



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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June 24, 2024

CBCA 8052-FEMA

In the Matter of DAMERON HOSPITAL ASSOCIATION

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Jennifer Bollinger, Chief Counsel, Carl DeNigris, Assistant Chief Counsel/Acting Deputy Director, and Michael Romero, Counsel, Governor's Office of Emergency Services, Mather, CA, counsel for Grantee; and Eli Owen, Assistant Director, Fan Jia, Infrastructure Branch Chief, Robert Larsen, Public Assistance Officer, and Courtney Day and Destiny Saechou, Associate Governmental Program Analysts, Governor's Office of Emergency Services, Mather, CA, appearing for Grantee.

Maureen Dimino, 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 **SHERIDAN**, **O'ROURKE**, and **KANG**.

**KANG**, Board Judge, writing for the Panel.

Applicant, Dameron Hospital Association (Dameron), sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) as to eligibility for public assistance (PA) funding to reimburse costs for responding to the COVID-19 pandemic. FEMA denied Dameron's request for public assistance (RPA) because it was not timely submitted. The grantee here is the California Office of Emergency Services (Cal OES). We find applicant is not eligible for PA because it did not timely submit

its RPA and because no extenuating circumstances beyond applicant's control merit consideration of the late request.

### Background

Congress enacted the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) to provide "assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [major] disasters." 42 U.S.C. § 5121(b). The Stafford Act is "designed to assist the efforts of [eligible entities affected by major disasters] in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas." *Id.* § 5121(a).

On March 13, 2020, the President declared the COVID-19 pandemic a nationwide emergency and issued emergency and disaster declarations for each state and territory under the Stafford Act. For California, FEMA issued EM-3428-CA on March 13, 2020, and DR-4482-CA on March 22, 2020, which established the disaster incident period as January 20, 2020, to May 11, 2023. *See* FEMA DR-4482-CA, <http://www.fema.gov/disaster/4482> (last visited June 20, 2024); FEMA EM-3428-CA, <http://www.fema.gov/disaster/3428> (last visited June 20, 2024).

Dameron is a public non-profit hospital in San Joaquin County, California. Applicant states that, in 2019, it was "financially struggling" and facing difficulties in providing medical services to its community. Request for Arbitration (RFA) at 10. On January 1, 2020, Adventist Health, a not-for-profit healthcare system, "assumed management" of Dameron. *Id.* Dameron states that the COVID-19 pandemic caused medical staffing shortages and additional financial burdens. *Id.* at 12. Dameron asserts that it also experienced "internal struggles related to transition of operations" and "several leadership changes" during the pandemic. *Id.* These changes included the appointment of five different chief financial officers during the period of January 1, 2020, to October 2022, as well as the departure of other senior leaders. *Id.* at 13-14. In addition to these challenges, Dameron was issued a "90 Day Termination Notice" from the Centers for Medicare and Medicaid Services (CMS) on June 9, 2022, that required responses to a potential termination of applicant's participation in the Medicare program. *Id.* at 21-23.

On March 21, 2020, FEMA issued a memorandum to its regional administrators concerning the deadline for submission of RPAs for reimbursement of eligible COVID-19 costs. FEMA's Exhibit 5. The memorandum stated that enforcement of the regulatory requirement to submit RPAs within thirty days of the declaration of a disaster was "not appropriate" in light of the "unprecedented nature of the national emergency declaration." *Id.* For that reason, the deadline would "remain open for the duration of the Public Health

Emergency, as declared by the Secretary of the U.S. Department of Health and Human Services, unless an earlier deadline is deemed appropriate by the Assistant Administrator, Recovery Directorate.” *Id.*

On April 1, 2022, FEMA issued guidance stating that the deadline for submission of RPAs for COVID-19 funding would be July 1, 2022. FEMA’s Exhibit 11 at 1. The guidance explained that “FEMA will develop and issue an interim policy that provides guidance . . . on the implementation of the established deadlines. This policy will be posted for public comment and stakeholder input prior to finalization and issuance.” *Id.* at 2. On June 13, 2022, FEMA issued guidance regarding various deadlines for the COVID-19 PA process, including the July 1, 2022, deadline for submitting RPAs. FEMA’s Exhibit 3 at 2.

Dameron did not submit an RPA by the July 1, 2022, deadline. Applicant states that it “was informed of the July 1, 2022[,] RPA deadline on December 15, 2022[,] and completed the RPA that same day.” Request for Arbitration at 14, 24; FEMA’s Exhibit 8 at 5. Dameron does not explain how it learned of the deadline. On December 22, 2022, applicant submitted to Cal OES its RPA and a request to FEMA for an extension of the July 1, 2022, RPA deadline. Applicant’s Exhibit 17 at 1. On December 23, Cal OES forwarded the RPA and request to the FEMA regional administrator. FEMA’s Exhibit 8 at 1.

On June 21, 2023, FEMA denied Dameron’s request, finding that Dameron’s lack of awareness of the RPA deadline was not a circumstance beyond its control that merited an extension of time for submitting its RPA. FEMA’s Exhibit 21 at 1. On September 8, 2023, Dameron filed a first-level appeal of the denial of the request. FEMA’s Exhibit 8 at 1. On January 22, 2024, FEMA denied the first-level appeal, finding again that there were no extenuating circumstances beyond applicant’s control that merited an extension of time. Applicant’s Exhibit 3 at 3.

Dameron filed this request for arbitration on March 22, 2024. The parties elected to conduct the arbitration based on the record submitted to the panel. Rule 611 (48 CFR 6106.611 (2023)).

### Discussion

This arbitration concerns whether FEMA should waive the July 1, 2022, deadline and accept Dameron’s late-submitted RPA. We address two primary issues: (1) FEMA’s contention that Dameron is not an applicant for PA and is therefore not eligible for arbitration of this dispute; and (2) Dameron’s argument that the deadline should be waived because its RPA was submitted late due to extenuating circumstances beyond its control. For the reasons discussed below, we find Dameron is an eligible applicant for purposes of

pursuing arbitration but that there are no extenuating circumstances beyond applicant's control that merit waiver of its failure timely to submit its RPA.

In arbitration matters, the Board reviews an applicant's eligibility for PA de novo. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980. This review extends to determinations of issues of fact. *Harris County, Texas*, CBCA 6909-FEMA, 21-1 BCA ¶ 37,754, at 183,268 (2020).

Section 301 of the Stafford Act allows federal agencies administering an assistance program to “modify or waive, for a major disaster, such administrative conditions for assistance as would otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster.” 42 U.S.C. § 5141. FEMA's regulations provide that deadlines for submitting RPAs may be extended where “the recipient justifies and makes a request in writing” and where the “justification [is] based on extenuating circumstances beyond the recipient's [grantee's] or subrecipient's [applicant's] control.” 44 CFR 206.202(f)(2) (2023); *see also* Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 130.<sup>1</sup> In interpreting this regulation, we look to whether there were “circumstances beyond [the applicant's] control that prevented [it] from proceeding . . . in a proper fashion.” *Vista on 5th Corp.*, CBCA 7691-FEMA, 23-1 BCA ¶ 38,356, at 186,269 (quoting *Community Dental Services v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002)).

#### I. Dameron is a PA Applicant Eligible for Arbitration of this Dispute

FEMA requests that we dismiss this matter, arguing that the dispute is not eligible for arbitration under the Stafford Act. FEMA contends that only applicants may seek arbitration and that Dameron is not an applicant for purposes of PA funding because it did not submit a timely RPA through the FEMA Grants Portal. We find no merit to this argument.

In *Housing Preservation Trust, Inc.*, CBCA 7517-FEMA, 23-1 BCA ¶ 38,267, an arbitration panel found that an entity seeking a waiver of an RPA timeliness deadline was not an applicant for purposes of seeking arbitration because it did not submit an RPA. Rather, the entity sought “a determination that the deadline to file, which has long since passed, should be extended.” *Id.* at 185,807. In contrast, a different arbitration panel found in *Vista on 5th Corp.*, 23-1 BCA at 186,269, that an entity seeking a waiver of an RPA timeliness

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<sup>1</sup> This version of the PAPPG applies to disasters declared on or after August 23, 2017, but before June 1, 2020. *See* PAPPG (June 2020) at 12; PAPPG (Apr. 2018) at vii.

deadline was an applicant because it submitted an RPA and sought consideration of that late submission. In distinguishing *Housing Preservation Trust*, the panel explained, “Vista has submitted an RPA, albeit a late one.” *Id.*

Guidance issued by FEMA on April 10, 2020, and June 13, 2022, stated that RPAs must be submitted through FEMA’s online Grants Portal. FEMA’s Exhibits 3 at 2, 6 at 1-2. FEMA argues, in essence, that Dameron’s failure to comply with the requirement to submit its RPA through the Grants Portal means that the RPA was never submitted.

We conclude that Dameron’s efforts here are similar to those in *Vista on 5th* in that it prepared and submitted an untimely RPA. Unlike the purported applicant in *Housing Preservation Trust*, Dameron is not simply seeking a declaration by the panel that FEMA should allow the submission of an RPA at some later date.<sup>2</sup> For these reasons, it is sufficient that Dameron submitted the RPA to Cal OES and not through the Grants Portal.

Our conclusion is consistent with the definition of applicant in FEMA’s regulations: “Applicant means a State agency, local government, or eligible private nonprofit organization, as identified in Subpart H of this regulation, submitting an application to the recipient for assistance under the State’s grant.” 44 CFR 206.201(a). This regulation broadly states that an applicant is an entity “submitting an application” to the state recipient

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<sup>2</sup> Decisions by other panels in other Stafford Act arbitrations are not binding precedent. Rule 613 (Arbitration decisions under the Stafford Act are “primarily for the parties, [are] not precedential, and should concisely resolve the dispute.”). We consider the decisions by other panels cited herein to be persuasive authority.

but does not specify that, to be an “applicant,” the application must be timely submitted.<sup>3</sup> *See id.*

Additionally, as noted above, the Stafford Act provides for “waiver of any rule of eligibility if the inability to meet such conditions [for eligibility] is a result of the major disaster,” 42 U.S.C. § 5141, and FEMA’s regulations provide that deadlines for submitting RPAs may be extended “based on extenuating circumstances beyond the recipient’s [grantee’s] or subrecipient’s [applicant’s] control.” 44 CFR 206.202(f)(2). Where FEMA rejects an entity’s RPA because it was submitted after the deadline, the act of seeking a waiver or extension of the deadline puts the entity squarely within the scope of arbitration provided under the Stafford Act. In sum, Dameron is eligible to seek arbitration of this dispute.

## II. Extenuating Circumstances Beyond Applicant’s Control

Dameron argues that FEMA should waive the July 1, 2022, RPA deadline and accept the request it submitted through Cal OES on December 23, 2022. Applicant raises three primary arguments: (1) Dameron was unaware of the deadline due to extenuating circumstances beyond its control; (2) FEMA’s establishment of the deadline was improper; and (3) FEMA has granted waivers in similar circumstances. We find no merit to any of these arguments.

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<sup>3</sup> We also note that, in the first appeal decision, FEMA referred to Dameron as an applicant and advised that it was eligible to file a second appeal with FEMA. “The Applicant may appeal this determination to the Assistant Administrator, Recovery Directorate, at FEMA Headquarters pursuant to 44 CFR § 206.206.” Applicant’s Exhibit 3 at 1. With regard to arbitration, FEMA stated in the first appeal decision that, “[a]lternatively, this determination may be eligible for arbitration by the Civilian Board of Contract Appeals (CBCA) . . . . To determine eligibility for arbitration, please review FEMA’s Arbitration Fact Sheet.” *Id.* at 2. FEMA’s regulations state that an “applicant” may file an appeal of a PA determination through the recipient to the FEMA Regional Administrator and that, in the event a first appeal is denied, the “applicant” may either file a second appeal with the FEMA Assistant Administrator for the Recovery Directorate or request arbitration from the CBCA. 44 CFR 206.206(b)(1)-(3). These regulations do not provide different definitions for “applicant” in connection with first and second appeals or arbitrations.

### A. Causes of the Missed Deadline

Dameron does not specifically argue that it was unable to prepare and submit its RPA by the deadline. Rather, applicant states that it was unaware of the deadline and that this lack of knowledge was excusable based on extenuating circumstances beyond its control.

Dameron states that its lack of knowledge of the deadline was the result of challenges posed by its pre-pandemic financial situation, its pre-pandemic change in management, numerous changes in leadership during the pandemic, burdens imposed by its response to CMS's termination notice, and the effect of the pandemic on its staffing and resources. RFA at 10-24; Applicant's Reply at 35-37. Applicant does not demonstrate that any of the circumstances directly caused its lack of knowledge of the RPA deadline. Moreover, the challenges described by applicant relate primarily to its organizational and financial challenges rather than circumstances beyond its control. While the pandemic may have added to these challenges, applicant does not demonstrate that the pandemic, or any other outside circumstances, caused its lack of knowledge.

Dameron also contends that it was unaware of deadlines because the grantee, Cal OES, did not notify it of the deadline. Other arbitration panels have found that the failure of a grantee to notify a potential applicant of information required for the successful submission of an RPA is not an extenuating circumstance that merits waiver of a deadline. *E.g., Vista on 5th Corp.*, 23-1 BCA at 186,269. In this regard, FEMA's regulations state that the justification for waiver of an RPA deadline must be supported by extenuating circumstances beyond the control of the grantee or applicant. 44 CFR 206.202(f)(2); PAPPG at 130. We therefore find that Cal OES's failure to notify Dameron does not merit waiver of the deadline.

In sum, applicant's lack of awareness of the July 1, 2022, RPA deadline was not caused by extenuating circumstances beyond its control that merit waiver of the deadline.

### B. Establishment of the July 1, 2022, Deadline

Dameron argues that FEMA unreasonably set the RPA deadline before the end of the COVID-19 public health emergency and that the agency's guidance regarding the July 1, 2022, deadline did not provide adequate time to submit an RPA. For these reasons, Dameron argues either that the deadline should not be enforced or that applicant's lack of knowledge of the RPAs should be waived.

As discussed above, FEMA initially advised, in March 2020, that the RPA deadline would remain open until the end of the public health emergency, unless a shorter deadline was announced. Dameron does not dispute that FEMA issued publically available guidance on April 1 and June 15, 2022, advising that the RPA deadline would be July 1, 2022. While the April 1 guidance advised that further details about PA funding deadlines would be forthcoming, it did not state that the July 1 deadline for RPAs was uncertain. Thus, both the April 1 and June 15 guidance provided prospective applicants notice of the July 1 deadline. Nothing in the record regarding FEMA's establishment of the deadline shows that Dameron's lack of knowledge was due to extenuating circumstances beyond its control that merit a waiver of the deadline.<sup>4</sup>

### C. Other Waivers

Dameron contends that FEMA has waived the RPA deadline for other applicants who requested COVID-19 PA under circumstances similar to its own. For example, Dameron cites blanket waivers issued to two grantees, the States of New Jersey and Florida, for deadlines in connection with COVID-19 PAs. These waivers, however, concerned a December 31, 2022, deadline for the submission or completion of project worksheets for timely submitted RPAs, rather than extensions of the July 1, 2022, RPA deadline. Applicant's Exhibits 15 (Florida Extension), 16 (New Jersey Extension). Neither these dissimilar circumstances nor the circumstances in any of the other examples cited by Dameron demonstrate that FEMA has waived the July 1, 2022, RPA deadline for similarly situated applications.<sup>5</sup>

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<sup>4</sup> Dameron also argues that the establishment of the July 1, 2022, deadline was arbitrary and improper because FEMA initially set an open-ended deadline (the end of the declared public health emergency) and the pandemic was ongoing at the time the deadline was established. This is a matter we will not consider. While we arbitrate disputes concerning the eligibility of an applicant for PA, including whether procedural failures by an applicant should be waived, we do not arbitrate matters that precede the submission of an RPA—such as the establishment of a deadline for the submission of RPAs. *See Housing Preservation Trust, Inc.*, 23-1 BCA at 185,807 (citing Rule 604(a); 42 U.S.C. § 5189a(d)(1); 44 CFR 206.202(b), (c), (f)(2), 206.206(b)).

<sup>5</sup> FEMA states that the two examples of waivers for RPA deadlines that Dameron contends occurred under similar circumstances—those for Union General Hospital and Zach Theater—require additional review and may be reconsidered. FEMA's Response at 46-47; FEMA's Sur-Reply at 12-13. Because FEMA states that it is reinvestigating these waiver determinations, we do not find that they provide support to Dameron's argument.



For the reasons discussed above, Dameron does not demonstrate that its failure to submit a timely RPA was due to extenuating circumstances beyond its control. To the extent applicant contends that FEMA should grant a waiver because the agency has previously granted waivers in circumstances similar to Dameron's, the record does not support these assertions.<sup>6</sup>

Decision

Dameron did not submit its RPA by the deadline established by FEMA and is therefore not eligible for PA. FEMA need not extend the deadline for Dameron to submit the RPA at issue.

*Jonathan L. Kang*  
JONATHAN L. KANG  
Board Judge

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

*Kathleen J. O'Rourke*  
KATHLEEN J. O'ROURKE  
Board Judge

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<sup>6</sup> FEMA's first appeal decision asserted that "a prior FEMA decision to grant a time extension for an applicant or project carries no weight of precedence to apply to other situations with different applicants and factual considerations, to include Applicant's late RPA in this case." Applicant's Exhibit 3 at 3. In light of applicant's failure to identify waivers in similar circumstances, we need not address how a waiver under similar circumstances should affect our assessment of a request that otherwise, on its face, does not merit waiver.