



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 19, 2023

CBCA 7651-FEMA

In the Matter of COLLIER COUNTY, FLORIDA

Erin Greten and Ernest Abbott of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Washington, DC; and Katelyn Dodd of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Birmingham, AL, counsel for Applicant.

Stephanie Stachowicz (Twomey), General Counsel, Florida Division of Emergency Management, Tallahassee, FL, counsel for Grantee; and Marija Diceviciute, Appeals Officer, and Melissa Shirah, Recovery Bureau Chief, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Ramoncito J. deBorja, 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**, **GOODMAN**, and **SULLIVAN**.

SULLIVAN, Board Judge, writing for the panel.

Collier County, Florida, sought to arbitrate the denial by the Federal Emergency Management Agency (FEMA) of its request for public assistance funds for a beach renourishment project. FEMA denied Collier County's request because the county began work on the project before FEMA finished its environmental and historic preservation (EHP) review. The panel finds that the primary focus of Collier County's challenge—whether further environmental review was necessary—is foreclosed as untimely because FEMA made that determination in 2021. Regarding Collier County's contention that it reasonably believed that the environmental reviews were complete or could have been completed after construction began, the panel finds that FEMA's 2021 decision put Collier County on notice

that a full environmental review was necessary and declines to disturb FEMA's determination that the review had to be complete before construction began.

Background

Collier County experienced widespread flooding as a result of Hurricane Irma in September 2017. Following the disaster, Collier County sought public assistance funds to construct emergency sand berms on its beaches. In February 2020, FEMA denied the county's request because the work had not been completed within the regulatory six-month period for emergency work.

Collier County appealed the determination, and in August 2021, FEMA granted the appeal and provided a time extension through the end of April 2022. However, FEMA conditioned the extension, in part, upon the requirement that "[a]ll conditions outlined in FEMA's Finding of No Significant Impact (FONSI) for the finalized SEA [supplemental environmental assessment] must be followed." Request for Arbitration (RFA), Exhibit 2 at 6. When FEMA notified the applicant of its conditional approval with the need for a full environmental review, it noted that the county's delays in performing the project "obviated the expedited EHP and permitting procedures available for the construction of emergency beach berms. As a result of the project denial, the full EHP review and permitting process, already in process, was suspended." *Id.* at 5.

Collier County started construction on the project on November 1, 2021, to meet the new deadline and to avoid interfering with turtle nesting season. On November 3, 2021, FEMA contacted county officials to discuss the outstanding EHP review items and learned that construction had begun. FEMA informed Collier County that the project was not in compliance with the requirements of the National Environmental Policy Act (NEPA) because the necessary consultation with local tribes, as required by Section 106 of the National Historic Preservation Act and public comment period for NEPA and Executive Order 11988, had not been completed. FEMA told Collier County that it could cease work until the necessary steps were completed, but the county declined because it had a very narrow window in which to complete construction.

FEMA never issued the supplemental environmental assessment or FONSI. In February 2022, FEMA again denied Collier County's request for public assistance funds because the county "failed to adhere to EHP regulations requiring completion of the SEA prior to commencing construction." RFA, Exhibit 1 at 5. Collier County appealed FEMA's determination, which FEMA upheld on the first appeal.

Discussion

Collier County challenges FEMA’s determination that further environmental reviews were necessary, asserting that the project was emergency work and the scope of work fell within the statutory exemption from the NEPA requirements found in the Stafford Act. *See* 42 U.S.C. § 5159 (2018). The panel need not examine any of these challenges because Collier County’s request to arbitrate this issue is untimely. Pursuant to the Stafford Act, an applicant has sixty days to challenge a decision from FEMA regarding eligibility for public assistance funds. *Id.* § 5189a(a). In August 2021, FEMA granted an extension of the time to complete the project, conditioned upon the county following the requirements of a SEA and FONSI that were yet to be completed. This determination was a decision regarding eligibility which the applicant could have appealed or sought to arbitrate. Having failed to appeal or to seek arbitration, Collier County is bound to FEMA’s determination that further environmental reviews were necessary. Because Collier County’s challenge to this determination is time-barred, the panel does not reach the merits of this issue.

Collier County also asserts that it “reasonably concluded” from FEMA’s August 2021 decision that the environmental reviews were complete and that it could proceed with the project. RFA Reply Brief at 9; *see also* RFA Brief at 14. FEMA’s decision required Collier County to comply with “all conditions outlined” in FEMA’s FONSI and SEA. It would have been reasonable and prudent for Collier County to ask FEMA for these documents to ensure compliance with this requirement. If Collier County had done so, it would have learned that the environmental reviews were not complete. Collier County did not act reasonably in light of the language of FEMA’s conditional approval.

Finally, Collier County asserts that FEMA could and should have completed any necessary environmental reviews after the commencement of construction activities. FEMA disagrees, and we will not disturb that judgment, adopting the rationale expressed in *Startex-Jackson-Wellford-Duncan Water District*, CBCA 7416-FEMA, 22-1 BCA ¶ 38,229, at 185,657.

Decision

The panel confirms FEMA’s denial of Collier County’s request for public assistance funds.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge