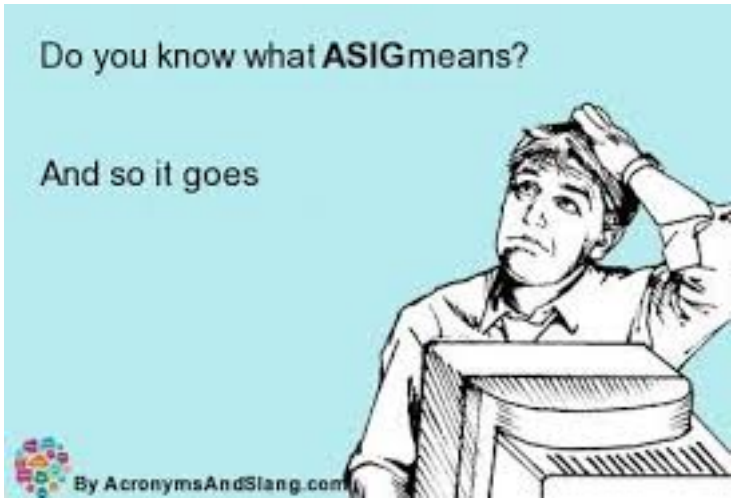

Frequently, government auditors and investigators demand that contractors provide documents that attorneys consider to be subject to privilege, and thus protected. The situation creates conflict between what the auditors assert they need for their audit and what the attorneys assert they do not have to provide to anybody. Indeed, the attorneys assert that there are adverse consequences from providing material protected by the attorney-client privilege.

The matter often comes up in audits of consultants' expenses, where invoices from external attorneys are requested so that they can be reviewed for allowability. The matter can arise in requests for internal audits and/or internal investigations conducted at the behest of corporate counsel. The matter almost always bubbles up in audits of contractor disclosures made pursuant to the 52.203-13 contract clause. The tension between evidentiary support and legal privilege comes up in other contexts as well.

And it's almost always a problem.

The problem is that providing auditors or investigators with attorney-privileged material may act to waive that privilege with respect to downstream litigation. We wrote about that problem **right here**. We discussed a recent case where privilege was deemed to have been waived when an internal investigation was provided to the GSA Inspector General, and we opined that "Such reviews should only be provided to outsiders (including government personnel such as DCAA auditors or Agency Inspectors General) under very carefully considered circumstances, lest the door be opened for

qui tam
relators and opposing counsel to obtain a bounty of documents that would have otherwise been protected."

More recently, a D.C. district court told KBR that its 89 internal fraud investigation reports (prepared under privilege and related to alleged violations of KBR's ethics policy) were *not* protected by the attorney-client privilege. According to an analysis of the court's decision, prepared by the attorneys at GreenbergTaurig—

… the court reasoned that because these investigations are required by federal procurement regulations, the company would have had to conduct them anyway, regardless of whether they had been advised to do so by an attorney. The court relied on the 'mandatory' nature of the investigations in reaching its conclusion that the documents were neither privileged nor protected by the work product doctrine.

KBR quickly appealed via a writ of mandamus, and the D.C. Circuit Court of Appeals reversed. In a unanimous decision, the Appellate Court found that the doctrine of attorney-client privilege protected KBR's internal investigations. That was a fortunate outcome, both for KBR and for other government contractors.

The conflict arose again when two Department of Energy contractors at the Hanford Waste Treatment & Immobilization Plant ("WTP") refused to provide the DOE Inspector General with more than 4,300 requested documents. Both the prime contractor (Bechtel National, Inc.) and its subcontractor (URS Energy and Construction, Inc.) allegedly refused to cooperate with the DOE IG's investigation into the firing of a whistle-blower (Ms. Donna Busche). Allegedly, Ms. Busche was fired by URS "after raising safety concerns" regarding activities at the $12 Billion project to treat radioactive waste at the site, which played a key role in the World War II "Manhattan Project" and the "Cold War" arms race that followed.

The DOE IG spent six months investigating whether or not Ms. Busche was terminated in retaliation for her "blowing the whistle" on unsafe practices. **According to the DOE IG**, its investigators could not reach any conclusions "because of a material scope limitation." In other words, because the DOE contractors refused to provide the requested documents, the auditors had nothing to audit. According to the DOE IG—

On the advice of outside counsel, both contractors took the position that the documents in question were subject to either attorney-client or attorney work product privilege. Also, URS made a unilateral determination that certain documents were not relevant to our examination. Specifically, Bechtel withheld 235 documents and URS withheld 4,305 documents. Of the 4,305 withheld documents, URS' attorney eventually agreed to provide access to a portion of the 2,754 documents that URS had concluded were non-responsive but which were not subject to the asserted attorney-client privilege. Attorneys representing both Bechtel and URS stated that the assertion of privilege was necessary given the likelihood of litigation regarding the Busche matter. Their basic concern was that releasing the documents to the Office of Inspector General would constitute a waiver of privilege in future proceedings.

The DOE IG told Bechtel and URS that their contracts with DOE contained clauses that required all documents “acquired or generated under the contract, including those for which attorney-client and attorney work product privilege were asserted.” However, the contractors’ attorneys didn’t agree with that interpretation of the clauses’ requirements. The DOE IG reported that “It was the position of counsel for both Bechtel and URS that these clauses were too broad and that they were unenforceable, specifically in situations where litigation was either in process or was likely.”

And the contractors’ attorneys stuck to that position, despite pressure applied to the companies.

That position did not sit well with Senator Claire McCaskill, (D-MO). You may remember Senator McCaskill from **her grilling** of then-DCAA Director April Stephenson. Ms. McCaskill **reportedly** “slammed” the two contractors, writing (in a letter to the Secretary of Energy) that she would like him to tell her how they would be held accountable “for their noncompliance, including withholding of fees and recovery of costs incurred” by the DOE IG.

Bechtel had its **own take** on the situation. It wrote—

Bechtel went above and beyond in cooperating with the OIG's investigation--providing requested documents for review and people to interview, in accordance with the protocol agreed to with the IG.Â Furthermore, we offered to work with the OIG to provide access to documents that are protected under the law, in a way that preserves those protections, but the OIG declined our offer.Â

And there the matter sits (so far as we know).

Meanwhile, news reports indicate that KBR is back in court, fighting a demand by a *qui tam* relator that it turn over documents provided to the government. The relator's attorneys are arguing that KBR waived attorney-client privilege when it decided to provide the documents.

And so it goes …