

U.S. Department of Labor

**Board of Contract Appeals
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Date Issued: April 7, 1997

CASE NUMBERS: 96-BCA-2
96-BCA-7
97-BCA-2

In the Matter of:

CHARLESGATE CONSTRUCTION COMPANY,
Appellant

CONTRACT NUMBER: E-4388-4-00-82-20

**RULING ON CONTRACTING OFFICER'S MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

By letter dated July 16, 1996, the Contracting Officer served Charlesgate Construction Co. ("Appellant") with its First Request for Production of Documents. The Contracting Officer's request for production instructed Appellant to identify with particularity any documents which Appellant withheld on the grounds of privilege. (Contracting Officer's Motion to Compel, Exh. 1.) The Contracting Officer's request for production of documents also included the following four requests:

2. Produce all documents relied upon, consulted or reviewed in preparing Charlesgate's Critical Path Schedules or other schedules for the Grafton Project.
3. Produce all documents related to, concerning or related to Charlesgate's Critical Path Schedules or other schedules for the Grafton Project. . . .
7. Produce all documents, including all contracts, invoices, memoranda, correspondence, etc., related to or concerning subcontractors of services or supplies, of any tier, utilized by Charlesgate or its subcontractors on the Grafton Project. . . .
10. Produce all change requests and orders issued, pending or executed, issued by or received by all subcontractors and suppliers of any tier related to the Grafton Project.

(Contracting Officer's Motion to Compel, Exh. 1.)

By letter dated September 18, 1996, Appellant responded to the Contracting Officer's First Request for Production of Documents. In its response, Appellant made a general objection to the Contracting Officer's requests for production "insofar as it seeks the production of documents which are protected from production by the attorney-client privilege, or which evidence or constitute work product or documents prepared in anticipation of the claim." No specific documents were identified

as being withheld on the basis of privilege. Appellant also made the following responses to requests 2, 3, 7 and 10:

Charlesgate objects to Request No. 2 on the grounds that it is overbroad, unduly burdensome and fails to identify the documents sought with particularity. Without waiving this objection, Charlesgate states that it is not able at this time to identify any documents with particularity that were relied upon at the time the Schedules were generated. In general, Charlesgate relied upon the status of construction, problems encountered in the field and the remaining scope of contract work to be completed, to use their best efforts to generate these schedules as well as input from the Department of Labor representatives. . . .

Charlesgate objects to Request No. 3 on the grounds that it is overbroad, unduly burdensome and fails to identify the documents sought with particularity. Without waiving this objection, Charlesgate states that it is not able at this time to identify any documents with particularity that were relied upon at the time the Schedules were generated. . . .

Charlesgate objects to Request No. 7 on the grounds that it is overbroad, vague, unduly burdensome and fails to specify with particularity the documents sought. Further answering Charlesgate states that to the best of its knowledge it contracted with at least fifty (50) subcontractors and or materials suppliers on this \$6,000,000.00 Project. The Contracting Officer fails to demonstrate any relevancy to the claim with this broad brush request. The documents requested encompass thousands and thousands of pages. . . .

Charlesgate objects to Request No. 10 on the grounds that it is overbroad, vague and fails to identify with particularity the documents sought. Further assuming Charlesgate states that to the best of its knowledge it contracted with at least fifty (50) subcontractors and or materials suppliers on this \$6,000,000.00 Project. The Contracting Officer fails to demonstrate any relevancy to the claim with this broad brush request. . . .

(Contracting Officer's Motion to Compel, Exh. 2.)

Appellant argues, in opposition to the Contracting Officer's Motion to Compel, that the Contracting Officer is not entitled to production of privileged documents, and that Appellant is under no obligation to specifically identify the documents withheld on the basis of privilege. Appellant further argues that the Contracting Officer has not identified the requested documents with sufficient specificity, has not demonstrated the relevancy of the requested documents to the appeals, and has failed to demonstrate that the requested documents are likely to lead to the discovery of admissible evidence. Finally, Appellant claims that the Contracting Officer's discovery requests are unduly burdensome.

Appellant, as the party asserting that the requested documents are protected by the attorney-client privilege and the work product privilege, has the burden of proving that the allegedly privileged

documents are protected from discovery. See Cogefar-Impresit U.S.A., Inc., DOTCAB No. 2721, 95-1 BCA ¶ 27,567. Contrary to the assertions of Appellant, Appellant is required to specifically identify which documents it is withholding on the basis of privilege. Rule 26(b)(5) of the Federal Rules of Civil Procedure, as amended December 1, 1993, states:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Appellant has not specifically identified any allegedly privileged documents, and has not followed the proper procedures for the assertion of the attorney-client privilege or the work product privilege. In the absence of descriptions of the allegedly privileged documents, Appellant's claim of privilege must be rejected.

Requests for the production of documents may specify categories of documents to be produced. Fed. R. Civ. Pro. 34. The Contracting Officer has, in requests 2, 3, 7 and 10, identified categories of documents which is seeks from Appellant. I find that these requests are sufficiently specific to enable Appellant to adequately respond to the requests.

Contrary to the assertions of Appellant, the Contracting Officer does not have the burden of proving the relevancy of the discovery requests. Similarly, the Contracting Officer does not have to prove that the requested documents will most likely lead to the discovery of admissible evidence. Appellant bears the burden of proving that the requested documents have no relevance to the appeals, and will not lead to the discovery of admissible evidence. See Shostak Const. Corp., VABCA Nos. 3671, 3810, ___ BCA ¶ ___. Each of the Contracting Officer's production requests appears on its face to involve information and documents which are directly relevant to the claims at issue.

Appellant also bears the burden of proving that the requested discovery is unduly burdensome. Appellant must "make a specific, concise showing of substantive reasons why" it would be burdensome to respond to the discovery requests. See Automated Datatron, Inc. GPOBCA Nos. 25-87, 26-87, ___ BCA ¶ ___. The Government Printing Office Board of Contract Appeals observed in Automated Datatron, Inc., *supra*, that "[t]he fact that interrogatories require a degree of work, research, and expense do not automatically render them objectionable. A party cannot complain merely because in order to answer interrogatories it must compile information within its control or consult documents." (Citations omitted.) As Appellant has made no specific allegations of undue burden or irrelevancy regarding requests 2 and 3, I find requests 2 and 3 to be proper.

Appellant has made specific allegations of undue burden and irrelevancy with respect to requests 7 and 10. Appellant argued that it employed over 50 subcontractors for this project, but only three subcontractors are relevant to the appeals. Based on the issues raised in these appeals by

Appellant, the Contracting Officer's requests 7 and 10 are overly broad and burdensome in that they seek information regarding subcontractors not directly involved in this dispute.

The Contracting Officer's Motion to Compel is GRANTED IN PART and DENIED IN PART. Within ten days of receipt of this Ruling, Appellant shall identify, as instructed in the Contracting Officer's First Request for Production of Documents, all documents which it claims are protected from discovery on the basis of privilege, and shall fully respond to requests 2 and 3. Within ten days of receipt of this Ruling, the Contracting Officer shall revise requests 7 and 10 to limit their scope to those subcontractors directly relevant to the appeals, as determined by the issues raised in Appellant's complaints. Appellant shall have 30 days from receipt of the revised requests to produce the documents requested.

So ordered.

Edward Terhune Miller
Member, Board of Contract Appeals