

Phillips

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DECISION

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

FILE: B-201328

DATE: October 28, 1981

MATTER OF: Request for Advance Decision from
Army Finance and Accounting Officer--
Reconsideration

DIGEST:

1. Government is entitled to prompt-payment discount where failure to pay contractor within discount period is due to contractor's failure to pay workers proper wage rate in violation of Service Contract Act (SCA). However, Government is not entitled to discount on amount withheld which is in excess of amount owed workers or where court holds that SCA is not applicable to contract.
2. Payment of interest is not required to be made on amounts withheld by contracting agencies, at direction of Department of Labor, in excess of amount needed to reimburse workers underpaid by contractor in violation of Service Contract Act, since neither laws of United States nor contract provides for payment of interest.

The Finance and Accounting Officer, United States Army Troop Support and Aviation Materiel Readiness Command, St. Louis, Missouri, requests reconsideration of our decision B-201328, January 26, 1981, in which we declined to consider a request for an advance decision made in connection with a claim submitted by Harold and Elsie Williams, d/b/a Williams Moving Company (hereafter Williams) for refund of allegedly unearned prompt-payment discounts, plus interest, taken by the Government.

On January 3, 1977, the above Command awarded Williams requirement contract No. DAAJ04-77-D-0101 which contained a 50 percent, 20-day prompt-payment discount provision. By letter of March 2, 1977, to the Base Procurement Officer, the United States Department of

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Labor (DOL) requested that future payments under the above contract be withheld until \$39,057.22 had accumulated. A labor standards compliance investigation by DOL disclosed that Williams had, in violation of the Service Contract Act, 41 U.S.C. § 351, et seq. (1976), underpaid its workers on contract No. F11623-76-90062 with Scott Air Force Base, Illinois, and contract No. F03601-76-90004 with Blytheville Air Force Base, Arkansas, in the total amount of \$39,057.22, for the period January 1, 1975, to August 27, 1976. The letter also advised that legal proceedings had been initiated under the provisions of the Service Contract Act. The above Command withheld several payments totaling \$25,997.53 and the balance of \$13,059.69 was withheld by Finance and Accounting Officers at Scott and Blytheville Air Force Bases. The above payments were net after 50-percent discounts had been taken, even though in some instances, according to the Finance and Accounting Officer, discounts were deducted after the 20-day period had elapsed.

On May 15, 1980, DOL authorized the release to the contractor of any funds withheld in excess of \$22,154.66. The above Command, pursuant to an agreement with DOL and the other Finance and Accounting Offices involved, was directed to retain \$9,094.97 of the \$25,997.53 which it had withheld. A check in the amount of the balance, \$16,902.56, was issued to Williams by the above Command. The \$9,094.97, when added to the \$13,059.69 withheld at Scott and Blytheville Air Force Bases, equals \$22,154.66.

Williams' counsel, by letter of June 13, 1980, acknowledged receipt of the check, but made the following demands for payment:

- a. An additional \$16,902.56, plus 9 percent interest per annum on \$55,989.78, from February 1977 to May 22, 1980.
- b. Nine percent interest per annum on \$16,902.56 from May 22, 1980, until date of payment.

- c. An additional \$44,903.32, plus interest, from February 1977 to date of payment based on the failure of the Government to make timely payments of the \$22,154.66 still being withheld.

Williams filed suit against DOL to reverse the decision of the Administrative Law Judge (who we assume determined that Williams underpaid its employees in the amount of \$22,154.66) and further claimed improprieties by all agencies involved in the withholding of funds.

The above Command requested an advance decision from our Office in order to obtain answers to the following questions:

- a. Was the actual withholding by the above Command correct?
- b. Was it proper to take the 20-day prompt-payment discount when (1) the check was prepared within 20 days, but retained at DOL's direction; (2) the check was prepared more than 20 days after receipt of the invoice, but payment was withheld at DOL's direction?
- c. Is payment of interest at the rates established in the contract required for funds withheld at DOL's direction?

Our Office, by decision B-201328, January 26, 1981, declined to consider the request for an advance decision on the basis that the issues that we were requested to resolve, involving the propriety of the withholdings and the prompt-payment discounts taken in connection with the withholdings, were before a court of competent jurisdiction.

In an order filed on January 20, 1981, the district court dismissed without prejudice all defendants, except DOL, as well as all claims regarding the propriety of the withholdings. The Finance and Accounting Officer bases his request for reconsideration of our January 26, 1981, decision on the fact that the matters for resolution

are no longer before the court. While we cannot disagree with this conclusion, it should be pointed out that the validity of Williams' claims still depends, to a large extent, on the court's decision concerning the Service Contract Act violations. Should the court rule that the act was inapplicable to Williams' contract, the Government's entitlement to the prompt-payment discounts might be, as will be explained later, called into question. For this reason, we will, as much as possible, confine our response to general questions of law and will not address the specific monetary claims by Williams.

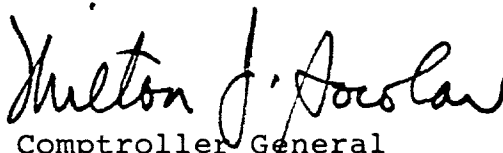
Concerning question "a," section 1-1903.41(a) of the Defense Acquisition Regulation (DAR), entitled "Service Contract Act of 1965," is listed in section "L" of the contract as a clause that is incorporated therein. This clause includes applicable provisions of the Service Contract Act. Section (a) of the clause provides that service employees employed in the performance of a contract shall be paid not less than a minimum monetary wage as determined by the Secretary of Labor. In this regard, see 41 U.S.C. § 351(a) (1976). Section (g) of the clause provides that the contracting officer shall withhold from monies owed the contractor under any contract between the Government and the contractor such sums as DOL decides is necessary to reimburse underpaid employees. See 41 U.S.C. § 352(a) (1976). Therefore, since (1) provisions of the Service Contract Act were incorporated into the contract, (2) both the contract clause and provisions of the act provide for withholding, at the direction of DOL, of funds owed under the contract to reimburse underpaid workers, (3) DOL has the primary responsibility for administering the act, as well as determining its applicability, and (4) DOL determined that the act was applicable to this contract, we can only conclude that the withholding by the above Command, as well as by the Air Force, was proper. Moreover, even should the court, in the proceedings initiated by Williams, ultimately determine that the Service Contract Act was not, in fact, applicable to the present contract, we do not believe that the Air Force or the above Command could have refused to withhold the amounts requested by DOL,

since DOL had determined that the act was applicable to the contract and that Williams had underpaid its workers in violation of that act.

Regarding question "b," it has long been our position that where a delay in making payment appears to have been caused by the Government and is not attributable to any negligence on the part of the contractor, the taking of a discount after expiration of the discount period is unauthorized. B-172812, January 13, 1972. On the other hand, the Government may not be deprived of its right to a prompt-payment discount where the delay in making the payment is occasioned by the contractor. Philadelphia Scientific Controls, Inc., B-184351, January 27, 1976, 76-1 CPD 48. Thus, to the extent that the withholdings represent amounts actually underpaid the workers in violation of the Service Contract Act and, but for the withholding, would have been paid within the discount period, the Government is entitled to take the prompt-payment discount since the delay was caused by the contractor's failure to pay its workers the proper wage rate. Of course, if the court should decide that the Service Contract Act was inapplicable to Williams' contract, it could be argued that the delay in making payment was caused by the Government and was not attributable to any negligence on the part of Williams. Where the check was prepared more than 20 days after the invoice, but payment was withheld at DOL's direction, the Government may not take a prompt-payment discount since the Government would not have, in any event, been able to pay the contractor within the discount period. See Philadelphia Scientific Controls, Inc., supra. In regard to any amount withheld which is in excess of the actual amount underpaid the workers, the Government is not entitled to a prompt-payment discount since it cannot be said that the delay in payment was the contractor's fault. The reason for this is that the contractor did not underpay the workers in this amount and DOL should not have directed that this amount be withheld. Therefore, the delay was caused by the Government.

Concerning question "c," we assume that the interest rates established in the contract are covered by DAR §§ 7-104.39 and 7-104.82, mentioned by the Finance and Accounting Officer in his request for an advance

decision. We note that DAR § 7-104.39 covers interest rates payable on amounts owed the Government by the contractor. This provision would not be applicable to the present situation. DAR § 7-104.82 refers to the interest to be paid on a claim the amount of which has been finally determined by the Armed Services Board of Contract Appeals or a court of competent jurisdiction pursuant to an appeal by the contractor under the "Disputes" clause. We do not believe that this provision applies to the present case. It is the position of our Office that the payment of interest by the Government on its unpaid accounts may not be made except where interest is stipulated by contract or is provided by the laws of the United States. See Western Mass. Electric Company, B-184962, November 14, 1975, 75-2 CPD 310, and cases cited therein. We know of no law authorizing the payment of interest in the present circumstances. Therefore, in the absence of a contract provision specifically authorizing the payment of interest in the present case, we must conclude that the payment of interest on the funds withheld at the request of DOL is not required.

for 
Comptroller General
of the United States