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R. J. Allen, Jr.

DECISION



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

FILE: B-190180

DATE: June 22, 1976

**MATTER OF: Department of the Army, Corps of Engineers
Request for Advance Decision**

DIGEST:

As between Small Business Administration (SBA) and Corps of Engineers (agent for the U.S. Postal Service), Corps is entitled to proceeds of property which is the product of section 8(a) subcontractors' contract. By agreeing that title to such property would vest in the Corps upon the Corps making progress payments to the 8(a) subcontractor, SBA waived security interest in the property.

The Department of the Army, Corps of Engineers (Corps), Small Business Administration (SBA), and United States Postal Service (USPS) have submitted the question of whether the SBA or the Corps and USPS are entitled to the proceeds of the sale of the personal property of the Nartrans Manufacturing Company (Nartrans).

Briefly, USPS asked the Corps to purchase mechanization equipment, consisting of metal containers and tow bars, for Bulk Mail Centers. On February 6, 1974, the Corps awarded a contract (DACW87-74-C-9007) for the equipment to the SBA under the provisions of Section 8(a) of the Small Business Act (16 U.S.C. 637(a)(2) (1970)). SBA then awarded a subcontract (SBA 9108(a)74-C-170) to Nartrans on March 11, 1974 for \$1,661,764.14. At this time SBA had outstanding loans to Nartrans of \$338,000.00. In the approximately one year period between the date of award and the Government's termination of Nartrans contract for default, the Corps paid progress payments, beginning June 12, 1974, in the amount of \$823,725.00 and the SBA advanced an additional \$450,000 effective August 9, 1974. By the contract completion date, Nartrans had constructed and delivered 10 containers valued at \$5,269.70. In addition, SBA sold Nartrans' inventory on December 8 and 9, 1975 and realized a net of \$361,174.24.

SBA's position is that it is entitled to retain the proceeds of the forced sale on two grounds: first,

SBA holds a perfected security interest in all of the property sold which is prior in time to the Corps' contract with SBA; second, SBA has a lien paramount to any interest of the Corps by virtue of making advance payments pursuant to 41 U.S.C. 255 (1970).

The Corps points to paragraph 59 of the General Provisions of its contract with the SBA regarding progress payments for small business concerns. That paragraph states in applicable part as follows:

"Progress payments shall be made to the contractor as work progresses, from time to time upon request, in amounts approved by the Contracting Officer upon the following terms and conditions:

* * * * *

"(d) Title. Immediately upon the date of this contract, title to all parts; materials; inventories; work in process; special tooling * * *; nondurable (i.e. noncapital) tools, jigs, dies and fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids * * *; and drawings and technical data * * *; theretofore acquired or produced by the contractor and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the contractor and allocated or properly chargeable to this contract as aforesaid shall forthwith vest in the Government upon said acquisition, production or allocation."

The Corps contends that title to the property covered by Clause 59 vested in the Corps and that this is the same property which generated the proceeds in question.

SBA states that, regardless of the fact that the "Progress Payment for Small Business Concerns" Clause

is listed in the General Conditions section of its contract with the SBA, such clause is not applicable to SBA. The Corps' contract with the SB' states under Section 6 "Special Clauses for 8(a) Prime Contracts" at subsection d that:

"The general provisions of this contract are not operative between SBA and the [Corps] but they are applicable to SBA's subcontractor."

As stated above, the Corps' claim is based on the terms of the contract provision vesting title in the Corps of all Nartrans' property allocable to or the product of the contract. The SBA's position is that the contract clause upon which the Corps relies does not apply to SBA. We agree with the SBA that Clause 59(d) was not in its contract with the Corps. The SBA did agree, however, that clause 59(d) was applicable as between the Corps and Nartrans.

The law is well settled that the SBA can waive its rights in its security interest. SBA expressly agreed here that if the Corps made progress payments to Nartrans, title to certain of Nartrans' property would vest in the Corps. In our view, that agreement is sufficient to waive SBA's security interest in the contract property. See Baker Products Credit v. Long Cr. Meat 266 Ore. 643, 513 P. 2d 1129 (1973).


SBA also argues that by advancing monies pursuant to 41 U.S.C. § 255 (1970) and taking a security interest in the property in question "paramount to all other liens" it has superior right to the proceeds of the sale. We note, however, that the Corps took title to all property covered by Clause 59(d) as if it were acquired on March 11, 1974, the date of the contract, see U.S. v. Buder, 414 F. Supp. 1 (1975) (affd. 538 F.2d 333 (1976)), while SBA's advance payment to Nartrans was effective August 9, 1974. Therefore, we must conclude that SBA's security interest, being only in Nartrans' property, did not attach to the property or proceeds in which the Corps had title.

It is not clear from the record how much of the property in Nartrans' possession at the time of the sale

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was covered by the terms of Clause 59(d). It is clear, however, that the Corps' claim extends only to the proceeds of property properly allocable or chargeable to the contract. Statements have been made to the effect that all of the property in Nartran's possession was so allocable. From the present record, however, we cannot determine if this is true. Therefore, we are leaving it to SBA, the Corps, and the USPS to determine the extent to which the proceeds of the sale are attributable to property generated under the contract.


Acting Comptroller General
of the United States