

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

ORDER ON FURTHER DISCOVERY PROCEEDINGS: September 8, 2003

GSBCA 15502, 16055

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Patrick J. Greene, Jr., of Peckar & Abramson, River Edge, NJ, counsel for Appellant.

Kevin J. Rice, David M. Smith, and Robert M. Notigan, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

BORWICK, Board Judge.

This order provides the Board's rulings on appellant's motion for early production of a settlement agreement of an appeal related to the instant appeal and any joint defense agreements the respondent has signed with its architect and the architect's subcontractors. Respondent objects to production of these documents on several grounds including the attorney work product privilege, "joint defense" privilege, and the assertion that the request is premature. Appellant objects to the Board's giving effect to respondent's joint defense agreement with its architect or the architect's subcontractors.

We grant respondent's objection in part. Respondent may redact only limited portions of those documents, as specified in this opinion. Respondent must produce the remainder to appellant. We deny appellant's objection to Board recognition of the joint defense agreements. The Board will recognize, with certain limitations described in this opinion, respondent's joint defense agreement with its architect since respondent has shown a sufficient common legal interest to support a joint defense agreement with the architect. We reserve ruling on the Board's recognizing the joint defense agreement with the architect's subcontractors pending further information from respondent.

Background

These appeals involve Turner Construction Company, appellant, and the General Services Administration (GSA), respondent. Respondent contracted with appellant to construct the Federal Building and Courthouse, Islip, New York. Appellant submitted a claim for \$78,452,427 to the contracting officer and subsequently revised its claim to \$85,190,882. After the contracting officer had failed to render a decision on the claim, appellant filed an appeal with this Board (GSBCA 16055) from a deemed denial. 41 U.S.C. §§ 605(c)(5), 606 (2000).¹

The Government managed the construction project with a group of consultants known as the "design team." The design team consists of The Spector Group (TSG)/Richard Meier & Partners (RM&P) (hereinafter TSG/RM&P); Lehrer McGovern Bovis, Inc. (LMB); Syska & Hennessey (S&H); Ysrael A. Sinuk, P.C. (YAS); and RA. Heintges Architects (RAH). GSA contracted with TSG/RM&P to provide architectural design services for the project and with LMB for quality control construction manager services. TSG/RM&P subcontracted with S&H to provide mechanical, engineering, plumbing, and fire alarm consulting engineering services for the project. YAS and RAH were also subcontractors to TSG/RM&P. YAS provided structural engineering services for the project and RAH provided design services relating to the project's curtainwall.

Appellant's complaint alleges that many steel design drawings were defective in that they lacked dimensions and other necessary information about connections and loads. Complaint ¶ 23A, GSBCA 16055. The complaint alleges that the design drawings contained hundreds of interferences between the structural steel and mechanical, electrical, plumbing, and sprinkler (MEPS) systems, and that the design documents failed to provide sufficient space for the designed MEPS systems. *Id.* ¶ 23B-C. The complaint alleges that the design documents for the MEPS systems contained many defects and that appellant and its MEPS subcontractors had to redesign the systems to correct the defects. *Id.* ¶ 23D. Appellant alleges that the curtainwall specifications contained a non-cumulative specification of 1/32 inch and that constructing a curtainwall to that specification was commercially impractical. *Id.* ¶ 23F. Appellant alleges that defects in GSA's structural steel design resulted in insufficient clearances for installation of the curtainwall on certain areas of the building and that design documents were defective because various curtainwall elements lacked necessary structural support. *Id.* ¶ 23G-H. Appellant also alleges other design defects similar to the defects described above. *Id.* ¶ 23I-M. For example, appellant maintains that the design documents contained numerous erroneous design details for the drywall and carpentry work and that the design documents provided insufficient support for long spans of floor. *Id.* at ¶ 23L-M.²

¹ The appeal docketed as GSBCA 15502 is an appeal from GSA's assessment of liquidated damages, which has been consolidated with the later-filed appeal.

² Appellant's request for equitable adjustment dated January 19, 2001, goes into extensive and graphic detail concerning allegedly deficient design documents. For example, appellant stated that the Government and its design team "created a set of design documents that contained numerous omissions and conflicts, including a lack of coordination of structural steel drawings and an overall failure to provide sufficient space for the designed [MEPS]"

In summary, appellant alleges that the design defects caused substantial project delay and additional costs to Turner and its subcontractors, and that the design defects described in the complaint constitute defective specifications for which the Government is responsible entitling appellant to an equitable adjustment and increased time for performance under the Changes and Suspension of Work clauses. Complaint ¶¶ 24-25.

On June 2, 2003, appellant made an early document discovery request for respondent's production of copies of its agreement with the construction manager and any of its designers for the project, including any settlement and joint defense agreements.

On June 13, respondent objected to production of such documents on three grounds. First, respondent objected on the grounds of the attorney work product privilege because the documents "contain the thought processes and analyses of respondent's trial counsel as to the involvement of the design team in the litigation." Respondent's Opposition at 1. Second, respondent objected on the grounds of the "joint defense privilege" because "the communications between parties of a joint defense agreement are confidential and privileged." *Id.* at 2. Finally, respondent objected to the request because the document request was premature, in that the Board did not schedule document production to end until October 3. *Id.* at 1.

In a memorandum dated July 14, 2003, respondent further explained its work-product privilege argument, stating that the joint defense agreements and the settlement agreement, which are described below, "reflect both GSA's and the Design Team's legal opinions and assessments of potential exposure to such a degree that they can only be characterized as work product." Respondent's Supplemental Opposition at 7.

In response to appellant's argument that the Board should not recognize the joint defense agreements, respondent argues that respondent and members of the design team have a common legal interest to support the joint defense agreements. Respondent argues that "any liability that is assessed against GSA would give rise to potential exposure for the Design Team." Respondent's Opposition at 6. Further, respondent argues that TSG/RM&P is responsible under its contract with GSA for the quality, technical accuracy, and coordination of all design drawings and would be liable under its contract with GSA for negligent performance of services performed under the contract. Respondent's Supplemental Opposition at 3; *see id.*, Exhibit 1 (referencing Federal Acquisition Regulation (FAR) 236-23 (Apr. 1984) (hereinafter referred to as the Architect-Engineer clause)). As for the subcontractors to TSG/RM&P, respondent argues that GSA "has no reason to believe that [TSG/RM&P] would have agreed to exculpate their subcontractors for the subcontractors' professional liability." Respondent's Supplemental Opposition at 5.

Appellant maintains that the documents are not privileged. In support of its argument that the Board not recognize the joint defense agreements, appellant argues that the only parties to this litigation are Turner and GSA and that any liability of members of the design team would be based upon "completely different legal theories, would involve different

systems, as detailed in the sections below." Claim, GSBCA 16055 at 4-5.

standards of liability, different methods of proof and different damages." Appellant's Memorandum at 7. Appellant argues that for the Board to give effect to any joint defense agreement, the parties must have identical legal interests, and that standard is not met in this case.

Three documents are at issue here - the settlement agreement of April 6, 2003, and two joint defense agreements. The settlement agreement settled the case of Michael H. Spector, AIA P.C. d/b/a The Spector Group v. General Services Administration, GSBCA 15322, which involved a claim for extra work under the architect's design contract for the Islip courthouse. The joint defense agreements are two separate, but related, documents - a primary joint defense agreement, dated May 2, 2002, and signed by GSA, TSG/RM&P, and S&H, and a supplemental subconsultant joint defense agreement, entered in March 2003 and signed by those parties and YAS and RAH. The Board has reviewed the documents in camera. Additionally, respondent has provided us with suggested redactions to the allegedly privileged documents should we reject the Government's contention that the documents should be withheld in their entirety.

Discussion

Respondent, as the party objecting to discovery, has the burden of establishing its claim of privilege for the contested documents. AT&T Communications Inc. v. General Services Administration, GSBCA 14732, 99-2 BCA ¶ 30,580. We first consider whether respondent has met its burden of establishing that all or part of the settlement agreement comes within the work-product privilege. We will then consider whether the Board will give effect to the joint defense agreements that respondent has signed, and finally, whether the joint defense agreements themselves come within the attorney work product privilege and are thus exempt from disclosure.

The attorney work product privilege protects from discovery, absent a showing of substantial need, trial preparation materials developed in anticipation of litigation. The privilege, therefore, is a qualified one. Fed. R. Civ. P. 26(b)(3) AT&T Communications, 99-2 BCA at 151,012. Opinion work product, however, which reveals the mental processes and theories of attorneys involved in the case, is almost always protected from discovery. United States ex. rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 683-84 (S.D. Cal. 1996); AT&T Communications. A document created in the regular course of business and not in anticipation of litigation is not covered by the work product privilege. Ed A. Wilson, Inc. v. General Services Administration, GSBCA 12596, 94-3 BCA ¶ 26,998.

Settlement agreement

Respondent claims that portions of the settlement agreement dated April 6, 2003, between GSA and TSG come under the work product privilege. Although Spector did not involve the instant litigation, the cases were related. The parties introduced terms into the settlement agreement of the Spector appeal that deal with the instant litigation. The terms are stated in paragraph 1(b) of the settlement agreement, and reflect counsel for respondent's mental processes and theories involving the present litigation. We therefore accept

respondent's counsel's suggested redaction of those portions of paragraph 1(b). The remainder of the settlement agreement must be produced. Documents not privileged must be produced in discovery if relevant to the subject matter in the pending case and if the information sought appears reasonably calculated to lead to admissible evidence. Board Rule 115(c). The unredacted parts of the settlement agreement show that GSA agreed to pay a sum of money to its architect on the architect's claim for additional design work. This document reasonably could lead to admissible evidence concerning appellant's claim for extra work associated with performance of the construction contract in the building the architect had designed.

Joint defense agreements

Joint defense agreements implicate the joint defense doctrine. The original purpose of the joint defense doctrine was to preserve material protected by the attorney-client privilege from claims of waiver when parties having common legal interests communicated otherwise privileged information to one another. In Re Regents of University of California, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (recognizing joint defense agreements in patent case); R.E. Meyers & Co. v. United States, 41 Fed. Cl. 729, 731-32 (1998). The joint defense doctrine also applies to material covered by the attorney work product privilege. Burroughs, 167 F.R.D. at 685; Moniaros Contracting Corp., DOT CAB 96-1 BCA ¶ 28,234, at 140,984.

The joint defense doctrine does not create a separate privilege; rather, it serves only as an extension of the attorney-client or attorney work product privileges. Cavallaro v. United States, 284 F.3d 236, 240 (1st Cir. 2002); Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 469 (S.D.N.Y. 2003); McNally Tunneling Corp. v. City of Evanston, 93 Civ 7222, 2001 WL 1246630, at 2 (N.D. Ill. 2001); Katz v. AT&T Corp., 191 F.R.D. 433, 437.³ The joint defense doctrine does not apply to material generated in the normal course of business. For the joint defense doctrine to apply, the party seeking to assert the doctrine must show that the material was created as part of a joint defense effort, that the material furthered that effort, and that the underlying existing privilege has not been waived. Burroughs, 167 F.R.D. 685; Moniaros, 96-1 BCA at 140,984; see also United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

A person or firm need not be a litigant to be a party to a joint defense agreement; the joint defense doctrine applies to parties or potential parties sharing a common interest in the outcome of the litigation. Russell v. General Electric Co., 149 F.R.D. 578, 580 (N.D. Ill. 1993); Katz, 191 F.R.D. at 437 (common interest doctrine applies to parties with shared interest in outcome of litigation against actual or potential common adversary). The interests of the members of the joint defense agreement must be "identical." Gulf Islands Leasing,

³ In this regard, we find that the Government and design team's reference in paragraphs B3 and B4 of the joint defense agreement to a "joint defense privilege" overly broad. The Government may not in this litigation rely on its unilateral creation of a separate joint defense privilege in the agreement as a basis for withholding discovery material from appellant.

215 F.R.D. at 471. The Court of Federal Claims found an identity of interests, sufficient to support a joint defense agreement, between a non-party firm and the United States in a patent lawsuit against the United States because, under its contract with the United States, the non-party firm was required to indemnify the Government for any damages awarded against the Government in the suit. R.E. Myers, 41 Fed. Cl. at 74.

As we have seen above, appellant accuses the design team, including TSG/RM&P, of providing: defective structural steel design drawings having insufficient design loads; structural steel designs that would not accommodate the MEPS systems; deficient MEPS system designs; a curtainwall design that was impossible to construct and that lacked crucial structural details; and carpentry and drywall designs that were lacking support details. In short, appellant's claim to the contracting officer and its complaint before this Board alleges an incompetent, non-functional design by the design team, which, if proven, would be actionable by the Government under the Architect-Engineer clause of TSG/RM&P's contract with the Government.

It is apparent to the Board that, to defend this case, the Government, with the assistance of employees of the design team, will seek to establish the competency and accuracy of the contract's original design documents and to establish that appellant, as opposed to the design documents, was the cause of the disruptions and delays to the job.

If appellant proves the allegations in its complaint concerning defective design, then, absent other exculpatory factors, TSG/RM&P could well be subject to liability under the Architect-Engineer clause of its contract with the Government for "all damages to the Government caused by [TSG/RM&P's] negligent performance of any of the services furnished under [the] contract." Respondent's Supplemental Opposition, Exhibit 1.

In the past, the Government has sought to recover against architects or engineers for damages suffered by the Government for defective project design under the Architect-Engineer clause, including extra costs the Government paid a contractor resulting from the defective design. Parsons Main Inc., ASBCA 51355, 02-2 BCA ¶ 31,886; Brunson Associates, ASBCA 41201, 94-2 BCA ¶ 26,936; Meese-Peterson & Foss, Inc., VABCA 3673, 93-2 BCA ¶ 25,671.⁴ In this matter, respondent has stated its intention to seek recovery against members of the design team for the cost of deficient design to the Islip courthouse project. We conclude that the Government has demonstrated that, as against appellant's claim, respondent and TSG/RM&P have close to identical legal interests which justify the joint defense agreement. It is evident to us that in a very real and practical sense,

⁴ The elements of proof for a defective design case are: (1) the construction contractor substantially complied with the architect-engineer's design in the manner intended by the architect-engineer; (2) the architect-engineer exercised its skill, ability and judgment negligently, instead of with reasonable care with respect to the design; and (3) the architect-engineer's defective design was the proximate cause of damage to the Government. Parsons Main, 02-2 BCA at 157,537.

TSG/RM&P stands as a common adversary with the Government as against Turner's claim. The Board will consequently recognize the agreement.

Although, the Board will give effect to the Government's joint defense agreement with TSG/RM&P, the case law discussed above establishes limits to its applicability. The joint defense agreement will only apply to: (1) material generated as part of the joint defense effort in this litigation, (2) material generated after the signing of the joint defense agreement on May 2, 2002, and (3) material generated which furthered that joint defense effort. The joint defense doctrine does not apply to material generated in the normal course of business, i.e., in the course of performing the construction contract for the Islip courthouse.

We cannot at this time recognize the joint defense agreements signed by the architect's subcontractors. Respondent has not persuaded us that S&H, YAS, or RAH has sufficient common interest with GSA to invoke the joint defense doctrine. Respondent has not demonstrated that, by virtue of clauses in their subcontracts, those firms are subject to the potential liability of the Architect-Engineer clause that is present in TSG/RM&P's contract with the Government or a similar clause having the same effect as the Architect-Engineer clause. Indeed, in its submissions to the Board, GSA only speculates as to the potential liability of those firms. Respondent may submit terms and conditions of the subcontracts of S&H, YAS, or RAH that respondent maintains create a common legal interest with the Government. Respondent is to produce the additional information within ten days of this order.

Respondent has argued for extensive redactions of the joint defense agreements on the basis of the work product privilege.⁵ The primary joint defense agreement is divided into four parts: (1) joint defense (part A); preservation of privileges and confidentiality of joint defense information (part B); resolution of GSA claims (part C); and miscellaneous (part D). Part A identifies the members of the joint defense agreement and the joint defense effort the parties will undertake in this litigation. Part B purports to establish the confidentiality of joint defense information. Part C establishes a procedure and methodology to resolve potential future claims against certain members of the design team.

The subconsultant joint defense agreement incorporates the terms of the primary joint defense agreement. The subconsultant joint defense agreement also contains parts A, B, and C, which are counterparts to parts A, B, and C of the primary joint defense agreement.

Respondent has not established that most of parts A and B of the primary joint defense agreement are privileged. Indeed, appellant has a substantial need to know the terms of much of parts A and B of the primary joint defense agreement to enable it to conduct its discovery and to prepare for trial. *Power Mosfet Technologies v. Siemens, AG*, 206 F.R.D. 422, 426 n.12 (E.D. Tex. 2000). All parties must be aware of the reach of any waiver of the attorney-client and attorney work product privileges in this litigation. Parts A and B address

⁵ The issue of whether all or part of the subconsultant joint defense agreement is privileged and must be produced is separate from the issue--about which we have asked for additional information from respondent--of Board recognition of that agreement.

those issues. The terms and conditions of the joint defense agreement will influence the scope and breadth of appellant's document and written discovery as well as depositions. The only portions of part A, which deals with trial strategy for the present litigation, that appellant does not need to know are paragraphs 2, 4, and 8. Those portions may be redacted. This ruling applies as well to counterpart provisions in the supplemental subconsultant agreement, specifically part A, paragraph 3 of that agreement.

The only portion of part C of the primary joint defense agreement dealing with the present litigation is the second sentence of paragraph 2. That sentence may be redacted in its entirety, since it deals with respondent's trial preparation and strategy and with matters concerning which appellant has no need to know to prepare its case. The remainder of part C deals with allocation of liability and resolution of liability for potential future claims of GSA against the design team. That portion does not deal with this litigation; rather, it deals with circumstances where the interests of the design team and respondent would be adverse. This portion of the joint defense agreement must be produced. See Tribune Co. v. Purcigliotti, 1997 WL 540810 (S.D.N.Y. 1997) (standstill agreement must be produced since it is discrete part of joint defense agreement, relates to future litigation, and does not reveal trial strategy in present action). The subconsultant agreement must also be produced save for the redactions to that agreement mentioned in this opinion.

ANTHONY S. BORWICK
Board Judge