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

31304

B-179415

August 28, 1973

Maryland Casualty Company
Wheaton Plaza Office Building
Suite 800
Wheaton, Maryland 20902

Attention: Mr. Richard L. Duffey
Claims Department

Gentlemen:

This is in reply to your letter of June 28, 1973, requesting reconsideration of our Settlement Certificate dated February 3, 1972, which denied your claim for $4,919 under General Services Administration (GSA) contract No. GS-03B-15674.

The record indicates that you were the payment and performance bond surety for J & B Construction Company, Incorporated (J & B), the contractor on the above-mentioned GSA contract. The record further indicates that J & B was defaulted in December 1969, and that upon completion of all the required work, the amount of $4,919 remained for disbursement under the contract. You claimed this sum because of your payments in excess of $9,000 to various suppliers pursuant to the terms of the payment bond. On December 29, 1969, however, the Internal Revenue Service served a tax levy upon GSA in the amount of $63,017.85 (subsequently reduced to $28,165.65 plus interest) against any proceeds due to J & B. GSA submitted the matter to this Office for resolution, and was advised that under United States v. Munsey Trust Co., 332 U.S. 234 (1947), "the Government's right of set-off * * * is superior to that of a surety whose claim is based upon payments to laborers and materialmen under the payment bond."

In your request for reconsideration, you stated that Fireman's Fund Insurance Company v. United States, 190 Ct. Cl. 804, 421 F. 2d 706 (1970), should be considered as superseding Munsey and as authorizing payment to you. The Fireman's Fund case recognized certain subrogation rights in a payment bond surety, but held only that the Government "assumed the risk of liability to the surety" when the contracting officer paid certain contract proceeds directly

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to the contractor after it had been put on notice by the surety that a supplier had instituted suit against the contractor and the surety for nonpayment of invoices. It did not consider the question of the Government's right to set-off against contract funds when a surety is claiming against such funds.

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. Since the surety in this case paid only on its payment bond, it falls in the latter category, and must claim the retainage subject to the tax claim of the United States. 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)."

Accordingly, our Settlement Certificate denying your claim is affirmed.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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