

Arbitrating FEMA Denials of Public Assistance Grant Funding

After every federal disaster declaration, FEMA may authorize Public Assistance (PA) grants to public entities--counties, municipalities, school districts, regional collaboratives and private non-profits that provide public services, like hospital associations. These grants pay for emergency response services, building restoration, and some forms of new construction. Applicants denied PA grant funding by FEMA were traditionally stuck appealing that decision within FEMA, but new legislation allows Applicants to arbitrate both denials and limitations on awarded grants before a neutral body, the Civilian Board of Contract Appeals (CBCA), in an expedited and impartial process.

Nichols Liu LLP is an authority on CBCA arbitrations of FEMA PA grants. Our team wrote the first and only treatise on the CBCA's PA arbitration process, a Briefing Paper accompanying this Notice. Our personnel clerked at the CBCA when the arbitration rules were drafted and the first arbitrations were conducted, and we routinely litigate the most complex issues of regulatory interpretation and Cost Accounting Standards. We represent both the PA grant applicants/recipients and the contractors performing PA grant work.

CBCA arbitrations of FEMA PA decisions are versatile and comparatively swift. If an applicant is denied a PA grant, or is awarded a PA grant in reduced value, or is denied payment for costs incurred pursuant to an awarded grant, the applicant may appeal those decisions within FEMA. Should FEMA deny that initial appeal, the applicant may choose arbitration by the CBCA instead of a second appeal within FEMA. Arbitrations are required by regulation to resolve the dispute within 120 days, and the CBCA's resolution is binding on the parties. Arbitration also allows the applicant to present new evidence and to argue the merits of its case in person. By contrast, secondary appeals within FEMA can take 180-days to two years to resolve, and their rigidly bureaucratic proceedings limit the information and arguments that may be considered.

In past PA arbitrations, the CBCA has:

- Reversed FEMA's narrow interpretation of its own regulations to find a wastewater treatment facility eligible for overtime costs incurred in response to the COVID-19 pandemic.
- Rejected FEMA's application of contradictory FEMA guidance regarding the "rural" or "urban" classification of applications, deciding that the applicant was eligible for award according to the lower cost threshold for rural applicants.
- Denied FEMA's interpretation of 42 U.S.C. § 5155(a) as barring a county's claim for debris removal costs simply because the company responsible for such damage could have been sued by the state.
- Found an environmental conservation sanctuary eligible for PA grant funding because of its secondary use as an emergency supplier of water in the event of wildfires, despite FEMA's refusal to recognize it as an eligible facility.
- Overturned FEMA's determination that an application for debris removal was untimely, finding the applicant eligible for PA grant funding.
- Applied a broader interpretation of the term "damage," as defined within FEMA regulation, to find a submerged roadway eligible for a PA grant despite FEMA's contention that only roads rendered impassable would be eligible for funding.
- Overturned FEMA's determination that repairs to parts of a hospital's roof and chiller system damaged by high winds were ineligible for PA funding.
- Determined that a natural dune feature where applicant "planted or encouraged grass" and installed a "fence across the crest" qualified as an "improved natural feature" and so was eligible for funding, despite FEMA's assertion that the improvements were incidental.
- Reversed FEMA's determination that a water district inadequately documented its routine maintenance of a dam subsequently damaged by disaster.

If you would like to know more about our services or inquire about representation in a current dispute, please email us at svankopp@nicholsliu.com, or contact our offices at

(202) 846-9834
www.nicholsliu.com

655 15th St N.W., Suite 425
Washington, DC 20005

