



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 31, 2022

CBCA 7345-FEMA

In the Matter of U.S. VIRGIN ISLANDS DEPARTMENT OF PUBLIC WORKS

Derek Gabriel, Commissioner of U.S. Virgin Islands Department of Public Works, St. Croix, VI, appearing for Applicant; and Katie Belfi of Witt O'Brien's, LLC, New York, NY, counsel for Applicant.

Brad Gair, Managing Director of Witt O'Brien's, LLC, New York, NY, appearing for Grantee.

Maureen Dimino and Stanley Thompson, Jr., 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 **DRUMMOND**, **SHERIDAN**, and **CHADWICK**.

The U.S. Virgin Islands (USVI) Department of Public Works (DPW) requested public assistance (PA) funding from the Federal Emergency Management Agency (FEMA) to repair roadways allegedly damaged by Hurricane Marie on the island of St. Croix, USVI. FEMA denied DPW's PA request, finding that the work was ineligible because the applicant failed to prove that the claimed damage to the roads was a direct result of the disaster event. FEMA denied DPW's first-level appeal as untimely. DPW sought arbitration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018), of FEMA's determination and requested the panel find that its first-level appeal was timely and that the roadway repairs are eligible for PA funding. FEMA moved to dismiss DPW's application for arbitration on the basis that the first-level appeal was

untimely, and in the alternative, that the roadway repairs are ineligible. The parties agreed to a paper hearing pursuant to Board Rule 611 (48 CFR 6106.611 (2020)).

Background

When Hurricane Maria hit St. Croix in September 2017, the President declared it a major disaster, authorizing FEMA to provide federal assistance pursuant to the Stafford Act. The DPW requested PA funding to repair damages to its roads allegedly caused by the hurricane.

FEMA conducted site inspections of the damaged roadways with DPW in late 2017 and early 2018. After moving the project worksheets to the grants management (GM) system, FEMA's Joint Recovery Office (JRO) in St. Croix conducted a review of the projects to ensure that all of the damages were accurately recorded with supporting documentation and found that a number of the road sites were ineligible due to insufficient documentation. FEMA asked DPW to provide additional documentation in order to determine the eligibility of the road sites.

In late 2020 and early 2021, FEMA revisited seven road sites and found that two were eligible for FEMA repair funding. From the site inspections and the reassessments of the roads for which eligibility was denied, FEMA concluded that the claimed damages were caused by a lack of maintenance, a loss of useful life, or negligence. FEMA also found that some sites were damaged after the disaster and that for other sites there was insufficient documentation for FEMA to validate eligibility. FEMA granted approximately \$17.8 million for road repairs in St. Croix.

On June 22, 2021, FEMA issued a determination memorandum (DM) denying DPW's request for PA funding for damages at fifteen separate roadway sites, grouped together as Project 2. DPW received notice of the DM by email on June 23, 2021, and FEMA recorded the read receipt the same day. The DM was uploaded to the GM portal on June 30, 2021, with a "DM Read Receipt Deadline" of July 16, 2021. The portal recorded July 13, 2021, as the date DPW downloaded the DM. DPW submitted its first-level appeal of FEMA's determination to the grantee, USVI Office of Disaster Recovery (OR), on September 10, 2021. OR submitted the appeal, with its recommendation, to FEMA on November 8, 2021.

On January 13, 2022, FEMA denied DPW's first-level appeal as untimely, stating that applicant had failed to submit its appeal to the recipient within sixty days, or by August 23,

2021.¹ In the email transmitting the DM, FEMA provided:

In order to ensure the Territory and Applicant receive FEMA's official correspondence, FEMA has included a Read Receipt and a Delivery Receipt in all emails transmitted to the Territory. The correspondence will be updated into Grants Manager also.

DPW filed its request for arbitration on March 11, 2022, asking the panel to find that the first-level appeal was timely because the trigger date to start the sixty-day appeal period was the date the applicant downloaded the DM from the portal. DPW additionally asks the panel to determine that FEMA's reversal of its initial decision on the eligibility of the roads was incorrect and that the repairs are eligible for funding.

FEMA moved to dismiss DPW's application for arbitration on the basis that the panel lacks jurisdiction over DPW's untimely first appeal.

DPW's Position

DPW argues that its first-level appeal to the grantee was timely as the sixty-day time limitation did not start to run until July 13, 2021, the day DPW downloaded the DM from the GM portal. DPW contends that FEMA incorrectly relied only on the email read-receipt date to determine the timeliness of its first-level appeal and did not properly consider the transmission of the DM via the GM portal. DPW states that the portal provided applicants fifteen days to acknowledge the DM. The DM was uploaded into the GM on June 30, 2021. DPW read the DM on July 13, 2021, three days before the "DM Read Receipt Deadline" of July 16, 2021.

DPW's primary argument is that it relied on the guidance provided by FEMA's JRO staff to submit its appeal within sixty days of downloading the DM from the GM portal. DPW contends that "[a]n Applicant should not be penalized for following instructions provided by Field Staff especially when a known ambiguity that [sic] exists in FEMA's guidance regarding the trigger for the Applicant's initial 60-day appeal timeline (as evidenced by the recent revisions FEMA has made to its Regulations at 44 CFR 206.206 and the Public Assistance Appeals and Arbitration Policy)." DPW argues that the regional FEMA staff was unaware of the instructions in the GM portal and those provided by the JRO staff when considering the date of transmission in the GM portal.

¹ The actual sixty-day deadline, August 22, 2021, fell on a Sunday and was extended to the next business day.

DPW also claims that an ambiguity exists as to what method of notification triggers the sixty-day appeal period. DPW states that FEMA has multiple acceptable methods for notifying applicants and has never specified which one is the trigger. DPW argues that FEMA knew about this ambiguity and attempted to address it when revising its appeals regulations. DPW provided a detailed explanation of FEMA's rule-making process in revising 44 CFR 206.206 and the fourth version of FEMA's Public Assistance Program and Policy Guide (PAPPG) to argue that no one method for notifying applicants has been identified as the triggering event.²

DPW makes two additional arguments as to why its first appeal should be considered timely. DPW argues that FEMA's approach in considering only the date in which the email was transmitted is inconsistent with how FEMA handles appeal timelines in other territories and conflicts with the instructions in the GM.³ In addition, DPW argues that FEMA can exercise flexibility within its regulatory timelines and has done so in the past, such as when it extended deadlines during the COVID-19 pandemic.

FEMA's Position

FEMA argues that DPW failed to submit its first appeal within the sixty-day time frame established under 44 CFR 206.206(c) and section 423 of the Stafford Act, 42 U.S.C. § 5189a. FEMA contends that DPW received notice of the DM on June 23, 2021, and untimely submitted its first appeal on September 10, 2021, eighteen days beyond the sixty-day time frame. FEMA argues that "email read-receipts are well established as notification of receipt for purposes of calculating the 60-day appeal time frame." According to FEMA, notice, for purposes of starting the sixty-day appeal period, is the date by which FEMA

² As the disaster in this arbitration occurred in 2017, the Board will not consider this part of DPW's argument as FEMA's new regulations are only effective for disasters declared after January 1, 2022, and version four of the PAPPG is only effective for disasters declared after June 1, 2020. Version four of the PAPPG explains that FEMA issues determinations by "any method that confirms receipt." PAPPG (June 2020) at 39 n.71. However, only version three is relevant to this arbitration, and it does not include any guidance as to how FEMA transmits its determinations. PAPPG (Apr. 2018). Similarly, FEMA has revised 44 CFR 206.206 to read that appeals must be made within sixty calendar days "from the date of the FEMA determination," but notes that the revised regulation is only applicable to disasters declared after January 1, 2022.

³ DPW referenced its first-level appeals to FEMA for road repairs in St. Thomas where DPW submitted appeals based on the date it downloaded the DM from the GM portal. FEMA asserts that the download date was used because FEMA did not receive an email read receipt from DPW.

confirms receipt by the applicant. FEMA acknowledges that this confirmation can happen by multiple methods, “including Grants Manager, certified or return receipt mail, or an email with read-receipt acknowledgment.” FEMA’s policy implementation branch chief testified, by affidavit, that FEMA has two methods for transmitting DMs to applicants: email and the GM portal.

FEMA characterizes DPW’s defense that it relied on the guidance provided by FEMA’s JRO staff to its detriment as an estoppel argument that must fail. DPW had argued that its first appeal was timely because it relied on guidance from FEMA officials that the receipt of the DM in the GM system started the sixty-day clock. FEMA disagrees with DPW for three reasons: (1) DPW should have confirmed the appeal date with the regional administrator’s office but failed to do so; (2) estoppel is not applicable when government officials give incorrect advice or guidance; and (3) the Stafford Act does not provide the panel with authority to grant equitable relief, including accepting an untimely appeal.

Discussion

The main issue is whether DPW’s receipt of FEMA’s email of the DM satisfied the notice requirement to start the sixty-day clock for appeals. The panel finds that the sixty-day time limit for submitting a first-level appeal began on June 23, 2021, when FEMA confirmed that DPW had received and read FEMA’s email containing the DM.

The Stafford Act provides applicants an opportunity to appeal:

Any decision regarding eligibility for, from, or amount of assistance under this subchapter 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.

42 U.S.C. § 5189a(a). FEMA’s regulations, effective at the time of the disaster and DPW’s appeal, stated:

(1) Appellants must file appeals within 60 days after receipt of a notice of the action that is being appealed.

44 CFR 206.206(c)(1) (2017). Under the statute and FEMA’s regulations, the sixty-day time period begins once the applicant has been notified of the action to be appealed. FEMA states that it received an email read receipt confirming that DPW had received and read the email containing the DM on June 23, 2021. DPW acknowledges that it read the email on June 23, 2021, but argues that it had sixty days from when it downloaded the DM from the GM portal to start the sixty-day clock. DPW is incorrect.

The panel finds that the date of the email's read receipt is the appropriate date for starting the sixty-day time limit for appeal. The Stafford Act and FEMA regulations clearly provide that the sixty-day period begins once an applicant has received notice of the action to be appealed. FEMA has two methods for transmitting DMs to applicants: email and the GM portal.

FEMA's email clearly informed the applicant and grantee that a read receipt was included for all emails and that the GM would be updated at a later time. While it is unfortunate that DPW may have received confusing or conflicting advice from FEMA's JRO staff, FEMA's regional staff satisfied its duty of providing DPW notice of its appeal rights in the DM letter in the June 23, 2021, email.

DPW's Estoppel Argument

DPW disagrees with FEMA's characterization of its reliance argument as an estoppel argument and instead contends that it has provided "clear and unequivocal evidence of explicit direction provided by authorized FEMA officials." DPW distinguishes itself from an applicant in a prior and non-binding arbitration decision, *Sewerage & Water Board of New Orleans*, CBCA 1760-FEMA, 10-1, BCA ¶ 34,448, to argue that unlike the applicant in that case, DPW has provided documents and affidavits to support its argument that multiple FEMA project managers instructed it to rely on the GM download date for the sixty-day trigger event. In *Sewerage & Water Board of New Orleans*, a different panel found that the applicant had not presented any compelling evidence that a FEMA official had instructed the applicant to abandon the appeal process. DPW cites to meeting notes from JRO staff for another project in St. Thomas in which JRO provided:

[e]mail sent to Applicant advising that the DM notification is available in GP [Grants Portal] and to acknowledge receipt which will capture the date and will begin the 60 days to appeal. If the Applicant does not acknowledge the DM in GP during the 15-day period in GP, we will use the delivery receipt confirmation date when the DMs were emailed out to the Applicant.

In an email regarding the St. Thomas project, JRO staff informed DPW:

Please be advised that the Notification for the Determination Memorandum (DM) cited above is available to you in Grants Portal. The Applicant has 15 calendar days to acknowledge the notification. Once the notification is acknowledged, the date will be captured and will begin the 60 calendar days available for the Applicant to appeal the DM. The Applicant has 15 calendar days to acknowledge the notification, thereafter, the 60 calendar days to submit an appeal will begin automatically.

The panel does not find any evidence in the record as to whether JRO staff provided these instructions to DPW for the St. Croix road appeals. While DPW argues that it applied the guidance received for the St. Thomas project to all of its appeals, including the St. Croix road appeals, there is no evidence that FEMA directed DPW to follow these instructions when appealing the St. Croix DM.

Nevertheless, even if DPW could show that the JRO staff instructed it to abide by the GM system date rather than the email date in the St. Croix road appeals, the panel finds that DPW's argument is one for estoppel and cannot be granted. "Equitable estoppel will not lie against the Government in cases in which government officials gave incorrect advice or guidance regarding statutory entitlements." *Lumbee Tribe of North Carolina*, CBCA 7209-FEMA, 21-1 BCA ¶ 37,969 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 420 (1990)).

Decision

The panel finds that FEMA correctly determined that DPW's first-level appeal was untimely pursuant to the Stafford Act.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge