



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 6, 2017

CBCA 5549-FEMA

In the Matter of ROMAN CATHOLIC CHURCH
OF THE ARCHDIOCESE OF NEW ORLEANS

Michael G. Gaffney of Gaffney & Gaffney, Metairie, LA, counsel for Applicant.

Mark S. Riley, Deputy Director, and Carla Richard, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Michelle Buckalew, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and John Dimos, 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 **LESTER**, **RUSSELL**, and **BEARDSLEY**.

On November 18, 2016, the Roman Catholic Church of the Archdiocese of New Orleans (ANO) submitted a request for arbitration (RFA) to the Board pursuant to section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), and its implementing regulation, 44 CFR 206.209 (2016). The Federal Emergency Management Agency (FEMA) subsequently filed a motion to dismiss the ANO's RFA, arguing that the allegations contained in the RFA are too vague and conclusory to satisfy the statutory and regulatory requirements for an RFA. For the reasons set forth below, we deny FEMA's motion.

Background

In 1984, the ANO converted a former convent into a shelter for homeless women and their children, currently known as “Hotel Hope.” The ANO ran the 6509 square foot facility as a shelter until August 29, 2005, when six feet of sea water flooded the first floor of the building as a result of Hurricane Katrina. The parties agree that the first floor of the facility suffered significant damage as a result of the inundation of the brackish water. The ANO also contends that winds from Hurricane Katrina peeled the roof from the building, allowing rainwater to cause extensive damage to the roof insulation, ceiling, and floors on the second floor. FEMA maintains that the second floor sustained only minor damage.

Under the Public Assistance program, authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2006), FEMA provides grants to the State of Louisiana to assist in the response to, and recovery from, Presidentially-declared emergencies and major disasters, including permanent restoration of infrastructure. Louisiana, as the grantee, issued subgrants to various entities needing assistance in the recovery from Hurricane Katrina, including a subgrant through the Governor’s Office of Homeland Security and Environmental Preparedness (GOHSEP) to the ANO for Hotel Hope. FEMA does not dispute that the ANO is an eligible applicant for public assistance funding or that Hotel Hope is an eligible facility.

FEMA originally funded project worksheet (PW) 11678 showing a cost estimate for repairs to Hotel Hope of \$366,531, but, following additional submissions and review, has subsequently increased its estimate to \$440,846.

The ANO engaged a local architectural firm to assess and quantify the damage caused by Hurricane Katrina to Hotel Hope. That firm ultimately estimated a cost to repair the damage that the hurricane caused to the facility of \$997,051 and, in addition, estimated a cost to replace the facility of \$1,572,112.89. The GOHSEP prepared its own analysis of the cost to repair the disaster damage, which identified a repair cost of \$997,220, and does not appear to question the ANO’s replacement cost estimate.

On November 18, 2016, the ANO submitted a twenty-two page RFA to the Board, requesting that an arbitration panel find that the cost of the repairs necessary to restore Hotel Hope to its pre-Katrina condition is greater than fifty percent of the replacement cost of the building, which would entitle the ANO to a public assistance grant in the amount of the

building's replacement cost rather than simply the cost of facility repairs.¹ In the RFA, the ANO identified what it described as errors in FEMA's analysis of costs, alleging that, in conducting the fifty-percent analysis, FEMA improperly applied specific requirements of its Cost Estimating Format (CEF) for Large Projects Instructional Guide and its CEF Standard Operating Procedure. The ANO also described the basis of the alleged errors. In addition, the ANO described the manner in which FEMA allegedly had improperly estimated the cost of a proposed cost savings project in particular rooms in Hotel Hope rather than (as the ANO alleged FEMA should have done) estimating the cost of disaster damage; had misapplied its CEF escalation factor in calculating disaster damage; had assumed that the Louisiana Office of State Fire Marshal would waive certain life-safety codes in any repair of the homeless shelter; had determined that the ANO and GOHSEP had intermingled "union shop" and "open shop" labor rates in an inconsistent manner in their repair and replacement estimates; had failed to recognize certain costs associated with complying with the Americans with Disabilities Act (ADA); had misapplied certain building codes in its estimates; had failed to take into account increased repair costs required under the National Historic Preservation Act and the Department of the Interior's Standards for the Treatment of Historic Properties; and had determined that particular damages were not caused by Hurricane Katrina, but, instead, by other factors. Accompanying the RFA were fifteen exhibits, which included, among other things, cost estimates from the local architectural firm that the ANO used and from the GOHSEP, a copy of the relevant project worksheet (PW 11678, version 6) identifying the costs at issue, and a side-by-side comparison of the FEMA and GOHSEP CEFs.

FEMA subsequently filed its motion to dismiss the RFA because it allegedly fails to provide sufficient information to enable FEMA or the arbitration panel to identify and respond to the facts or law in dispute.

Discussion

Pursuant to 44 CFR 206.209(e), an RFA "must contain a written statement and all documentation supporting the position of the applicant," *id.* 206.209(e)(1), and "should describe [the applicant's] claim with sufficient detail so that the circumstances of the dispute

¹ FEMA regulations delineate when a public assistance grant should be for repairs to a facility and when, instead, it should be for facility replacement. "A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster." 44 CFR 206.226(f)(1). "If a damaged facility is not repairable . . . , approved restorative work may include replacement of the facility." *Id.* 206.226(f)(2).

are clear to the arbitration panel.” *Id.* 206.209(e)(5) (emphasis added). The supplementary information in the preamble to the final rule for that regulation, as set forth in the Federal Register during the rule’s promulgation, reiterates the requirements for, as well as the permissive elements of, the content of the RFA:

The request should include all information necessary for the arbitration panel to make an informed decision. The request should clearly set out the applicant’s/subgrantee’s position. The parties are encouraged to describe their claims in sufficient detail to make the circumstances of the dispute clear to the arbitration panel.

74 Fed. Reg. 44,761, 44,763 (Aug. 31, 2009). In addition, the preamble lays out the extent to which documentation may be used to support an RFA:

The applicant/grantee may provide supporting documentation not previously included in the project worksheet or the application to FEMA. There is no limit on the amount of documentation that may be provided.

Id.

FEMA asks us to dismiss this entire arbitration because, according to FEMA, “the Applicant’s allegations are so vague and conclusory[] that they present no supporting law or facts,” that FEMA is “challenged in responding to such allegations without any specificity from the Applicant,” and the arbitration panel will be unable to understand the ANO’s claims. Motion at 2. FEMA asserts that the ANO has woven “[o]verwhelming vague and conclusory allegations” throughout the RFA “such that FEMA is not on proper notice of [the ANO’s] claims against it.” *Id.* at 6.

We review a motion by FEMA to dismiss an RFA in the same manner that we review a motion to dismiss an appeal for failure to state a claim upon which relief can be granted. *St. Tammany Parish Government*, CBCA 3872-FEMA, 14-1 BCA ¶ 35,735, at 174,905. In evaluating such a motion, we apply the same standard applicable to a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *CH2M Hill Hanford Group, Inc. v. Department of Energy*, CBCA 708, 08-2 BCA ¶ 33,871, at 167,666. Under that standard, “[w]e assume that all well-pled factual allegations plausible on their face are true and indulge all reasonable inferences in favor of the non-movant.” *St. Tammany Parish*, 14-1 BCA at 174,905. Further, “[i]n considering a motion to dismiss for failure to state a claim, ‘materials attached to a complaint may be considered as exhibits that are part of the complaint for determining the sufficiency of the pleadings.’” *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789

(quoting *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 n.4 (Fed. Cir. 2006)); see Fed. R. Civ. P. 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”). Applying that same rationale to a review of the sufficiency of an RFA, we will evaluate the sufficiency of an RFA by reference to (1) the descriptive allegations contained in the RFA itself, and (2) the documents accompanying the RFA, see *St. Tammany Parish*, 14-1 BCA at 174,905 (examining documents accompanying the RFA to determine the sufficiency of the RFA’s allegations), even where the accompanying documents were not previously provided or made available to FEMA as a part of a prior submission and exchange process. See 74 Fed. Reg. at 44,763.

Based upon our review of the RFA and its accompanying documents, we can find no valid basis upon which to dismiss this matter for failure to state a claim. We recognize that an applicant’s “obligation to provide the ‘grounds’ of [its] ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Factual allegations must be enough to raise a right to relief above a speculative level.” *Id.* Nevertheless, neither a complaint nor an RFA must contain “detailed factual allegations.” *Id.* Certainly, pursuant to FEMA’s regulations, an applicant is *entitled* to provide the Board with detailed factual allegations and supporting documentation. See 74 Fed. Reg. at 44,763. As set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure, though, a pleading that sets forth a claim for relief is only *required* to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

The ANO has provided us and FEMA with the necessary information here. To the extent that FEMA believes that it needs more information about the ANO’s alleged facts than identified in the written RFA itself, there are analytical documents accompanying the RFA that shed additional light on the ANO’s positions. Although we recognize FEMA’s confusion about the amount of the ANO’s requested relief (a request for \$2.1 million, an amount seemingly in excess of the replacement cost valuation that the ANO’s analyst created), questions about the ANO’s permissible dollar recovery for damage to Hotel Hope from Hurricane Katrina do not equate to a failure to state any claim at all and do not warrant dismissal of the entire arbitration request. We will leave it to the ANO to establish entitlement to its claimed quantum at the hearing of this matter.

Decision

For the foregoing reasons, FEMA's motion to dismiss is denied.

HAROLD D. LESTER, JR.
Board Judge

BEVERLY M. RUSSELL
Board Judge

ERICA S. BEARDSLEY
Board Judge