



Comptroller General
of the United States

Washington, D.C. 20548

Full
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Decision

Matter of: Priority of Payment Between Payment Bond Surety
and Contractor

File: B-238695

Date: September 13, 1991

DIGEST

Where contractor and payment bond surety both claim entitlement to final contract payment, the payment should be held by the government pursuant to Federal Acquisition Regulation section 28.106-7(b) until there is an agreement between the parties or a judicial determination of their rights.

DECISION

The Army Corps of Engineers requests an advance decision as to whether a contractor or its payment bond surety has priority to funds due under a contract. We conclude that under Federal Acquisition Regulation (FAR) § 28.106-7(b), the Corps is authorized to pay either party only upon an agreement between the parties or a judicial determination of their rights.

BACKGROUND

On September 2, 1983, the Army Corps of Engineers, Omaha District, awarded contract No. DACW45-83-C-0360 to Associated Industrial Contracting, Inc. for the rehabilitation of a water storage tank at Garrison Dam, Riverdale, North Dakota. The contract price was \$147,741. Consistent with requirements of the Miller Act, 40 U.S.C. §§ 270a-270d (1988), Associated provided performance and payment bonds issued by The Travelers Indemnity Co., its surety.

The contractor completed the project on September 21, 1984. Because the required completion date was September 1, however, the Corps withheld \$2,800 as liquidated damages for 20 days late performance.

On June 10, 1986, Associated submitted a claim for \$89,410.86 to the Corps on behalf of Universal Applicators, Inc., one of its subcontractors under the contract, for increased costs allegedly resulting from a constructive suspension of the contract by the government. The amount claimed included the

\$2,800 in liquidated damages. The contracting officer issued a final decision on the claim on August 4, 1986, in which he modified the required completion date and authorized the release of the \$2,800 to the contractor. He denied the remainder of the claim.1/

On October 3, 1986, counsel for Travelers informed the contracting officer that Travelers had paid \$1,745 to another subcontractor, Becker Electric, for labor and materials provided to Associated during contract performance. Travelers alleged that it therefore was entitled to \$1,745 of the funds retained by the Corps. Travelers asserted further that it was entitled to the remainder of the funds because Associated had assigned to Travelers its right to all contract payments.2/

Meanwhile, Universal had filed suit against Associated and Travelers on June 17, 1986, in the United States District Court for the District of North Dakota. Universal claimed damages in the amount of \$70,680.52 for extra expenses incurred on the contract. On December 17, 1986, Travelers paid \$32,500 to Universal under the payment bond to settle the subcontractor's claim against Travelers.

Associated asserts that Travelers should not receive the fund because it failed to conduct an investigation before settling Universal's claim. Because Travelers paid the claim voluntarily and, Associated contends, in defiance of its instructions, Associated believes the surety is precluded from seeking reimbursement from the funds held by the government.

The Army is withholding the \$2,800, plus interest, until the identity of the proper payee can be determined. The contracting officer has advised both the contractor and

1/ Associated subsequently filed an appeal with the Corps of Engineers Board of Contract Appeals. The Board denied the appeal on April 21, 1988.


2/ Although Travelers alleges that Associated assigned its right to the final payment, the alleged assignment does not qualify under the Assignment of Claims Act, 41 U.S.C. § 15 (1988). Generally, an assignment of accounts receivable from the United States lawfully can be accomplished only through compliance with the Act, which provides that money due under a government contract may be assigned only to a bank, trust company, or other financing institution. See 55 Comp. Gen. 155 (1957). We decided in a prior case that Travelers does not qualify as a "financing institution" under the Act. B-187456, Nov. 4, 1976.

Travelers that the government considers itself a mere stakeholder and is obligated to withhold payment until agreement is reached between the contractor and the surety, or until there is a judicial determination of the rights of the parties. Because the parties have been unable to reach agreement, and litigation costs would exceed the amount in issue, we have been asked to provide an advance decision.

DISCUSSION

Associated has performed the contract, and, to our knowledge, the government has no further interest in this matter other than as a stakeholder with respect to the remaining funds. The funds ordinarily would be owed to the contractor had it paid the materialmen and subcontractors. When the government is in the position of stakeholder, however, it may not simply pay the contractor if, as in this case, the surety has given adequate notice of competing claims to the fund. American Fidelity Fire Ins. Co., 58 Comp. Gen. 64 (1978), 78-2 CPD ¶ 333 (citing Home Indem. Co. v. United States, 376 F.2d 890, 893 (Ct. Cl. 1967)).

FAR § 28.106-7(b) provides that a contracting officer shall withhold final contract payment if the surety provides written notice that the contractor has not paid its subcontractors or suppliers.^{3/} In these circumstances, final payment is authorized only upon agreement between the contractor and the surety or a judicial determination concerning the rights of the parties. See Fish and Wildlife Service -- Payment of Retained Contract Proceeds to Sureties, B-234582, Dec. 11, 1990. Accordingly, payment can be made by the Corps only upon agreement between Associated and Travelers or a judicial determination of their rights. We recognize that the cost of litigation likely would exceed the amount withheld, but we find nothing in FAR § 28.106-7 that would allow either the contracting officer or this Office to resolve what is essentially a dispute between private parties.

for 
Comptroller General
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^{3/} The surety is required under the FAR to agree to hold the government harmless from any liability resulting from withholding final payment. The record does not indicate whether the surety in this case has so agreed.