

BOBBY JINDAL
GOVERNOR



ANGELE DAVIS
COMMISSIONER OF ADMINISTRATION

State of Louisiana

Division of Administration

September 30, 2009 **FACILITY PLANNING AND CONTROL**

ATTN: FEMA Arbitration Administrator
Civilian Board of Contract Appeals
1800 F. Street, NW
Washington, D.C. 20036

VIA FEDERAL EXPRESS

Re: Request For Arbitration
In Re: FEMA PW No. 2175(Versions 0-3) and Related Matters
APPLICANT NAME: State of Louisiana, Facility Planning and Control (FP&C)
FIPS #: 000UXL4N-00
FEMA Disaster #: 1603

Dear FEMA Arbitration Administrator:

Please accept this as our formal Request for Arbitration pursuant to 44 CFR Part 206, subpart G, adding section 206.209. Enclosed with this correspondence is an original and three copies of "Facility Planning and Control, State of Louisiana's Request for Arbitration of Project Worksheet Number 2175V3 and Related Matters" along with arbitration exhibits submitted in support of this Request for Arbitration. As set forth in the enclosed documents, we are filing this Request for Arbitration in lieu of the existing administrative appeal of the captioned PW and hereby withdraw the pending appeal.

Thank you for your consideration of Request for Arbitration. If you should have any questions or need any additional information, please do not hesitate to contact this office.

Sincerely,


Jerry W. Jones
Assistant Commissioner

Enclosures as stated

cc: Mr. Gary Jones, FEMA Regional Administrator (via Federal Express)
Mr. Mark Riley, Grantee/GOHSEP (Hand Delivered)

REQUEST FOR ARBITRATION

IN RE FEMA PW NO. 2175 (VERSIONS 0-3) AND RELATED MATTERS

APPLICANT: FACILITY PLANNING & CONTROL, STATE OF LOUISIANA
FACILITY: CHARITY HOSPITAL (STATE ID 00521)
FIPS NO: 000UXL4N-00
FEMA PW NO: 2175 (VERSIONS 0-3)

**FACILITY PLANNING AND CONTROL, STATE OF LOUISIANA'S
REQUEST FOR ARBITRATION OF PROJECT WORKSHEET
NUMBER 2175V3 AND RELATED MATTERS**

TO THE HONORABLE ARBITRATION PANEL:

**I. STATEMENT OF SUBJECT MATTER JURISDICTION AND ADMINISTRATIVE
APPEAL WITHDRAWAL**

This Honorable Arbitration Panel is granted subject matter jurisdiction over this dispute pursuant to 44 CFR Part 206, subpart G, adding section 206.209, which is derived from statutory authority set forth in Public Law 111-5, Section 601.¹ The amount in controversy exceeds five hundred thousand dollars. The “purpose” and stated reasons for the granting of subject matter jurisdiction is “to expedite recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast region” (preamble, sec. 206 IIB), and therefore the jurisdiction should be construed to “expedite recovery efforts.” 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). The respondent/FEMA has different jurisdictional requirements to simultaneously submit a

¹See Arbitration Rules, 44 CFR Part 206, subpart G, adding section 206.209, attached as Ex. “37”.

response in support of its position, a copy of the project worksheet(s), and any supporting information to the arbitration administrator, the Grantee, and the applicant/subgrantee (206.209(e)(4); preamble, sec. 206F).

In light of this grant of subject matter jurisdiction, applicant/subgrantee files this Request for Arbitration in lieu of continuation of the existing administrative appeal of the captioned PW pursuant to section 206.209(e)(2).

II. INTRODUCTION

Pursuant to 44 CFR Part 206, Facility Planning and Control - State of Louisiana ("FP&C" or "Applicant")² submits this request for arbitration (the "Request for Arbitration") in connection with Project Worksheet ("PW") No. 2175V3 issued by the Federal Emergency Management Agency ("FEMA") through the Louisiana Transitional Recovery Office ("LA-TRO") and obligated on or about January 11, 2009. This PW relates to Charity Hospital (State ID 00521) and its stated purpose is to "(1) consolidate all building damage, scope of work, and costs obligated for Charity Hospital to date and (2) provide additional building damage description and resulting additional scope of work and costs based on additional information brought forth by the Applicant, FEMA site validation and additional site observations, and construction costs based on current market

²FP&C is the named Applicant and is authorized to act pursuant to State of Louisiana Executive Order No. KBB 2006-1 which provides that "the Office of Facility Planning and Control shall serve as the applicant for public assistance to the Federal Emergency Management Agency for all permanent repairs to damaged state facilities and buildings necessitated by Hurricane Katrina and/or Rita." Attached as Ex. "1". However, FP&C serves as Applicant on behalf of the Board of Supervisors of Louisiana State University Agricultural and Mechanical College (LSU Board of Supervisors") which is the designated owner of Charity Hospital pursuant to La. R.S. 17:1519.2(A)(1) and (B), attached as Ex. "2". Both the Health Care Services Division and the Health Sciences Center are component parts of and subject to the control of the LSU Board of Supervisors. Also, the Medical Center of New Orleans (MCLNO) of which the Charity Hospital Building is a part, is subject to LSU Board of Supervisors ownership and control.

conditions.”³

This Request for Arbitration seeks to have the arbitration panel determine that FEMA has failed or refused, for more than four (4) years since Charity Hospital was devastated by Hurricane Katrina, to meet its obligations with respect to the PW at issue. FP&C asks the arbitration panel to determine, based on the record herein and which was before FEMA at the time it made its prior decision, that FP&C is entitled to the relief requested. The arbitration panel need look no further than the unrefuted multiple reports issued by highly qualified experts that have uniformly determined that the damages to Charity Hospital easily exceed fifty (50%) percent of the hospital’s replacement cost. Under FEMA’s own explicit 50-Percent Rule, a proper finding that the damages exceed 50 percent of the replacement cost clearly entitles FP&C to receive the replacement value of the facility. Accordingly, FP&C asks the arbitration panel to review the record provided herewith and to determine the FP&C is entitled to the replacement value of Charity Hospital - - which FP&C has calculated to be not less than \$491,884,000 using FEMA’s own Cost Estimating Format.

FP&C submits that PW2175V3 issued by FEMA (LA-TRO) in the amount of \$121,786,484 fails to fully and adequately assess the scope of work or the costs to repair the damages to Charity Hospital. FEMA has provided no evidence that it has undertaken a complete room-by-room, floor-by-floor assessment of the damages to the entirety of Charity Hospital, as it required FP&C to do, and in which it participated as FP&C did cause such an assessment. The only known and disclosed assessment undertaken by FEMA took place in late 2005 and was primarily limited to damages identified in the Charity Hospital basement. It did not include a complete and thorough evaluation

³A copy of PW2175V3 is attached as Ex. “3”.

of the entire hospital by persons with expertise to identify, evaluate and assess the catastrophic architectural, plumbing, mechanical, electrical, fire protection and environmental damages caused by Hurricane Katrina. FEMA simply cannot support or justify the amounts obligated in PW2175V3 based upon any articulated rational or objective and thorough analysis by FEMA or anyone engaged by FEMA to assess the damages independent of the assessments caused by FP&C which FEMA required and in which it participated.

FP&C on the other hand, engaged the services of highly qualified experts to thoroughly assess the damages to Charity Hospital. Most notably, a team of experts lead by Blich Knevel Architects (the "BKA Team") undertook an 18-month room-by-room, floor-by-floor evaluation and assessment of the storm related architectural, plumbing, mechanical, electrical, fire protection and environmental damages in the basement and on floors 1 through 20 of Charity Hospital. As demonstrated in great detail herein, this 18-month assessment resulted in the production of a 2000-plus page report by the BKA Team identifying each item of damage and detailing the estimated cost to repair and/or replace each damaged item. The cost to repair the disaster-related damages identified by the BKA Team far exceed the amounts obligated by FEMA in PW2175V3. FEMA's rejection of or refusal to properly consider the damages identified by the BKA Team is without any rational basis in fact and is not based upon any reasonable support, information or documents prepared or produced by FEMA in connection with this claim.

Additionally, PW2175V3 fails to recognize or apply the FEMA 50-Percent Rule with respect to the extensive damages to Charity Hospital that have been determined by highly qualified expert consultants to greatly exceed 50 percent of the replacement cost. The "Restoration of Damaged

Facilities” standard is governed by 44 CFR § 206.226 which provides:

- “(f) Repair versus replacement.
- (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 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 ... approved restoration work may include replacement of the facility.”⁴

The 18-month evaluation and assessment conducted by the highly qualified BKA Team and the thousands of pages of documentation submitted simultaneously with this Request for Arbitration fully supports the conclusion that Charity Hospital is a facility that was devastated by Hurricane Katrina. The resulting damages greatly exceed 50 percent of the replacement cost. The facility can no longer perform its predisaster function as a Trauma Level One hospital and the leading medical training and educational facility in the State of Louisiana. This obvious conclusion was reached not only by the BKA Team but also two other qualified groups of experts who have evaluated the facility (whose reports are submitted as further support for FP&C’s claim).⁵

FP&C’s Claim for replacement cost of at least \$491,884,000 is derived using FEMA’s own Cost Estimating Format (CEF) *in accordance with FEMA rules and guidance*.⁶ The CEF is a cost estimating tool used by FEMA to estimate the cost of large permanent work projects. It is “a forward-pricing methodology developed by FEMA to more accurately estimate total project costs

⁴See 44 CFR § 206.226, attached as Ex. “36”.

⁵See detailed discussion of FEMA’s 50-Percent Rule and the results of the BKA evaluation at Section V.B., *infra*.

⁶See detailed discussion of replacement cost calculation using the CEF format at Section V.C., *infra*. See also Cost Estimating Format (CEF) Replacement Cost Estimates prepared by GOHSEP and submitted to FEMA (LA-TRO) with the FP&C Claim on or about July 3, 2008, attached hereto as Ex. “4”. See also FEMA-Cost Estimating Format For Large Projects Instructional Guide, attached hereto as Ex. “5”.

based on construction industry standards”.⁷ An accurate assessment of the disaster-related damages, corresponding scope of work, the proper application of the 50-Percent Rule and FEMA’s Cost Estimating Format demonstrate that FP&C is entitled to a replacement value of at least \$491,884,000 for Charity Hospital.

FP&C sets forth the factual background and the various arbitration issues below and forwards this Request for Arbitration of PW2175V3 simultaneously to the Grantee, the State of Louisiana Governor’s Office of Emergency Preparedness and Homeland Security (“GOHSEP”), the FEMA Regional Administrator, and the arbitration administrator as required by the newly adopted FEMA arbitration rules. FP&C respectfully asks the designated arbitration panel to correct the erroneous and unsupported action taken by FEMA (LA-TRO) in its issuance of PW2175V3 and the continued errors and omissions by FEMA-Region 6 in rejecting FP&C’s First Appeal. FP&C requests that the arbitration panel determine the scope of work and the costs to repair the damages to Charity Hospital, apply the 50- Percent Rule (as demonstrated by this record and the absence of a proper basis for FEMA’s consistent prior refusal to timely apply the rule) and award FP&C the replacement value of Charity Hospital - - which is calculated to be not less than \$491,884,000 *using FEMA’s own Cost Estimating Format*.

III. FACTUAL BACKGROUND

A. Charity Hospital Pre-Katrina

Charity Hospital is located at 1532 Tulane Avenue, New Orleans, Louisiana. The hospital was built in 1939. It is a twenty (20) story medical facility and has a total gross area of

⁷See general discussion at www.fema.gov/government/grant/pa/faq.shtm- - “What is the Cost Estimating Format?”

approximately 998,000 square feet. Prior to Hurricane Katrina, Charity Hospital *was fully functional, licensed and accredited as a medical patient care/critical care facility.* In addition, Charity Hospital has long served as one of the State's premier teaching and research facilities. The hospital had 345 licensed beds and was accredited by the Joint Commission on Accreditation of Healthcare Organization.⁸ It is one of only two "Trauma Level One" facilities in the entire State of Louisiana. Charity Hospital was administered by the Louisiana State University Board of Supervisors through the LSU Health Care Service Division (LSU-HCSD) and the LSU Health Sciences Center-New Orleans, both subject to the control of the Board of Supervisors (hereafter "LSU").

Prior to Hurricane Katrina, Charity Hospital fulfilled a dual mission. First and foremost, Charity Hospital brought compassionate, quality medical care to Louisiana residents regardless of income or insurance coverage. Charity Hospital provided a full range of medical services to the indigent and those in need without private insurance coverage. Secondly, Charity Hospital (through LSU) provided high quality training and educational facilities for students, ensuring for all Louisianians the availability of well-trained health professionals. It is widely reported that some 70 percent of the doctors currently practicing in Louisiana were trained in New Orleans at Charity Hospital. In 2004, Charity Hospital trained 32 percent of the medical residents in Louisiana. In 2008, with only the interim public hospital in operation, the percentage of medical residents in training had declined to only 18 percent of the medical residents in Louisiana.

Additionally, Charity Hospital's economic impact in the New Orleans area and the State of

⁸See Accreditation attached as Ex. "6".

Louisiana is immense. According to the Interim LSU Public Hospital Annual Report for Fiscal Year 2007, the interim hospital employed 1,620 employees and generated revenues of nearly \$500 million. The economic impact of the jobs and revenues created by the smaller interim hospital is far less than pre-Katrina Charity Hospital. For all of these reasons, the building of a replacement hospital is critical to the recovery of the healthcare system in New Orleans in terms of medical care, jobs, revenues, medical education and research.

B. Charity Hospital 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. It caused major wind and water damage and the storm surge caused catastrophic damage along the coastline of Louisiana and the greater New Orleans area. Katrina's storm surge caused several breaches in levees around New Orleans. Most of the city was flooded, as breached drainage and navigational canals allowed water, sewerage and chemicals to flow into much of Orleans Parish. The Center for Disease Control ("CDC") issued warnings to residents, clean-up workers and property owners as to potential hazards that could occur from contact with the toxic floodwaters.

Charity Hospital's more than 100,000 square foot basement was flooded to a height of approximately 12 feet. The highest observed level of the floodwater was within an inch of the first floor. The upper floors received wind and water damage from hundreds of broken windows, damaged and blown out doorways and roof leaks. The major mechanical, electrical, and plumbing (MEP) systems in Charity Hospital were located in the basement which was totally inundated by contaminated and corrosive floodwaters *for more than 40 days*. Unlike more modern constructed

facilities, this facility was constructed in 1939 when it was a common practice to put critical MEP in the least utilized spaces. The critical MEP of this hospital sustained its entire operations; it was the heartbeat that allowed the hospital to function. The contaminated floodwaters incapacitated all utility infrastructure of the entire building, not for a few days or weeks, but for months. As a result of the major flooding from Katrina and the aftermath in New Orleans, the critical utility infrastructure of this hospital failed quickly. In addition, wind damage to the roof and roof top equipment caused catastrophic environmental control failures inside the building.⁹

Patients, medical staff and operational personnel remained in the hospital immediately after Katrina since it was anticipated that the hospital would serve as a critical needs shelter. However, the subsequent levee breaches and the resulting flooding left more than 1,000 individuals trapped in the hospital without water, air-conditioning, functional sanitary sewer and food. Patients, medical staff and personnel were eventually evacuated about one week after the storm.

Following the evacuation of Charity Hospital, military personnel took control of the building and all access thereto for weeks after the storm. The floodwaters remained in the basement of Charity Hospital for some forty (40) days following the storm. The lack of access, electricity and other utilities and the overall disaster environment of the city prohibited pumping water and maintaining climate controls immediately following the hurricane. These dire circumstances increased the opportunity for mold plumes and mildew to grow within the building during the days, weeks and months after the storm.

⁹A video disk depicting the catastrophic damage to Charity Hospital caused by Hurricane Katrina is attached as Ex. "7".

C. Asset Protection Measures Taken Post-Katrina¹⁰

Despite the catastrophic conditions that existed at Charity Hospital and throughout the New Orleans area, hospital staff and hired contractors worked diligently to assess the damage and to undertake asset protection measures.¹¹ Contentions by FEMA to the contrary are wholly unsupported by facts.¹² Within *two weeks* after the storm, initial damage assessments were undertaken. Those efforts were hindered by the fact that the basement remained fully flooded as were major sections of the City of New Orleans. Initial assessments disclosed that there were significant amounts of medical waste, human waste and garbage in the building. The Charity Hospital morgue and basement contained approximately seventeen sets of human remains. These toxic and hazardous conditions implicated significant health and safety concerns which impacted early efforts to engage in clean-up, repair and overall asset protection of the facility. Mold formation was already evident on architectural surfaces throughout the building, associated with rainwater leaks and uncontrolled environmental conditions.¹³

By mid-September, LSU contracted with a private security firm to provide security for the hospital and a fence was installed around the entire perimeter of the hospital. A contract was issued by the U. S. Army Corps of Engineers to pump out the floodwaters from the Charity Hospital

¹⁰Asset protection measures are discussed in detail herein because FEMA has erroneously claimed that much of the damage to Charity Hospital was caused by FP&C's failure to protect its assets. See further discussion of this arbitration issue at Section V.E., *infra*.

¹¹Asset protection measures are summarized in the Chronology of Asset Protection at pp. 29-35, attached as Ex. "8".

¹²See discussion at Section V.E., *infra*.

¹³See letter from Paul Rainwater (Louisiana Recovery Authority) to Congressman Joseph Cao dated February 20, 2009, attached as Ex. "9".

basement. Initial pumping began promptly (with the use of diesel powered pumps) but efforts were hampered by additional flooding caused by Hurricane Rita in September 2005 and other conditions which caused water intrusion to continue in the basement long after Hurricane Katrina. *Within a month* after Hurricane Katrina, significant efforts were undertaken to repair blown out windows and other building envelope features. From September 2005 through October 28, 2005, workers boarded or otherwise closed approximately 480 exterior windows and doorways. Also, by the end of October 2005, workers completed temporary repairs to the Charity Hospital roof and remedial repairs were undertaken thereafter when additional roof leaks were identified.¹⁴

By mid-October 2005, workers developed and implemented a bypass of portions of the electrical systems that allowed partial electrical power to be restored to Charity Hospital. This was accomplished by bypassing flood damaged 13.8 kilovolt feeders in the basement and rigging two temporary 13.8 kilovolt feeders on the fourteenth floor. The bypass resulted in partial re-energizing of loads on floors three through twenty and allowed some environmental controls to be restored to the floors at and above floor three.

Beginning December 1, 2005, LSU staff began minimum bi-weekly inspections of Charity Hospital to identify building envelope and security failures. As these items were identified, work orders were generated and carried out to correct any identified problems. In addition to regular bi-weekly inspections, workers made inspections after each major weather event (significant rain and/or wind) to identify and repair deficiencies. These activities have continued uninterrupted through the

¹⁴See Chronology of Asset Protection-Charity Hospital, attached as Ex. "8".

present date.¹⁵ Throughout this extended period during which Charity Hospital has remained uninhabited, LSU has undertaken to perform partial asbestos removal in connection with asset protection, mold remediation, and debris removal. To date, LSU continues to incur charges for electricity and generators to operate cooling systems in portions of the vacant hospital.¹⁶ In total, *LSU has spent over \$5 million on asset protection with respect to Charity Hospital, much of which has been reimbursed by FEMA upon their determination of appropriateness.*

D. Three Groups Of Independent Consultants Were Hired to Assess The Damages To Charity Hospital

FP&C, LSU and GOHSEP have engaged three separate and independent groups of highly qualified architectural, engineering, construction and environmental consultants to perform assessments of the damage to Charity Hospital caused by Hurricane Katrina. These three groups of consultants, first, ADAMS Management Services Corp. (the “ADAMS Team”), then Blich Knevel Architects (the “BKA Team”) and then RSMeans Business Solutions (the “RSMeans Team”), all reached the same conclusion. After performing assessments of the damages and the estimated costs to repair those damages, these independent consultants each concluded that the estimated cost to repair Charity Hospital was well over 50 percent of the estimated replacement cost.

1. Analysis By The ADAMS Team

The ADAMS Team was engaged by LSU in the latter part of 2005. ADAMS is a national consulting firm with twenty years of experience assisting healthcare clients with construction and

¹⁵See Paul Rainwater letter to Congressman Cao, attached as Ex. “9”.

¹⁶A sampling of electric, water and sewer bills paid by LSU for Charity Hospital are attached hereto in electronic form as Ex. “10”.

expansion needs. The ADAMS Team included industry experts in the fields of architecture, engineering, environmental, and construction to assess Charity Hospital.

The ADAMS Team was engaged to: (i) produce an impartial, third party facility condition assessment of Charity Hospital; (ii) identify life safety and health issues with respect to the physical construction; (iii) recommend specific corrective measures complete with repair cost estimates; and (iv) estimate replacement costs for comparison to estimated repair costs. The ADAMS Team thoroughly inspected the hospital and addressed damages relating to environmental conditions, exterior structure, interior finish/structure, HVAC, electrical, plumbing, fire safety, accessibility, and vertical transportation.

In November 2005, the ADAMS Team issued its summary assessment report (the "ADAMS Report").¹⁷ The ADAMS Report describes the nature of the damage assessed, the calculation of estimated repair costs and the calculation of estimated replacement cost. The ADAMS Report concluded that estimated repair costs equaled 65.2% of replacement costs.¹⁸ Additionally, the ADAMS Report concluded that Charity Hospital is "unsuitable for use and occupancy as a health care or patient care facility." The report also notes that Hurricane Katrina and the resultant flood damage have pushed the facility "beyond any practical measure for rehabilitation for patient care or research activities." Finally, the ADAMS Report concludes that Charity Hospital has been "rendered uninhabitable and unsalvageable" and "the cost of rehabilitating cannot be justified in comparison

¹⁷The ADAMS Report-Executive Summary is attached as Ex. "11".

¹⁸Although the 2005 Adams Report calculates replacement cost of \$395 million, as discussed in Section V.C. *infra*, FP&C performed a separate calculation using FEMA's *Cost Estimating Format* which resulted in a replacement cost of \$491 million. See *Cost Estimating Format (CEF) Replacement Cost Estimates*, attached as Ex. "4".

to replacement facilities built to standards of modern healthcare delivery.”

The ADAMS Report was initially provided to FEMA personnel in November 2005 as evidence of the nature and extent of the damages to Charity Hospital. However, FEMA personnel immediately rejected the ADAMS Report because FEMA claimed that it was only a *summary* report and did not contain the comprehensive assessment of damages needed to support the claim for damages to Charity Hospital.¹⁹ When FEMA rejected the ADAMS Report for not being as detailed as FEMA required (essentially a “take-off” for the entire building), FP&C engaged the BKA Team to perform a floor-by-floor, room-by-room assessment of the entire Charity Hospital building which is described below.

2. Analysis By The BKA Team

In light of FEMA’s objection to the “summary” nature of the ADAMS Report, FP&C engaged the BKA Team in August 2006 to perform a second and even more detailed independent, third-party assessment of the damages to Charity Hospital. The BKA Team was engaged to: (i) produce an impartial comprehensive facility condition evaluation of damages resulting from Hurricane Katrina incurred at Charity Hospital; (ii) identify and assess direct and indirect damages from the storm; (iii) recommend corrective measures with appropriate cost estimates; and (iv) estimate replacement costs for the Charity Hospital building.²⁰ The BKA Team consisted of a collaboration of architects, engineers and environmental consultants. Blich Knevel Architects

¹⁹Interesting, FEMA attempted to rely exclusively on the ADAMS Report in denying FP&C’s First Appeal. FEMA devised an unsupported argument that the ADAMS Report purportedly demonstrated that the 50-Percent Rule was not satisfied. FP&C addresses this baseless argument in detail in Section V.D. and shows that FEMA was arbitrary in its deletion of over \$68 million in damages identified in the ADAMS Report.

²⁰See Affidavit of H. V. Nagendra, attached as Ex. “32”.

("BKA") provided architectural expertise, URS Corporation ("URS") provided engineering services, and W. D. Scott Group, Inc. ("W. D. Scott") provided environmental expertise.²¹

BKA specializes in providing a full range of design and construction administration services for major medical centers, specialty hospitals, out-patient facilities, clinics and hospital renovations. BKA is a founding member of the American College of Health Architects, a national organization committed to developing and credentialing the best healthcare architects in the United States. BKA has provided architectural services for many of the regions healthcare facilities, including: East Jefferson General Hospital-Metairie, LA; Veteran's Administration Medical Center-Biloxi, MS; Touro Infirmary-New Orleans, LA; Pendleton Memorial Methodist Hospital-New Orleans, LA; and Slidell Memorial Hospital-Slidell, LA. BKA's recent FEMA reimbursable storm recovery projects include the University Hospital-Interim Facility in New Orleans, Memorial Hospital at Gulfport and several non-profit elder-care and nursing home facilities in New Orleans.

URS is one of the industry's leading architectural, engineering, planning, environmental and construction services firms serving government agencies and private industrial and commercial companies worldwide. It is a top-tier contractor to the U. S. Federal government in the areas of program management, systems engineering, technical assistance, operations and maintenance, construction and environmental management services. URS personnel were engaged by FEMA as the lead electrical engineers for Katrina and Rita focusing on damage assessments with the Justice Team, dealing with the courts, prisons and other structures. URS has also been engaged with regard

²¹Biographical Information on the BKA Team (i.e. BKA, URS and W. D. Scott) is attached hereto as Ex. "12". Also attached as Ex. "13" is the Louisiana Architects Selection Board Application completed by BKA in connection with the Charity Hospital engagement. See also Affidavit of H. V. Nagendra, attached as Ex. "32".

to numerous other U. S. government projects including the Keesler Air Force Base Medical Center Renovations, Tri-Service Ambulatory Clinic at the Pentagon, U. S. Naval Research Laboratory Renovation, and various U. S. Veterans Affairs Medical Centers, to name a few.

W. D. Scott is a leader in the management of hazardous/toxic materials and waste. The company is staffed with seasoned environmental and safety professionals who are expertly trained in the areas of environmental site assessments, hazardous waste investigations, remediation services, environmental permitting, and air quality engineering. A local company, W. D. Scott was one of the first environmental consultants on the scene following Hurricane Katrina and provided environmental services on projects involving Xavier University, East Jefferson General Hospital, Scariano Brothers Meatpacking, Bywater Hospital, University Hospital and St. Bernard Parish Schools. W. D. Scott's involvement with the BKA Team was spearheaded by William D. Scott, the company's President and Senior Project Manager. Mr. Scott, like all of the other members of the BKA Team, is a highly trained engineer with approximately thirty (30) years of experience in environmental matters.

The BKA Team embarked on a detailed room-by-room, floor-by-floor assessment of the hospital from September 2006 through December 2006. During this four month period, the BKA Team had some 30-40 individuals in the hospital daily taking photographs, recording assessment notes and performing a detailed assessment of the damages.²² The BKA Team addressed storm damages relating to the exterior facade, interior finishes, structure, HVAC, electrical, plumbing, fire safety, environmental remediation and vertical transportation and systems. Moreover, during an 18-

²²See BKA Supplemental Report, Ex. "22" and Nagendra Affidavit, Ex. "32".

month period from September 2006 through February 2008 members of the BKA Team *generally met with FEMA personnel on a bi-weekly basis to discuss the ongoing assessment work and the various items of damage.*²³ The lead FEMA personnel who participated in these meetings were Susan O'Brien, Michael Beall and Steven Arroyo. *FEMA personnel were well aware of the scope of work, the nature of the assessment and the methods used by the BKA Team to quantify the damages as a result of these regular meetings.*²⁴ *FEMA did not object to or raise any significant issues regarding the scope of the work, the quantities involved, and did not identify any duplicate items, or deferred maintenance during those meetings.*²⁵

In June 2008, the BKA Team issued its storm damage evaluation report (the "BKA Report").²⁶ The BKA Report consists of more than 2000 pages of information and data summarizing the BKA Team's detailed floor-by-floor, room-by-room assessment of the damages. The BKA Report describes the architectural, engineering and environmental damages, provides estimated building repair costs and estimated building replacement costs. Based upon the estimates for cost of repair and replacement described in the BKA Report, the estimated repair cost is equal to 80.1% of the replacement cost of the facility.²⁷ Thus, like the ADAMS Report before it, the BKA Report concluded that the estimated repair costs for Charity Hospital greatly exceeded 50 percent of the

²³Id.

²⁴Id.

²⁵Id.

²⁶An electronic version of the BKA Report is attached as Ex. "14". See also Nagendra Affidavit, Ex. "32".

²⁷See discussion and calculation at Section V.B, *infra*.

replacement cost of the facility.²⁸ It was the BKA Report that FP&C primarily relied upon in submitting its claim in June 2008 for a new cost alignment. Significantly, it is the BKA Report that FEMA (LA-TRO) primarily referred to in issuing PW2175V3.²⁹

3. Analysis By The RSMMeans Team

The RSMMeans Team was engaged by the Governor's Office of Homeland Security and Emergency Preparedness ("GOHSEP") in early 2008 to provide another independent, third-party assessment of Charity Hospital by: (i) estimating the disaster related damage and disaster related repair costs; (ii) estimating a replacement cost for Charity Hospital; and (iii) meeting with FEMA and BKA to evaluate the process for determining the methodologies used in the assessment.³⁰ GOHSEP was aware that RSMMeans is the largest and most respected construction cost analyst in the United States and wanted additional confirmation of the accuracy of the BKA assessment. RSMMeans has developed the most comprehensive construction database in North America, offers nearly one hundred costs and reference publications, and provides extensive consulting services in the area of construction costs. RSMMeans has been engaged by various governmental entities, including, the U. S. Department of Energy, the U. S. Department of Labor, the U. S. Army Corps of Engineers, the U. S. Army-Institute of Water Resources and the U. S. Department of Veteran Affairs to perform various consulting services.³¹ The RSMMeans Team assigned to the Charity Hospital project included Barbara Balboni, a Senior Engineer specializing in predictive cost modeling in the governmental and

²⁸See Nagendra Affidavit, Ex. "32".

²⁹See PW2175V3, attached as Ex. "3".

³⁰See Affidavit of Barbara Balboni, attached as Ex. "33".

³¹Id.

corporate sectors, Eugene Spencer, a Senior Engineer with over thirty years of experience in private and government construction and facilities maintenance on complex projects such as hospitals and medical research facilities, and John H. Chiang, a Senior Engineer with cost estimation expertise in residential, commercial and industrial sectors.³²

The RSMMeans Team was engaged to perform estimates for the repair of Charity Hospital to pre-Katrina conditions and to determine the estimated replacement cost. In performing its analysis, the RSMMeans Team undertook multiple site visits to Charity Hospital, engaged in meetings with the BKA Team regarding their floor-by-floor assessment, reviewed floor plans and specifications prepared by the BKA Team, reviewed the various damage assessments prepared by BKA, URS and W. D. Scott, reviewed the chronology of asset protection, and reviewed the ADAMS Report.

In June 2008, the RSMMeans Team issued its Charity Hospital estimates report (the “RSMMeans Report”).³³ The sixty-five page report includes *line-item repair estimates* for all architectural, electrical, mechanical, structural, environmental and other damages identified in the BKA Team’s room-by-room, floor-by-floor assessment of damages. The RSMMeans Report also includes a detailed replacement cost analysis for Charity Hospital. The RSMMeans Report calculated estimated repair costs to be 68.2% of estimated replacement cost of the facility.³⁴ Thus, like both the ADAMS Report and the BKA Report, the RSMMeans Report concluded that estimated repair costs for Charity Hospital would easily exceed 50 percent of the estimated replacement cost of the facility.³⁵

³²Biographical Information on the RSMMeans Team is attached as Ex. “15”. See also Balboni Affidavit, Ex. “33”.

³³A copy of the RSMMeans Report is attached as Ex. “16”. See also Balboni Affidavit, Ex. “33”.

³⁴See discussion and calculation at Section V.B., *infra*.

³⁵See Balboni Affidavit, Ex. “33”.

E. FP&C Submits A Claim For Replacement Cost Of Charity Hospital To FEMA (LA-TRO)

After literally years of damage assessments to Charity Hospital at substantial costs to FP&C and with FEMA knowledge and participation, FP&C had in its possession three independent reports from highly qualified experts that repair costs would greatly exceed 50 percent of estimated replacement cost of Charity Hospital. On June 23, 2008, FP&C submitted a request to the GOHSEP for a scope and cost alignment for Charity Hospital.³⁶ This request advised GOHSEP of the findings by both the BKA Report and the RSMeans Report that estimated repair costs would exceed 50 percent of replacement costs.³⁷ FP&C accordingly requested that GOHSEP submit a request to FEMA (LA-TRO) to issue a new Project Worksheet for the estimated replacement cost of Charity Hospital. By letter dated July 3, 2008, GOHSEP submitted the FP&C request for scope and cost alignment to FEMA (LA-TRO).³⁸ This request asked FEMA (LA-TRO) to issue a new consolidated Project Worksheet obligating an estimated replacement cost of \$491,884.00.³⁹ This replacement cost figure was calculated using FEMA's own Cost Estimating Format.

The GOHSEP letter informs FEMA (LA-TRO) of the conclusions of the BKA Report and the RSMeans Report and further offers to make "experts for BKA and RSMeans available to discuss any portions of the report which may need further clarification."⁴⁰ Submitted as attachments to this

³⁶The June 23, 2008, letter from Mark Moses (FP&C) to Mark Riley (GOHSEP) is attached as Ex. "17".

³⁷The letter also points out that the BKA Report and the RSMeans Report are consistent with the findings of the ADAMS Report which had been previously provided to FEMA.

³⁸The July 3, 2008, letter from Mark Riley (GOHSEP) to James Stark (FEMA) is attached as Ex. "18".

³⁹Id.

⁴⁰The letter also refers FEMA to the ADAMS Report which had been previously provided to FEMA.

letter were: (i) the FP&C letter dated June 23, 2008;⁴¹ (ii) the FP&C Request for Project Worksheet;⁴² (iii) the BKA Report;⁴³ (iv) the RSMMeans Report;⁴⁴ (v) Charity Hospital Repair or Replacement analysis (50-Percent Rule);⁴⁵ (vi) Cost Estimating Format (“CEF”) Sheets for BKA’s Estimate;⁴⁶ (vii) CEF Sheets for RSMMeans Estimates;⁴⁷ and (viii) CEF, Replacement Cost Estimate.⁴⁸

F. FEMA (LA-TRO) Rejects FP&C Claim For Replacement Cost of Charity Hospital

On or about December 19, 2008, FEMA (LA-TRO) issued PW2175V3 relating to Charity Hospital.⁴⁹ PW2175V3 does increase the scope and repair cost estimates for Charity Hospital, but it flatly rejects FP&C’s claim for replacement cost. PW2175V3 states that it is intended to consolidate all building damage, scope of work and costs obligated for Charity Hospital and to provide additional building damage, additional scope of the work and costs based upon additional information brought by the Applicant. PW2175V3 allocates \$57,861,580.53 for flood damage, \$15,380,926.47 for wind damage, and another \$51,000,000 for loosely specified anticipated but

⁴¹See Ex. “17”.

⁴²See Ex. “18”; Encl. #2.

⁴³See Ex. “14”.

⁴⁴See Ex. “16”.

⁴⁵See Ex. “18”; Encl. #5.

⁴⁶See Ex. “18”, Encl. #6.

⁴⁷See Ex. “18”, Encl. #7.

⁴⁸See Ex. “4”.

⁴⁹PW2175V3 is attached as Ex. “3”.

unallocated damages.⁵⁰ After deducting \$2,456,023 for costs previously authorized in Version 0 and Version 2 of PW2175, the total amount of \$121,786,484 was obligated by FEMA on or about *January 11, 2009*. It is that action that is the central subject of this arbitration.

In rejecting FP&C's request for the replacement cost of Charity Hospital, FEMA (LA-TRO) gave various vague, non-specific and factually wholly unsupported reasons. For example, PW2175V3 indicates that the Charity Hospital claim was being discounted for failure to do adequate asset protection. However, FEMA (LA-TRO) *does not specify or describe what asset protection measures FP&C failed to take or the nature and/or extent of the damages caused by the purported failure to protect assets*. Moreover, while the PW indicates that the claim is being discounted, *it does not state a specific dollar amount (or even a range) that is subject to this discount*. Additionally, PW2175V3 indicates that the Charity Hospital claim is being discounted because it contains ineligible work and/or excess scope of work. Once again FEMA (LA-TRO) *does not identify the ineligible work or the excess scope of work of which it complains and fails to specify the dollar amount (or even a range) that is being deducted for this reason*. These are illustrative of many vague and arbitrary conclusions by FEMA (LA-TRO) as set forth herein and which are not supported by any reasonable factual basis, which have caused FP&C to file this Request For Arbitration of the actions they took in PW2175V3.

G. Damages And Scope Of Work Captured By FEMA In PW 2175(Version 0-3)

FEMA (LA-TRO) has now obligated four (4) versions of PW2175 as summarized below:

⁵⁰FEMA (LA-TRO) states that the \$51,000,000 of additional damages was based on (1) the magnitude of the impact of the disaster, (2) recognition that the actual cause of much post-storm damage could not conclusively be determined, and (3) the desire to accelerate the recovery of the healthcare system in New Orleans.

1. PW2175 Version 0 - Obligated on May 23, 2006 for \$1,465,717.00. The scope of work was written to “return the critical mechanical, electrical, fire protection and plumbing systems within the basement area to pre-Katrina condition.” The Project Officer notes, “This is the first of two or more versions required to establish the full eligible scope of work and minimum estimated project cost for eligible repair work at Charity Hospital”.

2. PW2175 Version 1 - Obligated on June 17, 2007 (after Congressional approval to increase the Federal Share to 100%) for \$146,571.70.

3. PW2175 Version 2 - Obligated on November 13, 2008 for \$3,171,507.84. As noted by the Project Officer, “pursuant to understanding with the State ORM, relative to their \$100,000,000.00 flood insurance coverage, this version is being written to include recoverable flood insurance proceeds”.

4. PW2175 Version 3 - Obligated on January 11, 2009 for \$121,505,484.00. This project worksheet brings the total of obligated funding for the Charity Hospital project to \$126,142,708.84 and includes PWs 2174 and 2176.

H. FEMA-Region 6 Rejects First Appeal

FP&C (through GOHSEP) filed its first appeal (pursuant to 44CFR§206.206) with FEMA-Region 6 on or about March 11, 2009 (the “First Appeal”).⁵¹ This First Appeal set forth eight (8) specific and comprehensive assignments of error with regard to PW2175V3. By letter dated May 8, 2009, FEMA-Region 6 responded by wholly rejecting the First Appeal. FEMA-Region 6 performed a limited and incomplete review of the documentary evidence, used a flawed analysis and

⁵¹See First Appeal by FP&C, attached as Ex. “35”.

failed to directly address most of the legitimate assignments of error raised in the First Appeal. In rejecting the First Appeal, FEMA-Region 6 completely ignored the primary documentation submitted by FP&C in support of the appeal - - the comprehensive facility assessment of the disaster related damages to Charity Hospital prepared by the Blich Knevel team of experts (the "BKA Report"). The BKA Report was submitted to FEMA by FP&C as its official claim for damages to Charity Hospital because it represents a comprehensive damage assessment presented that provides detailed room-by-room, floor-by-floor assessment of the building's components and elements, and provides a thorough and complete analysis of the damages caused by Hurricanes Katrina and/or Rita. It is the product of an 18-month effort costing hundreds of thousands of dollars *in which FEMA personnel actively participated in bi-weekly meetings to review the ongoing assessment work and the various items of damages*. FEMA-Region 6 dismissively rejected the BKA Report because it was purportedly done two years after the hurricane. Instead, FEMA-Region 6 relied solely on the summary report prepared by ADAMS Management Services Corp. (the "ADAMS Report") - - which it previously rejected because it was a *summary* report. The ADAMS Report was submitted by FP&C with the First Appeal as *additional* support of its claim, but was not a primary comprehensive room-by-room assessment like the BKA Report. Moreover, FEMA's analysis of the ADAMS Report is completely flawed.⁵² For example, FEMA arbitrarily deleted over \$68 million in damages from the ADAMS Report without any legitimate grounds for doing so.⁵³ As described previously, the ADAMS Report was initially provided to FEMA personnel in November 2005 as evidence of

⁵²See discussion at Section V.D., *infra*.

⁵³Id.

the damages to Charity Hospital. However, FEMA personnel immediately rejected the ADAMS Report because FEMA claimed that it was only a *summary* report and did not contain the comprehensive assessment of damages needed to support the claim for damages to Charity Hospital. Remarkably, it was FEMA's *rejection* of the ADAMS Report that caused FP&C (with the participation of FEMA personnel) to engage Blich Knevel to perform an extensive comprehensive assessment of the damages. FEMA-Region 6 improperly ignored the primary damage evaluation submitted by FP&C and completely failed to conduct a thorough and independent review of FP&C claims.

IV. ARBITRATION ISSUES

FP&C identifies and discusses below the various issues (often interrelated) raised in connection with this Request for Arbitration of PW2175V3, and provides supporting documents which fully support FP&C's claim for the replacement cost of Charity Hospital of at least \$491,884,000.

A. Arbitration Issue No. 1

The in-depth assessments of highly qualified architectural, engineering, construction and environmental experts clearly demonstrate (and in the absence of any competent contrary evidence by FEMA) that the scope and amount of disaster related damages to Charity Hospital greatly exceed the amount obligated by FEMA in PW2175V3.

B. Arbitration Issue No. 2

The in-depth assessments of highly qualified architectural, engineering, construction and environmental experts clearly demonstrate that the cost to repair the disaster related damages to Charity Hospital will greatly exceed 50 percent of the replacement cost of the facility according to applicable FEMA formulas.

C. Arbitration Issue No. 3

FP&C is entitled to the replacement value of Charity Hospital which is calculated to be at least \$491,884,000 pursuant to FEMA's own Cost Estimating Format (CEF).

D. Arbitration Issue No. 4

In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) failed to follow its own rules and guidelines and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

E. Arbitration Issue No. 5

In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly discounted the FP&C Claim by an unspecified amount because of an alleged failure by FP&C to do adequate asset protection and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

F. Arbitration Issue No. 6

In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly discounted the FP&C Claim by an unspecified amount because of alleged ineligible work and/or excess scope of work and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

G. Arbitration Issue No. 7

In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly discounted the FP&C Claim by an inappropriate and unspecified amount without factual support for its determination that the use of the FEMA Cost Estimating Format (CEF) was inconsistent with FEMA estimating practices and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

H. Arbitration Issue No. 8

In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly, and without any factual basis, disallowed fixed equipment from the FP&C Claim and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

I. Assignment of Error No. 9

In connection with Arbitration Issues 1, 2 and 3, PW2175V3 contains numerous material errors and omissions, fails to properly determine the scope of the work and fails to properly determine the costs to repair the damages and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

J. Assignment of Error No. 10

In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) failed to properly apply the 50-Percent Rule to Charity Hospital and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal

K. Arbitration Issue No. 11

In connection with Arbitration Issues 1, 2 and 3, FEMA-Region 6 completely ignored the primary documentation submitted by FP&C in support of the First Appeal - - the comprehensive facility assessment of the disaster related damages to Charity Hospital prepared by the Blich Knevel team of experts.

L. Arbitration Issue No. 12

In connection with Arbitration Issues 1, 2 and 3, FEMA-Region 6 failed to do a complete, thorough and independent review of FP&C's claim resulting in an incomplete and wholly deficient administrative fact finding process.

V. DISCUSSION OF ARBITRATION ISSUES

A. Arbitration Issue No. 1 - The in-depth assessments of highly qualified architectural, engineering, construction and environmental experts clearly demonstrate (and in the absence of any competent contrary evidence by FEMA) that the scope and amount of disaster related damages to Charity Hospital greatly exceeds the amount obligated by FEMA in PW2175V3.

FP&C, LSU and GOHSEP have engaged three separate and independent groups of highly qualified architectural, engineering, construction and environmental consultants to assess the damages to Charity Hospital. The assessment primarily relied upon by FP&C in the submission of its claim to FEMA is the 18-month floor-by-floor, room-by-room assessment by the BKA Team

which resulted in the 2000-plus page BKA Report which itemizes in great detail the storm related damages. The work performed by the BKA Team and other experts clearly demonstrate that the scope of the work and amount of disaster related damages to Charity Hospital greatly exceed the amount obligated by FEMA in PW2175V3.

The BKA Report is based on numerous site visits, detailed assessments and evaluations of the post-Katrina conditions at Charity Hospital.⁵⁴ The BKA Report identifies and lists the damages resulting directly from the storm and damages resulting indirectly from the storm.⁵⁵ The BKA Team expressly determined that most of the damages captured in the report occurred within the first 120 days after Hurricane Katrina and that *any contributory damages after the first 120 days were insignificant*.⁵⁶ The BKA Team observed that the major operating systems at Charity Hospital were in the basement which was flooded to a height of greater than 12 feet and were totally decimated by the flooding.⁵⁷ The entire utility structure was incapacitated as a result of the basement flooding.⁵⁸ In addition, the wind damage to roof top equipment caused catastrophic environmental control failures inside the building.⁵⁹

BKA undertook a floor-by-floor assessment evaluating the basement and floors 1 through 20 of Charity Hospital. To simplify reporting to manageable and comprehensible volumes of

⁵⁴BKA Report, Introduction, page 3 of 5, Ex. 14, and Nagendra Affidavit, Ex. "32".

⁵⁵Id.

⁵⁶Id.

⁵⁷BKA Report, Introduction, p. 4 of 5, Ex. 14 and Nagendra Affidavit, Ex. "32".

⁵⁸Id.

⁵⁹Id.

information, the BKA Team divided each floor into zones and damages were evaluated zone by zone.⁶⁰ A review of the thousands of pages that make up the BKA Report, show the following detailed analysis: (1) architectural maps which depict each zone on a given floor and summarize the architectural, plumbing, mechanical, electrical, environmental, and fire protection categories of damages for each zone mapped;⁶¹ (2) photographs of the damages depicted in each zone on each floor;⁶² (3) a narrative “damages evaluation” discussing and summarizing the architectural, plumbing, mechanical, electrical, and fire protection damages in each zone on each floor;⁶³ (4) a quantity survey listing and describing each damaged item, the quantity damaged and the observed cause of the damage in each zone on each floor;⁶⁴ and (5) a cost estimate listing the quantity, description, and estimated cost for each item of damages in each zone on each floor.⁶⁵ These detailed evaluations of the basement and floors 1 through 20 of Charity Hospital make up the bulk of the 2000-plus page BKA Report.

After the lengthy and detailed zone-by-zone, floor-by-floor assessment of the storm-related damages to Charity Hospital, the BKA Team calculated the estimated cost to repair these damages. Reproduced below is a “Building Repair Cost Summary” prepared by the BKA Team which summarizes the repair cost estimates captured in the more detailed and lengthy floor-by-floor

⁶⁰BKA Report, Report Format, p. 1 of 2, Ex. 14 and Nagendra Affidavit, Ex. “32”.

⁶¹See e.g., BKA Report, Basement, Maps, Vol. 2, Ex. 14 and Nagendra Affidavit Ex. “32”.

⁶²Id.

⁶³See e.g., BKA Report, Basement, Damage Evaluation, Vol. 1, Ex. 14 and Nagendra Affidavit, Ex. “32”.

⁶⁴See e.g., BKA Report, Basement, Quantity Survey, Vol. 1, Ex. 14 and Nagendra Affidavit, Ex. “32”.

⁶⁵See e.g., BKA Report, Basement, Cost Est., Vol. 1, Ex. 14 and Nagendra Affidavit, Ex. “32”.

evaluations.

BUILDING REPAIR COST SUMMARY⁶⁶						
Description	Unit	Bare Mat.	Bare Labor	Bare Equip.	Other	Total
Basement	LS	2,905,103.35	3,068,181.43	179,421.21	13,895,903.20	20,048,609.19
1 st Floor	LS	7,920,102.37	752,546.10	56,747.84	229,555.00	8,958,951.31
2 nd Floor	LS	9,578,855.90	578,768.99	25,739.25	214,855.00	10,398,219.14
3 rd Floor	LS	6,836,580.50	501,631.03	28,659.23	154,277.50	7,521,148.26
4 th Floor	LS	6,606,143.68	256,048.53	11,405.65	151,280.00	7,024,877.86
5 th Floor	LS	5,835,806.45	268,094.21	12,521.36	151,280.00	6,267,702.02
6 th Floor	LS	5,788,071.36	197,325.89	8,954.65	151,280.00	6,145,631.90
7 th Floor	LS	3,724,375.58	125,114.69	6,190.55	151,280.00	4,006,960.82
8 th Floor	LS	4,385,087.44	445,548.22	32,102.81	151,280.00	5,014,018.47
9 th Floor	LS	4,159,136.51	605,786.39	52,482.51	151,280.00	4,968,685.41
10 th Floor	LS	4,664,414.52	555,924.22	46,628.13	151,280.00	5,418,246.87
11 th Floor	LS	4,001,506.52	186,119.68	9,416.89	151,280.00	4,348,323.09
12 th Floor	LS	7,799,973.60	646,105.04	34,487.51	170,925.00	8,651,491.15
13 th Floor	LS	1,556,363.07	194,764.32	11,608.96	55,577.50	1,818,313.85
14 th Floor	LS	2,474,154.62	173,822.64	8,620.22	53,900.00	2,710,497.48
15 th Floor	LS	880,531.68	101,927.09	4,810.15	24,840.00	1,012,108.92
16 th Floor	LS	1,163,329.28	102,199.73	4,810.15	24,840.00	1,295,179.16
17 th Floor	LS	1,164,161.46	102,558.57	4,826.54	24,840.00	1,296,386.57
18 th Floor	LS	1,165,086.60	102,766.46	4,845.91	24,840.00	1,297,538.97
19 th Floor	LS	820,205.91	56,795.72	2,517.68	17,920.00	897,439.31
20 th Floor	LS	133,955.39	5,521.18	279.40	9,800.00	149,555.97
Stairwells	LS	142,662.80	276,783.28	18,220.71	0.00	437,666.79
Vertical Chases	LS	171,686.02	145,927.60	2,910.00	48,235.00	366,758.62
West Pavilion	LS	0.00	0.00	0.00	54,400.00	54,400.00

⁶⁶See also BKA Report, Costing, page 1 of 1, Ex. 14 and Nagendra Affidavit, Ex. "32".

Exterior Skin	LS	4,771.98	3,752.04	249.60	0.00	8,773.62
Roofing Repairs	LS	0.00	0.00	0.00	1,640,000.00	1,640,000.00
Elevator Repairs	LS	0.00	0.00	0.00	4,440,000.00	4,440,000.00
Hospital Equipment	LS	0.00	0.00	0.00	36,135,500.00	36,135,500.00
Base Cost Subtotal 1		83,882,066.59	9,454,013.05	568,456.92	58,428,448.20	152,332,984.76
Contractor's Job Site Cost	LS	0.00	0.00	0.00	10,093,820.06	10,093,820.06
Contractor's Contract Cost	LS	0.00	0.00	0.00	16,481,941.37	16,481,941.37
Contractor's OH & Profit 15%	LS	0.00	0.00	0.00	26,836,311.93	26,836,311.93
Subtotal 2		83,882,066.59	9,454,013.05	568,456.92	111,840,521.56	205,745,058.12
RS Means 2008 local weighted cost average (.8497) = adjustment to 1.0 = +15.03%						30,923,482.23
Subtotal 3						236,668,540.35
FP&C Project MGMT Cost 18.5%						43,783,679.95
Total Cost To Repair Charity Hospital From Storm Damage						280,452,220.32
Additional Cost To Implement Code Compliance To Charity Hospital						9,159,510.09

As summarized above and as discussed in excruciating detail in the 2000-plus page BKA Report, the BKA Team calculated “Base Cost” (before including site work, contractor costs, or project management costs) to be \$152,332,984.76.⁶⁷ Further, the BKA team calculated the “Total Cost to Repair Charity Hospital From Storm Damage” (after including site work, contractor costs, or project management costs) to be \$280,452,220.32.⁶⁸ Finally, the BKA Team determined that Charity Hospital would incur an additional cost of \$9,159,510.09⁶⁹ to implement code compliance

⁶⁷See “Base Cost Subtotal 1” on chart above.

⁶⁸See “Total Cost To Repair Charity Hospital From Storm Damage” on chart above.

⁶⁹See “Additional Cost To Implement Code compliance To Charity Hospital” on chart above.

when the repairs were made. All totalled, the BKA Team determined the overall repair cost to be \$290 million.

The cost estimates prepared by the BKA Team were done in accordance with applicable Federal Regulations and FEMA's own Public Assistance Policy Digest. The Stafford Act, 42 U.S.C. §5172, provides for the repair, restoration, and replacement of damaged facilities. It authorizes assistance "to a State or local government for the repair, restoration, reconstruction or replacement of a public facility damaged or destroyed by a major disaster." 44 U.S.C. § 5172(a)(1).⁷⁰ It further provides that the cost of repairing, restoring, reconstructing or replacing the facility shall be determined by estimating the eligible cost "*on the basis of the design of the facility as the facility existed immediately before the major disaster*" and "*in conformity with codes, specifications, and standards applicable at the time at which the disaster occurred.*" 44 U.S.C. § 5172(e)(1). Moreover, FEMA's own Policy Digest describes the method by which these eligible costs should be determined, stating:

"When an Applicant requests public assistance for disaster-related work, grant amounts are based on actual costs if the work was completed at the time of the request. However, for work that has not been completed at the time of the request, *a Cost Estimate must be used.* Typically, these estimates are prepared using unit costs. With this method, the project is broken down into elements based on the quantities of material that must be used to complete the work. For example, a culvert repair may be broken down into linear feet of pipe, cubic yards of fill, and square feet of pavement. The estimate for each of these items is a cost per unit that includes all labor, equipment, and material necessary to install that item (referred to as an "in-place" cost). (Emphasis added).

* * *

For large or complex projects, it may be necessary for the Applicant to prepare a

⁷⁰See 44 U.S.C. § 5172, attached as Ex. "38".

detailed design of the restoration work before a viable cost estimate can be developed. In such cases, a grant for engineering design services is approved first (see Engineering and Design Services). Once the design is complete, a cost estimate for the work is prepared or actual bids for the work may be used as the basis for the grant. Costs for managing a project may also be included if the project is sufficiently large or complex to require them (see Large Projects). Most small projects do not require project management above the level of a first-level supervisor.”⁷¹

BKA prepared detailed costs estimates as outlined in FEMA’s own rules and guidance. As previously discussed, this 18-month effort was with the ongoing active participation of FEMA personnel. There is no question that the highly qualified BKA Team undertook detailed estimates of every item of storm related damages on a unit cost basis. Despite performing the above cost estimates in accordance with FEMA’s express guidance, FEMA rejected the BKA Report without any rational or reasonable factual basis.

In stark contrast to the complete and thorough BKA Report, FEMA’s PW2175V3 fails to fully and adequately assess the scope of the work or the cost to repair the damages to Charity Hospital. FEMA has never undertaken a complete room-by-room, floor-by-floor assessment like the one undertaken by the BKA Team as described above. PW2175V3 only obligates approximately \$121 million to repair the storm-related damages, an amount that is less than one-half of the repair costs calculated by the BKA Team. Moreover, as discussed below, FEMA has not supported or justified the amounts obligated in PW2175V3 based upon any objective analysis by FEMA or anyone engaged by FEMA to independently assess the damages.

In PW2175V3, FEMA sets forth a list of some 249 line items of repair costs that it recognizes with respect to Charity Hospital. This listing is replete with errors, omissions, and underestimated

⁷¹Public Assistance, Policy Digest, FEMA-321/October 2001, Cost Estimate, p. 22; attached as Ex. “39”.

costs. FEMA's estimate woefully understates the square footage of Charity Hospital and various hospital floors. For example, the floor plan space for Charity Hospital is 998,749 square feet. However, PW2175V3 uses only 900,000 square feet to calculate certain repair costs.⁷² Additionally, the actual square footage of the first floor is 111,000 square feet, but FEMA (LA-TRO) uses a figure of only 85,000 square feet in its assessment.⁷³ Additionally, PW2175V3 fails to consider or allocate costs for numerous environmental matters that clearly must be addressed to repair Charity Hospital. PW2175V3 does not recognize or allocate estimated costs to remediate chemical contamination, mold infestation, biological cleaning of all surfaces to address blood borne pathogens and other environmental hazards. The FEMA (LA-TRO) estimate does not address these significant environmental costs even though similar costs were recognized and approved by FEMA (LA-TRO) in connection with the repair of the LSU Interim Public Hospital (former University Hospital, like Charity a part of the LSU-MCLNO System).⁷⁴

The attached BKA Supplemental Report addresses the failure by FEMA (LA-TRO) to properly determine the scope of the work, the failure to properly estimate the costs to repair the disaster related damages, and identifies some of the numerous errors and omissions in the scope of work and cost estimates listed in PW2175V3.⁷⁵ This supplemental report identifies in chart form numerous errors and omissions by FEMA (LA-TRO) that detrimentally affect the value of the FP&C Claim. Moreover, the BKA Supplemental Report is illustrative and not a line-by-line comparison

⁷²See PW2175V3, page 6, line 4, 5, attached as Ex. "3".

⁷³See PW2175V3, page 2, attached as Ex. "3".

⁷⁴See BKA Supplemental Report, attached as Ex. "22" and Nagendra Affidavit, Ex. "32".

⁷⁵Id.

of all of the errors and omissions. Due to time constraints and costs, the BKA Supplemental Report provides only a summary of some of the more egregious errors and omissions by FEMA (LA-TRO). It does, however, fully establish the lack of a reasonable factual basis and the arbitrary nature of FEMA's position.

FP&C submits that the extensive 18-month detailed evaluation by the BKA Team fully, completely and properly captures the scope of the storm related damages and the estimated cost to repair the facility. By contrast, FEMA's PW2175V3 is woefully deficient in its assessment of both scope and cost. Accordingly, FP&C asks the arbitration panel to accept in its entirety, the damage estimates calculated by the BKA Team in the BKA Report.

B. Arbitration Issue No. 2 - The in-depth assessments of highly qualified architectural, engineering, construction and environmental experts clearly demonstrate that the cost to repair the disaster related damages to Charity Hospital will greatly exceed 50 percent of the replacement cost of the facility according to applicable FEMA formulas.

All three experts engaged by FP&C, LSU and GOHSEP uniformly agree that the cost to repair the disaster related damages greatly exceed 50 percent of the replacement cost of Charity Hospital as follows: (1) ADAMS Report = 65.2%; (2) BKA Report = 80.1%; and (3) RSMeans Report = 68.2%.⁷⁶ As discussed above, the BKA Team did the most detailed assessment of the hospital and it is the BKA Report that was primarily relied upon by FP&C in submitting its claim to FEMA in July 2008. The other two reports confirm the BKA conclusion on this material issue.

⁷⁶See ADAMS Report, Ex. "11", BKA Report, Ex. "14", Nagendra Affidavit, Ex. "32", RSMeans Report, Ex. "16" and Balboni Affidavit, Ex. "33".

The BKA Report calculated the "Building Replacement Cost" as follows:

BUILDING REPLACEMENT COST⁷⁷			
RS Means 2008-Model Type Hospital 4-8 Story, Precast Concrete Panels With Exposed Aggregate/Steel Frame. Data modified to meet existing building parameters, and configuration			
Stories (Ea.): 21			
Story Height (L.F.): 15			
Floor Area (S.F.): 1001588			
Basement: Not Included			
A Substructure			
A1010	Standard Foundations		1,383,500.00
A1030	Slab on Grade		284,500.00
A2010	Basement Excavation		4,600.00
A2020	Basement Walls		80,500.00
B Shell			
B1010	Floor Construction		16,107,500.00
B1020	Roof Construction		352,500.00
B2010	Exterior Walls		9,570,000.00
B2020	Exterior Windows		4,297,000.00
B2030	Exterior Doors		603,500.00
B3010	Roof Coverings		304,000.00
B3020	Roof Openings		27,100.00
C Interiors			
C1010	Partitions		6,140,000.00
C1020	Interior Doors		9,089,000.00
C1030	Fittings		878,500.00

⁷⁷This chart summary is reproduced from the text of the BKA Report. See BKA Report, Charity Hospital Replacement, pp. 1-2, Vol. 1, Ex. "14" and Nagendra Affidavit, Ex. "32".

C2010	Stair Construction		1,210,000.00
C3010	Wall Finishes		5,805,500.00
C3020	Floor Finishes		8,138,000.00
C3030	Ceiling Finishes		5,551,000.00
D Services			
D1010	Elevators and Lifts		5,198,500.00
D2010	Plumbing Fixtures		5,617,000.00
D2020	Domestic Water Distribution		918,500.00
D2040	Rain Water Drainage		91,000.00
D3010	Energy Supply		2,694,500.00
D3020	Heat Generating Systems		325,500.00
D3030	Cooling Generating Systems		2,490,500.00
D3090	Other HVAC Systems/Equip		22,691,500.00
D4010	Sprinklers		1,726,000.00
D4020	Standpipes		355,000.00
D5010	Electrical Service/Distribution		694,500.00
D5020	Lighting and Branch Wiring		13,239,500.00
D5030	Communications and Security		1,397,000.00
D5090	Other Electrical Systems		3,796,500.00
E. Equipment & Furnishings			
E1000	Hospital Equipment - derived from actual sampling of new hospitals, see list		55,000,000.00
Sub-Total			186,062,200.00
F Common Additives			
F1002	Medical Cases		698,625.00
F1004	Millwork/Casework		1,915,736.00
F1005	Nurses Call System		184,920.00
F1006	Sound/Paging System		119,119.00
G General Site - Code Requirements			

G1000	Site Elevation 140,000 sf - 6 foot (41.377 cy)		1,034,425.00
G1001	Site Improvements for elevation change		250,000.00
Sub-Total 1			190,265,025.00
CONTRACTOR'S JOB-SITE COST 10%			19,026,502.50
CONTRACTOR'S CONTRACTOR COST			11,008,734.35
GENERAL CONDITIONS (Overhead & Profit from RS Means		25%	55,075,065.46
Sub-Total 2			275,375,327.31
RS Means 2008 local weighted cost average (.8497) - adjustment to 1.0 = +15.03%			41,388,911.76
Sub-Total 3			316,764,239.01
FP&C PROJECT MGMT COST		18.5%	58,601,384.22
TOTAL COST TO REPLACE CHARITY HOSPITAL			375,365,623.22

As set forth above, the BKA Team calculated the replacement cost on an approximately 1,000,000 square foot hospital (*i.e.*, equivalent in size to Charity Hospital) using generally accepted RSMeans 2008 Model costs for a "Precast Concrete Panels With Exposed Aggregate/Steel Frame" hospital. Using these parameters, the BKA Report calculates a base replacement cost (before including site work, contractor costs, and general conditions) to be \$190,265,025 and total replacement cost (after including site work, contractor costs and general conditions) of \$375,365,623. Using BKA's repair and replacement cost calculations, and applying those calculations to FEMA's 50-Percent Rule, it becomes readily apparent (as demonstrated below) that the repair costs greatly exceed 50 percent of the replacement cost of the facility.

The FEMA 50-Percent Rule is set forth in 44 C.F.R. § 206.226(f)(1). This FEMA regulation provides as follows with regard to repair versus replacement of a damaged facility:

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.⁷⁸

The determination of eligibility of a facility for replacement is calculated by the following fraction: the cost of the disaster damage (repair of the damaged components only, using present day materials and methods) divided by the cost of replacement of the facility with a facility of equivalent capacity, using current codes for new construction.⁷⁹ If this calculation is greater than 50 percent, then replacement is eligible for FEMA funding.⁸⁰ FEMA's Policy Digest states that "*[r]epair cost equals the cost of repair of the damaged components only. The cost does not include codes and standards upgrades, demolition, site work, or applicable project management costs.*"⁸¹ It also provides that "*[r]eplacement cost equals the cost of reconstructing the facility and includes current codes and standards upgrades. The cost does not include demolition, site work, or applicable project management costs.*"⁸² (Emphasis added).

When the FEMA 50-Percent Rule is applied to the cost estimates prepared in the BKA Report, a clear result is reached. *Repair cost* (before code upgrades, demolition, site work or

⁷⁸44 C.F.R. § 206.226(f)(1); attached as Ex. "36".

⁷⁹See FEMA Policy 9524.4, Eligibility of Facilities for Replacement (the 50-Percent Rule) attached as Ex. "41"; and FEMA Guidance No. 4511.6E, The 50-Percent Rule: The Eligibility of Facilities for Replacement under 44 CFR 206.226, attached as Ex. "42".

⁸⁰Id.

⁸¹FEMA Public Assistance, Policy Digest, FEMA-321/October 2001, Repair or Replacement, p. 106, attached as Ex. "39".

⁸²Id.

applicable project management costs) is equal to \$152,332,984.76.⁸³ *Replacement cost* (before demolition, site work, or applicable project management costs) is equal to \$190,265,025.00.⁸⁴ Using these figures, the 50-Percent Rule is calculated as follows:

$$\frac{\text{Repair Cost}}{\text{Replacement Cost}} = \frac{\$152,332,984}{\$190,265,025} = 80.1\%$$

Applying FEMA’s 50-Percent Rule formula to the detailed repair and replacement cost estimates prepared by the BKA Team demonstrates that repair costs easily exceed 50 percent of replacement cost.⁸⁵ *FP&C notes that the \$190 million estimate by BKA is a base replacement cost and does not include job site costs, overhead, contractor profit or project management costs.* As discussed above, FEMA rules and guidelines provide that this base cost is to be used to determine the applicability of the 50-Percent Rule. *However, if the 50-Percent Rule is met (as in this case), FEMA rules and guidelines provide that the Applicant is entitled to a replacement value which includes job site costs, overhead, contractor profit and project management costs.* The replacement value to which FP&C is entitled is calculated using FEMA’s Cost Estimating Format (CEF) which is discussed in detail (and the calculation of \$491 million is provided) in Section V.C. below.

The BKA Team is not alone in its assessment of this issue. RSMeans has reviewed and has confirmed that the cost of repair greatly exceeds 50 percent of the replacement cost of Charity Hospital under FEMA’s 50-Percent Rule. As previously discussed, RSMeans is highly qualified and has developed the most comprehensive construction cost database in North America, offers nearly

⁸³This the “Base Cost Subtotal 1” on BKA’s Building Repair Cost Summary. See Section V.A., *supra*.

⁸⁴This is “Subtotal 1” on BKA’s Building Replacement Cost Summary.

⁸⁵See Nagendra Affidavit, Ex. “32”.

one hundred costs and reference publications, and is one of the leading construction cost consultants in the world. RSMMeans independently evaluated the repair and replacement cost estimates and calculated the repair costs for Charity Hospital to be equal to 68.2% of the replacement value of the facility.⁸⁶

C. Arbitration Issue No. 3 - FP&C is entitled to the replacement cost of Charity Hospital which is calculated to be at least \$491,884,000 pursuant to FEMA's own Cost Estimating Format (CEF).

As discussed in the sections above, the cost to repair the storm related damages greatly exceeds 50 percent of the replacement cost of the facility. Therefore under FEMA's 50-Percent Rule, FP&C is entitled to receive the replacement value of the facility. See 44 CFR § 206.226(f). FP&C (with the assistance of GOHSEP) has calculated the replacement value to be at least \$491,884,000 pursuant to FEMA's Cost Estimating Format (CEF).

FEMA uses a cost estimating methodology called the Cost Estimating Format (CEF) to better estimate the total cost of large projects.⁸⁷ The CEF is a forward-pricing model that allows FEMA to account for all possible costs associated with a construction project.⁸⁸ FEMA's Policy Digest explains the various costs included in the CEF calculation as follows:

The CEF relies on the development of a clear definition of the scope of work that is eligible for public assistance. Once this scope of work has been developed, the CEF is applied in eight parts. Part A represents the base cost of completing the project; it includes the labor, materials, and equipment necessary to complete each item of the scope of work. Parts B through H contain job-specific factors that depend on the

⁸⁶See RSMMeans Report, Ex. "16" and Balboni Affidavit, Ex. "33".

⁸⁷FEMA Public Assistance, Policy Digest, FEMA-321/October 2001 Cost Estimating Format (CEF) at p. 23, attached as Ex. "39".

⁸⁸Id.

methods, complexity, and time of construction. These factors are described below.

Part B includes construction costs not typically itemized in Part A, such as the general contractor's supervision costs.

Part C reflects construction cost contingencies and is designed to address budgetary risks associated with project complexity.

Part D accounts for the contractor's overhead, insurance, bonds and profit.

Part E accounts for cost escalation over the life of the project.

Part F includes fees for special reviews, plan checks and permits.

Part G is the applicant's reserve for change orders and unforeseen conditions.

Part H accounts for the applicant's cost to manage the design and construction of the project.⁸⁹

FP&C sought the assistance of GOHSEP to calculate the replacement cost of Charity Hospital *using FEMA's Cost Estimating Format*. GOHSEP employees who are experienced estimators (and in fact former FEMA employees) undertook the Charity Hospital replacement cost calculation.⁹⁰ By letter dated July 3, 2008, GOHSEP submitted the FP&C request for a scope and cost alignment to FEMA (LA-TRO).⁹¹ This request asked FEMA (LA-TRO) to issue a new consolidated Project Worksheet for Charity Hospital obligating estimated replacement costs of \$491,884,000. This replacement cost amount was calculated using FEMA's Cost Estimating Format (CEF) and employed the CEF estimating "worksheet" designed by FEMA as a "more

⁸⁹Id.

⁹⁰See Affidavit of John Zimmer, attached as Ex. "34".

⁹¹The July 3, 2008, letter from Mark Riley (GOHSEP) to James Stark (FEMA) is attached as Ex. "18".

uniform method of estimating costs for large projects.⁹² The CEF worksheet allows the user to estimate the base construction costs (Part A). Part A costs for Charity Hospital consist of base building labor and material costs of \$146,474,139 and equipment costs of \$34,940,000. GOHSEP calculated the base building costs using the RSMeans model for a basic hospital with a comparable square footage to that of Charity Hospital (i.e. 1,000,000 sq. feet). GOHSEP then applied unit costs taken from the RSMeans 2006 Square Foot Building Models For Large Hospitals to arrive at a base building cost of \$146 million.⁹³ It is noted that *the base replacement cost* used by GOHSEP in its CEF Calculation is actually significantly less than the *base replacement cost* calculated by the BKA Report (\$190 million) and the RSMeans Report (\$238 million). Part A equipment costs of \$34,940,000 were taken directly from the equipment cost estimate found on page 56 of the RSMeans Report.⁹⁴ After calculating Part A costs, GOHSEP then applied a series of factors (Parts B through H) representing expenses 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.”⁹⁵ This forward-pricing methodology provides an estimate of “the total eligible funding at the beginning of the project” and “is used to obligate funds for the project.”⁹⁶ GOHSEP used this FEMA-designed CEF worksheet to arrive at its replacement cost figure of \$491,884,000.⁹⁷ FP&C,

⁹²See FEMA - Cost Estimating Format For Large Projects Instructional Guide at p. 4, attached as Ex. “5”.

⁹³See GOHSEP’s Cost Estimating Format (CEF) Replacement Cost Estimates, attached as Ex. “4”.

⁹⁴See RSMeans Report at p. 56, attached as Ex. “16” and Balboni Affidavit attached as Ex. “33”.

⁹⁵*Id.* at p. 4.

⁹⁶*Id.* at p. 4.

⁹⁷See GOHSEP’s Cost Estimating Format Replacement Cost Estimates, attached as Ex. “4”.

with the assistance of GOHSEP's experienced and qualified personnel, properly calculated the replacement cost pursuant to FEMA's rules and guidance. Accordingly, FP&C asks this arbitration panel to award FP&C the replacement value of Charity Hospital, an amount not less than the \$491,884,000 calculated using FEMA's Cost Estimating Format.

D. Arbitration Issue No. 4 - In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) failed to follow its own rules and guidelines and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

FEMA's actions with respect to Charity Hospital are inconsistent with and contrary to the purpose and intent of the Stafford Act. By enacting the Stafford Act, Congress authorized the President to award grants to assist state and local governments (and other public assistance applicants) with the repair, restoration and reconstruction or replacement of damaged facilities. 42 U.S.C. § 5172. The Stafford Act is intended "to provide an orderly and continuing means of assistance by the Federal government to State and local governments in carrying out their responsibilities to alleviate the suffering and damages" which result from disasters. 42 U.S.C. § 5121(b). A crucial part of FEMA's mission is to help communities recover as quickly as possible. Id. It has now been some four years since Hurricane Katrina and FP&C still has not received the reasonable and appropriate level of assistance required under the law and regulations for the damages to Charity Hospital.

FEMA personnel were initially provided with the ADAMS Report in November 2005 concluding that replacement cost was the appropriate measure of damages to Charity Hospital. FEMA (LA-TRO) personnel rejected the report because they claimed that it was only a summary report and did not contain the type of comprehensive damage assessment needed to support the claim

for Charity Hospital. Thereafter, FP&C and GOHSEP engaged two additional teams of independent experts (the BKA Team and the RSMeans Team) to assess the damages and to provide estimates to repair and/or replace Charity Hospital. After an exhaustive room-by-room, floor-by-floor assessment of the damages and at great expense, both of these teams of experts rendered reports that concluded that the cost to repair Charity Hospital would greatly exceed 50 percent of its replacement cost.

FP&C provided FEMA (LA-TRO) with overwhelming expert analysis and data to support the immense scope of disaster related damages, the estimated costs to repair the disaster related damages, and the estimated replacement cost of Charity Hospital. FEMA (LA-TRO) received this information in early July 2008 and waited another six months to once again reject FP&C's claim for replacement cost. As discussed in other sections herein, this rejection is without a reasonable basis in law or fact. FP&C submits that the actions by FEMA (LA-TRO) in this case have been counter productive and arbitrary and are directly contrary to the purpose and intent of the Stafford Act to provide needed assistance to help communities recover as quickly as possible from catastrophic natural disasters.

FEMA (LA-TRO) has also failed in its responsibilities regarding *project formulation* with respect to the assessment of the damages and issuance of Project Worksheets pertaining to Charity Hospital. FEMA has project formulation responsibilities which include taking a *leadership* role in identifying the eligible scope of work and doing quantitative estimates for the eligible work. See 44 CFR § 206.201. Project officers are supposed to be program experts trained in developing the scope of work and cost estimates for large projects. A project officer is required to work closely with the applicant to identify and evaluate all work activities associated with the project. See, FEMA Policy

9570.5. FEMA (LA-TRO) utterly and arbitrarily failed to carry out these mandated responsibilities in this case.

To FP&C's knowledge, FEMA (LA-TRO) did only one substantive assessment of the damages to Charity Hospital. This assessment took place in late 2005 shortly after Hurricane Katrina. The damage assessment was primarily limited to damages identified in the Charity Hospital basement. It did not include a room-by-room, floor-by-floor assessment of the damage to the other twenty floors of the hospital. This initial FEMA (LA-TRO) damage assessment resulted in the issuance of PW2174, PW2175, and PW2176, woefully deficient Project Worksheets which obligated repair costs of only approximately \$21 million for the entire damages to Charity Hospital and did not include any environmental assessment and related costs. There is nothing in the record leading to their decision that FEMA (LA-TRO) personnel undertook any additional assessments of the scope of work (other than brief site visits to confirm the scope of work identified by the BKA Team in its assessment; there is nothing indicating that FEMA independently undertook a complete room-by-room, floor-by-floor assessment of the damages to the entirety of Charity Hospital.

The problems encountered with respect to Charity Hospital are identical to those discussed in the December 2008 study by the United States Government Accountability Office (GAO-09-129) of the "challenges" experienced by FEMA with Gulf Coast rebuilding.⁹⁸ The GAO study found that:

"We identified several challenges involving the process of developing PA projects which, at times, contributed to delays and increased costs particularly for many large permanent work projects. These included difficulties in: (1) determining the amount of damage that was actually disaster-related, (2) using PA program flexibilities to rebuild the post-disaster needs of PA grant applicants, (3) assessing project scope and deciding whether to repair or rebuild, (4) estimating project costs, and (5) obtaining

⁹⁸A copy of GAO-09-129 is attached as Ex. "19".

resources to initiate projects.” *Id.* at p. 3, 19.

The GAO Report also found that:

“Cost estimates were often made very early in the project-development process before knowing the full extent of the damage. *FEMA officials noted that the earlier in the process that a cost estimate is developed, the greater likelihood that the estimate will be inaccurate since these early estimates may not factor in all of the damage that exist.* These officials told us that early estimates typically cover only obvious damage since conducting detailed investigations of damage shortly after a major disaster can be difficult.” *Id.* at p. 26. (Emphasis added).

Finally, the GAO Report states that:

“*Shortages of experienced and knowledgeable staff were particularly problematic during the initial stages of rebuilding.* FEMA’s early reliance on temporary rotating staff did not provide the level of continuity needed for the complex demands of Gulf Coast rebuilding.” (Emphasis added).

These are the exact types of failures by FEMA (LA-TRO) which occurred with respect to Charity Hospital. FEMA (LA-TRO) personnel failed to conduct a thorough and complete analysis of the scope of the work or the estimated cost to repair. In fact, most of the FEMA Project Officers and PAC’s assigned to assist the Applicant with project formulation throughout much of the relevant time period after the disaster were inexperienced and lacked Public Assistance training to effectively assist FP&C in their recovery effort. Nevertheless, FEMA (LA-TRO) has rejected the in-depth analysis and assessments by three separate teams of experts who properly quantified the scope of work, calculated appropriate estimates for the cost of repair, and determine that replacement cost is appropriate in this case. These actions were arbitrary and capricious and contrary to FEMA’s project formulation responsibilities.

FEMA (LA-TRO) complains in PW2175V3 that FP&C purportedly failed to do asset protection with respect to Charity Hospital. As previously described in Section II.C. above, FP&C

(through LSU) went to great measures to protect its assets. LSU paid a total of approximately \$5 million in Category B emergency protective measures costs with respect to Charity Hospital. The contention that the Applicant failed to protect its Charity Hospital assets is without any factual support and just plain wrong.⁹⁹

At the same time, the record reflects that while FEMA Project Officers and PAC's provided limited emergency protective measures guidance to LSU (the responsible party for temporary repairs) and wrote some project worksheets of eligible Category B damages, no further guidance was given to either LSU or FP&C regarding any additional requirements. In PW2175V3, FEMA (LA-TRO) points to two letters from Jim Stark¹⁰⁰ dated April 16, 2007, and May 5, 2008, wherein he vaguely states that FP&C "has not taken reasonable and prudent measures to protect damaged facilities." He does not provide any information whatsoever regarding the *factual basis* for determining (a) the nature of the damage or (b) the measures that FP&C should have taken to correct the non-specific deficiencies. Moreover, nowhere in these letters does Mr. Stark (or any other FEMA personnel) offer to work with FP&C to identify needed asset protection or to issue a FEMA obligated Project Worksheet to cover the costs associated with doing additional asset protection.¹⁰¹

Applicant has reviewed the FEMA (LA-TRO) Case Management File for Charity Hospital.

The Case Management File contains very little discussion or noted concern by FEMA (LA-TRO)

⁹⁹See also discussion regarding asset protection at Sections III.C. and V.E.

¹⁰⁰Jim Stark previously served as Director of the Transitional Recovery Offices in New Orleans and Mississippi and also served as an assistant administrator for Gulf Coast Recovery. Stark was recently removed from his position as Director of the Transitional Recovery Offices in Louisiana and Mississippi and now is only serving as an assistant administrator.

¹⁰¹See letter dated August 15, 2007, from Thomas Kirkpatrick (GOHSEP) to Jim Stark responding to statements made by Stark in his April 16, 2007 letter, attached as Ex. "20".

personnel regarding any purported failure to perform asset protection with regard to Charity Hospital. In fact, as best Applicant can determine, FEMA (LA-TRO) personnel mentioned asset protection regarding Charity Hospital only two times in the entire FEMA (LA-TRO) Case Management file.¹⁰² Both of these references are dated February 5, 2007, some eighteen months after the hurricane. The first reference is by "Steven Arroyo" and he notes that "standing water was observed on the second floor west center hall main corridor and second floor elevator lobby." He further notes that "weather past few days had been rainy" and "source of water leakage was not identified." The second reference is also from "Steven Arroyo" and it states that during a site visit on February 1, 2007, he noted a single "open damaged window, located on the 6th Floor." These two references appear to be the only discussion by FEMA (LA-TRO) personnel of any failure to do asset protection at Charity Hospital in the entire FEMA (LA-TRO) Case Management File that contains several thousand pages of information and data. Moreover, these two referenced deficiencies, which were observed *eighteen months after the storm*, do not state how long these conditions existed, whether any actual damage resulted, and whether the conditions were reported to FP&C. Finally, there are no follow-up notes to determine if the referenced deficiencies were subsequently corrected by FP&C. These acts and omissions by FEMA (LA-TRO) with respect to asset protection demonstrate a failure by FEMA to properly conduct project formulation as required by its own rules and regulations and the arbitrary nature of its conclusory allegations.

In the First Appeal, FEMA-Region 6 failed to directly address any of the matters raised by FP&C in this regard. Instead, FEMA-Region 6 set off on a discussion of the ADAMS Report (the

¹⁰²Copies of the relevant portions of the Case Management File is attached hereto as Ex. "21".

very report rejected by FEMA personnel in November 2005 because it was not sufficiently comprehensive) as the purported reason why FP&C is not entitled to a realignment of the scope of work and/or the replacement cost of Charity Hospital. As discussed in detail in Section V.K. of this Request for Arbitration, the reliance by FEMA-Region 6 on the summary ADAMS Report is both wrong and disingenuous. In reviewing and analyzing the First Appeal, FEMA-Region 6 should have based its review on the BKA Report, the damage assessment that was submitted by FP&C and considered by FEMA (LA-TRO) in issuing PW2175V3. By relying exclusively on the ADAMS Report, FEMA-Region 6 simply elected to ignore the only comprehensive floor-by-floor, room-by-room assessment of the storm related damages to Charity Hospital.

The only articulated reason by FEMA-Region 6 for considering the ADAMS Report and ignoring the BKA Report is the following statement:

“For the purposes of this appeal, the ADAMS report will be used for comparison to FEMA’s estimate of repair. The ADAMS report is dated November 2005 which is immediately following the disaster and the BKA and the RS Means reports are dated June 2008 more than two years after the ADAMS report was prepared. The ADAMS report is logically a more accurate representation of the disaster related damages to the Hospital as a result of the hurricane.”¹⁰³

The above statement by FEMA-Region 6 borders on the absurd. As FEMA-Region 6 is well aware, the ADAMS Report is an “executive summary” containing approximately 50 pages of analysis of the damages to Charity Hospital. In November 2005, FEMA personnel rejected the report and refused to consider it in assessing the damages to Charity Hospital. FEMA’s purported reason for rejecting the ADAMS Report was that it was only a summary and was not sufficiently comprehensive to support FP&C’s claim for damages and/or replacement. It was FEMA’s initial

¹⁰³FEMA-Region 6, First Appeal Analysis at p. 6, attached as Ex. “27”.

rejection of the ADAMS Report as insufficient and incomplete that caused FP&C to engage the BKA Team to do a comprehensive room-by-room, floor-by-floor assessment. The result of 18 months of work (with the bi-weekly participation of FEMA personnel) is a damage assessment by the BKA Team of experts containing over 2000 pages of in-depth and detailed analysis of the storm related damages to Charity Hospital. The contention by FEMA-Region 6 that the ADAMS Report should be considered exclusively because it is “logically a more accurate representation of the disaster related damages” is another example of the arbitrary and capricious manner in which this claim has been handled by FEMA to date.

Moreover, FEMA-Region 6's refusal to consider the BKA Report because it was prepared more “than two years” after the storm flies in the face of FEMA’s own ongoing practices.¹⁰⁴ Nearly four years after Hurricane Katrina and Rita, FEMA currently has local field offices operating in Baton Rouge, Lake Charles, Harahan and other locations. These local field offices continue to assess storm related damages and continue to write various project worksheets for storm related damages some four years after the hurricanes. The assertion by FEMA-Region 6 that the BKA Report is somehow inaccurate or unreliable because it was prepared approximately two years after the storm is nothing more than an unsubstantiated excuse for ignoring the only comprehensive floor-by-floor, room-by-room damage assessment of Charity Hospital. If FEMA can continue to assess damages and write PW’s four years after the storm - - then the highly qualified BKA Team could certainly do an accurate and complete assessment of the storm-related damages two years after the event.

Additionally, FEMA-Regions 6's purported analysis of the ADAMS Report is in itself

¹⁰⁴It is also noted that BKA began its assessment in September 2006, approximately one year after Katrina and Rita.

arbitrary and flawed. FEMA-Region 6 takes this summary report and arbitrarily reduces the ADAMS damage calculations to reach a predestined replacement cost percentage that falls below fifty percent. For example, FEMA-Region 6 reduces the ADAMS damage calculation by \$4.87M for ADA Compliance, \$7.16M for Life Safety Compliance and \$5.08M for Electrical Compliance claiming that these items are not considered in the 50-Percent Rule calculation.¹⁰⁵ The ADAMS Report makes it clear that these expenses are for “disaster initiated compliance costs.”¹⁰⁶ FEMA’s current Disaster Assistance Policies expressly provide that such code compliance costs are in fact included in the 50- Percent Rule calculation. This is reflected in Disaster Assistance Policy 9524.4 dated March 25, 2009, which provides:

“C. Computations

1. In accordance with 44 CFR §206.226(f), a facility is eligible for replacement when the repair cost exceeds 50 percent of the replacement cost. The comparison of repair costs with replacement costs results in a fraction that expresses repair as a percentage of replacement.
2. The numerator of the fraction is the cost of repairing disaster damage only and includes costs associated with codes and standards upgrades that apply to the repair of the damaged elements only ... (Emphasis added).¹⁰⁷

Disaster Assistance Policy 9524.4 (March 25, 2009) states that “this policy clarifies the application of 44 CFR §206.226(f) [the -Percent Rule] to determinations of whether a disaster-damaged facility is eligible for repair or replacement.” (Emphasis added).¹⁰⁸ This same method of computation is also

¹⁰⁵See First Appeal Analysis at p. 4, attached as Ex. “27”.

¹⁰⁶See attached Ex. “11”.

¹⁰⁷See Disaster Assistance Policy 9524.4 (March 25, 2009), attached as Ex. “28”.

¹⁰⁸Id.

expressed in the Public Assistance Policy Digest-FEMA 321/January 2008 at page 113 and Public Assistance Guide FEMA 322/June 2007.¹⁰⁹ Thus, FEMA's own disaster assistance policies clarify and confirm that disaster-related code upgrades are in fact included in the 50-Percent Rule calculation.

Finally, FEMA-Region 6 simply deletes the ADAMS Report damages of \$57.63M for "Window repairs" and \$11.87M for "Exterior wall repairs".¹¹⁰ FEMA-Region 6 gives no explanation for this wholesale deletion other than saying that such damages were not sufficiently documented in the ADAMS Report. It is obvious that this reduction is nothing more than an effort to force the ADAMS Report replacement cost calculation below the fifty percent threshold. FEMA-Region 6 makes the statement that the ADAMS Report is "logically a more accurate representation of the disaster related damages to the Hospital as a result of the hurricane."¹¹¹ Nevertheless, FEMA-Region 6 then inexplicably discounts the ADAMS Report damage calculation by \$57.63M and \$11.87M without any reasonable basis. FEMA-Region 6 complains that the 50 page report is not sufficiently detailed to support FP&C's replacement cost claim while simply ignoring the 2000-plus page comprehensive damage assessment found in the BKA Report. FP&C submits that FEMA-Region 6 was wrong to rely exclusively on the ADAMS Report, instead of the BKA Report, and its analysis of the ADAMS Report was both arbitrary and flawed.

¹⁰⁹See attached Ex. "29".

¹¹⁰See First Appeal Analysis at p. 4, Attached as Ex. "27".

¹¹¹Id. at p. 6.

E. Arbitration Issue No. 5 - In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly discounted the FP&C Claim by an unspecified amount because of an alleged failure by FP&C to do adequate asset protection and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

On pages three and four of PW2175V3, FEMA (LA-TRO) alleges that FP&C did not take necessary and appropriate measures to protect Charity Hospital assets after the storm. FEMA (LA-TRO) apparently uses this alleged failure to do asset protection as its grounds for rejecting FP&C's claim for the replacement cost of Charity Hospital. PW2175V3 states: "FEMA recognizes that a fully functioning facility was not possible in the months that immediately followed Hurricane Katrina; however, it appears that measures could have been performed to impede the continuation of damages to the building and its contents."¹¹² Nowhere in PW2175V3 (or in any other document or communication) does FEMA (LA-TRO) provide any specifics regarding (i) the factual basis for its conclusory assertion of the manner in which FP&C failed to protect Charity Hospital's assets, (ii) what damages (if any) were caused by the failure to do asset protection, (iii) what items of damages and/or costs of repair listed in the BKA Report and/or RSMMeans Report were disallowed for failure to do asset protection, and (iv) what items of damages and/or costs of repair listed in the BKA Report and/or RSMMeans Report were discounted because of failure to do asset protection. Most importantly, PW2175V3 does not even state the dollar amount (or even a range of amounts) by which the FP&C claim has been reduced/discounted by FEMA (LA-TRO) for the alleged failure to do adequate asset protection. In short, FEMA (LA-TRO) has arbitrarily and without any articulated factual basis chosen to cite failure of asset protection as a primary reason for denying FP&C's replacement cost

¹¹²See PW2175V3 at p. 4 attached as Ex. "3", (emphasis added).

claim without specifying any reasonable basis for this conclusion.

As discussed in Section II.C. above, the Applicant went to great lengths to perform asset protection with regard to Charity Hospital. Despite flooding and other catastrophic conditions that existed during the weeks and months after the storm, LSU was proactive in its efforts to protect and temporarily repair storm damage to Charity Hospital. Those actions are detailed in Section II.C. above and in the Chronology of Asset Protection (see Exhibit "8") that was provided to FEMA (LA-TRO) as an attachment to FP&C's replacement cost claim. FP&C has demonstrated that it (through LSU) did undertake extensive asset measures and devoted a great amount of effort, manpower, time and expense to "impede the continuation of damages to the building." The non-specific allegation that FP&C should have done more ignores the reality of the circumstances in this case, and utterly fails to provide any factual support for this material contention.

Additionally, FEMA (LA-TRO) wholly ignores the findings of the BKA Report with respect to the matter of asset protection and any resulting damages. The BKA Report directly addresses this issue and states:

"This damage report summarizes the damages resulting directly from the storm [and] damages resulting indirectly from the storm It is important to note that majority of the damages captured in this report occurred within the first 120 days after the worst Hurricane and the subsequent flooding of a major city in this country's history. It is the shared opinion of the authors of this report including engineers and environmental experts that little could have been done to this facility beyond the first few months after Katrina to restore this facility back to treating patients and providing healthcare. All contributory damages after those first 120 days are insignificant. Further, it should be noted that the design and construction time for repairs and renovations to Charity Hospital immediately after the storm would have taken not less than 24 months resulting in the same contributory damages observed thus far."¹¹³

¹¹³See BKA Report at p. 3, attached as Ex. "14".

Thus, the BKA Report expressly states that the damages captured in the report occurred within the first 120 days after the worst hurricane and the subsequent flooding of a major city in the country's history and that any contributory damages after those first 120 days are insignificant. FEMA (LA-TRO) makes no effort to address or refute this reasonable determination by a team of expert architects, engineers and environmental consultants. Having provided no factual basis for its conclusion, nevertheless, FEMA (LA-TRO) arbitrarily rejected the FP&C claim for replacement cost because of a purported and unsupported "continuation of damages to the building."

FEMA's only support for its conclusion that FP&C failed to do adequate asset protection are two letters from Jim Stark to the State of Louisiana dated April 16, 2007 and May 5, 2008; and one sentence taken from a letter from BKA to the State of Louisiana dated April 8, 2008. The vague and non-specific letters from Mr. Stark are discussed in detail in Section III.A. above and need not be repeated here. The one sentence from the BKA letter dated April 8, 2008, is taken out of context and does not support the rejection of FP&C's \$491 million replacement cost claim.¹¹⁴ Simply put, FEMA (LA-TRO) has arbitrarily rejected the FP&C Claim for failure to do asset protection without specifying any reasonable basis for reaching this conclusion.

In the First Appeal, FEMA-Region 6 continued the tired, unsupported theme that FP&C failed to take reasonable asset protection measures. FEMA-Region 6 used this as a purported reason for rejecting FP&C's appeal, but fails to even identify what damages (if any) were actually caused by the failure to do reasonable asset protection and the dollar amount of the purported damages resulting from the failure to do asset protection. As discussed below, FEMA-Region 6 failed to fully

¹¹⁴See discussion of the April 8, 2008, letter in the BKA Supplemental Report, attached as Ex. "22".

consider the documents and information presented and, like FEMA (LA-TRO), reached erroneous conclusions regarding the reasonableness of FP&C's asset protection measures for Charity Hospital.

FEMA-Region 6 states: "The chronology reveals that applicant was aware of the need for asset protection the week of September 15-20, 2005. The entry for that date states that standing water from roof leaks was evident in the upper floors and mold formation was evident on the architectural surfaces in some areas of the building associated with leaks and uncontrolled environmental conditions."¹¹⁵ The implication from this statement is that FP&C took no asset protection measures after being aware of these conditions. That implication is irrefutably wrong. The chronology expressly shows that FP&C (through LSU-HCS) took immediate asset protection measures to prevent the continued intrusion of water and to temporarily repair roof leaks. By October 28, 2005 (only thirty-eight days later), FP&C (through LSU-HCS) had completed "temporary repairs of CH (Charity Hospital) roof damage and windows. MCLNO staff boarded or otherwise closed approximately 480 exterior windows and doorways."¹¹⁶ Thus, the implication by FEMA-Region 6 that FP&C was aware of roof leaks and other environmental conditions and failed to do asset protection is patently incorrect.

Another clearly erroneous assertion by FEMA-Region 6 is the statement that "the temporary measures specifically excluded energizing the building to maintain environment or temperature controls within the building."¹¹⁷ This statement makes one wonder if FEMA-Region 6 even bothered

¹¹⁵First Appeal Analysis at p. 6, Ex. "27".

¹¹⁶See Chronology of Asset Protection at p. 30, Ex. "8".

¹¹⁷First Appeal Analysis at p. 7, Ex. "27".

to read the chronology in reaching its conclusions. If FEMA-Region 6 had read the chronology, it would have noted the entry related October 17, 2005, which states that “MCLNO staff developed and implemented workarounds that allowed partial electrical power restoration to CH [Charity Hospital].... This allowed the partial re-energizing of loads on Floors 3 through 20.”¹¹⁸ Thus, the building was partially re-energized within six (6) weeks after the storm and FEMA-Region 6’s contention that temporary measures excluded energizing the building is once again false.

FEMA-Region 6 also states that “pages 29-35 of the Chronology are prepared to address inspections specific to the Hospital and include the same template statement used for the MCLNO Recovery Efforts Section of the Chronology described above. These entries do not provide any detail of asset protection measures that were completed.”¹¹⁹ Once again it is apparent that FEMA-Region 6 failed to even review the chronology. If it had it would have seen entries showing: (i) September 15-20, 2005 - - initial inspection and damage survey was undertaken; (ii) September 16, 2005 - - a contract was entered to pump out the basement; (iii) September 26, 2005 - - facilities staff commences temporary repairs to windows and other building membrane features; (iv) September 28, 2005 - - samples were taken to analyze basement flood waters; (v) October 6, 2005 - - purchasing staff bids the initial gut and clearing of the flooded basement; (vi) October 7, 2005 - - initial cleanup efforts continue; (vii) October 17, 2005 - - partial re-energizing of Floors 3 through 20; (viii) October 28, 2005 - - contract issued to remove water sediment, building materials, etc. from CH basement; (ix) October 28, 2005 - - completed temporary repairs to CH roof and windows;

¹¹⁸See Chronology of Asset Protection at p. 30, Ex. “8”.

¹¹⁹First Appeal Analysis at p. 6, Ex. “27”.

(x) December 1, 2005 -- staff commences the use of portable pumps and generators to again dewater the CH basement after recent severe squalls.¹²⁰ Again, FEMA-Region 6's contention that the chronology entries "do not provide any detail of asset protection measures" is just plain false.

Apparently, FEMA-Region 6 takes exception to the numerous entries in the chronology after December 2005 which simply state "MCLNO staff inspects the CH building to identify building envelope and security failures. These items are identified, work orders are generated and repairs are carried out."¹²¹ FEMA has no legitimate grounds to dispute that the bi-weekly inspections and subsequent asset protection measures documented in the chronology were in fact undertaken by FP&C (through LSU-HCS). In fact, neither FEMA (LA-TRO) nor FEMA-Region 6 have specifically identified what FP&C failed to do, what damages were caused by the failure to do asset protection or the dollar amount of the resulting damages. Instead, FEMA-Region 6 elected to arbitrarily use the purported failure to adequately document the asset protection as its excuse for denying FP&C's appeal without any concrete, legitimate basis for this conclusion.

Finally, by ignoring the BKA Report, FEMA-Region 6 sidestepped the unrefuted expert findings by the BKA Team that the damages captured in the BKA Report occurred within the first 120 days after the storm. The BKA Team of experts expressly state that "it is the shared opinion of the authors of this report including engineers [i.e. URS] and environmental experts [i.e. W. D. Scott] that ... all contributory damages after those first 120 days are insignificant."¹²² FP&C has provided

¹²⁰See Chronology of Asset Protection at pp. 29-30, Ex. "8".

¹²¹See Chronology of Asset Protection at p. 31, et seq, Ex. "8".

¹²²See BKA Report at p. 3, Ex. "14".

FEMA with a team of highly qualified experts who have opined that the damage was done in the first 120 days after the storm and that any damages from any purported failure to do asset protection after that time period was insignificant. FEMA-Region 6 has no reasonable grounds to refute this expert analysis so it chooses to ignore it altogether.

F. **Arbitration Issue No. 6 - In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly discounted the FP&C Claim by an unspecified amount because of alleged ineligible work and/or excess scope of work and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.**

On page 4 of PW2175V3, FEMA (LA-TRO) states that the “claim appeared to present other ineligible work inclusive of predisaster conditions, such as code deficiencies, deferred maintenance, and excess scope of work.”¹²³ FEMA (LA-TRO) further states that the claim presented “quantities in excess to those observed by FEMA” and “inclusive of MCLNO contents” that have been “included in prior claims by MCLNO.”¹²⁴ This contention relating to the alleged inclusion of MCLNO contents is erroneous and is discussed in detail in Section V.H. below. Otherwise, FEMA (LA-TRO) is non-specific regarding the alleged “ineligible work”, “deferred maintenance” and/or “excess scope of work” which supports the wholesale rejection of FP&C’s replacement cost claim. Once again, PW2175V3 does not even state the dollar amount (or even a range of amounts) by which FP&C’s claim has been reduced/discounted for alleged ineligible work, deferred maintenance, and excess scope of work. This is another example of the arbitrary rejection of FP&C’s replacement cost claim without any reasonable basis in fact.

¹²³See P2175V3 at p. 4 attached as Ex. “3”.

¹²⁴Id.

As discussed in the attached BKA Supplemental Report, FP&C, along with the BKA Team and FEMA (LA-TRO) personnel met on a regular basis commencing in October 2006 and continuing until February 2008.¹²⁵ These joint meetings were conducted in order to (i) format an acceptable methodology of documenting the scope of work, (ii) determine the appropriate format for claim submission and (iii) discuss additional storm damage assessed by the BKA Team.¹²⁶ During these meetings, draft versions of the BKA Team findings were submitted to all parties, including FEMA (LA-TRO) personnel, for review and comment. The lead FEMA personnel who participated in these meetings were Susan O'Brien, Michael Beall and Steven Arroyo. Thus, FEMA (LA-TRO) personnel were well aware of the scope of work, the nature of the assessments and the methods used by the BKA Team to quantify the damages as a result of these regular meetings. Moreover, FEMA (LA-TRO) personnel did not object or raise any significant concerns regarding the scope of the work, the quantities involved or duplicate items during those meetings. However, FP&C notes that PW2175V3 is signed and apparently authored by Melissa Pritchett. Ms. Pritchett did not participate in any of the meetings during the eighteenth month period that the scope of work, assessments, and methods were discussed and addressed. FP&C has found no indication that Ms. Pritchett was even aware of these meetings and the nature of the discussions between FP&C, BKA Team members and other FEMA personnel.

The BKA Supplemental Report does point to one area that could be a potential source of confusion by FEMA (LA-TRO) personnel that could result in the erroneous conclusion that the

¹²⁵See BKA Supplemental Report, attached as Ex. "22".

¹²⁶ BKA Supplemental Report, attached as Ex. "22".

FP&C claim contains duplicate items. The BKA Supplemental Report explains that the original ceiling systems in Charity Hospital, composed of a suspended three coat cement plaster finish and adhered acoustical tile board, served not only as the finished ceiling product but also as the floor-by-floor fire separation. Multiple additional layers of suspended ceiling were installed in various areas of the hospital during renovations over the years. This resulted in some areas of the hospital having as many as three different levels of ceiling on a given floor. The damaged areas identified in the FP&C claim do contain, in some instances, the demolition and replacement of all ceiling systems in certain specified areas. This could have led FEMA (LA-TRO) personnel to erroneously conclude that duplicate quantities were being sought when they were not. The BKA Supplemental Report cautions that such replacement was limited to specific areas and that not all ceiling systems were replaced after demolition. The decision to replace was based on cost effectiveness and best practices.¹²⁷ Of course, FEMA (LA-TRO) personnel who participated in the regular meetings with the BKA Team were well aware that ceiling demolition and replacement were being addressed in this manner. Thus, the possible confusion in this area is somewhat difficult to understand, and is clearly not caused by FP&C.

With regard to deferred maintenance, the BKA Supplemental Report makes it clear that the BKA Report *does not include items of deferred maintenance*.¹²⁸ The BKA Team did have discussions with FEMA (LA-TRO) personnel about deferred maintenance during the regular joint meetings described above. These discussions centered on the condition of the exterior windows and

¹²⁷See BKA Supplemental Report, attached as Ex. "22".

¹²⁸BKA Supplemental Report, attached as Ex. "22".

flashings. The FP&C Claim (as reflected in the BKA Report) only includes costs of repair work associated with windows that suffered damage as a result of the storm, i.e. broken or damaged windows caused by wind-blown debris.¹²⁹ The cost of repair estimates do not include any amounts for deferred maintenance with respect to windows or any other portions of Charity Hospital. The statement in PW2175V3 that the FP&C Claim includes items of deferred maintenance is without basis in fact and is once again wrong, arbitrary and without a reasonable factual basis.

In the First Appeal, FEMA-Region 6 ignored most of the issues raised by FP&C in this regard. FEMA-Region 6 refused to even review or consider the supplemental report by the BKA Team which makes it abundantly clear that the BKA damage assessment does not include ineligible work, deferred maintenance and/or excess scope of work.¹³⁰ Instead of properly considering the supporting evidence submitted by FP&C, FEMA-Region 6 simply failed to consider and address the issues altogether.

The only discussion by FEMA-Region 6 is the comment that “MCLNO facilities, which were either in poor physical condition or needed significant repairs prior to Hurricane Katrina, sustained significant damage from the hurricane. Prior to the disaster, both hospital facilities had documented deficiencies and were having difficulty meeting health care standards.”¹³¹ Although FEMA-Region 6 does not expressly explain the relevance of this comment, it is apparent that it attempts to discount FP&C’s damage claim by some unknown amount for purported predisaster

¹²⁹Id.

¹³⁰See BKA Supplemental Report, attached as Ex. “22”.

¹³¹First Appeal Analysis at p. 5, Ex. “27”.

conditions. As has been typical throughout the entire process, FEMA-Region 6 (like FEMA LA-TRO before it) completely failed to identify specifically what predisaster conditions are being discounted and/or the amount of the claim by FP&C that supposedly relates to predisaster conditions that are not storm related.

FP&C respectfully submits that scope of work and costs to repair Charity Hospital should not be discounted by FEMA for unspecified predisaster conditions. It is undisputed that Charity Hospital was an accredited healthcare facility actively operating as one of only two "Trauma Level One" facilities in the State of Louisiana.¹³² Certainly the building was old -- built in 1939 -- but it was serving as the leading training and educational facility in the State when it was devastated by Hurricane Katrina. To FP&C's knowledge, there is no FEMA rule, regulation, guidance or policy which provides that FEMA emergency assistance should be discounted or reduced because a building is old. Nowhere do the FEMA rules and regulations provide that a storm damaged building and its components should be discounted to a depreciated value. To the contrary, FEMA guidance states that the cost of disaster damage should be determined "using present day materials and methods." FEMA assistance has always been calculated based upon the actual present day cost to repair or replace (if the damage exceeds 50 percent) the storm damaged property without regard to the depreciated value of that property.¹³³ In fact, FP&C is not aware of FEMA raising this "predisaster conditions" issue with respect to any other State or local government building damaged by Hurricane

¹³²See accreditation attached as Ex. "6".

¹³³See eg. discussion of the calculation of "Repair Cost" and "Replacement Cost" in Public Assistance Policy Digest FEMA 321/January 2008, attached as Ex. "29." Also see FEMA Policy 9524.4 and FEMA Guidance No. 4511.61E, attached as Exs. "41" and "42".

Katrina. FP&C submits that any effort to discount the scope of work and costs of repair for predisaster conditions, *i.e.* depreciation, is improper and is contrary to FEMA's rules and guidance. Finally, FP&C notes that the BKA Report, the only comprehensive floor-by-floor, room-by-room damage assessment of Charity Hospital, does not capture or include any repairs that were not either directly or indirectly related to Hurricane Katrina. This is pointed out in detail in the BKA Supplemental Report. Moreover, in a recent letter from H. V. Nagendra (BKA) to Mark Moses (FP&C) dated April 28, 2009,¹³⁴ the BKA Team once again confirms that the BKA Report does not include such items, stating:

The BKA's Storm Damage Evaluation and scope of work was limited to BKA's Damage Assessment of Katrina related storm damage. BKA's evaluation documented both direct and indirect Katrina Storm Damages using direct observation and the extensive experience and professional opinion of BKA's Damage Assessment Team to produce the Katrina Storm Damage Scope. No other work scopes or items were made part of or included in our assessment, per the clear and explicit instructions of the State of Louisiana Office of Facility Planning and Control. The resulting assessment is the basis for the Charity Hospital Claim for all storm related damages. We continue to emphasize that our damage evaluation and resulting claim do not include any items related to compliance with new code and regulatory standards, except as necessary to effect storm damage repairs.

The body of work represented in the Charity Hospital assessment of damages is self evident. However, focus must returned to the Introduction section of BKA's Damage Assessment. The report's introduction clearly states that the scope of BKA's Damage Assessment is the result of damages resulting from Hurricane Katrina, both direct and indirect, and specifically excludes identified items of deferred maintenance, non storm damage, and questionable items. Extreme and expert effort was devoted by the BKA Evaluation Team to determine the cause and origin of the damages to the Structure to insure that only legitimate, Katrina related, storm damages items were included in BKA's Damage Assessment.¹³⁵

¹³⁴See attached Ex. "30" and Nagendra Affidavit, Ex. "32".

¹³⁵See Ex. "30" at pp. 1-2.

Thus, any contention by FEMA-Region 6 that the Charity Hospital damage submission included predisaster conditions that were not storm related is simply incorrect.

G. Arbitration Issue No. 7 - In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly discounted the FP&C Claim by an inappropriate and unspecified amount without factual support for its determination that the use of the FEMA Cost Estimating Format (CEF) was inconsistent with FEMA estimating practices and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

On page 4 of the PW2175V3, FEMA (LA-TRO) states that “the use of the FEMA Cost Estimating Format (CEF) was inconsistent with FEMA estimating practices. For example, the estimate used contained ineligible work; duplicate allowances; national cost data rather than local cost data; and customized unpublished RSMMeans cost codes.”¹³⁶ While FEMA (LA-TRO) gives general and vague “examples,” those examples provide no specifics as to how FP&C’s calculation is inconsistent or improper. PW2175V3 does not identify the “ineligible” work or in any way explain why the unspecified work is deemed ineligible. Likewise, the PW does not identify the “duplicate allowances” that purportedly make the CEF calculation inconsistent. FEMA (LA-TRO) once again fails to assign a dollar amount to these matters and does not tell FP&C how much its replacement cost claim is being reduced or discounted for the alleged nonspecific inconsistencies - - all such actions constituting arbitrary and capricious actions by FEMA.

As discussed in the attached BKA Supplemental Report, the BKA Team has again reviewed the FP&C claim (*i.e.* the BKA Report) and has found no ineligible work.¹³⁷ As set forth above, the BKA Team had regular meetings with FEMA personnel over an extended eighteen-month period.

¹³⁶See PW2175V3 at p. 4 attached as Ex. “3”.

¹³⁷See BKA Supplemental Report, attached as Ex. “22”.

FEMA (LA-TRO) personnel were well aware of the nature and scope of the work included in the BKA Report.¹³⁸ FEMA (LA-TRO) personnel did not identify or complain of “ineligible work” during those regular meetings. Moreover, the BKA Team was somewhat dumbfounded by FEMA’s contention that the FP&C claim includes “duplicate allowances.” The BKA Supplemental Report notes that in construction terms, an allowance is an allocation of monies “for unknowns or for incomplete scope determinations.”¹³⁹ The supplemental report further explains that “[t]he FP&C claim does not contain allowances, as this would contradict FEMA requirements to assign costs only to known scope resulting from damage from the storm event.”¹⁴⁰ Thus, the BKA Team points out that there are no such “allowances” in the FP&C claim and there are certainly no “duplicate allowances” in this case. FEMA’s assertions to the contrary are without a factual basis and arbitrary.

Even more baffling is the contention in PW2175V3 that FP&C’s cost estimates are “inconsistent” or improper because the BKA Report (and the RSMeans Report) uses “national cost data rather than local cost data.” It is readily apparent from both the BKA Report and the RSMeans Report that both used a national cost factor of “1.0”. The BKA Supplemental Report explains that this factor was used to more accurately represent the current market conditions in New Orleans after Hurricane Katrina.¹⁴¹ In fact, a review of PW2175V3 discloses that FEMA (LA-TRO) used the identical factor of “1.0” in calculating its “CEF Part A Estimate” with respect to the Charity Hospital

¹³⁸See discussion in Section III.D.2. and V.E., supra.

¹³⁹BKA Supplemental Report, attached as Ex. “22”.

¹⁴⁰Id.

¹⁴¹Id.

repair cost.¹⁴² This factor of 1.0 is referred to as “City Adj. Factor” by FEMA (LA-TRO) in its CEF Part A Estimate. Moreover, this adjusted cost factor of 1.0 has been used by FEMA (LA-TRO) in connection with Project Worksheets involving other Louisiana facilities. For example, a City Adj. Factor of 1.0 was used by FEMA (LA-TRO) to perform the CEF repair cost estimate for Plaquemines Medical Center Hospital Service Dist. #1 (PW10364V2).¹⁴³ Thus, the complaint that the FP&C Claim used a national cost factor of 1.00, a cost factor which is identical to the City Adj. Factor of 1.00 used by FEMA (LA-TRO), is arbitrary, simply makes no sense, and is another example of the overall arbitrary refusal to grant FP&C’s meritorious claim for the replacement cost of Charity Hospital.

In the First Appeal, FEMA-Region 6 elected to completely ignore this issue stating:

The applicant references the BKA Supplemental Report as the basis for its claim of inconsistent estimating practices by FEMA. The FEMA response to this appeal is based on the ADAMS report and not the BKA or RS Means report as previously discussed. Therefore, a response to “Assignment of Error No. 4” [now Assignment of Error No. 7 in this Request for Arbitration] is not provided.¹⁴⁴

As discussed in detail and Sections V.D and V.K., FEMA-Region 6 improperly relied exclusively on the ADAMS Report in its response and failed to even address the BKA Report. The BKA Report was the basis for FP&C’s submission to FEMA (LA-TRO) and it was the report that was considered and discussed by FEMA (LA-TRO) in issuing PW 2175V3. FEMA-Region 6 should have considered and addressed these issues directly in the First Appeal. Instead, it sidestepped the

¹⁴²See Attachment 6 to PW2175V3 at pp. 3-23 attached as Ex. “3”.

¹⁴³See PW10364V2, a copy of which is attached as Ex. “23”.

¹⁴⁴First Appeal Analysis at p. 8, Ex. “27”.

issues altogether. Accordingly, FP&C asks the arbitration panel to recognize the erroneous statements and conclusions reached by FEMA and correct the errors made in PW2175V3.

H. Arbitration Issue No. 8 - In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) improperly and without factual basis disallowed fixed equipment from the FP&C Claim and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

On page 4 of PW2175V3, FEMA (LA-TRO) summarily rejects FP&C's claim for approximately \$36 million (according to the BKA Report) in hospital fixed equipment costs with a four sentence explanation of the purported reasons for its wholesale rejection of this significant damage category. FEMA (LA-TRO) states that the "FP&C Claim included a damage claim for medical equipment owned by MCLNO.¹⁴⁵ MCLNO is part of the LSU Hospital System and includes the Charity Hospital building.¹⁴⁶ Several of these pieces of equipment are covered in PW16809. Additional identified damages to equipment in Charity Hospital will be addressed in future versions of PW16809. Medical equipment owned by MCLNO is not considered part of the construction of Charity Hospital."¹⁴⁷ FEMA (LA-TRO) again fails to identify the specific medical equipment that is purportedly duplicative of PW16809 or the dollar amount of the duplicative items. As discussed below, the fixed equipment sought in the BKA Report and the RSMMeans Report (with a few insignificant exceptions) is not duplicative of PW16809. But equally important, FEMA (LA-TRO) makes no effort whatsoever to distinguish between fixed equipment, which is by FEMA's own rules and regulations, considered to be part of the building, and movable contents, which are generally not

¹⁴⁵See Footnote 1, supra.

¹⁴⁶Id.

¹⁴⁷See PW2175V3 at p. 4, attached as Ex. "3".

considered to be part of the construction. The wholesale and categorical rejection of all fixed equipment is arbitrary, without a factual basis and, as discussed below, is contrary to the guidance found in FEMA's own regulations, contrary to the methodology to which FEMA (LA-TRO) personnel agreed to during meetings with FP&C and the BKA Team, and is contrary to Louisiana law regarding component parts of buildings or other constructions.

Initially, it is noted that the items of fixed equipment listed in the BKA Report are not duplicative of the contents claimed by MCLNO in PW16809. The BKA Supplemental Report states that the BKA Team has again reviewed its fixed equipment list and has found no duplicate items.¹⁴⁸ As for the RSMeans Report, Applicant has compared the equipment listed in that report to the MCLNO equipment inventory and has found very few duplicates. Of the 5294 line items of the MCLNO equipment inventory, only 47 items are included in the RSMeans report. Those items included are three (3) autopsy tables (total cost of \$54,300), thirteen (13) sterilizers (total cost of \$19,296), two (2) commercial ranges (total cost of \$9,499), and a dishwasher (total cost of \$8,799.93).¹⁴⁹ Any duplicate equipment items in the RSMeans Report are clearly minor and are insignificant and immaterial to the determination of FP&C's replacement cost claim, particularly in light of the affirmative proof of damages presented by FP&C.

The real issue regarding the fixed equipment listed in the BKA Report and RSMeans Report is whether it should be included as part of the building, and correspondingly, part of the FP&C claim

¹⁴⁸BKA Supplemental Report, attached as Ex. "22". The only possible "duplicate" in the BKA Report are the 22 dental chairs that FEMA contends were moved to the interior of University Hospital. These dental chairs make up exactly \$132,000 of FP&C's \$36 million fixed equipment repair cost estimate. This amount is certainly not a material amount and does not affect the conclusion in the BKA Report that repair costs exceed 50 percent of replacement cost.

¹⁴⁹See MCLNO inventory of contents for Charity Hospital attached as Ex. "24".

for repair and/or replacement of Charity Hospital. A review of the items of fixed equipment included in the BKA Report and RSMMeans Report readily discloses that they include major items of fixed equipment that are built-in and/or permanently attached to the hospital building. The fixed equipment lists include CT Scanners, patient headwalls, x-ray machines, walk-in freezers, walk-in refrigerators, surgery headwalls, operating room lights, and built-in kitchen equipment. These are the types of fixed equipment that would normally be considered a permanent part of the hospital.¹⁵⁰ The contention by FEMA (LA-TRO) that this fixed equipment is “not considered part of the construction of Charity Hospital” is not supported by either fact or law.

Although there are no specific FEMA rules regarding the treatment of fixed equipment in a hospital, other FEMA rules on fixed equipment should provide guidance in this area. Specifically, FP&C notes that 44 CFR, Ch. 1, pt. 61, App. (A)(3) identifies types of fixed equipment in a residential setting that are generally considered to be a part of the building. This section of the CFR, which deals with the Standard Flood Insurance Policy issued by FEMA, provides that the following fixtures, machinery and equipment are considered to be “Building Property” by FEMA:

- (a) Awnings and canopies;
- (b) Blinds;
- (c) Carpet permanently installed over unfinished flooring;
- (d) Central air conditioners;
- (e) Elevator equipment;
- (f) Fire extinguishing apparatus;
- (g) Fire sprinkler systems;
- (h) Walk-in freezers;
- (i) Furnaces;
- (j) Light fixtures;
- (k) Outdoor antennas and aerials fastened to buildings;

¹⁵⁰The BKA Supplemental Report reiterates that “it is industry practice to include the costs of fixed equipment to the construction cost of the building.” See attached Ex. “22”.

- (l) Permanently installed cupboards, bookcases, paneling, and wallpaper;
- (m) Pumps and machinery for operating pumps;
- (n) Ventilating equipment;
- (o) Wall mirrors, permanently installed; and
- (p) In the units within the building, installed;
 - (1) Built-in dishwashers;
 - (2) Built-in microwave ovens;
 - (3) Garbage disposal units;
 - (4) Hot water heaters, including solar water heaters;
 - (5) Kitchen cabinets;
 - (6) Plumbing fixtures;
 - (7) Radiators;
 - (8) Ranges;
 - (9) Refrigerators; and
 - (10) Stoves.¹⁵¹

The above listing (which deals with a residential setting) identifies numerous items of permanently attached fixtures, machinery and equipment that are considered by FEMA to be “building property”.

Clearly items like light fixtures, walk-in freezers, built-in kitchen equipment and the like are not simple contents as FEMA (LA-TRO) is contending in this case without a factual or legal basis. The fixed equipment listed on the FP&C Claim is of the nature of building property and should be included as part of the cost to repair and/or replace Charity Hospital.

Moreover, FEMA (LA-TRO) was well aware that these types of fixed equipment items would be included in the FP&C Claim and never objected until the issuance of PW2175V3 in December 2008. FEMA (LA-TRO) personnel had multiple discussions with FP&C and the BKA Team about the “methodology” to be used in connection with the FP&C Claim. The agreed upon “methodology” is expressly set forth in the BKA Report.¹⁵² This methodology expressly states that

¹⁵¹See 44 CFR, Ch. 1, Pt. 61, App. (A)(3), p. 287, attached as Ex. “40”.

¹⁵²See BKA Report, Methodology page 1 of 1, attached as Ex. “14”.

“fixed light fixtures, exam lights, surgical lights and patient headwalls are considered part of the building repair costs.”¹⁵³ This was discussed with and agreed to by FEMA (LA-TRO) personnel prior to the issuance of the BKA Report. However, FEMA (LA-TRO) now arbitrarily claims that such fixed equipment is not to be considered part of the building.

Finally, it is noted that the inclusion of this fixed equipment as part of Charity Hospital is consistent with Louisiana law. Louisiana Civil Code Article 466 addresses “component parts of a building or other construction.” Article 466 provides:

Art. 466. Component parts of a building or other construction

Things that are attached to a building and that, according to prevailing usages, serve to complete a building of the same general type, without regard to its specific use, are its component parts. Component parts of this kind may include doors, shutters, gutters, and cabinetry, as well as plumbing, heating, cooling, electrical, and similar systems.

Things that are attached to a construction other than a building and that serve its principal use are its component parts.

Other things are component parts of a building or other construction if they are attached to such a degree that they cannot be removed without substantial damage to themselves or to the building or other construction.

The fixed equipment identified in the FP&C Claim are component parts of Charity Hospital. They include various electrical installations, permanently attached medical equipment, and built-in installations. These items are not simple contents and should be included in the FP&C Claim.

In the First Appeal, FEMA-Region 6 dismissed FP&C’s claim for inclusion of fixed equipment with the unsupported statement that “it is not industry standard to consider specialized fixed equipment, which serves a specific and independent function, as a critical support component

¹⁵³Id.

to be included in a repair/replacement building estimate.”¹⁵⁴ FEMA-Region 6 made this bare statement without citation to any FEMA rules, regulations, policies or other guidance. This statement is in fact contrary to the opinions of the BKA team of experts who stated that “it is industry practice to include the costs of fixed equipment to the construction cost of the building.”¹⁵⁵ Apparently, FEMA-Region 6 erroneously believes it is the undisputed authority on “industry practices” and needs no actual authority or basis for such unilateral conclusions.

In the absence of specific FEMA emergency assistance rules on the subject of fixed equipment, FP&C cited FEMA rules pertaining to National Flood Insurance and requested that said rules be applied by analogy in this case. FP&C pointed out that 44 CFR, Ch. 1, pt. 61, App. (A)(3) identifies various types of fixed equipment generally considered to be part of the building. FEMA-Region 6 simply rejected this analogy without any reasonable basis - - stating only that “this listing of fixtures, equipment and machinery is for insuring purposes only and has no relevance to Public Assistance eligibility.”¹⁵⁶

FP&C respectfully asks this arbitration panel to properly consider the issues relating to fixed equipment under federal and state law. PW2175V3 improperly disallows fixed equipment without any reasonable or rational basis. In considering this issue, the arbitration panel should properly consider the treatment of fixed equipment in the BKA Report and the BKA Supplemental Report, and, in light of the authorities cited above, should conclude that such fixed equipment is a

¹⁵⁴First Appeal Analysis at p. 8, Ex. “27”.

¹⁵⁵See BKA Supplemental Report, attached as Ex. “22”.

¹⁵⁶First Appeal Analysis at p. 8, Ex. “27”.

component of the building and included in the damage assessment.

I. Arbitration Issue No. 9 - In connection with Arbitration Issues 1, 2 and 3, PW2175V3 contains numerous material errors and omissions, fails to properly determine the scope of the work and fails to properly determine the costs to repair the damages and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

In PW2175V3, FEMA sets forth a list of some 249 line items of repair costs that it recognizes with respect to Charity Hospital. This listing is replete with errors, omissions, and underestimated costs. FEMA's estimate woefully understates the square footage of Charity Hospital and various hospital floors. For example, the floor plan space for Charity Hospital is 998,749 square feet. However, PW2175V3 uses only 900,000 square feet to calculate certain repair costs.¹⁵⁷ Additionally, the actual square footage of the first floor is 111,000 square feet, but FEMA (LA-TRO) uses a figure of only 85,000 square feet in its assessment.¹⁵⁸ Additionally, PW2175V3 fails to consider or allocate costs for numerous environmental matters that clearly must be addressed to repair Charity Hospital. PW2175V3 does not recognize or allocate estimated costs to remediate chemical contamination, mold infestation, biological cleaning of all surfaces to address blood borne pathogens and other environmental hazards. The FEMA (LA-TRO) estimate does not address these significant environmental costs even though similar costs were recognized and approved by FEMA (LA-TRO) in connection with the repair of the LSU Interim Public Hospital (former University Hospital).¹⁵⁹

¹⁵⁷See PW2175V3, page 6, ln. 4, 5, attached as Ex. "3".

¹⁵⁸See PW2175V3, page 2, attached as Ex. "3".

¹⁵⁹See BKA Supplemental Report, attached as Ex. "22".

The attached BKA Supplemental Report addresses the failure by FEMA (LA-TRO) to properly determine the scope of the work, the failure to properly estimate the costs to repair the disaster related damages, and identifies some of the numerous errors and omissions in the scope of work and cost estimates listed in PW2175V3.¹⁶⁰ This supplemental report identifies in chart form numerous errors and omissions by FEMA (LA-TRO) that detrimentally affect the value of the FP&C Claim. The BKA Supplemental Report is not a line by line comparison of all of the errors and omissions. Due to time constraints and costs, the BKA Supplemental Report provides only a summary of some of the more egregious errors and omissions by FEMA (LA-TRO). It fully establishes, however, the lack of a reasonable factual basis and the arbitrary nature of FEMA's position.

In the First Appeal, FFMA-Region 6 completely ignored the BKA Supplemental Report, stating:

The applicant uses the BKA Supplemental Report as the basis for the claim what PW2175v3 does not properly estimate, or itemize, the costs to repair the disaster related damage to the Hospital. The FEMA response to this appeal is based on the ADAMS report and not the BKA or RS Means reports as previously discussed. Therefore, a response ... is not provided.¹⁶¹

FEMA-Region 6's refusal to even review the hundreds of errors, omissions, and underestimated costs in PW2175V3 demonstrates its total failure to even consider the merits of FP&C's First Appeal. FP&C's First Appeal sought a review of the scope of the work and costs estimated by FEMA in PW2175V3. FP&C produced a 30 page BKA Supplemental Report that identifies hundreds of errors, omissions and underestimates in PW2175V3.¹⁶² FP&C points out, among hundreds of other

¹⁶⁰Id.

¹⁶¹First Appeal Analysis at p. 8, Ex. "27".

¹⁶²BKA Supplemental Report, Ex. "22".

errors, that FEMA (LA-TRO) woefully understated the square footage of the various hospital floors in PW2175V3 and that FEMA(LA-TRO) failed to consider numerous environmental remediation costs that are eligible for reimbursement.¹⁶³

FP&C submits that a simple review of PW2175V3 clearly demonstrates that the obligated repair costs for Charity Hospital are incredibly understated. For example, a review of the per square foot repair costs obligated in PW2175V3 for critical mechanical and electrical systems show that those costs are less than half of the per square foot amount obligated by FEMA for many other State and local government buildings damaged by Hurricane Katrina. This comparison is set forth in the tables below.

<u>PW#</u>	<u>Building</u>	<u>Square Footage</u>	<u>Mechanical/Electrical Costs Obligated</u>	<u>Repair Cost per Square Foot</u>
2175v3	Charity Hospital - Main	998,749	\$9,119,678.09	\$9.13

* * * *

<u>PW#</u>	<u>Building</u>	<u>Square Footage</u>	<u>Mechanical/Electrical Costs Obligated</u>	<u>Repair Cost per Square Foot</u>
4876	Templeman Ph III & IV	160,000	\$3,991,737.00	\$24.95
5118	N.O. State Office Building	169,997	3,334,419.00	19.61
13948	Orleans Ph. Prison	82,600	2,406,364.50	29.13
930	Templeman Phase V	42,875	2,095,921.00	48.88
532	Orleans Ph. Courthouse	29,260	1,781,610.00	60.89

¹⁶³See BKA Report, Ex. "14" and BKA Supplemental Report, Ex. "22".

3977	Templeman Phase I	57,330	1,094,553.00	19.09
926	Orleans Ph. Criminal Intake	27,500	446,029	16.22

As the tables above aptly demonstrate, the critical mechanical and electrical repair costs obligated by FEMA (LA-TRO) in PW2175V3 is far less than the per square foot repair costs obligated for other State and local government buildings damaged by Katrina.¹⁶⁴ The examples listed above show that PW2175V3 obligates less than one-half (and in one case less than one-sixth) of the per square foot repair costs of other similarly damaged buildings. The magnitude of this discrepancy becomes even more apparent when we take into account the fact that most of Charity Hospital's critical electrical and mechanical systems were located in the basement and were totally destroyed by the floodwaters of Hurricane Katrina.

FP&C submits that the above discrepancies and the hundreds of items identified in the BKA Supplemental Report support its position in this arbitration. A review readily discloses that the BKA Report is the damage assessment which properly identifies the complete and accurate scope of work and correctly captures the costs associated with the scope of work.

J. Arbitration Issue No. 10 - In connection with Arbitration Issues 1, 2 and 3, FEMA (LA-TRO) failed to properly apply the 50-Percent Rule to Charity Hospital and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.

FEMA (LA-TRO) and FEMA-Region 6 have failed and/or refused to apply the 50-Percent Rule to Charity Hospital, but instead insists on only obligating limited, inadequate and incomplete repair costs even though replacement is appropriate in this case. FEMA's refusal to apply the 50-

¹⁶⁴Electronic copies of PW's 4876, 5118, 13948, 930, 532, 3977 and 926 are attached as Ex. "31".

Percent Rule is inconsistent with law. FEMA's own regulations and guidance and is inconsistent with the treatment of other facilities severely damaged by Hurricane Katrina (e.g., Plaquemines Medical Center Hospital Service District #1 - PW1036V2, which is incorporated by reference in order to demonstrate the arbitrary PATTERN OF CONDUCT by FEMA). The refusal to acknowledge the applicability of the 50-Percent Rule and its failure to apply the rule in this case is arbitrary and without reasonable basis in law or fact.

The FEMA 50-Percent Rule is set forth in 44 C.F.R. § 206.226(f)(1). This FEMA regulation provides with regard to repair versus replacement of a damaged facility:

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.¹⁶⁵

The determination of eligibility of a facility for replacement is calculated by the following fraction: The cost of the disaster damage (repair of the damaged components only, using present day materials and methods) divided by the cost of replacement of the facility with a facility of equivalent capacity, using current codes for new construction.¹⁶⁶ If this calculation is greater than 50 percent, then replacement is eligible for FEMA funding.¹⁶⁷

In the instant case, both the BKA Report and the RSMeans Report provided expert assessments of both the base cost to repair the disaster damage and the estimated base replacement

¹⁶⁵44 C.F.R. § 206.226(f)(1), attached as Ex. "36".

¹⁶⁶See FEMA Policy 9524.4, Eligibility of Facilities for Replacement (the 50-Percent Rule), attached as Ex. "41"; and FEMA Guidance No. 4511.61E, The 50-Percent Rule: The Eligibility of Facilities for Replacement under 44 CFR 206.226, attached as Ex. "42".

¹⁶⁷Id.

cost. Those calculations are discussed in Section II.D. above. Both the BKA Report and the RSMeans Report demonstrate that the base cost to repair Charity Hospital easily exceeds 50 percent of the base replacement cost. The BKA Report calculates the ratio at 80.1% for base repair costs divided by base replacement cost. The RSMeans Report calculates the ratio to be 68.2% for base repair costs divided by base replacement cost. Thus, both of these expert reports (like the prior Adams Report) demonstrate that the FEMA 50-Percent Rule is triggered with regard to Charity Hospital and FP&C is entitled to replacement value under FEMA regulations and guidance.

FEMA (LA-TRO) and FEMA-Region 6 rejected FP&C's replacement cost claim without a reasonable basis in fact or law. The vague criticisms by FEMA (LA-TRO) of the BKA Report and/or RSMeans Report have little or no bearing on the applicability of the 50-Percent Rule to Charity Hospital in this case. For example, the single greatest dollar amount questioned by FEMA (LA-TRO) is the inclusion of fixed equipment as part of the FP&C Claim for replacement of Charity Hospital. FP&C submits that the fixed equipment was properly included in the claim as discussed in detail in Section V.G. above. However, even if FEMA (LA-TRO) is assumed to be correct, and fixed equipment should be dealt with separately, this change would have no bearing on the conclusion that repair costs exceed 50 percent of replacement cost of Charity Hospital. The BKA Report calculates the cost to repair fixed equipment to be \$36,135,500 and the replacement cost of fixed equipment to be \$55,000,000. If these two numbers are backed out of the 50-Percent Rule calculation, we reach the following result:

$$\frac{\text{BKA Repair Costs - Fixed Equipment}}{\text{BKA Replacement Cost - Fixed Equip.}} = \frac{\$152,332,984 - \$36,135,500}{\$190,265,025 - \$55,000,000} = 85.9\%$$

Thus, when fixed equipment is subtracted from both the estimated repair costs and replacement cost

calculation in the BKA Report, the ratio of repair/replacement actually increased from 80.1% to 85.9%. FEMA (LA-TRO) is clearly wrong in its contention that the inclusion of fixed equipment somehow justifies FEMA's refusal to apply the 50-Percent Rule to Charity Hospital. The refusal to recognize and apply the 50-Percent Rule to Charity Hospital is simply arbitrary and improper.

K. Arbitration Issue No. 11 - In connection with Arbitration Issues 1, 2 and 3, FEMA-Region 6 completely ignored the primary documentation submitted by FP&C in support of the First Appeal - - the comprehensive facility assessment of the disaster related damages to Charity Hospital prepared by the Blich Knevel team of experts.

In rejecting the First Appeal, FEMA-Region 6 completely ignored the primary documentation submitted by FP&C - - the comprehensive facility assessment of the damages to Charity Hospital prepared by the Blich Knevel team of experts. The BKA Report involves the only detailed room-by-room, floor-by-floor assessment of the storm damages to Charity Hospital. It is the product of an 18-month effort costing hundreds of thousands of dollars in which FEMA personnel actively participated in bi-weekly meetings to review the ongoing assessment work and the various items of damages. FEMA-Region 6 dismissively rejected the BKA Report because it was purportedly done two years after the hurricane. Instead, FEMA-Region 6 relied solely on the ADAMS Report. This summary ADAMS Report was submitted by FP&C with the First Appeal as additional support of its claim, but was not a primary comprehensive, room-by-room assessment like the BKA Report. Moreover, FEMA's analysis of the ADAMS Report is completely flawed and arbitrarily deletes more than \$68 million in damages from the ADAMS Report.¹⁶⁸ As described previously, the ADAMS Report was initially provided to FEMA personnel in November 2005 as evidence of the damages to Charity Hospital. However, FEMA personnel immediately rejected the ADAMS Report because

¹⁶⁸See discussion in Section V.D., supra.

FEMA claimed that it was only a summary report and did not contain the comprehensive assessment of damages needed to support the claim for damages to Charity Hospital. It was precisely the rejection of the ADAMS Report that caused the FP&C (with the participation of FEMA personnel) to engage Blich Knevel to perform a comprehensive assessment of the damages.

It is important to note that throughout the entire process - - from the initial claim submission to FEMA (LA-TRO) through the First Appeal to FEMA Region 6 - - FP&C has submitted and relied on the BKA Report as the comprehensive damage assessment in support of its claim for the damages to and/or replacement cost of Charity Hospital. This is reflected in all of the communications between FP&C (or GOHSEP) and FEMA. For example, in the claim submission letter from FP&C to GOHSEP dated June 23, 2008, it states that “Blich Knevel Architects (BKA) under contract to FP&C has performed a re-inspection of [Charity] and the result of their work is attached. The BKA Report is the basis for the request for scope and cost alignment.”¹⁶⁹ Likewise, in the transmittal of the request for cost realignment from GOHSEP to FEMA (LA-TRO) dated July 3, 2008, it states that “FP&C engaged Blich Knevel Architects (BKA) of New Orleans to complete an extensive damage assessment of the Hospital.”¹⁷⁰ This letter also noted an additional report by RSMMeans which was submitted in further support of the request for scope alignment.¹⁷¹

It is abundantly clear from the text of PW2175V3 that the BKA Report was the primary comprehensive damage assessment submitted by FP&C and considered by FEMA (LA-TRO) in connection with the issuance of PW2175V3. On page 1 of PW2175V3, FEMA (LA-TRO) lists the

¹⁶⁹See letter from Mark A. Moses (FP&C) to Mark Riley (GOHSEP) dated June 23, 2008, attached as Ex. “25”.

¹⁷⁰See letter from Mark S. Riley (GOHSEP) to James Stark (FEMA) dated July 3, 2008, attached as Ex. “26”.

¹⁷¹Id.

documentation submitted in support of the scope alignment as including “Blitch Knevel Report”.¹⁷² Nowhere does PW2175V3 list the ADAMS Report among the documents submitted or considered by FEMA (LA-TRO) in connection with the issuance of PW2175V3. Throughout PW2175V3, FEMA (LA-TRO) refers to Blitch Knevel Architects and the report generated by Blitch Knevel and FEMA (LA-TRO) points to purported errors and/or deficiencies in the BKA Report in reaching its findings and conclusions as to the scope and cost of the work in PW2175V3.

When FP&C filed its First Appeal, it properly listed various assignments of error based on statements made by FEMA (LA-TRO) in the text of PW2175V3. Naturally, those assignments of error related primarily to the failure by FEMA (La-TRO) to properly consider and accept various findings in the BKA Report, the comprehensive damage assessment submitted by FP&C and discussed in PW2175V3. However, in rejecting the First Appeal, FEMA-Region 6 elected to wholly ignore the BKA Report - - the very damage assessment that was submitted by FP&C and considered by FEMA (LA-TRO) in issuing PW2175V3. In taking this approach, FEMA-Region 6 sidestepped the numerous errors and omissions made by FEMA (LA-TRO) in PW2175V3 by blatantly ignoring the only complete and thorough floor-by-floor, room-by-room comprehensive damage assessment performed with respect to Charity Hospital. After some 18 months of work and hundreds of thousands of dollars in expense (with the consent and participation of FEMA personnel), FEMA-Region 6 simply elected to throw away the BKA Report because it was more convenient for it to attempt to apply its flawed reasoning for denying FP&C’s claim to the ADAMS summary report. Such action is another example of the continued arbitrary and capricious manner in which FEMA

¹⁷²See Ex. “3”.

has handled the Charity Hospital claim and should be corrected by this panel.

L. Arbitration Issue No. 12 - In connection with Arbitration Issues 1, 2 and 3, FEMA-Region 6 failed to do a complete, thorough and independent review of FP&C's claim resulting in an incomplete and wholly deficient administrative fact finding process.

The Charity Hospital claim is a highly significant claim in light of the size of the claim, the nature of the facility damaged (one of the State's largest Trauma One hospital and teaching facilities), and the importance to the people of the State of Louisiana. The size and importance of the claim, and its inherent complexity, certainly warrant that FEMA should leave "no stone unturned" or at least be reasonable and prudent in considering all evidence presented by FP&C in order to properly undertake a fair, complete and thorough administrative fact finding process. FEMA-Region 6 completely failed in this regard through its limited and incomplete review of the evidence presented and its total refusal to even consider many of the assignments of error raised by FP&C in the First Appeal.

The record shows a failure by FEMA-Region 6 to do a complete and independent review of the evidence submitted by FP&C and demonstrates the inadequacy of FEMA's determination of the scope of the work and the amount of damages incurred by Charity Hospital. If FEMA can simply pick and choose the evidence that it will consider and/or review (rather than considering all documents and evidence presented), it fails to undertake a fair and an appropriate fact finding process upon which to base its determinations of public assistance. In fact, FEMA-Region 6 did not even bother to consider the most important evidence submitted by FP&C in support of the First Appeal -- the 2000-plus page comprehensive floor-by-floor, room-by-room damage assessment performed by the BKA team of experts. Instead, FEMA-Region 6 simply ignored numerous

legitimate assignments of error on appeal and disingenuously upheld the erroneous decision of FEMA (LA-TRO).

FEMA-Region 6 considered only a 50 page summary report and ignored the other thousands of pages of documentary evidence submitted by FP&C in support of the First Appeal. A review of FEMA-Region 6's "First Appeal Analysis" expressly reflects such action.¹⁷³ This action calls into question the fairness of FEMA's entire administrative fact-finding process in connection with the Charity Hospital claim. FP&C submits that FEMA's statutory scheme for appeals of determinations of disaster assistance is inadequate on its face and has been inadequate as applied to the Charity Hospital claim in this case.

VI. REQUEST FOR ORAL ARGUMENT/ HEARING

FP&C respectfully requests that 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 (LA-TRO) and FEMA-Region 6 have failed to assess the scope of the work and the costs to repair the damages to Charity Hospital and to evaluate information presented to them by FP&C. Additionally, FEMA (LA-TRO) and FEMA-Region 6 have failed to recognize and apply the 50-Percent Rule with respect to the extensive damages to Charity Hospital that have been determined by three independent teams of highly qualified expert consultants to greatly exceed 50 percent of the replacement cost in accordance with law and regulations.

¹⁷³See First Appeal Analysis, attached as Ex. "27".

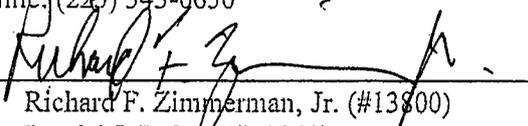
ACCORDINGLY, FP&C RESPECTFULLY REQUESTS that this Honorable Arbitration Panel properly determine the scope of work and the costs to repair the disaster-related damages as described in this Request for Arbitration, and properly apply the 50-Percent Rule to award FP&C the replacement value of Charity Hospital-- an amount calculated to be not less than \$491,884,000.

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

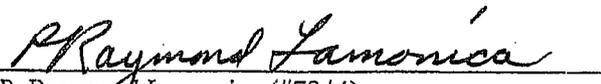
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Submitted this 30th day of September, 2009.

VERIFICATION

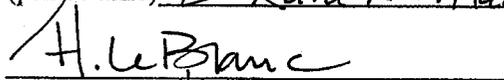
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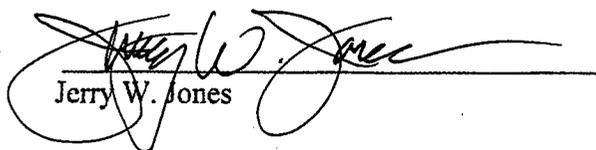
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, personally came and appeared JERRY W. JONES, Assistant Commissioner, State of Louisiana, Division of Administration, Facility Planning and Control ("Applicant"), who being first duly sworn, said that he is an architect licensed in the State of Louisiana and pursuant to his duties and responsibilities with Applicant, he has personal knowledge of the facts and circumstances regarding the efforts by Applicant to obtain FEMA assistance in connection with the Hurricane Katrina related damages to Charity Hospital; that he has read the "Request For Arbitration Of Project Worksheet Number 2175V3 By Facility Planning And Control, State of Louisiana", and he attests that all factual statements made therein are true and correct based upon his knowledge, information and belief, and that this Request for Arbitration is being transmitted simultaneously to the Grantee - - Attn: Mark Riley, Deputy Director GOHSEP, 7667 Independence Blvd., Baton Rouge, LA 70806; FEMA - - Attn: Gary Jones, Acting Regional Administrator, 800 N. Loop 288, Denton, TX 76209; and Arbitration Administrator - - Civilian Board of Contract Appeals (3 copies), Sixth Floor, 1800 F Street, NW, Washington, DC 20036.

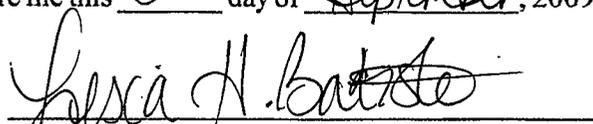
WITNESSES:


(print name) Kara K. Allen


(print name) Hilary LeBlanc


Jerry W. Jones

SWORN TO AND SUBSCRIBED before me this 30th day of September, 2009.


Notary Public Lesia H. Batiste
Lifetime

#230176

**FACILITY PLANNING AND CONTROL, STATE OF LOUISIANA'S
REQUEST FOR ARBITRATION OF PROJECT WORKSHEET NUMBER 2175V3**

LIST OF ARBITRATION EXHIBITS

<u>Exhibit #</u>	<u>Description</u>
1.	State of Louisiana Executive Order No. KBB 2006-1
2.	La. R.S. 17:1519.2
3.	FEMA PW2175V3
4.	Cost Estimating Format (CEF) Replacement Cost Estimates by GOHSEP
5.	FEMA – Cost Estimating Format For Large Projects Instructional Guide
6.	Charity Hospital Accreditation
7.	Video – Damage to Charity Hospital
8.	Chronology of Asset Protection – Charity Hospital
9.	Letter from Paul Rainwater to Congressman Joseph Cao dated February 20, 2009
10.	Bills paid by LSU for Asset Protection (in electronic form)
11.	ADAMS Report Executive Summary dated November 2005
12.	Biographical information on BKA, URS and W.D. Scott (the “BKA Team”)
13.	Louisiana Architects Selection Board Application completed by BKA
14.	BKA Report dated June 2008 (in electronic form)
15.	Biographical information on RSMeans Team
16.	RSMeans Report dated June 2008
17.	Letter from Mark Moses to Mark Riley dated June 23, 2008
18.	Letter from Mark Riley to James Stark dated July 3, 2008

19. Report by United States Government Accountability Office (GOA-09-129) dated December 2008
20. Letter from Thomas Kirkpatrick to James Stark dated August 15, 2007
21. FEMA Case Management File – Notes regarding asset protection at Charity Hospital
22. BKA Supplemental Report
23. FEMA PW10364V2
24. MCLNO contents inventory – Charity Hospital (in electronic form)
25. Letter from Mark A. Moses to Mark Riley dated June 23, 2008
26. Letter from Mark Riley to James Stark dated July 3, 2008
27. Letter from Gary Jones to Colonel Thomas Kirkpatrick dated May 8, 2009 with attached “First Appeal Analysis”
28. Disaster Assistance Policy 9524.4
29. Select pages from Public Assistance Policy Digest-FEMA 321/January 2008 and Public Assistance Guide-FEMA 322/June 2007
30. Letter from H. V. Nagendra to Mark Moses dated April 28, 2009
31. Electronic copy of Project Worksheets 4876, 5118, 13948, 930, 532, 3977 and 926
32. Affidavit of H. V. Negendra, Blich Knevel & Associates
33. Affidavit of Barbara Balboni, RSMeans
34. Affidavit of John Zimmer, GOHSEP
35. First Appeal of PW2175V3 filed by FP&C on March 11, 2009
36. 44 CFR § 206.226
37. Arbitration Rules, 44 CFR Part 206, subpart G, adding 206.209
38. 44 U.S.C. § 5172

39. Public Assistance, Policy Digest, FEMA-321/October 2001, pp. 22, 23 and 106
40. 44 CFR, Ch. 1, Pt. 61, App. (A)(3), p. 287
41. FEMA Policy 9524.4
42. FEMA Guidance No. 4511.61E