The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United States Army Responsibility Under Joint Payment Agreement

File: B-226540

Date: August 21, 1987

DIGEST

Where the Army Corps of Engineers breached a joint payment agreement by issuing a check only to one party, the proper measure of damages is the amount the aggrieved party would have received had the check been issued jointly.

DECISION

The Department of the Army, under the authority of section 3529 of title 31 of the United States Code, has asked us to determine whether it is obligated to make a separate payment to Southwest Construction Supply and Sales, Inc. for furnishing materials to Security Fence Company, a government contractor, under a joint payment agreement between all the parties. For the reasons given below, we find that the Army should pay Southwest Construction an amount equal to what it would have been paid had the joint payment agreement been implemented properly.

BACKGROUND

In August 1984, the United States Army entered into a contract with Security Fence for $8,000 (Contract No. DACW 56-84-M-1031). As the contract price was under $25,000 the contractor was not required to furnish a payment bond under the Miller Act, 40 U.S.C. § 270a, and did not do so. The contract was modified in April 1985 and the contract amount was increased to $23,318. Under the contract Security Fence agreed to furnish materials, labor and equipment to construct fences at the Robert S. Kerr Area Office of the Tulsa District Corps of Engineers. Security Fence engaged Southwest Construction to provide materials for the project. As work on the contract progressed, two checks were issued to Security Fence.

During contract performance, Southwest Construction became concerned about its being paid by Security Fence, and asked the Corps of Engineers' contracting officer to enter into a joint payment agreement between itself, the Corps and Security Fence. Concerned that Southwest Construction's failure to perform would hinder completion of the contract, the contracting officer agreed. The agreement, which was concluded in March 1985, obligated the Corps of Engineers to issue checks payable jointly to Southwest Construction and Security Fence in consideration for Southwest Construction's agreement to continue to supply materials to the project. It also stated that the contract between the Corps of Engineers and Security Fence included materials valued at $5,000 that were to be supplied exclusively by Southwest Construction. After the Army's Finance and Accounting Office had received the joint payment agreement, a final check on the contract for $15,164.82 mistakenly was issued solely to Security Fence.

On several occasions the Army unsuccessfully attempted to have the check returned so that it could reissue a joint check. Southwest Construction also attempted to collect $7,314 from Security Fence, approximately half the proceeds of the check, but it too was unsuccessful. As a result, it filed suit in the District Court for Denver, Colorado, Southwest Construction Supply and Sales, Inc. v. Swenson, 85 CV 16412 (Dist. Ct. Denver, filed Dec. 20, 1985); however, it was not able to have the summons and complaint served on David Swenson, Security Fence's principal.1/

In October 1986, the Corps of Engineers requested that $8,000 be setoff against any proceeds due or owing Security Fence by the Department of Interior's Bureau of Land Management. The Bureau informed the Army that $9,637.50 was available on another contract; however, those proceeds were subject to two other setoff requests totaling $20,687.74.

The Army states that the contract in question was concluded solely between the United States and Security Fence and that the joint payment agreement essentially granted a partial assignment to Southwest Construction of contract proceeds for work to be performed by Security Fence. The Army suggests that by entering into the joint payment agreement

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1/ The record suggests that Mr. Swenson cannot be located. Southwest Construction informs us that it is not pursuing this litigation.

it waived the Assignment of Claims Act, 31 U.S.C. § 3727; 41 U.S.C. § 15. It agrees that it had notice of this assignment prior to issuance of the $15,164.82 check.

Although the Army acknowledges that the partial assignment is valid, it has concluded that if it paid the $7,314 directly to Southwest Construction, it would be violating the terms and conditions of the joint payment agreement since the government's obligation is to both parties. In this regard, it states that Southwest Construction's claim for monies owed for providing construction materials should be against Security Fence and not the Army. The Army suggests the proper resolution is for it to reissue a joint check payable to both parties and subsequently take appropriate steps to recoup the amount of the first check from Security Fence.

Southwest Construction maintains that the Army Finance and Accounting officer's failure to abide by the terms of the joint payment agreement resulted in a loss to it of $7,314. Since the government breached the agreement, Southwest Construction contends the Army is liable and should reimburse it in that amount.

LEGAL DISCUSSION

To recover on a contract claim against the United States there must be a direct contractual relationship, express or implied, between the claimant and the United States. This direct relationship or "privity of contract" generally does not exist where a claim against the government is asserted by a subcontractor. B-171255, Jan. 5, 1972. Exceptions have been recognized, however, where the conduct of the government and the subcontractor evidences a direct contractual arrangement. B-187806, Jan. 11, 1979. For example, in B-171868, Aug. 20, 1971, we sustained the claim of a subcontractor where it was established that supplies were furnished by it to the prime contractor after assurances were made by a government contracting officer that payment would be made upon receipt of the supplies.

The facts show that the joint payment agreement was a valid contract between the Army, Southwest Construction, and Security Fence about the method of payment on the contract.2/ The agreement obligated the Army to pay

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2/ We disagree with the Army that the joint payment agreement can be characterized as a partial assignment of contract proceeds by Security Fence to Southwest Construction under the Assignment of Claims Act, as amended, 31 U.S.C. § 3727; 41 U.S.C. § 15. To be valid against the

proceeds by check jointly to Southwest Construction and Security Fence. The facts indicate that the contracting officer thought the joint payment agreement was necessary to insure timely completion of the contract. Had Southwest Construction pulled out, not only would performance have been delayed but it is likely that the expense to the government of completing the contract would have increased. Although we think the agreement somewhat unusual because the government ordinarily does not deal directly with its subcontractors, we think the need for timely performance by Southwest Construction provided consideration to support the direct contractual relationship between the government and Southwest Construction concerning payment. The government had no prior contractional relationship with Southwest Construction.

The Army's payment to Security Fence of $15,164.82 constituted a discharge only of the government's debt to Security Fence. The promise made was to pay Security Fence and Southwest Construction jointly by check. The Army clearly breached the agreement by not making a joint payment. This resulted in Southwest Construction not receiving what it was owed from Security Fence. Accordingly, the Army is liable to Southwest Construction for its breach of contract.

We turn next to the proper remedy. We have held that when a payment is mistakenly made to persons clearly not entitled to it, and it is equally clear that another person is so entitled, an agency may and should make payment to the proper payee, irrespective of recovery of the erroneous payment. 37 Comp. Gen. 131, 133 (1957). In this instance, the mistake was not in making Security Fence a payee, but in not making the check also payable to Southwest Construction. As a result, Security Fence cashed the check but did not pay Southwest Construction the amount it would have received had the check been jointly issued. We think that amount is what the Army should pay Southwest Construction, irrespective of recovery from Security Fence.

The record, however, does not show what amount should be paid to Southwest Construction. Although the joint payment agreement states that the materials to be supplied by Southwest Construction were valued at $5,000, we take that

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government, an assignment of contract proceeds must be to a financing institution which has made a loan to the assignor, and generally must assign all the proceeds, or at least the full amount necessary to discharge the assignor's debt to the assignee. B-172059, June 29, 1971. In this situation, these requirements have not been satisfied.

to be a statement primarily about the value of the materials but not necessarily an agreement about the final amount that Southwest Construction would be paid. There is nothing else in the agreement indicating what that amount would be. Although Southwest Construction is claiming $7,314 from the Army, or approximately half the proceeds of the $15,164.82 check, the record does not clearly indicate how that amount was determined. In view of the uncertainty about the amount owing, the Army should require Southwest Construction to account for what is owed from Security Fence. The Army could then pay this amount to Southwest Construction directly, as a measure of damages for its breach of contract.

Additionally, the Army also should continue to attempt recovery of the amount it must pay Southwest Construction from Security Fence by setoff or other appropriate remedy. It also should determine which official or officials should be held pecuniarily liable for the erroneous disbursement and whether relief should be requested from the General Accounting Office under the accountable officer statutes.

for James F. Hinchman
Comptroller General
of the United States