



UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-222098

March 27, 1986

The Honorable Webb Franklin
United States House of Representatives

Dear Mr. Franklin:

This is in reference to your letter dated February 10, 1986, to our Office on behalf of Ivey Electrical Corporation. You asked that we respond to Ivey's concern that the General Services Administration's refusal to make progress payments to prime contractors for stored construction materials absent proof of the contractor's ownership of those materials will increase costs of subcontractors such as Ivey and thereby dissuade them from performing on government contracts.

The basis of Ivey's complaint appears to be as follows. Because Ivey does not require payment from the prime contractor for 30-60 days after delivery of materials and, thus, the prime does not have an invoice to establish ownership, the government will not include the cost of the materials in progress payments to the prime. As a result, the prime delays payment to Ivey for the full 30-60 days instead of paying Ivey immediately out of progress payment proceeds. Ivey states that this government policy has led other suppliers to certify falsely that the prime has paid for, and holds title to, delivered materials. Ivey claims it is being penalized for not making false certifications since, as a result, it must wait longer for payment from the prime, leading to an increase in its borrowing costs.

The "policy" to which Ivey refers actually is Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.232-5(b) (1984), entitled "Payments Under Fixed-Price Construction Contracts." This regulation provides that the government shall make progress payments to contractors on a monthly basis, as the work proceeds, based on estimates developed by the contracting officer. The contracting officer is authorized to include the cost of materials delivered to the worksite in preparing these monthly estimates, but may

only include the cost of materials delivered to the contractor at other locations if the contract specifically so provides and the contractor furnishes evidence both of actual title to the materials and that the materials in fact will be used to perform the contract.

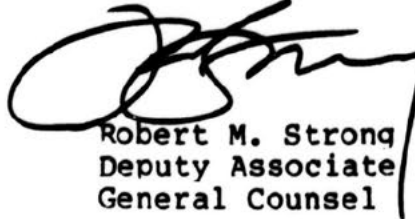
We have been advised informally by the FAR Secretariat instrumental in promulgating the regulation that this requirement stems from the government's desire to assure that the contractor actually has legal title to materials before the government pays for them. It has been determined that this is the best means of minimizing the possibility that the government will pay for materials that later may be found to be owned by another party (e.g., a supplier). Consistent with this intent, the provision elsewhere specifically provides that all materials covered by progress payments shall become the sole property of the government at the time of payment. FAR, 48 C.F.R. § 52.232-5(d). The Secretariat further points out that the requirement here reflects common trade practice, having been adopted by both the American Institute of Architects and the Association of General Contractors.

While the requirement for proof of title may not inure to the ultimate benefit of all subcontractors and suppliers, eliminating the requirement would subject the government to precisely the risk the requirement was designed to control. The government generally is in privity only with the prime contractor, not subcontractors and suppliers, and certain regulations, including the one in question, have been fashioned to protect the government's financial and other interests in the government-prime contractor relationship. The fact that such regulations at times may negatively affect a subcontractor's interests, while unfortunate, is not a sufficient basis for eliminating the regulations. We therefore share the Secretariat's view that the interests of subcontractors do not outweigh the interest of the government and the public in receiving title to materials in return for payment.

We do not condone false certification by contractors to avoid late payments. Ivey has presented no evidence of any specific false certification, however, and, to the extent Ivey does possess such evidence, it should pursue this matter through the Department of Justice.

If you have further questions, I can be reached at
(202) 275-5532.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'R. Strong', is written over the typed name and title. The signature is stylized with a large loop at the beginning and a long horizontal stroke extending to the right.

Robert M. Strong
Deputy Associate
General Counsel