



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 16, 2014

CBCA 2878

JANE MOBLEY ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ralph C. Thomas III of Barton Baker Thomas & Tolle LLP, McLean, VA, counsel for Appellant.

Catherine Crow and John S. Tobey, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

McCANN, Board Judge.

RULING ON RESPONDENT'S CLAIM OF PRIVILEGE

Respondent has claimed attorney-client privilege for thirty-five documents, some with attachments, plus portions of seven other documents, requested in discovery by appellant. Respondent submitted those documents to the Board for in camera review to determine whether the attorney-client privilege applies. The Board rules on the applicability of the privilege to these documents in accordance with the case law pertaining to attorney-client privilege as set forth in *LFH, LLC v General Services Administration*, CBCA 395, et al., 08-2 BCA ¶ 33,915; *Automar IV Corp.*, DOT BCA 1867, 88-2 BCA ¶20,821; and many other cases. We rule as follows:

Documents 1 through 30 are email messages between the contracting officer and her attorney for the purpose of obtaining legal advice. As such these email messages are protected by the attorney-client privilege. *LFH, LLC*, 08-2 BCA at 167,819. Some of these email messages have documents attached. Those attachments are also privileged because they are attached and disclosure would partially reveal the substance of the privileged communication. *Oasis International Waters, Inc. v. United States*, 110 Fed. Cl. 87, 99-100 (2013). However, no claim of privilege has been made on the attached documents independent their attachment to the email messages. Accordingly, no privilege attaches to these documents if requested independent of the messages.

Document 31 is a chain of email messages between the contracting officer, her first line supervisor, her former first line supervisor, her second line supervisor, and the Regional Inspector General (IG) for Auditing in Region 6 in GSA's Office of Inspector General (OIG). This chain of email messages is not subject to the attorney-client privilege even though it does include communications between an attorney and her client. The forwarding of the privileged communications to the IG waived that privilege. "Any voluntary disclosure, inconsistent with the confidential nature of the attorney-client relationship waives the privilege." *Automar IV Corp.*, 88-2 BCA at 105,260. Respondent has failed to establish that disclosure to the IG was consistent with the attorney-client relationship. The party asserting privilege has the burden of establishing its applicability. *Cencast Services, L.P. v. United States*, 91 Fed. Cl. 496, 502 (2010).

Document 32 is an email message to the contracting officer from her first line supervisor containing privileged information. Communications between the contracting officer and her first line supervisor do not waive the privilege. The document is privileged.

Document 33 is an email message chain between the contracting officer, her first line supervisor, and her attorney. The privilege has not been waived. The document is privileged.

Document 34 is an email message between the contracting officer and her first line supervisor. The privilege has not been waived. The document is privileged.

Document 35 is an email message chain between the contracting officer, her attorney, and her supervisor. The privilege has not been waived. The document is privileged.

Respondent has redacted portions of seven other documents. The following are the Board's ruling on these redactions.

Document 1 is an email message from the contracting officer to Robert Juarez (unknown position) on June 22, 2010. The names of two bidders and the amounts of their bids are redacted. Respondent claims privilege under the Procurement Integrity Act. Respondent also cites to *Brooks Range Contract Services, Inc. v. United States*, 101 Fed. Cl. 699 (2011), and to *Tech Systems v. United States*, No. 10-877C, 2011 U.S. Claims LEXIS 1896 (Fed. Cl. Sept. 19, 2011), as support.

Respondent has failed to justify or even explain the claimed redaction. Respondent fails to cite to any part of the Procurement Integrity Act as support for its position that the names of bidders and the total amount of their bids are entitled to protection post award. Further, respondent has not indicated how the cited decisions apply. The redaction is denied.

Document 2 is a six-page string of email messages. The last email message is from Amy Lillard, Branch Chief, Financial Operations Branch, to the contracting officer. Within this string is an email message from the contracting officer to Pamela Harmon (unknown position) in the Financial Operations Branch. Respondent claims that the redacted portion is privileged under the attorney-client privilege because all addressees are “within the small, magic circle of closely related persons who were appropriate, if not vital to a consultation.” As support for its position, respondent cites to *LFH, LLC, and General Electric Co. v. United States*, No. 81-70, 1972 U.S. Ct. Cl., LEXIS 442 (Sept. 19, 1972).

The redaction is denied. Our review of these cases reveals no support for the proposition that members of the Finance Branch are within a group of closely related people where disclosure would not waive the attorney-client privilege. Certainly, respondent has not established that dissemination to Ms. Lillard and Ms. Harmon would not waive the attorney-client privilege. Ms. Lillard and Ms. Harmon are neither the attorney nor the client. They are third persons. Dissemination to them waived any attorney-client privilege that existed. *Automar IV Corp.*, 88-2 BCA at 105,261.

Document 3 is an email message from the contracting officer to Katina Beach and John Pollock (unknown positions) within the OIG. The email message refers to some advice given by counsel to the contracting officer. The redaction is denied for the reasons set forth for document 2. Ms. Beach and Mr. Pollock are third persons to the attorney-client relationship.

Document 4 is an email message from Joshua Woods (the contracting officer’s then first line supervisor) to the contracting officer, and to Mr. Springer (her second line supervisor). Communications that include supervisors do not destroy the attorney-client privilege. As such, the redactions are upheld.

Document 5 is the same as document 4 with the addition of a third redaction which pertains solely to the attachment to the email message. According to respondent, “The third redaction was to not produce the attachment,” because producing the attachment would reveal the substance of a communication between the contracting officer and her attorney. The attachment need not be produced as it is part of the privileged communication. However, if the attachment was properly requested independent of the email message, it must be produced.

Document 6 appears to be exactly the same as document 5. If it is not, respondent has failed to make clear the difference. Accordingly, the Board’s ruling is the same as for document 5.

Document 7 is an email message from the contracting officer to three employees in the OIG on May 31, 2012, plus an attachment. No attorney-client privilege attaches to this communication as it is to a third party and not between an attorney and the attorney’s client. Accordingly, any redaction of the email message or the attachment is denied as the attorney-client privilege does not apply to either.

R. ANTHONY McCANN
Board Judge