



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 9, 2022

CBCA 7416-FEMA

In the Matter of STARTEX-JACKSON-WELLFORD-DUNCAN WATER DISTRICT

Wendy Huff Ellard of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; and Danielle Aymond of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Baton Rouge, LA, counsel for Applicant.

Elizabeth Rice Polk, South Carolina Emergency Management Division, West Columbia, SC, counsel for Grantee.

Shahnam Thompson, 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 **VERGILIO, KULLBERG, and SULLIVAN.**

Startex-Jackson-Wellford-Duncan Water District is the applicant in this arbitration under 42 U.S.C. § 5189a(d) (2018) involving the Federal Emergency Management Agency (FEMA) and a declared disaster. The applicant—supported by the grantee, the South Carolina Emergency Management Division—seeks to overturn the latest determinations by FEMA to deny public assistance (PA) funding; FEMA has deemed the applicant ineligible because of its failure to allow FEMA to complete its required review of environmental and historic preservation (EHP) before beginning construction. This arbitration, which follows an earlier arbitration in which these issues were not ripe for resolution, *Startex-Jackson-Wellford-Duncan Water District*, CBCA 7219-FEMA, 22-1 BCA ¶38,010 (2021) (providing general background for this case), is resolved on the written record. Based upon our review of that record, we uphold FEMA’s denial. This decision is “the final administrative action on the arbitrated dispute.” Rule 613 (48 CFR 6106.613 (2021)).

Background

A declared disaster of February 2020 damaged the spillway of a dam owned and maintained by applicant. The water levels in the dam were lowered until the repair work could be completed. In April 2020, FEMA notified applicant that FEMA would need to conduct an EHP review before PA funds could be granted for the repair of the spillway. FEMA Timeline of Events.¹ In September, the project entered the queue for EHP approval. The following month, work to repair the facility began. In November 2020, the United States Army Corps of Engineers (USACE) issued a permit stating: “Once project construction is initiated, it must be carried out to completion.” In December, FEMA sought additional information to further the EHP review and, upon learning that construction had begun, advised applicant to cease construction until FEMA completed its EHP. The grantee and an engineering firm hired by the applicant concluded that it was unsafe to stop the repair work. By mid-March 2021, most of the excavation was complete and additional work to repair the spillway commenced. In June 2021, FEMA denied the request for PA because FEMA could not complete the EHP reviews and “a required environmental assessment” had not been completed before construction began. Request for Arbitration, Exhibit 1 at 3.

Discussion

As an element of providing funding, FEMA is charged with ensuring that each approved project “complies with applicable Federal [EHP] laws and their implementing regulations, and applicable [executive orders].” Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 8. As indicated in the PAPPG’s Appendix A and stated by a declarant in a witness statement, whether this project is viewed as one for repairs or improvement, FEMA must consider thirty different statutes, regulations, and executive orders, including those for environmental concerns. *See id.* app. A. The PAPPG advises that “[t]he Applicant needs to make every effort to afford FEMA the opportunity to perform EHP reviews prior to the start of construction for any Permanent Work project. Proceeding with Permanent Work before FEMA completes EHP reviews jeopardizes PA funding.” PAPPG at 85. And, “[i]f the Applicant begins construction work before FEMA completes its EHP review, the Applicant will jeopardize PA funding for that project. FEMA generally cannot conduct consultation with resource agencies after the Applicant initiates work on a project

¹ The panel requested that the parties prepare a timeline of key events. Although FEMA provided no citations to the record, the document that was generated as a result of an Environmental Planning and Historic Preservation scoping meeting in April 2020 does not state a need for EHP review, based on information presented to date. FEMA Response, Exhibit 7.

because those agencies lose the ability to consider alternatives that would avoid, minimize, or mitigate adverse effects to the environment or historic properties.” *Id.* at 86.

The panel upholds FEMA’s denial of PA funds because the required EHP reviews were not completed before the project commenced. FEMA stopped its review because it could not engage with the public and affected tribes concerning the project and any possible effects once the construction was underway. With the project underway, alternatives could not be considered or weighed. While we understand applicant’s decision to continue with construction in December 2020, despite FEMA’s warning about the need for an EHP review, applicant cannot now avoid the consequences of that election.

The reviews and permitting conducted by the USACE are not sufficient substitutes for FEMA’s analysis, given that the considerations and scope of review conducted by the USACE are more limited than those for FEMA, which considers other environmental statutes and requirements for Stafford Act PA funding.

Applicant also provides the report of an engineering firm that evaluated the scope of the project within FEMA’s EHP compliance process and determined that the project complied with all applicable requirements. While this analysis is useful, it would have been helpful if applicant had provided it prior to beginning construction and allowed FEMA to evaluate it as part of its EHP review. The report is neither determinative nor a substitute for FEMA’s analysis.

Finally, applicant and grantee argue that FEMA should have exercised its discretion to grant PA funds in this situation. The panel does not fault FEMA for choosing not to provide funding.

Decision

The panel upholds FEMA’s determination to deny PA funding.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge