

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

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**FILE:** B-212221**DATE:** August 24, 1983**MATTER OF:** General Services Administration--Request  
for Advance Decision**DIGEST:**

1. Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government.
2. Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept pro rata settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor.

The General Services Administration (GSA) requests an advance decision regarding the authority of a contracting officer to settle claims of two subcontractors from contract funds remaining after termination for default of a prime contract. We conclude that the subcontractors have no legal basis for recovery from the Government, and the contracting officer has no authority to settle at this time.

On August 24, 1981, GSA awarded a \$24,975 contract for handicap alterations to the Federal Building and U.S. Post Office, Tupelo, Mississippi to C.G. Construction Company. A \$500 change order brought the total contract price to \$25,475. Since the amount of the original award had been less than \$25,000, GSA did not require payment and performance bonds. The agency paid C.G. Construction a total of \$9,171 in progress payments before the firm abandoned the project and apparently went out of business. Consequently, the contracting officer terminated the contract for default on April 5, 1982.

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On May 14, 1982, GSA awarded a completion contract in the amount of \$5,000 to Creative Glass Company, a subcontractor on the project. After all the work had been completed, a balance of \$11,304 still remained in the account.

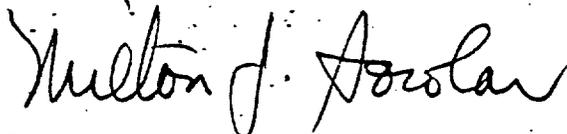
Because C.G. Construction did not submit payrolls as required by the contract, GSA has no record of claims for labor or materials furnished by subcontractors or suppliers, except for those on which it seeks our opinion: a claim by Creative Glass, which on March 23, 1983, advised the contracting officer that it was owed \$14,856.80 for labor and materials, and a claim by Senter Transit Mix for \$716.10. Both firms have agreed to accept pro rata settlements of their claims from the funds remaining in the contract account and to hold the Government harmless for any additional amounts due.

Before settling a claim, a contracting officer must determine whether there is a sufficient legal basis for recovery from the Government. It is well settled that since privity of contract generally does not exist between the Government and subcontractors, such firms have no legally permissible way to bring claims directly against the Government. See Curtis Jepson, trading as Curt's Plumbing and Heating, B-194773, May 24, 1979, 79-1 CPD 376; 23 Comp. Gen. 655 (1944). Privity may be found in certain situations, however, under recognized common law theories of agency, third party beneficiary, or implied contract. See Universal Aircraft Parts, Inc., B-187806, January 11, 1979, 79-1 CPD 14.

In this case, none of the above theories applies. We find no suggestion of a contractual relationship, express or implied, between the subcontractors/suppliers and the Government during the period before the prime contractor's default. Nor do we find that C.G. Construction was acting "by and for" GSA, or that the claimants are third party beneficiaries of C.G. Construction's contract with GSA, since there is no evidence that the contracting parties, i.e., C.G. Construction and GSA, had the interest of the claimants in mind when they entered into the contract. See Universal Aircraft Parts, Inc., supra. Therefore, we find no legal basis for a direct claim against GSA.

GSA asks whether, under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601(4), 605 (Supp. IV 1980), the contracting officer has authority to decide the claims. Although the Act does not categorically exclude all subcontractors and third parties from proceeding under it, see A&B Foundry, Inc., EBCA No. 118-4-80, May 29, 1981, 81-1 BCA ¶15,161, the boards of contract appeals repeatedly have held that absent privity, or specific contractual provisions or agency regulations providing for direct appeal, subcontractors and suppliers have no right to recover for unpaid labor and materials furnished to the prime contractor. Enactment of the Contract Disputes Act did not alter this requirement. Id.; J.M.C. Mechanical, Inc., ASBCA No. 26750, June 17, 1982, 82-2 BCA ¶15,878, and cases cited therein.

The subcontractors and suppliers in this case thus have no legal claim against GSA. While in certain circumstances, a prime contractor itself can pursue retained funds or authorize subcontractors to do so in its name, see Divide Constructors, Inc., Subcontractors to Granite Construction Company, IBCA No. 1134-12-76, March 29, 1977, 77-1 BCA ¶ 12,430, it appears from the record that the principals of this prime contractor cannot be located. Also, GSA's submission to our Office suggests that the prime's failure to submit required payrolls has precluded the Government from determining whether there are other suppliers, or workers, who might be due payment. Consequently, we think it would be premature for the Government to dispose of the funds in issue until a trustee in bankruptcy and/or a court of competent jurisdiction settles accounts among these two firms and other potential claimants. Cf. Merritt v. United States, 267 U.S. 338 (1925) (subcontractor may not recover full contract price from the Government); B-147131, March 2, 1962 (subcontractor's claim denied pending final determination by proper judicial authority).

for   
Comptroller General  
of the United States