Solan

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Priority of Payment Between Payment Bond Surety and Assignee

File: B-229724

Date: March 4, 1988

DIGEST

Consistent with doctrine of subrogation which allows a payment bond surety who pays the debts of his principal to assert all the rights of the creditors who were paid to enforce the surety's right to be reimbursed, payment bond surety has priority over an assignee bank to $2,902.29 paid by the surety to subcontractor materialmen.

DECISION

A disbursing officer with the United States Army, Corps of Engineers, asks about priority of payment of remaining contract funds between a payment bond surety and an assignee bank. For the reasons given, we find that the payment bond surety has priority.

BACKGROUND

On July 30, 1985, the Pittsburgh District, Army Corps of Engineers, awarded a contract (DACW 59-85-C-0083) to Danbury Construction Co. for dredging a boat launching ramp in the Buffalo Creek Recreation Area, Buffalo Creek, West Virginia. The contract price was just under $100,000. Consistent with Miller Act requirements, 40 U.S.C. §§ 270a-270d, Danbury posted performance and payment bonds from the Fidelity and Deposit Company of Maryland.

On October 4, 1985, the Danbury Construction Company assigned its right to all contract proceeds to the First National Bank of Bellevue, Ohio. The Corps of Engineers accepted the assignment on October 9, 1985.

The facts indicate that the contractor completed the project; however, during the course of the work, the payment bond surety was required to make two payments to subcontractors totalling $2,902.29. On June 11, 1987, the Corps disbursing officer received a request from the Corps District Office of Counsel requesting that he pay the surety the $2,902.29 the surety paid the two subcontractors under the payment bond. In view of the assignment to the bank, the disbursing officer is concerned about conflicting claims to the $2,902.29 and thus asks us to determine who has priority.

LEGAL DISCUSSION

The doctrine of subrogation allows a payment bond surety who pays the debts of his principal to assert all the rights of the creditors who were paid to enforce the surety's right to be reimbursed. Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136-37 (1962). For example, when a surety meets its obligations on a payment bond by paying claims of laborers and materialmen, it is subrogated to whatever rights the contractor and laborers had in undisbursed funds. Id. at 141. The surety's right has been held to relate back to the date of the surety bond, entitling it to priority over all subsequent lienholders and general creditors. Western Casualty and Surety Co. v. Brooks, 362 F.2d 486, 489-90 (4th Cir. 1966).

As an assignee can acquire no greater right to contract proceeds than its contractor-assignor had, and an assignor's right to payment under a government contract is subject to the surety's right to be reimbursed for amounts paid on the contractor's behalf, a payment bond surety would have priority over an assignee. 63 Comp. Gen. 533, 535 (1984).

In this instance, Fidelity and Deposit Company of Maryland, the payment bond surety, made two payments totalling $2,902.29 to subcontractors under the payment bond. The payment bond was executed several months prior to the assignment of contract proceeds to the First National Bank of Bellevue, Ohio. Consistent with the legal principles described, Fidelity and Deposit Company has priority over First National, as assignee, for the amount paid by the surety. We understand there are sufficient remaining contract proceeds to pay the surety.

Milton J. Socolar

for Comptroller General
of the United States