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**DECISION**

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

**FILE:** B-216209 **DATE:** September 24, 1984

**MATTER OF:** Department of Army--Request for Advance Decision

**DIGEST:**

1. Payment of withheld contract funds that are claimed by the contractor's payment bond surety, which, pursuant to its obligation, paid an amount to subcontractors in excess of the amount remaining to be paid under the contract, may be made to the surety. Contractor's debts to its subcontractors on a different contract do not impact on this result because subcontractors do not have privity with the government.

2. Payment of withheld contract funds should not be made except pursuant to an agreement by the parties or pursuant to an order by a court of competent jurisdiction where contracting officer failed to insure that a valid Miller Act payment bond was furnished by the contractor, the contractor has not fully paid its subcontractors, and where the relative rights of the parties competing for the (limited) funds remain unclear.

By letter dated August 22, 1984, the Chief, Finance and Accounting Division, Directorate of Resource Management, Army Corps of Engineers (Army), requested a decision of our Office in regard to the disbursement of funds withheld under two contracts, DACA65-82-C-0081 (contract 81) and DACA65-82-C-0154 (contract 154), between Eastern Building Services, Inc. (Eastern), and the Army.

## Contract 81 Funds

Work under contract 81 was substantially completed, but Eastern failed to pay all of its creditor-subcontractors. The Wausau Insurance Company (Wausau) has claimed the balance to be paid under this contract, $16,188, because pursuant to its obligations as Eastern's payment bond surety, it paid out over $30,000 to Eastern's subcontractors. Citing United Electric Corporation v. United States, 647 F.2d 1082 (Ct. Cl. 1981), cert. denied 454

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U.S. 863, 102 S. Ct. 322 (1981), the Army recognizes that since performance has been completed and since Wausau has paid its principal's obligations, Wausau is subrogated to Eastern's right to the unpaid portion under Eastern's contract. See also Pearlman v. Reliance Insurance Company, 371 U.S. 132, 83 S. Ct. 232, 9 L.Ed.2d 190 (1962).

What concerns the Army, however, is whether the unpaid amount under contract 81 should be setoff by the government to pay Eastern's subcontractors not protected by a surety bond under contract 154, rather than being paid to Wausau.

Since the subcontractors under contract 154 lack privity of contract with the United States, they do not have standing to sue the government for payment under contract 154. See United Electric Corporation v. United States, supra. Therefore, the payment bond surety is entitled to payment of the retained funds under contract 81. See Barrett v. United States, 367 F.2d 834 (Ct. Cl. 1966); United Pacific Insurance Co. v. United States, 319 F.2d 893, (Ct. Cl. 1963).

Contract 154 Funds

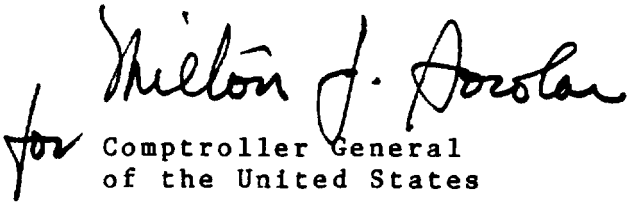
Approximately 4-1/2 months after award of contract 154 was made to Eastern, the Army discovered that Eastern never submitted valid Miller Act performance and payment bonds. Attempts to get Eastern to secure valid bonds failed. With approximately $27,000 in work left to be performed, Eastern ceased functioning as a corporate entity. Eastern allegedly has no assets.

Eastern's subcontractors contend that Eastern owes them a total of $64,584. Eastern disputes the allegation that $30,363.56 is owed to one of the subcontractors, H.D. Gleghorn Excavating Co. (Gleghorn), and contends that Gleghorn is indebted to Eastern in an amount in excess of $11,700.

According to the Army, exclusive of liquidated damages and the estimated cost of completion of the contract, a balance of $14,569 remains to be paid under the contract. The Army requests that our Office decide what to do with the remaining contract funds.

The Army informs us that at least one subcontractor plans to initiate a tort claim against the Army under the Federal Tort Claims Act, 28 U.S.C. §§ 2674 et seq. (1976), for the value of the services furnished to Eastern under its contract, basing its claim on the alleged negligent failure of the contracting officer to require that Eastern furnish a valid payment bond. We note, however, that such claims have been held to be not cognizable under the Federal Tort Claims Act. See, e.g., Bob Bates, B-205165, Jan. 8, 1982, 82-1 C.P.D. ¶ 25; McMann v. Northern Pueblos Enterprises, 594 F.2d 784 (10th Cir. 1979); Devlin Lumber & Supply Corp. v. United States, 488 F.2d 88 (4th Cir. 1973) (per curiam).

In view of the disagreement between at least one of Eastern's subcontractors and Eastern regarding the amount owed by Eastern it would not be possible to conclusively determine administratively the rights of all the parties. The ascertainment of the facts regarding these issues is properly for determination by a court. Although there is no privity between the United States and materialmen (Eastern's subcontractors) so as to warrant the settlement of their claims by the government (see B-174534, Dec. 10, 1971), it has been recognized that the government has a nonenforceable equitable obligation to see that subcontractors are paid, which is generally released by the presence of reliable payment bond sureties. See United States Fidelity & Guaranty Co. et. al. v. United States, 475 F.2d 1377 (Ct. Cl. 1973); United States v. Munsey Trust Co., supra. In the circumstances of this case, where the contractor admits that it has not fully paid its subcontractors, where there is no surety to pay the subcontractors, where it appears that there will be excess retained contract funds in the hands of the government, and where the relative rights of the parties competing for the funds remain unclear, we recommend that Army retain the funds and not make payment except pursuant to an agreement by all of the parties or pursuant to an order by a court of competent jurisdiction. See B-158142, Feb. 14, 1966.



for Comptroller General
of the United States