



FEMA

November 25, 2009

BY HAND-DELIVERY

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

DOCKET NUMBER: CBCA-1772-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by Forrest County Board of Supervisors and filed as CBCA-1772-FEMA. Submitted with the Response is a binder(s) of exhibits.

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

Very truly yours,

Diane L. Donley
General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472

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OFFICE OF CHIEF COUNSEL
CIVILIAN BOARD OF CONTRACT APPEALS

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Very truly yours,

A handwritten signature in cursive script that reads "Diane L. Donley".

Diane L. Donley
General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472

BY NEXT DAY DELIVERY

cc:

TO THE APPLICANT:

David B. Miller, Esq.
Board Attorney
Forrest County Board of Supervisors
641 Main Street
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TO THE STATE:

Thomas M. Womack
Director
Mississippi Emergency Management Agency
#1 MEMA Drive
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To THE REGION:

Valerie Rhoads
Federal Emergency Management Agency
Department of Homeland Security
3003 Chamblee Tucker Road, Room 230
Atlanta, GA 30341

**FORREST COUNTY BOARD OF SUPERVISORS
REQUEST FOR ARBITRATION OF DENIAL OF PUBLIC ASSISTANCE
FUNDING FOR MOLD REMEDIATION FOR CIRCUIT COURT BUILDING
PROJECT WORKSHEET: 8837
FEMA-1604-DR-MS
DOCKET # CBCA 1772-FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO
ARBITRATION REQUEST OF FORREST COUNTY BOARD OF
SUPERVISORS IN HATTIESBURG, MS**

On October 27, 2009, the Federal Emergency Management Agency (“FEMA”) received the request of the Forrest County Board of Supervisors (here after “the County”) in Hattiesburg, MS, to arbitrate FEMA’s decision to deny public assistance funding for moisture damage and mold remediation for the County’s Circuit Court Building. The amount in dispute for this request is \$202,443. This document, with attached declarations and exhibits, constitutes FEMA’s response to the Board’s arbitration request.

ARBITRATION PANEL JURISDICTION

The County has **failed** to meet the statutory and regulatory requirements for filing an arbitration request as outlined in The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009), and in Title 44 of the Code of Federal Regulations (hereafter C.F.R.) § 206.209, as follows:

- Project Worksheet (PW) 8837 was prepared for \$506,108.35; however, in its arbitration request, the Applicant only seeks Public Assistance eligibility for \$202,443 in disaster-related damage for the project. Thus, the County has failed to meet the statutory monetary threshold for arbitration.
- FEMA responded to the Applicant’s first appeal on September 27, 2007.

- FEMA responded to the Applicant's second appeal on February 18, 2009.
- The arbitration request was filed by letter dated October 27, 2009, with all supporting documentation. However, despite the County meeting the October 30, 2009 arbitration request submittal deadline, the request is *prima facie* ineligible for arbitration because it fails to meet the regulatory threshold of \$500,000 as required by The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009), and 44 C.F.R. § 206.209(b).

SUMMARY OF FEMA'S POSITION

Following Hurricane Katrina, the County requested that FEMA prepare a project worksheet to document disaster damage and related cost estimate for public assistance for interior repairs and mold remediation at the County's Circuit Court Building. The County also requested assistance for temporary relocation costs for its personnel and office equipment while this work was being performed. The County asserted that damage to the building resulted from extensive mold growth due to moisture penetration caused by storm damage to the building exterior and a nine-day disruption of power after the disaster. The County cited the resulting high humidity and moisture within the building as causing the growth and spread of mold spores throughout the Circuit Court Building.

FEMA prepared Project Worksheet 2071 for \$4,249 to cover the disaster-related damage to this facility on October 12, 2005. See FEMA Exhibit 1, Project Worksheet 2071 Circuit Court Grounds. At the County's request, on May 23, 2006, a FEMA project

team, which included a FEMA mold specialist, inspected the facility and prepared a report on purported disaster damage. See FEMA Exhibit 2, FEMA Inspection Team Reports. Upon review of that report and accompanying photographs, FEMA determined that the damage cited by the Applicant was the result of pre-existing conditions and post-storm negligence and not a direct result of the storm. See FEMA Exhibit 3, Color Photographs from PW 8837 V0. See FEMA Exhibit 4, Project Worksheet 8837 Forrest County Circuit Court Building. Consequently, FEMA determined that the moisture and mold damage to the Applicant's facility was not eligible for public assistance funding and, on November 11, 2006, obligated PW 8837 as a zero dollar project worksheet. See FEMA Exhibit 5, FEMA Forrest County Chronology of Events with Case Management File.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) and 44 C.F.R. Part 206 authorize FEMA to fund the repair of disaster-related damage only. See 42 U.S.C. § 5172 and 44 C.F.R. § 206.223 (a)(1). FEMA denied eligibility for public assistance funding for repairs to Forrest County's Circuit Court Building on the basis that the damage claimed was not caused by the major disaster.

BACKGROUND

The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for administering and coordinating the Federal governmental response to

Presidential-declared disasters pursuant to the Stafford Act.¹ See 42 U.S.C. §§ 5121, *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a “major disaster.” See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36, 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared area. See 42 U.S.C. § 5170.

The Disaster Declaration

On August 29, 2005, the President issued a major disaster declaration for the State of Mississippi as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration authorized all categories of Public Assistance, including permanent and emergency work. See FEMA Exhibit 6, Presidential Declaration for DR-1604. Permanent work includes work to repair or replace buildings or contents to their pre-disaster condition. See 42 U.S.C. § 5170b; 44 C.F.R. § 206.201; and applicable policies. The President’s declaration included assistance for Forrest County which made the Forrest County Board of Supervisors eligible to apply for FEMA Public Assistance for reimbursement of eligible emergency protective measures and permanent restorative work.

Among other types of assistance available under the Stafford Act, FEMA may provide grants for Public Assistance (“PA”). Specifically, the Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged

¹ The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

facilities. See 42 U.S.C. § 5172. FEMA may, at its discretion, provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the Subgrantee, facility, and work meet eligibility requirements. Subgrantees are local governments or other legal entities, such as the Forrest County Board of Supervisors, which are eligible to receive Federal financial assistance for disaster damages. See 44 C.F.R. §§ 206.200-.229. FEMA can provide PA funding in the form of grants for the state or local government's own recovery efforts, See 44 C.F.R. § 206.203, or FEMA may fund direct Federal assistance through which a Federal agency performs the emergency response work. See 44 C.F.R. § 206.208. FEMA may also fund permanent repairs or replacement costs to restore eligible facilities on the basis of the design of such facilities as they existed prior to the disaster. See 44 C.F.R. § 206.226. In addition FEMA PA may fund the relocation of eligible destroyed facilities if the existing facility is subject to repetitive heavy damage and the overall project is cost effective. See 44 C.F.R. § 206.226(g). FEMA's main objective is to provide Federal disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the Subgrantee's facility and work meet eligibility requirements. See 44 C.F.R. §§ 206.200-.229.

To receive PA funding for permanent restorative work, an eligible subgrantee must have a facility that was damaged by a declared major disaster; that facility must be within the disaster-declared area; and, that facility and the work to repair it must be the legal responsibility of the eligible subgrantee. See 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221 - .223; 206.226(c)(1). With PA, a Federal inspection team accompanied by the

Subgrantee's local representative surveys the damaged facilities and estimates the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on project worksheets ("PWs"). Id. PWs estimate disaster damage, determine whether the damage is eligible for Public Assistance, and list, among other information, the scope and "quantitative estimate for the cost of eligible work." Id.

After PW completion, FEMA reviews the PW in order to make determinations on whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available, *i.e.*, "obligate," based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or Subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). Rather, a PW establishes the scope of work and provides cost estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See Id. 44 C.F.R. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 644 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States). If the actual cost to complete the approved scope of work described in the PW exceeds the estimate, FEMA may approve additional funding during the project closeout process.

The State of Mississippi is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). The disaster declaration included Forrest County,

which makes Forrest County Board of Supervisors an eligible subgrantee of the State.

See 44 C.F.R. § 206.201.

Appeals and Arbitration

The Stafford Act authorizes appeals of PA assistance decisions. See 42 U.S.C. § 5189(a).

There are two levels of appeal; the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, establishes a new option, arbitration, under the PA program for contesting award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607.² See 44 C.F.R. § 206.209. The arbitration panel's decision constitutes the final decision on the issue under dispute, is binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

County Grant Applications

On August 29, 2005, Hurricane Katrina struck Forest County, which is located in south-central Mississippi. FEMA prepared 71 project worksheets and approved \$943,042.25 in eligible assistance to enable the County to remove debris and clean, repair or replace disaster-related damage to the County's facilities and infrastructure. See FEMA Exhibit 7, Forrest County Board of Supervisors List of Project Worksheets.

² Approved disaster requests are assigned serially-ordered major disaster declaration numbers beginning with declaration #1, a Georgia tornado approved by President Eisenhower in May 1953.

The Circuit Court building, located in Hattiesburg, was constructed about 100 years ago, in the 1910 time period, see Applicant Arbitration Request, Attachment 8, and is listed on the National Register of Historic Places. The Court building experienced high winds and driving rain from Hurricane Katrina. The only storm damage FEMA was able to document to the exterior of the building, however, was breakage of four windows on the southeast corner of the building, a missing pedestrian hand rail, and globe lamps. This damage was addressed on PW 2071 and is not in dispute for this arbitration request. See FEMA Exhibit 1. No storm-related damage to the interior was identified on PW 8837. The major disaster also damaged the electrical distribution system within the County and power to the building was suspended for nine days. See Applicant's Arbitration Request, page 1.

On September 6, 2009, electrical power was restored and the Applicant restarted its heating, ventilating, and air conditioning (HVAC) system without cleaning and disinfecting the system. The County continued to occupy the building until May 2006, when it relocated to other facilities and initiated mold remediation measures at the Court building. The County claimed that, as a result of the major disaster, moisture had penetrated the building and that the power outage disrupted the building's HVAC system. The County further asserts that the resultant high humidity and temperatures within the building produced rapid mold growth throughout the building. As a result, the County requested FEMA public assistance funding for the replacement of furniture, carpeting, wall surfaces, and ceiling tiles throughout the building. The County requested FEMA

assistance for temporary relocation expenses while the building was undergoing mold remediation and renovation.

In May 2006, an inspection team composed of FEMA and State project specialists, a FEMA mold specialist, and safety specialists, accompanied the County's Circuit Court House maintenance supervisor on a site visit to observe and document damages to the structure purportedly caused by the storm. The FEMA team prepared a report which concluded that the building was in an advanced state of disrepair and negligence before the disaster and that the purported damage to the building had, in fact, been caused by the County's failure to conduct preventive maintenance. See FEMA Exhibit 2. The FEMA team further cited negligence as a cause of the purported damage after it learned that the County had not cleaned the building's HVAC system and air supply ducts for several years and had not cleaned the system or changed filters before restarting it after the storm. Id.

The County provided to FEMA a report by Bonner Analytical Testing Company, Hattiesburg, MS, which attributed mold contamination within the building to damage caused by the major disaster. See FEMA Exhibit 8, Bonner Analytical Testing Company Indoor Air Quality Report Forrest County Courthouse. The report concluded that the storm had caused "extensive microbial amplification throughout the building" and set forth a set of recommendations for eliminating mold damage. The report also assessed the percentage of this damage which could be attributed to the major disaster. Id. FEMA concluded, however, this report lacked supporting detail to substantiate its

recommendations. For example, no explanation was provided for attributing 10 percent of damage to the air handling system to the disaster.

Nevertheless, at the County's request, FEMA prepared PW 8837. The PW included estimated repair costs for damage purportedly inflicted by the major disaster. Based on information supplied by the County, FEMA estimated that repair costs plus costs for relocating the County's staffs to a temporary location would total \$506,109. The County requested assistance for 40 percent of these costs or \$202,443. FEMA denied eligibility for any repair or temporary relocation costs for this facility on the basis that mold damage was due to conditions within the Building prior to the storm. See Exhibit 4. Federal regulations stipulate that in order to be eligible for public assistance, work must be required as a result of the major disaster. See 44 C.F.R. § 206.223 (a)(1). As such, the County was not eligible for assistance for these costs.

PROCEDURAL HISTORY

The County received notification on November 3, 2006, of FEMA's denial of public assistance funding eligibility for the County Circuit Court Building. Pursuant to 44 C.F.R. § 206.206, the County had 60 days after that date to appeal the FEMA determination. On February 9, 2007, the County notified the Mississippi Emergency Management Agency of its intention to file a first appeal. The State submitted that appeal to FEMA's Regional Administrator on September 27, 2007. See FEMA Exhibit 9, Grantee First Appeal Letter with Forrest County Appeal Request. Thus, the first appeal was not submitted in accordance with the timeframes outlined in 44 C.F.R. § 206.206.

The County's first appeal requested FEMA make eligible for reimbursement the cost for mold remediation for the building. The County asserted that the damage was disaster-related and as such should be eligible for FEMA public assistance funding. The County conceded in this appeal that not all of the claimed damages were caused by the storm and stated that it believes that that only 40 percent of the damage were attributable to the major disaster. Id.

FEMA's Regional Administrator determined that FEMA inspectors had documented the issues extensively in the May 2006 report, the PW narrative and accompanying photos. On January 17, 2008, the FEMA Regional Administrator denied the County's first appeal on the basis that the damages were not caused by the disaster event. See FEMA Exhibit 10, FEMA Regional Administrator Response to First Appeal.

In accordance with 44 C.F.R. § 206.206, the County had 60 days to file a second appeal to FEMA. On March 12, 2008, the County filed a second appeal. The Grantee submitted its second appeal on May 12, 2008, recommending FEMA reconsider and grant the County the amount of \$202,443, representing 40 percent of the total cost of mold remediation identified in the Bonner report. See FEMA Exhibit 11, Grantee Second Appeal Letter with Forrest County Appeal Request.

On February 18, 2009, FEMA denied the second appeal reaffirming that the damages were not caused by Hurricane Katrina. See FEMA Exhibit 12, FEMA Headquarters

Response to Second Appeal. However, the County had not received a final Agency decision by February 17, 2009; therefore, it formally withdrew its second appeal and sought arbitration of this dispute instead, in accordance with 44 C.F.R. § 206.209.

Pursuant to this regulation, the County filed its arbitration request with the Civilian Board of Contract Appeals on October 27, 2009; therefore, the Request for Arbitration was submitted within the required timeframe. In its arbitration filing, the County requests the arbitration panel overrule FEMA's denial of public assistance in the amount of 40 percent of the total PW costs, \$202,443.34, or render its own findings as to the costs directly attributable to the disaster. The amount in dispute for this request is under the \$500,000 threshold established by 44 C.F.R. § 206.209. Consequently, this request fails to qualify for arbitration.

STANDARD OF REVIEW

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

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

Third, the ARRA grants the arbitration panel “*sufficient authority* regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of [the Stafford Act].” (emphasis added). The phrase “sufficient authority” indicates that this Panel’s authority is not absolute. Congress could not have intended the arbitration panel to have review authority that exceeds that of any Federal court. Indeed, this was settled by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), where the Court noted that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”³ By implementing the appropriate “arbitrary and capricious” standard, the arbitration panel has sufficient review authority.

Finally, the ARRA tasked the arbitration panel to make determinations regarding the “award or denial” of the PA application for “covered hurricane damage.” Again, the

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

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

The arbitration panel must also consider “general principles respecting the proper allocation of judicial authority to review agency orders” when making its decision regarding the standard of review. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985). It is well-settled that review of Agency action, where Congress has not designated a standard of review, defaults to the arbitrary and capricious standard articulated in the Administrative Procedure Act (APA), 5 U.S.C. § 706:

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

United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Nat’l Broad. Co. v. United States, 319 U.S. 190, 227(1943)). Accordingly, courts consistently hold that, in the absence of a statutorily-defined type of review, the reviewing body must seek guidance in the APA and only “hold unlawful or set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

” GTE South, Inc. v. Morrison, 1997 U.S. Dist. LEXIS 23871 (E.D. VA) (citing 5 U.S.C. § 706(2)(A)); see Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996); Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986) (proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review); see also Cabinet Mountains Wilderness v. Peterson, 222 U.S. App. D.C. 228, 685 F.2d 678 (D.C. Cir. 1982); Am. Canoe Ass'n v. United States EPA, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999).

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

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

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

DISCUSSION AND ANALYSIS

1. The County's request for arbitration is not arbitrable because it fails to meet the regulatory threshold of \$500,000 as required by 44 C.F.R. § 206.209.

At the request of the County, FEMA prepared PW 8837 for \$506,108, which FEMA determined to be ineligible. See FEMA Exhibit 4. However, in its arbitration request, the Applicant only seeks Public Assistance eligibility of \$202,443 for disaster-related damage for the project. See Applicant's Arbitration Request. Pursuant to the authorizing legislation that established this arbitration option, the statutory threshold for arbitration eligibility is \$500,000. See The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009); see also 44 C.F.R. § 206.209(b). As such, the County's request disputing only \$202,443 fails to meet the threshold for arbitration eligibility. Therefore, FEMA respectfully requests that the Panel dismiss the County's request and find this matter not subject to arbitration.

2. In any event, the County has failed to establish that the claimed damage was the result of a major disaster.

A major disaster is by definition an event for which Federal assistance is necessary "to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby." See 42 U.S.C. § 5122(2). As part of the process of "alleviating the damage, loss, hardship, or suffering," the Stafford Act authorizes assistance for "the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster." See 42 U.S.C. 5172 (a) (1) (A). Federal regulations are clear that eligible work for these purposes must be required as the result of a major disaster event. See 44 C.F.R. § 206.223(a)(1). The Stafford Act and Federal regulations also stipulate that "no

assistance will be provided to an applicant for damages caused by its own negligence.”

See 44 C.F.R § 206.223(e).

The County argues that the amount claimed was directly attributable to the major disaster. FEMA disagrees, and asserts that all of the damage claimed was attributable to circumstances other than the major disaster event. Federal regulations are clear that eligible work must be required as the result of a major disaster event. See 44 C.F.R. § 206.223(a)(1). In documentation submitted to FEMA in 2006 and again with its arbitration request, the County states that only 40 percent of the total claimed mold remediation costs is appropriately attributable to a major disaster. See Applicant Arbitration Request. The County provides no information or documentation to explain how it arrived at a figure of “40 percent” reimbursement of its claimed damages or how the 40 percent relates to the damage percentages allotted for specific elements or estimates.

Specifically, the County’s report estimates the “percentage of damage due to Katrina” is as follows:

- Air handling systems – disaster damage – 10 percent;
- Tear out and build back – disaster damage – 40 percent;
- Clean, disinfect, and HEPA vacuum, pack out/move contents – disaster damage – 60 percent;
- Replace porous contents or clean and test individually – disaster damage – 60 percent;

- Clean, disinfect, and HEPA vacuum files – disaster damage – 60 percent; and,
- Clean, disinfect, and HEPA vacuum computers – disaster damage – 60 percent.

Id.

As noted in the FEMA report of May 2006, the County's submission provided no explanation of how these percentages were derived. See FEMA Exhibit 2. In addition, the County's one and a half page report included no supporting documentation verifying how these percentages were substantiated. Further, the County's report does acknowledge that HVAC systems, for example, were "likely contaminated prior to Katrina." See Applicant's Exhibit B.

FEMA's 2006 report stated that the County had reported that the masonry structure of the building had been waterproofed approximately five years earlier. FEMA recommended that the County make available relevant contracts and records so that conditions existing in the building after the disaster could be compared with those existing before the storm. See FEMA Exhibit 2. By its own admission, the County was unable to produce such records. See Applicant's Arbitration Request, Pg. 2. Therefore, there is no evidence in the County's submission that any such comparison was performed.

FEMA's determination, on the other hand, is based on visual observation of the overall condition of the building and is documented by extensive photographs taken during the site visit in May 2006. See FEMA Exhibit 3. Thus, it is clear from FEMA's report and supporting documentation that FEMA conducted a thorough inspection by a highly

qualified team. See FEMA Exhibit 2; FEMA Exhibit 13, Guidelines FEMA 1604-DR-MS Mold Remediation Costs. There is no indication that FEMA made its determination arbitrarily or capriciously, therefore, deference to FEMA's decision is appropriate. Id.

a. The County's failure to perform routine maintenance allowed moisture to penetrate the building and the resultant growth of mold well before the major disaster.

The County asserts that 40 percent of the disaster damage included in the PW was directly attributable to the disaster. FEMA disagrees and asserts that the disaster damage was primarily pre-existing, was due to the Applicant's own negligence, and was not a result of the major disaster. FEMA policies stipulate that "damage that results from a cause other than the designated event, or from pre-disaster damage, is not eligible" for public assistance. See FEMA Exhibit 11, Attachment 3. FEMA Disaster Specific Guidance for FEMA 1604-DR-MS, issued September 28, 2005, provided FEMA project officers a checklist for determining the existence of pre-disaster mold growth. See FEMA Exhibit 13. This guidance acknowledged that climatic conditions in the area were conducive to mold growth prior to the storm. The Guidance reminded FEMA project officers that public assistance would be available only for those applicants who could demonstrate that mold contamination was the direct result of the major disaster and not pre-existing conditions. FEMA's inspection was conducted in accordance with the protocol established in this Guidance. Id.

The FEMA team documented that wind-driven rain had penetrated the South East corner of the building where four windows were broken, but observed no other disaster-related

exterior damage to the building. See Exhibit 2. As noted above, these damages were documented in another PW and are not the subject of this dispute. See FEMA Exhibit 1.

In its inspection and in accordance with the FEMA 1604-DR-MS protocol, the FEMA team uncovered extensive evidence of the County's failure to perform routine, preventive maintenance prior to the disaster. As the photographs at FEMA Exhibit 3 clearly show, the inspection team found numerous examples of pre-existing holes, cracks, ripped seams, damaged sealant and caulking at multiple points on the building's exterior. The first item on the FEMA mold inspection protocol required an inspection of window seals. The FEMA inspection team found that windows throughout the building showed signs of long-standing cracking and deteriorated, ill-fitting wood framing and sills. Id. The team observed gaps in exterior windows and door frames. Id. Cracks in brick mortar joints and examples of poor workmanship in repairs were observable at numerous locations on the building exterior. Id. The roofing system showed extensive signs of long-standing deterioration at multiple points. These pre-existing conditions were all conducive to long-term moisture penetration of the building and a high probability of extensive mold growth prior to the disaster.

As the photographs also show, the FEMA team also found long-standing water damage and resulting deterioration to paint, caulking, and wood in numerous locations within the building. Id. The team found peeling wall paper in several rooms within the building, but the only evidence of mold was in areas where moisture penetration had been a long-standing problem. The mold growth in the section of the building that experience storm

damage (four broken windows) was no greater than other parts of the building which suffered no storm damage. See FEMA Exhibit 2. The FEMA inspection team determined that these pre-existing conditions permitted moisture to penetrate the building on a regular basis well before the major disaster and that moisture accumulation would have been highly conducive to the growth of mold throughout the facility well before the disaster. Id.

The County, in its arbitration request, asserts that Federal regulations prohibiting public assistance for negligence apply only to applicant actions after a major disaster. See Applicant's Arbitration Request page 2. However, Federal regulations at 44 C.F.R. § 206.223 (e) do not distinguish between pre- and post-storm negligence. Specifically, this regulation states: "No assistance will be provided to an applicant for damages caused by its own negligence." Moreover, FEMA policies are clear that "(d)amage that results from a cause other than the designated event, or from pre-disaster damage, is not eligible." See FEMA Exhibit 11, Attachment 3. There is no regulation or policy which stipulates that negligence only arises after a major disaster, thus, the Applicant's interpretation is incorrect.

In summary, the FEMA inspectors determined the mold damage attributed to the major disaster was in fact due to "poor housekeeping and the lack of proper maintenance to the building" prior to the storm. See FEMA Exhibit 2. The conditions that were conducive to mold growth and the spread of mold spores throughout the building were long-standing before the disaster; the County's failure to address these conditions represented

negligence. Consequently, the County was unable to document that its claimed damage was the direct result of the major disaster as required by Federal regulations. See 44 C.F.R. § 206.223 (a)(1).

In addition to the longstanding water intrusion and the County's failure to perform recent maintenance on the building, the age of the building (nearly 100 years at the time of the disaster) when not maintained, directly contributed to these pre-existing conditions. As discussed above, Federal regulations are clear that eligible work must be caused by the major disaster. See 44 C.F.R. § 206.223(a)(1). The Stafford Act and Federal regulations also stipulate that "no assistance will be provided to an applicant for disaster damages caused by its own negligence." See 44 C.F.R § 206.223(e). Accordingly, FEMA correctly determined that the disaster damages claimed by the Applicant were ineligible. See FEMA Exhibit 4.

b. Before re-starting the HVAC systems, the Applicant failed to clean and disinfect them

The County asserts that its failure to clean the HVAC system upon power restoration was not negligent given the scope of Hurricane Katrina. See Applicant's Arbitration Request page 2. FEMA disagrees and asserts that the County's failure to clean and disinfect the HVAC systems amounts to negligence. The Stafford Act and Federal regulations stipulate that "no assistance will be provided to an applicant for damages caused by its own negligence." See 44 C.F.R § 206.223(e). The FEMA inspection team learned that the HVAC system had been restarted after the storm without a change of filters or system cleaning. See FEMA Exhibit 2. The report observed that "when the systems were turned

back on without being cleaned, the mold spores from within the mechanical air handling equipment and internally insulated duct work (HVAC) were pumped out into the building, contaminating the air and all the porous surfaces throughout the building.” Id. Moreover, FEMA inspectors noted on the site visit that the HVAC equipment and supply duct had not been cleaned in several years, which suggests that mold spores were almost certainly present in the system prior to the storm. Id.

As noted above, Federal regulations are clear that public assistance will not be provided for damages caused by applicant negligence. See 44 C.F.R. §206.223(e). These damages could have been prevented with routine cleaning of the HVAC system and maintenance. In this instance, negligence occurred when the County restarted the building’s HVAC system without first changing its filters and performing a systematic cleaning of ductwork throughout the building. The failure to perform such a routine task, as was performed by countless other FEMA public assistance applicants in the area, undoubtedly contributed to the spread of mold spores throughout the building.

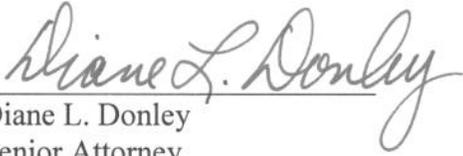
The FEMA team also found evidence that air handling units within the building were likely saturated with moisture leaking from nearby pipes before the storm. This would have created an environment for microbial growth and dispersion through the building via the air supply on a regular basis before the disaster. The FEMA team determined further that storm driven rain had not penetrated the duct system in the building. Id.

In summary, FEMA inspectors determined that the Applicant failed to clean and disinfect the HVAC systems prior to restarting the system. See FEMA Exhibit 2. The failure to perform this necessary task caused the spread of mold spores throughout the building and constituted negligence. Id. Consequently, this claim is ineligible for public assistance. See 44 C.F.R. § 206.223(a)(1).

CONCLUSION AND RECOMMENDATION

The Applicant is not eligible for arbitration because its request for eligibility fails to meet the mandated threshold of \$500,000. Moreover, it is not eligible under the Public Assistance grant program for FEMA reimbursement for the costs, which it did not substantiate, identified in its arbitration request as the damage claimed cannot be shown to be the direct result of the major disaster. Instead, FEMA has determined that these were attributable to deferred maintenance and post-storm negligence. See 44 C.F.R. § 206.223. Therefore, FEMA respectfully recommends that the Panel find in favor of FEMA and deny the Subgrantee's request for additional Public Assistance funding.

Respectfully submitted on this 25th day of November 2009 by



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LIST OF EXHIBITS

- Exhibit 1 – Project Worksheet 2071, Circuit Court Grounds
- Exhibit 2 – FEMA Inspection Team Reports
- Exhibit 3 – Color Photographs from PW 8837 VO
- Exhibit 4 – Project Worksheet 8837, Forrest County Circuit Court Building
- Exhibit 5 – FEMA Forrest County Chronology of Events with Case Management File
- Exhibit 6 – Presidential Declaration for DR-1604
- Exhibit 7 – Forrest County Board of Supervisors List of Project Worksheets
- Exhibit 8 – Bonner Analytical Testing Company Indoor Air Quality Report Forrest Count Courthouse
- Exhibit 9 – Grantee First Appeal Letter with Forrest County Appeal Request
- Exhibit 10 – FEMA Regional Administrator Response to First Appeal
- Exhibit 11 – Grantee Second Appeal Letter with Forrest County Appeal Request
- Exhibit 12 – FEMA Headquarters Response to Second Appeal
- Exhibit 13 – Guidelines FEMA 1604-DR-MS Mold Remediation Costs