



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Litigation Services of South Texas, Inc.

File: B-249880

Date: May 14, 1993

DIGEST

An agency may not ordinarily pay contract retainage directly to an unpaid subcontractor unless a court of competent jurisdiction orders the payment or all the interested parties have consented. An exception may be made, however, where: it is not reasonable to expect the subcontractor to obtain a court order in view of the small amount involved (\$847.35); the prime contractor has long ceased operations and its consent cannot be obtained; there is no evidence of competing claims to the amount; and the subcontractor has agreed to indemnify the agency from any further liability concerning the claim. Payment may be made to the subcontractor, provided the agency confirms that there are no competing claims to the funds.

DECISION

This decision is in response to a joint request by the General Counsel of the National Labor Relations Board (NLRB) and Litigation Services of South Texas, Inc. (Litigation Services) concerning NLRB's authority to pay Litigation Services \$847.35, for court reporting services rendered to the agency. We conclude that NLRB may pay Litigation Services the claimed amount, provided it confirms that there are no competing claims to the funds.

The pertinent facts are not in dispute. The NLRB entered into a contract with International Litigation Services, Inc. (International), a Texas corporation, to do court reporting tasks for NLRB for the period of 1987 to 1989. International contracted with Litigation Services to work as a subcontractor under the contract. Effective June 30, 1987, the NLRB terminated the contract with International with a no-cost settlement.

Before that date, Litigation Services performed court reporting services under the contract, but International never requested payment from NLRB for those services. Litigation Services has made several unsuccessful attempts

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to contact International, but International's corporate charter was forfeited by the Secretary of State of Texas, on January 9, 1989, and it has ceased operations. Litigation Services has requested payment from NLRB for the court reporting services it performed.

The NLRB General Counsel states that funds have been retained to pay for these services. However, he points out that privity of contract existed only between NLRB and International and not between NLRB and Litigation Services. Fairchild Industries, Inc. v. United States, 620 F.2d 807, 809 (Ct. Cl. 1980).

The NLRB and Litigation Services have executed an indemnification agreement under which the parties confirm that, to the best of their knowledge, there are no other outstanding claims to the amount owed for the services Litigation Services performed, and Litigation Services agrees to relieve and indemnify NLRB and the United States Government from any further liability concerning the claim. Based upon the agreement, the NLRB supports payment of \$847.35 directly to Litigation Services for the services it rendered to the agency.

This Office and the courts have long held that, since there is no privity of contract between the government and the subcontractor under a prime government contract, the government may not enforce a subcontractor's rights against the prime contractor, and the subcontractor may not make a claim directly against the government.¹ However, because the courts have recognized that an unpaid subcontractor may have an equitable claim to any contract retainage held by the government, we have held that the government should retain the unpaid funds and not make payment except pursuant to an agreement by all of the parties involved or by an order of a court of competent jurisdiction.²

NLRB states that it did inform Litigation Services that it could sue International directly, or it could have a representative of International execute an Indemnification

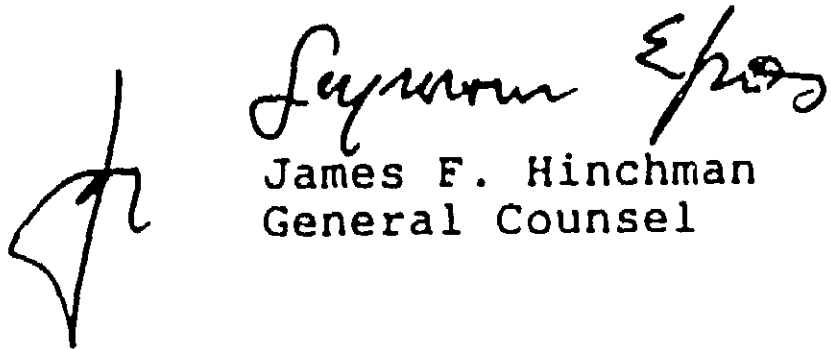
¹Merritt v. United States, 267 U.S. 338 (1925); Universal Fiberglass Corp. v. United States, 210 Ct. Cl. 220, 227-228 (1976); Petrin v. United States, 90 Ct. Cl. 670 (1940); Urban Mass Transportation Administration, 68 Comp. Gen. 494 (1989); Naval Facilities Engineering Command, 57 Comp. Gen. 176 (1977); B-160329, Nov. 7, 1966.

²United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1381, 1382 (1973); 57 Comp. Gen. 176, supra; Panama Canal Commission, B-224953, Jan. 9, 1987.

Agreement. Since International has ceased operations, NLRB states that the above methods to resolve the matter are not feasible and that the only possible alternative is to have Litigation Services agree to indemnify NLRB from any further liability concerning its claim.

As indicated above, we would not ordinarily approve payment of contract retainage directly to a subcontractor, unless a court orders the payment or all the interested parties agree to the payment. However, under the unusual circumstances of this case, including the fact that the unpaid court reporting services were actually performed by the subcontractor, we believe an exception to this rule may be allowed here.

Clearly, in view of the small amount involved, it is not reasonable to require as a condition of payment that Litigation Services obtain a court order in this case. Nor is it reasonable to require as an alternative that it must obtain the consent of all interested parties before it may be paid. NLRB reports that the prime contractor has long ceased operations, and there is no evidence of any competing claims to the \$847.35, which NLRB has retained to pay for the services performed by Litigation Services almost 6 years ago. Accordingly, we have no objection to NLRB's proposed action, provided NLRB confirms that there are no competing claims to the funds at this time.



James F. Hinchman
General Counsel