UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 9, 2016

CBCA 3389, 4818

AKAL SECURITY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Terrence M. O'Connor, Stephanie D. Wilson, and Frank R. Gulino of Berenzwig Leonard LLP, McLean, VA, counsel for Appellant.

Song U. Kim, Geoffrey Harriman, Cassandra Maximous, and Mark Menacker, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **GOODMAN**.[1]

VERGILIO, Board Judge.

The Board received from Akal Security, Inc. notices of appeal concerning its contract, ACL-2-C-003, with Immigration and Customs Enforcement, successor to the United States Immigration and Naturalization Service (INS), of the Department of Homeland Security (agency). The contractor had provided detention officers (guard services) and supervision under a fixed-price contract. During the performance period some employees filed lawsuits, which became a class action, against the contractor alleging that the contractor had violated California laws by providing insufficient pay and/or benefits in terms of breaks. The matter

[1] The panel has changed from the original because of the retirement of Board Judge Stern.

was resolved through a settlement agreement, approved by a state court, under which the contractor paid $9,738,535.31 (covering unpaid wages, enhancement payments to named plaintiffs, and legal fees and costs to class counsel). The contractor here seeks that amount plus $1,355,681.95 (said to be a portion of its legal fees and costs incurred in defending the lawsuit and negotiating the settlement agreement), for a total of $11,094,217.26, all denied by a contracting officer in response to two certified claims.

In CBCA 3389, the contractor seeks relief under theories of mutual mistake (regarding the applicability of California wage and benefits laws to this contract) and an agency breach of the duty to cooperate and not hinder performance (allegedly by impeding the contractor's ability to comply with California law regarding meal and rest breaks). The Board grants the agency's motion for summary relief. Mutual mistake cannot exist as asserted for two reasons. The written contract does not state that compliance with California wage and benefits laws is not required or specify that such laws are inapplicable. The contract places on the contractor the obligation to comply with all applicable laws. The asserted mistake as to the applicability of law does not lend itself to the relief sought; any agency belief was not a part of the written contract. Any mistake was unilateral. The contractor's allegations of lack of cooperation and hindrance do not identify any instance when the contractor did not or could not perform as it desired because of an agency action or inaction. Allegations of what the agency would not have allowed or permitted (in contrast to actual actions and inactions) are not material. That is, deposition testimony by agency personnel of what would not have been permitted does not translate into actual interference in the past; the contractor has not identified harm arising during performance.

In CBCA 4818, the contractor seeks the same relief under the same contract. Even without reaching the question of timeliness of each element of the claim, the contractor's three theories do not survive the agency's motion to dismiss for failure to state a claim upon which relief can be granted. Design specifications did not exist. During performance, the contractor never sought a determination under the Ambiguities clause; nor has an ambiguity been identified which required resolution. While the contractor maintains that the agency hindered and interfered with the contractor's performance by not informing the contractor on the applicability of California law to wages and benefits under this contract, the contract placed the responsibility of compliance on the contractor; the agency was not obligated to perform the contractor's work of determining legal liabilities and obligations. Under the fixed price contract no duty arose for the agency to provide legal research or interpretation as sought by the contractor during performance and thereafter. The contractor was obligated to perform in accordance with applicable state laws for the agreed upon price; the contractor assumed the risk that it misunderstood the law or failed to pay or provide benefits to employees as required. The contractor is not entitled to additional payment under the contract.

The Board makes findings of fact based upon the uncontested documents of the solicitation and contract (the contractor's assertion that a modification altered particular terms of the contract does not create a factual dispute given that an amendment to the solicitation had placed the terms in the contract as signed) and the uncontested material facts as raised by the agency and contractor for purposes of resolving the agency motion in the first appeal. The second appeal is resolved through the assertions in the claim and the terms of the contract. In summary, the resolution is determined by the fact that the contractor was obligated to comply with applicable laws. While the contractor asserts that it failed to comply with state wage and benefits laws, no term of the contract caused the contractor to violate state law and the agency acted in accordance with its contractual obligations.

Findings of Fact

The Solicitation and Contract

1. On April 4, 2001, the agency issued a solicitation to obtain proposals for unarmed guard services at a facility in California. Exhibit 1 (all exhibits are in the appeal file, as supplemented, unless noted otherwise). The contractor would be required to provide a project manager (not a separately priced line item), as well as a supervisory custody officer for three shifts every day, and individuals to cover forty-three other posts or positions for one, two, or three shifts per day. Exhibit 1 at 76 (§ J-1). Solicitation amendment 4 changed the postpositions to have two supervisory positions (one for two shifts, the other for three shifts, daily, with a change in nomenclature), and forty-three custody officer posts, some identified as "INS Designated Assignment," with the estimated man-hour quantities in the change stated as 297,024 for custody officers and 14,560 for supervisors. Exhibit 8 at 338-39, 349-51 (§ B)

2. The solicitation stated that in accordance with attached specifications, the contractor shall provide unarmed guard services. "The quantities represent an estimated amount for the service required." Further,

> The man-hour quantities listed below are estimated quantities and not a guarantee of any kind although they are based on past history and anticipated requirements. Man-hour means productive hour. Only productive hours can be invoiced. Productive hours are only those actually on the job to man postpositions or perform supervisory functions. Man-hour unit prices shall include all costs (direct and indirect), profit and overhead. Costs include but are not limited to management, wages, benefits, training time, holiday and vacation time, sick leave, relief guards, muster time, drug testing, equipment,

> material, uniforms, shift differentials, insurance and any other costs required to perform this contract.

Exhibits 1 at 3 (§ B), 8 at 349 (§ B). The section also noted that the offer must contain firm, fixed prices for the base year and four one-year option periods for all line items. The chart, as amended as noted in finding 1, substantively the same for each period, required the offeror to provide unit (man-hour) and total prices for contract line (clin) items of custody officer (i.e., guard services) and supervisory custody officer lieutenant (supervisors) positions:

clin item #	item description	est. qty.	unit	unit price	total
0001	custody officers	297,024	man-hour	$	$
0002	supervisors	14,560	man-hour	$	$

Exhibits 8 at 349-51 (§ B). Under the solicitation and the contractor's offer, for each of the base and option years, the sum of the prices for the two line items reflected the total base or option year estimated price. Exhibits 8 at 49-51, 15 at 407-09.

3. Consistent with section J-1, Finding 1, the estimated quantities reflect 43 custody officer posts designated for coverage of one, two, or three shifts of eight hours per day for 7 days per week (56 for one shift, 112 for two shifts, and 168 for three shifts) for 52 weeks, and two supervisor positions to be filled, one for three shifts and one for two shifts of eight hours per day for 7 days per week for 52 weeks. Included within the postpositions are single shift positions identified as "INS Designated Assignment" which are to be utilized at the discretion of the agency officer in charge, and may not be utilized as relief for other posts. A note explains: "INS pays for actual hours worked (8 hours per shift) at the all-inclusive rate listed in Schedule B [i.e., the offeror's/contractor's pricing]. **It is the responsibility of the Contractor to include lunch periods, breaks, training hours, relief and any other costs into the man hour rate.**" Exhibit 8 at 338-39 (§ J.1). This language from solicitation amendment 4 reflects an alteration from the original solicitation, which identified some positions as "Rover (Undesignated)." Exhibit 1 at 76 (§ J.1). While the contractor contends that contract modification 7 eliminated these rover (undesignated) positions, leaving the contractor without personnel who could perform during breaks, Claim (CBCA 3389) at 2-3, that bilateral, no-cost modification permitted a one-hour change in the work schedule but did not alter the postpositions under the contract; amendment 4 (issued before receipt of final proposals) eliminated those rover positions. Exhibits 8, 23. The contractor's position regarding a contractual change fails to represent a plausible material fact.

4. A Post Relief provision states:

> As indicated in the post orders, no Custody Officer shall leave his post until relieved by another Custody Officer. When the Contractor or Contractor Supervisors authorize rest or relief periods, the Contractor shall assign undesignated officers to perform the duties of the Custody Officers on break.

Exhibit 1 at 24 (¶ C.2.H).

5. The Scope of Work portion of the solicitation/contract specifies:

> The Contractor shall furnish unarmed security guard services, including management personnel, supervision, manpower, relief guards, uniforms, equipment, and supplies to provide guard services seven (7) days a week, twenty-four (24) hours per day at [the site in] El Centro, CA. The Contractor shall provide a minimum of one Custody Officer of the same gender as the detainees per shift.
>
> . . . .
>
> The Contractor is to include in the man-hour rate at Schedule B all costs for services INS requires in the contract.

Exhibit 1 at 8 (¶ C.1.C).

6. The solicitation explains the phrase "man-hour rate":

> The rate that includes all costs, overhead and profit required to perform the contract. Costs include management, wages, benefits, training time, holiday and vacation pay, sick leave, materials, equipment and any other costs to meet contract requirements described in the solicitation and as shown in man-hours chart in Section J, Attachment 1. Only productive hours can be invoiced. Productive hours are those hours when the required services are involved.

Exhibit 1 at 11 (¶ C.1.D).

7. A Rules and Regulations clause dictates that the contractor is to abide by all rules and regulations governing the site. The clause identifies the sources of applicable rules and regulations; the list omits any reference to state and local laws and standards, but those are neither rules nor regulations. Exhibit 1 at 14 (¶ C.1.F). Immediately following is an Ambiguities clause that provides:

> All services must comply with the PWS [performance work statement] and all applicable state and local laws and standards. Should a conflict exist between any of these, the more stringent shall apply. If the Contractor is unable to determine which standard is more stringent, the Contracting Officer (CO) shall determine the appropriate standard.

Exhibit 1 at 14 (¶ C.1.G). The rules and regulations prohibited officers from going off-site during breaks. Contractor's Statement of Uncontested Facts at 3 (¶ 13).

8. The agency provided the offerors with responses to various inquiries from vendors including the following on the permits and licenses clause:

> Discussions with the business-licensing agency indicate the services performed on Federal Property do not require a CA business license. Paragraph K.1. On page C-19, indicate contractor must meet state and local requirements.
>
> Q. Is the [pertinent] Center considered Federal Property?
>
> **Yes.**
>
> Q. Will the contract require the contractor to have a CA business license?
>
> **To the best of our knowledge, a business license is not required given that all work is to be performed on a Federal Facility; however, it is for [sic] the responsibility of the offeror to contact the appropriate state licensing authority for a determination.**
>
> . . . .
>
> Do the productive man-hours listed in Section B include relief hours?
>
> **Yes. See B-2, Second Paragraph**
>
> "Costs include but not limited to relief guards....."

Exhibit 10 at 376 (¶¶ 19, 24). Although the solicitation amendments do not incorporate the questions and responses, Exhibits 2, 6-8, the solicitation and contract contain no language inconsistent with the responses.

9. The responses to vendor questions also address section J, attachment 1, the man-hour chart, and include the following:

> B. How are rovers deployed per shift? Can they work as a supervisor and a rover?
>
> **See Revised Attachment 1, Postpositions Man-Hour Chart, Amendment 004. No, Rovers are not Supervisors.**
>
> C. Are officers allowed to break on[e] another? Are relief hours built in to total hours listed? How are officers given breaks?
>
> **Postpositions must be manned at all times. There are no Relief Postpositions on Attachment 1, Postpositions Man-Hour Chart. It is the contractor's responsibility to determine how officers will be given breaks and provide for Relief Personnel necessary.**

Exhibit 10 at 384 (Q&A 65). Although the solicitation amendments do not incorporate the questions and responses, Exhibits 2, 6-8, the solicitation and contract contain no language inconsistent with the responses.

10. A Permits and Licenses section contains a Business Permits and Licenses clause which specifies: "The Contractor shall comply with all applicable Federal, State, and Local laws and all applicable Occupational Safety and Health Administration (OSHA) standards." Exhibits 1 at 25 (¶ C.2.K.1), 8 at 358 (¶ C.2.K.1). The section also contains a Jurisdiction clause: "The Contractor's authority under this contract is limited to space or posts that are under the charge and control of INS. The Contractor will not extend his services into any other areas." Exhibits 1 at 25 (¶ C.2.K.3), 8 at 359 (¶ C.2.K.3).

11. A separate Permits and Licenses clause dictates: "In performance of work under this contract, the Contractor shall be responsible for obtaining all necessary permits and licenses, and for complying with all applicable Federal, State, and Municipal laws. The Contractor is to be licensed in the State of contract performance, if such licensing is required by the State." Exhibit 1 at 57 (¶ H-9).

12. Section C of the solicitation/contract addresses the staffing plan:

> The Contractor shall staff the postpositions in accordance with the man-hour chart provided in **Section J. Attachment No. 1.**

> **A. Minimum Staffing Requirements**.
>
> The Contractor shall fully staff the facility to secure, control, and supervise detainees in custody regardless of the detainee population. Staffing must be sufficient to cover the posts as listed in the solicitation. The Contractor shall ensure daily Custody Officer assignment rosters, by shift, for the duration of the contract. The assignment rosters shall indicate the number of staff, job titles, names, hours, and days of work for each post. The daily roster shall be posted 24 hours in advance. Shift rosters must be provided to the COTR on a daily basis upon completion of the third shift.

Exhibits 1 at 26 (¶ 3), 8 (¶ 3), 16.

13. The agency issued written questions and answers from a preproposal conference held in April 2001, with the preface: "The INS answered the questions that were addressed at the conference to the best of our knowledge; however, the contractor is responsible for their own 'best' business practice decisions and should structure their proposals accordingly." Also, "Please note—no change will be made to the requirements of this solicitation unless an amendment is issued by the contracting officer." Exhibit 3 at 317. An answer explained lunch and time breaks: "You must rotate rovers for it. Planning lunch and breaks is the responsibility of the contractor. The Contractor is responsible for 8 productive hours per shift." Exhibit 3 at 317-18. While an amendment does not expressly incorporate the question and answer, the language of the solicitation and contract is consistent with the response in specifying that the contractor would be responsible for coverage over lunch and break periods. Findings 2-5, 8-9. Because amendment 4, as noted in Finding 3, eliminated the undesignated rover positions, the contractor cannot establish that this reference to rovers, not part of the final solicitation or contract, constitutes a material fact to the resolution of the disputes.

14. Also within that issuance, another question and answer provided:

> **California law requires vacations to be paid upon termination and accrue to the date [of] termination. Federal law is different and does not accrue to the date of termination. Federal law is different and does not accrue until the anniversary date is reached. How does the *Suarez* decision [a]ffect this contract requirement?**
>
> We are unable to provide legal advice to contractors.

Exhibit 3 at 319. This question and answer was not part of a solicitation amendment, but nothing in it is contrary to a term or condition of the contract.

15. Subsequently, prior to proposal submission, this contractor posed questions at the end of April 2001. In particular, noting that the solicitation states that relief is required to be provided by "undesignated officers," a question asked: Does this mean that the "rovers" will be providing the breaks during their regularly scheduled hours, or should the contractor be providing additional "breaker" officers to provide relief during breaks that are required by law or by the CBA (collective bargaining agreement)? Exhibit 4 at 321 (Ques. 1). The agency provided a response, directing the contractor to see the revised postposition man-hour chart in amendment 4. Exhibit 9 at 367 (¶ 1). That is, as noted above, the amendment eliminated the undesignated rover positions. The chart identifies postpositions and states both that INS designated assignment positions must be manned and may not be utilized as relief for other positions, and that it is the responsibility of the contractor to include lunch periods, breaks, relief, and other costs into the man hour rate. Exhibit 8 at 338-40.

16. In providing the various responses to additional questions, the agency cautioned offerors to "review the amendments since any questions that resulted in constructive changes to the solicitation are reflected in the amendments." Exhibit 10 at 372.

17. In its statement of uncontested facts, the contractor notes that it received a letter from the agency written on February 28, 2002, "informing Akal that the California legislature had recently passed a new law outlining changes to California Worker's Compensation Administration and Benefits, and asking whether Akal had taken those changes into account in its most recent proposal." Contractor's Statement of Uncontested Facts at 1 (¶ 1).

18. With an award date of May 9, 2002, Akal became the contractor. Exhibit 16; Original Exhibit 2. The agency unilaterally exercised each of the four options, and the parties entered into bilateral modifications to further extend the performance period and to account for wage determination changes and to reflect alterations arising from changes to terms and conditions of the contractor's collective bargaining agreements. E.g., Exhibits 19-25, 30-34, 36, 40-41, 43-46. The contractor provided services under the contract from January 1, 2003, through June 30, 2009.

Resolution of Class Action

19. The contractor cites the following as California law relevant to this dispute, in effect at the time of the final proposal and during performance:

11. Meal Periods.

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> . . . .
>
> 12. Rest Periods.
>
> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time for four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

Complaint at 6 (¶ 23).

20. In April 2006, employees of the contractor filed causes of action in a California court. In June 2009, a judge granted a motion for class certification, finding:

> that common questions predominate with respect to whether the guards occupy positions wherein they are entitled to meal periods, rest breaks and overtime premium pay in accordance with California law. Additionally, the court finds that common questions predominate with respect to whether an on-duty meal period and/or rest break complies with California law.

Exhibit 107 at 17563 (¶¶ 2-3).

21. In February 2009, the contractor informed, and sought assistance from, the agency regarding the legal matters concerning the application of California law to wages and

benefits. Exhibits 42, 93-97. Further requests for input and a declaration were made in April and May 2009, with the agency providing a response. Exhibits 98-109. The agency declined to have one of its employees sign proposed affidavits, when the contractor sought a legal opinion from the proposed affiant. Exhibits 101-05.

22. The contractor has identified no reference in a submission to the agency during the performance period when it referenced the Ambiguities clause, Finding 7, or identified any conflict between requirements of the contract. The contractor has not identified instances of when, during performance, it sought to add staff to the contract to provide additional coverage for rest or lunch breaks or when the agency denied, or delayed in permitting, any such related clearances or additional personnel.

23. By a statement of decision (not identified as a judgment) for the court, a judge of a Superior Court of the State of California resolved specific issues involving the suit brought by personnel who performed under the contract here at issue against this contractor:

> **1. Does California law does not [sic] regulate the federal function in this matter?**
>
> [Contractor] provides security services at a federal facility; therefore, [contractor] performs a federal function. However, pursuant to the clear provisions of the contract [contractor] was required to provide sufficient staffing to cover all positions. Further, the contract states that [contractor] will comply with all state and local laws in performance of the contract.
>
> *Murphy v. Kenneth Cole Productions* (2007) 40 Cal. 4th 1094 provides the premium paid for missed meal periods and break times is a *compensatory* wage due to the employee. Sole impact on the contractor here is financial, and where local regulations simply increase costs there is no impact on the federal function. Here the impact of Cal. Law is to increase the costs of [contractor's] performance of the contract; therefore, there is no impact on federal function.
>
> **Does application of California Law Interfere with the Federal Government's Lawful Control of the Contract?**
>
> The Court has paraphrased this issue so as to be less argumentative. At trial, [contractor] introduced evidence for the purpose of showing that pursuant to the contract the federal government ha[d] the right to control certain aspects of [contractor's] performance, that the Federal Government exercise that control, and that the result of that exercise of control was collusion of

> [contractor's] compliance with California wage and hour law. Specifically, [contractor] claimed that it was precluded, or would have been precluded, from having more staff on-site to cover meal breaks and rest periods.
>
> A review of the contract compels a finding by this court that the federal government had no such control under the contract. [Contractor's] primary obligation under the contract was to provide sufficient staffing for the facility. Contract did not explicitly limit the number of staff who could be on-site at any given time. Further, the nature of shift work contemplates that additional staff will be on-site during shift changes. Finally, the contract required [contractor] to comply with state and local laws. Therefore, this court concludes that had [sic] the federal government had no contractual right to preclude [contractor] from maintaining sufficient staff to comply with California law on meal and rest breaks.

Exhibit 119 at 17624-25.

24. Thereafter, the parties to the class action entered into a settlement agreement. On September 19, 2011, a judge of the California Superior Court entered an order and judgment approving the class action settlement. Complaint (3389), Exhibit 13. The contractor has paid $5,358,973.19 to class members who timely submitted a claim, $140,000 in enhancement payments, and, for opposing legal fees and expenses, $3,900,000 in attorney fees and $339,562.12 in costs. The contractor also seeks $1,355,681.95, said to be a portion of the fees and costs it incurred in defending and resolving the class action matter. Contractor's Statement of Uncontested Facts at 8 (¶¶ 40-41). For purposes of resolving these motions, the Board assumes that the contractor violated California law.

CBCA 3389

25. On November 1, 2012, the contractor submitted to the contracting officer a certified claim seeking to recover $11,094,217.26. Exhibit 50. The contractor alleges mutual mistake in believing that the facility was under exclusive federal jurisdiction and as to the parties' belief that the change associated with amendment 7 was a no-cost change when there actually was an associated cost. The contractor also alleges that the agency breached its duty to cooperate and not hinder performance by impeding the contractor's ability to comply with California laws regarding meal and rest breaks. Exhibit 50 at 666. More specifically on the breach assertion, the contractor maintains that the agency

> breached its duty to cooperate and not hinder performance by requiring Akal to comply with applicable state and local laws under the Contract, but then

> making it impossible for Akal to do so by (1) not allowing the officers to leave the facility during their meal breaks, (2) not allowing more employees on site than there were post positions, and (3) not processing clearances for additional officers in a timely fashion.

Exhibit 50 at 671. Regarding the second item, the contractor adds that if one assumes that the agency interpreted the contract to permit additional officers on site and such an interpretation is reasonable, "Akal's interpretation that they were not allowed to have additional officers on site is also reasonable and therefore should prevail." Exhibit 50 at 673-74 (parentheticals and case citation omitted). The contracting officer denied the claim, by decision dated March 29, 2013. Exhibit 51. The Board received the contractor's notice of appeal on May 29, 2013.

CBCA 4818

26. Seeking the same $11,094,217.26, on April 20, 2015, the contractor submitted a second certified claim to the contracting officer. The contractor raised three bases for relief, alleging an agency breach of the: (1) implied warranty of design specifications, (2) Ambiguities clause (the agency "failed to carry out this express duty to cooperate by failing to respond to Akal's request for assistance in ascertaining the applicability of California wage and hour laws to El Centro" and "Akal suffered damages as a direct result of [the agency's] failure to inform Akal that California wage and hour law did apply to the facility when Akal requested such information in February 2009"), and (3) implied duty to cooperate (in failing to respond to contractor's request for assistance in determining whether California wage and hour law applied to Akal's contract, the agency breached its duty of good faith and fair dealing). Exhibit 121 at 17658-64. By decision dated June 19, 2015, the contracting officer denied the claim, concluding that the contract contains no design specification, the contractor's inquiries did not implicate the Ambiguities clause, and the agency responded to requests but refrained from providing legal research or conclusions and did not breach an implied duty to cooperate. Exhibit 122. On June 25, 2015, the Board docketed as CBCA 4818, the contractor's appeal from the decision.

Discussion

The particulars of each claim and resolution are detailed below. From the facts, it should be apparent that the solicitation and contract required the contractor to perform at a fixed price, with that price to reflect performance in accordance with applicable state laws. The contract contains explicit statements that contractor is to comply with applicable state laws and that pricing was to reflect full coverage while guards were on lunch or other breaks, Findings 2-6, 8-11, 13, 15-16. The contractor has not established that state laws are rules or

regulations in the context of the clause and contract (with the express requirement to comply with applicable laws), such that the omission from the Rules and Regulations clause does not absolve the contractor from compliance. Finding 7. Moreover, prior to the submission of final proposals, the agency informed the contractor of changes to California laws and sought to ensure that the contractor took those changes into account. Finding 17.

Not material to the resolution of these disputes at this stage are the contractor's references to the prior contract and how the contractor continued the staffing practices for lunches and breaks with agreements with the union, and to the agency's issuances for the subsequent contract. As to the first, the continuation of practices does not mean that such practices complied with the former or recently changed laws; the contractor was required to comply with applicable laws. As to the second, the following solicitation and contract are not informative when considering the contract in question. The plain meaning of the language of the contract regarding the contractor's obligations makes it unnecessary to go beyond that language; there is no need to consider the prior or subsequent solicitation or contract language. Under the fixed-price contract, the contractor receives no more than the agreed-upon price.

While the contractor references views of a purported expert regarding the reasonable interpretation of solicitation provisions and the reasonableness of the contractor's actions, such views do not represent appropriate expert testimony (and, in any event, even if accepted, do not entitle the contractor to more than the fixed-price and suggest that had the contractor sought such advice regarding its obligations prior to submitting its proposal or during performance it may have avoided its legal difficulties and expenses). The Federal Circuit has cautioned with regard to the use of "experts":

> The views of the self-proclaimed CAS [Cost Accounting Standards] experts, including professors of economics and accounting, a former employee of the CAS Board, and a government contracts accounting consultant, as to the proper interpretation of those regulations is simply irrelevant to our interpretive task; such evidence should not be received, much less considered, by the Board on the interpretive issue. That interpretive issue is to be approached like other legal issues–based on briefing and argument by the affected parties.

Rumsfeld v. United Technologies Corp., 315 F.3d 1361, 1369 (Fed. Cir. 2003). Accordingly, the Board treats the purported expert's positions as part of the briefing and argument of the contractor, not as expert testimony.

The contractor performed seemingly believing that it was in compliance with applicable laws, perhaps concluding that California wage and benefits laws were not applicable. During performance, the contractor has identified no instance when it sought to add staffing to address differently lunch and other breaks. To resolve the motions, the Board can assume that the agency was slow in finalizing clearances; however, the contractor has not provided a connection to establish that it would have altered or intended to alter its staffing. The contractor's position in these cases reflects after-the-fact attempts to shift blame to the agency, when contractually and legally the contractor has failed to identify any agency impropriety.

CBCA 3389

In this case, the contractor raises two theories for relief: (i) agency breach of its duty to cooperate and not hinder performance (by impeding the contractor's ability to comply with California laws), and (ii) mutual mistake in believing that the facility was under exclusive federal jurisdiction (regarding the applicability of California wage and benefits laws to this contract).

The contractor opposes the agency motion seeking summary relief. The standards for summary relief are not in dispute. Summary relief is appropriate when, drawing all justifiable inferences in the non-movant's favor, there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. *AmerGen Energy Co. v. United States*, 779 F.3d 1368, 1372 (Fed. Cir. 2015); *R&G Food Services, Inc. v. Department of Agriculture*, CBCA 3487, slip op. at 4 (Nov. 21, 2016) ("We may grant the motion only if the evidence cited by [the contractor, non-movant], which has the burden of proof as to its breach claim, cannot support the claim[.]"); *Sea Shepherd Conservation Society v. General Services Administration*, CBCA 5254 et al., slip op. at 5-6 (Nov. 21, 2016).

Mutual mistake cannot exist as asserted when the contract places on the contractor the obligation to comply with all applicable laws. There is no language or exception in the contract relieving the contractor from complying with California wage and benefit laws. The asserted mistake as to the applicability of law does not lend itself to the relief sought. Questions of authority aside, even assuming the agency believed that such laws were not applicable, any such unstated (i.e., not part of the written contract) beliefs did not form a basis of the bargain. The contractor's allegations of lack of cooperation and hindrance do not identify any instance when the contractor did not or could not perform as it desired because of an agency action or inaction. Allegations of what the agency might or might not have allowed or permitted (in contrast to actual actions and inactions) are not material. That is, deposition testimony by agency personnel of what would have been permitted or not does

not translate into actual interference in the past; the contractor has not identified harm arising during performance. A purported expert's views on what certain solicitation provisions might mean or what might constitute adequate guidance are overreaching in terms of appropriate expert testimony and are treated as part of the contractor's argument and briefing.

The agency did not breach its duty to cooperate and not hinder performance by impeding the contractor's ability to comply with California laws

This portion of the claim identifies no action or inaction by the agency that altered the contractor's performance of this contract. The Board assumes that the contractor has correctly placed in context the testimony of agency personnel who stated that the contractor would not have been allowed to bring on additional staff. What is material is that the contractor premises this portion of its claim on a critical non-existent fact. The contractor does not reference any instance of when it actually sought to add personnel or when the agency acted or failed to act in such a way that altered the contractor's ability to perform the contract. The Board will not extend the theories of failure to cooperate or hindering performance to the mere hypothetical. That the contractor has identified no potential facts to support the notion of actual agency impropriety and resulting specific harm to the contractor is in keeping with the contractor's position that it was unaware of the applicability of state law to its performance of this contract; the contractor did not seek to do anything differently during performance. Without a particular instance of actual action or inaction by the agency that harmed the contractor, the contractor cannot prevail on these theories. The contractor could have no reasonable expectation for the agency to act other than as it did. *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014).

There could be no mutual mistake

The requirements to obtain contract reformation due to a mutual mistake are well-established. Here, the contractor has the burden to demonstrate that (1) the contracting parties were mistaken in their belief regarding a fact, (2) the mistaken belief constituted a basic assumption underlying the contract, (3) the mistake had a material effect on the bargain, and (4) the contract did not put the risk of the mistake on the party seeking reformation. *Lakeshore*, at 1349-50.

The alleged mistake (1) is one of law, not fact, (2) was not a basic assumption of the contract because the contract did not specify the applicable laws, (3) there was no material effect on the bargain because the contractor did not alter its pricing when notified of the laws to consider, and (4) the fixed-price nature of the contract put the risk of the mistake on the contractor. The solicitation and contract were explicit in detailing that it was for the contractor to abide by applicable laws. The agency made neither proffer nor promise as to

the applicable laws. Without addressing questions of authority and what is required to establish an agency belief, one can assume that the agency fully believed that the facility was exempt from state laws relating to wage and break benefits. This belief, unstated in the written contract, does not assist the contractor. The risks of determining the applicable laws, particularly coupled with the fixed-price nature of the contract, were placed upon the contractor. At best, the contractor can demonstrate a unilateral mistake. It bore the risks of the consequences (beneficial or otherwise) of such a mistake.

The contractor references contract modification 7 as an instance of a mutual mistake because of an alleged impact on agency designated officer postpositions. This aspect of the claim may be resolved by reference to the modification and the contract, which contained solicitation amendment 4. The contractor's factual assertion is not plausible to create a dispute; the contractor mischaracterizes the contract modification. Solicitation amendment 4 eliminated the undesignated rover positions and created the agency designated positions. Finding 3. Therefore, the factual basis to the contractor's assertion is lacking. Moreover, the contractor signed the modification as a no-cost modification. Although the contractor may have been mistaken as to the cost impact (assuming such an impact transpired), there is no basis to revisit the contract modification. The contractor cannot establish the elements of mutual mistake.

CBCA 4818

In this second appeal, the contractor seeks $11,094,217.26–the same amount as in the first appeal. In support it raises three theories alleging that the agency breached (i) the implied warranty of design specifications based upon the agency's and contract's requirement that the contractor's employees remain on-duty during meal breaks, in violation of state wage and hour laws; (ii) the contract arising from the agency's failure to comply with the Ambiguities clause; and (iii) the contract arising from the agency's failure to comply with the implied duty to cooperate with the contractor.

The contractor opposes the agency motion to dismiss for failure to state a claim upon which relief can be granted, filed under Rule 8(c)(1), 48 CFR 6101.8(c)(1) (2015), and for untimeliness (asserting that more than six years have elapsed from claim accrual). The material to be considered and the standard of review of the failure to state a claim motion are well-established. The Board is to assume all well-pled factual allegations as true and indulge in all reasonable inferences in favor of the non-movant. The claimant must plead factual allegations that support a facially plausible claim. Threadbare allegations of the elements of a cause of action, supported by merely conclusory statements, do not suffice to defeat a motion. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149 slip op. (Nov. 22, 2016).

Even without resolving the question of timeliness of each element of the claim, the contractor's three theories of relief do not survive the agency's motion. Design specifications did not exist. The contractor never sought a determination under the Ambiguities clause; nor has an ambiguity been identified. While the contractor maintains that the agency hindered and interfered with the contractor's performance by not informing the contractor on the applicability of California law to wages and benefits under this contract, the contract placed the responsibility of compliance on the contractor; the agency was not obligated to perform the contractor's work of determining legal liabilities and obligations. Under the fixed price contract the contractor was obligated to perform in accordance with applicable state laws for the agreed upon price; the contractor assumed the risk that it misunderstood the law or failed to pay or provided benefits to employees as required. The contractor is not entitled to additional payment under the contract. In granting the agency's motion, the Board denies this appeal.

There are no design specifications

The contractor has failed to identify design specifications in this contract under which the contractor was to provide services. The Government did not design anything. A requirement to staff specific posts or positions for particular shifts does not constitute a design specification. The contractor asserts that the specifications were design specifications because they required employees to remain on-duty during meal breaks, in violation of California wage and hours laws. The premises underlying this theory of relief are not well-pled in two respects. First, the contractor has not identified California law which prohibits an employer from keeping employees on duty during meal breaks; the submissions indicate that law requires an employer to provide meal and rest periods, and to pay the employee missed periods. Findings 19, 23. The plain language of the contract belies the contractor's assertions; the contract recognized meal and other breaks. The contractor has not explained how prohibiting employees from leaving a facility during a break, and keeping employees on-duty while at the facility during a break, would violate the law, although such restrictions could affect payment to the employees. Second, the contract does not contain design specifications. There is no design in this contract for services. The contractor references case law that treats as design specifications those instances when an agency sets forth "in precise detail" the work to be performed and the manner in which the work is to be performed, such that the contractor cannot deviate but must follow such instructions as one would a road map. *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969). The present contract lacks such specifications. The contract identified the postpositions to be staffed for each shift; the contract did not dictate how the contractor would accomplish staffing, and did not limit the agreements the contractor may have reached with individual employees regarding lunch and other breaks.

The contractor sought no determination under the Ambiguities clause

The Ambiguities clause provides:

> All services must comply with the PWS [performance work statement] and all applicable state and local laws and standards. Should a conflict exist between any of these, the more stringent shall apply. If the Contractor is unable to determine which standard is more stringent, the Contracting Officer (CO) shall determine the appropriate standard.

Finding 7. The contractor contends that the agency failed to respond to the contractor's request for assistance in ascertaining the applicability of California wage and hour laws to the facility in question. Claim at 14. The contractor relies upon what it characterizes as the contracting officer's refusal to determine whether California wage and hour laws applied to the facility:

> By failing to respond to Akal's requests for the contracting officer to determine whether California wage and hour laws applied at [the facility], [the agency] breached its express duty as established by the Ambiguities clause. Akal specifically asked the contracting officer to resolve an ambiguity, but the contracting officer failed to provide any substantive response at all.
>
> . . . .
>
> Akal suffered damages as a direct result of [the agency's] failure to inform Akal that California wage and hour law did apply to the facility when Akal requested such information in February 2009.

Complaint at 15.

On its face, this theory of relief fails for two distinct reasons. First, the contractor did not reference the Ambiguities clause in its inquiries during performance. Finding 22. Second, the contractor has not identified an ambiguity. That is, the contractor has not supported its assertion that there existed a conflict between the work statement and applicable state laws and standards, much less that there was a question of which was more stringent and therefore applicable. The contractor did not seek to resolve an ambiguity about which provisions might be more stringent, but sought a legal conclusion on the applicability of the law. That request falls outside the clause.

The agency did not breach any identified implied duty to cooperate with the contractor

The contractor references court cases when it asserts that the agency breached its duty of good faith and fair dealing, including *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (duty of good faith and fair dealing imposes obligations on both contracting parties that include duty not to interfere with performance and not to act so as to destroy reasonable expectations regarding the fruits of the contract) and *Celeron Gathering Corp. v. United States*, 34 Fed. Cl. 745, 753 (1996) (concept of fair dealing places on Government a duty to render reasonable cooperation to the contractor in the performance of the contract; a claim under duty of cooperation concerns the reasonableness of the government's actions after considering the facts and circumstances at the time). Complaint at 16. The contractor faults the agency for not informing the contractor that the facility was not a federal enclave and that California wage and benefits laws applied to the facility when the agency was aware of such conclusions in February 2009. Complaint at 15, 17.

This theory fails legally because the contract placed upon the contractor, not the agency, the responsibility to comply with applicable law; the agency was not obligated to offer its legal opinion on such matters. The contractor could have no reasonable expectation that the agency would perform legal research and reach the requested legal determinations.

While the contractor states that many legal fees and costs could have been avoided had the agency informed the contractor that California wage and hour law applied to the facility when the contractor requested such information in February 2009, the contract placed the burden on the contractor to determine and abide by the applicable law.

Decision

The Board **DENIES** each appeal: CBCA 3389 is resolved by granting the agency's motion for summary relief; CBCA 4818 is resolved by granting the agency's motion to dismiss for failure to state a claim.

JOSEPH A. VERGILIO
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

ALLAN H. GOODMAN
Board Judge