



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL GRANTED IN PART: July 1, 2015

CBCA 3389

AKAL SECURITY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Terrence O'Connor, Kathryn M. Lipp, and Stephanie D. Wilson of Berenzweig Leonard, LLP, McLean, VA, counsel for Appellant.

Song U. Kim, Cassandra A. Maximous, and Mark E. Menacker, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

STERN, Board Judge.

We have before us a motion to compel filed by the Department of Homeland Security, Immigration and Customs Enforcement (DHS). Akal Security, Inc. (Akal or appellant) filed this appeal from the decision of DHS's contracting officer denying Akal's claim for \$11,094,217.26. Appellant seeks the \$9,738,535.31 it paid to settle a class action lawsuit filed against it by its own security officers. Akal also seeks \$1,355,681.95 in legal fees and costs that it expended in defending the lawsuit.

Akal was awarded this contract on April 4, 2001, to provide security guard services at DHS's El Centro Service Processing Center (El Centro) in California. Akal provided these guard services from January 1, 2003, to June 30, 2009. California wage and hour regulations place certain requirements on employers regarding the amount and length of meal and rest periods for their employees. Apparently, during some periods, appellant did not provide the proper amount of paid rest and meal breaks for its El Centro employees as prescribed by the California regulations.

The security guards employed by Akal brought a class action lawsuit against Akal seeking unpaid wages and other damages. After a partial trial on certain of the issues, the California Superior Court for Imperial County found that Akal had failed to comply with the provisions of the regulations requiring payment to its personnel during rest and meal breaks. This led Akal to settle the lawsuit for the amount set forth above.

The parties are currently engaged in discovery. On May 15, 2014, DHS served document requests on Akal. Among other items, DHS sought:

All documents obtained, generated, consulted, relied upon, or otherwise pertaining to the litigation and/or settlement of *David Loera, et al. v. Akal Security, Inc.*, Imperial County Superior Court Case No. ECU 03022 (the matter referenced in the Complaint) and/or any appeal therefrom, including, but not limited to, (a) communications between Akal and its litigation attorneys in that matter, (b) communications between Akal's litigation attorneys in that matter and attorneys affiliated in any way with Berenzweig Leonard, LLP prior to or contemporaneous with the settlement referenced in the Complaint, and (c) all documents analyzing the strengths and weaknesses of Akal's litigation position or the advisability of settlement or appeal.

On May 30, 2014, Akal objected to this request, asserting that "it is overly broad, unduly burdensome, seeks privileged and/or confidential information, and seeks attorney work product."

On December 1, 2014, the Government filed the pending motion, requesting the Board order appellant to produce all documents responsive to the Government's request.

Discussion

The Government submits that the information it seeks in its request is necessary for its defense against the claims asserted by Akal. The Government maintains that Akal waived the attorney-client and work product privileges with respect to the communications between

Akal and its lawyers surrounding the settlement in the *Loera* case because Akal put that settlement at issue in the present proceeding.

The Board permits parties in litigation to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of a party.” Rule 13(b) (48 CFR 6101.13(b) (2014)).

Though it asserts that DHS’s request is overly broad and burdensome, Akal has failed to introduce any evidence in support of this argument. We conclude that unless a privilege attaches to the documents, they must be produced for inspection by DHS.

The attorney-client privilege protects confidential communications between an attorney and client, made for the purpose of obtaining legal advice. *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987); *see also Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *see generally Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). A litigant properly invokes the attorney-client privilege when:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court . . . and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding . . . and
- (4) the privilege has been (a) claimed and (b) not waived by the client.

Energy Capital Corp. v. United States, 45 Fed. Cl. 481, 484-85 (2000) (citation omitted). The purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients.” *Upjohn Co.*, 449 U.S. at 389.

The work product privilege attaches to documents prepared in anticipation of litigation by an attorney. *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). It “shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *United States v. Nobles*, 422 U.S. 225, 238 (1975).

A waiver of the attorney-client and work product privileges may occur when a party possesses privileged information which is at issue because that party has made it pertinent to the legal theory of its case and where preservation of the privileges would deny the opponent access to that information which is vital to its case. (Two other approaches

regarding waiver of these privileges - an automatic waiver by bringing the legal action or an application of a balancing test of the need of discovery against the need for protecting secrecy - are not applicable here since DHS has not asserted that there is no other means for it to obtain the information.) *Zenith Radio Corp. v. United States*, 764 F.2d 1577 (Fed. Cir. 1985). In *Zenith* the Government asserted attorney-client and work product privileges to protect against production the internal communications relating to Zenith's allegation that it was unreasonable for the Government not to have agreed to certain terms of a settlement. The Court stated, "[a] party does not automatically waive [the attorney-client or work product] privileges, which protect the formulation of legal opinions or litigation strategy, simply by bringing suit," and when sufficient information can be obtained through unprivileged means, the requisite "strong showing of need" is not met. *Id.* at 1580. Zenith failed to carry its burden of showing that the information it sought was vital to its defense. Further, in denying access to privileged documents on the basis of waiver, the Court concluded that "[i]f the views of the parties to or the drafters of the settlement agreements are pertinent to the resolution of that legal issue — a question on which we intimate no opinion — Zenith has not given any convincing reason why it could not obtain that information by deposing those individuals." *Id.* Cases where courts have found a waiver of privilege doctrine exhibit several common factors: (1) the very subject of privileged communications is critically relevant to the issue to be litigated, (2) there is a good faith basis for believing such essential privileged communications exist, and (3) there is no other source of direct proof on the issue. See *Ohio Casualty Group v. American International Specialty Lines Insurance Co.*, No. 04 Civ. 10282, 2006 U.S. Dist. LEXIS 52070, at *12 (S.D.N.Y. July 25, 2006); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 94 Civ. 1317, 1995 U.S. Dist. LEXIS 14808 (S.D.N.Y. Oct. 11, 1995); *Standard Chartered Bank PLC v. Ayala International Holdings, Inc. (U.S.)*, 111 F.R.D. 76 (S.D.N.Y. 1986).

Thus, in order to obtain otherwise privileged documents, in addition to showing the need for pertinent materials, the party seeking the documentation must demonstrate its inability to obtain the information elsewhere. In *Superior Timber Co.*, IBCA 3459, 97-2 BCA ¶ 29,112, the appellant sought production of privileged documents related to its claim on the basis of the Government's alleged waiver of the privileges. The Department of the Interior Board of Contract Appeals held that the Government did not waive its attorney-client or work product privileges because "[a]ppellant could not establish that it would be unable to obtain [the wanted] factual information other than through production of the [privileged] documents it sought." 97-2 BCA at 144,867.

DHS suggests that the privileges should be pierced because Akal's attorneys' communications regarding the settlement might reveal information relevant to the reasonableness of the settlement. The fact that the communications between Akal and its lawyers leading up to the *Loera* settlement might contain information potentially relevant to

the reasonableness of the settlement does not result in a waiver of the attorney-client or work product privileges

DHS has not carried its burden of showing that the documents it seeks were pertinent in appellant's settling of the *Loera* lawsuit. Appellant has not waived the attorney-client or work product privileges solely by making the amount of the settlement of the *Loera* lawsuit the basis for its claim against DHS. DHS has also not demonstrated that the documents are vital and that it is unable to obtain the information it seeks elsewhere, such as from the testimony of company personnel involved in the settlement discussions or from other documents which set forth appellant's rationale and position in agreeing to settle the underlying lawsuit.

Based on these conclusions, at this time we need not examine the documents *in camera*.

Decision

The motion to compel is **GRANTED IN PART** as to any documents sought by DHS for which appellant has not asserted a privilege. The motion to compel is otherwise denied.

JAMES L. STERN
Board Judge