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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-194025

[Legislation To Reimburse Firm for Services Performed as Subcontractor Under DOE Contract]

MAY 9 1979

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The Honorable Richard S. Schweiker
United States Senate

Dear Senator Schweiker:

DLG-01526

We refer to your letter dated January 23, 1979, requesting our views on the request of F. J. Meyerl, Inc. (Meyerl), that you introduce a private relief bill in Congress to reimburse that firm for services performed as a subcontractor under Department of Energy (DOE) contract ET-77-C-01-8918.

DLG-01527 19CC00214

Meyerl claims it performed steel erection services for Building Systems, Inc. (BSI), the prime contractor for the Bureau of Mines facility at Bruceton, Pennsylvania; that BSI is unable to pay Meyerl the $73,000.63 due for the work performed; that the BSI contract has been terminated by the Government for default and that no payment bond exists to protect the rights of subcontractors under this contract as required by the Miller Act, 40 U.S.C. 270a et seq. (1976).

The Miller Act is applicable only to construction contracts, and not to contracts for the furnishing of supplies or services to the United States. We have examined a copy of the contract in question and note that it was regarded by the Bureau of Mines as, and advertised as, a supply contract rather than one for construction. Under this circumstance, no payment bond is ordinarily required of prime contractors and thus as in most supply contracts, Meyerl assumed the risk of nonpayment without recourse to the United States. This result is based on the theory that no privity of contract exists between the Government and a subcontractor which provides legal justification to support a claim by a subcontractor against the United States. See 32 Comp. Gen. 174 (1952). Consequently, DOE properly refused to reimburse Meyerl for its claim.

Similarly, where a construction contract has been awarded without the Miller Act payment bond, a prime contractor's failure or refusal to pay a subcontractor for work performed would not entitle the subcontractor to recover its loss from the United States. See Devlin Lumber & Supply Corporation v. United States, 488 F.2d 88 (4th Cir. 1973); United States v. Smith, 324 F.2d 622 (5th Cir. 1963).

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We would not therefore recommend that the legislation be introduced as requested, because in our view, Meyerl has not shown any special circumstances which would entitle it to payment while other similarly situated firms would be required to bear the loss.

Meyerl also urges that consideration be given to amendment of the Miller Act although it has not indicated the nature of such an amendment. Because any amendment to the Act could have a serious adverse effect on the Government's interests in these cases as well as create additional costly administrative burdens, we are unable to comment without knowing the precise nature of any proposed amendment. In any event, however, we do not believe the facts of this case alone warrant amendment of the Act.

We trust the foregoing adequately responds to your inquiry.

Your letter of January 23, 1979, and its enclosure are returned as requested.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar
General Counsel

Enclosures