9119 Mr. Harfunther

DECISION

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

FILE B-201465 DATE: August 11, 1981

MATTER OF Commercial Union Insurance Company

DIGEST:

1. Surety may not offset its loss on one contract against balance existing on another contract even though surety has bonded same company under each contract.

2. Blanket assignment to bank may not be recognized as valid assignment under Assignment of Claims Act. However, if bank is able to provide any evidence to substantiate validity of assignment as to subject contract, bank may be paid so long as Government is indemnified.

The Department of the Army (United States Corps of Engineers) awarded contract No. DACA45-74-C-0205 to the Wright Air Conditioning, Plumbing, & Heating Co. (Wright) on April 1, 1974. Wright successfully completed the contract in August 1979, and the Army holds $29,000 payable under the contract. The Special Disbursing Officer, Omaha District, Corps of Engineers, Omaha, Nebraska, requests our decision as to whom this sum should be paid.

The performance and payment bond surety on the contract, the Commercial Union Insurance Company (Commercial), maintains that it should receive at least $25,174.89 of the sum. City Bank and Trust Company of Kansas City, Missouri (formerly Grand Avenue Bank and Trust Company), also claims the entire sum.

Commercial's claim is based on two grounds. First, the surety in a Missouri court action has recited that it has made payments (totaling about $22,000) to laborers and suppliers under payment bonds issued to Wright under separate contracts unrelated to the subject contract. Because of the losses incurred on these unrelated contracts, the surety is of the

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view that it is entitled to offset these losses against the balance remaining under the subject contract even though the surety--to the best of our knowledge--has not made any payment on the bonds under the subject contract. Second, Commercial is of the view that it is entitled to the claimed amount because Wright agreed in October 1979 that the $29,000 should be "payable jointly to Wright and [the surety]" as a condition, so Commercial argues, to Commercial's consent to an "increase in penalty of bond."

It is well established that a surety may not offset its loss on one contract against a balance existing on another separate contract even though the surety has bonded the same company under each contract. See B-160641, March 8, 1967; Western Casualty and Surety Company v. Brooks, 362 F.2d 486 (4th Cir. 1966). Thus, we reject the first ground of the surety's claim. Further, it is clear that the second ground of Commercial's claim lacks merit to the extent that Commercial is claiming as an assignee of the contractor. Such an assignment must be considered invalid under the Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 203 (1976) and 41 U.S.C. § 15 (1976), since the surety is not a financing institution.

City Bank argues that it is entitled to the $29,000 under two 1975 documents which Wright executed in favor of the Grand Avenue Bank and Trust Company. These documents--entitled "Inventory and Accounts Receivable/Security Agreement" and "Security Agreement Covering Rights Under Contracts"--must be considered to be, at best, blanket assignments of accounts receivables and contracts since they do not refer to the specific contract in question. Moreover, each agreement contains a provision under which Wright agreed to "execute any instruments * * * required * * * in order that all monies due and to become due under [United States contracts] shall be assigned to Bank * * * under the Federal Assignment of Claims Act." However, the present record does not contain any document which evidences a specific assignment by Wright of the monies due under the subject contract as was apparently contemplated under the quoted provision. Nevertheless, City Bank notes that it gave a "Notice of Assignment" (containing the above documents) to the Corps of Engineers in November 1978 and that the surety's attorney acknowledges that it "received a notice advising

of [these documents]" in 1978. And the Bank argues that it is entitled to the $29,000 as a proper assignee under the Assignment of Claims Act of 1940, above.

In General Services Administration--Advance Decision, Assignment of Claims Act, 58 Comp. Gen. 619 (1979), 79-2 CPD 151, we considered a similar situation involving a blanket assignment. In the cited case, we observed:

> "In this connection, we have held that an assignment of a claim against the Government should specify the particular contract involved, and, therefore, that a blanket assignment does not meet the requirements of the Act where the Government seeks to set off a tax indebtedness. See B-120222, October 27, 1955. We have noted in one decision that the lack of specificity of a blanket agreement can be cured for purposes of perfecting a valid assignment under the Act when 'there are in existence later amendment schedules [specifying the Government contract] signed by the assignor, which purport to be an integral part of the original [blanket] assignment instrument.' B-171125, February 4, 1971. GSA has provided us documentation in addition to the 1976 agreement which raises the possibility that there may be sufficient documentation of a valid assignment applicable to the instant contract payment.
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> "It appears from the documents subsequently submitted here by GSA that during the period of performance of the Floyd Bennett Field contract, Sterling loaned Teltronics $1 million. This is evidenced by a secured note dated December 29, 1978, and executed by the Treasurer and Vice-President of Teltronics. By the terms of the note, Teltronics granted a security

> interest in and assigned all accounts receivable to Sterling. (This note also refers to the 1976 blanket agreement as a matter of collateral security for the loan.) In the documentation we received, a schedule of Teltronics' accounts receivable lists the Floyd Bennett Field contract account. Assuming that GSA concludes that the December 1978 secured note is an authentic document, we believe it should be recognized as an assignment under the Act. Nevertheless, because of the controversy in this matter the bank should be required to indemnify the Government from any claims that might be made by the contractor. The bank may be paid upon satisfaction of these requirements."

Unlike the cited GSA case, there is no documentation of record from which it may be determined that Wright has assented to a specific assignment of monies due under the subject contract.

Accordingly, on the record here, the Government may not recognize the assignment as valid and payment may not be made by the Government to City Bank. However, we recognize the possibility that City Bank may have evidence of the type involved in the above case to substantiate the validity of the assignment. Therefore, the Army should afford City Bank an opportunity to provide any available evidence. If the Army is satisfied that whatever evidence is submitted substantiates the assignment's validity as to the subject contract, consistent with this decision, City Bank may be paid so long as the Government is indemnified from any possible claims by the assignor. See The Office of S. Thomas Shumate-AIA Architect, B-195629, September 7, 1979, 79-2 CPD 182.

Milton J. Socolar

Acting Comptroller General
of the United States

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

B-201465 August 11, 1981

The Honorable Thomas F. Eagleton
United States Senate

Dear Senator Eagleton:

By letters of January 7 and April 30, 1981, you have expressed interest in the claim of the City Bank and Trust Company of Kansas City, Missouri, for reimbursement from the final payment proceeds under Department of the Army (United States Corps of Engineers) contract No. DACA45-74-C-0205.

Enclosed is a copy of our decision of today in the matter.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure