Phillips

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DECISION

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

[Request for Reconsideration]

FILE: B-196064 DATE: November 18, 1980

MATTER OF: H.C. Wear & Associates, Inc.

DIGEST:

1. Two individuals were employees of contractor rather than subcontractors since (1) contractor did not submit DD Form 1566, required to be submitted for all subcontractors, (2) there were no written subcontracts, (3) there is no evidence that individuals had prior experience as subcontractors, separate places of business, their own equipment or other indicia of bona fide subcontractors such as company checks and stationery, and (4) neither individual indicated that he considered himself to be subcontractor and one individual specifically denied he was subcontractor. Therefore, employees of alleged subcontractors were, in fact, employees of contractor for wages tax purposes.

2. Government (IRS) has common law right to set off debts owed to it by contractor against funds, in its hands, belonging to contractor.

By letter of September 25, 1980, counsel for H.C. Wear & Associates, Inc. (Wear), requested reconsideration of our Findings of January 3, 1980, which led to a request by the Internal Revenue Service (IRS) that Wear pay the employer's share of the Federal Insurance Contribution Act (FICA) tax due on back wages paid to five Wear employees. Wear argues that since the five individuals were not its employees, but rather employees of subcontractors (Guy Miller and Ray Hamilton), it (Wear) should not be liable for the employer's share of the FICA tax.

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By way of background, there follows a brief history of the relevant events leading to the IRS request. Air Force contract No. F33617-76-90195, for the alteration of heating and air-conditioning systems in nine airmen dormitories at Rickenbacker Air Force Base, Ohio, was awarded to Wear. The contract contained a provision mandated by section 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a (1976), which required that laborers and mechanics employed in the performance of the contract be paid a prevailing wage rate as determined by the Secretary of Labor. Wage determination No. OH-76-2044, dated April 9, 1976, was included in the contract.

A labor standards investigation conducted by the Air Force disclosed that eight workers employed by Wear, which included the five above-mentioned individuals, as well as 34 employees of Hydronics, Inc., a Wear subcontractor, had been underpaid in violation of the Davis-Bacon Act. In our Findings of January 3, 1980, we made a determination that the violations by Wear constituted a willful "disregard of obligations to employees" under the Davis-Bacon Act so as to warrant debarment and concurred with the Air Force's view that the eight above-mentioned individuals were employees of Wear. Wear acknowledges that one of the eight was its employee.

Pursuant to section 1 of the Davis-Bacon Act and section 18-704.13 of the Defense Acquisition Regulation, the balance of the funds, $43,273.40, due Wear under the contract was withheld by the Air Force to cover the underpayment of the 42 workers. This amount was forwarded to our Office for disbursal. The amount determined to be due the 42 employees was subsequently reduced to $32,500 and the amount determined to be due Wear's eight employees was reduced from $12,408.67 to $6,526.97.

Generally, if we are satisfied, after a review of the record, that the amount determined to be due the workers is correct, we will disburse that amount to the aggrieved workers and if there are any funds left we usually return those funds to the contractor. However, in the present case, we noted that the Air Force's investigation officer had recommended that the IRS perform an audit to determine if appropriate deductions were taken from the employee's wages. Since the record did not indicate what action, if any, had been taken on this recommendation, we disbursed $32,500 to the underpaid workers and returned the balance of $10,773.40 to the Air Force for disbursal to either the contractor or for

offset by the IRS should it have any valid claims against Wear. Apparently the Air Force has not released the balance to Wear. This would appear to be a proper course of action, since the Government has the same common law right "which belongs to every creditor, to apply the unappropriated moneys of his debtor in his hands, in extinguishment of the debts due to him." United States v. Munsey Trust Co., 332 U.S. 234 (1947). Thus, if it is determined that the individuals in question were employees of Wear, the Government (IRS) might wish to offset Wear's debt against the funds being held by the Government (the Air Force).

Therefore, the issue with which we have to deal is whether Guy Miller and Ray Hamilton were employees of Wear or bona fide subcontractors. These two individuals were allegedly the two subcontractors who employed the five employees in question. First, we note that the record contains no indication that Wear submitted a Statement and Acknowledgement (DD Form 1566), as required for all subcontractors by the General Provisions of Wear's contract, for these two subcontractors. DD Form 1566 notifies the contracting officer of any subcontract and the name and address of the subcontractor and furnishes a signed statement by the subcontractor acknowledging the inclusion of the required labor standards provisions in the subcontract. According to the Investigation Officer, a DD Form 1566 was submitted for Hydronics, Inc., which apparently was a bona fide subcontractor. Second, the record contains no evidence of any written subcontracts for the two alleged subcontractors. Third, the record contains no evidence that these two individuals had (1) prior experience as subcontractors for Wear or, for that matter, any other firm, (2) separate places of business, (3) their own equipment (other than personal handtools) or (4) other indicia of bona fide subcontractors such as company checks and stationery (other than invoices with the company names on them). Also, we note that both Roy Hamilton and Guy Miller, as well as the five employees in question, were carried on Wear's payrolls as employees. This was not the case with Hydronics and its employees. Finally, neither Roy Hamilton nor Guy Miller indicated that he considered himself to be a subcontractor. For that matter, Roy Hamilton specifically denied that he was a subcontractor.

Therefore, on the basis of the record, we conclude that neither Roy Hamilton nor Guy Miller was a bona fide subcontractor, but were employees of Wear, as were the five other employees in question, and our Findings of January 3, 1980, is affirmed.

Harry R. Van Cleve

For the Comptroller General
of the United States