UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: March 1, 2017

CBCA 5516

COMPUCRAFT, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas J. Wingfield, Atlanta, GA, counsel for Appellant.

Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SULLIVAN**, and **BEARDSLEY**.

SULLIVAN, Board Judge.

CompuCraft, Inc. (CompuCraft) appeals the final decision of a contracting officer for the General Services Administration (GSA), denying CompuCraft's request that the contracting officer change its past performance evaluations in the Contractor Performance Assessment Reporting System (CPARS). GSA moves to dismiss the appeal, in part, asserting that the Board lacks jurisdiction to grant injunctive relief and to review the portions of the claim granted by the contracting officer. For the reasons set forth below, GSA's motion is granted in part and denied in part.

Findings of Fact

I. Performance and Final Payment

The following factual allegations are taken from CompuCraft's first amended complaint and supplemented with information from the Rule 4 file.

CompuCraft is a small, family-owned general contractor, registered and licensed in Georgia. Complaint ¶ 1, 23. On September 18, 2014, GSA awarded CompuCraft a task order in the amount of $537,290, for the "system design, equipment replacement, and efficiency improvement" of the heating, ventilation, and air conditioning (HVAC) system at the Savannah Tomochichi Federal Building and Courthouse. *Id*. ¶ 9; Appeal File, Exhibit 3 at 1, 10.[1] CompuCraft began work on October 9, 2014, and completed the work on August 18, 2015.[2] Complaint ¶ 10. On September 8, 2015, GSA conducted a final inspection of the work. *Id*. ¶ 11. CompuCraft received final payment of the contract balance on October 1, 2015. *Id*. ¶ 13.

II. Performance Evaluation

Pursuant to the Federal Acquisition Regulation (FAR), "agencies shall prepare evaluations of contractor performance for each contract that exceeds the simplified acquisition threshold." 48 CFR 42.1502(b) (2015) (FAR 42.1502(b)). The FAR instructs that performance evaluations shall be entered into the CPARS and then automatically transmitted to the Past Performance Information Retrieval System (PPIRS), from which they can be retrieved by federal government agencies seeking information on contractor past performance. *Id*. 42.1503(f); Exhibit 22 at 4. Contractors may, after notification that their evaluation is ready, submit comments, rebut statements, or provide additional information in response to the contracting officer's evaluation. FAR 42.1503(d). Any disagreements between the parties shall be reviewed at a level above the contracting officer, but "the ultimate conclusion on the performance evaluation is a decision of the contracting agency." *Id*. The primary purpose of the CPARS is to ensure that "current, complete and accurate information on contractor performance information" is utilized by agency source selection officials in awarding best value contracts and orders to contractors. Exhibit 22 at 9.

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[1] All exhibits referenced in this decision are found in the appeal file.

[2] All work was not completed until September 9, 2015, after CompuCraft made emergency repairs to pre-existing leaking pipes, which GSA funded under Modification 1, issued on August 20, 2015. Exhibit 24 at 1, 3.

The FAR provides that the "evaluation should reflect how the contractor performed." FAR 42.1503(b)(1). Further, "[t]he evaluation should include clear and relevant information that accurately depicts the contractor's performance, and be based on objective facts supported by program and contract or order performance data." *Id*. Contracting officers are to evaluate performance on technical merit (quality of product or service), cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements), schedule/timeliness, management or business relations, small business subcontracting, and other factors, including late or nonpayment to subcontractors, trafficking violations, and tax delinquency. FAR 42.1503(b)(2). The contracting officer is to assign a rating for each evaluation factor "in accordance with a five scale rating system (i.e., exceptional, very good, satisfactory, marginal, and unsatisfactory)" and provide a narrative that supports the ratings given. *Id*. 14.1503(b)(4).

On or about March 23, 2016[3], the contracting officer posted the first evaluation (initial evaluation) for CompuCraft on the CPARS website. *Id*. ¶ 14. The initial evaluation read as follows:

Evaluation Areas	**Rating**
Quality	Marginal
Schedule	Unsatisfactory
Cost Control	Marginal
Management	Marginal
Utilization of Small Business	N/A
Regulatory Compliance	Marginal
Other Areas:	
Warranty Period	Marginal

Id.; Exhibit 21 at 1-2. The contracting officer stated in the recommendation section that "[the contracting officer] would not recommend [CompuCraft] for similar requirements in the future." Complaint ¶ 16; Exhibit 21 at 3. CompuCraft responded to the evaluation on June

[3] The contracting officer's draft evaluation was issued on this date. Exhibit 21 at 1. The initial evaluation was not entered into the CPARS until June 28, 2016. Exhibit 24 at 3.

18, 2016, asserting that the negative evaluation was the result of animosity on the part of the project manager towards CompuCraft, and requested that the initial evaluation be revised. Complaint ¶ 27; Exhibit 23 at 1, 3. The contracting officer did not make any changes to the initial evaluation in response to CompuCraft's request. Complaint ¶ 28.

III. CompuCraft's Claim

On August 3, 2016, CompuCraft submitted a claim to the contracting officer alleging that the contracting officer's performance evaluation failed to comply with the regulatory requirements, relied upon inaccurate facts and conclusions, and would cause irreparable damage to CompuCraft if not corrected or removed. Exhibit 25 at 1. CompuCraft sought to have its CPARS ratings changed from marginal and unsatisfactory to exceptional, very good, or satisfactory or, alternatively, to have its "[r]atings [for this order] removed entirely from the CPARS website." *Id*. ¶ 29; Exhibit 25 at 1. On that same day, the contracting officer posted a second evaluation (modified evaluation) on the CPARS website. Complaint ¶ 31. The modified evaluation read as follows:

Evaluation Areas	**Rating**
Quality	Satisfactory
Schedule	Satisfactory
Cost Control	N/A
Management	Marginal
Utilization of Small Business	N/A
Regulatory Compliance	N/A
Other Areas:	
Warranty Period	Satisfactory

Id.; Exhibit 26, at 1-2. The contracting officer again stated in the recommendation section that "[the contracting officer] would not recommend [CompuCraft] for similar requirements in the future." Complaint ¶ 31; Exhibit 26, at 3. The contracting officer issued a final decision on CompuCraft's claim on September 22, 2016, acknowledging that he had made revisions to CompuCraft's ratings and denying CompuCraft's claim to change the marginal rating for the management category. Exhibit 27.

On October 17, 2016, CompuCraft filed a notice of appeal. CompuCraft filed its first amended complaint on November 21, 2016, asking:

> [t]hat the Board issue an Order directing GSA to amend the evaluation so as to give CompuCraft a rating of "Exceptional" in every applicable category and to change the "Recommendation"; or, in the alternative, that the Board issue an order directing GSA to delete the evaluation and all modifications in their entirety; or, in the alternative, that the Board issue a Ruling that the Contracting Officer and GSA Branch Chief, Non-Prospectus each acted arbitrarily and capriciously in drafting, approving, and posting the Original Evaluation and the Modified Evaluation.

First Amended Complaint at 13.

On December 22, 2016, GSA filed a motion to dismiss in part, asserting that the Board cannot grant the injunctive relief sought by CompuCraft's first amended complaint and that the portions of the claim already granted by the contracting officer are not properly before the Board. Respondent's Motion to Dismiss at 3-4.

Discussion

I. Standard of Review

In considering a motion to dismiss, "a tribunal accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the [appellant]." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969. CompuCraft bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,602 (quoting *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

II. The Board Lacks Jurisdiction to Grant Injunctive Relief

The Board derives its jurisdiction from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. If jurisdiction cannot be established, the Board must dismiss the case. *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992). A claim challenging an unsatisfactory performance evaluation is subject to review by the Court of Federal Claims and boards of contract appeals. *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311-14 (Fed. Cir. 2011). A contractor "clearly [has] standing to sue [the Government] based on the substantive allegation that the [G]overnment acted arbitrarily and capriciously

in assigning an inaccurate and unfair performance evaluation." *Id*., 656 F.3d at 1316; *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,929.

The Board, however, is not the proper forum for resolving every factual dispute between the contractor and the Government. *Orr*, 16-1 BCA at 177,930. Although the Board has jurisdiction to assess whether the evaluation was arbitrary and capricious, "[the Board] cannot direct the Government to revise [a performance evaluation] in a particular way through some form of injunctive relief." *Id.* (citing *Versar, Inc.*, ASBCA 56857, 10-1 BCA ¶ 34,437, at 169,959); *Colonna's Shipyard, Inc.*, ASBCA 59987, et al., 16-1 BCA ¶ 36,518, at 177,899.

Here, CompuCraft is seeking, in part, injunctive relief, requesting that the Board direct GSA to revise its performance evaluation by changing the rating for each evaluative factor to exceptional, or in the alternative, to remove entirely the evaluations from the CPARS website. The Board lacks jurisdiction to grant such relief and the portions of its complaint seeking such relief are dismissed.

III. The Contracting Officer's Final Decision Does Not Control the Scope of the Board's Review

GSA also seeks a ruling regarding the scope of the matters properly before the Board. Respondent's Motion to Dismiss at 4. GSA argues that, because the contracting officer changed the ratings to satisfactory in all categories, except the management category, in the modified evaluation, the only claim properly before the Board is whether the unchanged marginal rating for the management category is arbitrary and capricious. *Id*. GSA construes the scope of the Board's review too narrowly.

The CDA provides that "[e]ach claim by a contractor against the [Government] relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1) (2012). Once the contracting officer renders a decision, a contractor may, within 90 days, appeal to the appropriate board of contract appeals. *Id*. §§ 7104(a), 7105. Thus, two prerequisites are required prior to an appeal to the Board: (1) the contractor must have submitted a proper CDA claim to the contracting officer, *id*. § 7103(a), and (2) the contracting officer must have either issued a decision on the claim, *id*. § 7104(a), or have failed to issue a decision within the required time period, *id*. § 7103(f). *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004).

The CDA further provides that "[s]pecific findings of fact are not required," in a contracting officer's decision, but "[i]f made, specific findings of fact are not binding in any subsequent proceeding." *Id*. § 7103(e). Following a contracting officer's decision, the Board

shall proceed to conduct a de novo review. *Id*. § 7104(b)(4). "[O]nce an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate." *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (*en banc*); *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 177,706.

The *Wilner* court cites *Assurance Co. v. United States*, 813 F.2d 1202 (Fed. Cir. 1987), to address the role and import of a contracting officer's decision in an appeal to be decided by a board of contract appeals under the CDA. In *Assurance*, the contracting officer determined that the contractor was owed amounts on two elements of its claim, but the board, in rendering its decision, reduced or eliminated these amounts. 813 F.2d at 1206. The Court concluded that the board had the authority to reduce the contracting officer's award. *Id*. Because of the de novo nature of proceedings under the CDA, "the contracting officer's [decision] is not to be treated [as] the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal." *Id*. Accordingly, the Board's jurisdiction on appeal is not limited to that amount (or, in this case, rating) denied by a contracting officer in a contractor's claim but encompasses the entire claim.

In its motion, GSA relies upon the Board's holding in *Qwest Communications Co., LLC v. General Services Administration*, where the Board stated that an action brought under the CDA "must be 'based on the same claim previously presented to and denied by the contracting officer.'" CBCA 3423, 14-1 BCA ¶ 35,655, at 174,564. GSA misapprehends the import of that language. It is the act of denial of the contractor's claim and the matters raised in the claim that give rise to our jurisdiction, not the matters actually denied. "The Board is not bound by the contracting officer's final decision in reaching its findings on appeal." *Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,743. To hold otherwise would violate the CDA's instruction that the Board conduct a de novo review. 41 U.S.C. § 7104(b)(4). Having rendered a final decision on CompuCraft's claim, the parties are before the Board on a "clean slate," *Wilner*, at 1402, and the Board will proceed to review the claim de novo. Thus, the Board may review the entire performance evaluation that was the subject of CompuCraft's claim that the ratings given were arbitrary and capricious.

Decision

GSA's motion is granted in part and denied in part. The appeal is **DISMISSED IN PART FOR LACK OF JURISDICTION**.

MARIAN E. SULLIVAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ERICA S. BEARDSLEY
Board Judge