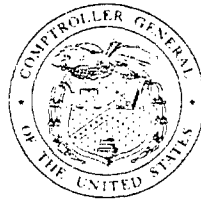


Proc I

DECISION



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

10, 288

FILE: B-194773

DATE: May 24, 1979

MATTER OF: Curtis Jepson, trading as Curt's Plumbing
and Heating

DLG 01646

DIGEST:

Claims of subcontractor against prime contractor are not for consideration by GAO since there is no privity of contract. Subcontractor's remedy is an action on payment bond under Miller Act, 40 U.S.C. § 270a (1976).

By letter dated April 30, 1979, with enclosures, counsel for Mr. Curtis Jepson, trading as Curt's Plumbing and Heating (Jepson), requested our assistance in securing the payment of two claims against B.M.R. Construction Company (B.M.R.). The two claims, for \$2,000 and \$2,760, are for work performed by Jepson as a subcontractor on General Services Administration (GSA) contract No. GS-035-78 and Department of the Army contract No. DAHC 30-78-M3984, on both of which B.M.R. was the prime contractor. Hartford Accident and Indemnity Company is the performance and payment bond surety on both contracts.

DLG 01647

AG-CDD017
AG-CDD020

According to Jepson, the GSA contract was terminated and a takeover agreement under the performance bond was entered into with the surety, but prior to the termination progress payments were made to B.M.R. and included the \$2,000 in costs incurred by Jepson. Jepson claims that the contracting officer is now threatening to turn over the \$20,412 contract balance to the surety in spite of knowledge of Jepson's claim. Jepson states that both the surety and B.M.R. were requested to pay the claim and both refused to do so.

Jepson also requested that GSA withhold the entire \$20,412 contract balance from the surety until payment to Jepson has been made. Regarding the Army contract, Jepson states that the entire contract amount, including the \$2,760 in costs incurred by Jepson, was paid to B.M.R.

[Protest INVOLVING CLAIMS of
Subcontractor AGAINST
Contractor]

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Finally, Jepson states that B.M.R.'s refusal to pay either claim was due to the fact that there was a dispute between Jepson and B.M.R. concerning cost estimates for additional work to be performed on the GSA contract by Jepson.

It has been held consistently that subcontractors do not have legally enforceable rights against the United States for money due them from Government prime contractors. B-175500, February 23, 1973, and cases cited therein. Rather, the subcontractor's remedy is an action on the payment bond brought under the Miller Act, 40 U.S.C. § 270a (1976). See United Pacific Insurance Co. v. United States, 319 F.2d 893 (1963). The settlement of obligations between contractors and those furnishing labor and materials is not a matter for decision by our Office, since there is no privity of contract between the subcontractor and the United States. See United States v. Cleveland Electric Company of South Carolina, 373 F.2d 585 (1967).

In this regard, 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). However, our Office has held that the equitable obligation is discharged by providing a Miller Act payment bond for the protection of laborers and materialmen. B-168267, November 17, 1969.

In view of these holdings, there is no duty on the part of the Government to withhold payments otherwise due the surety in order to protect the rights of the subcontractor, Jepson, since Jepson is protected by the payment bond.

Regarding the dispute between Jepson and B.M.R. concerning the cost estimates for the additional work under the GSA contract, this would appear to be a matter for resolution under the Miller Act proceedings.


Deputy Comptroller General
of the United States