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WASHINGTON, D.C. 20548

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The Honorable Morris K. Udall
House of Representatives

Dear Mr. Udall:

You requested on May 8, 1972, that we examine into certain circumstances related to the construction of a family housing project at Fort Huachuca, Arizona. The construction contract was awarded to Quiller Construction Company, Los Angeles, by the Los Angeles District of the Corps of Engineers. Quiller subcontracted a portion of the work to Southland Mechanical Constructors Corporation, Redlands, California; which, in turn, subcontracted the work to Cooley Equipment Company, Tucson, Arizona. Your letter relates mainly to these companies.

In subsequent meetings we briefed your office on the progress of our fieldwork at Fort Huachuca and our tentative findings. We mentioned that Cooley was experiencing some problems with the job and had submitted several claims to Southland for costs incurred for additional work. Cooley claimed that the additional work (1) was caused by incorrect descriptions of the scope and site conditions or (2) was required by the architect-engineer firm hired by the Corps of Engineers to inspect the work although beyond the specifications for the job. Southland agreed with Cooley, and both companies requested Quiller to file a claim against the Government.

On May 7, 1973, Quiller forwarded to the Los Angeles District a claim submitted by Nixen and Lewis, attorneys at law, on behalf of Southland for $67,501.45 and Cooley for $280,147.49. Quiller requested also that the contracting officer render his decision on the claim.

The claim has been filed pursuant to the terms of the disputes clause of the prime contract, which provides for initial resolution of disputes by the contracting officer subject to appeal to the Armed Services Board of Contract Appeals. The disputes clause provided by paragraph 7-602.6 of the Armed Services Procurement Regulation for use in fixed-price construction contracts follows.

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"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Dispute' clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

We have discussed with your office the matter of the submission of the claim and its effect on our review. As explained in our meeting, our office has consistently refrained from intervening in matters properly under consideration by a contracting officer or under appeal from a contracting officer's decision to a Board of Contract Appeals pursuant to the disputes clause. We therefore have historically declined to consider such matters until the administrative remedies afforded the contractor by the clause are exhausted. Furthermore, as a result of the decision of the U.S. Supreme Court in S&E Contractors, Inc. v. United States, (406 U.S. 1 (1972)), our office has concluded that GAO should not review Board of Contract Appeals decisions except in cases involving fraud or bad faith. In this regard, this decision stated:

> "We hold that absent fraud or bad faith, the federal agency's settlement under the disputes clause is binding on the Government, that there is not another tier of administrative review, and that, save for fraud or bad faith, the decision of AEC [Atomic Energy Commission] is 'final and conclusive', it being for these purposes the Federal Government."

In view of the present claim, issuance of a report bearing on the performance and administration of this contract would not be proper and could possibly prejudice not only the Government's interests but those of other parties as well.

A copy of this letter is being made available to Congressman John J. Rhodes in accordance with your prior approval.

Sincerely yours,

PAUL G. DEMBLING

Acting Comptroller General
of the United States