



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED IN PART: October 18, 2016

CBCA 5299

SYLVAN B. ORR,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Sylvan B. Orr, pro se, Idaho Falls, ID.

Daniel B. Rosenbluth, Office of the General Counsel, Department of Agriculture, Golden, CO, counsel for Respondent.

Before Board Judges **GOODMAN, WALTERS,** and **LESTER.**

**LESTER,** Board Judge.

On April 26, 2016, appellant, Sylvan B. Orr, filed an appeal of a contracting officer's decision dated March 18, 2016. In response to the complaint that Mr. Orr subsequently filed with the Board on May 27, 2016, the United States Forest Service (an entity within the Department of Agriculture, the respondent in this appeal) requested that we address several "threshold issues" that it believed would allow this case to proceed expeditiously. On August 25, 2016, after two extensive telephonic conferences with the parties, the Board issued a show cause order requesting that the parties address three issues the resolution of which

could be dispositive of this appeal. Both parties have responded to the show cause order, and Mr. Orr has also submitted a response to the Board's order of September 23, 2016, in which we requested additional information. We have thoroughly considered the arguments that the parties made during the telephonic conferences and in response to the show cause order, and we have thoroughly reviewed all of the documents in the appeal file.

### Factual Background

#### I. The Solicitation and Award

The Forest Service issued a request for quotations (RFQ) seeking “to obtain Weed Washing Units<sup>1</sup> for use on a local, Regional and Nationwide basis” for fire suppression and all-hazard incidents. Appeal File, Exhibit A at 27-28.<sup>2</sup> The RFQ indicated that the agency would award “a sufficient number of I-BPAs [Incident Blanket Purchase Agreements] anticipated to meet incident resource needs resulting from this solicitation to responsible quoters whose quotes conforming to the solicitation will be advantageous to the Government, price and other factors considered.” *Id.* at 15 (clause B.3(a)). The RFQ further provided that “[t]he number of I-BPAs awarded will be determined based upon historical usage and other relevant data such as predictive services information, available personnel to administer agreements, etc.” *Id.*

The RFQ made clear that, if a contractor received an I-BPA, there was no guarantee that *any* orders would ever be placed under it and that, if the agency placed an order, the contractor would be encouraged but not required to accept it:

This solicitation will result in multiple agreements. The dollar limitation for any individual order is \$150,000.00. Since the needs of the Government and availability of Contractor's resources during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, *the Contractor shall furnish the resources listed herein to the*

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<sup>1</sup> A weed washing unit includes all equipment (including, among other things, portable commercial high-pressure power washers) necessary for washing fire engines, heavy equipment, logging equipment, and other vehicles to remove soil, plant parts, and seeds from them during a fire suppression or all-hazard incident; transportation of the weed washing equipment to and from an incident site; set up and take down of that equipment; and at least two skilled operators to perform operations. Exhibit A at 28-30.

<sup>2</sup> All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

*extent the Contractor is willing and able at the time of order. Due to the sporadic occurrence of incident activity, the placement of any orders IS NOT GUARANTEED.*

Exhibit A at 14 (clause B.2(a)) (emphasis added). The RFQ also made clear that the award of I-BPAs “does not preclude the Government from using any Agency or Agency Cooperator owned resources before equipment is mobilized under this Agreement.” *Id.* at 31 (clause D.6(a)).

The RFQ provided that numerous individuals – dispatchers, buying team members, finance section chiefs, procurement unit leaders, contracting officers, and purchasing agents, *see* Exhibit A at 26 (clause C.4) – could place orders against an I-BPA, but that any such orders, to be effective, had to “be placed in accordance with established ordering procedures as specified in National and Regional mobilization guides.” *Id.* Orders were to “originate from the host dispatch center.” *Id.* at 34 (clause D.6.9). The RFQ stated that “[e]ach host dispatch center will give dispatch priority to the resource offering the greatest advantage” to the Government “before all other private resources not under Agreement” except in certain specifically identified circumstances. *Id.* at 31 (clause D.6.1(a)). It also provided that “[r]esources on an awarded Agreement will be ranked on a dispatch priority list” by a host dispatch zone, *id.* at 32 (clause D.6.2(a)); that “each host dispatch center will have an established dispatch priority list showing [those] resources,” *id.* (clause D.6.3.1); and that the Government “intends to dispatch contractor resources based on this priority ranking other than for initial attack.” *Id.* The RFQ also identified the procedures that the agency would use to place an order with a contractor (through the delivery of certain information, including an incident order number, the date and time to report to the incident, and incident contact information), *id.* at 32-33 (clause D.6.4.1(a)), and established the manner in which the contractor would accept the order:

#### D.6.5 – DISPATCHING PROCEDURES

D.6.5.1 – When receiving the dispatch call, the Contractor shall confirm their availability and ability to meet specified timeframes. If the Contractor cannot be reached or is not able to meet the time and date needed, the dispatcher may proceed with contacting the next resource on the dispatch priority list. Contractor shall check in at the assignment at the time agreed upon when dispatched.

*Id.* at 33. The RFQ expressly precluded dispatchers at the host dispatch center from providing any contractor with pre-assignment information, “such as ‘when or if a Contractor will be called for an assignment’ or ‘status of other contractors.’” *Id.* at 31 (clause D.6(b)).

The RFQ further provided that, for each order that the contractor performed, the Forest Service would undertake a written performance evaluation, as follows:

#### D.20 – PERFORMANCE EVALUATIONS

Performance evaluations will be performed at the incident using the form in Exhibit E. The evaluation will be completed at the incident by the government representative supervising the work. This form is the preferred performance evaluation to be accepted by the Contracting Officer. The evaluators [sic] signature shall be legible and printed on the form. If the supervising Government representative is released from the incident prior to the release of the resource, the government representative will complete a performance evaluation prior to demobilization, for work the resource performed under their supervision. The Government representative will review the performance evaluation with the Contractor, record Contractor comments, and obtain Contractor signature acknowledging completion of the evaluation. The Government evaluator will then give a copy of the evaluation form(s) to the Contractor at the incident and submit a copy to the incident Finance Section (for distribution to the Contracting Officer and the Host unit incident file).

Exhibit A at 38-39; *see* Exhibit C at 117. The parties originally indicated that this clause was subsequently modified to include somewhat different language, *see* Complaint ¶ 5; Answer ¶ 5, but the Forest Service has since retreated from that position.<sup>3</sup> We cannot find any contract modification amending the original clause in the appeal file, but, reading the alleged amendment's language, any such amendment is not relevant for purposes of this appeal because the substance of the requirements under clause D.20 remained the same regardless of which version applies, although the amendment allegedly adds language indicating that the contracting officer will use the performance evaluation in future procurements when considering past performance and adds a requirement for a final inspection.

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<sup>3</sup> In our show cause order, we asked the parties to provide us with a copy of the contract amendment substituting the alternate version of clause D.20 and to explain the circumstances under which the substitution occurred, but neither party did so. Instead, the Forest Service, contrary to the statement in its answer, represented that the version of clause D.20 applicable to Mr. Orr's agreement is the one found at page 38 of the appeal file, which is quoted above. Because of the similarity in the two cited versions of clause D.20, it is unnecessary for us to attempt to resolve the discrepancy in the Forest Service's statements.

On April 9, 2013, the Forest Service awarded Mr. Orr an I-BPA for weed washing units for Regions 2 and 4 (Rocky Mountain and Intermountain Regions), effective April 9, 2013, through April 9, 2016. Exhibit A at 1. Mr. Orr's I-BPA incorporated the terms of the RFQ.

## II. Orders Under the I-BPA

In August 2015, the Central Idaho Interagency Fire Center placed an order under Mr. Orr's I-BPA, numbered as resource order no. E-60, for a weed washing unit for the Bobcat fire in Salmon, Idaho. Exhibit B at 79. According to the appeal file, there was a dispute upon Mr. Orr's arrival as to whether the equipment was set up in accordance with I-BPA requirements, and Mr. Orr or his employee(s) may have been required to relocate the equipment. Exhibit D at 140-44. In any event, Mr. Orr and/or his employee(s) performed the work, and, on August 26, 2015, Mr. Orr signed an invoice (on Optional Form 286) indicating that he had worked on the order from August 22 through 25, 2015, and seeking payment of \$5860. Exhibit D at 180. Above Mr. Orr's signature on the invoice, which was also signed by the government receiving officer, was the following pre-printed release language:

Contract Release For And In Consideration Of Receipt Of Payment In The Amount Shown On "Net Amount Due" Line 28 [\$5860]. Contractor Hereby Releases The Government From Any And All Claims Arising Under This Agreement Except As Reserved In "Remarks" Block 22.

*Id.* In block 22, titled "Remarks," was the pre-printed word "Final," and Mr. Orr provided an additional signature next to the handwritten words "No Damage No Claims" in block 22, *id.*, although he maintains that he signed the document under duress.

Mr. Orr has also alleged that he requested assignment to the Elevenmile fire incident and that there was some indication from individuals associated with the Government that he would obtain the assignment. Ultimately, though, his request was not honored, and he asserts that he lost work which he "could have reasonably expected the Government" to provide him. *See* Complaint at 2.

## III. The E-60 Bobcat Fire Performance Evaluation

On August 25, 2015, as Mr. Orr was completing the E-60 Bobcat fire work, the government inspector on the site prepared a performance evaluation on the form identified in the BPA. Exhibit D at 137-38. That evaluation contains comments about the preparedness and responsiveness of Mr. Orr's team with which Mr. Orr has informed us he disagrees. The

government inspector was called to another job and did not review the comments with Mr. Orr at that time, provide Mr. Orr with the opportunity to comment upon the performance evaluation, or obtain Mr. Orr's signature on it, as required by clause D.20 of the BPA. Nevertheless, the performance evaluation was provided to the contracting officer. Mr. Orr was not aware that a performance evaluation had been written until some time after he had executed the release on August 26, 2015.

The contracting officer has since recognized that the proper procedures for completing the performance evaluation, which required an opportunity for Mr. Orr to comment, were not followed. Exhibit D at 184. She has informed Mr. Orr that, because of that, she never acted upon the performance evaluation and did not consider it in evaluating future awards or performance ratings. *Id.* She has also notified the Board in a sworn declaration that the evaluation is not included in the Contractor Performance Assessment Reporting System (CPARS), that the document is wholly internal to her Forest Service office, that she has not used it to date and will not use it in the future, and that it "will never be distributed, shared or utilized by any successor contracting officers." Declaration of Contracting Officer ¶ 8 (Sept. 26, 2016). She subsequently averred that it has been withdrawn from Mr. Orr's contract file and destroyed. Supplemental Declaration of Contracting Officer (Oct. 3, 2016).

#### IV. Mr. Orr's Claim

On September 25, 2015, Mr. Orr submitted what the Forest Service contracting officer considered to be a claim. Exhibit C at 81-119. In that document, Mr. Orr made various representations complaining about alleged errors in the performance evaluation and appears to request that the contracting officer reexamine it:

To sum this up [there] are some remarkable discrepancies between . . . evaluation ID-SCF-015187 and Facts that should be examined bearing in mind some considerable time, and expenditures [were] put forth both personally as well as cooperatively by [Contractor Orr] and employees [sic] individual preparation and timing.

*Id.* at 90.

On the last page of the September 25, 2015, document, under the heading "Change Order or Claim," Mr. Orr requested \$3691 for the E-60 weed washing unit work. Exhibit C at 119. Of that amount, \$1465 was for payment for an additional day of work on August 21, 2015, at Mr. Orr's daily rate, apparently because of a dispute with the on-site inspector that required him to relocate equipment, and \$2226 (six days at \$371 per day) because Mr. Orr

allegedly could not dispose of waste generated by the project until August 31, 2015. Mr. Orr indicated on the page that “[t]his is a very condensed version of our claim.” *Id.*

Subsequently, the contracting officer asked Mr. Orr to clarify what he was requesting through the September 25, 2015, submission. On January 20, 2016, Arlyn Orr, who is Sylvan Orr’s son, responded to the contracting officer that the Orrs would provide her with an invoice “that includes a qualified claim for the amount specific to the terms of the contract.” Exhibit D at 154.

On or about January 21, 2016, the contracting officer received a supplement to Sylvan Orr’s September 25, 2015, submission, which was in the form of an invoice titled “Estimate” and that identified two claims, the Bobcat fire claim previously discussed and a second claim, not previously identified, for the Elevenmile fire. Exhibit C at 120-23. As for the Bobcat fire claim, Sylvan Orr provided what he described as an “estimate and time line of the issue,” *id.* at 15, and increased the amount requested to \$10,255 (\$1465 for work on August 21, 2015, and \$8790 for six days of pressure washing and trying to deliver solid waste from August 26 to August 31, 2015). As for the new Elevenmile fire claim, Mr. Orr asserted that this claim was “a result of extension of” the Bobcat fire claim “due to the Bobcat fire evaluation.” *Id.* at 158. He stated that, because the government inspector for the Bobcat fire work provided Mr. Orr with an unfair performance evaluation on that project and “discriminated against” him, he did not receive an order for the Elevenmile fire work, work that he thought he should have gotten. Because the Elevenmile fire lasted from August 28 to September 11, 2015, he felt that he should be paid his daily rate for that period “due to the unfair treatment by [the government inspector] on the Bobcat fire” and requested payment of \$27,540. *Id.*

#### V. The Contracting Officer’s Decision and the Appeal

On March 18, 2016, the Forest Service contracting officer issued a decision denying Mr. Orr’s monetary claims. Exhibit E at 197-99. In the decision, she indicated that, with regard to the E-60 Bobcat fire claim, Mr. Orr had signed a final invoice containing a release indicating no damage and no claims. *Id.* at 199. She did not address Mr. Orr’s comments about the performance evaluation for the E-60 Bobcat fire work. Subsequently, on March 28, 2016, the contracting officer, further addressing the Elevenmile fire claim, provided Mr. Orr with a copy of the dispatch priority list from the host dispatch center, which showed that Mr. Orr was fourth in line amongst I-BPA holders for a weed washing unit order, and indicated that, with three contractors ahead of him in line, he could not have received the Elevenmile fire work. Exhibit D at 181.

On April 26, 2016, Mr. Orr filed a notice of appeal, challenging the contracting officer's decision "[d]enying his Claim for – equitable adjustment in final pay – due to [agency] Arbitrary & Capricious Abuse of the contract" and stating that the total amount in dispute is \$37,795. He also asserted in his notice of appeal that the Forest Service had "failed to observe the mandatory [contract clause] D.20 PERFORMANCE EVALUATIONS, as well as the FINAL INSPECTION," in violation of "standard policy prior to demobilization for work performed under [the inspector's] supervision."

#### VI. Proceedings Before the Board

After filing his notice of appeal, Mr. Orr filed a complaint with the Board, and the Government filed an answer. With its answer, the Forest Service requested a telephonic conference with the Board to address specific "threshold issues" that the Forest Service wanted the Board to resolve in an "expeditious" manner. The Board conducted an hour-long telephonic conference with the parties on July 29, 2016, in which Arlyn Orr (upon behalf of his father), counsel for the Forest Service, and the Forest Service contracting officer participated. During that conference, the parties discussed in detail the various issues that Sylvan Orr was raising, addressing their positions on the defects in the performance evaluations and on the monetary claims. After the Board subsequently conducted a more in-depth review of the appeal file, it held a longer telephonic conference with the parties on August 22, 2016, in which both Sylvan and Arlyn Orr, as well as Mr. Orr's son-in-law, participated, along with counsel for the Forest Service and the Forest Service contracting officer. During that conference, the parties presented their positions on the various issues raised in the appeal.

Following that conference, the Board issued a show cause order, dated August 25, 2016, asking the parties to address three issues. First, we asked Sylvan Orr to show cause as to why, in light of the Court of Appeals for the Federal Circuit's decisions in *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058 (Fed. Cir. 2002), and *Crewzers Fire Crew Transport, Inc. v. United States*, 741 F.3d 1380 (Fed. Cir. 2014), we should not dismiss his Elevenmile fire claim for lack of jurisdiction because of the absence of any enforceable contract for that work. Second, we asked Mr. Orr to address whether he had submitted a valid claim for the Bobcat fire work and, if he had, whether a final release that he signed barred recovery for his claim. Third, we asked the parties to address the extent to which we possessed jurisdiction to entertain Mr. Orr's complaints about the manner in which his contractor performance evaluation was conducted and about the contents of that evaluation, as well as whether those complaints had become moot. Both parties have responded to that order; Mr. Orr has also responded to a subsequent order, dated September 23, 2016, requesting additional information; and both parties later submitted additional information.

## Discussion

### I. Mr. Orr's Pro Se Status

“Generally, we give greater procedural latitude to appellants representing themselves pro se than we give to parties represented by attorneys.” *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,896; see *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,552, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016). “[T]his more lenient standard for interpreting pleadings,” however, “does not change a pro se litigant’s burden of proof or our weighing of the factual record.” *1-A Construction*, 15-1 BCA at 175,552 (quoting *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991, at 171,975).

### II. The Elevenmile Fire Claim

Mr. Orr asserts that he should have been, but was not, offered an order for work on the Elevenmile fire incident and that the Government’s failure to offer him this work cost him an estimated \$27,540. As the agency has correctly argued, we lack jurisdiction to consider this claim because it arises out of an I-BPA that did not create mutual obligations.

The I-BPA at issue here expressly provided that there was no guarantee that the Government would ever place *any* orders under it, Exhibit A at 14 (clause B.2(a)), and it provided no minimum purchase guarantee. Further, Mr. Orr was not obligated to accept any order that the Government placed, but was free to decline an order if he so chose. *Id.*

The Court of Appeals for the Federal Circuit addressed a similar “contract” with the Forest Service in *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058 (Fed. Cir. 2002), in which a fire protection company complained that it had been “systematically excluded” from providing firefighting services to the Government under tender agreements. *Id.* at 1060. Like the I-BPA at issue in this appeal, the tender agreements in *Ridge Runner* did not guarantee that the Forest Service would order any equipment and did not require the contractor to accept any orders that were placed. The Federal Circuit held that such agreements do not constitute binding and enforceable contracts because they create only “illusory promises” without any mutuality of obligation:

The Tender Agreements here are nothing but illusory promises. By the phrase illusory promise is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been

had he said no words at all. The government had the option of attempting to obtain firefighting services from [the contractor] or any other source, regardless of whether that source had signed a tender agreement. The Agreements contained no clause limiting the government's options for firefighting services; the government merely "promised" to consider using [the contractor] for firefighting services. Also, the Tender Agreement placed no obligation upon [the contractor]. If the government came calling, [the contractor] "promised" to provide the requested equipment only if it was "willing and able." It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties.

*Id.* at 1061-62 (citations omitted).

Because "BPAs themselves are not contracts," we lack jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), to entertain claims arising out of them. *Zhengxing v. United States*, 71 Fed. Cl. 732, 738, *aff'd*, 204 F. App'x 885 (Fed. Cir. 2006); *see Crewzers Fire Crew Transport, Inc. v. United States*, 741 F.3d 1380, 1382-83 (Fed. Cir. 2014) (failure to make "nonfrivolous allegation" that a BPA created mutual obligations is a jurisdictional defect); *Brent Packer*, 16-1 BCA at 176,897-98 (Board lacks jurisdiction to entertain claim arising under a BPA that does not create mutual obligations); *Bob Minor Irrigation Parts & Service v. Department of Agriculture*, CBCA 1096, 08-2 BCA ¶ 33,895, at 167,766 (dismissing claim under similar type of agreement for weed washing units). The fact that the I-BPA used words that sound contractual in nature or that purport to require the Government to create priority listings of I-BPA holders does not somehow create mutual contract obligations or transform the I-BPA into an enforceable contract. To the extent that Mr. Orr is alleging that he was led to believe from discussions with various individuals that he would or might receive the Elevenmile fire incident work, the I-BPA made clear that any orders had to originate from the host resource center, Exhibit A at 34 (clause D.6.9), and, in any event, Mr. Orr does not allege that any order was ever consummated. Until and unless the host resource center issued an order that he accepted, he had no contractual rights in the Elevenmile fire incident work.

We dismiss Mr. Orr's Elevenmile fire claim for lack of jurisdiction.

### III. The Bobcat Fire Claim

#### A. Jurisdiction

Once an order under a BPA is issued by the Government and accepted by the contractor, a contract comes into being. *Brent Packer*, 16-1 BCA at 176,898; *see*

*Cardiometrix*, DOT BCA 2571, et al., 94-1 BCA ¶ 26,269, at 130,699 (“Separate contracts came into being each time the [agency] ordered services [under a BPA] and [the contractor] provided the requested services.”). Mr. Orr has claimed that he is entitled to recover \$10,255 in additional costs under an order that the Government placed, and that he performed, for the Bobcat fire incident. We possess jurisdiction to entertain this claim because it arises under a contract that came into existence when Mr. Orr accepted the agency’s Bobcat fire order and because, in addition, it is the subject of a written claim submission compliant with the requirements of the CDA.<sup>4</sup>

B. Mr. Orr’s Written Release

The agency has argued that Mr. Orr’s Bobcat fire claim is barred by a general release that Mr. Orr signed to obtain final payment for work performed under the order. “It is well settled that a contractor who executes a general release is thereafter barred from maintaining a suit for damages or for additional compensation under the contract based upon events that occurred prior to the execution of the release.” *B.D. Click Co. v. United States*, 614 F.2d 748, 756 (Ct. Cl. 1980). “A party who settles,” or provides a release, “may not avoid it by proof that his claim was just,” as it “has long been held that a release for a lawful consideration is binding though the contractor received only what was otherwise due him.” *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1044 (Ct. Cl. 1976). “If parties intend to leave some things open and unsettled, their intent so to do should be made manifest” in the release itself. *United States v. William Cramp & Sons Ship & Engine Building Co.*, 206 U.S. 118, 128 (1907).

To determine the scope of a release, we look to its language. “Because a release is contractual in nature, it is interpreted in the same manner as any other contract term or provision.” *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009).

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<sup>4</sup> In our show cause order dated August 25, 2016, we asked the parties to address whether the Bobcat fire claim that Mr. Orr submitted sufficiently identified the basis of Mr. Orr’s claim, made a monetary request in a sum certain, and requested a contracting officer’s final decision, as required by the CDA, 41 U.S.C. § 7103(a), and the Federal Acquisition Regulation (FAR), 48 CFR 2.101 (2015). Although there is some language in Mr. Orr’s claim and its supplement indicating that the amount claimed was stated as an estimate rather than as a “sum certain,” see *J.P. Donovan Construction, Inc. v. Mabus*, 469 F. App’x 903, 908 (Fed. Cir. 2012) (use of qualifying language in identifying monetary amount owed, such as use of word “approximately,” is not a sum certain), we are convinced after studying the entirety of the documents that Mr. Orr intended his request for \$10,255 to be the definitive amount sought and that his communication otherwise satisfies the requirements of a claim.

Accordingly, “[i]f the provisions of a release are ‘clear and unambiguous, they must be given their plain and ordinary meaning.’” *Holland v. United States*, 621 F.3d 1366, 1378 (Fed. Cir. 2010) (quoting *Bell BCI*, 570 F.3d at 1341). Here, the pre-printed release form that Mr. Orr signed on August 26, 2015, provided a “Contract Release for and in Consideration of Receipt of Payment in the Amount Shown on ‘Net Amount Due’ Line 28 [\$5860]” and indicated that “Contractor Hereby Releases the Government from Any and All Claims Arising under this Agreement Except as Reserved in ‘Remarks’ Block 22.” Exhibit D at 180. In block 22 was the typed word “Final” and the handwritten words “No Damage No Claims,” next to which Mr. Orr provided a separate and additional signature. *Id.* As the Court of Claims, the predecessor to the Federal Circuit, held in *Bobbi’s Decorating & Renovation Co. v. United States*, 218 Ct. Cl. 653 (1978), this type of broad release encompasses and waives all claims arising under a contract:

[P]laintiff signed a full release at about the same time it received the payment it now calls partial. There was no exception to the release or any indication, in the release itself or outside, that it did not mean precisely what it said (plaintiff “hereby releases the Secretary [of the agency] from any and all claims arising under or by virtue of said contract or any modification or change thereof”). *A full-scale release of that type ends all liability.*

*Id.* at 654 (emphasis added); see *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 16-1 BCA ¶ 36,444, at 177,624 (discussing effect of general release).

### C. Mr. Orr’s Claim of Duress

“[T]here are ‘special and limited situations’ in which a claim will survive the execution of a general release.” *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,395 (quoting *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806 (1963)); see *Ingham Regional Medical Center v. United States*, 126 Fed. Cl. 1, 38 (2016) (“There are . . . circumstances when a party may bring a claim despite the execution of an otherwise applicable release.”). “[W]here fraud or duress is involved,” for example, “the release will not be held to bar the prosecution of the claim.” *J.G. Watts*, 161 Ct. Cl. at 807. “Boards of contract appeals have consistently reviewed assertions by contractors that notwithstanding unambiguous releases in contract modifications, claims should be considered on their merits because the release language did not represent the parties’ intentions.” *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262.

In his response to the Board’s show cause order, Mr. Orr argues that his signature beneath the final payment release “was obtained under duress” and that the entire release

document is “an unconscionable pretext.” Show Cause Response at 6. He further asserts that a government employee, not he, added the “No Damage No Claims” language to the final payment document that Mr. Orr had to sign and that the Government’s act of forcing Mr. Orr to sign such a release to obtain final payment violated FAR 3.101-1, which provides that “Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.” 48 CFR 3.101-1.

The burden of proving that a release’s execution was procured through duress sufficient to invalidate it is upon the party seeking relief. *Klamath & Moadoc Tribes v. United States*, 81 Ct. Cl. 79, 99, *aff’d*, 296 U.S. 244 (1935); *see Riennes Construction Co.*, IBCA 3572-96, et al., 98-2 BCA ¶ 29,821, at 147,658 (“Appellant has the burden to prove duress” in executing release); *Longmire Coal Corp.*, EBCA 156-2-81, 84-2 BCA ¶ 17,345, at 86,429 (“Appellant has the burden of proving that what appears to be a binding . . . agreement was entered into by [appellant] under duress imposed by [the agency].”). In establishing any claim of economic duress or improper business compulsion in the execution of a release, there are three common elements that the contractor must show existed at the time that it was allegedly forced to execute its release: “(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.” *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953). The contractor “must go beyond the mere showing of a reluctance to accept and of financial embarrassment” to substantiate its allegation of economic duress or business compulsion. *Id.* Instead, the contractor must show wrongful conduct on the Government’s part, not merely that the Government made a hard bargain:

Economic pressure and “even the threat of considerable financial loss” are not duress. *International Tel. & Tel. Corp. v. United States*, 206 Ct. Cl. 37, 52, n.11, 509 F.2d 541, 549, n.11 (1975). “Economic duress may not be implied merely from the making of a hard bargain.” *Aircraft Associates & Mfg. Co., Inc. v. United States*, 174 Ct. Cl. 886, 896, 357 F.2d 373, 378 (1966). The mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions. *Fruhauf Southwest Garment Co. v. United States*, [126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953)]. “Some *wrongful conduct must be shown*, to shift to defendant the responsibility for bargains made by plaintiff under the stress of financial necessity.” *LaCrosse Garment Mfg. Co. v. United States*, 193 Ct. Cl. 168, 177, 432 F.2d 1377, 1382 (1970).

*Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983) (emphasis in original) (quoting *Johnson, Drake & Piper, Inc.*, 531 F.2d at 1042-43); see *Bish Contracting Co.*, IBCA 951-1-72, 73-1 BCA ¶ 9896, at 46,270 (“Economic duress may not be implied . . . merely from the fact that a hard bargain may have been made.”).

To meet this standard and “render an agreement voidable on grounds of duress it must be shown that the party’s manifestation of assent was induced by an improper *threat* which left the recipient with no reasonable alternative save to agree.” *Systems Technology*, 699 F.2d at 1387 (quoting *David Nassif Associates v. United States*, 644 F.2d 4, 12 (Ct. Cl. 1981)) (emphasis added); see *Adler Construction Co. v. United States*, 423 F.2d 1362, 1365 (Ct. Cl. 1970) (even a contractor’s “desperate financial condition” does not constitute the type of duress sufficient to vitiate a release, absent improper coercion by the Government). The types of threats that can render an agreement voidable include improper “threats that would accomplish economic harm,” “threats that would breach a duty of good faith and fair dealing under a contract,” and “threats which, though lawful in themselves, are enhanced in their effectiveness in inducing assent to unfair terms because they exploit prior unfair dealing on the part of the party making the threat.” *Systems Technology*, 699 F.2d at 1387 (quoting *David Nassif*, 644 F.2d at 12). “A threat does not amount to duress unless it is so improper as to amount to an abuse of [the bargaining] process.” Restatement (Second) of Contracts § 176 cmt. a (1981). In *Nash Janitorial Service, Inc.*, GSBCA 6390, 84-1 BCA ¶ 17,135, one of our predecessor boards, the General Services Board of Contract Appeals, looked to the Restatement (Second) of Contracts to attempt to distinguish between the types of “threats” during negotiations that would constitute duress and the types of conduct in the bargaining process that would not rise that level:

#### When a Threat Is Improper

- (1) A threat is improper if
  - (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
  - (b) what is threatened is a criminal prosecution,
  - (c) what is threatened is the use of civil process and the threat is made in bad faith, or
  - (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
- (2) A threat is improper if the resulting exchange is not on fair terms, and
  - (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

- (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
- (c) what is threatened is otherwise a use of power for illegitimate ends.

*Id.* at 85,369.

Here, Mr. Orr has not identified any threat or coercion by an agency employee. Instead, he has alleged that he “does not have unlimited operating capital [sic] and could not at the time [of signing the release] on short notice have easily covered the payroll and expenses without making some type of financial sacrifice or seeking an operating loan, or high Interest Pay day loan . . . of some sort.” Appellant’s Supplemental Response at 2 (Sept. 29, 2016). That type of financial situation does not constitute the type of government-created coercion that would vitiate the finality of a release. It is, instead, a type of external economic pressure that, while obviously causing hardship for a contractor, we cannot attribute to the Government. *International Telephone & Telegraph Corp.*, 509 F.2d at 549 n.11; *Adler Construction*, 423 F.2d at 1364.

Mr. Orr also attempts to distance himself from the words “No Damage No Claims” in block 22 of the form in which the release is contained, asserting that it was a Forest Service employee (not he) who handwrote those words. Nevertheless, Mr. Orr acknowledges that he signed the release *after* those words were written there. The written language on the form clearly indicated that the signatory was releasing all claims under the contract other than those specifically identified and reserved in block 22. Further, Mr. Orr has not alleged any facts indicating that he was barred from listing specific claims in block 22 if he wanted to exempt them from the scope of the release or that he otherwise could not have objected to the full release before he signed it. “The time to have reserved such claims was upon the execution of the release, and we cannot passively assume that their reservation in the release would have caused the Government to deny him the final payment.” *Adler Construction*, 423 F.2d at 1364.

Mr. Orr also suggests that his burden of establishing duress should be reduced because the agency failed to satisfy its obligations under FAR 3.101-1, which addresses the Government’s obligation to conduct business “in a manner above reproach” and to expend public funds with “the highest degree of public trust and an impeccable standard of conduct.” That standard, he alleges, creates heightened obligations for Government actors that should vitiate releases created in violation of that standard, and he alleges that the Government did not meet that standard in its dealings with him. FAR 3.101-1 creates a general standard for government behavior that is intended to protect “the integrity of the government procurement process” and “the integrity of the system,” rather than to protect “a particular interest of the

contractor.” *INSLAW, Inc. v. United States*, 40 Fed. Cl. 843, 858-59 (1998). FAR 3.101-1 does not, in and of itself, create an actionable claim by a contractor for its violation during performance of a contract, beyond and outside the context of a specific breach of a particular contract provision or a specific violation of the duty of good faith and fair dealing under an existing contract. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979) (“the Court has been especially reluctant to imply causes of action under statutes” or, here, regulations “that create duties on the part of persons for the benefit of the public at large”); *Shero v. City of Grove, Oklahoma*, No. 05-CV-0137, 2006 WL 3196270, at \*9 (N.D. Okla. Nov. 2, 2006) (law enacted for public benefit does not generally create private right of action for monetary damages). Similarly, it provides no basis for somehow lessening a contractor’s burden of excusing itself from the effect of a release that it voluntarily signed. In any event, Mr. Orr has not alleged, much less provided any evidence showing, that his execution of the release was the product of any type of coercion or threat by the Government.

Mr. Orr cannot avoid the release based upon a claim of duress.

D. Mr. Orr’s Claim Based Upon Post-Release Actions

Although a portion of Mr. Orr’s Bobcat fire claim covers work that pre-dates and is barred by Mr. Orr’s execution of the release on August 26, 2015, Mr. Orr asserts that the release should not apply to that portion of his Bobcat fire claim relating to events that occurred *after* his execution of the release. Under Mr. Orr’s I-BPA, at the conclusion of each order that it placed, the Forest Service was to “[r]emove solid waste or designate an appropriate disposal site” for it. Exhibit A at 28 (clause D.2.1(e)(3)). Correspondingly, Mr. Orr was to “[c]apture, package and label solid waste in secure, easily transportable containment packages/devices, approved by the government representative at the incident, and place them at a location specified by the government.” *Id.* at 29 (clause D.2.1(f)(7)). Mr. Orr asserts that the Forest Service employee directed him to dispose of solid waste, but provided “no instruction as to where to dispose of it.” Exhibit C at 121. For the six days beginning August 26 and ending August 31, 2015 (after he executed the release at issue here), Mr. Orr alleges, he actively “made efforts to find out where [the Forest Service employee] wanted the solid waste disposed of,” and the employee “was negligent,” after Mr. Orr’s execution of the release, “in his duty to designate a proper disposal site.” *Id.*; *see* Exhibit D at 152.<sup>5</sup>

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<sup>5</sup> The Forest Service has presented evidence disputing Mr. Orr’s version of what happened after Mr. Orr executed the release on August 26, 2015. At this stage of proceedings, we cannot resolve disputed facts about Mr. Orr’s claim. Resolution will require further development of the record.

Absent special circumstances, a general release only serves to preclude those claims “based upon events which occurred prior to the execution of the release.” *H.L.C. & Associates Construction Co. v. United States*, 367 F.2d 586, 590 (Ct. Cl. 1966); *see B.D. Click Co.*, 614 F.2d at 756; *Johnson, Drake & Piper, Inc.*, 531 F.2d at 1047. Although it is conceivable that parties to a government contract could agree to release future claims resulting from future government actions, such a release would require very clear and explicit language to that effect. *See, e.g., Augustine Medical, Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1372-74 (Fed. Cir. 1999); *Vita-Herb Nutraceuticals Inc. v. Probiohealth LLC*, No. 11-1463, 2012 WL 3903454, at \*6 (C.D. Cal. Sept. 6, 2012); *Matlock v. National Union Fire Insurance Co. of Pittsburgh*, 925 F. Supp. 468, 473 (E.D. Tex. 1996). We do not have such clear and explicit language here. To the extent that Mr. Orr’s solid waste disposal claim is based upon a Forest Service employee’s alleged actions, or inactions, *after* execution of the release, the release, at least based upon the information currently in the record, does not bar that claim.

Although Mr. Orr’s claim for monies associated with the August 21 work pre-dating the release are dismissed, we will schedule further proceedings with regard to Mr. Orr’s claim seeking monies associated with work from August 26 to 31, 2015.

#### IV. Mr. Orr’s Performance Evaluation

##### A. Procedural Challenges to the Performance Evaluation

Mr. Orr has challenged the performance evaluation that the Forest Service created at the conclusion of the Bobcat fire order, disputing its conclusions and challenging the procedures under which it was created. The Forest Service questions our authority to consider Mr. Orr’s challenge.<sup>6</sup>

In *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), the Federal Circuit held that, under the CDA, a contract “claim” that is subject to review by the Court of Federal Claims or a board of contract appeals may involve a challenge to certain aspects of a performance evaluation. The Court recognized that, under the FAR, the definition of “claim” includes not only requests for payment of money in a sum certain and for the adjustment or interpretation of contract terms, but also requests for “other relief arising under or relating to the contract.” *Id.* at 1311 (quoting 48 CFR 2.101). Finding that

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<sup>6</sup> In challenging Mr. Orr’s performance evaluation claim, the Forest Service argues that the claim is barred by the August 25, 2015, release. Based upon our resolution of Mr. Orr’s performance evaluation claim below, we need not address this argument.

the term “relating to” is one “of substantial breadth,” *id.* at 1312, the Court held that a non-monetary dispute can be the subject of a claim if it has “some relationship to the terms or performance of a government contract.” *Id.* (quoting *Applied Cos. v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998)). Although “unsatisfactory performance evaluations may not relate to the terms of the contract itself,” the Court found, “they relate to [the contractor’s] performance under the contract” and, therefore, are properly the subject of a “claim.” *Id.* at 1313. Accordingly, a contractor’s challenge to a performance evaluation can constitute a matter within the Board’s subject matter jurisdiction.

That being said, the Federal Circuit made clear that not every aspect of a performance evaluation is subject to challenge as a contract “claim,” specifically excluding challenges based upon “minor procedural violations.” *Todd Construction*, 656 F.3d at 1315. As the Armed Services Board of Contract Appeals explained in *Raytheon Co., Space & Airborne Systems*, ASBCA 57801, et al., 15-1 BCA ¶ 36,024, any defect in a performance evaluation must have a prejudicial effect upon the contractor if a board is to exercise jurisdiction to entertain a challenge to it:

[T]he Federal Circuit has required contractors to show a prejudicial violation of a regulation in comparable circumstances. In *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), a contractor contended that the contracting officer failed to follow the requirements of a pertinent regulation while issuing a performance evaluation. The court of appeals found, however, that the contractor had “alleged nothing to indicate that the outcome of the performance evaluations would have been any different if the purported procedural errors had not occurred.” *Id.* at 1316. The court of appeals held that “[i]n general, standing requires that the plaintiff show an injury in fact, ‘a casual connection between the injury and the conduct complained of,’ and that his injury would likely be redressable by court action.” *Id.* at 1315 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As a result, the Federal Circuit held that the contractor lacked standing to sue with respect to these procedural violations. *See id.*

*Id.* at 175,959; *see GSC Construction, Inc.*, ASBCA 58747, 14-1 BCA ¶ 35,714, at 174,868 (agreeing with the Government’s argument that, “regardless of whether procedural violations occurred [in preparing the performance evaluation], appellant has failed to offer any proof that it was prejudiced as a result thereof”).

Mr. Orr asserts that the performance evaluation was improper because the government inspector “did not review the performance evaluations with the contractor, record contractor comments, and obtain contractor signature acknowledging completion of the evaluation in

observance of [contract clause] D.20.” Complaint ¶ 8. The Forest Service does not deny that these procedures, which clause D.20 contemplates, were not followed. Yet, Mr. Orr acknowledges that he received a copy of the performance evaluation on or about October 12, 2015, Complaint ¶ 7.C, and, to the extent that it prejudices him, he is free to comment upon and dispute it now. The errors about which Mr. Orr complains are procedural missteps that the Federal Circuit held in *Todd Construction* do not give rise to a cause of action under the CDA.

Mr. Orr also complains that no final inspection was performed. See Complaint ¶ 9. We have no jurisdiction to consider this argument because, as far as we can tell, it is not mentioned in his claim, much less identified as a non-monetary dispute that the contracting officer was required to decide. See *Magwood Services, Inc. v. General Services Administration*, CBCA 4975, slip op. at 5 (Dec 3, 2015) (“The Board cannot exercise jurisdiction over a claim that was never presented to the contracting officer for a final decision.”). Further, the contracting officer has provided Mr. Orr with what she has told him is the final inspection document. Exhibit D at 172, 177, 184. Although Mr. Orr complains that he would like the document “officially formatted” in a different way, he has no basis under his contract for demanding, or using the Board to obtain, such action. We must dismiss this procedural challenge.

#### B. Substantive Challenges to the Performance Evaluation

That leaves us with Mr. Orr’s challenge to the substance of each sentence in the Forest Service’s performance evaluation. He essentially disputes the accuracy of everything in the evaluation. The Federal Circuit has held that a contractor “clearly does have standing to sue based on its substantive allegation that the government acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation.” *Todd Construction*, 656 F.3d at 1316; see *MicroTechnologies, LLC*, ASBCA 59911, et al., 16-1 BCA ¶ 36,354, at 177,235-36 (finding jurisdiction to consider challenge to allegedly flawed performance evaluation); *GSC Construction*, 14-1 BCA at 174,868 (“GSC also alleges that the Navy’s final performance evaluation is arbitrary and capricious because it is based on erroneous factual conclusions regarding its performance under the contract, which necessarily requires an examination of the details of GSC’s performance that underlie the Navy’s adverse ratings.” (citation omitted)). Under the Federal Circuit’s decision in *Todd Construction*, we normally would have jurisdiction to consider this aspect of Mr. Orr’s non-monetary claim.

In this case, though, the Forest Service contracting officer has made clear that Mr. Orr’s challenge to the particular performance evaluation at issue here has become moot. During two conference calls with the Board, she reported that, because Mr. Orr had not had an opportunity to comment upon the performance evaluation before it was provided to her

and because she recognized that procedural defect, she never acted upon the performance evaluation and never considered it when making future awards or developing performance ratings, and she referred us to an April 2016 email message to Mr. Orr to that effect. Exhibit D at 184. It is not included in the CPARS or any other database and is used only internally within the Forest Service office involved here for consideration for future awards. The contracting officer did not use the performance evaluation for any purpose, has now withdrawn it from Mr. Orr's contract performance file and destroyed it, and has attested that it will not "be taken into consideration for any future awards or performance evaluations," and "it will never be distributed, shared or utilized by any successor contracting officers." Declaration of Contracting Officer ¶ 8 (Sept. 26, 2016).

A matter becomes "moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). To the extent that an agency withdraws a negative performance evaluation such that it cannot influence future evaluations of the contractor, that action, which eliminates the harm resulting from the negative evaluation, can moot a challenge to it. *See Gittens v. Department of Homeland Security*, 124 F. App'x 653, 654 (Fed. Cir. 2005) (case was properly dismissed as moot where agency had rescinded its unsuitability determination, even though petitioner "appears to dispute that the adverse action was rescinded"). If a matter becomes moot, "it no longer presents a justiciable controversy over which a federal court may exercise jurisdiction." *Humane Society of the United States v. Clinton*, 236 F.3d 1320, 1331 (Fed. Cir. 2001) (quoting *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998)). That same mootness doctrine applies to and limits the authority of the Board. *See, e.g., AeroVironment, Inc., ASBCA 58598, et al., 16-1 BCA ¶ 36,337, at 177,180-81; Air, Inc., GSBCA 7687, et al., 1985 WL 17107 (Nov. 5, 1985).*

Nevertheless, the agency's rescission or cancellation of the challenged document "must be complete in order for the appeal to be deemed moot and to relieve [a tribunal] of its statutory obligation to decide the appeal." *Kagel v. Department of the Army*, 126 F.3d 1455, 1458 (Fed. Cir. 1997) (citing *Bruning v. Veterans Administration*, 834 F.2d 1019, 1021 (Fed. Cir. 1987)). "The burden rests with [the respondent] to demonstrate that an action is moot." *Harris Patriot Healthcare Solutions, LLC v. United States*, 95 Fed. Cl. 585, 592 (2010).<sup>7</sup>

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<sup>7</sup> Mr. Orr has informed us that he recently sold his weed washing equipment and is now out of that business. Because he conceivably could elect to purchase new equipment and reenter that field, we cannot say, despite the agency's suggestion to the contrary, that the equipment sale is enough to render his performance evaluation challenge moot.

Because we can review challenges to performance evaluations only to the extent that the contractor can show that the Government's missteps prejudice the contractor, *Todd Construction*, 656 F.3d at 1315, the Forest Service can meet its burden of proving mootness by establishing that the disputed performance evaluation will never have any effect upon Mr. Orr's future consideration for awards. The Forest Service has satisfied that burden. Because the current performance evaluation can have no effect upon Mr. Orr's ability to obtain future awards, there is no actual controversy affecting any legally cognizable interest for us to review.

From the Board's communications with Mr. Orr, it is clear that he is extremely upset about his performance evaluation, does not like what it said, and disagrees with the views of the Forest Service employee who drafted it. Although the mere fact that the negative evaluation was written will likely continue to bother him, the Board is not a forum for resolving every factual disagreement that a contractor may have with the Government, regardless of its ultimate lack of effect upon the contractor's rights. Even in the best of circumstances, we can review a performance evaluation only to assess whether it was arbitrary and capricious, but we cannot direct the Government to revise it in a particular way through some form of injunctive relief. *See, e.g., MicroTechnologies, LLC*, ASBCA 59911, et al., 15-1 BCA ¶ 36,125, at 176,350; *Versar, Inc.*, ASBCA 56857, 10-1 BCA ¶ 34,437, at 169,959. Further, to the extent that we can review a contractor's factual challenges to a performance evaluation under the rationale of *Todd Construction*, there must be some quantifiable prejudice to the contractor from the performance evaluation, meaning "[d]amage or detriment to one's legal rights or claims." *Black's Law Dictionary* 1370 (10th ed. 2014). Mr. Orr's bruised feelings, even if justified, are not enough to invoke the authority of the Board. Any challenges to the only performance evaluation that is before us for review are now moot.

If this appeal were pending in federal court, "[m]ootness [would be] a jurisdictional question because [courts are] 'not empowered to decide moot questions or abstract propositions'" for which no case or controversy, as required by Article III of the United States Constitution, exists. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *United States v. Alaska Steamship Co.*, 253 U.S. 113, 116 (1920)). "[M]ootness is an exception to 'the long-standing rule in the Federal courts that jurisdiction is determined at the time the suit is filed and, after vesting, cannot be ousted by subsequent events, including action by the parties.'" *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 329 (2012) (quoting *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983)). "Traditionally," however, "the boards of contract appeals, when dismissing cases for mootness, have not linked such dismissals to a lack of jurisdiction," *Air, Inc.*, 1985 WL 17107, apparently, at least in part, because the Board's jurisdiction arises under Article I rather than Article III. *Sperry Corp.*, GSBCA 8208-P, et al., 86-1 BCA ¶ 18,704, at 94,078;

*Custodial Guidance Systems, Inc.*, GSBCA 6531, 83-1 BCA ¶ 16,278, at 80,886; *see Grammco Computer Sales, Inc.*, GSBCA 9612-P, 88-3 BCA ¶ 21,118, at 106,613 (dismissing protest with prejudice as moot); *North American Automated Systems Co.*, GSBCA 9179-P, 88-1 BCA ¶ 20,258, at 102,516 (1987) (same). Although there is authority for the proposition that an Article I tribunal (like the Board) subject to review by an Article III appellate body should treat the case-or-controversy requirement as a jurisdictional necessity, *see CBY Design*, 105 Fed. Cl. at 328 (“[w]hen a matter before [an Article I] court is subject to review by the Federal Circuit, an Article III court, mootness is not merely a matter of prudence” (citations omitted)), we are guided by the precedent of our predecessor board, *see Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,989 (adopting decisions of predecessor boards as precedent), and dismiss Mr. Orr’s challenge to the contents of his performance evaluation for failure to state a claim.

### Decision

For the foregoing reasons, we **DISMISS** Mr. Orr’s appeal **IN PART**. We dismiss his monetary claim for unassigned Elevenmile fire incident work for lack of jurisdiction; dismiss with prejudice his monetary claim arising out of work on August 21, 2015, under the Bobcat fire incident order for failure to state a claim; dismiss his procedural challenges to the agency’s performance evaluation for lack of jurisdiction; and dismiss his remaining challenges to the performance evaluation as moot. By separate order, we will schedule further proceedings on Mr. Orr’s monetary claim arising out of work from August 26 to 31, 2015, under the Bobcat fire incident order.

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HAROLD D. LESTER, JR.  
Board Judge

We concur:

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ALLAN H. GOODMAN  
Board Judge

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RICHARD C. WALTERS  
Board Judge