



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER REGARDING DOCUMENTS WITHHELD AS PROTECTED
BY THE DELIBERATIVE PROCESS PRIVILEGE:

February 8, 2022

CBCA 6597

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Terry R. Marston II of Marston Legal, PLLC, Kirkland, WA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration,
Department of Transportation, Vancouver, WA, counsel for Respondent.

LESTER, Board Judge.

ORDER¹

By motion dated August 17, 2021, appellant, Active Construction, Inc. (ACI), requested that the Board reconsider that portion of its panel decision dated August 9, 2021,

¹ This order is being published to assist in providing greater transparency to the public about the manner in which the Board has addressed issues in cases before it. Nevertheless, although single-judge orders like this one are binding in the appeals in which they are issued, they are, consistent with Board Rule 1(d) (48 CFR 6101.1(d) (2020)), not precedential in other appeals before the Board.

denying its motion to compel production of documents that the Federal Highway Administration (FHWA) has withheld as protected by the deliberative process privilege.

Background

In its August 9 decision, the Board found that it lacked jurisdiction to entertain ACI's good faith and fair dealing breach claim. *Active Construction, Inc. v. Department of Transportation*, CBCA 6597, 21-1 BCA ¶ 37,905. It also found that, because ACI had agreed that the documents it was seeking to require the FHWA to produce all related to funding decisions relevant only to that good faith and fair dealing breach claim, the documents sought were irrelevant to any issue properly before the Board and, therefore, did not need to be produced. *Id.* In its request for reconsideration, ACI does not challenge the Board's jurisdictional holding but argues that the Board misinterpreted its representations about the nature of the documents that it was seeking. It asserts that, although (in light of the Board's jurisdictional determination) it is no longer seeking funding records, its original motion to compel encompassed broader categories of documents beyond those related to funding, including, but not limited to, its request for equitable adjustment cost estimates, FHWA emails considering those estimates, and documents reviewed by the FHWA contracting officer in considering change requests.

Although we provided the FHWA an opportunity to respond to ACI's request for reconsideration, the FHWA filed no response. Given its silence, we assume that the FHWA agrees that we misinterpreted ACI's prior representations about the nature of the documents being sought.

In response to the request for reconsideration, we allowed ACI to select up to seventy documents from the FHWA's privilege log that it wanted the Board to review in camera. We also allowed the FHWA to select some additional documents from its log for in camera submission to provide the Board with a more complete understanding of the nature of the documents over which the FHWA had invoked the deliberative process privilege. The FHWA submitted these documents to the Board on December 29, 2021, and the presiding judge has completed an in camera review of those documents.

Discussion

The Deliberative Process Privilege

The deliberative process privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions' by protecting open and frank discussion among those who make them within the Government."

Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (quoting *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). Nevertheless, the “privilege should be construed narrowly in order to permit parties seeking discovery to obtain sufficient information.” *First Heights Bank v. United States*, 46 Fed. Cl. 827, 829-30 (2000). The privilege only protects information from disclosure that is “predecisional” (that is, generated before the agency adopts a policy or reaches a decision) and “deliberative” in nature (that is, prepared to assist an agency decision-maker in arriving at a decision through the give-and-take of the collaborative process). *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. Food & Drug Administration*, 449 F.3d 141, 151 (D.C. Cir. 2006); *Formaldehyde Institute v. Department of Health & Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). Such information can include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. United States Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Nevertheless, “post-decisional records fall outside the deliberative process privilege if they follow a final decision and are designed to explain a decision already made.” *Lahr v. National Transportation Safety Board*, 569 F.3d 964, 981 (9th Cir. 2009).

Importantly for purposes of ACI’s motion, the deliberative process privilege is not absolute. Even if the privilege is properly invoked, an individual need for information as evidence may outweigh any public interest in nondisclosure. *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 854 (3d Cir. 1995). To compel disclosure after a proper invocation of the privilege, the claimant must make “a showing of necessity sufficient to outweigh the adverse effects the production would engender.” *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328-29 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C. Cir. 1967). The role of the Government in the litigation, however, may affect that balancing of interests. *Redland Soccer*, 55 F.3d at 854. “Where the Government is a party litigant and application of executive privilege may result in an unfair litigating advantage,” tribunals “may be more inclined to find that the privilege must give way to the need.” *4K Global-ACC Joint Venture v. Department of Labor*, CBCA 6683, et al., slip op. at 12 (Feb. 10, 2021) (quoting *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA 17717, 73-2 BCA ¶ 10,205); see *Dairyland Power Cooperative v. United States*, 77 Fed. Cl. 330, 342 (2007) (If the Government is a party to and has a stake in the action, its privilege invocation “must be carefully scrutinized.”). The balance is more likely to weigh in favor of a contractor’s need for protected documents if the Government takes a “litigation position” that implicates the documents. *Pacific Gas & Electric Co. v. United States*, 71 Fed. Cl. 205, 214 (2006).

The Board's Privilege Determinations

Having reviewed the sampling of documents that the FHWA presented the Board for in camera review, we believe that they can be divided into three categories:

First, a few of the documents that the FHWA has submitted for in camera review relate to decisions that had already been made when the documents were created. One example is privilege log entry no. 112, which involves an email from one FHWA employee forwarding to two other FHWA employees a unilateral contract modification (CM00039) that the FHWA contracting officer had already executed as well as an internal memorandum (already signed by the contracting officer as "Approved") justifying the unilateral modification. Similar documents are at privilege log entry nos. 396, 404, 528, 539, 572, 718, 914, 1009, and 1024. As discussed above, the deliberative process privilege only applies to "predecisional" documents. *Renegotiation Board*, 421 U.S. at 184. Once a decision is made, deliberations have ended, and, absent circumstances indicating that the decision is not actually "final," there is no longer a basis for applying a privilege that is designed to encourage frank and open predecisional deliberations. There is no basis for invoking the deliberative process privilege over these post-decisional documents.

Second, the FHWA has asserted the privilege over documents that have no discernible tie to a "decision" that the agency is deliberating. That is, the FHWA has not identified any "decision" that the FHWA was considering when these documents were created, and nothing in these documents suggests that they in some way contributed to the deliberations of any such "decision." An example is found in privilege log entry nos. 262 and 265, which are two related emails in which one FHWA employee asks another FHWA employee to update a work schedule, with an attachment that appears to be an "as planned" construction schedule associated with a particular contract modification. Other examples are privilege log entry nos. 404, 485, and 699. Any document to which the deliberative process privilege attaches must relate to deliberations intended to lead to a decision. The FHWA cannot invoke the deliberative process privilege over routine messages transmitted within the agency. *See Lahr*, 569 F.3d at 981 (finding that the privilege does not protect "the routine collection of data and analysis where the agency could point only to speculative or generalized purposes for which the information would be used").

Third, the FHWA has asserted the privilege over deliberations relating to the administration of the very contract at issue in this appeal. In fact, other than a single internal FHWA email attaching a Value Engineering Change Proposal from an unrelated contract (which may or may not have been forwarded for use in the administration of ACI's contract), every single document that the FHWA provided in the sample of documents that it submitted to the Board for in camera review relates to contract administration matters under ACI's contract. For example, privilege log entry no. 212 is an email to which is attached a price

negotiation memorandum in support of a proposed no-cost contract modification under ACI's contract. The proposed modification is in response to ACI's request for a contract change to allow placement of pavement to a maximum lift thickness of three inches instead of the two-and-a-half-inch lifts required by contract specifications. Although there are a few suggested edits in the email chain accompanying the memorandum, they are innocuous. The only "decision" that is being deliberated is a decision about whether and how to respond to ACI's contract change request.

For the reasons that we discussed in our February 10, 2021, decision in *4K Global-ACC Joint Venture*, only in unusual situations will an agency be able to preclude production of documents relating to contract administration decisions, particularly those relating to decisions about contract changes and modifications, under the guise of the deliberative process privilege when defending against a contract action seeking damages for those same contract administration activities, changes, and modifications:

These later considerations are directly relevant when the Government seeks to withhold documents relating to deliberations regarding the administration of the very contract at issue in the litigation. Many years ago, the Armed Services Board of Contract Appeals (ASBCA) in *Ingalls Shipbuilding* analyzed the distinction between internal agency deliberations about policy and legal matters, on the one hand, and internal deliberations about contract administration matters, on the other. The ASBCA recognized that concern about full and frank exchanges of information "comes into play" where "commentary or policy analysis is . . . involved" on matters of agency policy, "as e.g. in suggestions for modification of [safety] standards." *Id.* (quoting *Ditlow v. Volpe*, 362 F. Supp. 1321, 1327 (D.D.C. 1973)). The same concern, the ASBCA recognized, is not typically in play where individuals are providing opinions to a contracting officer about matters of contract administration on a particular government contract:

It may well be in a particular case, especially in connection with contract disputes, that technical experts are providing to a decision-maker (such as a contracting officer) factual input of various kinds—e.g., engineering, audit, quality assurance. Such factual information could be characterized as opinion, in the sense that any statement of fact is actually the opinion of the person making the statement, and other persons may well hold a contrary opinion. Likewise, such factual information could be characterized as advisory, in the sense that it is provided to assist the decision-maker. The "advisory opinions" that executive privilege is designed to protect, however, contain

ideas and points of view on legal and policy matters, as distinguished from factual matters.

Id. “Factual investigations, such as evaluations of contract claims, that are needed in the ordinary course of Government business, will not foreseeably dry up because of the possibility of future disclosure. If anything, the knowledge of possible future disclosure would simply bring to bear a greater incentive for the investigators to be fully accurate, which we view as a salutary effect to be sought after, not avoided.” *Id.* Accordingly, the ASBCA held that the deliberative process privilege was not applicable to the types of “opinion” about factual matters that were presented to the contracting officer. *See also Carl W. Olson & Sons Co.*, IBCA 930-9-71, 74-1 BCA ¶ 10,564 (citing *Ingalls Shipbuilding* with approval); *Robert E. McKee General Contractor, Inc.*, GSBCA 3697, 1973 WL 1973 (Oct. 16, 1973) (same).

4K Global, slip op. at 12-13.

In our review of the documents that the FHWA submitted for in camera review, we did not identify a single document that we could consider privileged. The documents, most of which involve the development of pre-negotiation and price negotiation memoranda in response to proposed contract changes, relate to routine contract administration matters that would not normally be considered privileged. Although an agency might “deliberate” before reaching a “decision” on whether to approve a contract change request and on whether and how to pay for it, those types of contract administration activities are not normally the type of legal and policy deliberations that the deliberative process privilege is targeted as protecting. *Ingalls Shipbuilding*. The privilege might technically cover these types of deliberations, but the privilege has to fall, absent very good reasons to the contrary, in response to a contractor’s appeal challenging the very contract administration matters that the agency contracting office was deciding.

Further, “[t]o test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” *Coastal States Gas*, 617 F.2d at 866. Having reviewed the sampling of documents that the FHWA submitted for in camera review, we cannot find in them the types of candid and personal disclosures that the deliberative process privilege encourages, which is not surprising given that they relate to matters of normal contract administration. The conclusory assertions set forth in a declaration in support of the FHWA’s invocation of the privilege that employees would be less willing to disclose agency negotiation goals in writing if they knew that their goals might be discoverable in a subsequent contract dispute merely parrot language from court decisions about the

deliberative process privilege and do not provide any realistic evidence or examples of why that would be. The FHWA has identified no good reasons justifying its need to keep these contract administration deliberations out of the normal discovery process.

Of the documents that the FHWA submitted for in camera review, we direct that the FHWA produce all of them to ACI, other than any documents that solely address FHWA funding requests and funding issues. As the Board held in its August 9, 2021, decision, documents relating to funding requests and funding issues are not relevant to the matters properly before the Board. A requesting party cannot, as a matter of law, demonstrate “need” sufficient to overcome a deliberative process assertion in the absence of relevance. *United States v. Farley*, 11 F.3d 1385, 1390 (7th Cir. 1993). In any event, the FHWA, as we held in our August 9 decision, need not produce such documents.

Because we have determined that the sample of documents submitted to the Board should be produced (except for irrelevant funding documents), we need not resolve ACI’s challenge to the sufficiency of the declaration from the FHWA agency official invoking the deliberative process privilege.

Decision

ACI’s request for reconsideration is **GRANTED IN PART**. No later than **February 18, 2022**, the FHWA shall produce to ACI the documents that it provided to the Board for in camera review, except that it may withhold from production any documents that it believes relate solely to funding issues.

The FHWA and ACI shall confer to determine whether they can resolve their dispute as to the remaining documents identified in the FHWA’s privilege log as subject to the deliberative process privilege and report to the Board no later than **February 18, 2022**, on the extent to which further proceedings relating to ACI’s motion to compel will be necessary.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge