

Mr. Beneyan



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Beall Plumbing and Heating Co.
File: B-243230
Date: March 21, 1991

Leonard A. White, Esq., Goldstein, Handler and White, P.C., for the protester.
Aldo A. Beneyan, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by construction subcontractor based solely on the alleged failure of defaulted general construction contractor to meet its contractual obligations to pay subcontractor is dismissed, since protest concerns only the settlement of obligations between private parties and thus does not invoke the General Accounting Office's bid protest jurisdiction.

DECISION

Beall Plumbing and Heating Co. protests the award of any contract under invitation for bids (IFB) No. DACA31-91-B-0043 (0043), issued by the United States Army Corps of Engineers as a procurement after default for the completion of a child development and religious education building in Fort Belvoir, Virginia. We dismiss the protest without first obtaining an administrative report from the contracting agency because the protest is based on matters strictly between private parties, not within our Office's bid protest jurisdiction.

According to Beall, 2 years ago the Army contracted with Innovative Military Technologies, Inc., d/b/a Meridian Construction Co., Inc. (contract No. DACA31-88-C-0315 (0315)) for the construction of the facility at issue. Meridian, as the general contractor, furnished performance and payment bonds pursuant to the Miller Act, 40 U.S.C. § 270a(a) (1988), naming two individuals as sureties.^{1/} Beall states that

^{1/} The Miller Act requires the general contractor to furnish a performance bond "in such amount as [t]he [contracting officer] shall deem adequate," 40 U.S.C. § 270a(a) (1); and a payment bond in an amount equal to a set percentage of the

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Meridian was terminated for default on April 10, 1989, and that the completion contractor subsequently retained by Meridian's sureties, Certified Surety Management, Inc., was also recently terminated for default. Beall, which apparently was a subcontractor that provided labor or materials to Certified, alleges that Certified has since defaulted on its contractual obligation to pay Beall. Beall argues that the Army should pay Beall money owed to it by Certified, from funds presumably retained by the Army under contract No. 0315 and Certified's takeover agreement.^{2/}

Although Beall characterizes its submission to our Office as a bid protest, and identifies a solicitation issued by a federal agency, it is essentially a claim based on the alleged failure of Certified, the completion general contractor, to meet its contractual obligations to pay Beall, a subcontractor. Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (1988), our Office is authorized to decide a "protest concerning an alleged violation of a procurement statute or regulation" by a federal agency. Beall's allegations that it has not been paid by Certified do not concern a violation of either a procurement statute or regulation; rather, they concern the settlement of obligations between a prime contractor and its subcontractors, which is a

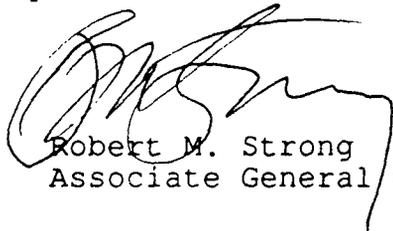
1/ (...continued)

total amount payable on the construction contract, up to a maximum of \$2.5 million, "for the protection of all persons supplying labor or material" for the project. 40 U.S.C. § 270a(a)(2). The purpose of a Miller Act payment bond is to provide suppliers of labor and materials the security that they ordinarily enjoy under state mechanic's lien laws, but which, because of the government's constitutional immunity, they do not have on federal property or work. F.D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co., Inc., 417 U.S. 116 (1974). Beall provided what appears to be a photocopy of Standard Form 25-A "Payment Bond," executed by Meridian's individual sureties on June 19, 1988, indicating the penal sum as \$2.5 million, and the date of contract No. 0315 as June 16, 1988.

2/ Beall also argues that except for using the funds allegedly retained under contract No. 0315 to pay Beall, the Army's use of the funds to finance the completion contract under the IFB is a violation of the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988); that the Army should use the allegedly retained funds to create a "remedial fund" for the benefit of the unpaid Miller Act bond claimants; that the Army failed to properly assess the assets pledged by Meridian's sureties; and that Beall has a "proper claim for non-payment under the payment bond."

matter between the parties and does not directly involve the government. United States Coast Guard--Payment of Contract Retainages to Subcontractors, B-218813, April 9, 1986.^{3/} A subcontractor's legal remedy is an action on the contract against the general contractor, or against the sureties on the payment bond brought under the Miller Act. See 40 U.S.C. § 270b(a); United States Coast Guard--Payment of Contract Retainages to Subcontractors, B-218813, supra, at 2.

The protest is dismissed.



Robert M. Strong
Associate General Counsel

^{3/} To the extent that Beall's submission states a claim for any unpaid balance that the Army may owe Certified, we have consistently held that since there is no direct contractual relationship between subcontractors and the United States, subcontractors generally do not have legally enforceable rights against the government for money owed to them by prime contractors. See, e.g., General Servs. Admin.--Advance Decision, 62 Comp. Gen. 633 (1983), 83-2 CPD ¶ 402; Mary Helen Coal Co., Inc., B-203658, Dec. 20, 1982, 82-2 CPD ¶ 545.