



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: January 13, 2022

CBCA 7208

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), alleges that it lost revenue as a result of a reduction in transportation services ordered by the Department of Veterans Affairs (VA) under the parties' indefinite delivery indefinite quantity (IDIQ) contract due to the COVID-19 pandemic. The VA moves to dismiss the appeal on the ground that the VA had no obligation to order more services because it had satisfied the guaranteed minimum under the contract. We dismiss this appeal for failure to state a claim.

Background

In August 2019, OWL contracted with the VA to provide wheelchair van and sedan transportation services for the VA beneficiaries of the Edward Hines Jr. VA hospital in Hines, Illinois, and associated community-based outpatient clinics. Appeal File, Exhibit 2 at 5. The contract included Federal Acquisition Regulation (FAR) clause 52.216-22, Indefinite Quantity (OCT 1995), *id.* at 26, and under section C.12, the contract states that “[t]his contract will be an IDIQ contract with a 5 year ordering period.” *Id.* at 32. The contract includes a guaranteed minimum of \$500,000 to “be met in the initial fiscal year of the contract award.” *Id.* at 4. The minimum amount of \$500,000 was met during the initial year of the contract. Notice of Appeal, Exhibit D at 28-29.¹

OWL alleges that, as a result of COVID-19,² “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. The COVID-19 pandemic, and the subsequent executive order and actions by the VA “substantially reduced ridership and substantially changed how OWL delivered transportation.” *Id.* at 3. As a result, OWL claims an equitable adjustment for the period of April through December 2020 in the amount of \$1,058,560.13. *Id.* at 1, 3.

Discussion

“[T]he granting of a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy.” *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705 (citing *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698). 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*

¹ Appellant designated its notice of appeal as its complaint.

² 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 (Exec. 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.

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 IDIQ’s contract guaranteed minimum was fulfilled in the first year, and the VA had no further obligation to order services under the contract. In *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit summarized the Government’s obligations under an IDIQ contract:

[W]hile an IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services. 48 C.F.R. § 16.504(a) (2000). *See also Dot Sys., Inc. v. United States*, 231 Ct. Cl. 765 (1982). That is, under an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase[,] its legal obligation under the contract is satisfied. *See, e.g., Mason v. United States*, 222 Ct. Cl. 436, 615 F.2d 1343, 1346 (1980). Moreover, once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.

Travel Centre, 236 F.3d at 1319; *see also National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, 09-1 BCA ¶ 34,043 (“Under an IDIQ contract, the Government is not obligated to order more than the required minimum quantities, and once those minimum quantities are ordered, the Government’s obligations are satisfied.”).

The VA exceeded the minimum guaranteed amount of \$500,000 in the initial year of the contract. The VA, therefore, was not obligated to purchase any more transportation services from OWL under the contract, and OWL “could not have had a ‘reasonable expectation’ of revenue exceeding the minimum guarantee.” *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, 20-1 BCA ¶ 34,043 (quoting *Travel Centre*, 236 F.3d at 1319). Thus, OWL is not entitled to recover revenue lost as a result of the decrease in services ordered by the VA.

In its opposition to the VA’s motion to dismiss, OWL argues that the VA breached the contract by (1) not allowing OWL to transport more than one patient per trip; (2)

requiring OWL's drivers to perform COVID-19 screenings; and (3) telling OWL that it needed additional vehicles and drivers to resolve performance issues, when the performance issues were the fault of the VA. While OWL mentions these issues in its notice of appeal, it does not allege that the VA is liable for damages for breach of contract or contract changes. Instead, OWL alleges that it is entitled to compensation just for the reduction in the number of trips due to COVID-19 during the period of April through December 2020.

Owl had 5,478 trips during March 2020, and Owl averaged only 3,884.56 (34,961 trips / 9 months) trips per month during the remaining nine months of 2020. . . . Assuming that the March 2020 revenue represents the average monthly revenue for the remaining nine months of 2020, the total revenue for those remaining nine months should have been \$3,810,321.00 (\$423,369.00 x 9 months) instead of the actual total revenue for those nine months of \$2,751,760.87, for a difference of **\$1,058,560.13**.

Notice of Appeal at 3. OWL's total amount claimed is \$1,058,560.13.

Because OWL only claims a loss of revenue resulting from the VA placing fewer orders due to the pandemic, OWL has failed to state a claim upon which relief can be granted. We, therefore, dismiss the appeal.

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