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Part I

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

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[Subcontractor Claim for Additional Compensation for Wage Escalation Costs]

JUN 8 1979

The Honorable Henry M. Jackson
United States Senate

Dear Senator Jackson:

DLG01789

We refer to your letter of November 30, 1978, concerning the claim of your constituent, Warren, Little and Lund, Inc. (WL&L), for additional compensation for wage escalation costs as a subcontractor on the Grand Coulee Dam Third Powerplant project. As your staff has been advised, it was necessary to request a report and pertinent documentation from the agency involved, the latest of which was received on May 8, 1979.

The record indicates that on November 20, 1973, the prime contractor, Wismer and Becker Contracting Engineers (W&B), entered into a contract with the United States Department of the Interior, Bureau of Reclamation (Bureau), for the construction of the Grand Coulee Dam Third Powerplant. Paragraph 1.3.7. of the contract specifications provided for adjustments for changes in the cost of labor, to commence 1 year after the date of contract award, with the Government paying 75 percent of any increase in such costs. In addition, subparagraph 1.3.7.a. provided that no adjustment would be made because of increased wages paid by any subcontractor "unless the contractor furnishes evidence that he agreed, as a part of the subcontract negotiations, to reimburse the subcontractor for the payment of such increased wages."

The subcontract agreement between W&B and WL&L did not contain a specific provision permitting adjustments because of increased labor costs nor did it refer to paragraph 1.3.7. After requesting an adjustment for another subcontractor in November 1975, W&B was notified that the Bureau would not make the adjustment because the Bureau did not find any reference to paragraph 1.3.7., or the conditions established by that paragraph, in the subcontract agreement. W&B responded to this rejection

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by informing the Bureau that it had agreed orally during preaward discussions that its subcontractors would be entitled to adjustments for increased labor costs and requested that the Bureau accept this as evidence of such agreements.

The Third Powerplant Construction Engineer then referred this matter to the Director of Design and Construction for resolution. In May 1976, the Director informed the Third Powerplant Engineer that only one subcontractor was entitled to a wage escalation adjustment under the specific provisions of its subcontract agreement. The record indicates that the Bureau's major concern was that it was completely dependent on what W&B and the subcontractors said was agreed upon during negotiations since there was nothing in writing to support these alleged agreements. The Bureau was concerned that, if labor costs went down, W&B and the subcontractors could contend that there was no agreement to make adjustments.

W&B was notified of the Bureau's decision in June 1976 and spent the next several months trying to convince the Bureau to change its position. These attempts proved unsuccessful until December 1976, when the Bureau decided to allow adjustments for all of W&B's subcontractors, provided that evidence could be furnished from original bid papers that the subcontractors did not include allowances in their bids for expected increases in wages. This information was considered necessary in order to prevent any duplication of payment.

In January 1977, WL&L submitted its request for wage escalation payments, along with supporting documents, to W&B, which in turn forwarded the request to the Bureau. The Bureau concluded that WL&L was not entitled to an adjustment because the subcontract did not state that wage escalation would be paid in accordance with paragraph 1.3.7. and the data furnished showed that WL&L had included some escalation in its bid. In contrast, other subcontractors were eventually held to be entitled to adjustments because the data furnished showed that they did not include any escalation in their bids.

When notified in June 1977 that its request had been rejected, WL&L again asked W&B to forward the request to the Bureau. However, it appears that W&B never received WL&L's letter of June 17, 1977, which made this request. Thus, instead of seeking an adjustment, W&B did nothing for more than 3 months. Finally, by a letter dated September 23, 1977, W&B informed WL&L that because more than 100 days had passed since it had notified WL&L of the Bureau's decision, and since no response had been received, W&B was going to consider the matter closed.

In the meantime, W&B had held a meeting with the Bureau on August 16, 1977, and had reached a final settlement of the contract, although the settlement papers were not signed at that time.

On September 30, 1977, WL&L responded to the September 23 letter by notifying W&B that it did not consider its entitlement to wage escalation a closed matter. Despite being informed of WL&L's complete disagreement, on October 4, 1977, W&B signed the final settlement papers which included a provision for the release of all claims against the Government.

By letters of October 11 and November 11, 1977, WL&L again pressed W&B for action. W&B then forwarded another request for reconsideration to the Bureau. However, in a letter dated February 3, 1978, the Bureau concluded that, in view of the release of claims which W&B had signed without exception, it was not able to reconsider WL&L's claim.

Based on the foregoing information, we cannot find that the Bureau is under any legal obligation to pay your constituent's claim.

Any legal liability on the part of the Government must be based upon a contract. As a general rule, where the Government enters into a prime

contract, there is no privity of contract between the Government and a subcontractor of the Government's prime contractor. See Merritt v. United States, 267 U.S. 338 (1925); Brister & Kroester Lumber Corp. v. United States, 90 F. Supp. 695 (Ct. Cl. 1950). The record here indicates that WL&L's contract was with W&B and not with the Bureau. Thus, all of WL&L's rights and obligations are governed by that contract.

In this connection, section 3 of the subcontract provides in pertinent part:

> "This Subcontract agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto. No agent or representative of either party has authority to make, and the parties shall not be liable for, any statement, representation, promise or agreement not set forth herein."

By its terms, the subcontract agreement was intended to be a complete and final expression of the rights and duties undertaken by the parties. Under these circumstances, it is well established that the law will not recognize any evidence of statements, whether oral or written, made by either party prior to or contemporaneous with the signing of the contract which vary or contradict the written document. Corbin on Contracts § 573 (1960); Williston on Contracts § 631 (3rd ed. 1961).

It appears, therefore, that the oral preaward discussions which W&B conducted with WL&L and the other subcontractors did not legally bind the prime contractor to seek adjustments for increased labor costs from the Bureau. Moreover, neither these preaward discussions nor the absence of escalation in the subcontract workpapers appears to satisfy the conditions established by subparagraph 1.3.7.a. for a subcontractor to be entitled to wage escalation payments from the Government. The Bureau, therefore, was correct when it initially refused to allow adjustments for all but one of the subcontractors, whose particular subcontract contained language of entitlement.

But, as noted above, the Bureau did eventually allow adjustments for some of the subcontractors. Although the Bureau's adjustments were questionable, we believe that the general release which W&B gave the Government, coupled with the Bureau's final payment to W&B, constituted a final and binding settlement of all claims which the Government might have. A final settlement such as this, moreover, may not be disturbed unless it was obtained by fraud, duress, or mutual mistake. See, e.g., J.C. Watts Construction Company v. United States, 161 Ct. Cl. 801 (1963); Thomas A. Edison, Inc. v. United States, 65 Ct. Cl. 190 (1928); Harston Navigation Company, B-173425, August 8, 1974, 74-2 CPD 86; D'Oller Engineering Co. v. United States, 244 F. 90 (3rd. Cir. 1917). 46 Comp. Gen. 414 (1966); 30 id. 335 (1951); 25 id. 893 (1946); 23 id. 632 (1944). There has been no allegation here of fraud, duress, or mutual mistake in the final settlement of the contract.

Not only is the Bureau barred from asserting any additional claims, but W&B, in executing the general release, discharged the Government from the firm's claims arising under the contract. J.C. Watts Construction Company, v. United States, supra; Thomas A. Edison, Inc. v. United States, supra. We have held that the Government has a right to know when it makes a payment in final settlement of a contract that the payment is in fact final and conclusive except for those claims, if any, which the contractor asserts at or before the time of settlement. Harston Navigation Company, supra.

W&B did not assert WL&L's claim at the time of settlement, and the Bureau states that it was unaware at that time that WL&L still wished to press the claim. Under these circumstances, the Bureau was correct in holding that the release discharged it from all claims and that it could not reconsider WL&L's claim for wage adjustments.

In our opinion, therefore, the Bureau has no legal obligation to reimburse WL&L for the increased labor costs it incurred during performance of the subcontract agreement.

We trust that this responds to your request.

Sincerely yours,

Deputy] R.F.KELLER
Comptroller General
of the United States