



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 24, 2010

CBCA 1768-FEMA

In the Matter of STATE OF LOUISIANA, FACILITY PLANNING AND CONTROL

Pamela M. Perkins and Karen A. Loftin, Office of General Counsel, Division of Administration, State of Louisiana, Baton Rouge, LA, counsel for Applicant.

Mark S. Riley, Deputy Director, and Lynn L. Wiltz, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Linda M. Davis, Kim A. Hazel and Chad T. Clifford, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **GOODMAN**, and **STEEL**.

This case involves a request by the State of Louisiana, Facility Planning and Control (the applicant), that the arbitration panel direct the Federal Emergency Management Agency (FEMA) to award a public assistance grant in the amount of \$2,200,000 for repair of disaster-related damage caused by Hurricane Katrina to the New Orleans City Park (Park). The parties have resolved a major portion of the request for arbitration. FEMA has requested dismissal of the remainder of the arbitration request, asserting that this arbitration panel lacks jurisdiction. As discussed below, we find that the arbitration panel has jurisdiction over the remainder of the arbitration request and deny FEMA's request for dismissal.

Background

Statute and Regulations

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the President the authority to make public assistance disaster grants, using cost estimating procedures, to a state or local government for repair, reconstruction, or replacement of public facilities on the basis of the design of a facility as it existed immediately before the major disaster. 42 U.S.C. § 5172 (2006). FEMA administers the Stafford Act.

FEMA's rules implementing the statute for public assistance grants are found at 44 CFR subpt. G (2009). FEMA defines a "grant" as "an award of financial assistance" which shall be based upon the total eligible federal share of all approved projects. 44 CFR 206.201(d). A project is a logical grouping of work required as a result of a declared major disaster. *Id.* 206.201(i). "Permanent work" is restorative work that must be performed through repairs or replacement to restore an eligible facility "on the basis of its predisaster design and current applicable standards." *Id.* 206.201(g). The object of repair is to enable the facility to perform the function for which it was being used as well as it did immediately prior to the disaster. *Id.* 206.226(f). "Predisaster design" means the size or capacity of a facility as originally designed and constructed or subsequently modified by changes or additions to the original design. *Id.* 206.201(h). FEMA must approve the scope of eligible work and an itemized cost estimate before funding a project. *Id.* 206.201(i)(1).

Federal public disaster assistance is initiated through an application by prospective grantees and subgrantees as provided in 44 CFR 206.202. Grants are awarded through the use of project worksheets (PWs), which must identify "all eligible work" and "all costs for disaster-related damages for funding." 44 CFR 206.202(d)(1). The arbitration panel is authorized to resolve disputes between an applicant or subgrantee and FEMA regarding disputed public assistance grants. *Id.* 206.209.

Scope of Review

FEMA has asked the panel to limit its review to the evidence before the agency during its own review of the matter, and to affirm the agency's determination unless we find that it lacks a reasonable basis -- i.e., it is arbitrary or capricious. For the reasons explained by another arbitration panel in *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335 (2009), this panel denies FEMA's request that we limit our review. We will consider all evidence in the record created for this arbitration proceeding, and we will review that evidence *de novo*.

Factual Background

Flooding from Hurricane Katrina inundated the Park, leaving four to six feet of standing water for several weeks. Soon after flood waters subsided, construction contractors and debris haulers used portions of the Park to stage large vehicles and heavy equipment, which caused damage in addition to that caused by flood waters.

Between March 20 and March 27, 2008, personnel from FEMA and the applicant and the applicant's engineer participated in an assessment of the damage to the Park, the project at issue. PW 17708, dated April 4, 2008, was prepared and issued by FEMA. On May 16, 2008, the applicant appealed FEMA's determination, alleging that FEMA erred in its assessment of disaster-related damage and that the disaster either caused the claimed damage or accelerated deterioration of the roads. FEMA denied the appeal. The applicant filed a second appeal on October 1, 2008, but later withdrew that appeal and filed this arbitration request on October 26, 2009.

In its initial response to the arbitration request, FEMA agreed with the applicant that damage to fifty-eight sites included in PW 17708 was disaster-related. FEMA concurred with the applicant's recommended scope of work for the repair of these fifty-eight sites, estimated the cost to repair the damage to be \$1,911,855, and stated that FEMA would approve this amount for these project repairs. On December 22, 2009, during a conference with the chair of the arbitration panel, the parties acknowledged that the amount of \$1,911,855 recommended by FEMA was acceptable to the parties and was no longer an issue in this arbitration.

Jurisdiction of the Arbitration Panel over the Remainder of the Request for Arbitration

The applicant's arbitration request sought funding for sixteen sites¹ in addition to the fifty-eight sites for which a grant amount has been agreed by the parties. FEMA maintains that the arbitration panel's jurisdiction to hear the applicant's request regarding these sixteen sites is limited by the regulations that established this arbitration process.

The following regulation sets forth the arbitration panel's jurisdiction:

¹ The applicant initially sought funding for seventeen sites but subsequently determined that one of the sites was a duplicate of another.

(b) Applicability. An applicant or subgrantee (hereinafter “applicant” for purposes of this section) may request arbitration of *a determination made by FEMA* on an application for Public Assistance, provided that the total amount of the project is greater than \$500,000, and provided that:

- (1) the applicant is eligible to file an appeal under §206.206; or
- (2) the applicant had a first or second level appeal pending with FEMA pursuant to §206.206 on or after February 17, 2009.

44 CFR 206.209(b) (emphasis added).

FEMA maintains that it has not made a determination regarding the sixteen sites at issue. FEMA asserts that these sites were not part of a FEMA determination pursuant to 44 CFR 206.209(b) in PW 17708, dated April 4, 2008, and that the applicant did not raise any issue regarding these sites in the applicant’s first appeal in May 2008 or in the second appeal in October 2008. Therefore, FEMA requests that this panel dismiss the applicant’s request to arbitrate a grant amount as to these sites.

The applicant insists that the sixteen sites were included during the review of the damage by personnel from FEMA and the applicant and the applicant’s engineer before PW 17708 was issued. According to the applicant, there is no discernable reason why these sites were omitted by FEMA when PW 17708 was compiled and the omission of the sites itself was a determination made by FEMA and therefore subject to review by the arbitration panel pursuant to 44 CFR 206.209(b).

The applicant supports these factual allegations by an affidavit of its engineer, Mr. David Dupré. He states in his affidavit that either he or the applicant’s personnel presented and pointed out all damage areas in the Park to FEMA, including the sixteen sites at issue, and those areas were then inspected by FEMA. He then had several site meetings with a FEMA project officer, Kent Anderson, who was charged with writing the PW regarding the damage to the Park. Based on these site meetings, Mr. Anderson revised the spreadsheet documenting the damage and sent Mr. Dupré a version dated March 28, 2008. Upon receipt of this spreadsheet, Mr. Dupré noticed that Mr. Anderson had omitted several damage sites agreed upon in the field. On April 10, 2008, he e-mailed Mr. Anderson a list of the omitted damage sites that needed to be included in the PW.

On April 10, 2008, Mr. Dupré revised the plans and sent them to Mr. Anderson. Mr. Dupré returned to the Park to review the damage sites. He states that the damage sites at issue in this arbitration are accurately reflected in the applicant’s submission of January 22, 2010, to the arbitration panel. Mr. Dupré states further that the plans sent back to Mr. Anderson on April 10, 2008, clearly include all sixteen damage locations now at

issue. Therefore, the damage sites now at issue are not “new” sites, as they are shown on the plans provided to FEMA by Mr. Dupré in April 2008.

The panel has reviewed the documentation submitted by the applicant in support of Mr. Dupré’s affidavit and finds the damage sites at issue are shown on the plans provided to FEMA by Mr. Dupré in April 2008.

We find the applicant’s position logical and persuasive. A review of the documentation indicating the parameters of the sites at issue leaves no doubt that the sites are interspersed throughout the Park and are therefore part of the project as defined by the regulations, i.e., a logical grouping of work required as a result of a declared major disaster. It is clear that these sites were identified by the applicant as part of the project before PW 17708 was issued. The regulations require FEMA to identify “all eligible work” and “all costs for disaster-related damages for funding” in a PW. 44 CFR 206.202(d)(1). If FEMA failed to include an assessment of these sites in the PW, this failure does not bar the inclusion of an assessment now or divest this arbitration panel of jurisdiction. Rather, a failure by FEMA to assess damage sites that are included in the project and reviewed prior to issuance of a PW, whether such failure is inadvertent or intentional, is a violation of regulation and itself a determination by FEMA that is appealable and subject to arbitration. *Id.* 206.209(b). We therefore find that this arbitration panel has jurisdiction over the remainder of the request for arbitration.

Another arbitration panel, in *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA (Feb. 1, 2010), held in similar circumstances that a project worksheet can be amended to include additional work not included previously:

At the hearing, FEMA contended that the applicant had waived its rights to additional grants because the applicant had not identified roof, siding, and window replacement in the earlier PWs. This argument is without merit. This dispute arose after the applicant had requested reinspection of work at the schools that had been the subject of earlier PWs. FEMA granted reinspection on June 19, 2009, which resulted in amended PWs. FEMA’s public assistance branch chief admitted that a PW is a living document until project completion. Furthermore, nothing in the language of the PWs or any other document of record suggests that an applicant waives rights to seek further assistance should the necessity for additional assistance become apparent at any time.

Slip op. at 4-5 (footnote omitted).

Accordingly, as the project has not been completed, an assessment for additional assistance for the sixteen sites can be included in the PW at this time. If the estimated cost of repair of these sites is less than \$500,000, this would still be within our jurisdiction, as the total PW exceeds the jurisdictional amount. *Forrest County Board of Supervisors, CBCA 1772-FEMA* (Jan. 20, 2010).

Decision

FEMA's request to dismiss the arbitration request with regard to the sixteen sites is **DENIED**.

ALLAN H. GOODMAN
Board Judge

STEPHEN M. DANIELS
Board Judge

CANDIDA S. STEEL
Board Judge