



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 24, 2021

CBCA 7102-FEMA

In the Matter of CITY OF PINE BLUFF, ARKANSAS

Shirley M. Washington, Mayor, City of Pine Bluff, Arkansas, Pine Bluff, AR, appearing for Applicant.

Bethany Cason, Staff Attorney, Arkansas Division of Emergency Management, North Little Rock, AR, counsel 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 **GOODMAN, SULLIVAN, and O'ROURKE.**

Background

In September 1994, the City of Pine Bluff, Arkansas (the City), entered into a lease agreement with D.A. Thomas Enterprises for the construction and operation of an eighteen-hole public golf course, which included a clubhouse and other capital improvements. The golf course, named "Harbor Oaks," opened in 1995 and became a draw for economic activity in the region, serving as a venue for meetings, banquets, golf tournaments, and other events. Twenty-one years later, in 2016, the city council approved a reassignment of the lease to Michael and Jamie Wilson and M&J Golf Enterprises, LLC.

Between May 21 and June 14, 2019, severe storms and flooding caused widespread damage throughout several counties in central Arkansas, including Pine Bluff. On June 8, 2019, the President declared the storm events a disaster, authorizing FEMA distribution of federal assistance for storm damage through the public assistance (PA) program authorized

by the Stafford Act. *See* 42 U.S.C. § 5172 (2018). Harbor Oaks, which is owned by the City, sustained damage to its clubhouse and course infrastructure as a result of the flooding. The City applied for PA funding through the Arkansas Division of Emergency Management (ADEM). FEMA documented more than two million dollars of damage in three separate project worksheets, but ultimately denied the funding based on its interpretation of the City's lease agreement. FEMA determined that the terms of the lease made the lessee, not the City, legally responsible for repairing the damage. Based on that determination, FEMA concluded that the project was not eligible for PA funding because it failed to meet the requirements outlined in 44 CFR 206.223(a)(3) (2020).

The City disagreed with FEMA's interpretation of the lease and filed a first-level appeal within FEMA. FEMA denied the appeal and notified the City and ADEM of the decision by email on February 11, 2021, at 7:16 p.m. The email included the following request: "Please reply to this email to acknowledge receipt." At 8:19 p.m. on the same day, FEMA received a "read receipt" stating that the ADEM director read the email. Although the City's mayor did not send an acknowledgment of receipt until February 16, 2021, at 3:28 a.m., FEMA received an automated notification of successful delivery to the mayor's email address on February 11, 2021, at 7:16 p.m.

In its decision letter attached to the email, FEMA informed the City that it could file a second-level appeal within FEMA or, in the alternative, could arbitrate the matter before the Civilian Board of Contract Appeals (CBCA or Board). The letter referred the City to FEMA's "Fact Sheet for Public Assistance Appeals and Arbitration Under the Disaster Recovery Reform Act" (Fact Sheet) to determine eligibility for arbitration. The letter also stated: "The CBCA regulations at 48 CFR 6106.601 through .613, provide the CBCA's rules of procedure for FEMA arbitrations. Filing and procedural rules are available on the CBCA's website at www.cbca.gov. A subgrantee must submit its request for arbitration simultaneously to the Grantee, the FEMA Regional Administrator, and the CBCA."

A section of the Fact Sheet, entitled "Time limits for filing a second-level appeal or a request for Section 423 Arbitration," stated: "Applicants must file a second-level appeal or section 423 arbitration request within 60 days after receipt of the first appeal decision. If the applicant takes neither action, the applicant no longer has a right to appeal or arbitrate." The Fact Sheet also echoed the guidance in FEMA's decision letter, which instructed the applicant to submit its request for arbitration "in writing simultaneously to the recipient, the FEMA Regional Administrator, and the arbitration administrator (the CBCA)."

The City chose to pursue arbitration at the Board rather than a second-level appeal within FEMA. ADEM instructed the City to submit its request for arbitration solely to ADEM, which it did on April 9, 2021. Three days later, on April 12, 2021, ADEM contacted FEMA for assistance in proceeding with arbitration at the Board. On April 13, 2021, FEMA

advised ADEM that the City needed to follow the guidance found within the FEMA Fact Sheet regarding the issue—the same Fact Sheet that was enclosed in FEMA’s first appeal determination—and that FEMA would not be able to forward the request for arbitration on the City’s behalf because FEMA would also be a party to the arbitration.

The City submitted its request for arbitration to the Board on April 13, 2021. Three days later, FEMA filed with the Board a motion to dismiss the City’s arbitration request on the basis that it was not timely filed. In its motion, FEMA pointed out that the City filed its arbitration request *sixty-one* days after it received FEMA’s decision on the first appeal, and since the statutory deadline requires an applicant to file a request for arbitration within *sixty* days, the City’s request failed to meet the deadline. In response, the City urged the Board to deny the motion. It argued that because FEMA sent the appeal decision well after business hours on February 11th, the date of receipt should be considered February 12th, which would make the arbitration request timely filed.

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. § 5189a] at any time before the Administrator of [FEMA] has issued a final agency determination.” 42 U.S.C. § 5189a(d)(5)(B). Pursuant to Board Rule 604 (48 CFR 6106.604), “[a]n applicant . . . may request arbitration by following applicable FEMA guidance implementing section 423 of the Stafford Act.” Because FEMA has not yet promulgated regulations to address requests for arbitration to the Board, the “applicable guidance” in this case is FEMA’s “Fact Sheet for Public Assistance Appeals and Arbitration under the Disaster Recovery Reform Act,” which FEMA sent to the applicant along with the appeal decision. The Fact Sheet instructed applicants to file a request for arbitration simultaneously with the Board, FEMA and ADEM “within 60 days after receipt of the first appeal decision.” It further advised that “[i]f the applicant takes neither action, the applicant no longer has a right to appeal or arbitrate.”

To decide this motion, we must first determine when the City received FEMA’s appeal decision. Based on the record, there is no dispute that FEMA transmitted the decision to the City and ADEM by email on February 11, 2021. Because the email was sent after business hours at 7:16 p.m., however, the City contends that FEMA should have reasonably expected it to be received on the following day, February 12, 2021. By identifying February 12th as the date of receipt rather than February 11th, the sixty-day time period would begin to run on February 13th, and, as a result, the City’s April 13th request for arbitration to the Board would be considered timely.

In this era of instant communications, the City’s argument is understandable. Nonetheless, there is no precedent for the City’s approach to computing the time period at issue. Neither the Stafford Act nor FEMA’s regulations provide guidance on how to determine when a filing is received. FEMA’s Public Assistance Program and Policy Guide (Apr. 2018) also is silent. Instead, we find guidance in the Board’s Rule for “Computing and Extending Time,” Rule 3(a), which computes time in units of “days” and makes no allowances for when during the day communications are delivered, received, or read. 48 CFR 6101.3(a); *see Government Services Corp. v. Department of Homeland Security*, CBCA 4204, 15-1 BCA ¶ 35,807 (2014) (“The date of receipt is not tied to the time of receipt or the business hours of [the recipient] and is not based upon work days.”). Since receipt of the first appeal determination occurred on February 11, 2021, the City needed to file its request for arbitration on or before April 12, 2021, in order for it to be considered timely. The City filed its request with the Board on April 13, 2021, and as such, we find it was not timely filed. The Board has no authority to extend the filing deadline.

The City’s additional arguments for denying FEMA’s motion include: 1) that the City acted in good faith by submitting its request to ADEM within the sixty-day time period; 2) that the mistake in filing resulted from erroneous advice given to the City by ADEM; and 3) that the Fact Sheet lacked clarity. In light of the time limits set forth in the Stafford Act, however, these arguments are unavailing. *See* 42 U.S.C. § 5189a(a) (“Any decision regarding eligibility for, from, or amount of assistance . . . may be appealed within 60 days after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance.”); *Town of Elizabethtown, North Carolina*, CBCA 7064-FEMA (Apr. 14, 2021).

Decision

We grant the motion and dismiss the arbitration as untimely filed.

Kathleen J. O’Rourke
KATHLEEN J. O’ROURKE
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge