



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 6, 2016

CBCA 4984-FEMA

In the Matter of LOUISIANA DEPARTMENT OF NATURAL RESOURCES,
through the COASTAL PROTECTION AND RESTORATION AUTHORITY

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Mark Riley, Deputy Director, William J. Patrigo, Appeals Specialist, and Carla Richard, Appeals Manager, 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, Baton Rouge, LA/Biloxi, MS; Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and John Ebersole and Brock Pierson, 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) and **SULLIVAN**.¹

¹ Judge Howard A. Pollack, who was a member of the arbitration panel in this case, has retired since the panel issued its decision in this case. Because this opinion addresses a motion for reconsideration of that decision, no new judge has been added to the panel.

The Louisiana Department of Natural Resources (LDNR), through the Coastal Protection and Restoration Authority, moves the arbitration panel to reconsider its decision in this case. *See Louisiana Department of Natural Resources*, CBCA 4984-FEMA, 16-1 BCA ¶ 36,321. LDNR maintains that the panel did not address one of the issues the applicant raised in its request for arbitration, which it characterizes as being that Louisiana's Coastal Barrier Resource System "and/or the individual islands making up the System are in fact natural features that have been improved and maintained," and therefore eligible for a public assistance grant under the Federal Emergency Management Agency's (FEMA's) regulations regarding disaster assistance. *See* 44 CFR pt. 206, subpt. G (2005). LDNR maintains further that the panel erred in not permitting oral argument on this matter, and in not delaying proceedings until LDNR received from FEMA documents it had sought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (2012). LDNR asks us to reopen the case to consider this issue, which it believes to be outstanding, and to permit oral argument and further documentation on the issue. The State of Louisiana, the prospective grantee, supports this request.

FEMA opposes the motion. It maintains that the panel has no authority to modify its decision, that the panel ruled on all issues which were before it, and that the panel's resolution of the case affords LDNR an opportunity to make oral argument and present additional documentation as to matters which are susceptible to further arbitration.

We agree with FEMA that we have no authority to grant reconsideration of our decision. LDNR asserts that the motion is appropriate under the Rules of Procedure of the Civilian Board of Contract Appeals, and in particular, the Board's Rule 26 ("Reconsideration; amendment of decisions; new hearings"), 48 CFR 6101.26 (2015). This rule is applicable to contract dispute cases, *see* 48 CFR pt. 6101, not arbitrations of FEMA's public assistance determinations. *City of New Orleans, Louisiana*, CBCA 3344-FEMA, 13 BCA ¶ 35,362, at 173,542 ("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."). The latter type of cases, which include this one, involve arbitration rather than adjudication, and grants rather than contracts; they are governed by regulations established by FEMA in 44 CFR 206.209 (2009). *Id.* These regulations provide that "[a] decision of the majority of the panel shall constitute a final decision, binding on all parties. Final decisions are not subject to further administrative review." 44 CFR 206.209(k)(3). No provision is made in the regulations for reconsideration.

The regulation just cited is consistent with the general rule that once an arbitrator issues a decision, he has discharged his duty and has no continuing authority to revise the decision. *See, e.g., International Brotherhood of Electrical Workers, Local Union 824 v. Verizon Florida, LLC*, 803 F.3d 1241, 1245-46, 1248 (11th Cir. 2015); *Colonial Penn*

Insurance Co. v. Omaha Indemnity Co., 943 F.2d 327, 331, 333 (3d Cir. 1991). There are narrow exceptions to this rule – situations in which a mistake (such as an obvious error in arithmetic computation) is apparent on the face of the award, the decision contains an ambiguity which requires clarification, or the decision does not adjudicate an issue which was submitted to the arbitrator. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010); *Legion Insurance Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999); *Colonial Penn*, 943 F.2d at 332. Additionally, the parties may by contract authorize an arbitrator to reconsider his decision, and reconsideration may be authorized by “external law.” *International Brotherhood*, 803 F.3d at 1249; *T.Co Metals*, 592 F.3d at 342-43; *Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995); *Newman v. Corrado*, 897 F.2d 1579, 1582-83 (Fed. Cir. 1990).

Although LDNR does not address either the general rule or the exceptions to it, fortuitously for the applicant, one of the arguments it has made fits within one of the narrow exceptions to the rule: the panel did not address one of the issues presented to it. The argument, however, is not well taken. Under FEMA’s regulations, as we held, a “system” cannot qualify as a “public facility” which is eligible for a public assistance grant unless it is “built or manufactured, or an improved and maintained natural feature.” The parties’ written presentations made clear that a significant percentage of the funds sought are for fill material, dune vegetation, and sand fencing to be added, not replaced, on a majority of the Louisiana barrier islands. These additions cannot be construed as works which were built, manufactured, or improved and maintained natural features prior to the hurricanes. Thus, although there may be some works on some of the islands which were built, manufactured, or improved and maintained natural features before the disasters struck, the islands, as a system, cannot be so characterized. Because the application for public assistance was made for the system as a whole, it cannot be granted. This is a conclusion which is a consequence of the legal analysis we made, after having considered the parties’ presentations. LDNR has not identified what it might have said or shown us in documentary form that might affect the conclusion, if it had been given a chance to supplement its presentation, so it has suffered no prejudice by not having been able to supplement in either of these ways. This conclusion fully disposes of LDNR’s contention that the islands as a system may receive a grant.

The extent to which some works on some individual islands may meet the requirements for public assistance is clearly in dispute, however. We determined that to promote an economical consideration of this matter, “the prudent course of action is for LDNR to exercise its rights by making new, separate applications for grants for ‘public facilities’ on each of the islands for which it believes natural features were improved and maintained, seeking grants from FEMA in response to each of these individual applications.” This resolution permits LDNR to pursue its position that “the individual islands making up

the [Louisiana Coastal Barrier Resource] System are in fact natural features that have been improved and maintained,” and therefore eligible for a public assistance grant. 16-1 BCA at 177,082. If LDNR proceeds as we have permitted it to do, and it seeks arbitration on any or all of its applications, it will have an opportunity to present oral argument and documentation (including documents received from FEMA through Freedom of Information Act requests) in the course of the arbitration(s).

We consequently decline to accept LDNR’s invitation to reconsider our decision in this case.

STEPHEN M. DANIELS
Board Judge

MARIAN E. SULLIVAN
Board Judge