



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER DENYING REQUEST FOR REDACTIONS: April 2, 2021

CBCA 6631

SAGE ACQUISITIONS LLC,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Michael R. Rizzo, Aaron S. Ralph, and Kevin J. Slattum of Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, CA, counsel for Appellant.

Blythe I. Rodgers, Julie K. Cannatti, and William J. Selinger, Office of the General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

GOODMAN, Board Judge.

ORDER

On January 28, 2021, the Board issued a decision dismissing this appeal for lack of jurisdiction. Appellant has requested that certain information be redacted from the Board's decision before the decision is issued to the public. We deny appellant's request.

Background

Appellant filed its notice of appeal on October 11, 2019, attaching as exhibit 2 a Standard Form 1436 (SF 1436) executed by its chief financial officer, and its termination for convenience settlement proposal (TSP) dated January 10, 2019, comprised of a sixty-nine-

page narrative and a two-page table listing forty-nine exhibits. The exhibits were not attached to the notice of appeal.

On November 14, 2019, appellant filed its complaint, which contained references to various dollar amounts in the SF 1436 and TSP narrative. That same day, respondent filed its appeal file as required by Board Rule 4 (48 CFR 6101.4 (2019)). Exhibit 77 of the appeal file consisted of 1854 pages, comprised of appellant's emails dated January 10, 2019, transmitting with attachments the SF 1436, the TSP, the exhibit list of the TSP, and the forty-nine exhibits.

On July 1, 2020, respondent filed a motion to dismiss the appeal. Appellant filed an opposition to the motion on August 18, 2020, and respondent filed a reply on September 8, 2020.

On October 9, 2020, appellant filed a response to the Board's order dated October 7, 2020 (which sought clarification of an issue raised in the briefing of the motion to dismiss), attaching as an exhibit the SF 1436.

On October 15, 2020, more than one year after the appeal was initiated, the parties filed a motion for the Board to enter a protective order, attaching a joint draft protective order. Paragraph 1.a–.d of the joint draft protective order listed various documents produced by respondent during discovery which respondent designated as protected. Several documents were identified by title, and others identified as listed in an email chain. None of the documents were identified as having been filed previously with the Board by either party. Paragraphs 2 and 3 contained the procedure for designating material as protected before exchanging it between parties and filing with the Board:

2. A party may designate any document, information, or other tangible item as protected by marking the following words on the face and every subsequent page of the original or photocopy of the document, information, or other tangible item, or by delivering at the time of disclosure, production, or filing to the party to whom disclosure is made written notices that the tangible item is protected material. To the extent that the party generating or providing any document, information, or tangible item wishes to designate it as protected, it shall do so when it is passed to another party of record or to the Board. If the party receiving any document, information, or tangible item wishes to add a protective designation to the material received, it shall do so within seven working days of receipt by informing all parties (and the Board, if the material was submitted to the Board) that it is to be protected.

3. The party claiming protection is to identify each portion of the material for which it is claiming protection. This may be done either by highlighting or otherwise marking the material for which protection is sought, or by providing a separate redacted version of the material, with all protected portions deleted, with respect to material not protected. However, any party entering any protected material into the record or submitting protected material to another party in response to a proper discovery request is to submit a redacted version along with the original version.

On October 30, 2020, before the Board adopted the joint protective order, the Board held a telephone conference with counsel to discuss the procedures for submitting materials to the Board deemed protected by the parties and marked as protected under the protective order. Because of procedures in effect from the COVID-19 pandemic, with Board personnel working remotely, the Board informed the parties as to the procedures for submitting protected material to the Board so that it could be stored and accessed separately from the remainder of the record. The Board's order of October 30, 2020, confirming the discussion in the telephone conference and adopting the parties' proposed protective order, emphasized that all protected material shall be submitted to the Board electronically, with each page of the document designated protected pursuant to the protective order, either on a physical media or via efile, encrypted and password protected.

After the parties' protective order was adopted by the Board, neither party submitted to the Board any materials or documents which they deemed to be protected pursuant to the protective order.

On November 12, 2020, the Board issued an order directing appellant to answer inquiries concerning issues raised in the briefing of the motion to dismiss. That order referenced various dollar amounts in the SF 1436, the TSP, the briefing of the motion to dismiss, and the complaint. On November 20, 2020, appellant responded with a narrative concerning the calculation of the dollar amounts at issue. Appellant did not identify its narrative or any portion of it as protected.

On January 28, 2021, the Board issued a decision to the parties dismissing this appeal for lack of jurisdiction. Although the parties had made no submission to the Board identifying material as protected, the Board, as a precaution, issued its opinion under a protective order with an order stating:

[The] parties may request that the Board redact portions of the decision which they believe is from material that has been *previously designated as protected*. Accordingly, the parties have until Friday, February 5, 2021 to identify any portions of the decision that they believe may require redaction. For each

proposed redaction, the party is to provide a basis for the Board making the redaction, including when the material sought to be redacted was *previously designated as protected*.

(Emphasis added.)

Appellant filed on February 5, 2021, a request to redact all dollar amounts in the Board's decision. Appellant's request attached a copy of the Board's decision with all dollar amounts redacted, and did not identify the source of the proposed redactions as any material previously designated as protected.¹ In support of its request, appellant stated various legal arguments and allegations of confidentiality. On February 11, 2021, respondent submitted a response to the Board's order, referencing appellant's response, stating: "Although the proposed redactions pertain to information that was not previously marked protected pursuant to the Protective Order for this appeal, the Agency has no objections to Appellant's Proposed Redactions."

On February 19, 2021, the Board held a telephone conference to discuss appellant's request for redactions. On March 2, 2021, the Board issued an order requesting supplementation of appellant's February 5, 2021, request for redaction, to which appellant responded on March 8, 2021.

Discussion

This Board's decision in *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027, discusses the parameters and operation of protective orders, with extensive legal citation. As stated in that decision, blanket protective orders, like the one issued in this appeal, allow the parties to exchange confidential or sensitive information in discovery, but limit the exchange to a narrow group of individuals. Blanket protective orders allow the parties to protect specific documents that they, in good faith, believe are entitled to protection.² Anything less than a document-by-document or very narrowly drawn category-by-category assessment fails to satisfy the initial good faith review requirement. After this "sifting," and proper designation of materials as protected, a party may then file

¹ The Board's decision had quoted the dollar amounts with citations to the SF 1436, the TSP narrative submitted by both appellant and respondent, the complaint, briefings of the motion to dismiss, and appellant's responses to the Board's orders, all of which had been previously submitted to the Board without redaction and not designated in whole or in part as protected material by either party.

² In contrast, umbrella protective orders are used to limit all documents produced to only certain individuals.

the protected information with the tribunal with the understanding that the public would not have access to it. The protective order in this case contains specific procedures for marking material as protected on a document-by-document basis, including highlighting and redacting information. The Board's order adopting the parties' protective order included specific requirements that the parties submit protected material to the Board electronically and encrypted/password protected, so that it could be kept separate from the remainder of the record.

Appellant requests this Board to redact all dollar amounts in the Board's decision dismissing the appeal, which was issued three months after the blanket protective order was issued. The proposed redactions are not from any material previously marked protected in this appeal, as neither party submitted material to the Board designated as protected. In its request for redaction, appellant did not identify where in the record these dollar amounts appeared, or any material previously filed with the Board that was designated as protected pursuant to the protective order and that contained these dollar amounts, as directed by the Board when the protective order was adopted. Rather, appellant supported its request for redaction by stating (1) that the dollar amounts were proprietary and confidential business data that is exempt from disclosure under exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2018), and the Trade Secrets Act, 18 U.S.C. § 1905; (2) that the Federal Acquisition Regulation establishes that commercial and financial information that is privileged or confidential includes cost breakdowns, profit, indirect cost rates, and similar information, *see* 48 CFR 15.506(e)(3); and (3) that Sage keeps its cost and profit data confidential and private, as the cover note³ to its January 9 termination settlement proposal shows,⁴ and respondent gave no indication it would release this data. Appellant cites *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), for the holding that commercial or financial information is exempt from disclosure when the owner treats the information as confidential and the information was provided to the Government under an assurance of privacy by the agency receiving the information.

Yates-Desbuild emphasizes that the general rule requires openness of judicial proceedings. To overcome the presumption that documents filed with a tribunal should be

³ Appellant submitted this document in response to the Board's order dated March 2, 2021, which had been previously submitted by respondent in the appeal file. The Board could not discern a request for confidentiality in the document.

⁴ While the Board's decision identified the sources of the dollar amounts from documents and pleadings in the record which had not been designated as protected, appellant only refers to the source of the proposed redactions as the TSP with general allegations of confidentiality.

publicly available and to establish good cause for keeping documents under a protective order, a party seeking protection must demonstrate a particular need for protection. Broad, conclusory allegations of harm, unsubstantiated by specific examples or articulated reasoning are insufficient. Appellant's arguments lack merit. While appellant contends that the TSP was submitted to respondent with the expectation that the Government would keep it confidential, the Government was not the first to make the TSP a public document. Rather, appellant filed the SF 1436 and the TSP as an exhibit to its notice of appeal. Appellant's allegation that it expected respondent to keep these documents confidential based on statute, regulation, or presumptions described in case law, is inconsistent with appellant's voluntary, unprotected filing with the Board of the SF 1436 and TSP when it initiated the appeal. Also, when soon thereafter respondent filed the SF 1436, the TSP, and appellant's exhibits to the TSP with the Board, appellant did not object.

The Board's decision dismissing the appeal cited the dollar amounts which appellant seeks to redact from the SF 1436, the TSP, appellant's complaint, respondent's motion to dismiss the appeal, appellant's response to the motion, the Board's orders of inquiry to appellant, and appellant's responses to the Board's orders. Except for the Board's second order of inquiry and appellant's response to the order, all of these documents and pleadings were filed with the Board in the one-year period before the parties submitted their request for a protective order. Once the protective order was issued, neither party submitted information to the Board designated as protected, and therefore no portion of the record was designated as protected while the appeal was pending before the Board.⁵

Appellant's broad allegations of confidentiality of the unprotected information it seeks to redact are inconsistent with its filing of all documents containing the information without designating the documents as protected pursuant to the protective order. Respondent's lack of opposition to the proposed redactions is inconsistent with its submission of the appeal file as unprotected. Appellant has not shown good cause to overcome the assumption of public access to the information for which it seeks redaction.

⁵ Appellant could have no expectation of confidentiality of an unprotected record, as the public has access to the record pursuant to Board Rule 9(e):

Review and copying. The Clerk makes records for decision, except evidence submitted under a protective order or in camera, available for review on reasonable notice during business hours, and provides copies of such available documents for a reasonable fee.

Order

Appellant's request to redact the Board's decision dismissing the appeal is **DENIED**. The decision will be released to the public in its entirety, without redaction.

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge