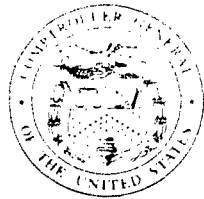


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**DECISION**



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

FILE: B-198100

DATE: December 16, 1980

MATTER OF: Air Force Request for Advance Decision

**DIGEST:**

*[Claim for*

Payment of balance due under exterior painting contract] that is claimed by assignee-bank, payment surety, Internal Revenue Service and Department of Labor should be withheld pending judicial determination of rights of claimants since conflicting court decisions preclude administrative resolution by GAO of entitlement priority.

This matter concerns \$30,126.00, which constitutes the final payment under contract No. SB1308(a)-78-C-042 (SBA) F197650-78-C-0046 (AF) and is being withheld by the Department of the Air Force, Hanscom Air Force Base, Massachusetts, pending resolution of conflicting demands for payment.

The contract for the exterior painting of various buildings was awarded to P&R Professional Painting Company, Inc. (P&R) on March 16, 1978 and incorporated the labor standards provisions of Standard Form 19-A (including the Davis-Bacon provisions) and the appropriate Department of Labor wage rate. The contract also incorporated an Assignment of Claims clause which included the "no set-off" provisions of the Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 203, 41 U.S.C. § 15 (1976). On May 26, 1978, in accordance with the terms of the contract, P&R and the American Fidelity Fire Insurance Company executed performance and payment bonds. Final acceptance of the work under the contract occurred on May 24, 1979.

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The following parties have submitted claims for the amount withheld:

1. Unity Bank and Trust Company, Roxbury, Massachusetts, on June 12, 1978, was assigned all monies due or to become due under the contract in accordance with the Assignment of Claims Act and demands the full retainage.
2. The Internal Revenue Service (IRS), pursuant to a notice of levy filed on October 23, 1978, claims \$26,217.26 plus accrued interest covering P&R's tax indebtedness for that firm's failure to pay Federal taxes withheld from the wages of its employees.
3. The Department of Labor (DOL) requested on December 13, 1978 and February 20, 1979 that the Air Force withhold amounts for Davis-Bacon Act (40 U.S.C. § 276a (1976)) underpayments which DOL has now determined to total \$24,434.78.
4. American Fidelity Fire Insurance Company, the surety on the payment bond under the contract, has demanded payment of \$10,197.66, representing payments made to subcontractors, suppliers and materialmen, and additionally, \$3,346.52 in administrative and legal expenses.

For the reasons stated below, we are unable to determine the priority rights of the various parties to the withheld funds.

With respect to the claim of the assignee-bank, assignments of accounts receivable from the United States can be accomplished through the Assignment of Claims Act. Assignees are required by the Act to file written notice of assignment with the contracting officer and the disbursing officer, if any, and with any sureties. In this instance no written notice of the assignment was filed with the surety. The failure

to give notice of the assignment to the surety does not appear to affect the validity of the assignment as between the assignee-bank, IRS and DOL. If, however, the surety is able to show that it was prejudiced by the failure to notify it, that factor may affect whether the assignee-bank or the surety has priority. See generally New Amsterdam Casualty Company v. Manufacturers and Traders Trust Company, 330 F.2d 575 (2nd Cir. 1964).

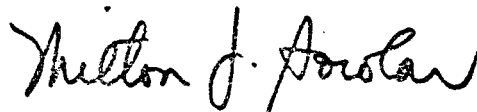
Moreover, in view of conflicting court decisions as to whether the rights of a bank as a contractor's assignee under the Assignment of Claims Act are superior to those of a contractor's payment surety, we have consistently held that our Office would not be warranted in rendering a decision authorizing payment to either the bank or the surety company. Rather, the bank and the surety company must either settle their differences by mutual agreement or they must present the issues to a court of competent jurisdiction. 46 Comp. Gen. 389 (1966); 33 Comp. Gen. 608 (1954); Compare Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 F.2d 73 (5th Cir. 1945); General Casualty Co. v. Second National Bank of Houston, 178 F.2d 679 (5th Cir. 1949) with Hardin County Savings Bank v. United States, 65 F. Supp. 1017 (Ct. Cl. 1946); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950).

Without a definitive resolution of the priority between the assignee-bank and the payment surety, none of the other claimants' priorities can be determined since it appears that their rights may depend upon whether the bank or the surety is determined to have priority.

For example, a payment surety is "merely a subrogee of the contractor and a creditor of the Government," Bonneville Power Administration, B-188473, August 3, 1977, 77-2 CPD 74, and does not have priority when the United

States is asserting a tax obligation owed by the prime contractor. United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377 (Ct. Cl. 1973); Robert L. Singleton; Capital City Construction, Inc., et al., B-189183, January 12, 1979, 79-1 CPD 17. However, an assignee-bank, under the "no set-off" provisions of the Assignment of Claims Act, does have priority when the United States is asserting a tax obligation of the prime contractor. See Central Bank v. United States, 345 U.S. 639 (1953).

With respect to the underpaid workers' claims, while recognizing that the Government, in this case the IRS, has the common law right of set-off against amounts owed the contractor by the Government, United States v. Munsey Trust Co., 332 U.S. 234 (1957), we have held that "once the money is withheld and segregated by the contracting officer for the specific purpose of covering alleged Davis-Bacon underpayments, the contractor has no interest in those monies to which an IRS levy can attach." Richard T. D'Ambrosia d.b.a. Ambrosia Construction Company, 55 Comp. Gen. 744 (1976), 76-1 CPD 88. Here, however, we note that the IRS levy attached prior to any monies being withheld by the contracting officer for the specific purpose of covering the alleged Davis-Bacon underpayments. Thus, and in any event, in view of the conflicting court decisions and the consequential doubtful validity of the competing priorities, we believe that, in the absense of agreement between the parties, payment should be withheld pending judicial determination on their rights in such proceedings as they may choose to institute. See Charles v. United States, 19 Ct. Cl. 316, 319 (1884); Longwill v. United States, 17 Ct. Cl. 288, 291 (1881).



For the Comptroller General  
of the United States