



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART: March 18, 2024

CBCA 7718

ALEXANDER CPA PLLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael J. Montalbano of Blank Rome LLP, Philadelphia, PA; and Dominique L. Casimir of Blank Rome LLP, Washington, DC, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

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

CHADWICK, Board Judge.

Appellant, Alexander CPA PLLC (ACPA), seeks relief under a contract whose purpose was to identify and recover funds owed to respondent, Department of Veterans Affairs (VA), by private health insurers. ACPA alleges that VA's delays and mismanagement hampered ACPA's ability to earn contingency fees. VA moves to dismiss the appeal for failure to state a claim on which we could grant relief. VA's motion is meritorious in part but does not address the entire case. We grant the motion in part.

Background

VA awarded the contract to ACPA in May 2019. As VA explained in the performance work statement, federal law “permits VA to seek reimbursement from [third-party health insurers] for the cost of non-service-connected medical care furnished to eligible Veterans who have commercial insurance coverage.” Responsibility for pursuing the reimbursement rests with seven regional “consolidated patient account centers” (CPACs). The stated objective of the contract was “to actively [audit] insurance carrier payments,” using records provided by CPACs, “to determine appropriate collections and, if underpayments are identified, pursue the collection of” money owed to VA’s Veterans Health Administration.

The contract was an indefinite quantity, indefinite delivery (IDIQ) vehicle with two contract line items (CLINs).¹ CLIN 0001 was for a “Feasibility Assessment Report” that was described in the performance work statement.² CLIN 0001 provided:

Services will be ordered against this CLIN by executing a priced task order electronically.

This task is the minimum order quantity for the contract.

The total Award Value for this CLIN is \$240,000.00.

The period of performance is 30 business days from the date of the executed task order.

CLIN 0002 was for “Recovery Audit Services” in accordance with the performance work statement. This CLIN listed, by acronym, seven regional CPACs as delivery locations for services. CLIN 0002 continued in part:

This is a Third Party Reimbursed CLIN [under which VA would pay ACPA a contingency fee of 18.5% on reimbursements obtained via recovery audits].

¹ The contract included the following Federal Acquisition Regulation (FAR) clauses: FAR 52.216-18, Ordering (Oct. 1995) (48 CFR 52.216-18 (2018)); FAR 52.216-19, Order Limitations (Oct. 1995); and FAR 52.216-22, Indefinite Quantity (Oct. 1995).

² ACPA’s claim states that VA accepted the feasibility assessment report in December 2019. ACPA does not allege that VA did not pay for the report.

Services will be ordered against this CLIN by executing a separate task order(s) for each CPAC. Each task order may be issued at any time during the three (3) year period of eligibility but will not exceed 12 months at a time. Issuance of task orders will be determined based on the results of [the feasibility report under CLIN 0001]. All task orders will be issued electronically.

The period of performance is three (3) years from the date the VA approves [the feasibility report deliverable under CLIN 0001].

Section 5 of the performance work statement was titled “Applicable Documents.” It consisted of the following list:

- The Health Insurance Portability and Accountability Act of 1996 (HIPAA—all existing and revised statutes)
- Title 38 USC Section 1729 and Title 38 CFR Part 17.101 and Part 17.106
- Federal Information Security Management Act (FISMA)
- VA Financial Policy Volume XII, Chapter 5

As discussed below, ACPA relies on the allegations in three paragraphs of its complaint to establish the relevant language of the cited VA financial policy. VA does not deny those paragraphs of the complaint (relying instead on the evasive response that the policy “speaks for itself”). To the extent that either party expected us to interpret the policy in its original context, it would have been appropriate for a party to include the document—which appears to be integral to the case but which we do not have before us and decline to search for outside the record—in the appeal file.

In July 2022, ACPA submitted a certified claim for \$29,641,835, alleging that “the recovery audit results have been hampered,” and ACPA’s contingency fee impaired, “due to the VA’s interference in and lack of cooperation with the collections process; the VA has refused to take certain actions required by VA policies and statutes that would have resulted in increased collections.” In section headings, ACPA enumerated the actions complained of as: “1. Refusal to Authorize or Issue Notices of Indebtedness to Nonresponsive [Third-Party Insurers]”; “2. Failure to Comply with Federal Guidelines Regarding Compromising Debts”; and “3. Lack of Task Orders & Limited Scope of Task Orders.” The claim alleged breaches of express contract provisions and of the implied duty of good faith and fair dealing.

VA denied the claim in its entirety in January 2023. ACPA filed this appeal within ninety days.

ACPA's complaint, filed in March 2023, contains three counts. The counts appear largely to incorporate, but do not track, the section headings of the claim. Count I alleges breach of contract. Count II alleges "breach of the duty of good faith and fair dealing" (which is also a breach of contract).³ Count III alleges "bad faith administration" of the contract and includes allegations, "[u]pon information and belief," of several actions by VA which were not alleged in the claim, which did not allege bad faith.

VA answered the complaint in May 2023. In June 2023, the parties jointly sought a stay of proceedings to brief a motion that VA filed in July 2023 to dismiss the appeal for failure to state a claim. As discussed below, VA argues that ACPA has no legal entitlement because (1) VA undisputedly ordered the minimum quantity stated in CLIN 0001; (2) VA ultimately issued orders for all seven CPACs listed in CLIN 0002; (3) VA had no contractual duty to issue notices of indebtedness or to compromise claims against insurers; and (4) ACPA could not prove "bad faith settlement negotiations" by VA without violating Federal Rule of Evidence 408. Briefing is complete, including a surreply that the Board permitted ACPA to file in September 2023.

Discussion

"To survive a motion to dismiss for failure to state a claim upon which relief may be granted under Board Rule 8(e) (48 CFR 6101.8(e) [(2023)]), [ACPA] must point to factual allegations [in its complaint] that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of" ACPA. *Cobra Acquisitions, LLC v. Department of Homeland Security*, CBCA 7724, 23-1 BCA ¶ 38,433, at 186,782–73 (internal quotation marks omitted); see *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014). "This rule does not apply, however, to legal conclusions." *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014).

ACPA Does Not Seek Relief for Failure to Issue Task Orders

We first eliminate an issue. Although ACPA argued in its certified claim that "failure to release . . . task orders for [all seven] CPACs" listed in CLIN 0002 "constitute[d] a breach of contract" and titled a section of its complaint "The VA Failed to Issue Recovery Audit Service Task Orders," ACPA has abandoned this theory of relief. In its September 2023 surreply, ACPA states, "This Appeal does not concern whether the VA was required to issue task orders The VA has already issued the task orders in question; whether it was

³ "Failure to fulfill that duty [of good faith and fair dealing] constitutes a breach of contract." *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014).

required to issue them is now beside the point.” Without determining whether VA issued all of the orders, which would take us outside the pleadings, we accept this framing of the case.

Ordering the Minimum Quantity Does Not Conclusively End the Agency’s Obligations

The Court of Appeals for the Federal Circuit held in *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001), that “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.” VA argues that, having ordered the minimum quantity stated in CLIN 0001 (the feasibility assessment report), it cannot be liable to ACPA because *Travel Centre* means exactly what the sentence just quoted says: “[O]nce the minimum order is fulfilled,” VA writes, “the Government’s legal obligation under the contract is satisfied. Period. End of story.” We disagree.

“It is a truism that bears repeating that broad language in an opinion must be read in light of the issue before the court.” *Northern States Power Co. v. United States*, 224 F.3d 1361, 1367 (Fed. Cir. 2000). The issue presented in *Travel Centre* was whether “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.” *Travel Centre*, 236 F.3d at 1319. The Court’s decision thus addressed the Government’s *ordering* obligation—not any other duties that might arise under such a contract. *See id.* at 1319–20.

In any event, this Board rejected VA’s expansive reading of *Travel Centre* in *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635. We wrote in *TranBen*, “Despite the seemingly categorical statement in *Travel Centre* that, once the Government orders the minimum, ‘its legal obligation under the contract is satisfied’ . . . , we and other tribunals have recognized [after *Travel Centre*] that the Government can breach an IDIQ contract’s implied duty of good faith and fair dealing despite ordering the minimum.” *Id.* at 178,430 (quoting *Travel Centre*, 236 F.3d at 1319) (citing *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, 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), *cited in Future Forest, LLC v. Department of Agriculture*, CBCA 5863, 20-1 BCA ¶ 37,565, at 182,399. Our conclusion in *TranBen* that the Government may, in theory, even after ordering the guaranteed minimum, breach a duty that is *implied* from an IDIQ contract certainly means the Government could also breach an express duty after ordering the minimum. *Cf. Metcalf*, 742 F.3d at 994–95 (noting the implied duty of good faith and fair dealing supplements express terms, and “any breach of that duty has to be connected, though it is not limited, to the bargain struck in the contract”); *Bell/Heery*, 739 F.3d at 1335 (“[I]mplied duties . . . cannot ‘form the basis for wholly new contract terms, particularly

terms which would be inconsistent with the express terms of the agreement.” (quoting *Jarvis v. United States*, 43 Fed. Cl. 529, 534 (1999)). VA is not entitled to dismissal, wholly or in part, solely because VA ordered the minimum quantity stated in CLIN 0001.

VA Had No Express Duty to Issue Notices of Indebtedness

ACPA alleges in the complaint that because “the Contract incorporate[d] the VA Financial Policy,” the contract imposed a duty on VA to follow its alleged policy that the agency “will . . . issue” a notice of indebtedness “[o]nce it is determined [that any] third-party [insurer] owes a debt[.]”⁴ VA does not deny ACPA’s factual allegation as to the words of the VA financial policy, but VA rejects the legal premise that the contract incorporated the financial policy as an obligation owed by VA to ACPA. We agree with VA that the contract did not use “language of incorporation” with respect to the VA policy. See *CSI Aviation, Inc. v. Department of Homeland Security*, 31 F.4th 1349, 1356 (Fed. Cir. 2022).

Although parties need not use any special words of incorporation, such language “must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).” *CSI Aviation*, 31 F.4th at 1355 (quoting *Northrop Grumman Information Technology, Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008)). The reference in this contract to the VA financial policy falls in the category of background material. The performance work statement—an unlikely place to incorporate an extrinsic document as imposing duties *on the agency* to begin with—lists the financial policy together with statutes and regulations. The meaning conveyed is that the laws and the policy are “applicable” in the sense of being relevant to performance. We see nothing in the contract to indicate that VA intended to take on a contractual obligation to follow its agency policy or else find itself in breach.

ACPA points out that *CSI Aviation* held that a statement in that contract that a document attached to the contract “will apply to all operations” sufficed to incorporate that document as a matter of law. 31 F.4th at 1354–56. ACPA argues that the statement here in the performance work statement that the financial policy was “[a]pplicable” serves the same function. Like VA, we find the differences between *CSI Aviation* and this case more salient than any facial similarity. In *CSI Aviation*, the contract specifically stated, in an attachment

⁴ ACPA alleges, and VA does not deny, that section 040502.A of the applicable financial policy states: “Once it is determined a first-party or third-party owes a debt, VA will establish a receivable in the accounting system and issue a [notice of indebtedness] and/or a health care claim(s) to the responsible individual or third party.”

to the standard contract form, that some documents were “incorporated and made part of the contract.” *Id.* at 1352. The issue on appeal was whether a document that did not appear in the list of incorporated documents, but that was referenced (“will apply to all operations”) in a document in the list, should be included in the chain of incorporation. *See id.* at 1355. The Court answered in the affirmative. *Id.* at 1357. Notably, the document at issue was contractual in format—a list of the contractor’s “terms and conditions.” *See id.*

Here, by contrast, the financial policy is mentioned as “applicable” in the performance work statement with no associated indications of intent to incorporate outside documents into the agreement. We must be “reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation.” *St. Christopher Associates, L.P. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008). The performance work statement merely lists the VA policy document as “applicable” to the contractor’s work, alongside statutes and regulations, using language that would not suffice to incorporate the statutes or regulations themselves as contractually binding. Accordingly, we do not read the contract as incorporating any of the materials in the list, including the financial policy. It follows that VA did not agree to issue notices of indebtedness in all cases in which it “[wa]s determined” that a third party owed VA a debt, as ACPA alleges the VA financial policy prescribes. The complaint fails to state a claim in count I for breach of an express duty to issue notices of indebtedness.

VA Had No Express Duty to Compromise Debts

ACPA alleges in the complaint that “VA . . . failed to even *consider* reasonable settlements negotiated by ACPA [with third-party insurers] for the VA’s review. There is no basis in the Contract or the VA Financial Policy for the VA to simply deny wholesale all settlement attempts based on its ‘discretion.’” (Paragraph break and number omitted.) VA argues that it did not bind itself to follow the policy. ACPA argues in opposing the motion to dismiss that it has plausibly alleged that, by rejecting proposed settlements, “VA failed to comply with its contractual obligation to comply with the VA Financial Policy incorporated in the Contract.” For the reasons given above, we agree with VA that the financial policy was not incorporated, so the allegation that VA violated the policy as an *express* contract requirement fails to state a claim as a matter of law. As discussed below, the financial policy could still be relevant to the implied duty of good faith and fair dealing.

Federal Rule of Evidence 408 Is Irrelevant at This Stage

VA’s final argument for dismissal is that ACPA’s complaint includes allegations, among its allegations of breaches of the implied duty of good faith and fair dealing, that VA acted in bad faith when discussing and negotiating ACPA’s certified claim between the claim’s submission in July 2022 and the contracting officer’s decision in January 2023. VA

argues that “to the extent Appellant’s claims relied on the existence and/or timing of settlement discussions, such evidence is inadmissible” under Federal Rule of Evidence 408, “and those claims which would fail in the absence of such evidence should be dismissed.” VA cites no case in which a tribunal dismissed a claim on this basis.

We doubt, first of all, that we have jurisdiction to address this aspect of the complaint, since—naturally, given the timeline—the allegations of bad faith negotiation were not set out in the certified claim itself. *See, e.g., Lee’s Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017); *Active Construction, Inc. v. Department of Transportation*, CBCA 6597, 21-1 BCA ¶ 37,905, at 184,098. To the extent that we reach the merits, we will resolve any evidentiary objections if and when they arise with respect to our receipt of evidence, not peremptorily on a motion to dismiss.

Unaddressed Matters

VA styles its motion as a motion to dismiss “this appeal . . . with prejudice” but does not address all aspects of the case. In particular, both the certified claim and the complaint allege in the alternative that, even if VA did not breach express provisions of the IDIQ contract,⁵ the agency violated the implied duty of good faith and fair dealing. VA nowhere addresses the implied duty theory. As a result, VA offers us no reason to doubt that ACPA plausibly alleges that VA “interfere[d]” and failed to cooperate “with [ACPA’s] performance . . . so as to destroy the reasonable expectations of [ACPA] regarding the fruits of the contract” in breach of the duty of good faith and fair dealing. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). We find more than enough facts alleged in the complaint to make it plausible that ACPA reasonably expected different behavior by VA in pursuing claims against insurers and that VA may have, for example, “hinder[ed], delay[ed], accelerate[d], or fail[ed] to cooperate with the contract work; use[d] unfair ordering procedures;” and/or “abuse[d] discretion reserved to it by the contract terms.” *TranBen*, 17-1 BCA at 178,431 (listing possible ways to breach the duty of good faith and fair dealing under an IDIQ contract after ordering the minimum). The complaint remains viable to the extent that we do not dismiss particular claims in this decision.

⁵ The parties debate whether a task order is a separate contract or part of the IDIQ contract. “Task orders issued under indefinite quantity contracts represent the government’s exercise of existing contract rights and are not separate, individual contracts.” *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, et al., 21-1 BCA ¶ 37,899, at 184,048 (internal quotation marks omitted).

Decision

As explained, the complaint is **DISMISSED IN PART**.

Kyle Chadwick

KYLE CHADWICK

Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge