ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of - | ) | |
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| St. Michael's Inc. | ) | ASBCA Nos. 62226, 62271, 62272 |
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| Under Contract No. SP4703-17-A-0002 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE SMITH

Appellant St. Michael's Inc. (SMI) challenges three [redacted] Contractor Performance Assessment Reporting System (CPARS)[1] ratings of its management of three task orders (TOs) under contract number SP4703-17-A-0002. Respondent Defense Logistics Agency (DLA) based its ratings on SMI's inability to maintain the staffing levels that SMI had proposed to perform the task orders. SMI contends that DLA's ratings were arbitrary and capricious because the fixed-price task orders did not mandate specific staffing levels and DLA did not suffer impacts from SMI's staffing gaps. DLA disagrees and also argues that this appeal is moot because the CPARS reports have expired. We find that DLA's ratings were not inconsistent with applicable CPARS guidance and, in any event, because the reports are no longer visible in CPARS and cannot be amended or revised by DLA, these appeals are moot. Accordingly, the appeals are denied.

FINDINGS OF FACT

SMI's Task Orders

SMI (along with its "lead teaming partner" KPMG) (collectively SMI/KPMG) was awarded Blanket Purchase Agreement SP4703-17-A-0002 (BPA) on January 31, 2017

[1] "CPARS" refers to the rating system, while an individual rating is referred to as a "CPAR," and the plural of a CPAR is "CPARs."

(R4, tabs 1, 3 at 1). The BPA was for "assist[ance to] DLA in achieving its financial statement audit sustainment objectives through improved business operations stewardship" using several individually awarded task orders (TOs) (R4, tab 5 at 13).

During performance of TOs 31, 59, and 61 (R4, tabs 5, 73, 82),[2] DLA became concerned about vacancies in SMI's staff (also referred to as "billets") compared to the planned staffing shown in SMI's TO proposals (R4, tabs 9 at 1, 80 at 1, 87 at 1, 90 at 5-6, 91 at 5-6, 92 at 5-6; app. supp. R4, tab 10 at 52-57). SMI agreed that recruiting and retaining staff was a problem and continually sought to hire and train new employees (R4, tabs 12-71 (SMI's weekly staffing reports from July 19, 2018 - April 8, 2019), 72 ("Number one focous [sic] - funded and empty billets")). Between June 2018 and continually through February 2019, DLA, KPMG, and SMI discussed weekly vacancy reports and "unfilled billet summary[s]" that fluctuated over time, but SMI never achieved full staffing for any of the three TOs at issue (R4, tab 8 at 2-3; app. supp. R4, tabs 1-9, tab 10 at 52-57, app. supp. R4, tab 10 Resp. document production DLA 000051-0000119). Nevertheless, SMI/KPMG timely met the requirements for TO deliverables, which DLA later rated as [redacted] (*see* R4, tab 77). TO31 was completed and closed on April 26, 2019 (R4, tab 7). But SMI and DLA (with KPMG's assent) bilaterally agreed to deobligate funds and terminate for convenience TO59 and TO61 effective April 30, 2019 (R4, tabs 77, 78, 85). The termination of TO59 noted that [redacted] caused a reduction in the fixed price by [redacted] as an equitable adjustment to DLA (R4, tab 77 at 2).

The CPARS Process

Since approximately 2011, CPARS has become the governmentwide system for federal agencies to share assessments of contractors' performance of federal government contracts. FAR 42.1502(a); *see also, e.g.*, Stephanie Hagan, *What is CPARS?*, WINVALE (June 21, 2023), https://info.winvale.com/blog/what-is-cpars; Rob Muzzio, *U.S. Federal Government Contractor Performance System History* (2017), http://www.ultimusperformancellc.com/history-of-federal-performance-management-systems.html. As suggested by its name, CPARS uses standardized formats and procedures for creating and publishing written reports on contractor performance, which are available online for agencies to consider in their source selection decisions. FAR 42.1500-03. Regulations govern the creation, publishing, access, and use of CPARS that apply to all users, and the functionality of CPARS ensures that many of those rules are followed. *Id.* For example, access to CPARS is limited to the rated contractors and registered users within the federal government, generally contracting

[2] DLA awarded separate "parallel" but functionally identical BPAs and TOs to each member of the SMI/KPMG team (R4, tabs 2-5). For purposes of this decision, we refer only to SMI's TO numbers, which are abbreviated as "TO##."

personnel or others with a "need to know." CPARS, GUIDANCE FOR THE CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (CPARS) 3 (2023), https://www.cpars.gov/cparsweb/assets/documents/CPARS-Guidance.pdf (hereinafter CPARS GUIDANCE).[3] In addition, time and access parameters prevent late assessments. FAR 42.1503(d)-(f); CPARS GUIDANCE at 19-23.

FAR 42.1501(b) provides that "CPARS is the official source for *past performance* information" (original italics). FAR 42.1503(g) provides that "Agencies *shall* use the *past performance* information in CPARS" (original italics) and that CPARs are active and usable as past performance data for three years from "completion of performance of the evaluated contract or order." This results in a rolling three-year window when each CPAR can be used to evaluate a contractor for future awards. *Id.* According to DLA, after three years CPARs are archived and become functionally invisible and inaccessible to all users (supp. decl. of Kelly Moore at 2).[4]

Although it is possible to preserve CPARS content beyond expiration by printing, downloading, or otherwise copying the online reports during the three years they are available, CPARS data in any form is guarded closely. FAR 42.1503(d); CPARS GUIDANCE at 27; *see also* R4, tabs 8, 79, 86.[5] CPARs are treated as source selection sensitive for Freedom of Information Act (FOIA) and litigation discovery.[6] CPARS GUIDANCE at 27-28. Because CPARS is the only recognized system for contractor performance assessment that is now in existence, there is no mechanism for creating *ad hoc* performance reports, and certainly none that would be accessible to other people inside or outside of DLA (supp. decl. of Kelly Moore at 2).

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[3] "The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the [three year] period the information may be used to provide source selection information." FAR 42.1503(d).

[4] With the assistance of help-desk personnel, CPARs can be "un-archived" and viewed or edited, but they are automatically re-archived the same day (supp. decl. of Kelly Moore at 2). Despite this very limited capability, we find that for all practical and realistic purposes CPARs disappear from view after three years and that revising an archived CPAR would have no practical effect.

[5] Each page or screen of CPARS is marked with the legend "FOR OFFICIAL USE ONLY / SOURCE SELECTION INFORMATION - SEE FAR 2.101, 3.104, AND 42.1503" (R4, tabs 8, 79, 86).

[6] As an illustration, in this appeal DLA resisted producing its CPARs for KPMG's parallel TOs in discovery, and only did so after we issued a Protective Order.

Guidance for CPARS Performance Assessments

CPARS evaluations "should" be based upon "objective data (or subjective observations)" and "present enough information in each applicable category to accurately describe the contractor's performance in a way that provides useful insight for Federal source selection officials." CPARS GUIDANCE at 41-42; *see* FAR 42.1503(b)(1). When rating a contractor's management, the government "[a]ssess[es] the integration and coordination of all activity needed to execute the contract/order, specifically the timeliness, completeness and quality of problem identification [and] corrective action plans . . . ." CPARS GUIDANCE at 47.

[redacted] EVALUATION RATINGS DEFINITIONS. Regarding staffing, [redacted].

Before each CPAR becomes final, there is a defined three-step process that includes posting the contracting officer's assessments, followed by an opportunity for the contractor to challenge the ratings and explain its position, and then a resolution of any disagreements by a higher agency official. Each of these steps is visible on CPARS when it is completed. FAR 42-1503(d); CPARS GUIDANCE at 19-23; *see also*, R4, tabs 8, 79, 86.

DLA's CPARS Ratings of SMI

After SMI's work on the three TOs ended, DLA's contracting officer posted CPARs that rated SMI's quality, schedule, and management for each TO (R4, tabs 8 at 1-2, 79 at 2, 86 at 2). DLA rated SMI [redacted] for quality and [redacted] for schedule on all three TOs (R4, tabs 8 at 1-2, 79 at 2, 86 at 2). DLA rated SMI [redacted] (R4, tabs 8 at 1-2, 79 at 2, 86 at 2). For TO31, as an example, DLA commented that [redacted] (R4, tab 8 at 3).

DLA's narratives were slightly different for each TO, but, consistent with the emails and meeting agendas cited above, [redacted] (R4, tabs 8, 79, 86). This resulted in significantly fewer labor hours to perform the work — an added burden to KPMG (according to DLA) — and was the primary factor in the decision to

end SMI's work on TO59 and TO61 early (R4, tabs 77, 79 at 2, 86 at 2). DLA indicated that [redacted] (R4, tabs 79 at 2, 86 at 2). DLA suggested that it might be exposed to equitable adjustment claims from KPMG for SMI's lower work effort (R4, tabs 79 at 2, 86 at 2).

For TO31 and TO61, DLA noted [redacted] (R4, tab 8 at 3; tab 86 at 2-3). For TO59 DLA [redacted] (R4, tab 79 at 2).

SMI's Disagreements with DLA's Ratings

In response to DLA's ratings, SMI accepted the [redacted] quality and timeliness ratings but challenged the [redacted] management ratings per the CPARS comment and dispute format described above (R4, tabs 8, 79, 86). SMI did not specifically dispute [redacted] for TO59 (R4, tab 79). SMI's CPARS narratives argued, as SMI does here, that DLA misapplied the rating criteria, most notably that DLA did not suffer a sufficient negative impact to justify [redacted] SMI asserted that [redacted] (R4, tabs 8, 79, 86).

Following SMI's challenges, DLA's review official agreed with [redacted] and all steps of the CPARS process concluded on July 17, 2019 (TO31), and September 5, 2019 (TO59, TO61) (R4, tabs 8 at 4-5, 79 at 5, 86 at 4-5).

SMI resubmitted its disagreements as certified claims on August 12, 2019, and September 16, 2019, one for each [redacted] (R4, tabs 93-95). The certified claims were denied by DLA on October 10, 2019, and November 14, 2019 (R4, tabs 9, 80, 87).[7]

SMI timely initiated these appeals on October 21, 2019 (TO31) (ASBCA No. 62226) and November 21, 2019 (TO59, TO61) (ASBCA Nos. 62271 and 62272), which were consolidated on December 16, 2019. The appeals moved through an unhurried pleading and discovery schedule, generally by joint agreement between the parties. There was at least one schedule extension sought by SMI, and a discovery dispute over SMI's document requests that "stall[ed] the progress of this appeal" before we resolved it on September 2, 2021. After a period of over one year between

[7] CPARS does not keep track of activity such as certified claims, COFDs, or litigation that occurs after the final step of each CPAR (R4, tabs 8, 79, 86).

November 18, 2021, and January 4, 2023, where nothing was filed by either party, the parties agreed in January 2023 to submit these appeals for disposition under the Board's Rule 11 and agreed to a briefing schedule. DLA interposed a concurrent motion to dismiss for mootness, and substantive Rule 11 briefing concluded on August 4, 2023, with the submission SMI's surreply brief.[8]

The CPARs Have Expired

Meanwhile, back on April 30, 2022, which was the three-year anniversary of completion or termination of the three TOs, each CPAR became inaccessible for view, revision, or for any other purpose, to all users of CPARS (gov't mot., ex. A, Declaration of Contracting Officer Kelly Moore ¶¶ 3-7 ("[T]here is no longer any record of the ratings associated with the Task Orders at issue in this appeal in the system," and "the CPARs at issue in this appeal are no longer in CPARS and are no longer available to provide assessment of SMI's performance nor are these ratings available to be updated or otherwise changed."); decl. attach. 1, 2).

And regardless of whether the assessments could still be viewed in CPARS, on the same three-year anniversary, each TO and its associated CPAR moved outside the permissible time window during which SMI's past performance on these TOs could be considered in any government source selection. *See* FAR 42.1503(g).

No Evidence of Harm to SMI

During the time that SMI's CPARs were accessible, there is no evidence in the record that SMI's [redacted] ratings were ever "used against" SMI in any contract award decision. Indeed, there is no evidence in the record that any of the CPARs were ever used, or even seen, by anyone except the parties to these appeals. Even without that type of data, which might not be recorded by CPARS or be otherwise obtainable by either party, there is no evidence in the record (for instance, SMI's own records regarding contracts bid versus contracts awarded, non-award debriefs, etc.) from which we might find or infer that SMI experienced any ill-effects of the [redacted] ratings. By the operation and rules for CPARS described above, it appears that no future harm can occur either because the disputed ratings no longer functionally exist (decl. of Kelly Moore ¶¶ 4-7).

SMI suggests that it might someday be asked about the ratings or asked for its copies of the expired CPARs by non-government entities with whom SMI wishes to

[8] We subsequently ordered supplemental briefing which was completed on July 11, 2024.

conduct business, but there is no evidence that has previously occurred or is likely to in the future (app. opp'n at 2-3, app. supp. br. at 3).[9]

## DECISION

The ASBCA has jurisdiction to address inaccurate and unfair CPARS ratings. *Cameron Bell Corp. d/b/a Gov Sols. Grp.*, ASBCA No. 61856, 19-1 BCA ¶ 37,323 at 181,537. In doing so, we "assess whether the contracting officer acted reasonably in rendering the disputed performance rating or was arbitrary and capricious and abused his [or her] discretion." *Id*. Although we lack authority to "order the government to revise a CPARS rating, we may remand to require the contracting officer to follow applicable regulations and provide [the contractor] a fair and accurate performance evaluation." *Id.* (citing *PROTEC GmbH*, ASBCA No. 61161 et al., 18-1 BCA ¶ 37,064 at 180,419-20). Thus, in broad terms, the issue in these appeals is whether DLA's [redacted] ratings of [redacted] were arbitrary and capricious. We also have the question of mootness because the CPARs in question have expired.

### DLA's [redacted] Ratings Were Not Arbitrary and Capricious

The CPARS rating guidance suggests that ratings should be based upon objective facts but does not establish rigid criteria for individual ratings and expressly provides that ratings can be influenced by subjective observations and viewpoints of agency personnel. CPARS Guidance at 41-42; *see* FAR 42.1503(b)(1). The wording of the guidance, including "may" "should" and "subjective," is no more specific than those words. *Id.* Instead, the guidance provides the general criteria and examples quoted above that, taken together, reiterate the obvious -- CPARS ratings are the contracting agency's *opinion* of several aspects of the contractor's performance, based upon events that occurred during performance.

With that in mind, the CPARS guidance quoted above provided a reasonable basis for DLA to rate SMI's [redacted] as [redacted] SMI's inability to perform these TOs with a full staff fits within the example provided in the CPARS criteria, to wit: [redacted] CPARS GUIDANCE at 50. While DLA did not base its ratings on schedule delinquency, and did not focus specifically on "key personnel," the preface "could, for example" means that DLA was not restricted to deficiencies in schedule or key personnel when rating SMI. We

[9] As SMI recognizes, "[i]t cannot be known, and there is no evidence before the Board either way, if the existence of those poor grades and the non-recommendation has had any lingering impact on the reputation of SMI" (app. opp'n at 5).

conclude, therefore, that DLA was not unreasonable, and certainly not arbitrary and capricious, to assess SMI's [redacted] as a weakness in SMI's [redacted]

SMI relies upon the same regulations regarding CPARS but does not identify any precedent that a [redacted] rating cannot be based upon [redacted] Instead, unable to show that its [redacted] these TOs, SMI argues that DLA did not cite a contract performance failure and "suffered no impact as a result of SMI's unfilled billets" (app. br. at 15). But SMI splits hairs too finely. While DLA did not contend that SMI's incomplete staff caused specific defects in SMI's contract deliverables, that was not an element of DLA's [redacted] rating, nor is it required to be. TO59 and TO61 were bilaterally ended early, at least in part because of SMI's [redacted] (R4, tab 87 at 2). The unanticipated early termination of an unfinished contract is, by definition, an impact to the government. SMI's arguments to the contrary are unsupported, and a bit disingenuous given SMI's bilateral agreement that [redacted] contributed to the terminations (R4, tab 77 at 2).[10]

Moreover, although TO31 was completed without early termination, the fact that SMI's inability to [redacted] its work was a "number one focus" that was tracked and discussed at weekly meetings is again an impact to the government. Without the [redacted] DLA may not have been occupied with monitoring SMI's staffing, weekly or at all.

SMI's arguments that the impact to the government must be more dramatic than early termination or weekly meeting topics (app. br. at 15, 23-28) is nitpicking that is not supported by the regulations or precedent either. For instance, KPMG did not eventually submit a certified claim to DLA for the cost of finishing SMI's work, but the question would never have arisen if SMI had completed TO59 and TO60. SMI's speculation that the weekly meeting time "would have been only moments" and "such a minimal amount of time simply cannot suffice to show actual impact" is unsupported (app. br. at 25). Again, the CPARS guidance does not provide specific examples of impacts to the government or mandate a threshold of cost, time or other impacts to justify a [redacted] rating. CPARS GUIDANCE at 50. The words "significant events" applies here to the

[10] We similarly reject SMI's several allegations of bad faith, especially regarding events following the CPARS evaluations, including during the parties' discovery dispute here (app. br. at 16-23). Among other faults in logic, the bad faith allegations are not supported by the required clear and convincing evidence. *See, e.g., GSC Constr., Inc.*, ASBCA Nos. 59402, 59601, 21-1 BCA ¶ 37,751 at 183,226 (citing *Road and Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368-69 (Fed. Cir. 2012)).

[redacted] issues (again, a bilaterally acknowledged factor in the terminations), not a criteria for the degree of "impact."

Last, SMI's argument to the effect that DLA was barred from [redacted] ratings for [redacted] when the deliverables were [redacted] (app. br. at 28) ignores the basic fact that CPARS contains *separate* ratings for [redacted] etc., not a single rating for all aspects of contract performance based solely on the quality of the deliverables. The CPARS regulations do not require ratings in one category to dictate ratings in another. Just the opposite: the existence of separate ratings categories necessarily means separate ratings so, like here, it is entirely possible for one aspect of performance to be very good while another is less so.

DLA Cannot Amend Its Ratings Because The Reports Have Expired

DLA also argues that this appeal is moot because the CPARs at issue have expired. We agree because, regardless of the merits, DLA is unable to revise the reports or replace the ratings.

We clearly possessed jurisdiction at the outset of these appeals while the disputed CPARs were accessible for revision by DLA, visible to authorized users of CPARS, and a permissible source of past performance information to other agencies. Moreover, at that time there was at least a potential for future harm to SMI regarding source selections. But given the intervening expiration of the CPARs, a remand to DLA to "follow applicable regulations and provide [SMI] a fair and accurate performance evaluation" would ask DLA to do the impossible because the applicable regulations require all performance assessments to be done *in* CPARS and CPARS is not an available vehicle to change the assessments after three years have passed. *See Powell v. McCormack*, 395 U.S. 486, 495-96 (1969) ("[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"). As the Federal Circuit summarized in *Ferring B.V. v. Watson Lab'ys., Inc.-Fla.*, "[a] case becomes moot when interim relief or events have eradicated the effects of a defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." 764 F.3d 1382, 1391 (Fed. Cir. 2014) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). A case remains viable only if "throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).

Although the question of mootness in other contexts – many prior to the CPARS regulations, has often involved pre-litigation recission and release of government claims,

voluntary modification of CPARS ratings, or other actions,[11] such questions are not present here. Through the simple passage of time, not any change of heart by DLA, the disputed CPARs have expired, are inaccessible, and are functionally gone forever.[12]).

Thus, due to the parameters set by the regulations, SMI's CPARS ratings cannot be replaced or revised, regardless of our decision here. They can never be considered, or even seen, by any acquisition personnel in future source selections. *See Orr v. Dept. of Agric.*, CBCA No. 5299, 16-1 BCA ¶ 36,522 at 177,931 (denying a challenge to a withdrawn non-CPARS performance evaluation because it "will never have any effect upon [the contractor's] future consideration for awards"). The possibility of SMI sharing its CPARs with another unknown potential partner in the future is just too speculative under the circumstances to justify the continuation of litigation that has become meaningless.

Finally, SMI argues, essentially, that CPARs challenges can never become moot because that would permit agencies to evade their scrutiny through intentional delay (app. supp. br. at 4). Not only is this argument irrelevant to the standards for mootness, discussed above, but our rules offer appellants several ways to expedite their appeals with or without the cooperation of respondent agencies, notably Board Rules 12.2 and 12.3, which require resolution of the appeal within 120 and 180 days, respectively when the amount in dispute is beneath certain dollar thresholds.[13]

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[11] *L-3 Commc'ns Integrated Sys., L.P.*, ASBCA Nos. 60431, 60432, 16-1 BCA ¶ 36,362 at 177,253 (government withdrawal of a final decision asserting a government claim); *Teddy's Cool Treats*, ASBCA No. 58384, 14-1 BCA ¶ 35,601 at 174,410 (unilateral conversion of default termination); *KAMP Sys., Inc.*, ASBCA No. 54253, 09-2 BCA ¶ 34,196 at 168,995 (rescission of government claim); *Crowley Government Servs., Inc.*, ASBCA No. 63531, 23-1 BCA ¶ 38,371 at 186,363 (recission of CPARS ratings while still asserting the "factual substance" of them did not render the appeal moot); *but see*, *BLR Grp. of America, Inc. v. United States*, 94 Fed. Cl. 354 (2010) (addressing scope of past performance reviews by procuring officials where CPARs were "availab[le] to all government procurement officials" and did consider the practical and regulatory inability of rating officials to amend expired CPARs).

[12] This is not a novel proposition. We noted in *Patricia I. Romero, Inc., d/b/a Pacific Builders*, ASBCA No. 63093, 23-1 BCA ¶ 38,362 at 186,285 that the "[government] stated that, despite 'he contracting officer's agreement to change PWB's CPARS ratings and narratives, doing so was 'no longer practical.' Due to their age, the CPARS evaluations had been automatically archived and were no longer visible or accessible on the CPARS website.")

[13] Because challenges to CPARS ratings do not require monetary damages, Rules 12.2 and 12.3 will always be available to any litigant who wishes to utilize them.

We have considered SMI's additional arguments and find them unpersuasive even if not specifically addressed herein.

## CONCLUSION

SMI has not demonstrated that the government's marginal ratings violated the applicable regulations or were arbitrary and capricious. In addition, these appeals are moot. The appeals are denied.

Dated: January 29, 2025

Brian S. Smith
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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 Nos. 62226, 62271, 62272, Appeals of St. Michael's Inc., rendered in conformance with the Board's Charter.

Dated: January 29, 2025

for Jamnye D. Alibata

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals