

U.S. Department of Labor

Board of Contract Appeals
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Date Issued: March 7, 1997

CASE NUMBERS: 96-BCA-2
96-BCA-7
97-BCA-2

In the Matter of:

CHARLESGATE CONSTRUCTION COMPANY,
Appellant

CONTRACT NUMBER: E-4388-4-00-82-20

RULING ON APPELLANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

On June 17, 1996, Appellant Charlesgate Construction Company ("Appellant") served its First Request for Production of Documents on the U.S. Department of Labor ("Department"). Appellant's Request contained the following instruction: "If it is claimed that any document is privileged, each document for which a privilege is asserted should be fully identified in writing, except that the substance of it need not be described to the extent that it is claimed to be privileged." In its response to Appellant's Request for Production of Documents, dated August 21, 1996, the Department listed 31 documents which it claimed were privileged under the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege. The invocation of one or more of the privileges with respect to any particular document by the Department has taken the form of a short description of the document followed by the name of the privilege invoked. In no case has the rationale for the invocation been disclosed.

Appellant filed a Motion To Compel Production of Documents with the Board on November 18, 1996. Appellant contends that it is entitled to a more frank and open response to its discovery request, and that a party resisting discovery must show particular and specific demonstration of fact, as distinguished from stereotyped or conclusory statements as the basis for the resistance, citing General Dynamics v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974) and Coastal States Gas Corp. v. DOE, 617 F.2d 854, 861 (D.C.Cir. 1980). Appellant points out that, in particular, the deliberative process privilege tends to be considered in the context of FOIA requests, and is properly given a very narrow construction in the context of litigation. The deliberative process privilege "must be construed as narrowly as consistent with efficient Government operation." Wolfe v. HHS, 839 F.2d 768, 773 (D.C.Cir. 1988)(en banc). Appellant argues that the Department has not proven the necessary elements for the assertion of the claimed privileges, and that

the descriptions of the documents in issue do not, of themselves, disclose with any assurance a basis which supports invocation of the privilege.

The Department filed its response to Appellant's Motion to Compel with this Board on December 23, 1996. After reconsideration, the Department released 13 of the 31 documents claimed as privileged. The Department asserts that the deliberative process privilege applies to seven of the remaining documents, the attorney-client privilege and the attorney work product privilege apply to ten documents, and all three privileges apply to one document. In support of its assertion of the deliberative process privilege, the Department had submitted the Declaration of Raymond Uhalde, Deputy Assistant Secretary for the Department's Employment and Training Administration. In its response, the Department has not given a more detailed description of the documents for which it claims privilege than originally provided to Appellant in the Department's Response to Appellant's Request for Production of Documents.

DELIBERATIVE PROCESS PRIVILEGE

As observed by the Department of Transportation Board of Contract Appeals, "[t]he [deliberative process] privilege extends to intra-government documents reflecting advisory opinions, recommendations, and deliberations that comprise a part of the process by which governmental decisions and policy are formulated." Federal Data Corp., DOTCAB No. 2389, 91-3 BCA ¶ 24,063; Carl Zeiss Stiftung v. VEB Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966). The deliberative process privilege should be narrowly construed. Unisys Corp. v. Department of Commerce, GSBCA No. 12823-COM, 95-2 BCA ¶ 27,903. The Department bears the burden to prove that the requested documents are protected from discovery by the deliberative process privilege. Walsky Construction Co. v. United States, 20 Cl. Ct. 317 (1990).

To protect the specified documents from discovery, the Department must show that the documents are pre-decisional and deliberative. As stated by the U.S. Claims Court, "[a] document is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." Walsky Construction Co. v. United States, *supra*, quoting Senate of Puerto Rico v. United States Dept. Of Justice, 823 F.2d 574 (D.C. Cir. 1987); see also Federal Data Corp., *supra*. The decision to which the claim of privilege relates is the Contracting Officer's final decision dated November 3, 1995. Any documents originated after November 3, 1995, would not be protected from disclosure by the deliberative process privilege. As described in the Declaration of Raymond Uhalde, document 24 is dated July 25, 1996, and the deliberative process privilege would not apply to that document. The Department has described documents 25 and 30 as undated memorandums, and has offered no further proof of the predecisional nature of the documents. From the Department's description of documents 25 and 30, the Board cannot find that these documents are predecisional. The Department had failed to show that documents 24, 25, and 30, satisfy the predecisional requirement for the assertion of the deliberative process privilege.

The documents must also "address 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" Walsky Construction, *supra*,

gouting Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); see also Unisys Corp., *supra*. As contrasted with the descriptions of documents 3 and 4, which state that the documents contain “options and recommendations” for the Contracting Officer’s consideration, the descriptions of documents 2, 5, and 6, do not indicate that the documents contain any recommendations or opinions relating to Appellant’s claim. The Department has failed to show that documents 2, 5, and 6, are deliberative in nature, and therefore, the deliberative process privilege will not protect documents 2, 5, and 6, from discovery.

As described in the Uhalde declaration, only documents 3 and 4 may arguably come within the protection of the deliberative process privilege. However, an asserted claim of privilege must specifically describe the material that is allegedly privileged, and must state the reasons for preserving the confidentiality of the requested documents. Automar IV Corp., DOTCAB No. 1867, 88-2 BCA ¶ 20,821, citing Mobile Oil Corp. v. Department of Energy, 520 F. Supp. 414 (N.D.N.Y. 1981). The Department’s descriptions of documents 3 and 4 fall far short of that standard.

Furthermore, factual information contained in the purportedly privileged documents is not protected from disclosure where the factual information can be separated from the opinions and recommendations contained in the documents. Federal Data Corp., *supra*. The deliberative process privilege also does not apply to recommendations that the agency chooses to incorporate either expressly or by reference into its final decision. Unisys Corp., *supra*; U.S. West Information Systems, Inc., GSBCA No. 9103-P, 87-3 BCA ¶ 20,204. The Department has failed to prove, as is its burden, that the recommendations and opinions contained in documents 3 and 4 cannot be separated from any factual information contained in the documents, or that the recommendations and opinions were not incorporated into the Contracting Officer’s final decision denying Appellant’s claim. In the absence of such a showing, the Board cannot find that documents 3 and 4 are protected from discovery by the deliberative process privilege.

Certainly the need for full discovery is compelling in a case such as this, and refusal to do so smacks of a search for tactical advantage in a sporting contest rather than a search for truth. The Board, therefore, takes a dim view of the invocation of privilege generally where the Appeal File prepared by the Contracting Officer is supposed to contain all documents relevant to the contract dispute.

The Board finds that the Department has not proven the requirements for the invocation of the deliberative process privilege in any instance in which the Department relies solely upon the deliberative process privilege. All of those requested documents, therefore, shall be promptly produced and disclosed to Appellant. It appears that those documents are central to an analysis of the delay claim.

ATTORNEY-CLIENT PRIVILEGE

As stated by the General Services Board of Contract Appeals,

The essential elements of the attorney-client privilege are: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except that the protection be waived.

Herman B. Taylor Construction Co. v. General Services Administration, GSBCA No. 12915, 96-1 BCA ¶ 27,958. Only two of the eleven documents claimed as privileged meet the requirements of the attorney-client privilege. Document 20 is an “[u]ndated memorandum John Steenberg, Contracting Officer, to Vincent Constantino, attorney,” and document 23 is a “[m]emorandum sent by fax, dated July 17, 1996, from David Howard, DMJM/HTB, to Vincent Constantino, attorney.” The Department has properly asserted the attorney-client privilege with respect to documents 20 and 23. The remaining nine documents do not involve communications between departmental representatives and their attorney, and therefore, the attorney-client privilege does not apply to those documents.

ATTORNEY WORK PRODUCT PRIVILEGE

To qualify for protection under the attorney work product privilege, the documents must have been prepared by or for an attorney in anticipation of litigation. Fed. R. Civ. Pro. 26(b)(3); Cogefar-Impresit U.S.A., Inc., DOTCAB No. 2721, 95-1 BCA ¶ 27,567. Of the remaining nine documents, the Board finds that four are protected from discovery under the attorney work product privilege. Document 22 is “Trip Report of Settlement Meeting held July 8-9, 1996.” Documents 26, 27, and 31 are documents prepared at the request of Vincent Constantino analyzing and responding to various aspects of Appellant’s claim and complaint. The Department properly invoked the attorney work product privilege with respect to Documents 22, 26, 27, and 31. The remaining documents do not indicate that they were prepared by an attorney, or at the request of an attorney. Those documents, therefore, are not protected by the attorney work product privilege.

In summary, Appellant’s Motion to Compel is **GRANTED IN PART** and **DENIED IN PART**. The Department’s claim of privilege is sustained with respect to documents 20, 22, 23, 26, 27, and 31, and Appellant’s Motion to Compel is denied as to those documents. The Department has not asserted a valid claim of privilege for documents 2, 3, 4, 5, 6, 16, 17, 18, 21, 24, 25, and 30, and Appellant’s Motion to Compel is granted with respect to those documents. The Department shall produce documents 2, 3, 4, 5, 6, 16, 17, 18, 21, 24, 25, and 30 within ten days from receipt of this Ruling.

So ordered.

Edward Terhune Miller

Member, Board of Contract Appeals