

Applicant Arbitration Request



MISSISSIPPI STATE PORT AUTHORITY AT GULFPORT

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BY FEDEX

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Re: FEMA-1604-DR-MS-Mississippi State Port Authority, #000-U6SCL-00 Request for Arbitration and Withdrawal of Appeal of the Limited Application of Cost Estimating Format Factors to Building 14, Freezer (PW#8908), and Building 15, Chiller (PW#9836)

To All Concerned Parties:

I. Request for Arbitration.

This will serve as the Mississippi State Port Authority's (hereinafter "MSPA") **Request for Arbitration** of the referenced matters pursuant to the American Recovery and Reinvestment Act ("ARRA") and 44 CFR Part 206. This will also serve as the withdrawal of the MSPA's appeal of the referenced matters in order to allow the MSPA to proceed to arbitrate the dispute with the Federal

Emergency Management Agency (“FEMA”) over the referenced Project Worksheets (“PW” or if plural “PWs”). The MSPA is now represented by Balch & Bingham LLP as counsel of record.

II. Statement of Relevant Facts.¹

On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast with high winds, rain and a record tidal surge. The center of the storm made landfall roughly 20 miles to the west of the MSPA’s Port Facility (hereinafter “the Port”) located in Gulfport, Mississippi. The Port was in the Northeast quadrant of the storm, which is scientifically recognized to be the area of the strongest winds, the greatest amount of rain, the highest storm surge and by far the most damage and destruction during a hurricane.

Prior to the storm, the MSPA had several buildings on the Port that were used during the day to day operations. Among those were Freezer 14 (PW #8908)² and Chiller 15 (PW #9836).³ At the time of Hurricane Katrina on August 29, 2005, these buildings were being used as short term refrigerated warehouse storage facilities.⁴

Freezer 14 (PW #8908) contained 1,937,225 cubic feet of refrigerated space and 44,895 cubic feet of additional space as a blast freezer. This building was damaged to the point of a total loss by the storm. In order to continue port operations at the same level as on August 29, 2005, this building must be completely reconstructed.

Chiller 15 (PW #9836) contained 473,000 cubic feet of refrigerated space. This building was damaged to the point of a total loss by the storm. In order to continue port operations at the same level as on August 29, 2005, this building must be completely reconstructed.

The initial Cost Estimating Format (“CEF”) dated March 3, 2008, performed by FEMA on the two refrigerated warehouses in issue, correctly considered the buildings and the components of the refrigeration systems as integrated units. When evaluated in this manner, the estimated total cost to repair or replace the destroyed buildings with buildings serving the same function and capacity that Freezer 14 and Chiller 15 served on August 29, 2005, was \$45,519,595 for Freezer 14 (PW #8908) and \$12,714,755 for Chiller 15 (PW #9836).

¹ See Exhibit “A” separately bound containing a complete timeline with supporting exhibits.

² See Exhibit “B” attached hereto.

³ See Exhibit “C” attached hereto.

⁴ The term “short term” does not describe the duration of the use of the buildings as refrigerated facilities. To the contrary, the term “short term” refers to the length of time that the goods were stored in the warehouse. On August 29, 2005, these two buildings were, and had been for more than a decade, permanently used exclusively for the purpose of refrigerated cold storage warehouses.

FEMA, by a letter dated February 9, 2009, advised that they had obtained "guidance" which lead to revised estimates for the replacement or repair of Freezer 14 (PW #8908) and Chiller 15 (PW #9836) pursuant to a CEF developed in July of 2008, so that the refrigeration systems, which FEMA referred to as equipment, were to be "considered a separate unit purchase, and, therefore is eligible only for limited application of Cost Estimating Format factors." These so called "revised estimates" caused a substantial reduction in the eligible costs. The "revised" figures were \$34,333,021 for Freezer 14 (PW #8908) and \$9,835,178 for Chiller 15 (PW #9836). It also needs to be noted that the revised dollar amount for Freezer 14 (PW #8908) excluded the eligible costs of demolition in the amount of \$211,980.

The MSPA has consistently taken the position that the refrigeration systems that are a part of Freezer 14 (PW #8908) and Chiller 15 (PW #9836) and which are essential to their function as refrigerated warehouses, are integrated into and have become a part of the building and its structure.

MSPA disputed FEMA's conclusion and filed its appeal of the decision on March 27, 2009.⁵ Unfortunately, FEMA utilized ostensibly *brand new* ways of interpreting and applying policy, and rendered a decision rejecting the MSPA's appeal. The MSPA received the decision on September 21, 2009.⁶

III. Statement of Basis for Arbitration.

FEMA improperly determined the estimated total cost to repair and/or replace Freezer 14 (PW #8908) and Chiller 15 (PW #9836) for the following reasons:

1. The cost to repair or replace the respective Buildings was to be based upon the use of the facilities as of the date of the disaster/loss. As of August 29, 2005 the Buildings were being used as refrigerated cold storage warehouses, with refrigeration systems that were **integrated** with the building structure in such a manner that the systems were a part of the building structure and should have been evaluated as such when applying the Cost Estimating Format ("CEF") factors.

2. Alternatively, the CEF Factors were incorrectly applied, resulting in an artificially low cost estimate, and if applied correctly, the eligible costs would have been substantially higher.

3. MSPA denies FEMA's claim that buildings were demolished before FEMA inspected them.

⁵ See Exhibit "D" attached hereto.

⁶ See Exhibit "E" attached hereto.

IV. Each Refrigeration System/Building is One Integrated Unit and Should be Considered as Such.

When FEMA denied the MSPA's appeal, FEMA stated:

"FEMA's assessment was based on the construction history of these facilities. Both were originally constructed as pre-engineered metal buildings in the mid-1970's. Over the space of the next 20 years, the [MSPA] incrementally added refrigeration equipment to both facilities. Because the equipment was purchased separately and added incrementally, FEMA treated facility construction replacement and repair costs and equipment replacement costs separately. This approach was taken by the [MSPA's] engineering firm in its assessments of replacement costs for the two facilities developed in late September 2005."

However, pursuant to 42 U.S.C. § 1572(e)(1),⁷ the "net eligible cost" is defined as "the cost of repairing, restoring, reconstructing, or replacing a public facility...on the basis of the design of such facility **as it existed immediately prior to the major disaster** and in conformity with current applicable codes, specifications, and standards....." (emphasis added). For purposes of the net eligible cost, on August 29, 2005, Freezer 14 (PW #8908) and Chiller 15 (PW #9836) were in service as integrated refrigerated cold storage warehouse facilities at the MSPA.

While the exteriors of the structures were initially constructed in the 1970's as open dry storage warehouses, they were converted to integrated refrigerated warehouses more than a decade prior to Katrina. Contrary to FEMA's assessment that refrigeration equipment was "incrementally added", the conversion to integrated refrigerated warehouses was the result of two major reconstruction projects. In the first major reconstruction project, Building 14 was converted to a freezer in 1991 and in the second major reconstruction project, Building 15 was converted to a chiller in 1993. As evidenced by the engineering drawings, plans, specifications, and photographs submitted to FEMA, the conversion of these buildings was accomplished by the incorporation into these buildings of the refrigeration systems which were engineered in such a way that the systems became a part of the structures. The following details establish that fact beyond any doubt:

- The freezer and chiller walls were fastened to the structures' floors and roof frames, and were incapable of standing without support.
- The ceilings were fastened to, and suspended from, the framing of the warehouse roofs and were incapable of supporting themselves.
- The evaporators were fastened to, and suspended from, the buildings' structures and could not be supported by the wall panels or the ceiling panels of the freezer and chiller.

⁷ Section 406(e)(1) of the Robert T. Stafford Disaster Recovery Act, commonly referred to as the Stafford Act.

- The complex electrical distribution systems for the refrigeration systems were attached to the buildings' structures. The wall panels and ceiling panels alone were not capable of supporting the electrical system.
- The piping system through which the refrigerant flowed, was suspended from and attached to the buildings' structures. The wall panels and the ceiling panels alone were incapable of supporting the piping systems.
- The sprinkler systems were "dry" systems required for use in refrigerated space and were attached to the structures.
- The lighting fixtures were cold weather ballasts required for the refrigerated space and were attached to the structures.
- The condensers were attached to the structural steel frame of the buildings. They were dependent on the structures for support and were dependent on the structures for their power and piping systems.
- The compressors were situated within a concrete block mechanical room inside the warehouses. The compressors were affixed to the buildings' concrete floors and connected to the buildings' electrical systems and piping systems.
- The thermosyphon/pilot receivers were affixed to the roofs of the buildings and were attached to the structures. They were connected to all the buildings' piping and electrical systems and controls.
- The recirculators were affixed to the buildings' concrete floors and were connected to the buildings' piping systems. They were situated within the buildings' concrete block mechanical rooms.
- The air compressors that control the buildings' dry sprinkler systems were affixed to the buildings' concrete floors. They were connected to the buildings' electrical and sprinkler systems and were located within the buildings' concrete block mechanical rooms.
- All of the evaporators were affixed to and suspended from the buildings' structural steel frames. The evaporators were connected to the buildings' piping and electrical systems.

The following photographs⁸ depict the damage to refrigerated structures that were located at the MSPA: F-4, F-5, F-6, F-7, F-8, F-11, F-13, F-14, F-16, F-17, F-19, F-20 and F-21.

⁸ See Composite Exhibit "F" attached hereto.

*Since the appeal – In addition to these undisputed facts above, the MSPA has now gathered expert opinions which provide further proof that Freezer 14 (PW #8908) and Chiller 15 (PW #9836) were integrated refrigerated warehouses at the time Hurricane Katrina struck. These facts are supported not only by the plans, drawings, specifications and the Port photos, but also by the reports as follows:

1. Gary Cowles of Cowles, Murphy, Glover & Associates, is an experienced engineer licensed by the state of Mississippi who has designed for construction several types of refrigerated warehouses in the Gulf region. Mr. Cowles has provided a report based upon his examination of the plans, specifications, and photographs and upon his education, training and experience.⁹ Mr. Cowles opines that Freezer 14 (PW #8908) and Chiller 15 (PW #9836) are integrated units.

According to Mr. Cowles:

“Based on our education, training and experience, we are of the opinion that the refrigeration systems were not stand alone systems but integral parts of the buildings. The refrigeration equipment, insulation, piping, electrical, control wiring and appurtenances, as installed and utilized as part of Buildings 14 and 15, could not stand alone without the existing foundations and building structures. The refrigeration equipment and appurtenances could not have been permitted by the local building code to be constructed as stand alone systems. Stated differently, if reconstructed by today’s standards, Buildings 14 and 15 would be designed and constructed as integrated cold storage buildings. For the reasons above, the buildings and all associated refrigerated systems existing at the time of Hurricane Katrina must be considered integral parts of the total buildings.”

2. Mr. Allen Purvis, is a Mississippi licensed appraiser who has over 30 years of experience in the business of appraising commercial and industrial buildings.

According to Mr. Purvis:

“It is of my opinion that, on completion, the work to add the refrigerated sections could not have been distinguished in design, function or utility from warehouses which had included refrigeration sections at the time of their original construction. The only difference between alteration and initial construction would have been the costs of minor demolition during the addition of the refrigeration components. In my opinion, the extensive work and new components, including new refrigerated doors, mechanical systems, walls, ceilings and floors, all became a part of the real property when completed.”

⁹ See Exhibit “G” attached hereto.

Mr. Purvis goes on to conclude that:

“In my opinion, as previously stated, all the improvements made to Buildings 14 and 15 regardless of their timing relative to initial construction were permanent improvements and part of the real property.”¹⁰

Consistent with its experts’ opinions, the repair or replacement of Freezer 14 (PW #8908) and Chiller 15 (PW #9836) would be bid and contracted by MSPA as single projects, respectively. The prime or general contractor could not bid on the construction of the building and exclude the inclusion of the refrigeration system, leaving that work to be performed by a separate prime or general refrigeration contractor. To the contrary, the general contractor would be engaged to construct or repair the entire facility including the integrated refrigeration systems.

*Primary Point – If the Arbitration Panel agrees with the undisputed evidence that Buildings 14 and 15 were integrated refrigerated buildings at the time of Hurricane Katrina, the MSPA is entitled to an additional increase of \$18,969,703. On the other hand, if Buildings 14 and 15 were not integrated refrigerated buildings as FEMA incorrectly suggests, MSPA’s alternative arguments below must be considered.

V. FEMA Misapplied the CEF Factors to be Considered as a Part of the Repair or Replacement of the Subject Refrigerated Cold Storage Warehouses.

The CEF Instructional Guide provides a worksheet allowing the user to estimate the base construction cost for repairs or reconstruction on large projects.¹¹

THE CEF:

“The CEF provides a worksheet, called Part A, that allows the user to estimate the base construction costs. The user then applies a series of factors (Part B through H) that represent the non-construction costs. These expenses can reasonably be expected to occur because they are construction-related costs usually encountered during the course of construction. These factors are applied to the Part A base construction costs to estimate the total cost of completing the project. This “forward-pricing” methodology provides an estimate of the total eligible funding at the beginning of the project. This estimate, which is used to obligate the funds for the project, allows the applicant to more accurately manage the budget with a greater degree of confidence.”

FEMA’s current position is in stark contrast to the basic concept of the CEF. FEMA’s position is that after the facility (shell) is constructed, MSPA can simply purchase and insert into the shell such

¹⁰ See Exhibit “H” attached hereto.

¹¹ Federal Emergency Management Agency, *Cost Estimating Format for Large Projects, Instructional Guide* (version 2, November 1998) (hereinafter “the Instructional Guide”).

refrigeration equipment. This position fails to acknowledge the planning, engineering, acquisition, and installation of the equipment as part of the overall facility and further fails to acknowledge that projects of this nature are contracted in their entirety. Consequently, the MSPA is entitled to the application of the additional CEF factors.

Stated differently, in addition to its base construction costs, the MSPA is entitled to recover additional non-construction costs resulting from the application of a series of factors. These non-construction costs would include: temporary costs associated with the job,¹² construction cost contingencies including design and construction,¹³ the general contractor's overhead and profit,¹⁴ a cost escalation allowance,¹⁵ the cost of plan review and construction permits¹⁶ the applicant's reserve for construction,¹⁷ and the applicant's project and management costs.¹⁸ The last of these additional costs specifically includes the project management during the design phase and the architectural and design contract costs.¹⁹ When calculating the CEF for Freezer 14 (PW #8908) and Chiller 15 (PW #9836), FEMA failed to consider the engineering and project management costs which would be incurred even under FEMA's distorted "equipment" theory.

Alternatively, FEMA failed to properly apply other CEF factors. The installation of the refrigeration systems will require specialized supervision, temporary utilities, temporary safety measures and quality control as set forth in Part B. It will also require site access, storage, staging and similar contingencies as allowed by Part C. Under Part D, MSPA would be allowed to consider the various parts of the refrigeration systems when calculating the cost of insurance on the project, calculating overhead and calculating the contractor's profit. Likewise, FEMA failed to allow or provide contingencies for change orders associated with the construction and installation of the refrigeration systems as allowed under Part G.

Under Part H, Freezer 14 (PW #8908) and Chiller 15 (PW #9836) involved in this case were an integral part of a complex "waterfront and marine terminal facility" similar to the example in the FEMA Public Assistance Guide.²⁰ The MSPA's Port facilities, like the example in the Guide, are considered to be of "above average complexity calling for the application of Curve A." FEMA failed to do so with either of the PWs at issue herein.

¹² *Instructional Guide*, Part B, pp. 30-31.

¹³ *Instructional Guide*, Part C, pp. 31-34.

¹⁴ *Instructional Guide*, Part D, p. 35.

¹⁵ *Instructional Guide*, Part E, pp. 36-39.

¹⁶ *Instructional Guide*, Part F, p. 39.

¹⁷ *Instructional Guide*, Part G, p. 40.

¹⁸ *Instructional Guide*, Part H, pp. 40-43.

¹⁹ *Instructional Guide*, Part H.1 and H.2, p. 41.

²⁰ Federal Emergency Management Agency, *Public Assistance Guide*, p. 75.

VI. FEMA Inspected all Buildings.

On October 13, 2005, Jennifer Dussor, the Original FEMA Project Officer (PO), sent Mary Bourdin (MSPA) an email stating, "We met with John Webb yesterday and took a tour of the port property." There is no dispute that FEMA inspected all port facilities.²¹ In fact, any remaining portion of Chiller 15 (PW #9836) was not demolished until February of 2006. Any remaining portion of Freezer 14 (PW #8908) was cleared away in November of 2005.²²

VII. Withdrawal of all Further Appeals.

After February 17, 2009, MSPA had pending a First Appeal of the Limited Application of CEF Factors to Freezer 14 (PW #8908) and Chiller 15 (PW #9836). By a FEMA letter dated August 27, 2009 and received by MSPA on September 21, 2009, that appeal was denied.

Pursuant to 44 CFR Part 206 (II)(D), MSPA, as the applicant/subgrantee does hereby withdraw all appeals and waive any right to further appeal to which it may be entitled and does formally request hereby that this matter be decided by arbitration.

VIII. Eligibility of MSPA for Arbitration.

MSPA had pending on February 17, 2009, a First Appeal of the adverse ruling by FEMA on Freezer 14 (PW #8908) and Chiller 15 (PW #9836). This appeal was decided adversely to MSPA by a FEMA ruling dated August 27, 2009 and received from MEMA by the MSPA on September 21, 2009. The Public Assistance projects, which are the subject of Freezer 14 (PW #8908) and Chiller 15 (PW #9836), exceed the threshold minimum of \$500,000. The Public Assistance projects which are the subject of the referenced PW's are subject to or are under DR-1604. Therefore, MSPA was "engaged in the FEMA appeals process as of February, 2009, and had not received a final agency decision prior to February 17, 2009" even though a decision on the appeal was issued on or after February 17, 2009; MSPA has withdrawn from the continuation of the appeal process; and MSPA is eligible to participate in the arbitration process in lieu of further appeals.²³

IX. Conclusion.

A comprehensive review of all of the evidence presented by the MSPA with this Request and contained in the appeal file, clearly indicates that as of August 29, 2005, Freezer 14 (PW #8908) and Chiller 15 (PW #9836) at the MSPA, were in service and being used as fully integrated refrigerated cold storage warehouses and should be restored to that use by considering them as such. Furthermore,

²¹ See Exhibit "I" attached hereto.

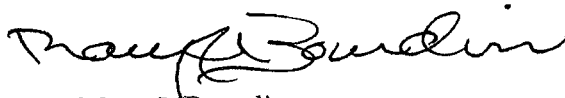
²² See Exhibit "J" attached hereto.

²³ 44 CFR, Part 206 (II)(A)

FEMA wholly failed to consider all relevant CEF factors resulting in an artificially low estimate of the costs for repair/replacement of Freezer 14 (PW #8908) and Chiller 15 (PW #9836).

MSPA would request that the arbitration panel enter a ruling awarding an increase in total dollars awarded for Freezer 14 (PW #8908) in the amount of \$11,712,261 and for Chiller 15 (PW #9836) in the amount of \$7,257,442, for a total increase of \$18,969,703.

Sincerely,



Mary J. Bourdin
Applicant's Authorized Representative



Paul J. Delcambre, Jr.
Balch & Bingham LLP
Of Counsel

cc: Mr. Donald R. Allee, w/o attachments
Board of Commissioners, MSPA, w/o attachments
Ben H. Stone, Esq., w/o attachments
The Honorable Governor Haley Barbour,
c/o Mr. Jack Norris, w/o attachments