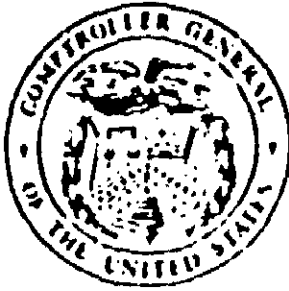


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**DECISION**



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

FILE: B-205165

DATE: January 8, 1982

MATTER OF: Bob Bates

**DIGEST:**

Where contracting officer failed to require contractor to furnish Miller Act bond for protection of subcontractors and paid retainage to contractor, knowing that subcontractor had not been paid by contractor, GAO has no basis to pay claim by subcontractor for value of labor and material furnished contractor since there is no privity between Government and subcontractor.

By letter of September 22, 1981, counsel for Mr. Bob Bates (hereafter referred to as the claimant) filed the present claim with our Office. By way of background, there follows a brief summary of the events leading up to the claim.

In August of 1979, the United States Fish and Wildlife Service, United States Department of Interior awarded Tribal Construction, Inc. (Tribal), a contract, in the amount of \$30,780, for the construction of a prefab metal building at the Optima National Wildlife Refuge in Oklahoma. On September 28, 1979, Tribal entered into a subcontract arrangement with the claimant for the performance of a portion of the contract.

The claimant's subcontract work was substantially completed by November 11, 1979. According to the claimant, on December 20, 1979, he notified the Fish and Wildlife Service that he had not yet been paid by the contractor, at which time the Fish and Wildlife Service still had approximately \$30,000 in undisbursed funds in its possession. On January 10, 1980, the claimant instituted a suit against the contractor in

the Cleveland County District Court, Oklahoma, which on April 14, 1980, resulted in a judgment in favor of the claimant for \$15,400, plus attorney's fees, court costs and interest. On January 14, 1980, the claimant again notified the Fish and Wildlife Service of the dispute and requested that the Service place the \$30,000 in a court fund pending the outcome of the suit against the contractor. On January 16, 1980, the Fish and Wildlife Service released the funds to the contractor.

In May of 1980, the claimant attempted to make a claim under the payment bond. According to the claimant, it was at this point that he discovered that the contracting officer had not required Tribal to furnish a payment bond, even though under the terms of the Miller Act, 40 U.S.C. § 270(a)(2) (1976), such a bond is mandatory.

The claimant initiated a tort claim with the agency under the Federal Tort Claims Act, 28 U.S.C. § 2674 et seq. (1976), against the Fish and Wildlife Service for the value of material and labor furnished Tribal on the contract, basing his claim on the negligent failure of the contracting officer to require that Tribal furnish a payment bond. By an administrative determination dated December 5, 1980, the Field Solicitor, Southwest Region, United States Department of Interior, determined that such claim was not cognizable under the Federal Tort Claims Act, citing Devlin Lumber and Supply Corporation v. United States, 488 F.2d 88 (1973); and, United States v. Smith, 324 F.2d 622 (1963), as authority for the determination. In this regard, we note that in a recent Court of Claims decision, United Electric Corporation v. United States, Ct. Cl. 10-80C, April 22, 1981, the court held that a subcontractor has no standing in a suit in the Court of Claims based on the Government failure to require an adequate Miller Act bond. The court based its decision on lack of privity between the subcontractor and the Government under 28 U.S.C. § 1491, the act under which the suit was brought.

In his appeal to this Office, the claimant argues that he did everything required of him to establish entitlement to payment and yet the Government, with full knowledge of his claim, paid the contractor. Therefore, the Government was at the very least a stake holder, and was on notice of the dispute between the contractor and claimant, and should have held the funds pending the outcome of their dispute. Claimant further argues that since the Miller Act was enacted for the protection of the subcontractor, he should not be left without a remedy because of the Government's negligence or oversight.

In B-174534, December 10, 1971, which also involved a situation where the contracting officer failed to require the contractor to furnish a payment bond and there were undisbursed funds, this Office held that settlement of obligations between Government contractors and those furnishing material for the prosecution of the contract work is not required of the Government, there being no privity of contract between such persons and the United States. In that case, we recognized that while the Miller Act payment bond is the only protection provided by a statute for persons supplying material for the completion of the contract, the statute does not establish any privity between the United States and materialmen so as to authorize the settlement of their claims by the Government. The facts of the present case furnish no reason for us to alter our views in this regard.

Thus, we conclude that no basis exists for authorizing payment of the claim and it is, therefore, denied.

*Harvey R. Van Cleave*  
For the Comptroller General  
of the United States