



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 28, 2014

CBCA 3608-FEMA

In the Matter of LIVINGSTON PARISH

Hilary S. Cairnie, William T. DeVinney, and Maria R. Coor of Baker & Hostetler LLP, 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.

Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS; and Brock Pierson and Caroline Hong, 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), **SOMERS**, and **KULLBERG**.

Livingston Parish, Louisiana, has asked that a panel of the Civilian Board of Contract Appeals determine, through arbitration, that the Parish is eligible to recover, as a public assistance grant, \$59,183,143 it expended to clear waterways from damage wrought by Hurricane Gustav in September 2008. That damage included trees hanging or leaning over public areas or improved property.

The Federal Emergency Management Agency (FEMA) moves the panel to dismiss the request for arbitration with prejudice, on the ground that the panel lacks jurisdiction over the case. In the alternative, FEMA asks us to stay proceedings for 120 days during which the agency might further evaluate the Parish's contention. The Parish and the State of Louisiana

Governor's Office of Homeland Security and Emergency Preparedness, which is the grantee, oppose the motion. We deny the motion.

Section 565 of the Consolidated and Further Continuing Appropriations Act, 2013, provides as follows:

The Inspector General [of the Department of Homeland Security] shall review the applications for public assistance provided through the Disaster Relief Fund with a project cost that exceeds \$10,000,000 and the resulting decisions issued by [FEMA] for category A debris removal for DR-1786 upon receipt of a request from an applicant made no earlier than 90 days after filing an appeal with [FEMA] without regard to whether the Administrator of [FEMA] has issued a final agency determination on the application for assistance: *Provided*, That not later than 180 days after the date of such request, the Inspector General shall determine whether [FEMA] correctly applied its rules and regulations to determine eligibility of the applicant's claim: *Provided further*, That if the Inspector General finds that [FEMA] determinations related to eligibility and cost involved a misapplication of its rules and regulations, the applicant may submit the dispute to the arbitration process established under the authority granted under section 601 of Public Law 111-5 not later than 15 days after the date of issuance of the inspector General's finding in the previous proviso: *Provided further*, That if the Inspector General finds that [FEMA] provided unauthorized funding, that [FEMA] shall take corrective action.

Pub. L. No. 113-6, § 565, 127 Stat. 198, 381 (2013).¹

Livingston Parish has met all of the requirements established by section 565 for us to take jurisdiction over the case.

The Parish made applications for public assistance provided through the Disaster Relief Fund, for category A debris removal for DR-1786, with a project cost that exceeds

¹ Category A debris removal includes clearance of trees, woody debris, sand, mud, silt, and gravel. DR-1786 is the number of the Presidential declaration of a major disaster resulting from Hurricane Gustav. Section 601 of Public Law 111-5 directs the President to establish an arbitration panel under FEMA's public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita, which occurred in 2005; the Civilian Board of Contract Appeals has been designated that arbitration panel.

\$10,000,000. The applications were for three categories of costs -- (a) \$14,096,899 for removal of “leaners and hangers,” trees which had been uprooted and by leaning over were posing an immediate threat to lives, public health and safety, or improved property; and limbs which by hanging over public areas were posing a threat to public areas; (b) \$44,002,901 for removing debris from waterways; and (c) \$1,083,344 for direct administrative costs. The total amount sought is \$59,183,143.

The Parish requested that the Inspector General review FEMA’s decisions regarding these applications on April 3, 2013. April 3, 2013 was more than ninety days after the Parish had filed appeals with FEMA as to determinations made by the agency on the Parish’s applications. The appeals were filed on June 1, 2010, January 18, 2011, and September 15, 2011.

In an audit report dated October 24, 2013, the Inspector General concluded:

FEMA did not always follow Federal rules and regulations in making . . . decisions [on the eligibility of the Parish’s debris removal costs]. Specifically, for two appeals (one granted and one denied), FEMA did not respond within the 90-day time limit that Federal regulation requires. Finally, in a third instance . . . FEMA held the appeal for 655 days – more than 21 months – before it responded. However, in its response, FEMA did not notify the Parish of its final appeal determination, but rather stated that it was no longer reviewing the Parish’s claims because of our audit. However, by not making a decision on this second-level appeal, FEMA has, in effect, denied the Parish’s appeal for reimbursement without following Federal regulation.^[2]

² The ninety-day time limit to which the Inspector General referred is prescribed in a regulation promulgated by FEMA and set out at 44 CFR 206.206(c)(3):

Within 90 days following receipt of an appeal, the Regional Director (for first appeals) or Associate Director/Executive Associate Director (for second appeals) will notify the grantee in writing of the disposition of the appeal or of the need for additional information. A request by the Regional Director or Associate Director/Executive Associate Director for additional information will include a date by which the information must be provided. Within 90 days following the receipt of the requested additional information or following expiration of the period for providing the information, the Regional Director or Associate Director/Executive Associate Director will notify the grantee in writing of the disposition of the appeal. If the decision is to grant the appeal,

(continued...)

As this paragraph makes clear, the Inspector General found that FEMA determinations related to eligibility and cost associated with the Parish's application involved a misapplication of rules and regulations. The Parish submitted its dispute to the arbitration process established under the authority granted under section 601 of Public Law 111-5 -- that is to say, to the Civilian Board of Contract Appeals -- within fifteen days after the date of issuance of the Inspector General's finding. The finding was issued on October 24, 2013, and the dispute was submitted to this Board on November 8, 2013, fifteen days later.

This is all we need to find in order to take jurisdiction over the case.

FEMA makes several arguments to the contrary, but we do not find them persuasive. Two are worthy of comment: (1) We disagree with the proposition that the statute permits an applicant to come here only if the Inspector General finds an error by the agency in addressing the merits of a claim. The law's language is far broader than that: a request for arbitration may be made if the Inspector General finds that "determinations *related to* eligibility and cost *involved* a misapplication of its rules and regulations." (2) We also disagree with FEMA's contention that because an applicant may ask for arbitration of a dispute under section 601 of Public Law 111-5 only as an alternative to the agency appeal process, an applicant may not ask for arbitration under section 565 of Public Law 113-6 if the appeal process is ongoing. The latter statute, under which we consider this case, allows initiation of the process which may lead to coming here "without regard to whether the Administrator of [FEMA] has issued a final agency determination on the application for assistance."

In addition to finding that we have jurisdiction over the case, we address FEMA's alternative motion that we stay proceedings for 120 days during which the agency might further evaluate the Parish's application. We agree with the Parish and the State of Louisiana that such a stay is unnecessary. This dispute has been pending for several years, and FEMA should have been thoroughly evaluating the Parish's contentions at least since June 2010, when the Parish lodged its first agency appeal. The arbitration process should be a vehicle for bringing this dispute to a prompt conclusion, rather than delaying matters still further.

² (...continued)

the Regional Director will take appropriate implementing action.

Thus, we deny FEMA's motion in its entirety. The panel, after consultation with the parties, will establish a schedule for further proceedings in the case.

STEPHEN M. DANIELS
Board Judge

JERI KAYLENE SOMERS
Board Judge

H. CHUCK KULLBERG
Board Judge