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DECISION



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

FILE: B-187456

DATE: November 4, 1976

MATTER OF: Travelers Indemnity Co.

DIGEST:

1. An assignment of accounts receivable from the United States can only be effectively accomplished pursuant to the Assignment of Claims Act (1940) as amended, 31 U.S.C. § 203, 41 U.S.C. 15, and a surety does not qualify as a proper assignee, since it is not a "financing institution" within the meaning of the Act.
2. The Government's right of set-off is superior to that of a surety whose claim is based upon payment to laborers and materialmen under the payment bond. United States v. Munsey Trust Co., 332 U.S. 234 (1947).

The Department of the Air Force, Washington Area Procurement Center, (HQ COMD. USAF) Andrews Air Force Base (AFB), Washington, D.C., has requested an advance decision as to whether contract retainages should be paid to Travelers Indemnity Company (Travelers), the contractor's surety and assignee, or to the Internal Revenue Service (IRS).

The contractor was required to furnish performance and payment bonds pursuant to the Miller Act, as amended, 40 U.S.C. § 270a-270e. These bonds were underwritten by Travelers. The contractor subsequently attempted to assign to Travelers all monies due under the contract. (No notice of assignment dated and signed by the contracting officer is on the record before us.) On May 21, 1976, the contracting officer received and acknowledged an IRS Notice of Levy for unpaid taxes in the amount of \$111,883.25.

The Department advises that there is presently due and owing the sum of \$55,687.22 on the contract, performance having been satisfactorily completed. The record before us shows that various payments were made by Travelers for wages and materials commencing in November 1975 and continuing through June 1976, so that all payments made by Travelers would have been made under the provisions of the payment bond. The firm has not alleged completion of the contract pursuant to the performance bond.

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By letter to the contracting officer dated July 7, 1976, Travelers stated in pertinent part that:

"The Travelers Indemnity Company is not a Bank. There has been no U.C.C. filing of the Assignment, nor is the Assignment one you would consider to be under the 'Assignment of Claims Act'. The Travelers asked for an assignment* * * prior to our financing the Principal* * *to ensure you, the owner, that the contract would be completed* * *without your default of the Principal and formal assignment to the Surety* * *."

In 55 Comp. Gen. 155, 157 (1975), we stated that:

"Generally, an assignment of accounts receivable from the United States can be lawfully accomplished only through compliance with the Assignment of Claims Act of 1940, as amended, 31 U.S. Code 203, 41 U.S.C. 15 (1970). Under 31 U.S.C. 203 (1970) moneys due under a Government contract may be assigned to a 'bank, trust company, or other financing institution.' Assignees are required to comply with requirement for written notice of assignments as provided in the Act. In addition, the Act limits the Government's right to reduction or setoff as follows:

'* * *payments to be made to the assignee* * *under such contract* * * shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract* * *.'"

Travelers has not established itself as a "financing institution" making itself eligible as an assignee of contract payments which is enforceable against the Government. A firm whose credit extensions and lending operations, although carried on regularly, are merely incidental or subsidiary to another end, in light of a firm's overall operations and more important purpose, such as, its role as surety, is not a financing institution. See B-155944, February 10, 1965; B-153608, March 17, 1964, and 43 Comp. Gen. 138 (1963). Indeed Travelers' July 7th letter appears to admit that it does not qualify as a proper assignee under the Assignment of Claims Act.

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Consequently, absent any showing by Travelers that it qualifies as a financing institution, the purported assignment is void insofar as the United States is concerned. 31 U.S.C. § 203.

Likewise, although the issue has not been raised directly, Travelers' July 7, 1976 letter asserts that:

"Our involvement in financing the contractor in the final sense becomes more one of subrogation than assignment. * * * If we, the Surety, have provided a benefit to the Government, are we not a subrogee of the Government and as such entitled to the remaining progress money* * *?"

As we have noted above, from the record before us payments made by Travelers appear to have been made pursuant to the Miller Act payment bond.

The current rule with respect to this situation was stated by the Court of Claims in United States Fidelity & Guaranty Co. v. United States (No. 183-70, March 16, 1973). In that case the Court said:

"This matter was most recently handled by the court in Aetna Ins. Co. v. United States, 197 Ct. Cl. 713, 456 F. 2d 773 (1972), in which the rule originally expressed in United States v. Munsey Trust Co., *supra*, was followed. A surety that pays on a performance bond in order to complete the subject contract has priority over the United States to the retainage in its hands. A surety that pays on its payment bond, however, does not have priority when the United States is asserting a tax or other obligation owed by the prime contractor."

While a surety which completes the contract pursuant to its performance bond would become a subrogee of the Government and thus would be entitled to any rights the Government has to retained funds, a payment bond surety which pays the contractor's laborers and materialmen is merely a subrogee of the contractor and thus a creditor of the Government. See Trinity Universal Ins. Co. v. United States, 382 F. 2d 317 (5th Cir. 1967), *cert denied*, 390 U.S. 906 (1968); Barrett v. United States, 177 Ct. Cl. 380, 367 F. 2d 834 (1966). The Government, of course, may setoff claims against its creditors.

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Therefore, we conclude that Travelers has not established entitlement to the retainage held by the Government ahead of the IRS for unpaid taxes either by virtue of the assignment or as a result of the payments made as surety under the payment bond.

Deputy

R. J. K. 11
Comptroller General
of the United States