

**DECISION**

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

28222

**FILE:**

B-214905

**DATE:** May 15, 1984**MATTER OF:**

Watervliet Arsenal, Department of the Army

**DIGEST:**

Payment of withheld contract funds that are claimed by payment bond surety, the DOL for wage underpayments, and the IRS for tax indebtedness may be made in the full amount of the DOL claim, then of the IRS claim, with the remaining balance payable to the surety.

By letter dated April 5, 1984, the contracting officer at Watervliet Arsenal, Department of the Army (Army), requested a decision of our Office in regard to the disbursement of funds withheld under contract No. DAAA22-83-C-0133 between Dennis H. Tremont, Inc. (Tremont), and the Army.

By letter dated January 9, 1984, the Department of Labor (DOL) notified the Army that an investigation disclosed that Tremont had at that point failed to pay \$12,117.23 in wages and overtime in violation of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act (CWHSSA). In addition, \$100 in liquidated damages was computed to be due as a result of the CWHSSA violations. DOL requested that sufficient funds be withheld to cover the back wage deficiency. Shortly thereafter, the Internal Revenue Service (IRS) requested to be paid by the Army a sum of \$5,895.15 plus interest and penalty charges from the contract proceeds to satisfy the tax liability of Tremont.

On February 27, 1984, the attorney for International Fidelity Insurance Company (Fidelity), the payment bond surety for Tremont, wrote the Army and requested that the next \$23,867.59 which becomes due to Tremont be paid by the Army to Fidelity as reimbursement of the payment it made on Tremont's payment bond. The Army has requested that we determine the priority of the claims of the DOL, IRS, and Fidelity.

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As to the priority of claims between a payment bond surety and DOL for the benefit of the unpaid workers, 40 U.S.C. § 276a-2(b) (1982) provides, in pertinent part:

"If the accrued payments withheld under the terms of the contract . . . are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required . . . such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials . . ."

Since laborers have the right to recover unpaid wages from the surety, it follows that the claim of DOL for the benefit of unpaid workers prevails over the surety's claim. Forest Service Request for Advance Decision, B-211539, September 26, 1983.

The tax claim also has priority over the claim of a payment bond surety. United States v. Munsey Trust Co., 332 U.S. 234 (1947); United States Fidelity & Guaranty Co., et al. v. United States, 475 F.2d 1377 (1973); Forest Service Request for Advance Decision, supra; Robert L. Singleton; Capital City Construction, Inc., et al., B-189183, January 12, 1979, 79-1 CPD 17.

Concerning the priority between the unpaid wage claims (presented by DOL) and the IRS tax claim, this Office has held that available funds should be applied first to the wage underpayments. Cascade Reforestation, Inc., 56 Comp. Gen. 499 (1977), 77-1 CPD 250.

We conclude that from retained contract funds, the DOL's claim concerning wage underpayments should receive first priority. If the DOL's claim can be fully paid, then the claim of the IRS should be paid. Finally, if the IRS could be fully paid from contract funds earned by Tremont, remaining funds should go towards payment of Fidelity's claim if it is otherwise proper.

The contracting officer has inquired about the procedures involved in processing the funds withheld to

satisfy DOL's claim. Defense Acquisition Regulation  
§ 18-704.13 (1976 ed.) outlines the procedures.

*Milton J. Aorlan*

Acting Comptroller General  
of the United States