

“ILLUSORY” INDEFINITE DELIVERY CONTRACTS

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MLB Transportation, Inc. performed a contract to transport patients in wheelchairs by van from the Department of Veterans Affairs (“VA”) hospital in Atlanta, GA to their homes. Because payments declined due to a decreased need for the services during the COVID-19 pandemic, MLB filed a claim seeking payments of insurance costs and vehicle financing costs that it expected to recoup during the last two months of its contract. VA denied the claim, and MLB appealed. *MLB Transportation, Inc.*, CBCA 7019, Sept. 3, 2021. The Civilian Board of Contract Appeals (“Board”) concurred in VA’s request to dismiss the appeal for failure to state a claim.

The contract contained line items for different types of trips and waiting times. Apparently, the parties treated this contract as an indefinite quantity contract, which requested payment for quantities smaller than the line items in the contract. However, the contract did not contain any language or clause stating that it was an indefinite quantity or requirements contract, nor did it require the Government to order a minimum amount. FAR Subpart 16.5 describes the different types of indefinite delivery contracts, and specifically requires the use of:

- FAR 52.216-18, Ordering, when a definite quantity contract, a requirements contract or an indefinite quantity contract is used;
- FAR 52.216-19, Order Limitations, for similar contracts as FAR 52.216-18;
- FAR 52.216-21, Requirements, when a requirements contract is used; and
- FAR 52.216-22, Indefinite Quantity, when an indefinite quantity contract is used.
- In addition, FAR 16.504, Indefinite Quantity Contracts, states that the “contract must require the Government to order at least a stated minimum quantity of supplies or services.”

The contract in this appeal contained none of the required items.

The Board noted that the contract lacked a guaranteed minimum clause, and such an indefinite quantity contract is illusory and unenforceable because there is no binding promise by the Government regarding the minimum amount that it would purchase. The Board further noted that if this had been a proper indefinite quantity contract with a minimum clause, that “minimum would have been the measure of VA’s obligation.” However, even though unenforceable at its inception, the contract became valid and binding “to the extent that it was performed.” Therefore VA was only required to pay for actual services, and MLB was not entitled to any anticipated profits or additional costs, which is what MLB sought. Apparently VA had paid for all services that were provided.

Because MLB did not allege in its claim or notice of appeal that it has not been paid for services that it rendered, the Board dismissed the appeal for failure to state a claim.

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