



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 30, 2020

CBCA 6903-FEMA

In the Matter of ST. JOHN'S RIVER UTILITY, INC.

Francheska Sabatini and Kevin M. Stone of Stone & Gerken, P.A., Mount Dora, FL, counsel for Applicant.

Sherin Joseph, Appeals Officer, and Allison McLeary, Interim Bureau Chief of Recovery, Florida Division of Emergency Management, Tallahassee, FL, appearing for Grantee.

Christiana C. Cooley and Ramoncito J. deBorja, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and 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 **VERGILIO**, **GOODMAN**, and **KULLBERG**.

In February 2018, the applicant, St. John's River Utility, Inc., transmitted a request for public assistance (RPA) to the grantee, Florida Division of Emergency Management (grantee or recipient), for damage incurred to its low-pressure sewer collection system following Hurricane Irma in 2017. The Federal Emergency Management Agency (FEMA) denied the RPA due to the grantee's alleged failure to timely submit the RPA to FEMA and to present justification of extenuating circumstances for the late submission. On August 21, 2020, the applicant timely filed a request for arbitration under 42 U.S.C.A. § 5189a(d) (West 2020) for a determination of whether extenuating circumstances justified the late submission.

In response to the applicant's request for arbitration, FEMA filed a motion to dismiss this case without the panel resolving the issues of timeliness or extenuating circumstances. FEMA maintains that because the RPA was determined to be untimely, a substantive eligibility determination regarding the applicant's RPA had not been rendered. FEMA therefore characterizes the resulting dispute as related to FEMA's discretionary grants administration authority, and not regarding "the eligibility for assistance or repayment of assistance." 42 U.S.C.A. § 5189a(d)(1). FEMA concludes that the dispute presented in this arbitration is outside of the Board's arbitration authority to resolve.

CBCA Rule 610 (48 CFR 6106.610 (2019)) specifies:

No party may move for a prehearing merits decision (*e.g.*, summary judgment or dismissal for failure to state a claim) or for involuntary prehearing dismissal other than on the merits except on the grounds that an arbitration request is untimely. A panel ordinarily issues one decision per arbitration.

As this arbitration request was timely filed, FEMA has not stated sufficient grounds for dismissal. By proceeding to the hearing, the panel has rejected FEMA's suggestion that the panel deviate from Board rules, adopted by the Board after a notice and comment period and published in the Federal Register.

In its motion to dismiss, FEMA miscasts its actions and the issues presented. FEMA determined that the applicant is not eligible to receive public assistance. FEMA concluded both that it received the RPA after the time for receipt had passed and that extenuating circumstances to justify an extension had not been demonstrated. Under the previously cited statute, the panel is authorized to resolve these issues (timeliness of receipt of the request for public assistance, and, if needed, the existence, or not, of extenuating circumstances to justify extending the time for submission) that affect the applicant's eligibility.

The panel therefore denies FEMA's motion, and has proceeded to resolve the issues presented on the merits at a hearing held on October 28, 2020, considering the submissions of the parties and testimony of witnesses.

The applicant states in its request for arbitration that after FEMA had previously granted the applicant an extension for filing its RPA, it submitted its RPA to the grantee on February 2, 2018, for transmission to FEMA. However, the grantee did not transmit the applicant's RPA to FEMA until February 6, 2019, over a year after the applicant submitted the RPA to the grantee, and purportedly without providing FEMA any written justification for the additional delay. FEMA therefore denied the applicant's RPA. The applicant appealed to FEMA, and FEMA issued a determination, dated June 26, 2020, that while the applicant had "justified that extenuating circumstances outside of its control prevented the

timely submission of its RPA,” which had resulted in FEMA’s extension to file the RPA, “[the grantee] did not present compelling documentation demonstrating extenuating circumstances to justify [its] late submission.” The appeal was therefore denied.

At the hearing, the grantee’s witness testified that information provided from its grants management data system indicated that the grantee had electronically exported the applicant’s RPA to FEMA in February 2018. FEMA’s witnesses testified that while FEMA had received the grantee’s exported information at that time, RPAs in the applicant’s category (non-houses of worship) had been due in November 2017 and were therefore determined to be untimely. As a result, the applicant’s RPA and seventeen RPAs from other applicants in the same category that had been submitted by the grantee were also deemed untimely and were “removed from the FEMA’s application process.” FEMA’s witnesses testified that an individual who they believed was the grantee’s liaison was notified of the removal of the eighteen RPA’s from the process, including the applicant’s. Shortly thereafter, in March 2018, the grantee again submitted eleven of these eighteen RPAs to FEMA, but the applicant’s was not resubmitted.

The applicant asserts in its request for arbitration that, believing that its RPA had been timely submitted to FEMA by the grantee in February 2019, it made numerous inquiries to the grantee to obtain updates on the progress of its application, citing email correspondence in February, May, July, August, October, and December 2018 and January and February 2019. During the hearing, the grantee offered no explanation as to why it had not communicated with FEMA upon receipt of the applicant’s inquiries. Even if FEMA never formally notified the grantee that the applicant’s RPA had been removed from the system, as the grantee asserts, that does not explain satisfactorily the grantee’s inaction.

The applicable regulations governing the issue in this case are:

(c) *Request for Public Assistance (Request)*. The recipient [grantee] must send a completed *Request* (FEMA Form 90-49) to the Regional Administrator for each applicant who requests public assistance. You must send *Requests* to the Regional Administrator within 30 days after designation of the area where the damage occurred.

....

(f) *Exceptions*. The following are exceptions to the procedures and time limitations outlined in this section.

....

(2) *Time limitations.* The Regional Administrator may extend the time limitations . . . when the recipient justifies and makes a request in writing. The justification must be based on extenuating circumstances beyond the recipient's or subrecipient's [applicant's] control.

44 CFR 206.202 (2019).

The applicant interprets this provision as follows:

[The regulation] provides that an extension may be provided when justified based on extenuating circumstances beyond Applicant's or Recipient's control. As the record will reflect, extenuating circumstances beyond Applicant's control have been established. Any delays caused by [the grantee] in its submittal of Applicant's RPA to FEMA were clearly beyond Applicant's control. An extension of time allowing for a late submittal is therefore allowable under the rule and appropriate under the circumstances.

The applicant's interpretation is not faithful to the regulation, which speaks to circumstances not only beyond the applicant's control but also beyond the grantee's. Pursuant to 44 CFR 206.200(b)(2)(i), a grantee in the role of a recipient is expected to "[i]nform subrecipients [applicants] about the status of their applications." This panel applies FEMA's reasonable interpretation that may require extenuating circumstances for late action by either or both the applicant and grantee/recipient.

While the applicant may have been justified in submitting its application late to the grantee, this does not relieve the grantee and applicant from the consequences of the grantee's subsequent failure to ensure the timely submittal of the RPA to FEMA and further failure to inform the applicant about the status of its RPA. The grantee has not explained its continued failure to inquire of FEMA as to the progress of the application process after submitting the RPA in February 2018, despite the applicant's many requests to do so. Neither the applicant nor the grantee proved that when the grantee submitted the applicant's RPA to FEMA in February 2018 and resubmitted the RPA in February 2019, it sufficiently documented a justification of extenuating circumstances for untimely submission.

We conclude that the grantee untimely submitted the RPA and supporting documentation, and that extenuating circumstances do not exist to justify a time extension. The applicant is not eligible to receive funds under the RPA.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge