A Unique Privilege Issue In DOE Contracting

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Government contractors sometimes confront unique clauses in entering into contracts with government agencies. Recently, we encountered a standard U.S. Department of Energy contract clause, Clause H.39, "Access To And Ownership of Records," which addresses contractor-owned records.

In litigation at the U.S. Court of Federal Claims between our client, CB&I AREVA MOX Services LLC, and the National Nuclear Security Administration, an agency within the DOE, the DOE claimed Clause H.39 entitled it to Mox Services' privileged information, arguing that MOX Services had waived any privilege under Clause H.39.

During the litigation, we obtained a protective order shielding the privileged information from disclosure despite this significant clause and DOE's opposing position. The case settled in December with a $186 million payment to MOX Services.

This article addresses the issues surrounding Clause H.39, which incorporates Title 48, Section 970.5204-3 of the Code of Federal Regulations, a provision of the DOE Acquisition Regulations. Below we discuss this unique DOE clause and provide recommendations for handling privileged communications when contracting with the DOE.

Key Provisions of Clause H.39

In the MOX litigation, the entire Clause H.39 was at issue in one of the complaints, and upon the DOE's termination for convenience, the dispute centered on Clause H.39(c).

Clause H.39 addresses government-owned records and contractor-owned records.[1] In paragraph (a), the clause provides the following definition of government-owned records: Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, including records series described within the contract as Privacy Act systems of records, shall be the property of the [g]overnment and shall be maintained in accordance with 36 CFR, Chapter XII, Subchapter B, 'Records Management.'[2]

Paragraph (b) addresses contractor-owned records and states that the "following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause."[3]

It further notes that "the contracting officer shall identify which of the following categories of records will be included in the clause, excluding records operated and maintained in DOE Privacy Act system of records."[4]

With regard to contractor-owned records, the paragraph lists five categories of records, including employment-related records, confidential contractor financial information, records relating to procurement actions by the contractor, legal records and technology transfer records.[5] Legal records, the clause provides, include "legal opinions, litigation files, and

documents covered by the attorney-client and attorney work product privileges."[6]

In paragraph (c), the clause specifically addresses contract completion or termination and provides:
Upon the request of the [g]overnment, the contractor shall provide either the original contractor-owned records or copies of the records identified in paragraph (b) of this clause, to DOE or its designees, including successor contractors.[7] ... Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act) as appropriate.[8]

The paragraph addresses the copying of such records, stating that "[i]f the contractor chooses to provide its original contractor-owned records to the Government or its designee, the contractor shall retain future rights to access and copy such records as needed."[9]

Paragraph (d) applies to the inspection, copying and audit of "[a]ll records acquired or generated by the [c]ontractor under this contract in the possession of the [c]ontractor, including those described at paragraph (b) of this clause."[10] It states that such records "shall be subject to inspection, copying, and audit by the [g]overnment or its designees at all reasonable times."[11]

Paragraph (e) states that the "clause applies to all records created, received and maintained by the contractor without regard to the date or origination of such records including records acquired from a predecessor contractor."[12]

Regulatory Background For Clause H.39

In response to the DOE's arguments that MOX Services waived any privilege in Clause H.39(c), MOX Services was successful in obtaining a protective order, particularly because of the clause's detailed regulatory history on this very issue.

Specifically, Clause H.39 stems from the DOE's "long history of overseeing aspects of its contractors' management of legal matters and associated costs."[13] The DOE's facilities generate "a substantial amount of litigation against which the department may elect to defend itself or authorize the contractor to defend."[14] As a result, the DOE has attempted to rein in the cost of contractor-managed litigation by overseeing the contractor's engagement of outside counsel and auditing "records relevant to the representation."[15]

The DOE has recognized contractors' "concern about the potential waiver of attorney-client confidentiality privileges if contractors provide the type of information required" to audit their outside counsel.[16] In response to these concerns, the DOE has consistently assured its contractors through rulemaking that their disclosure of privileged information to DOE would not result in a waiver of such privileges under the common interest doctrine.[17]

It has explained that it "needs to receive information regarding contractor litigation in order to participate in strategy and to justify the reimbursement of the costs of litigation."[18] The DOE also has stated that its standard insurance-litigation "and claims clause provides that the [d]epartment can direct the defense of such litigation and provides for the collaboration between [d]epartment representatives and in-house or [d]epartment approved outside counsel."[19]

It further has noted that it "needs to be provided pleadings and other documents that deal with the strategy of the case," and has assured contractors that all such privileged communications would be protected by the common interest doctrine.[20]

Litigating Against DOE Clause H.39

Despite this regulatory history, the DOE recently argued in the MOX litigation that Clause H.39 allows it to obtain copies of privileged information pertaining to matters in which the DOE and its contractor are adverse. Under the DOE's view of Clause H.39, a contractor agrees to a blanket contractual waiver of the attorney-client and attorney work product privileges for every communication and document related to the contract at issue.

Such blanket waiver of these privileges is fundamentally at odds with the purpose of Clause H.39 and its regulatory history. It is clear that legal records, as defined under Clause H.39(b), cover only those records that would typically be shared with the DOE pursuant to the insurance-litigation and claims clause, Department of Energy Acquisition Regulations Section 952.231-71, or the clause requiring contractors to submit a legal management plan, Title 10, Section 719 of the Code of Federal Regulations.

Whether the DOE has a contractual right to audit or obtain legal records turns on whether it shares a common interest with the contractor with respect to the records.

The purpose of Clause H.39, to facilitate the DOE's oversight of common interest litigation, does not apply when the records relate to privileged matters concerning disputes with the DOE. The contractor and the DOE do not have a common interest in any communications or documents related to the contractor's claims against the DOE.

Indeed, the contractor's costs to prosecute those claims are expressly unallowable under Federal Acquisition Regulation Section 31.205-47(f). As such, there is no need for the DOE to obtain those privileged documents to oversee or manage costs.

Recommendations For Handling Clause H.39 in DOE Contracting

In order to properly safeguard attorney-client privileged and work product protected materials, DOE contractors should consider the following recommendations:

- Contractors should emphasize that Title 48, Section 970.5204-3(b) of the Code of Federal Regulations provides the contracting officer with discretion to identify which of the categories of records will be included in Clause H.39. As such, the category pertaining to legal records, Section 970.5204-3(b)(4), could be excluded from the clause or modified to expressly apply only in common interest situations.

- If the DOE will not agree to exclude or modify Clause H.39, contractors should try to ensure that the DOE agrees in a formal writing at the outset that any DOE right to obtain an original or copies of legal records for inspection, copying, audit or upon termination, only applies when the DOE and its contractor share a common interest.

- Unless the DOE agrees to exclude or modify Clause H.39 as stated above, contractors should try to keep all privileged communications outside of any areas that the DOE would have access to, including potentially creating a separate program or database to maintain legal communications. An important issue is segregating the

contractor's in-house counsel communications with its project team from other communications at the beginning to ensure they are not intermingled throughout the duration of contract performance. Even with this segregation, however, the DOE may still argue that it is entitled to the segregated legal communications and the regulatory history above should prove useful in opposing any such position.

In sum, DOE Clause H.39 is a unique contracting clause that could subject DOE contractors to a fight over their privileged communications. By keeping these recommendations in mind, DOE contractors can best protect their attorney-client privileged and work product protected materials.

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[1] 48 C.F.R. 970.5204-3(a) and (b).

[2] 48 C.F.R. 970.5204-3(a).

[3] 48 C.F.R. 970.5204-3(b).

[4] Id.

[5] Id.

[6] 48 C.F.R. 970.5204-3(b)(4).

[7] 48 C.F.R. 970.5204-3(c).

[8] Id.

[9] Id.

[10] 48 C.F.R. 970.5204-3(d).

[11] Id.

[12] 48 C.F.R. 970.5204-3(e).

[13] 78 Fed. Reg. 25795 (May 3, 2013).

[14] 59 Fed. Reg. 44981 (Aug. 31, 1994).

[15] 61 Fed. Reg. 14763, 14765 (April 3, 1996); see also 66 Fed. Reg. 4616, 4616-17 (Jan. 18, 2001) ("establishing regulations to monitor and control legal costs and to provide guidance to aid contractors and Department personnel in making determinations regarding the reasonableness of all outside legal costs, including the costs of litigation").

[16] 66 Fed. Reg. at 4617.

[17] Id.; see also 10 C.F.R. § 719.8 ("As long as the Department and the contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.").

[18] 66 Fed. Reg. at 4617.

[19] Id.

[20] Id.