



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 5, 2022

CBCA 7324

FOCUSED MANAGEMENT, INC.,

Appellant,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

Tenley A. Carp and Micah Kanters of Arnall Golden Gregory LLP, Washington, DC, counsel for Appellant.

Kevin J. Rice and Angela T. Puri, Office of General Counsel, Consumer Financial Protection Bureau, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER, O'ROURKE**, and **CHADWICK**.

CHADWICK, Board Judge.

The appellant, Focused Management, Inc. (FMI), challenges ratings assigned to it by the respondent, Consumer Financial Protection Bureau (CFPB), in the Contractor Performance Assessment Reporting System (CPARS). We summarily deny the appeal.

Background

The contract, awarded in May 2017, required FMI to staff and operate a “support desk” (or “service desk”) for information technology users at CFPB. FMI performed the contract until May 2022. FMI challenges four CPARS ratings for the second option year,

May 2019 to May 2020. FMI writes that it was “greatly surprised” to receive “‘Marginal’ ratings in the Quality, Schedule, and Management categories and a ‘Satisfactory’ rating in the Cost Control category.” FMI submitted a claim disputing those four ratings. The contracting officer denied the claim in November 2021. FMI filed this appeal in February 2022. In its notice of appeal, which the Board designated the complaint under Board Rule 6(a) (48 CFR 6101.6(a) (2021)), FMI alleged that CFPB’s evaluation contained statements that were “simply not true” and that if “properly evaluated, FMI should have received ‘Satisfactory’ ratings under Quality, Schedule, and Management, and a ‘Very Good’ rating on Cost Control.”

CFPB requests summary judgment under Rule 8(f). In opposing the motion, FMI no longer accuses CFPB of making flatly untrue statements. CFPB’s amended statement of undisputed material facts under Rule 8(f)(1)¹ contains ninety-six paragraphs, thirty-eight of which FMI does not dispute in its Rule 8(f)(2) statement of genuine issues. Of the remaining fifty-eight paragraphs, FMI responds to one paragraph as “[d]isputed” but cites as support for its denial only an allegation of its complaint, which is not an “appeal file exhibit[,]” an “admission in [a] pleading[,]” or any other type of “evidence” on which we may rely at the summary judgment stage. *See* Rule 8(f)(2); *see also* *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987).² FMI states that CFPB’s other fifty-seven paragraphs are “disputed in part,” mostly as allegedly “incomplete” or “misleading,” but FMI’s responses consist almost entirely of argument without citation of evidence. FMI cites a total of four pages of record evidence in its statement of genuine issues. We defer review of any underlying factual issues to the Discussion section.

Discussion

We may review CPARS ratings to determine whether they are “arbitrary and capricious,” which our appellate authority has equated with being “inaccurate” and/or “unfair.” *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311–13, 1316 (Fed. Cir. 2011) (“Todd clearly does have standing to sue based on its substantive allegation that the government acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation.”), *quoted in CompuCraft, Inc. v. General Services Administration*,

¹ FMI did not timely respond to CFPB’s motion at first. *See* Rule 8(g). The Board invited CFPB to refile its Rule 8(f)(1) statement, however, because the statement did not cite evidence bearing on all facts at issue. FMI timely responded to the amended filing.

² FMI cites its complaint in response to CFPB’s statement that computer hardware that FMI was responsible for inventorying was “accessible” at CFPB headquarters. FMI alleges vaguely that “[c]ertain . . . hardware” was inaccessible in locked rooms.

CBCA 5516, 17-1 BCA ¶ 36,662, at 178,539.³ If we agree with a contractor’s challenge, we will say so, but “we cannot direct the Government to revise [an evaluation] in a particular way through some form of injunctive relief.” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,931.

CFPB must show that it “is entitled to judgment as a matter of law based on undisputed material facts.” Rule 8(f). CFPB argues that FMI “has not denied that [documented] performance issues occurred, but has simply taken issue with the Contracting Officer’s judgment of the facts under the circumstances.” FMI need only show that “one or more” facts bearing on its claim are “genuinely in dispute” and “material.” *See Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1368 (Fed. Cir. 2006).

We address the disputed ratings in turn.

Quality

CFPB assigned FMI a marginal rating for quality for 2019–2020.⁴ The contracting officer’s evaluation of this factor consists of eight paragraphs explaining the agency’s view that “FMI met the minimum . . . requirements” but was “not able to complete all the positive actions aimed at improving . . . [preexisting] issues related to staff turnover, equipment availability and software asset management activities, and did not meet some other Quality related contractual requirements.”

³ Under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2018), agency action based on inaccurate fact finding would be labeled an abuse of discretion. *See, e.g., Honeywell International Inc. v. Arkema Inc.*, 939 F.3d 1345, 1348 (Fed. Cir. 2019) (“The Board abuses its discretion if the decision,” *inter alia*, “rests on clearly erroneous fact findings” or if the record “contains no evidence on which the Board could rationally base its decision.”). “A decision is arbitrary and capricious” under the APA, by contrast, “when the agency fails to articulate a ‘rational connection between the facts found and the choice made.’” *In re Vivint, Inc.*, 14 F.4th 1342, 1351 (Fed. Cir. 2021) (quoting *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 (1983)), *quoted in IAP Worldwide Services, Inc. v. United States*, 159 Fed. Cl. 265, 310 (2022). We understand the term “arbitrary and capricious” as used in *Todd Construction* to cover both types of errors in this context.

⁴ In general, the distinction between a marginal rating and a satisfactory rating as defined by regulation is whether the performance overall “meets” or “does not meet” the core requirements. *See* 48 CFR 42.1503, tbl. 42-1(c), (d) (2020).

FMI argues, first, that the evaluation fails to identify a “significant event” that “impacted the Government,” as the Federal Acquisition Regulation indicates an agency should do when assigning a marginal rating. *See* 48 CFR 42.1503, tbl. 42-1(d) (2020) (“To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government.”). We disagree. The evaluation states, among other things, that FMI provided “inconsistent Quality of Service to the customers” due to staff turnover, missed “incidents and request deadlines,” and “struggled with managing Onboards.” These are specific and significant criticisms.

FMI asserts that the staff turnover, equipment issues, and onboarding problems cited by CFPB were “directly related to the COVID-19 pandemic” and that “the Bureau has failed to consider the relevant complexities that FMI was dealing with in March of 2020 and beyond.” FMI cites no evidence or proposed findings raising genuine disputes of fact regarding any such “complexities,” however, and “simply saying the word ‘COVID-19’” is not probative “without providing any [evidentiary] support.” *Martinez v. Costco Wholesale Corp.*, 336 F.R.D. 183, 188 (S.D. Cal. 2020), *quoted in United Facilities Service Corp. v. General Services Administration*, CBCA 5272, 22-1 BCA ¶ 38,090, at 184,978, *appeal docketed*, No. 22-1911 (Fed. Cir. June 15, 2022). FMI identifies no factual dispute or legal error bearing on whether the rating is arbitrary, capricious, or otherwise mistaken.

Schedule

CFPB rated FMI’s performance marginal for schedule. The factor evaluation consists of four paragraphs and states that FMI “struggled to meet the schedule requirements for Onboard equipment provisioning,” “did not meet other Schedule related contractual requirements such as the Weekly Service Desk report, Monthly Asset Inventory report[,] . . . the Quarterly Self-Assessment,” and “inventory verification requirements of a [timely] 99% verification rate.”

FMI asserts that the agency’s complaints about onboarding “inaccurate[ly] reflect[] . . . the changes to the onboarding requirements . . . that were implemented during the early months of the pandemic,” but again, FMI argues in conclusory fashion and does not cite record evidence raising genuine disputes of fact about the events to which FMI refers or the inaccuracies it alleges. FMI contends that CFPB should have exercised discretion to be more flexible about contractual deadlines after March 2020 and asserts that FMI is being unfairly “criticize[d] . . . for failing to access . . . secured storage areas” to inventory equipment, which is not a criticism we can discern in the words of the evaluation. Based on the briefing, we find no triable claim that this rating is arbitrary, capricious, or otherwise in error.

Management

CFPB rated FMI marginal for management. The factor evaluation consists of six paragraphs and states that “inadequate training of new employees and transition of knowledge during staffing turnovers caused the quality” of technical support “to decrease” during the year, although “[d]uring this Pandemic COVID-19 time, the FMI contractors . . . did receive positive feedback for their support.” The evaluation adds that “the transition to the new [project manager] in April [2020] was ineffective, as observed through issue[s] with deliverable delivery and execution of Offboarding [and] Onboarding.”

In two short paragraphs citing no evidence, FMI argues that CFPB’s evaluation “fails to account for” the COVID-19 pandemic. Again, we find such vague and unsupported assertions inadequate to support a claim that the rating is arbitrary and capricious.

Cost Control

Finally, CFPB rated FMI satisfactory for cost control. CFPB’s evaluation explains in two paragraphs that “FMI [was] on-budget, with the exception of a low burn-rate affected by contractor turnover and delays in recruitment of replacement personnel.” FMI argues that the rating is unreasonably low because FMI “saved the Bureau money by having a burn rate of less than 100%” and that “this performance measure is inherently flawed given the pandemic” in any event. CFPB argues that “cost savings resulted” not from FMI’s management efforts but “from simply having inadequate staff, which le[d] to serious performance issues.” Raising the rating to very good would imply “no significant weaknesses” related to cost control. *See* 48 CFR 42.1503, tbl. 42-1(b). FMI cites no evidence that it “controlled costs” in the conventional manner by frugally meeting contract requirements. Under the circumstances, which are noted in the evaluation, we see no viable claim that the satisfactory rating is arbitrary, capricious, or otherwise in error.

Decision

We grant CFPB’s motion for summary judgment and **DENY** the appeal.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge