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Horrell
Proc. I

DECISION



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

FILE: B-189902

DATE: October 5, 1977

MATTER OF: Cascade Pacific T.S.I., Inc.

DIGEST:

Claim for excess costs due under one Forest Service contract may be set off against balance due under another Forest Service contract prior to setoff for contractor's indebtedness to Internal Revenue Service for taxes, since tax claim is subordinate.

By letter dated August 15, 1977, the Authorized Certifying Officer, Region 3, Forest Service, Department of Agriculture, requested a decision as to the disbursement that should be made of the \$2,502.24 retainage remaining as the final balance due under Lincoln National Forest (Lincoln) contract 16-2224 with Cascade Pacific T.S.I., Inc. (Cascade), in view of the claims for the balance made by the Internal Revenue Service (IRS) and the Coconino National Forest (Coconino).

The Forest Service awarded the Lincoln contract and Coconino contract 04-720 to Cascade for reforestation work. Subsequently, on April 2, 1976, IRS served a notice of levy on the Forest Service advising that \$37,150.98, representing unpaid taxes, was owed to the Government by Cascade and demanding that the funds owed to Cascade by the Forest Service be applied to Cascade's delinquent tax bill. A notice of Federal tax lien was filed on April 6, 1976. On April 7, 1976, contract 04-720 was terminated for default (failure to commence work) by Coconino. On April 9, 1976, contract 16-2224 was terminated for failure to complete the project within the specified time by Lincoln.

Coconino, on April 16, 1976, notified Lincoln of the default and that it appeared that Cascade would be liable for excess costs. Furthermore, Coconino requested that, until determination of damages, no payments be made to Cascade from the undisbursed earnings retained under contract 16-2224. On May 24, 1976, Coconino notified Cascade of its determination of damages, amounting to \$13,157.98, which

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represented the reprourement costs minus the amount of Cascade's contract. After some apparent collection attempts produced no positive response, Coconino, on September 27, 1976, requested that the funds remaining from contract 16-2224 be applied to the indebtedness. On October 7, 1976, Lincoln made a determination that there was a balance of \$2,500.14 remaining under contract 16-2224.

IRS claims the contract balance on the basis that the notice of levy was perfected before Coconino's claim. The Forest Service, on the other hand, contends that it has priority over IRS based upon its contractual right to the remaining funds from the time the contract is entered into.

In Pacific Insurance Company, Limited, B-180333, April 2, 1974, 74-1 CPD 163, citin. B-161460, May 25, 1967, it was held that a claim for excess costs due under one contract of the contracting agency may be set off against the balance due under another contract of the contracting agency prior to setoff for the contractor's indebtedness to IRS for taxes, since the tax claim is subordinate to the excess cost claim.

Accordingly, the balance due under contract 16-2224, whether it be the \$2,500.14 determined on October 7, 1976, or the \$2,502.24 stated in the certifying officer's letter of August 15, 1977, may be disbursed to partially satisfy the Forest Service claim under contract 04-720.


Deputy Comptroller General
of the United States