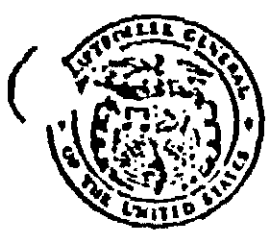


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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

D-179163

November 30, 1973

Colonel Philip R. Curtis  
Director of Accounting Operations  
Headquarters, Air Force Accounting  
and Finance Center  
3300 York Street  
Denver, Colorado 80205

Dear Colonel Curtis:

Reference is made to the letter of July 6, 1973, from Colonel Rank, the prior Director of Accounting Operations, reference TCU, forwarding a request from Captain D. L. Dennis, Accounting Finance Officer, for an [advance decision concerning the disposition of the final payment due] under contract No. 8620-73-C-0078 in the amount of \$14,372.50.

On January 27, 1973, Mr. W. G. Bailey, doing business as an individual, entered into a contract with the Air Force to repair exterior doors in the family housing area at Hurlburt Field, Florida, for a contract price of \$28,600. A performance bond in the penal amount of \$24,973 and a payment bond in the penal amount of \$12,497.50 covering this contract were executed on January 23, 1973, by the American States Insurance Company, hereafter referred to as the surety. The contractor also executed an assignment of the amounts due under the contract to the Eglis National Bank, also referred to as the assignee. A notice of assignment was sent to the contracting officer and his acknowledgement thereon is dated February 5, 1973.

The contractor completed performance of the contract and on June 6, 1973, he submitted an invoice for final payment. The contracting officer has certified that the contract has been performed as required and that payment of the invoice is proper.

It is reported that normally the payment due under the contract would have been made to the assignee. However, by letter dated June 11, 1973, the surety advised the contracting officer that it had an assignment from the contractor executed prior to furnishing the payment bond under the subject contract and that it had been notified of some unpaid bills for materials used on the Hurlburt Field job and on other jobs. Since the surety expected to incur obligations under the payment bond furnished to Mr. Bailey it initially requested that it be paid any

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further amounts which are payable under the subject contract. At our request, the surety by letter of July 19, 1973 (copy enclosed), furnished invoices from laborers and materialmen. These invoices in the total amount of \$20,521.76 are in excess of the penal amount of the surety's bond. The surety advised that of this amount \$11,499 was applicable to the Hurlburt Field job and at least part of the balance was also applicable to that job. In subsequent correspondence from the attorneys for the surety (copies enclosed) the view is expressed that the penal sum of the bond is in excess of the outstanding claims. However, in our opinion there has not been an adequate showing of this fact since the correspondence does not appear to account for the claim of Brentwood Construction Company in the amount of \$6,994.82, which might be allocable to the subject contract. In addition, the amount claimed by Gatlin Lumber & Supply and Moore-Wandley, Incorporated, while disputed by the contractor, raises the possibility that payments in excess of the penal sum may be required to satisfy such claims.

On November 8, 1973, you informally confirmed the previous advice to our Office that the surety will agree to relinquish any right it has to the contract fund in order that payment might be made to the bank. By letter of November 5, 1973, the Eglin National Bank certified that the funds received by the bank will be held in escrow until the claims of all laborers and materialmen applicable to the Hurlburt Field job have been paid. The bank has informally advised that all the funds will be placed in the escrow account and that the account will be established for the benefit of laborers and materialmen.

To the extent that the Government does not have any claims against the contractor, the Government is merely a stakeholder of the fund in its possession since performance under the contract has been completed and the only real concern of the Government is that payment results in a valid acquittance. We do not have any objection to payment of the fund to the bank assuming that you obtain satisfactory documentation of the surety's relinquishment of any right to the fund and the bank's agreement to hold the money for the benefit of laborers and materialmen on the Hurlburt job. We believe such an arrangement satisfies the Government's equitable obligation to see that laborers and materialmen on Government contracts are paid. See United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377 (Ct. Cl. 1973).

To insure that the Government's interests are protected the Internal Revenue Service should be contacted to ascertain whether there are any tax claims against the contractor before the money is released.

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The payment voucher enclosed with the file is returned. The assignee and the surety have been advised of our views in the matter.

Sincerely yours,

Paul G. Dembling

For the Comptroller General  
of the United States

Enclosures