



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 22, 2024

CBCA 8136-FEMA

In the Matter of LEGACY TREATMENT SERVICES

Nick DeRose, Chief Business Officer of Legacy Treatment Services, appearing for Applicant; and Christopher B. Bladel of Buttaci Leardi & Werner, LLC, Princeton, NJ, counsel for Applicant.

Lieutenant Colonel Christopher M. DeMaise, New Jersey Governor's Recovery Bureau, New Jersey Division of State Police, West Trenton, NJ, appearing for Grantee.

Christiana Cooley, 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 **VOLK**.

SHERIDAN, Board Judge, writing for the Panel.

Legacy Treatment Centers, Inc. (Legacy or applicant) sought to arbitrate the first appeal decision of the Federal Emergency Management Agency (FEMA) in which FEMA denied the applicant's request for public assistance (PA) funds to reimburse \$7,237,407.85 in costs for six Coronavirus (COVID-19) Grants Manager Projects (GMPs). We conclude that the request for public assistance (RPA) was late without extenuating circumstances and deny the applicant's reimbursement costs.

Background

The President declared a major disaster for the State of New Jersey in response to the COVID-19 pandemic on March 25, 2020, FEMA-4488-DR-NJ, entitling eligible entities to

apply for public assistance under the Robert T. Stafford Disaster Relief and Emergency Act (Stafford Act). 42 U.S.C. §§ 5121–5207 (2018). The regulations and policies associated with PA requests for COVID-19 are extensive. Relevant to this RPA, FEMA set July 1, 2022, as a revised deadline to submit RPAs for COVID-19-related work performed through that date “under the authority in 44 CFR 206.202(f)(2) [(2022)] to extend the deadlines set forth in 44 CFR 206.202(c).” COVID-19 Public Assistance Implementation–Progress, Success and Next Steps Memorandum to Regional Administrators (Mar. 30, 2022) at 2. This memorandum also provided that:

FEMA Regional Administrators may further extend the RPA deadline up to 90 days after July 1, 2022, when the Recipient makes a request in writing and the request is justified based on extenuating circumstances beyond the Recipient’s or Applicant’s control. For time extensions beyond 90 days, Regional Administrators must coordinate with, and gain concurrence from, the Assistant Administrator, Recovery Directorate at FEMA Headquarters.

Id. On April 1, 2022, FEMA issued “Guidance on COVID-19 Requests for Public Assistance and Project Applications,” as a public “FEMA Advisory” announcing the July 1, 2022, deadline.

In June 2022, FEMA, through its “Coronavirus (COVID-19) Pandemic: Public Assistance Programmatic Deadlines Policy,” reiterated the deadlines to submit COVID-19-related RPAs to FEMA and to do so “via the Grants Portal system no later than July 1, 2022.” FEMA Policy 104-22-0002 (June 13, 2022) (COVID-19 Deadlines Policy), at 2. The policy set forth the same time extension requirements as those in FEMA’s March 30, 2022, memorandum:

- a. FEMA Regional Administrators may extend the RPA deadline for a potential Applicant up to 90 days after July 1, 2022, when the request is justified based on extenuating circumstances beyond the Recipient’s or Applicant’s control.
- b. For time extensions beyond 90 days, Regional Administrators must coordinate with the Assistant Administrator, Recovery Directorate at FEMA Headquarters for concurrence.
- c. An example of an extenuating circumstance that may justify a time extension for RPA submittal is:
 - If an Applicant did not anticipate conducting any COVID-19 work and did not conduct work until after July 1, 2022.

Id.

On March 2, 2023, eight months after the July 1, 2022, deadline, the applicant, which is a private nonprofit company, submitted its RPA and a time extension request with the New Jersey Office of Emergency Management (the recipient). The applicant's rationale for the late submission was that it was "previously unaware of our eligibility as a private non-profit in the FEMA Public Assistance program" and "unaware of the process of filing for an RPA" due to pandemic-related staffing shortages.

The recipient submitted the applicant's RPA into FEMA's Grants Portal on March 13, 2023, seeking approval of the applicant's late request for PA due to the applicant's "extraordinary circumstances." The request appeared as "approved" on FEMA's Grants Portal, and the applicant received an automatically-generated email on April 5, 2023, stating that its RPA was approved.

Despite the April 5, 2023, approval notification, FEMA made it clear in an April 27, 2023, email to Legacy that its time extension request was being reviewed by FEMA Headquarters. During the summer of 2023, Legacy and its external consultant dedicated many hours to build project details for submission into the Grants Portal.

On November 27, 2023, FEMA denied the applicant's request for an extension to file an RPA, determining that Legacy's asserted justification—namely, "staffing shortages and lacking knowledge of the Public Assistance program"—was not an extenuating circumstance beyond the applicant's or recipient's control.

In its first-level appeal, Legacy asserted that its lack of knowledge was due to the recipient's failure to notify Legacy about the deadline to apply for PA benefits. In addition, Legacy asserted that it was acting "in good faith" by continuing work on the project after it received the April 5, 2023, approval and was then allowed to load project details in the Grants Portal.

On May 1, 2024, FEMA denied the applicant's first appeal, explaining that the applicant had not shown sufficient extenuating circumstances, finding that it is a "[r]ecipient's responsibility to notify potential applicants of available funding" and that staffing shortages were endemic to COVID-19. FEMA also found that the April 5, 2023, email stating that the applicant was eligible for PA was inaccurate because the "Regional Administrator had not granted a time extension pursuant to the [COVID-19 Deadlines Policy], and therefore FEMA could not have properly approved the Applicant's RPA." Before the Board, FEMA represents that FEMA's Grants Manager system sent this email in error based on a FEMA employee's mistaken approval of the applicant's RPA and that the

FEMA personnel who reviewed the RPA did not have authority to approve or accept late RPAs.

Legacy contends in its arbitration request that the COVID-19 Deadlines Policy upon which FEMA relies improperly contradicts 44 CFR 206.202(f)(2) and, therefore, violates the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559. Legacy explains that, because 44 CFR 206.202(f)(2) unambiguously gives FEMA's Regional Administrator authority to grant extensions of the deadlines, FEMA's COVID-19 Deadlines Policy, which requires concurrence with an Assistant Administrator at FEMA Headquarters for extension approval, is impermissible and unenforceable. The applicant asserts that the regulation should be given preference over FEMA's COVID-19 Deadlines Policy because, while the regulation was promulgated in accordance with the APA, the policy document was not.

Legacy sought arbitration under 42 U.S.C. § 5189(a)(d). We agree with FEMA that Legacy is not eligible for an extension because Legacy has not demonstrated sufficient extenuating circumstances.

Discussion

This arbitration concerns whether FEMA should waive the July 1, 2022, deadline for COVID-19-related PA funding applications and accept Legacy's late-submitted RPA. There are three essential issues addressed in this decision: (1) Legacy's argument that FEMA's COVID-19 Deadlines Policy conflicts with FEMA statutory requirements, in violation of the APA; (2) FEMA's determination that Legacy does not have extenuating circumstances to warrant extension for a late submission; and (3) Legacy's contention that it was acting in "good faith" after its submission was approved on FEMA's Grants Portal.

FEMA Did Not Grant an Extension for Filing the RPA

The Stafford Act provides that FEMA "may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this title and perform any of the powers and duties provided by this title." 42 U.S.C. § 5197(g). Implementing that provision, FEMA promulgated 44 CFR 206.202(f)(2), which provides that "[t]he Regional Administrator may extend the time limitations" for an applicant to submit an RPA "when the recipient justifies and makes a request in writing" showing "extenuating circumstances beyond the recipient's or subrecipient's control." FEMA's published policy for COVID-19 PA funding adds a requirement to that provision, requiring that, "[f]or time extensions beyond 90 days, Regional Administrators must coordinate with the Assistant Administrator, Recovery Directorate at FEMA Headquarters for concurrence."

Applicant argues that FEMA approved an extension enabling it to submit its RPA but now seeks to renege on that approval by citing the COVID-19 Deadlines Policy, which requires the Assistant Administrator, Recovery Directorate, to concur before the Regional Administrator can grant an extension. Legacy argues that the concurrence requirement, which was not promulgated through notice-and-comment rulemaking like 44 CFR 206.202, is unenforceable because it conflicts with the authority granted the Regional Administrator under 44 CFR 206.202(f)(2). The facts of this case do not require the panel to decide whether FEMA's COVID-19 Deadlines Policy conflicts with 44 CFR 206.202(f)(2) because the Regional Administrator never granted Legacy an extension to file its RPA. The April 5, 2023, email from the Grants Portal was not a decision by the Regional Administrator granting an extension. Subsequently, the November 27, 2023, Region 2 letter denied the extension request. If there is any doubt about the Regional Administrator's position, the Regional Administrator signed the May 1, 2024, first appeal denial letter. Even were we to find that someone granted an extension without authority, we would also find that the COVID-19 Deadlines Policy, which adds the requirement for a further concurrence for extensions over ninety days, was not met.

Extenuating Circumstances

Legacy does not state that it could not have submitted the RPA by the deadline. Rather, it asserts unawareness of the deadline. In its initial appeal to FEMA, Legacy also explained that it was "operating in survival mode" and stated that its geographical region was "an epicenter for the pandemic and was harder hit than most," which caused them to miss the deadline. Even if these statements may be true, there is no evidence specifically explaining how Legacy was impacted but, even more importantly, describing why these circumstances caused Legacy to miss the deadline. *See Dameron Hospital Association, CBCA 8052-FEMA, 24-1 BCA ¶ 38,604, at 187,662 (concluding that, where an "applicant does not demonstrate that the pandemic, or any other outside circumstances, caused its lack of knowledge," it does not merit a waiver of COVID-19 Deadlines Policy).*

Legacy also contends that the RPA deadline should be waived because the grantee, New Jersey Governor's Disaster Recovery Bureau, failed to notify it of the deadline. FEMA's regulation requires extenuating circumstances beyond the applicant's or recipient's control to waive the RPA deadline. 44 CFR 206.202(f)(2); PAPPG at 130. A failure of a recipient to notify a potential applicant does not warrant a waiver of a deadline because it is not an extenuating circumstance. *Dameron Hospital Association, 24-1 BCA at 187,663.*

Acting in Good Faith and Estoppel

Legacy contends that it was acting in good faith by putting together an application after the request for an extension was flagged as approved on the Grants Portal. The panel

does not doubt that Legacy acted in good faith. However, that does not change our conclusions that the Regional Administrator ultimately denied Legacy's extension request and that Legacy did not present an extenuating circumstance sufficient to warrant the extension.

Decision

The panel concludes that FEMA appropriately denied the appeal and the RPA pursuant to the Stafford Act.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge

Daniel B. Volk

DANIEL B. VOLK
Board Judge