

DOCUMENT RESUME

03254 - [A2873296]

[Priority of Payment among Competing Claimants for Funds Withheld under a Construction Contract]. B-188473. August 3, 1977. 5 pp.

Decision re: Bonneville Power Administration; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Crow Rock Products, Inc.; Forest Service; Sverdsten Logging Co., Inc.

Authority: Assignment of Claims Act of 1940, as amended (31 U.S.C. 203; 41 U.S.C. 15). (47 Stat. 1516; 31 U.S.C. 227). Miller Act. 18 Stat. 481. 55 Comp. Gen. 155. 37 Comp. Gen. 318. 20 Comp. Gen. 458. B-187456 (1976). B-187178 (1976). B-184506 (1975). B-161283 (1976). B-178168 (1973). Project Map, Inc. v. United States, 486 F.2d 1375 (Ct. Cl. 1973). United States v. Mursey Trust Company, 332 U.S.L. 234 (1947). Taggart v. United States, 17 Ct. Cl. 322, 327 (1881).

An Authorized Certifying Officer of the Bonneville Power Administration requested advice concerning the priority of payment among competing claimants for funds withheld under a construction contract. The setoff of fire suppression costs for a forest fire which occurred during the performance of the contract is appropriate even though the amount and liability are disputed. The Forest Service claim for the setoff of funds withheld under the contract has priority over the claim of payment bond surety, which is merely a subrogee of the contractor and creditor of the Government. (Author/SC)

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DECISION



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

FILE: B-188473

DATE: August 3, 1977

MATTER OF: Bonneville Power Administration

DIGEST:

1. Set-off of fire suppression costs from funds withheld under contract is appropriate even though amount and liability therefor is disputed.
2. Purported assignment by one corporation of payments under Government contract of another corporation is invalid absent evidence in record of compliance with notice requirements of Anti-Assignment Act and evidence of relationship of corporations. Even assuming purported letter of assignment and assignment itself satisfied act, prior Forest Service claim for set-off of withheld funds has priority. "No set-off" provisions of Act incorporated into contract are inapplicable.
3. Forest Service claim for set-off of funds withheld under contract has priority over claim of payment bond surety which is merely subrogee of contractor and creditor of Government.

An authorized certifying officer of the Bonneville Power Administration (BPA) has requested our opinion concerning the priority of payment among competing claimants for funds withheld under a construction contract.

BPA contract No. 14-03-4288A was awarded on April 19, 1974, to Crow Rock Products, Inc. (Crow), for the construction of access roads and right-of-way for power transmission facilities through an area including national forest lands in the state of Washington. A forest fire occurred during the course of performance by a subcontractor to Crow, Sverdsten Logging Company, Inc. (Sverdsten), incident to which the United States Forest Service incurred \$36,989.41 in fire suppression costs. The Forest Service has requested that the BPA set off this amount from funds remaining under the contract to reimburse the Forest Service for the costs of fire suppression in accordance with paragraph 4-506 of the contract which reads as follows:

"4-506. FIRE PREVENTION AND SUPPRESSION. A. The contractor shall do everything reasonably within his power and shall require his employees to do everything reasonably within their power, both independently and upon request to prevent and suppress fires on or adjacent to Forest Service lands. The contractor shall place his employees at the disposal of the Forest Service in case of fire on or near their lands. The Forest Service will pay the contractor at current fire fighter wage rates when his employees are used on fires for which the contractor is not responsible. The contractor shall pay to the Government the suppression costs and damages resulting from any fires caused by his operations."

The Forest Service contends that the fire was caused by Crow's subcontractor, Sverdsten, and that Crow is liable under this contract provision for reimbursement of the suppression costs incurred by the Forest Service. Sverdsten's liability insurance carrier has denied liability and questions the amount of the fire suppression costs claimed by the Forest Service. Crow has filed an action in a state court against Sverdsten in which one of the issues is the liability of Sverdsten for the fire.

The BPA has also received a claim from Crow's Miller Act surety for payment of the amount withheld on behalf of the Forest Service on the basis of substantial claims paid by the surety. Further, the file contains a purported notice of an alleged assignment by Poppie Corporation of payments under the BPA contract with Crow to the First Bank of Troy, Idaho; the bank contends that Poppie Corporation is the new name of Crow Rock Products, Inc., and that the assignment of accounts receivable of Crow was taken as collateral security on a note taken under a Small Business Administration loan guarantee and on other loans.

Counsel for Crow's surety argues that the amount of the claim and liability therefor are disputed, and that set-off is therefore inappropriate, citing Richmond, F. & P. R. v. McCarl, 62 F.2d 203 (1932) and Hines v. United States ex rel. Marsh, 105 F.2d 85 (1939). The former case, however, discusses the Government's right of set-off under chapter 149 of the Act of March 3, 1875, 18 Stat. 481, prior to its amendment by chapter 212 of the Act of March 3, 1933, 47 Stat. 1516, and is inapposite here because the language relied upon by counsel was deleted. The statute, as amended, codified at

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31 U.S.C. § 227 (1970), pertains only to set-offs by the Government against the liquidated claims of judgment creditors, and was so applied in the Hines case. The statute, as amended, does not deal with the Government's right of set-off prior to entry of a court judgment. Project Map, Inc. v. United States, 486 F.2d 1375 (Ct. Cl. 1973).

In the absence of a judgment here against the United States, the right of set-off is inherent in the United States and extends to debts owed as a result of separate and independent transactions. United States v. Munsey Trust Company, 332 U.S. 234 (1947). Where a person is both creditor and debtor to the Government, the accounting officers are required by law to consider both the debts and credits and set off one indebtedness against the other, and certify only the balance. Taggart v. United States, 17 Ct. Cl. 322, 327 (1881). This Office has held that the Government may setoff the estimated amount of claims due the United States by withholding amounts due under Government contracts. Metro Machine Corporation, B-187178, October 7, 1976, 76-2 CPD 323; Nabisco, Inc., B-184506, October 29, 1975, 76-1 CPD 189. Set-off of the amount of estimated debts is authorized notwithstanding the absence of final resolution of a contract dispute underlying the debt. Frank Biscoe Company, Inc., B-161283, March 16, 1976, 76-1 CPD 177; B-178368, September 24, 1973.

In view of the foregoing, we are of the opinion that set-off, contingent upon the relative priorities of the claimants is appropriate.

With respect to the claim of the Bank of Troy, assignments of accounts receivable from the United States can be lawfully accomplished only through compliance with the Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 203, 41 U.S.C. § 15 (1970). Banco Machine, Inc., 55 Comp. Gen. 155 (1975), 75-2 CPD 111. Assignees must comply with the requirement for written notice of assignments as stated in the Act, as follows:

"* * * file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing office: if any, designated in such contract to make payment."

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The record provides no evidence that the Bank of Troy has satisfied the notice requirements set forth in the statute; neither has the bank demonstrated by acceptable evidence the relationship of Poppie Corporation and Crow. Furthermore, even if the bank's letter to the contracting officer dated July 28, 1976, notifying him of the purported assignment satisfied the requirements of the Act and established the validity of the assignment, it would not be sufficient to establish the bank's claimed prior right to payment of the withheld funds. The contract contains an Assignment of Claims clause which incorporates the "no set-off" provisions of the Assignment of Claims Act, as amended, supra. This section places the following limitation on the Government's right of set-off:

"(payments) * * * shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation * * * (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes * * *." 41 U.S.C. § 15, 31 U.S.C. § 203.


As we noted above, the Forest Service claim for fire suppression costs arises under the express terms of the contract, rather than independent thereof, and involves neither renegotiation, fines, penalties or taxes. Consequently, the "no set-off" provision of the contract does not apply to the claim of the Forest Service. In this situation, the common law of assignments governs the relative priorities of the parties and it is well settled that the Government may setoff against an assignee any claims which have matured prior to the assignment. South Side Bank and Trust Company v. United States, 271 F.2d 813 (1955); 37 Comp. Gen. 318 (1957); 20 Comp. Gen. 458 (1941). The Forest Service request for set-off directed to the BPA is dated March 28, 1975, 16 months prior to the bank's purported notice of assignment. We are of the opinion that the claim of the Forest Service has priority over that of the Bank of Troy.

This leaves only the question of the surety's possible right to the funds withheld. We have been advised that the payments the surety allegedly made on behalf of Crow were made in fulfillment of its obligations under the payment bond required by the contract rather than under a performance bond.

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A surety which completes the contract under a performance bond becomes subrogated to the rights of the Government and is entitled to any withheld funds. It is well settled, however, that a payment bond surety which pays the contractor's laborers and materialmen is merely a subrogee of the contractor and a creditor of the Government. The Government may, of course, setoff claims against its creditors. United States v. Munsey Trust Co., supra; Travelers Indemnity Co., B-187456, November 4, 1976, 76-2 CPD 382.

In the circumstances set forth above, therefore, we conclude that the BPA may properly setoff the funds claimed by the Forest Service for the costs of fire suppression.


Deputy Comptroller General
of the United States