

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

*J. Carter
Proc I*

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FILE: B-192237

DATE: January 15, 1979

MATTER OF: United States Forest Service -
Request for Advance Decision

DIGEST:

1. Surety which completes defaulted contract under performance bond may be reimbursed for expenses it incurs in completing contract from unexpended contract balance free from setoff by Government of debts of contractor. Unexpended contract balance incorporates all funds remaining in Government's hands, including withheld percentages and progress payments, whether earned prior or subsequent to original contractor's default, less any liquidated damages to which Government is entitled.
2. Claim by payment bond surety against unexpended contract funds for payments to materialmen and laborers on behalf of defaulted contractor is subject to setoff by the Government for debts of contractor unless surety shows that it has satisfied all such claims. Absent consent of defaulted contractor, payment bond surety may not ordinarily be reimbursed from unexpended funds earned by contractor prior to default.
3. To extent Government has no claim against defaulted contractor or surety, Government is mere stakeholder of contract funds in its possession. Any funds remaining in Government's hands after appropriate reimbursement to surety should be retained pending outcome of litigation between surety and defaulted contractor.

The Acting Director of Administrative Services, United States Forest Service (USFS), has forwarded to our Office a request for advance decision regarding the priority of payment for funds withheld under a contract on the Spanish Peaks Project, Pike and San Isabel National Forests.

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Contract No. 33-2065 was awarded to the only offeror, American Design and Construction (American), on August 19, 1977. Work on the contract started on January 18, 1978, and progressed satisfactorily until about March 7, 1978, when American's payment and performance bond surety on the contract notified the Government that no payments were to be made to American. Shortly thereafter, American abandoned the jobsite and did not return. As of the date of the submission to our Office, the USFS had been holding a progress payment for about 2 months. The surety has filed suit against American for alleged default on its bonds in the amount of approximately \$91,000.

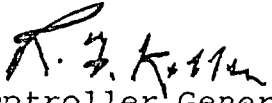
The USFS has requested our opinion regarding the proper disposition of the withheld payments. No voucher accompanied the request for decision. We have been advised that the contract has been terminated for default since the submission of these questions to our Office and that the surety has executed a takeover agreement.

We recognize the right of a surety which completes a defaulted contract under a performance bond to reimbursement for the expenses it incurs in completing the contract from the unexpended contract balance free from setoff by the Government of the debts of the contractor. M.C. & E. Service and Support Co., Inc., - Reconsideration, B-189137, May 19, 1978, 78-1 CPD 384; Larry, T. Smith, Inc., B-189679, September 7, 1977, 77-2 CPD 180. The "unexpended contract balance" incorporates all funds remaining in the hands of the Government under the contract, including withheld percentages and progress payments, whether earned prior or subsequent to the original contractor's default, less any liquidated damages to which the Government is entitled under the contract. B-155504, July 8, 1966; id., November 16, 1978.

It is equally well settled that any claim by the surety against the unexpended contract funds for payments to materialmen and laborers would be subject to setoff by the Government for the debts

of the contractor, Bonneville Power Administration, B-188473, August 3, 1977, 77-2 CPD 74; 40 Comp. Gen. 85 (1960); 31 Comp. Gen. 103 (1951); United States v. Munsey Trust Co., 332 U.S. 234 (1947). Furthermore, the surety must show that it has fully satisfied the claims of all laborers and materialmen arising from the contract before it can share in the retained funds on the basis of its payment bond obligation. See K.B.J. Engineering, Inc., B-190181, December 8, 1977, 77-2 CPD 445; American Surety Co. v. Westinghouse Electric Manufacturing Co., 296 U.S. 133 (1935). Absent the consent of the defaulting contractor, reimbursement to the surety for payments made in fulfillment of its payment bond obligation ordinarily may not be made from unexpended funds earned by the defaulting contractor prior to its default. 31 Comp. Gen. 103, supra.

To the extent that the Government has no claim against American or the surety, it is merely a stakeholder of the funds in its possession. Consequently, any funds remaining in the Government's hand after reimbursement to the surety in accordance with the above should be retained pending resolution of the litigation between American and its surety.


Deputy Comptroller General
of the United States