



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 14, 2021

CBCA 7064-FEMA

In the Matter of TOWN OF ELIZABETHTOWN, NORTH CAROLINA

H. Goldston Womble, Jr. of Womble Law Firm, Elizabethtown, NC, counsel for Applicant; and Patrick B. DeVane of Town of Elizabethtown, North Carolina, Elizabethtown, NC, appearing for Applicant.

Kathryn Van Tol, North Carolina Division of Emergency Management, Raleigh, NC, counsel for Grantee; and Todd Wright, Recovery Chief, North Carolina Division of Emergency Management, Raleigh, NC, appearing for Grantee.

Charles Schexnaildre, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **HYATT**, **LESTER**, and **CHADWICK**.

The North Carolina Department of Emergency Management (NCDEM) is the recipient of a grant from the Federal Emergency Management Agency (FEMA) that allowed subrecipients to seek public assistance (PA) funding from FEMA for disaster damage caused by Hurricane Florence. NCDEM submitted an arbitration request with the Board upon behalf of one of its subrecipients, the Town of Elizabethtown (the Town), pursuant to the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C.A. § 5189a (West 2020). FEMA has requested that we dismiss this arbitration matter as untimely filed because the Board did not receive the arbitration request until more than sixty days after the Town had received FEMA's decision denying the Town's first-level appeal. For the reasons explained below, we grant FEMA's request.

Background

The park and recreation facilities located at Lock and Dam #2 Park on the Cape Fear River in North Carolina (the facilities) encompass 29.89 acres of federal land under the jurisdiction of the United States Army Corps of Engineers (USACE). The Town holds a long-term lease with the USACE through which the Town, as lessee, has assumed legal responsibility for operation and maintenance of the facilities. The Town believes that, under the terms of its lease, it is responsible for repairing any damage caused to the facilities.

Between September 7 and 29, 2018, heavy rainfall associated with Hurricane Florence flooded the facilities. As a result of the hurricane, the President declared a major disaster in the state of North Carolina (DR-4393-NC). The Town asserts that, after consulting with FEMA's program delivery manager and FEMA counsel, the Town paid to repair the disaster-related damage at the facilities caused by Hurricane Florence.

The Town then requested PA funding as reimbursement for those repair and restoration costs. FEMA ultimately denied the Town's PA request. Based upon its independent review of the Town's lease with the USACE, FEMA found that the Town had no legal responsibility for repairing disaster-related damage at the facilities or any other damage that the Town did not itself cause. Consistent with the procedures set forth in 44 CFR 206.206 (2019), the Town filed a first-level appeal of FEMA's denial with the NCDEM on May 5, 2020, which the NCDEM forwarded to FEMA on May 22, 2020. FEMA denied the first-level appeal on December 16, 2020. In its decision, FEMA notified the Town of its right to file a second-level appeal, which, to be timely, the Town would have to deliver to the NCDEM within sixty days of its receipt of the first appeal decision, and notified the NCDEM of its obligation to forward any second-level appeal notice to the Assistant Administrator of FEMA's Recovery Directorate within sixty days of its receipt from the Town. FEMA also notified the Town and the NCDEM that, in lieu of a second-level appeal, the Town could seek arbitration before the Board, as follows:

Alternatively, this determination may be eligible for arbitration by the Civilian Board of Contract Appeals (CBCA) under the arbitration rights set forth in section 423 of the Stafford Act, as amended by section 1219 of the Disaster Recovery Reform Act (DRRA), which was signed into law on October 5, 2018. To determine eligibility for arbitration, please review FEMA's Arbitration Fact Sheet. The CBCA regulations at 48 C.F.R. 6106.601 through -613 provide the CBCA's rules of procedure for FEMA Section 423 arbitrations. Filing and procedural rules are available on the CBCA's website at www.cbca.gov. . . .

If the [Town] elects to not submit a second appeal request or request for arbitration within 60 days of the [Town's] receipt of this letter, this decision is the final agency determination on the matter, and the [Town] will no longer be able to appeal or arbitrate the matter.

FEMA's Motion to Dismiss, Exhibit 1 (footnote omitted).

FEMA attempted to deliver its first-level appeal decision to representatives for the Town and the NCDEM by email on December 16, 2020. FEMA received a "read receipt" acknowledgement from the NCDEM that same day, but received "undeliverable" notifications for the emails sent to the Town's representatives. After obtaining the name of a new representative for the Town and updated contact information for him from the NCDEM, FEMA resent the decision on December 17, 2020, but did not receive any receipt acknowledgement. After again reaching out for a response, the Town's representative notified FEMA on December 29, 2020, that he had, at some unidentified point, received the first appeal denial.

On February 10, 2021, the Town delivered a letter to the Director of the NCDEM addressed to the Regional Administrator for FEMA Region IV, to be sent "through" the Director of the NCDEM, requesting arbitration before the Board. The NCDEM forwarded the Town's arbitration request to the Board and to FEMA on March 4, 2021. After the Clerk of the Board docketed this arbitration matter, FEMA filed a motion seeking dismissal of the arbitration as untimely because it was filed with the Board more than sixty days after the Town received FEMA's first-level appeal decision. The Town elected not to respond to FEMA's motion, but the NCDEM filed an opposition.

Discussion

Under section 423 of the Stafford Act, an applicant "may submit a request for arbitration after the completion of the first appeal under subsection (a) [of 42 U.S.C.A. § 5189a] at any time before the Administrator of [FEMA] has issued a final agency determination" 42 U.S.C.A. § 5189a(d)(5)(B).¹

FEMA's regulations define if and when a FEMA first-level appeal decision becomes a "final agency determination." The Stafford Act provides that, once an applicant receives its first-level appeal decision from FEMA, the applicant has sixty days within which to file

¹ The Stafford Act also allows an applicant to file an arbitration request if FEMA has not issued a first-level appeal decision within 180 days after receipt of the appeal, 42 U.S.C.A. § 5189a(d)(5)(B), but that provision is irrelevant to the circumstances before us.

a second-level appeal. 42 U.S.C.A. § 5189a(a). Under FEMA's regulations implementing the Stafford Act, a subrecipient, like the Town, initiates a second-level appeal by "filing" its second-level appeal request with the recipient, here the NCDEM, within sixty days after receiving FEMA's first-level appeal decision. 44 CFR 206.206(c)(1). If the subrecipient files a second-level appeal notice, the recipient then has sixty days from the date that it receives the subrecipient's second-level appeal notice to forward it to FEMA. *See* 44 CFR 206.206(c)(2). If the subrecipient does *not* file a timely request with the recipient seeking a second-level appeal, the first-level appeal decision automatically becomes the "final agency determination" at the end of the first sixty-day period and is no longer subject to review.

Since the window for seeking arbitration closes if the subrecipient does not request a second-level appeal within that first sixty-day period, the filing requirements for seeking arbitration before the Board differ from the second-level appeal procedure. FEMA's "Fact Sheet for Public Assistance Appeals and Arbitration under the Disaster Recovery Reform Act" requires that, rather than submit the arbitration request to the recipient who then is responsible for forwarding it to FEMA, the subrecipient must submit the request for arbitration *simultaneously* to the Board, FEMA, and the recipient within sixty days of receiving the first-level appeal decision, thereby perfecting the arbitration request *before* the first-level appeal decision becomes final. Under Board Rule 604 (48 CFR 6106.604), we "follow[] applicable FEMA guidance implementing section 423 of the Stafford Act" regarding procedures for the timely submission of an arbitration request.

The Town did not submit its arbitration request to the Board within sixty days of its receipt of FEMA's first-level appeal decision, as required by FEMA's implementing guidance. Even if we were to assume (without deciding) that the Town did not receive FEMA's first-level appeal decision until as late as December 29, 2020, the Town would have to have submitted its arbitration request to the Board no later than March 1, 2021, to satisfy the time limits identified in FEMA's guidelines. It did not do so. The Town instead submitted its request only to the NCDEM, assuming that the NCDEM would forward it onward (as it eventually did after the sixty-day period for requesting arbitration had passed) to the Board and FEMA in the way that it would for a second-level appeal. That procedure does not work for an arbitration request. The Town's failure to submit its arbitration request to the *Board* within the sixty-day window renders its request untimely.

The NCDEM argues in its opposition to FEMA's motion that the Board should excuse the submission delay for two reasons: first, because it had never previously attempted to submit an arbitration request and was unfamiliar with the process, it incorrectly but reasonably assumed that the submittal and filing process was like that for a second-level appeal, a mistake that should be excused; and, second, any late submission resulted from the unavailability of NCDEM staff to process and forward the Town's arbitration request in the weeks after the Town asked the NCDEM to do so, and it would be unfair for the subrecipient

to be prejudiced by the recipient's unintended delay. Granted, FEMA's "Fact Sheet" could have been clearer in making sure that subrecipients/applicants understand that the number of entities to which they must deliver an arbitration request is larger than for a second-level appeal notice. Nevertheless, the defenses that the NCDEM raises do not allow us to excuse the untimely submission of the arbitration request to the Board.

Decision

For the foregoing reasons, this arbitration is dismissed as untimely filed.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

Catherine B. Hyatt

CATHERINE B. HYATT
Board Judge

CHADWICK, Board Judge, writing separately.

I would reach the same result in a different way. The distinction is significant. The first question in any arbitration is which issue or issues are arbitrable. When the right of arbitration is created by a contract, one "should not assume that the parties agreed to arbitrate arbitrability," that is, to have the arbitration forum decide what to arbitrate, "unless there is clear and unmistakable evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). I approach our statutory mandate in essentially the same way. Congress authorized us to arbitrate "the eligibility for [public] assistance or repayment of assistance provided." 42 U.S.C.A. § 5189a(d)(1) (West 2020). I do not see in the statute an authorization for us to decide whether a request for arbitration was timely.

I interpret Rule 604 to distinguish what would be covered by our procedures from what would be covered by FEMA's guidance. See 84 Fed. Reg. 29085, 29086 (June 21, 2019) ("The omission of a time to file an arbitration request is intentional. . . . The Board interprets the statutory term 'process' [in 42 U.S.C.A. § 5189a(d)(5)] to mean the steps established by FEMA for submitting a dispute to arbitration, including the timing and content of an arbitration request. The proposed rule [604] thus defers to FEMA's current and future published guidance on those processing matters."). Rule 604 does not say that we will arbitrate disputes over timeliness. It says only that applicants should follow FEMA's guidance.

Under our current authority, I do not intend to vote yea or nay when FEMA says an arbitration request is untimely. I believe that determination rests on the “process” side of the line that we drew in our arbitration rules, not on the “procedures” side. One might ask, but what if FEMA starts acting unreasonably with respect to timeliness? My answer is the same as for all of the other aspects of FEMA’s grant mission over which we lack arbitration authority: A solution would need to lie elsewhere. We are not a court, and Congress did not “suggest[] that the Board should review, sustain, or reverse” FEMA’s appeal decisions or advise FEMA on its policies. 84 Fed. Reg. 7861, 7862 (Mar. 5, 2019). I would dismiss this arbitration as untimely because FEMA says it is untimely.

Kyle Chadwick
KYLE CHADWICK
Board Judge