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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON

AR

The Honorable,
The Attorney General.

John M. Whelan Sons, Inc.

v.

: Ct. Cls.
: No. 14022

The United States

Sir:

The copy of the petition filed in the above entitled cause which you transmitted here August 8, 1938, with request for comments, et cetera, sets forth that the action is brought to recover the sum of \$39,045.70, as additional amounts alleged to be due in connection with the construction of seven officers' quarters at Fort Monmouth, New Jersey, under contract No. W-6148-CP-79, dated December 4, 1933. The claims may be classified generally as follows:

- (1) Increased costs due to subsurface conditions differing materially from those shown in the drawings and specifications;
- (2) cost of work and materials not within the contract requirements;
- (3) increased costs and damages resulting from the unreasonable interference by Government representatives with the performance of the contract, and
- (4) the remission of liquidated damages deducted from payments otherwise due the plaintiff under the contract.

You are informed that no claim has been filed in this office because of the matters set forth in the petition and this office

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has no information of record with respect thereto except that contained in the contract and vouchers which were forwarded here for examination and filing in accordance with law.

With letter dated May 13, 1938, there was transmitted to you a transcript from the books and proceedings of the General Accounting Office showing the indebtedness of the plaintiff to United States in the sum of \$21,747.84, of which \$21,647.84 represents excess costs of completing the involved contract due to the debtor's default, and \$100 represents liquidated damages which accrued prior to the termination of the contractor's right to proceed. The details of the indebtedness were summarized in letter of this office dated December 6, 1937, to you--see your file SEN:WJD 77-62-137. If collection proceedings have not been instituted to recover the said indebtedness you may find it proper to recall the transcript from the United States Attorney and interpose a cross action against the plaintiff in this suit.

With reference to plaintiff's claim for refund of liquidated damages assessed in the case, there is inclosed for your information a certified copy of voucher No. 1459 in the November 1934 accounts of Major W. D. Tabney, P.D., U. S. Army, on which was deducted the sum of \$1,500 as liquidated damages at the rate of \$25 per day during the period from September 2 to October 31, 1934--or sixty days. It will be noted that plaintiff signed the voucher without protest as to the deduction of liquidated damages. The contract required the work to be commenced December 28, 1933, and to be completed by

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August 5, 1934. By Extension Order dated March 29, 1934, the contract date for completion was extended twenty-seven days, or to September 1, 1934, due to unusual and severe weather. By Change Order "1" dated September 29, 1934, the contractor was allowed ninety days' additional time for completion of the contract work thus extending the completion date to November 30, 1934. Due to the foregoing extensions of time it is not clear on what basis the said deduction of \$1,500 as liquidated damages was made. In this connection, you are informed that in the settlement of this office dated March 19, 1935--a copy of which was included in the transcript--the plaintiff was, in effect, allowed credit for the amount of \$1,500, deducted on voucher No. 1459.

It is assumed that request will be made of the War Department for a report of the facts and for the names of witnesses who may be able to testify on behalf of the United States in this case.

Respectfully,

(Signed) R. N. Elliott

Acting Comptroller General
of the United States.