UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: December 20, 2021

CBCA 7183

OWL, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

James L. Hughes and Les A. Schneider of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **DRUMMOND**.

BEARDSLEY, Board Judge.

Appellant, OWL, Inc. (OWL), appealed the contracting officer's final decision denying OWL's request for an equitable adjustment (REA) of a 2018 contract with the Department of Veterans Affairs (VA) Southern Arizona VA Health Care System. OWL contracted with the VA to provide ambulette transportation services to VA beneficiaries. Appeal File, Exhibit 2.[1] The period of performance was a base year with four one-year option periods. *Id.* at 5. The contract included Federal Acquisition Regulation (FAR) clause

[1] All exhibits are in the appeal file, unless otherwise indicated.

52.216-22, Indefinite Quantity (OCT 1995), and stated under section B.5 Schedule of Supplies/Services that "[t]his is a Department of Veterans Affairs IDIQ [indefinite quantity indefinite delivery] contract for non-emergency patient transportation 'Ambulette' services, to include all labor, tools, equipment, vehicles, facilities, management, and all other elements necessary in accordance with the PWS [performance work statement], applicable Federal, VA, State, County, and City regulatory guidance for livery transportation services." *Id.* The contract provided that the quantity of services to be delivered would "be dependent on the numbers ordered by the VA Medical Center. For pricing purposes the Contract Line Items show the cost per job or hour and the estimated quantity per contract year. However, the quantity may fluctuate from the estimate." *Id.* The contract stated that "[s]ervices shall be provided on an as needed basis." *Id.* at 29.

The contract provided descriptions of supplies and services, such as Ambulatory Transport – Single Person Transport (one-way), Ambulatory Transport – Price for each additional person on a given transport (one-way), Wheelchair Transport – Single Person Transport (one-way), Wheelchair Transport – Second veteran/ride along (one-day), and Stretcher Transport – Single Person Transport (one-way). Exhibit 2 at 5. The contract included FAR clauses 52.216-18 Ordering (OCT 1995) and 52.216-19 Order Limitations (OCT 1995) but did not contain a requirements clause. *Id.* at 18.

On March 13, 2020, President Trump declared a national emergency with respect to the COVID-19 pandemic (Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020), Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak). On March 18, 2020, President Trump issued an Executive Order (Executive Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020), Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19) which required prioritizing and allocating health and medical resources to respond to the COVID-19 pandemic. Between March and June 2020, the VA issued myriad directives and guidance related to the COVID-19 pandemic. *See* Notice of Appeal at 3.[2]

OWL alleges that the VA "effectively issued a partial stop work order/government delay of work/change of work scope by limiting the number of patients per trip, reducing trip requests, and giving patients instructions to conduct telehealth appointments." Notice of Appeal at 2. OWL asserts that the COVID-19 pandemic and the subsequent Executive Order and actions by the VA "substantially reduced ridership and substantially changed how OWL delivered transportation services." *Id.* at 3. OWL was "instructed by VA to limit transportation to one patient at a time." *Id.* OWL averaged 5713.5 trips per month during

[2] Appellant designated its notice of appeal as its complaint.

2019 and only 4057.33 trips per month during 2020. *Id.* As a result of the "reduction in revenue and trips," OWL requested an equitable adjustment for the period of March 2020 through December 2020 in the amount of $799,621.91 (the difference between the decreased revenue offset by decreased labor and fuel costs). On May 18, 2021, the contracting officer at the VA denied the REA. On August 12, 2021, OWL appealed the decision of the contracting officer.

Discussion

In a complaint, a party "must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *SRA International, Inc. v. Department of State*, CBCA 6563, 20-1 BCA ¶ 37,543 (quoting *American Bankers Ass'n v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019)). "In reviewing a motion to dismiss for failure to state a claim, 'we accept as true the complaint's well-pled factual allegations,' though not its 'asserted legal conclusions.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The VA moves to dismiss this appeal because the contract did not include a guaranteed minimum and is, therefore, illusory and unenforceable. "An indefinite quantity contract that lacks a guaranteed minimum is illusory and unenforceable because the Government has not made a binding promise regarding the minimum amount that it will purchase." *MLB Transportation, Inc. v. Department of Veterans Affairs*, CBCA 7019, 21-1 BCA ¶ 37,919 (citing *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1301, 1306 (Fed. Cir. 1998); *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333). "Without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable." *Id.* (quoting *Torncello v. United States*, 681 F.2d 756, 761 (Ct. Cl. 1982)). An IDIQ contract requires that "the buyer . . . agree to purchase from the seller at least a guaranteed minimum quantity of goods or services." *Mason v. United States*, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980).

The parties intended the contract to be an indefinite quantity contract but failed to include a guaranteed minimum. "A contract lacking a minimum quantity term cannot be construed as a valid indefinite quantity contract and is binding only to the extent it was performed." *Carrington Group, Inc. v. Department of Veterans Affairs*, CBCA 2091, 12-1 BCA ¶ 34,993 (citing *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923); *Coyle's Pest Control*).

The contract also is not a requirements contract. The contract does not contain the FAR Requirements clause, FAR 52.216-21, and it does not require the VA to order all transport services from OWL. "A contract that lacks 'the typical FAR requirements contract

clauses could not be interpreted as a requirements contract . . . unless the contract language actually required the agency to purchase all of its requirements from the contractor under that contract.'" *MLB* (citing *Systems Management*). While OWL had a "legal obligation to satisfy" the VA's requirements for "non-emergency patient transportation 'Ambulette' services," the contract did not include any language which would indicate that OWL had the "'exclusive right' to satisfy" the VA's ambulatory services requirements. *See Valor Healthcare, Inc. v. Department of Veterans Affairs*, CBCA 6824 (June 23, 2021) (citing *Mason*, 615 F.2d at 1349). No clause in the contract requires the VA to utilize OWL's services for all of its ambulette services needs.

Neither OWL's expectations based on the parties' past dealings nor the pandemic "alter the interpretation of or create a basis to reform the agreement entered into" by the parties. *MLB*. Despite the illusory nature of the contract, the VA owes OWL for the services performed. *MLB*; *Willard*; *Carrington Group*. OWL, however, is not entitled to "additional costs or anticipatory profits." *MLB* (citing *Ralph Construction, Inc. v. United States*, 4 Cl. Ct. 727, 733 (1984); *Ducke Group, LLC v. Department of Veterans Affairs*, CBCA 3229, 13 BCA ¶ 35,337).

Because OWL did not assert a claim for unpaid costs for services provided (i.e., trips actually made), but instead claims costs incurred because the VA reduced services as a result of the pandemic, OWL has failed to state a claim upon which relief can be granted. We, therefore, dismiss the appeal. We also deny OWL's request to amend its complaint. Amending the complaint will not cure the fact that there is an illusory and unenforceable contract.

Decision

The VA's motion is granted. The appeal is **DISMISSED FOR FAILURE TO STATE A CLAIM**.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge