UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: September 3, 2021

CBCA 7019

MLB TRANSPORTATION, 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.

Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Lakewood, CO; and Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **GOODMAN**, **ZISCHKAU**, and **SULLIVAN**.

SULLIVAN, Board Judge.

For five months in 2020, MLB Transportation, Inc. (MLB) held a contract to transport patients in wheelchairs by van from the Department of Veterans Affairs (VA) hospital in Atlanta, Georgia, to their homes. Because its payments on the contract declined due to decreased need for transportation services during the COVID-19 pandemic, MLB filed a claim with the VA contracting officer, seeking payment of insurance costs and vehicle financing costs that it expected to recoup during the last two months of its contract. MLB appealed the denial of its claim to the Board.

VA filed a motion to dismiss for failure to state a claim, asserting that MLB has not and cannot identify a clause of its contract that gives MLB the right to seek payment for these costs. In reviewing the contract, we found that, although the parties describe the contract as an indefinite quantity contract, it contained no guaranteed minimum and was, therefore, illusory. Because MLB did not allege in its claim or its notice of appeal that it has not been paid for the services it rendered, we dismiss the appeal for failure to state a claim.[1]

Background

The initial period of MLB's contract was January 1 through February 29, 2020. Exhibit 5 at 7.[2] The contract period was extended three times and ended on May 14, 2020. Exhibits 12, 21, 30.

The contract contained five line items—two were prices for short- or long-distance trips ($80 and $96), two were mileage rates for short- and long-distance trips ($4.25/mile and $5/mile), and the fifth was the price for waiting, charged in increments of fifteen minutes. For each of these line items, the contract listed a quantity and a total cost, which was the product of the quantity and the unit price. For example, for one-way trips of less than 100 miles, the quantity was 2054 and the unit price was $80 for a total line item value of $164,320. Exhibit 5 at 5. By modification dated March 16, 2020, the quantity of short-distance trips was increased from 2054 to 6585. Exhibit 19. It appears that the parties treated the contract as an indefinite quantity contract based upon the invoices submitted, which sought payment for quantities smaller than these line items. *See, e.g.*, Exhibit 33.

The contract does not contain any language indicating that the contract is an indefinite quantity or requirements contract. Neither an indefinite quantity clause nor a requirements clause is include or incorporated into the contract. Although the contract states that "[t]he government reserves the right to increase or decrease the actual requirements as required – see guaranteed minimum," Exhibit 5 at 7, the contract does not state a guaranteed minimum.[3] The contract also does not state that VA will only purchase wheelchair van transportation services from MLB.

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[1] Pursuant to Board Rule 6(a), on January 21, 2021, MLB notified the Board of its choice to designate its notice of appeal as its complaint. 48 CFR 6101.6(a) (2020).

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

[3] MLB held another contract with VA in 2019 to provide the same type of services. That contract included the Indefinite Quantity clause at 48 CFR 52.216-22 and a statement regarding the guaranteed minimum. Exhibit 1 at 5, 19.

The contract included the Commercial Items clause, Federal Acquisition Regulation (FAR) 52.212-4, Contract Terms and Conditions—Commercial Items (Oct. 2018). 48 CFR 52.212-4 (2019). That clause provides that "[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties." Exhibit 5 at 19. The clause further provides that the possible causes of excusable delay under the contract include a pandemic. *Id*. at 20. For disputes on the contract, the clause incorporates by reference FAR 52.233-1.

According to its notice of appeal, MLB submitted monthly invoices for amounts ranging from $60,000 to $80,000 before the effects of the COVID-19 pandemic were felt. Notice of Appeal at 2. Because of the drop in rides that MLB attributes to the pandemic, the monthly amounts of MLB's invoices dropped to $11,000 to $20,000. Because of this loss of revenue in the time period from March 1 to May 31, 2020,[4] MLB seeks reimbursement of insurance premium costs and vehicle financing costs for the period in the amounts of $126,575.45 and $269,487.53, respectively.

Discussion

When ruling on a motion to dismiss for failure to state a claim, the Board will apply "the same standard as would a federal trial court." *Williams Building Co. v. Department of Veterans Affairs*, CBCA 6559, 20-1 BCA ¶ 37,492 (quoting *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272). This standard requires the complaint to allege facts that plausibly suggest a showing of entitlement to relief. *Id.* Determining the type of contract is a matter of law that is not controlled by a label in the contract. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333 (citing *Maintenance Engineers v. United States*, 749 F.2d 724, 776 n.3 (Fed. Cir. 1984)).

The parties both acknowledge that the agreement was intended to be an indefinte quantity contract but that it lacks a guaranteed minimum clause. *See* Appellant's Supplemental Response to Motion to Dismiss at 1. 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. *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998); *Systems Management*. "Without an obligatory minimum quantity, the buyer would be allowed to order nothing,

[4] It is not clear from MLB's appeal whether the vehicle financing costs are limited to this time period. Notice of Appeal at 2.

rendering its obligations illusory and, therefore, unenforceable." *Torncello v. United States*, 681 F.2d 756, 761 (Ct. Cl. 1982).

The contract also cannot be a requirements contract. The contract lacks FAR clauses 52.216-19 and 52.219-21. *See* 48 CFR 16.506(b), (d) (requirement to add clauses to a requirements contract). Further, the contract does not require VA to order all wheelchair transport services from MLB. *See, e.g.*, Exhibit 5 at 7. 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." *Systems Management.*

MLB contends that its contract with the VA differs from *Coyle's Pest Control, Inc.* because its contract was a sole-source bridge contract. *See* Appellant's Supplemental Response to Motion to Dismiss at 1. That distinction does not provide a basis for enforcing an illusory contract. Similarly, MLB's expectations based upon the parties' past dealings do not address the illusory nature of the contract. *See* Appellant's Response to Motion to Dismiss at 3. Even though neither party likely foresaw the impact of the COVID-19 pandemic on this contract, the pandemic does not alter the interpretation of or create a basis to reform the agreement entered into prior to the pandemic.

If the contract had been a proper indefinite quantity contract with a guaranteed minimum clause, that minimum would have been the measure of the VA's obligation. *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). While the contract at its inception was not enforceable due to the lack of a minimum guarantee, it became valid and binding to the extent that it was performed. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 494 (1923); *Coyle's Pest Control, Inc.*, 154 F.3d at 1306; *The Carrington Group, Inc. v. Department of Veterans Affairs*, CBCA 2091, 12-1 BCA ¶ 34,993. Thus, VA is obligated to compensate MLB for the services that it actually provided based upon the contract terms. MLB is not entitled to additional costs or anticipatory profits. *Ralph Construction, Inc. v. United States*, 4 Cl. Ct. 727, 733 (1984); *see also The Ducke Group, LLC v. Department of Veterans Affairs*, CBCA 3229, 13 BCA ¶ 35,337.

MLB did not allege in its claim or its notice of appeal that it had not been paid for services rendered (i.e., rides provided). Instead, its claim is for indirect costs that it did not and could not recover because VA ordered fewer rides than MLB expected. Since it has not alleged a claim for costs of services that it provided, MLB has failed to state a claim upon which relief can be granted, and, thus, we dismiss the appeal. We also deny MLB's request to amend its complaint. Because MLB did not allege in its claim that it had not been paid for services rendered, we would lack jurisdiction over such a claim in this appeal. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). MLB's request to amend

is properly denied as futile. *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539.

Decision

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

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge