

Applicant Arbitration Request

REQUEST FOR ARBITRATION

IN RE FEMA PW NO. 9230 (VERSIONS 0-2) AND RELATED MATTERS

APPLICANT: THE UNIVERSITY OF SOUTHERN MISSISSIPPI
FACILITY: ADMINISTRATION BUILDING (# 951)
FIPS NO: 000-UEM8U-00
FEMA PW NO: 9230 (VERSIONS 0-2)

THE UNIVERSITY OF SOUTHERN MISSISSIPPI
REQUEST FOR ARBITRATION OF PROJECT WORKSHEET
NUMBER 9230V2 AND RELATED MATTERS

TO THE HONORABLE ARBITRATION PANEL:

I. STATEMENT OF SUBJECT MATTER JURISDICTION

This Honorable Arbitration Panel is granted subject matter jurisdiction over this dispute pursuant to 44 CFR Part 206, subpart G, addition section 206.209, which is derived from statutory authority set forth in Public Law 111-5, Section 601. The amount in controversy exceeds five hundred thousand dollars. A Request for Arbitration “must contain a written statement and all documentation supporting the position of the applicant... (206-209(e)).” The applicant/subgrantee may provide supporting documentation not previously included in the project” (preamble, sec 206 IIC).

In light of this grant of subject matter jurisdiction, applicant/subgrantee, The University of Southern Mississippi, (“USM” or “Applicant”) files this Request for Arbitration in lieu of pursuing a second administrative appeal of the captioned PW pursuant to section 206.209(e)(2).

II. INTRODUCTION

Pursuant to 44 CFR Part 206, USM submits this request for arbitration (the "Request for Arbitration") in connection with Project Worksheet ("PW") No. 9230-V2 issued by the Federal Emergency Management Agency ("FEMA") through the Mississippi Transitional Recovery Office ("MS-TRO") and obligated on or about September 21, 2006. This PW relates to the Administration Building (Building # 951) and a copy of this PW is attached hereto as Exhibit 1.

This Request for Arbitration seeks to have the arbitration panel determine that FEMA had departed from its guidelines with respect to the PW at issue. USM asks the arbitration panel to determine, based on the record herein, that USM is entitled to the relief requested.

Under FEMA's 50 Percent Rule as stated in 44 CFR 206.226 (f) and more fully defined by FEMA in Exhibit 2 attached hereto, the Administration Building is eligible for replacement if the calculated costs of repair are more than 50 Percent of the cost of replacing the Administration Building to its pre-disaster condition.

In calculating the repair cost of the Administration Building in the PW, FEMA used the RS Means 2006 SF Cost Book to arrive at the total repair cost of \$953,413.19.

However, FEMA used the Annual Capital Facilities Study (2005) provided by USM to estimate the replacement value of the Administration Building-See attached Exhibit 3.

The PW states that this value is \$2,124,000 while the study states the value at \$2,225,053. This discrepancy is noted on page 4 of the First Appeal Analysis of FEMA's

First Appeal Determination dated June 23, 2009-see attached Exhibit 4. However, USM would argue that neither replacement cost value should have been used by FEMA as the denominator in the 50 Percent Rule. Again, on page 4 of the First Appeal Analysis, FEMA states "Beyond citing the individual elements of the replacement cost calculation, FEMA policy provides no direction as to the source of the replacement cost estimates. FEMA 1604 estimators have consistently used RS Means Costs Works data to generate these costs." (emphasis added) Furthermore, under the Guideline #19-Revision 1 attached hereto as Exhibit 5, FEMA states on page 2, "Furthermore, when performing the 50 Percent Rule Calculation, the individual performing the calculation must utilize the same cost estimating tool when calculating the repair cost and the replacement cost. For example, if the repair cost was derived from a 2006 RS Means Manual then the replacement cost too must be derived from a 2006 RS Means Manual" (emphasis added). FEMA clearly did not follow either the consistent procedure of using the RS Means Costs Works data as stated in the First Appeal Analysis nor its own Guideline #19 in calculating the Administration Building replacement value.

USM employed Mike Etem with the firm of PM2i, 1301 S. Capital of Texas Highway, Suite A-302, Austin, TX 78746, on or about September 22, 2009, to prepare an analysis of the replacement value of the Administration Building using the 2006 RS Means Cost Data. This report dated October 19, 2009, is attached hereto as Exhibit 6. Using the 2006 RS Means Cost Data, this report calculates the Replacement Value of the Administration Building at \$1,831,143. While USM disputes the Repair Cost estimate calculated by FEMA in the attached PW, using this number, \$953,413.19, as the numerator and the calculated replacement value of \$1,831,143 as the denominator,

clearly shows that the Repair Cost is more than 50% of the Replacement Value and USM is entitled to replacement of the facility under 44 CFR 206.226.

$$\frac{\text{Repair Cost}}{\text{Replacement Cost}} = \frac{\$953,413.19}{\$1,831,143} = 52.07\%$$

USM notes that the calculated Replacement Cost does not include job site costs, overhead, contractor profit or project management costs. Once the 50 Percent Rule is met, as in this case, under FEMA rules and guidelines, USM would be entitled to a replacement value which includes job site costs, overhead, contractor profit and project management costs which is calculated as shown below at \$2,547,520.

USM sets forth the factual background and the various arbitration issues below and forwards the Request for Arbitration of PW9230-V2 to the Grantee, the State of Mississippi's Mississippi Emergency Management Agency, (MEMA), the FEMA Regional Administrator, and the arbitration administrator as required under the newly adopted FEMA arbitration rules. USM respectfully requests for the arbitration panel to correct the action taken by FEMA in PW9230-V2 as well as the continued error by FEMA in partially rejecting USM's First Appeal as it applies to the Administration Building. USM requests that the arbitration panel apply the 50 Percent Rule to the corrected Replacement Value and/or Repair Costs as shown herein and award USM the Replacement Value of USM's Administration Building, which is calculated herein to be no less than \$2,547,500 using the Replacement Cost Estimate prepared by PM2i using 2006 RS Means Cost Data. This calculation is made by multiplying the Administration Building square footage of 16,000 times the RS Means model square foot cost of \$159.22 (adding back in contractor's fees and architect's fees) as shown in the attached Exhibit 6. $16,000 \times \$159.22 = \$2,547,520$.

III. FACTUAL BACKGROUND

A. Administration Building pre-Katrina

The Administration Building is located on the beach front, Gulf Coast Campus of The University of Southern Mississippi, at 730 East Beach Boulevard, Long Beach, Mississippi. The building was built in 1921. It is a two (2) story facility and has a total gross area of approximately 16,000 square feet. Prior to Hurricane Katrina, the Administration Building was *fully functional as a mixed use administrative office building, containing 32 offices, a bookstore, a break room, a mailroom, a classroom and a chemistry laboratory.*

B. Administration Building post-Katrina

Hurricane Katrina was the costliest and one of the deadliest hurricanes in American history. The storm made landfall on the morning of August 29, 2005 in Southeast Louisiana and the Southwest Mississippi Gulf Coast. It caused major wind and water damage and the storm surge caused catastrophic damage along the coastline of Mississippi. The storm surge reached approximately 25 feet in the Long Beach, Mississippi area, washing Gulf of Mexico salt water onto the beach front campus to depths up to 11 feet deep. The Administration Building, located in the center of the southern portion of the campus, has a first floor elevation of approximately 21 feet, and stands less than 1000 feet from the Gulf of Mexico. The building was ultimately inundated with approximately 4 feet of gulf water, and due to its proximity to the gulf, suffered direct and significant wave damage on top of the storm surge to a height of

approximately 8 feet in the southern wing of the building. Pictures of the Administration Building damage taken shortly after Katrina are attached hereto as Exhibit 7.

C. Independent Consultants Hired to Assess the Damages to Administration Building

1. In January, 2005, USM employed the firm of Simpkins & Costelli, Inc., 401 32 ½ Street, Gulfport, MS, 39506, to review the structural condition of the Administration Building at USM's Gulf Park Campus. At that time, there was a substantial amount of debris covering the damage and a detailed inspection was not practical. On or about January 17, 2007, William H. Kennedy, P.E., an associate with Simpkins performed a more extensive review after the debris had been removed. His report dated January 22, 2007, is attached hereto as Exhibit 8. His report states "...over the last 16 months the condition of each structure has worsened due to settlement from foundation damage that was not apparent during the earlier inspection." Kennedy further states with regard to the Administration Building, "It is estimated that the cost to return the structure to its previous condition would exceed 70% of the cost of constructing a new facility."
2. On or about September 28, 2009, USM employed the firm of Structural Design Group, 220 Great Circle Road, Suite 106, Nashville, TN 37228, to perform a Structural Engineering Report of the Administration Building. This report by Structural Design associates, Robert Bovine, P.E. and Thomas C. Schaeffer, P.E., dated October 2, 2009, is attached hereto as

Exhibit 9. In their report, they stated "...considering the age of the structure it may be cost-prohibitive to repair and retrofit the structure to meet the current building code requirements."

3. In June, 2009, USM employed the firm of M3 Construction Services, Inc., 425 Tribble Gap Road, Cumming, GA, 30040, to prepare a Repair Cost Estimate for the Administration Building using 2006 RS Means Cost Data.-See attached Exhibit 10. This report originally contained Overhead and Profit calculations but has been revised by associate Dana Meier on October 29, 2009, and is attached as Exhibit 11. This revised estimate shows that the Repair Cost Estimate for the Administration Building totals \$1,800,722.
4. On or about September 22, 2009, USM employed the firm of PM2i to prepare a Replacement Cost Estimate for the Administration Building per the 2006 RS Means Cost Data. This report, previously attached as Exhibit 6, was prepared by associate Mike Etem and calculated the Replacement Cost Estimate for the Administration Building at \$1,831,142.80.
5. In September, 2009, USM employed Walt Rode with Broaddus and Associates, 1 Hancock Plaza, 2510 14th St., Suite 810, Gulfport, MS 39501, to assist USM in reviewing the First Appeal Determination issued by FEMA on or about June 23, 2009 and to assist in this Request for Arbitration.

D. Damages And Scope Of Work to the Administration Building

Captured By FEMA In PW 9230 (Version 0-2)

FEMA (MS-TRO) has now obligated three (3) versions of PW9230 as summarized below:

1. PW 9230 Version 0 attached as Exhibit 12– Estimated Repair Cost-\$953,413.19 Obligated on September 21, 2006 in the amount of \$756,391.36, fed share \$680,752.22 – total repair estimate \$953,413.19 – with anticipated insurance proceeds of 197,021.83=\$756,391.36 X 90%=fed share \$680,752.22. On page 4 of this PW, the reviewer, Don Smith, stated that the estimated value of the Administration Building was \$2,124,000 and the building's damages did not meet the 50% rule.
2. PW 9230 Version 1 attached as Exhibit 13– Estimated Repair Cost-\$953,413.19. Obligated on July 5, 2007 (after Congressional approval to increase the Federal Share to 100%) for additional \$75,639.14=fed share \$756,391.36. On page 4 of this PW, the reviewer, Anthony Mancini, again states that the estimated value of the Administration Building was \$2,124,000 and the building's damages did not meet the 50% rule.
3. PW 9230 Version 2 previously attached as Exhibit 1– Estimated Repair Cost-\$953,413.19. Obligated on March 5, 2008, for a reduction of fed share by \$136,736.17, reinstating anticipated insurance proceeds reduction of \$197,021.83 and deducting Actual Wind Insurance Proceeds in the amount of \$333,758.00=fed share \$619,655.19. On page 4 of this PW, the reviewer, Jennifer Casey, once again states that the estimated value of the Administration Building was \$2,124,000 and the building's damages did not meet the 50% rule.

E. Applicant Submits Request for Official 50% Rule Determination

In September, 2008, USM requested through MEMA a written response from FEMA for a 50% building replacement calculation on three facilities on USM's Long Beach Campus, including the Administration Building. MEMA made this request to FEMA on or about October 1, 2008. FEMA, in a letter dated November 6, 2008 and attached hereto as Exhibit 14, stated that they had reviewed the PW's for each building and that 50% replacement calculations were not warranted. USM was notified about FEMA's decision by letter from MEMA dated November 13, 2008, a copy being attached hereto as Exhibit 15. This letter from MEMA stated "FEMA has determined that its initial estimates were adequate and denied the University's requests for these additional calculations." The MEMA letter also provided USM with information regarding USM's right to appeal the decision from FEMA.

F. Applicant Submits First Appeal concerning 50% Determination Denial

On or about December 2, 2008, USM submitted its first appeal to FEMA Region IV in accordance with 44 CFR 206.206. A copy of this appeal with documentation is attached hereto as Exhibit 16.

G. FEMA-Region IV Rejects First Appeal

On June 23, 2009, FEMA denied USM's appeal with regard to the Administration Building.-See previously attached Exhibit 3. FEMA stated in their denial, "Analysis of RS Means Cost Data for repairs and Subgrantee's Capital Facilities Study for replacement value reveal that only Lloyd Hall is eligible for replacement under FEMA policy."

IV. ARBITRATION ISSUES

USM identifies and discusses below the various issues raised in connection with this Request for Arbitration of PW9230V0, and provides supporting documents which fully support USM's claim for the replacement cost of the Administration Building of at least \$2,547,500.

A. Arbitration Issue No. 1

FEMA did not follow Disaster Specific Guideline #19 Revision 1, FEMA-1604-DR-MS 50 Percent Rule Calculation in calculating the Administration Building's replacement cost.

B. Arbitration Issue No. 2

The State Bureau of Building Facilities Inventory Report value used by FEMA to apply the 50-Percent Rule contains "soft costs" which must be deducted from the Administration Building's value to arrive at replacement cost.

C. Arbitration Issue No. 3

FEMA's repair cost calculations in PW 9230-V2 are incorrect because they erroneously use a 75% repair factor for first floor damage rather than 100%.

D. Arbitration Issue No. 4

USM disputes other repair cost calculations in PW 9230-V2.

V. DISCUSSION OF ARBITRATION ISSUES

A. Arbitration Issue No 1

In FEMA's First Appeal Determination letter dated June 23, 2009, FEMA states the following: "Analysis of RS Means Cost Data for repairs and Subgrantee's Capital Facilities Study for replacement value reveal that only Lloyd Hall is eligible for replacement under FEMA policy." Further in the First Appeal Analysis on page 4, FEMA states "Beyond citing the individual elements of the replacement cost calculation, FEMA policy provides no direction as to the source of the replacement cost estimates. FEMA 1604 estimators have consistently used RS Means Cost Works data to generate these costs. For this project, however, the PW's state that FEMA relied upon "Recommended Values" contained in the Subgrantee's 2005 Annual Capital Facilities Study." (emphasis added). USM would assert that FEMA ignored its own statement above in using the Capital Facilities Study rather than the RS Means Cost Works data to calculate the Replacement Cost for the Administration Building. Furthermore, FEMA ignored its own Guideline #19 previously attached hereto as Exhibit 5. In this guideline on page 2 it clearly states: "Furthermore, when performing the 50 Percent Rule Calculation, the individual performing the calculation must utilize the same cost estimating tool when calculating the repair cost and the replacement cost. For example, if the repair cost was derived from a 2006 RS Means Manual then the replacement cost too must be derived

from a 2006 RS Means Manual.” (emphasis added) USM would contend that FEMA clearly ignored both its consistent use of RS Means Cost Data to calculate replacement costs and its own Guideline 19 in using the 2005 Annual Capital Improvements Study to calculate replacement costs. As previously stated, USM employed the firm of PM2i to prepare a Replacement Cost Estimate for the Administration Building using 2006 RS Means Cost Data. This report, previously attached as Exhibit 6 shows a Replacement Cost Estimate of \$1,831,142.80. When compared with the PW9230-V2 repair estimate of \$953,413.19, it is clear that the Repair cost is more than 50% of the Replacement Cost of the Administration Building:

<u>Repair Cost</u>	<u>\$953,413.19</u>	=	52.07%
Replacement Cost	\$1,831,143		

Accordingly, USM requests that the Arbitration Panel award USM with the Replacement Value of the Administration Building which is calculated at \$2,547,520.

B. Arbitration Issue No 2

Consistently through the three PW's and in response to USM's First Appeal, FEMA has admitted that it used the 2005 Annual Capital Improvements Study (Exhibit 3) to calculate the Replacement Cost of the Administration Building. USM would argue that this Study should not have been used by FEMA as noted in Arbitration Issue No. 1 above. However, if this Study's value of \$2,225,053 is used for replacement cost, then this figure must be adjusted to reflect FEMA's definition of Replacement Cost. On page 113 of the Public Assistance Policy Digest FEMA 321/January 2008 attached hereto as Exhibit 17, FEMA states: "Replacement Cost includes the costs for all work necessary to provide a new facility of the same size or design capacity and function as the

damaged facility in accordance with all current applicable codes and standards. The cost **does not** include demolition, site work, applicable project management costs, cost of contents, and hazard mitigation measures.” As noted in the October 29, 2009, letter from William Wheat, Director of Physical Plant Accounting for USM attached as Exhibit 18, the Administration Building #951’s value as shown in the 2005 Annual Capital Facilities Study is an insurable value that includes “soft costs” necessary to cover all cost associated with new construction. Therefore, USM would contend that the insurable value of \$2,225,053 must be reduced by the costs of demolition, site work, applicable project management costs, cost of contents, and hazard mitigation measures. As part of Exhibit 18, Mr. Wheat has attached a spreadsheet showing the reductions necessary to eliminate just the project management costs from the stated insurable value of \$2,225,053. In accordance with his spreadsheet, the project management costs are calculated at \$561,461.96, leaving a net Replacement Cost of \$1,663,591.03. Using FEMA’s disputed Repair Costs as the numerator and the net Replacement Cost as the denominator, this calculation clearly shows that the Repair Costs are more than 50% of the Replacement Cost:

$$\frac{\text{Repair Cost}}{\text{Replacement Cost}} = \frac{\$953,413.19}{\$1,663,591.03} = 57.31\%$$

Accordingly, USM requests that the Arbitration Panel award USM with the Replacement Value of the Administration Building which is calculated at \$2,547,520.

C. Arbitration Issue No 3

USM disputes the Repair Cost Estimate for the Administration Building as shown in PW9230-V2, previously attached as Exhibit 1. In the Cost Estimate Summary, FEMA states "For insurance purposes, the 1st Floor has been estimated @ 75% of replacement costs as exterior walls are still intact and the 2nd floor has been estimated separately into repair cost/sections. The combined price is the total repair cost."

Therefore, the square footage of the 1st floor was reduced by 25% from 7,690 square feet to 5,768 square feet and then multiplied by the estimated unit cost of \$113.29 to arrive at Total Repair Cost of the First Floor Only of \$653,457. USM would argue that this was an arbitrary decision by the FEMA estimator and that there is no justification for the reduction in the first floor damage by 25%. In reducing the first floor estimate by 25%, the estimator did not take into account the significant structural damage to the first floor walls as pointed out by the structural engineers' reports previously attached hereto as Exhibits 8 and 9. In the report from Simpkins, William Kennedy states: "In addition, over the last 16 months the condition of each structure has worsened due to settlement from foundation damage that was not apparent during the earlier inspection...". He further states "The condition of this structure (Administration Building) has significantly worsened. In several locations, the floors have separated from the supporting structures and have settled as much as 4 inches."

Furthermore, on page 4 of the Technical Team Response to Document #9479, 6675, & 9230, dated August 16, 2007, previously attached hereto as part of USM's First Appeal (see Exhibit 16), Mike Quinn, MEMA engineer states "...The first floor was COMPLETELY GUTTED by storm surge." He also states: "Since both SOR's agree that

the first floor was critically damaged, the repair costs are taken on 100% of the floor space or 7,690 ft. This revision changes the costs, without any other changes, to \$1,271,217.” He further states “Generally, the first floor in all cases was destroyed by the storm for all intents and purposes.”

Based on the reports by both outside consultants and the MEMA engineer, USM would assert that there is no justification for the arbitrary reduction in the first floor square footage of the Administration Building in PW9230-V2. If the correct square footage of 7,690 is used for the first floor in the replacement cost estimate, this would increase the first floor estimate to 7,690 square feet X \$113,29=\$871,200. This would therefore increase the total repair cost estimate in the PW to \$1,171,156. If you use FEMA’s disputed estimated replacement cost of \$2,225,053, the repair cost is more than 50% of the replacement cost:

$$\frac{\text{Repair Cost}}{\text{Replacement Cost}} = \frac{\$1,171,156}{\$2,225,053} = 52.63\%$$

Again, USM requests that the Arbitration Panel award USM with the Replacement Value of the Administration Building which is calculated at \$2,547,520. In the alternative, USM requests for a complete review by FEMA of the estimated repair costs for the Administration Building including a complete structural engineering report.

D. Arbitration Issue No 4

USM would state that there are further errors and omissions in the projected repair estimate cost for the Administration Building and shown in PW9230-V2. In June, 2009, USM employed the firm of M3 Construction Services, Inc., to prepare an estimate for the renovation of the Administration Building. A site visit was conducted by the company in June, 2009, and the attached Construction Cost Estimate was prepared based on said site visit-see previously attached Exhibit 10. Using the 2006 RS Means Cost Data, this report calculated a repair cost of \$2,186,185.16. However, this original cost estimate dated July 1, 2009, contained overhead, profit, and bond which were soft costs not included in PW9230-V2. At the request of USM, MP3 Construction performed calculations to remove the soft costs from the July 1 estimate. These calculations were performed by Operations Manager, Dana Meier, on October 29, 2009, and were previously attached as Exhibit 11 This revised calculation shows a net Repair Cost for the Administration Building at \$1,800,722. This is compared to the estimate by FEMA of \$953,413.19 in PW9230-V2. USM believes that the Repair Cost estimate prepared by MP3 Construction is a true reflection of the costs associated with repairing the Administration Building. If the MP3 Construction Repair estimate of \$1,800,722 is used as the numerator and the disputed FEMA replacement cost of \$2,225,053 is used as the denominator, the repair costs are significantly more than 50% of the replacement costs:

$$\frac{\text{Repair Cost}}{\text{Replacement Cost}} = \frac{\$1,800,722}{\$2,225,053} = 80.93\%$$

Again, USM requests that the Arbitration Panel award USM with the Replacement Value of the Administration Building which is calculated at \$2,547,520. In the alternative, USM requests for a complete review by FEMA of the estimated repair costs for the Administration Building including a complete structural engineering report.

VI. REQUEST FOR ORAL ARGUMENT/HEARING

USM respectfully requests for a hearing in connection with this arbitration proceeding in accordance with the Arbitration Rules set forth in 44 CFR 206.209(h).

VII. RELIEF REQUESTED

As set forth above, FEMA (MS-TRO) and FEMA-Region 4 have failed to recognize and apply correctly the 50-Percent Rule with respect to the extensive damages to USM's Administration Building. FEMA has failed to follow its own policies and guidelines in denying USM the Replacement Value of the Administration Building. Further, FEMA used an incorrect value in estimating the Replacement Value of the Administration Building. Finally, the Repair Cost estimate prepared by FEMA in PW9230-V2 contains multiple errors which, if corrected, would entitle USM to the Replacement Value of the Administration Building.

THEREFORE, USM RESPECTFULLY REQUESTS that this Arbitration Panel properly determine the correct Repair and Replacement Costs as described in this Request for Arbitration and properly apply the 50 Percent Rule to award USM the Replacement Value of the Administration Building, an amount estimated at not less than \$2,547,200.

ACCORDINGLY, USM RESPECTFULLY REQUESTS that this Honorable Arbitration Panel properly determine the scope of work and the costs to repair the disaster-related damages as described in this Request for Arbitration, and properly apply the 50-Percent Rule to award USM the replacement value of the Administration Building—an amount calculated to be not less than \$2,547,520.

ALTERNATIVELY AND ADDITIONALLY, USM RESPECTFULLY REQUESTS all relief to which it is entitled in Law and Equity.

Submitted this 29th day of October, 2009.

By:



Lee P. Gore (MS Bar No. 4915)
Special Assistant Attorney General
The University of Southern Mississippi
118 College Drive #10051
Hattiesburg, MS 39406-0001
Telephone No.: 601-261-2195
Fax No.: 601-261-2724

AND

By:



G. Truett Roberts (MS Bar No. 5584)
Special Assistant Attorney General
The University of Southern Mississippi
118 College Drive #10051
Hattiesburg, MS 39406-0001
Telephone No.: 601-261-2195
Fax No.: 601-261-2724