

CONQUERING UNCERTAINTY IN AN INDEFINITE
WORLD: A SURVEY OF DISPUTES ARISING
UNDER IDIQ CONTRACTS

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I. INTRODUCTION

The Federal Government likes indefinite delivery/indefinite quantity (IDIQ) contracts. They provide buyers with access to a secure supply of goods and services to meet their recurring needs, while only obligating them to purchase a nominal amount from the contractor. As discussed elsewhere in this single-issue volume, the Government also likes IDIQ contracts because task orders issued thereunder are difficult to protest.

Contractors like IDIQ contracts too—or, whether they like them or not, they at least flock to opportunities to secure them. From the contractor's perspective, IDIQ contracts offer significant sales opportunities, and, perhaps even more importantly, they offer the opportunity to lock out (some, if not all) competitors. If all goes well, the contractor ends up supplying all of the Government's needs for a given good or service.

Of course, as we all know, IDIQ contracts—like any federal contract—do not always go well, and, for a number of reasons, previously enamored contractors can find themselves on the receiving end of a number of headaches. These headaches arise in a variety of circumstances, and many of them are unique to IDIQ contracts—or, at least, aspects of them are unique to IDIQ contracts. Against this background, this article examines the issue of disputes in the context of IDIQ contracts.

After an introductory discussion of IDIQ contracts in Parts II and III, including a basic comparison to requirements contracts, this article examines several dispute issues unique to IDIQ contracts. Part IV discusses disputes involving alleged negligence or bad faith in the Government's preparation of its IDIQ estimates and considers whether the case law provides an avenue for contractor recovery.

Part V focuses on situations where the Government fails to order the guaranteed minimum set forth in the IDIQ contract. Among other things, this section discusses breach of contract, damages, and proof of damages issues.

Parts VI and VII discuss IDIQ terminations for convenience and terminations for default, respectively.

Finally, Part VIII highlights recent case law in the area of disputes alleging that the Government deprived the contractor of the fair opportunity to compete for task orders under an IDIQ contract.

It is fair to say that IDIQ contracts offer unique opportunities, but also pose unique challenges. As with all types of federal contracts, contractors participating in IDIQ contracts will do well to recognize that the IDIQ rules regarding disputes are different from those facing contractors operating under other contracts. They are not more or less burdensome—just different. As noted above, this article will highlight some of those differences in an effort to equip IDIQ contractors—and potential IDIQ contractors—with the tools they need to achieve some semblance of certainty in an uncertain (or, at least, indefinite) world.

II. BASIC FEATURES OF IDIQ CONTRACTS

Government contracts generally fall into three categories: those for a definite quantity, those for an indefinite quantity, and those for requirements.¹ Contracts for a definite quantity provide for the delivery of a fixed quantity of supplies or services.² IDIQ contracts and requirements contracts, in contrast, are intended to allow for purchasing flexibility when the Government cannot accurately estimate the quantity or timing of its requirements in advance.³

Under an IDIQ contract, the Government agrees to order an indefinite quantity of supplies or services—within stated limits—during a fixed period.⁴ The quantity of supplies or services is not specified in the original contract. Rather, the Government has the flexibility to order products or services, via task or delivery orders, as its requirements become known.⁵ Such task or delivery orders are issued under the IDIQ contract and subject to its terms.⁶

Although broad, the ordering flexibility afforded to the Government by IDIQ contracts is not unlimited. An IDIQ contract requires the Government to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services.⁷ If the contract does not specify a guaranteed minimum quantity, there is no consideration, the contract is illusory, and it may not be enforced.⁸

1. *Ace-Fed. Reporters, Inc. v. Barram*, 226 F.3d 1329, 1331 (Fed. Cir. 2000) (quoting *Torncello v. United States*, 681 F.2d 756, 761–62 (Ct. Cl. 1982)).

2. A contract for a definite quantity may be structured as an indefinite-delivery contract. See FAR 16.502(a). Such contracts, known as definite-quantity contracts, provide for the delivery of a definite quantity of supplies or services during a fixed period, with deliveries or performance to be scheduled upon the issuance of task or delivery orders. *Id.* Definite-quantity contracts provide the Government with flexibility with respect to delivery dates but require the Government to determine in advance the quantity of supplies or services to be ordered during the delivery period. FAR 16.502(b)(1).

3. FAR 16.501-2(b)(2); see also *Travel Ctr. v. Barram*, 236 F.3d 1316, 1318–19 (Fed. Cir. 2001) (summarizing basic features of IDIQ and requirements contracts); *J. Cooper & Assocs. v. United States*, 53 Fed. Cl. 8, 16–17 (2002) (summarizing basic features of IDIQ and requirements contracts).

4. FAR 16.504(a); see also *Travel Ctr.*, 236 F.3d at 1319; *Mason v. United States*, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980).

5. FAR 16.504(a), 52.216-22(b) (required to be included in IDIQ contracts pursuant to FAR 16.506(e)).

6. FAR 52.216-18(b) (required to be included in IDIQ contracts pursuant to FAR 16.506(a)). The Ordering clause further provides that, in the event of a conflict between a delivery order or task order and the underlying IDIQ contract, the terms of the contract will control. *Id.*

7. FAR 16.504(a)(1); see also FAR 52.216-22(b) (“The Government shall order at least the quantity of supplies or services designated in the Schedule as the ‘minimum.’”).

8. See, e.g., *J. Cooper & Assocs.*, 53 Fed. Cl. at 17 (“Because the buyer is not obligated to purchase all requirements from the seller, unless the buyer contracts to purchase a minimum quantity, an IDIQ contract is ‘illusory and the contract unenforceable against the seller.’”) (quoting *Mason*, 615 F.2d at 1346 n.5); see also *Coyle’s Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998) (contract lacking minimum quantity term “cannot be construed as a valid indefinite quantity contract”); *Ralph Constr., Inc. v. United States*, 4 Cl. Ct. 727, 733 (1984) (holding that an IDIQ contract that did not require the Government to order any work from the contractor was “unenforceable because of the lack of mutuality of consideration” and “valid only to the extent it was performed”) (citing *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493–94 (1923)).

Further, the minimum quantity must be “more than a nominal quantity.”⁹ Although the Federal Acquisition Regulation (FAR) provides no guidance regarding what constitutes “more than a nominal quantity,” courts have enforced IDIQ contracts with a guaranteed minimum as low as \$100.¹⁰

Once the Government has ordered the guaranteed minimum quantity under an IDIQ contract, it has no further obligation to order any additional supplies or services from the contractor. The U.S. Court of Appeals for the Federal Circuit has explained this point as follows:

[U]nder 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. Moreover, 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.¹¹

Just as an IDIQ contract is required to state a guaranteed minimum quantity, so too it must state the maximum quantity that may be ordered by the Government.¹² The contractor is contractually obligated to fill all orders up to the maximum quantity.¹³ Once the maximum quantity has been reached, however, the Government cannot order, and the contractor is not required to provide, any additional supplies or services under the contract.¹⁴

There are many similarities between an IDIQ contract and a requirements contract. Both afford the Government the flexibility to enter into a binding agreement before the quantity of its requirements is known; both provide for the purchase of an indefinite quantity of supplies or services during a fixed period of time; and both contemplate the issuance of task or delivery orders that incorporate the terms of the underlying contract.¹⁵ On the other hand, there are two important differences.

First, an IDIQ contract does not contemplate an exclusive dealing arrangement.¹⁶ Under a requirements contract, in contrast, the ordering activities

9. FAR 16.504(a)(2).

10. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *see also* *Abatement Contracting Corp. v. United States*, 58 Fed. Cl. 594, 604 (2003) (holding that a contract minimum of \$50,000 was “more than a nominal amount”).

11. *Travel Ctr.*, 236 F.3d at 1319 (holding that a contractor is not entitled to rely on the accuracy of quantity estimates included in an IDIQ contract because the Government is only required to order the guaranteed minimum quantity); *accord* *Transtar Metals, Inc.*, ASBCA No. 55039, 07-1 BCA ¶ 33,482, at 165,959; *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985 at 120,039-41, *aff'd*, 972 F.2d 1353 (Fed. Cir. 1992) (unpublished table decision).

12. FAR 16.504(a)(1).

13. *Id.*; *see also* FAR 52.216-22(b) (“The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the ‘maximum.’”).

14. FAR 16.505(a)(2) (“Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract.”); FAR 52.216-22(b) (requiring contractor to furnish “up to and including” the maximum quantity).

15. *Compare* FAR 16.503(a)(1) (requirements contracts) *with* FAR 16.504(a)(1) (IDIQ contracts).

16. *See, e.g.*, *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) (“An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.”).

listed in the contract must fill all of their actual requirements for the specified supplies or services, during the contract period, by purchasing them from the contractor.¹⁷

Second, an IDIQ contract requires the Government to purchase a guaranteed minimum quantity of supplies or services.¹⁸ Under a requirements contract, however, consideration is satisfied by the Government's agreement to limit its range of future options and to turn only to the contractor for all requirements that may develop.¹⁹ Thus, there is no need for a requirements contract to specify a guaranteed minimum quantity to be enforceable.

III. CONTRACT TYPE—REQUIREMENTS OR IDIQ?

The distinction between whether a contract is a requirements contract or an IDIQ contract is critical to determining the parties' rights. For instance, as discussed elsewhere in this article, a contractor can recover for a negligently prepared estimate in connection with a requirements contract, but the same does not hold true for an IDIQ contract.²⁰ In this regard, a contractor, when bidding on a requirements contract, can rely on the estimate contained therein, whereas a contractor bidding on an IDIQ contract does so at its peril.²¹ Moreover, a contractor holding a requirements contract can prevail when the Government diverts its requirements to other sources, but a contractor holding an IDIQ contract is only entitled to the minimum quantity specified in the contract—and the Government, upon ordering that quantity, is free to order any requirements over and above that amount from any other sources or to perform the work in-house.²² As a result, contractors, disappointed that they only received the minimum amount of work under the contract (and not the estimated quantity), frequently attempt to argue that the contract at issue was actually a requirements contract.

As the case law demonstrates, however, defining exactly the type of contract consummated by the parties can at times be a challenging endeavor. Although several themes percolate from the case law, the Boards of Contract Appeals (Boards) and the courts appear to decide the issues primarily on a

17. See, e.g., FAR 16.503(a); FAR 52.216-21(c) (required to be included in requirements contracts pursuant to FAR 16.506(d)); *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998) (“[A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller.”) (quoting *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992)).

18. FAR 16.504(a)(1); see also FAR 52.216-22(b).

19. See, e.g., *J. Cooper & Assocs. v. United States*, 53 Fed. Cl. 8, 16 (2002) (quoting *Torncello v. United States*, 681 F.2d 756, 761 (Ct. Cl. 1982)).

20. Compare *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481, *aff'd*, *Crown Laundry & Dry Cleaners, Inc. v. United States*, 935 F.2d 281 (Fed. Cir. 1991) (unpublished table decision), *with* *Dot Sys., Inc. v. United States*, 231 Ct. Cl. 765 (1982).

21. See *Crown Laundry & Dry Cleaners*, 90-3 BCA ¶ 22,993, at 115,481.

22. See *Travel Ctr. v. Barram*, 236 F.3d 1316, 1318-19 (Fed. Cir. 2001).

case-by-case basis, examining the fundamental differences between the two types of contracts and employing basic tenets of contract interpretation when reaching their decisions.

The U.S. Court of Federal Claims, in *Rice Lake Contracting*, endorsed the application of the *Torncello* test for determining the nature of the contract executed by the parties.²³ Specifically, as interpreted by the Court of Federal Claims, the *Torncello* test directs the court to look at “(1) the text of the contract itself; and (2) the facts and circumstances which surround the formation of the contract at issue.”²⁴ The court also reiterated that the “primary distinguishing characteristic” between a requirements contract and an IDIQ contract is “whether it is implicit in [the contract] terms, or in the circumstances surrounding the formation of the contract, that the [Government] promised to give all its work authorizations to [the contractor] or whether the [Government] could use other contractors, too.”²⁵

In *Rice Lake Contracting*, the court applied both of the *Torncello* factors.²⁶ The court looked to the plain language of the contract, which contained the standard IDIQ clause.²⁷ The court also considered the events leading up to the execution of the contract. In particular, the court examined amendments that deleted a requirements contract clause and added a specific minimum quantity to the contract.²⁸ The court also explained that in order to give meaning to each contractual provision, specifically the minimum quantity clause, the court had to conclude that the contract was an IDIQ contract.²⁹

The case law has, for the most part, applied either or both of the factors set forth in *Torncello*, with or without citation to that case. For example, in *Crown Laundry*, the “basic issue” before the Board was whether the contract was a requirements contract or an IDIQ contract.³⁰ The contractor argued that the contract was “essentially a requirements contract” “regardless of its label.”³¹ The Board, however, did not “find [any] ambiguity in the clear contractual provisions.”³² It began its analysis by noting that the contract would have been illusory if it had not contained a guaranteed minimum quantity.³³ Moreover, the Board found that the contract contained all “[t]he special

23. *Rice Lake Contracting, Inc. v. United States*, 33 Fed. Cl. 144, 153 (1995).

24. *Id.* at 153 (citing *Torncello v. United States*, 681 F.2d 756, 760–61 (Ct. Cl. 1982)).

25. *Id.* (citing *Torncello*, 681 F.2d at 760–61). In *Torncello*, the court noted that the contract could not be an IDIQ contract because it lacked the “obligatory minimum quantity” provisions. *See id.*

26. *Id.* at 153–54.

27. *Id.* at 153.

28. *Id.*

29. *Id.* (quoting *Mason v. United States*, 222 Ct. Cl. 436, 443 (1980)).

30. *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115, 480, *aff'd*, *Crown Laundry & Dry Cleaners, Inc. v. United States*, 935 F.2d 281 (Fed. Cir. 1991) (unpublished table decision).

31. *Id.* at 115,481.

32. *Id.*

33. *Id.* at 115,480. In other words, the Board was applying the well-settled principle that the guaranteed minimum quantity provides the necessary consideration for an IDIQ contract to be

clauses prescribed” for executing an IDIQ contract.³⁴ Specifically, the contract (1) identified itself as an IDIQ contract, (2) designated a minimum and maximum quantity, (3) indicated that the quantities were “estimates only and are not purchased” by the contract, and (4) informed the contractor that “the Government would order the minimum quantity of laundry services and might order any additionally needed services.”³⁵ Because the contract included these provisions, the Board found the contract to be valid and enforceable as an IDIQ contract.³⁶

The Federal Circuit has likewise relied heavily on the plain language of the parties’ agreement in this context and has elaborated upon what it considers to be the key provisions in each type of contract. In *Travel Centre*, the Federal Circuit noted that the contractor “had entered into a contract with GSA that explicitly stated, within its four corners, that it was an IDIQ contract and that [the contractor] was guaranteed no more than \$100 in revenue.”³⁷ The court also explained that the phrase “a preferred source” did not provide the contractor with any exclusivity, which would have been required for the contract to be interpreted as a requirements contract.³⁸ Thus, the Federal Circuit concluded that the contract at issue was an IDIQ contract.³⁹

Similarly, in *Varilease*, the Federal Circuit concluded that the “plain language of the contract clearly, repeatedly, and unequivocally identifies it as an IDIQ contract rather than a requirements contract.”⁴⁰ The court elaborated that “the intention of the party entering into a contract is determined by an objective reading of the language of the contract,”⁴¹ and it identified what it

valid. *Rowe, Inc., v. Gen. Servs. Admin.*, GSBCA No. 15217, 03-1 BCA ¶ 32,162, at 159,020 (“A contract lacking a minimum quantity term cannot be interpreted as an indefinite quantity contract.”) (citing *Coyle’s Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998)); *S. Def. Sys., Inc.*, ASBCA No. 54045, 07-1 BCA ¶ 33,536, at 166,138 (“We agree that the contract is not a valid IDIQ contract since it lacks a guaranteed minimum amount.”).

34. *Crown Laundry & Dry Cleaners*, 90-3 BCA ¶ 22,993, at 115,481.

35. *Id.* Given its decision, the Board must have tacitly concluded that the \$85,000 minimum ordering amount was more than a nominal amount. See FAR 16.504(a)(2).

36. *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481; see also *RJO Enters., Inc.*, ASBCA No. 50981, 03-1 BCA ¶ 32,137. In that case, the contractor’s “principal argument [was] that notwithstanding the ID/IQ label affixed to the contract in issue, the proper interpretation is that the contract was rightfully intended by the parties to be a requirements-type ordering vehicle.” *Id.* at 158,907. The contractor’s argument, however, likewise did not succeed in light of the numerous IDIQ references in the contractual documents. *Id.* at 158,907–09.

37. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001).

38. *Id.*

39. *Id.* Interestingly, to reach such a holding, the Federal Circuit must have concluded that the \$100 minimum constituted more than a nominal amount. See FAR 16.504(a)(2). Several commentators have questioned the validity of such a conclusion. See Ralph C. Nash & John Cibinic, *PostScript: Estimates in Indefinite Delivery/Indefinite Quantity Contracts*, 15 NASH & CIBINIC REP. ¶ 15, Mar. 2001, at 43 (“There can be no doubt that the \$100 minimum is only a nominal amount.”).

40. *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002).

41. *Id.* Moreover, the court indicated that the contractor should have supported its argument that the contract was a requirements contract through the identification of contractual language that obligated the Government to purchase all of its requirements from that contractor.

believed to be “the essentials” of an IDIQ contract—“an obligation on the part of the government to order at least a minimum quantity . . . and an obligation on the part of the contractor to supply all . . . that the government orders up to a maximum quantity.”⁴²

Although the importance of a contract’s plain language cannot be stressed enough, the absence of a particular clause or provision may not necessarily be dispositive of the nature or type of the contract at issue.⁴³ For instance, in *Rowe, Inc.*, the solicitation and Price Negotiation Memorandum contemplated the award of an IDIQ contract.⁴⁴ In contrast, the contract indicated, in one clause, that it was a “requirements contract” and the Scope of Contract Clause provided that GSA “was obligated to purchase such quantities as may be needed from time to time to fill any requirements determined in accordance with applicable procurement regulations and supply procedures.”⁴⁵ Notably, the contract did not include the standard FAR Requirements clause.⁴⁶ Nevertheless, the Board held that the contract before it was a requirements contract.⁴⁷ The Board noted the absence of a minimum quantity, which in its view precluded the formation of an IDIQ contract, and explained that it “[did] not deem the absence of the standard Requirements clause a death knell to a conclusion that the [contractor’s] contract is a requirements contract.”⁴⁸ Importantly, the Board found that the Scope of Contract clause provided the contractor with the exclusivity necessary to form a requirements contract without the presence of the standard requirements clause.⁴⁹

Conversely, the mere inclusion of a certain clause likewise may not be dispositive. For example, in *Kernersville Builders & Remodeling*, the Board ultimately concluded that the “nature or type of contract” involved was an IDIQ contract.⁵⁰ The Government had characterized the contract as an IDIQ contract.⁵¹ The Board explained, however, that “the fact that the contract may be labeled an ‘indefinite quantity contract’ and contains an indefinite quantity

42. *Id.*

43. *TransCom Sys.*, ASBCA No. 53865, 03-1 BCA ¶ 32,246, at 159,443 (“The absence of the FAR 52.216-21 Requirements and 52.216-22 Indefinite Quantity clauses, and of a designated minimum quantity of supplies or services, from an instrument does not end the inquiry into the type of contract the parties intended.”).

44. *Rowe, Inc., v. Gen. Servs. Admin.*, GSBCA No. 15217, 03-1 BCA ¶ 32,162, at 159,020.

45. *Id.*

46. *Id.*

47. *Id.*; see also FAR 16.506(d), 52.216-21.

48. *Rowe*, 03-1 BCA ¶ 32,162, at 159,020.

49. *Id.* (“More significant is the Scope of Contract clause, which expressly stated that GSA was obligated to purchase the quantity of vehicles needed to fill any requirements . . . Because the contract gave [the contractor] the exclusive right to supply the vehicles within its scope, it was a requirements contract.” (internal quotation omitted)); see also *Centurion Elecs. Serv.*, ASBCA No. 51956, 03-1 BCA ¶ 32,097 at 158,658–59 (finding a requirements contract even though the FAR clause was lacking because the contractor, per the contract, was required to perform all the repairs).

50. *Kernersville Builders & Remodeling*, DOTBCA No. 2906, 96-2 BCA ¶ 28,552, at 142,562, 142,566.

51. *Id.* at 142,563.

provision does not, without more, make it an indefinite quantity contract.”⁵² Rather, the Board stated that “[t]he terms of the contract read reasonably and as a whole must clearly demonstrate that it is an indefinite quantity contract.”⁵³ Only after examining the contract in its entirety did the Board conclude that the contract was indeed an IDIQ contract.⁵⁴

Similarly, in *United Management*, the Board was confronted with a contract where the standard IDIQ clause was included, but the requirements clause was omitted.⁵⁵ The Board, however, stated that it could not decide the issue on summary judgment.⁵⁶ In reaching its conclusion, the Board noted the following:

Also in support of its argument, [the Government] relies upon the fact that the contract incorporated FAR 52.216-22 Indefinite Quantity, and did not incorporate FAR 52.216-21, which would have been found in a requirements contract. This is true, but not dispositive. Neither the presence of FAR 52.216-22 nor the absence of FAR 52.216-21 precludes [the Board] from deciding that the line items state requirements, and not indefinite quantities.⁵⁷

Thus, the Board did not view the presence of the standard IDIQ clause as controlling.⁵⁸

In sum, the above cases demonstrate that, consistent with fundamental principles of contract interpretation, the inquiry as to whether a contract constitutes a requirements contract or an IDIQ contract will first focus on the parties’ obligations and intentions as expressed through the plain language of the parties’ agreement.⁵⁹ However, the fact that either the standard requirements or IDIQ clause is included or omitted from the contract may not be dispositive of the issue.⁶⁰ The Boards and the courts will look to the contract as a whole to ascertain the rights afforded to the parties and will not simply rely on the labels placed on the contract.⁶¹ Moreover, it is important to keep in mind that the Boards and the courts will not absolve a contractor for its failure to comprehend or ascertain the nature of the contract before entering into the agreement. For instance, in *Kernersville Building & Remodeling*, the Board noted that the contractor “was obliged to read the contract before signing it” and “[i]f it misunderstood the terms, it should have made inquiry

52. *Id.*

53. *Id.*

54. *Id.* at 142,566.

55. *United Mgmt. Inc. v. Dep’t of the Treasury*, GSBCA No. 13515-TD, 97-1 BCA ¶ 28,751, at 143,494.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002).

60. *Kernersville Builders & Remodeling*, DOTBCA No. 2906, 96-2 BCA ¶ 28,552, at 142,563; *United Mgmt.*, 97-1 BCA ¶ 28,751, at 143,494.

61. *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481.

prior to bidding for or signing the contract.”⁶² Likewise, in *Marine Design*, the Board stated that it was “aware of no principle that excuses a party from reading a contract he is about to sign.”⁶³ Contractors are advised, therefore, to thoroughly review and understand the contracts they are signing and the terms contained therein.

When the contractual language is on their side, contractors have no reason to look beyond the “four corners” of the document. However, when the contractual language is not entirely clear or there is room for interpretation, contractors frequently attempt to rely on extrinsic evidence in proving their position. For example, in *Marine Design*, the appellant argued that the Government had breached a purported requirements contract by performing some of the work in-house.⁶⁴ The contract at issue contained many of the provisions necessary to establish an IDIQ contract.⁶⁵ The awarded contract, however, stated that it was an “Indefinite-Delivery Indefinite Requirements contract.”⁶⁶ In denying the Government’s summary judgment motion, the Board explained that while the contract contained “all of the appropriate clauses” and “contained no language or clauses that would indicate a contrary intent,” certain government actions, including pre-award discussions, suggested that the Government intended to award a requirements contract.⁶⁷ In other words, the Board was willing to look beyond the four corners of the document to ascertain the type of contract involved.⁶⁸

At the conclusion of its summary judgment opinion, however, the Board left open the possibility that “it could be argued [at the next phase of the proceedings] that the contract speaks unambiguously in this regard.”⁶⁹ And, in its subsequent opinion, the Board seized on this statement.⁷⁰ The Board acknowledged that the contract may have been “mislabelled” but explained that it was not bound by the parties’ label and was required to examine the legal rights afforded under the contract.⁷¹ Although the Board described the

62. *Kernersville Builders & Remodeling*, 96-2 BCA ¶ 28,552, at 142,563, 142,565–66.

63. *Marine Design Techs., Inc.*, ASBCA No. 39391, 94-1 BCA ¶ 26,355, at 131,095.

64. *Marine Design Techs., Inc.*, ASBCA No. 39391, 93-1 BCA ¶ 25,220, at 125,628.

65. *Id.* at 125,628–29. The solicitation (1) stated that the contract was an IDIQ contract, (2) referenced the contract’s IDIQ clause, and (3) identified a minimum and maximum quantity. *Id.* In addition, when the appellant received its notice of award, that notice informed the appellant that the contract was an IDIQ contract. *Id.*

66. *Id.* at 125,629. The contract, however, also retained the original version of the sentence that identified the contract as an IDIQ contract. *See id.*

67. *Id.*; *see also* *TransCom Sys.*, ASBCA No. 53865, 03-1 BCA ¶ 32,246, at 159,443 (“One must review . . . the parties’ course of dealing with respect to purchasing the designated supplies or services exclusively from the contractor.”); *In re Jez Enter.*, ASBCA No. 51851, 00-2 BCA ¶ 30,939, at 152,717 (denying summary judgment where “the parties’ actions and communications during performance [could] demonstrate that the parties created a requirements contract”).

68. *Marine Design Techs.*, 93-1 BCA ¶ 25,220, at 125,629.

69. *Id.*

70. *Marine Design Techs., Inc.*, ASBCA No. 39391, 94-1 BCA ¶ 26,355, at 131,094.

71. *Id.* at 131,094 (citing *Mason v. United States*, 615 F.2d 1343, 1346 (Ct. Cl. 1980)).

Government's actions that "confused" the contract type at issue, it relied on the language of the contract to override those actions.⁷² Specifically, the contract, as executed, contained (1) no requirements clause, (2) an IDIQ clause, and (3) the minimum and maximum quantity provisions.⁷³ Despite the arguments raised by appellant, the Board essentially concluded that the contract clauses "clearly establish the range of [the Government's] obligations."⁷⁴ Therefore, while a contractor may be able to present extrinsic evidence to substantiate its position, the viability of any such evidence will be tempered by the terms of the contract at issue.

If a Board or a court, however, cannot ascertain the type of contract at issue—through either the plain language of the contract or extrinsic evidence—the repercussions from such an outcome are usually borne by the contractor. For instance, in *Ann Riley & Associates*, the contract incorporated the standard IDIQ clause by reference.⁷⁵ However, the contract did not designate a specific minimum quantity to be procured.⁷⁶

The contractor in *Ann Riley & Associates* argued that the contract was illusory.⁷⁷ The Government, on the other hand, argued that the contract was a requirements contract.⁷⁸ The Board, however, initially concluded that, irrespective of what type of contract was actually at issue, it was not a requirements contract.⁷⁹ The Board acknowledged that the Government may have intended to enter into a requirements contract, but "it is neither the past practice nor the present intent that governs; what matters is how the [Government] actually structured *this* procurement."⁸⁰ The Board explained that the "essential ingredient" or the "sine qua non of a requirement contract" was lacking—a statement of exclusivity, in this case a statement that the Government "was obligated to satisfy all of its requirements for stenographic reporting services from this source and no other."⁸¹ The Board also noted the absence of the standard requirements clause in the contract.⁸² Based on the

72. *Id.* at 131,094–95; see also *Greenlee Constr., Inc. v. Gen. Servs. Admin.*, CBCA No. 416, 07-1 BCA ¶ 33,514, at 166,061, available at <http://www.cbca.gsa.gov/2007App/w41603060.txt> (rejecting the contractor's argument that the contract was "implemented as a requirement contract" when an "objective reading of the language of the contract" revealed otherwise).

73. *Marine Design Techs.*, 94-1 BCA ¶ 26,355, at 131,094. Moreover, for the minimum quantity clause to be given any meaning, the contract had to be interpreted as an IDIQ contract. *Id.* (citing *Mason*, 615 F.2d at 1347–50).

74. *Id.*

75. *Ann Riley & Assocs.*, DOTCAB No. 2418, 93-3 BCA ¶ 25,963, at 129,114.

76. *Id.*

77. *Id.* at 129,118.

78. *Id.*

79. *Id.* at 129,119.

80. *Id.* at 129,118 (emphasis added).

81. *Id.*; see also *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998) ("[A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller."); *In re Butler Ford*, AGBCA No. 98-188-1, 01-2 BCA ¶ 31,485, at 155,436 (explaining that the contract "lack[ed] the exclusivity language (and prescribed clause) essential to a requirements contract").

82. *Ann Riley & Assocs.*, DOTCAB No. 2418, 93-3 BCA ¶ 25,963, at 129,118.

foregoing, the Board found that the contract could not have been a requirements contract, as the Government argued.⁸³

However, this did not end the matter. The Board also noted that the contract was not an IDIQ contract. Specifically, the contract lacked the consideration necessary to form an IDIQ contract—an obligation to order a minimum quantity.⁸⁴ The Board, therefore, concluded the parties did not execute an enforceable contract,⁸⁵ such that the contract only “became valid and binding to the extent it was performed.”⁸⁶

The Board in *Butler Ford* reached a similar result.⁸⁷ The contractor asserted that the contract was a requirements contract;⁸⁸ the Government countered that it was “patently ambiguous” and, thus, enforceable only to the extent performed.⁸⁹ While the solicitation stated the agency’s intent to award an IDIQ contract, the contract lacked both the IDIQ and Requirements clauses.⁹⁰ Moreover, the contract specifically contemplated that FAR 52.216-21 (the standard Requirements clause) would be included if the contract were a requirements contract.⁹¹ The Board concluded that the “contract neither contained the exclusivity language necessary to require [the Government] to rent cars exclusively from [the contractor] nor did it contain a minimum quantity term.”⁹² Therefore, the contractor was entitled to “payment only for services actually ordered and provided.”⁹³ There was no argument that the contractor had not been fully compensated under the contract for the cars actually ordered for the period they were used. The Board concluded that no further compensation was due for actual usage and it denied the contractor’s other arguments and the appeal.⁹⁴

Against this backdrop, if a contractor alleges that a contract is a requirements contract, it is not enough that the contractor prove that it is not an IDIQ contract. Similarly, the fact that a contract is not an IDIQ contract does not establish that it is a requirements contract. The case law suggests that the contractor will be well-served by affirmatively establishing that the contract is a requirements contract. As the Federal Circuit has indicated, it will not “save an otherwise unenforceable indefinite quantity contract by interpreting it as an implied requirements contract.”⁹⁵ Such cases further underscore the

83. *Id.* at 129,119.

84. *Id.* at 129,120.

85. *Id.*

86. *Id.* at 129,121 (quoting *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 494 (1923)).

87. *In re Butler Ford*, AGBCA No. 98-188-1, 01-2 BCA ¶ 31,485, at 155,438.

88. *Id.* at 155,435. The contractor relied on certain written statements made by the CO and “out of context” testimony. *Id.* The Board, however, noted that the statements “were post-award and thus [the contractor] cannot claim to have relied upon them.” *Id.* at 155,436.

89. *Id.* at 155,435.

90. *Id.* at 155,436.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Coyle’s Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1304 (Fed. Cir. 1998) (citing *Torncello v.*

importance of properly designating the contract type at issue. Otherwise, to be binding only to the “extent performed,” as the Board found in *Ann Riley & Associates* and *Butler Ford*, is another way of saying that the contractor is not entitled to recover above and beyond what it has already received.⁹⁶

In sum, when establishing an IDIQ contract, the case law emphasizes the importance of including at least (1) the standard IDIQ clauses, FAR 16.504, 16.506(e), and 52.216-22 (or statements substantially similar to those contained therein), and (2) a designated minimum quantity, which is more than a nominal amount, and a maximum quantity. Conversely, the case law suggests that a requirements contract should contain (1) the standard requirements clauses, FAR 16.503, 16.506(d)(1), and 52.216-21 (or statements substantially similar to those contained therein), and (2) a statement that the Government will purchase all of its requirements under the contract from the contractor (i.e., a statement of exclusivity). The contractor also should attempt to minimize any overlap between the two types of contracts in the same contract document. The Board has made it clear that IDIQ and requirements clauses “are mutually exclusive and contradictory [and] a contract cannot meaningfully contain both clauses with both having simultaneous effect.”⁹⁷

The contractor, therefore, should be intimately familiar with the exact nature of the contract being procured. If a dispute should arise, a Board or a court will apply basic principles of contract interpretation and will look first to the plain language of the agreement.⁹⁸ Although a Board or a court may, at times, be receptive to extrinsic evidence, the contractor’s strongest arguments rest with the plain language of the agreement.⁹⁹ Last, if a Board or a court cannot ascertain the type of contract at issue, it might find the agreement unenforceable and only “binding to the extent it was performed.”¹⁰⁰ Accordingly, a contractor should ensure that the contract clearly defines whether it is an IDIQ or requirements type contract.

IV. NEGLIGENCE/BAD FAITH IN IDIQ ESTIMATE PREPARATION

Among the more significant differences between IDIQ contracts and requirements contracts are the standard of review and recovery associated with

United States, 681 F.2d 756, 771 (Ct. Cl. 1982)); *see also* J. Cooper & Assocs., Inc. v. United States, 53 Fed. Cl. 8, 19 (2002).

96. *Ann Riley & Assocs.*, DOTCAB No. 2418, 93-3 BCA ¶ 25,963, at 129,121; *In re Butler Ford*, AGBCA No. 98-188-1, 01-2 BCA ¶ 31,485, at 155,436; *see also* Konitz Contracting, Inc., ASBCA No. 52113, 00-2 BCA ¶ 31,121, at 153,714, 153,717 (finding a contract enforceable only to the extent performed when it included FAR 52.216-22 but omitted a maximum and minimum quantity, did not incorporate FAR 52.216-21, and lacked any language indicating exclusivity).

97. *Ann Riley*, 93-3 BCA ¶ 25,963, at 129,119.

98. *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481; *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002).

99. *See* *Marine Design Technologies*, ASBCA No. 39391, 94-1 BCA ¶ 26,355, at 131,094.

100. *Ann Riley*, 93-3 BCA ¶ 25,963, at 129,121; *In re Butler Ford*, 01-2 BCA ¶ 31,485, at 155,436.

a negligently prepared government estimate. When a contractor enters into a requirements contract, where the Government agrees to purchase all of its requirements from that contractor, it can prevail on a breach of contract claim by demonstrating that the Government negligently prepared its estimate.¹⁰¹ The rationale behind this rule is that in the requirements contract context, the contractor will almost invariably rely on the estimated quantities in preparing its bid because the estimate is the only meaningful indication of the Government's intended purchases.¹⁰²

A different standard, however, has been applied to IDIQ contract estimates. Specifically, it is well-established that a contractor may not recover for a negligently prepared government estimate in connection with an IDIQ contract.¹⁰³ The rationale here is that the contractor does not have a reasonable expectation that the Government will order more than the minimum quantity and, therefore, whether the estimate was negligently prepared is not of legal significance.¹⁰⁴ Beyond that, however, the case law building on this proposition has reached, at times, what appear to be divergent conclusions. Several cases addressing the issue suggest the accuracy of the Government's estimate is not material, provided that the Government has met its minimum ordering obligations.¹⁰⁵ Other cases reject the contractor's allegations of negligence or lack of due care but separately and independently analyze whether an allegation of bad faith has been raised or whether the factual allegations presented could even constitute bad faith or conduct of the "more egregious" type.¹⁰⁶ In other words, the case law has consistently grappled with whether a contractor can recover for a government estimate prepared in bad faith.

The conundrum was further complicated when the Federal Circuit rendered its decision in *Travel Centre*.¹⁰⁷ In addressing the contractor's argument, the court held that "[r]egardless of the accuracy of the estimates delineated in the solicitation . . . [the contractor] could not have had a reasonable expectation

101. *Crown Laundry & Dry Cleaners*, 90-3 BCA ¶ 22,993, at 115,480 (explaining that in the requirements contract context, "a contractor may recover where the Government's quantity estimates, upon which the contractor properly based its bid, are erroneous and negligently prepared"); see also *Travel Ctr.*, 236 F.3d at 1318-19; Ralph C. Nash & John Cibinic, *Requirements Contracts: Remedies for Faulty Estimates*, 15 NASH & CIBINIC REP. ¶ 37, July 2001, at 105.

102. *Womack v. United States*, 389 F.2d 793, 801 (Ct. Cl. 1968).

103. *Dot Sys. Inc. v. United States*, 231 Ct. Cl. 765, 769 (1982) (stating that, with respect to IDIQ contracts, "the Government cannot be held to the negligence standard for requirements contracts"); *Hermes Consol., Inc.*, ASBCA No. 52308, 02-1 BCA ¶ 31,767, at 156,899.

104. *Deterline Corp.*, ASBCA No. 33090, 88-3 BCA ¶ 21,132, at 106,688; *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,040; *Tracor Tech. Res., Inc.*, ASBCA No. 44759, 93-2 BCA ¶ 25,616, at 127,515-16; *Transtar Metals, Inc.*, ASBCA No. 55039, 07-1 BCA ¶ 33,482, at 165,959.

105. *E.g.*, *C.F.S. Air Cargo*, 91-2 BCA ¶ 23,985, at 120,039; *DynCorp.*, ASBCA No. 38862, 91-2 BCA ¶ 24,044, at 120,350, *aff'd mem.*, *DynCorp v. Garrett*, 972 F.2d 1353 (Fed. Cir. 1992); *Transtar Metals*, 07-1 BCA ¶ 33,482, at 165,959.

106. *Schweiger Constr. Co. v. United States*, 49 Fed. Cl. 188, 197-202 (2001); *White Sands Constr., Inc.*, ASBCA No. 51875, 02-2 BCA ¶ 31,858, at 157,438-39; *Tracor Tech.*, 93-2 BCA ¶ 25,616, at 127,515.

107. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001).

that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract."¹⁰⁸ This broadly worded statement has left the procurement community wondering whether a contractor has any recourse in the IDIQ context in connection with the Government's estimated ordering quantities.¹⁰⁹ *Schweiger Construction*, a case decided a day after *Travel Centre* (but that did not mention that case), and subsequent case law are indicative of the uncertainty surrounding the proper construction of the Federal Circuit's statements, at least as they apply to allegations of bad faith.¹¹⁰

In this regard, the Court of Federal Claims in *Schweiger Construction* concluded that a properly substantiated allegation of bad faith was actionable.¹¹¹ Conversely, in *Abatement Contracting*, that court declined to rely on *Schweiger Construction* because it did not take *Travel Centre* into account. *Abatement Contracting* held that *Travel Centre* precluded the contractor's bad faith argument as a matter of law.¹¹² In contrast, in *White Sands Construction*, the ASBCA concluded that the contractor's allegations of negligence and lack of due care were foreclosed by *Travel Centre*, but the Board separately analyzed the contractor's allegations of bad faith.¹¹³ In any event, it appears that a contractor seeking to recover because of alleged bad faith improprieties associated with the Government's estimate in an IDIQ contract will encounter a fragmented landscape. To place the issue in complete context, however, an examination of the pertinent case law is warranted.

In *Dot Systems, Inc.*, one of the seminal cases in this area, the contractor was awarded an IDIQ contract for overflow typing services.¹¹⁴ The contract guaranteed a minimum dollar amount of work and included estimated dollar values of services to be ordered in the base and option periods.¹¹⁵ In fact, the work the Government ordered never exceeded 10 percent of its estimates.¹¹⁶ The contractor claimed an equitable adjustment or contract breach due to the Government's alleged estimating errors.¹¹⁷ The court phrased the question presented as follows: "[W]hether as a matter of law plaintiff is precluded from recovering for errors in [the Government's] estimates in an indefinite quantity contract."¹¹⁸

In reaching its conclusion, the court emphasized the "allocation of risk" between the parties in an IDIQ contract.¹¹⁹ The court explained: "The general

108. *Id.*

109. Compare *Schweiger Constr. Co.*, 49 Fed. Cl. at 188, and *White Sands Constr.*, 02-2 BCA ¶ 31,858 at 157,438, with *Abatement Contracting Corp. v. United States*, 58 Fed. Cl. 594 (2003), and *Lance Logging Co.*, AGBCA No. 98-137-1, 01-1 BCA ¶ 31,356, at 154,849.

110. *Schweiger Constr. Co.*, 49 Fed. Cl. at 191-202.

111. *Id.* at 193-202.

112. *Abatement Contracting Co.*, 58 Fed. Cl. at 613.

113. *White Sands Const. Inc.*, 02-2 BCA ¶ 31,858, at 157,438-39.

114. *Dot Sys., Inc. v. United States*, 231 Ct. Cl. 765, 765-66 (1982).

115. *Id.* at 766.

116. *Id.*

117. *Id.*

118. *Id.* at 768.

119. *Id.*

rule is clear: a contractor cannot sign a contract which allocates the risk to it and then 4 years later come to this court, having lost its gamble, and insist that the risk be placed on the Government.¹²⁰ The court focused on the contract's minimum and maximum quantity provisions, the fact that the contract was unambiguously an IDIQ contract, and the language in the contract stating that the estimated quantities were not guaranteed.¹²¹ Based on the foregoing, the court concluded that the contractor could not have had a reasonable expectation that it would receive any work above the minimum quantity set forth in the contract.¹²²

The court then examined the "crucial" distinction between IDIQ and requirements contracts and stated that "the contractor here cannot expect the kind of accuracy in estimation that it can in a requirements or fixed price contract."¹²³ The court continued: "[b]y the same token, the Government cannot be held to the negligence standard for requirements contracts..."¹²⁴ After citing FAR provisions applicable to maximum quantities, the court concluded that there was no breach because "whatever their defects the estimates prepared by [the Government] met [the] standard."¹²⁵ Although the court granted the Government's motion for summary judgment, the exact standard employed by the court in reaching its conclusion is not evident from the opinion.¹²⁶ However, it is clear that the court was not applying a negligence standard to the Government's estimate.¹²⁷

In granting the Government's motion for summary judgment in *Deterline Corporation*, the Board denied the contractor's claims under an indefinite quantity contract that either the Government's estimated value of the contract was "grossly erroneous" or it had wrongfully diverted work or had partially terminated the contract for convenience.¹²⁸ The contract to provide services in support of the Army Training Extension Course¹²⁹ designated a minimum and a maximum dollar amount. While the Government's orders exceeded the minimum, they did not approach the maximum.¹³⁰ The Board observed that the contractor had not raised any facts relating to negligent preparation of any estimate;¹³¹ quantity estimates in the solicitation were for evaluation purposes

120. *Id.*

121. *Id.* at 768–69.

122. *Id.* at 769.

123. *Id.*

124. *Id.* (citing *Womack v. United States*, 182 Ct. Cl. 399, 412–13 (1968)).

125. *Id.* at 769–70.

126. See *Schweiger Constr. Co., Inc. v. United States*, 49 Fed. Cl. 188, 197 (2001) ("It is clear that the court was not applying a negligence standard, but it is unclear whether the standard it invoked was one of gross negligence or bad faith.")

127. *Id.* at 197; see also Ralph C. Nash & John Cibinic, *Estimates in Indefinite Delivery/Indefinite Quantity Contracts: Are They of Any Substance?* 13 NASH & CIBINIC REP. ¶ 63, Dec. 1999 (explaining that *Dot Systems* "does not state that the Government has no liability for a faulty estimate in an IDIQ contract or that it is only liable for a bad faith estimate").

128. *Deterline Corp.*, ASBCA No. 33090, 88-3 BCA ¶ 21,132, at 106,688.

129. *Id.* at 106,686.

130. *Id.* at 106,686, 106,688.

131. *Id.* at 106,688. The contractor also argued that the Government's prebid statements and actions were "effectively calculated to cause the contractor to believe that four times the minimum

only; they had in fact been exceeded; and (as the court had discussed in *Dot Systems*) the contractor bore the risk that it would be limited to the minimum contract amount.¹³² The Board noted that the contractor's interpretation would vitiate the Government's obligation under the contract to order only a specific minimum dollar amount.¹³³ Because the contractor had not presented facts relating to negligent estimates, the Board was not required to enunciate any particular standard for resolving such an issue.¹³⁴

Similarly, the limits of the Government's obligations with respect to estimates in the IDIQ context cannot be ascertained from *Crown Laundry*.¹³⁵ In that case, the contractor entered into an IDIQ contract to provide laundry services to the Navy.¹³⁶ The contract included the standard minimum and maximum quantities clause as well as a "detailed estimate," which the contractor relied on in preparing its bid.¹³⁷ Because the government orders did not comport with the estimated quantity in the contract, the contractor argued that the Government negligently prepared its estimate or did not exercise due care in doing so.¹³⁸ After determining that the contract at issue was an IDIQ contract, the Board dispelled the contractor's argument by noting that "the Government was obligated only to order the minimum quantity stated, and that it more than met that obligation."¹³⁹ Moreover, the Board stated that it "does not examine the reasonableness of the estimates in [IDIQ] contracts."¹⁴⁰ Whether the Board intended to preclude any review of government estimates as a matter of law cannot be discerned from *Crown Laundry*, despite the breadth of the Board's concluding statement.¹⁴¹ The Board only had before it the contractor's argument with respect to negligence and lack of due care and was not presented with an issue of bad faith.¹⁴²

In *C.F.S. Air Cargo*, however, the Board gave an indication that an allegation of bad faith would not be handled in the same manner, or grouped together with a claim that the Government's estimate was negligently prepared.¹⁴³ In that case, the contractor entered into an IDIQ contract to provide

amount would be ordered." *Id.* at 106,687. The Board rejected this argument, however, because its acceptance would cause the minimum quantity clause to be ignored and because the contractor did not provide any evidence to disregard the parol evidence rule. *Id.* at 106,688.

132. *Id.* at 106,689.

133. *Id.*

134. See *Dot Sys., Inc. v. United States*, 231 Ct. Cl. 765, 769 (1982).

135. *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481.

136. *Id.* at 115,480.

137. *Id.*

138. *Id.* at 115,481.

139. The contractor also argued that the negligence standard should be applied irrespective of how the contract is labeled—a proposition that the Board did not accept. *Id.* The contractor also assumed that the maximum quantity would be ordered—a proposition that, according to the Board, was in direct conflict with the express language of the IDIQ contract. *Id.*

140. *Id.*

141. See *id.*; see also *Schweiger Constr. Co. v. United States*, 49 Fed. Cl. 188, 196–98 (2001).

142. *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481.

143. *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,040.

a variety of materiel support services to the Navy.¹⁴⁴ The contract contained the standard minimum and maximum quantity clauses and cautioned offerors that the quantities were estimates only and were not guarantees of services to be ordered.¹⁴⁵ The contractor, however, relied on the estimated quantities in drafting its proposal and the Government knew it was doing so.¹⁴⁶ The Navy's orders during the period of performance were "substantially below" the estimated quantities. The contractor filed a claim with the contracting officer, which was denied.¹⁴⁷ Before the Board, the contractor argued that the Navy's estimate was "grossly overstated" and "negligently prepared."¹⁴⁸

The contractor, as had the appellant in *Crown Laundry*, attempted unsuccessfully to transplant standards applicable to estimates in requirements contracts into the IDIQ context.¹⁴⁹ The Board reiterated its statements in *Crown Laundry* that it does not "examine the reasonableness of estimates in [IDIQ] contracts" and added that "whether the estimates were negligently prepared or not is simply not material in light of the Government's legal obligation to order only the guaranteed minimum."¹⁵⁰ The Board explicitly "emphasized," however, that "there [was] no allegation of bad faith."¹⁵¹ In *C.F.S. Air Cargo*, the Board recognized the distinction between raising a negligence argument and an argument with respect to bad faith.¹⁵² It appears that all that the Board was saying here was that (1) an allegation of negligence—not an allegation of bad faith—was "not material" to its inquiry and (2) it would not review the reasonableness of the estimate when only an allegation of negligence was presented.¹⁵³ By explicitly stating that an allegation of bad faith was lacking, the Board tacitly acknowledged that such an argument could not be grouped together with its previous conclusions.¹⁵⁴

In *DynCorp*, the Board, in essence, adopted its decision in *C.F.S. Air Cargo*, which had addressed the same topics and had been issued a day earlier.¹⁵⁵ The Board quickly rejected the contractor's argument with respect to negligent preparation of estimates on the same grounds as set forth in *C.F.S. Air*

144. *Id.* at 120,036.

145. *Id.* at 120,037.

146. *Id.* at 120,039.

147. *Id.* at 120,038.

148. *Id.*

149. *Id.* at 120,038–39.

150. The Board also relied on the language in the contract stating that the estimates were not guaranteed and it noted that it was unwilling to shift the risk the contractor accepted when entering into an IDIQ contract. *Id.* at 120,040.

151. *Id.*

152. *See id.*

153. *See id.*; see also *Schweiger Constr. Co. v. United States*, 49 Fed. Cl. 188, 197 (2001) ("[A]lthough it is true that courts will not examine the reasonableness of such estimates in the face of allegations of negligence, in the IDIQ context courts will examine the estimates in instances of more egregious governmental conduct.").

154. *See C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,040.

155. *DynCorp*, ASBCA No. 38862, 91-2 BCA ¶ 24,044, at 120,350, *aff'd mem.*, *DynCorp v. Garrett*, 972 F.2d 1353 (Fed. Cir. 1992).

Cargo.¹⁵⁶ As was the case with the contractor in *C.F.S. Air Cargo*, the contractor in *DynCorp* did not specifically allege “bad faith,” but did ultimately argue that “such conduct certainly falls within DynCorp’s allegation that the estimates were not realistic or based on the most current information available.”¹⁵⁷ The Board, however, refused to accept the contractor’s argument because an allegation of bad faith was a “serious matter” that “cannot be derived from general allegations.”¹⁵⁸ Importantly, however, the Board considered the contractor’s allegation of bad faith in the context of IDIQ estimates and did not summarily dismiss the argument, which it would have done if such an argument were precluded as a matter of law.¹⁵⁹

Likewise, in *Tracor Technology Resources*, the Board reviewed an allegation of government bad faith in its estimate preparation.¹⁶⁰ The contractor entered into an IDIQ contract for the collection and transportation of specimens from collection laboratories to a designated drug laboratory.¹⁶¹ The Government ordered “substantially less” than the estimated quantity and the contractor filed a claim, which was denied.¹⁶² Before the Board, the contractor argued that the Government acted in bad faith by failing to disclose a district court injunction that would have significantly reduced the contractor’s work obligations under the contract.¹⁶³ Moreover, the contractor argued that the Government’s amended SOW contained “false and fraudulent” statements.¹⁶⁴

The Board, however, concluded that the contractor had not provided any evidence of bad faith, but rather only advanced general allegations.¹⁶⁵ In this regard, the Board explained that the contractor had failed to rebut the presumption of good faith applicable to government conduct.¹⁶⁶ Notably, only after rejecting the contractor’s bad faith argument did the Board rely on the fact that the Government ordered the minimum quantity to defeat the contractor’s negligence claim and to conclude that the contractor assumed the risk of a negligent estimate.¹⁶⁷ What is important in *Tracor Technology* is the manner in which the Board proceeded with its analysis—in fact, similar to that in *DynCorp*.¹⁶⁸ The Board addressed the issue of bad faith separately from the contractor’s negligence argument.¹⁶⁹ Moreover, while the Board stated

156. *Id.*

157. *Id.*

158. *Id.*

159. *See id.*

160. *Tracor Tech. Res., Inc.*, ASBCA No. 44759, 93-2 BCA ¶ 25,616, at 127,515.

161. *Id.* at 127,514.

162. *Id.*

163. *Id.* at 127,514–15.

164. *Id.* at 127,515 (relying on *Phillips National*, the contractor argued that the estimates amounted to nothing more than “unrealistic guesses”) (citing *Phillips Nat’l Inc.*, ASBCA No. 42762, 93-1 BCA ¶ 25,271, at 125,865).

165. *Id.*

166. *Id.* (citing *Kalvar Corp. v. United States*, 543 F.2d 1298 (1976)).

167. *Id.*

168. *Id.*; *see also DynCorp*, ASBCA No. 38862, 91-2 BCA ¶ 24,044, at 120,350.

169. *Tracor Tech. Res., Inc.*, ASBCA No. 44759, 93-2 BCA ¶ 25,616, at 127,515–16.

that the contractor assumed the risk of a negligent estimate, it certainly did not state that the contractor assumed the risk of an estimate prepared in bad faith.¹⁷⁰ In any event, it is important to keep in mind here that the Board reviewed the contractor's allegation of bad faith even though the Government ordered the minimum quantity set forth in the contract.¹⁷¹

Up until this point, the Boards and the Court of Federal Claims appeared to be willing to consider allegations of bad faith in connection with IDIQ estimates.¹⁷² However, the Federal Circuit's decision in *Travel Centre* placed those decisions into question. In *Travel Centre*, which was the subject of an intriguing procedural history where one of the judges in the majority opinion on liability would reverse course in the decision on damages, the contractor argued that the Government breached its contract for travel management services by not disclosing to it the fact that two of the agencies would not be utilizing the services (or approximately half of the work would no longer be needed).¹⁷³ The IDIQ contract contained the standard minimum and maximum clauses and an estimate of the anticipated volume of business.¹⁷⁴ While the Government satisfied the minimum ordering requirement, it did not come near the estimate, which formed the crux of the contractor's complaint.¹⁷⁵

After describing several of the fundamental differences between requirements contracts and IDIQ contracts, the Federal Circuit stated 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."¹⁷⁶ The Federal Circuit continued that "[r]egardless of the accuracy of the estimates delineated in the solicitation... [the contractor] could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract."¹⁷⁷ Stated another way, the Government

170. *Id.*; see also *Travel Ctr. v. Gen. Servs. Admin.*, GSBCA No. 14057, 99-2 BCA ¶ 30,521, at 150,714 ("There is no type of contract, including one for an indefinite quantity, in which the contractor assumes the risk that the Government has intentionally misled it."), *rev'd*, *Travel Ctr. v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001).

171. *Tracor Tech.*, 93-2 BCA ¶ 25,616, at 127,515.

172. *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,040; *DynCorp*, 91-2 BCA ¶ 24,044, at 120,350, *aff'd mem.*, *DynCorp v. Garrett*, 972 F.2d 1353 (Fed. Cir. 1992); *Tracor Tech.*, 93-2 BCA ¶ 25,616, at 127,515.

173. *Travel Ctr.*, 236 F.3d at 1318. Compare *Travel Ctr.*, 98-1 BCA ¶ 29,422, with *Travel Ctr. v. Gen. Servs. Admin.*, GSBCA No. 14057, 99-2 BCA ¶ 30,521.

174. *Travel Ctr.*, 236 F.3d at 1317. In addition, there apparently was an issue with respect to the type of contract involved (IDIQ or requirements). See *id.* at 1318. The Federal Circuit concluded that the contract was indeed an IDIQ contract. *Id.* It explained that the contract itself stated that it was an IDIQ contract, the contract contained a guaranteed minimum, the contractor understood it was not the exclusive source, and the contract only referred to the contractor as "a preferred source"—not "the exclusive source" or "the preferred source." *Id.*

175. *Id.* at 1317-20.

176. *Id.* at 1319.

177. *Id.* The Federal Circuit also indicated that the contractual language prevented the contractor from having any reasonable expectation that it would receive any work in excess of the minimum quantity. *Id.* at 1319 n.1.

satisfied its legal obligations under the IDIQ contract because it had ordered the minimum quantities.¹⁷⁸ As a result, the Federal Circuit concluded that the Government's "less than ideal contracting tactics fail to constitute a breach."¹⁷⁹

Some commentators have concluded that the Federal Circuit in *Travel Centre* simply "side-stepped" the bad faith issue¹⁸⁰—which would explain why the Board and the Court of Federal Claims have reached divergent decisions as they grapple with interpreting that case. In fact, it appears that the parties before the Board did not disagree that recovery could be available upon a proper showing of "bad faith."¹⁸¹ Moreover, the dissenting judge in the opinion on damages reiterated that "the cases recognize the possibility that some breach remedy might be available if faulty estimates are provided in bad faith..."¹⁸² The judges, however, did ultimately disagree about whether the underlying factual conduct had met that standard.¹⁸³ Despite being aware of the issue, it appears that the Federal Circuit nevertheless was able to avoid it by simply characterizing the Government's conduct as "less than ideal contracting tactics."¹⁸⁴ Allegations of bad faith are a "serious matter" and it is doubtful that the Federal Circuit would simply refer to bad faith conduct as "less than ideal."¹⁸⁵ By leaving the Government's conduct amorphous, the Federal Circuit created the following dichotomy: either the case was simply another addition to the long series of cases holding that contractors cannot recover for negligently prepared estimates or it reversed a line of cases examining bad faith allegations and provided the Government with virtually complete immunity in connection with its estimate preparation in IDIQ contracts.

Against this backdrop, it is hardly surprising that the Boards and the Court of Federal Claims have not been able to reach a consensus as to whether allegations of government bad faith in estimate preparation are actionable. For instance, in *Schweiger Construction*, a case decided one day after *Travel Centre* (but that did not mention the Federal Circuit's opinion), the Court of Federal Claims concluded that it would review an allegation of bad faith in connection with the Government's preparation of an IDIQ estimate.¹⁸⁶ The contractor had entered into an IDIQ contract to provide construction services in certain GSA-owned or -leased buildings.¹⁸⁷ The contract stated that the

178. *Id.* at 1319.

179. *Id.*

180. Nash & Cibinic, *supra* note 39, at 44.

181. Travel Ctr. v. Gen. Servs. Admin., GSBCA No. 14057, 98-1 BCA ¶ 29,533, at 146,430 ("GSA argues that, although the agency was negligent in preparing the estimate, it was not guilty of the 'bad faith' necessary to constitute a breach of contract.")

182. Travel Ctr. v. Gen. Servs. Admin., GSBCA No. 14057, 99-2 BCA ¶ 30,521, at 150,726 (Hyatt, J., dissenting).

183. *See id.*

184. Travel Ctr. v. Barram, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *see also* Nash & Cibinic, *supra* note 39, at 44.

185. DynCorp, ASBCA No. 38862, 91-2 BCA ¶ 24,044, at 120,350.

186. Schweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 198-202 (2001).

187. *Id.* at 190.

Government estimated less than 10 percent of the work would be performed outside of normal working hours.¹⁸⁸ According to the contractor, however, GSA was aware that it would require the contractor to perform a Social Security Administration remodeling project, which would require 100 percent of the work to be conducted outside of normal working hours.¹⁸⁹ Before the court, the dispute centered on several well-worn arguments, with the contractor arguing primarily that the estimate was “grossly inaccurate” and that the Government improperly failed to inform it of material changes to the estimates, and the Government arguing that it had satisfied its obligations by ordering the minimum quantities.¹⁹⁰

The Court of Federal Claims rejected the Government’s argument that it could not review the allegations pertaining to the accuracy of the estimate simply because the Government had met its ordering obligations.¹⁹¹ The court stated that the case law demonstrated “that courts *will* evaluate the accuracy of estimates in the face of more egregious conduct by the government, rising to the level of ‘bad faith.’”¹⁹² The court concluded that the contractor would be required to meet a standard equivalent to “well-nigh irrefragable proof,” including demonstrating “a specific intent to injure,” or action “motivated alone by malice,”¹⁹³ to overcome the presumption that the Government deals in good faith.¹⁹⁴

Although the court in *Schweiger Construction* undertook an extensive examination of the case law in this area to conclude that allegations of bad faith are reviewable,¹⁹⁵ its holding apparently stands on questionable grounds because it did not have the benefit of the Federal Circuit’s opinion in *Travel Centre* when reaching its conclusion.¹⁹⁶ Several cases decided after *Travel Centre* have taken an expansive view of that case and the Court of Federal Claims has declined subsequently to rely on *Schweiger Construction*. In essence, these decisions have denied any sort of meaningful review in connection with IDIQ estimates.

First, in *Abatement Contracting Corporation*, the contractor alleged that the Government failed to accurately estimate the amount of work required under

188. *Id.*

189. *Id.* at 191.

190. *Id.* at 193.

191. *Id.* at 195 (explaining “the question of the government’s obligation to order the stated minimum quantity (a fact undisputed in this case) is entirely distinguishable from whether a plaintiff may maintain a cause of action for inaccurately prepared estimates”).

192. *Id.* at 197 (emphasis in original).

193. *Id.* at 203.

194. *Id.* (noting the contractor did not specifically allege bad faith, though it “presented a bare foundation for a claim of bad faith” and “contain[ed] allegations suggestive of bad faith”).

195. In stark contrast, the Federal Circuit in *Travel Centre* did not undertake any sort of in-depth analysis with respect to such case law. See *Travel Ctr. v. Barram*, 236 F.3d 1316, 1316–20 (Fed. Cir. 2001). This may serve as yet another indication that the Federal Circuit did not intend to overrule those cases and that its decision did not implicate those cases (*i.e.*, the Federal Circuit simply did not view the conduct as rising to the level of bad faith).

196. *Abatement Contracting Corp. v. United States*, 58 Fed. Cl. 594, 613 (2003).

the contract.¹⁹⁷ The contractor, citing *Schweiger Construction*, argued that the court should review the Government's conduct to determine if it were sufficiently egregious to be actionable.¹⁹⁸ The court, however, concluded that it was bound by the Federal Circuit's decision in *Travel Centre*, which "compel[led] the rejection of plaintiff's claims concerning the Navy's lack of an accurate estimate..."¹⁹⁹ In other words, the Court of Federal Claims concluded that *Travel Centre* precluded review even in the face of allegations of "egregious conduct, beyond mere negligence, and rising to the level of bad faith."²⁰⁰

Second, in *Transtar Metals*, the contractor argued that the Government had prepared its estimate negligently and that there was a "substantial disparity" between the actual purchases and the Government's estimate.²⁰¹ The contractor asserted that the Government utilized "affirmative misstatements in the solicitation," the Government "[failed] to use reasonable care," and its estimate was "faulty, inaccurate and negligently prepared."²⁰² The Board, however, found the case before it dealt with a "substantially similar issue [that] was addressed by the Court in *Travel Centre*."²⁰³ The Board reasoned that the contractor could not recover because the Government met its minimum purchasing obligations under the contract.²⁰⁴ Specifically, the Board stated that "even assuming, *arguendo*, that the government possessed superior knowledge and negligently represented and misstated the annual quantity estimates...this is not material because the government met its purchase obligations under the contract."²⁰⁵ Although the Board did not use the term "bad faith," which could leave the door perhaps slightly cracked for an argument that it did not consider that particular issue, it is apparent, based upon *Abatement Contracting* and *Transtar Metals*, that contractors, at a minimum, will encounter an expansive interpretation of *Travel Centre* when seeking to recover in connection with an inaccurate government estimate.

Conversely, the Board in *White Sands Construction*, a case decided after *Travel Centre*, independently examined whether the Government exhibited bad faith in compiling its estimate.²⁰⁶ The contractor entered into an IDIQ contract and, while the Government ordered the minimum quantity, it failed to reach the estimated quantity.²⁰⁷ The contractor argued that "issues of negligence,

197. *Id.* at 611.

198. *Id.* at 612.

199. *Id.* at 613. In the alternative, the court also held that while the agency's actions may have been negligent, they did not rise to the level of bad faith. *Id.*

200. *Id.* (internal quotations omitted); see also *Lance Logging Co.*, AGBCA No. 98-137-1, 01-1 BCA ¶ 31,356, at 154,849 (relying on *Travel Centre* to conclude that the contractor's bad faith allegation must fail because the contractor could not have had a reasonable expectation that it would receive more than the minimum quantity).

201. *Transtar Metals, Inc.*, ASBCA No. 55039, 07-1 BCA ¶ 33,482, at 165,958.

202. *Id.* at 165,958-59.

203. *Id.* at 165,959.

204. *Id.*

205. *Id.*

206. *White Sands Constr.*, ASBCA No. 51875, 02-2 BCA ¶ 31,858, at 157,438-39.

207. *Id.* at 157,435, 157,437.

bad faith and lack of due care potentially give rise to liability for damages on the part of the government.²⁰⁸ The Board did initially note, based on *Travel Centre*, that the contractor could have no reasonable expectation that it would be awarded more than the minimum quantity.²⁰⁹ Nevertheless, the Board proceeded to address the contractor's "negligence, bad faith and lack of due care" arguments.²¹⁰ The Board characterized only the contractor's negligence and lack of care arguments as not "carr[ying] any legal significance" or "simply not relevant" because, even if the acts were true, they would not constitute a breach. It also found irrelevant questions of when the Government placed delivery orders or whether it contracted with others for supplies and services that could have been provided under the contract. Citing *Travel Centre*, the Board stated that, once the Government exceeded the guaranteed minimum for each contract period, it had satisfied its legal obligations.²¹¹

However, as it had done in *Tracor* and *DynCorp*, the Board separately analyzed the issue of bad faith (and, in this case, without reliance on *Travel Centre* as controlling authority). In other words, the Board must have reasoned that an allegation of bad faith was not precluded by that case. Although the Board ultimately concluded that the contractor did not meet the "high" burden of proof applicable to demonstrating bad faith, the outcome here is not as important as the opportunity afforded to the contractor (*i.e.*, that an allegation of bad faith was not precluded as a matter of law).²¹²

Based on the foregoing, it appears that the question of whether *Travel Centre* forecloses recovery when the Government allegedly prepares its estimate in bad faith is still not conclusively answered. Nevertheless, the case law contains several overarching themes. First, a contractor will not be able to argue successfully that the negligence standard in requirements contracts should be applied in the IDIQ context.²¹³ Second, a contractor will have difficulty persuading the court or the Boards that prebid statements and actions of government officials, or that quantities ordered on previous contracts,

208. *Id.* at 157,437.

209. *Id.* at 157,437-38.

210. *Id.* at 157,438-39.

211. *Id.* at 157,438.

212. Importantly, the Board was fully cognizant of the use of the phrase dismissal as a "matter of law." For instance, when analyzing the contractor's expectation under the contract, the Board stated the following: "[t]herefore, *as a matter of law*, appellant's arguments as to its 'reasonable expectation' and its complaint that the Government used other contracts must fail." *Id.* at 157,438 (emphasis added). In contrast, when analyzing the contractor's allegation of bad faith, the Board concluded: "Therefore, the contractor 'has failed utterly to provide *probative evidence*, let alone *meet its heavy burden to establish a genuine issue*,' as to any bad faith on the part of any Government official." *Id.* at 157,439 (citation omitted) (emphasis added). The fact that the contractor could not meet its summary judgment burden with respect to bad faith is a far different point than dismissing the allegation as a matter of law. The Board could have used that language in addressing the contractor's bad faith argument. It did not.

213. *Dot Sys., Inc. v. United States*, 231 Ct. Cl. 765, 769 (1982); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993, at 115,481; *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,040; *DynCorp*, ASBCA No. 38862, 91-2 BCA ¶ 24,044, at 120,350.

somehow alter the parties' obligations with respect to the agreement at issue.²¹⁴ Third, the court or the Boards will, of course, look to see whether the Government satisfied its minimum ordering obligations.²¹⁵ Fourth, the court or the Boards will rely on any disclaiming contractual language with respect to estimates and guaranteed quantities.²¹⁶ Fifth, the court or the Boards will examine the nature of an IDIQ contract and its inherent risk allocation (*i.e.*, placing the risk on the contractor that the estimate or maximum quantity will not be reached).²¹⁷ Last, contractors face the very real possibility that *Travel Centre* could be read as shielding the Government from allegations centered on bad faith in connection with IDIQ estimates.²¹⁸ In sum, a contractor faces an uphill battle in the IDIQ context when seeking to recover for an allegedly inaccurate estimate.

V. GOVERNMENT'S FAILURE TO ORDER GUARANTEED MINIMUM QUANTITY

A. Breach of Contract

The Government's primary obligation under an IDIQ contract is to order the guaranteed minimum quantity of supplies or services. Where, during the contract period, the Government has not ordered the guaranteed minimum quantity or terminated the contract for convenience, it is liable to the contractor for breach.²¹⁹

The contractually agreed-upon period of performance is a material element of an IDIQ contract. If the Government fails to order the guaranteed minimum quantity during the relevant ordering period, it cannot avoid liability by ordering additional quantities after that period has expired. Nor can the Government offset underordering in one period with overordering in another, unless the contract so allows.

214. *Deterline Corp.*, ASBCA No. 33090, 88-3 BCA ¶ 21,132, at 106,688; *White Sands Constr., Inc.*, ASBCA No. 51875, 02-2 BCA ¶ 31,858, at 157,438; *see also Petchem, Inc.*, ASBCA Nos. 51687, 51688, 52362, 01-2 BCA ¶ 31,656, at 156,396-97.

215. *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795, 800-01 (Fed. Cir. 2002); *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *Abatement Contracting Corp. v. United States*, 58 Fed. Cl. 594, 605 (2003); *Schweiger Constr. Co. v. United States*, 49 Fed. Cl. 188, 195 (2001); *Tracor Tech. Res., Inc.*, ASBCA No. 44759, 93-2 BCA ¶ 25,616, at 127,515; *Transtar Metals, Inc.*, ASBCA No. 55039, 07-1 BCA ¶ 33,482, at 165,959.

216. *Travel Ctr.*, 236 F.3d at 1319; *Dot Sys., Inc.*, 231 Ct. Cl. at 769; *Crown Laundry & Dry Cleaners*, 90-3 BCA ¶ 22,993, at 115,481; *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,040; *Deterline Corp.*, 88-3 BCA ¶ 21,132, at 106,688.

217. *Travel Ctr.*, 236 F.3d at 1319; *Dot Sys., Inc.*, 231 Ct. Cl. at 769; *C.F.S. Air Cargo, Inc.*, 91-2 BCA ¶ 23,985, at 120,040; *DynCorp*, 91-2 BCA ¶ 24,044, at 120,350; *Tracor Tech. Res., Inc.*, 93-2 BCA ¶ 25,616, at 127,515-16; *Deterline Corp.*, 88-3 BCA ¶ 21,132, at 106,688.

218. *Abatement Contracting Corp.*, 58 Fed. Cl. at 612-13; *Lance Logging Co.*, AGBCA No. 98-137-1, 01-1 BCA ¶ 31,356, at 154,849; *Transtar Metals, Inc.*, 07-1 BCA ¶ 33,482, at 165,958-59.

219. *See, e.g., White v. Delta Constr. Int'l, Inc.*, 285 F.3d 1040, 1046 (Fed. Cir. 2002) (holding that a contractor is entitled to breach of contract damages where the Government fails to order the guaranteed minimum quantity under an IDIQ contract); *accord PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647.

The Board's decision in the *RGI* case illustrates these principles.²²⁰ The contract at issue in *RGI* included one base year and two option years and specified a guaranteed minimum quantity for each period of performance.²²¹ The Government failed to order the guaranteed minimum quantity during the base year, but argued that it was not liable for breach because its combined orders for the base year and first option year exceeded the combined minimum quantities for those periods.²²² The Board rejected the Government's argument, noting that there was no provision in the contract that would allow overordering in one period to offset underordering in prior or subsequent periods.²²³ The Board further explained that "[e]xpiration of the basic performance period is the demarcation line" for determining whether the Government has satisfied its minimum ordering obligations.²²⁴

B. Damages

1. Anticipatory Profits versus Full Contract Value

In an early case, *Maxima Corp. v. United States*,²²⁵ the Federal Circuit appeared to suggest that the proper measure of damages for the Government's breach of an IDIQ contract is the difference between the full value of the guaranteed minimum quantity and the value of the orders actually issued by the Government. In that case, the Government had failed to order a sufficient quantity of services to meet the annual "Guaranteed Minimum" sum specified in the parties' IDIQ contract.²²⁶ After the contract expired, the contractor billed the Government for, and the Government initially paid, the difference between the guaranteed minimum sum and the value of the services ordered.²²⁷ A year later, however, the Government advised the contractor that the failure to order the guaranteed minimum sum constituted a constructive termination for convenience and ultimately demanded repayment of the previously paid amount.²²⁸

The Board held that the contract was terminated for convenience and that the contractor was required to refund the balance of the Government's final payment.²²⁹ The Federal Circuit reversed, holding that the constructive termination for convenience doctrine could not be applied after the completion of performance.²³⁰ The contractor was permitted to retain the payment previously made to it by the Government, i.e., the difference between the

220. *RGI, Inc.*, ASBCA No. 38772, 92-2 BCA ¶ 24,839.

221. *Id.* at 123,929.

222. *Id.* at 123,930.

223. *Id.* at 123,933.

224. *Id.*

225. 847 F.2d 1549 (Fed. Cir. 1988).

226. *Id.* at 1551.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1557.

guaranteed minimum sum and the value of the services ordered under the contract.²³¹

In a dissenting opinion, Circuit Judge Nies argued that the contractor's recovery for the Government's failure to order the guaranteed minimum sum should have been limited to lost profits.²³² The dissent reasoned that allowing the contractor to retain the full guaranteed sum, although it had not incurred the cost of supplying the corresponding amount of services, placed the contractor in a better position than it would have occupied if the Government had met its obligations under the contract.²³³

Subsequent cases limited *Maxima* to its facts. In *PHP Healthcare Corp.*, for example, the Board interpreted *Maxima* to allow recovery of the full contract price only where the contractor is guaranteed a minimum payment, as opposed to a minimum quantity of work, in exchange for maintaining significant standby capacity.²³⁴ The Board attempted to reconcile the majority and dissenting opinions in *Maxima* as follows:

PHP is entitled to be placed in as good a position as it would have been by performance of the contract. On the other hand, PHP is not entitled to be put in a better position than it would have been if it had to perform and bear the expense of full performance. It was the application of these general principles that particularly concerned the dissenting judge [in *Maxima*]...

...

In our view, the majority's damage award [in *Maxima*] is based on its interpretation of the contract terms, rather than on a departure from general damages principles. Under the majority's interpretation, "the Agency agreed to pay Maxima the annual 'Guaranteed Minimum' sum of \$420,534" in return for its capability to provide the contract services.²³⁵

Based upon this interpretation of *Maxima*, the Board held that the contractor's recovery was limited to lost profits because the contract at issue in *PHP Healthcare* guaranteed a minimum quantity of work, rather than payment of a guaranteed minimum amount.²³⁶

For nearly a decade after the *PHP Healthcare* decision, every case that addressed the issue followed *PHP Healthcare* in limiting the contractor's damages to lost profits.²³⁷ Although many of these cases acknowledged the *Maxima* holding, none followed *Maxima* in finding the unique type of IDIQ contract in

231. *See id.*

232. *Id.* at 1559 (Nies, J., dissenting).

233. *Id.* at 1559 n.5.

234. *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647, at 118,452.

235. *Id.*

236. *Id.* at 118,453.

237. *See, e.g.,* *AJT & Assocs., Inc.*, ASBCA No. 50240, 97-1 BCA ¶ 28,823, at 143,826-27 (holding that the contractor's recovery was limited to lost profits and rejecting the contractor's argument that the guaranteed minimum quantity requirement was in the nature of a liquidated damages clause); *Merrimac Mgmt. Inst., Inc.*, ASBCA No. 45291, 94-3 BCA ¶ 27,251, at 135,783 ("[T]he proper measure of damages is not the full amount of the minimum quantity, but the amount [the contractor] lost as a result of the Government's failure to order that quantity. The cost that [the contractor] would have incurred had the full amount been ordered must be

which the minimum quantity was intended as a guaranteed minimum payment to compensate the contractor for maintaining the availability of services.²³⁸

Nearly ten years after *PHP Healthcare*, however, the Armed Services Board of Contract Appeals decided the *Delta Construction* case,²³⁹ which appeared to breathe life back into the *Maxima* holding. The contract at issue in *Delta Construction* specified a guaranteed minimum value and also provided that “[t]he Contractor shall possess sufficient capability to accomplish a daily rate of work in monetary value of a minimum of \$3,000.00...”²⁴⁰ Following the Government’s failure to order work representing the guaranteed minimum contract value, the contracting officer determined that the contractor was entitled to lost profits on the unordered portion of the guaranteed minimum, overhead, and any other allowable, allocable, and reasonable costs incurred based upon the guaranteed minimum.²⁴¹

On appeal, the Board held that the contractor was entitled to recover the full difference between the value of the work ordered and the guaranteed minimum contract value.²⁴² The Board summarized its understanding of the applicable precedent as follows:

[T]he distinction between *Maxima*, where recovery was allowed, and *PHP* and *AJT & Associates*, where it was not, is that in the former the Court was persuaded that the contractor both “was required to and did maintain the capability of providing the minimum services set in the contract” in return for the minimum guaranteed payment and in the latter the Board was not persuaded that both of those factors were present.²⁴³

The Board concluded that the contractor was required to possess, and did possess, sufficient capability to accomplish the daily minimum work rate.²⁴⁴

The Federal Circuit reversed, holding that the contractor’s recovery was required to be reduced by the cost of the additional work that the contractor would have been required to perform had the Government ordered the guaranteed minimum.²⁴⁵ The court explained the fundamental purpose of breach of contract damages as follows:

As this court has stated, the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation...

taken into account in determining its actual loss.”); accord *Apex Int’l Mgmt Servs., Inc.*, ASBCA No. 38087, 94-2 BCA ¶ 26842, at 133,551.

238. See, e.g., *AJT & Assocs.*, 97-1 BCA ¶ 28,823, at 143,826; *Golden W. Builders*, PSBCA No. 3378, 93-3 BCA ¶ 26,195, at 130,410 (holding that the contractor’s recovery was limited to lost profits on the theory that a contract provision stating that “the total quantity of work ordered... will not be less than \$10,000” guaranteed a minimum quantity of work rather than a minimum payment).

239. See *Delta Constr. Int’l, Inc.*, ASBCA No. 52162, 01-1 BCA ¶ 31,195.

240. *Id.* at 154,025.

241. *Id.* at 154,026–27.

242. *Id.* at 154,028.

243. *Id.* (internal citation omitted).

244. *Id.*; see also *Mid-Eastern Indus., Inc.*, ASBCA No. 53016, 02-1 BCA ¶ 31,657, at 156,404 (following the Board’s decision in *Delta Construction* and reasoning that “[t]he minimum price was the consideration for the appellant’s being ready to perform during the performance period”).

245. *White v. Delta Constr. Int’l, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002).

A corollary of that principle is that the non-breaching party is not entitled to be put in a better position by the recovery than if the other party had fully performed the contract.²⁴⁶

According to the court, awarding the contractor the full difference between the minimum value and the value of the orders placed would place the contractor in a better position than if the Government had not breached the contract since the contractor would recover the entire price of the unordered quantities without having to incur any of the additional costs associated with providing such additional quantities to the Government.²⁴⁷

Rather than distinguishing *Maxima* on its facts, the court held that the *Maxima* decision was limited to the issue of the Government's entitlement to recover the amount it paid the contractor.²⁴⁸ Although the court acknowledged that *Maxima* had the effect of allowing the contractor to retain the full difference between the guaranteed minimum and the value of the work ordered, it explained that the issue of quantum was not before the court in that case:

All that the court held in *Maxima* was that the government could not retroactively terminate the contract for convenience after the contract had been fully performed...

Maxima did not decide anything about the propriety of the basis of calculating damages that the Board used in this case. Fairly and carefully read, *Maxima* cannot properly be understood to hold that where there is an indefinite-quantity contract with a guaranteed minimum and the contractor is obligated to be ready to perform a certain amount of work, the contractor is entitled to recover the amount by which the government falls short of the guaranteed minimum.²⁴⁹

Based upon this reasoning, it is now well-settled that the contractor's damages for the Government's failure to order the guaranteed minimum quantity under an IDIQ contract must exclude costs saved as a consequence of the Government's breach.²⁵⁰ The fact that the contractor may have been required to incur significant costs in maintaining the capability to perform is no longer relevant to this analysis.²⁵¹

2. Increased Unit Costs

When the government fails to order the guaranteed minimum quantity of supplies or services under an IDIQ contract, the contractor's damages are not limited to anticipatory profits on unordered quantities. The contractor also is entitled to recover any unit cost increases associated with providing a

246. *Id.* (internal quotations and citations omitted).

247. *Id.*

248. *Id.* at 1044–45.

249. *Id.* at 1044 (internal citation omitted).

250. *See, e.g.,* Bannum, Inc., DOTCAB No. 4452, 06-1 BCA ¶ 33,228, at 164,659 (“[T]he proper basis for damages is the loss the contractor suffered as a result of the government's breach, not the total amount it would have received without the breach. [The contractor] is not entitled to the full amount it would have received if the government had fulfilled the minimum guarantee—it must reduce its claim by any unrealized costs.”).

251. *Id.* (rejecting the contractor's argument that it was entitled to a greater measure of damages because the contract required it to maintain the capability to perform).

lower-than-anticipated quantity of supplies or services to the Government.²⁵² Such cost increases often arise from the contractor's inability to spread fixed costs over the entire guaranteed minimum quantity,²⁵³ but also may include lost volume discounts, lost labor efficiencies, and the like.

C. Proof of Damages

1. Anticipatory Profits

The process of attempting to establish lost profits under an IDIQ contract typically involves the contractor using in-house estimates prepared in connection with its proposal to establish the cost of supplying the guaranteed minimum quantity, the Government arguing that the contractor significantly underestimated its costs, and the parties introducing expert testimony to support their respective positions concerning the realism of the contractor's assumptions.²⁵⁴ In the end, the Board typically weighs the competing expert testimony and bases its damages award on a jury verdict methodology.²⁵⁵ When the contractor fails to produce any evidence of lost profits, however, the Board typically either relies on the contracting officer's estimate, if one exists, or simply declines to award lost profit damages to the contractor.²⁵⁶

2. Increased Unit Costs

Few cases have addressed the recovery of increased unit costs resulting from the Government's failure to order the guaranteed minimum quantity of supplies or services under an IDIQ contract. Proof of such costs, however, raises the exact same issues as the proof of increased unit costs following the partial termination for convenience of any contract.

One unusual case, however, merits special attention. In *Marut Testing & Inspection Services, Inc.*, the Board found that the contractor's testimony and records were not sufficiently reliable to establish the amount of increased costs occasioned by the Government's breach.²⁵⁷ Nevertheless, the Board took the unusual step of awarding the contractor the difference between the guaranteed

252. See, e.g., *Marut Testing & Inspection Servs., Inc.*, GSBICA Nos. 16079 *et al.*, 06-1 BCA ¶ 33,252, at 164,819-22 (allowing recovery for "standby costs"); *Bannum*, 06-1 BCA ¶ 33,228, at 164,659 (explaining that the measure of damages set forth in *Delta Construction* does not preclude a contractor from recovering additional costs resulting from the lost opportunity to capitalize costs over the entire guaranteed minimum quantity).

253. See, e.g., *Bannum*, 06-1 BCA ¶ 33,228, at 164,659.

254. See, e.g., *Jim Phillips Contracting, Inc.*, IBCA Nos. 4319 *et al.*, 04-1 BCA ¶ 32,416, at 160,464-66.

255. *Id.* at 160,468 (awarding a percentage of the anticipatory profits requested by the contractor without explaining how that percentage was derived).

256. See, e.g., *AJT & Assocs., Inc.*, ASBCA No. 50240, 97-1 BCA ¶ 28,823, at 143,826-27 (accepting contracting officer's profit estimate of 10 percent where contractor failed to produce evidence of lost profits); *Golden W. Builders*, PSBCA No. 3378, 93-3 BCA ¶ 26,195, at 130,410 (same).

257. GSBICA Nos. 16079 *et al.*, 06-1 BCA ¶ 33,252; *Bannum, Inc.*, DOTCAB No. 4452, 06-1 BCA ¶ 33,252, at 164,820-22.

minimum contract value and the value of the services ordered by the Government—the same measure of damages disapproved by the Federal Circuit in *Delta Construction*—as a proxy for such costs.²⁵⁸ The Board reasoned that the evidence, although insufficient to establish the amount of the contractor's damages with any precision, amply demonstrated that the contractor incurred costs many times greater than the guaranteed minimum contract value.²⁵⁹ On that basis, the Board concluded that awarding the measure of damages rejected in *Delta Construction* would not place the contractor in a better position than it would have occupied if the Government had not breached.²⁶⁰

Curiously, the Board did not address whether the contractor would have incurred any additional costs in connection with providing additional services up to the guaranteed minimum quantity. Further, although the Board noted that a contractor is entitled to recover increased costs only to the extent they are proved to be “actual, reasonable under the circumstances, and related to the contract,”²⁶¹ it did not analyze the contractor's claim in light of any of these requirements, including with respect to the reasonableness of incurring costs many times greater than the guaranteed minimum contract value.

The precedential value of *Marut Testing* is unclear because the opinion appears to be at odds with the reasoning, if not the holding, of *Delta Construction*. Nevertheless, the case arguably stands for the proposition that a contractor may be entitled to recover the difference between the value of the guaranteed minimum quantity and the value of the ordered quantity, as a proxy for actual damages, when it is clear the contractor has incurred costs significantly in excess of the guaranteed minimum value of the contract.

VI. TERMINATION FOR CONVENIENCE

Virtually all government contracts include a termination for convenience clause that allows the contracting officer to terminate the contract, in whole or in part, whenever he or she deems that such action is in the Government's interest.²⁶² When the Government properly terminates a contract for convenience, the contractor's recovery ordinarily is limited to the cost of the work performed, a reasonable profit on those costs, and any termination settlement costs incurred by the contractor.²⁶³

258. *Bannum*, 06-1 BCA ¶ 33,252, at 164,821–22.

259. *Id.* at 164,822.

260. *Id.* at 164,820.

261. *Id.*

262. *See, e.g.*, FAR 52.249-2, 52.249-6.

263. *See, e.g.*, FAR 52.249-2(g), 52.249-6(h). It should be noted, however, that the termination for convenience clause included in some fixed-price service contracts limits the contractor's recovery to payment for services rendered. *See* FAR 52.249-4 (“If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.”).

Over the years, the Boards and courts have developed a rich body of case law addressing the application of termination for convenience clauses to IDIQ contracts. These cases have focused on the amount of recovery available to the contractor when the Government terminates an IDIQ contract for convenience, as well as the application of various limitations on the termination for convenience doctrine to the special case of IDIQ contracts.

A. *Limitations on the Contractor's Recovery*

When the Government properly terminates an IDIQ contract for convenience, the contractor's recovery is limited by the terms of the applicable termination for convenience clause.²⁶⁴ This imposes two key limitations on the contractor's recovery: (1) the inability to recover anticipatory profits on unordered portions of the guaranteed minimum quantity and (2) the limitation of the contractor's termination for convenience costs to the value of the guaranteed minimum quantity of supplies or services set forth in the contract.

1. No Anticipatory Profits

The Government's failure to order the guaranteed minimum quantity of supplies or services under an IDIQ contract generally constitutes a breach of contract entitling the contractor to anticipatory profits on unordered portions of the guaranteed minimum quantity. The result is different, however, if the Government terminates the contract for convenience prior to its expiration. Then, the contractor's recovery is limited by the applicable termination for convenience clause and the contractor may not recover anticipatory profits on any unordered portions of the guaranteed minimum quantity.²⁶⁵

In the *Montana Refining* case, the contractor attempted to avoid this result, unsuccessfully, by arguing that the Government already was in breach of the parties' contract at the time it issued a partial termination for convenience.²⁶⁶ The contract at issue in *Montana Refining* required the Government to purchase a guaranteed minimum quantity of fuel over a twelve-month period and also limited the quantity of fuel the contractor was obligated to supply in any single month.²⁶⁷ The contractor argued that the Government breached the contract, prior to issuing the partial termination for convenience, because it purchased so little fuel in the first eight months of the contract that, pursuant to the monthly order limitation, it could not have attained the guaranteed

264. See, e.g., *Hermes Consol., Inc.*, ASBCA Nos. 52308, 52309, 02-1 BCA ¶ 31,767, at 156,898-99 (holding that the contractor was not entitled to recover damages when the Government terminated for convenience unordered portions of the guaranteed minimum quantity prior to expiration of the period of performance); *Mont. Ref.*, ASBCA No. 50,515, 00-1 BCA ¶ 30,694, at 151,627-29 (same); *Plaza 70 Interiors, Ltd.*, HUDBCA No. 94-C-150-C9, 95-2 BCA ¶ 27,668, at 137,939 (same).

265. See, e.g., *Hermes*, 02-1 BCA ¶ 31,767, at 156,898-99; *Mont. Ref.*, 00-1 BCA ¶ 30,694, at 151,627-29; *Plaza 70 Interiors*, 95-2 BCA ¶ 27,668, at 137,939.

266. *Mont. Ref.*, 00-1 BCA ¶ 30,694, at 151,627-28.

267. *Id.* at 151,625.

minimum quantity in the remaining four months.²⁶⁸ According to the contractor, the Government's conduct amounted to a prohibited retroactive termination for convenience, entitling the contractor to recover damages for breach.²⁶⁹

The Board rejected the factual basis for the contractor's breach argument on the grounds that the contract permitted the contractor to accept orders in excess of the monthly order limitation, which it had done in the past.²⁷⁰ More importantly, the Board found that even if the contractor had established the factual predicate for breach, a breach for failure to order is a constructive termination, with damages limited to those under the termination for convenience clause. Thus, the contractor would not be permitted to recover anticipatory profits in any event.²⁷¹

Further, the Board reasoned that the contractor was not entitled to be paid for two-thirds of the guaranteed minimum quantity, which corresponded to the portion of the contract ordering period that elapsed before the Government issued the partial termination for convenience.²⁷² The Board stated that it was unwilling to extend the *Maxima* rationale absent contract language requiring payment for the contractor's proportionate readiness to perform the contract.²⁷³

Montana Refining stands for the proposition that a contractor generally may not recover anticipatory profits on unordered portions of the guaranteed minimum quantity when the Government properly terminates an IDIQ contract for convenience. This general rule is not immutable, however, and may give way to the particular language of the relevant contract.

In an earlier *Montana Refining* case, for example, the parties' contract included the following special termination for convenience provision: "The Government shall not be liable for unordered quantities, *unless otherwise stated in this contract*."²⁷⁴ The Board held that the contract did not permit the Government to terminate for convenience any portion of the guaranteed minimum quantity because the foregoing language rendered the special termination for convenience clause subordinate to the minimum quantity clauses:

The Termination for Convenience clause in the contract states that "The Government shall not be liable for unordered quantities, unless otherwise stated in this contract." The 2,446,124 gallons constitute "unordered quantities." It is "otherwise stated" in [the minimum quantity clauses], which provide that the Government "shall . . . pay for" and "agrees to purchase . . . at least" the minimum quantity. The Government is liable for 2,446,126 gallons, therefore, under those clauses.²⁷⁵

268. *Id.* at 151,627–28.

269. *Id.*

270. *Id.* at 151,628–29.

271. *Id.*

272. *Id.*

273. *Id.*

274. Mont. Ref. Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656, at 132,611 (emphasis added).

275. *Id.* at 132,613.

The Board rejected the Government's position that the standard termination for convenience clause should have been read into the contract as a matter of law, reasoning that the special termination for convenience clause included in the contract was an authorized deviation from the FAR.²⁷⁶ The Board also rejected the Government's argument that it has "the inherent right to terminate a procurement contract for convenience," whenever in its best interest, as contrary to established precedent.²⁷⁷

Read together, the two *Montana Refining* cases suggest that a contractor should review the terms of its contract carefully before assuming it is not entitled to anticipatory profits when the Government terminates an IDIQ contract for convenience before ordering the guaranteed minimum quantity. Although such damages generally are not available, the result may be different if the contract includes nonstandard termination or minimum quantity provisions.

2. Total Contract Value

The standard termination for convenience clause used in noncommercial fixed-price contracts provides that the contractor's termination for convenience costs, exclusive of certain termination settlement costs, "may not exceed the *total contract price* as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated."²⁷⁸ Several cases have addressed the meaning of "total contract price," and thus the limitation on the contractor's termination for convenience costs, under IDIQ contracts that include similar language. Each of these cases has concluded that the contractor's recovery is limited to the value of the guaranteed minimum quantity of supplies or services required to be ordered by the Government, plus the value of any services ordered by the Government in excess of the minimum and any equitable adjustments due to the contractor.²⁷⁹

In *Okaw Industries*, the leading case on this point, the contract included a termination for convenience clause that limited the contractor's recovery to the "total contract price," less the amount of any payments made by the Government and any work not terminated.²⁸⁰ When the Government terminated the contract for convenience, after ordering the guaranteed minimum quantity of services, the contractor submitted a termination settlement proposal that exceeded the value of the work ordered under the contract.²⁸¹

The Board held that the contractor's recovery was limited to the value of the services ordered under the contract.²⁸² The Board's holding was based

276. *Id.* at 132,613-14.

277. *Id.* at 132,614.

278. FAR 52.249-2(f).

279. See *Okaw Indus., Inc.*, ASBCA Nos. 17863, 17864, 77-2 BCA ¶ 12,793, at 62,226-27; *Int'l Data Prods. Corp. v. United States*, 64 Fed. Cl. 642 (2005).

280. *Okaw Indus., Inc.*, 77-2 BCA ¶ 12,793, at 62,224.

281. *Id.* at 62,235-36.

282. *Id.* at 62,226-27.

upon the following interpretation of the contract's termination for convenience clause:

We conclude that the contract price, for the purpose of establishing the payment limit set forth in the Termination for Convenience provisions, was the price for the minimum value of services the Government was obligated to procure plus the value of any services it ordered in excess of that minimum.²⁸³

The Board reasoned that an IDIQ contract commits the Government to purchase only the guaranteed minimum quantity, not to place orders up to the estimated contract value.²⁸⁴ In addition, the Board rejected the contractor's argument that it would be unfair to deny recovery for costs incurred, explaining that the contractor knew, or should have known, that the Government was not obligated to issue orders in excess of the guaranteed minimum quantity.²⁸⁵

Finally, the Board explained that its reference to the "value of any services . . . ordered in excess of that minimum" referred not only to those services set forth in the schedule, but also included additional work required to be performed due to constructive changes resulting from the Government's failure to perform certain contractual obligations.²⁸⁶ Under *Okaw*, therefore, the "total contract price" of an IDIQ contract means the value of the guaranteed minimum quantity, plus the value of orders in excess of that quantity, plus the value of any equitable adjustments due to the contractor.²⁸⁷

Each case that has considered the issue since *Okaw* has adopted the same interpretation of the "total contract price" of an IDIQ contract. In the recent *International Data Products* case, for example, the court applied the *Okaw* holding to a former DFARS termination for convenience provision that also limited the contractor's recovery, exclusive of termination settlement costs, to the total contract price.²⁸⁸ Based upon the reasoning articulated in *Okaw*, the court held that the contractor was not entitled to any additional termination for convenience costs because the Government already paid the contractor the "total contract price" by placing orders in excess of the guaranteed minimum quantity.²⁸⁹

3. Equitable Adjustment for Partial Termination

When the Government issues a partial termination for convenience under a contract that includes the standard fixed-price termination for convenience clause, the contractor is entitled to an equitable adjustment on the continuing work for any increased costs borne by that work as a result of the termination.²⁹⁰ The typical rationale for such an adjustment is that a reduction

283. *Id.*

284. *Id.* at 62,226.

285. *Id.*

286. *Id.* at 62,227.

287. *Id.* at 62,226–27.

288. *Int'l Data Prods. Corp. v. United States*, 64 Fed. Cl. 642, 645 (2005).

289. *Id.* at 646–47.

290. FAR 52.249-2(l); *see also* *Cal-Tron Sys., Inc.*, ASBCA Nos. 49279, 50371, 97-2 BCA

in the quantity of work necessarily requires the unterminated work to carry a heavier share of fixed costs than contemplated by the parties when they entered into the contract.²⁹¹ In addition, a reduction in work may cause the contractor to lose labor efficiencies or volume discounts that formed the basis of the agreed-upon unit price.²⁹²

This rationale does not apply to the partial termination for convenience of an IDIQ contract under which the Government has ordered the guaranteed minimum quantity. This is because the contractor knows at the time it prices an IDIQ contract that the Government is not required to order more than the minimum quantity of supplies or services specified in the contract.

The result is different where the Government partially terminates for convenience an order issued under an IDIQ contract, rather than the IDIQ contract itself. In the former case, regardless of whether the Government has ordered the guaranteed minimum quantity, it has committed to purchase the additional quantities set forth in the relevant order.²⁹³

The *Information Systems and Networks* case illustrates this point.²⁹⁴ There, the Government initially issued a task order for information technology services at thirteen sites, but subsequently terminated the task order for convenience with respect to nine of those sites. The Government argued that the contractor was not entitled to recover volume discounts it lost from its vendors as a result of the reduction in work under the task order. The Government reasoned that the parties' agreement was an IDIQ contract; the Government was only obligated to order the guaranteed minimum quantity specified in the contract; and it had already ordered the quantity.²⁹⁵

The Board rejected the Government's argument on the basis that it ignored the distinction between the termination of a task order and termination of the underlying IDIQ contract:

The Government's arguments confuse the parties' "contract" with...an order issued under that contract. If the Government actually ordered 13 sites in the DO...and obtained several sites at a discounted price based upon the original volume ordered, if it subsequently alters the volume ordered by terminating the DO in part, it may not retain the work performed at the unit cost for the original, higher volume because the contract under which the DO was issued was for an "indefinite quantity," but must pay the contractor at the increased unit cost for the smaller volume of work performed.²⁹⁶

¶ 28,986, at 144,342-43 (holding that the contractor was entitled to recover unabsorbed overhead and G&A following partial termination for convenience); *Wheeler Bros.*, ASBCA No. 20465, 79-1 BCA ¶ 13,642 (same).

291. See, e.g., *Wheeler Bros.*, 79-1 BCA ¶ 13,642, at 66,919.

292. See, e.g., *Hunter Mfg. Co.*, ASBCA No. 48693, 97-1 BCA ¶ 28,824, at 143,830 (holding that the contractor was entitled to recover lost quantity discounts, lost unit labor efficiencies, and applicable indirect costs following partial termination for convenience).

293. See *Info. Sys. & Networks Corp.*, ASBCA No. 46119, 96-1 BCA ¶ 28,059, at 140,120-21.

294. *Id.*

295. *Id.* at 140,120.

296. *Id.* at 140,120-21.

In a subsequent opinion, the Board concluded that the terminated task order was, in fact, for thirteen sites.²⁹⁷ On that basis, the Board held that the contractor was entitled to recover the increased costs it incurred as the result of lost volume discounts and vendor restocking fees.²⁹⁸

B. *Limitations on the Government's Use of the Termination for Convenience Clause*

1. Completion of Performance

In several cases, the Government has sought to avoid breach of contract damages, based upon its failure to order the guaranteed minimum quantity under an IDIQ contract, by attempting to terminate the contract for convenience after the period of performance was complete. Courts and Boards universally have rejected such attempts, holding that the Government cannot terminate a contract for convenience after it has expired.²⁹⁹

The leading case with respect to the prohibition upon retroactive termination for convenience is *Maxima*. Throughout the term of the contract at issue in *Maxima*, the Government ordered services at a rate well below that necessary to meet the guaranteed minimum quantity.³⁰⁰ *Maxima* addressed this issue with the Government, but the Government declined to change the contract terms or terminate the contract for convenience.³⁰¹ As noted above, a year after the contract expired, the Government notified *Maxima* that the contract was constructively terminated for convenience based upon the Government's failure to order the guaranteed minimum quantity of services, and it demanded repayment of the amount it had previously paid the contractor for the unused portion of the contract's guaranteed minimum amount.³⁰²

The Board upheld the Government's termination for convenience, but the Federal Circuit reversed.³⁰³ The court's analysis began with a description of the nature and scope of the constructive termination for convenience doctrine:

[T]he concept of constructive termination for convenience enables the government's actual breach of contract to be retroactively justified. Such justification may be appropriate "in situations in which the government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid. Constructively, the clause can justify the government's actions, avoid breach and limit liability."

...

297. *Info. Sys. & Networks Corp.*, ASBCA No. 46119, 02-2 BCA ¶ 31,952, at 157,876.

298. *Id.*; see also *Deval Corp.*, ASBCA Nos. 47132, 47133, 95-1 BCA ¶ 27,537, at 137,223-24 (rejecting the Government's argument that a contractor may not recover increased overhead and G&A following the partial termination for convenience of a task order issued under an IDIQ contract).

299. See, e.g., *Maxima Corp. v. United States*, 847 F.2d 1549, 1556 (Fed. Cir. 1988); *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647, at 118,450-52.

300. *PHP Healthcare Corp.*, 91-1 BCA ¶ 23,647, at 118,452 (quoting *Maxima Corp.*, 847 F.2d at 1552-56).

301. *Id.*

302. *Id.*

303. *Id.* (quoting *Maxima Corp.*, 847 F.2d at 1551, 1557).

Constructive termination is applied when the basis upon which a contract was actually terminated is legally inadequate to justify the action taken.³⁰⁴

Applying these principles, the court held that the constructive termination for convenience doctrine did not apply because there was no improper termination or other breach during the period of performance. “No judicial authority,” the court observed, “has condoned the use of the [termination for] convenience clause to create a breach retroactively, where there was none, in order to change the government’s obligations under a completed contract.”³⁰⁵ According to the court, the Government’s actions, at best, constituted a claim for retroactive adjustment in the contract price, which must be made within a reasonable time.³⁰⁶ The court held that one year after expiration of the contract was not a reasonable time within which to request a reduction of the contract price.³⁰⁷ In reaching this conclusion, the court noted that the Government was on notice of its failure to order at a rate sufficient to satisfy the guaranteed minimum quantity since *Maxima* brought the issue to the Government’s attention during the contract term.³⁰⁸

Maxima did not expressly hold that the Government was prohibited from terminating a contract for convenience after the period of performance under all circumstances. Moreover, the court’s emphasis on the length of the Government’s delay in requesting repayment and the contractor’s notice to the Government that it was not on pace to order the guaranteed minimum quantity left room for the Government to argue that an IDIQ contract could be terminated for convenience retroactively within a reasonable time after the Government learns that its orders will be insufficient to meet the guaranteed minimum quantity.

In the *PHP Healthcare* case, the contractor advanced precisely this argument.³⁰⁹ There, as in *Maxima*, the Government purported to terminate an IDIQ contract after expiration of the period of performance in order to avoid paying damages for its failure to order the guaranteed minimum quantity.³¹⁰ In *PHP Healthcare*, however, the purported termination for convenience occurred only three days after the contract expired.³¹¹ The Government attempted to distinguish *Maxima* on this basis, reasoning that the one-year delay involved in *Maxima* “resulted in greater hardship to the contractor and greater cause to find in the contractor’s favor.”³¹² The Board rejected this argument and articulated the bright-line rule that the Government may not terminate a contract for convenience at any point after the period of

304. *Maxima Corp.*, 847 F.2d at 1553 (quoting *Torncello v. United States*, 681 F.2d 756, 759 (Ct. Cl. 1982)).

305. *Id.*

306. *Id.* at 1555.

307. *Id.* at 1556.

308. *Id.*

309. *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647, at 118,451.

310. *Id.* at 118,449-50.

311. *Id.* at 118,451.

312. *Id.*

performance has lapsed.³¹³ In the Board's words, with respect to the ability to terminate a contract for convenience, "[e]xpiration of the basic period of performance is the demarcation line."³¹⁴

The Government further attempted to distinguish *Maxima* on the basis that the Government was not in a position to terminate the contract for convenience earlier because it was unaware that it was not on pace to meet the guaranteed minimum quantity.³¹⁵ This was so, according to the Government, because the services at issue in *PHP Healthcare* were provided to individual patients on an as-needed basis, rather than ordered centrally, and because the contractor did not provide notice that the amount of services being used fell below the guaranteed minimum.³¹⁶ The Board rejected this argument, pointing out that the Government should have been aware of actual usage throughout the contract period based upon invoices that regularly were submitted by the contractor and approved by the COR.³¹⁷ In addition, the Board held that, in the absence of an express contractual duty, the contractor had no obligation to notify the Government that the guaranteed minimum quantity was unlikely to be met.³¹⁸

Based upon *Maxima* and *PHP Healthcare*,³¹⁹ it is now well-established that the Government cannot attempt to avoid breach of contract damages by terminating an IDIQ contract at any point—no matter how soon—after its expiration. On the other hand, other cases have made it equally clear the Government can avoid such damages by terminating an IDIQ contract for convenience at any point—no matter how late—before it expires.

This latter point is illustrated by *Hermes Consolidated*,³²⁰ where the Government issued a partial termination for convenience with respect to unordered portions of the guaranteed minimum quantity in one of two contracts at issue only eight days before the ordering period expired.³²¹ It partially terminated the other contract for convenience six months before the ordering period ended. The Board rejected the contractor's argument that the Government's actions under the first contract amounted to a retroactive termination for convenience and found none in either contract.³²² Relying on *PHP Healthcare*, the Board reasoned that "the expiration of the basic performance period is the demarcation line for retroactive terminations."³²³ As in *Montana Refining*, the Board further concluded that the contractor was

313. *Id.*

314. *Id.*

315. *Id.* at 118,452.

316. *Id.*

317. *Id.*

318. *Id.*

319. See, e.g., *Maxima Corp. v. United States*, 847 F.2d 1549, 1556 (Fed. Cir. 1988); *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647, at 118,450–52.

320. *Hermes Consol., Inc.*, ASBCA Nos. 52308, 52309, 02-1 BCA ¶ 31,767.

321. *Id.* at 156,898.

322. *Id.*

323. *Id.*

not entitled to recover a “proportionate” payment for the minimum quantities specified in both contracts corresponding to the portion of the ordering terms that had elapsed before the partial terminations for convenience were issued.³²⁴

2. Prior Bad Faith Breach

The termination for convenience doctrine does not apply if the Government has breached a contract in bad faith.³²⁵ Thus, where the Government terminates an IDIQ contract following a bad faith breach, the contractor may recover breach of contract damages, including anticipatory profits on any unordered portions of the guaranteed minimum quantity.³²⁶

In *Apex*, for example, the parties entered into an IDIQ contract for operation, maintenance, repair, and construction services.³²⁷ Based upon a “misguided sense of loyalty to Government workers” who were displaced as a result of the contract, Government personnel intentionally discarded keys to necessary equipment; intentionally destroyed manuals, parts, and tools needed to operate that equipment; removed vehicle and work station radios needed to respond to emergency calls; placed emergency calls when there were no emergencies; and arbitrarily withheld payment from the contractor.³²⁸ The contractor abandoned performance and the Government thereafter terminated the contract for default.³²⁹

The Board concluded that the Government’s actions constituted a material breach of the contract, discharged the contractor’s obligation to perform, and rendered the termination for default improper.³³⁰ The Board further held that the contractor’s recovery was not limited to termination for convenience costs because the Government acted in bad faith.³³¹

The Board began with the premise that the protection afforded to the Government by the termination for convenience clause is not available where the Government has acted in bad faith or clearly abused its discretion.³³² It analyzed the Government’s actions under the contract in light of the following passage from *Torncello v. United States*:

[I]t requires “well-nigh-irrefragable proof” to induce the court to abandon the presumption of good faith dealing. In the cases where the court has considered allegations of bad faith, the necessary “irrefragable proof” has been equated with

324. *Id.* at 156,899.

325. *See, e.g., Nat’l Factors, Inc. v. United States*, 492 F.2d 1383, 1385 (Ct. Cl. 1974) (“The termination of a contract for the convenience of the government is valid only in the absence of bad faith or a clear abuse of discretion.”); *accord Solar Turbines, Inc. v. United States*, 16 Cl. Ct. 304, 316 (1989).

326. *See Apex Int’l Mgmt. Servs., Inc.*, ASBCA No. 38087, 94-2 BCA ¶ 26,842, at 133,351.

327. *Id.* at 133,518–19.

328. *Id.* at 133,548–49.

329. *Id.* at 133,528.

330. *Id.* at 133,548–49.

331. *Id.* at 133,549–50.

332. *Id.* at 133,549.

evidence of some specific intent to injure the plaintiff. Thus, in *Gadsen v. United States*, the court compared bad faith to actions which are “motivated alone by malice.” In *Knotts*, the court found bad faith in a civilian pay suit only in view of a proven “conspiracy . . . to get rid of plaintiff.” Similarly, the court in *Struck Constr. Co. v. United States* found bad faith when confronted by a course of Governmental conduct which was “designedly oppressive.” But in *Librach*, the court found no bad faith because the officials involved were not “actuated by animus toward the plaintiff.”

...

Since good faith is presumed unless bad faith is shown, the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff.³³³

The Board concluded the record established “irrefragably” that the Government acted in bad faith by any of the foregoing standards (i.e., with specific intent to injure, motivated only by malice, based upon a conspiracy to get rid of the contractor, and in a manner that was designedly oppressive).³³⁴

Accordingly, the Board held that the contractor was entitled to traditional breach of contract damages, including anticipatory profits.³³⁵ With regard to the IDIQ portion of the contract in particular, the Board held the contractor was entitled to recover anticipatory profits on that portion of the guaranteed minimum quantity that was not ordered prior to the contractor’s avoidance of the contract.³³⁶

3. Prior Independent Breach

The constructive termination for convenience doctrine does not apply where the Government’s breach arises from conduct other than the improper termination of a contract. Thus, when the Government commits an independent breach of an IDIQ contract, the contractor may be entitled to recover anticipatory profits on the unordered portion of the guaranteed minimum quantity, and potentially on any additional quantities the contractor can prove the Government would have ordered under the contract.³³⁷

The recent *Ardco* case illustrates these points. *Ardco* involved an IDIQ contract to provide an aircraft and crew to drop fire retardant.³³⁸ The contractor was entitled to a fixed amount for each day its plane and crew were scheduled to be available, plus an additional amount for each flight hour of services provided.³³⁹ The terms of the contract did not guarantee the contractor would receive any minimum quantity of flight hours.³⁴⁰

333. *Id.* at 133,549–50 (quoting *Torncello v. United States*, 681 F.2d 786, 770–71 (Fed. Cir. 1982)) (internal citations omitted).

334. *Id.* at 133,550.

335. *Id.*

336. *Id.*

337. *Ardco, Inc.*, AGBCA No. 2003-183-1, 06-2 BCA ¶ 33,352, at 165,385–86.

338. *Id.* at 165,380–81.

339. *Id.* at 165,381.

340. *Id.*

The contractor provided the required aircraft and crew until a government employee drove a forklift into the airplane, rendering it unavailable for more than seven months.³⁴¹ During this period, the Government continued to pay the contractor the daily rate for the mandatory availability period but contracted with another firm for flight hours that, according to the Board, otherwise would have been performed by the contractor.³⁴²

The Government moved to dismiss the contractor's claim for lost profits, arguing that the Government could have terminated the flight portion of the contract under the contract's termination for convenience clause.³⁴³ The Board rejected this argument, holding that the constructive termination for convenience doctrine does not apply where the Government's conduct constitutes an independent breach of contract:

Since the clause makes the cancellation not a breach, then it follows that anticipatory profits could be and are excluded. The clause, however, was not intended nor is it properly used, when as here, the Government tries to use it to limit damages caused by an independent breach, which was independent of an attempt to cancel the work. The clause is not intended to cover a situation such as that here, where the government breached by hindering the contractor's ability to perform.³⁴⁴

The Board also rejected the Government's argument that the contractor could not recover anticipatory profits because the contract did not guarantee any flight hours.³⁴⁵ Although the parties' agreement was not a requirements contract, the Board apparently concluded that the contractor would have been selected to perform the flights that were ordered from the other firm when the contractor's plane became unavailable as a result of the Government's breach.³⁴⁶

It is not entirely clear how the *Ardco* holding would be applied to an IDIQ contract with a guaranteed minimum quantity. The contractor presumably would be entitled to recover anticipatory profits on the unordered portion of the guaranteed minimum quantity since the Government would be required to order at least that quantity of supplies or services. The fact the Board permitted the contractor to recover anticipatory profits in the absence of a guaranteed minimum quantity, however, suggests that a contractor would be free to argue that the Government would have ordered more than the guaranteed minimum quantity, and to recover anticipatory profits on whatever additional amount it could prove the Government would have ordered. Obviously, such an argument would present difficult issues of proof that were not addressed in *Ardco* since the procedural posture in that case was limited to the denial of the Government's motion for partial summary judgment.

341. *Id.*

342. *Id.*

343. *Id.* at 165,381–82.

344. *Id.* at 165,382.

345. *Id.* at 165,384.

346. *Id.*

VII. TERMINATION FOR DEFAULT

A. *Reprocurement Costs*

When a contractor breaches a task order issued under an IDIQ contract, the Government may terminate that task order for default and allow the underlying contract to continue in its place. The Government's reprocurement costs are then limited to excess costs incurred in obtaining supplies or services to replace those ordered under that particular task order.³⁴⁷ Alternatively, the Government may issue a termination for default that covers both the breached task order and the IDIQ contract as a whole and seek reprocurement costs for all quantities it could have ordered under the terms of the contract, including any unexercised option periods.³⁴⁸

The latter point is illustrated by the *Hyspan* case, where the parties entered into a contract for the supply of cryogenic metal hose assemblies that specified a maximum quantity of 2,000 units, with a one-year period of performance that could be extended for an additional ninety days.³⁴⁹ The Government issued three task orders under the contract. The contractor failed to deliver in a timely manner and the Government terminated those task orders and the IDIQ contract for default.³⁵⁰ Subsequently, the Government claimed it was entitled to reprocurement costs for quantities reprocured during the contract's base period, as well as additional quantities reprocured during the unexercised option period.³⁵¹ The Board held that the Government was entitled to recover reprocurement costs for all reprocured quantities that could have been ordered from the contractor during the base and option years of the terminated contract.³⁵² The Board reasoned it was "reasonable to assume" that the Government would have exercised the option period if the contract had not been terminated for default.³⁵³

B. *Rejection of Orders*

In addition to the requirement to specify guaranteed minimum and maximum values for the ordering period as a whole, IDIQ contracts typically specify minimum and maximum values for individual orders.³⁵⁴ Under the standard Order Limitations clause, the contractor is not required to fill orders falling outside the specified minimum and maximum order values.³⁵⁵ On the other

347. See *Chemithon Corp.*, GSBCA No. 4525, 1980 WL 2799 (Feb. 29, 1980) (analyzing assessment of reprocurement costs under terminated task orders on a task-order-by-task-order basis).

348. *Hyspan Precision Prods.*, ASBCA No. 19664, 76-2 BCA ¶ 11,922, at 57,149.

349. *Id.*

350. *Id.* at 57,145.

351. *Id.* at 57,148.

352. *Id.* at 57,149.

353. *Id.*

354. See FAR 52.216-19 (required to be included in IDIQ contracts pursuant to FAR 16.506(b)).

355. *Id.* It should be noted, however, that a contractor loses its right to reject an order exceeding the maximum value specified in the Order Limitations clause if it does not provide the

hand, the contractor generally does not have the right to reject any task or delivery orders that are within the scope of the Order Limitations clause and the parties' contract.³⁵⁶ If the contractor declines to perform such an order, the Government may terminate that order and the contract for default.³⁵⁷

In *Nu-Waay Enterprises*, for example, the parties entered into an IDIQ contract for roof repairs.³⁵⁸ Pursuant to the Order Limitations clause, the contractor was not required to accept task orders valued at less than \$2,000 or more than \$250,000.³⁵⁹ The Government issued a task order valued at approximately \$25,000, the contractor failed to perform, and the Government terminated the contract for default.³⁶⁰ Before the Board, the contractor argued it should not have been required to perform the \$25,000 task order because that task order was too small for the contractor to recoup its mobilization costs.³⁶¹ The Board rejected this argument and upheld the termination for default, reasoning that the contract expressly required the contractor to accept all task orders within the values set forth in the Order Limitations clause.³⁶²

The *Nu-Waay Enterprises* case illustrates the importance of negotiating appropriate minimum and maximum quantities under the Order Limitations clause. Had the contractor negotiated a minimum order quantity that was sufficiently high to allow it to recover its fixed cost, it would not have been forced to choose between performing an order at a loss and being terminated for default. Alternatively, at least in the case of multiple-award IDIQ contracts, it may be possible to negotiate a provision allowing the contractor to decline particular orders under circumstances broader than those contemplated by the Order Limitations clause.

VIII. FAIR OPPORTUNITY TO COMPETE/CDA CLAIM

An aggrieved contractor seeking to contest agency action in connection with the issuance or execution of a task order under an IDIQ contract faces an almost insurmountable hurdle. The Federal Acquisition and Streamlining Act (FASA), as implemented by the FAR, specifically provides that “[n]o protest under FAR 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task order or delivery-order contract, except for a protest on the grounds that the order increases the scope, period or maximum value of the contract...”³⁶³ To make matters worse, the Federal

Government with written notice of its intent to reject that order within the timeframe specified in the parties' contract. See FAR 52.216-19(d).

356. See FAR 52.216-22(b) (“The Contractor *shall* furnish to the Government, when and if ordered, the supplies or services specified in the Schedule...”) (emphasis added).

357. See *Nu-Waay Enters., Inc.*, ASBCA No. 53245, 04-1 BCA ¶ 32,496, at 160,763.

358. *Id.* at 160,761.

359. *Id.*

360. *Id.* at 160,761, 160,763.

361. *Id.* at 160,764.

362. *Id.*

363. FAR 16.505(a)(9) (citing 10 U.S.C. § 2304c(d) (2000) and 41 U.S.C. § 253j(d) (2000)); but see National Defense Authorization Act of 2008, Pub. L. No. 110-181, § 843 (allowing

Circuit concluded that “the government is required to purchase the minimum quantity stated in the [IDIQ] contract, but when the government makes that purchase its legal obligation under the contract is satisfied.”³⁶⁴ Both of these principles were frequently employed by the Government Accountability Office (GAO), the Boards, and the courts either to dismiss or deny contractor causes of action in this context.³⁶⁵ The bar against such protests was nearly impenetrable; it did not take much for the government to order the minimum quantity, thus satisfying its “legal obligations.” The avenues of relief afforded contractors were, therefore, severely circumscribed and contractors were left with little to no recourse for what at times appeared to be blatant violations of federal procurement regulations.³⁶⁶

Despite these hurdles, contractors ultimately would find a way to have their day in court. In a series of cases, contractors argued successfully that (1) the Government’s legal obligations did not end when it purchased the minimum quantity set forth in the contract and (2) FASA’s bid protest bar did not operate to preclude a claim for breach of contract damages for lack of a fair opportunity to compete.³⁶⁷ While the Boards appear to have embraced this line of reasoning, the Court of Federal Claims has rejected the suggestion that a bid protest can be “re-characterized” as a Contract Disputes Act (CDA) claim.³⁶⁸ Although this split exists currently between Board and Court of Federal Claims case law, it remains to be seen whether the reasoning in *A&D Fire Protection*, discussed in the notes below, will be accepted by other judges of the Court of Federal Claims or whether a different set of factual circumstances would lead to a different result.

In *Burke Court Reporting Co.*, the Department of Transportation Board of Contract Appeals first acknowledged that a contractor could maintain a cause of action after the Government ordered the minimum quantity.³⁶⁹ In that

protests in connection with orders “valued” at over \$10 million and providing for certain enhanced competition requirements for orders exceeding \$5 million).

364. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001).

365. See, e.g., *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 134 (2006) (“The court finds no reason to disagree with the analysis of Section 253(j)(d)’s bid protest bar in *Labat-Anderson* and *Group Seven*, as it applies to task orders on multiple award IDIQ contracts.”); *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, at 120,039 (“In reply, the Government’s position is simply that under the contract it was obligated to order a minimum estimated quantity . . . during the life of the contract. It fulfilled that obligation . . . Since the Government met its obligation to order the minimum, the allegation that the estimates were negligently prepared, even if true, is immaterial.”); *Corel Corp.*, Comp. Gen. B-283862, Nov. 18, 1999, 99-2 CPD ¶ 90, at 1 (relying on 41 U.S.C. § 253(j)(d) (1994) to dismiss protest challenging propriety of an award of a delivery order under an IDIQ contract).

366. *A&D Fire Protection*, 72 Fed. Cl. at 141 (explaining its concern that the court could not review the agency’s actions where “GSA’s treatment of [the protestor’s] proposal [did] not have all the hallmarks of fairness”).

367. *Burke Court Reporting Co.*, DOTBCA No. 3058, 97-2 BCA ¶ 29,323, at 145,801; *Cnty. Consulting Int’l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940; *L-3 Commc’ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374.

368. *A&D Fire Protection*, 72 Fed. Cl. at 135 (“[T]he court does not agree with the theory that actions, that are in essence bid protests of task order awards, can be re-characterized as contract disputes in order to create jurisdiction in this court or in an agency board of contract appeals.”).

369. *Burke Court Reporting Co.*, 97-2 BCA ¶ 29,323, at 145,800–01.

case, the appellant submitted a proposal to provide court reporting and deposition services.³⁷⁰ Apart from including the standard minimum and maximum quantity ordering provisions, the contract also provided that, after the Government satisfied its minimum purchasing obligations, task orders would be awarded in “the sole discretion of the Government.”³⁷¹ The contract further elaborated, however, that “[s]uch determinations will be made on the basis of what is in the best interest of the Government, taking into account factors such as availability and suitability of contractor resources, quality of contractor past performances, and prices.”³⁷²

During the period of contract performance, the contractor received a “very limited” amount of work—“less than 5% of what it properly could have received under the contract [] if award had been made on an equal basis...”³⁷³ The contractor believed the disparity in the amount of work it received occurred because the Government ignored the evaluation factors and criteria listed in the contract.³⁷⁴ Appellant submitted a claim to the contracting officer alleging a breach of contract and seeking breach damages.³⁷⁵

The Government moved for summary judgment on the grounds that it ordered the minimum quantity set forth and the contract allegedly gave the contracting officer “unbridled discretion” to award task orders after the minimum quantity was ordered.³⁷⁶ The Board, however, rejected the Government’s argument. The Board rejected the Government’s argument noting that its obligations are only “generally met” when it has purchased the minimum amount required and that the contract imposed further obligations on the Government that must be exercised in good faith:

Every contract contains with it the implied obligation that the parties will act in good faith during performance. Exculpatory language giving one party broad discretion to act in its own best interest does not negate other parts of the contract which also impose duties on that party. While the indefinite quantities clause of the contract only obligates [the Government] to order a specified dollar amount of services, a bidder has a right to rely on other contract provisions implying that it will be fairly considered for additional work, if required by the [G]overnment.³⁷⁷

In sum, in denying the Government’s summary judgment motion, the Board held that the Government did not relinquish its obligations by simply ordering the minimum quantity required under the contract. Rather, the

370. *Id.* at 145,798.

371. *Id.* at 145,799.

372. *Id.*

373. *Id.*

374. *Id.* at 145,801.

375. *Id.* at 145,798.

376. *Id.* at 145,800. Notably, the Government did not rely on the FASA bid protest bar and the Board did not reference the statutory prohibition in its analysis. *See id.* at 145,800–01. Nevertheless, as will be discussed below, the jurisdictional defense was fully ventilated and rejected in subsequent cases. *See Cmty. Consulting Int’l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, at 157,786–90; *see also L-3 Commc’ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374, at 165,451–52.

377. *Burke Court Reporting Co.*, DOTBCA No. 3058, 97-2 BCA ¶ 29,323, at 145,801.

Government had to exercise its contractual obligations in good faith, which included the obligation to “fairly consider[] appellant for orders in accordance with the terms of the contract” above and beyond the minimum ordering requirement.³⁷⁸

The Armed Services Board of Contract Appeals next confronted the issue in *Community Consulting International*.³⁷⁹ There, the Board concluded that an aggrieved contractor could seek breach damages stemming from a lack of fair consideration on task order awards.³⁸⁰ The contract was for services, assistance, and training in the area of sustainable urban management.³⁸¹ It included the standard minimum and maximum quantities clauses, and the Government had far exceeded its minimum ordering requirements.³⁸² Importantly, the contract also contained a clause affording contractors “a fair opportunity to be considered for each task order.”³⁸³ After the first eighteen months of contract performance, however, the contractor was permitted to bid on only twenty-six of the fifty-one task orders and only was awarded orders totaling approximately \$1.7 million, whereas the other five awardees were awarded task orders valued at approximately \$37 million.³⁸⁴ The contractor filed a CDA claim seeking damages for the Government’s “breach of the fair opportunity to compete.”³⁸⁵

The Government characterized the contractor’s complaint as “nothing more than a collective bid protest” and moved to have it dismissed based on FASA’s bid protest bar.³⁸⁶ The Government also argued, as it did in *Burke Reporting*, that its obligations were satisfied because it met its minimum purchasing requirement.³⁸⁷ Further, the Government argued that the contractor’s sole recourse was to complain to the task and delivery ombudsman.³⁸⁸ The contractor asserted primarily that it was seeking only “to enforce the terms of its own contract.”³⁸⁹ The Board, relying heavily on *Burke Reporting*, agreed with the contractor.

378. *Id.*

379. *Cnty. Consulting*, 02-2 BCA ¶ 31,940.

380. *Id.* at 157,790.

381. *Id.* at 157,782.

382. *Id.* at 157,782–84.

383. *Id.* at 157,783; see also FAR 16.505(b)(1)(ii)(A), (D) (explaining that “the contracting officer must [] [d]evelop placement procedures that will provide each awardee a fair opportunity to be considered for each order . . . [and] [i]nclude the procedures in the solicitation and the contract”).

384. *Cnty. Consulting Int’l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, at 157,784, 157,786–87.

385. *Id.* at 157,784. The Board held that the contractor’s certified claim met the statutory requirements of a CDA claim and had been “deemed denied” as a result of the lack of a contracting officer’s decision within sixty days of its submission. *Id.* at 157,785–86. Specifically, the contractor must have submitted a written demand or assertion, provided adequate notice of the amount of the claim (*i.e.*, sum certain), certified the accuracy of the claim, and requested a contracting officer’s final decision. See *id.* (concluding that the contractor submitted a “valid claim”); see also 41 U.S.C. § 605 (2000); FAR 2.101, 52.233-1.

386. *Cnty. Consulting*, 02-2 BCA ¶ 31,940, at 157,786; see also 10 U.S.C. § 2304c(d) (2000); 41 U.S.C. § 253j(d) (2000); FAR 16.505(a)(9).

387. *Cnty. Consulting*, 02-2 BCA ¶ 31,940, at 157,789; see also *Burke Court Reporting Co.*, DOTBCA No. 3058, 97-2 BCA ¶ 29,323, at 145,800.

388. *Cnty. Consulting*, 02-2 BCA ¶ 31,940, at 157,787.

389. *Id.* at 157,786.

The Board did not accept the Government's argument that the contractor's allegations constituted a bid protest.³⁹⁰ Rather, the Board reasoned that the contractor's cause of action fell within its CDA jurisdiction because the contractor was denied an opportunity to compete fairly for the individual task order as contemplated by the contract.³⁹¹ Specifically, the Board concluded that the contractor's allegations "are rooted squarely in the contractual promise" found in the contract's fair opportunity clause.³⁹² In making this determination, the Board also stated that there were no statutory or regulatory provisions that excluded multiple-award contracts from its CDA jurisdiction and that it would not create an exception to its own jurisdiction by implication.³⁹³ The Board also concluded that the ombudsman could not be the contractor's exclusive remedy because the ombudsman had not been granted any remedial powers by statute or regulation.³⁹⁴

Last, the Board rejected the Government's argument that it satisfied its obligations by ordering the minimum quantity. Addressing the Federal Circuit's decision in *Travel Centre*, which had provided the Government with new fodder since its defeat in *Burke Reporting*, the Board stated that "[w]hile the minimum quantity represents the extent of the Government's purchasing obligation . . . it does not constitute the outer limit of all of the Government's legal obligations under an indefinite quantity contract."³⁹⁵ The Board simply could not "harmonize" the Government's position with the other contract provisions—including the "fair opportunity to compete for each task order up to the ceiling" provision.³⁹⁶ Therefore, the Board, as it did in *Burke Reporting*, allowed the contractor to proceed with its breach of contract claim.³⁹⁷

390. *Id.*

391. *Id.* at 157,787.

392. *Id.* at 157,786.

393. *Id.* at 157,787.

394. *Id.* ("We also reject the argument that resort to the task and delivery order ombudsman is appellant's exclusive remedy. Neither 41 U.S.C. § 235j(e) nor FAR 16.505 confers remedial powers on the ombudsman."); see also Annejanette Kloeb Heckman, *Challenges to Task and Delivery Order Awards Under Multiple Award Contracts: Recent Developments and Proposals for Changes*, 42 *PROCUREMENT LAW*, 1, 16–17 (2007).

395. *Cnty. Consulting Int'l*, DOTBCA No. 3058, 02-2 BCA ¶ 31,940, at 157,789.

396. *Id.* In fact, a holding to the contrary would have rendered the remaining contract provisions meaningless. The Board's conclusion, therefore, is in accord with the well-established principle that "an interpretation which gives reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Arizona v. United States*, 216 Ct. Cl. 221, 235–36 (1978).

397. The contractor also argued that the Government's addition of two unrestricted awardees breached the contract's small business set-aside provisions. See *Cnty. Consulting*, 02-2 BCA ¶ 31,940, at 157,787–89. While this aspect of the contractor's complaint likewise survived the Government's motion to dismiss for lack of jurisdiction, the Board granted summary judgment to the Government on that issue. See *id.* at 157,789. The Board's analysis was threefold. First, the Board found that the inclusion of the two unrestricted awardees was accomplished through a bilateral modification, which the contractor had entered into without reserving any of its rights. See *id.* at 157,787–88. Second, the Board did not find any contractual promise that limited the number of unrestricted awardees. See *id.* at 157,788. Third, having concluded that

L-3 Communications afforded the Board its next opportunity to elaborate upon the bid protest/CDA claim distinction.³⁹⁸ In that case, the contract contained a “fair opportunity” provision in the Awarding Orders clause.³⁹⁹ After Boeing was awarded a delivery order for F-15 training devices, the contractor filed a certified claim with the contracting officer alleging a breach of the Awarding Orders clause, which subsequently was denied by the contracting officer in its entirety.⁴⁰⁰ The Government moved to dismiss the contractor’s claim, as it did in *Community Consulting*, on the basis that the claim was in substance a bid protest.⁴⁰¹ The Board again rejected the Government’s “bid protest” argument as follows:

The same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a “protest” seeking to cancel or modify the award and a “claim” for damages for breach of the Awarding Orders clause of the contract. These are separate and distinct forms of relief with “protests” governed by FAR Subpart 33.1 and “claims” by FAR subpart 33.2. The statute, regulation and contract clause prohibit only protests.^[402] [The contractor’s] certified claim for money damages for breach of the Awarding Orders clause does not seek to modify the award made. The denial of that claim by the contracting officer is within our jurisdiction under the CDA, FAR Subpart 33.2 and the FAR 52.233-1 DISPUTES (Dec. 1998) clause of the contract.⁴⁰³

Moreover, the Board also was not receptive to the Government’s attempt to distinguish and parse the holding in *Community Consulting*:

In [*Community Consulting*], we held that we had CDA jurisdiction over a claim for breach of a fair opportunity to compete clause in a multiple award indefinite quantity contract where the contractor was given the opportunity to bid on only 26 of the 51 orders awarded. The Government distinguishes [that case] from [the contractor’s] claim [here] on the ground that [the contractor] alleges only that specified evaluation criteria were not followed, and not that it was entirely denied an opportunity to compete. This is a distinction without a difference. There is as much a denial of a fair opportunity to be considered for award where the government does not follow the specified evaluation criteria as where it fails to solicit a bid.⁴⁰⁴

Accordingly, the Board denied the Government’s motion to dismiss and allowed its cause of action to proceed as a CDA claim under the contract’s Disputes clause. In essence, the Board refused to limit the holding in *Community*

a contractual promise was lacking, the Board held that the government had met its obligation by ordering the minimum quantity. *See id.* at 157,788–89.

398. *L-3 Commc’ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374.

399. *Id.* at 165,447.

400. *Id.* at 165,449, 165,451.

401. *Id.* at 165,451.

402. *See, e.g.*, 10 U.S.C. § 2304c(d) (2000) (“A protest is not authorized . . .” (emphasis added)); FAR 16.505(a)(9) (“No protest under subpart 33.1 is authorized . . .”).

403. *L-3 Commc’ns*, 06-2 BCA ¶ 33,374, at 164,451; *see also* Ralph C. Nash & John Cibinic, *Post-Script: Breach of Loss of the Fair Opportunity to Compete*, 20 NASH & CIBINIC REP. ¶ 59, Dec. 2006, at 185 (“A claim is not a protest. The objectives of claims and protests are entirely different. A protest is filed by a noncontractor seeking to prevent contract award to a competitor; a claim is filed by a contractor seeking money, time and/or contract interpretation.”).

404. *L-3 Commc’ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374, at 164,451–52.

Consulting to only those instances where a contractor is denied an opportunity to compete.

Against this backdrop, it appears that the Boards of Contract Appeals are willing to allow a contractor to file a breach claim seeking damages for being deprived of an opportunity to fairly compete or for the Government's failure to adhere to a contractual promise.⁴⁰⁵ The Court of Federal Claims, however, has reached an opposite conclusion. In *A&D Fire Protection*, GSA stated that it would provide contractors a "fair opportunity" to compete for the task orders.⁴⁰⁶ When the plaintiff was not awarded the contract, it requested and received a debriefing.⁴⁰⁷ Subsequently, the plaintiff filed a post-award bid protest, which included a request for a declaratory judgment and applications for a temporary restraining order and preliminary injunction seeking to enjoin the performance of the IDIQ contract.⁴⁰⁸ The court, however, declined to review the plaintiff's allegations because it held that the plaintiff's claim was barred by FASA's bid protest prohibition.⁴⁰⁹ Although not raised by the plaintiff, the court also found, in the alternative, that the plaintiff's cause of action could not proceed as a CDA action:

Second, as a general matter, the court does not agree with the theory that actions, that are in essence bid protests of task order awards, can be re-characterized as contract disputes in order to create jurisdiction in this court or in an agency board of contract appeals. *But see* Ralph C. Nash & John Cibinic, *Task Order Contracts: The Breach of Loss of the Fair Opportunity to Compete*, 16 No. 10 Nash & Cibinic Report 49 (Oct. 2002) ("Taking a case to the agency board of contract appeals appears to be a viable way to contest the lack of a fair opportunity to compete for task orders."). Such a stratagem attempts to evade the bar of task order bid protests clearly enunciated in Section 253j(d). *But see Cmty. Consulting Int'l*, ASBCA 53489, 02-2 BCA ¶ 31940, 2002 WL 1788535 (Aug. 2, 2002) (finding that a contract clause assuring a fair opportunity to compete for task orders gave the board jurisdiction, and finding no indication in FASA that "Congress explicitly carved out multiple award, task order contracts as an exception to [the board's] Contract Disputes Act jurisdiction"). The court does not find that this type of bid protest action would fall within its CDA jurisdiction.⁴¹⁰

405. An issue not reached by the Board was whether a contractor would be able to prove its damages. At least one commentator has concluded that "calculating damages [in this context] is almost impossible" because, in part, there is no guarantee that the contractor would have been selected for award even if provided fair consideration. Sean A. Sabin, *What Happened to the Federal Acquisition Streamlining Act's Protest Restrictions on Task and Delivery Orders? Recent Developments in Protests Related to the Issuance of Task and Delivery Orders and Proposals to Improve an Impaired System*, 56 A.F.L. REV. 283, 306 (2005). Nevertheless, at a minimum, it is important to keep in mind that "[t]he ascertainment of damages is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision: 'It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation.'" *Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (citations omitted).

406. *A&D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 128 (2006).

407. *Id.* at 129-30.

408. *Id.* at 127.

409. *Id.* at 133-35.

410. *Id.* at 135.

Therefore, based on *A&D Fire Protection*, it appears that a contractor will encounter adverse precedent when attempting to challenge agency action under the fair opportunity standard in the Court of Federal Claims.⁴¹¹

As set forth above, it appears that the Boards of Contract Appeals are more willing than the Court of Federal Claims to allow CDA claims to proceed alleging a breach of a fair opportunity to compete.⁴¹² The Board will look either to the implied obligation of good faith and/or specific contractual provisions, including fair competition provisions and solicitation criteria, to determine whether a breach claim is viable. Moreover, in light of the court's divergent opinion in *A&D Fire Protection*, a contractor would be best-served, for now, by filing such an action with the Board, as opposed to the Court of Federal Claims.

The issue, however, is not completely settled. The factual situation in *A&D Fire Protection* was dramatically different from that in *Burke Reporting, Community Consulting*, and *L-3 Communications*. In the latter cases, the contractor filed a claim with the contracting officer, which was denied or deemed denied.⁴¹³ In *A&D Fire Protection*, the contractor filed no such claim.⁴¹⁴ In fact, the contractor requested and received a debriefing, labeled its complaint as a post-award protest, and sought a declaratory judgment, temporary restraining order, and preliminary injunction.⁴¹⁵ These are the hallmark examples of a typical bid protest—including the applications for injunctive relief that would have the court cancel or modify the contract award.⁴¹⁶ The court would have been truly “re-characterizing” the contractor's action if it somehow concluded that the action was one under the CDA.

Moreover, the court's statements in *A&D Fire Protection* are dicta. The court already had concluded that the bid protest bar precluded the contractor's action and the court's musings about whether such an action could constitute a CDA claim were unnecessary to its holding since the plaintiff did not meet, or even attempt to meet, the CDA prerequisites, irrespective of whether such an action was technically viable.⁴¹⁷ Further, the judge who decided *A&D Fire Protection* was “troubled” by the statutory and regulatory framework that

411. *But see* ABF Freight Sys., Inc., 55 Fed. Cl. 392, 397 (2003) (stating that although the awardees lacked standing to assert the protest, “such a plaintiff is a contractor asserting a claim ‘relating to a contract’ and is subject to the Contract Disputes Act jurisdiction of this court, as set forth in 41 U.S.C. § 609”).

412. *See also* Heckman, *supra* note 394, at 19.

413. *Burke Court Reporting Co.*, DOTBCA No. 3058, 97-2 BCA ¶ 29,323, at 145,799; *Cnty. Consulting Int'l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, at 157,784; *L-3 Commc'ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374, at 165,451.

414. *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 127, 129–30 (2006).

415. *Id.*

416. *Nash & Cibinic*, *supra* note 403, at 185 (explaining that protests are “highly disruptive to Government operations” because GAO is permitted to suspend award or contract performance and because the Court of Federal Claims may issue a temporary restraining order or a preliminary or permanent injunction, or may grant declaratory relief).

417. *A&D Fire Protection*, 72 Fed. Cl. at 135 (“Even assuming CDA jurisdiction would lie for this suit, plaintiff has not alleged that a contract claim has been presented to the contracting officer. Failure to present a contract claim for a sum certain to the contracting officer prevents this court from taking jurisdiction over a CDA claim.”).

allegedly prevented any sort of meaningful review.⁴¹⁸ It remains to be seen, therefore, whether the court will reach a similar conclusion when presented with a factual scenario where the contractor bases its cause of action on the CDA and seeks only monetary damages, as opposed to injunctive relief.

IX. CONCLUSION

Federal contractors collectively spend a significant sum of money to identify, bid for, secure, and perform IDIQ contracts. Some are rewarded with frequent and lucrative orders. Others are let down when the expected orders are not forthcoming. In either case, as with any government contract, disputes are bound to materialize from time to time. Fortunately, there is a robust, and growing, body of case law to guide contractors (and government purchasers) through IDIQ contract disputes.

418. *Id.* at 140.