

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.
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APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE SCOTT

HMR^{TECH2}, LLC (TECH2) has 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 indefinite delivery/indefinite quantity (IDIQ) contract with the United States Air Force for the Consolidated Acquisition of Professional Services (CAPS). Appellant claims that, due to the Air Force's erroneous and arbitrary contract interpretation, it improperly refused to issue task order solicitations to appellant and to consider it for award. Appellant alleges, among other things, that the Air Force had been improperly influenced by a competitor, TYBRIN Corporation (TYBRIN). (R4, tab 23 at 4; *see also* compl. ¶¶ 30-36)

On 8 July 2009 the government moved to dismiss the appeal for lack of jurisdiction on the ground that appellant was seeking mandamus or specific performance because it had not filed a monetary claim but had asked the Board to order the Air Force to permit it to compete for task orders. On 5 October 2009 the Board granted appellant's unopposed motion to strike the portion of its complaint that had sought such relief. However, the government contended that the nature of appellant's claim remained the same. On 9 October 2009 the Board denied the government's motion to dismiss, holding that appellant had invoked a fundamental question of contract interpretation. *HMR^{TECH2}, LLC*, ASBCA No. 56829, 09-2 BCA ¶ 34,287 (*TECH2 I*). Thereafter the parties attempted, unsuccessfully, to settle their dispute, which they have now submitted for resolution on the written record, under Board Rule 11.

Appellant relies upon its claim, its complaint, the Rule 4 file and its supplemental Rule 4 file. The government also relies upon the latter files. Neither party has submitted any sworn statements. Some of the Board's fact findings are taken from its statement of facts in *TECH2 I* that the parties have not disputed.

FINDINGS OF FACT

Background and CAPS Contract

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

2. For background purposes, we accept appellant's statements in its claim and its complaint, which the government has not refuted, that ^{HMR}TECH was and remains a Service Disabled Veteran Owned Small Business. It was admitted to the Small Business Administration's (SBA's) section 8(a) Business Development (BD) program on 9 April 1998. On 22 October 1998 ^{HMR}TECH entered into a Mentor-Protégé (sometimes MP) agreement with HJ Ford Associates, Inc. (HJ Ford), which the SBA approved on 24 February 1999. On 18 August 2004, ^{HMR}TECH and HJ Ford formed a joint venture, known as ^{HMR}TECH/HJ Ford SBA JV, LLC (hereafter sometimes the joint venture), in the expectation of competing as a prime contractor for a CAPS program contract pursuant to 13 C.F.R. § 121.103(h)(3)(iii) (2005).¹ The CAPS program was a small business set-aside and not a section 8(a) set-aside. (R4, tab 23 at 2; compl., answer ¶¶ 7-11)

3. In February and April 2005 the Air Force issued draft solicitations for the award of small business set-aside IDIQ contracts under which it would acquire CAPS services through task order solicitations to the companies awarded an IDIQ contract. An amended solicitation issued in June 2005. (Compl., answer ¶¶ 5-7, 16)

¹ The provision states in part:

Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement....

4. By letter of 24 June 2005 to ^{HMR}TECH, Charita Albright, the SBA's Washington Metropolitan Area District Office Business Development Specialist, stated:

[^{HMR}TECH] is an 8(a) firm within the SBA, Washington Metropolitan Area District Office. [^{HMR}TECH] was certified under the 8(a) program on 4/9/98, and will graduate from the 8(a) program on 4/9/07. The firm is in good standing and is in compliance with SBA Program Rules & Regulations.

[^{HMR}TECH] has a Joint Venture Agreement in place with [HJ Ford], which was approved previously by the SBA. [The joint venture] is a viable undertaking for the CAPS procurement that is supported by the [SBA].

(R4, tab 3)

5. When appellant submitted its final proposal revision in response to the Air Force's solicitation, it included the SBA's letter stating that ^{HMR}TECH would graduate from the 8(a) program on 9 April 2007 (R4, tab 23 at 2; compl., answer ¶ 19). Thus, the government knew about this change at the outset of the contract. There is no evidence that it raised the issue with appellant, and it did not limit its contract award to appellant to any period less than the full five-year contract term (*see* R4, tab 1).

6. On 20 April 2006 the Air Force awarded the subject CAPS contract to appellant (R4, tab 1 at 1; compl., answer ¶ 20; *see* compl. ¶ 10; R4, tab 23 at 2). The Air Force also awarded CAPS 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. (R4, tab 1 at 10, 19 (Ordering clauses); compl., answer ¶¶ 21, 22)

7. The CAPS contract incorporates the Federal Acquisition Regulation (FAR) 52.216-18, ORDERING (OCT 1995) clause by reference (R4, tab 1 at 19). The clause provides in part:

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

8. 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)

9. The CAPS contract includes the following “H100” clause, at issue:

**H100 SMALL BUSINESS ADMINISTRATION (SBA)
MENTOR-PROTÉGÉ (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.* [Emphasis added]

(R4, tab 1 at 17; see compl., answer ¶ 16)

10. The regulation cited in the H100 clause, 13 C.F.R. § 124.520 (2006), Mentor/protege program, states in part:

(a) *General.* The [MP] program is designed to encourage approved mentors to provide various forms of assistance to eligible Participants. This assistance may include technical and/or management assistance; financial assistance...; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements. The purpose of the [MP] relationship is to enhance the capabilities of the protege and to improve its ability to successfully compete for contracts.

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist developing 8(a) Participants may act as a mentor and receive benefits as set forth in this section....

....

(c) *Proteges.* (1) In order to initially qualify as a protege firm, a Participant must:

(i) Be in the developmental stage of program participation;

(ii) Have never received an 8(a) contract; or

(iii) Have a size [with specified limit].

(2) Only firms that are in good standing in the 8(a) BD program...may qualify as a protege.

....

(d) *Benefits.* (1) A mentor and protégé may joint venture as a small business for any government procurement...provided the protégé qualifies as small for the procurement....

....

(e) *Written agreement.* (1) The mentor and protege firms must enter a written agreement setting forth an assessment of the protege's needs and describing the assistance the mentor commits to provide to address those needs....

(2) The written agreement must be approved by the Director, Office of Business Development....

....

(4) SBA will review the [MP] relationship annually to determine whether to approve its continuation for another year.

(5) SBA must approve all changes to a [MP] agreement in advance.

(f) *Evaluating the mentor/protege relationship.*

(1) In its annual business plan update required by § 124.403(a), the protege must report to SBA for the protege's preceding program year:

....

(iv) All federal contracts awarded to the [MP] relationship as a joint venture....

....

(2) The protege must annually certify to SBA whether there has been any change in the terms of the agreement.

(3) SBA will review the protege's report on the [MP] 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.* [Emphasis added.]

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

^{HMR} TECH 8(a) Graduation; Competitor Complaint; SBA Issues

12. On 9 April 2007 ^{HMR}TECH graduated from the SBA's 8(a) program. Noting that fact, the joint venture submitted its mentor-protege agreement, which is not of record, to the SBA for annual review in accordance with 13 C.F.R. § 124.520. The SBA approved the agreement on 20 April 2007. (Compl., answer ¶¶ 27-29; *see also* R4, tabs 3, 7 at 1)

13. On 30 May 2007 Cheryl Nilsson, Esq., then General Counsel and Vice President, Contracts, of TYBRIN, another CAPS program prime contractor, sent an e-mail to CO Daniel J. Lyons concerning the Air Force's announcement of a planned award to appellant, questioning whether it should be disqualified from further participation in the CAPS program because ^{HMR}TECH had graduated from the SBA's 8(a) program. Hereafter, unless otherwise noted, the communications to which we refer were by e-mail, which we identify by date and/or time. Ms. Nilsson is a former trial attorney at WPAFB and evidently was acquainted with Mr. Lyons. (App. supp. R4, tab 24 at 1, tab 43 at 75; *see Essex Electro Engineers, Inc.*, ASBCA Nos. 45663, 45664, 96-2 BCA ¶ 28,600) (Nilsson as Air Force co-counsel); *see also* compl., answer ¶¶ 30, 31)

14. On 30 May 2007 (6:18 PM) the CO forwarded Ms. Nilsson's e-mail to Thomas Krusemark, then the SBA's Procurement Center Representative at WPAFB, to counsel and other government personnel, seeking a meeting and advice. The CO referred to litigation by joint venture member HJ Ford's parent company involving TYBRIN and to a remark by Mr. Krusemark that this was enough of a basis to at least discuss dissolving the joint venture. (App. supp. R4, tab 24 at HMR001; *see also* R4, tab 4 at 1; app. supp. R4, tab 26 at HMR009)² The CO stated "I would like to respond to Cheryl that since the SBA has not informed me of any action to dissolve the joint venture I have not had reason not to consider them," but he noted that he would refrain from doing anything until he had discussed the matter with the government personnel (app. supp. R4, tab 24 at HMR001).

15. On 31 May 2007 (9:15 AM) the CO informed Mr. Krusemark, counsel, and another government employee, concerning an award announcement to appellant under the CAPS contract, that TYBRIN had "no bid" the requirement, was not an interested party, and he was about to sign another "HMR Tech" award that TYBRIN had "no bid." Counsel advised (9:26 AM, 12:43 PM) that, regardless of TYBRIN's status, the CO should refrain from awarding the task orders until the government's contract obligations were assessed. (App. supp. R4, tab 25 at HMR004-05)

16. On 31 May 2007 (11:35 AM) the CO informed counsel and others that, based upon his conversation with Mr. Krusemark:

² Appellant represents without contradiction that the parent company, Dynamics Research Corporation (DRC), had sued TYBRIN and some former DRC employees for alleged breach of their non-compete agreements, had filed a successful bid protest on that basis in connection with another contract, and had threatened a lawsuit against TYBRIN on the same basis in connection with competition for a task order under the CAPS contract (app. reply at 14 n.24).

It would seem that HMR Tech did graduate from the 8(a) program. The [MP] program is tied exclusively to the 8(a) program. The only question now is whether SBA is going to consider the [MP] status to stay intact with the CAPS Contract since they were considered a MP at time of award. Tom asked me to provide the Deputy Director of Contracts for the SBA a summary of how CAPS works and he will make a ruling.

(App. supp. R4, tab 25 at HMR004)

17. On 31 May 2007 (2:24 PM) Mr. Krusemark opined to the CO, counsel and other government personnel in part:

Can HMR Tech/HJ Ford receive contract awards as a [MP] under CAPS in light of their graduation from the 8(a) program? The SBA does not recognize [MP] relationships that are non 8(a), however the question that Mr. Fuji [identified as Director of Contracting for Business Development, 8(a) Division, Washington Metropolitan District Office] needs to rule on...is: since HMR Tech/HJ Ford was a legitimate [MP] Relationship in the eyes of the SBA at the time of the CAPS award, do they remain in that status for the life of the contract?...are task orders considered new work? If it is new work, then the [MP] relationship is no longer recognized in the eyes of the SBA, because HMR Tech/HJ Ford is no longer an 8(a) company. This is part of the equation that Mr. Fuji will need to look at in consult with legal.

We (SBA) will not get involved in any contract decision concerning invoking clauses in the contract, and how the government (USAF) intends on enforcing those. These are considered contractual/legal issues which USAF will need to rule on.

(*Id.* at HMR003-04)

18. On 31 May 2007 (5:39 PM) the CO informed SBA personnel Albright, Krusemark and Loretta Taylor, Sonia K. Carlton of an Air Force headquarters office concerned with small business, counsel, and others, that:

I have conflicting information from SBA. From my conversations with Charita, who is the Business Opportunity Specialist, HMR Tech/HJ Ford's [MP] is intact and has not been dissolved. I asked her if HMR TECH's 8(a) status affected the MP status in any way. She stated that the 8(a) status does not affect the [MP] relationship. From my perspective, Charita is the authority to make that determination. I have not made the award, although the users need date is today. If at all possible I would like confirmation that the MP venture between HMR Tech and HJ Ford is intact. If I get that confirmation I will make award. If Mr. Fuji needs to be involved in that decision, I would like to know why he has to be involved.

(App. supp. R4, tab 26 at HMR009)

19. On 1 June 2007 (9:01 AM) Mr. Krusemark inquired of Teresa L.G. Lewis, Director, Office of Management and Technical Assistance, SBA Office of Business Development, Washington, DC:

[C]an a [MP] relationship stay in effect, approved by the SBA for the life of the contract (in this case five years), even though the 8(a) company has graduated from the 8(a) program? I thought the SBA didn't recognize any [MP] Agreement if the company was not an 8(a) entity?...[T]his question may affect the outcome of a potential protest action, and how USAF is going to respond.

(R4, tab 4 at 1)

20. On 1 June 2007 (9:18 AM) Ms. Carlton opined to Mr. Krusemark and the CO that, because the contractor had already been awarded the CAPS contract, and assuming it was "an 8a" at contract award and that the task orders were within the scope of the existing ordering contract, the task orders were not "new work" (app. supp. R4, tab 25 at HMR003).

21. On 1 June 2007 (9:22 AM) the CO asked Ms. Lewis for prompt action because the Air Force's "urgent requirement" was being held up (R4, tab 4 at 1). She responded (10:13 AM) to the CO, Mr. Krusemark, Ms. Albright, and Ms. Taylor that:

Once the Protégé leaves the 8(a) BD Program their Agreement automatically expires; therefore, they will not qualify for any new 8(a) contracts. They may, however,

continue to perform on the contract until it expires. This applies to any contracts awarded to the [MP] JV entity.

(R4, tab 4 at 1) The CO asked Ms. Lewis (10:17 AM) whether he could assume she was “the final authority on making this decision for SBA? As you know I got conflicting answers from Tom Krusemark and Charita Albright” (R4, tab 5 at 2). She replied (10:33 AM):

I oversee the implementation of the [MP] Program for SBA and am responsible for the policy that governs it. I apologize for any confusion. I spoke with our General Counsel to confirm the guidance that I have provided and it is accurate.

(R4, tab 5 at 1-2)

22. On 1 June 2007 (10:51 AM) Mr. Krusemark reported to Ms. Carlton, counsel and others:

I was able to get to the head of the 8(a) [MP] Relationship program in SBA early this AM, and they in turn validated their decision with the General Counsel at SBA.

The [MP] Relationship JV entity is allowed to be awarded task orders under CAPS for the life of that five year contract, but would not be eligible for anything outside of CAPS.

(App. supp. R4, tab 27 at HMR016)

23. On 1 June 2007 (11:17 AM) one of the Air Force’s attorneys forwarded Mr. Krusemark’s e-mail to the CO, reporting that she disagreed with the SBA that the contractor was eligible for work over the life of the contract (*id.* at HMR015).

24. On 1 June 2007 (11:58 AM), at the request of counsel, the CO sought more specificity from Ms. Lewis, stating:

The Contract in question is a multiple award ID/IQ Contract that was awarded as a small business set aside. The period of performance is for five years ending on 19 Apr 12 (five year ordering period ends 19 Apr 11). The concern that we have is that we need your reading on whether the [MP] is in effect throughout the life of the

ID/IQ Contract and if it is in effect for each individual task order that is competed separately. If you can answer that, I think this will be put to rest.

(R4, tab 5 at 1) Ms. Lewis responded (12:37 PM) to the CO and others that “[t]he Joint Venture entity is in effect for the life of the contract and each task order” (*id.*).

25. On 14 June 2007 (7:42 PM) Ms. Nilsson sent an e-mail to Air Force counsel concerning the announcement of a delivery order award to appellant. She inquired whether there was “any way you can delay/stay the award until this gets sorted out?” (App. supp. R4, tab 42)

26. On 18 June 2007 (3:50 PM) the CO sent a draft letter and/or letter to Ms. Lewis at counsel’s request, seeking reconsideration by her office of the SBA’s approval of the joint venture’s MP agreement (R4, tab 6 at 3, tab 7; *see* compl., answer ¶¶ 32-34). The letter stated in part:

3. As required by 13 C.F.R. 124.520(e)(4), we have been told, HRMTech [sic] submitted the M-P Agreement for annual review and it was approved by 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 has [sic] received, we believe the M-P Agreement was reviewed and improperly approved on 20 Apr 07 by Ms. Charita Albright, the Business Opportunity Specialist in your SBA offices.
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 – and consider the USAF’s obligations under the CAPS contract, if accurate.

....

a. Please provide a reconsideration of your approval of the M-P Agreement in issue. Specifically, please advise if your original approval as of 20 Apr 07 is still in effect.

b. If your reconsideration results in a finding of disapproval, please advise as of what date the SBA disapproval is effective....

c. [O]ur legal office noted 13 C.F.R. 124.520(e)(5) requires that any changes to the M-P Agreement be approved by SBA before they take effect. Please advise if you believe that change in the 8A status should have resulted in a change to the M-P Agreement and whether the SBA approval was ever granted for the change.

(R4, tab 7 at 1-2)

27. On 18 June 2007 (4:25 PM) Ms. Lewis responded to the CO and others that as of ^{HMR}TECH's graduation date of 8 April 2007, the MP relationship with HJ Ford no longer qualified for "*additional* benefits" under SBA's MP Program (R4, tab 6 at 2) (emphasis added). The CO inquired of her (4:45 PM) whether ^{HMR}TECH had been notified, stating that he could not make any decisions until he had a formal decision from the SBA and it had formally notified ^{HMR}TECH (R4, tab 6 at 2). Ms. Lewis replied (5:14 PM) that she had responded to the CO's initial e-mail on 1 June; she did not understand the confusion; and "[t]he company was eligible to participate in the SBA [MP] Program until 8 April 2007" (R4, tab 6 at 1). The CO replied (5:24 PM):

You have confirmed what I needed to know, the HMR Tech/HJ Ford joint venture is no longer valid/intact as of 8 April 07. We will make the appropriate decisions from here based on that information. Do you plan on taking affirmative action to notify HMR Tech and HJ Ford of that decision and if so, when?

(R4, tab 6 at 1)

28. On 19 June 2007 (4:02 PM) Ms. Nilsson sent an e-mail to CO Lyons, Mr. Krusemark, Air Force counsel and others, said to attach a legal memorandum concerning appellant's alleged ineligibility for award of CAPS delivery orders under the H100 clause and FAR affiliation rules. She referred to a prior meeting with Air

Force counsel at which she had provided them with a draft of the memorandum. (App. supp. R4, tab 43 at 74)

29. By e-mail to the CO of 19 June 2007 (9:43 PM), attaching a letter to him of that date, appellant's counsel alleged that TYBRIN's allegations lacked merit and intentionally and improperly interfered with appellant's business (app. supp. R4, tab 29 at HMR030). Counsel stated that the joint venture had been advised by SBA headquarters in Washington, DC that it remained eligible under the CAPS contract and he presented legal arguments in support (R4, tab 8).

30. On 20 June 2007 (3:33 PM) Ms. Nilsson sent to the CO, Mr. Krusemark, Air Force counsel, and others, a summary of TYBRIN's analysis concerning the H100 clause and its contention that appellant was no longer eligible for CAPS orders (app. supp. R4, tab 43 at HMR073).

31. On 27 June 2007 (11:02 AM), referring to a draft staff summary sheet (SSS), a proposed letter from the CO to appellant stating that it was no longer eligible for task order awards under the CAPS contract, and related documents (*see* app. supp. R4, tab 35 at HMR054-59), Mr. Krusemark made "minor" recommended changes and asked Ms. Teresa Rendon of an Air Force small business office to inform the CO that he would continue to provide advice, but:

[T]he SBA wants me to minimize my involvement in terms of putting anything definitive in writing to avoid being a litigant in this case. I believe what you have put forward here is technically correct, however, I cannot comment on the merits of the protest with Tybrin or the decisions by the CO to take this action.

(App. supp. R4, tab 36 at HMR058-59)

32. By letter dated 27 June 2007 to the CO, appellant's counsel disputed an alleged Air Force determination that it was no longer eligible to receive task orders under the CAPS contract and that pending proposals were non-responsive (R4, tab 10).

33. On 2 July 2007 (9:31 AM), referring to the SSS "package," Ms. Sue Tormey of the Air Force advised the CO:

In a nutshell, we need the SBA to verify in writing if they no longer approve continuation of the [MP] **agreement**. I did see the 28 June 2007 email from Teresa Lewis where she states: the company was eligible to participate in the SBA [MP] **Program** until 8 April 2007.", however [it's]

silent regarding continuation of the [MP] agreement. The CAPS H-100 specifically references continuation of the [MP] agreement.

(App. supp. R4, tab 37 at HMR061)

34. In a second e-mail on 2 July 2007 (10:16 AM), Ms. Tormey reported that the government was “trying to nail down SBA’s continued approval (or disapproval[]) of the [MP] agreement today” (*id.*). The CO replied (11:51 AM) that getting “straight answers” from the SBA can be difficult, Ms. Lewis would not “coordinate” on the SSS, stating that it was Mr. Krusemark’s job, and:

When I pressed her to say the basis of the SSS was her email stating HMR Tech was no longer eligible to receive the benefits of the SBA [MP], she told me she would have to discuss this with her lawyer.

(*Id.* at HMR060) Mr. Dan Bowman of the Air Force responded to the CO (12:41 PM) that he had informed Mr. Krusemark that “the SBA needs to make a definitive statement that the [MP] agreement no longer exists and HMR Tech/HJ Ford now have a joint venture” (*id.*). The CO replied (12:47 PM):

Krusemark is not the guy for you to talk to. Start with Teresa Lewis. She was evasive when I tried to pin her down.... She is ultimately the director for the office in charge of approving or disapproving the agreement that [Ms. Tormey] has reservations about.

(*Id.*) Mr. Bowman responded to the CO (1:08 PM), that, in Ms. Lewis’ absence on leave, Mr. Krusemark had spoken to the deputy administrator, who was “going to send us a statement that says with HMR Tech graduation the [MP] is terminated...which is what we want” (*id.*). There is no such statement by the SBA in the record.

CO’s Disqualification of Appellant; Appellant’s Protests, Claim and Appeal

35. By e-mail of 2 July 2007 (4:28 PM) to ^{HMR}TECH (app. supp. R4, tab 38 at HMR062), the CO attached his memorandum of the same date on the subject of appellant’s status under the CAPS contract, referring to the H100 clause (R4, tab 12 at 1). The memorandum 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 [MP] 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 [the H100 clause] 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.

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

36. However, later on 2 July 2007 (6:37 PM), the CO sent an e-mail to SBA personnel, including Ms. Lewis, Mr. Fuji, and others stating:

I still would like a definitive answer from SBA in regard to the status of the annual SBA [MP] agreement. Everything I have from SBA leads me to believe that the agreement is no longer approved, but no one seems to be willing to come out and say it.

(App. supp. R4, tab 39 at HMR064)

37. By memorandum to appellant dated 6 July 2007, the CO referred to a request for proposals (RFP), to his 2 July 2007 memorandum, and to communications on behalf of appellant. He 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 [H100 clause].... [A]s a matter of contract administration, I determined the SBA's decision that the Joint Venture is no longer eligible for SBA [MP] benefits results in the Joint Venture's failure to have *any* SBA [MP] Agreement at the time of task order award. The SBA [MP] Agreement is clearly not one that, at time of task order award, is *approved* by the SBA since the SBA does not recognize the Joint Venture under the SBA [MP] program as of 8 Apr 07. 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.

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

38. On 11 July 2007 (10:55 AM) Ms. Nilsson sent an e-mail to CO Lyons, Air Force counsel and others, on the subject of “[CAPS] Competition Concern,” thanking the CO for his “efforts to date to enforce the small business requirements,” alleging violations of law by CAPS large businesses, and encouraging him to continue to effectuate his goals (app. supp. R4, tab 44 at 76).

39. On 19 July 2007 the CO sent an e-mail to Mr. Krusemark and Ms. Rendon concerning a document search, stating: “We came to the conclusion that SBA had wrongly Approved the Annual Agreement. I can’t find how we came to that conclusion.” (App. supp. R4, tab 41 at HMR071)

40. On 20 July 2007 the CO forwarded to the SBA a small business size protest filed by appellant on the alleged ground that the CO had made an illegal *de facto* size determination, contravening the SBA’s authority (R4, tab 16 at 1-2, tab 23 at 5, 25). On 21 August 2007 the SBA dismissed the protest on the basis that the Air Force had determined that appellant was ineligible to receive future task orders under the CAPS contract for reasons unrelated to size that were based upon a contract clause and, therefore, the joint venture had no standing to protest and the SBA’s Area Office had no jurisdiction (R4, tab 16 at 1, 4).³

41. At some point after the SBA’s dismissal of its size protest, ^{HMR}TECH 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 ^{HMR}TECH, alleged to be a fully qualifying small business (*see* R4, tab 18, tab 23 at 5; compl., ¶¶ 55, 56). On 12 December 2007 the Administrative Contracting Officer (ACO) executed a Change-of-Name Agreement, also signed by appellant’s president, which noted that it had changed its name, effective 12 October 2007, from ^{HMR}TECH/HJ FORD SBA JV, LLC to ^{HMR}TECH2, LLC. The ACO also executed a modification to the CAPS contract on 12 December 2007 so changing appellant’s name. (R4, tab 2; compl., answer ¶ 2)

42. Following its redemption of HJ Ford’s interest, after which the parties agree that it ceased being a true joint venture, appellant requested several times that the Air Force issue it task order solicitations and award it CAPS task orders if it were the

³ Appellant also filed a protest and supplemental protest with the Government Accountability Office (GAO) (app. reply br. at 7 n.9). On 28 August 2007 GAO dismissed appellant’s protest, which challenged the Air Force’s decision that it was no longer eligible for task orders under the CAPS contract, for lack of jurisdiction (R4, tab 17).

successful offeror. The Air Force refused to alter its position. (R4, tabs 19, 22; compl., answer ¶¶ 58, 60)

43. By letter dated 23 February 2009 appellant's counsel submitted its CDA claim to CO Carolle Henderson-Gilbert, seeking a final decision that the Air Force had misinterpreted the H100 clause and that its denial of appellant's right to compete for future task orders was contrary to law and the clause's plain meaning. Appellant sought reversal of the Air Force's determination and that it be permitted to compete for new task orders under the CAPS contract as a prime contractor. (R4, tab 23)

44. Appellant alleged in its claim and its subsequent complaint before the Board, *inter alia*, that the FAR and SBA regulations do not support the Air Force's position. Among other things, appellant cited to 13 C.F.R. § 121.404 (2006), When does SBA determine the size status of a business concern (R4, tab 23 at 9, compl., ¶ 77). That provision states:

a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price....

....

g) A concern that qualified as a small business at the time it receives a contract is considered a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business. However, the following exceptions apply....

The government has not refuted appellant's contention that none of the listed exceptions apply (compl., ¶ 77 n.3).

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

46. There is no evidence of conduct by the government or its personnel amounting to actions taken in bad faith or conspiracy with TYBRIN.

47. Concerning appellant's MP agreement and CAPS contract clause H100, the record does not contain any reconsideration or revocation of the acknowledged 20 April 2007 renewed approval by the SBA of the joint venture's MP agreement, or any official determination by a clearly authorized SBA official not to approve continuation of the agreement. In fact, the record, which consists in large part of e-mail chains, does not contain any formal official SBA determinations, other than Ms. Albright's 24 June 2005 letter stating that appellant was a viable undertaking for the CAPS procurement (finding 4) and the SBA's decision denying appellant's size protest for lack of standing and lack of jurisdiction (finding 40).

DISCUSSION

The Parties' Contentions

Appellant alleges that the Air Force misconstrued the plain language of the contract's H100 clause when, based upon the clause, it barred appellant from consideration for task orders due to ^{HMR}TECH's graduation from the SBA's 8(a) program in April 2007. Appellant asserts that the SBA never determined not to approve continuation of its MP agreement; indeed, it re-approved the agreement after ^{HMR}TECH had graduated; and, even if it had made such a determination, it did not do so in accordance with 13 C.F.R. § 124.520, as required under the H100 clause. Appellant alleges that the Air Force knew before it awarded the CAPS contract to appellant that ^{HMR}TECH would graduate from the 8(a) program within one year of contract award and that the Air Force never stated or suggested that this would render appellant ineligible for task orders during the full course of the five-year contract. Appellant further contends, among other things, that its competitor TYBRIN conspired with the Air Force and colored its decision to eliminate appellant as a CAPS contractor.

The government alleges that it properly excluded appellant from consideration for future task orders under the contract after appellant graduated from the 8(a) program. It contends that, once appellant had graduated, it was no longer entitled to any benefits under the MP program, and the exclusion was consistent with the H100 clause's alleged provision that, as soon as appellant lost those benefits, it no longer qualified for task order awards. The government further alleges, among other things, that appellant's conspiracy and similar allegations are tantamount to allegations of bad faith, which appellant has not established.⁴

⁴ In view of our conclusions, below, we do not discuss the allegations of improper government conduct and conspiracy, but we note that we found no such evidence (finding 46).

Contract Interpretation and Award Opportunity

We construe contract clause H100 in light of the regulation it references, 13 C.F.R. § 124.520, which provides in part:

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.

(Finding 10) The H100 clause in turn says that:

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.

(*Id.*) There is no evidence of such a determination (finding 47). Accordingly, clause H100 does not provide a basis for excluding ^{HMR}TECH from solicitations and awards.

Additionally, Ms. Lewis of the SBA, who had consulted with the SBA's general counsel, advised the government that appellant was eligible for the award of task orders for the life of its five year CAPS contract (findings 21, 22, 24). This is consistent with Title 13 C.F.R. § 121.404's provision that, subject to exceptions, a contractor's small business status at the time of contract award controls (finding 44). The government has not refuted this general rule nor appellant's contention that none of the exceptions apply (*id.*).

Moreover, at the time of contract award to appellant, the government knew that ^{HMR}TECH would graduate from the 8(a) program on 9 April 2007 and it did not limit its award to appellant to any period less than the full five-year contract term (finding 5). The government does not allege that the task or delivery orders were new contracts and the Board has held, in this context, that such orders represent the government's exercise of existing contract rights and are not separate, individual contracts. *Honeywell Federal Systems, Inc.*, ASBCA No. 36227, 89-1 BCA ¶ 21,258 at 107,175 (requirements contract); *Coastal States Petroleum Co.*, ASBCA No. 31059, 88-1 BCA ¶ 20,468 at 103,511 (indefinite quantity contract); *Radionics Inc.*, ASBCA No. 22727, 81-1 BCA ¶ 15,011 at 74,279 (indefinite quantity contract). *See also* finding 7 (under Ordering clause, delivery and task orders subject to contract's terms).

The contract's Awarding Orders clause provides that all multiple award contractors shall be provided a fair opportunity to be considered for orders (finding 8). Appellant was not given that opportunity. The Air Force improperly excluded appellant from eligibility to compete for additional task or delivery order awards.

DECISION

We sustain the appeal.

Dated: 12 March 2010

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

I concur

I concur

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

PAUL WILLIAMS
Administrative Judge
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 ^{HMR}TECH2, LLC, rendered in conformance with the Board's Charter.

Dated:

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