



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 4, 2012

CBCA 2875-FEMA

In the Matter of CITY OF NEW ORLEANS, LOUISIANA

Ernest B. Abbott of FEMA Law Associates, PLLC, Washington, DC, counsel for Applicant.

Mark Riley, Deputy Director, Mark DeBosier, State Coordinating Officer, and William J. Patrigo, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, New Orleans, LA; Michelle L. Buckalew, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and George Cotton, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **ZISCHKAU**, **HYATT**, and **STEEL**.

On June 29, 2012, the City of New Orleans, Louisiana, filed a request for arbitration of a May 24, 2012 determination by the Federal Emergency Management Agency (FEMA) regarding reimbursement of a portion of the City's salary costs for its police, fire, and emergency medical services (EMS) first responders who worked during and after Hurricane Katrina struck the City on August 29, 2005. Although FEMA initially decided in 2006 to reimburse the City for one-third of the regular time pay of these individuals in project worksheet (PW) 11 version 2, FEMA later decided in 2009 to de-obligate those funds in PW 11 version 5, stating that it could not verify that the regular time pay of these individuals was eligible for reimbursement.

On July 30, 2012, FEMA filed a motion to dismiss, and in the alternative, a response to the arbitration request. In its motion to dismiss, FEMA does not argue that the City's arbitration request is untimely with regard to the May 24 determination which was received by the City on June 11, 2012. Rather, FEMA argues that the City had thirty days after receipt of two earlier adverse determinations to file its request for arbitration but failed to do so. Having reviewed the parties' arguments and the record as supplemented, we deny FEMA's motion to dismiss.

FEMA first points to its issuance of PW 11 version 5 on October 8, 2009, in which FEMA stated in relevant part:

Version #2 and Version #4 (obligated for zero and put into Version #5) of PW 11 documented that both OEPYW [Official Emergency Pay, Working] and 1/3 of the regular time paid by the City of New Orleans is eligible for 100% reimbursement under 44 CFR 13 as extraordinary costs incurred as a result of the hurricane (Ref. Response and Recovery Directorate Policy Number: 9527.7 attached). At this time FEMA can not verify such a policy directorate or authorization that 1/3 of the regular time paid by the City of New Orleans is eligible for 100% reimbursement. Costs for 1/3 of regular time equaling \$10,944,688.83, included in previous versions have not been calculated into this version due to insufficient backup documentation at the time of this version. However, if documentation is found providing the previously referenced FEMA Response and Recovery Directorate Policy confirming that the City of New Orleans is to receive reimbursement for 1/3 of the regular time paid to employees by the City of New Orleans, a version will be written to obligate these specific cost.

The record shows that discussions, negotiations, and submissions on this issue continued well into 2011, and even as recently as April 2012.

FEMA further points to a February 3, 2012 email message sent by a FEMA program specialist to City representatives, following up on a telephone conversation earlier that same day, in which the FEMA representative states that "FEMA has found the existing FEMA policy and regulations do not allow the funding of regular time." The message contains attachments of various documents, policy statements, and guidance regarding the reimbursement of regular pay and OEPYW.

On March 6, 2012, the City submitted a request that FEMA re-obligate funds for regular time labor costs for its first responders. On May 24, 2012, FEMA's Deputy Director, Programs, Louisiana Recovery Office, sent a letter to the State of Louisiana's Deputy Director – Disaster Recovery Division, advising that although PW 11 version 2 erroneously

indicated that one-third of first responder costs (approximately \$10.8 million) would be eligible for reimbursement, FEMA in 2009 de-obligated this amount in PW 11 Version 5 and the City did not appeal FEMA's 2009 de-obligation. In the May 24 decision letter, FEMA's Deputy Director also noted that FEMA had informed the City in February 2012 (in response to a September 2011 memorandum and additional City requests for re-obligation) that FEMA "was not able under applicable law and policy to fund any of CNO's [the City of New Orleans'] regular-time first responder costs."

The Robert T. Stafford Disaster Relief and Emergency Assistance Act and FEMA's regulation provide that an eligible applicant may appeal "any" decision or determination regarding eligibility for federal assistance. 42 U.S.C. § 5189a(a) (2006); 44 CFR 206.206 (2011). Here, the City filed its request for arbitration pursuant to section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), which provides:

Notwithstanding any other provision of law, the President shall establish an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region. The arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than \$500,000.

Under FEMA's arbitration regulation, 44 CFR 206.209 (2011), an applicant must submit its arbitration request "within 30 calendar days after receipt of notice of the determination that is the subject of the arbitration request" *Id.* 206.209(d)(2).

We can find no statutory or regulatory requirement that required the City to appeal or request arbitration from the 2009 PW 11 version 5 issuance or the February 3, 2012 FEMA email message. PW 11 version 5 stated that FEMA would revisit the eligibility issue if the City provided additional supporting documentation. In March and April 2012, FEMA was still considering the merits of the City's eligibility request. The City chose to request arbitration from the May 24, 2012 decision after it exhausted all other approaches to securing FEMA's agreement to re-obligate the disputed funding. Accordingly, we conclude that the City timely filed its request for arbitration on June 29, 2012, which was within thirty days of its June 11 receipt of FEMA's May 24 determination letter. *See Hancock County, Mississippi School District*, CBCA 1951-FEMA, 10-2 BCA ¶ 34,505; *Moss Point School District*, CBCA 1800-FEMA, 10-1 BCA ¶ 34,450.

FEMA's motion to dismiss is denied.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge