

Forrest County



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October 26, 2009

~~Civilian Board of Contract Appeals
1800 F Street, NW
Washington, DC 20405~~

Re: Request for arbitration panel review pursuant to 44 CFR Section 206.209
FEMA-1604-DR-MS Forrest County BOS, #035-99035-00, PW #8837

Dear Sir or Madam:

Please consider this letter as the formal request of the Forrest County Board of Supervisors (“the County”) pursuant to 44 CFR Section 206.209 for arbitration panel review of a dispute over the denial of public assistance funding under the above referenced project worksheet by the Federal Emergency Management Agency (“FEMA”). By copies of this letter to both FEMA and the Mississippi Emergency Management Agency (“MEMA”), the County also hereby formally withdraws its Second Appeal of said denial pending as of February 17, 2009.

Jurisdiction

The instant dispute is eligible for arbitration panel review under 44 CFR Section 206.209 as a public assistance project arising out of Hurricane Katrina in the state of Mississippi involving an amount in excess of \$500,000, with a statutory appeal pending as of February 17, 2009.

Background

As set forth in the enclosed Project Worksheet Number 8837 (Exhibit A), Hurricane Katrina hit Hattiesburg, Mississippi, on August 29, 2005, with hurricane force winds and driving rain. Damage to the exterior of the County circuit court building permitted moisture intrusion into the building during the hurricane, while damage to the city’s electric power infrastructure resulted in power being off in the building for nine (9) days. Moisture intrusion and the loss of power to the building’s climate control system resulted in moisture damage and mold infestation requiring \$506,108.35 for temporary relocation costs and remediation.

Project Worksheet Number 8837

On November 3, 2006, FEMA denied any and all public assistance funding eligibility for the project due to improper maintenance of the building and HVAC system prior to Hurricane Katrina, the presence of mold in the building prior to the disaster, and the County's alleged "negligence...when the HVAC [system] was restarted without changing filters and cleaning the system," after the prolonged power interruption. See Exhibit A, p. 9.

The County's First Appeal

As set forth in the enclosed letter to Mike Womack of February 9, 2007 (Exhibit B), the County timely appealed FEMA's denial of public assistance for 40% of the cost of work described in the project worksheet, or \$202,443.34. The County based its appeal on the uncontested findings of an independent consultant that 40% of the damage encompassed under the project worksheet was directly attributable to Hurricane Katrina and "would have occurred even if no pre-existing conditions contributed to the contamination." See, generally, "Case Narrative" by Bonner Analytical Testing Company attached to Exhibit B. The County took exception to FEMA's ruling that the work was not required as a direct result of the disaster in light of FEMA's own admission that the power outage resulting from the Hurricane "may have caused additional mold problems." See Exhibit A, p. 9. The County also took exception to FEMA's related assertion that all of the damage to the building was caused by the County's negligence in failing to properly maintain the building's HVAC system. The basis for said ruling was an inspection conducted some nine months after the disaster, and the County admittedly had insufficient maintenance records to refute or confirm FEMA's contention. However, with respect to pre-disaster maintenance, the County submitted that FEMA's Public Assistance Guide (FEMA 322) only contemplated post-disaster negligence as grounds for ineligibility. See FEMA 322, pp.26-27. Moreover, with respect to post-disaster maintenance, the County submitted that failure to clean the HVAC system upon power restoration was in no way negligent given the circumstances faced by County maintenance staff just over one week after the worst natural disaster in American history.

FEMA's First Appeal Determination

As set forth in the enclosed letter to Mike Womack of January 17, 2008 (Exhibit C), FEMA denied the County's First Appeal on essentially the same grounds set forth in the Project Worksheet.

The County's Second Appeal

As set forth in the enclosed letter to Mike Womack of March 12, 2008 (Exhibit D), the County's Second Appeal requested that FEMA reconsider two important issues inadequately addressed in the First Appeal Determination and accompanying analysis. First, the County submitted that

FEMA had failed to address the implications of its own admission in the Project Worksheet that the power outage caused by Hurricane Katrina “may have caused additional mold problems.” Even if the County had negligently maintained the facility prior to Hurricane Katrina’s landfall on August 29, 2005, and from and after the restoration of power on September 7, 2005, the intervening nine days without climate control caused some damage to the building. FEMA, having rejected without explanation the conclusion of Bonner Analytical Testing Company that the nine day period accounted for 40% of the total damage to the building, simply asserted that the County’s alleged maintenance failures made such a determination “nearly impossible.” Second, the County submitted that FEMA continued to misapply its own policies regarding contributory negligence. With regard to any shortcomings in pre-disaster maintenance, 44 CFR §206.233(e) as interpreted in the relevant portions of the FEMA Policy Digest clearly applied only to post-disaster negligence, i.e., “when an Applicant fails to take prudent measures to protect a facility from *further* damage in the wake of a disaster” (emphasis supplied). The County also pointed out that nothing in the governing regulations implied, much less required, that a finding of contributory negligence on the part of the County precluded any and all public assistance. The County, having already spent thousands of dollars to hire an independent consultant to perform the calculations FEMA alleged to be “nearly impossible,” closed its appeal by inviting FEMA to make its own determination as to fraction of the required work directly attributable to the power outage and to provide assistance accordingly.

FEMA’s Second Appeal Determination

As set forth in the enclosed letter to Mike Womack of February 18, 2009 (Exhibit E), FEMA denied the County’s Second Appeal on essentially the same grounds set forth in both the Project Worksheet and the First Appeal Determination.

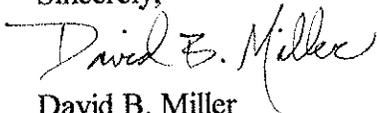
Conclusion

As set forth above and in the enclosed Exhibits, the undisputed findings of Bonner Analytical Testing Company indicate that 40% of the costs to repair the County’s circuit court building as contemplated by the disputed Project Worksheet were directly attributable to Hurricane Katrina and would have occurred even in the absence of any alleged negligence on the part of the County. Accordingly, the County respectfully requests that, upon review, the arbitration panel overrule FEMA’s denial of public assistance in the amount of 40% of the total Project Worksheet costs and direct an award of public assistance to the County in the amount of \$202,443.34. In the alternative, the County respectfully requests that, upon review, the arbitration panel render its own findings as to the costs under the Project Worksheet directly attributable to the disaster and award the County public assistance accordingly.

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Thank you for your time, attention, and consideration in this matter. Pursuant to applicable sections of the Code of Federal Regulations, copies of the instant request for arbitration panel review and withdrawal of pending Second Appeal are being submitted to both FEMA and MEMA for response and/or recommendation. Please advise the undersigned if additional information or documentation would facilitate the Board's consideration of the County's request.

Sincerely,

A handwritten signature in cursive script that reads "David B. Miller". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

David B. Miller
Board Attorney

Enclosures (5).

cc: Valerie Rhoads, Federal Emergency Management Agency
Mike Womack, Mississippi Emergency Management Agency

PROJECT WORKSHEET REPORT

DECLARATION NO. FEMA-MS - DR1604
 FIPS NO. 035-99035-00
 APPLICANT NAME FORREST (COUNTY)
 SUBDIVISION
 FEMA PW # 8837 VSN 0 REF# FCC-001

PREPARED DATE 06/06/2006
 REPORT DATE 11/03/2006 13:15
 INF TYPE INF
 NON-INF
 REC

CATEGORY E. Public Buildings COUNTY FORREST FUNDING OPTION COST SHARE 0.9

STD PROJECT NO. 599 PROJECT TITLE FORREST COUNTY CIRCUIT COURT BUILDING

PROJECTED CMPLTN DT 02/28/2007 ACTUAL CMPLTN DT WORK COMPLETE AS OF 05/05/2006 : 0 %

ELIGIBILITY Yes AMOUNT ELIG \$.00 FEDERAL SHARE \$.00 PRIORITY Normal

BEGIN DESIGN DT BEGIN CONSTR DT

END DESIGN DT END CONSTR DT

PREPARER CHARLES LOCKE

ROLE PO DATA SOURCE Paper

STATE

DATE OBLGTD 11/03/2006 PACKAGE DATE 11/02/2006

PACKAGE ID 340

PW REVIEWER DATA

	REVIEWER NAME	DATE
INITIAL REVIEW	WILLIAMS,DICK	07/11/2006
FINAL REVIEW	ROSE,EDWIN	11/02/2006

MT PROP Yes No

VALIDATED Yes No

PNP QUESTIONS Yes No

STATE RVWD Yes No

ATTACH Yes No

- Does the Scope of Work change the pre-disaster conditions at the site? Yes No Unsure
- Special Considerations issues included? Yes No Unsure
- Is there insurance coverage on this facility? Yes No Unsure
- Hazard Mitigation proposal included? Yes No Unsure

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FEMA PW # 8837 VSN 0 REF# FCC-001

SITE NUMBER 1 of 1

FACILITY NAME FORREST COUNTY CIRCUIT COURT BUILDING

Latitude 31.32744

ADDRESS

Longitude -89.2911

CITY HATTISBURG

STATE MS ZIP 39402

Was this site previously damaged? Yes No Unsure

SITE NUMBER 1 - LOCATION

630 MAIN STREET, HATTIESBURG, MS 39402

SITE NUMBER 1 - DAMAGE DIMENSIONS AND DESCRIPTION

"GPS COORDINATES WERE TAKEN AT THE FRONT ENTRANCE TO THE COURT HOUSE."

AUGUST 29, 2005, HURRICANE KATRINA HIT HATTIESBURG, MS WITH HURRICANE FORCE WINDS AND DRIVING RAIN. MINIMAL DAMAGE WAS CAUSED TO THE FORREST COUNTY CIRCUIT COURT BUILDING BY THE HURRICANE FORCE WINDS AND THE WIND DRIVEN RAIN. THE APPLICANT STATED THESE DAMAGES WERE INCLUDED IN A PREVIOUS PW WRITTEN BY A CHRIS DOVAS.

THE ELECTRIC POWER SERVING THE BUILDING AND THE CITY OF HATTIESBURG WAS SEVERALLY DAMAGED BY THE HURRICANE FORCE WINDS RESULTING IN THE POWER TO THE BUILDING BEING OFF FOR NINE (9) DAYS.

PRIOR TO THE EVENT, THE HVAC SYSTEM THROUGHOUT THE BUILDING WAS IN POOR CONDITION DUE TO THE LACK OF MAINTENANCE. THE FILTERS WERE DIRTY AND SOME WERE MISSING. THIS RESULTED IN THE AIR HANDLING UNITS COILS, FANS AND INTERNAL COMPONENTS, AS WELL AS THE SUPPLY AND RETURN AIR DUCTS AND GRILLS, BEING EXCESSIVELY CONTAMINATED WITH DIRT AND CONTAMINATED WATER ALLOWING MOLD SPORE TO DEVELOP.

SEE SCANNED AND ATTACHED NARRATIVE.

SITE NUMBER 1 - SCOPE OF WORK

WORK TO BE COMPLETED:

* REMOVE AND REPLACE THE CARPET AND CARPET PADDING THROUGH OUT THE BUILDING, 6,497 SQUARE FEET (SF) AT THE BASEMENT LEVEL, 10,175 SQUARE FEET (SF) ON THE FIRST FLOOR, 4,939 SQUARE FEET (SF) ON THE SECOND LEVEL FOR A TOTAL OF 21,521 SQUARE FEET (SF) OR 2,392 SQUARE YARDS (SY).

* REMOVE AND REPLACE ALL SUSPENDED CEILING TILES THROUGH OUT THE BUILDING. 9,142 SF OF TILES ON THE BASEMENT LEVEL, 8,230 SF ON THE FIRST FLOOR LEVEL, 2,997 SF OF TILES ON THE SECOND FLOOR LEVEL FOR A TOTAL OF 20,369 SF.

* CLEAN AND DECONTAMINATE 927 SF OF PAINTED CEILING AT THE BASEMENT LEVEL, 3,099 SF OF PAINTED CEILING SURFACE ON THE FIRST FLOOR, 4,676 SF OF PAINTED CEILING SURFACE ON THE SECOND FLOOR FOR A TOTAL OF 8,702 SF.

SEE SCANNED AND ATTACHED NARRATIVE.

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FEMA PW # 8837 VSN 0 REF# FCC-001

COST ESTIMATE

ITEM	VSN	CODE	MATERIAL AND/OR DESCRIPTION	UOM	QTY	UNIT PRICE	COST
1	0	0000	WORK TO BE COMPLETED	LS	1	\$0.00	\$0.00
2	0	9999	PRICE FROM CONTINUATION PAGE NO. 2	LS	1	\$506,108.35	\$506,108.35
3	0	9999	INELIGIBLE COST	LS	1	\$-506,108.35	(\$506,108.35)
Eligible Amounts:							
Total (this version)							(\$0.00)
Total Oblig To Date							\$0.00
Unobligated + Obligated							(\$0.00)
Federal Share for Obligated and Unobligated							\$0.00

SPECIAL CONSIDERATIONS

1 Does the damaged facility or item of work have insurance coverage and/or is it an insurable risk (e.g., buildings, equipment, vehicles, etc.)? Yes No Unsure

COMMENTS : 07/08/2006 13:43:51 A COPY OF THE APPLICANT'S INSURANCE POLICY IS ON FILE AT THE LTRO IN BILOXI, MS

COMMENTS : 07/11/2006 13:26:31 07/11/06 - APPLICANT HAS INSURANCE POLICY THROUGH ST. PAUL FIRE AND MARINE COMPANY; POLICY EFFECTIVE DATE 02/18/05 TO 02/18/06; POLICY NUMBER GP09313521. PROPERTY AND BUSINESS PERSONAL COVERAGE ON SCHEDULED LOCATIONS; EACH SCHEDULED LOCATIONS HAS A STATED LIMIT OF COVERAGE FOR PROPERTY AND BUSINESS PERSONAL PROPERTY, BUILDING BLANKET COVERAGE WITH A \$40,020,946.00 LIMIT OF COVERAGE. VALUATION IS REPLACEMENT COST, WITH A COINSURANCE OF 90%. BUSINESS PERSONAL PROPERTY IS INCLUDED WITH THE BUILDING COVERAGE AT REPLACEMENT COST WITH A 90% COINSURANCE. PROPERTY PROTECTION DEDUCTIBLE IS \$2,500.00 PER OCCURRENCE. PROPERTY PROTECTION COVERAGE SUMMARY, PSS PROPERTY PROTECTION ADDITIONAL BENEFITS COVERAGE FORMS IS INCLUDED IN THE POLICY. JOHN LUNA, INSURANCE SPECIALIST

2 Is the damaged facility located within a floodplain or coastal high hazard area and/or does it have an impact on a floodplain or wetland? Yes No Unsure

COMMENTS : 07/08/2006 13:43:51 FIRM PANEL # 28035C0045 C

3 Is the damaged facility or item of work located within or adjacent to a Coastal Barrier Resource System Unit or an Otherwise Protected Area? Yes No Unsure

4 Will the proposed facility repairs/reconstruction change the pre-disaster conditions (e.g., footprint, material, location, capacity, use or function)? Yes No Unsure

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SPECIAL CONSIDERATIONS

- 5 Does the applicant have a hazard mitigation proposal or would the applicant like technical assistance for a hazard mitigation proposal? Yes No Unsure
- 6 Is the damaged facility on the National Register of Historic Places or the state historic listing? Is it older than 50 years? Are there more, similar buildings near the site? Yes No Unsure
 COMMENTS : 07/08/2006 13:43:51 THE BUILDING WAS PLACED ON THE MISSISSIPPI LANDMARK DESIGNATION ON JUNE 5, 1986, AND ON THE NATIONAL REGISTER OF HISTORIC PLACES ON APRIL 16, 1993.
- 7 Are there any pristine or undisturbed areas on, or near, the project site? Are there large tracts of forestland? Yes No Unsure
- 8 Are there any hazardous materials at or adjacent to the damaged facility and/or item of work? Yes No Unsure
- 9 Are there any other environmental or controversial issues associated with the damaged facility and/or item of work? Yes No Unsure

EXISTING INSURANCE

Insurance Type	Policy No.	Bldg/Property Amount	Content Amt	Insurance Amount	Deductible Amount
General	GP09313521	\$,00	\$,00	\$40,020,946.00	\$2,500.00
Yrs Rqd :					

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FLOODPLAIN

Applicant Type (A)

1. Is the project in a Wetland (Swamp,marsh,etc.)? (B) STEP 1

2. Is the project on a FIA/FEMA map? Map No.

3. Total PW estimated cost of restoration (C)

4. Has this project been damaged by flooding previously? (D) Location
When?

Has a flood insurance payment(s) ever been received?

5. Land Use Upstream 5. Land Use Downstream

6. Recommendation

Federal Inspector TMANCINI

Date 07/26/2006 00:00:00

7. Justification For Floodway or Coastal High Hazard Area Location (E)

8. Initial Notice Determination Step 2

(A) Degree of Public Need

(B) No. of Individuals Affected

Repair/Replacement Relocate No FEMA Action

(C) Potential for Controversy

(D) Potential Impact

9. Are the following alternatives feasible? (Base your decision on the considerations listed below)

(A) Engineering (C) Economic Aspects (E) Legal Constraints

STEP 3

	1	2	3	4	5	6
Minimize danger to lives	<input type="radio"/> Y <input checked="" type="radio"/> N					
Minimize damage to facility	<input type="radio"/> Y <input checked="" type="radio"/> N					
Minimize damage elsewhere	<input type="radio"/> Y <input checked="" type="radio"/> N					
Reduce support of floodplain or wetland	<input type="radio"/> Y <input checked="" type="radio"/> N					
Restore floodplain values	<input type="radio"/> Y <input checked="" type="radio"/> N					
Maintain or improve economic resources	<input type="radio"/> Y <input checked="" type="radio"/> N					
Maintain or improve social resources	<input type="radio"/> Y <input checked="" type="radio"/> N					

10. Feasible Alternatives that will minimize adverse impacts

- | | |
|---|---|
| <input type="checkbox"/> 1. Relocated outside the base floodplain | <input type="checkbox"/> 5. Restore w/o MT |
| <input type="checkbox"/> 2. Restore w/ MT | <input type="checkbox"/> 6. No action (Disapprove project) |
| <input type="checkbox"/> 3. Transfer function to another facility | <input type="checkbox"/> 7. Suspend for further investigation |
| <input type="checkbox"/> 4. Reduce scope of work | |

11. Re-evaluate the alternatives. Select the number of the chosen alternative from STEP 3. If none, select "None" and indicate suspension in STEP 8 with a "7"

STEP 6

12. Final Notice Determination

First check if any of the following apply :

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- Critical Action
- PW > \$100,000
- Repair is substantial improvement
- Previously damaged in declared flooded disaster
- Located in floodway or coastal high hazard area
- An individual first notice was issued
- Past flood insurance payment(s)

FEMA Reviewer

MANCINI, ANTHONY

Date

07/26/2006 00:00:00

STEP 7

STEP 8

1 2 3 4 5 6 7

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FEMA PW # 8837 VSN 0 REF# FCC-001

ENVIRONMENTAL - All Environmental Review is complete. Project must be implemented in accordance with conditions list below.

Laws/EOs	Status
Coastal Barriers Resources Act (CBRA)	Gen Revw/NA
Clean Water Act (CWA)	Gen Revw/NA
Coastal Zone Management Act (CZMA)	Gen Revw/NA
Endangered Species Act (ESA)	Gen Revw/NA
Fish and Wildlife Coordination Act (FWCA)	Gen Revw/NA
National Historic Preservation Act (NHPA)	Gen Revw/NA
Clean Air Act (CAA)	Gen Revw/NA
E.O. 11988: Floodplains	Gen Revw/NA
E.O. 11990: Wetlands	Gen Revw/NA
E.O. 12898: Environmental Justice for Low Income and Minority Populations	Gen Revw/NA

NEPA Level of Review - NEPA review is complete. The project is Statutorily Excluded. - HPELT1

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Standard Conditions

1. Any change to the approved scope of work will require re-evaluation for compliance with NEPA and other Laws and Executive Orders.
2. This review does not address all federal, state and local requirements. Acceptance of federal funding requires recipient to comply with all federal, state and local laws. Failure to obtain all appropriate federal, state and local environmental permits and clearances may jeopardize federal funding.
3. If ground disturbing activities occur during construction, applicant will monitor ground disturbance and if any potential archeological resources are discovered, will immediately cease construction in that area and notify the State and FEMA.

PROJECT WORKSHEET REPORT

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FEMA PW # 8837 VSN 0 REF# FCC-001

GENERAL COMMENTS

6/21/2006-THE DAMAGES CLAIMED IN THIS PW FOR MOLD STUDY, CARPET, CEILING TILES, VINYL WALL COVERINGS, WALL SURFACES, HVAC CLEANING, AND FABRIC COVERED FURNITURE AND RUGS IS NOT ELIGIBLE FOR FEMA FUNDING. THE BUILDING SUFFERED MINIMAL DAMAGE AS A RESULT OF THE DISASTER (4 WINDOWS BROKEN ON THE SOUTH SIDE BUT NO ROOF, FLASHING, OR OTHER DAMAGES). THE PO HAS DOCUMENTED THAT THE BUILDING, AS WELL AS, THE HVAC SYSTEM WERE NOT PROPERLY MAINTAINED BEFORE THE DISASTER, THAT MOLD WAS PRESENT BEFORE THE DISASTER, AND THE MOLD ON THE SOUTH SIDE OF THE BUILDING THAT HAD WATER INTRUSION FROM THE BROKEN WINDOWS WAS NOT ANY WORSE THAN MOLD ON THE WEST SIDE THAT HAD NO DAMAGE.

PAGE 23 OF THE PA GUIDE STATES: WORK MUST BE REQUIRED AS A DIRECTLY RESULT OF THE DECLARED DISASTER. THE APPLICANT'S CONSULTANT REPORTED THAT 40% OF THE MOLD CAUSED BY DAMAGE WAS A RESULT OF THE PRESENCE OF MOLD BEFORE THE DISASTER. POWER BEING OUT 9 DAYS MAY HAVE CAUSED ADDITIONAL MOLD PROBLEMS, BUT NEGLIGENCE OCCURRED WHEN THE HVAC WAS RESTARTED WITHOUT CHANGING FILTERS AND CLEANING THE SYSTEM.

PAGE 26 PA GUIDE STATES: DAMAGE CAUSED BY NEGLIGENCE ON THE PART OF THE APPLICANT IS NOT ELIGIBLE. R. PLUNKETT, QC REVIEW

06/21/2006- THE TEMPORARY RELOCATION COSTS IN THIS PW ARE NOT ELIGIBLE FOR FEMA FUNDING. THE DAMAGES, PRESENCE OF MOLD, THAT CAUSED THE APPLICANT TO TEMPORARILY RELOCATE WAS NOT A DIRECT RESULT OF THE DECLARED DISASTER. THE APPLICANT OCCUPIED THE BUILDING IMMEDIATELY AFTER THE DISASTER AND CONTINUED TO OCCUPY THE BUILDING UNTIL MAY 2006 WHEN OTHER SPACE WAS LEASED. R. PLUNKETT, QC REVIEW

07/11/06 - NO INSURANCE REVIEW IS RQUIRED ON THIS PW, INSURANCE COVERAGE IS NOT AFFECTED BY THE CHANGES IN THE COST AMOUNTS. JOHN LUNA, INSURANCE SPECIALIST.

07/11/2006 - THE PROJECT AS DESCRIBED IN THE SCOPE OF WORK IS PUBLIC ASSISTANCE PROGRAM INELIGIBLE. NO NEPA, ENVIRONMENTAL OR HISTORIC PRESERVATION REVIEW CONDUCTED. HOLLY PELT, ENVIRONMENTAL SPECIALIST

07/11/06: REVIEW O

F THIS PROJECT HAS IDENTIFIED NO MITIGATION OPPORTUNITY - P. ANDERSON, MITIGATION SPECIALIST

7/26/06: PROJECT IS LOCATED OUTSIDE THE SPECIAL FLOOD HAZARD ZONE. TMANCINI, FLOODPLAIN REVIEWER

10/05/2006 - ON HOLD PENDING STATE CONCURRENCE WITH ELIGIBILITY RULING AND DISCUSSION WITH APPLICANT. S. DREHER, STATE REVIEW

11/01/2006 - PW FORWARDED FOR OBLIGATION AT ZERO DOLLARS. S. DREHER, STATE REVIEW

PW REQUIRED REVIEWS

REVIEW	REVIEW STATUS	RECOMMENDATION	ASSIGNED REVIEWER	REVIEWER	DATE SUBMITTED	DATE REVIEWED
Initial	Complete	Eligible		dwilli13	07/10/2006	07/11/2006
Insurance	Complete	Eligible	JOHN LUNA	jluna	07/11/2006	07/11/2006
STATE	Complete	Eligible	MICHAEL LANDERS	sdreher	07/11/2006	11/02/2006
MITIGATION 2	Complete	Eligible	PETER ANDERSON	panders6	07/11/2006	07/11/2006
Mitigation Staff	Complete	Eligible	PETER ANDERSON	panders6	07/11/2006	07/11/2006

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PW REQUIRED REVIEWS

REVIEW	REVIEW STATUS	RECOMMENDATION	ASSIGNED REVIEWER	REVIEWER	DATE SUBMITTED	DATE REVIEWED
Floodplain Management	Complete	Eligible		amancini	07/11/2006	07/26/2006
Environmental	Complete	Ineligible		hpelt1	07/11/2006	07/11/2006
Historical	Complete	Ineligible		hpelt1	07/11/2006	07/11/2006
Final	Complete	Eligible	EDWIN ROSE	erose	11/02/2006	11/02/2006

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PHONE (601) 545-6007
FAX (601) 545-6050

February 9, 2007

Mr. Mike Womack
Alternate Governor's Authorized Representative (AGAR)
FEMA-MEMA Joint Field Office
P.O. Box 4517
Biloxi, MS 39535
Attn: Larry Bowman, State Public Assistance Officer

Re: Project Worksheet Package No. 340
Project Worksheet Number 8837

Dear Mr. Bowman:

Please accept this letter as Forrest County's formal appeal of the above referenced PW, which was not received due to misdelivery until the third week of December, 2006. Specifically, the County appeals the denial of public assistance for 40% of the cost of the work described in the PW, or \$202,443.34. The basis for the County's appeal is the PW's misapplication of two key provisions of the Public Assistance Guide (FEMA 322) as well as the case narrative prepared by Bonner Analytical Testing Company, a copy of which is enclosed and was also submitted by the County in connection with its original public assistance application.

First, the County takes exception to the PW's conclusion that the work was not required as a direct result of the disaster (FEMA 322, p.23). This conclusion is apparently based on the narrative by Bonner Analytical pursuant to which the Courthouse's air handling systems were found "likely contaminated prior to Katrina." While the County acknowledges that the available public assistance might be reduced accordingly, the uncontested narrative still attributes 40% of the damage encompassed under the PW directly to Hurricane Katrina, noting specifically that the same "would have occurred even if no pre-existing conditions contributed to the contamination." Indeed, the PW itself explicitly acknowledges that the power outage resulting from the Hurricane "may have caused additional problems," but no assistance regarding such "additional problems" is contemplated.

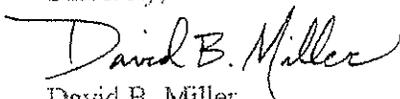
Mr. Larry Bowman
February 9, 2007
Page 2

Instead, the PW concludes that all of the damage was caused by negligence on the part of the County and is, therefore, ineligible (FEMA 322, p.26). Specifically, the PW alleges that the County failed to maintain the courthouse HVAC system properly either before the disaster or upon startup thereafter. The basis for these assertions is an inspection of the system conducted some nine months after the disaster and is, accordingly, of questionable validity. Admittedly, the County does not possess detailed maintenance records for the system with which to refute or confirm such a conclusion. However, the County would submit in this regard that the PW's labeling as negligence the failure to clean the HVAC system upon the restoration of power is patently absurd, revealing a complete disregard for the circumstances faced by County maintenance staff just one full week into the worst natural disaster in American history. Even assuming, arguendo, that the systems were not maintained properly, the guidelines clearly only contemplate post-disaster negligence as grounds for ineligibility (FEMA 322, pp.26-27).

In summary, the undisputed findings of Bonner Analytical Testing Company indicate that 40% of the damage to the Courthouse encompassed by the PW was directly attributable to Hurricane Katrina. Accordingly, the County appeals the PW's denial of 40% of the amount of public assistance applied for, which amounts to \$202,443.34. In the alternative, the County appeals the PW's denial of any public assistance whatsoever given its acknowledgment that the nine-day power outage directly attributable to the disaster "may have caused additional problems."

Thank you for your time, assistance, and consideration in this matter. Please let me know if any additional information or documentation would facilitate the County's appeal.

Sincerely,


David B. Miller
Board Attorney

Enclosure.



BONNER ANALYTICAL TESTING COMPANY

2703 OAK GROVE ROAD
HATTIESBURG, MS 39402
PH. (601) 264-2854
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CASE NARRATIVE

**Katrina-Related Damage
At the
Forrest County Court House
630 N. Main Street
Hattiesburg, MS**

On October 21 and 24, 2005, December 30, 2005, and January 16, 2006 Bonner Analytical Testing Company (BATCO) performed an indoor air quality investigation of the Forrest County Court House (FCCH) located at 630 N. Main Street in Hattiesburg, MS. The investigation revealed extensive microbial amplification throughout the building. The purpose of this correspondence is to assess how much of the damage was caused or exacerbated by Hurricane Katrina.

The facts are as follows:

1. Wind-driven rain resulted in moisture intrusion into the facility.
2. Hurricane-force winds caused windows to break resulting in moisture and microbial intrusion.
3. Power was off in the building for nine (9) days.
4. Under these conditions of high humidity and moisture intrusion microbial amplification will occur within 48 hours in the southern region of the U.S.
5. Given that the FCCH was without electricity for nine days, the extensive microbial amplification observed would have occurred even if no pre-existing conditions contributed to the contamination.

In light of the fact that there is no analytical data prior to the storm to quantitate pre-existing conditions in the building, and the fact that occupant complaints have risen sharply since the storm, Katrina related damage will be assessed based on professional experience.

The percentage of damage due to Katrina are estimated as follows:

1. Air handling systems – Katrina damage 10%. These systems were likely contaminated prior to Katrina. The conditions were exacerbated by the storm.
-
-



BONNER ANALYTICAL TESTING COMPANY

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2. Tear-out and build back – Katrina damage 40%. Vinyl wall covering is likely to have contributed to contamination. Tear-out should include all visible microbial amplification to include drywall, insulation and damaged plaster.
3. Clean, disinfect and HEPA vacuum, pack out/move contents - Katrina damage 60%.
4. Replace porous contents or clean and test individually – Katrina damage 60%.
5. Clean, disinfect and HEPA vacuum files – Katrina damage 60%.
6. Clean, disinfect and HEPA vacuum computers – Katrina damage 60%.

These observations certified by:

Michael S. Bonner, Ph.D.
Bonner Analytical Testing Company



FEMA

Received 1/22/08

January 17, 2008

Mr. Thomas M. "Mike" Womack
Executive Director
Mississippi Emergency Management Agency
Post Office Box 5644
Pearl, Mississippi 39208-5644

Attention: Larry Bowman

Reference: First Appeal Determination
FEMA-1604-DR-MS
Forrest County
PA-ID 035-99035-00
Project Worksheet 8837

Dear Mr. Womack:

This is in response your letter dated September 27, 2007, submitting the formal first appeal of the above referenced Project Worksheet (PW). You requested that the Subgrantee's costs for a portion of the mold remediation be considered eligible for the Federal Emergency Management Agency's (FEMA's) Public Assistance funding. Although the total cost of damage to the Forrest County Court Building was estimated at \$506,108.35, the Subgrantee maintains that the appealed monetary figure should be 40 percent of the total, or \$202,443.34. The percentage is derived from the Subgrantee's testing consultant who averaged the disaster-related damage at 40 percent of total damage.

Electrical power in the facility was disrupted for nine days after Hurricane Katrina. The Subgrantee asserts that the power disruption and high humidity and moisture in the building resulted in the growth and spread of mold throughout the facility. The growth of the mold necessitated extensive interior repairs and the temporary relocation of its staff.

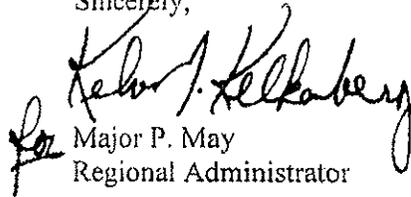
FEMA staff conducted multiple inspections of the Court Building. These inspections determined that the building was in an advanced state of disrepair with extensive deferred maintenance and in need of extensive exterior repairs. They found numerous sealant deficiencies, long standing in nature. The staff concluded that moisture and mold growth had likely been significant in the building prior to the storm. The Subgrantee's staff reported that the storm had broken four windows on the southeast corner of the building.

The FEMA inspection team learned that the heating, ventilating and air conditioning systems had not been cleaned or disinfected, nor had the systems' filters been replaced prior to power restoration. These issues were documented extensively in the PW narrative and accompanying photographs.

Therefore, based on the enclosed First Appeal Analysis and all other available information, the Subgrantee's appeal is denied. Please inform the Subgrantee of my determination and its right to a second appeal pursuant to 44 CFR §206.206.

If you have questions or need additional information, please contact Mr. Jesse F. Munoz, Director, Disaster Assistance Division, at (770) 220-5300.

Sincerely,


Major P. May
Regional Administrator

Enclosure
First Appeal Analysis

FIRST APPEAL ANALYSIS
FEMA-1604-DR-MS
Forrest County PA-ID 035-99035-00
Denial of Assistance for Mold Remediation

BACKGROUND

On August 29, 2005, Hurricane Katrina struck Forrest County, MS. The County is in south-central Mississippi, covers 470 square miles, and had a pre-storm population of approximately 72,000. The subject of this appeal is the Forrest County Court Building, located in Hattiesburg, MS. The building, constructed in 1909, experienced high winds and driving rain. Reported damages were limited to four broken windows on the southeast corner of the building.

However, the Subgrantee attributes extensive mold damage in the facility to the storm's disruption of power, high humidity and moisture in the building, and the resultant growth and spread of mold spores throughout the building. The presence of high levels of mold necessitated extensive interior repairs and the temporary relocation of staff.

In Project Worksheet (PW) 8837, FEMA assessed interior repairs, mold remediation, and the temporary relocation costs to total \$506,108.35. The interior repairs focused primarily on the removal and replacement of carpeting and ceiling tiles; cleaning and decontamination of wall surfaces and heating, ventilating and air conditioning (HVAC) systems; and the removal and replacement of all fabrics on furniture. The temporary relocation costs involved moving and lease expenses at two alternative locations in Hattiesburg.

FEMA determined that all damages were caused by a combination of deferred maintenance and post-storm negligence and disallowed these costs. The PW documented FEMA findings and was obligated for zero dollars on November 11, 2006.

The Subgrantee filed an appeal with the State on February 9, 2007. In its appeal, the Subgrantee writes that "mis-delivery" of the PW accounts for the delay in filing its initial appeal. The Subgrantee was not late; it filed its appeal within the statutory 60 days "after receipt of a notice of the action that is being appealed." However, the State did not forward its review of the appeal within its statutory 60 days.

Nevertheless, on September 27, 2007, the Mississippi Emergency Management Agency (MEMA) presented this first appeal on behalf of Forrest County. The State's appeal recommends that FEMA reimburse the Subgrantee's costs for mold remediation although a specific monetary figure is not stated in its letter.

LEGAL AUTHORITY

- Robert T. Stafford Disaster Relief and Emergency Act, P.L 93-288, as amended, 2003, 42 U.S.C. §5172, Section 406
- 44 C.F.R. §§206.200-228.

DISCUSSION

MEMA summarizes the Subgrantee's appeal as follows:

- FEMA unfairly disallowed the Subgrantee's costs for mold remediation in the County Court Building.
- FEMA should allow at least 40 percent of the mold remediation costs based on an analysis of storm damage by an outside consultant.

The Subgrantee asserts that FEMA incorrectly assessed the damages to have stemmed from deferred maintenance and post-storm negligence. Specifically, the Subgrantee attributes the spread of mold throughout the facility to the penetration of wind-driven rain and the disruption of power which shut off HVAC systems. The power disruption and the resulting high humidity and moisture in the facility led to "extensive microbial amplification" throughout the building.

The Subgrantee hired an outside consultant to perform an analysis of the indoor air quality on four separate occasions – October 21 and 24 and December 30, 2005, and January 16, 2006. The analysis attributed percentages of damage throughout the facility to the disaster as follows:

- Air handling systems 10%
- Interior damages 40%
- HEPA Vacuum 60%
- Porous contents 60%
- HEPA vacuum files 60%
- HEPA vacuum computers 60%

On the basis of this study, the Subgrantee asserts that 40 percent of the damage to the facility "was directly attributable to Hurricane Katrina."

PW 8837 is accompanied by an extensive narrative that documents the results of facility inspections by Project Officers, FEMA estimators, a FEMA Senior Industrial Hygienist/Safety Specialist, and the Subgrantee's facility Maintenance Supervisor. The Project Officers determined that the sum of damage suffered in the storm was four broken windows on the south-east corner of the building. Inspection of the overall building indicated that the penetration of driving rain had been limited to that area alone. The Maintenance Supervisor told FEMA that the storm had not inflicted damage on the building roof or flashing.

Further, the FEMA inspection determined that the facility exhibited extensive deferred maintenance requirements. The inspection report and accompanying photographs document the existence of numerous pre-existing holes, cracks, seams, vents, and other sealant problems that likely permitted moisture to penetrate the facility long before the storm. These pre-existing conditions could permit wind-driven rain to penetrate the facility.

Secondly, the Subgrantee's consultant report acknowledges that the facility's HVAC systems were likely contaminated prior to the disaster, but adds that "conditions were exacerbated by the storm." The FEMA Project Officers learned that the building's maintenance personnel did not clean HVAC systems or replace filters prior to restoring the power nine days after the storm. While mold was almost certainly present in the building pre-disaster, a lack of preventive maintenance likely resulted in higher levels of mold spores, further contaminating air quality and surfaces throughout the building.

The Subgrantee asserts that its actions did not constitute negligence and pleads the exigencies of the situation prevailing after the storm. However, Federal regulations are clear on the consequences of negligence on the part of an Applicant. 44 CFR §206.223 (e) stipulates that "No assistance will be provided to an applicant for damages caused by its own negligence." The FEMA Policy Digest, FEMA 321, page 83, elaborates further on this point:

"Repair of damage caused by Negligence on the part of the Applicant is not eligible for reimbursement. This issue often arises when an Applicant fails to take prudent measures to protect a facility from further damage in the wake of a disaster."

An example of such a prudent measure would be cleaning and disinfecting HVAC systems and replacing filters prior to turning systems back on in the aftermath of a hurricane. The failure to do so, coupled with the state of disrepair of the facility makes nearly impossible a determination that the damage was the direct result of the storm. 44 CFR §206.223 (a) (1) states that an "item of work must be required as the result of the major disaster event."

Since the mold build-up cannot be directly attributable to the disaster, the costs of the temporary relocation of staff are not eligible for FEMA assistance. The staff returned to the facility immediately after the storm and remained in the building until May 2006.

RECOMMENDATION

It is recommended that the Subgrantee's first appeal be denied.

Forrest  County

DAVID B. MILLER
BOARD ATTORNEY

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HATTIESBURG, MISSISSIPPI 39403-1310

PHONE (601) 545-6007
FAX (601) 545-6050

March 12, 2008

Mr. Thomas M. "Mike" Womack, Executive Director
Mississippi Emergency Management Agency
Post Office Box 5644
Pearl, Mississippi 39208-5644

Re: FEMA-1604-DR-MS-FORREST COUNTY, #035-99035-00
Second Appeal of Denial of Assistance for Mold Remediation, PW #8837
Second Appeal

Dear Mr. Womack:

Please accept this letter as Forrest County's formal Second Appeal of the above referenced Project Worksheet. Without belaboring the arguments and authorities raised in its First Appeal filed on February 9, 2007, the County respectfully requests that FEMA reconsider two important issues inadequately addressed in its First Appeal Determination and accompanying Analysis dated January 18, 2008.

First, FEMA fails to address the implications of its own admission in the Project Worksheet that the power outage caused by Hurricane Katrina "may have caused additional problems" with the mold infestation in the Courthouse. Even assuming that the County negligently maintained the facility prior to landfall on August 29, 2005, and from and after the restoration of power on September 7, 2005, all parties concur that the intervening nine days without climate control damaged the facility. Rejecting without explanation the conclusion of Bonner Analytical Testing Company that this nine day period accounted for 40% of the total damage to the facility, FEMA nevertheless fails to supply a figure of its own. Instead, any efforts at such a calculation are abandoned altogether in light of the assertion that the impact of maintenance failures make such a determination "nearly impossible." The County sincerely appreciates the difficulties inherent in assigning a dollar amount to the damage attributable to the nine days of heat and moisture buildup in the facility, especially after spending thousands of dollars to hire an independent consultant to perform the calculations in question. However, even if unsatisfied with Bonner Analytical's findings, surely FEMA can agree that the work to repair the "additional problems" directly attributable to the disaster cost the County something, make its own calculations, and award an appropriate level of assistance accordingly.

Exhibit D

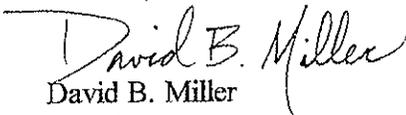
Mr. Thomas M. "Mike" Womack
March 12, 2008
Page 2

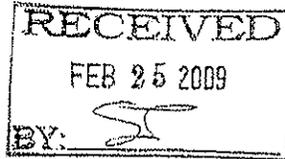
Second, FEMA misapplies the applicable regulations regarding the applicant's alleged negligence. Given the extensive damage to other County properties and the concomitant strain on the human and financial resources of its maintenance department, the County respectfully maintains that its failure to clean the Courthouse's HVAC system nine days after the worst natural disaster in American history hardly amounts to negligence. With regard to any shortcomings of pre-disaster maintenance, 44 CFR §206.233(e) as interpreted in the relevant portions of the FEMA Policy Digest clearly applies only to post-disaster negligence, i.e., "when an Applicant fails to take prudent measures to protect a facility from *further* damage in the wake of a disaster" (emphasis supplied). Bonner Analytical's finding that damage to the facility "would have occurred even if no pre-existing conditions contributed to the contamination" bears repeating in this regard. Moreover, nothing in the governing regulations implies, much less requires, that FEMA's finding of contributory negligence on the part of the County precludes any and all assistance with the related work. Indeed, if FEMA admits that some "additional problems" directly attributable to the power outage occurred alongside damage attributable to the failure to clean the HVAC system upon startup, FEMA should award assistance for that fraction of the work directly attributable to the power outage and, by implication, to the disaster. Once again, the issue boils down to a calculation of that portion of the work required owing to the disaster, including the power outage between August 29 and September 7, 2005. The aforementioned difficulties inherent in arriving at a suitable figure need not preclude assistance altogether.

In summary, the County respectfully reiterates the findings of an independent consultant that 40% of the work required under the Project Worksheet was directly attributable to damage caused by Hurricane Katrina and not to the County's pre- or post-disaster negligence. Accordingly, the County appeals FEMA's denial of 40% of the total amount of public assistance applied for, or \$202,443.34. In the alternative, the County appeals the denial of any public assistance under the Project Worksheet whatsoever given FEMA's acknowledgment that the nine-day power outage directly attributable to the disaster "may have caused additional problems" in the Courthouse.

Thank you for your time and assistance in this matter. Please let me know if any additional information or documentation would facilitate consideration of the County's Second Appeal.

Sincerely,


David B. Miller
Board Attorney



U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472



FEMA

FEB 18 2009

Thomas M. Womack
Governor's Authorized Representative
Mississippi Emergency Management Agency
P.O. Box 5644
Pearl, MS 39208

Re: Second Appeal—Forrest County, PA ID 035-99035-00, Mold Remediation,
FEMA-1604-DR-MS, Project Worksheet (PW) 8837

Dear Mr. Womack:

This letter is in response to your letter dated May 12, 2008, which transmitted the referenced second appeal on behalf of Forrest County (Applicant). The Applicant is appealing the Department of Homeland Security's Federal Emergency Management Agency's (FEMA) denial of Public Assistance funding for mold remediation and temporary relocation costs at the Forrest County Courthouse.

On August 29, 2005, Hurricane Katrina damaged the electrical distribution system in Forrest County. As a result, the Courthouse did not have power for nine days. The only damage to the Courthouse was several broken windows. The Applicant returned to the Courthouse after electrical power was restored and continued to use the building until May 2006. In May 2006, the Applicant relocated functions that were performed at the Courthouse to other facilities and initiated mold remediation measures at Courthouse. The mold remediation measures included the removal and replacement of ceiling tiles, carpeting, wall coverings, and fabric-covered furniture. In response to the Applicant's request for assistance, FEMA initially prepared Project Worksheet (PW) 8837 for \$506,108 for the estimated cost of mold remediation and temporary relocation. After inspecting the Courthouse and reviewing the proposed scope of work, FEMA determined that the work was not eligible because it was not required as a direct result of the disaster. Rather, the work was required because of deferred maintenance and post-storm negligence.

The Applicant submitted its first appeal in a letter dated February 9, 2007. Based on an analysis of "storm damage" performed by the Applicant's consultant, the Applicant requested that FEMA provide funding for at least 40 percent of mold remediation costs. The Regional Administrator denied the first appeal in a letter dated January 17, 2008, stating that the Applicant failed to take prudent measures to clean and disinfect heating, ventilation, and air conditioning (HVAC) systems and the facility was in significant disrepair prior to the disaster. Therefore, the damage was not a direct result of the disaster.

Thomas M. Womack

Page 2

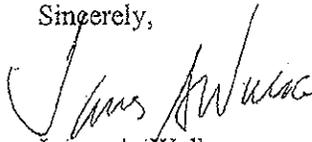
The Applicant submitted its second appeal in a letter dated March 12, 2008. The Applicant reasserts that it acted in a prudent manner by quickly restoring temperature and humidity control in an effort to minimize additional mold proliferation. The Applicant also contends that FEMA did not attempt to determine a reasonable apportionment between disaster-related and non-disaster-related damage and claims.

44 CFR §206.223 requires that to be eligible for assistance, an item of work must be the result of the disaster. As explained in the Regional Administrator's first appeal response, mold and condition for mold propagation, existed at the Courthouse prior to the disaster. Therefore, the mold remediation work that the Applicant performed in May 2006 was not caused by Hurricane Katrina. Further, the Applicant did not provide any compelling reason to support its request to apportion 40 percent of the mold remediation costs to Hurricane Katrina. Regarding the negligence issue, it is reasonable to assume that one would change the filters and clean and disinfect the HVAC system before reactivating the system after nine days without power. However, the fact that the Applicant did not perform these activities is not a determining factor in this appeal determination.

I reviewed the all information submitted with the appeal and have determined that the mold remediation work that the Applicant performed was not caused by Hurricane Katrina. Accordingly, I am denying the second appeal.

Please inform the Applicant of my decision. This determination constitutes the final decision on this matter pursuant to 44 CFR §206.206.

Sincerely,



James A. Walke
Acting Assistant Administrator
Disaster Assistance Directorate

cc: Major P. May
Regional Administrator
FEMA Region IV