DECISION

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

24930

FILE: B-206799 DATE: April 21, 1983

MATTER OF: Joseph Slemp

DIGEST:

1. Where the Government has received notice of a valid assignment, but thereafter erroneously pays the assignor, it remains liable to the assignee for the erroneous payment.

2. Although a third party guarantor repaid the assignee financing bank the sum outstanding on a loan made by the bank to a Government contractor, the Government remains obligated to pay the assignee bank since the Government is a stranger to transactions between the assignee and the third party.

3. Third party guarantor becomes subrogated to the financing bank's rights under the latter's assignment of a Government contractor's right to contract payments where the guarantor paid the contractor's debt to the financing bank pursuant to obligation as guarantor of the loan. Accordingly, the guarantor stands in the place of the original financing bank and obtains the right to be paid by the Government in the amount which the guarantor paid to the bank.

4. Because of apparent validity of both assignee's claim and subrogee's claim, GAO recommends that both parties be requested to direct the Government as to form in which payment should be issued, with appropriate wavier of possible claims sufficient to provide the Government with an acquittance which shall be binding on both.

Joseph Slemp claims payment of $12,000 which represents money paid to Tri-Tech Corporation (Tri-Tech) by the National Institutes of Health (NIH) under contract No. 263-77-C-0690. Mr. Slemp asserts that the money was improperly paid to the assignor (Tri-Tech) after an assignment of contract proceeds had been made to the Guaranty Bank and

Trust Company (Guaranty Bank); Mr. Slemp argues that he has become subrogated to the bank's claim against NIH by virtue of having paid the bank in full as endorser of a note which the bank was unable to collect from Tri-Tech.

We allow the claim.

The underlying contract was awarded by NIH to Tri-Tech on September 30, 1977, at which time Mr. Slemp was president of Tri-Tech. On December 12, 1977, Tri-Tech presented NIH with an assignment of claims under the contract in favor of Guaranty Bank. The contract was modified on that date to provide that payment of money due under the contract to Tri-Tech would be paid to the assignee, Guaranty Bank. NIH concedes that this constituted a valid and binding assignment with proper notice under the Assignment of Claims Act, 31 U.S.C. § 203 (now to be codified at 31 U.S.C. § 3727), and 41 U.S.C. § 15 (1976).

On September 10, 1978, in consideration of the assignment, Guaranty Bank made a loan to Tri-Tech in the amount of $15,500 to finance Tri-Tech's performance under the NIH contract. Mr. Slemp, individually, guaranteed payment of this loan by endorsement of Tri-Tech's promissory note to Guaranty Bank. On November 22, 1978, NIH made a payment under the contract directly to Tri-Tech in the amount of $12,000. This amount was subsequently paid over by Tri-Tech to the Internal Revenue Service (IRS) in response to a notice of levy served by the IRS on both NIH and Tri-Tech on November 27, 1978. On March 21, 1979, NIH made another payment directly to Tri-Tech in the amount of $6,000. This latter amount was paid over to Guaranty Bank in partial satisfaction of Tri-Tech's outstanding debt. Thereafter, the bank requested either NIH's assistance in retrieving the $12,000 erroneously paid to Tri-Tech or reimbursement by NIH of the funds owed to the bank under the assignment. NIH denied the bank's request on the grounds that the money was properly paid to the IRS; the bank then unsuccessfully attempted to collect the balance due from Tri-Tech. Next, the bank requested and received payment direct from Mr. Slemp as endorser of the note. In consideration for Mr. Slemp's full payment under the note, the bank assigned its interest, without recourse, to Mr. Slemp. Mr. Slemp's claim against NIH is based on his rights arising from payment of this debt.

NIH concedes that its $12,000 payment to Tri-Tech, the assignor, was improperly made in view of the valid assignment to the Guaranty Bank. As NIH also concedes, ordinarily, once the Government has received notice of a valid assignment and thereafter erroneously pays the assignor, it

remains liable to the assignee for the amount of the erroneous payment. Central National Bank of Richmond, 91 F. Supp. 738 (Ct. Cl. 1950); Centennial Systems, Incorporated, B-196275, October 29, 1981, 81-2 CPD 403. However, NIH argues that the IRS levy might (but concededly probably would not) have been valid against the Guaranty Bank and, therefore, NIH argues that it might be valid as against Mr. Slemp--with the result that Mr. Slemp actually did not suffer any injury as the result of the erroneous payment. NIH also argues that Mr. Slemp's rights as a subrogee of the bank are a matter of equity and it would be "inequitable" to permit Mr. Slemp to gain by shifting to his status as an individual with respect to this claim when he appeared to act as an officer or employee of Tri-Tech with respect to the other relevant transactions at issue.

We find these arguments inapposite. First, the record clearly establishes that Mr. Slemp was no longer president of Tri-Tech at the time that he endorsed the note to Guaranty Bank and there is no evidence whatsoever that he acted in anything other than his individual capacity during any of the relevant transactions. With respect to the IRS levy, it was served after NIH made payment to Tri-Tech. In addition, the fact that an assignee has been paid once by a third party is not determinative of the assignee's rights or of the Government's obligations under an assignment. This is because the Government is a stranger to any contractual arrangements between the assignee and any third party. Trilon Research Corporation, 54 Comp. Gen. 137 (1974), 74-2 CPD 116. Thus it is clear that the Government continues to be obligated in the amount of the contract proceeds improperly paid to Tri-Tech, and as a stakeholder the Government's only concern is that it disburses the money to the appropriate recipient and receives a valid acquittance on the claim.

Mr. Slemp has two alternate bases for recovery; one as the third party assignee of the note, the other as subrogee to Guaranty Bank's claim against NIH. Mr. Slemp's claim as a third party assignee is invalid because the assignment violates the Assignment of Claims Act. See Berkeley v. United States, 276 F.2d 9 (Ct. Cl. 1960). Guaranty Bank's assignment of the note to Mr. Slemp was invalid under the act for a variety of reasons, including the fact that Mr. Slemp is not a qualifying financial institution, he did not advance funds for the performance of the Government contract, and proper notice was not given to NIH. See 49 Comp. Gen. 44 (1969).

However, notwithstanding the fact that Mr. Slemp is disqualified by statute as an assignee, he may still be permitted to recover as a subrogee in equity, if he obtained his subrogation rights by operation of law. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); Numax Electronics, Inc., 54 Comp. Gen. 580 (1975), 75-1 CPD 21. Here, it is clear that Mr. Slemp met the general subrogation requirements in that he discharged Tri-Tech's obligation to Guaranty Bank under compulsion in his capacity as guarantor of Tri-Tech's note and not merely as a volunteer. See United States v. Munsey Trust Co., 332 U.S. 234 (1947); Prairie State Bank v. United States, 164 U.S. 227 (1896).

Mr. Slemp has a mixed status as both a subrogee and an assignee. In First National City Bank v. United States, 548 F.2d 928 (Ct. Cl. 1977), the Court of Claims found that a plaintiff with such a mixed status, while disqualified as an assignee, was entitled to recover as a subrogee. In reaching its conclusion, the court emphasized the course of conduct of the Government in dealing directly with the subrogee prior to the filing of the claim. First National, supra, at 936, 937. No such course of conduct is present between the Government and Mr. Slemp in the present case. Accordingly, there is some question as to Mr. Slemp's right to payment as a subrogee.

Nevertheless, we find that either Mr. Slemp or Guaranty Bank has a valid claim. Thus, the Government's concern is that payment be made to the proper party in interest in order to obtain a valid acquittance. To obtain this result, we recommend that HHS request instruction from Mr. Slemp and the bank regarding which party or parties should be issued the check, with whichever party (if either) not appearing on the check also providing a waiver of claim against the Government. Upon receipt of such waiver and instructions, HHS should issue a check payable as directed by the parties.

for /Harry R. Van Cleve
Comptroller General
of the United States