

6474

F. Phillips PL

DECISION



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

FILE: B-189137

DATE: May 19, 1978

MATTER OF: M.C.&E. Service & Support Co., Inc. -
Reconsideration

DIGEST:

That portion of M.C.&E. Service & Support Co., Inc., B-189137, August 1, 1977, 77-2 CPD 65, holding that Government claims had higher priority than did surety's claims to funds withheld from monies owed contractor under contract is overruled, since decision erroneously held that surety's claims were based on amount expended for employee taxes prior to surety's takeover of contract, i.e., under payment bond, when, in fact, surety's funds had been expended to complete contract, i.e., under performance bond, and thus had first priority.

By letter of September 8, 1977, with enclosures, counsel for The Travelers Indemnity Company requested that we reconsider our decision M.C.&E. Service & Support Co., Inc. B-189137, August 1, 1977, 77-2 CPD 65.

Our decision of August 1, 1977, was issued pursuant to a request by the Air Force that we decide the priorities to be accorded various claimants to funds withheld under six separate contracts between M.C.&E. Service & Support Co., Inc. (MC&E), and the Air Force. These six contracts were for the furnishing of dining hall services at six Air Force bases for the period July 1, 1975, through June 30, 1976. During the period March through May 1976, MC&E defaulted on four of the contracts and MC&E's surety,

B-189137

The Travelers Indemnity Company (Travelers Indemnity), took over performance on the two remaining contracts. The present reconsideration will deal only with the priorities on the latter two contracts which were for dining services at Davis-Monthan Air Force Base, Arizona (contract No. F02301-75-C-0158), and Peterson Air Force Base, Colorado (contract No. F05604-75-90131). The Air Force is presently holding a total of \$60,108.39 (an increase of \$7,478.00 over the \$52,630.39 reported earlier due to increased withholdings under the George AFB contract), \$9,634.43 of which was withheld on the Davis-Monthan AFB contract and \$10,891.25 on the Peterson AFB contract. All or part of the amounts withheld under these two contracts are claimed by the Department of Labor (DOL), the Internal Revenue Service (IRS) and MC&E's surety, Travelers Indemnity.

By letter of May 7, 1976, DOL requested that the Air Force withhold all funds available under the contracts to cover Service Contract Act (SCA), 41 U.S.C. §§ 351-358 (1970), violations. A figure of \$44,823.72 was established for the underpayments. This amount was to be transferred to DOL for payment to MC&E employees at the six bases. An IRS levy in the amount of \$219,453.14 was filed for unpaid Social Security and employee income taxes. The notice of levy was served on April 27, 1976. Finally, we were advised by the Air Force that Travelers Indemnity was claiming \$3,838.85 in connection with the Peterson AFB contract for employee taxes paid by the surety for the period immediately prior to the surety's assumption of performance. On the basis of this information, we concluded that the \$3,838.85 was expended as part of the surety's obligation under its payment bond, rather than under its performance bond. This being the case, we held that under the rationale of United States v. Munsey Trust Co., Receiver, 332 U.S. 234 (1947), the Government could offset its claims against the amount withheld from monies owed the contractor, whereas, had the surety expended the money to complete the contract, i.e., under its performance bond, the Government would have no such right.

B-189137

In its letter of September 8, 1977, requesting reconsideration of our decision of August 1, 1977, counsel for the surety took strong exception to our statement that \$3,838.85 was expended to pay employee taxes for the period immediately prior to the surety's takeover of MC&E's contract at Peterson AFB and has furnished adequate evidence to indicate that the statement was erroneous. Additionally, the surety made a claim for \$14,065.85 on the Davis-Monthan AFB contract, a matter which had not been brought to our attention in the Air Force report forwarded with its request for a decision. Also, the surety stated that its claim on the Peterson AFB contract was \$5,254.66, rather than \$3,838.85. Our Office requested a supplemental report from the Air Force which was furnished to us under cover letter of January 23, 1978. On the basis of the current record, it appears that the claims by Travelers Indemnity in connection with the Peterson AFB and Davis-Monthan AFB contracts represent money expended to complete the contract, i.e., under the performance bonds. Pursuant to our reasoning in M.C.&E. Service & Support Co., Inc., supra, Travelers Indemnity should be given first priority to the funds withheld under the Peterson AFB and Davis-Monthan AFB contracts. The balance of the \$10,891.95 withheld under the Peterson AFB contract (the claim by Travelers Indemnity was only \$5,254.66) should be applied to the payment of MC&E workers underpaid under the SCA. Since the present reconsideration does not deal with the other four contracts between MC&E and the Air Force, distribution under those contracts may be made in accordance with the instructions in our decision of August 1, 1977, i.e., the withheld funds may be applied first to the workers who were underpaid under the SCA and the balance against Air Force's excess procurement costs. Any part of our decision of August 1, 1977, which is inconsistent with the present decision is overruled.


Deputy Comptroller General
of the United States