



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 12, 2020

CBCA 6590-FEMA

In the Matter of MUNICIPALITY OF CABO ROJO

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Before the Arbitration Panel consisting of Board Judges **SOMERS** (Chair), **BEARDSLEY**, and **HYATT**.

Applicant, the Municipality of Cabo Rojo, Puerto Rico (Cabo Rojo), seeks arbitration of the Federal Emergency Management Agency's (FEMA) denial of Cabo Rojo's request for public assistance (PA) funding in the amount of \$264,200 for recovery efforts resulting from damage caused by Hurricane Maria in 2017. FEMA determined that only those municipalities identified by the Puerto Rico Environmental Quality Board to be without municipal waste removal services as of a certain date would be eligible to receive reimbursement of the cost of supplemental removal services as necessary to eliminate the immediate threat to public health and safety. Cabo Rojo was not identified as one of the eligible municipalities.

In response to Cabo Rojo's request for arbitration, FEMA argues that Cabo Rojo is not eligible for CBCA arbitration under 42 U.S.C. § 5189a (2018). Specifically, in cases

where the amount in dispute is over \$100,000 but under \$500,000, the applicant must be in a “rural area” as defined by the Federal Aviation Administration Reauthorization Act of 2018, at 42 U.S.C. § 5189a(d)(4). FEMA disputes that Cabo Rojo is in a rural area.

The panel decides this matter pursuant to the authority set forth in 42 U.S.C. §5189a(d). The panel conducted the arbitration in accordance with Board Rule 611 (48 CFR 6106.611 (2019)). For the foregoing reasons, we conclude that while Cabo Rojo is eligible for CBCA arbitration, Cabo Rojo has failed to present sufficient evidence to establish that it is entitled to be reimbursed for its expenses.

Background

A. Cabo Rojo’s Public Assistance Request

On September 20, 2017, winds, flooding, and storm surges caused by Hurricane Maria, a deadly category 5 hurricane, led to catastrophic damage throughout the Commonwealth of Puerto Rico (Puerto Rico), including complete destruction of the island’s electrical grid that resulted in an island-wide blackout. In addition, the island lost water, energy, and communications services for a lengthy period of time. As a result, the President declared a major disaster under FEMA-4339-DR-PR. The major disaster declaration authorized Public Assistance (PA) funding for all of Puerto Rico.

Due to the disruption of normal services, volumes of waste and debris accumulated in many municipalities, including Cabo Rojo.¹ Prior to the storm, some municipalities provided local waste collection while others, like Cabo Rojo, used a “pay-as-you-throw” waste disposal program. After Maria, Cabo Rojo suspended the “pay-as-you-throw” program and resumed municipal waste collection services. Contracting on an emergency basis with a private entity, Cabo Rojo entered into two separate contracts, the first of which lasted from September 22 through 25, 2017. The second contract was in effect from September 25, 2017, through March 31, 2018.

¹ Cabo Rojo is located on the southwestern corner of Puerto Rico, the opposite side of the island from San Juan. Seventy-five percent of the Cabo Rojo territory is either natural forest reserve or a local agricultural reserve devoted to cattle grazing. Most of Cabo Rojo does not enjoy the benefit of a sewage disposal system.

In October 2017, Puerto Rico's Secretary of Health, noting that the accumulation of municipal waste in the absence of waste collection services created a public health hazard, asked FEMA for assistance. On October 22, 2017, FEMA agreed to reimburse certain domestic waste removal costs as emergency protective measures, stating:

FEMA has determined that reimbursement for the removal of domestic garbage placed in the public rights of way (ROW) in those municipalities where the services have not been restored is eligible for Public Assistance (PA) funding as an Emergency Measure (Category B). Domestic garbage removal will only be eligible for reimbursement until municipal waste removal service is restored or for the 60 days after the start of the incident periods (November 5, 2017 for Irma and November 16, 2017 for Maria) or whichever is sooner.

Under this policy, FEMA agreed to fund two different types of trash collection. Through a policy referred to as "one pass only" trash collection, FEMA agreed to fund the one time collection of trash, across the island, including reimbursing areas that had resumed municipal waste collection. For those municipalities where waste collection had not been restored, FEMA also agreed to fund the cost of collecting waste placed in the public rights-of-way up until November 16, 2017, so long as the municipalities provided documentation for all costs, locations, and debris removal. Initially, Puerto Rican authorities identified sixteen municipalities across Puerto Rico where waste collection had yet to be restored, subsequently adding three more municipalities. The authorities did not include Cabo Rojo among those eligible for additional funding of more than the one-pass trash collection.

As a result of the damage resulting from the storm, communication and travel across the island remained difficult. Authorities coordinating relief efforts did not visit Cabo Rojo until the second half of October 2017. In addition, the mayor of Cabo Rojo did not learn about the possibility of receiving funding beyond the "one pass only" trash collection until 2018.

Cabo Rojo submitted a request for PA funding to FEMA for \$264,000 for the "reimbursement of associated cost [sic] for the collection of debris and mixed solid waste generated from the damage [caused] by Hurricane Maria in the Municipality of Cabo Rojo." Cabo Rojo contends that sixteen other municipalities on the island received this reimbursement, and despite the fact that Cabo Rojo exercised due diligence in presenting enough evidence to establish that it had incurred additional costs, FEMA denied its request. Cabo Rojo appealed. On June 18, 2018, FEMA denied the appeal.

Discussion

Arbitration Authority

FEMA asserts that Cabo Rojo is ineligible for CBCA arbitration because it cannot be categorized as “rural.” Specifically, under 42 U.S.C. § 5189a, FEMA applicants are entitled to CBCA arbitration when the amount in dispute exceeds \$500,000, or when an applicant in a rural area has a dispute of over \$100,000. Cabo Rojo’s claim seeks more than \$100,000 but less than \$500,000. As such, Cabo Rojo must be considered to be a “rural area” in order to be eligible for arbitration.

To determine if Cabo Rojo is a rural area, we look to the plain meaning of the statute. The statute defines rural area as “an area with a population of less than 200,000 outside an urbanized area.” 42 U.S.C. § 5189a(d)(4). The statute, however, does not define “area” or “outside an urbanized area,” and FEMA has not issued regulations that define these statutory terms. Thus, how to determine if an applicant is outside an urbanized area is less than clear.

In a FEMA “Fact Sheet,”² FEMA states that it uses the “Am I Rural” online program/tool maintained by the Rural Health Information Hub to determine whether an applicant is rural. Through this tool, a user may enter a precise geographic location into an online map to determine whether an area is considered rural. The tool, however, provides inconsistent results. For example, the tool will identify one geographic point in Cabo Rojo as urban, but a different geographic point in Cabo Rojo as rural. In this case, because the applicant is the entire municipality of Cabo Rojo, this inconsistency is particularly difficult to reconcile.

In its oral argument, FEMA asserted that instead of using Am I Rural, it now applies the United States Census Bureau (Census Bureau) rural/urban distinctions to determine whether an area is outside an urbanized area.³ According to its publication, Defining Rural at the U.S. Census Bureau, the Census Bureau defines a rural area by first determining what is urban, and then designating the remaining areas as rural. United States Census Bureau, Defining Rural at the U.S. Census Bureau, 2 (2016). The Census Bureau, however, does not

² Federal Emergency Management Agency, Fact Sheet-Public Assistance Arbitration, (Dec. 21, 2018), <http://www.publicnow.com/view/97A309A8510B8FE8131088C58C74B27FE70AF2F3?2018->.

³ Nothing in the record indicates that FEMA has publicized, formalized, or codified this policy.

individually classify Cabo Rojo as rural or urban and does not classify the areas beside or next to Cabo Rojo as urban or rural. The Census Bureau instead classifies as urban the multi-city area of San Germán—Cabo Rojo—Sabana Grande.⁴ Thus, this tool is also not useful in determining if Cabo Rojo meets the definition of rural. Moreover, to define what is urban, the Census Bureau applies a population density analysis, and an area with a population of over 50,000 people is considered an “urbanized area.” *Id.* at 2-3. Using FEMA’s interpretation that “outside an urbanized area” means not within an urban area, an applicant within an area with a population of over 50,000 would never be identified as rural, even though the statute identifies as rural an area with a population under 200,000. *Id.* Using the Census Bureau distinction, therefore, would result in eliminating the statutory arbitration right for applicants in areas with populations between 50,000 and 200,000 people, such as Cabo Rojo.

By formalizing the right of arbitration before the CBCA through statute, Congress clearly intended to provide applicants an opportunity to have their disputes heard by an objective entity through a fair and impartial arbitration. 42 U.S.C. § 5189a(c); Rule 613 (Arbitration decisions are “primarily for the parties, [are] not precedential, and should concisely resolve the dispute.”). Because the statutory right to appeal a decision for arbitration is a remedial benefit to applicants, this panel finds liberal construction of the statutory ambiguity most compelling. *See* 1 William Blackstone, *Commentaries* *1, *59 (“The fairest and most rational method to interpret the will of the legislator . . . [is] the words, the context, the subject-matter, the effects and consequences, the spirit and reason of the law.”).

In the absence of rules interpreting the statute in a manner consistent with the underlying law, *see* 42 U.S.C. § 5189a(c), we defer to the statutory goal of providing “the fair and impartial consideration of appeals,” *id.*, and we consider the evidence presented. Here, we find that there is enough evidence that Cabo Rojo meets the statutory definition of a rural area to justify hearing the arbitration. For these reasons, we deny FEMA’s motion to dismiss.

Funding Eligibility

As discussed above, Cabo Rojo claims eligibility for \$264,000 for funding domestic trash disposal services following Hurricane Maria. FEMA funded domestic waste removal services based on a public health risk across Puerto Rico as a one-pass solution to the public

⁴ See U.S. Census Bureau, 2010 Census Urban and Rural Classification and Urban Area Criteria, List of 2010 Census Urban Area, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html> (last revised Dec. 2, 2019).

health threat, which Cabo Rojo received. FEMA also funded additional disposal services for areas that remained without municipal service after the one pass solution was implemented. Cabo Rojo did not receive the additional funding because it was not included on a list prepared by Puerto Rican government officials.

The weight of evidence before the panel does not indicate that Cabo Rojo was without municipal waste services, or that the remaining trash in Cabo Rojo was the type of domestic waste public health risk that FEMA funding was intended to rectify. Both testimony and trash collection records indicate that waste removal had resumed within a short period following Hurricane Maria. The limited photographic evidence and testimony describing the content of the waste also do not clearly show that the remaining trash after the one pass service was domestic waste rather than ineligible hurricane debris. No contemporaneous documentation exists to support Cabo Rojo's claim.

Under 42 U.S.C. § 5189a(a), the CBCA may review FEMA decisions on applicant eligibility. The Cabo Rojo Government worked diligently to regain disposal services in the area, while those services may not have been regained in other municipalities as quickly. The reimbursement of other municipalities, however, does not entitle Cabo Rojo to reimbursement. Without more, the evidence does not support its claim, and we find that Cabo Rojo is not eligible for additional FEMA reimbursement of waste disposal services.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge