



Federal Government Contractors Alert

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APPELLATE FEDERAL COURT OVERTURNS DISTRICT COURT RULING; FEDERAL GOVERNMENT CONTRACTOR MUST DISCLOSE INTERNAL INVESTIGATION DOCUMENTS IN WHISTLEBLOWER LAWSUIT

In our current [Williams Mullen Construction Industry News](#), the article titled “Federal Contractors” discussed a ruling on March 6, 2014 by the U.S. District Court for the District of Columbia ordering a federal government contractor, Kellogg, Brown & Root (KBR), to produce, in response to a plaintiff whistleblower’s discovery request, documents and communications generated from KBR’s internal investigation of alleged misconduct in its performance of a federal government contract. As noted in our newsletter article, this ruling was significant and disturbing because KBR had conducted the internal investigation to comply with federal statutory and regulatory requirements as a federal government contractor, as well as its corporate policy. By doing so, KBR, nonetheless, found itself on the horns of a dilemma in the whistleblower’s lawsuit because of its compliance with the federal contracting requirements and its internal policy.

KBR petitioned the appellate federal court for a writ of mandamus. The appellate court, noting the far-reaching effect of the district court’s ruling within the federal government contracting industry, granted the writ and, on June 27, 2014, vacated the district court’s order of production.

The appellate court’s ruling is noteworthy, not only for the result but also for the court’s discussion of steps that government contractors can take to maintain the attorney-client privilege over documents and communications generated in a legally required internal investigation.

First, one of the highlights of the ruling was the appellate court’s finding that internal investigations to comply with legal or corporate requirements will not waive the attorney-client privilege so long as obtaining or providing legal advice was one of the significant purposes, but not necessarily the sole purpose, of the internal investigation. In contrast, the district court had found the primary purpose of the contractor’s internal investigation was to comply with the federal regulatory requirements and internal corporate policy and not to provide or obtain legal advice; therefore the attorney-client privilege did not apply to communications and documents from the investigation. The appellate court clarified that a court

need not determine whether the provision of legal advice was the primary purpose of the communication, but instead whether it was a primary purpose, and it was not correct for a court to assume there was but one primary purpose of a communication. The appellate court noted that the district court had taken a “novel approach” in its rationale for ordering disclosure of the documents and communications from the contractor’s internal investigation.

Second, in rejecting the district court’s reasons for ordering production, the appellate court’s opinion provides guidance to government contractors who want to protect the attorney-client privilege over documents and communications generated in internal investigations to comply with legal requirements. Among the circumstances that would support the preservation of the attorney-client privilege are: 1) counsel (whether in-house or outside counsel) direct the internal investigation, 2) investigation interviews may be conducted by non-attorneys so long as the interviewers are conducting the interviews at the direction of counsel, and 3) while “magic words” are not required, the employee to be interviewed should be informed that the interview is pursuant to an internal investigation undertaken by counsel and that the information disclosed in the interview is to be considered confidential.

This appellate court’s ruling now removes one of the dilemmas facing contractors when complying with the federal statutory and regulatory requirements for open and forthright contracting with the federal government.

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