ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Parsons Government Services, Inc.	)	ASBCA No. 61630
	)	
Under Contract No. W911S0-11-D-0038	)	

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CPT Richard W. Hagner, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK

This appeal is about compensation for role players. Parsons Government Services, Inc. (Parsons) provided actors to assist the United States Army to train soldiers in California. Parsons' role players sued it for additional compensation based upon California court rulings interpreting the state's wage requirements. It settled with its employees and seeks reimbursement of those costs from the government. The parties submitted the appeal for consideration under Board Rule 11. The appeal is denied.

FINDINGS OF FACT

1. When the Army trains its soldiers it sometimes uses role players. This enables soldiers to interact more realistically with individuals or groups portraying the inhabitants of a particular location. (Stip. ¶ 1) The Army issued task orders through the indefinite delivery, indefinite quantity contract identified above with Parsons to provide role players for its training center at Fort Irwin, California (stip. ¶¶ 2, 14-15, 21, 26-27). Among the clauses incorporated into the contract were Federal Acquisition Regulation (FAR) 52.222-41, SERVICE CONTRACT ACT OF 1965 (NOV 2007) and FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT-PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (SEP 2009) (SCA Price Adjustment Clause) (R4, tab 1 at 102-03). Also relevant is the Service Contract Act (SCA). 41 U.S.C. §§ 6701-07. The contract also contained Department of Labor (DOL) wage determinations (R4, tab 1 at 118-25).

2. Prior to the Army's issuance of the Parsons task orders, another contractor named CALNET, Inc. (CALNET) provided role players at Fort Irwin. The Department of Labor (DOL) investigated this contract and found that CALNET paid proper hourly wages in accordance with applicable DOL wage determinations but did not pay for enough hours. DOL determined that when role players were onsite for Full Spectrum Operation (FSO) Periods, which were 24-hour duty shifts, they should have been paid a minimum of 13 hours of work, instead of the 12 hours they had been receiving. This calculation typically excluded eight hours for sleep and three hours for meal time from a 24-hour period. DOL indicated that additional hours might be compensable if sleep or meal time were interrupted. (R4, tab 66 at 4-5)

3. The first of Parsons' role player task orders begins with the Army's June 29, 2012, draft Task Order Response (TOR) 48 to obtain comments (stip. ¶ 6). The included Performance Work Statement provided that personnel would be at a specified site for up to 13 hours per day, though some activities would be for less time (stip. ¶¶ 6, 8, 11; R4, tab 10 at 6). However, other than management, the role players were required to remain on the installation throughout each of the 19 day rotational periods (stip. ¶ 8; R4, tab 10 at 5-6). The Army identified applicable DOL wage determinations, but explained to Parsons that California wage rates and overtime laws also governed (stip. ¶¶ 8-9). Parsons submitted a firm-fixed price proposal providing the hours each employee would work. Parsons would not compensate any employee for more than 13 hours on any given day. (Stip. ¶ 13) On September 10, 2012, the Army issued Task Order (TO) 17 in response to the proposal requiring role players for multiple rotations at a firm-fixed price (stip. ¶ 14; R4, tab 23).

4. The second task order began with TOR 77, issued on July 10, 2013 (stip. ¶ 17). It too provided that role players would be onsite for 19 day rotations, working different numbers of hours on particular days, but never to exceed 13 hours in a day (stip. ¶ 18). Again, the Army warned Parsons that California labor laws and a state wage determination would apply along with a DOL wage determination (stip. ¶ 19). Parsons submitted a firm-fixed price proposal giving the hours each employee would work, stating again that it would not compensate employees for more than 13 hours per day. (Stip. ¶ 20) On July 25, the Army issued Parsons TO 30 in response to its proposal requiring role players for a firm-fixed price (stip. ¶ 21; R4, tab 32). Role players were housed on base (stip. ¶ 26).

5. Both task orders stated that personnel shall be at the specified work site for up to 13 hours per day (R4, tab 23 at 7-8, tab 32 at 7-8).

6. On July 3, 2013, a California appellate court issued its decision in *Mendiola v. CPS Sec. Sols., Inc.*, 159 Cal. Rptr. 3d 159 (Ct. App. 2013). That case involved a claim by security guards who were required to be on call at their work

when not on duty. The court held that a California state wage order (known as Wage Order No. 4) required compensation for all time they were on call, with the exception of eight hours for sleep under specified conditions. *Id.* at 179-80. Wage Order No. 4 applied to guards, but did not mention actors or role players (R4, tab 77 at 4). On January 8, 2015, the California Supreme Court held that under the wage order sleep time could not be excluded from the guards' compensation for their time on call. *Mendiola v. CPS Sec. Sols., Inc.*, 340 P.2d 355 (Cal. 2015).

7. Beginning in January 2015, various role players employed under TOs 17 and 30 added Parsons as a class action defendant in lawsuits seeking compensation for 24-hour workdays based upon the *Mendiola* holding (stip. ¶ 31; app. br. at 8-9).

8. On July 1, 2016, Parsons settled the role players' class action suits. In accordance with an order of the United States District Court for the Central District of California approving the settlement, Parsons contributed $1,761,829.66 to the settlement. Parsons paid its lawyers $619,265.91 for their representation. (Stip. ¶ 37) In approving the settlement, the court stated that the claims appeared strong, but whether the California Supreme Court holding in *Mendiola* applied to the role players remained in question (stip. ¶ 38).

9. On September 20, 2017, Parsons submitted a Request for Equitable Adjustment (REA) to the contracting officer seeking the amount of its settlement payment as well as the costs and attorney fees incurred defending against the suits (stip. ¶ 39). On March 6, 2018, Parsons submitted a certified claim for $2,399,507.83, representing its REA and costs preparing it. The contracting officer denied the claim on April 25, 2018 and this appeal followed. (Stip. ¶ 40)

DECISION

I. Cost Principles

Parsons argues first that the FAR Subpart 31.2 cost principles entitle it to recover its settlement cost as well as associated fees. In summary, Subpart 31.2 provides standards for contract pricing, payments owed under cost reimbursement contracts, negotiating indirect cost rates, termination costs, price revisions, and pricing changes or modifications. FAR 31.103. Among the criteria for determining the allowability of any costs are the terms of the contract. FAR 31.201-2(a)(4). These task orders are firm-fixed price (findings 3-4). They place the risk of performance costs upon Parsons. They do not permit Parsons to automatically recover any unexpected increased performance costs and calculate them under Subpart 31.2.

Under a firm-fixed price arrangement, Parsons assumed "maximum risk and full responsibility for all costs and resulting profit or loss." FAR 16.202-1. The price was

"not subject to any adjustment on the basis of [Parsons'] cost experience in performing the contract." *Id.*; *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1361 (Fed. Cir. 2016). Here, the Army warned Parsons prior to proposals that the task orders were subject to California state wage rates and overtime rules (findings 3-4). To the extent *Mendiola* prompted Parsons to settle claims by its employees for unexpected additional compensation, Parsons bore the risk of that exposure. *See Lakeshore Eng'g Servs., Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the contractor that the actual cost of performance will be higher than the price of the contract") (quoting *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996)); *Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1384 (Fed. Cir. 1999) (observing that, under a fixed price contract, "[t]he risk of loss for misjudging what it takes to perform . . . is on the contractor, not the Government").

In an effort to avoid the risks it assumed, Parsons observes that FAR 31.103(a) applies the Subpart 31.2 cost principles to price contract modifications with commercial organizations. However, the government did not modify the task orders so that argument is inapplicable.[1]

Parsons also relies upon the observation in *Tolliver Group, Inc. v. United* States, 140 Fed. Cl. 520, 526 (2018) *(Tolliver* I), that fixed-price contracts are not categorically immune from the applicability of Part 31's cost principles. As a general matter that is true because, as observed, the cost principles would apply to determine termination costs or price adjustments. More specifically, Parsons relies upon *Tolliver* I's denial of a government motion to dismiss a claim seeking a portion of legal fees incurred defending a False Claims Act *qui tam* action. The court opined that the level-of-effort development contract at issue was established pursuant to cost principles, and therefore cost principles located at FAR 31.205-47 governing recovery of legal fees provided a basis for entitlement. *Tolliver* I, 140 Fed. Cl. at 528-29. Parsons has not shown that these task orders for the acquisition of the services of role players were level-of-effort development contracts. *See* FAR 16.207-2 (explaining that level-of-effort contracts are suitable for investigation or study in a research and development area). Anyway, the Court of Federal Claims ultimately granted summary judgment to Tolliver on different

[1] Parsons' citations to Defense Federal Acquisition Regulation (DFARS) clause, 252.243-7001, PRICING OF CONTRACT MODIFICATIONS (DEC 1991) and DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998), are equally irrelevant. The former simply applies the cost principles when costs are a factor in pricing a contract adjustment. It does not dictate when adjustments are required. The latter describes the contours of an REA, limits the types of costs that may be sought, and requires a certification. It also fails to address when an adjustment is appropriate.

grounds than what it suggested in *Tolliver* I, finding entitlement because of defective contract specifications. *Tolliver Grp., Inc. v. United States*, No. 17-1763C, 2020 WL 360464 (Fed. Cl. Jan. 22, 2020) (*Tolliver* II). Retreating from *Tolliver* I's theory that the cost principles themselves provided a basis for recovery, *Tolliver* II acknowledged that, but for the defective specifications, the fixed-price nature of Tolliver's contract might preclude recovery of the unforeseen *qui tam* litigation costs. *Id.* at 7 (citing *Allegheny Teledyne Inc. v. United States*, 316 F.3d 1366, 1376 n.7 (Fed. Cir. 2003)). We agree. The cost principles do not entitle Parsons to recover the settlement cost of its employees' *Mendiola* claims.

II. SCA Price Adjustment Clause

The second argument Parsons advances for recovery relies upon the contract's SCA Price Adjustment Clause located at FAR 52.222-43. As background, because they are service contracts the task orders were subject to DOL wage determinations issued under the SCA (findings 1, 3-4). Parsons was required to pay its employees in accordance with them. FAR 52.222-41(c); *Lear Siegler Servs., Inc. v. Rumsfield*, 457 F.3d 1262, 1266 (Fed. Cir. 2006). The government in essence pays a premium for services in return for its contractors' compliance with these requirements. *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1351 (Fed. Cir. 2017). The SCA Price Adjustment Clause mandates contractor compliance with the DOL wage determination in effect at specific points in a contract's life, such as the anniversary date of a multiple year contract or the beginning of each option period. FAR 52.222-43(c); *see also* FAR 52.222-41(c). The clause does not make contractors eat the costs of those wage determination increases occurring over time. Among other things, it requires the government to adjust contract prices to reflect wage increases made to comply with "[a]n increased . . . wage determination otherwise applied to the contract by operation of law . . . " FAR 52.222-43(d)(2); *see also Call Henry*, 855 F.3d at 1351.

Parsons argues this last cited provision of the SCA Price Adjustment Clause requires its recovery. It contends that DOL's CALNET ruling found that role players onsite at Fort Irwin for 24 hours need only be paid for 13 hours per day, which was then incorporated into the task orders.[2] Parsons says *Mendiola*'s holding that security guards must be paid under Wage Order No. 4 for all their time on call dictated that it settle its role players' claims for additional pay, which was then approved by the district court and ordered paid. It suggests that this chain of events qualifies under FAR 52.222-43(d)(2) as an increased wage determination applied to the task orders by operation of law, mandating that it should receive an increase to its contract prices.

[2] Parsons' suggestion that DOL's CALNET ruling found that role players need only be paid for 13 hours per day is incorrect. It stated that 13 hours is a minimum during the FSO (24-hour) duty shifts (R4, tab 66 at 195).

Without opining on whether *Mendiola*'s ruling about payments owed to security guards applies to Parsons' role players, Parsons is complaining about the potential impact of state law upon it. Subsection (c) of the SCA Price Adjustment Clause defines the wage determination applicable to a contract as that issued by DOL. FAR 52.222-43(c). Logically then, subsection (d)(2)'s adjustment of the contract price to reflect an increased wage determination applied by operation of law is similarly limited to a DOL determination. Nothing in the clause suggests that the government is to assume the costs of higher contractor labor expenses resulting from increased state wage orders.[3] Whatever California law may have required of Parsons, DOL did not change its wage requirements for role players. Furthermore, the fact that the district court approved Parsons' settlements of its employees' claims, and ordered payment, did not convert the settlements into an increased DOL wage determination.

Parsons appears to stake much of its argument upon *Lear Siegler Services.* There, a contractor sought reimbursement of the increased costs of providing its employees with the defined-benefit health plan required by a collective bargaining agreement (CBA). Under the SCA, a DOL wage determination includes a CBA-defined benefit that a contractor is required to provide. 41 U.S.C. § 6703; *Lear Siegler Servs.*, 457 F.3d at 1268. The court of appeals held that an increase in the employer's benefit costs qualified for a price adjustment under the SCA Price Adjustment Clause even if the nominal benefit to employees remained unchanged. *Lear Siegler Servs.*, 457 F.3d at 1269.

Parsons implies that even if there was no actual increase in a wage order, its costs of complying with the DOL wage determinations applicable to its task orders increased when it was ordered by the district court to pay the settlements of its employees' *Mendiola* claims. That is not correct. As observed, the employees' *Mendiola* claims were premised upon California Wage Order No. 4 (findings 6-7). Parsons' settlement of them had nothing to do with any DOL wage determinations. Although *Lear Siegler Services* suggests taking an expansive view of what constitutes a change to a wage determination, it is still anchored to the costs of complying with DOL determinations. The decision cannot be stretched to mandate compensation for increases in a contractor's costs to comply with independent state requirements. The more apt precedent is *Aleman Food Services, Inc. v. United States*, 994 F.2d 819 (Fed. Cir. 1993). There, the court of appeals held that Texas' increased worker's compensation and unemployment insurance taxes were not recoverable under the comparable SCA price adjustment clause because the employee benefits funded by the taxes were neither mandated nor increased by a DOL wage determination. *Id*. at 822-23.

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[3] Also, nothing in the record shows that California has increased Wage Order No. 4, only that the California Supreme Court has ruled the security guards at issue in *Mendiola* must be paid for the entire time they are on call (finding 6).

The SCA Price Adjustment Clause does not entitle Parsons to recover its settlement costs.

III. Mutal Mistake

Finally, Parsons contends that the parties were mutually mistaken about a fact. Mutual mistake of fact might entitle a claimant to reformation of a contract. *See Atlas Corp. v. United States*, 895 F.2d 745, 749-50 (Fed. Cir. 1990). Apparently, Parsons seeks a reformation that would shift all of its settlement costs to the government. To establish a mutual mistake of fact, Parsons must prove by clear and convincing evidence that: (1) the 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; (4) the contract did not put the risk of the mistake on the party seeking reformation. *Nat'l Austl. Bank v. United States*, 452 F.3d 1321, 1329-30 (Fed. Cir. 2006); *Atlas Corp.*, 895 F.2d at 750.

Parsons suggests the parties committed two mistakes of fact. First, it says the parties mistakenly believed that Parsons would only have to pay its role players for 13 hours per day. It suggests *Mendiola* establishes their mistake about the requirements of Wage Order No. 4. A contention that the parties mistakenly interpreted the requirements of Wage Order No. 4 is not a mutual mistake of fact but a mistake of law. A mistake of law is not a ground for reformation. *Bank of Guam v. United States*, 578 F.3d 1318, 1330 (Fed. Cir. 2009). Additionally, Parsons is not premising its mistake claim upon an erroneous belief by the parties about a fact existing at the time of contracting, but upon their alleged prediction about the costs Parsons would incur during performance. Assumptions about future facts cannot establish a mutual mistake claim. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994) ("A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined [under the doctrine of mutual mistake of fact]") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981)).

Even if Parsons had demonstrated that the alleged mistake about Wage Order No. 4 was one of fact and not about future events, because Parsons settled its employees' claims, it is unknown whether *Mendiola*'s conclusion about guards also apples to Parsons' role players. Parsons has shown only that it settled claims. As the district court declared when approving the settlements, the claims appeared strong, but whether *Mendiola* applied to the role players remained in question (finding 8). Parsons has not proven by clear and convincing evidence that the parties made a mistake. Similarly, Parsons has not shown that the Army had any views at the time it issued the task orders what Wage Order No. 4 required of Parsons. Again, the Army warned Parsons that California overtime laws would govern its activities, leaving it to Parsons

to accurately ascertain and follow those rules (findings 3-4). These facts demonstrate that the assumption underlying the task orders was that Parsons was required to comply with California's requirements, whatever they were. Furthermore, Parsons has not proven by clear and convincing evidence that the contract did not put the risk of the alleged mistake on Parsons. Indeed, the facts, coupled with the firm-fixed price nature of the task orders, show Parsons assumed the risk of any mistake it made applying California's requirements.

Parsons' second alleged mutual mistake of fact twists around its first argument. Instead of contending the parties believed DOL had limited the number of hours role players need to be paid, to 13 per day, Parsons suggests the parties believed DOL required that role players be paid for no more than 13 hours per day. Again, an alleged mistake about the meaning of a DOL ruling is not one of fact and cannot form the basis for reformation. Beyond that, Parsons' argument is unsupported. None of the stipulations cited by Parsons indicate that either party believed the DOL determination restricted employee pay to a maximum of 13 hours per day (stip. ¶¶ 8, 11, 18). Though Parsons did state that it would not pay role players for more than 13 hours per day, that statement does not evidence a mutual belief that DOL had placed a federally mandated cap on the hours role players could be compensated. Parsons has not proven by clear and convincing evidence that the parties committed a mutual mistake about the meaning of the DOL determination.

CONCLUSION

The appeal is denied.

Dated: April 23, 2020

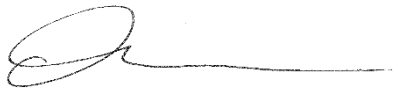
MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 61630, Appeal of Parsons Government Services, Inc., rendered in conformance with the Board's Charter.

Dated: April 24, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals