



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 6, 2023

CBCA 7691-FEMA

In the Matter of VISTA ON 5TH CORP.

Nicole F. Atanasio, President and Chief Executive Officer, and Salvatore Nicosia, Vice President of Finance of Vista on 5th Corp., New York, NY, appearing for Applicant.

Joseph Stinson, Deputy Section Chief of Recovery, New York State Division of Homeland Security and Emergency Services, Albany, NY, appearing for Grantee.

Rebecca Otey and 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 **LESTER**, **KULLBERG**, and **CHADWICK**.

CHADWICK, Board Judge, writing for the panel.

Vista on 5th Corp. (Vista), a nonprofit entity, requested arbitration after the Federal Emergency Management Agency (FEMA) rejected a late request for public assistance (RPA) and denied a first appeal of the rejection. Vista and the state grantee argue that extenuating circumstances excused Vista's failure to meet the RPA deadline. FEMA asks us to dismiss the arbitration on the grounds that Vista is not an "applicant for public assistance" under governing law and policy or, alternatively, to affirm FEMA's decision not to extend the deadline. Because Vista submitted an RPA, it is an "applicant" under FEMA's stated policy, even if its application was late. Nevertheless, without deciding the extent to which (if at all) we have the authority to overturn an exercise of discretion by FEMA in denying a time extension request, we conclude that, in the circumstances here, Vista does not proffer adequate grounds for a time extension.

Background

The President declared Hurricane Ida a major disaster for the relevant county on September 5, 2021. FEMA ultimately established the deadline for Ida RPAs as October 29, 2021. Vista submitted an RPA to the New York State grant recipient on February 14, 2022 (108 days after the deadline). The grantee forwarded the request to FEMA eighteen days later, on March 4, with a recommendation that FEMA accept the late submission because Vista had diligently pursued an insurance claim and had requested FEMA public assistance promptly after learning about such grants. In an April 2022 letter and in a formal determination in June 2022, FEMA denied the request to submit a late RPA, finding that Vista and the grantee had not shown “extenuating circumstances beyond the recipient’s or subrecipient’s control” as required by 44 CFR 206.202(f)(2) (2022).

Vista and the grantee pursued an agency appeal, arguing principally, in the grantee’s words, that Vista “provided justification of extenuating circumstances beyond its control—it did not know the [public assistance] program was available in time to timely apply—which has been accepted for other applicants in this disaster.” In January 2023, FEMA denied the appeal, writing in relevant part that the grantee’s asserted failure to notify Vista of the possible availability of public assistance promptly after the disaster “is not an extenuating circumstance” beyond either one’s control and that “FEMA evaluates each late RPA request on its own merits.” Vista timely sought arbitration under 42 U.S.C. § 5189a(d) (2018) and our rules. The panel heard argument in May 2023.

Discussion

As a threshold matter, FEMA urges us to dismiss this arbitration without reaching the merits of Vista’s arguments for a time extension. FEMA cites *Housing Preservation Trust, Inc. (HPT)*, CBCA 7517-FEMA, 23-1 BCA ¶ 38,267, at 185,807, in which an arbitration panel found that a nonprofit which “had not submitted any RPAs” was not an “applicant for public assistance” and that its extension request was a “pre-application matter . . . [and not] among those the Board has been tasked by statute to decide.” The postures of this arbitration and of *HPT* (which “is not precedential” per Board Rule 613 (48 CFR 6106.613 (2021)) are different. In *HPT*, the nonprofit had not applied for PA funding. Here, Vista has submitted an RPA, albeit a late one. FEMA’s guidance expressly provides, “When an entity applies for PA funding, it is the Applicant.” Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 22. FEMA’s current position that an applicant is an applicant only if its application is timely is inconsistent with the PAPPG.

On the merits, there is a question as to the extent to which, under our statutory authority, we should question exercises of discretion by FEMA like the one at issue here. We need not wrestle with the scope of that authority now because, in this case, we agree with

FEMA’s decision. *Cf. Servitodo LLC v. Small Business Administration*, CBCA 6055, 18-1 BCA ¶ 37,170, at 180,938 n.5 (similar analysis in a Contract Disputes Act case). It is clear that Vista has not identified a valid basis for requiring FEMA to grant it a time extension. FEMA’s regulation directs our attention to whether there were “extenuating circumstances beyond the . . . control” of Vista and/or the grantee. 44 CFR 206.202(f). We are influenced, in reading the regulation, by the fact that courts have interpreted Rule 60(b)(6) of the Federal Rules of Civil Procedure, which governs motions for relief from otherwise final court judgments or orders, to require essentially the same thing—i.e., “circumstances beyond [the movant’s] control that prevented him from proceeding . . . in a proper fashion.” *Community Dental Services v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002); see *Qiang Wang v. Palo Alto Networks, Inc.*, 686 Fed. App’x 890, 894-95 (Fed. Cir. 2017). Applying this standard, courts have refused to relieve parties of the consequences of “decision[s] made because of inaccurate information or advice,” *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101-02 (9th Cir. 2006), or attributable to lack of legal representation or ignorance of the law. See *Matarese v. LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986); *Cohen v. Abramowitz*, 549 B.R. 316, 326 (W.D. Pa. 2016); *Jarvis v. Parker*, 13 F. Supp. 3d 74, 79-80 (D.D.C. 2014).

In rebutting FEMA’s position in its Rule 608 response and at oral argument that Vista “chose” to focus on other possible sources of funding before contacting FEMA, Vista and the grantee contend that Vista simply did not learn about the public assistance program until after the RPA deadline. We agree with FEMA that the familiar words of 44 CFR 206.202(f)(2) support a conclusion that lack of knowledge (or lack of communication by the responsible grantee) of the deadline for submitting an RPA is not an excuse that requires an extension of time. We could not find, for that matter, that Vista was totally unaware of public assistance—the record shows that Vista pursued RPAs for COVID-19 relief even as the deadline for hurricane relief passed. Vista knew or should have known where to find the relevant regulations and guidance. That FEMA may have granted time extensions at around the same time (mostly for COVID-19 relief, as we understand it) does not affect our reading of the regulation or imply that FEMA must grant extensions across the board.

Decision

FEMA need not extend the deadline for Vista to submit the RPA at issue.

Kyle Chadwick
KYLE CHADWICK
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

CHADWICK, Board Judge, writing separately.

I write separately to emphasize (because timeliness seems to be an emerging issue in our arbitrations) that the question about our arbitration authority that we avoid here is not necessarily the same question as whether our authority extends to deciding whether applicants filed timely agency appeals or requests for arbitration. *See, e.g., Town of Elizabethtown, North Carolina*, CBCA 7064-FEMA, 21-1 BCA ¶ 37,842, at 183,743-44 (Chadwick, Board Judge, writing separately) (“I do not see in the statute an authorization for us to decide whether a request for arbitration was timely.”). Further, I do not accept—at least yet—the categorical, non-precedential statement in *City of Beaumont, Texas*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018, at 184,631, that “[t]here is no basis for excluding the issue of timeliness from [an] arbitration proceeding.” As I have explained, “I approach our statutory mandate” by asking not what arbitrators do in general but what Congress instructed this Board to do. *Town of Elizabethtown*, 21-1 BCA at 183,743.