UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 8, 2009

CBCA 1739-FEMA

In the Matter of BAY ST. LOUIS-WAVELAND SCHOOL DISTRICT

Ronald J. Artigues, Jr. and Mark W. Garriga of Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Jackson, MS, counsel for Applicant.

Thomas M. Womack, Executive Director, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Kim A. Hazel, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Management Agency.

Before the Arbitration Panel consisting of Board Judges **BORWICK**, **McCANN**, and **WALTERS**.

BORWICK, Board Judge.

Introduction

The Bay St. Louis-Waveland School District (BSWSD), supported by the Mississippi Emergency Management Agency (MEMA), seeks a substantial disaster grant pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5172 (2006). The Federal Emergency Management Agency (FEMA), in an interim decision, has determined that the BSWSD and MEMA are entitled to a grant award considerably less than what they seek. This matter is the first case before an arbitration panel convened under Section 601 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), to determine with finality the appropriate amount of a grant award.

FEMA has raised the issue of what scope of review the arbitration panel should apply in reaching its determinations. FEMA argues that the arbitration panel must apply the deferential arbitrary and capricious standard that reviewing courts apply under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2006).[1] The BSWSD and MEMA argue that the arbitration panel does not conduct review at all, but arbitrates de novo. We agree with BSWSD and MEMA. For the reasons below, in arbitrating these cases, we shall look at matters de novo, which is the traditional and accepted standard for arbitrators. The ARRA and implementing regulation make clear that we sit as arbitrators applying customary arbitration standards, not as a court of review. Additionally, under regulation, an arbitration award determined by the arbitration panel serves as the final administrative action, not as the decision of a reviewing court. The arbitration panel, as the final executive branch decision-maker, is not bound by a deferential standard of review.

Background

Statutory and regulatory provisions

The Stafford Act authorizes the President to make public assistance disaster grants as follows:

> (a) Contributions
>
> (1) In general
>
> The President may make contributions--
>
> (A) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government; and
>
> (B) subject to paragraph (3), to a person that owns or operates a private nonprofit facility

[1] The relevant portion of the APA, 5 U.S.C. § 706, provides that "a reviewing court shall . . . set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

> damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person.
>
> . . . .
>
> (e) Eligible cost
>
> (1) Determination
>
> (A) In general
>
> For the purposes of this section, the President shall estimate the eligible cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility--
>
> (i) on the basis of the design of the facility as the facility existed immediately before the major disaster; and
>
> (ii) in conformity with codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or under the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) applicable at the time at which the disaster occurred.
>
> (B) Cost estimation procedures
>
> (i) In general
>
> Subject to paragraph (2), the President shall use the cost estimation procedures established under paragraph (3) to determine the eligible cost under this subsection.

42 U.S.C. § 5172.

FEMA administers the public assistance disaster grants authorized by the Stafford Act and has published implementing regulations at 44 CFR pt. 206 (2008). A grant is an award of financial assistance and the grantee is the government to which the grant is awarded. *Id*. 206.201(d)-(e) (2008). An applicant is a state agency, local government, or eligible private non-profit organization submitting an application to the grantee for public assistance under a state's grant. *Id*. 206.201(a). FEMA administers grants on a project basis, which is defined as "a logical grouping of work required as a result of the declared major disaster or emergency." *Id*. 206.201(i). FEMA must approve a scope of eligible work and an itemized cost estimate before funding a project. A project may include eligible work at several sites. *Id*. 206.201(i)(1)-(2).

The prospective grantee must submit an initial request for public assistance to a FEMA Regional Director for each applicant seeking disaster assistance within thirty days after designation of where the damage occurred. 44 CFR 206.202(c). The applicant is responsible for identifying all eligible work and for submitting all costs for disaster related damages for funding by FEMA. *Id*. 206.202(d). The scope of eligible work and quantitative estimate of the scope of work are recorded on a project worksheet, which is prepared by FEMA officials or the applicant, with the assistance of the state as appropriate. *Id*. An applicant has sixty days after the first substantive meeting with FEMA officials to identify and report damage to FEMA. *Id*. Then, before FEMA obligates grant funds, the applicant must submit a request for disaster assistance to the FEMA Regional Director. The Regional Director will obligate grant funds based upon an approved project worksheet. *Id*. 206.202(e).

Before February 17, 2009, regulation only provided for an internal two-level appeals process within FEMA in case of disputes arising from FEMA's administration of the public disaster assistance program, with the first level appeal being to a FEMA Regional Director and the second level appeal being to the FEMA Associate Director/Executive Associate Director for Response and Recovery. 44 CFR 206.206(a)-(b). The decision of the FEMA official at the next higher level was deemed to be the final administrative decision of FEMA. *Id*. 206.206(e)(3).

On February 17, 2009, the President signed the ARRA. Section 601 of that Act, Pub.L. No. 111-5, 123 Stat. at 164, provides in part as follows:

> *Notwithstanding any other provision of law*, the President shall establish an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region. The arbitration panel shall have sufficient authority regarding the award or denial of disputed public

> assistance applications for covered hurricane damage under section 403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than $500,000.

(Emphasis added).

By memorandum of August 6, 2009, the President assigned to the Secretary of Homeland Security the functions of the President under Section 601. 74 Fed. Reg. 40,055 (Aug. 10, 2009).

The Department of Homeland Security entered into a memorandum of agreement with the Civilian Board of Contract Appeals (CBCA) under which the CBCA exercises the delegated arbitration authority of Section 601. FEMA has issued regulations implementing the arbitration provisions, which are found at 74 Fed. Reg. 44,761 (Aug. 31, 2009) (to be codified at 44 CFR 206.209[2]). The purpose of the arbitration is to resolve disputed public assistance applications for certain enumerated disasters. 44 CFR 206.209(a) (2009). The use of arbitration is "in lieu of filing or continuing an appeal [by applicants or sub-grantees] pursuant to [44 CFR] 206.206." *Id.* 206.209(d). Arbitration is not available for any matter that obtained final agency action by FEMA pursuant to 44 CFR 206.206 before February 17, 2009, or where an applicant failed to file a timely appeal before August 31, 2009. *Id.* 206.209(d)(2).

Each party may make a submission to the arbitration panel, 44 CFR 206.209(e), which may conduct an oral informal hearing at a party's request. *Id*. 206.209(h). Before the close of the hearing, the panel may request additional information from the parties or seek the advice of independent subject matter experts. *Id*. 206.209(h)(3). The panel may request additional information after the hearing, or consent to a party's request for additional information. *Id*. 206.209(h)(8). In making its decision, the panel shall consider all submitted material from each party and may seek the advice of independent scientific and technical experts. *Id*. 206.209(i)(2).

The regulations also provide that:

> A decision of the majority of the panel shall constitute a final decision, binding on all parties. Final decisions are not subject to further

[2] For ease of reading, we refer to the announced CFR codification, which commences at 74 Fed Reg. 44,767.

> administrative review. Final decisions are not subject to judicial review, except as permitted by 9 U.S.C. [§] 10.

44 CFR 206.209(k)(3).

The arbitration case

On September 30, 2009, the BSWSD submitted an arbitration request for hurricane damage at BSWSD schools allegedly caused by Hurricane Katrina. MEMA and the BSWSD claim a total cost of $7,273,082.43 for eligible work, i.e., purportedly necessary replacement of roofs, siding, and windows in certain schools within the BSWSD.[3] FEMA granted $176,407 of that claim amount, generally contending that there was no visual damage to the structures that would warrant replacement of their roofs, siding, and windows. Thus, the case presents purely factual issues of the extent of the damage caused by Hurricane Katrina to the roofs, siding, and windows of the affected schools. The case does not turn on the validity or interpretation of FEMA's regulation of disaster assistance under the Stafford Act.

Discussion

Relying principally on *Chevron U.S.A. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), FEMA argues:

> This Panel must afford considerable deference to FEMA's interpretation of the statutory scheme it has been entrusted to administer, and to its own regulations. As with judicial review under the Administrative Procedure Act (APA), this Panel must affirm FEMA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A final agency decision is entitled to a presumption of regularity and must be upheld as long as there is a rational basis for it. Under the "highly deferential" standard of APA review, this Panel, like a court "may not substitute [its] judgment for that of the agency" but instead must presume "the agency action to be valid and [will affirm] the agency action if a reasonable basis exists for its decision."

FEMA Initial Submission at 7 (case and statutory citations omitted).

---

[3] This sum includes percentage commissions for profit, overhead, taxes, and architectural and engineering fees that BSWSD also sought.

FEMA miscasts the panel's role in this matter. The arbitration panel does not sit as a court reviewing the validity of agency regulations, as in the case of *Chevron* and its progeny, nor does it engage in judicial review of a final agency action based on a compiled administrative record under the APA, as in the case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Instead, we sit as an arbitration panel. Section 601 of the ARRA grants to the arbitrators sufficient authority to resolve disputes over public assistance grants under the Stafford Act, notwithstanding any other provision of law. 123 Stat. at 164.[4]

Additionally, the arbitration panel does not review an administrative record as would a reviewing court under the APA. FEMA's own implementing regulations contemplate that a record be created specifically for the arbitration panel which will enable the panel to resolve disputes related to a public assistance grant. The record consists of materials submitted by all parties to the arbitration as well as any independent material from technical and scientific experts that the panel considers necessary to resolve the dispute.

The arbitration panel's decision is an alternative to the established procedures leading to final agency action, and the panel's decision is administratively final and not subject to judicial review save for the narrow standards of 9 U.S.C. § 10. As Congress conceived in the ARRA, arbitration before the CBCA may be pursued by grantees and applicants in lieu of the second level of administrative appeal within the agency. The panel of CBCA Board Judge arbitrators should not be expected to defer to the decision making of lower level FEMA officials. Instead, the CBCA panel should provide a fresh and comprehensive look at all the facts and circumstances surrounding the case. In short, the arbitration decision serves as the final administrative action. The arbitration panel will consider the reasoning of FEMA officials, but a determination of any official or individual is not presumptively binding or automatically awarded deference. The panel decides each matter de novo as it views the facts and the law.

---

[4] Even if we accepted FEMA's argument that the arbitrary and capricious standard would otherwise apply to the arbitration, the later-enacted ARRA would trump the APA, since it establishes the arbitration "notwithstanding any other provision of law." As the BSWSD notes in its reply brief, when a statute grants authority "notwithstanding any other provision of law," it signals that the provision supercedes provisions of all laws that would hinder the authority conferred by the later enacted statute. BSWSD Brief at 3; s*ee Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

Here, the statutory and regulatory scheme envisions independent fact finding by the arbitration panel based upon a record compiled by the arbitration panel. In discussing an arbitrator's role in light of the standards of 9 U.S.C. § 10, the Supreme Court observed, "We should, if anything be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968). Courts generally defer to arbitrators' factual findings. *Warrior & Gulf Navigation Co. v. United Steelworkers of America*, 996 F.2d 279, 280 (11th Cir. 1993). In a case of arbitration under a collective bargaining agreement involving a workplace dispute, the Supreme Court noted:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987). The Supreme Court also stated:

> The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [the employee] and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task. If additional facts were to be found, the arbitrator should find them in the course of any further effort the Company might have made to discharge [the employee] for having had marijuana in his car on company premises.

Id. at 45. *See also Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*, 475 F.3d 746, 756 (6th Cir. 2007); *Armco Employees Independent Federation, Inc. v. Armco Steel Co. L.P.*, 65 F.3d 492, 497-98 (6th Cir. 1995). Indeed, in examining arbitration agreements, in the absence of express reservation, it is presumed that everything necessary to the ultimate decision, both as to law and as to fact, is included in the authority of the arbitrators. *Continental Materials Corp. v. Gladdis Mining Co.*, 306 F.2d 952, 955 (10th Cir. 1962).

FEMA, citing a supposedly applicable case from the United States Supreme Court, argues that the arbitration panel here must apply the arbitrary and capricious standard, because the arbitration involves statutory entitlements. FEMA Brief at 8-9. The case,

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), only stands for the proposition that disputes involving statutory rights are subject to mandatory arbitration clauses. *Mitsubishi*, 473 U.S. at 627; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). We reject the argument that the case relied upon by FEMA limits the arbitrators' authority as established by the ARRA and implementing regulation.

Here, the arbitration arrangement enacted by Congress and implemented by regulation is consistent with the accepted notions of the arbitral role. Section 601 of the ARRA provides the arbitrators "sufficient authority," without reservation. The implementing regulatory scheme does not contemplate the arbitration panel's deferential review of FEMA's intermediate determinations concerning the extent of damage to the BSWSD schools' roofs, siding, and windows. To the contrary, FEMA's regulation contemplates that the panel will make independent determinations of the extent of the damage, taking into account the submissions of all parties to the arbitration. However, the burden of proving the claims by a preponderance of the evidence remains with the BSWSD and MEMA, since they are, respectively, the applicant and grantee.

_____
ANTHONY S. BORWICK
Board Judge

_____
R. ANTHONY McCANN
Board Judge

_____
RICHARD C. WALTERS
Board Judge