

01591

DECISION



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

FILE: B-187456

DATE: March 8, 1977

MATTER OF: Travelers Indemnity Company - Reconsideration

DIGEST:

Miller Act surety which has received payment in excess of its proven expenditures under its binding obligations in connection with a construction contract has no claim against undischursed funds held by Government.

Travelers Indemnity Company (Travelers) has requested reconsideration of our decision Travelers Indemnity Company, B-187456, November 4, 1976, in which we found that Travelers was not an assignee under the Assignment of Claims Act (1940), as amended, and that consequently the Government's right of set-off against contract funds in its hands for unpaid taxes was superior to any right to the funds Travelers might have as surety under a Miller Act payment bond. Travelers asserts that it was a performance bond surety and that as such it has the superior claim to the funds.

Travelers had sought payment from the Air Force of the balance of the contract funds in the amount of \$55,687.22 as assignee under an assignment made by Bell Contracting Company, Inc. (Bell), a painting subcontractor under Air Force prime contract No. F49642-75-90318, awarded to the Small Business Administration under the 8(a) program. Subsequent to the purported assignment, the Internal Revenue Service served the Air Force with a notice of levy in the amount of \$111,883.25 for unpaid taxes owed by Bell.

The record submitted to this Office by the Air Force for an advance decision on the Travelers claim to the total funds contained the purported assignment, a payment log furnished by Travelers showing payments for labor and materials only, and letters to the contracting officer from Travelers and Bell. No specific request was made by Travelers as surety under the performance bond, and no proof was offered showing entitlement to the entire contract balance, save for the assignment.

In support of its request for reconsideration, Travelers stated that when Bell became financially unable to perform the contract, "Bell and Travelers entered into an oral, informal agreement whereby Travelers, pursuant to its obligation under

B-187456

its performance bond" agreed to finance the job to completion through the contractor. Travelers also notes that by letter dated November 6, 1975, the Government was advised by Bell to send future payments due Bell under the contract to Travelers. Travelers has furnished us copies of its drafts to Bell and to the paint suppliers, noting that pursuant to the asserted agreement, Travelers met the job payroll in the amount of \$2,129.34, commencing November 7, 1975, and thereafter paid suppliers a total of \$7,674.32 through the completion of the job. Travelers asserts that the total of the payments it made exceeded the amount it received from the Government pursuant to the "assignment" by \$13,903.54. Although the date of loss shown on the Travelers payment record is November 4, 1975, so that any agreement between it and Bell and any consequent obligations assumed by the surety under the performance bond apparently commenced on that date, Travelers had not offered any evidence to show when materials for which it made payment were delivered to the job in question, or whether the materials were in fact for use in the performance of the contract. Neither had it shown by appropriate evidence that the funds it assertedly paid to Bell for payroll purposes either related to or were used strictly for payrolls for the job in question.

Subsequent to our request for such evidence, Travelers advised that it did not have copies of Bell's payroll records, and that "[a]ll efforts to obtain such payrolls through Bell's office by Travelers have been unsuccessful". Travelers recommended we obtain such information from the certified payroll records furnished the contracting officer pursuant to the contract. Travelers did furnish copies of "bills" from the paint supplier, stating that "[i]t is assumed that materials were delivered prior to the time the bills were sent."

An examination of the payroll records certified by Bell to the contracting officer shows that commencing on November 4, 1975, through completion of the job, a total of \$38,042.36 was expended for payrolls on the contract. Travelers' payment log for the same period shows payments of \$53,638.61, or \$15,596.25 more than was certified to have been actually expended for payroll purposes.

An examination of the supplier's bills furnished by Travelers shows that the \$4,814.60 paid by Travelers on December 2, 1975, was for materials billed prior to October 21, 1975, and that

included in those bills were \$533.02 in materials for unidentifiable jobs, \$79.75 for "Piney Branch Rd," and \$21.53 for "Northeast library," for a total of \$634.30 apparently unrelated to the Bolling Air Force Base contract in question. Moreover, of the \$1,363.64 materials payments made on February 25, 1976, \$244.74 were for materials where no job was indicated. The final materials payment of \$1,496.08 appears to be supported, although we note that in a number of instances "Bolling" was handwritten after the bills were prepared. The surety's total out-of-pocket expenditures under the contract adjudged from the evidence furnished by the surety and from the certified payroll records, including payments for materials delivered prior to the approximate date of the surety's financing agreement, is recapitulated as follows:

\$38,042.36	payroll
2,614.98	materials
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\$40,657.34	cost from date of agreement
4,180.40	cost of materials prior to surety's financing agreement
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\$44,837.74	total expenditure for contract

Agency records show that as of the contractor's November 6, 1975 billing of \$16,254, Bell had completed 47 percent of the work and had thus earned \$70,737.82. The Government retained 10 percent of the sum earned, so that as of November 6, the approximate date of the asserted oral agreement between the surety and Bell, the contractor was entitled to payment of \$63,664.04, but had been paid only \$47,409.39. The \$16,254.65 due under the November 6, 1975 invoice was subsequently paid to Travelers under the "assignment." Travelers received one other payment of \$31,154.74, for a total of \$47,409.39, or \$2,571.65 more than has been shown to have been expended by the surety under its bonding obligations.

It is not disputed that a surety is not entitled to more than what it pays out under either a payment or performance bond. See, e.g., Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962). Therefore, we need not decide whether Travelers in fact acted as a performance bond surety in this case, and instead must again conclude that the surety has not established entitlement to the funds held by the Government.


Acting Comptroller General
of the United States