for the repair of the buildings. In late August 2020, FEMA issued amendments to PWs 1368 and 1370 based on the Anderson Consulting estimates. These PW amendments found that the eligible repair costs were more than fifty percent of the estimated costs of replacement.

In February 2022, FEMA issued determination memorandums (DMs) for PWs 1368 and 1370 that denied the majority of the repair costs requested by applicant. The DMs found that some of the costs in the Anderson Consulting estimates were duplicative of costs approved for the emergency work and that other costs were either not eligible or unsupported. Based on FEMA's revised costs in the DMs, FEMA found that the eligible repair costs were less than fifty percent of applicant's estimated costs of replacement and were therefore not eligible for replacement.

Applicant filed first-level appeals of the DMs in April 2022 and June 2022, seeking increased repair costs that HACL contended justified full replacement of the buildings. FEMA's August 2023 decision on the first-level appeals adjusted certain of applicant's

¹ Applicant does not state when Anderson Consulting inspected the Lumbee Homes buildings for this report, but FEMA states that this occurred in June 2019.

requested repair costs, concluding that some had been improperly excluded or found not eligible, while others had been improperly found eligible. Relevant here, the costs that FEMA found eligible included replacement of heating, ventilation, and air conditioning (HVAC) systems, replacement of exterior wall insulation, and replacement and repair of parts of the flooring.

Overall, FEMA found applicant eligible for \$1,726,309 in repair costs under PW 1368 and \$850,843 in repair costs under PW 1370. Because the eligible repair costs were less than fifty percent of applicant's estimated replacement values of the buildings (\$8,591,270 for PW 1368 and \$9,813,993 for PW 1370), FEMA found that the buildings were still not eligible for replacement.

Applicant requested arbitration on October 2, 2023. The parties elected to conduct the arbitration on the basis of the record submitted to the panel.

Discussion

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2018), provides the statutory authority for FEMA's federal disaster response activities. Congress enacted the Stafford Act to provide "assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [major] disasters." 42 U.S.C. § 5121(b). The Stafford Act is "designed to assist the efforts of [states affected by major disasters] in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas." *Id.* § 5121(a).

An applicant has the burden to demonstrate that damage was directly caused by a declared disaster. FEMA's Public Assistance Program and Policy Guide (PAPPG) (Jan. 2016) at 9, 19.² To be eligible, costs must be directly tied to the performance of eligible work and adequately documented. *Id.* at 21. Moreover, PA funding is intended to restore damaged facilities to their prior function in accordance with applicable codes and standards, and an applicant must demonstrate that the repair costs are for damage directly caused by the disaster rather than by pre-existing damage or by a failure to reasonably mitigate damages. *Id.* at 19, 81-82.

When evaluating whether a damaged facility is eligible for replacement, rather than repair, "FEMA compares the repair cost with the replacement cost and evaluates the

² The January 2016 PAPPG applies to declared disasters from January 1, 2016, through March 31, 2017.

feasibility of repairing the facility.” PAPPG at 96. “A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that 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) (2016).

Applicant seeks replacement of thirty-three buildings, comprising sixty-eight housing units, at Lumbee Homes. HACL’s request for arbitration (RFA) initially asked “only [that] the Panel determine whether or not the units are eligible for replacement.” RFA at 2. Applicant raises two primary arguments in support of its position that the costs to repair the buildings exceed fifty percent of the costs of replacing them. First, applicant contends that the panel should accept the estimates prepared by HACL’s consultant that were presented in the first appeal and that the estimates reflect repair costs in excess of fifty percent of the costs of replacement.³ Second, in the event the panel does not accept the consultant’s original estimates, applicant submits new estimates that identify three additional categories of costs that were not raised in connection with the first appeal and that increase the repair costs for the buildings above the fifty-percent threshold.

Notwithstanding the limited scope of the request set forth in the RFA, applicant’s reply to FEMA’s response added new alternative requests in the event the panel does not find the buildings eligible for replacement. These alternative requests ask that we either direct FEMA to work with applicant to conduct a more detailed inspection of the buildings and develop mutually-agreeable repair costs or remand the matter of repair costs for reconsideration by FEMA. We therefore address applicant’s primary arguments in support of its position that the costs to repair the buildings exceed fifty percent of the costs of replacing them as well as applicant’s new alternative requests.

I. Estimates from Applicant’s Consultant

Applicant argues that FEMA is obligated under its policies to accept as dispositive the cost estimates prepared by HACL’s consultant, Anderson Consulting. Applicant contends

³ Applicant also contends that FEMA improperly reversed the findings in its August 2020 amendments to PW 1368 and 1370, which found eligibility for repair costs in excess of fifty percent of the estimated replacement costs. FEMA is not prohibited from reconsidering or changing an initial determination, and an applicant cannot demonstrate eligibility for PA funding based solely on the fact that FEMA had initially made a more favorable finding. *See Montgomery County Secondary Roads*, CBCA 7480-FEMA, 22-1 BCA ¶ 38,230, at 185,659-60.

that these estimates demonstrate that the costs of repairing the buildings exceed fifty percent of the costs of replacement. We find no merit to these arguments.

The PAPPG states that FEMA will use an applicant's cost estimate to determine PA eligibility where it:

- Is prepared by a licensed Professional Engineer or other estimating professional, such as a licensed architect or certified professional cost estimator who certifies that the estimate was prepared in accordance with industry standards;
- Includes certification that the estimated cost directly corresponds to the repair of the agreed upon damage;
- Is based on unit costs for each component of the SOW and not a lump sum amount;
- Contains a level of detail sufficient for FEMA to validate that all components correspond with the agreed-upon SOW; and
- Is reasonable.

PAPPG at 132.

To the extent applicant contends that the mere submission of certified estimates by a licensed professional establishes cost eligibility, we disagree, as the adequacy of an estimate's details and its overall reasonableness must be considered.

FEMA does not dispute that the Anderson Consulting estimates were prepared by a licensed professional engineer. FEMA argues, however, that the estimates do not contain adequate detail, are not reasonable, and do not establish eligibility of repair costs that exceed the fifty-percent threshold. FEMA notes that the estimates were based on inspections that took place more than three years after Hurricane Matthew. Based on the passage of time, FEMA contends that applicant cannot demonstrate that Hurricane Matthew was the direct cause of the damage to the buildings, as opposed to delays in remediating the damage from that storm or intervening events such as the flooding experienced in the buildings caused by Hurricane Florence in September 2018.⁴

⁴ We do not agree with FEMA's assertion that an assessment conducted three years after a disaster is "blanketly unreliable." FEMA Response at 13. However, we agree

The 2019 and 2020 Anderson Consulting estimates consist solely of costs and do not directly address why the claimed damages were eligible for reimbursement. Applicant submitted an affidavit from Larry Anderson, president of Anderson Consulting, to support the estimates, but the assertions therein do not adequately explain why inspections three years later are reliable.⁵ In light of the passage of time and lack of adequate explanations, the estimates do not contain details sufficient to validate that all of the repair costs are within the scope of work or are otherwise reasonable. In sum, applicant does not establish that FEMA policy requires deference to the estimates prepared by applicant's consultant.

II. Additional Repair Costs

We next address three categories of costs that applicant contends should be added to the FEMA-approved repair costs: HVAC replacement, wall insulation replacement, and flooring repair and replacement. Applicant contends that the addition of these costs increases the repair costs above the fifty-percent threshold, thereby qualifying the buildings for replacement. We find no merit to these arguments.

A. HVAC Replacement Costs

FEMA granted \$4554.54 to replace the HVAC systems at each of the thirty-three affected buildings. FEMA's Exhibit 26, Declaration of Jack Marlowe (Nov. 16, 2023) ¶ 18; Applicant's Exhibit 1, First Appeal Decision Analysis at 15; Cost Estimating Formula Sheets (CEFs) at 1-78. This amount consists of \$2777.16 for a condenser, evaporator, air handler, and ductwork, plus \$1777.38 for soft costs. *Id.* Applicant contends, based on the opinion of Anderson Consulting and cost survey data, that the costs of replacing the HVAC systems

that the passage of time generally increases the burden on an applicant to demonstrate that the claimed damage was directly caused by the disaster and not by alternative causes. *See City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,684.

⁵ Applicant also argues that failure to promptly assess damage is due to FEMA's failure to conduct inspections of the buildings, as contemplated by the PAPPG. The PAPPG provides that, during project formulation, "FEMA and the Recipient conduct site inspections with the Applicant to validate, quantify, and document the cause, location, and details of the reported damage and debris impacts and identify [environmental and historic preservation (EHP)] issues and hazard mitigation opportunities" PAPPG at 128. In June 2017, FEMA inspected two of applicant's buildings for damage to assess EHP issues. Even if the inspections were not the joint inspections anticipated by the PAPPG (a matter we need not resolve), applicant does not establish that a failure to conduct inspections requires FEMA to accept applicant's estimates or otherwise excuses applicant from the requirement to establish its entitlement to PA funding.

should be higher, ranging from \$11,432.82 for one-bedroom duplex units to \$21,137.03 for four-bedroom duplex units.

FEMA's first appeal decision approved full replacement of HVAC systems for the buildings, including replacement of existing 2.5-ton capacity units.⁶ Applicant's consultant states that the approved costs are inadequate, in part, because they do not include costs for the larger three- to four-ton units. Applicant's Exhibit 17, Affidavit of Larry W. Anderson (Dec. 5, 2023) ¶ 11. The PWs for the buildings all provide for 2.5-ton capacity replacement units, stating that they are "equivalent in size" to the existing units. Applicant's Exhibit 6 at 7. While applicant appears to argue that the buildings require units larger than 2.5 tons, applicant does not demonstrate that the existing units had this capacity. Thus, even if upgrades to larger units were appropriate in light of previously undersized units at Lumbee Homes, applicant is eligible only for restoration to the prior function of the units and not for improvements or upgrades.⁷ On this record, applicant does not demonstrate that it is eligible for replacement of the larger units.⁸

In addition, applicant's RFA included a chart titled "NEW HVAC SYSTEM COST," citing cost survey data from the Homeguide.com website.⁹ Applicant contends that this data shows significantly higher costs for HVAC replacements. The data, however, does not address the size of the HVAC systems replaced or the locality of the work. Thus, nothing

⁶ Confusingly, FEMA's response to the RFA stated that only the outdoor parts of the HVAC systems were eligible for replacement, as there was no evidence of damage to the interior parts of the system. The same response, however, stated that the outdoor condenser, indoor component costs were eligible as well. Moreover, the first appeal decision stated that the buildings were eligible for HVAC replacement, and the CEFs identified costs for both the indoor and outdoor components. Applicant's Exhibit 1, First Appeal Decision Analysis at 15, 23-129 CEFs at 1-78. Thus, despite applicant's contention that FEMA only granted costs for the interior parts of the HVAC systems, the record shows that FEMA granted costs for the indoor and outdoor components.

⁷ A building is eligible for upgrades required by applicable codes and standards. PAPPG at 81-82; *City of Hattiesburg, Mississippi*, CBCA 7017-FEMA, 22-1 BCA ¶ 37,986, at 184,457-58 (2021). Applicant, however, does not contend that upgrades to the size of the HVAC units are required based on codes or standards.

⁸ Applicant does not explain whether its request for larger units applies to some or all of the buildings, leaving the panel unable to assess the reasonableness of the costs.

⁹ Homeguide.com describes itself as a website that provides information services homeowners and contractors. See <https://homeguide.com/about> (last visited Feb. 16, 2024).

about this information establishes applicant's costs as reasonable. On this record, applicant is not eligible for costs for HVAC replacement in excess of that granted by FEMA.

B. Exterior Walls Insulation Replacement

FEMA approved replacement of exterior wall insulation. Applicant contends that additional repair costs are required for the related work of removing an exterior brick wrap to access the insulation. Applicant also contends that fiberboard sheathing between the exterior wall and the brick wrap must be sanitized and that this sheathing can only be accessed by removing the brick wrap.

FEMA states that the exterior wall insulation may be accessed without removal of the exterior brick wrap, making those costs not eligible for reimbursement. FEMA's response included photos and detailed rebuttals of applicant's arguments regarding the design of the buildings and the accessibility of the insulation from the interior of the building. FEMA also states that photos of the units show plywood sheathing that does not require sanitizing, rather than fiberboard sheathing, as claimed by applicant.

Applicant does not meaningfully explain why the insulation is inaccessible and requires removal of the brick sheathing. Photos provided by applicant, which are cited by both parties, appear to show that the insulation is accessible from the inside of the building units. Further, while applicant represents that buildings of the type at Lumbee Homes "typically" have fiberboard sheathing that requires replacement after flooding, applicant does not directly address FEMA's finding that the buildings do not have damaged fiberboard sheathing. On this record, applicant is not eligible for costs for exterior wall insulation in excess of that granted by FEMA.

C. Floor Repair and Replacement

The floors at the Lumbee Homes buildings consist of two layers of vinyl floor composite (VTC) tile and mastic adhesive paste over concrete floors. The parties agree that the lower layer of VTC tiles and mastic contains asbestos. The parties also agree that the upper layer of VTC tiles and mastic does not contain asbestos and was installed to encapsulate the asbestos-containing lower layer, thereby preventing the release of asbestos fibers.

FEMA's first appeal decision found evidence of damage to some areas of the flooring, including places that required removal and replacement of the upper layer of VTC and places that required removal and replacement of both layers. FEMA noted, however, that applicant did not provide specific dimensions or quantities for damaged tiles. FEMA therefore granted costs to replace up to twenty-five percent of the lower layer of VTC tiles and mastic,

including removal and disposal of materials containing asbestos, as well as up to 100% of the upper layer of VTC tiles.

Applicant does not specifically dispute that the asbestos in the lower layer of VTC tiles and mastic are encapsulated by the upper layer. Applicant also does not specifically dispute that the upper layer of VTC tiles can be replaced without disturbing the asbestos in the lower layer of VTC tiles and mastic. Instead, applicant's consultant states that the flood water that entered the buildings was "black water," or "Category 3 water," which the consultant characterizes as "toxic." Anderson Affidavit ¶ 7. Based on the assumption that the water was toxic, applicant contends that both layers of the flooring require replacement, as well as additional remediation and monitoring to address asbestos, and that the concrete subfloor requires decontamination.

As FEMA notes, category 3 water is "grossly contaminated" and includes "water originating from seawater, ground water, surface water, rising rivers and streams, and wind-driven rain from hurricanes and tropical storms." FEMA's Exhibit 30 at 9.¹⁰ Such water is not necessarily toxic but is rather "heavily contaminated and *can* contain pathogens or toxins." *Id.* at 19 (emphasis added). Additionally, guidance cited by applicant, issued by FEMA in connection with Hurricane Katrina, states that, while vinyl tiles placed over wood floors should be removed following flooding, vinyl tiles placed over concrete floors should be removed if damaged, i.e., curled. *See* FEMA's Exhibits 31 at 2, 32 (pt. 5) at 8-18.

Applicant assumes, but does not demonstrate, that toxins requiring decontamination are present in the flooring. Apart from its argument that toxins require replacement of both layers of all flooring, applicant does not demonstrate that FEMA's estimate that twenty-five percent of the lower layer of flooring is damaged and requires replacement is incorrect. On this record, applicant is not eligible for costs for floor replacement in excess of that granted by FEMA.

¹⁰ FEMA's Exhibit 30 is a document titled "Report to [the Environmental Protection Agency (EPA)] on Guidance Documents to Safely Clean, Decontaminate, and Reoccupy Flood-Damaged Houses," which appears to be a report provided by consultants to the EPA. This document cites the S500 Standard and Reference Guide for Professional Water Damage Restoration, published by the Institute of Inspection, Cleaning, and Restoration Certification, which categorizes water by level of contamination in categories 1 through 3.

III. Alternative Requests

As alternatives to finding that the Lumbee Homes buildings are eligible for replacement, applicant makes two additional requests. First, applicant requests that we direct HACL and FEMA to “work together (to include a building-by-building joint site inspection, if necessary) to submit to the Panel a mutually agreeable final repair CEF for each of the four representative unit types in accordance with FEMA Policy.” Applicant’s Reply to FEMA Response at 5. As a second alternative, applicant requests that “the Panel order FEMA to remand this matter for genuine reconsideration of the repair values.” *Id.* at 17. We find no basis to grant either of these alternative requests.

The applicable regulation states that “[a]n eligible applicant may request arbitration to dispute the eligibility for assistance or repayment of assistance.” 44 CFR 206.206(b) (2022). The regulation does not anticipate that the panel will direct FEMA to assist an applicant with identifying information to support its application nor does the regulation anticipate that the panel will order FEMA to conduct a general reconsideration of an application, absent any specific errors. For these reasons, we deny applicant’s alternative requests for relief.

Decision

The buildings at issue are not eligible for replacement costs, as the costs for repairs do not exceed fifty percent of the costs to replace the units. No other relief is granted.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge