



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 30, 2011

CBCA 2280-FEMA

In the Matter of HANCOCK COUNTY BOARD OF SUPERVISORS

Ronnie J. Artiques, Jr. and Mark W. Garriga of Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Ridgeland, MS, counsel for Applicant.

Thomas M. Womack, Executive Director, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Valerie Rhoads, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Atlanta, GA; and Linda Litke, Office of General Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **GILMORE**, **BORWICK**, and **WALTERS**.

The Federal Emergency Management Agency (FEMA) filed a motion to dismiss the request for arbitration in this matter. For the reasons explained below, the panel grants the motion, in part, on jurisdictional grounds.

Background

The applicant, Hancock County Board of Supervisors (County), submitted to the panel a request for arbitration dated January 28, 2011, seeking resolution of the County's dispute with FEMA regarding reimbursement under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5121, *et seq.*(2006). This request involves costs for averting the threat to public safety posed by certain trees situated in the County that allegedly were damaged in 2005 as a result of Hurricane Katrina. The Mississippi Emergency Management Agency (MEMA), as grantee, subsequently filed with

the Board its recommendation endorsing the County's request. In response, FEMA filed a motion to dismiss, based on a purported lack of timeliness on the County's part as well as on this Board's purported lack of jurisdiction to address the County's request in this instance. FEMA, to preserve its rights, also filed an opposition to the request on its merits. Thereafter, both the County and MEMA submitted oppositions to the FEMA motion to dismiss.

Discussion

In challenging the County's timeliness, FEMA points to its regulations regarding the use of arbitration, which read, in pertinent part:

An applicant . . . must submit its request for arbitration . . . within 30 calendar days after receipt of notice of the determination that is the subject of the arbitration request

44 CFR 206.209(e)(2) (2009). In this case, the FEMA letter containing the determination that is the subject of the instant arbitration request was dated December 6, 2010. That letter was received by MEMA on December 7, 2010. MEMA, by letter dated December 9, 2010, forwarded the FEMA determination to the County. The County asserts that it did not receive MEMA's letter until December 30, 2010. FEMA contests that assertion, urging that the County must have received MEMA's letter substantially earlier than claimed, because: (1) the County's offices in Bay St. Louis, Mississippi, are only 141 miles away from the MEMA offices in Pearl, Mississippi; and (2) the United States Postal Service provides a general estimate on its website of only two to three days for delivery of First Class mail. Submitting the request for arbitration on January 28, 2011, would thus be untimely, according to FEMA.

The FEMA letter of December 6, 2010, bears a receipt stamp dated December 30, 2010, and, other than its notions as to how long mail delivery normally should take, FEMA offers no tangible evidence that the MEMA letter was actually received by the County at any time prior to December 30. Moreover, notwithstanding the December 9 date of MEMA's letter, the panel has been offered nothing by any of the parties to establish when MEMA mailed its letter. Accordingly, the Board can only presume that the letter was received by the County on December 30. On that basis, the County's submittal of a request for arbitration on January 28, 2011, was within the required thirty calendar day period and thus was timely.

In addition to the issue of timeliness, FEMA seeks dismissal of the County's request for arbitration on jurisdictional grounds. In this regard, FEMA asserts that the matter of reimbursement for removal of dead and dying trees within the county had already been the subject of two levels of appeal under the FEMA appellate procedure. Because arbitration

before the Board is only to be used in lieu of an appeal, FEMA argues, it is not appropriate in this case.

In terms of appeals under the FEMA administrative appeal process, the regulations contemplate that a first level appeal be presented to the FEMA Regional Director. The second level of appeal is to be handled by the Associate Director/Executive Associate Director for Response and Recovery. 44 CFR 206.206(b). Here, FEMA provided reimbursement for removal of dead and dying trees within the “surge zone” of Hurricane Katrina – which the panel understands to mean the area directly impacted by saltwater from the Gulf of Mexico transported inland by surge action of the storm. The County sought to expand coverage to include trees lying outside the surge zone, but its request was denied. In this connection, the panel agrees with FEMA that a March 17, 2009, letter from the County’s attorneys to MEMA was the applicant’s first appeal of that issue. By letter dated May 29, 2009, the FEMA Regional Administrator denied that appeal, finding that the County failed to prove to FEMA’s satisfaction that damage to trees outside the surge zone was brought about by Hurricane Katrina, rather than other potential causes. It is undisputed that the County was advised of its right to file a second appeal from the Regional Administrator’s decision and that it missed the sixty-day deadline for that second appeal.

By letter dated October 28, 2010, the County asked MEMA to have FEMA reopen the “standing dead tree removal project.” In that letter, the County spoke of trees continuing to die and continuing to pose a safety hazard for County residents. With that letter, for the first time, the County quantified the numbers of trees allegedly affected and provided an estimate of costs for tree removal, both within and outside the surge zone. FEMA seeks to characterize the October 28, 2010, letter as the County’s “second appeal” and the aforesaid December 6, 2010, FEMA letter, in turn, as FEMA’s denial of that “second appeal.”

The panel cannot agree with FEMA’s characterizations. The supposed “second appeal” was not decided by the official charged with handling second level administrative appeals, i.e., the Associate Director/Executive Associate Director for Response and Recovery, 44 CFR 206.206(b).¹ Rather, the December 6, 2010, letter was issued by the Director of FEMA’s Mississippi Recovery Office. Moreover, neither the October 28, 2010, letter from the County nor FEMA’s December 6, 2010, letter in response thereto spoke of or

¹ In its letter to the County forwarding the Regional Administrator’s denial of the first appeal, MEMA identifies the official for deciding any second appeal as the “Associate Director for Recovery Division, Emergency Preparedness and Response Directorate with the Department of Homeland Security.”

treated the County's request for reopening the "standing dead tree removal project" as an "appeal."

MEMA, in its response to FEMA's motion, maintains that the October 28 letter was never an "appeal," and that the December 6 letter, accordingly, was not a decision on an "appeal." Instead, MEMA posits, the December 6 letter was itself a "determination" giving rise to appeal rights. Clearly, the December 6, 2010, letter would not be a "determination" subject to appeal, insofar as it pertains to the issue of tree removal outside the surge zone. That issue had been determined against the County by FEMA's earlier decisions, and, because the County failed timely to seek a second level appeal on that issue, it may not now pursue arbitration of that issue. In this regard, we note the following discussion that accompanied issuance of FEMA's regulations pertaining to arbitration under the American Recovery and Reinvestment Act of 2009 (ARRA):

Applicants/subgrantees that had a first or second level appeal pending on or after February 17, 2009 [the effective date of the ARRA], may choose arbitration, regardless of whether FEMA had issued a decision on the appeal since the effective date of the ARRA. However, ***if the applicant/subgrantee was eligible to appeal after the effective date of the ARRA, but allowed the appeal period to expire without filing an appeal, the applicant/subgrantee is not eligible to file an appeal and, therefore, is not eligible for arbitration.***

Arbitration for Public Assistance Determinations Related to Hurricanes Katrina and Rita (Disasters DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607), 74 Fed. Reg. 44,761, 44,762 (Aug. 31, 2009) (emphasis supplied).

By the same token, the Regional Administrator's decision of May 29, 2009, was addressed solely to tree removal outside the surge area and did not deal with tree deaths within the surge area that continued, purportedly as a result of Hurricane Katrina, after the March 31, 2009, date for termination of FEMA's tree removal project. This new issue was raised for the first time by the County's October 28, 2010, letter, which sought to reopen the "standing dead tree removal project" for all of Hancock County (i.e., both inside and outside the surge zone) and was decided by FEMA for the first time as part of the aforesaid December 6, 2010, response.² Thus, to the extent the December 6 letter addresses the issue

² The December 6, 2010, FEMA letter concludes in this regard: "Trees continuing to die along roadways both inside and outside the surge area cannot be directly related to Hurricane Katrina and are most likely due to the stress of multiple subsequent events and beetle infestations. For that reason, FEMA cannot reopen the standing dead tree project after all

of additional dead trees within the surge zone, it is an appealable “determination” and one that may be arbitrated by this panel.

Decision

The motion to dismiss the request for arbitration is denied as to alleged untimeliness, but is granted in part, insofar as it pertains to the issue of tree removal outside the surge zone. The arbitration will proceed on the issue of entitlement to further reimbursement for tree removal within the surge zone.

RICHARD C. WALTERS
Board Judge

ANTHONY S. BORWICK
Board Judge

BERYL S. GILMORE
Board Judge

dead trees on ROW [rights of way] in the surge area attributed to Katrina were removed prior to March 31, 2009, as previously agreed with Hancock County.”