Claims, Public Records and the Work Product Exception

Construction claims analysis always involves both a technical analysis and a legal analysis. Contractors consult with their legal counsel in an attorney-client privileged context in order to gain an understanding of the legal issues with regard to contract terms, rights and remedies. Owners and their agents need to engage in the same type of consultation to fully understand the legal aspects of a claim.

In the situation where there is a disputed claim on a public construction project, there is often correspondence about the matter between the public owner (“Owner”), its legal counsel, the construction manager as agent, if any, and the architect. Pursuant to the terms of their contracts, the construction manager as agent and architect are limited agents of the Owner so such consultation is to be expected.

For example, in a case where a contractor claims that it was delayed on the project as a result of some action or inaction of the Owner, it would be unusual for there not to be letters, emails or meeting minutes from the construction manager to the Owner speaking about the issue. Similarly, in the case where there is a defective work claim on the project, the architect will most likely have some written communication with the Owner about the contractor’s responsibility for the problem. Some of those communications may be public records available to the contractor, but some may be privileged as “work product.”

It would certainly provide the contractor with a strategic advantage if it were able to access the written communications between the Owner and its construction manager and architect about the disputed matter when those communications constitute work product prepared in anticipation of litigation.

Is this the type of documentation that can be accessed through the Ohio Public Records Act? The first issue to consider is the definition of a “public record.” Under Ohio Revised Code (“R.C.”) §149.43(A)(1), “... '[p]ublic record’ does not mean any of the following: (g) trial preparation records.” Under R.C. § 149.43(A)(4), “‘Trial preparation record’ means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.”

Thus, the trial preparation record exception to the public records act is not limited to documents prepared in the course of litigation. It also applies to documents that are compiled in “reasonable anticipation” of a court action or proceeding.

The next issue to consider is the effect of a “Claim” on a construction project. AIA Document A201–2007 General Conditions of the Contract for Construction, Section 15.1.1 states: “A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term ‘Claim’ also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.”

Thus, a Claim is a disputed matter, and a party asserts a Claim against the other party with the anticipation of recovering some form of relief from the other party. Therefore, Owner documentation analyzing the Claim can certainly be said to be compiled in “reasonable anticipation” of a civil action, which would bring the documents under the category of the trial preparation records exception.

Then, at the point a lawsuit is filed, the work product doctrine becomes relevant under R.C. §149.43(A)(1)(v), which states: “‘[p]ublic record’ does not mean any of the following: (v) Records the release of
which is prohibited by state or federal law. . . “ The work product doctrine is contained in Ohio Civil Rule 26(B)(3), which states: “. . . a party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing of good cause therefor.”

Thus, based on the text of the rule, the work product doctrine extends to the Owner’s agents and consultants to the extent those documents constitute claims analysis prepared in anticipation of litigation.

The capacity of the roles of the architect and construction manager is set forth in statutes, the applicable agreements and the particular circumstances. For example, R.C. § 9.33(A) states: “‘Construction Manager’ means a person with substantial discretion and authority to plan, coordinate, manage, and direct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, or other improvement. . . .” Thus, by statute the construction manager is certainly designated an agent of the Owner with significant “authority.”

Further, under the AIA Document A232–2009 General Conditions of the Contract for Construction, it states in §4.2.1: “The Construction Manager and Architect will provide administration of the Contract as described in the Contract Documents and will be the Owner’s representatives during construction . . . The Construction Manager and Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.” Thus, the General Conditions often advise the contractor as to the agency role of the architect and construction manager on behalf of the Owner.

The circumstances of any particular situation will also factor into the issue. Indeed, if an Owner seeks specific advice and consultation from either an architect or a construction manager on a disputed matter with a contractor, then the work product doctrine could be employed to provide protection for any resulting documentation.

As a result, the Public Records Act does not automatically compel a public owner to disclose written communications between the Owner and its construction manager and architect containing their analysis of disputed matters. The “trial preparation record” exception provides public owners with the right to withhold documentation that relates to the analysis of disputed matters that is compiled in “anticipation of litigation.”

Note: Backup documentation for claims that may be kept in the ordinary course of business – such as the “bid takeoff,” job cost reports, field logs, and other such documents – would not fall under the category of work product.

Subcontractor Default Insurance — A Cautionary Tale

A recent New York County, New York, appellate decision highlights the potential inadequacies of subcontractor default insurance (“SDI”). These products are sometimes referred to as “Subguard” insurance based on the name given to one such product offered by Zurich North America Insurance Company.

SDI is meant to provide coverage for damages that result from a subcontractor’s default in its performance of work on a construction project. In Waterscape Resort LLC v. McGovern, 2013 NY Slip Op 04709 (June 20, 2013), a project owner claimed that its construction manager represented that the owner was fully protected by the construction manager’s SDI policy against any default by the largest subcontractor on the project. When the subcontractor defaulted, however, there was no SDI coverage for the owner’s damages that resulted from the default. In fact, most SDI policies only protect the prime contractor or construction manager and not the owner.

The owner filed a lawsuit against its construction manager (“CM”), claiming the CM had falsely represented that it had adequate SDI coverage for that subcontractor to protect the owner. The court noted that the named insured on the SDI policy was the CM, not the owner, and therefore the owner had no protection under the policy. The court also found
that the owner had not asked the subcontractor itself or the insurance provider if the owner was protected by the SDI policy. Accordingly, the court held that the owner could not recover its losses from the CM based on the alleged false representation.

This case demonstrates that SDI policies do not normally provide the coverage an owner might expect and indicates that it is the owner’s responsibility to determine whether or not it is covered. Moreover, even if an endorsement naming the owner is provided, the circumstances under which protection is provided to the owner may be extremely limited, often requiring that the CM or prime contractor be legally determined to be insolvent or in bankruptcy before coverage for the owner becomes available.

Although it is a New York case, Waterscape should serve as a warning to construction project owners who would like to rely on SDI policies in lieu of a bond or other forms of protection for the owner. Moreover, some prime contractor default policies have restrictions on coverage requiring insolvency of the prime contractor and/or severely limiting the time frame during which there is coverage. Owners need to be sure that there are not large holes in their protection, or at a minimum, make an informed decision regarding their willingness to accept gaps in coverage in order to realize up front savings.

Ohio AG: A Person may Simultaneously Serve as County Engineer and Member of the Board of Directors of a Conservancy District in that County

In January 2013, the Ohio Attorney General (“OAG”) issued advisory opinion 2013 Op. Att’y Gen. No. 002, determining that a person may simultaneously serve as a county engineer and a member of the board of directors of a conservancy district with territory in the same county, with some limitations. OAG opinions are recommendations of the law and while they are not binding law, the opinion would be persuasive in court.

The OAG determined that whether a person may serve concurrently in two public positions is dependent upon an analysis of seven “compatibility factors”:

1. Whether either position is a classified employment under R.C. 124.57;
2. Whether a constitutional provision or statute prohibits holding both positions at the same time;
3. Whether one position is subordinate to, or in any way a check upon, the other;
4. Whether it is physically possible for one person to discharge the duties of both positions;
5. Whether there is an impermissible conflict of interest between the two positions;
6. Whether there are local charter provisions, resolutions, or ordinances that are controlling; and
7. Whether there are federal, state, or local departmental regulations applicable.

In analyzing these factors, the OAG first found that neither position is a classified employment under R.C. 124.57. This statute prohibits an officer or employee in the classified service of the state, counties, cities, school districts and civil service townships from holding partisan political positions. However, a county engineer is an elected official in the unclassified civil service and is therefore not subject to R.C. 124.57. Furthermore, members of conservancy district boards of directors are not subject to 124.57 because they are not in the service of the state or any county, city, school district or civil service township. Rather, they are distinct political subdivisions created to solve water quality management problems.

The OAG also determined that no constitutional provision or statute disallows the simultaneous holding of a board membership of a conservancy district and the position of county engineer.
Next, the OAG found that the positions of county engineer and board member of a conservancy district operate independently of one another. A county engineer is an elected official responsible to the electorate of the county, whereas, members of the board of directors of a conservancy district are appointed by the conservancy court, consisting of one common pleas judge for each county with territory in the district.

The positions in no way supervise one another, are in no way responsible for appointing or removing one another, and are otherwise not subordinate to or are a check upon one another. The OAG advised that local officials should determine whether it is physically possible for one person to perform the duties of both positions. If a person chooses to serve simultaneously, they must be certain that they are able to discharge the duties in both positions in a timely and competent manner.

The OAG then noted that a person may not serve simultaneously in two positions if doing so would subject him or her to divided loyalties, conflicting duties or any other act outside the public interest. So, in order to determine whether a conflict of interest would exist, the OAG reviewed the powers, duties, and responsibilities of both the county engineer and board members of a conservancy district.

The OAG determined that while some responsibilities of the two positions may overlap, this would not be a regular occurrence. Additionally, because a county engineer would have the ability to abstain from any matter that conflicts with his position as a board member of a conservancy district, the OAG determined that conflicts can be easily avoided.

Finally, if a local resolution, ordinances or departmental regulation exist prohibiting the holding of these positions simultaneously, the OAG determined that it would be up to the local officials to resolve the incompatibility.

Accordingly, the OAG determined that a person may serve as both county engineer and member of the board of directors of a conservancy district that has territory in that county. However, he recommended the following limitations: as a conservancy board member, an individual may not participate in negotiations, discussions, other deliberations or votes relating to his or her duties as county engineer; and, as county engineer, he or she may not participate in any review, evaluation or approval of conservancy district plans or improvements or exercise any powers or duties of the conservancy district under an agreement between the county and the conservancy district.

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