

Government Contracts Update: Attorney-Client and Work Product Privileges

Recent Decision Finds that Documents May Remain Privileged Even if Inadvertently Provided to Government

Summary: In *PK Contractors, Inc.*, 2004 WL 95239, ASBCA No. 53,576, the Armed Services Board of Contract Appeals ("ASBCA") reviewed a privilege claim for several documents that had been inadvertently produced by a contractor to the government during discovery. After reviewing the facts and determining that the contractor did not intend to release the documents and had taken adequate measures to avoid production of privileged materials, the Board found that the contractor had not waived its claim of privilege and ordered the government to return all copies of the inadvertently produced documents.

Analysis: The Board rejected the government's argument that the contractor's inadvertent production of the privileged documents constituted an automatic waiver of privileges and applied the two-part test contained in *National Helium Corp. v. United States*, 219 Ct. Cl. 612 (1979). Under this test, the Board addressed two basic questions: "did the client wish to keep back the privileged materials and did he take adequate steps in the circumstances to prevent disclosure of such documents?" *PK Contractors* at 3 (citing *National Helium* at 616).

- The Board found that **the contractor satisfied the first prong because it was clear that it did not intend to release the privileged materials**. The contractor had objected to the production of documents in response to the government's discovery request and withheld some documents. In addition, the contractor's counsel immediately demanded that the inadvertently produced documents be returned when he learned of their production and had instructed a deponent not to answer any questions concerning the documents.
- **With regard to the second prong, the Board concluded that the contractor had not been so "lax, careless, or inadequate" that it could be deemed to be indifferent to the production of documents**, noting that the case involved a large volume of documents (86 boxes) and that the contractor's lawyers had spent a total of fifty-eight (58) hours conducting a page-by-page review of documents that it believed had a direct bearing on the claim and a general review of its remaining files.

Practitioner Tips: Rather than relying upon a court or board to rule that you have not waived applicable privileges by inadvertently producing a document, it may be more prudent to enter into an inadvertent waiver agreement at the outset of any litigation. Whether or not you enter into such an agreement, the decision in *PK Contractors* makes clear that there are a few steps that you can take to buttress any inadvertent production claim. These include:

- Interposing appropriate objections to discovery requests;
- Thoroughly reviewing documents prior to production and documenting review procedures;
- Keeping accurate track of the time spent conducting the review;
- Involving counsel in the review process; and
- Immediately demanding the return of any inadvertently produced, privileged documents.

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