ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Pending before the Board are cross-motions for partial summary judgment. Respondent, the Department of the Navy (government or Navy) seeks partial summary judgment by dismissing count two of the complaint filed by appellant, Chugach Federal Solutions, Inc. (CFSI or Chugach), on the theory that Chugach is judicially estopped from asserting that the Navy's independent government estimate (IGE) constitutes superior knowledge, because Chugach purportedly took an inconsistent position in a bid-protest action before the Government Accountability Office (GAO). Chugach cross-moves for partial summary judgment seeking a finding that the Navy cannot establish estoppel or waiver as affirmative defenses. We find that Chugach did not take a clearly inconsistent litigating position before GAO and deny the government's motion. In addition, we find that the government has not identified any facts supporting the application of estoppel or waiver and grant partial summary judgment in favor of Chugach.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

On November 21, 2011, Naval Facilities Engineering Command, Northwest (NAVFAC NW) issued Request for Proposals No. N44255-10-R-5016 (RFP) for a fixed-price, indefinite-delivery, indefinite-quantity contract for base operations support services at Navy installations throughout NAVFAC NW's area of operations (R4, tab 1 at 1, tab 240 at 29291). The RFP provided that offerors would be evaluated on the basis of price and six non-price factors (R4, tab 1 at 76). Relevant to this appeal, one of the factors, technical approach and methods, required offerors to address their staffing and methodology (*id.* at 81-82). The RFP additionally provided that that price analysis would be performed by one or more techniques to ensure a fair and reasonable price. The RFP identified possible analysis techniques including a comparison of proposed prices received in response to the RFP, and a comparison of proposed prices with the IGE. (*Id.* at 79)

On March 31, 2014, the Navy awarded Contract No. N44255-14-D-9000 to Chugach in the amount of $275,855,236.74 (R4, tab 240 at 29295). That same day, the incumbent contractor, West Sound Services Group (WSSG), filed a post-award bid protest with GAO, asserting that the award to Chugach was improper because of defects in the Navy's source selection process, including a purported failure to perform a realism analysis of the full time equivalent employees (FTEs) proposed by Chugach and the other offerors (gov't mot., ex. 36 at 1, 6).

On April 3, 2014, Chugach, as the awardee, intervened in the protest (gov't mot., ex. 34). Chugach was represented in the protest by counsel currently representing Chugach in this appeal, and its counsel were admitted to the GAO protective order (gov't mot., exs. 34-35). Chugach and the Navy subsequently filed a joint request for partial summary dismissal of the protest (gov't mot., ex. 37). On April 23, 2014, GAO partially granted the Navy and Chugach's joint request by dismissing WSSG's assertion that the Navy "failed to perform a price realism analysis in accordance with the RFP" (gov't mot., ex. 6 at 1). GAO found "no legal or factual basis for this claim; the terms of the RFP did not require a price realism analysis" (*id.*).

Chugach additionally coordinated with the Navy in preparing the agency report that would be submitted to GAO as the contracting officer's official response to the protest (gov't mot., exs. 16-17). As part of this coordination, Chugach had access, subject to the GAO protective order, to Navy source selection documents and Chugach's counsel, in turn, provided the Navy access to a secure document exchange system to facilitate the Navy's sharing of documents with CFSI (gov't mot., exs. 18-20, 23). These documents included the Source Selection Advisory Counsel's Supplemental Evaluation Report of Request for Proposal N44255-10-R-5016 West Sound Base Operating Support Contract, and the Source Selection Authority's Award Rationale (ex. 11 at 6-20, ex. 12 at 121-44). Although the Navy characterizes this

cooperation as Chugach co-authoring the agency report, only the Navy signed the document (gov't mot., at 12, ex. 42).

Relevant to this appeal, the May 5, 2014 agency report explained that the Navy evaluated the proposals by first comparing the offerors' proposed staffing levels to the IGE and then additionally evaluated the staffing levels using a statistical analysis calculating the mean and standard deviation of the offers, excluding the IGE, and reviewed the offerors' technical approaches (gov't mot., ex. 42 at 9-10). The Navy performed this statistical analysis because "it recognized that a collective statistical model of the offerors' FTE counts better reflected current market conditions and the approaches employed by the offerors than the IGE did" (*id.* at 9).

The agency report additionally responded to WSSC's argument, based on *OneSource Energy Services, Inc.*, B-283445, 2000 CPD ¶ 109 (Comp. Gen. Nov. 19, 1999), that the award to Chugach was improper because the Navy purportedly had mechanically applied the undisclosed IGE as a minimum staffing level (gov't mot., ex. 36 at 8-9). In *OneSource*, the agency determined that the protestor's proposed staffing level was unacceptable based upon an undisclosed minimum staffing level and the agency failed to consider the protestor's technical approach in determining that the staffing level was inadequate, despite the fact that the protestor had proposed a staffing level just short of the minimum. *OneSource*, 2000 CPD ¶ 109. In sustaining the protest, the GAO relied upon its prior holding in *KCA Corp.*, B-255115, 94-1 CPD ¶ 94 (Comp. Gen. Feb. 9, 1994) for the proposition that "it is inappropriate to determine the acceptability of proposals by the mechanical application of an undisclosed estimate." *Id.* The Navy responded to WSSC's argument by stating:

> So instead of relying entirely on an inaccurate and undisclosed estimate, as the agency in *One Source Energy Services* did, the Navy employed a statistical analysis that would identify any elements of an offeror's proposal that significantly deviated from that of the other offerors and then evaluated whether anything in that offeror's proposal supported such a deviation. The Navy's IGE was simply a "starting point" for its reasonable evaluation.

(Gov't mot., ex. 42 at 14).

On May 19, 2014, Chugach submitted to GAO its comments on the Navy's agency report, "endors[ing] without exception the Navy's position" (gov't mot., ex. 38). On May 15, 2014, WSSG submitted a supplemental protest (gov't mot., ex. 40). Once again, Chugach worked with the Navy in responding to the supplemental protest (gov't mot., ex. 30). On May 30, 2014, Chugach again endorsed the Navy's arguments regarding the supplemental protest (gov't mot. ex. 39).

On July 9, 2014, GAO denied both protests (gov't mot., ex. 33); *West Sound Services Group, LLC*, B-406583.4, B-406583.5, 2014 CPD ¶ 208 (Comp. Gen. July 9, 2014). In its decision denying the Protest, the GAO quoted the Navy's source selection advisory council report that "'[w]hile offerors differed in their approaches or methods for meeting the RFP requirements...no firm provided an approach or method that was so unique that [it] would noticeably impact staffing due to increased or decreased efficiencies'..... As a result, the technical team concluded that it was appropriate to compare offerors' proposed FTEs to each other with a standard deviation analysis" before holding that "[o]n this record, we find that the agency reasonably evaluated [WSSG's] technical approach." (Gov't mot., ex. 33 at 6, 8)

On September 2, 2016, Chugach submitted a certified claim to the Navy in the amount of $36,043,945.01, alleging that the government withheld superior knowledge regarding the level of effort required to perform the contract and how the work differed from the prior base operations support contract (R4, tab 240 at 1, 9). The contracting officer denied Chugach's claim in a final decision dated July 28, 2017 (*id.* at 1, 16). Chugach timely appealed to the Board and filed its complaint on October 5, 2017. In Count II of its complaint, Chugach contends that the Navy withheld "superior knowledge," which Chugach defines as "vital information" (compl. ¶ 124). Chugach alleges that "NAVFAC possessed a wealth of knowledge—knowledge not shared with CFSI— suggesting that CFSI would fail to perform with the resources it proposed" (compl. ¶ 125). Specifically, Chugach alleges that "NAVFAC failed to disclose its knowledge, reflected in the IGE, that the level of effort and costs required to perform this contract would be substantially greater than under the previous contract" (compl. ¶ 126).

On June 19, 2018, the Navy sought leave to amend its answer to assert the affirmative defenses of waiver and estoppel. Chugach opposed the Navy's motion on the basis of futility, asserting that no possible set of facts could support the Navy's affirmative defenses of waiver and estoppel (app. opp'n at 9-17). In a published decision, we granted the Navy's motion for leave to amend its answer, noting that because "we do not consider the facts outside the pleadings, we cannot find that no set of facts could support an affirmative defense of estoppel." *Chugach Federal Solutions, Inc.*, ASBCA No. 61320, 18-1 BCA ¶ 37,111 at 180,620. The Navy subsequently filed the motion under consideration followed by Chugach's cross-motion.

DECISION

We will grant summary judgment only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine

issue of material fact, and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Once the moving party has met its burden of establishing the absence of disputed material facts, then the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The fact that both the government and Chugach have moved for summary judgment does not require us to grant summary judgment for one side or the other, both motions can be denied in the event that there are material factual disputes regarding each motion. *See, e.g. Mingus*, 812 F.2d at 1391.

A. Judicial Estoppel

Judicial estoppel is a long-standing doctrine that prevents a litigating party from maintaining a litigating position in one legal action and then assuming a contrary position in a subsequent legal action. Although judicial estoppel has long been recognized, courts have found that its application cannot be reduced to a specific test. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). However, there are three generally accepted criteria for application of judicial estoppel. The Court of Appeals for the Federal Circuit has set forth the general criteria as: "(1) a party's later position is 'clearly inconsistent' with its prior position, (2) the party successfully persuaded a court to accept its prior position, and (3) the party 'would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 718 F.3d 1350, 1358–59 (Fed. Cir. 2013) (quoting *New Hampshire*, 532 U.S. at 750–51). Statements susceptible to conflicting interpretation are not "clearly inconsistent," rather the "position[s] must be directly inconsistent, that is, mutually exclusive." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004). The Court of Appeals for the Federal Circuit has held that boards of contract appeals may apply the doctrine of judicial estoppel in appropriate cases. *Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996).

B. The Navy's Motion

The Navy moves for partial summary judgment, asserting that Chugach's actions constitute judicial estoppel. According to the Navy, Chugach's current litigating position, that the Navy possessed superior knowledge that was reflected in the IGE, is "clearly inconsistent" with positions asserted in the GAO bid protest action (gov't mot. at 20-28); Chugach successfully persuaded GAO of its prior position (*id.* at 28-30); and Chugach would gain an unfair advantage if it were permitted to take an inconsistent position and this would impose an unfair detriment upon the Navy (*id.* at 30-32). Chugach contends that its statements of general support in favor of the Navy's position do not constitute a litigating positing before GAO, and the statements

are not inconsistent with its current position (app. cross-mot. at 6-10); the GAO did not adopt Chugach's contentions (*id.* at 10-12); and that the Navy has not established that Chugach would gain an unfair advantage or that the Navy would suffer an unfair detriment (*id.* at 12-18).

The Navy contends that statements in the agency report can be attributed to Chugach because Chugach assisted in drafting the report and endorsed the agency report to the GAO (gov't mot. at 19, 26, 32-33). Assuming, but not holding, that Chugach's endorsement of the Navy's position constitutes Chugach making the same arguments to the GAO, we find that Chugach is not asserting "clearly inconsistent" positions before the GAO and before the Board.

We start with the arguments actually presented to the GAO. The Navy's motion relies upon the agency report as asserting a litigating position that "the Navy appropriately evaluated the offerors' proposals by comparing them to each other using a statistical analysis, rather than by comparing them to the 'inaccurate and undisclosed' IGE" (gov't mot. at 22). The Navy additionally cites to the Source Selection Advisory Counsel's Supplemental Evaluation Report of Request for Proposal N44255-10-R-5016 West Sound Base Operating Support Contract, and the Source Selection Authority's Award Rationale, as further evidence of Chugach's litigating position (gov't mot. at 24-25, ex. 11 at 6-20, ex. 12 at 121-44). However, while these documents were cited in the agency report, and were provided to GAO as part of the administrative record for the protest, the agency report does not quote the language the Navy relies upon, and the language was not cited by the GAO. Moreover, as source selection documents, they were prepared before award of the contract, and thus, before the post-award protest. Thus, these documents do not constitute statements to a tribunal. Additionally, as source selection documents they were necessarily prepared without any involvement or input from offerors such as Chugach. Thus, we limit our analysis to statements actually presented to the GAO in the agency report.

Contrary to the Navy's arguments, the statements actually contained in the agency report do not state that the IGE is inaccurate. Rather, the agency report argues that the Navy evaluated the proposals by first comparing the offerors' proposed staffing levels to the IGE and then additionally evaluated the staffing levels using a statistical analysis calculating the mean and standard deviation of the offers, excluding the IGE, and reviewed the offerors' technical approaches (gov't mot., ex. 42 at 9-10). The Navy performed this statistical analysis because "it recognized that a collective statistical model of the offerors' FTE counts better reflected current market conditions and the approaches employed by the offerors than the IGE did" (*id.* at 9).

The Navy additionally cites to language in the agency report that it characterizes as stating that the IGE was undisclosed and inaccurate. However, a fair reading of that language does not support the Navy's characterization. The statement

regarding an "undisclosed and inaccurate" estimate in the agency report actually relates to the staffing level at issue in the *OneSource* protest. In its motion, the Navy characterizes the statement as follows: "the Navy appropriately evaluated the offerors' proposals by comparing them to each other using a statistical analysis, rather than by comparing them to the 'inaccurate and undisclosed' IGE" (gov't mot. at 22). However, the actual language of the agency report states:

> So instead of relying entirely on an inaccurate and undisclosed estimate, as the agency in *One Source Energy Services* did, the Navy employed a statistical analysis that would identify any elements of an offeror's proposal that significantly deviated from that of the other offerors and then evaluated whether anything in that offeror's proposal supported such a deviation. The Navy's IGE was simply a "starting point" for its reasonable evaluation.

(Gov't mot., ex. 42 at 14) Read as a whole, the agency report does not argue that the IGE is inaccurate, but rather that it was one element of a more thorough analysis. Put more simply, the dispute before the GAO was process-based, and did not address the quality of the data. Thus, we hold that Chugach has not asserted "directly inconsistent, this is, mutually exclusive" positions before GAO and the Board. *Alternative Sys. Concepts*, 374 F.3d at 33. Because we find that Chugach has not asserted "clearly inconsistent" positions, it is also clear that there is no risk of the GAO or this Board having been misled and there is not a need to invoke judicial estoppel to prevent prejudice to the Navy. Accordingly, we deny the Navy's motion for partial summary judgment.

In its opposition and cross-motion, Chugach stated that its superior knowledge claim "does not turn on whether the Navy's Independent Government Estimate was accurate; it turns on whether the Navy improperly withheld the underlying information that it used to develop that estimate – the information 'reflected in the [estimate]'" (app. cross-mot. at 2). In its response and reply, the Navy argued that Chugach's statement was an admission, and requested that the Board grant summary judgment that the IGE does not constitute superior knowledge (gov't resp. & reply at 2-3). The Navy states that its motion is limited to Chugach's allegation that the IGE itself, and not the underlying data, constituted superior knowledge (*id.* at 3, n.3). However, this is inconsistent with the Navy's position in its moving brief. The Navy's moving brief states that the:

> Board should grant partial summary judgment in favor of the Navy because.... CFSI asserts in this appeal that the Navy's knowledge as reflected in its independent government estimate ("IGE") constitutes "superior knowledge," it previously represented to GAO that the IGE

is inaccurate, unreliable, and was not vital to the evaluation of proposals.

(Gov't mot. at 1)

As an initial point, we do not consider arguments raised for the first time in a reply brief. *See, e.g., Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801 *et al.*, 15-1 BCA ¶ 36,024 at 175,960 n.3. Even if we were to consider the Navy's argument, it is not persuasive. In paragraph 126 of Chugach's complaint, it argues that the Navy "failed to disclose its knowledge, reflected in the IGE, that the level of effort and costs required to perform this contract would be substantially greater than under the previous contract" (compl. ¶ 126). Thus, we read Chugach's position to be that the Navy knew that it would cost the awardee more to perform this contract than it cost the incumbent contractor to perform the previous contract and that this superior knowledge was used by the Navy to prepare the IGE. Accordingly, we find that the Navy's untimely argument seeks summary judgment on a point not in dispute between the parties and not advocated by Chugach, and we decline to enter summary judgment on the issue.

Additionally, we note that briefing of these cross-motions was concurrent with discovery in the appeal. In a surreply, Chugach asserts that documents recently produced in discovery by the Navy demonstrate that the Navy made updates to the IGE during the course of the procurement, contrary to the Navy's statements in its motion, and that this constitutes a changed circumstance and provides another reason to deny the Navy's motion (app. surreply at 4-9). As we have determined that Chugach did not make conflicting statements before the GAO, we need not reach this issue.

C. Chugach's Cross-Motion

Chugach seeks entry of summary judgment in its favor with regard to the Navy's affirmative defenses of estoppel and waiver. As noted above, we rejected Chugach's futility argument in its opposition to the Navy's motion for leave to file an amended answer asserting the affirmative defenses of estoppel and waiver. Our earlier decision essentially applied the standard of review for a motion to dismiss. In other words, based only on the pleadings, we could not find that no set of possible facts could support a finding of estoppel or waiver. Chugach has now filed a motion for partial summary judgment, supported by the Navy's responses to interrogatories propounded by Chugach. Under the standard of review for a motion for summary judgment, once Chugach presents evidence sufficient to support the entry of summary judgment, the Navy cannot rest on statements of counsel, but must demonstrate the existence of a material factual dispute, or present a declaration establishing that it is unable to respond to the summary judgment motion without specifically identified discovery. As will be discussed below, the Navy did neither. Accordingly, we grant

Chugach's motion and enter summary judgment in favor of Chugach with regard to the Navy's affirmative defenses of estoppel and waiver.

Chugach asserts that the Navy cannot establish the affirmative defense of estoppel. Based on the discussion above, we find that the Navy cannot establish judicial estoppel. In addition to the arguments discussed above regarding judicial estoppel, Chugach alleges that the Navy cannot establish collateral estoppel or equitable estoppel (app. cross-mot. at 19-25).[1] With regard to collateral estoppel, Chugach notes that the required elements for that affirmative defense include a valid final decision on the merits (*id.* at 19-20); *see, e.g., Lockheed Corp.*, ASBCA No. 39744, 97-1 BCA ¶ 28,757 at 143,517. The Navy concedes that the GAO protest is the only previous litigation that both Chugach and the Navy have been involved in regarding the contract at issue in this appeal (Department of the Navy's Response to Appellant's Statement of Undisputed Material Facts (gov't resp., SUMF) ¶ 1). As a matter of law, we hold that collateral estoppel cannot be established by a GAO decision because the GAO issues only non-final advisory opinions in bid protest actions. *See* 31 U.S.C. § 3554(b)(1); *Optimum Servs., Inc. v. Dept. of the Interior*, CBCA No. 4968, 16-1 BCA ¶ 36,357 at 177,245.

With regard to equitable estoppel, the required elements include:

> (1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance on this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

Mabus v. Gen. Dynamics C4 Sys., Inc, 633 F.3d 1356, 1359 (Fed. Cir. 2011) (quoting *Lincoln Logs Ltd. v. Lincoln Pre–Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992)). As noted above, we find that Chugach did not make inconsistent statements, and Chugach contends that this means that the Navy cannot establish misleading conduct. More significantly, Chugach points to the Navy's inability, in discovery responses, to identify reliance or prejudice.

In an interrogatory, Chugach asked the Navy to identify "all statements, actions, or omissions that the Navy contends support its affirmative defense of estoppel" (gov't resp., SUMF ¶ 9) (quoting CFSI interrogatory no. 10). A subsequent interrogatory asked Navy to identify "all actions or inactions by the Navy that the Navy contends

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[1] Chugach's motion also addresses claim preclusion (app. cross-mot. at 19-23); however, the Navy's response clarified that it had not asserted claim preclusion (*res judicata*) (gov't resp. & reply at 14). Thus, we need not decide the issue.

were taken or not taken in reliance on each of the statements, actions, or omissions" identified in the previous interrogatory (gov't resp., SUMF ¶ 10 (quoting CFSI interrogatory no. 11)). In response, the Navy stated its position regarding judicial estoppel and objected to the interrogatory because discovery was not complete, and then stated that:

> [W]hen CFSI submitted its comments to GAO in protest No. B-406583.4, the Navy had no reason to believe that CFSI was being anything other than accurate. It may be impossible to ever state definitively what actions or inactions the Navy may have taken or not taken had it believed that CFSI's protest position was not being accurately stated.

(Gov't resp., SUMF ¶ 11) Thus, Chugach asserts that the Navy cannot establish the necessary elements for equitable estoppel (app. cross-mot. at 24-25). We find that Chugach has asserted facts, supported by citation to documentary evidence, sufficient to support the entry of summary judgment.

In response, the Navy conflates the standard of review for a motion to dismiss with the standard of review for a motion for summary judgment. The Navy characterizes Chugach's motion as a "replay of its opposition to the Navy's motion to amend" and refers to Chugach's "prematurely advanced theory that the Navy will never be able to prove any [affirmative defense] regardless of what may be learned through the discovery process" (gov't resp. & reply at 10). In deciding motions for summary judgment, we look to Federal Rules of Civil Procedure Rule 56. *See* Board Rule 7(c)(2). FED. R. CIV. P. 56(d), "When Facts Are Unavailable to the Nonmovant," provides that:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

FED. R. CIV. P. 56(d). Here, the government did not request time to take discovery but simply asserts that we should deny Chugach's motion because the government might be able to develop facts in the future to oppose the motion (gov't resp. & reply at 12-13). This is insufficient. Where, as here, Chugach has presented facts sufficient to support the entry of summary judgment, the non-moving party must either establish the existence of material facts in dispute pursuant to FED. R. CIV. P. 56(c), or explain why it cannot establish the existence of material facts pursuant to FED. R. CIV. P. 56(d). The

non-moving party cannot request deferral of a ruling on a summary judgment motion simply by noting that discovery is not complete, but must explain specifically how additional discovery will allow the party to rebut the summary judgment motion. *See, e.g., Garcia v. United States Air Force*, 533 F.3d 1170, 1179-80 (10th Cir. 2008); *Serdarevic v. Advanced Medical Optics, Inc.*, 532 F.3d 1352, 1363-64 (Fed. Cir. 2008). Even ignoring the requirement that the non-moving party support its motion by declaration, the statements by Navy counsel amount to nothing more than the vague assertion that something might turn-up in discovery, and do not identify specific information, not already in the possession of the Navy, that may be obtained through additional discovery.[2] Accordingly, we grant partial summary judgment in favor of Chugach regarding the Navy's affirmative defense of estoppel.

Additionally, Chugach alleges that the Navy cannot establish its affirmative defense of waiver (app. cross-mot. at 25-27). In an interrogatory response, the Navy identified Chugach's joint filing with the Navy to partially dismiss the GAO protest, Chugach's co-development and co-authoring of the GAO protest agency report, and Chugach's comments to GAO endorsing the Navy's position as actions supporting its affirmative defense of waiver (gov't resp., SUMF ¶¶ 7, 8 (quoting CFSI interrogatory no. 9)). Waiver occurs when a party intentionally relinquishes a known right. *General Dynamics C4 Sys. Inc.*, ASBCA No. 54988, 08-1 BCA ¶ 33,779 at 167,192. As Chugach notes, its joint filing with the Navy of a partial motion to dismiss pertained only to a purported failure by the Navy to perform a price realism analysis (gov't mot., ex. 6 at 1). Chugach alleges that there was no discussion of staffing levels or other issues relevant to this appeal (app. cross-mot. at 26-27) and the Navy does not identify any discussion of relevant issues (gov't resp. & reply). Accordingly, we find that Chugach's joint filing of the motion for partial dismissal does not constitute waiver.

With regard to the agency report and Chugach's statements in support of the agency report, Chugach alleges that, as an intervenor in the bid protest action, it could not have asserted any-cross-or counter-claims against the Navy. Thus, according to Chugach, because it could not have previously asserted a claim, it could not have waived its ability to assert the claim through a filing at GAO. (App. cross-mot. at 27) We agree that Chugach, as the awardee and intervenor, was not able to raise any cross-or counter-claims against the Navy before the GAO. *See* 4 C.F.R. § 21.0(a)(1), (b)(1); *Aegis Defense Services, LLC*, B-412755, 2016 CPD ¶ 98 (Comp. Gen. Mar. 25, 2016) (holding that "the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract").

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[2] Not only does the Navy fail to present a basis for us to believe that it could turn up facts in discovery to support this defense, but we find it difficult to see how it ever could: if statements by Chugach to the Navy misled the Navy, nobody would be better positioned than the Navy to know which ones they were.

Thus, we find that Chugach has asserted facts, supported by the Navy's discovery responses, that would support the entry of summary judgment in favor of Chugach with regard to the Navy's affirmative defense of waiver. As discussed above, the Navy did not respond to Chugach's cross-motion, beyond indicating that summary judgment would be inappropriate because discovery might turn up some facts supporting waiver. The Navy did not cite any language in the agency report that it contends constituted a waiver of Chugach's rights, and did not present any argument that Chugach's motion was legally insufficient to demonstrate a lack of waiver. The Navy's response is not sufficient to prevent the entry of summary judgment. Accordingly, we grant Chugach's motion for partial summary judgment with regard to the Navy's affirmative defense of waiver.

CONCLUSION

For the reasons stated above, we deny the government's motion for partial summary judgment and grant Chugach's cross-motion for partial summary judgment.

Dated: April 10, 2019

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

I concur

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

I concur

J. REID PROUTY
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:

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