



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: June 23, 2021

CBCA 6824

VALOR HEALTHCARE, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Stuart B. Nibley, Amy C. Hoang, and Sarah F. Burgart of K&L Gates 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 **BEARDSLEY** (Chair), **GOODMAN**, and **SULLIVAN**.

**SULLIVAN**, Board Judge.

Valor Healthcare, Inc. (Valor), contracted with Department of Veterans Affairs (VA) to provide primary care services to veterans at three community clinics within the region served by the Butler Medical Center, in Butler, Pennsylvania. When the number of patients seeking care at two of the clinics were fewer than the number estimated by VA in the request for proposals and resulting contract, Valor submitted a claim to the contracting officer for the difference between the amount of profit that Valor expected and the amount that it realized. Valor appealed the denial of its claim to the Board, alleging, as it did in its claim, that VA prepared negligent estimates or that VA possessed superior knowledge regarding the basis for the estimates that it should have shared with Valor.

VA filed a motion for summary judgment, asserting that, because the contract is an indefinite quantity contract, Valor's claims fail as a matter of law. Valor responded that the contract should be viewed as a requirements contract and, so viewed, its claims survive VA's challenge. Because the contract is an indefinite quantity contract, precedent requires us to grant VA's motion and deny Valor's appeal.

### Background

#### I. Contract Terms

In May 2015, Valor and VA executed the contract, which required the provision of health care services at three community clinics for a base year and four option years. Exhibit 5 at 1, 13-15.<sup>1</sup> In bidding the contract, Valor provided a price per member per month (PMPM) for each of the clinics for each of the years of the contract. This price was multiplied by the estimated number of patients provided by VA to obtain the total estimated cost for each year of the contract at each clinic. VA's estimates for two of the clinics (Armstrong and Clarion) are the subject of the dispute in this appeal.

Because Valor's contract covered three clinics, the contract for the base period and any options exercised guaranteed a minimum quantity of 2000 PMPM. Exhibit 5 at 13. The maximum quantity was 30,000 PMPM. *Id.* The contract also contained the Federal Acquisition Regulation (FAR) Indefinite Quantity clause, FAR 52.216-22. *Id.* at 123-24.

Valor was required to provide a "sufficient number of Primary Care providers so that each Primary Care provider has a reasonable caseload." Exhibit 5 at 26. Pursuant to the contract, "[c]urrent caseload ratios are based on the expectation that a fulltime physician will care for approximately 1200 patients and a midlevel provider will care for approximately 900 patients." *Id.* Based upon these expectations, the contract required Valor to fulfill staffing models described in the contract. *Id.* at 26-27. The contract also contained "minimum staffing requirements" tied to the number of veterans served and the staffing models. *Id.* at 28.

Pursuant to the instructions in the request for proposals, Valor was required to provide "a description of the methods by which it will ensure provider panel sizes remain within established parameters" and "a detailed discussion of how the structure and/or processes of the Contractor shall be adjusted when/if the providers' panel sizes exceed the established requirements." Exhibit 2 at 158. Valor also was required to provide the number of exam rooms it proposed to supply per provider and meet or exceed the requirement of 2.5 exam

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<sup>1</sup> All exhibits are found in the appeal file, unless otherwise noted.

rooms per provider. *Id.* at 159. The contracting officer evaluated the price Valor proposed for reasonableness, defined as “a cost (Price) that provides best value to the Government when consideration is given to prices in the market, . . . technical and functional capabilities of the offeror,” and realism, defined as “what it would cost the offeror to perform the effort if the offeror operates with reasonable economy and efficiency.” *Id.* at 163.

VA had responsibility for determining which veterans were eligible to be seen at Valor’s clinics, patients who were on the “billable roster.” Exhibit 5 at 103. If a veteran sought medical care at one of Valor’s clinics but was already “assigned to another Primary Care provider or provider within the [Veterans Health Administration],” VA was responsible for determining where that veteran would be enrolled. *Id.* Veterans could not be enrolled in more than one location for primary care services. *Id.* at 104.

Attachment 7 to the contract was titled “Statistical Information and Workload Estimates.” Exhibit 5 at 275-77. It stated that “[v]eterans are not ‘assigned’ to a [clinic] but may choose either to be seen at VA or to be enrolled in a [clinic]. VA will notify Veterans about the availability of [Valor’s clinics] and the services to [be] provided there.” *Id.* at 275. VA provided the projected number of enrollees and clinic stops for fiscal years 2013 to 2016, “[b]ased on previous and current projected enrollees and workload.” VA provided the number of anticipated new and existing users “[b]ased on historical patterns in the area” and warned that the numbers provided were estimates only: “The numbers of Veterans residing in the counties identified above and estimated numbers of visits per patient year, as stated above, are estimates and are to be used for information purposes only. VA in no way guarantees the accuracy of the estimates.” *Id.* at 276. Finally, VA advised that “[p]atients have the right to receive Primary Care other than from VA or a VA [community based outpatient clinic].” *Id.*

## II. Valor’s Claim

Valor used the VA patient estimate for each clinic to develop its PMPM price for each patient for each clinic for the base year and option years. Complaint ¶ 15. Valor also used VA’s patient estimates to develop its technical proposal for staffing and facilities, both of which were determined by the number of patients pursuant to the terms of the solicitation and resulting contract. Complaint ¶¶ 21–25.

The number of veterans enrolled in Valor’s clinics were lower and remained lower than VA’s estimates through the course of the contract. Complaint ¶¶ 27–28. Valor submitted a claim of \$1,581,573, to the contracting officer. *Id.*, Exhibit G. Valor calculated

this amount by subtracting its actual profit from the anticipated profits based upon VA's patient estimates for the two clinics. *Id.*, Exhibit G at 23.<sup>2</sup>

### Discussion

#### I. Parties Executed An Indefinite Quantity Contract

The first issue presented by VA's motion is what type of contract did the parties execute? VA asserts it is an indefinite quantity contract. Valor asserts that it is a requirements contract. Determining the type of contract is a matter of legal interpretation. *Environmental Quality Management, Inc. v. Environmental Protection Agency*, CBCA 3072, 13 BCA ¶ 35,300.

We find that the contract is an indefinite quantity contract because it is labeled as such, includes the Indefinite Quantity contract clause from the FAR, and contains a guaranteed minimum, all indicia of an indefinite quantity contract. *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1303 (Fed. Cir. 1998); *Mason v. United States*, 615 F.2d 1343, 1347 (Ct. Cl. 1980). The contract cannot be a requirements contract because, although Valor had the legal obligation to satisfy all of VA's requirements for primary care services for veteran patients, to the extent requested, it did not have the "exclusive right" to satisfy these requirements. *Mason*, 615 F.2d at 1349; *Rowe, Inc. v. General Services Administration*, GSBCA 15217, 03-1 BCA ¶ 32,162. Instead, the contract provided that veterans could seek primary care services from private providers and VA itself, in addition to Valor. Thus, the contract lacks the exclusivity required of a requirements contract. *Marut Testing & Inspections Services, Inc. v. General Services Administration*, GSBCA 15412, 02-2 BCA ¶ 31,945.

Valor asserts that, although the contract contained indicia of an indefinite quantity contract, the parties acted as if the contract were a requirements contract. One, Valor was required to provide community-based care for all of VA's requirements, up to the contract maximum. As noted, while Valor was required to meet all of the primary care needs for the patients that it saw, not all patients were required to seek primary care services at its clinics, thereby eliminating a key element of a requirements contract. *See Marut Testing*.

Two, Valor asserts, VA was not free to obtain community clinic services from other vendors. But, as Valor acknowledges, veterans could obtain their primary care services from

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<sup>2</sup> In its claim, Valor represented that it was not seeking anticipated profits for the base year because staffing issues lowered its incurred costs for that year. Complaint, Exhibit G at 21-22.

VA directly so that Valor was not the only provider of primary care services. This availability of choice precludes finding that VA made a promise to fulfill all of its requirements from Valor, the key to a requirements contract. *Mason*, 615 F.2d at 1349.

## II. Valor's Negligent Estimates Claim Must Fail

Having determined that the contract is an indefinite quantity contract, we next turn to VA's contention that Valor's negligent estimates claim must fail as a matter of law. VA is correct. A claim for negligent estimates is not a basis for recovery on an indefinite quantity contract. *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, 20-1 BCA ¶ 37,746.

In *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001), the United State Court of Appeals for the Federal Circuit declared the measure of the Government's obligation on an indefinite quantity contract. "[W]hen an [indefinite delivery/indefinite quantity] contract between a contracting party and the government clearly indicates that the contracting party is guaranteed no more than a non-nominal amount of sales, purchases exceeding that minimum amount satisfy the government's legal obligation under the contract." *Travel Centre*, 236 F.3d at 1319. In *Travel Centre*, the appeal arose as a challenge to the Government's termination for convenience in the face of the Government's knowledge that the estimates in the solicitation were too high. *Id.* at 1318. This limitation has been applied to cases involving claims for negligent estimates: "The government cannot be liable for breaching an indefinite quantity contract on the basis of making negligent estimates as long as the government orders the guaranteed minimum." *American General Trading & Contracting, WLL*, ASBCA 56758, 12-1 BCA ¶ 34,905.

Seeking to preserve its negligent estimates claim, Valor asserts that it had a "reasonable expectation" that VA would require services for more than the minimum number of patients in the contract based upon the aspects of the contract that appeared to be a requirements contract. Valor's "reasonable expectation" cannot overcome the plain language of the contract indicating that it is an indefinite quantity contract. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *see also Future Forest v. Department of Agriculture*, 2021 WL 1422742 (Fed. Cir. Apr. 15, 2021) (affirming principle despite alleged violation of duty of good faith and fair dealing). Instead, Valor's reasonable expectation is bound by these contract terms. *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635. For these reasons, we deny Valor's Health's claim based upon negligent estimates.

### III. Valor's Superior Knowledge Claim Also Must Fail

Having found that Valor cannot maintain a claim for negligent estimates, we turn to Valor's primary claim—superior knowledge. To succeed on a superior knowledge claim, Valor must establish, among other elements, that it undertook work on the contract “without vital knowledge of a fact that affect[ed] performance costs or duration.” *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994). Valor alleges that VA's failure to share the proper patient estimates affected the costs of performance of the contract, because Valor priced its technical proposal in such a way that actual performance was more expensive (i.e., less profitable) than it would have been if it had priced its proposal using the correct information. The question presented is, despite this allegation, must Valor's claim fail because the minimum guarantee caps VA's obligation on the contract?

We hold that Valor's superior knowledge claim also fails. Because the claim is based upon the estimates in the solicitation and resulting contract, the limits of *Travel Centre* must apply. At issue in *Travel Centre* was the Government's failure to disclose information regarding reduced estimates for the business under the contract. Although it was not described as a negligent estimates or superior knowledge claim, at issue was the Government's withholding of information regarding performance and whether that withholding constituted a breach of the duty of good faith and fair dealing.

Valor's superior knowledge claim can be reduced to an argument that “we would have bid differently if we had known that there would be fewer patients.” But the calculation of damages resulting from VA's alleged failure is the difference in profit that Valor received and what it expected based upon VA's estimates. In essence, Valor alleges that VA was obligated to buy primary care services for the number of veterans set forth in the estimates, which is not the premise of an indefinite quantity contract. Valor was offering to provide medical care, and VA was offering to buy those services for a guaranteed minimum number of patients, not any more. Valor cannot maintain a claim based upon the “expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract.” *Travel Centre*. 236 F.3d at 1319. To find otherwise would alter the nature of the bargain between the parties.

Valor cites to two cases as support for the premise that the Board has not foreclosed the possibility that a superior knowledge claim can be asserted on an indefinite quantity contract: *TranBen* and *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377. While it is true that both of these cases involved indefinite quantity contracts and discussed superior knowledge claims, neither case addressed the issue directly nor provides sufficient rationale for the Board to find that Valor's claims can survive the precedents discussed above.

Decision

VA's motion for summary judgment is granted. Valor's appeal is **DENIED**.

*Marian E. Sullivan*

MARIAN E. SULLIVAN

Board Judge

We concur:

*Erica S. Beardsley*

ERICA S. BEARDSLEY

Board Judge

*Allan H. Goodman*

ALLAN H. GOODMAN

Board Judge