



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 2, 2010

CBCA 1800-FEMA

In the Matter of MOSS POINT SCHOOL DISTRICT

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Before the Arbitration Panel consisting of Board Judges **STERN**, **DRUMMOND**, and **WALTERS**.

The instant matter arises from a request for arbitration dated November 16, 2009, submitted to the Board by the Moss Point School District, Moss Point, Mississippi (MPSD). MSPD is an applicant for a disaster grant relating to Hurricane Katrina and administered under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5172 (2006), by the Federal Emergency Management Agency (FEMA). The grantee, the Mississippi Emergency Management Agency (MEMA), provided the panel with a recommendation dated December 4, 2009, supporting the MPSD request. As part of its response dated December 18, 2009, FEMA moves for dismissal of the arbitration for lack of jurisdiction. The panel denies FEMA's motion for the reasons set forth below.

Both in its response to the request for arbitration and in the brief it submitted pursuant to the panel's request, FEMA insists that the panel is without jurisdiction to arbitrate. According to FEMA, the matter at issue was already the subject of two levels of appeal

within the agency, and a final binding decision had already been issued to MPSD some seven months prior to the effective date of the statute that provides for the possibility of arbitration of grant disputes under the Stafford Act, i.e., the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, 164 (2009).

By authority of the President, the Department of Homeland Security entered into a memorandum of agreement with this Board under which the Board exercises the delegated arbitration authority of Section 601 of the ARRA. Under implementing regulations issued by FEMA, the use of arbitration is “in lieu of filing or continuing an appeal [by applicants or sub-grantees pursuant to 44 CFR 206.206].” 44 CFR 206.209(a) (2009). The regulations further provide that arbitration is not available for any matter that obtained final agency action by FEMA pursuant to 44 CFR 206.206 before the ARRA’s effective date, February 17, 2009. *Id.* 206.209(d)(2).

In the present instance, storm surge waters from Hurricane Katrina are said to have caused the two buildings of MPSD’s Magnolia Junior High School to be inundated with salt water, varying in depth from 18” to 40”. MPSD submitted a grant application to FEMA through MEMA for relief assistance under the Stafford Act. There was a dispute between MPSD and FEMA regarding the grant application. More specifically, the parties were in disagreement as to whether the costs related to certain emergency measures – in particular, mold remediation costs – were to be included within FEMA’s computation under the so-called “50% Rule” for determining whether facilities are eligible for total replacement, as opposed to repair. Under 44 CFR 206.226(f)(1), **where repair is “feasible,”** a facility will be considered “repairable” “when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition.” If, on the other hand, estimated repair costs exceed 50% of estimated replacement costs, an applicant is eligible to receive a grant for facility replacement. FEMA in this case found that mold remediation costs are not includable in the “50% Rule” computation, and that damages to the junior high school buildings did not exceed 50% of their estimated replacement cost. FEMA thus ruled that the junior high school buildings were only eligible for repair under the grant. MPSD filed a timely appeal from that ruling on or about April 18, 2007. On July 19, 2007, the FEMA Regional Administrator denied that appeal. MPSD then filed a second appeal through the grantee, MEMA, on September 26, 2007, and the second appeal ultimately was denied by FEMA’s Assistant Administrator for Disaster Assistance Directorate, by letter dated July 17, 2008. That letter read, in pertinent part:

I have determined that mold remediation work completed at the facility is appropriately funded under Category B. Costs for emergency work are not considered in repair costs for 50% Rule analysis. The repair versus

replacement ratio is less than 50 percent for each building and funding for replacement buildings is not warranted. Therefore, the appeal is denied.

FEMA maintains, based on its regulations (44 CFR 206.209 (d)(2)), that, because final agency action was taken against MPSD after a second level appeal before February 17, 2009, the effective date of the ARRA, MPSD may not pursue arbitration before this panel. MPSD vehemently contests this position.

MPSD asserts that the matter currently before this panel is not the same as that decided by the FEMA Assistant Administrator in 2008. More particularly, it explains, when it sought a building permit from the City of Moss Point in order to commence with the repair project at the junior high school, the permit was refused. The city said that the buildings, as repaired, would not conform to National Flood Insurance Program (NFIP) standards, FEMA flood plain guidelines, and a new city flood plain damage prevention ordinance (in turn, based on those standards and guidelines) that took effect on February 17, 2009, the same date ARRA went into effect. This refusal was conveyed by the city's FEMA Mitigation/Floodplain Specialist on or about August 11, 2009, during a meeting with MPSD's architects and project manager, which had been convened to review MSPD's project plans for the junior high school project. Letters of clarification were exchanged between MSPD and the city in August and September, and the refusal was confirmed. The city's new ordinance, for listed critical facilities such as the junior high school, requires either floodproofing or heightened building elevation for the lowest level (including the basement) to four feet above the base flood elevation (BFE) for new construction or substantially improved facilities. In 2008, the city adopted new flood insurance rate maps, which showed the BFE for the location of the junior high school at ten feet above mean sea level. The finished elevations of the junior high school structures vary between 8.73 feet and 9.78 feet above mean sea level – i.e., below the newly established BFE.

MSPD had the city remove all of its schools from the list of critical facilities in October 2009, since the schools did not fall within the FEMA definition of "critical facilities." Nevertheless, the junior high school buildings still lay below the BFE and, according to MPSD, pursuant to NFIP section 60.3(c)(3), would still have to be elevated above the BFE or be designed to be watertight below the BFE "with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy." MSPD relates that the FEMA and MEMA technical team assessors met with MSPD's project architect and agreed that: (1) elevating the existing facilities to the required elevation would not be feasible; and (2) dry floodproofing exterior walls with impermeable polymer coatings or by the construction of a free standing flood wall or levee similarly would be impracticable.

From MSPD's perspective, because repair was no longer "feasible" – i.e., in light of its inability to secure a building permit – MSPD could no longer proceed with the contemplated repair project for the junior high school. MSPD, by letter dated October 8, 2009, therefore asked MEMA to approach FEMA, and MEMA, by letter dated October 15, 2009, requested that FEMA reconsider MSPD's request to fund the total replacement of the Magnolia Junior High School facilities. By letter dated October 23, 2009, FEMA responded to MEMA's request, referring to its earlier denials of replacement funding as being "final" and suggesting possible availability of hazard mitigation funding under Section 406 of the Stafford Act. MEMA, by letter dated October 28, 2009, forwarded that FEMA response to MSPD. MSPD took this response as a denial of replacement funding. Instead of filing an administrative appeal from this response with FEMA's Regional Administrator, it filed the instant request for arbitration with the Board on November 19, 2009.

The panel agrees that the MSPD request for arbitration arose from a matter not addressed by FEMA's prior appeal decisions. Interestingly, though MSPD and MEMA both specifically referred to the request for reconsideration and the FEMA response of October 23, 2009, FEMA chose not to make mention of that exchange in any of its filings with the Board. The October 23, 2009, response, notwithstanding the change of circumstances MSPD was facing, refers to and reaffirms the earlier FEMA appeal decisions denying total replacement funding. That response itself constitutes a FEMA determination that was subject to appeal. FEMA regulations convey to this arbitration panel jurisdiction to decide a dispute upon an applicant's request, whenever an applicant is "eligible to file an appeal," regardless of whether or not an appeal has been filed. *See* 44 CFR 206.209(a)(1). The request for arbitration here, taken in lieu of an administrative appeal to the FEMA Regional Administrator, was timely filed, i.e., within thirty days of FEMA's October 23 determination. 44 CFR 206.209(e)(2). Curiously, though FEMA had advised MEMA (and MSPD) in that determination that arbitration was not available, FEMA now argues that a request for arbitration somehow should have been filed by MSPD either within thirty days of the city's enactment of the ordinance in question or within thirty days of the city's refusal to issue a building permit to MSPD based on that ordinance. FEMA is plainly wrong on all counts. The Board would not have had jurisdiction to decide a dispute between MSPD and the City of Moss Point, but does have jurisdiction to arbitrate the instant dispute between MSPD and FEMA.

FEMA's other arguments seem more in the nature of arguments in support of a motion for summary relief than arguments directed at this panel's jurisdiction. Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98

F.3d 1314, 1316 (Fed. Cir. 1996). Addressing whether MSPD ultimately can recover for the additional costs necessitated in order to comply with the city's 2009 flood plain ordinance, FEMA cites to the following language of 44 CFR 206.226(d)(3)(i), requiring that, in order to recover for costs associated with compliance with codes and standards, such codes and standards must:

Be found reasonable, in writing, and formally adopted and implemented by the State or local government on or before the disaster declaration date or be a legal Federal requirement applicable to the type of restoration.

There is no question, i.e., no genuine issue of material fact, as to whether the new ordinance was "formally adopted and implemented . . . on or before the disaster declaration date." Hurricane Katrina obviously was declared a disaster years before the February 17, 2009, effective date for the city's flood plain ordinance. Whether or not the ordinance is "a legal Federal requirement applicable to the type of restoration," however, is not so obvious.

Both MSPD and MEMA are under the impression that the city's ordinance came about as a result of FEMA flood plain requirements. FEMA does not dispute that, for facilities within its boundaries to qualify for federal flood plain insurance and participate in the NFIP, the City of Moss Point had to amend its code to incorporate the new flood plain ordinance based on NFIP standards and FEMA guidelines. FEMA argues instead that, because the city could have opted to withdraw from the NFIP, the decision to enact the ordinance in order to remain in the program was strictly that of the local government and not a "federal requirement." In this regard, FEMA points to the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), and to that court's refusal to issue an injunction to compel various parishes and other related entities in Louisiana to comply with federal regulations governing flood plain construction and management. The court in *Parish of St. Bernard* made the following observations:

It is black letter law that an injunction will not issue when it would be ineffectual. Under the NFIP a community may withdraw, or it may be suspended by the agency, if it is not in compliance with the regulations governing flood plain construction and management. Nonetheless, the government seeks an injunction to force the parishes to bring into compliance all areas located in flood plains that are in violation of the regulations. The government also seeks a prospective injunction to keep the communities from engaging in future violations.

We can perceive no utility in such a course. Requiring a community to do acts which it may voluntarily choose to avoid is not a proper exercise of judicial power. In no way is community participation in the NFIP required. Deciding to join or remain under the program is a decision left solely by the statute to the local community. This remains true even after Congress created additional incentives to secure more widespread community participation. As a result, it is not a proper use of judicial power to force the parishes to do what they may decide to avoid doing by simply withdrawing from the program.

Similarly, requiring a community to undertake expensive reconstruction projects to bring itself into compliance with the NFIP is fruitless when the agency already possesses the power to suspend any community which is in violation. We certainly agree with the government that a community must be in compliance to remain in the program. However, that is not equivalent to saying we must force a community to comply by means of an injunction.

Id. at 1123.

While *Parish of St. Bernard* may be instructive regarding the realities of communities and their decisions as to whether or not to participate in the NFIP, it is not dispositive of the issue here at hand. The present arbitration does not involve a government request for injunctive relief, and the Fifth Circuit in *Parish of St. Bernard* was not asked to interpret the language of FEMA regulations pertaining to the provision of disaster relief under a federal remedial statute. Although the court in *Parish of St. Bernard* may have been reluctant to impose an injunction on parties not bound by federal law to participate in the NFIP, this does not mean that a municipality already participating in the NFIP and wishing to continue to participate may not be subject to federal NFIP standards and related FEMA flood plain guidelines. To the contrary, as the court noted, “a community must be in compliance to remain in the program.” *Id.* Thus, the mere fact that the City of Moss Point may opt to withdraw from the NFIP will not render the federal flood plain regulations into something other than a “legal Federal requirement applicable to the type of restoration” contemplated by the MPSD, so long as Moss Point is a program participant. In short, the panel cannot conclude, as a matter of law, that MPSD will not be eligible for a disaster relief grant that would allow it to proceed with restorative work in the present case.

Decision

_____ Accordingly, FEMA's motion to dismiss for lack of jurisdiction is denied.

RICHARD C. WALTERS
Board Judge

JAMES L. STERN
Board Judge

JEROME M. DRUMMOND
Board Judge