

## RESPONSE TO APPLICANT'S ARBITRATION ISSUES

### Arbitration Issue No. 1

**The in-depth assessment 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.**

### Response to Arbitration Issue No. 1

The Applicant has not demonstrated that the amount of disaster-related damage and eligible project costs warrant replacement of Charity Hospital. Charity Hospital was in a severe state of disrepair prior to Hurricane Katrina. See Exhibits 2 and 3. The deteriorated condition made it difficult for FEMA's initial inspection team to distinguish widespread pre-disaster damage and deferred maintenance issues from disaster-related damage. That the damage must be the result of a major disaster is a fundamental eligibility requirement. See 44 C.F.R. § 206.223(a). PA guidance further explains that, "Damage that results from a cause other than the designated event, such as pre-existing damage, is not eligible." PA Guide, FEMA 322 (1999) at 23.

As will be stated below in detail, FEMA reviewed and analyzed all three expert reports submitted by the Applicant in accordance with applicable PA Program eligibility criteria. See Exhibit 1. FEMA concluded that each report was fatally flawed because of the consultants' failure to correctly assess disaster-related damage. This fatal defect was the underpinning for the experts' inaccurate conclusions.

### The "Independent" Experts

The Applicant claims that the State engaged "three separate and independent groups of highly qualified architectural, engineering, construction and environmental consultants to assess damage to Charity Hospital." Applicant Request at 27. This claim of expert witness

independence is repeated throughout the Request for Arbitration. However, the consultants at issue here are not independent, as they have existing relationships with the Applicant. All three consulting firms have ongoing financial relationships with the State of Louisiana that suggest bias with respect to their damage assessments and cost estimates. BKA, in particular, may receive more compensation relative to project costs; that is, the higher the costs, the greater the compensation. Applicant Exhibit 8 at 15; Exhibit 21(J). In fact, it was a foregone conclusion that the Applicant would replace Charity Hospital, even before BKA had performed damage assessments following Hurricane Katrina. See Exhibit 28. RS Means was hired by the State to conduct its estimate. RS Means' estimate notes that plans showing existing conditions before the disaster were not made available and that its estimate relied heavily on BKA quantities. As such, the estimates prepared by RS Means cannot be considered independent. Similarly, ADAMS may be vested in its earlier conclusions – studies commissioned by the Applicant in 2002 and 2003 – in which replacement of Charity Hospital was recommended based on the building's deteriorated condition well before Hurricane Katrina. See Exhibits 2 and 3. Nevertheless, FEMA does not object to the Applicant's use of consultants to assess damage and prepare repair estimates. FEMA objectively reviews estimates prepared by an applicant's hired consultants. However, FEMA notes that the consultants' calculations of the 50 Percent Rule span 15 percentage points, despite the fact that each consultant claims to have followed applicable FEMA regulation and policy.

### Damage Assessments

According to the Applicant, FEMA's damage assessment consisted of a single effort undertaken by non-experts in late 2005 and limited to the Charity Hospital basement. Applicant Request at 3-4. On the contrary, FEMA deployed a team of highly skilled technical specialists to assess damage at Charity Hospital shortly after the disaster. See Exhibit 7, paras.10-12; see also Exhibit

13. Pursuant to 44 C.F.R. § 206.202(d), the Applicant is responsible for identifying all eligible work and costs for disaster-related damage. However, FEMA initially took the lead in this effort due to the catastrophic nature of Hurricane Katrina, and the fact that the State of Louisiana had not decided which agency would represent the State as the applicant for Charity Hospital.<sup>26</sup> See Exhibit 7, para. 11. As the State had not designated an applicant, FEMA, with the State's permission, initiated inspections and began preparing PWs based on these site inspections and damage assessments. Id.; see also Exhibit 11.

FEMA undertook comprehensive site inspections of the facility to determine disaster-related damage, contrary to the Applicant's allegation that FEMA performed a cursory assessment. FEMA specialists began initial site inspections of Charity Hospital in early October 2005 and surveyed all areas of the hospital by mid-December 2005 with site visits continuing through June 2006. Id. Staff from Charity Hospital's tenant agency, LSUHSD, provided access to the entire hospital, except for a small number of locked rooms to which the LSUHSD could not provide access. Thus, the FEMA team assessed disaster-related damage for the entire facility by mid-April 2006. Based on these site inspections between October 2005 and April 2006, FEMA prepared multiple PWs totaling more than \$23 million to repair disaster-related damage to Charity Hospital. See Exhibit 7, para. 12.

It was not until November 4, 2005, that LSUHSD's architectural firm, ADAMS, provided FEMA a damage assessment and cost estimate to repair Charity Hospital. See Applicant Exhibit 11. The ADAMS report concluded that disaster-related damage far exceeded that which was documented by FEMA's initial inspection teams. This report, however, was deficient and did not serve the process of scope alignment. The report data was insufficient data in summary

---

<sup>26</sup> In late-November 2005, the State determined that FP&C would represent the State as the applicant for permanent repairs to all State-owned facilities. See Exhibit 11.

format, which made it impossible for FEMA to discern and verify disaster-related damage in the scope of work. For this reason, FEMA rejected the report and so informed the Applicant, GOHSEP, and LSUHSD in early December 2005.<sup>27</sup> See Exhibit 7, para. 15.

Applicant sought another opinion and contracted with BKA to assess damage at Charity Hospital and other MCLNO facilities, including University Hospital. Applicant then informed FEMA that BKA would work with FEMA on scope alignment activities. (Declaration) FEMA and BKA mutually agreed on how to proceed with scope alignment. They worked together on a room-by-room assessment, until the Applicant abruptly removed BKA from the scope alignment process in order to have BKA submit a claim for the replacement of Charity Hospital based on a completely different methodology. See Exhibit 7, para. 28; Applicant Exhibit 8 at 12-23.

#### BKA Report

Applicant uses BKA's report to "clearly demonstrate" that the scope and amount of disaster-related damage to Charity Hospital greatly exceeds the amount obligated by FEMA in PW 2175v3. This report is based on data first collected by BKA more than a year after Hurricane Katrina, and through damage assessments that continued over the following 18 months.

Applicant Exhibit 14, Introduction, at 3 of 5; Applicant Request at 28. This is in direct contrast to the site visits and assessments of disaster-related damage FEMA conducted within eight months of the disaster. See Exhibit 12. Not only was BKA's assessment untimely, but it failed to distinguish disaster-related damage from the facility's pre-existing condition of disrepair and damage that existed prior to Hurricane Katrina, as well as damage resulting from Applicant's failure to adequately protect the facility following the disaster.<sup>28</sup> See Applicant Exhibit 8 at 13-

---

<sup>27</sup> FEMA rejection of the 2005 ADAMS Report was reasonable and appropriate. See Exhibit 1.

<sup>28</sup> This is addressed more thoroughly in response to Arbitration Issue Nos. 5 and 6.

14. BKA's assessment also included repair costs for building components that sustained no damage at all.<sup>29</sup>

FEMA refutes Applicant's claim that its damage assessment is faulty because FEMA failed to undertake a "complete room-by-room, floor-by-floor assessment of damages to the entirety of Charity Hospital...." Applicant Request at 3. Notwithstanding that it is the Applicant's duty to identify damage and bring it to FEMA's attention. See 44 C.F.R. § 206.202(d). However, for the reasons stated above, FEMA had already performed this task months earlier. See Exhibit 7, para. 11-12. FEMA participated in BKA's assessment because the parties agreed to a room-by-room format to document the damage. See Applicant Exhibit 8 at 12-23. This was the chosen methodology for the activity FEMA and BKA called the "scope alignment" and was necessary to facilitate comparison with FEMA's initial PWs. Id. at 19.

The adopted methodology for scope alignment included data sampling to test the validity of the data with respect to disaster-related damage. It was in the course of this sampling that FEMA determined that BKA's data was adulterated with itemized damage not related to Hurricane Katrina. FEMA also advised BKA about disaster-related damage that it missed in its damage assessment. As a result, FEMA insisted on full validation of damage, which led to the Applicant's withdrawal from the scope alignment process. Following the abrogation of the scope alignment process, the Applicant directed its consultant, BKA, to use a "zone-by-zone" methodology to develop a separate damage assessment to support the Applicant's claim for the replacement of Charity Hospital. See Exhibit 7, para. 27; Applicant Request at 29. This zone-by-zone methodology was not agreed to, and resulted in FEMA ultimately rejecting this BKA assessment, as the zone by zone methodology used inappropriately applied the 50 Percent Rule

---

<sup>29</sup> This is addressed more thoroughly in response to Arbitration Issue No. 6.

to separate components of the facility, whereas the 50 Percent Rule is properly applied to the entire facility.

Finally, FEMA refutes Applicant's assertion that FEMA's estimate is "not based upon any objective analysis" because the "approximately \$121 million"<sup>30</sup> obligated in PW 2175v3 to repair disaster-related damage is less than one-half the repair costs as estimated by BKA.

Applicant Request at 33. The Applicant's assertion is erroneous because an accurate estimate of eligible costs must be based on disaster-related damage. 44 C.F.R. § 206.223(a). The PW 2175v3 repair estimate for Charity Hospital consolidates all FEMA-determined disaster-related building damage, eligible scope of work and estimated repair costs. See Exhibit 7, para. 17. That FEMA's estimated eligible costs are lower than the Applicant's estimated repair costs is immaterial. FEMA's estimated costs are based on FEMA's reasonable and appropriate determination of eligible disaster-related damage. Furthermore, FEMA's determination of eligible costs is significant in regard to the 50 Percent Rule calculation. If the estimated cost to repair disaster-related damage is less than 50 Percent of the estimated cost to replace Charity Hospital, only the eligible repair costs would be available to the Applicant. 44 C.F.R. § 206.226(f); see Applicant Exhibits 41 and 42. In this regard, FEMA's repair estimate is less than 50 percent of the estimated cost to replace Charity Hospital. Thus, FEMA maintains that Charity Hospital is repairable and the eligible costs obligated in PW 2175v3 are available to the Applicant.

Within Arbitration Issue #1, the Applicant also objects to scope of work quantities and building descriptions used in PW 2175v3. Applicant Request at 34. The Applicant noted the following specific items, which are each followed by FEMA's response:

---

<sup>30</sup> Amount obligated with PW 2175, inclusive of all versions, is actually \$126,142,709.

- 1) *PW 2175v3 used 900,000 square feet to calculate “certain” repair costs when the hospital’s building floor area is 998,749 square feet.*

The “certain” repair costs refer to clean up during and after repairs. FEMA does not agree that the disaster-related repairs will result in the need to clean all 998,749 square feet of the building. Even BKA noted a number of zones that were either undamaged or sustained minimal damage (e.g., Zones E1, E2, and C2E on the 13<sup>th</sup> floor, among others). The Applicant’s own expert consultants noted none or minimal damage to portions of the building. Thus, FEMA appropriately concluded that less than 998,749 square feet of building floor area needed to be cleaned during and after repairs.

- 2) *PW 2175v3 states the area of the first floor is 85,000 square feet when the area on this floor is actually 111,000 square feet.*

FEMA determined the floor area square footage for the general facility description from Drawing Number GA-1 in the Applicant’s assessment developed by BKA, which lists the area of the first floor as “85,372 SF.” Applicant Exhibit 14, Drawing Number GA-1. Furthermore, FEMA did not use its description of the first floor surface area as the basis for calculating damage, scope or cost.

- 3) *PW 2175v3 does not allocate costs for numerous environmental matters (e.g., chemical contamination, mold infestation, biological cleaning of all surfaces to address blood borne pathogens, etc.).*

FEMA obligated PW 3456, which covered the cost of de-mucking, cleaning, removal of asbestos containing material, and mold abatement in the basement (\$250,386), plus the removal of spoiled food and damaged equipment (\$54,300). This scope of work was identified by LSUHSD and its contractors to clean and sanitize the Charity Hospital basement as a stabilization measure. After LSUHSD contractors completed the initial scope of work, LSUHSD submitted a request for additional funding (\$397,800) to re-clean and sanitize the basement because of apparent continuation of flooding after the initial cleaning. FEMA denied the LSUHSD the additional funding because LSUHSD could not prove that the additional basement contamination from re-flooding could not have been reasonably avoided. Absent such proof, additional funds are not eligible. 44 CFR § 206.223(e).

Similarly, FEMA has determined that most of the environmental remediation work identified by the Applicant is the result of Applicant negligence and therefore is not eligible.<sup>31</sup> Id. U.S. Army Staff Sergeant Johnson and Charity Hospital's Dr. Moises testified that they had scrubbed clean and sanitized the first few floors of Charity Hospital. See Exhibit 8. Specifically, Sergeant Johnson added that these areas were tested and re-tested until, as early as September 19, 2005, Army hazmat contractors deemed that contaminant levels had been reduced to a level safe for human occupation and use. Id. ADAMS reported in November 2005 that Army contractors employed "highly sensitive testing equipment capable of assessing to a degree that is 69 orders of magnitude below the parts per million (ppm standard)" when conducting this testing.<sup>32</sup> See Applicant Exhibit 11 at 3.20. FEMA inspections, which started in early October

---

<sup>31</sup> This finding is described in greater detail in response to Arbitration Issue #5.

<sup>32</sup> ADAMS also suggested the Applicant could request the results from the Army contractor.

2005, noted relatively minor damage in floors one to 20, which substantiates the accounts given by Sgt. Johnson and Dr. Moises in regards to the condition of the facility.

The Applicant must demonstrate that this scope of work is necessary to repair disaster-related damage that could not have been reasonably avoided. FEMA repeatedly encouraged the Applicant to conduct the testing necessary to facilitate determination of damage source and appropriate scope of work. As such, the Applicant's claims for extensive environmental remediation work not obligated in PW 3456, or otherwise covered as incidental to permanent repairs by PW 2175v3, is not eligible.

The Applicant's Request also references the BKA Supplemental Report and its allegations of "numerous errors and omissions in the scope of work and cost estimates" in PW 2175v3. See Applicant Request at 34-35. As explained in more detail in FEMA's response to Arbitration Issue #9, the Applicant did not provide sufficient information to justify its conclusions.

The PW 2175v3 repair estimate for Charity Hospital consolidates all FEMA-determined disaster-related building damage, eligible scope of work and estimated repair costs. See Exhibit 7, para. 30. That FEMA's estimated costs are less than the Applicant's estimated repair costs is immaterial. See Applicant Request at 33. What is material, however, is that FEMA's estimated repair cost (based on disaster-related damage) is less than 50 Percent of the estimated cost to replace Charity Hospital. See 44 C.F.R. § 206.226(f). Thus, FEMA maintains that, under the Agency's legal requirements, Charity Hospital is repairable and the Applicant is only eligible for the amount obligated in PW 2175v3.

## 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.**

### Response to Arbitration Issue No. 2

FEMA restates its Response to Arbitration Issue No. 1 herein. The Applicant's claim is based on the damage assessments of only one of its consultants, BKA. Applicant Request, at 35. Thus, FEMA addresses only the BKA calculations of damage under the 50 Percent Rule.<sup>33</sup>

FEMA maintains that the Applicant misapplied the 50 Percent Rule in two significant ways: inclusion of damage not caused by the major disaster; and application of the 50 Percent Rule to building components instead of the entire building.

In accordance with the 50 Percent Rule, a facility is eligible for replacement when the repair cost is less than 50 percent of the cost to replace the facility to its pre-disaster condition. See 44 C.F.R. § 206.226 (f)(1); FEMA Response and Recovery Directorate Policy 9524.4 (1998). The calculation is a comparison of the repair cost and replacement cost. It is expressed as a fraction with the repair cost (numerator) as a percentage of replacement cost (denominator).

FEMA's discussion in the Argument section of this response establishes that BKA's data includes damage not caused by the major disaster. The law provides only for reimbursement for work to repair disaster-related damage. 44 C.F.R. § 206.223(a). BKA calculations are based on damaged building components, whereas the 50 Percent Rule must be applied to the entire facility. Applicant Exhibit 14 at 1 (Methodology, Architectural Items #1, 5 and 8); see Applicant

---

<sup>33</sup> FEMA reviewed each of the Applicant's repair and replacement estimates. See Exhibit 1.

Exhibits 41 and 42. Based on this failure to adhere to legal requirements, the Applicant's cost estimate of eligible work does not document damage caused by Hurricane Katrina, and therefore cannot be used by FEMA.

#### BKA Misapplied The 50 Percent Rule

BKA estimates that the cost to repair Charity Hospital is 81.3 percent of the cost to replace the hospital. See Applicant Exhibit 14, Building Repair Cost Analysis at 2. FEMA rejects the Applicant's conclusion that Charity Hospital should receive funding in the amount to replace the facility because the estimates include costs to repair damage not caused by Hurricane Katrina, and the consultants misapplied FEMA Response and Recovery Directorate Policy 9525.4 (1998). See Applicant Exhibits 41 and 42.

BKA's repair estimate relies on misapplication of the 50 percent Rule to individual building components. See Applicant Exhibit 14, Methodology, Architectural Items #1, 5, and 8 at 1. This misapplication of the 50 Percent Rule fails to comply with applicable law and policy that dictates that the 50 Percent Rule calculation be applied to the facility as a whole. See Applicant Exhibits 41 and 42. FEMA policy limits application of the 50 Percent Rule to a facility; not individual components of a facility such as walls, floors, ceilings, windows, or doors.<sup>34</sup> Id. By misapplying the 50 Percent Rule to building components instead of the entire building, the Applicant erroneously inflated its repair cost estimate. Misapplying the 50 Percent Rule in this manner allowed the Applicant to count undamaged building elements in its eligible cost calculation. Moreover, this misapplication of the 50 Percent Rule falsely bolsters the Applicant's preferred cost estimate, which in turn favors the Applicant's assertion that FEMA should make full replacement costs available to the Applicant. However, because the Applicant's approach

---

<sup>34</sup> "Facility" as applicable to Charity Hospital is defined as a building or piece of equipment. See Public Assistance Guide, FEMA 322 (1999) at 16.

fails to comply with applicable law and policy, its cost estimate cannot be used in making a 50 Percent Rule calculation. 44 C.F.R. § 206.223(a); see Applicant Exhibits 41 and 42.

As an example, BKA includes in its repair cost estimate the incidental replacement of plumbing, electrical, telephone, and data outlets that correlate to removal of walls. See Applicant Exhibit 14, Methodology, Engineering Item #6 at 2. Misapplication of the 50 Percent Rule to wall surfaces could result in replacement of wall area that was not damaged by the disaster. Id. at 1 (Architectural Items #1 and 2). Non-load bearing walls in the flooded basement likely sustained 100 percent damage requiring replacement. However, the eligibility to repair wall area damaged from embedded mold and water from leaky windows, roofs, plumbing, and HVAC equipment is subject to FEMA verifying that the damage is disaster-related. If the damage resulted from deferred maintenance or negligence, then repair work is ineligible. See 44 C.F.R. § 206.223(e); PA Guide, FEMA 322 (1999) at 26-27.

Even if determined eligible, repair is limited to the disaster-damaged portion of the wall. Since BKA determined whether walls would be repaired or replaced by misapplying the 50 Percent Rule, FEMA cannot evaluate to the extent to which replacement of plumbing, electrical, telephone, and data outlets may be eligible for wall repair or replacement work. FEMA must first verify the underlying cause of damage to the wall to determine the eligible scope of work and quantities before determining the eligible repair cost.

The Applicant's repair cost estimate relies on the BKA methodology assumptions. See Applicant Exhibit 14, Methodology, Cost Estimate Item #1 at 2. Given that these assumptions ensure that the BKA Report includes ineligible work, the repair cost is inappropriately inflated

and cannot be used in the 50 Percent Rule in accordance with applicable FEMA regulation and policy.

### **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).**

### **Response to Arbitration Issue No. 3**

FEMA's assistance is discretionary and based on an eligible scope of work and eligible costs to repair damage caused by Hurricane Katrina. The Applicant used a replacement cost estimate in the amount of \$491,884,000 to support its claim for replacement value of Charity Hospital.

FEMA maintains that this estimate includes multiple violations of applicable FEMA regulation and policy. See Exhibit 1 at 4-16. On the other hand, FEMA's cost estimate of \$126,142,709 for the repair of Charity Hospital is correctly based on applicable law and policy. Exhibit 12(B).

The Applicant uses a replacement cost of \$491,884,000, apparently because it is the most favorable among the estimates the Applicant has in its possession to support its position.<sup>35</sup> The Applicant relies on the BKA estimate to demonstrate that damage assessments were accurate and that the Applicant should receive replacement value for Charity Hospital; however, it chose to reject the much lower BKA replacement estimate in favor of the inflated GOHSEP replacement estimate.

Although the Applicant is not entitled to the replacement cost of Charity Hospital, FEMA's cost estimating team reviewed the Applicant's replacement estimate and found a number of technical and methodological errors. Specifically, the claim that GOHSEP calculated the replacement estimate of \$491,884,000 pursuant to FEMA's rules and guidance is demonstrably false.

---

<sup>35</sup>Replacement estimates provided by the Applicant's expert consultants include: \$322,000,000 (RS Means), \$375,365,623 (BKA), \$395,406,622 (ADAMS); and \$491,884,055 (GOHSEP).

GOHSEP's replacement estimate represents six separate violations of FEMA regulation and policy.

1. The Applicant's Request omits essential elements of the Cost Estimating Format (CEF).

The CEF submitted with the Applicant's Request includes only two components of the CEF: the "Part A" and "Total Uncompleted Work." See Applicant Exhibit 4. As described in the CEF for Large Projects Instructional Guide (Ver. 2), the CEF is a spreadsheet that consists of six separate and distinct components. *Id.* at 16. All six components are necessary for an estimate to be considered a CEF. For example, FEMA cannot determine whether the factors selected in the "Total Uncompleted Work" component are reasonable without an explanation of the factors and values selected by the estimator. The CEF Instructional Guide provides the following description of this tab:

"The CEF Notes sheet provides the user with a place to document the logic, assumptions, and reasoning for the selection of each factor. To ensure proper documentation, *the user must enter notes for each work type and must indicate the values chosen for each factor*" (emphasis added). *Id.*, at 18.

In addition to the "CEF Notes" tab, the "CEF Fact Sheet," "Summary for Completed Work," and "Total Project Summary" tabs are also missing, resulting in an estimate that is not consistent with a FEMA CEF.

2. The estimate improperly includes replacement of functions that did not exist at the time of the disaster. See Applicant Exhibit 4.

Entergy provided heating and cooling generated at an off-site facility. See Applicant's Exhibit 8 at 9. Replacement cost is limited to facility's pre-disaster designed capacity and function. Therefore, inclusion of an off-site heating and cooling generation function at a separate facility is not an eligible replacement cost. See Applicant's Exhibits 41 and 42.

3. The estimate improperly includes replacement of fixed medical equipment that is assumed to have been in the hospital.

The estimate includes \$34,940,000 for fixed institutional equipment. GOHSEP obtained this estimate from the repair and replacement estimates prepared by RS Means.<sup>36</sup> See Applicant Request at 43. The RS Means report states that it "...attempted to identify the fixed equipment that would have existed within Charity Hospital at the time of the hurricane..." [but resorted to contacting vendors and consultants] ...who have general knowledge of the types of equipment that would have been present." See Applicant Exhibit 16 at 6. Only items determined to have been damaged by the disaster are eligible for repair or replacement and only function and design capacity that existed prior to the disaster is eligible in a replacement project. See Applicant Exhibits 41 and 42.

4. The estimate improperly assumes that the disaster damaged the fixed medical equipment beyond repair.

Although the GOHSEP replacement estimate relies on the equipment replacement cost from the RS Means report, RS Means based its replacement conclusion on the opinion of a professor who did not inspect the equipment and therefore, could not conclude that damage was caused by the disaster. Applicant Exhibit 16 at 57. Only equipment items determined by FEMA to be damaged beyond repair as a result of the disaster are eligible for replacement. See 44 C.F.R. § 206.226(h).

5. The estimate also improperly assumes replacement with new items.

Since the GOHSEP replacement estimate relies on the RS Means report's replacement cost for damaged equipment, it carries forward the RS Means report's improper assumption that

---

<sup>36</sup> This refers to the Charity Hospital repair and replacement estimates prepared by RS Means for GOHSEP and is not to be confused with the database of construction costs maintained by the company.

damaged equipment would be replaced with new equipment. See Applicant Exhibit 16 at 6 and 49. Even if FEMA were to concur that the listed items were in the hospital at the time of the disaster and damaged beyond repair by the disaster, replacement with new items is not eligible. Replacement of damaged equipment is limited to items that are approximately the same age, capacity, and condition. See 44 C.F.R. § 206.226(h); see also Applicant Exhibits 41 and 42.

6. GOHSEP estimators improperly applied CEF factors.

The estimators maximized the recommended value of most factors, which inappropriately inflated the total replacement estimate value.<sup>37</sup> These factors are “multipliers” on the base construction cost. The more factors selected and the higher the selected values, the higher the total replacement estimate. CEF users are required to document the rationale behind factors and values selected. See Applicant’s Exhibit 5, CEF Notes, at 18. Also, GOHSEP estimators failed to document the rationale as required to facilitate FEMA quality assurance review and to prevent estimators from inflating the total estimate without any rational basis. See Applicant Exhibit 4.

In addition to these assignments of error, FEMA’s cost estimating team noted that GOHSEP excluded eligible items from their estimate. For example, demolition costs and fixed institutional equipment that is structurally integrated into the facility and assumed in the RS Means Square Foot Cost base hospital model are excluded.<sup>38</sup> Finally, the GOHSEP estimate appears to rely on standard foundations and a basement. The estimate does not appear to include the cost for pile construction, or the need to elevate the lower floor to the Advisory Base Flood Elevation (ABFE), which is required for construction of this type in the New Orleans area. See Exhibit 29.

---

<sup>37</sup> All but three factors were selected at maximum values. The estimators excluded construction permit fees (Part F) since, presumably, the Applicant would not charge itself for permit fees and the escalation factor does not have a recommended range.

<sup>38</sup> Costs for medical gasses, paging/call systems, patient and surgical headwalls, etc. are not in the RS Means equipment estimate of \$34,940,000 or the GOHSEP list of Part A base replacement items.

The FEMA cost estimating team correctly applied FEMA regulation, policy, and guidance to determine that the full replacement value of a facility of the same pre-storm function and capacity as Charity Hospital is \$474,750,898, exclusive of costs for eligible repair or replacement of custom institutional equipment not included in the RS Means Square Foot Cost base hospital model.<sup>39</sup> See Exhibit 1, Attachment B.

#### **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.**

#### **Response to Arbitration Issue No. 4**

FEMA consistently followed all applicable legal requirements and PA program guidelines in developing all PWs related to Charity Hospital and in review of the Applicant's claim. Contrary to the Applicant assertion, FEMA is approving project funding to the extent provided by applicable laws and guidelines provide in order to help facilitate the Applicant's recovery from Hurricane Katrina. See Applicant Request at 44.

FEMA acted early and swiftly to identify damage to Charity Hospital. It took the lead because the State was confused about which of its government subdivisions would be the PA applicant for Charity Hospital. See Exhibit 11. Accordingly, FEMA moved ahead with damage assessments. When the State identified that FP&C would be the applicant, FEMA prepared multiple PWs based on its damage assessments. These PWs, totaling more than \$23 million, were prepared between October 2005 and April 2006 for repairs to Charity Hospital for damage

---

<sup>39</sup> Response to Arbitration Issue #8 includes a more detailed explanation of why certain types of fixed institutional equipment must be excluded from the Applicant's claim.

caused by Hurricane Katrina. The Applicant's assertions to the contrary are clearly misleading. See Applicant Request at 45.

As stated in responses to Arbitration Issue Nos. 1, 2, and 3 if a cost estimate is not based on damage caused by Hurricane Katrina, that cost estimate cannot be used, as it will include ineligible scope of work to repair non disaster-related damage. This is precisely what FEMA found when analyzing the Applicant experts' reports. FEMA's CEF Instructional Guide (Ver. 2) sets forth the established procedure for reviewing applicant estimates developed by Architect/Engineering (A/E) consultants. In the course of reviewing the Applicant's claim for eventual use in a CEF, FEMA realized that it could not verify all items of work as eligible, which is required by the CEF Instructional Guide (Ver. 2). FEMA is responsible for determining eligibility of work and costs. 44 C.F.R. §§ 206.223(a), 206.205(b)(2). In the process, FEMA must also be able to verify scope of work quantities. 44 C.F.R. § 206.202(d).

The reports were rejected for various reasons, namely, for having been compiled and presented in a format that left FEMA unable to verify disaster-related damage. Also, errors in methodology and misapplication of applicable FEMA regulation and policy resulted in the Applicant's submission of an unjustifiably inflated cost estimate. Furthermore, the Applicant's cessation of the scope alignment process and request that FEMA process its claim without further scope alignment made it impossible for FEMA to validate disaster-related damage. Exhibit 7, para. 27.

The Applicant asserts that FEMA failed to follow its own rules and guidelines in deciding against the Applicant on first appeal. Because FEMA's preparation of PWs for Charity Hospital and rejection of the Applicant's estimates were consistent with the Stafford Act, and applicable

the Applicant had not completed its own damage assessment and presented damage to FEMA in accordance with C.F.R. § 206.202(d)(1)(ii), FEMA the lead and drafted early PWs based on damage that, at the time, could be conclusively determined to be the result of Hurricane Katrina.

Most of the FEMA site visits that yielded data for the damage descriptions contained in PWs 2174, 2175, 2176, 6090, and 10104 were conducted within six months of the disaster by a team of highly qualified technical specialists.<sup>40</sup> Years of neglect left the facility in such poor condition that the cause of some damage observed by the FEMA inspection team was uncertain. Given the Applicant's responsibility to identify damage, and the fact that the Applicant had not yet identified and presented what it considered to be disaster-related damage, the FEMA inspectors documented only the damage that could be conclusively determined to be the result of Hurricane Katrina in these initial PWs. FEMA and the Applicant understood that the scope alignment process would provide the Applicant with ample opportunity to present its damage findings to FEMA in accordance with 44 C.F.R. § 206.202(d)(1)(ii).

FEMA does not dispute the Applicant's claim that LSUHSD took action necessary to protect Charity Hospital from post-disaster damage in the weeks and months after the disaster. The Applicant's Chronology of Asset Protection lists a number of positive and direct contributions to this end. See Applicant Exhibit 8 at 29-30.

FEMA site visits conducted in February 2006 and June 2006 confirmed that damage to the facility had stabilized. See Exhibits 14 and 15. A FEMA mold specialist, escorted by an Applicant representative each time, documented limited instances of localized mold, including some that appeared to be of pre-disaster origin. The specialist noted that the Applicant had not

---

<sup>40</sup> A list of primary members of the FEMA team assigned to Charity Hospital and their credentials is attached as Exhibit 13.

provided FEMA with any reports outlining type, locations and quantities of materials impacted by mold growth related to the disaster. See Exhibit 14 at 2. During the June site visits, the specialist noted that the HVAC systems appeared to be operating on some floors and relative humidity readings noted conditions in most areas were not conducive to mold growth. The FEMA specialist concluded:

“The suspect mold growth observed in the building, which is contributable to Hurricane Katrina, probably occurred within a few weeks following the disaster and then receded as water and water-impacted materials were removed from the building and inside temperatures and relative humidity decreased as outside conditions became cooler and less humid. Little additional growth has probably occurred to date.

...

If currently operating HVAC systems are maintained and additional HVAC units are brought back on line, it is unlikely that conditions will reoccur [sic] within the building that could support mold growth.” Exhibit 15 at 5.

The work outlined in the Applicant’s Chronology of Asset Protection up to that point appeared to FEMA to have stabilized Charity Hospital from sustaining significant levels of continuing damage as of June 2006.

However, the record demonstrates that from June 2006 through February 2007, the Chronology repeats the same text to describe generic MCLNO staff asset protection activities. Applicant Exhibit 8 at 31-34. Conspicuously missing from the Chronology is reference to the November 2006 ADAMS supplemental report that noted the immediate need to replace roofing sections and clean HVAC ducts. Applicant took no action in response to this supplemental report to protect its assets from concerns with regard to imminent threat of further damage to the facility. See Exhibit 16; see also Applicant Exhibit 8 at 31-34

The Applicant references a letter from FEMA to GOHSEP, dated April 16, 2007, and criticizes FEMA for use of “one sentence” allegedly taken out of context from a BKA letter to the Applicant. The quote was not taken out of context and, in fact, the full

context was available to the Applicant by way of multiple letters and meeting notes prepared by BKA dated February 13, 2007, April 24, 2007, April 27, 2007, and May 9, 2007. See Exhibit 21. Each of these notes and letters reference specific asset protection measures the Applicant identified as being necessary as early as February 13, 2007. See Exhibit 21(A) at 2. The description of this meeting provided in the Applicant's Chronology of Asset Protection clarifies that the temporary measures described "will not include energizing the buildings to maintain environmental or temperature controls within the structures." See Applicant Exhibit 8 at 34. This statement suggests that environmental controls in place as of June 2006 were cut off sometime thereafter. Mr. Schoen's comments also raise serious questions about the accuracy of the Chronology of Asset Protection between June 2006 and February 2007. If MCLNO staff were doing the work described in the Chronology, Mr. Schoen could not have concluded that prior MCLNO measures had not remained in place.

From February 13, 2007, onward, asset protection was a regular topic of discussion at the bi-weekly scope alignment meetings. BKA-generated meeting notes attest to this fact. See Exhibit 21. At the June 28, 2007, scope alignment meeting, BKA meeting notes that FEMA's urged commencement of identified asset protection measures "without further delay." Exhibit 21g at 2. In November 2007, the Applicant commissioned a roof inspection and condition survey. This survey concluded the roof needed to be replaced to protect the facility. See Exhibit 23. This conclusion should have come as no surprise given ADAMS reached the same conclusion (with a note of urgency) over one year earlier. See Exhibit 16 at 10. In April 2008, BKA disclosed that the Applicant "only recently" tasked the company to prepare bid documents for the stabilization efforts that had only been discussed for 14 months. See Exhibit 21(J).

Although FEMA, in a broad letter to GOHSEP that expressed concern about many applicants with inadequate asset protection measures in place, did not specify the precise concerns about asset protection at Charity Hospital, the Applicant cannot feign ignorance of direct knowledge of its own specific asset protection needs at the facility. See Exhibit 21(A-J); see also Applicant Exhibit 8 at 22-23.

In May 2009, the Applicant notified FEMA that it had completed the asset protection scope of work described in February 2007. See Exhibit 24. Ongoing water damage from leaks through the damaged roof (documented by ADAMS in November 2006) coupled with cessation of environmental or temperature controls create prime conditions for substantial mold growth between November 2006 and July 2008 (time of the BKA submission). This calls into question the validity of the collective “opinion” of BKA experts that the majority of damage documented in the July 2008 claim occurred within the first 120 days of the disaster.

FEMA inspectors were in the building and documented the damage within the first six months of the disaster and a site visit in June 2006 confirmed that the damage had stabilized. Yet FEMA’s documentation of disaster-related damage and the damage brought forth by BKA from inspections started more than a year after the disaster are at significant variance. During scope alignment, FEMA voiced repeated concern regarding the deteriorating conditions at Charity Hospital. Even the Applicant (as well as BKA) recognized the need to take important steps to protect the facility.

On a parallel track with the asset protection efforts, scope alignment had run into serious issues. Specifically, FEMA noted more than 200 specific instances where the BKA workbooks included

ineligible work, damage that could not be verified, avoidable post-disaster damage, and undocumented assumptions. A sample of these findings provided to the Applicant and BKA is included in Exhibit 18. FEMA also provided several hundred additional comments and notes to the Applicant and BKA regarding other discrepancies found during the 18-month validation process. See Exhibits 19 and 20.

These issues culminated in an April 2008 decision by the Applicant to suspend the scope alignment process and submit a claim. In place of the 22 scope alignment workbooks that included a room-by-room assessment of damage and proposed scope of work, in July 2008 the Applicant submitted a 2,000-page assessment aggregated by zone, rendering 18 months worth of scope alignment findings worthless for use in validating the newly submitted claim. The Applicant did not give FEMA the opportunity to validate its claim in accordance with FEMA regulation and policy, and therefore, denial was the only outcome.

FEMA had intended to use scope alignment process to identify the cause of damage and to determine eligibility of specific unavoidable post-disaster damage claimed by the Applicant. However, the Applicant's withdrawal from the scope alignment process and insistence that FEMA make a determination on the submitted claim precluded FEMA from attributing specific items in the claim to its failure to protect assets.

Regarding the Applicant's complaints related to FEMA Region VI review of the first appeal, please refer to FEMA's response to Arbitration Issue No. 11.

### 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/excess of work and FEMA-Region 6 failed to properly address or remedy this error in the First Appeal.**

### Response to Arbitration Issue No. 6

PW 2175v3 is not a “discount” of the Applicant’s claim. As noted in response to Arbitration Issues 1, 2, and 3, FEMA’s rejection of the Applicant’s claim in its entirety was appropriate under applicable law and program guidance. PW 2175v3 consolidates all disaster-related damage to Charity Hospital documented by FEMA in previous PWs and includes additional funding for eligible scope of work documented through the scope alignment process, as well as estimates of eligible scope of work for the repair of concealed damage and post-disaster damage that could not be avoided. The Applicant could not demonstrate in the BKA data and cost estimate, nor could FEMA verify, that the claimed work was disaster-related. See Applicant Request at 60. The Applicant failed to submit a scope of work for eligible disaster-related damage as is required. See 44 C.F.R. §§ 206.223(a), 206.202(d). Accordingly, FEMA’s cost estimate was based on eligible work, which is the work required to repair damage caused by Hurricane Katrina.

By law, FEMA has sole responsibility for determining eligible scope of work and cost. See 42 U.S.C. § 5172(a)-(b). Given this responsibility, FEMA developed guidelines for field staff to follow when reviewing applicant estimates that are based on an A/E report. Consistent with law, the first step in this review process is verification that “all items of work included in the estimate are eligible.” See CEF for Large Projects Instructional Guide (Ver. 2), pg. 27. If FEMA cannot verify the eligibility of the scope of work, the estimate must not be used as the basis for obligating funds. See CEF for Large Projects Instructional Guide (Ver. 2), pg. 19.

On July 8, 2008, the Applicant submitted its claim, which was based on repair and replacement estimates prepared by BKA. FEMA reviewed all submitted material and informed the Applicant that it could not verify all scope of work within the BKA Report and, in fact, FEMA had reason to believe the estimate includes ineligible work. Exhibit 7, paras. 23-25, 27, and 29. In response, the Applicant asked that FEMA process its claim with the stipulation that no further scope alignment or additional information would be provided. *Id.* at para. 28. The Applicant's request was unreasonable, as the estimate prepared by BKA did not appropriately document disaster-related damage for verification, and included ineligible scope of work. The Applicant was unwilling to proceed with the scope alignment process to resolve these issues. Thus, the Applicant's request left FEMA with little choice but to reject the claim (based on the BKA estimate) in its entirety because eligible work had to be based on damage caused by Hurricane Katrina. 44 CFR § 206.226(f).

FEMA's rejection of the claim was also based on FEMA's determination that the BKA Report included a substantial amount of other damage not related to the disaster. There was existing damage to the facility from years of deferred maintenance, as well as post-event damage resulting from the Applicant's negligence in adequately protecting the facility from further damage following Hurricane Katrina. *Id.* at paras. 25-26. Again, had the Applicant not withdrawn from the scope alignment process, these issues should have been resolved.

In particular, some of the Applicant's disaster damage claims are hard to reconcile given the documented pre-disaster conditions. For example, the BKA Report attributed the need to replace the HVAC system to the disaster. See Applicant Exhibit 14, Methodology, Engineering Items #1 and 2 at 1. However, ADAMS noted the need to replace the system prior to the disaster: "The HVAC system in the facility is overall dysfunctional and requires a complete replacement."

Exhibit 3 at 1.2. The BKA Report indicates that replacement of the potable water piping is necessary because of the disaster. See Applicant Exhibit 14, Methodology, Engineering Item 4 at 2. Yet, the ADAMS (2002) Report identified replacement of “water supply and drain systems” as necessary *prior to* the disaster. See Exhibit 2 at 1.1.11.

BKA claims the need for extensive environmental remediation of asbestos, mold, lead based paint, and other environmental contaminants that threaten public health. See Applicant Exhibit 14, Environmental Conditions at 1-3. Yet, ADAMS (2002) highlights extensive environmental remediation needs throughout the building and specifically notes that “Indoor air quality and the growth of mold is a major issue...” Exhibit 2 at 1.1.7; see Exhibit 2 at 2.2. FEMA’s repeated requests for testing results and other documentation that demonstrates the claimed remediation work is required as a result of the disaster went unanswered for more than 18 months. Exhibit 7, para. 25.

Perhaps the most glaring contradiction is the BKA *opinion* rendered in 2008 that the majority of the damage captured in its report occurred within the first 120 days. See Applicant Exhibit 14 at 3 (Introduction). Presumably included in this category of damage is the BKA finding that all HVAC equipment and duct work cannot be cleaned and must be replaced due to mold contamination. See Applicant Exhibit 14 at 10 (Methodology, Engineering Item #1 at 1). This finding is contradicted by statements made by ADAMS in 2006 and BKA 2007. See Exhibit 16 at 16-17; see Exhibit 21(C).

BKA’s 2008 findings that the majority of damage to the facility occurred within 120 days of Hurricane Katrina are further contradicted by a letter to the Applicant dated April 24, 2007. This letter includes a proposal to provide professional services related to asset protection measures to

“prevent further damage” to Charity Hospital. One of the asset protective measures noted by BKA is to “Clean ducts and provide temporary HVAC.” See Exhibit 21(C). The claim that the majority of damage identified in BKA’s 2008 report occurred within 120 days of the disaster is not credible if ducts that merely needed to be cleaned in 2006 and 2007 were declared in need of complete replacement by July 2008.

The inability to verify eligible scope of work in the Applicant’s claim precludes FEMA from using the claim as a basis for obligating federal funds in accordance with the Stafford Act, Federal regulations, and FEMA policy. FEMA Region VI’s decision to deny the Applicant’s first appeal was fair and reasonable and based on appropriate application of applicable law and program guidance.

**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.**

**Response to Arbitration Issue No. 7**

PW 2175v3 is not a discount of the Applicant’s claim. As noted in response to Arbitration Issues Nos. 1, 2, and 3, FEMA’s rejection of the Applicant’s claim in its entirety is required by applicable law, regulation, and policy. PW 2175v3 consolidates all disaster-related damage to Charity Hospital documented by FEMA in previous PWs. In addition, PW 2175v3 includes funding for eligible scope of work documented through scope alignment process and estimates of eligible scope of work for concealed disaster damage and unavoidable post-disaster damage.

FEMA used the FEMA CEF Instructional Guide (Ver. 2) to review estimates prepared by BKA as well as the GOHSEP replacement cost estimate. The first step of this procedure requires the

preparer of the CEF to determine that the estimate is based on eligible scope of work. If all items in the scope of work cannot be determined eligible, the CEF Instructional Guide (Ver. 2) instructs the FEMA specialist to revisit the scope of work. The BKA repair estimate and the GOHSEP replacement estimate fail at this first fundamental step.

### BKA Repair Estimate

The BKA Report claims to report only disaster-related damage; however, as demonstrated in response to Applicant Issue Nos. 1, 2 and 3, and in greater detail in Exhibit X, the BKA estimate includes the cost to repair items not damaged by the disaster, ineligible scope of work, and used improper cost estimating techniques. Therefore, PW 2175v3 is correct in its conclusion that the BKA estimate is inconsistent with FEMA estimating practices.

FEMA notes the Applicant's objection to the PW 2175v3 finding that the BKA Report incorrectly used national cost codes as opposed to local cost codes:

“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 used to more accurately represent the current market conditions in New Orleans after Hurricane Katrina. In fact, a review of PW 2175V3 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 repair cost. 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 Services Dist. #1 (PW10364V2). 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 and 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.” Applicant Request at 67-68.

As a preliminary note, CEF Instructional Guide (Ver. 2) requires use of the appropriate city adjustment factor. See Applicant's Exhibit 5 at 27. Accordingly, PW 2175v3, PW 10364v2 and all other PWs prepared by FEMA (LA-TRO) estimators use the appropriate city adjustment factor.

The Applicant's confusion over FEMA's criticism of its use of national cost data appears to be the result of a general unfamiliarity with modern estimating technology. FEMA (LA-TRO) cost estimators use RS Means Costworks software when developing estimates. The Costworks software requires the user to enter the zip code for the area in which the estimated construction project will take place. The zip code automatically updates all unit prices in the Costworks database to the applicable city adjustment factor. Experienced estimators are familiar with this feature of RS Means Costworks, as it can save significant time and reduces the potential for error that can occur with manual adjustments to each cost line item in a base construction estimate (CEF Part A). Since RS Means Costworks software automatically adjusts the base unit prices to the appropriate city adjustment factor for New Orleans, a factor of "1.0" times the (already adjusted) city adjustment factor must be used when the data are transferred from the Costworks output to the CEF. The city adjustment factor for the New Orleans area is approximately 85 percent of the RS Means national cost data; however, the BKA estimate inappropriately included a line item to inflate the repair cost by 15 percent. Applicant Exhibit 14 at 1 (Building Repair Cost Summary).

#### GOHSEP Replacement Cost Estimate

This cost estimate violated six specific provisions of FEMA regulation, policy, and guidance as noted in detail in FEMA's Response to Applicant's Arbitration Issue No. 3:

1. The Applicant's Request omits essential elements of the Cost Estimating Format (CEF).

2. The estimate improperly includes replacement of functions that did not exist at the time of the disaster.
3. The estimate improperly includes replacement of fixed medical equipment that is assumed to have been in the hospital.
4. The estimate improperly assumes that the disaster damaged the fixed medical equipment beyond repair.
5. The estimate also improperly assumes replacement with new items.
6. GOHSEP estimators improperly applied CEF factors.

The Applicant asserts that its claim does not include duplicate allowances, but FEMA notes that GOHSEP's improper application of CEF factors (see violation #6 above) resulted in duplication of H.2 factors. See Applicant Request at 66-67. The H.2 factors are allowance estimates for A&E Design Contract costs. Only one of the three options provided in the H.2 factor can be selected in accordance with FEMA CEF guidelines. Two of the three CEF H.2 factors are derived from data developed by the American Society of Civil Engineers Committee on Professional Practice and correlate estimates of A&E design costs with total construction costs. The CEF provides options for projects of average and above-average complexity. Given the design complexity involved in replacing a 998,000 square-foot hospital, the GOHSEP estimators correctly selected the H.2 factor for above-average complexity. In addition to the correct H.2 factor, the GOHSEP estimators also selected the H.2 factor for Basic Construction Inspection Services. As explained in CEF Instructional Guide, the Basic Construction Inspection Services factor is only applied for projects of below-average complexity. See Applicant's Exhibit 5 at 42. This duplication of allowances for A&E Design Costs is inappropriate and contrary to FEMA estimating practice.

In accordance with CEF Instructional Guide (Ver. 2), FEMA determined that it could not use the BKA Report estimate as the basis for obligating funding because it includes ineligible work, work related to non-disaster damage, and commits multiple estimating errors. The Applicant's replacement estimate for Charity Hospital commits six specific violations of FEMA regulation, policy, and program guidelines. A CEF cannot be prepared consistent with FEMA estimating practices unless FEMA can verify the eligibility of all items in the scope of work. Identifying eligible scope of work was the purpose of scope alignment. The Applicant's unilateral cessation of scope alignment activities ensured FEMA's denial of the replacement claim in its entirety. As stated in PW 2175v3 and reiterated in the FEMA Region VI first appeal response, the Applicant's estimates are inconsistent with FEMA estimating practices. FEMA's actions were fair and reasonable and consistent with applicable law and program guidelines.

#### **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.**

#### **Response to Arbitration Issue No. 8**

FEMA properly disallowed associated fixed equipment costs from the Applicant's claim for disaster-related damage to the facility. Equipment owned by an applicant that was damaged as a result of a declared disaster is eligible for repair or replacement under applicable PA Program rules. See 44 C.F.R. § 206.226(h); see also 44 C.F.R. § 206.201(c). The Applicant's claim includes a list of fixed equipment located within the hospital. See Applicant Exhibit 14, Replacement Costs for Damaged Fixed Medical Equipment at 1-2,

GOHSEP had previously informed FEMA that LSUHSD, not FP&C (the Applicant), would be the applicant for damaged equipment and contents at the MCLNO campus (including Charity

Hospital). As such, FEMA prepared PW 16809 for LSUHSD for damaged equipment and contents. If the Applicant now maintains that it owns the items listed in its claim and that this equipment does not represent duplicate items captured in PW 16809, FEMA may consider a PW for these items. However, the Applicant has neither provided documentation to FEMA that the damaged equipment was damaged by Hurricane Katrina (per 44 C.F.R. § 206.223(a)) nor that this equipment was damaged beyond repair and thus requires replacement (per 44 C.F.R. § 206.226(h)).<sup>41</sup>

FEMA acknowledges that some fixed institutional equipment is standard for all basic hospitals and this fixed equipment is structurally integrated into the facility's design (e.g., headwalls, nurses call system, sound/paging system, medical gasses, etc.). These standard fixed equipment items are included in the RS Means Square Foot Cost base hospital model and should be included in the repair and replacement estimates when performing the 50 Percent Rule calculation. However, other fixed institutional equipment that is attached, but not structurally integrated into the building is more appropriately classified as contents in context of 44 C.F.R. § 206.226(h). Examples of such equipment from the Applicant's list include autopsy tables, dental chairs, CT scanners, sterilizers, particle separators, etc. This equipment is excluded from the 50 Percent Rule calculations to avoid irrational conclusions regarding the repair or replacement of the building and/or equipment.<sup>42</sup>

---

<sup>41</sup> The BKA Report notes that BKA has not assessed damage to this equipment and that the claim is based solely on the list submitted by LSU/MCLNO. See Applicant Exhibit 14 at 1 (Architectural Item #4 in "Methodology"). Assuming the listed equipment was damaged by the disaster, the extent of damage would need to be documented by testing the equipment with appropriate diagnostic tools. FEMA would review the documentation and determine the cause of damage and eligibility for repair or replacement of each item pursuant to 44 C.F.R. § 206.226(h).

<sup>42</sup> Application of the 50 Percent Rule with regard to fixed equipment must follow a general rule of reason. Consider a lightning strike associated with a declared event that causes extensive and unrepairable damage to a very expensive piece of medical equipment "fixed" to a small building of simple construction. If the equipment and the building were considered together, damage to the equipment alone could exceed 50 percent of the total replacement cost of both the equipment and the building. It would be irrational to interpret the 50 Percent Rule to suggest that replacement of an undamaged building is eligible. The counter-example includes the same piece of equipment "fixed" to a much larger and more expensive host building. A lightning strike can also damage equipment beyond repair while causing minimal or no damage to the host building. The estimated cost of all repairs would likely be far

The Applicant's reference to equipment items considered part of a residential building pursuant to Standard Flood Insurance Policy regulation is not applicable to Public Assistance. See Applicant Request for Arbitration, pg. 71-72. Under Public Assistance program eligibility guidelines, each piece of building equipment or contents must be evaluated separately from the building to determine whether it is repairable or eligible for replacement. See 44 C.F.R. § 206.226(h); see also Applicant's Applicant Exhibits 41 and 42. By way of example, it is not hard to imagine a scenario where a dental chair or autopsy table (two examples from the Applicant's list of "fixed" equipment) sustains little or no damage from a disaster that causes significant damage to the building. If the dental chair or autopsy table is included in the 50 percent calculation for the building, one could reach the incorrect conclusion that replacement of these items is eligible. As stated above, FEMA policy requires that only equipment damaged beyond repair is eligible for replacement and that each item of equipment must be segregated from, and not included in, the 50 Percent Rule calculation for the building.

The Applicant also states that FEMA personnel knew and understood that fixed medical equipment would be included in the claim and never objected until issuance of PW 2175v3. See Applicant's Request at 72-73. However, the Applicant's assertion confuses the issue. FEMA agrees that certain types of fixed institutional equipment that is structurally integrated with a building should be included in the 50 Percent Rule calculation for a building. Examples include surgical lights, patient headwalls, medical gases, and nurses call systems, and sound/paging systems. Segregation of these systems or components for evaluation of repair or replacement is not practical. On the other hand, separate evaluation of dental chairs, autopsy tables, CT scanners, and other custom equipment pieces attached to the building can be readily evaluated

---

less than 50 percent of the combined replacement cost. However, it would be irrational to deny the applicant replacement of the damaged piece of fixed medical equipment on the basis that the item is "fixed" to the building.

for repair or replacement in conformance with 44 C.F.R. § 206.226(h), as such items are not permanently affixed to the facility and can easily be removed. As described previously, determination of which fixed medical equipment can be included in the 50 Percent Rule calculation for a building and which items of fixed medical equipment must be segregated from the calculation and evaluated separately follows a rule of reason.

FEMA's position regarding the treatment of fixed medical equipment is consistent with BKA's repair cost methodology. Note the following from the BKA Cost Estimate Methodology: "1. Quantities are established using the assumptions in the architectural assumptions above." Applicant Exhibit 14, Methodology, Cost Estimates Item #1 at 2. Fixed medical equipment identified in the architectural assumptions include: "Fixed light fixtures, exam lights, surgical lights and patient headwalls." *Id.* Architectural Item #3 at 1. Fixed medical equipment excluded from the architectural assumptions include: "All other fixed medical equipment." *Id.* If repair cost estimate quantities are established using these appropriate architectural assumptions, then only fixed light fixtures, exam lights, surgical lights and patient headwalls should be included in the BKA repair cost estimate. If such appropriate architectural assumption were used here, FEMA would not take issue with the BKA methodology.<sup>43</sup> However, the Applicant did not use such assumptions here in the BKA repair cost estimate methodology; hence FEMA's objection.

The BKA repair cost, which the Applicant used to determine the 50 Percent Rule calculation, includes the Applicant's estimate of damaged "attached" medical equipment in the repair cost numerator contrary to the BKA methodology. See Applicant Exhibit 14 at 1-2 (Building Repair Cost Summary, and Replacement Costs for Damaged Fixed Medical Equipment). This is

---

<sup>43</sup> To clarify, although FEMA would not have an issue with the methodology, FEMA must determine that fixed light fixtures, exam lights, surgical lights and patient headwalls were damaged by the disaster before including repair costs for these items in the PW or in the 50 Percent Rule calculation for the building.

contrary to BKA repair cost methodology, which states that only medical equipment that is structurally integrated (e.g., headwalls, lighting, etc.) should be included in the building repair cost. See Id. at 1 (Methodology, Architectural Item #3). The Applicant's repair cost estimate is based on replacement cost for a list of items provided by "Bob Arnold" who apparently works for the MCLNO Facilities Department. FEMA cannot determine whether any of this equipment was damaged by the disaster, as the Applicant's claim includes no explanation for how it determined the replacement cost for these items. Furthermore, FEMA notes that the Applicant used two different figures in regards to eligible equipment costs in its 50 Percent Rule calculation. The Applicant used a \$36 million replacement cost figure in the repair numerator and a \$55 million replacement cost in the replacement denominator of the 50 Percent Rule calculation. This suggests that the Applicant is seeking \$55 million for fixed equipment it determined would cost only \$36 million to replace.

Consistent with BKA's methodology, FEMA has agreed to evaluate custom medical equipment damage claims separately to determine eligible scope of repair or replacement work pursuant to 44 C.F.R. § 206.226(h). In fact, PW 16809 covers many of such items as claimed separately by LSUHSD.

As demonstrated, segregation of fixed institutional equipment that is attached, but not structurally integrated into the facility is reasonable and necessary for purposes of the 50 Percent Rule calculation in accordance with FEMA regulation and policy. Furthermore, the 50 Percent Rule has no bearing on the underlying eligibility of the repair or replacement of any piece of damaged equipment. As such, FEMA Region VI was correct to deny the Applicant's first appeal.

### 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 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.**

### Response to Arbitration Issue No. 9

*PW 2175v3 properly determined the scope of work and properly accounted for eligible disaster related damage.* PW 2175v3 represents the only estimate of eligible scope of work and cost that meets Public Assistance Program funding criteria. FEMA developed this PW to: consolidate previous large project PWs prepared for the facility; capture additional disaster-related damage, scope, and costs identified through the agreed upon scope alignment process, which the Applicant abandoned; and provide cost allowances for eligible work for estimates of concealed disaster-related damage and unavoidable post-disaster damage.

Most of the disputed items noted in the BKA Supplemental Report referenced in the Applicant's Request for Arbitration relate to BKA's disagreement with the eligible scope quantities that FEMA developed. See Applicant Exhibit 22, disputed Item Nos.1, 7-12, 14, 17 and 18 at 9-11. Disagreement over eligible scope of work (i.e., the extent of disaster-related damage) is the basis of the Applicant's Request for Arbitration. As described earlier in this response in the section entitled "FEMA's Evaluation of the Applicant's Replacement Claim," FEMA did not accept the BKA Report scope quantities and estimates because they were not developed in compliance with FEMA regulation, policy, and guidance.<sup>44</sup> Therefore, FEMA developed its own damage description and scope of work based on initial site visits, information gleaned from the scope alignment (up to the point of the Applicant withdrew from the process), as well as reasonable

---

<sup>44</sup> See also Exhibit 1 for a detailed review of the Applicant's estimates. This review found numerous instances of ineligible work and technical and methodological errors resulting. The report concludes that each of the Applicant's estimates cannot be used as the basis for obligating Public Assistance funding or for concluding that the hospital is eligible for replacement pursuant the 50 Percent Rule.

estimates for eligible scope of work related to concealed and post-disaster damage. The Applicant has not demonstrated clear error in FEMA's determination of eligible scope of work quantities.

The BKA Supplemental Report also claims that the FEMA repair scope of work does not use "best practices" in the replacement of plaster ceilings and plaster walls, as the FEMA repair scope does so in the manner consistent with the existing plaster ceilings and walls in Charity Hospital. The Report claims this type of antiquated construction is no longer a construction standard and is not cost effective. See Applicant Exhibit 22, disputed Item No.16 at 10. Due to the age of Charity Hospital and potential eligibility for listing on the National Register of Historic Places (NRHP) pursuant to Section 106 of the National Historic Preservation Act, repair and replacement with "in kind" materials is required until FEMA, in coordination with the Louisiana State Historic Preservation Officer (SHPO), determines that the Applicant's proposed repair or replacement with new materials would not adversely affect the facility's eligibility for future NRHP listing. See PA Guide, FEMA 322 (1999) at 108-109.

The BKA Supplemental Report also claims that FEMA underestimated the cost of environmental remediation work that the Applicant claims is required by Occupational Safety and Health Administration (OSHA), United States Environmental Protection Agency (USEPA) and Louisiana Department of Environmental Quality (LDEQ). See Applicant Exhibit 22 at 10-11 (disputed Item #17). BKA repeatedly referred to these requirements during scope alignment, but never responded to multiple FEMA requests for documentation to support these claims. See Exhibit 7, para 25.

Furthermore, the Applicant's comments related to alleged misallocation of cause of damage, i.e., wind versus flood, have no material consequence on the obligated funding amount. See Applicant Exhibit 22 at 9 (disputed Items Nos. 2-6). The BKA Supplemental Report also notes disagreement over the estimating technique applied by FEMA to estimate crew labor for three scope items out of 275 in PW 2175v3, yet does not provide a recommendation for what it considers the appropriate estimate of crew labor costs for these items. See Applicant Exhibit 22 at 10 (disputed Item #13). Finally, the BKA Report notes that FEMA allocated *too much* funding for interior door replacement in the basement. See Applicant Exhibit 22, at 10 (disputed Item #15).

In addition to items noted in the BKA Supplemental Report, the Applicant submitted a list of PWs that FEMA prepared for other facilities in Louisiana damaged by Hurricane Katrina. See Applicant Request at 77. The list includes facilities ranging in size from 27,500 square feet to 169,997 square feet and notes the obligated unit costs for repair of damaged mechanical and electrical equipment.

FEMA reviewed each of these PWs and associated cost estimates and finds the Applicant's comparison inappropriate. See Exhibit 30. First, the Applicant attempts to compare square-foot unit prices for mechanical and electrical repairs at smaller facilities to repairs at the much larger Charity Hospital. Second, the Applicant erred in determining that the cost per square foot to repair mechanical and electrical equipment at Charity Hospital is \$9.13, as the Applicant simply divided the total obligated funds for these costs by the total building square footage. FEMA's estimate of these costs was based on disaster-related damage to such systems within the limited areas of the facility. Thus, to develop an accurate unit cost per square foot for disaster-related damage to mechanical and electrical equipment, the obligated funding for these costs must be

divided by the approximate area of the facility with disaster-related damage to mechanical and electrical components.

When appropriately calculated, the cost obligated in PW 2175v3 is approximately \$32.11 per square foot of area with disaster-related damage to mechanical and electrical components.

Furthermore, the Applicant's Request with regards to its attempt to compare damage and cost at Charity Hospital to damage and cost at other facilities contains multiple errors, as the Applicant erred by misrepresenting area with disaster-related damage and eligible cost. FEMA remedies these errors and summarizes in the following table the actual square-foot unit prices for mechanical and electrical repairs at the enumerated facilities.<sup>45</sup>

Project No.	Facility	Calculation	
		Applicant	FEMA
PW 2175	Charity Hospital	\$9.13/SF	\$32.11/SF
PW 4876	Templeman 3 & 4	\$24.95/SF	\$24.95/SF
PW 5118	New Orleans State Office Bldg	\$19.61/SF	\$19.61/SF
PW 532	Orleans Parish Courthouse	\$60.89/SF	\$20.36/SF
PW 3977	Templeman Phase 1	\$19.09/SF	\$23.50/SF
PW 930	Templeman Phase 5	\$48.88/SF	Not Applicable*
PW 13948	Orleans Parish Prison	\$29.13/SF	Not Applicable*
PW 926	Orleans Parish Criminal Intake	\$16.22/SF	Not Applicable*

\*No useful conclusion can be reached based on scope of work and obligated funding.

Furthermore, FEMA asserts, for the reasons described above, that the Applicant did not provide sufficient documentation with the Request for Arbitration to support a finding that PW 2175v3 includes any material error or omission in eligible scope of work or cost. Rather, the Applicant has failed to submit all such documentation in support of its claim with the initial Request for Arbitration as required per 44 C.F.R. § 206.209(e)(5).

<sup>45</sup> See Exhibit 30 for a more thorough analysis of the errors represented in the table.

### **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.**

### **Response to Arbitration Issue No. 10**

PW 2175v3 does not include a 50 Percent Rule calculation because the FEMA LA-TRO staff determined that the eligible repair costs for Charity Hospital were far below 50 percent of replacement costs prior to completing the PW, making performance of the calculation unnecessary. FEMA reached this conclusion after comparing FEMA's estimate of eligible repair cost to any of the three estimates of replacement costs presented by the Applicant. FEMA's conclusion is also reasonable given the limited damage that resulted from the hurricane. Flooding was isolated to the basement and other damage to the facility was minor. Also, as indicated by an emergency room physician at Charity Hospital, who took part in cleanup efforts shortly after Hurricane Katrina, the first three floors were scrubbed clean and ready to open for business within two weeks of the storm's landfall.<sup>46</sup> The State's consultants found no structural failures and initial FEMA inspections of floors one to 20 indicated relatively minor damage from the hurricane. Although scope alignment yielded some additional eligible scope of work not captured during these initial FEMA inspections, the difference was insignificant relative to any of the Applicant's replacement cost estimates.

The Applicant's assertion that Hurricane Katrina alone caused enough damage to justify replacement is not supported by the facts. Charity Hospital was already in a state of severe disrepair at the time of the disaster because of Applicant's failure to maintain and repair the facility over a number of years. See Exhibits 2 and 3. Furthermore, following the storm the

---

<sup>46</sup> See footnote 5.

Applicant failed to take basic protective measures to protect the facility from ongoing damage.<sup>47</sup> Funding obligated in PW 2175v3 is limited, by law, to the cost to repair disaster-related damage; thus, PW 2175v3 does not include funding for repairs related to the Applicant's deferred maintenance and negligence.

#### Unfounded Allegations and Misrepresentations

The Applicant alleges that FEMA's decision to not perform the 50 Percent Rule calculation in PW 2175v3 is inconsistent with treatment of other "facilities." Only one example, PW 10364v2, is incorporated into the Applicant's Request by reference. See Applicant Request at 79.

Application of the 50 Percent Rule in PW 10364v2 is consistent with that of PW 2175v3, the Applicant's unfounded allegation notwithstanding. See Applicant Exhibit 23. The Plaquemines Medical Center facility in PW 10364v2 is a one-story, 26,800 square-foot facility damaged by flooding that reached the rooftop. Even with this level of devastation, FEMA calculated the repair cost to be only 63 percent of the facility's replacement cost. This facility is obviously not comparable to Charity Hospital, a 20-story, 998,000 square-foot facility with flooding that only affected the basement.

The Applicant also incorrectly asserts that the BKA Report calculates the 50 Percent Rule ratio for Charity Hospital to be 80.1 percent, when in fact the BKA Report calculates that repair costs (\$163,420,319) are 81.3 percent of replacement cost (\$201,005,766). See Applicant Exhibit 14 at A2 (Building Repair Cost Analysis, Costing). Although the differences seem minor, FEMA demonstrates below how the Applicant's misrepresentation of the BKA Report's calculation of the 50 Percent Rule is used to inappropriately criticize FEMA's determinations in regards to PW 2175v3.

---

<sup>47</sup> This is addressed more thoroughly in response to Arbitration Issue No. 5.

The BKA Report includes two different base repair costs. BKA used the Revision 1 repair cost of \$163,420,319 in the numerator of its calculation of the 50 Percent Rule. See Applicant Exhibit 14 at A2 (Building Repair Cost Analysis). Although BKA references this estimate in its calculation, the estimate itself has been omitted from the BKA Report. The Revision 2 repair cost that is included in the BKA Report is \$152,332,985. See Applicant Exhibit 14 at 1 (Building Repair Cost Summary). The Revision 2 base repair cost numerator includes a line item for the Applicant's replacement cost for undocumented damage to fixed medical equipment (\$36,135,500); however, BKA explicitly notes that its actual repair cost are limited to specific equipment and excludes the Applicant's list of damaged fixed medical equipment. See Applicant Exhibit 14 at 3-4 (Methodology, Architectural Items #2-3). Excluding the Applicant's list of fixed medical equipment, consistent with BKA's methodology, BKA's portion of the Revision 2 base repair cost should be \$116,197,485. See Exhibit 1 at 11.

The BKA Report includes four separate replacement cost estimates, each derived by using different methodologies. Id. at 12-13. The Applicant selected the Revision 2 Estimate of \$190,265,025 for use in its calculation of the 50 Percent Rule. See Applicant Request at 36-38; see also Applicant Exhibit 14 at 1 (Building Replacement Cost, Revision 2). The Revision 2 Estimate inappropriately includes \$55,000,000 for replacement of custom fixed institutional equipment, most of which does not appear to be included in the RS Means Square Foot Cost base hospital model.<sup>48</sup> After limiting the replacement cost estimate to items included in the RS

---

<sup>48</sup> BKA does not provide a list of replacement equipment. The \$55,000,000 replacement value is calculated on an average square-foot cost for "fixed/major moveable medical equipment" at recently constructed hospitals in other states. See Applicant Exhibit 14 at 1 (Hospital Equipment Cost for Replacement Facility). Fixed equipment itemized in the BKA Analysis 1 Estimate of \$201,013,827 is limited to the types of equipment assumed in the RS Means Square Foot cost data. The cost of this equipment as listed in the BKA Analysis 1 Estimate is \$16,044,347. Therefore, it is appropriate to replace the \$55,000,000 estimate for all fixed equipment in the Revision 2 Estimate with the Analysis 1 Estimate of \$16,044,347 only fixed equipment assumed in the RS Means Square Foot base hospital model.

Means Square Foot Cost base hospital model, the Revision 2 Estimate denominator should be \$151,309,372.

But, the Revision 2 Estimate was not the replacement cost estimate selected by BKA for use in its calculation of the 50 Percent Rule. BKA estimated three replacement costs and selected the Analysis 2A Estimate (\$201,005,766) for use in the denominator of its calculation of the 50 Percent Rule. Exhibit 1 at 12-13. This denominator was interpreted from RS Means Square Foot cost data for a base hospital model, which appropriately excludes most of the \$55,000,000 of custom fixed equipment included in the Revision 2 Estimate. Fixed equipment itemized in the Analysis 1 Estimate of \$201,013,827 is limited to the types of equipment assumed in the RS Means Square Foot cost data (e.g., equipment that is structurally integrated with the building). The cost of this equipment as listed in the BKA Analysis 1 Estimate is \$16,044,347.

Using an “apples-to-apples” comparison in calculating the 50 Percent Rule, by excluding fixed institutional equipment that is attached, but not structurally integrated into the facility from the Revision 2 repair cost estimate and from all four of the BKA replacement cost estimates, the BKA repair/replacement ratio ranges from 57.8 to 76.8 percent:

- Revision 2 repair (\$116,197,485) divided by Revision 2 replacement (\$151,309,372) = **76.8 percent.**
- Revision 2 repair (\$116,197,485) divided by Analysis 1 replacement (\$201,013,827) = **57.8 percent.**
- Revision 2 repair (\$116,197,485) divided by Analysis 2A replacement (\$201,005,766) = **57.8 percent.**
- Revision 2 repair (\$116,197,485) divided by Analysis 2B replacement (\$200,965,548) = **57.8 percent.**

Based upon the above comparison, the Applicant apparently picked the replacement cost estimate from the BKA Report that would best serve its desired purpose.

Furthermore, the Applicant misrepresented the BKA Report to criticize FEMA's compliance with applicable regulation regarding the eligibility of costs for damaged equipment.<sup>49</sup> The Applicant claims that once the cost to *repair* fixed equipment is removed from the repair numerator and the cost to *replace* fixed equipment is removed from the replacement denominator, the ratio is 85.9 percent. See Applicant Request at 80-81. However, the BKA Report makes no such claim that the \$36,135,500 cited is the cost to *repair* fixed equipment. To the contrary, the Applicant-provided list of equipment included in the BKA Report states 11 separate times that \$36,135,500 is the cost to *replace* the fixed equipment. In fact, the title of the BKA Report page declares: "REPLACEMENT COSTS FOR DAMAGED FIXED MEDICAL EQUIPMENT." See Applicant Exhibit 14 at 1 (Replacement Costs for Damaged Fixed Medical Equipment).

Irrespective of FEMA's application of the 50 Percent Rule and the Applicant's clear misrepresentation of the BKA Report data, the assertion that Applicant should receive \$55,000,000 to replace equipment allegedly damaged by the disaster when the Applicant determined replacement of this equipment would only cost \$36,135,500 is illogical.

#### FEMA's Calculation of the 50 Percent Rule

In response to the Applicant's first appeal, FEMA calculated the 50 Percent Rule utilizing one of Applicant's replacement estimates. Upon review of the calculation contained in the first appeal response, FEMA concludes that the calculation was not performed correctly. The 50 Percent Rule calculation contained in the first appeal was an attempt to show that, using the Applicant's methodology for variables included in the numerator and denominator of the calculation, the

---

<sup>49</sup> 44 C.F.R. § 206.226(h) requires separate evaluation of damaged equipment and contents for repair and replacement.

disaster-related damage to the facility was far less than 50 percent. When calculated in accordance with applicable FEMA regulations and policy the cost to repair documented disaster-related damage is 19.5 percent of estimated the hospital's replacement cost. The following discussion provides more detailed explanation of this calculation.

According to FEMA Response and Recovery Directorate Policy 9524.4 (1998), a facility is eligible for replacement if the cost to repair disaster-related damage (repair of the damaged components only, using present day materials and methods) is equal to or greater than 50 percent cost to replace the facility. The policy notes that not all eligible costs are included in the 50 Percent Rule calculation. CEF Instructional Guide (Ver. 2) provides more specific guidance on which repair and replacement variables are included in the fraction:

The repair vs. replacement calculation is begun by completing two separate Part A base cost estimates using CEF (do not apply parts B through H). Prepare one estimate for each of the repair and replacement scenarios. The "Total Part A Base Construction Cost" from the estimates are used in calculating the actual repair vs. replacement fraction. The percentage result determines whether the type of work will be repair or replacement." See Applicant Exhibit 5 at 20.

The "Total Part A Base Construction Cost" is the sum of estimated hard construction costs. Base construction costs do not include the following costs, which may also be eligible for FEMA funding (as defined in the CEF Instructional Guide, Ver. 2):

- General contractor's field supervision costs and job site costs such as temporary services and utilities, safety and security measures, quality control and administrative submittals (CEF Part B costs).
- Construction cost contingencies and is designed to address budgetary risks associated with project complexity in determining scope of work (CEF Part C costs).
- Contractor's home office overhead, insurance, bonds, and profit (CEF Part D costs).

- Cost escalation over the duration of the project and is based upon an inflation adjustment from the time the estimate is prepared until the mid-point of construction for the eligible scope of work (CEF Part E costs).
- Fees for building permits, plan checks, and special reviews (CEF Part F costs).
- Applicant's reserve for change orders and differing site conditions (CEF Part G costs).
- Applicant's cost to manage the design and construction of the project (CEF Part H costs).

The LA-TRO developed and used the flowchart to describe and depict the 50 Percent Rule determination process, consistent with applicable FEMA regulation and policy. See Exhibit 1, Attachment A.

#### Repair Estimate (Numerator)

The total base repair cost identified by the CEF prepared for PW 2175v3 is \$32,134,983 (in comparison, the full estimate of eligible repair costs is \$126,142,709).

#### Replacement Estimate (Denominator)

FEMA determined that the appropriate replacement cost for use in the denominator of the 50 Percent Rule calculation is \$165,186,501.<sup>50</sup> FEMA's replacement model assumes a 998,749 square foot, 21-story, RS Means Square Foot Cost base hospital model, which is elevated to the appropriate Base Flood Elevation (BFE), along with associated Americans with Disabilities Act (ADA) upgrades, and constructed on piles as is required for new construction in the New Orleans area. The replacement model assumes 21 stories because the new facility would not have a basement and the additional story would replace the pre-storm basement capacity. All custom

---

<sup>50</sup> In comparison, the full estimated cost to replace Charity Hospital's function and capacity is \$474,750,898 plus the as of yet undetermined cost to repair or replace certain fixed equipment.

equipment that is not included in the RS Means Square Foot Cost base hospital model is excluded from the base replacement cost.<sup>51</sup>

### Calculation

Replacement of Charity Hospital is not eligible in accordance with FEMA Response and Recovery Directorate Policy 9524.4 (1998) because base repair cost (\$32,134,983) for disaster-related damage is only 19.5 percent of the base replacement cost (\$165,186,501).<sup>52</sup> As stated in PW 2175v3, the allowance for FEMA's estimate of unavoidable post-disaster damage must be excluded from the 50 Percent Rule calculation. If FEMA were to include the base cost of this allowance in the calculation, the determination would not change, as the total eligible base repair cost (\$54,387,829) would be 32.9 percent of the estimated base replacement cost (\$165,186,501).

### 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 Blich Knevel team of experts.**

### Response to Arbitration Issue No. 11

The Applicant's allegation that FEMA Region VI "completely ignored the primary documentation submitted by FP&C" is baseless. FEMA's first appeal process involves an independent review by the FEMA Regional Administrator of all information and documentation submitted by an applicant in support of its appeal. The FEMA Region VI Regional Administrator fulfilled all requirements of 44 C.F.R. § 206.206.

---

<sup>51</sup> Under PA program eligibility guidelines, each piece of custom building equipment or contents that are not structurally integrated with the facility's design must be evaluated separately from the building to determine whether it is repairable or eligible for replacement to facilitate compliance with 44 C.F.R. § 206.226(h). See response to Arbitration Issue #8 for a more detailed explanation of this topic.

<sup>52</sup> The total allowance for repair of FEMA's estimate for unavoidable post-disaster damage is a "loaded" cost to complete all repair and includes an estimate for non-construction costs represented by CEF factors B-H. The total cost of all other repairs as indicated in the PW 2175v3 CEF is \$73,242,507, which is 2.279 times the CEF Part A of \$32,134,983. Similarly, the total cost of \$50,719,000 for repairs to unavoidable post-disaster damage equals 2.279 times the Part A base cost of \$22,252,846.

Based upon a thorough review of all information and documentation submitted with Applicant's appeal, the FEMA Region VI Regional Administrator decided that the Applicant had not demonstrated that repair costs for Charity Hospital exceed 50 percent of replacement costs pursuant to 44 C.F.R. § 206.226(f) and FEMA Response and Recovery Directorate Policy 9524.4 (1998). The FEMA Region VI Regional Administrator also decided that PW2175v3 was a reasonable and appropriate estimate of eligible scope and costs to repair Charity Hospital in accordance with applicable law. See 42 U.S.C. § 5172(a) and (b). Accordingly, the Regional Administrator rejected the Applicant's first appeal. See Applicant Exhibit 27.

The Applicant raised the same objections to the FEMA Region VI first appeal decision in its second appeal (now withdrawn). See Exhibit 26, Assignment of Error #1. Timely submittal of the second appeal effectively stayed FEMA's final administrative decision related to the first appeal. See 44 C.F.R. § 206.226(f). FEMA now submits this response, in its entirety, in response to the Applicant's Request for Arbitration in accordance with 44 C.F.R. § 206.209(e)(4). See also 44 C.F.R. § 206.209(e)(2).

As discussed in FEMA's response to Arbitration Issue No. 1, FEMA determined that the BKA Report included ineligible scope of work and, therefore, the report was rejected in accordance with applicable law, regulation, and policy. Additionally, FEMA's responses to Arbitration Issue Nos. 2 and 3 demonstrate that rejection of the Applicant's claim for replacement value for Charity Hospital was in accordance with applicable regulation and policy. Furthermore, FEMA's response to Arbitration Issue #4 demonstrates that FEMA's actions related to Charity Hospital, specifically related to PW 2175v3, were fair and reasonable, and done in accordance with applicable law, regulation and policy.

### **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.**

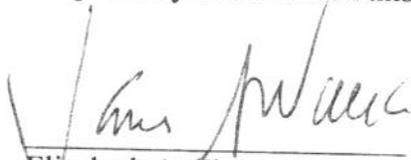
### **Response to Arbitration Issue No. 12**

FEMA has undertaken a complete and thorough review of FP&C's claim in relation to eligible costs for the repair of Charity Hospital. Furthermore, FEMA has followed all applicable law, regulation, and policy in making determinations in relation to FP&C's claim. For the reasons stated above in this response the Applicants Request for Arbitration, including FEMA's responses to Arbitration Issues Nos. 1-11, FEMA asserts that it has acted fair and reasonably in making all determinations in relations to FP&C's claim.

### **CONCLUSION AND RECOMMENDATION**

The FEMA Public Assistance Applicant, FP&C, has utilized a technical analysis of damages and scope of work that fails to meet the requirements of the Stafford Act, its implementing regulations, and applicable policy. FP&C has thus failed to demonstrate that it is eligible for any additional FEMA funding for the repair or replacement of Charity Hospital. FEMA's determination in PW 2175v3 has a reasonable basis and is entitled to deference. FEMA therefore respectfully requests this panel find in favor of FEMA and deny FP&C's request for additional Public Assistance funding.

Respectfully submitted on this 30th day of October 2009 by



For Elizabeth A. Zimmerman  
Assistant Administrator  
Disaster Assistance Directorate  
Federal Emergency Management Agency

Attachments