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W. Thompson
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DECISION



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

FILE: B-167886, B-174985 DATE: June 1, 1978

MATTER OF: Federal Contractors

DIGEST:

Setoff of payments retained under contract against debts owed Government by performance bond surety that completed contract is proper even though surety is being liquidated in State court proceeding, since debts and credits being set off accrued before commencement of liquidation proceeding.

The Indiana Department of Insurance (Indiana) has appealed the settlement of our Claims Division in the case of Federal Contractors, Inc. (Federal), B-167886, B-174985, April 9, 1976.

Federal was awarded contract No. DABF15-70-C-0097 by the Department of the Army (Army). When Federal defaulted, the surety under the performance bond, United Bonding Insurance Company (UBIC), completed the contract work. Contract payments in the amount of \$22,116.06 were retained by the Government. The Army assessed, under the contract, liquidated damages of \$4,060, damages for inspection costs of \$272.24 and damages of \$25 for cleaning the work area. This amount was set off against the \$22,116.06, leaving \$17,758.82 still owed under the contract.

While UBIC did not assert a claim for the retained funds, its right to them as a completing surety under a performance bond was recognized. Trinity Universal Company v. United States, 382 F.2d 317 (1967). Our Claims Division determined that the retained funds were proper for setoff against debts owed the United States by UBIC under other contracts. Since UBIC's debts exceeded the amount retained, the entire amount was set off.

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Liquidation of UBIC was begun in the State of Indiana on February 18, 1971. Indiana now disputes the propriety of the setoff of the retained funds against the UBIC debts. Indiana states that this set-off was " * * * in contravention of Indiana law and the jurisdiction of Superior Court No. 7, Marion County, Indiana, which governs the affairs of the Surety in Liquidation." According to Indiana, the Government subjected itself to local jurisdiction by filing claims in the liquidation proceeding, and is therefore bound by local procedures and law. Indiana argues that the Government should pay the retained funds to the Surety in Liquidation for the benefit of all creditors who have filed claims in the liquidation proceeding. Indiana also disputes the validity and amount of several of the debts against which the retained funds were set off.

The United States Supreme Court stated, in United States v. Munsey Trust Co., 332 U.S. 234, 239-240 (1947), that:

" * * * The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.' Gratiot v. United States, 15 Pet. 336, 370; McKnight v. United States, 95 U.S. 179, 186. More than that, federal statute gives jurisdiction to the Court of Claims to hear and determine 'All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court * * *.' Judicial Code § 145, 28 U.S.C. § 250. This power given to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication, gives power to the Comptroller General to do the same, subject to review by that court." (Emphasis added.)

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The right of setoff is inherent in the United States and extends to debts owed as a result of separate and independent transactions. United States v. Munsey Trust, supra. Also, the Government may set off 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. Such setoff is proper even if the liability and amount of the debts are in dispute, with the exception of setoffs against the liquidated claims of judgment creditors. Bonneville Power Administration, B-188473, August 3, 1977, 77-2 CPD 74.

We have consistently held that setoff is proper when the debtor is in proceedings under the Bankruptcy Act, 11 U.S.C. § 1 et. seq. (1970), if the debts and credits to be set off occurred before the filing of the petition in bankruptcy. See, e.g., B-147763, B-158743, April 27, 1966. The right to setoff in such cases is specifically provided for in 11 U.S.C. § 108 (1970).

Regarding Indiana's argument that by filing proofs of claims against UBIC in the liquidation the Government subjected itself to the jurisdiction of the Indiana court and the application of Indiana law, the Government does not, by seeking affirmative relief in a State court, subject itself to all of the incidents of State law which govern other suitors. See, e.g., United States v. John Hancock Mut. Ins. Co., 364 U.S. 301 (1960); United States v. Summerlin, 310 U.S. 414 (1940). Generally, where the United States is found to have subjected itself to State court jurisdiction, the United States initiated the suit as plaintiff. See, e.g., United States v. Martin, 267 F.2d 764 (1959). In this case, the United States is not a plaintiff and did not initiate the proceedings. Therefore, we do not think that the United States has waived its inherent right to setoff by filing proofs of claims in the Indiana liquidation proceeding.

The record shows that all debts and credits set off here accrued before the Indiana liquidation proceedings were begun. Setoff then would appear to be proper if the standard of 11 U.S.C. § 108 (1970) is applied by analogy. Even if Indiana law is applied, the result should

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be the same, as § 27-1-4-16, Burns Indiana Stat. Ann.
(1975), provides for setoffs in insurance company
liquidations in a manner very similar to that of
11 U.S.C. § 108.

While Indiana disputes the validity and amount of
certain of the debts, as we stated above, such a dispute
only prevents setoff where the liquidated claims of
judgment creditors are involved, which is not the case here.

Accordingly, the April 9, 1976, settlement of our
Claims Division is affirmed.


Deputy Comptroller General
of the United States