



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: February 19, 2014

CBCA 3389

AKAL SECURITY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Terrence O'Connor and Stephanie D. Wilson for Berenzweig Leonard, LLP, McLean, VA, appearing for Appellant.

Song U. Kim, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **GOODMAN**.

STERN, Board Judge.

This matter is before us on a motion to dismiss filed by the United States Department of Homeland Security, United States Immigration and Customs Enforcement (DHS).¹ Akal Security, Inc. (Akal or appellant) filed this appeal from the decision of DHS's contracting

¹ The facts herein are taken from the pleadings and documents filed by the parties on this motion.

officer denying Akal's claim for \$11,094,217.26. Appellant seeks the \$9,738,535.31 it paid to settle a class action lawsuit filed against it by its own security officers. Akal also seeks \$1,355,681.95 in legal fees and costs that it expended in defending the lawsuit.

Akal was awarded this contract on April 4, 2001, to provide security guard services at DHS's El Centro Service Processing Center (El Centro) in California. Akal provided these guard services from January 1, 2003, to June 30, 2009. The contract required Akal to provide guards approved by DHS and required Akal to keep these guards at various posts within El Centro. Akal was required to keep the posts manned at all times. As originally structured, the contract contained a fixed amount of guard positions plus extra guards so that all positions could remain occupied even when guards were on a rest break from duty, or were otherwise absent. The contract required that employees could only work at El Centro if they were approved by DHS with a "suitability clearance." The contract also required Akal's compliance with "applicable" state law. In addition, Akal was to report to DHS any difficulty in performing its duties.

California wage and hour regulations place certain requirements on employers regarding the amount and length of meal and rest periods for their employees. Apparently, during some periods, appellant did not provide the proper amount of paid rest and meal breaks for its El Centro employees as prescribed by the California regulations.

The security guards employed by Akal brought a class action lawsuit against Akal seeking unpaid wages and other damages. After a partial trial on certain of the issues, the California Superior Court for the county of Imperial found that El Centro was not a federal facility and that Akal had failed to comply with the provisions of the regulations requiring payment to its personnel during rest and meal breaks. This led Akal to settle the lawsuit for the amounts set forth previously.

Appellant claims that both it and DHS were mistaken in their belief that El Centro was a federal facility not subject to California law with regard to the particular regulations that Akal violated and that resulted in the lawsuit brought against it by its employees. Akal claims that DHS was untimely in clearing the guards, which led appellant to have inadequate staffing to permit rest breaks by its personnel. Appellant alleges that, as work progressed, DHS changed the contract and the DHS policies so that extra guards were not available to be used as substitutes for guards at their work posts. Akal submits that DHS did not permit more guards to be at the site than the number of positions that was set forth in the contract. Appellant also claims that DHS did not permit the guards to leave the facility when they were on breaks from work and restricted the amount and length of breaks available to the guards. Akal claims that DHS issued unilateral directives reducing the rest and meal breaks for the security guards. Akal further alleges that, in 2009, it sought information in writing from

DHS regarding El Centro's status as a federal facility and DHS failed to respond to two separate written requests.

Appellant argues in its complaint that DHS breached its duty to cooperate and not hinder performance. Akal claims that DHS's actions prevented it from compliance with the California regulations. Appellant also claims that both parties were mistaken in their belief that El Centro was a federal facility and not subject to California law. This argument includes allegations regarding statements made by DHS prior to contract award.

DHS argues that appellant cannot establish the required elements of mutual mistake to prevail on this appeal. DHS also argues that it did not breach its duty of good faith as the contract placed the burden of compliance with state law on appellant and appellant was free to comply with the California law despite DHS's alleged actions. DHS further claims that Akal did not report any difficulty regarding guard breaks during contract performance. DHS submits that even if it contributed to appellant's non-compliance with California regulations, Akal cannot prevail as it has not met its burden of separating its own fault from the alleged DHS fault in causing the violations.

A motion to dismiss is appropriate if the Board can decide the appeal on the pleadings without the introduction of further evidence. *Americom Government Services v. General Services Administration*, CBCA 2294, 12-1 BCA ¶ 34,895 (2011). We have stated,

The law is clear that a motion to dismiss for failure to state a claim will be granted only when the facts asserted by the appellant do not entitle it to a legal remedy. We assume that all well-pled factual allegations plausible on their face are true and indulge all reasonable inferences in favor of the non-movant. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Océ North America, Inc. v. Department of Health and Human Services*, CBCA 2115, 11-1 BCA ¶ 34,677; *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770.

URS Energy & Construction, Inc. v. Department of Energy, CBCA 2260, 11-2 BCA ¶ 34,815 at 171,332.

Based on the pleadings we are unable to conclude that appellant has not stated a cause of action. Akal's allegations are sufficient to withstand a motion to dismiss for failure to state a claim.

Decision

The motion to dismiss the appeal is **DENIED**.

JAMES L. STERN
Board Judge

We concur:

JERI K. SOMERS
Board Judge

ALLAN H. GOODMAN
Board Judge