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From:
Sent: Wednesday, May 19, 2010 9:15:40 AM
To:
Cc:
Subject: RE: Collection of Performance bonds (Miller Act), surety bods and bail bonds

Unfortunately, I don't know anything about the collection of Miller Act performance bonds, surety bonds or bail bonds. I am trying to find someone to help you.

In the meantime, I found the excerpt below in the GL-1 training materials. Hopefully, it will be helpful.

The Miller Act

If a subcontractor or supplier who provides labor or materials to a prime contractor is not paid for work done on behalf of the government, then sovereign immunity would leave them without the ability to recover directly against the government. To protect these subcontractors and suppliers, Congress enacted the Miller Act, currently codified at 40 U.S.C. ' ' 3131 and 3132, in 1935. Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999). Specifically, the Miller Act requires that the prime contractor on certain federal construction projects furnish both a performance and a payment bond to the federal government "[b]efore any contract of more than $100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government … ," thus allowing a subcontractor or supplier to sue on the surety bond. 40 U.S.C. ' 3131(b).

Although the Miller Act requires payment and performance bonds for federal contracts and provides for the right to sue on the payment bond, it does not set forth the priorities as between any claim of the surety and any claim the government has for debts owed to it by the contractor.

However, the Supreme Court addressed this issue in the case United States v. Munsey Trust Co. of Washington, D.C., 332 U.S. 234 (1947). In Munsey Trust, the Court first held that the government, like any creditor, has the right to setoff amounts owed to a debtor against amounts the debtor owes to the government. 332 U.S. at 239. The Court rejected the surety=s argument that it was entitled to the balance due because it was subrogated to the rights of the subcontractors, noting that subcontractors have no enforceable rights against the United States and that, in this case, the subcontractors had been paid.

The Court also considered the result if the contracts had not been completed. It noted that, if the government completed the job itself, the surety would be liable for any amount required to complete the job in excess of what the government would have paid the contractor. However, if the surety completed the job, the Court stated that the surety would be entitled to the Aretained moneys in addition to progress payments,@ as otherwise a surety would rarely agree to complete a job if it knew that, by doing so, it would lose more money than if it had allowed the government to proceed. Id. at 244.

Subsequently, lower courts have cited the Supreme Court's analysis in Munsey Trust to distinguish between those circumstances in which the surety makes payments pursuant to its payment bond and the government has the right to setoff, see Dependable Ins. Co., Inc. v. United States, 846 F.2d 65, 67 (Fed. Cir. 1988); United States Fid. & Guar. Co. v. United States, 475 F.2d 1377, 1383 (Ct. Cl. 1973); Barrett v. United States, 367 F.2d 834 (Ct. Cl. 1966), and those in which the surety satisfies its performance bond obligation and the government does not have the right to setoff. See Aetna Cas. & Surety Co. v. United States, 845 F.2d 971, 976 (Fed. Cir. 1988); Aetna Cas. & Surety Co. v. United States, 435 F.2d 1082 (5th Cir. 1970); Trinity Universal Ins. Co., v. United States, 382 F.2d 317, 321 (5th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

Although Munsey Trust involved a setoff rather than a levy, the courts have not distinguished the cases on the basis of whether the government asserted a right to setoff, Trinity Universal Ins. Co., 382 F.2d at 318, or whether a levy was served. Aetna Casualty & Surety Co., 845 F.2d at 973; United States Fid. & Guar. Co. v. United States, 475 F.2d at 1379-1380. The law is the same regardless of the method in which the government asserted its claim.