UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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

CBCA 7184

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.

The Department of Veterans Affairs (VA) moves to dismiss for failure to state a claim the appeal of OWL, Inc. (OWL) on the grounds that (1) there can be no recovery of alleged costs attributable to an unforeseen pandemic and (2) the VA is not obligated under a requirements contract to purchase a certain number of services. We dismiss the appeal for failure to state a claim.

Background

On July 12, 2017, OWL entered into a requirements contract with the VA to "provide ambulatory, wheelchair and stretcher transportation services to VA beneficiaries of the

Phoenix VA Health Care System and Clinics." Appeal File, Exhibit 2 at 60.[1] The period of performance was a base year with five one-year option periods. *Id.* The contract indicated that "[t]his is a requirements contract for the period of July 2017 through April 2022." *Id.* at 1. The contract included the Federal Acquisition Regulation (FAR) clause 52.216-21 Requirements (OCT 1995), stating in part:

> This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule ***are estimates only and are not purchased by this contract***. Except as this contract may otherwise provide, ***if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.***

Id. at 83 (emphasis added). The contract also included FAR clauses 52.216-18 Ordering (OCT 1995) and 52.216-19 Order Limitations (OCT 1995). *Id.*

OWL alleges that as a result of the COVID-19 pandemic,[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.[3] OWL claims that "the COVID-19 pandemic, the Executive Order and the VA's actions substantially reduced ridership and substantially changed how OWL delivered transportation services." *Id.* at 3. Because of the reduction in revenue and trips, OWL submitted to the contracting office a request for equitable adjustment (REA) that sought reimbursement for the calendar year 2020 of $380,060.37. The requested amount was based on a loss of revenue of $850,218 minus savings due to a reduced labor force and fuel costs of $470,157.63. *Id.* On August 12, 2021, OWL timely appealed to the Board the decision of the contracting officer denying OWL's REA.

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

[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 (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.

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

Discussion

> The Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance in deciding a motion to dismiss for failure to state a claim. Rule 8(e). Thus, in considering this motion, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006)). Under this standard, [OWL's] claim must be "plausible on its face" when drawing "all reasonable inferences in favor of the [appellant]." *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013)); *see also Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272.

ITS Group Corp v. Department of Agriculture, CBCA 6621, 20-1 BCA ¶ 37,602.

The VA moves to dismiss this appeal, arguing that the VA had no obligation to purchase a specific amount of services from OWL. The VA's only obligation to OWL under the contract was to utilize OWL's services exclusively to fulfill the VA's requirements during the contract period. "A requirements contract requires the contracting government entity to fill all of its actual requirements for supplies or services that are specified in the contract, during the contract period, by purchases from the contract awardee." *Travel Centre v. Barram*, 236 F.3d 1316, 1318–19 (Fed. Cir. 2001) (citing 48 CFR 16.503(a) (2000)); *see also Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998) (citing *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir.1992)). OWL does not allege that the VA failed to utilize OWL's services exclusively or diverted business from OWL to another contractor. *See Rumsfeld v. Applied Cos.*, 325 F.3d 1328, 1339 (Fed. Cir. 2003) ("[T]he government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements.").

The VA was "entitled to reduce or otherwise change its requirements for legitimate business reasons." *Lockheed Martin Aircraft Center*, ASBCA 55164, 08-1 BCA ¶ 33,832; *see also ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, et al., 13 BCA ¶ 35,260; *T&M Distributors, Inc.*, ASBCA 51279, 01-2 BCA ¶ 31,442 (noting that the Government was not liable for breach if its requirements actually differ from those anticipated when the requirements contract was made). "When a contractor alleges that the government breached its contract by reducing its requirements, the contractor bears the burden to prove that the government acted in bad faith, for example, by reducing its requirements solely to avoid its contractual obligations. In the absence of a showing that the government acted in bad faith, it will be presumed to have reduced its requirements for valid

business reasons." *Lockheed Martin* (citing *Technical Assistance International, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998); *East Bay Auto Supply, Inc.*, ASBCA 25542, 81-2 BCA ¶ 15,204)). OWL makes no allegation of bad faith or that the VA reduced the requirements to avoid its contractual obligation. The legitimate reason for the reduction was the pandemic. The risk of a decrease in the number of required trips falls on OWL, not the VA.

OWL has failed to identify any clause in the contract or other basis to shift the risk to the VA for revenue lost due to an unforeseen pandemic. OWL points to FAR clause 52.212-4, Excusable Delay, but that clause only states that OWL will not be liable for default if nonperformance was caused by the Government. OWL was not found to be in default. Under the requirements contract, the VA did not guarantee OWL a specific number of trips, and the VA legitimately reduced its requirements. Neither OWL's expectations based on the parties' past dealings nor the pandemic can "alter the interpretation of or create a basis to reform the agreement entered into" by the parties. *MLB Transportation, Inc. v. Department of Veterans Affairs*, CBCA 7019, 21-1 BCA ¶ 37,919. 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