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B-214273, Jun 21, 1984

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B-214273, JUN 21, 1984

DIGEST: 1. ARMY IS AUTHORIZED TO MAKE PAYMENT TO A CONTRACTOR'S ASSIGNEE FOR AMOUNTS THAT WERE ERRONEOUSLY PAID TO THE CONTRACTOR AFTER THE ARMY HAD RECEIVED VALID NOTICE THAT THE CONTRACTOR HAD ASSIGNED ITS RIGHTS IN ACCORDANCE WITH THE ASSIGNMENT OF CLAIMS ACT, 31 U.S.C. SEC. 3727, 41 U.S.C. SEC. 15 (1982). ASSIGNEE IS ENTITLED TO PAYMENT EVEN THOUGH ARMY HAS NOT YET RECOVERED THE ERRONEOUS PAYMENTS FROM THE CONTRACTOR. 2. PROMPT PAYMENT ACT DOES NOT PROVIDE BASIS FOR PAYMENT OF INTEREST SINCE IMPLEMENTING REGULATIONS OF OFFICE OF MANAGEMENT AND BUDGET PROVIDE THAT INTEREST SHALL APPLY ONLY WITH RESPECT TO CONTRACTS ISSUED ON OR AFTER OCTOBER 1, 1982, AND CONTRACT IN THIS CASE WAS ISSUED IN 1981.

HOME STATE BANK - PAYMENT UNDER ASSIGNMENT OF CLAIMS ACT:

THE ARMY MADE PAYMENTS TO A CONTRACTOR WHICH HAD ASSIGNED ITS RIGHTS UNDER THE CONTRACT TO A BANK. THOSE PAYMENTS WERE IMPROPER BECAUSE THE ARMY HAD RECEIVED VALID NOTICE OF THE ASSIGNMENT BEFORE THE PAYMENTS WERE MADE. WE HAVE BEEN ASKED TO RENDER AN ADVANCE DECISION ON THE PROPRIETY OF MAKING PAYMENT TO THE BANK FOR AMOUNTS THAT WERE PAID BY THE ARMY TO THE CONTRACTOR, DESPITE THE ARMY'S PRIOR RECEIPT OF THE NOTICE OF ASSIGNMENT. FOR THE REASONS GIVEN BELOW, WE CONCLUDE THAT PAYMENT SHOULD BE MADE TO THE BANK, EVEN THOUGH THE ERRONEOUS PAYMENT TO THE CONTRACTOR HAS NOT YET BEEN RECOVERED. AS IS ALSO EXPLAINED BELOW, THE BANK IS NOT ENTITLED TO RECEIVE INTEREST UNDER THE PROMPT PAYMENT ACT, 31 U.S.C. SEC. 3901 (1982).

ACCORDING TO THE SUBMISSION, ON DECEMBER 30, 1981, THE ARMY RECEIVED A NOTICE OF ASSIGNMENT BY JESCO RESOURCES INC., TO THE HOME STATE BANK OF THE PROCEEDS TO BE EARNED UNDER JESCO'S CONTRACT (NO. DAKF19-81-D 0091) WITH THE UNITED STATES ARMY. FINDING THE NOTICE AND ASSIGNMENT TO BE PROPER AND IN ACCORDANCE WITH THE ASSIGNMENT OF CLAIMS ACT, 31 U.S.C. SEC. 3727, 41 U.S.C. SEC. 15 (1982), THE ARMY MADE MONTHLY PAYMENTS UNDER THE CONTRACT TO HOME STATE BANK UNTIL MAY 1982. THE SUBMISSION FURTHER POINTS OUT THAT IN MAY 1982, "A NEW CLERK FAILED TO SEE THE ASSIGNMENT NOTICE CONTAINED IN THE FILE AND MADE PAYMENT DIRECTLY TO JESCO FOR JUNE AND JULY 1982." THOSE TWO PAYMENTS TOTALLED $36,030.23. IN AUGUST 1982, THE ERROR WAS CAUGHT AND SUBSEQUENT PAYMENTS WERE REDIRECTED TO HOME STATE. AT THE SAME TIME, DEMANDS WERE SENT TO JESCO REQUESTING REPAYMENT TO THE ARMY OF THE AMOUNTS THAT IT WAS IMPROPERLY PAID. JESCO HAS REFUSED TO REPAY THE ARMY, APPARENTLY BECAUSE OF A DISPUTE BETWEEN JESCO AND HOME STATE CONCERNING THEIR UNDERLYING AGREEMENT. HOME STATE, THROUGH ITS ATTORNEYS, HAS DEMANDED PAYMENT FROM THE ARMY IN THE AMOUNT OF $36,030.23 TO COVER THE TWO ERRONEOUS PAYMENTS MADE TO JESCO, PLUS INTEREST ON THAT AMOUNT.

THE FINANCE AND ACCOUNTING OFFICER, FORT RILEY, KANSAS, HAS REQUESTED THIS DECISION BECAUSE HE IS UNCERTAIN AS TO THE PROPRIETY OF MAKING A "DUPLICATE" PAYMENT TO HOME STATE BEFORE THE ARMY HAS COLLECTED THAT AMOUNT FROM JESCO. HE ALSO QUESTIONS WHETHER THE PROMPT PAYMENT ACT, 31 U.S.C. SEC. 3901, PROVIDES A BASIS TO HONOR HOME STATE'S CLAIM FOR INTEREST.

IT IS WELL-SETTLED LAW THAT ONCE THE UNITED STATES HAS RECEIVED VALID NOTICE OF AN ASSIGNMENT, IT PAYS THE ASSIGNOR AT ITS PERIL. WHEN SUCH AN ERROR OCCURS. THE UNITED STATES REMAINS LIABLE TO THE ASSIGNEE FOR THE AMOUNT OF THE ERRONEOUS PAYMENT. TUFTCO CORP. V. UNITED STATES, 614 F.2D 740 (CT.CL. 1980); CENTRAL NATIONAL BANK OF RICHMOND V. UNITED STATES, 91 F.SUPP. 738 (CT.CL.1950); 61 COMP.GEN. 53, 55 (1981). IT IS EQUALLY CLEAR THAT THE UNITED STATES IS REQUIRED TO MAKE PAYMENT TO THE ASSIGNEE EVEN THOUGH RECOVERY OF THE ERRONEOUS PAYMENT FROM THE ASSIGNOR HAS NOT YET BEEN EFFECTED. E.G., B-98609, NOVEMBER 14, 1950. ANY DISPUTES BETWEEN THE ASSIGNOR AND THE ASSIGNEE OVER ALLEGED BREACHES OF THE UNDERLYING AGREEMENT ARE PURELY PRIVATE MATTERS TO BE SETTLED BETWEEN THE PARTIES, WITHOUT THE INVOLVEMENT OF THE GOVERNMENT.

OF COURSE, MAKING PAYMENT TO THE ASSIGNEE DOES NOT RELIEVE THE ASSIGNOR OF THE OBLIGATION TO REPAY THOSE AMOUNTS WHICH IT RECEIVED IN CONTRAVENTION OF THE ASSIGNMENT. THE ASSIGNOR HAS RECEIVED AND USED GOVERNMENT FUNDS TO WHICH IT WAS NOT ENTITLED. THE GOVERNMENT HAS AND SHOULD ASSERT A CLAIM FOR THOSE FUNDS AGAINST THE ASSIGNOR. CENTRAL NATIONAL BANK, 91 F.SUPP. AT 741. NEITHER DOES THE MAKING OF PAYMENT TO THE ASSIGNEE RELIEVE THE ACCOUNTABLE OFFICER OF LIABILITY FOR THE ERRONEOUS PAYMENT OR THE DUTY TO RECOUP THE AMOUNTS ERRONEOUSLY PAID TO THE ASSIGNOR.

FOR THESE REASONS, WE CONCLUDE THAT HOME STATE BANK IS ENTITLED TO RECEIVE PAYMENT FROM THE ARMY FOR THOSE AMOUNTS ERRONEOUSLY PAID TO JESCO WHICH SHOULD HAVE BEEN PAID TO HOME STATE AS JESCO'S ASSIGNEE. ARMY SHOULD CONTINUE TO ATTEMPT TO COLLECT THOSE ERRONEOUS PAYMENTS FROM JESCO, PURSUANT TO THE FEDERAL CLAIMS COLLECTION STANDARDS, 4 C.F.R. CHAP. II, AS AMENDED, 49 FED.REG. 8889 (1984).

THE ARMY'S SECOND QUESTION IS WHETHER INTEREST SHOULD BE PAID TO HOME STATE IN CONSEQUENCE OF THE ARMY'S FAILURE TO MAKE TIMELY PAYMENTS OF THOSE AMOUNTS TO HOME STATE. INTEREST MAY BE PAID BY THE UNITED STATES ONLY WHEN EXPRESSLY PROVIDED FOR IN AN APPLICABLE CONTRACTUAL OR STATUTORY PROVISION. E.G., UNITED STATES V. LOUISIANA, 446 U.S. 253 (1980); BROMLEY V. UNITED STATES, 219 CT.CL. 517, 596 F.2D 448, 450 (1979). WE ARE ADVISED THAT THE CONTRACT IN THIS CASE DOES NOT SPECIFICALLY PROVIDE FOR THE ASSESSMENT OF INTEREST AGAINST THE UNITED STATES. HOWEVER, THE ARMY ASKS WHETHER INTEREST MIGHT BE AUTHORIZED IN THIS CASE BY THE PROVISIONS OF THE PROMPT PAYMENT ACT, 31 U.S.C. SECS. 3901-3906.

NORMALLY, WE WOULD DECLINE TO ADDRESS THE PROMPT PAYMENT ACT ON JURISDICTIONAL GROUNDS BECAUSE THAT ACT PROVIDES FOR CLAIMS TO BE FILED WITH THE CONTRACTING OFFICER IN ACCORDANCE WITH SECTION 6 OF THE CONTRACT DISPUTES ACT OF 1978, 41 U.S.C. SEC. 606. SEE 31 U.S.C. SEC. 3906; B-213383, NOVEMBER 7, 1983. HERE, HOWEVER, IT IS CLEAR THAT THE CONTRACTING OFFICER WOULD HAVE NO AUTHORITY TO ALLOW THE CLAIM. THE PROMPT PAYMENT ACT DIRECTS THE PAYMENT OF INTEREST IN ACCORDANCE WITH REGULATIONS ISSUED BY THE OFFICE OF MANAGEMENT AND BUDGET. OMB'S IMPLEMENTING REGULATIONS ARE FOUND IN OMB CIRCULAR NO. A-125, AUGUST 19, 1982. PARAGRAPH 3 OF OMB CIRCULAR NO. A-125 PROVIDES THAT INTEREST PENALTIES "WILL APPLY TO PAYMENTS MADE UNDER CONTRACTS ISSUED ON OR AFTER OCTOBER 1, 1982." SINCE THE CONTRACT IN THIS CASE WAS ISSUED IN 1981, THE PROMPT PAYMENT ACT IS

NOT APPLICABLE.

CONSISTENT WITH THE FOREGOING DISCUSSION, WE ARE RETURNING THE VOUCHER TO AUTHORIZE PAYMENT TO HOME STATE BANK OF THE $36,030.23 WHICH WAS ERRONEOUSLY PAID TO JESCO. THE VOUCHER MAY BE PAID IF OTHERWISE PROPER.