

Transp.

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DECISION



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

[Disbursement of Contract Retainages]

FILE: B-194931

DATE: April 10, 1980

MATTER OF: Department of the Interior - request
for advance decision *33*

DIGEST:

Miller Act surety which had opportunity to protect own interests regarding expenditures allegedly incurred after responding to Government "claims of defective workmanship" has not established entitlement to contract retainage held by Government.

The Department of the Interior (Interior) has requested an advance decision as to whether contract retainages under a construction contract No. CX-9000-3-0087, awarded by the National Park Service, Pacific Northwest Region, should be paid to the contractor's surety or to the Internal Revenue Service (IRS) in satisfaction of a tax levy against the contractor. The surety, National Surety Corporation, claims priority over IRS under its performance bond.

The contractor, Irvin and Company (Irvin) entered into this contract for the construction of certain facilities at McKinley National Park on March 7, 1973. During the course of the construction a dispute arose regarding the scope of the work required under the contract. Irvin eventually completed the construction to the satisfaction of the Government, after allegedly incurring additional expenses in an amount in excess of \$150,000 as the result of performing the disputed work. Some of this expense resulted from changes directed during the course of initial construction, and the remainder was incurred in the fall of 1973 when the contractor was required to rectify certain construction deficiencies.

In this regard, the surety alleges that it was contacted and "requested to respond to claims of defective workmanship in the fall of 1973," and that it "expended funds in completing work which was later

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claimed to be outside the scope of the work." The surety advised the contracting officer by letter dated October 19, 1973, of its interest in the contract retainages. Finally the surety asserts that "[n]o question existed in the mind of the contracting officer, National Surety and the contractor that the work which the Government was insisting be done after August 3, 1974 (sic) [the work was completed in 1973] was done through the financial participation and other assistance of the surety."

The IRS served three notices of levy on the contracting officer (on December 3, 1973, January 29, 1974, and November 11, 1974) demanding payment from contract retainages for taxes outstanding against Irvin. The Department of the Interior paid the first two such levies (for a total of \$29,576.94), but withheld payment of the third levy for \$6,164.09 after National asserted that it had a priority claim to the remaining \$6,329.60 contract retainage.

The allegedly additional work eventually became the subject of an appeal to the Interior Board of Contract Appeals. Included in the claim was the work which the surety asserts was completed pursuant to its performance bond. By settlement agreement dated March 6, 1979, Irvin and the Department of the Interior agreed to settle the claim for \$75,000. It was expressly agreed that the \$6,329.63 in disputed retainage was not part of the settlement, and that final disposition of this sum remained at issue. The \$75,000 payment was sent to the contractor at the surety's Seattle, Washington, office.

It is well settled that a Miller Act surety which has completed performance of a contract after default by a contractor is entitled to withheld funds free of setoff. Trinity Universal Insurance Company v. United States, 382 F.2d 317 (1967); Security Insurance Company of Hartford v. United States, 428 F.2d 838 (1970); Aetna Casualty and Surety Company v. United States, 435 F.2d 1082 (1970). It is

also settled law that if such a surety expends money under a payment bond, the Government may set off against retainages due the contractor for debts owed to it by the contractor even as a result of separate and independent transactions. United States v. Munsey Trust Co., 332 U.S. 234 (1947).

The surety here argues that it is a completing surety and therefore has a priority claim to the retainage. However, as a prerequisite to entitlement to any payment from contract retainages for money provided under either the payment or performance bond, the surety must establish that it has expended more than it has already received from the Government in reimbursement. See Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962); Travelers Indemnity Company - Reconsideration, B-187456, March 8, 1977, 77-1 CPD 169.

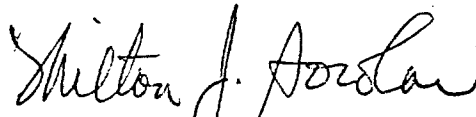
We have reviewed the expenses allegedly incurred by the contractor, as broken down in a letter and exhibits by Irvin to Interior, dated December 12, 1974, which sets forth the claim which formed the basis of the above-referenced \$75,000 compromise. We note that the majority of the expenses relate to allegedly "additional" work performed prior to the date the surety claims it was called upon to step in. The only items claimed which specifically relate to any work performed subsequent to June 1973 (i.e., work done in "fall" of 1973) are as follows:

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|----|---|-------------|
| 1. | "Travel and Expedite Material
and Tools"
(9/23/73 - 10/17/73) | \$ 4,336.00 |
| 2. | "Releveling Lobby"
(9/24/73 - 10/18/73) | \$11,769.00 |
| 3. | "Repair Sheet Rock and
Wainscoat" | \$ 8,220.00 |
| 4. | "Leveling Desk" | \$ 636.00 |
| 5. | "Replace and Realign Trim,
Doors, Jambs" | \$ 5,959.00 |

6. "Replace Steps"	\$ 1,000.00
7. "Cleanup and move out"	<u>\$ 7,450.00</u>
Total	\$39,370.00

Thus a total of only \$39,370 is alleged to have been spent after the date the surety asserts it stepped in to complete the job.

Since the \$75,000 settlement payment was directed to the surety's office, we believe it had an ample opportunity to protect its own interests insofar as the \$39,370 is concerned, and there is nothing on the record to indicate why the surety's claim has not been satisfied. Accordingly, we do not believe the surety has established entitlement to the \$6,370 in undisbursed contract retainages.



For the Comptroller General
of the United States