



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 13, 2010

CBCA 1951-FEMA

In the Matter of HANCOCK COUNTY, MISSISSIPPI SCHOOL DISTRICT

R. Mark Alexander, Jr., and Paul J. Delcambre, Jr., of Balch & Bingham LLP, Gulfport, MS, counsel for Applicant.

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

Melissa Pleasant, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC; and Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **GILMORE, STEEL, and KULLBERG.**

This case involves a request by the Hancock County, Mississippi School District (Hancock County or applicant) and the Mississippi Emergency Management Agency (MEMA or grantee) for the arbitration panel to determine whether Hancock County can recover the costs it expended in replacing fourteen buses destroyed by Hurricane Katrina (Katrina) with new buses. The Federal Emergency Management Agency (FEMA) has determined that Hancock County is entitled to only the estimated costs of replacing the 14 buses with used buses of similar make and model. After the application for arbitration was filed, FEMA requested that the arbitration be dismissed, contending that Hancock County did not file a first level appeal within sixty days of its receipt of the funding amounts set forth in project worksheet (PW) 7122, version 2, which MEMA sent to the applicant on July 29, 2008. FEMA argues that because the applicant failed to file a first level appeal, arbitration is not available to the applicant under 44 CFR 206.209 (2009).

The parties filed briefs on the issue, and a telephonic hearing was held on June 29, 2010. The panel finds that FEMA has not presented a valid ground for dismissal and, accordingly, FEMA's request to dismiss the arbitration is denied.

In support of its request for dismissal, FEMA relies solely on the July 29, 2008, memorandum from MEMA to the applicant (which attached PW 7122, version 2, and set forth certain appeal rights) as providing the notice to the applicant of FEMA's final determination on the bus replacement costs. FEMA contends that applicant should have appealed determinations set forth in that PW within sixty days of receipt of that memorandum. The applicant and grantee contend that PW 7122, version 2, was not a denial of the full replacement costs for the fourteen buses and, thus, there was no FEMA decision to appeal. They contend that FEMA's final review and determination of the replacement costs are set forth in PW 7122, version 3, and that the applicant timely filed its arbitration request after receipt of MEMA's memorandum dated February 22, 2010, forwarding PW 7122, version 3.

PW 7122, version 2 (attached to the MEMA's July 29, 2008, memorandum), states that it was "written to adjust the anticipated insurance reduction to reflect actual insurance proceeds for the 14 buses." This version also included a cost estimate for replacing fourteen buses with used buses, and an estimate for painting the school names and numbers on the buses. There were no signatures by FEMA representatives on the face of the PW and no language in the PW stating that it represented FEMA's final determination of the bus replacement costs.

MEMA's July 29, 2008, memorandum to the applicant stated the following:

After your review [of the PW], if you disagree with the scope of work or the obligated amount, please contact the MEMA representative listed above to discuss any questions or concerns. The MEMA representative can help you determine what follow up actions may be best to help address your concerns such as working with FEMA to try to resolve the issue or proceeding with filing an appeal.

In accordance with [44 CFR 206.206], you have the right to appeal any PW. The appeal must be submitted in writing within 60 days of receipt of this memorandum The appeal will be processed through [MEMA] and should be sent to the address of the [Governor's authorized representative].

FEMA contends that the applicant had sixty days after receipt of this memorandum in which to file its appeal and having failed to do so, arbitration is not available to it.

The record shows, however, that there was no language in PW 7122, version 2, indicating that it was FEMA's final determination of the costs to be paid for replacing the fourteen buses destroyed by Katrina. The PW states that it was written to adjust the insurance proceeds. FEMA did not produce any evidence establishing that FEMA's Regional Director or designee had reviewed or approved the PW. Additionally, there is no written correspondence in the record from FEMA to MEMA evidencing a final determination by FEMA's Regional Director on eligible bus replacement costs which included the appropriate appeal language, which determination MEMA was then required to send to the applicant. It is FEMA, not MEMA, which is charged under the regulations with making the final determination on a public assistance application. *See* 44 CFR 206.200-.206.

Here FEMA had not issued a final determination on eligible costs for replacement of the fourteen buses as of July 29, 2008, when MEMA's memorandum was written. The PW that contains FEMA's final determination on these costs is PW 7122, version 3, which was attached to MEMA's memorandum dated February 22, 2010, providing the applicant sixty days from the date of receipt in which to appeal that determination. Applicant timely filed a request for arbitration on March 24, 2010, in lieu of filing an appeal under 44 CFR 206.206, as set forth under 44 CFR 206.209(b)(1).

Decision

FEMA's request to dismiss this arbitration is denied. The parties shall prepare for the July 28, 2010, arbitration hearing as set forth in the panel's Post-Conference Memorandum and Order dated May 27, 2010.

BERYL S. GILMORE
Board Judge

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge

