ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
[HMR]TECH2, LLC	)	ASBCA No. 56829
	)	
Under Contract No. FA8622-06-D-8502	)	

APPEARANCES FOR THE APPELLANT: Brian A. Bannon, Esq.
Andrew W. Dyer, Jr., Esq.
Blank Rome LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Alan R. Caramella, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION TO DISMISS

Appellant [HMR]TECH2, LLC (TECH2) appealed under the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(5), from the contracting officer's (CO's) deemed denial of its claim under its captioned multiple award, indefinite delivery/indefinite quantity (IDIQ) contract with the Air Force for the Consolidated Acquisition of Professional Services (CAPS). Appellant claimed that, due to the Air Force's erroneous and arbitrary interpretation of the CAPS contract, it improperly refused to issue task order solicitations to appellant and to consider it for the award of task orders, despite the fact that appellant was fully qualified to receive them under the contract's terms and applicable law and regulations.

On 8 July 2009 the government moved to dismiss the appeal for lack of jurisdiction. It alleged that it appeared that appellant was seeking relief in the nature of mandamus or specific performance, noting that the complaint's prayer for relief included a request that the Board "order the Air Force to permit the Appellant to compete for task orders under the CAPS Contract as a prime contractor" (compl. ¶ 96).

Appellant opposed the motion to dismiss and moved to strike the quoted portion of its complaint. The government did not oppose the motion to strike but averred that it did not alter the fundamental nature of appellant's claim or the relief sought and it persisted in its motion to dismiss. On 5 October 2009 the Board granted appellant's motion to strike. For the reasons below, we deny the government's motion to dismiss.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The following facts, alleged in the complaint or taken from documents referred to therein, are undisputed or uncontroverted.

Through the CAPS program, the Air Force's Aeronautical Systems Center, located at Wright-Patterson Air Force Base, acquires a wide range of services, including, among many others, acquisition logistics and management (compl. and answer ¶¶ 3, 4).

In 2005 the Air Force issued a solicitation for the award of multiple IDIQ contracts under which it would acquire CAPS services by issuing task order solicitations to the companies awarded an IDIQ contract. The CAPS program contracts are small business set-asides. (Compl. and answer ¶¶ 5-7)

When appellant submitted its final proposal revision in response to the Air Force's 2005 solicitation, it included a letter from the Small Business Administration (SBA) stating that HMRTECH would graduate from the Section 8(a) program on 9 April 2007 (compl. and answer ¶ 19).

On 20 April 2006 the Air Force awarded the captioned CAPS contract to appellant, which was then the joint venture HMRTECH/HJ FORD SBA JV, LLC (R4, tab 1 at 1; compl. and answer ¶ 20; *see* compl. ¶ 10; R4, tab 23 at 2). The Air Force also awarded CAPS program contracts to at least seven other commercial entities. Each CAPS program contract is effective for five years from the date of award, until April 2011, unless terminated. (Compl. and answer ¶¶ 21, 22)

The CAPS contract incorporates by reference the Federal Acquisition Regulation (FAR) 52.233-1, DISPUTES (JUL 2002) and ALTERNATE I (DEC 1991) clauses (R4, tab 1 at 21). The Disputes clause provides in part:

> (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 CAPS contract contains the Air Force FAR Supplement 5352.216-9000, AWARDING ORDERS UNDER MULTIPLE AWARD CONTRACTS (JUN 2002) – ALTERNATE II (JUN 2002) (TAILORED) clause (Awarding Orders clause), which provides in part:

> (a) All multiple award contractors shall be provided a fair opportunity to be considered for each order in excess of

> $2,500 pursuant to the procedures established in this clause….
>
> ....
>
> (b) Unless the procedures in paragraph (a) are used for awarding individual orders, multiple award contractors will be provided a fair opportunity to be considered for each order using the following procedures [listed in Alternate II]....

(R4, tab 1 at 27)

The CAPS contract also includes the following "H100" clause:

> **H100 SMALL BUSINESS ADMINISTRATION (SBA) MENTOR-PROTEGE (JUN 2005)**
>
> Any mentor-protégé concern shall provide the government any updates/changes to their SBA/DoD approved mentor-protégé agreement during the life of the contract. The concern must also provide the point of contact…of the SBA/DoD office that reviewed and approved their mentor-protégé agreement. The Contracting Office will monitor the concern's progress toward meeting its stated goals and reporting requirements to the SBA/DoD…. In accordance with 13 CFR 124.520, if, during the life of this contract, the SBA determines not to approve continuation of the Mentor-Protégé agreement, the concern will no longer be eligible for delivery orders under this contract.

(R4, tab 1 at 17; *see* compl. and answer ¶ 16) The cited regulation, 13 C.F.R. § 124.520 (2006), states at paragraph (f)(3):

> SBA will review the protege's report on the mentor/protege relationship as part of its annual review of the firm's business plan pursuant to § 124.403. SBA may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor/protege agreement or that the assistance has not resulted in any material benefits or developmental gains to the protege.

(*See* compl. and answer ¶ 17)

During the first year of its CAPS contract, the Air Force awarded task orders to appellant, all of which it completed successfully (compl. and answer ¶¶ 24-26).

In April 2007 HMRTECH graduated from the SBA's 8(a) program. Noting that fact, appellant submitted its mentor-protégé agreement to the SBA for review; and the SBA approved the agreement. (Compl. and answer ¶¶ 27-29; *see also* R4, tab 7 at 1)

On 30 May 2007, TYBRIN Corporation, another CAPS program prime contractor, sent the CO an e-mail questioning whether appellant should be disqualified from further participation in the CAPS program because HMRTECH had graduated from the SBA's 8(a) program (compl. and answer ¶¶ 30, 31).

By memorandum e-mailed to the SBA on or about 18 June 2007, the CO sent a draft letter and/or letter, seeking reconsideration of the SBA's approval of appellant's mentor-protege agreement (R4, tab 6 at 3; *see* compl. and answer ¶¶ 32-34). The letter stated in part:

> 3. …HRMTech [sic] submitted the M-P Agreement for annual review and it was approved by the SBA. HMRTech/HJFord provided accurate data in the submission, to include that they had graduated from the 8A program on 9 Apr 07. According to recent email inputs our offices [sic] has received, we believe the M-P Agreement was reviewed and improperly approved on 20 Apr….
>
> 4. Since 20 Apr 07[,] HMRTech HJFord has been awarded three task orders worth approximately $2M. In addition[,] there are many task orders pending award and RFPs that need to be solicited. HMRTech/HJ Ford stands to be awarded large task order awards under the CAPS contract *after* HRMTech [sic] apparently has graduated from the 8A program. Soon after announcing the first of the TO awards noted, my office received an email from Tybrin, one of the other ten SB CAPS contractors[,] noting that the TO release to HMRTech *seemed to violate the H100 Clause in the CAPS contract*. With this called to the [CO's] attention, he awarded two task orders due to urgent requirements[,] stay all others until this issue is resolved [sic] – *and consider the USAF's obligations under the CAPS contract*, if accurate. [Emphasis added, except for "after"]

(R4, tab 7 at 1-2)

By e-mails sent to the CO on 18 June 2007, in response to e-mails from him, the SBA's Director, Office of Management and Technical Assistance, Office of Business Development, stated, first, that "[a]s of the date of HMR Tech's graduation date of April 8, 2007, the Mentor/Protege relationship with HJ Ford no longer qualifies for additional benefits under SBA's Mentor Protege Program," and, in a second e-mail, that the "[t]he company was eligible to participate in the SBA Mentor-Protege Program until 8 April 2007." After the SBA's first e-mail, the CO stated that he could not make any decisions until he had a formal decision from the SBA and it had formally notified the contractor. After the SBA's second e-mail, he stated that appropriate decisions would be made based upon his interpretation of the e-mail. (R4, tab 6 at 1-2; *see* compl. and answer ¶¶ 38, 39)

By memorandum to appellant dated 2 July 2007, the CO stated in part:

> HMR Tech/HJ Ford Joint Venture was a CAPS prime contractor with a small business status at the time of CAPS award based on a Mentor-Protégé (M-P) program under the [SBA]. When HMR Tech graduated from the 8(a) program on 8 Apr 07 they no longer qualified as a M-P, although the joint venture is intact. *Under Section H, Special Contract Clauses, H-100 "Small Business Administration (SBA) Mentor-Protégé"* since HMR Tech/HJ Ford no longer has the benefits of the SBA M-P program, they are no longer eligible for task order awards under the CAPS contract. [Emphasis added]

(R4, tab 12 at 1; compl. and answer ¶ 44)

By memorandum to appellant dated 6 July 2007, which referred to the CAPS contract's H100 clause in its caption, the CO stated in part:

> Specifically addressing the subject RFP and issues raised in [referenced correspondence], the Joint Venture's proposal was determined ineligible for the task order award and, therefore, not considered for award *under application of the Section H, Special Contract Requirement H-100 "Small Business Administration (SBA) Mentor-Protégé (H-100 Clause)*.… To be clear, my determination was one of contract administration – *applying the requirements of the H-100 Clause* to the known facts – and *is not based* on any challenge to the size status of the Joint Venture and does not require further inputs from SBA. [Emphasis added, except for "is not based"]

(R4, tab 13 at 1; *see* compl. and answer ¶ 49)

By memorandum to appellant's counsel dated 21 August 2007, which dismissed appellant's size protest, the SBA addressed Air Force submissions concerning the purpose and interpretation of clause H100 and concluded:

> In this case, the Air Force has made it clear that the JV will be denied future task orders *based on application of Clause H100*, regardless of the size of the joint venture. SBA finds no basis on which to question the veracity of the Air Force in this regard.… *Since the Area Office finds that the JV has been eliminated based on application of Clause H100 of the contract*, and that Clause H100 is independent of and not related to the size of the JV, we conclude that the JV has been eliminated for reasons other than size. [Emphasis added]

(R4, tab 16 at 4; *see* compl. and answer ¶ 54)

Appellant alleges, without contradiction, that, thereafter, HMRTech and HJ Ford decided that it was in appellant's best interest for it to redeem HJ Ford's interest, after which appellant became a single member limited liability company owned entirely by HMRTech, qualifying as a small business (compl. ¶¶ 55, 56). On 12 December 2007 the Administrative Contracting Officer (ACO) executed a Change-of-Name Agreement, signed by appellant's president, which noted that appellant had changed its name, effective 12 December 2007, from HMRTECH/HJ FORD SBA JV, LLC to HMRTECH2, LLC. The ACO also executed a modification to the CAPS contract on 12 December 2007 so changing appellant's name. (R4, tab 2; compl. and answer ¶ 2)

After its redemption of HJ Ford's interest, appellant requested several times that the Air Force issue it task order solicitations under the CAPS contract and award it task orders if it were the successful offeror. The Air Force refused to alter its position. (Compl. and answer ¶¶ 58, 60)

On 23 February 2009 appellant submitted a CDA claim to the CO, seeking a CO's decision that the Air Force had misinterpreted the H100 clause and that its decision denying appellant the right to continue to compete for task orders was contrary to the clause's plain meaning and to applicable statutes, regulations and decisional law. Appellant asked that it be permitted to compete for new task orders under the CAPS contract as a prime contractor. (R4, tab 23; *see* compl. and answer ¶ 61) Although it did not name the CAPS contract's Awarding Orders clause, appellant cited the associated statute, 10 U.S.C. § 2304c(b), and regulation, FAR 16.505(b)(1)(i), which require that the CO provide each awardee a fair opportunity to be considered for each task order (R4, tab 23 at 8, 9).

The CO did not issue a decision or contact appellant within 60 days and its claim was deemed denied (compl. and answer ¶ 61). Appellant appealed to the Board on 14 May 2009.

In its complaint appellant alleged, among other things, that the Air Force's most recent position for disqualifying it from future task orders relied solely upon the H100 clause and that the CO's interpretation contradicted the clause's plain meaning (*e.g.*, compl. ¶¶ 64, 72). After the Board's grant of appellant's motion to strike, the complaint's Conclusion and Request for Relief states:

> For the foregoing reasons, the Air Force's decision to deny the Appellant the ability to receive solicitations for and to compete for CAPS task orders is patently unreasonable. Appellant requests that the Board reverse this decision in all respects....

(Compl. ¶ 96)

DISCUSSION

The government moves to dismiss this appeal for lack of jurisdiction on the ground that appellant is not seeking the Board's contract interpretation, which the government claims would provide no meaningful relief to appellant, but rather an impermissible order that it be allowed to compete for future task orders. Appellant responds, among other things, that the Board clearly has jurisdiction over the contract interpretation issue appellant has raised concerning the H100 clause, upon which the CO relied in purporting to disqualify appellant from consideration for task orders under its CAPS contract.

It is apparent from appellant's undisputed or uncontroverted allegations in its complaint that the CO began to contemplate disqualifying appellant from consideration for task orders under the CAPS contract after a competitor complained that any future award to appellant would allegedly violate the contract's H100 clause because the HMRTECH portion of appellant's joint venture had graduated from the SBA's 8(a) program. The CO several times cited the H100 clause as the basis for his decision to discontinue issuing task order solicitations, or any task orders, to appellant under the CAPS contract.

The issue of the proper interpretation of the H100 clause is at the core of the parties' dispute and is not merely academic. The contract's Disputes clause provides for CDA claims seeking the adjustment or interpretation of contract terms or other relief arising under or relating to the contract. *See also* FAR 2.101, defining "claim" the same way. It is well settled that the Board has jurisdiction to entertain claims for contract

interpretation. *Donald M. Lake, d/b/a Shady Cove Resort & Marina*, ASBCA No. 54422, 05-1 BCA ¶ 32,920 at 163,071-72 (collecting cases). Moreover, 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. *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,331.

Appellant invokes a "fundamental question of contract interpretation," which requires prompt resolution. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271, *reh'g denied*, 186 F.3d 1379 (Fed. Cir. 1999). This is necessary in order to afford appellant any opportunity to compete for task orders under the CAPS contract prior to the contract's expiration in early 2011.

DECISION

We deny the government's motion to dismiss for lack of jurisdiction.

Dated: 9 October 2009

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

I concur

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

I concur

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. 56829, Appeal of HMRTECH2, LLC, rendered in conformance with the Board's Charter.

Dated:

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