

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Chugach Federal Solutions, Inc. ) ASBCA No. 61320  
 )  
Under Contract No. N44255-14-D-9000 )

APPEARANCES FOR THE APPELLANT: Richard B. O’Keeffe, Jr., Esq.  
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Washington, DC

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Navy Chief Trial Attorney  
David M. Marquez, Esq.  
Jonathan M. Warren, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE D’ALESSANDRIS ON  
RESPONDENT’S MOTION FOR LEAVE TO AMEND ITS ANSWER

Pending before the Board is respondent, the Department of the Navy’s (Navy’s) motion for leave to amend its answer to assert the affirmative defenses of estoppel and waiver. The Navy asserts that appellant, Chugach Federal Solutions, Inc. (Chugach) took positions in a post-award bid protest before the Government Accountability Office (GAO) that are inconsistent with its positions asserted in this appeal. The Navy does not identify the statements it contends are inconsistent with Chugach’s current litigating position (gov’t mot. at 1). Chugach opposes the Navy’s motion as futile, but does not allege prejudice. Specifically, Chugach asserts that “no set of facts could support the Navy’s proposed affirmative defenses” (app. resp. at 9). The Navy contends in its reply brief that Chugach’s opposition is premised on a “straw-man” argument that it presumes the Navy will assert. However, the Navy does not identify any facts that would establish valid affirmative defenses. The Navy also represents that Chugach has served discovery upon the Navy seeking information and documents relating to the proposed affirmative defenses. (Gov’t reply at 1-2)

Pursuant to Board Rule 6(d) we may “permit either party to amend its pleading upon conditions fair to both parties.” Although not binding upon us, the Board also looks to FED. R. CIV. P. 15(a)(2), with its liberal standard for amendment, for guidance. *See, e.g., Relyant, LLC*, ASBCA No. 59809, 2018 WL 3387700 (June 27, 2018) (citing *Beyley Constr. Group Corp.*, ASBCA No. 55692, 08-2 BCA ¶ 33,999 at 168,134). Thus, we will not deny a request to amend absent a good reason. *Id.* Here, Chugach does not assert that

it would be prejudiced by the Navy's addition of affirmative defenses. Accordingly, we find that it would not be unfair to grant the Navy's motion.

Next, we turn to Chugach's assertion that it would be futile to allow the Navy to amend its answer. Futility of amendment is a recognized basis for denying a motion for leave to amend a pleading. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962). Chugach's futility argument that "no set of facts could support the Navy's proposed affirmative defenses" essentially argues that the proposed affirmative defenses would be subject to a motion to dismiss for failure to state a defense upon which relief could be granted.\* However, to present this argument, Chugach relies upon numerous facts not contained in the pleadings (app. resp. at 2-9). In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted we do not consider facts outside the pleadings. *See, e.g., L-3 Communications Integrated Systems, L.P.*, ASBCA Nos. 60713, 60716, 17-1 BCA ¶ 36,865; FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). As it would be inappropriate to consider such facts in reviewing a motion to dismiss, we do not consider these facts in considering Chugach's futility argument.

As noted above, the Navy does not identify the statements that it contends are inconsistent with Chugach's current position. Board Rule 6(b) requires only affirmative defenses be "set forth [in] simple, concise, and direct statements." Thus, for there to be no set of facts that could support the Navy's claim, we would need to assume that the Navy is essentially asserting a defense with no basis in law. Federal courts are divided on the question of whether affirmative defenses need to satisfy the standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that a complaint must "state a claim to relief that is plausible on its face." Our reviewing court, the Court of Appeals for the Federal Circuit, has only addressed this question in a non-precedential opinion applying sixth circuit law to a patent case. *Quality Edge, Inc. v. Rollex Corp.*, 709 F. App'x 1000 (Fed. Cir. 2017); Robert A. Matthews, Jr., *Applicability of Iqbal and Twombly to Affirmative Defenses*, 6 Annotated Patent Digest § 39:11.75 (July 2018). Thus, we rely upon our own precedent in *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 16-1 BCA ¶ 36,426 at 177,581-82 (denying motion to strike affirmative defenses for failure to satisfy *Iqbal* pleading requirements) in determining that affirmative defenses are not required to state "plausible grounds" for relief.

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\* Alternatively, Chugach could move to strike the affirmative defenses. Pursuant to FED. R. CIV. P. 12(f) a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." As a failure to state a defense upon which relief could be granted would also be an "insufficient defense," we do not see a distinction for the purpose of this motion.

With the Navy asserting no supporting facts, and without the context provided by the facts asserted in Chugach's response, we are left to determine whether the Navy could establish the affirmative defenses of waiver or estoppel under any possible set of facts. Obviously, Chugach's counsel could have made statements, however implausible, that would constitute waiver. Additionally, Chugach's estoppel argument presumes that the Navy will argue collateral estoppel, rather than other forms of estoppel, because of facts it asserts regarding the GAO proceedings (app. resp. at 12). As we do not consider the facts outside the pleadings, we cannot find that no set of facts could support an affirmative defense of estoppel. On this basis, we find that the Navy can assert valid affirmative defenses of waiver and estoppel, and grant the Navy's motion to amend its answer.

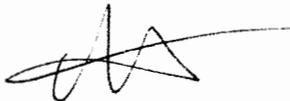
Dated: July 16, 2018



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DAVID D'ALESSANDRIS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

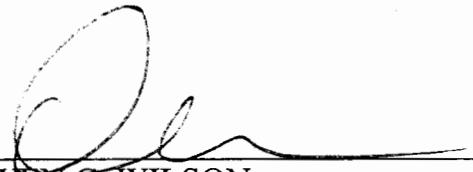
I concur



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

I concur



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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. 61320, Appeal of Chugach Federal Solutions, Inc., rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals