UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 13, 2010

CBCA 1760-FEMA

In the Matter of SEWERAGE & WATER BOARD OF NEW ORLEANS

Jason Higginbotham, Director of Emergency Management, Gerard M. Victor, Special Counsel, and Brian A. Ferrara, Deputy Special Counsel, Sewerage & Water Board of New Orleans, New Orleans, LA, appearing for Applicant.

Paul W. Rainwater, Executive Director, Louisiana Recovery Authority, Baton Rouge, LA; and Mark S. Riley, Deputy Director, Lynn L. Wiltz, Appeals Specialist, and William J. Patrigo, Appeals Specialist, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Chad T. Clifford, John B. Patterson, Linda M. Davis, and Kim A. Hazel, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **GILMORE**, **STERN**, and **SHERIDAN**.

GILMORE, Board Judge.

The Federal Emergency Management Administration (FEMA) moved to dismiss the application of the Sewerage and Water Board of New Orleans (applicant) for arbitration of its claim to replace the anti-theft devices on fire hydrants allegedly damaged by Hurricane Katrina, docketed as CBCA 1760-FEMA. FEMA contends that applicant failed to timely file its second appeal and, thus, the panel has no jurisdiction to arbitrate the claim. FEMA contends that the applicant received the first appeal decision on its claim on September 24, 2007, and that, pursuant to 42 U.S.C. § 5189a and 44 CFR 206.206(c), the applicant had sixty

days in which to file its second appeal to the State of Louisiana, the grantee. FEMA asserts that the first appeal decision notified the applicant of the sixty-day appeal period. FEMA, therefore, contends that the applicant had until November 23, 2007, to file its second appeal, and that such appeal was not filed until May 23, 2008. FEMA further contends that because the regulations governing the arbitration process at 44 CFR 206.209(d)(2) provide that "arbitration is not available for determinations for which the applicant failed to timely appeal under the provisions of [44 CFR] 206.206 prior to August 31, 2009," the arbitration should be dismissed for lack of jurisdiction. FEMA asserts that even though it considered the second appeal, including providing the applicant a hearing, its consideration of the second appeal did not constitute a waiver of the statutory and regulatory time limits and, further, that FEMA has no authority to waive these time limits.

The applicant and grantee, in their respective responses to the motion, admit that the second appeal was filed beyond the sixty-day period. However, the applicant and grantee contend that the FEMA representative with whom they were negotiating (a public assistance coordinator) told them not to file the second appeal because the representative could not assist if an appeal was pending. They also contend that FEMA officials led them to believe that they were to resolve the claim through the Louisiana Transitional Recovery Office. The applicant and grantee contend that in May of 2008, approximately six months after the sixty-day appeal period had run, they were told by the same FEMA representative that FEMA was going back to the appeals process and that the applicant should file its second appeal, which it did on May 23, 2008. The applicant and grantee further assert that they continued discussing the anti-theft devices claim with FEMA representatives long after the sixty-day appeal period had run and, after the second appeal was filed, the applicant was provided a hearing. The applicant and grantee argue that it would be inequitable and unfair to deny arbitration of this claim since they were at all times simply following guidance provided by FEMA representatives.

The parties filed briefs on December 8 and 9, 2009. The panel held a telephonic hearing on the motion on January 5, 2010, in which the applicant, grantee, and FEMA orally presented their positions.

Discussion

There is no dispute that the governing statute and implementing regulations provide that the applicant has sixty days in which to appeal a decision after receipt of notice of the decision on a claim. In this case, the first appeal decision was received by the applicant on September 24, 2007. The decision stated clearly that the appeal was denied and that if the applicant desired to pursue a second appeal, the appeal must be submitted to the grantee

within sixty days of receipt of the decision. The second appeal was filed on May 23, 2008, six months after the applicant received notice of the first appeal decision.

The evidence in the record does not support the applicant's allegation that FEMA officials misled the applicant. Neither the applicant nor the grantee has presented compelling evidence that at any point during consideration of this claim an authorized FEMA official gave instruction that the appeal process should be abandoned or delayed. There were no documents or affidavits submitted by the applicant or grantee to support this bare assertion. While we understand that, after receiving the first appeal decision, alternate procedures were employed in an attempt to resolve the matter, there is no evidence that these procedures obviated the statutory and regulatory appeal process that had already begun. The applicant should have taken appropriate steps to protect its appeal rights. Having failed to do so, the applicant lost its right to pursue a second appeal.

Decision

We conclude that the applicant did not timely file its second appeal and that arbitration is not available for the anti-theft devices claim. We, therefore, dismiss CBCA 1760-FEMA.

BERYL S. GILMORE
Board Judge

JAMES L. STERN
Board Judge

PATRICIA J. SHERIDAN
Board Judge