

Civilian Board of Contract Appeals Narrows Scope of Implied Duty of Good Faith and Fair Dealing in IDIQ Contracts

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In [*TranBen, Ltd. v. Department of Transportation*, CBCA 5448 \(Jan. 26, 2017\)](#), the Civilian Board of Contract Appeals (“Board”) recently applied a restrictive view of the implied duty of good faith and fair dealing under an indefinite delivery/indefinite quantity (“IDIQ”) contract. In its appeal seeking almost \$14 million, TranBen, Ltd. (“TranBen”) alleged that the Department of Transportation (“DOT” or “Government”) breached the implied duty by misleading the Internal Revenue Service (“IRS”) about the availability of paper vouchers in order to receive IRS guidance allowing DOT to issue transit subsidies on debit cards, instead of vouchers, without rendering them taxable. The Board dismissed the appeal for failure to state a claim in a troubling decision that calls into question the viability of the implied duty under an IDIQ contract where the Government satisfies its minimum ordering obligation. At the very least, the Board’s decision indicates contractors should be even more vigilant, at the early stages of IDIQ contract formation, to ensure that their legitimate expectations are protected through express contract language.

I. Factual and Procedural Background

Under an IDIQ contract awarded in 2009, TranBen supplied paper vouchers through which DOT distributed tax-free mass transit subsidies to federal employees in the D.C. area. The IDIQ contract had a minimum guaranteed order of \$1 million, and DOT purchased nearly \$270 million worth of vouchers before the contract expired in 2013. However, more than 75% of the orders came in the first two years of performance. In 2011, DOT began shifting the transit benefit program from paper media toward electronic media, including debit cards. One precondition for using debit cards was to ensure that the IRS would not consider the cash reimbursements loaded on the debit cards taxable. To that end, DOT apparently told the IRS that paper vouchers were no longer readily available, which caused the IRS to concur in DOT’s position that transit subsidies on debit cards should not be taxable.

At the Board, TranBen alleged that DOT’s representation to the IRS regarding the availability of paper vouchers was misleading, evidenced by the fact that DOT continued to purchase vouchers from TranBen after 2011. TranBen generally asserted that because of DOT’s resultant shift from paper vouchers to debit cards, DOT ordered fewer vouchers than TranBen reasonably anticipated.

The Government filed a motion to dismiss for failure to state a claim.

II. Analysis

Relying on the well-established rule, stated in *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001), that an IDIQ contract requires the Government to order *only* a stated minimum quantity of supplies or services, the Board began by determining that the change in quantities ordered over time under TranBen's contract did not constitute a change to or breach of the contract because DOT had no ordering obligation beyond the \$1 million guarantee. Then, the Board recognized that, despite the "seemingly categorical" rule in *Travel Centre* that the Government satisfies its legal obligation under the contract once it orders the minimum quantity, the Board "and other tribunals have recognized that the Government can breach an IDIQ contract's implied duty of good faith and fair dealing despite ordering the minimum." Guided by the principle that the implied duty is limited and has to be connected to the bargain contemplated in the contract, the Board next addressed each of the three specific ways TranBen alleged that DOT's reduction in purchasing paper vouchers violated the duty.

First, TranBen alleged that DOT violated the implied duty by not informing TranBen before contract award that DOT planned to start buying debit cards instead of vouchers. However, based on *Scott Timber Co. v. United States*, 692 F.3d 1365 (Fed. Cir. 2012), the Board held that DOT "could not have breached the covenant of good faith and fair dealing by its pre-award conduct because the covenant did not exist until the contract was signed." Characterizing TranBen's allegation regarding pre-award dealings as resembling a breach of the pre-award duty to disclose superior knowledge, the Board could not grant relief on such a basis because TranBen did not assert a superior knowledge ground in its certified claim or complaint.

Second, citing *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), TranBen averred that DOT's misstatements to the IRS eliminated TranBen's ability to fully perform under the contract by reappropriating the benefits that TranBen expected from the contract. However, the Board found that both parties fully performed the contract: TranBen fully performed by filling DOT's orders, and DOT fully performed by ordering at least the minimum quantity and paying for same. To so conclude, the Board reiterated that an IDIQ contract requires the Government to order *only* the stated minimum quantity. Further, distinguishing *Centex Corp.* by noting that the guaranteed minimum is the only consideration provided by the Government in forming an IDIQ contract, the Board reasoned that TranBen could not reasonably expect DOT's orders to exceed that minimum.

Last, citing *Malone v. United States*, 857 F.2d 787 (Fed. Cir. 1988), and *E&E Enterprises Global, Inc. v. United States*, 120 Fed. Cl. 165 (2015), TranBen argued that DOT's refusal to explain to TranBen why it told the IRS that paper vouchers were not readily available amounted to a lack of cooperation. The Board held that those cases were distinguishable because TranBen did not allege that DOT: (1) withheld information necessary for performance, (2) caused TranBen to waste work, or (3) actually interfered with contract work.

III. Holding and Implications

Even recognizing that "TranBen plausibly alleged that, in pursuing its policy goal of distributing transit benefits on debit cards, DOT took a position within the Government for which it lacked a good faith basis, and that this led to a reduction in DOT's orders from" and harmed TranBen, the Board granted the Government's motion to dismiss "because the parties performed the IDIQ contract as written, and DOT did not[:] hinder, delay, accelerate, or fail to cooperate with the contract work; use unfair ordering procedures; abuse discretion reserved to it by the contract terms; target TranBen for

harm; reappropriate bargained-for contract benefits; or mislead TranBen about contract requirements.” In doing so, the Board disconcertingly declared that the duty of good faith and fair dealing protects only “reasonable, *contract-based* expectations” and not against “every dubious action by the contracting agency that impairs the value of the contract.”

Therefore, based on this case’s restrictive view of the implied duty, contractors in the early stages of IDIQ formation should openly discuss with the contracting agency factors that may affect performance in excess of the guaranteed minimums. Then, contractors should attempt to negotiate the implementation of any expectations about those factors as contract terms. More concretely, for example, if contractors wish to be timely informed about agency actions that may negatively impact the agency’s ability to purchase in excess of an IDIQ contract’s guarantee, then contractors should attempt to memorialize such an expectation as an express contract term.

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National Law Review, Volume VII, Number 39

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