

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-214985 **DATE:** May 22, 1984**MATTER OF:** Cotton States Mutual Insurance Company**DIGEST:**

Where a Miller Act payment bond surety and the contractor had notified the agency of the surety's right to any contract retainages, but where the agency had erroneously made final payment to the contractor and a federal tax lien had attached to the final payment before the contractor could forward the final payment to the surety, the agency is not liable to the surety since a tax claim has priority over the claim of a payment bond surety.

The Department of the Navy, Naval Weapons Station, Yorktown, Virginia (Navy), has requested a decision as to whether the claim of a payment bond surety should be paid. Cotton States Mutual Insurance Company (Cotton States) has filed a claim for \$55,000 under Navy contract No. N62470-78-C-2762 for railroad repair at the Naval Weapons Station. Cotton States was the surety under Miller Act (40 U.S.C. §§ 270a-270f (1976 & Supp. II 1978)) performance and payment bonds provided by the prime contractor, Georgia-Carolina Railroad Contractors, Inc. (Georgia-Carolina).

On May 30, 1979, both Cotton States and Georgia-Carolina advised the Navy that, since Georgia-Carolina had received financial assistance from Cotton States under its Miller Act bond, all further payments due the contractor under the contract should be sent to the surety. The Navy subsequently mailed several progress payments to the surety.

The contractor ultimately completed performance and submitted a claim associated with certain change orders under the contract. A settlement agreement was eventually reached, entitling the contractor to a final payment of \$119,192.00.

On August 4, 1983, Georgia-Carolina's president hand-carried the final invoice for the contract to the Naval Weapons Station Disbursing Office for payment. The disbursing officer issued a check in the amount of \$119,192.00 to Georgia-Carolina's president instead of sending payment to the surety according to instructions.

028896

28290

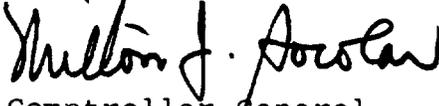
Georgia-Carolina's president, in attempting to pay the surety, subsequently deposited the check in Georgia-Carolina's checking account and then attempted to obtain a cashier's check in the same amount payable to Cotton States. However, a federal tax lien attached in the amount of approximately \$55,000. Consequently, the contractor was only successful in paying the surety approximately \$64,000. Cotton States has been unsuccessful in recovering the balance, and it now claims that the Navy is liable to it for the \$55,000 obtained by the Internal Revenue Service because, had the Navy mailed the check to it as previously agreed, the tax lien would not have been satisfied from the final payment and Cotton States would have received the full amount of the final payment.

We have held that if it appears that the government, after due notice of the facts giving rise to an equitable right in the surety and of the surety's assertion of such a right, paid out the money to someone other than the surety without a valid reason for so doing, the surety is entitled to that money. American Fidelity Fire Insurance Co., 58 Comp. Gen. 64 (1978), 78-2 CPD 333; American Fidelity Fire Insurance Company; Heritage Insurance Company of America, B-200374, October 21, 1980, 80-2 CPD 307.

The Navy argues that the above decisions are inapposite because, in those cases, after the government made payment to the contractor instead of the surety due to a clerical error, the surety was unable to collect the money because the contractor misappropriated the payment. Here, the surety was unable to collect the full amount because of the contractor's tax indebtedness. The Navy further contends that since the surety's claim here arose due to the government's assertion of its tax claim, the Navy's liability should depend upon the order of priority between the surety and the tax claim and that a tax claim has priority over the claim of a payment bond surety.

We agree. Since a tax claim has priority over the claim of a payment bond surety, Forest Service Request for Advance Decision, B-211539, September 26, 1983, the surety was never entitled to the \$55,000 that it claims.

Accordingly, the Navy need not pay Cotton States' claim.

for 
Comptroller General
of the United States