UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART: November 24, 2020

CBCA 6885

ROCJOI MEDICAL IMAGING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Joseph A. Camardo, Jr. of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR; and Jared M. Levin, Office of General Counsel, Department of Veterans Affairs, Brockton, MA, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **ZISCHKAU**, and **CHADWICK**.

CHADWICK, Board Judge.

RocJoi Medical Imaging, LLC (RJMI) alleges that the Department of Veterans Affairs (VA) included inaccurate estimates in a contract for radiology services and caused RJMI to perform unnecessary contract administration. In the decision that RJMI has appealed, a VA contracting officer found RJMI entitled to some relief for a shortfall in orders below the contract's minimum guarantee. VA moves to dismiss RJMI's complaint for failure to state a claim on which the Board could grant relief. As we explain, we grant the motion in substantial part but deny it in part, such that aspects of the case survive.

Background

We base this summary on the allegations of the complaint and the claim and on contract documents cited in or integral to the complaint.

In September 2017, VA awarded RJMI an indefinite quantity contract for "Long Term Tele Radiology Services" for a VA facility in Muskogee, Oklahoma. The contract included the Indefinite Quantity clause (48 CFR 52.216-22 (Oct. 1995)) and the corresponding Ordering clause (48 CFR 52.216-18 (Oct. 1995)). Contract section B.3 stated, "The minimum guarantee under this contract is 7,000 studies." A "study" was a review of radiological examination results. The price schedule listed fourteen types of studies with various estimated quantities, totaling approximately 10,000 studies per contract year, at an estimated total annual price of about $360,000. RJMI alleges that the contract's estimated study quantities and the estimated annual values were significantly lower than the corresponding amounts that had been stated in the solicitation.

Although performance was originally expected to start in October 2017, in September 2018, the parties bilaterally modified a task order issued under the contract to reset the base year to August 2018 through July 2019. RJMI alleged in its claim that this modification (P00005, appeal file exhibit 19) was "unilateral." RJMI's president signed the modification without noting any objection, however. "In reviewing a motion to dismiss, . . . we are not required to accept the asserted legal conclusion[]" that the bilaterally signed modification was unilateral. *American Bankers Ass'n v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019). VA did not exercise its option to extend the contract past the base year.

RJMI alleges that VA ordered fewer than 7000 studies but it does not allege in the pleadings, as far as we can determine, exactly how many studies VA did order.

In October 2019, RJMI submitted a request for an equitable adjustment (REA), which RJMI certified as a claim for $420,531 in January 2020. The claim had three itemized components: $358,131.50 for "defective estimates," $48,000 for time spent by RJMI's president on "emails and telephone conferences," and $14,400 for REA preparation. As the quantum for defective estimates, RJMI sought the "overhead and profit" that it said it would have earned on orders from October 2017 through July 2019 totaling more than $2.1 million.

The claim went on to state that "[a]n alternative damage calculation would be based upon not receiving [orders for] the minimum quantity of 7,000 studies for the time frames of 10/1/17 to 9/30/18 and 10/1/18 to 7/31/19. For these two years, RJMI should have [performed] 14,000 studies," which RJMI stated would have provided "overhead and profit in the amount of $33,319.55." RJMI added in a footnote that substituting this alternative

claim for $33,319.55 for its claim for $358,131.50 for defective estimates would make the "total damages" $95,719.55.

In June 2020, the contracting officer decided that RJMI was entitled to $39,489.51 for the agency's having ordered fewer than 7000 studies in total, but she otherwise denied the claim. RJMI filed this appeal in July 2020 and filed a three-page, ten-paragraph complaint in August 2020. VA moved under Board Rule 8(e) (48 CFR 6101.8(e) (2020)) to dismiss the complaint for failure to state a claim. The motion is fully briefed.

Discussion

The applicable standard is familiar. To defeat VA's motion to dismiss, RJMI "must point to factual allegations that, if true, would state a claim to relief that is plausible on its face when we draw all reasonable inferences in favor of" RJMI. *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272 (internal quotation marks omitted).[1] RJMI's complaint is short on operative facts. It contains no counts and alleges primarily that RJMI "is entitled to full compensation as reflected in its Claim." We have liberally construed the complaint by drawing on the more detailed allegations in the claim.

As VA points out, most of the relief that RJMI seeks is barred by precedent. RJMI cannot recover for defective estimates because no such claim can arise under a contract containing the standard Indefinite Quantity clause. *See Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) (explaining that the contractor "could not have had a reasonable expectation" of revenue exceeding the minimum guarantee "[r]egardless of the accuracy of the estimates"); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002) (noting more generally that "estimates are not guarantees" "absent . . . contractual language" to that effect); *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043 (quoting *Travel Centre* in denying relief as a matter of law); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA 39982, 90-3 BCA ¶ 22,993 ("[W]e do not examine the reasonableness of the estimates in indefinite quantity contracts."); *IDIQ Contracts Requiring a Capital Investment: High Risk*, 32 Nash & Cibinic Rep. ¶ 40 (2018) (calling *Travel Centre* "the death knell" for defective estimates claims

---

[1] RJMI quotes a passage from *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, in which the Board, in dictum, quoted *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), as to the standard for stating a claim. *Conley v. Gibson* was abrogated by the Supreme Court in 2007, and we no longer apply it. *Williams Building Co. v. Department of Veterans Affairs*, CBCA 6559, 20-1 BCA ¶ 37,492.

under indefinite quantity contracts). It does not matter, therefore, whether we would examine the higher estimates in the solicitation or the lower estimates in the contract.

RJMI relies primarily on a law review article[2] and does not engage with any of the decisions we cite in the paragraph above. RJMI also relies on *Ravens Group v. United States*, 112 Fed. Cl. 39 (2013). As the Board has noted, the court in *Ravens Group* suggested in denying a motion for summary judgment that "a negligent estimate in an [indefinite quantity] contract might create a basis for monetary recovery in certain limited instances." *VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928 (2017). We are not bound by *Ravens Group*, however, and we find it unpersuasive and contrary to our own precedent and that of the Federal Circuit on this issue.[3] RJMI fails to state a claim for relief for defective estimates.

It is unclear from the face of the complaint whether RJMI still separately seeks relief for a failure to order the minimum quantity of services. In the complaint's prayer for relief, RJMI requests "the full [claimed] amount of $420,531.00, plus interest, *less* the amount . . . awarded" by the contracting officer to satisfy the minimum guarantee (emphasis added). RJMI and the contracting officer both understood RJMI's claim as demanding alternative relief under the minimum guarantee. We cannot determine from the pleadings alone, however, whether VA has paid, or RJMI has accepted, the $39,489.51 that the contracting officer decided was due to RJMI for VA's failure to order the guaranteed minimum.

To the extent relevant, we agree with the agency that "the minimum guarantee under the Contract is simply 7,000 studies in total," not 7000 per year, as RJMI seems to have presumed in preparing its claim. VA correctly observes that the guarantee sentence "is clear and unambiguous and makes no reference" to separate annual guarantees. *See George Hyman Construction Co.*, GSBCA 2327, 68-1 BCA ¶ 6803 (declining to "add words to a contract so as to achieve a result desired by only one party thereto"); *see also George Hyman Construction Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987). RJMI relies on *Bannum, Inc. v. Department of Justice*, DOT BCA 4452, 06-1 BCA ¶ 33,228, but that case is not analogous. The board in *Bannum* concluded "that the contract award documents

---

[2] Marko W. Kipa, Keith R. Szeliga & Jonathan S. Aronie, *Conquering Uncertainty in an Indefinite World: A Survey of Disputes Arising Under IDIQ Contracts*, 37 Pub. Cont. L.J. 415 (2008).

[3] Among other things, "[i]t does not appear that the Government in *Ravens Group* argued that its quantity obligations . . . were limited to the minimum and maximum quantity figures contained in the contract," *VSE Corp.*, and the court in *Ravens Group* did not discuss *Travel Centre* or any other decisions construing the Indefinite Quantity clause.

[we]re internally inconsistent" as to the minimum guarantee where one part of the contract referred to a single line item while another part seemed to encompass three line items. RJMI points to no similar inconsistency or ambiguity in the statement of "the minimum guarantee under this contract" at issue here. RJMI also argues that the Board should doubt that 7000 studies was the guaranteed minimum given the number of radiologists that RJMI told VA it would use to perform the contract. Guaranteed minimums can be nominal amounts, however, and often bear little or no relation to the anticipated contract value. *See, e.g.*, *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377 (involving a contract with a maximum value of $11,910,605 and a guaranteed minimum of $25,000).

Nonetheless, as it appears from the pleadings that RJMI could still be entitled to some recovery under the minimum guarantee in light of the Board's interpretation of the guarantee, we deny VA's motion to dismiss that claim from the case. *See White v. Delta Construction International, Inc*., 285 F.3d 1040, 1043–44 (Fed. Cir. 2002).

RJMI's demands for contract administration and REA preparation costs also survive the motion. VA argues that RJMI cites "no evidence" that it incurred the claimed costs, and that the costs appear to be associated with the claim rather than the REA. Those arguments raise factual issues outside the pleadings that we cannot reach on a motion to dismiss. *E.g*., *ITS Group Corp v. Department of Agriculture*, CBCA 6621, 20-1 BCA ¶ 37,602; *see also P.R. Burke Corp. v. United States*, 58 Fed. Cl. 549, 559 (2003) (ruling that "genuine issues of material fact" precluded summary judgment on a claim for consultant's fees).

Decision

The motion to dismiss is granted as to the defective estimates claim and is otherwise denied. The appeal is **DISMISSED IN PART**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge