



FEMA LAW ASSOCIATES, PLLC
Latest FEMA Law Developments At a Glance

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Message From the President

This newsletter is dedicated to the new arbitration process for disputes arising from FEMA's public assistance program. Although this program is limited to disputes from the "Gulf Coast Region" and Hurricanes Katrina and Rita, the success (or failure) of this program could have a significant impact on future processing of other public assistance program applications and appeals.

Previous issues of our Newsletter can be obtained on the FEMA Law website, www.fema-law.com (click on "e-Newsletters").

-Ernest Abbott

New Arbitration Panels for FEMA Public Assistance Program

On Monday, August 31, 2009, FEMA published "final" regulations covering its new public assistance arbitration program. (They are at 74 Fed. Reg. 44761.) Secretary Napolitano had announced the new process on August 6, 2009; a set of "Frequently Asked Questions" and answers was distributed with the DHS Press Release. <http://www.fema.gov/news/newsrelease.fema?id=49243>

As reported in our April newsletter (Issue 11) this arbitration option was established, as of February 17, 2009, by a one sentence long section of the economic stimulus legislation enacted in February at the instigation of Senator Mary Landrieu (D-LA). The full text of the section reads as follows:

SEC. 601. Arbitration Panel – 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 [Stafford Act] for a project the total amount of which is more than \$500,000.

For the last 5 months, FEMA and DHS have been developing the arbitration procedures required by the legislation. The basic features of the program are relatively simple – although we see several serious impediments to the arbitration process outlined by the new regulations. Here are the simple parts:

- As required by the statute, the arbitration process is limited to disputes from Public Assistance projects in excess of \$500,000 arising from hurricanes Katrina and Rita in the

Gulf Coast states of Alabama, Louisiana, Mississippi and Texas.

- According to the regulations, arbitration is available only to public assistance applicants who (1) are still eligible to file an appeal under 44 CFR 206.206, or (2) had a first or second appeal pending as of February 17, 2009. This means that applicants can also seek arbitration of
 - o any new FEMA public assistance decision (such as one generated by an Audit Report of the Inspector General, or one which had never previously been issued); and of
 - o any FEMA Second Appeal decision issued between February 17, 2009 and August 31, 2009.
- Those with a right to arbitrate as of August 31, 2009 must file for arbitration by Wednesday, September 30, 2009. Otherwise, an applicant must seek arbitration within 30 calendar days of the decision being challenged. (If the 30th calendar day ends on a weekend or holiday, it is prudent to file on the last working day before the 30 day period expires).
- An applicant seeking arbitration must withdraw any pending appeal. Applicants must choose between appeals and arbitration.
- Arbitration procedures are extremely expedited. The initial arbitration submission, due in 30 days, is the only written submission that applicants have a right to submit, and this submission must include "a written statement and *all documentation supporting the position of the applicant.*" 44 CFR 206.209(e) (emphasis added).

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Arbitration Panels, Cont'd

- In addition, the state then must submit its recommendation on the dispute in 15 calendar days (rather than the 60 days provided by FEMA's appeal procedures).
- FEMA then must submit its response to the arbitration request (along with "a copy of the Project Worksheet and *any other supporting information*" in 30 days.
- Multiple third-party, neutral panels will be established as the caseload dictates. Each arbitration panel will consist of three judges, independent from DHS, drawn from the federal pool of administrative law judges and similar officials that currently serve on boards, commissions and agencies.
- FEMA will publish guidance regarding the procedures governing the arbitration panels and the arbitration process. Decisions are made by majority of the arbitrators, each having a single vote.
- There is then 10 days to hold a "preliminary conference" to clarify issues and on administrative matters, and then an in-person or telephonic hearing if requested. (FEMA's FAQ states that most of the arbitrations will be decided without a hearing, on the written statements provided by the parties.)
- Each panel is expected to make every effort to reach a decision within 60 days of reviewing the written material or hearing the oral testimony, whichever comes later. However, in highly technical or complex matters, it may take an arbitration panel longer to reach a decision.
- The decision of the majority of the arbitration panel is a final decision, binding on the parties. The final decision is not subject to further administrative or judicial review, except for some very limited exceptions permitted by the Alternative Dispute Resolution Act, 9 USC § 10. ■

Troubling Aspects of the New Rules:

1. The rules assume that an applicant has the information and documentation required to establish eligibility at the outset of the arbitration process. Public Assistance program disputes arise generally because FEMA concludes that the applicant's contract prices were unreasonably high, or that work was ineligible or was not properly performed. FEMA's conclusions are based on staff analyses of samples of other applicants' contract prices that it has access to, or of inspection of samples of work performed. However, FEMA frequently does not provide its supporting analysis to the applicant. In fact, FEMA frequently is the only party with information that allows applicants to understand and respond to the disallowance of cost in an appeal (or an arbitration). And FEMA's responsiveness to FOIA requests seeking this information is notoriously slow – generally requiring a number of months. Yet FEMA's new arbitration rules go out of their way to indicate that the only submissions of documentation by an applicant are in its initial submission on September 30, 2009 or (30 days after the FEMA decision). The Rules do provide for a hearing – when applicants can argue in support of their position referencing documents already submitted – but the Rules state that "*parties may not provide additional paper submissions at the hearing.*" Only if the arbitration panel itself is frustrated by the lack of an adequate record, and decides to allow submission of additional information, is there an opportunity to provide additional documentation in response to new information provided in FEMA's arbitration response – or documentation that may have previously been withheld by FEMA.
2. The preamble of the rule properly recognizes that "public assistance determinations can be technical and complex," and so provides for the possibility that the arbitration panel may take longer than 60 days to decide an appeal involving "a highly technical or complex matter." However, there appears no recognition that it may take applicants (or the state or FEMA) more time to present their arbitration submissions in highly technical matter with potentially millions of dollars at stake.
3. By requesting arbitration, an applicant must withdraw its appeal and agree to "comply with applicable guidance." However, FEMA has not issued the guidance that the applicant is agreeing to – and reserves the right to "issue separate guidance as necessary." 44 CFR 206.209(m).

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Troubling Aspects, Cont'd

4. Arbitration is available for public assistance “projects” where the amount in dispute is over \$500,000. The Preamble correctly states that this dollar limitation is set by [the statute] and is not within FEMA’s discretion. But it is quite unclear how the “project” covered by this dollar limitation is defined and who gets to define it. The preamble states that:

“The project worksheet documents the details of the project, which is a logical grouping of work required as a result of a declared major disaster or emergency. A project may include eligible work at several sites, and may include more than one project worksheet.”

If FEMA has divided a “project” into several project worksheets, how is the applicant to be sure which project worksheets are part of the “project” and which are not? If several PWs total more than \$500,000, but individual ones do not, how is the applicant to know which PWs can be arbitrated? If the applicant seeks arbitration of several PWs, and withdraws pending appeals as required by the rule – has the applicant lost any right to a substantive review of the FEMA decision if FEMA persuades the arbitrators that the multiple PWs were not part of a single project and so did not meet the \$500,000 threshold?

5. It appears that FEMA is seriously understating the complexity of the work required to submit requests for arbitration and all supporting documentation. In the “Paperwork Reduction Act” analysis in the Preamble, FEMA asserts that the time required to submit a request for arbitration is 1 hour – citing statistics from other government programs in which the “request for

arbitration” is a mere notice of intention to arbitrate. But the public assistance disputes that remain unresolved four years after landfall are unresolved not because they are easy – but because they raise highly technical, complex, contentious or troublesome issues. It also appears that FEMA has understated the potential scope of the matters that may be subject to arbitration. The Preamble states confidently that there are only about 127 projects that will likely go to arbitration. This may well be accurate – given the difficulty many applicants will face in preparing a complete arbitration submission by September 30. But note that there remains a wave of potential audits of public assistance grants by the Inspector General – and any recommended disallowances that are adopted by FEMA will generate a new round of potential arbitrations and appeals.

6. FEMA precludes “ex parte communications” but nowhere do its regulations define the term except in the context of rulemaking (44 CFR §1.6 – “significant information and argument respecting the merits of a proposed rule.”). A definition would make it clear whether it is permissible to contact the arbitrators even on purely procedural/scheduling grounds (e.g. to schedule a phone call) – or whether all communications of any type must be routed through the arbitration administrator.
7. The rule states that the decision of the arbitration panel is final except as permitted by 9 USC §10 – which basically applies where there is some form of fraud in the proceeding or misconduct by the arbitrators. It is not clear whether this provision ‘trumps’ other statutory restrictions on FEMA’s ability to obtain return of FEMA public assistance moneys, such as that in Stafford Act Section 705(c). ■

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