

DECISION

24947
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-210243**DATE:** April 22, 1983**MATTER OF:** Alaska Security Agency, Ltd.**DIGEST:**

1. The Department of Labor's claims to withheld funds on behalf of workers underpaid by a contractor in violation of the Service Contract Act and the Contract Work Hours and Safety Standards Act (CWHSSA), and to liquidated damages for violation of the CWHSSA, have priority over an Internal Revenue Service lien for unpaid taxes.
2. The Department of Labor's claim to withheld funds on behalf of workers underpaid by a Government contractor has priority over the Government's claim for as yet undetermined liquidated damages stemming from the contractor's violation of the Contract Work Hours and Safety Standards Act.
3. An IRS tax lien on funds withheld from a contractor has priority over a state levy of attachment where the tax lien was filed first.
4. The Government may not be deprived of its right to a prompt payment discount where the delay in making the payment is caused by the contractor. Further, an agency's claim to a prompt payment discount on funds withheld from a contractor who has not submitted invoices takes priority over claims resulting from wage underpayments and over an Internal Revenue Service tax lien.

This is in response to a request from a certifying officer at the Federal Aviation Administration (FAA) for a decision about the proper disposition of funds otherwise due the Alaska Security Agency, Ltd. (ASA) under Contract No. 04-82-C-10028 for security guard services from November 1981 to November 1982. The FAA has

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withheld payment for work performed during August and September 1982 because the agency never received invoices for those months and because of competing claims to the funds withheld.

The following parties are competing for the \$15,423.42 in question:

1. The Department of Labor (DOL) requested on October 14, 1982, that the FAA withhold \$11,279.81 from contract funds for distribution to ASA employees as a result of labor stipulation violations which resulted in wage underpayments to the employees in that amount.
2. The Internal Revenue Service (IRS), pursuant to a Notice of Levy dated August 31, 1982, claims \$63,590.69 for ASA's unpaid taxes.
3. The DOL intends to claim liquidated damages resulting from the labor stipulation violations; however, it has not as yet determined the amount of liquidated damages owed by the contractor to the Government for the violations.
4. The State of Alaska claims \$2,296.93 pursuant to a November 1982 Writ of Attachment obtained in state court.
5. The FAA itself claims 9 percent of the final payment due as a prompt payment discount because it never received invoices for the last 2 months of contract performance.

We hold that, after the deduction of the FAA's prompt payment discount, the withheld funds should be used to satisfy the underpaid workers claim and the liquidated damages claim. The remaining sums, if any, should be forwarded to the IRS.

DOL and IRS Claims

The Service Contract Act of 1965 (SCA), 41 U.S.C. §§ 351-358 (1976), provides that, as a general rule, contracts in excess of \$2,500 entered into by the United States to obtain services through the use of service employees must contain certain labor standards stipulations, including the payment of specified minimum wages. Section 3(a) of the SCA, 41 U.S.C. § 352(a), provides that so much of the accrued payment due on the contract may be withheld as is necessary to compensate underpaid employees and that, on order of the Secretary of Labor, any compensation found due shall be paid directly to the employees from the withheld monies. See also 29 C.F.R. § 4.187 (1982).

~~The Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. §§ 327-332 (1976), concerns the standard workweek and the requirement for overtime pay. The contractor that violates the CWHSSA is liable to the employees for the unpaid wages and to the Government for liquidated damages. 40 U.S.C. § 328(b)(2). The statute directs our Office to pay aggrieved employees, from any amounts withheld, funds which are administratively found to be due them.~~

The general rule is that the funds withheld for underpaid workers should be applied to the underpayments before being used to satisfy a tax debt owed to the Government. See, e.g., M.C.&E. Service & Support Co., Inc, B-189137, August 1, 1977, 77-2 CPD 65, rev'd. on other grounds, B-189137, May 19, 1978, 78-1 CPD 384; Cascade Reforestation, Inc., 56 Comp. Gen. 499 (1977), 77-1 CPD 250. The Government's claim for liquidated damages under the CWHSSA also has priority over an IRS tax lien, see Pacific Insurance Company, Ltd., B-180333, April 2, 1974, 74-1 CPD 163; B-161460, May 25, 1977, although the underpaid workers claim takes priority over the liquidated damages claim. 29 C.F.R. § 5.14(d)(2) (1982).

Thus, DOL's claims for the underpaid workers and for liquidated damages on behalf of the Government have priority, in that order, over the claim by the IRS for unpaid taxes.

The IRS and State of Alaska Claims

The IRS claim is superior to that of the State of Alaska. In general, "[a]s against a recorded federal tax lien, the relative priority of a state lien is determined by the rule 'first in time is first in right,' * * *." United States v. Equitable Life Assurance Society, 384 U.S. 323, 327 (1966). The Federal tax levy in this case, of which notice was served on the FAA on August 30, 1982, was filed before the State levy, by November 1982 writ of attachment. Therefore, the IRS claim has priority.

The Prompt Payment Discount

The question regarding the FAA's claim to 9 percent of the amount due as a prompt payment discount involves two issues: first, whether taking advantage of the discount is appropriate in this case, and second, what priority, in relation to the other claims, is to be accorded the FAA's claim to the amount represented by the discount.

The discount clause of the contract in question states that the prompt payment time period of 20 days is to be determined from the date the correct invoice is received in the office specified by the Government. In this case, the FAA received no invoices for August or September. The FAA's failure to pay was also occasioned by its receipt of the IRS and DOL notices.

The Government may not be deprived of its right to a prompt payment discount where the delay in making the payment is caused by the contractor. Philadelphia Scientific Controls Inc., B-184351, January 27, 1976, 76-1 CPD 48. ASA's failure to submit invoices, or alternatively, its failure to pay workers the proper wage rate in violation of the SCA and the CWHSSA, in addition to its actions which resulted in the IRS levy and state writ of attachment, are the cause of the Government's delay in making the final payment in this case. See Request for Advance Decision from Army Finance and Accounting Office--Reconsideration, B-201328, October 28, 1981, 81-2 CPD 353. Therefore, the FAA is entitled to the 9 percent discount.

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Moreover, the FAA's claim to the discount is superior to those of the other parties. The reason is that the withheld funds that represent the discount basically are not funds to which ASA is entitled under the contract. See Request for Advance Decision from Army Finance and Accounting Office--Reconsideration, supra. Thus, the FAA may take the 9 percent discount before paying the otherwise top priority claim.

In summary, the order of priority to be accorded to the competing claims in this case is as follows. The FAA may first deduct the 9 percent discount, and then pay as much of the withheld funds as needed to compensate the underpaid workers and to satisfy the Government's liquidated damages claim stemming from labor violations. Any remaining sum should be forwarded to the IRS to satisfy its claim.

for *Harry R. Van Cleave*
Comptroller General
of the United States