



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 3, 2013

CBCA 3344-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, Carla Richard, Appeals Manager, and William J. Patrigo, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

George M. Cotton and Charles Schexnaildre, 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 **GOODMAN**, **SHERIDAN**, and **WALTERS**.

The instant arbitration involves a claim by the applicant, the City of New Orleans, Louisiana (CNO), under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2006), for reimbursement of costs for the construction of curb ramps for various roads throughout the city that had been damaged by Hurricane Katrina. The ramps, CNO avers, are required in order to bring the roads into compliance with the requirements of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213. CNO's request for arbitration here specifically addresses project worksheets issued by the Federal Emergency Management Agency (FEMA) earlier this year as part of what has been termed the FEMA/CNO "Phase II – Recovery Roads" program. The worksheets exclude reimbursement for certain ramps, and both CNO and the grantee, the Louisiana Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), challenge the propriety of such exclusion.

Respondent, FEMA, has filed two motions with the arbitration panel. The first motion seeks summary relief from the panel. The second posits that the arbitration should be dismissed as beyond this panel's jurisdiction. Both motions are founded on FEMA's belief that the matter at issue here concerning reimbursement for ADA ramps had been decided by FEMA in February 2008 and the fact that CNO had not appealed from that decision. In the alternative, FEMA insists that the arbitration should not proceed, even if its motions are denied, because, in its view, CNO has failed to provide the panel with sufficient information to render relief. For the reasons explained below, based on the record that currently exists, we do not concur with FEMA's arguments on either motion and thus deny both. Likewise, we do not accept FEMA's alternative argument and will proceed with the arbitration.

Background

Hurricane Katrina, on August 29, 2005, caused immense impact to communities all along the Gulf Coast. Much of New Orleans was submerged in debris-filled floodwater due to the storm surge, unrelenting rainfall, and levee failure. Tremendous damage was sustained to roads and sidewalks throughout the city. In the storm's aftermath, FEMA, State of Louisiana, and CNO representatives worked together to assess the damage and determine what was needed to repair and restore the roads, sidewalks, and curbs. A total of fifty-two project worksheets were developed (corresponding to individual New Orleans neighborhoods) to outline the scope of work and to estimate the costs that would be entailed.

By letter to GOHSEP dated November 14, 2007, CNO sought from FEMA clarification of various matters regarding the funding of work required to comply with applicable codes and standards in conjunction with needed road repairs. Paragraph 2 of the letter sought a "formal written statement [from FEMA] concerning the issue of adjacent and contiguous pavement replacement required to comply with . . . current codes and standards." Paragraph 2a specifically raised the issue of reimbursement for ADA ramps in the following manner:

- a. With regard to sidewalk, driveway, and handicap ramps, please note that the STD1 drawing clearly show[s] maximum and minimum transverse and cross slope requirements for repair or rehabilitation work. These standards are established to ensure safety and compliance with the American[s] with Disabilities Act. The City of New Orleans is asking whether FEMA will reimburse for such additional repairs needed to repair eligible areas in accordance with current codes and standards.

FEMA's response to the matters of inquiry, contained in a letter from FEMA's Director of the Louisiana Transitional Recovery Office dated February 1, 2008, addressed CNO's paragraph 2a in the following manner:

FEMA recognizes that sidewalks at curb returns must be replaced to comply with Americans with Disabilities Act standards. Storm-damaged curb return areas requiring replacement were scoped with sufficient size in order to accommodate handicap ramps, where needed.

Though recognizing that ADA standards would be treated generally in the same manner as other codes and standards and stating that "storm-damaged curb return areas" had been "scoped" – and purportedly would be funded through the project worksheets – "to accommodate handicap ramps," the February 2008 letter did not expressly state that it was a determination regarding all areas that might be potentially eligible for Stafford Act funding.

Discussion

FEMA relies on CBCA Board Rule 8 in support of its motion for summary relief. The Board's rules of procedure, which govern, *inter alia*, its adjudication of federal procurement contract appeals under the Contract Disputes Act, do not apply to FEMA arbitrations, which are governed solely by the regulations FEMA promulgated to implement the arbitration provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, 164 (2009). As CNO correctly notes, a Board arbitration panel, in responding to a FEMA motion for summary relief in another FEMA arbitration, had expressed doubt as to its authority to render summary relief (that is, a summary ruling on the merits of a case) without a hearing or other oral presentation of some sort. In that regard, the panel observed that, under FEMA's regulations, an applicant that has requested arbitration is to be afforded the "opportunity to make an oral presentation on the substance of the applicant's claim." *Moss Point School District*, CBCA 2440-FEMA (interlocutory decision of September 13, 2011) (citing 44 CFR 206.209(h)(1) (2010)).

In the present instance, a motion for summary relief would be inappropriate in any event, given that FEMA's argument is essentially jurisdictional in nature – that arbitration would be unavailable here, since CNO purportedly failed "to file a timely appeal" from FEMA's February 2008 "determination" under "the provisions of [44 CFR] § 206.206." If, as FEMA urges, the panel has no jurisdiction to conduct an arbitration due to the applicant's failure to file a timely appeal, it most assuredly would have no jurisdiction to render summary judgment without an arbitration hearing.

The motion to dismiss, on the other hand, would have some logic based on this jurisdictional argument. To prevail on this argument, however, FEMA first would need to establish: (1) that the February 2008 letter constituted an appealable “determination”; and (2) that the determination addressed and disposed of the issue raised by the request for arbitration. The wording of the letter does not clearly indicate that it was intended as a determination necessitating an appeal by CNO to a higher FEMA authority on the handicap ramp issue currently before us. Moreover, it is not apparent from the letter itself that it was intended to formally reject the claim CNO is now pursuing. Nor is it evident from the record before us whether, at any time prior to the issuance of the February 2008 letter, the parties specifically discussed the degree to which undamaged curb returns would need to be replaced with ones having ADA compliant handicap ramps and whether such curb replacements would be eligible for Stafford Act funding. Indeed, the issue of additional funding to achieve ADA compliance being pursued at this time may well have been raised for the first time at a meeting with FEMA in July 2012. The minutes of that meeting read, in pertinent part:

FEMA confirmed the eligibility decision [regarding ADA ramps not being fundable for non-storm damaged road “elements”] would be articulated in the Lower 9th Ward version [i.e., the project worksheet for the Lower 9th Ward] currently being drafted.

Motion for Summary Relief, Exhibit 7 at 4. No mention is made in the minutes about the 2008 letter, nor is there any allusion to the “decision” having already been made years prior to July 2012. To the contrary, the minutes state that “articulation” of the “eligibility decision” was to be made in the phase II project worksheet for the Lower 9th Ward. That project worksheet was not issued until March of this year. And the “determination” set out in that 2013 worksheet is what CNO currently wishes to arbitrate.

In short, as to FEMA’s motions for summary relief and to dismiss, the record presented thus far does not establish sufficiently that, as of 2008, the parties discussed and appreciated fully either the extent to which the ADA might require ramp construction or the applicability of the Stafford Act to all potential ADA ramp situations. On the other hand, jurisdictional issues can be raised at any stage, and FEMA would not be precluded from presenting further evidence at the arbitration hearing that might support its jurisdictional argument.

Finally, as to FEMA’s alternative argument for not proceeding with an arbitration hearing, i.e., the perceived insufficiency of information to allow the panel to grant relief, it appears to the panel that FEMA’s position is inconsistent with its characterization of the February 2008 letter as a “determination” of the ADA ramp issue. If FEMA believes it was

able to render a determination of that issue in 2008, notwithstanding incomplete information as to the specific intersections within New Orleans for which the ADR would require curb ramps, then there is nothing to prevent this panel from providing a determination on that issue now. There is no reason why the panel cannot provide general guidance as to the extent of Stafford Act funding eligibility for ADA ramps in New Orleans and no reason to suspect that the parties would not be able subsequently to identify and agree upon funding for construction of eligible ramps once that guidance is furnished.

Decision

For the foregoing reason, we deny both FEMA motions and will proceed forthwith to schedule a hearing in this arbitration.

RICHARD C. WALTERS
Board Judge

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge