UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED: January 26, 2017

CBCA 5448

TRANBEN, LTD.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Paul W. Bowen and Thomas S. Miller of K&L Gates LLP, Seattle, WA; and Stuart B. Nibley and Amy M. Conant of K&L Gates LLP, Washington, DC, counsel for Appellant.

Bonnie Angermann, Office of General Counsel, Department of Transportation, Washington, DC, counsel for Respondent.

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

CHADWICK, Board Judge.

TranBen, Ltd. timely appealed from the denial of its certified claim alleging that the Department of Transportation (DOT) violated the implied covenant of good faith and fair dealing under an indefinite delivery/indefinite quantity (IDIQ) contract, or constructively changed the contract. TranBen supplied paper vouchers with which DOT distributed tax-free mass transit subsidies to federal employees in the Washington, D.C., region. TranBen alleges, among other things, that DOT misled the Internal Revenue Service (IRS) about the availability of paper vouchers in order to obtain IRS guidance that DOT could issue transit subsidies on debit cards instead of vouchers without rendering the benefits taxable. As a result, TranBen says, DOT ordered fewer vouchers than TranBen reasonably anticipated. Before discovery, DOT filed alternative motions to dismiss for failure to state a claim and for summary relief. We grant the motion to dismiss the appeal because, even if TranBen proved all of the facts it has alleged, DOT's

alleged misstatements to the IRS did not modify the contract terms and were too far removed from DOT's express contractual duties to support a breach claim.

Background

In light of our disposition, we base this summary on the allegations of TranBen's 243-paragraph complaint, the complaint's thirty-two exhibits, and applicable law. DOT's answer admits most of TranBen's allegations—including that paper vouchers were "readily available"—but denies that DOT misled anyone in connection with the transition from vouchers to debit cards. DOT's statement of uncontested facts in support of its motion for summary relief does not directly controvert TranBen's core allegations.[1]

I. Transit Benefits

Federal agencies in the national capital region must offer their employees tax-free "qualified transportation fringe benefits" to subsidize the employees' use of mass transit to commute. Exec. Order 13150, § 1, 65 Fed. Reg. 24,613, 24,613 (Apr. 21, 2000); *see* 26 U.S.C. § 132(a)(5), (f) (2012). DOT distributes transit benefits for itself and other agencies through its Office of Transportation Services (TRANServe).

The tax code favors providing the benefits in the form of "transit passes" (defined as "pass[es], token[s], farecard[s], voucher[s], or similar item[s]"). 26 U.S.C. § 132(f)(1)(B), (5)(A)(1). A "cash reimbursement" for transit costs qualifies as nontaxable "only if a *voucher* or similar item which may be exchanged only for a transit pass is *not readily available* for direct distribution by the employer to the employee." *Id.* § 132(f)(3) (emphasis added).

From the inception of the federal transit benefit program until 2011, DOT issued transit benefits using paper vouchers, paper farecards, or, where available, smart cards usable only for local mass transit.

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[1] For example, DOT states that it "has never alleged that TranBen's vouchers are not compliant with IRS regulations," but this overlooks the *statutory* issue discussed below. DOT also denies in conclusory terms that it "ma[d]e misrepresentations to IRS about whether TranBen's vouchers were readily available," but DOT does not say what it *did* tell the IRS, or even whether it now thinks the vouchers were readily available. We allowed TranBen to defer responding to DOT's motion for summary relief until after we ruled on the motion to dismiss, but we do not need to see TranBen's response to see that these facts, among others, are genuinely disputed, even if ultimately not material.

II. The Contract and the Alleged Breach or Change

DOT awarded TranBen the contract at issue in September 2009. It was an IDIQ vehicle for paper vouchers negotiable as payments to selected transit providers, with a minimum guaranteed order of $1,000,000. DOT purchased nearly $270,000,000 worth of vouchers before the contract expired in September 2013.[2] More than seventy-five percent of the orders, however, came in the first two years.

In 2011, DOT began shifting the transit benefit program from paper media toward electronic media, including debit cards. In a March 2011 Federal Register notice, DOT cited as its reasons for this policy decision "rising program costs related to inventory, travel, and infrastructure support," as well as "the shift to electronic fare media by State and local transit authorities." 76 Fed. Reg. 17,470, 17,470-71 (Mar. 29, 2011). One precondition for using debit cards was to ensure that the IRS would not consider the "cash reimbursements" loaded on the debit cards to pay transit fares *taxable* to the federal employees under 26 U.S.C. § 132(f)(3). DOT consulted with the IRS about this issue.

The IRS memorialized the outcome of the discussions in an email message to DOT in November 2011. (We do not have the original message. It is quoted in an excerpt attached to the complaint from a later IRS response to congressional questions.) The IRS advised DOT, among other things, that issuing debit cards restricted to use at locations where transit fare media are sold "satisfies the requirements for a bona fide cash reimbursement program . . . *since a transit pass does not appear to be otherwise readily available* for use by DOT . . . . *You have indicated* that no other vouchers or transit pass is [sic] available for use by federal government employers to provide benefits on . . . transit systems [that do not accept smart cards,] as a result of the restrictions placed on the use of federal funds under 31 U.S.C. section 3302" (emphasis added). The latter statute requires agencies to hold "public money . . . in the Treasury or with a depositary designated by the Secretary of the Treasury under law." 31 U.S.C. § 3302(c)(1).

TranBen alleges that DOT's representation to the IRS that the public money statute caused transit passes (including paper vouchers) not to be "readily available" was incorrect, as evidenced by the fact that DOT continued to purchase vouchers from

[2] The price per voucher was the face amount, with no surcharge. The record suggests that the profitability of the contract depended on the extent to which TranBen had to reimburse the transit providers for vouchers used by the recipient employees.

TranBen after 2011, albeit in reduced amounts.[3] We assume for purposes of deciding DOT's motion to dismiss that paper vouchers were readily available.

In December 2011, DOT began requiring all agencies in the Washington area to use debit cards rather than paper vouchers to provide transit benefits to their employees who commuted on mass transit systems that did not accept electronic farecards (the Maryland Area Rail Commuter system, Virginia Railway Express, and the Washington Metropolitan Area Transit Authority buses). TranBen alleges that it asked DOT "[o]n several occasions" why it took the position that vouchers were not readily available, but it never got an answer.

III. The Claim and Appeal

TranBen submitted a request for equitable adjustment (REA) in May 2016 seeking lost profits of $13,950,017 "plus attorney and consultant fees" for "DOT's unreasonable conduct" in adopting debit cards, "which constructively changed the contract[] and breached the implied covenant" of good faith and fair dealing.[4] TranBen certified the REA as a claim in June 2016. The DOT contracting officer denied the claim in July 2016. TranBen appealed the denial in August 2016. Its complaint seeks lost profits on the grounds that DOT breached the duty of good faith and fair dealing by making misrepresentations to the IRS, "unreasonably . . . awarding the . . . Contract without informing TranBen of its plan to allege . . . that TranBen's vouchers violate the [law]," and failing to cooperate with TranBen in performing the contract; or alternatively, because DOT effected a constructive change that decreased the value of the contract.

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[3] TranBen also alleges that DOT misled the IRS about whether the debit cards had features that prevented the employees from using them for unintended (taxable) purposes. Given our legal analysis, we set this allegation aside. If, as we conclude, misrepresentations by DOT to the IRS concerning paper vouchers—the subject matter of TranBen's contract—cannot support a breach claim, then, perforce, misrepresentations about debit cards, which DOT acquired entirely separately from this contract, cannot either.

[4] TranBen cited the 2009 contract and a 2013 contract in its REA, but it alleged no damages under the 2013 contract and now seeks relief only under the 2009 contract.

Discussion

DOT filed two dispositive motions.[5] We would deny both motions if we thought TranBen had a viable legal theory and the facts it alleges were material. As noted, DOT's motion for summary relief does not engage meaningfully with TranBen's allegations about DOT's communications with the IRS. DOT thus fails to show there is "no genuine issue" as to whether DOT misled the IRS about the evidently important tax issue of whether paper vouchers were readily available as a substitute for debit cards. Board Rule 8(g)(1), (2) (48 CFR 6101.8(g)(1), (2) (2015)). If this alleged misrepresentation were legally material, summary relief would be inappropriate, as the record shows the facts "could reasonably be decided in favor of the non-movant at a hearing." *Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,934.

We focus on, and grant, the motion to dismiss because we conclude that the facts alleged, with reasonable inferences drawn in TranBen's favor, do not "support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). We can readily dispose of two aspects of the appeal. First, TranBen alleges that DOT violated the implied covenant of good faith and fair dealing by not informing TranBen *before* contract award that DOT planned to start buying debit cards instead of vouchers. However, DOT "could not have breached the covenant of good faith and fair dealing by its pre-award conduct because the covenant did not exist until the contract was signed." *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012). TranBen's allegation resembles a breach of the pre-award duty to disclose superior knowledge, but that duty is "separate and distinct from the implied duty of good faith and fair dealing, even if they involve similar principles," *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,353 n.3, and TranBen did not set forth a superior knowledge claim in its certified claim or complaint.

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[5] We also considered whether the claim for a specific dollar amount "plus attorney and consultant fees" states a sum certain supporting our jurisdiction. *Cf. ARI University Heights LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,187 (dismissing for lack of jurisdiction because claimed "dollar amount . . . preceded by the phrase 'of a minimum'" was not a sum certain). We find that it does, as the unspecified fees are severable, and TranBen does not seek them on appeal. *See Heritage of America, LLC v. Department of Veterans Affairs*, CBCA 1945, 12-1 BCA ¶ 34,888, at 171,854 (2011) (finding claim for specified interest "properly before the Board" although the same claim element sought unspecified "penalties"); *U.S. General, Inc.*, ASBCA 52041, 00-1 BCA ¶ 30,850, at 152,275-76 (finding "no valid claim" for unspecified "costs and attorney's fees" demanded in claim letter, but treating dollar amount in letter as a sum certain).

Second, TranBen's allegations do not fit under the rubric of constructive change. That doctrine entitles a contractor to a price adjustment when "the contract work is actually changed but the procedures of the Changes clause have not been followed." John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 386 (5th ed. 2016); *see Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. C1. 1971) ("Equitable adjustments in this context are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract."); *Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. C1. 1967). TranBen cites no disagreement between the parties about the express contract requirements and alleges no facts suggesting that DOT modified or interfered with TranBen's performance of the actual contract work—delivering the vouchers ordered by DOT.

What changed over time were the quantities that DOT ordered. This reduction alone, as TranBen acknowledges, did not change or breach the contract, as DOT had no ordering obligation beyond the $1,000,000 guarantee. *See Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) ("[A]n IDIQ contract . . . requires the government to order only a stated minimum quantity of supplies or services."). Despite the seemingly categorical statement in *Travel Centre* that, once the Government orders the minimum, "its legal obligation under the contract is satisfied," *id*., we and other tribunals have recognized that the Government can breach an IDIQ contract's implied duty of good faith and fair dealing despite ordering the minimum. *See CAE USA*, 16-1 BCA at 177,347; *E&E Enterprises Global, Inc. v. United States*, 120 Fed. Cl. 165, 182 (2015); *Advanced Technologies & Testing Laboratories, Inc*., ASBCA 55805, 08-2 BCA ¶ 33,950, at 167,975-76 (*AT&TL*). We know of no decision *finding* a breach of the duty where the Government satisfied its minimum ordering obligation under an IDIQ contract.

We recently surveyed the uncertain bounds of the implied duty of good faith and fair dealing in *CAE USA*, 16-1 BCA at 177,347-49. We repeat here only that the "'duty has to be connected, though it is not limited, to the bargain struck in the contract,'" *id*. at 177,349 (quoting *Metcalf Construction Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014)), and "'is not limitless.'" *Id*. (quoting *West Run Student Housing Associates, LLC v. Huntington National Bank*, 712 F.3d 165, 170 (3d Cir. 2013)). Claims that the Government breached the duty under IDIQ contracts have survived dispositive motions where it was plausibly alleged that the Government made contract performance more expensive, *AT&TL*, 08-2 BCA at 167,976; placed orders under the contract using unfair procedures, *Digital Technologies, Inc. v. United States*, 89 Fed. Cl. 711, 728-31 (2009); *Community Consulting International*, ASBCA 53489, 02-2 BCA ¶ 31,940 at 157,789; *Burke Court Reporting Co.*, DOT BCA 3058, 97-2 BCA ¶ 29,323, at 145,800-01; "drastically reduced [orders] in retaliation for the participation of . . . subcontractor[] employees in an administrative proceeding," *ALK Services., Inc*. *v. Department of Veterans Affairs*, CBCA 1789, 10-2 BCA ¶ 34,518, at 170,245; or behaved badly toward

the contractor at "every stage of th[e] procurement, from acquisition planning to close-out of the contract." *E&E Enterprises,* 120 Fed. Cl. at 169. In *CAE USA*, however, we granted the agency's motion for summary relief where an IDIQ contractor complained that the agency did not take helpful actions "beyond what the contract require[d]. That is not the purpose of the implied duty of good faith and fair dealing." 16-1 BCA at 177,349.

TranBen argues that DOT's misstatements to the IRS "eliminated TranBen's ability to fully perform under the contract," giving rise to a claim. That characterization does not fit the facts. TranBen "fully performed" by filling DOT's orders; DOT performed by ordering the minimum quantity and paying for what it ordered. TranBen's real complaint is that DOT did not order as many vouchers as TranBen believes it should have. TranBen also argues that DOT took steps designed to "reappropriate the benefits" that TranBen expected from the contract, citing *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005). *Centex* is inapposite. The Court in that case found a breach of the duty of good faith and fair dealing where a financial institution "reasonably regarded the availability of tax deductions . . . as an important part of the contract consideration and . . . reasonably expected the government not to withhold that consideration by legislation specifically targeted at the contract," as Congress later did. *Id*. at 1304-05; *see First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed. Cir. 2005) (finding similar breach where same legislation "changed the balance of contract consideration"). Here, by contrast, since the guaranteed minimum is the only consideration provided by the Government in forming an IDIQ contract, *see Maxima Corp. v. United States*, 847 F.2d 1549, 1557 (Fed. Cir. 1988) (noting this guarantee "make[s] the contract enforceable"), the consideration could not include any "expectation" that DOT's orders would exceed the minimum. To hold otherwise would impermissibly change the nature of the contract. *See Metcalf*, 742 F.3d at 991. It follows that the Government did not "reappropriate" any contract "benefits" here as it did in *Centex*. There, the Government took back part of the price Centex reasonably thought it had bargained for. Here, as a matter of law, the total contract price did not exceed the value of DOT's orders, *see International Data Products Corp. v. United States*, 492 F.3d 1317, 1324 (Fed. Cir. 2007), and DOT did not claw back any of the nearly $270,000,000 it paid TranBen for the vouchers.

TranBen further argues that DOT's refusal to explain to TranBen why it told the IRS that paper vouchers were not readily available constituted a "lack of cooperation" in violation of the duty of good faith and fair dealing, citing *Malone v. United States*, 849 F.2d 1441 (Fed. Cir.), *modified*, 857 F.2d 787 (Fed. Cir. 1988), and *E&E Enterprises*. Neither of the cited decisions helps TranBen avoid dismissal. Unlike DOT's silence here, the agency's uncooperativeness in *Malone* had a direct effect on the contract work. The Court found a material breach where the contracting officer's "evasive conduct misled Malone to perform roughly 70% of its contractual obligation in reliance on a workmanship standard the [Government later] found unacceptable." 849 F.2d at 1445.

TranBen does not allege that DO T withheld information necessary for performance or caused TranBen to waste work. As for *E&E Enterprises*, we cannot tell what particular allegations led the court to hold that the complaint stated a claim, as the court said it was "not necessary to catalogue" them, 120 Fed. Cl. at 169, but we can see that, unlike here, the contractor colorably alleged that the agency went beyond merely not cooperating and actually "'interfer[ed]' with" the contract work. *Id*. at 181 (quoting complaint).

In sum, TranBen plausibly alleges that, in pursuing its policy goal of distributing transit benefits on debit cards, DOT took a position within the Government for which it lacked a good faith basis, and that this led, in turn, to a reduction in DOT's orders from TranBen. If that is true, then DOT did something inappropriate that harmed TranBen. Yet, because the parties performed the IDIQ contract as written, and DOT did not hinder, delay, accelerate, or fail to cooperate with the contract work; use unfair ordering procedures; abuse discretion reserved to it by the contract terms; target TranBen for harm; reappropriate bargained-for contract benefits; or mislead TranBen about contract requirements, TranBen's novel claim rests either near the outer limit of the duty of good faith and fair dealing, or outside it. Did TranBen have a reasonable expectation that DOT would not misapply federal law in a way that made the contract less valuable? Probably. We all expect the Government to follow the law. Was this a *contract-based* expectation remediable in damages? That is a harder question, but we conclude not.

"[W]hile the implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain, the nature of that bargain is central to keeping the duty focused on 'honoring the reasonable expectations created by the autonomous expressions of the contracting parties.'" *Metcalf*, 742 F.3d at 991 (quoting *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.)). Here, the parties' bargain was an IDIQ contract, a vehicle that, "within its four corners," preserves maximum flexibility for the Government in ordering. *Travel Centre*, 236 F.3d at 1319. If TranBen expected in forming the contract that DOT's orders would exceed the guaranteed minimum, that expectation was not "created by" the contract itself. *Tymshare*, 727 F.2d at 1152. Nor did the contract create unique grounds for TranBen to expect DOT to confer in good faith with the IRS about the taxability of transit benefits—that is a duty DOT owes to the public in general, not to particular contractors. TranBen's reasonable, *contract-based* expectations were that DOT would order at least $1,000,000 worth of vouchers, pay for the ordered vouchers that TranBen delivered, and treat TranBen fairly *under the contract*. The implied duty of good faith and fair dealing does not entitle a contractor to damages for every dubious action by the contracting agency that impairs the value of the contract. We conclude that, even if TranBen proved at a hearing everything it has alleged, the intra-governmental communications at issue were simply too far removed from the express contract terms, and the reasonable expectations they created, to constitute a breach.

Decision

The motion for summary relief is denied as moot. The motion to dismiss is granted, and the appeal is **DISMISSED FOR FAILURE TO STATE A CLAIM**.

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KYLE CHADWICK
Board Judge

We concur:

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JOSEPH A. VERGILIO
Board Judge

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KATHLEEN J. O'ROURKE
Board Judge