

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Colonna's Shipyard, Inc.) ASBCA No. 56940
)
Under Contract No. N40025-08-C-8002)

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Assistant Director

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION TO DISMISS IN PART
FOR LACK OF JURISDICTION

Appellant Colonna's Shipyard, Inc. (Colonna's) has appealed from the contracting officer's (CO) denial of its claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, which sought the CO's review and modification of the performance rating issued to it by the Department of the Navy under the subject contract's past performance assessment clause. Appellant alleges that the Navy acted arbitrarily and capriciously and breached the contract by failing to follow the clause's procedures and to produce and publish the fair and accurate evaluation the clause requires. The Navy contends that appellant has not submitted a valid CDA claim and moves for dismissal for lack of jurisdiction and for failure to state a claim. Appellant opposes the motions. For the reasons set forth below we deny them.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The Contract

On 11 January 2008, the Department of the Navy, Mid-Atlantic Regional Maintenance Center (MARMC), awarded Colonna's the subject negotiated firm-fixed price repair availability contract for the USS HAWES in the amount of \$2,730,255 (R4, tab 1 at 1-2 of 58). Contract modifications affected the scope of work, resulting in a net \$2,935,886.24 price increase (R4, tabs 2-16, *see* tab 16 at 2). The work focused upon

two major ship alterations--fan coil unit upgrade and bilge sprinkling installation--and a berthing modification. Repair work included the repair of hull and watertight door cracks, and emergent oil distribution box replacement. (R4, tab 49, ref. F; *see also* gov't mot. ¶ 2)

The contract contains a clause entitled "RMC C-2-0019 PAST PERFORMANCE ASSESSMENT (as modified) (APRIL 2000)" (performance assessment clause), which provides in part:

(a) The contractor, in performing this Job Order or Contract will be subject to a past performance assessment in accordance with FAR 42.15 and the Department of the Navy Contractor Performance Assessment Reporting System (CPARS) Guide in effect on the date of award. All information contained in this assessment may be used, within the limitations of FAR 42.15, by the Government for future source selection in accordance with FAR 15.304 when past performance is an evaluation factor for award. The assessment will be conducted upon redelivery of the vessel; and an addendum assessment may be conducted after the guarantee period expires.

(R4, tab 1 at 26 of 58)

The performance assessment clause provides for potential meetings between the government and the contractor and for the contractor's response to the government's CPAR evaluation (R4, tab 1 at 26 of 58, ¶¶ (b), (c)). It further provides:

(e) After receipt of contractor comments or 30 days from the date the contractor received its assessment, whichever occurs first, the assessment will be sent to the reviewing official for review and signature. The reviewing official, for purposes of this clause, is the cognizant RMC. The final CPAR assessment adjective ratings/colors will be the unilateral determination of the reviewing official. The assessment is considered complete when signed by the reviewing official. The assessment is not subject to the Disputes clause of the Job Order, nor is it subject to appeal beyond the review and comment procedures described above and in the Navy CPARS Guide.

(R4, tab 1 at 26-27 of 58)

The performance assessment clause identifies the elements upon which the contractor will be assessed, including, in pertinent part, “TECHNICAL (QUALITY OF PRODUCT),” “SCHEDULE (TIMELINESS OF PERFORMANCE),” and “MANAGEMENT.” Under each element, the contract lists numerous sub-elements “which could be evaluated.” (R4, tab 1 at 27-28 of 58, ¶ (h)) The clause concludes, in relevant part:

The following adjectival ratings and criteria shall be used when assessing all past performance elements:

Dark Blue (Exceptional). Performance meets contractual requirements and exceeds many to the Government’s benefit. The contractual performance of the element or sub-element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.

Purple (Very Good). Performance meets contractual requirements and exceeds some to the Government’s benefit. The contractual performance of the element or sub-element being assessed was accomplished with some minor problems for which corrective actions taken by the contractor were effective.

Green (Satisfactory). Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.

Yellow (Marginal). Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being assessed reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor’s proposed actions appear only marginally effective or were not fully implemented.

(R4, tab 1 at 29 of 58, ¶ (h))¹

Paragraph (a) of the contract’s performance assessment clause, quoted above, makes the government’s assessment of the contractor’s performance subject to Federal

¹ The “Red” or “Unsatisfactory” rating (*see id.*) is not at issue.

Acquisition Regulation (FAR) Subpart 42.15-CONTRACTOR PERFORMANCE INFORMATION, which provides in part at subsection 42.1502(b) that agencies “shall evaluate construction contractor performance...in accordance with 36.201.” FAR 36.201 states at paragraph (b), *Review of performance reports*:

Each performance report shall be reviewed to ensure that it is accurate and fair. The reviewing official should have knowledge of the contractor’s performance and should normally be at an organizational level above that of the evaluating official. [Emphasis added]

The contract incorporates the FAR 52.233-1, DISPUTES (JUL 2002)-ALTERNATE I (DEC 1991) clause by reference (R4, tab 1 at 46 of 58). The Disputes clause defines “claim,” in pertinent part, as follows:

(c) Claim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.

The contract’s performance period was 12 March 2008 through 14 May 2008. Colonna’s completed the work on time (R4, tab 17, tab 49, ref. A at 1; compl. ¶ 3; gov’t mot. ¶¶ 1, 4).

Performance Assessments and Disputed CPARS Ratings

During contract performance MARMC issued 28 Corrective Action Requests (CARs) to Colonna’s (R4, tabs 19-46, *see also* R4, tabs 47-48). By letter of 22 May 2008, Colonna’s challenged virtually all of the CARs and alleged that they were defective, improperly issued, or resolved, and should be rescinded (R4, tab 49, refs. G, I, J; compl. ¶¶ 14-16).

By evaluation dated 28 May 2008 Colonna’s responded to the Navy’s Past Performance Information Survey. Colonna’s assessed that it was entitled to a “Very Good,” or “Purple,” rating in the Technical category and “Exceptional,” or “Dark Blue,” ratings in the Schedule and Management categories. (R4, tab 49, ref. B at 1, 4, 5, 7)

By e-mail of 11 August 2008 to Colonna’s, Commander Charles B. Marks, the Commanding Officer of the USS HAWES, addressed its contract performance, stating in part: “Overall, Colonna’s work was solid and the organization was committed to a successful availability. The availability completed on time and on budget, a credit to the contractor” (R4, tab 49 at 5 of 11, ref. F).

On 2 October 2008 MARMC personnel met with Colonna's to address its challenges to the 28 CARs. On 15 October 2008 MARMC convened a CAR Review Board. On 23 October 2008 MARMC advised Colonna's that it had withdrawn nine "Method B" CARs, reduced seven "Method B" CARs to "Method A," or minor, and closed the only major, or "Method C," CAR as resolved. (R4, tab 49 at 5-6 of 11, ref. J; compl. ¶ 17) Colonna's alleges that, of the remaining 18 CARs, 9 involved the parties' disagreement over contract interpretation (R4, tab 49 at 6 of 11; compl. ¶ 18).

In October 2008 MARMC issued CPARs rating Colonna's performance as "Yellow," or "Marginal," in the Technical and Management categories and "Green," or "Satisfactory," in the Schedule category (R4, tab 49, refs. D, E). On 24 October 2008 a CPAR was sent to Commander Eric Stump, the Reviewing Official, who was also the CO, for closure on the ground that Colonna's had not responded to the evaluation within 30 days. Subsequently, Navy officials learned of Colonna's challenges to the CARs and "pulled back" the "finalized" CPAR on or about 1 December 2008. (R4, tab 51) Colonna's submitted its comments on or about 29 December 2008. After receiving Colonna's objections to the October CPARs, including its contention that they did not take into account the CAR withdrawals and revisions, Commander Stump issued a final CPAR on 26 January 2009, giving Colonna's "Green" ratings in the Technical and Schedule categories and a "Yellow" rating in the Management category. (R4, tab 49 at 2 of 11, refs. A, C, tab 51; *see also* gov't mot. ¶¶ 6-8; app. opp'n at 2)

The Claim

By letter dated 21 April 2009 to Commander Stump as CO, Colonna's asserted that its CPAR ratings were erroneous and unfair and did not reflect the high quality of its contract performance. It requested a final CO's decision. (R4, tab 49) Colonna's contended that the Navy had made many errors in the CPAR scoring, as evidenced by its incomplete corrections, and that the Navy had the obligation "to issue a fair, impartial, and reasonable CPAR consistent with the contractor's performance" (R4, tab 49 at 2 of 11). Among other things, Colonna's contended that MARMC personnel did not take into account that the contract was a competitively bid, fixed-price contract rather than the cost-reimbursement multi-ship multi-option contract under which they were used to working. Colonna's alleged that its ratings were affected because it could not agree to all of the MARMC personnel's contract changes at no price increase, although it performed many additional efforts at no cost. Colonna's further alleged that MARMC's project manager and other Navy project personnel were prejudiced and biased against it; they had made degrading comments and threatened it with bad CARs and CPARs; and they were "the reason for the low CPAR scoring on what was by any account a very good job." (R4, tab 49 at 3-4 of 11) Colonna's contended that "the MARMC CPAR evaluation team ignored both the Commanding Officer's comments and the facts that were recited in his email" (R4, tab 49 at 5 of 11) and that the ratings were inconsistent

with the 27 CPAR ratings Colonna's received from the government for its work on other vessels from 1999 through 2008 (R4, tab 49 at 6 of 11).

Colonna's cited the contract's performance assessment clause and case law as the basis of its entitlement under the contract and as a matter of right to a CPAR score and to seek review of that score under the CDA (R4, tab 49 at 8). It sought a CO's final decision addressing the issues of:

- (a) The erroneous scoring of Colonna's performance under the HAWES contract and CPAR, (b) a redetermination of such score because the Navy's CPAR scoring of Colonna's on the HAWES was false and highly prejudicial, (c) modification of the CPAR to reflect the above-average performance by Colonna's on the HAWES Contract, and (d) correction of the Navy's failure to issue a fair and accurate CPAR. It is Colonna's position that its performance under the HAWES Contract should result in a CPAR score of no less than purple, and possibly dark blue, for each of the three major elements of the evaluation (i.e., the technical, managerial, and schedule scoring elements).

(R4, tab 49 at 9-10 of 11)

On 18 June 2009 the CO denied Colonna's claim (R4, tab 50). Colonna's appealed to the Board on 14 September 2009.

Appellant's Complaint

Appellant's complaint reiterates the contentions in its claim. Appellant cites the contract's performance assessment clause, and alleges that it received "improper, erroneous, arbitrary and capricious scoring" (compl. ¶¶ 5, 13, *see also* ¶¶ 24, 35). It further alleges that "[a]t worst such scoring represents bad faith or prejudice on the part of the Navy or the CPARS evaluation team that performed such scoring" (compl. ¶ 36).

In Count I of its complaint, appellant alleges that the Navy breached the contract by violating its incorporated FAR and CPARS principles and procedures and by failing accurately to score the contractor's performance, to its harm (compl. ¶¶ 47, 48). Appellant asks the Board to declare the scores erroneous and a violation of the contract and its incorporated procedures, and to revise the scores. Alternatively, if the Board deems that relief to be beyond its jurisdiction, appellant asks the Board to find that the CO's decision and CPAR scoring were erroneous, failed to follow the contract, and violated the contract's incorporated provisions and procedures, and to remand the matter

to the CO with instructions or advice to permit the CO to review the scoring and to correct or amend it. (Compl. ¶¶ 51, 58)

In Count II, appellant alleges that the Navy breached the contract because the CO's and the Navy's determinations during the contractually-mandated evaluation process were arbitrary and capricious and they violated the contract and the incorporated CPARS scoring principles by failing accurately to credit the contractor for its outstanding performance and to produce and publish the fair and accurate evaluation required by the contract (compl. ¶¶ 53-55). Appellant's request for Board action is similar to that in Count I (compl. ¶ 58).

The complaint culminates in appellant's request for judgment that the CPARS scoring on the HAWES contract was improper or erroneous, arbitrary and/or capricious, and did not comply with the procedures incorporated into the contract. In addition to seeking the Board's revision of the scoring or its remand to the CO, appellant asks for its legal fees and costs and for such other and further relief as the Board deems just and equitable. (Compl. at 11-12)

DISCUSSION

The Parties' Contentions

The government contends that the Board lacks jurisdiction to entertain appellant's claim on the alleged grounds that the performance evaluation and appellant's request for revision do not constitute cognizable CDA claims and the Board does not have authority to issue injunctive relief or order specific performance and cannot direct the CO to amend a performance evaluation. The government alleges that "the claim does not seek adjustment of a contract term, an interpretation of the contract, relief under a remedy-granting clause or relief for a breach of contractual duty" (gov't reply at 3). It contends that appellant's performance evaluation was not required by the contract and was not done pursuant to the contract, but rather pursuant to statute and implementing regulations.²

² The government does not invoke the portion of paragraph (e) of the assessment clause that attempts to remove the CPAR assessment from coverage under the contract's Disputes clause and to deny any appeal rights beyond the review and comment procedures referred to in the assessment clause. In fact, that portion of paragraph (e) is invalid. The parties cannot contract away the statutory rights the CDA confers. *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-60 (Fed. Cir. 1997) (invalidating portion of clause that purported to make award fee decision the unilateral determination of Fee Determining Official (FDO) and not subject to Disputes clause; court states Board can reverse CO's affirmance of FDO's decision only if discretion abused and decision is arbitrary and capricious); *see also Puyallup Tribe of Indians*, ASBCA No. 29802, 88-2 BCA ¶ 20,640, *aff'd*,

In its opposition to the government’s motion, appellant now acknowledges that the Board does not itself have the power to change appellant’s CPAR score or to direct the CO to change it (opp’n at 1, 6, 8). However, appellant asserts that, under the CDA, its claim is valid and the Board has jurisdiction to grant it relief and to remand the matter to require the CO to follow applicable regulations and provide appellant with a fair and accurate performance evaluation. Appellant relies principally upon recent decisions by the U.S. Court of Federal Claims (COFC) in *Todd Construction, L.P. v. United States*, 88 Fed. Cl. 235 (2009), *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008), and *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634 (2008), in which the court determined that claims concerning performance rating issues were valid CDA claims and that the COFC had CDA jurisdiction to consider them. Regarding the merits of its appeal, appellant alleges that it does not agree with all of the government’s alleged facts and that there are “many more” facts the Board should consider that the parties have not yet presented (opp’n at 3).

Motion to Dismiss Standards

The government has moved to dismiss both for lack of jurisdiction, which would not be on the merits, and for failure to state a claim, which would be. *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *recon. denied*, 03-1 BCA ¶ 32,130, *aff’d*, 82 Fed. Appx. 226 (Fed. Cir. 2003). We are not to grant a dismissal for failure to state a claim unless it appears beyond doubt that appellant cannot prove any set of facts in support of its claim that would entitle it to relief; we are to accept all of the complaint’s factual allegations as true; and we are to resolve all reasonable inferences in favor of appellant as the non-movant. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001); *Thai Hai*, 02-2 BCA ¶ 31,971 at 157,920.

Board Has Jurisdiction To Entertain Appellant’s Breach Claim Pertaining To Its Performance Assessment

Board precedent confirms that the Board has jurisdiction under the CDA to entertain a performance rating dispute that arises under a contract’s terms. *See Versar, Inc.*, ASBCA No. 56857, 2010 ASBCA LEXIS (6 May 2010), from which much of the following discussion is derived. Accordingly, we need not address the COFC’s cases upon which appellant relies.

The CDA provides that “[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the [CO] for a

871 F.2d 1096 (Fed. Cir. 1989) (unpub.) (contract’s sovereign immunity provision cannot nullify Disputes clause, which is required by regulation).

decision.” 41 U.S.C. § 605(a) (emphasis added). Under the CDA the Board has jurisdiction to decide “any appeal” from a CO’s decision “*relative to a contract*” made by specified departments or agencies. 41 U.S.C. § 607(d) (emphasis added). The CDA’s implementing regulations, at FAR 2.101, incorporated into the contract’s Disputes clause, define “Claim” as:

[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or *interpretation of contract terms, or other relief arising under or relating to the contract.* [Emphasis added]

The government’s contention that appellant’s claim does not involve a contract interpretation issue or an alleged breach of a contractual duty is incorrect. Appellant’s claim is based upon the government’s alleged breach of the contract’s performance assessment clause. That clause provides that the contractor, in performing the contract, “will be subject to a past performance assessment in accordance with FAR 42.15.” The clause sets forth rating categories and describes their criteria in general terms, including, with respect to each category, the need to assess whether the contractor met contractual requirements. Thus, whether a given category applies to a contractor’s performance is subject to interpretation of both the assessment clause and the contract as a whole.

Moreover, FAR 36.201, incorporated into the performance assessment clause through FAR subpart 42.15, requires that the government provide the contractor with an “accurate and fair” performance report.” Appellant has alleged that the government breached its contract by issuing arbitrary and capricious CPAR scores in contravention of the performance assessment clause’s procedures and its incorporated requirement for an accurate and fair rating, and by violating the duty of good faith and fair dealing implicit in every contract.

The Board possesses jurisdiction to evaluate and declare the parties’ rights concerning contract clauses. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1270-71, *reh’g denied*, 186 F.3d 1379 (Fed. Cir. 1999). Appellant’s performance rating claim is based upon the contract’s express and incorporated terms and seeks relief arising under and relating to the contract. “[A] contract interpretation claim need not be limited to the language of a clause in dispute but may involve a decision as to the correctness of actions taken under the contract in light of the clause and associated regulations.”
^{HMR}*TECH2, LLC*, ASBCA No. 56829, 09-2 BCA ¶ 34,287 at 169,373 (citation omitted).

In *Sundt Construction, Inc.*, ASBCA No. 56293, 09-1 BCA ¶ 34,084 at 168,518, the Board held that, when a performance rating claim is based upon a contract’s disputed terms, we “have jurisdiction to determine the rights and obligations of the parties” under those terms. *See also Coast Canvas Products II Co.*, ASBCA No. 31699, 87-1 BCA

¶ 19,678 (contract modification embodying settlement barred CO's subsequent adverse performance rating of contractor). Our statement in *Versar* concerning *Sundt*, and the government's arguments in *Versar*, also applies to its arguments in the instant appeal:

In *Sundt*, the Board acknowledged our prior decisions, cited by the [government] in this appeal, that we lack jurisdiction to decide appeals from unsatisfactory performance ratings when contract terms are not at issue. Those decisions stemmed from *Konoike Construction Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24,170, where appellant did not submit a CDA claim but contended that the government's performance evaluation, standing alone, constituted a government CDA claim. The Board held that the evaluation did not fall within the Disputes clause's three categories of claims and, because there was no claim underlying the appeal, it did not have jurisdiction. That was not the case in *Sundt* and is not the case here.

Versar, 2010 ASBCA LEXIS, at *22-23.

Further, our conclusion in *Versar* pertaining to the awarding orders clause at issue there also applies to this appeal and the performance assessment clause in question:

In connection with the "other relief" sought, we can interpret the contract's Awarding Orders clauses and assess whether the CO acted reasonably in rendering the disputed "red" performance rating or was arbitrary and capricious and abused her discretion. See [*Burnside-Ott Aviation Training Center*, 107 F.3d 854] (Board had CDA jurisdiction to consider contractor's claim that government had improperly calculated award fee due based upon specified evaluation criteria in contract clause). The Board also has jurisdiction to determine whether the government breached its implied contractual duty of good faith and fair dealing inherent in every contract. See *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010). However, we do not have jurisdiction to grant specific performance or injunctive relief. *Rig Masters, Inc.*, ASBCA No. 52891, 01-2 BCA ¶ 31,468.

Versar, 2010 ASBCA LEXIS, at *24.

Appellant now acknowledges that the Board does not have jurisdiction to grant specific performance or injunctive relief. Thus, similarly to our decision in *Versar*, we strike the portions of appellant's requests for relief that seek the Board's revision of the government's CPARs scoring and we otherwise deny the government's motion to dismiss for lack of jurisdiction.

With regard to the government's motion to dismiss for failure to state a claim, the Board accepts all of the complaint's factual allegations as true and we resolve all reasonable inferences in appellant's favor. We note that the government moved to dismiss near the outset of the appeal and that there is no indication that any discovery has occurred. We conclude that the government has not established beyond doubt that appellant cannot prove any set of facts in support of its claim that would entitle it to relief.

DECISION

We grant the government's motion to dismiss for lack of jurisdiction to the extent stated and we otherwise deny it, and we deny the government's motion to dismiss for failure to state a claim.

Dated: 24 June 2010

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56940, Appeal of Colonna's Shipyard, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals