



FEMA

November 30, 2009

BY HAND-DELIVERY

Clerk of the Board
Civilian Board of Contract Appeals
1800 M Street, N.W.
6th Floor
Washington, D.C. 20036

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2009 NOV 30 P 4: 05
CIVILIAN BOARD OF
CONTRACT APPEALS

BS

DOCKET NUMBER: CBCA-1783-FEMA
In the matter of City of Westwego

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by City of Westwego and filed as CBCA-1783-FEMA. Submitted with the Response is a binder(s) of exhibits.

Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or lindam.davis@dhs.gov; and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or kim.hazel@dhs.gov.

Very truly yours,

Linda M. Davis
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cc: James L. Butler, C.P.A.
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**CITY OF WESTWEGO, LOUISIANA
CITY HALL AND POLICE STATION
PWs #17663, #7704 and #7815
FEMA-1603-DR-LA
Docket # CBCA 1783-FEMA**

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DEPARTMENT OF
CONTRACT APPEALS

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO
ARBITRATION REQUEST OF CITY OF WESTWEGO, LOUISIANA**

On October 30, 2009, the Federal Emergency Management Agency (FEMA) received the request of City of Westwego, Louisiana (Applicant) to arbitrate FEMA's denial of \$3,931,724 for the replacement of the Applicant's municipal building under Project Worksheet (PW) 17663. FEMA prepared PW 17633 to consolidate and supersede PWs 7704 and 7815, which were originally prepared and approved for the Police Station and the City Hall, respectively.¹ This constitutes FEMA's response to the arbitration request of the Applicant.

JURISDICTION

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009) ("ARRA"), which establishes the option for arbitration under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX and DR-1607-LA. See 44 C.F.R. § 206.209.

The Applicant meets regulatory guidelines for filing an arbitration request as outlined in 44 C.F.R. § 206.209 as follows:

- The arbitration request exceeds the \$500,000 arbitration project threshold.

¹ The City of Westwego municipal building is comprised of both City Hall and Police Station offices.

- The Governor’s Office of Homeland Security and Emergency Preparedness (GOHSEP) submitted the Applicant’s first-level appeal to FEMA on December 12, 2008.
- FEMA denied the Applicant’s first-level appeal on February 25, 2009.
- The Applicant submitted its second-level appeal to FEMA on April 30, 2009.
- The Applicant filed a Request for Arbitration (“Request”) with the Civilian Board of Contract Appeals and withdrew its pending second appeal on October 28, 2009.

SUMMARY OF FEMA’S POSITION

FEMA contends that the damage to Applicant’s municipal building is repairable and that, pursuant to FEMA regulations and PA program policy, the building does not meet the FEMA regulatory threshold for replacement. See 44 C.F.R. § 206.226(f)(1)-(3). FEMA estimates the cost to repair disaster-caused damage to the building is \$737,822.

BACKGROUND

The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”).² 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a “major disaster.” See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. When a major disaster is declared, the President determines the types of discretionary assistance that may be

² The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. 42 U.S.C. § 5164.

made available in the area he has determined is encompassed by the incident – the “declared area.” 42 U.S.C. § 5170a.

The Declaration

On August 29, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration under the Stafford Act authorized all categories of Public Assistance, including emergency protective measures and restoration of eligible facilities. See Exhibit 19. The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). City of Westwego, Louisiana is a subgrantee of the State of Louisiana. See 44 C.F.R. § 206.201(l).

The President’s declaration enabled the City of Westwego to apply for FEMA Public Assistance reimbursement for eligible emergency work and permanent repair, restoration, and replacement of eligible facilities. Emergency work includes measures, such as debris removal, that are necessary to eliminate immediate threats to life and property. See 42 U.S.C. § 5170b; 44 C.F.R. § 206.225. Restoration of eligible facilities includes the repair of a facility to its function immediately prior to the major disaster. An applicant may also apply for funding to replace or relocate a facility, or for an alternate or improved project. See 42 U.S.C. § 5172; 44 C.F.R. § 206.226.

The Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. The PA program allows FEMA, in its

discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200-.206.

PA funding may be provided in the form of grants for the state or local government's own recovery efforts, or FEMA may fund direct federal assistance through which a federal agency performs the recovery work. See 44 C.F.R. § 206.203, and 44 C.F.R. § 206.208, respectively. FEMA may also fund eligible private nonprofit facilities, such as educational facilities or schools, through a subgrantee. See 44 C.F.R. § 206.223(b).

To receive PA, the applicant must own an eligible facility and meet the work eligibility requirements set forth in FEMA regulations. Specifically, the item of work must be required as a result of the major disaster; the facility must be located within the disaster-declared area; and the facility must be the legal responsibility of the eligible applicant. 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221-.223; 206.226(c)(1). Under the PA program, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on Project Worksheets ("PWs"). Id. PWs document damage caused by the disaster, and list, among other information, the scope and "quantitative estimate for the eligible work." Id.

FEMA reviews PWs after they are completed in order to determine whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, "obligate") based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract

between FEMA and the Grantee and/or subgrantee to pay Federal disaster assistance and does not create any right of the Grantee or subgrantee to receive any such Federal funds. See 44 C.F.R. § 206.202(d). A PW only provides a cost estimate and scope of work based upon the engineering analysis and on-site investigation of disaster-caused damage. See 44 C.F.R. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

Appeals and Arbitration

The Stafford Act authorizes appeals of PA eligibility decisions. See 42 U.S.C. § 5189a. There are two levels of appeal - the first to the Regional Administrator, and the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). Pursuant to a provision of the ARRA, an applicant may avail itself of arbitration in lieu of a final agency decision under the PA program for award determinations related to Hurricanes Katrina and Rita. See 44 C.F.R. § 206.209. A decision of a majority of this Panel will constitute the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

City of Westwego Project – City Hall and Police Station Project

The City of Westwego City Hall and Police Department offices are constructed as one building and are located at 417 Avenue A in Westwego, Louisiana. The Police Station and City Hall share a common load bearing wall between two separate, but physically joined, administrative offices. There is no interior passage way between the offices. Based on a floor plan from the

Westwego City Hall Codes and Standards Study, the City Hall offices are approximately 5,558 square feet (SF) and are in a one story, wood frame building with brick veneer and a composition asphalt shingle roof. See Applicant Exhibit 11, Table of Contents, Number 14. Based on the same floor plan, the Police Department Offices are 4,133 SF in a one story, wood frame building with a partial second floor, brick veneer and a composition asphalt shingle roof. The combined offices are referred to as the “Municipal Building” on the floor plan. Id.

The Westwego City Hall and Police Department offices were damaged by high winds, rain and flooding from Hurricane Katrina. The Municipal Building was flooded with up to six inches of storm water and suffered wind damage. FEMA completed several damage assessments of the Municipal Building.

FEMA initially prepared PW 7704 for Police Station offices, and PW 7815 for City Hall offices in March 2006 to document and estimate the costs to repair disaster damage. FEMA subsequently revised the scope of work and cost estimate for each PW and consolidated the two PWs into a single PW. The following description of PWs provides a chronology of the damage assessments and the funding FEMA approved for the Applicant’s City Hall and Police Station offices.

PW 7704 (Police Station)

On March 16, 2006, FEMA prepared the initial version of PW 7704 and indicated that the Applicant had not repaired any disaster-related damage to the Municipal Building at the time it was inspected by FEMA. See Exhibit 1. FEMA documented damage to 100 SF of the roof,

surveillance station and cameras and estimated the repair cost to be \$3,373. Id. at 3. FEMA approved and obligated the PW on May 15, 2006. Id. at 1.

On June 27, 2006, FEMA prepared PW 7704 version 1 to revise the scope of work and increase the estimated cost to \$128,483. See Exhibit 2. The revised scope of work included replacing the roof, rather than repairing it, and repairing interior floor-to-ceiling damage that resulted from flooding. See Id. at 5. FEMA approved the revised funding on September 25, 2006. Id. at 1.

On January 4, 2007, FEMA prepared PW 7704 version 2, and indicated that the Applicant had not completed any permanent repairs at the time of FEMA's inspection. See Exhibit 3. The scope of work in this version of the PW indicated that the facility's dimensions were 67 feet by 36 feet for a total area of 2,412 SF³. Id. at 6. This version of the PW increased the estimate for repair costs by \$207,045 for a cumulative eligible repair cost of \$335,528. See Exhibit 4. Based on the increase in repair costs, this version of the PW recommended funding the demolition and replacement of the building because the 50% Rule threshold was met. See Response and Recovery Directorate Policy 9424.4, *Eligibility of Facilities for Replacement under 44 CFR 206.226(d)(1)*, dated September 24, 1998. The calculation used base repair costs⁴ of \$174,772 from Part A divided by base replacement costs for a 2,412 SF building of \$298,072 from Part A to equal 58.63 percent.⁵ See Exhibit 3 at 7. This version calculated an estimate for replacement of \$734,989. FEMA approved the PW on July 20, 2007. Id.

³ The use of 2,412 SF is an obvious error because the floor plan of the building shows the area to be 4,133 SF.

⁴ Base costs include the labor, materials, and equipment necessary to complete each item of the scope of work and are identified within FEMA's Cost Estimating Format (CEF) as Part A costs.

⁵ The replacement cost should be based on 4,133 SF, which would increase the size and cost of the replacement calculation in Part A by 42 percent. The 50 percent threshold would no longer be met, thereby making the facility ineligible for replacement.

PW 7815 (City Hall)

On March 30, 2006, FEMA prepared the initial version of PW 7815 and indicated that the Applicant had completed 26 percent of the permanent repair work at the time of FEMA's inspection. The eligible work addressed in this PW was the repair of the air conditioning unit, roof, and suspended ceiling at an estimated cost of \$8,809. See Exhibit 5. FEMA approved the funding on June 19, 2006. Id. at 1.

On June 27, 2006, FEMA prepared PW 7815 version 1 and indicated that the Applicant had completed permanent repairs only to the air conditioning unit at the time of the inspection. See Exhibit 6. This PW version increased the cost estimate for repair by approximately \$169,821. Id. at 6. The additional scope of work was primarily for roof replacement (52 squares = 5,200 SF) and interior floor-to-ceiling damage that resulted from flooding. Id. at 5. FEMA approved the funding on September 8, 2006. Id. at 1.

On January 4, 2007, FEMA prepared PW 7815 version 2, and did not indicate whether the Applicant had completed previously funded permanent repairs at the time of the inspection. See Exhibit 7. The scope of work for this PW version indicates that the facility's dimensions are 82 feet by 36 feet, for a total area of 2,952 SF⁶. Id. at 5. This PW version increased the estimate for repair costs by \$295,641 a cumulative eligible repair cost of \$461,032. See Exhibit 8. Based on the increase in repair cost, the version recommends funding the demolition and replacement of the building, claiming the 50% Rule threshold was met. The calculation used base repair costs of \$226,063 from Part A divided by base replacement costs of \$353,426 from Part A to equal 63.96

⁶ The use of 2,952 SF is an obvious error because Municipal Building floor plan shows the area to be 5,558 SF.

percent.⁷ See Exhibit 7 at 6. This version calculated an estimate for replacement of \$729,760. FEMA approved the revised PW on July 18, 2007. Id. at 1.

PW 17663

FEMA prepared a preliminary draft of PW 17663 in March 2008 to consolidate PWs 7704 and 7815, and included the estimated cost of \$3,931,724 to replace the Municipal Building. When FEMA subsequently discovered that the estimates to replace the building used an incorrect square footage and the replacement cost estimates contained numerous errors and were incorrect, FEMA did not process the PW as a replacement project.⁸ On June 5, 2008, FEMA prepared PW 17663 version 0 to consolidate PWs 7704 and 7815, updated the scopes of work based on new assessments and revised the estimated cost to \$737,822. See Exhibit 9.

FEMA notified GOHSEP by letter dated July 8, 2008, that the Applicant was not eligible for a replacement facility as originally determined. See Applicant Exhibit 5.

PROCEDURAL HISTORY

First Appeal

In a letter dated October 6, 2008, the Applicant submitted a first-level appeal request for the replacement cost of its Municipal Building. GOHSEP submitted the Applicant's first appeal

⁷ The replacement cost should be based on 4,133 SF, which would increase the size and cost of the replacement calculation in Part A by 42 percent and the 50 percent threshold could not be met. With this correction, the Municipal Building is ineligible for replacement.

⁸ This PW used corrected total square footage of 4,134 SF for the Police Station Offices, and 5,558 SF for the City Hall Offices. Base repair costs were estimated at \$337,094, and base replacement costs at \$1,012,693. The corrected square footage and base repair- replacement cost estimates resulted in a 34 percent calculation that did not reach the 50 percent threshold to qualify for a replacement building. See Exhibit 9 at 9. PW 17663v0 was approved for repair costs of \$737,822 for a net funding of \$516,478 on August 7, 2008. Id. at 10 and 1. This is addressed in detail in the **Discussion and Analysis** section of this Response.

letter to FEMA on December 12, 2008. In support of its appeal, the Applicant provided an analysis from a consulting firm to support its request for a replacement facility. See Exhibit 10. In a letter dated February 25, 2009, FEMA denied the Applicant's request for replacement of the Municipal Building because the repair costs were 33 percent of replacement costs; therefore, the Municipal Building was not eligible for replacement under the Public Assistance program. See Exhibit 11.

Second Appeal

On April 30, 2009, the Applicant filed a second-level appeal, disagreeing with FEMA that the Municipal Building is repairable and requested funding for a replacement facility. See Applicant Exhibit 2. Prior to FEMA rendering an opinion on the second appeal, the Applicant withdrew its second appeal of PW 7704, PW 7815, and PW 17663 on October 28, 2009, and requested evaluation of its claim through the arbitration process. See Exhibit 12.

Request for Arbitration

The Applicant now files this request for arbitration seeking \$3,931,724 for replacement of its Municipal Building. In its arbitration request, the Applicant argues that replacement is required because estimates prepared by its consultant show that "the project does qualify for replacement." See Applicant's Request at 2. The Applicant also claims that not all eligible damage was assessed in FEMA's repair estimates. Id. at 2. By letter dated November 10, 2009, GOHSEP submitted a written recommendation in support of the Applicant's Arbitration Request.⁹ See Exhibit 13.

⁹ GOHSEP did not provide or introduce any new information or raise new issues in its response.

STANDARD OF REVIEW

While the ARRA provides for a limited waiver of immunity, it is silent as to the standard of review to be used in the arbitrations. However, the text of the ARRA clearly **contemplates an “arbitrary and capricious” -- and not a *de novo* -- standard of review.** First, the provision “the President shall establish an arbitration panel *under* the Federal Emergency Management Agency public assistance program,” (emphasis added) illustrates two clear concepts: (1) the Executive Branch is responsible for establishing the arbitration panel and defining its authority; and (2) the authority is “under” the FEMA PA program. It does not follow from that phrase that Congress intended a *de novo* review.

Second, the express purpose of the arbitration panel is “to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region.” Again, the plain text does not contemplate a *de novo* review that will duplicate previous time-intensive efforts to determine the amount of hurricane damage to facilities that is eligible for a grant under FEMA’s PA program.

Third, the ARRA grants the arbitration panel “*sufficient authority* regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of [the Stafford Act].” (emphasis added). The phrase “sufficient authority” indicates that this Panel’s authority is not absolute. Congress could not have intended the arbitration panel to have review authority that exceeds that of any Federal court. Indeed, this was settled by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), where the Court noted that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an

arbitral, rather than a judicial forum.”¹⁰ By implementing the appropriate “arbitrary and capricious” standard, the arbitration panel has sufficient review authority.

Finally, the ARRA tasked the arbitration panel to make determinations regarding the “award or denial” of the PA application for “covered hurricane damage.” Again, the ARRA provides for review of the prior administrative proceedings – the “award or denial” – not for an independent evaluation. The plain meaning of the phrase “covered hurricane damage” is that damage for which FEMA reimbursement is authorized by the Stafford Act. The ARRA plainly does not expand FEMA’s authority under sections 403, 406 and 407 to provide Federal funding for hurricane damages and an arbitration panel must also necessarily be guided by, and limited by, the scope of sections 403, 406 and 407.

The arbitration panel must also consider “general principles respecting the proper allocation of judicial authority to review agency orders” when making its decision regarding the standard of review. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985). It is well-settled that review of Agency action, where Congress has not designated a standard of review, defaults to the arbitrary and capricious standard articulated in the Administrative Procedure Act (APA), 5

U.S.C. § 706:

In cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme Court] has held that consideration must be confined to the administrative record and that no de novo proceeding may be held.

¹⁰ An arbitration under the ARRA is a unique circumstance resulting from special legislation specific to a particular set of entities that mandates FEMA, as the entity charged with implementing the Stafford Act, participate. The ARRA arbitration is therefore akin to an arbitration where one party is required to pursue a statutory claim. See, e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1468-69, 1476 (D.C. Cir. 1997) (comparing arbitration under a collective bargaining agreement where nearly unlimited deference is paid with an arbitration of a statutory claim where such deference is “not appropriate”).

United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Nat'l Broad. Co. v. United States, 319 U.S. 190, 227(1943)). Accordingly, courts consistently hold that, in the absence of a statutorily-defined type of review, the reviewing body must seek guidance in the APA and only “hold unlawful or set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ ” GTE South, Inc. v. Morrison, 1997 U.S. Dist. LEXIS 23871 (E.D. VA) (citing 5 U.S.C. § 706(2)(A)); see Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996); Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986) (proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review); see also Cabinet Mountains Wilderness v. Peterson, 222 U.S. App. D.C. 228, 685 F.2d 678 (D.C. Cir. 1982); Am. Canoe Ass'n v. United States EPA, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999).

The APA standard for review of FEMA’s public assistance decisions has been explained by the 9th Circuit when reviewing a decision by FEMA to deobligate certain costs from a PA grant:

Under the APA, we may set aside agency action only if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The standard is a narrow one, and the reviewing court may not substitute its judgment for that of the agency. However, the agency must articulate a rational connection between the facts found and the conclusions made. Also, we must give substantial deference to an agency’s interpretation of its own regulations.

Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Fed. Emergency Mgmt. Agency, 371 F.3d 701, 706 (9th Cir. 2004) (internal citations omitted). See also Graham v. Federal Emergency Management Agency, 149 F.3d 997, 1007 (9th Cir. 1998) (applying APA and arbitrary and capricious standard where decision is not discretionary).

DISCUSSION AND ANALYSIS

The Municipal Building is Repairable and Is Not Eligible for Replacement under the 50% Rule

FEMA, GOHSEP and the Applicant inspected the Municipal Building three times to document disaster damage. Based on these inspections, FEMA estimated that the cost to repair disaster damage is \$737,822. See Exhibits 10 and 17.

The Applicant argues that the amount of eligible costs to repair its Municipal Building exceeds 50 percent of replacement costs, and therefore it is eligible for replacement under 44 C.F.R. § 206.226(f). Specifically, the Applicant claims that FEMA must fund a replacement facility in the amount of \$3,931,724 as written in a preliminary draft of PW 17663 that was never approved, but was subsequently revised. See Applicant Exhibit 1.

FEMA has the authority to determine whether a facility is eligible for repair or replacement costs. 42 U.S.C. § 5172. Under FEMA's 50% Rule,

(1) 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.

(2) If a damaged facility is not repairable in accordance with paragraph (d)(1) of this section, approved restorative work may include replacement of the facility. The applicant may elect to perform repairs to the facility, in lieu of replacement, if such work is in conformity with applicable standards. However, eligible costs shall be limited to the less expensive of repairs or replacement.
44 C.F.R. § 206.226(f).

PW 17663 - Preliminary Draft

FEMA prepared PW 17663 to consolidate PW 7704 (Police Station) and PW 7815 (City Hall) into one PW and treat the offices as one building. In developing the combined scope of work for PW 17633, FEMA realized that the square footage used by the project officer to calculate the replacement cost estimates for PWs 7704 and 7815 was incorrect. The square footage for the replacement estimate in PW 7704 (Police Station) was calculated using 2,412 SF instead of the 4,133 SF stated in the floor plan. The square footage for the replacement estimate in PW 7815 (City Hall) indicated 2,952 SF, rather than the 5,558 SF stated in the floor plan. This error resulted in a lower replacement cost and a higher repair to replacement ratio. Quite simply, the 50% Rule threshold cannot be met when the Municipal Building's correct square footage is applied in the calculation.

A review of the scope of work for preliminary draft consolidated PW 17633 shows the repair square-footage estimate was also wrong. The square footage was inflated through extrapolating the damage dimensions to correspond with the corrected larger total building size from the floor plan. For example, in most line items for the scope of work, the quantities were inflated by a factor of 1.9 or 2.0, which is similar to the increase in total square footage based on the floor plan. See Exhibit 14. Extrapolating the damage dimensions artificially inflated the repair estimate. Consequently, the improperly calculated repair to replacement ratio exceeded 50 percent. See Exhibit 15. This flawed methodology resulted in incorrect cost estimates.

PW 17663 - Final

FEMA, the Applicant, and GOHSEP representatives conducted new damage assessments prior to rewriting PW 17663 in June 2008. Using the dimensions from the floor plan that the Applicant's consultant provided and information collected from the damage assessments, FEMA revised PW 17663 to reflect the correct cost to repair the disaster damage to the Municipal Building and to determine whether the building would be eligible for replacement under Response and Recovery Directorate Policy 9524.4. The appropriate calculation for the 50% Rule uses \$337,094 for base repair costs and \$1,012,693 for base replacement costs. See Exhibit 16. The percent of repair to replacement is 34 percent. The final PW 17663 estimates an eligible repair cost of \$737,822, less insurance recovery, for a net of \$516,478. See Exhibit 9 at 10. FEMA approved the funding on August 7, 2008.

PW 17663 reflects the correct cost to repair disaster damage to the Municipal Building. The building does not qualify for replacement under the Response and Recovery Directorate Policy 9524.4.

GOHSEP's Estimate

The Applicant provided an assessment and report developed by GOHSEP's consultant, O'Malley Consultants, Mining and Civil Engineering (O'Malley). See Applicant Exhibit 11. The Applicant claims the consultant concluded that the project qualifies for replacement. The report states that the City Hall is 73 percent damaged and the Police Station is 80 percent damaged; therefore, both buildings would be eligible for replacement. See Applicant Exhibit 11, Table of Contents 7 and 9.

The O'Malley scope of work and cost estimates are flawed. In July 2008, the FEMA Louisiana Transitional Recovery Office (LTRO) developed tables showing comparisons between FEMA and O'Malley's base repair estimates¹¹. See Exhibits 17 and 18. The FEMA repair estimate for the Police Station is \$128,200, compared to the O'Malley repair estimate of \$469,426, while the FEMA repair estimate for the City Hall is \$144,457, compared to O'Malley repair estimate of \$416,245.

The Municipal Building was flooded by only six inches of water following Hurricane Katrina, and, to date, remains occupied and used for municipal purposes. The O'Malley estimate includes costs for items such as mold containment, replacement of door hardware and hinges, electrical conduit, replacement of copper wiring, cleaning of masonry using chemicals and high pressure water, and replacement of fire doors and metal frames. The TRO comparison table contains other general comments for each estimate. See Exhibit 17 at 4-5, 10 and Exhibit 18 at 16, 21. The comments cover issues of National Average Cost versus Local Cost Use of Factors; added scope; increased quantities; changes in item description and associated costs; use of General Conditions (Division 1) Items; and use of unnecessary work items.¹²

The O'Malley report is flawed and does not present an eligible scope of work based on disaster damage, and the cost estimate is inflated, such that it improperly supports a replacement facility under the 50% Rule. FEMA has developed its scope of work and cost estimate in accordance with applicable regulations and policies, and concludes that the Applicant has not demonstrated

¹¹ The FEMA estimates use O'Malley's line items and are not to be compared to the CEF for PW 17663.

¹² General conditions (Division 1), is in reference to the Construction Specifications Institutes (CSI) divisions of construction specifications.

that its Municipal Building meets the 50% Rule threshold to warrant PA funding to replace the facility.

CONCLUSION AND RECOMMENDATION

FEMA has approved \$737,822 (less insurance proceeds) to repair disaster damage to the Municipal Building. The Municipal Building is not eligible for replacement under Public Assistance regulations and policy. FEMA's estimate of the cost to repair the Municipal Building has a reasonable basis and is entitled to deference. Therefore, FEMA respectfully recommends this Panel find in favor of FEMA and deny the Applicant's request for Public Assistance funding to replace the Municipal Building for \$3,931,724.

Respectfully submitted on this 30th day of November 2009 by,

A handwritten signature in cursive script, appearing to read "Kim A. Hazel", written over a horizontal line.

Kim A. Hazel
Senior Attorney
Federal Emergency Management Agency
500 C St., S.W.
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Cc: James L. Butler
City Accountant
City of Westwego

Mark Riley
Deputy Director
GOSEPH

Gary Jones
Acting Administrator
Federal Emergency Management Agency Region VI

DOCKET #CBCA 1783-FEMA

LIST OF EXHIBITS

- Exhibit #1 PW 7704v0
- Exhibit #2 PW 7704v1
- Exhibit #3 PW 7704v2
- Exhibit #4 CEF for PW 7704v2
- Exhibit #5 PW 7815v0
- Exhibit #6 PW 7815v1
- Exhibit #7 PW 7815v2
- Exhibit #8 CEF for PW 7815v2
- Exhibit #9 PW 17663v0 (Overwrite)
- Exhibit #10 Applicant First Appeal Letter
- Exhibit #11 FEMA First Appeal Response Letter
- Exhibit #12 Applicant's Withdrawal Letter
- Exhibit #13 GOHSEP Arbitration Letter
- Exhibit #14 Comparison of Extrapolation
- Exhibit #15 CEF for Preliminary PW17663
- Exhibit #16 CEF for PW 17663v0 (Overwrite)
- Exhibit #17 O'Malley Comparison - Police Station
- Exhibit #18 O'Malley Comparison - City Hall
- Exhibit #19 Major Disaster Declaration, DR-1603-LA