UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 2, 2010

CBCA 2018-FEMA

In the Matter of BALDWIN COUNTY BOARD OF SUPERVISORS

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Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **VERGILIO**, and **KULLBERG**.

This case involves a request by the Baldwin County Board of Supervisors (Baldwin County) and the State of Alabama Emergency Management Agency (AEMA) that the arbitration panel determine whether the Federal Emergency Management Agency (FEMA) can recover previously reimbursed tipping fees that were charged in connection with debris removal. FEMA has raised two matters related to the proceedings in this arbitration that are addressed in this ruling. First, FEMA contends that this matter should be dismissed because Baldwin County previously elected to appeal FEMA's decision before requesting arbitration in this matter. Second, FEMA contends that the $500,000 statutory threshold for this Board to conduct an arbitration in this matter has not been met. A majority of this panel does not

find that FEMA has raised valid grounds for dismissal, and, accordingly, FEMA's request that this matter be dismissed is denied.

On October 13, 2006, FEMA issued a project worksheet (PW) in the amount of $2,917,201.16 for debris removal in Baldwin County due to damage from Hurricane Katrina. The cost of debris removal included tipping fees, which are charged for each cubic yard of debris brought to a landfill. FEMA's Office of the Inspector General determined in an audit report dated December 4, 2008, that Baldwin County had been improperly reimbursed for excessive tipping fees in connection with debris removal after Hurricane Katrina.[1] On August 11, 2009, FEMA retroactively disallowed tipping fees in the amount of $440,033 plus interest in the amount of $83,274. Baldwin filed an appeal to FEMA's regional office on October 13, 2009, and the appeal was denied on April 5, 2010. Baldwin County subsequently filed its request for arbitration on May 14, 2010.

FEMA contends that because Baldwin County elected the administrative appeals process, it is now barred from requesting an arbitration. An applicant is allowed a two-step appeal process of FEMA determinations in which an appeal is first submitted to a Regional Administrator, and an appeal of the Regional Administrator's decision can be submitted to the Assistant Administrator of the Disaster Assistance Directorate. 44 CFR 206.206 (2009). An applicant, however, who "is eligible to file an appeal under § 206.206 . . . or . . . had a first or second level appeal pending with FEMA pursuant to § 206.206 on or after February 17, 2009" may request arbitration "in lieu of filing or continuing an appeal under [section] 206.206." *Id*. 206.209. In this case, Baldwin County is requesting arbitration in lieu of continuing the appeal process, and its request for arbitration under such circumstances is not contrary to section 206.209.[2]

The panel is not persuaded by FEMA's argument that the comments published with 44 CFR 206.209 would preclude Baldwin County from requesting arbitration after having commenced an appeal. The relevant portion of that commentary stated that "[t]he use of only one review procedure, arbitration or appeal, is more expeditious than two consecutive review procedures." 74 Fed. Reg. 44,762 (Aug. 31, 2009). Allowing Baldwin County to proceed with the arbitration process is not inconsistent with the expeditious resolution of this matter.

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[1] In addition to Hurricane Katrina, the audit dealt with reimbursements related to two other hurricanes (Ivan and Dennis) that are not at issue in this matter.

[2] In order to protect its right to appeal the decision by FEMA's regional office in the event the panel ruled that it did not have jurisdiction, Baldwin County filed a protective appeal. Baldwin County has represented that its protective appeal would be withdrawn if the Board determines that it has jurisdiction in this matter.

The comments that accompanied the publication of 44 CFR 206.206 recognized that "[t]he first appeal to the Regional Director frequently gathers new information related to the issue that the Regional Director rules upon for the first time." 63 Fed. Reg. 17,109 (Apr. 8, 1998). It is reasonable to conclude that this panel is benefiting from the record and analysis that was developed during the appeal process. Also, an arbitration of this matter necessarily requires terminating the appeal process, which precludes Baldwin County from participating in two consecutive proceedings. Consequently, the Board does not find that Baldwin County's request for arbitration is contrary to the comments that accompanied the publication of 44 CFR 206.209.

FEMA also argues that the amount at issue in this matter is below the $500,000 threshold required for an arbitration before this Board. The authority of this Board to conduct an arbitration in this matter is set forth in the American Recovery and Reinvestment Act of 2009 (ARRA), which states in relevant part the following:

> 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.

Pub. L. No. 111-5, § 601, 23 Stat. 115, 164 (2009). Under 44 CFR 206.209(b), an applicant "may request arbitration of a determination made by FEMA on application for Public Assistance, provided that the total amount of the project is greater than $500,000." The term "project" is defined as follows:

> A *project* is a logical grouping of work required as a result of the declared major disaster or emergency. The scope of work and cost estimate for a project are documented on a Project Worksheet (FEMA Form 90-91).

44 CFR 206.200(i).

FEMA errs in arguing that the $500,000 threshold has not been met in this matter. The amount shown on the project worksheet (PW) is $2,917,201.16, which is well in excess of $500,000. FEMA incorrectly argues that the project cost is $494,027.29, but that is the difference between two items shown on the PW and not the project cost. Additionally, FEMA argues that the audited amount, $440,033, is less than the $500,000 threshold, but the audited amount is not the project amount.

Neither of the grounds for dismissal that FEMA relies on are valid. A majority of this panel concludes that the panel has the authority to conduct the arbitration in this matter.

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H. CHUCK KULLBERG
Board Judge

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STEPHEN M. DANIELS
Board Judge

Unlike the majority of this panel, I would grant the motion of the Federal Emergency Management Agency (FEMA) and dismiss this matter for lack of authority to arbitrate the dispute.[3] Because the applicant, Baldwin County Board of Supervisors, elected the appeal process to obtain review of a FEMA determination it is precluded from use of this arbitration process.

Pertinent regulations deal with the availability of the arbitration process at this Board:

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[3] Alternatively, FEMA moves to dismiss contending that a $500,000 threshold is not here satisfied. In its statement of facts, FEMA focuses upon an amount in the project disallowed, without addressing the amount of the project as described in regulation, 44 CFR 206.209(b). I agree with the majority that FEMA has not shown that the dollar threshold is not satisfied.

> An applicant . . . may request arbitration of a determination made by FEMA on an application for Public Assistance, provided that the total amount of the project is greater than $500,000, and provided that:
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> (1) the applicant is eligible to file an appeal under § 206.206; or
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> (2) the applicant had a first or second level appeal pending with FEMA pursuant to § 206.206 on or after February 17, 2009.

44 CFR 206.209(b) (2009). The referenced 206.206 procedures provide for two levels of appeals to administrators of FEMA. The regulations also contain provisions that address the rules governing the arbitration, and the limitations when electing remedies:

> (c) *Governing rules.* An applicant that elects arbitration agrees to abide by this section and applicable guidance. The arbitration will be conducted pursuant to procedure established by the arbitration panel.
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> (d) *Limitations*--(1) *Election of remedies.* A request for arbitration under this section is in lieu of filing or continuing an appeal under § 206.206.

44 CFR 206.209.

A discussion of the rules, found in the Federal Register with the issuance of the final rules, provides guidance to the applicants, this Board, and the public:

> The stated purpose of the ARRA [the American Recovery and Reinvestment Act of 2009] arbitration provision is to "expedite" recovery efforts. Accordingly, a request for arbitration is in lieu of filing or continuing an appeal under 44 CFR 206.206. The use of only one review procedure, arbitration or appeal, is more expeditious than two consecutive review procedures. The use of both arbitration and the standard appeal process would lengthen, not expedite, the recovery process. Arbitration and appeals each require significant time to complete, and FEMA has determined going forward that it would be contrary to

> Congressional intent to allow applicants/subgrantees to pursue both an appeal and arbitration.

74 Fed. Reg. 44,762-63 (2009).

In this instance, the applicant received an initial adverse determination after the publication and effective date of the final rules regarding arbitration. The applicant elected to proceed through the appeal process described in 44 CFR 206.206. After an adverse determination from FEMA at the level one appeal, the applicant filed this arbitration action. As I interpret the regulation, the applicant's filing of the initial appeal serves to preclude the applicant from pursuing resolution through this Board's arbitration procedures. As the published limitation in the election provision of the regulation and the guidance quoted above make explicit, the appeal process may be utilized in lieu of (not in addition to) the arbitration process. With a FEMA determination ripe for review after the publication of the final rules, the regulations entitle an applicant to either an appeal or arbitration, but not both.

After the effective date of the final rules regarding arbitration, this applicant initiated review through the appeal process. The explicit limitation, expressed as an election of remedies, found in the regulations and explained in the guidelines, has meaning under accepted principles of interpretation. Having made an election of the appeal process, the applicant may not elect the arbitration process at this time. Concluding that this Board lacks the authority to provide the requested review, I would grant FEMA's motion to dismiss.

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JOSEPH A. VERGILIO
Board Judge