Published on *The National Law Review* https://natlawreview.com

D.C. Circuit Court Action Renews Fears about Mandatory Disclosure Rule

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A recent, federal evidentiary ruling calls the Attorney-Client Privilege and Work Product Doctrine into question where privileged documents relate to an internal investigation made pursuant to the FAR's Mandatory Disclosure Rule.

Most government contractors are aware of the "**Mandatory Disclosure Rule,"** which came into effect in December, 2008. Under the Mandatory Disclosure Rule:

> *[A] contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act.*

FAR 3.1003(a)(2). This policy is also found in FAR Clause 52.203-13.[1]

In order to discover and investigate potential violations, all "contractors should have an employee business ethics and compliance training program and an internal control system that [f]acilitate[s] timely discovery and disclosure of improper conduct in connection with Government contracts; . . . ." FAR 3.1002(b)(2). Many contractors are required to have such a program, which includes "[a]n internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports." FAR 52.203-13(c)(2)(ii)(D).

When the Mandatory Disclosure Rule was being debated in the regulatory rulemaking process, many members of the public were concerned that mandatory disclosure could conflict with the Attorney Client Privilege or other, similar evidentiary privileges. In its Final Rule (Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008)), the Councils acknowledged that "[m]any respondents expressed concern that compliance with the rules

requiring disclosure and full cooperation would be interpreted to require contractors waive an otherwise valid claim of attorney-client privilege or protections afforded by the attorney work product doctrine, ..." Id. at 67,076.

The Councils quickly dismissed this concern by declaring that "[i]t is doubtful any regulation or contract clause could legally compel a contractor or its employees to forfeit these rights." Id. at 67,077. Additionally, in an effort to ameliorate these fears, the Councils added the following, "limiting" language to the regulation:

> *"Full cooperation" [d]oes not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require [a] Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; . . . .*

FAR 52.203-13(a)(2)(i) (internal numbering omitted).

However, a recent decision by the U.S. District Court for the District of Columbia has re-raised these privilege concerns.[2] On March 6, 2014, the Court ordered the defendant to produce 89 documents generated during Mandatory Disclosure Rule investigations that are related to the case at hand. United States of America ex rel. Harry Barko v. Halliburton Co., et al., (D.D.C. Mar. 6, 2014) (order compelling production of certain documents).

The defendants sought protection of the documents under the Attorney-Client Privilege or the Work Product Doctrine. Id. at 4. The documents were generated pursuant to internal investigations that the company undertook, in part, in order to comply with the Disclosure Rule's requirement that a contractor investigate potential civil or criminal violations by its personnel. Id. at 3-4.

In ruling that the defendants were required to turn over the documents, the Court noted that "[m]ost importantly, the Court finds that the [Disclosure Rule] investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice," therefore, the Attorney-Client Privilege did not apply to the documents generated pursuant to the internal investigation. Id. at 5. Similarly, the Court found that the Work Product Doctrine did not protect the documents from disclosure, in part because "government regulations require [the defendant] to investigate potential fraud," and the defendant conducted the "internal investigation in the ordinary course of business . . . ." Id. at 8. Therefore, the documents generated as a result of a regulatory-mandated, internal investigation were not protected by either the Attorney-Client Privilege or the Work Product Doctrine, and they must be turned over to the plaintiff in the case.

The Court's reasoning that investigatory documents generated during a mandatory, internal investigation are not protected by the Attorney-Client Privilege or Work Product Doctrine because they were generated pursuant to a regulatory requirement, is understandably troubling to many contractors. This rationale is contrary to the Councils' announcement that "[i]t is doubtful any regulation or contract clause could legally compel a contractor or its employees to forfeit these rights." Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,077 (Nov. 12, 2008).

If upheld, the Court's reasoning may mark the end of federal government contractors' confidential, internal investigations.[3]

[1] While the clause only applies to certain contracts and contractors, the Mandatory Disclosure Rule applies to all contractors "[w]hether or not the clause . . . is applicable." FAR 3.1003(a)(2).

[2] The internal investigation in the instant case was made pursuant to a predecessor disclosure rule under the Department of Defense FAR Supplement. See DFARS Subpart 203.70 (2001).

[3] The defendant in this case filed a Writ of Mandamus at the U.S. Court of Appeals for the District of Columbia on March 12, 2014.

National Law Review, Volume IV, Number 90