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

30328

B-176596

December 20, 1972

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Prentice Corporation
319 New Britain Road
Kensington, Connecticut 06037

Attention: Mr. Prentice M. Troup
President

Gentlemen:

Reference is made to your letter of May 1, 1972, to the Assistant Counsel, Defense Supply Agency, Cameron Station, Alexandria, Virginia, in which you expressed your desire that our Office review your claim arising from the termination of Defense Supply Agency (DSA) contract No. DSA100-70C-2086, with Interstate Manufacturing Corporation, Highspire, Pennsylvania.

The subject contract was partially terminated for the convenience of the Government in December 1970, and Interstate was instructed to suspend all work and terminate its subcontracts. Interstate was further advised of its duty under Armed Services Procurement Regulation (ASPR) 8-205(vii) to settle all outstanding liabilities and claims arising from the termination of subcontracts, obtaining any approval required by the Termination Contracting Officer (TCO).

A letter from your counsel dated April 16, 1971, advised the TCO that:

"I have this day sent an original and five copies of the enclosed form DD 540 and the enclosed form DD 543, executed by Prentice Corporation for processing.

* * * * *

PUBLISHED DECISION
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"We are aware that Interstate and its corporate president are unwilling to pay or even sign a note for amounts already delivered to them against the same government contract. They don't contest the liability but decline to sign a note providing for payment and indicate that their company may not be in a position to pay. Under the circumstances and being aware of the fact that they are bidding on additional work under a different corporate entity, we feel it advisable to make you, as the termination officer and person responsible for seeing that subcontractors are paid from the contract termination payments, aware of the fact that we have submitted these claims to Interstate for further processing."

The record reveals that in July 1971 Interstate presented the TCO with a proposed settlement of its subcontract with your firm in the amount of $16,970; that the TCO accepted the settlement by letter of August 11, 1971; and that Interstate finalized this claim on August 13, 1971.

In the meantime, you were requested by the Defense Contract Administration Services District (DCASD), Hartford, Connecticut, by letter of June 23, 1971, to ship your termination inventory, consisting of 228,000 FSN 3698 Keepers with Slides, to the Defense Depot, Mechanicsburg, Pennsylvania. The value of this termination inventory was stipulated at $10,260. Payment to Interstate, including the $16,970 allocated to the settlement of your terminated subcontract, was completed by the Finance Office on October 22, 1971. Your present claim is based upon Interstate's failure to pay you the value of your termination inventory.

The record indicates that, by letter of October 13, 1971, your counsel advised the TCO that:

"My client would not have delivered additional goods to Interstate against which it has a suit pending for nonpayment of goods previously delivered if it had to rely on Interstate for payment. My client is relying on your responsibility for seeing that sub-contractors

are paid to insure that any funds disbursed are applied in payment of our invoices."

Your counsel states in his letter of November 16, 1971, to DSA in Philadelphia, that in conversing with the TCO, he was repeatedly reminded that the DSA deals only with prime contractors. The counsel also contends that the DSA "participated in a deliberate deception" to induce you to make a shipment you would not otherwise have made. It is contended that DSA held itself out as final customer of the shipment, concealing the fact that Interstate was the actual final customer, and in so doing, became responsible for payment.

By letter of November 24, 1971, the DSA Philadelphia Office replied that ASPR 8-209 denies subcontractors any contractual rights against the Government regarding the termination of a prime contract and that all subcontracted termination inventory is required to be disposed of in accordance with Section XXIV of the ASPR, which sets forth the policies and procedures to be followed by property disposal officers in the disposition of termination inventory. The letter advised that the Government had satisfied its contractual obligation of payment to the prime contractor, and could not contemplate the tender of a duplicate payment to Prentice Corporation, with whom the Government did not have a contractual relationship. You were advised that your remedy was an action against Interstate.

Your letter of May 1, 1972, to the Assistant Counsel, DSA Headquarters states, inter alia, that:

(1) Prentice Corporation made every reasonable effort to prevent further losses by alerting the TCO to the situation and putting him on notice that you could not expect payment from Interstate.

(2) You would not have released the material had you known that, contrary to your advice, you would have to look to Interstate for payment.

(3) Since the Government entered into a settlement agreement with Interstate agreeing that Interstate would pay its subcontractors within 10 days after receipt of payment by the Government, the Government has an obligation to subcontractors to insure payment by the prime.

(4) Interstate entered into the settlement agreement with fraudulent intent, and you believe the FBI should investigate the matter.

(5) DSA agrees that Prentice has been harmed but that under the present regulations there was no way in which Prentice could have avoided the loss.

(6) DSA agrees this is an unusual case and, as such, it is your position that the ASPR regulations were not meant to cover this situation, and therefore you should be afforded relief by the Government.

With regard to your first two contentions, we are unable to conclude that the letter of April 16, 1971, indicated with any degree of clarity that you were conditioning your shipment of the subject inventory upon a guarantee of payment therefor by DSA. Our perusal of that letter indicates that your counsel was merely advising the TCO that you had submitted your inventory claims to Interstate for further processing, and of your payment difficulties with Interstate, because you believed the TCO was responsible for seeing that subcontractors are paid by the prime contractor once the contract termination payments were made to the prime contractor.

Nowhere does that letter apprise the TCO that you would not submit the subject inventory items to the property disposal procedures set forth in Sections VIII and XXIV of the ASPR, and incorporated into the prime contract, without an express Government guarantee of payment. In view thereof, and while any misunderstanding that may have ensued therefrom is indeed unfortunate, we are unable to conclude that the letter of April 16, 1971, was worded in a manner which would place the TCO on notice that your offer of the inventory listed on the inventory forms you submitted, or any shipment of inventory in response to a request by the DCASD, Hartford, would be contingent upon a DSA guarantee of payment. If that was your intent, we cannot agree that your letter constituted a reasonable effort to place the TCO on notice that your shipment was so conditioned, nor can we conclude that the TCO was obligated, on the basis of that letter, to advise you to withdraw the subject inventory from the processing procedures set out in the prime contract, under

which the payment of terminated subcontracts was to be made through the medium of the prime contractor.

While we do agree that your counsel's letter of October 13, 1971, was sufficient to notify the DSA of the fact that you would not have shipped the subject inventory if you had known you would have to rely on the prime contractor for payment, it appears that DSA had already allocated the subject inventory to the terminated portion of the contract and had made provisions in the settlement agreement of late September, 1971, for the inclusion of this claim in the payment to Interstate.

Had your letter of October 13 been received prior to the order of the DCASD to effect shipment, it may have imposed an obligation upon DSA to advise you that it intended to pay you only through Interstate. However, without the benefit of the letter of October 13, we cannot conclude that the request of DCASD, Hartford, to ship inventory which you had submitted for allocation to the terminated contract, was intended to deliberately deceive you, contrary to your allegations.

With regard to the effect of your letter of October 13 on the proposed payment to Interstate, it should be noted that the settlement agreement had, at that time, already been consummated with Interstate. In similar circumstances we denied a request by a subcontractor holding a state court judgment against a prime contractor (terminated by the Government for convenience) that the Government withhold from its payment to the prime contractor the money owed to the subcontractor, and require it to be paid directly to the subcontractor. In that case, we held that since there is no privity of contract between the Government and the subcontractor under prime Government contracts, there was no legally permissible way for the Government to enforce the subcontractor's rights against the prime contractor, or for the subcontractor to make a claim directly against the Government. See B-160329, November 7, 1966. Thus, even if it is known that there are outstanding claims against the prime contractor when final payment is made by the Government, the Government is unable to condition payment to the prime on the payment by the prime of outstanding obligations, or to make payment directly to the subcontractor to whom the prime owes money.

Nor do we view the circumstances here to be so unusual as to take the matter out of the "no privity" rule. The mere fact that the

Government is instrumental in inducing a subcontractor to do something is insufficient to establish privity in the absence of an express promise by the Government to guarantee payment to the subcontractor. See B-171255, January 5, 1972. Our review of the record relative to your claim fails to reveal any such express promise.

We believe that the foregoing is also dispositive of your third contention. However, in this connection, your attention is also directed to ASPR 8-209.1, which expresses a clear mandate that:

> "A subcontractor has no contractual rights against the Government upon the termination of a prime contract. The rights of a subcontractor are against the prime contractor or intermediate subcontractor with whom he has contracted * * *."

In view thereof, and notwithstanding the existence in the termination settlement agreement between the DSA and Interstate of a stipulation that the prime contractor agreed to pay the claims of its subcontractors within 10 days from payment by the Government, the ASPR clearly refutes any inference of the existence of contractual rights by a subcontractor against the Government with regard to termination settlement agreements. To the contrary, the ASPR clearly indicates that the 10-day provision must be construed as enforceable only by the subcontractor against the prime.

Your fourth contention attributes Interstate with fraudulent intent in entering into the settlement agreement, and requests an FBI investigation. We find no evidence of such intent in the present record, and we must therefore decline to refer the matter to the Department of Justice. However, if it is still your sentiment that such was the case, you may forward your allegations directly to that Department and request further action.

With regard to your contention that DSA agrees that you have been harmed, and there was no way you could have prevented your loss under the present regulations, the record reveals merely an acknowledgement by DSA that Interstate has not complied with the payment provision of the settlement agreement, and the statement that DSA is unable to pursue the matter further since Interstate is no longer in business. We therefore find nothing in the record to substantiate your understanding of DSA's position.

Your sixth contention alleges that you believe DSA agrees that this is an unusual case, and the ASPR was not meant to cover this situation. Accordingly, you contend that you should be afforded relief by the Government.

Our review of the record fails to indicate any such concession by the DSA. To the contrary, DSA maintains it was acting properly under the ASPR regulations pertaining to the termination of contracts for the Government's convenience, and there is nothing to indicate that DSA considered the circumstances of this case to be excepted from the ASPR's termination procedure. In view of your election to submit your claim through the prime contractor, and your inventory to the Government under the procedures set out in both ASPR and the prime contract, we are unable to conclude that this is an unusual case not meant to be covered by the regulation, or that DSA would have been warranted in ignoring the termination procedures set forth in ASPR.

While we are sympathetic to your difficulty in obtaining satisfaction of your claim from Interstate, we are unable to discern any basis upon which the Government has incurred a legal obligation to pay your claim. Accordingly, it must be denied.

Very truly yours,

R.F.KELLER

Deputy Comptroller General
of the United States