



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 8, 2018

CBCA 5933-FEMA

In the Matter of PLAQUEMINES PARISH GOVERNMENT

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Before the arbitration panel consisting of Board Judges **HYATT**, **VERGILIO**, and **GOODMAN**.

On November 17, 2017, applicant, Plaquemines Parish Government, submitted to the Board a request for arbitration of a determination made by the Federal Emergency Management Agency (FEMA). The matter arises from FEMA's denial of certain expenses claimed by the Parish under project worksheet (PW) 3227, version (V)7, for the actual out-of-pocket costs incurred by it for the completion of construction of a new facility to consolidate and replace a firehouse and an emergency medical services building that were heavily damaged as a result of Hurricane Katrina. The Parish seeks the requested public assistance funding pursuant to section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164, and its implementing regulation, 44 CFR 206.209 (2016). The PW version in dispute is for the added costs the Parish incurred to complete the facility as a result of the default of the original contractor selected by the Parish and the subsequent bankruptcy of the bonding company.

Pursuant to 44 CFR 206.206, on October 15, 2015, applicant initially appealed the project officer's denial of the request for additional funding to the Regional Administrator, who considers first appeals for public assistance-related decisions. The Regional Administrator's decision was issued on October 16, 2017. Notice of that decision, provided by the grantee, Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), was received by applicant on October 25, 2017. Plaquemines Parish filed its arbitration request at the Board on November 17, 2017, in lieu of continuing with the second level appeal provided in 44 CFR 206.206(b)(2).

Also on November 17, 2017, FEMA filed a motion to dismiss the application, asserting that the Board lacks subject matter jurisdiction under 44 CFR 206.209(d)(1), which states that a request for arbitration shall be in lieu of filing or continuing an appeal under 202.206. Specifically, this provision states as follows:

(d) *Limitations* –

(1) *Election of remedies.* A request for arbitration under this section is in lieu of filing or continuing an appeal under § 206.206.

(2) *Final agency action under § 206.206.* Arbitration is not available for any matter that obtained final agency action by FEMA pursuant to § 206.206 prior to February 17, 2009. Arbitration is not available for determinations for which the applicant failed to file a timely appeal under the provisions of § 206.206 prior to August 31, 2009, or for determinations which received a decision on a second appeal from FEMA prior to February 17, 2009.

FEMA maintains that an applicant must exclusively elect an administrative appeal or arbitration. In this case, FEMA maintains that having elected to proceed under section 206.206, the Parish is precluded from pursuing arbitration.

The resolution of FEMA's motion turns on the interpretation of two relevant provisions. Section 206.206 of 44 CFR prescribes an administrative appeal for the review of any determination arising from an application for federal disaster assistance under a two-step process:

(b) *Levels of Appeal.*

(1) The Regional Administrator will consider first appeals for public assistance-related decisions under subparts A through L of this part.

(2) The Assistant Administrator for the Disaster Assistance Directorate will consider appeals of the Regional Administrator's decision on any first appeal under paragraph (b)(1) of this section.

44 CFR 206.206(b). Subsection 206.209(b) governs arbitration by the Board of public assistance determinations related to Hurricanes Katrina and Rita, for applications that exceed \$500,000, provided that:

(1) the applicant is eligible to file an appeal under § 206.206; or

(2) the applicant had a first or second level appeal pending with FEMA pursuant to § 206.206 on or after February 17, 2009.

Id. 206.209(b).

Although none of the parties actually cite to the decision, the issue raised here was squarely addressed and decided in *Baldwin County Board of Supervisors*, CBCA 2018-FEMA, 10-2 BCA ¶ 34,504. There, as here, the applicant had pursued an administrative appeal through the first level and then filed a request for arbitration at the Board. In that case, the majority rejected FEMA's contention that the applicant was limited to one of two separate alternatives – either the two-step administrative appeal process or arbitration – but could not start the administrative appeal process and then elect arbitration in lieu of continuing with a second level appeal under section 206.209(b).

The *Baldwin* majority provided cogent reasoning to support its conclusion that the applicant in that case was not barred from pursuing arbitration:

FEMA contends that because Baldwin County elected the administrative appeals process, it is now barred from requesting an arbitration. An applicant is allowed a two-step appeal process of FEMA determinations in which an appeal is first submitted to a Regional Administrator, and an appeal of the Regional Administrator's decision can be submitted to the Assistant Administrator of the Disaster Assistance Directorate. 44 CFR 206.206 (2009). An applicant, however, who “is eligible to file an appeal under § 206.206 . . . or . . . had a first or second level appeal pending with FEMA pursuant to § 206.206 on or after February 17, 2009” may request arbitration “in lieu of filing or continuing an appeal under [section] 206.206.” *Id.* 206.209. In this case, Baldwin County is requesting arbitration in lieu of continuing the appeal process, and its request for arbitration under such circumstances is not contrary to section 206.209.

The panel is not persuaded by FEMA's argument that the comments published with 44 CFR 206.209 would preclude Baldwin County from requesting arbitration after having commenced an appeal. The relevant portion of that commentary stated that "[t]he use of only one review procedure, arbitration or appeal, is more expeditious than two consecutive review procedures." 74 Fed. Reg. 44,762 (Aug. 31, 2009). Allowing Baldwin County to proceed with the arbitration process is not inconsistent with the expeditious resolution of this matter. The comments that accompanied the publication of 44 CFR 206.206 recognized that "[t]he first appeal to the Regional Director frequently gathers new information related to the issue that the Regional Director rules upon for the first time." 63 Fed. Reg. 17,109 (Apr. 8, 1998). It is reasonable to conclude that this panel is benefiting from the record and analysis that was developed during the appeal process. Also, an arbitration of this matter necessarily requires terminating the appeal process, which precludes Baldwin County from participating in two consecutive proceedings. Consequently, the Board does not find that Baldwin County's request for arbitration is contrary to the comments that accompanied the publication of 44 CFR 206.209.

10-2 BCA at 170,161-62 (footnote omitted). The analysis presented in *Baldwin* gives full effect to the language of the applicable provisions when read as a whole and is both cogent and persuasive. The Parish has properly filed an application for arbitration in lieu of continuing its appeal and, as such, the Board has authority to entertain its application.

This interpretation has been in place for nearly eight years now, yet FEMA has not undertaken to revise the applicable regulations to express more clearly the view it continues to espouse. We recognize that this is an arbitration, and that the rules of stare decisis are not strictly applicable. Nonetheless, a ruling such as this one, interpreting the scope of the Board's authority to entertain an application for arbitration, should not be open for reconsideration each time the issue arises, with the potential for conflicting results on the question of whether arbitration is available in lieu of continuing with an appeal depending on the individual constituency of a given panel.

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

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge

Because Plaquemines Parish Government (applicant) filed an appeal with the Federal Emergency Management Agency (FEMA) seeking review of an initial FEMA determination on an application for public assistance relating to Hurricane Katrina, I conclude that this panel is without the authority to resolve the arbitration request subsequently made by the applicant relating to that application and the FEMA determination on appeal.

Regulations establish the application procedures to obtain public assistance and the appeal and arbitration procedures to challenge a determination. 44 CFR 206.202, .206, .209 (2015) (referred to hereafter simply by the part and subpart number; e.g., 206.202). Two levels of potential appeal are available under the appeal procedures: a first-level appeal to the Regional Administrator, and a second-level appeal to the Assistant Administrator for the Disaster Assistance Directorate. 206.206(b). Such appeals must be filed within sixty days after receipt of a notice of the action that is being appealed. 206.206(c).

Effective in 2009, regulations also establish procedures to obtain arbitration regarding public assistance determinations related to Hurricane Katrina (and Rita). 206.209. There is an express limitation or election of remedies provision: "A request for arbitration under this section is in lieu of filing or continuing an appeal under 206.206." 206.209(d). An applicant may request arbitration, provided that (among various requirements):

- (1) the applicant is eligible to file an appeal under 206.206; or
- (2) the applicant had a first or second level appeal pending with FEMA pursuant to 206.206 on or after February 17, 2009.

206.209(b). Further, “An applicant under paragraph (b)(2) of this section must make a request for arbitration in writing and, if FEMA has not issued a decision on the appeal, submit a withdrawal of the pending appeal . . . by October 30, 2009.” 206.209(e)(2).

Well after 2009, FEMA made an initial determination on the here-disputed project assistance request related to Hurricane Katrina. On October 30, 2015, the applicant filed a first-level appeal with FEMA pursuant to regulation, 206.206. On November 16, 2017 (after receiving a decision on that first-level appeal, although that decision is not here material), the applicant requested arbitration from this Board regarding those FEMA determinations, referencing 206.209 as the underlying basis for this Board’s authority.

As of October 30, 2015, the applicant was eligible to file a first-level appeal, and opted to do so; the applicant did not seek arbitration at that time. Under the limitation, or election of remedies, provision, the applicant then became ineligible to seek arbitration at this Board. 206.209(d). That resolves this matter.

The other members of this panel, as did two other panel members in *Baldwin County Board of Supervisors*, CBCA 2018-FEMA, 10-2 BCA ¶ 34,504, *mot. for reconsideration denied*, 10-2 BCA ¶ 34,515, fail to give effect to the plain meaning of the regulations which govern this Board’s arbitration authority. Arbitration became an option on February 17, 2009, not a coincidental date in the regulations here discussed, with regulations finalized and effective August 31, 2009. After the effective date of the arbitration regulations, an applicant desiring to utilize the arbitration process on a determination with an appeal pending had to have withdrawn the appeal by October 30, 2009. The phrase “continuing an appeal” in the election of remedies provision means that for a then-existing appeal, an applicant could continue to utilize the appeal process or seek arbitration. After October 30, 2009, an applicant could not pursue an appeal and seek arbitration. Otherwise, there is no election or limitation.

The interpretation adopted by other panel members gives this applicant, who could have elected arbitration from the outset, far greater options than an applicant who had an appeal pending when the arbitration process first became available. That applicant would have had to withdraw a pending appeal by October 30, 2009. By a majority, this applicant is permitted to file a first-level appeal, get a decision on that appeal, and then pursue arbitration. The regulations dictate a different result, made clear by the election of remedies provisions and a FEMA release, FNF-09-036, dated August 6, 2009:

The arbitration process is in lieu of the current administrative appeals process. If an applicant requests arbitration, the applicant is agreeing to forgo seeking a formal appeal. However, applicants who have an appeal currently pending

may for a limited time elect to withdraw that appeal and have the matter reviewed by an arbitration panel. Such applicants will need to elect to do so by October 30, 2009.

The applicant could choose to appeal to FEMA or could seek arbitration, but not both.

This is arbitration, such that panel decisions are not precedential. Establishing a consistent interpretation and application of provisions generally is preferable to inconsistent results. However, each arbitration award is subject to being vacated when the arbitrators exceed their powers. 9 U.S.C. § 10(a)(4) (2012). Therefore, an arbitration panel must determine its powers for each case. Here, there is no court or precedential determination that dictates the result. I conclude that this panel is without the authority to arbitrate this matter.

JOSEPH A. VERGILIO
Board Judge