

DECISION

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

FILE: B-218813**DATE:** April 9, 1986**MATTER OF:** United States Coast Guard--Payment of Contract Retainages to Subcontractors**DIGEST:** The United States Coast Guard should make payments of contract retainage to subcontractors only pursuant to an order of a court of competent jurisdiction when the prime contractor refuses to indicate whether or not it has paid its subcontractors and the surety appears unable to fulfill its payment bond obligations.

A contracting officer for the United States Coast Guard requests an advance decision on whether he may pay three subcontractors who have not been paid by the prime contractor. The payment would be made out of a contract retainage of \$12,272.77 which the prime contractor has not yet received since he repeatedly has refused to submit a final invoice and the required releases. As will be explained below, we conclude that the Coast Guard should make payments only pursuant to an order of a court of competent jurisdiction.

BACKGROUND

In fiscal year 1979, the United States Coast Guard awarded contract number DOT-CG8-8121 to Roy Robert Colvin. Mr. Colvin completed all work under the contract, which called for reconstruction of certain Government quarters, on April 29, 1982. Mr. Colvin has never received a contract retainage of \$12,272.77 since he has refused to submit a final invoice and the required releases to the Coast Guard. Indeed Mr. Colvin has ignored several written requests from the Coast Guard and has never returned telephone calls on this matter.

Three of the subcontractors hired by Mr. Colvin, the prime contractor, have written to the contracting officer that they have never received payment from Mr. Colvin. To evidence Mr. Colvin's indebtedness to them, the subcontractors, Byron P. Starns, Baton Rouge Lumber Co, Inc., and City Building Supply Inc., have submitted copies of invoices and claims amounting to over \$16,000. The subcontractors also indicate that they have not been paid by the payment surety under the contract. They have not sued the surety because they believe the surety is insolvent and has insufficient assets to make a suit worthwhile.

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Since Mr. Colvin has shown no interest in being paid the retainage, the contracting officer has decided that he should use these funds to pay the subcontractors a percentage of their claims rather than return the funds to the Treasury. He does not indicate the basis for his decision, but apparently he is relying on a file memorandum which discusses a court case setting out a theory under which the subcontractors could be paid. In that case, United Electric Corporation v. United States, 647 F.2d 1082 (Ct. Cl. 1981), the court recognized that subcontractors, such as in the current case, lack privity of contract with the United States and cannot sue the United States when neither the prime contractor nor the surety makes payment. Nevertheless, the court indicated that in its opinion if contract money was still available, the United States could voluntarily choose to make payment to the subcontractor. Id. at 1087. Furthermore, the court stated that:

"[W]e believe that [the United States] has a nonenforceable obligation to do so, when and if it becomes clear that [the subcontractor] had a valid claim, that contract retainage or other unexpended funds under the contract are available for such payment, and that, if those funds are not paid out, the Government will be receiving a windfall which it should not have."
Id.

ANALYSIS

The settlement of obligations between a prime contractor and its subcontractors is a matter between the parties and does not involve the Government. It has been consistently held that subcontractors do not have legally enforceable rights against the United States for money due them from Government contractors. 62 Comp. Gen. 633 (1983) and cases cited therein. The reason for this holding is that there is no direct contractual relationship between the subcontractor and the United States. The subcontractor's sole legal remedy is an action on the payment bond, brought under the Miller Act, 40 U.S.C. § 270(a). See B-214699.2, Feb. 12, 1985.

Although there is no privity of contract between the United States and the subcontractors so as to warrant settlement of their claims by the Government, both this Office and the courts have recognized that the Government has a nonenforceable equitable obligation to see that subcontractors are paid. This obligation is generally fulfilled by requiring that each construction contractor retain a reliable payment bond surety where the amount of the contract exceeds \$5,000.

See 63 Comp. Gen. 608, 610 (1984) and cases cited therein. In this case, the surety appears to be unable to meet its obligation under the payment bond. Further, because the prime contractor refuses to indicate whether or not it has paid its subcontractors, it is impossible to determine administratively the respective rights of the parties.

We realize that the Court of Claims, in United Electric Corp. v. United States, which we referred to above, suggested that the Government could voluntarily pay contract retainage to unpaid subcontractors. See 647 F.2d at 1087. We are concerned, however, that should the Coast Guard make these payments voluntarily, it would not be protected against a future claim by the prime contractor or other claimants and, conceivably, could be required to pay twice. The Government should have the protection which would be afforded only by a court order resulting from a suit by the subcontractors against the prime contractor or the surety. Therefore the Coast Guard should retain the funds and make payment only after a court of competent jurisdiction determines the respective rights of all the parties. See 62 Comp. Gen. 633 (1983).



Acting Comptroller General
of the United States