Claims, Public Records and the Work Product Exception

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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.

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