

DECISION

97491
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548
60512

FILE: B-182911

DATE: February 5, 1975

MATTER OF: Reeves Electric Construction Company

DIGEST:

Where subcontractor notifies contracting office of contractor's refusal to pay monies owed subcontractor and contractor refuses to pay subcontractor until Government pays it amount retained under contract and surety under Miller Act states that it has no objection to release of monies to contractor, provided money is used to pay bills under contracts on which it is surety, Government should not disburse funds to contractor since Government is on notice of claims by subcontractor for which surety is potentially liable should contractor not pay subcontractor. Accordingly, in the absence of an agreement between the parties, it is suggested that funds be retained pending judicial determination of rights of parties.

By letter of December 17, 1974, the certifying officer at the Rocky Mountain Regional Office of the National Park Service, United States Department of the Interior, Denver, Colorado, requested our decision as to the propriety of a final payment under contract No. CX-1200-4-9017 for the resurfacing of roads at the Custer Battlefield National Monument in Montana.

Contract No. CX-1200-4-9017 was awarded to Reeves Electric Construction Company (Reeves) on June 28, 1974. Work under the contract was accepted as complete on October 12, 1974. On October 25, 1974, a copy of the final estimate (Payment Estimate No. 5), together with the Release of Claims, was sent to Reeves for execution. On October 29, 1974, Portable Pavers, Inc. (Portable Pavers), one of Reeves' subcontractors under the above contract, advised the contracting officer's staff that its invoices to Reeves in the amounts of \$24,768.60 and \$6,989.40 had not been paid. Prior to this notice by Portable Pavers, the contracting officer had sent a telegram dated October 25, 1974, to the surety on the present contract, United States Fidelity and Guaranty Company, requesting the surety's consent to the release of the retention amount of \$23,725.94. The surety replied, in pertinent part, as follows:

"We have no objection to the dispersal of monies to Reeves Electric Construction Company. However, as stated before, any monies paid to Mr. Reeves other than for the purpose of paying bills on the Park Service jobs and other Reeves Electric Construction Company projects, will not be considered by Surety in the event of default."

According to the contracting officer, he has requested Reeves to furnish proof of payment of all outstanding claims of subcontractors and suppliers so that the final payment can be released. Apparently, Reeves has not furnished this proof. Also, according to the contracting officer, it is Reeves' position that it will be unable to pay Portable Pavers until it (Reeves) is paid by the Government and that according to the terms of its contract with Portable Pavers payment to Portable Pavers is contingent upon receipt of payment from the Government.

It has been consistently held that subcontractors do not have legally enforceable rights against the United States for money due them from Government prime contractors. See B-175500, February 23, 1973; B-168267, November 17, 1969; United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947); United Pacific Insurance Co. v. United States, 319 F.2d 893 (1963). Rather, the subcontractor's remedy is an action on the payment bond brought under the Miller Act, 40 U.S.C. § 270b (1970).

Additionally, it has been held that "laborers and materialmen have a right to be paid out of the retained fund," Pearlman v. Reliance Insurance Co., 371 U.S. 132, 141 (1962); but that right is "* * * The analogue of the 'equitable obligations' of the United States 'to see that the laborers and supply men were paid.'" Barrett v. United States, 367 F.2d 834, 837-838 (1966). In this connection, our Office has stated that the equitable obligation is discharged by providing a Miller Act payment bond for the protection of laborers and materialmen. B-168267, supra.

Thus, it would appear from these holdings that there is no duty on the part of the Government to withhold payments otherwise due to the prime contractor in order to protect the rights of subcontractors since they are protected by the payment bond. However, in Home Indemnity Co. v. United States, 376 F.2d 890 (1967) where the Government had notice from the prime contractor's surety that claims had been made by unpaid laborers and materialmen

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on the payment bond and the Government made final payment to the contractor, the court held that the funds should have been held for the surety. The court's rationale was that when the contract was completed the Government became a stakeholder of the final payment for the surety and had no right to settle the question unilaterally by paying the fund directly to the contractor.

Our Office has held that the decision in Home indicates that the Government's interests might be jeopardized where it pays a prime contractor when it is on notice of laborers' and materialmen's claims against the payment bond surety. B-168267, supra. Therefore, absent the surety's adequate agreement, we do not believe it would be proper to pay the contractor. The surety's quoted reply is not adequate agreement since it appears to be conditioned on the use of the payment by the contractor to pay bills on this or other projects. The Government is not in a position to monitor the contractor's use of the payment. Unless an adequate agreement in accordance with the foregoing is received from the surety, payment should be withheld pending judicial determination of the rights of the parties.


Deputy Comptroller General
of the United States