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DEFENSE CONTRACT FINANCING UNDER THE ASSIGNMENT OF CLAIMS ACT

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INTRODUCTION

In the current spate of articles, seminars, and general concern among members of the bar over all aspects of public contracting, an area of discussion that seems to have been overlooked is the manner by which public contracts, and more particularly, Government defense contracts may be financed.

Although today there does not seem to be the impetus toward extensive utilization of the Guaranteed Loan ("V-Loan")[1] or Advance Payments[2] financing procedures that characterized Government defense contracting during the Second World War and the Korean Conflict, the trend today, especially in view of the tight situation in the current money market, is to make increasing use of the less complex methods of financing production, particularly through the medium of progress payments[3] or accounts receivable financing under the Assignment of Claims Act of 1940.[4]

The purpose of this paper will be to discuss the many facets of accounts receivable financing under the Act, setting forth some of the advantages (and pitfalls) to be gained thereby.

BACKGROUND—HISTORICAL PERSPECTIVE

Assignment of claims against the United States was at first strictly regulated, there being statutory provision to the effect that no claim

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†The views and opinions expressed herein are those of the author and do not imply the endorsement of the Department of Defense or any agencies thereof.

1. Defense Production Act of 1950, 50 U.S.C. APP. § 2091 (1964); Exec. Order No. 10,480, 3 C.F.R., 1949-1953 Comp.; DOD Directive No. 5100.34.

2. 10 U.S.C. § 2307 (1964). Advance payments are also authorized pursuant to 50 U.S.C.A. § 1431 *et. seq.;* Exec. Order No. 10,789, 3 C.F.R., 1954-1958 Comp.; DOD Directive No. 7830.1.

3. 10 U.S.C. § 2307 (1964). The details of obtaining progress payments are set forth in the Armed Services Procurement Regulation, Appendix E-500, 32 C.F.R. § 163.69 [hereinafter cited as ASPR].

4. 31 U.S.C. § 203 (1964); 41 U.S.C. § 15 (1964) [hereinafter cited as the Act].

against the United States could be assigned except after the issuance of a warrant for payment and proper attestation and acknowledgment of the instrument by which the assignment was to be accomplished.[5] It was said that the purpose of the anti-assignment statute was to prevent persons of influence from buying up claims against the United States which might be improperly urged upon the accounting officers of the Government, to prevent the possible multiple payment of claims, to make unnecessary the investigation of the validity of alleged assignments, and to enable the Government to deal only with the original claimant.[6]

However, the courts were quick to realize that the rigors of the anti-assignment statutes were not applicable to situations wherein the interest of the United States was not at stake, thus holding that an assignment of a claim not in strict accordance with the statutes might nonetheless be valid as between the assignor and assignee although void insofar as the United States was concerned.[7] Since the anti-assignment statutes had been enacted for the benefit of the Government, it might waive that protection and give recognition to such assignments as between the parties.

As the impact of Government and public contracting increased during the Depression, it was recognized that some form of simple financing should be made available to Government contractors; and temporary legislation was enacted which provided for assignment to any national or state bank of claims due or to become due under a Government contract.[8] Recognizing the immediate need for financing the massive defense production effort that would be necessary to successfully resolve the impending conflict, Congress took action in the latter part of 1940 to effect a permanent amendment of the anti-assignment statutes so that private financing would be readily available to those contractors en-

5. REV. STAT. §§ 3477, 3737. For an excellent discussion of the history of the Act, see Nichols, *Assignment of Claims Act of 1940—A Decade Later*, 12 U. PITT. L. REV. 538 (1950).

6. *See, e.g.*, Spofford v. Kirk, 97 U.S. 484, 498 (1878); Goodman v. Niblack, 102 U.S. 556, 560 (1880).

7. McKenzie v. Irving Trust Co., 323 U.S. 365 (1945); Martin v. National Sur. Co., 300 U.S. 588 (1937).

8. *Cf.* National Industrial Recovery Act, June 16, 1933, ch. 90, Art. II, §§ 201, 206(a), 48 Stat. 200; Work Relief and Public Works Appropriation Act of 1938, June 21, 1938, ch. 554, §§ 201-5, 52 Stat. 816; Independent Office's Appropriation Act of 1943, June 27, 1942, ch. 450, 56 Stat. 410 (extending time for execution under preceding Acts).

gaged in performance under Government contracts.[9] The end result of such concern was the Assignment of Claims Act of 1940.[10]

The only major revision of the Act was made in 1951, when Congress, dissatisfied with decisions of the Comptroller General of the United States holding that the United States could assert claims against an assignor directly against the assignee by way of set-off, restitution, or repayment for claims arising under the contract or independently of the contract for unpaid withholding and social security taxes on wages earned under the contract,[11] amended the Act to limit the assignee's

9. H. R. REP. No. 2925, 76th Cong., 3d Sess. (1940); S. REP. No. 2136, 76th Cong., 3d Sess. (1940).

10. Act of Oct. 9, 1940, ch. 779, § 1, 54 Stat. 1029. As amended [Act of May 15, 1951, ch. 75, 65 Stat. 41] the Act provides substantially as follows:

> (1) that the prohibition against assignment of claims against the United States does not apply in any case in which [T]he moneys due or to become due from the United States . . . under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financial institution. . . .; (2) [that] . . . any such assignment shall cover all payments due or to become due under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing. . . .; (3) [that the assignee] . . . shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency, (b) the surety . . ., and (c) the disbursing officer. . . .; (4) [that] . . . no liability of any nature of the assignor to the United States . . ., whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount . . . received under such contract . . .; (5) [and that] . . . [A]ny contract of the Department of Defense, the General Services Administration, . . . or any department or agency of the United States designated by the President . . . in time of war or national emergency . . . [may] provide that payments to be made to the assignee . . . shall not be subject to reduction or set-off . . . for any liability of any nature of the assignor to the United States . . . which arises independently of such contract, or . . . for any liability of the assignor on account of (1) renegotiation under any renegotiation statute . . ., (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of social security contributions, whether arising from or independently of such contract.

11. *See*, Ms. COMP. GEN. B-93528 (Dec. 29, 1950); Ms. COMP. GEN. B-72929 (May 18, 1950). A good discussion of the background of the 1951 amendment may be found in Note, *Financing by Assignment of Government Contracts: Expanding the Assignee's Risk*, 60 YALE L.J. 548 (1951).

derivative liability for restitution and enacted the so-called "no set-off" clause. This clause, when included in a contract, diminishes the Government's common-law right of set-off.[12]

Nature of the Assignment

An assignment under the Act comes into effect only upon an underlying contractual obligation;[13] however, an assignment may come into existence at any time thereafter, and has in fact been recognized as valid even after the vouchers for payment have been prepared.[14] The only requirement for the validity of an assignment executed during the performance of a contract is that some right or obligation under the contract remain unsettled.[15] The assignment will not be considered to be binding upon the Government until the contracting officer has received notice of the assignment,[16] but it is not necessary that such notice strictly comply with all the requirements of the Act to be considered binding upon the Government, the Comptroller General having indicated that substantial compliance with the notice and filing requirements is sufficient to render the instrument binding.[17]

Upon an otherwise valid assignment, the assignee succeeds only to whatever rights its assignor had to the contract proceeds; for example, any amounts due the Government under the Price Redetermination[18] and Default[19] clauses may be withheld from payment to the assignee.[20] But in such a case the Government would be precluded from recovering

12. The "no set-off" clause is contained in General Provision 8(a) of GSA Standard Form 32, June 1964 edition) ASPR App. F-100.32) and is authorized by ASPR 7-103.8 for inclusion in all Department of Defense contracts. The cited ASPR implementation also sets forth additional notice and filing requirements. By Exec. Order No. 10,840, 3 C.F.R., 1959-1963 Comp., and Exec. Order No. 10,824, 3 C.F.R., 1959-1963 Comp., the President has designated the Federal Aviation Administration and the National Aeronautics and Space Administration as additional agencies to which the "no set-off" provisions apply. The state of national emergency contained in Presidential Proclamation No. 2,914, 3 C.F.R., 1949-1953 Comp., is still in effect.

13. Ms. Comp. Gen. B-153171 (Oct. 8, 1964).

14. Central Nat. Bank v. United States, 91 F. Supp. 738 (Ct. Cl. 1950); Ms. Comp Gen. B-122071 (Dec. 1, 1954).

15. Ms. Comp. Gen. B-125205 (Nov. 14, 1955); *cf.* 31 Comp. Gen. 685 (1952).

16. Ms. Comp. Gen. B-158451 (March 3, 1966).

17. 20 Comp. Gen. 424 (1941).

18. ASPR 7-109.2, 7-109.4.

19. ASPR 7-103.11.

20. Ms. Comp. Gen. B-119142 (Oct. 1, 1954); Ms. Comp. Gen. B-110730 (Sept. 18, 1952); Ms. Comp. Gen. B-84138 (May 17, 1949).

any sums directly paid to the assignee by way of restitution or repayment under the 1951 amendment to the Act.

Conversely, where an assignment has been properly effected, the assignee is entitled to all additional proceeds that come due under the terms of the contract, as under the Changes clause,[21] without the necessity of a separate assignment.[22] The rationale for such a result seems to be that the rights and obligations of the parties were fixed by the inclusion of the clauses in the terms of the original contract, so that the various equitable adjustments accomplished pursuant to such clauses can be construed merely to render more definite the extent of the parties' liabilities.

It should also be noted that the assignee's right to the contract proceeds is in the nature of a legal, rather than an equitable right,[23] so that once an assignment has been properly effected it cannot be revoked by the assignor.[24] Similarly, the assignee's legal right to the proceeds ceases sua sponte when the loan secured by the assignment has been discharged.[25]

Although the general rule is that the assignee has but a legal right of subrogation to the claim of its assignor against the Government, the Court of Claims has found that in certain situations where the application of the fraud and false claim statutes[26] would lead to the forfeiture of a claim on the part of an innocent assignee, that the assignee attains the same status as that of the holder of a negotiable note insofar as those statutes are concerned, so that the assignee's claim is not forfeited by fraud on the part of the assignor.[27]

Since the assignee's rights against the Government arise only by way of subrogation, it is clear that there is no privity of contract between the Government and the assignee;[28] consequently, the Government cannot

21. ASPR 7-103.2.

22. 23 Comp. Gen. 943 (1944).

23. *Cf.* Ms. Comp. Gen. B-149657 (Feb. 9, 1965).

24. 35 Comp. Gen. 104, 106 (1955).

25. Beaconwear Clothing Co. v. United States, 355 F.2d 583 (Ct. Cl. 1966). Although the Act specifically prohibits the further assignment of a claim to the contract proceeds, the Comptroller General has not construed the Act as prohibiting, upon the release of the original assignment, the reassignment of any remaining amounts payable under the contract. Ms. Comp. Gen. B-155400 (Dec. 3, 1964); 39 Comp. Gen. 533 (1960); Ms. Comp. Gen. B-33501 (April 1, 1943). *Contra,* Durant Nat'l Bank v. United States, 168 F. Supp. 203 (E.D. Okla. 1958).

26. 28 U.S.C. § 2514 (1964); 31 U.S.C. § 231 (1964).

27. Arlington Trust Co. v. United States, 100 F. Supp. 817 (Ct. Cl. 1951).

28. Ms. Comp. Gen. B-69120 (Dec. 18, 1947).

be charged with the duty of notifying the assignee as to the status of the contract or the existence of any outstanding claims against the contractor arising independently of the contract.[29] The test as to the degree of duty owed by the Government to the assignee is one of good-faith dealings, however, so that if the Government knows or has the means of knowing that the contract assigned is worthless, and if the Government is ignorant of that fact only because of its own carelessness in overpaying the assignor, it may not take advantage of such carelessness and negligence in an attempt to recoup indirectly such negligent overpayments from the assignee.[30]

The assignee's claim under an otherwise valid assignment is limited by the amount of the assignor's indebtedness to the assignee,[31] although it is not necessary for the assignee to prove that advances made by it under the assignment were used for the performance of Government contracts.[32]

Contracts Providing for Payments Aggregating One Thousand Dollars or More

Since the Act makes specific provision for assignments under "contracts providing for payments aggregating $1,000 or more," a question arises as to what constitutes a "contract" for the purposes of the Act. In the case of the usual fixed-price solicitation utilizing GSA Standard Forms 33 and 33A,[33] Instruction 10(d) of GSA Standard Form 33A provides in pertinent part that written awards will be mailed to the successful offeror within the time specified for acceptance, so that a binding bilateral contract will result on deposit of the award notice in

29. South Side Bank & Trust Co. v. United States, 221 F.2d 813 (7th Cir. 1955); Ms. Comp. Gen. B-45291 (Nov. 21, 1944).

30. Mercantile Nat'l Bank v. United States, 280 F.2d 832 (Ct. Cl. 1960). A case in the same vein is Central Nat'l Bank v. United States, 91 F. Supp. 738 (Ct. Cl. 1950), holding that where the assignee gives timely notice of the assignment, but due to inadvertence on the part of the Government payments are made directly to the assignor rather than the assignee, the Government will be treated as an ordinary debtor so that the assignee may recover from the Government sums erroneously paid to the assignor.

31. Coleman v. United States, 158 Ct. Cl. 490 (1962); Ms. Comp. Gen. B-156871 (Aug. 4, 1965); 37 Comp. Gen. 9 (1957); 36 Comp. Gen. 19 (1956); 35 Comp. Gen. 104 (1955).

32. 36 Comp. Gen. 19, 21 (1956); *cf.* Peterman Lumber Co. v. Adams, 128 F. Supp. 6 (W.D. Ark. 1955).

33. GSA Standard Form 33, July 1966 (ASPR App. F-100.33), and GSA Standard Form 33A, July 1966 (ASPR App. F-100.33A)

the mail by the Government.[34] In such a case, an assignment executed after the specified date but prior to receipt of the formal contract by the offeror will be deemed to have been made under a "contract" as defined by the Act.[35]

Insofar as other types of Government contracts are concerned, since the Armed Services Procurement Regulation specifically provides that Basic Agreements[36] and Basic Ordering Agreements[37] are not to be treated as contracts but rather as advance understandings as to the terms and conditions of any contract executed thereunder, it is clear that an assignment under such an agreement would not be effective until a binding bilateral contract had been effected. The same result would not be reached under Indefinite Delivery Type Contracts,[38] since in such instruments there is an underlying right or obligation upon which the concept of a "contract" may exist.

In short, the test of a "contract" seems to be whether or not there is a binding bilateral agreement between the assignor and the Government, so that, for example, under a unilateral Purchase Order[39] an assignment would not be effective until the order had been accepted in writing or the assignor had performed the exact act requested by the order.[40]

Concerning the requirement of "payments aggregating $1,000 or more," the Comptroller General will recognize instruments obligating funds less than $1,000 issued under a master agreement such as those of the Indefinite Delivery Type previously discussed, so long as it can be determined that the entire amount due under the master contract will aggregate $1,000 or more.[41] In such event, it would also seem permissibile to execute one instrument of assignment covering each order subsequently issued against the master agreement.[42]

34. 45 COMP. GEN. 701 (1966).

35. Ms. COMP. GEN. B-153171 (Oct. 8, 1964); Ms. COMP. GEN. B-29624 (Oct. 29, 1942). Where award is consummated by use of GSA Standard Form 26, July, 1966 (ASPR App. F-100.26), ASPR 16-102.2(h) provides in pertinent part that although the award may specify an effective date, that a mutually binding agreement may be found to be in existence prior thereto, so that the question of whether there is a "contract" within the meaning of the Act prior to the effective date of the formal award would depend on the particular circumstances in each case.

36. ASPR 3-410.1.

37. *Id.* 3-410.2.

38. *Id.* 3-409.

39. *Id.* 3-608.

40. Ordnance Parts Company, ASBCA No. 12820, 68-1 BCA ¶ 6870 (1968).

41. 23 COMP. GEN. 989 (1944).

42. *Cf.* Ms. COMP. GEN. B-24402 (Sept. 21, 1942).

QUALITIES OF A PROPER ASSIGNEE

The Act provides that assignments shall be executed in favor of a "bank, trust company, or other financial institution." Although the Act makes perfectly clear what is a "bank" or "trust company," the determination of what constitutes a "financial institution" has been another important problem facing those agencies charged with implementing the Act.

A determination of whether a particular entity meets the definition of a "financial institution" must be left to the particular facts and circumstances surrounding each case, since the tendency has been to construe the term in a broad sense. Generally however, any business concern that regularly engages in credit extension and receivables financing, as opposed to one that does so on a basis incidental to its primary operations, may be considered to meet the definition of a "financial institution." [43] Pension trusts,[44] small business investment companies organized under the Small Business Act,[45] and partnerships[46] have been held to be proper assignees under the Act; the only requirement in each case is that financing operations must be the assignee's principal business.

The Act also provides that an "assignment may be made to one party as agent or trustee for two or more parties participating in such financing"; thus, it has been held that an assignment to a bank from a wholesale merchant under a Government contract, such assignment providing that all sums collected thereunder are to be turned over to the wholesale merchant's factor who borrowed money from the bank to finance the wholesaler's performance, is a proper assignment under the Act.[47] The only requirement in this type of third party financing is that the legal right to collect the proceeds must vest in a single financial institution.

ASSIGNEE'S DERIVATIVE LIABILITY FOR RESTITUTION OR REPAYMENT

As previously mentioned, certain decisions of the Comptroller General prompted the Congress in 1951 to amend the Act to provide that no liability of the assignor to the United States would impose any liability on the assignee to make restitution or repayment. The effect of this amendment was to preclude the Government from recovering from

43. 22 COMP. GEN. 44, 46 (1942); 21 COMP. GEN. 120 (1941); 20 COMP. GEN. 415 (1941); Ms. COMP. GEN. B-14682 (Feb. 5, 1941).

44. 40 COMP. GEN. 174 (1960).

45. 43 COMP. GEN. 138 (1963).

46. 31 COMP. GEN. 90 (1951).

47. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685 (Ct. Cl. 1960).

an assignee erroneous payments made under an assignment, except in the case of fraud on the part of the assignee.[48]

But it should be noted that the effect of the 1951 amendment is to preclude recovery by restitution or repayment in those cases where the assignee's liability is derivative only, so that the remedy is available to the Government in those cases where the assignee has directly engaged in fraudulent conduct. Fraud on the part of the assignor or its agents is not sufficient, however, to permit recovery as against the assignee.[49]

SET-OFF AGAINST THE ASSIGNEE

In the absence of a "no set-off" clause as provided for in the 1951 amendment of the Act, the rights of the assignee are governed by the common law, so that the assignee has no greater right against the obligor, the Government in this instance, than his assignor.[50] Thus the fact that the assignee is not on notice of a debt arising under the contract when it accepts the assignment does not defeat the Government's right of set-off.[51]

Although the Comptroller General had previously acquiesced in the position that under the common law of assignments, debts of the assignor which matured after an assignment was effected might not be set-off against payments otherwise due an assignee,[52] his recent decisions indicate that the former view will not be followed; hence, debts owed to the United States by the assignor which existed before the effective date of the assignment may, at the time they mature, be set-off against mature obligations owed by the Government to the assignee.[53]

In those contracts containing the "no set-off" clause authorized under the Act, the Government's common law right of set-off is nullified insofar as claims arising independently of the contract are concerned and is limited to those claims under the contract which are not specifically exempted by the "no set-off" provisions. Thus it has been held that the

48. *Compare* United States v. Hadden, 192 F.2d 327 (6th Cir. 1951), *with* Mercantile Nat'l Bank v. United States, 280 F.2d 832 (Ct. Cl. 1960), *and* American Fidelity Co. v. National City Bank, 266 F.2d 910 (D.C. Cir. 1959).

49. Daval Handbags, Inc., ASBCA No. 3899, 59-2 BCA ¶ 2387 (1959).

50. 37 COMP. GEN. 318 (1957).

51. South Side Bank & Trust Co. v. United States, 221 F.2d 813 (7th Cir. 1955); Ms. COMP. GEN. B-157886 (Nov. 12, 1965).

52. First Nat'l Bank v. United States, 117 F. Supp. 486 (N.D. Ala. 1953); 37 COMP. Gen. 318 (1957); 20 COMP. GEN. 458 (1941).

53. 37 COMP. GEN. 808 (1958).

"no set-off" clause prohibits the United States from collecting, by way of set-off against the assignee, a tax claim against the assignor which had matured prior to notice of assignment.[54]

The inclusion of a "no set-off" clause in a contract does not preclude the Government from withholding payments during performance of the contract to accomplish set-off for claims arising under the contract and not specifically exempted by the Act,[55] such as claims for excess costs under the Default clause,[56] or for penalties or withholdings assessed under the terms of the Davis-Bacon,[57] Walsh-Healey,[58] or Contract Work Hours Standards Acts,[59] the provisions of which are incorporated in certain contracts by reference.[60]

Where a "no set-off" clause is included in a contract, it should be emphasized that the clause will only operate to immunize those proceeds from set-off that are attributable to the assignor's indebtedness to the assignee, so that any amounts in excess of this sum remaining in the hands of the Government may be applied to debts of the assignor arising independently of the contract.[61]

Conflicts Between Assignee and Surety

An uncertain point under the Act has been the conflicting interpretation of the right of a surety under Miller Act[62] performance and payment bonds versus the right of an assignee to the retained percentages withheld by the Government to assure performance under defaulted construction contracts.[63] Generally, the Miller Act requires that construction contractors furnish a performance bond to secure complete

54. Rose v. United States, 373 F.2d 963 (Ct. Cl. 1967); 37 Comp. Gen. 318 (1957).

55. 45 Comp. Gen. 484 (1966) (liquidated damages).

56. 35 Comp. Gen. 149 (1955). The default clause may be found in ASPR App. F-100.32, General Provision 11.

57. 40 U.S.C. §§ 276(a)-(a)(7) (1964).

58. 41 U.S.C. §§ 35-45 (1964).

59. 40 U.S.C. §§ 327-30 (1964).

60. Ms. Comp. Gen. B-150528 (Feb. 1, 1950).

61. 37 Comp. Gen. 9 (1957); 36 Comp. Gen. 19, 21 (1956); 35 Comp. Gen. 104, 108 (1955).

62. 40 U.S.C. §§ 270(a)-(e).

63. Under the payments clause of GSA Standard Form 23-A, (ASPR App. F-100.23-A.) the Government agrees to make monthly progress payments as the work progresses, withholding ten percent of the amount of each payment until final completion and acceptance. A detailed discussion of the entire topic of conflicting claims to the retained percentages may be found in Speidel, *"Stakeholder" Payments Under Federal Construction Contracts: Payment Bond Surety vs. Assignee*, 47 Va. L. Rev. 640 (1961).

and timely performance and a payment bond for the protection of laborers and materialmen.[64] When a surety under a performance bond is compelled to make payment or to "take-over" the contract and complete the project, it is subrogated to the rights of the Government as to the retained percentages under the contract;[65] when a surety is compelled to make payment under the payment bond to unpaid laborers and materialmen, it is subrogated only to the "equitable priority" of the unpaid laborers and materialmen in the retained percentages.[66]

The controversy arises when the surety and an assignee whose advances to the defaulted contractor have not been satisfied both assert a claim to the retained percentages in the hands of the Government.

Insofar as the priorities under a performance bond are concerned, there is general agreement that the right of the assignee is inferior to that of the surety, since the surety is subrogated to the right of the Government in the retained percentages, while the assignee's right can rise no higher than the right of the defaulted assignor.[67]

However, there is a split of opinion between the Fifth Circuit and the Court of Claims as to the priorities under a payment bond; the Fifth Circuit holds that the assignee has the better right,[68] while the Court of Claims maintains that the retained percentages should go to the surety.[69] The Fifth Circuit construes the Act as providing that all proceeds will be paid over to the assignee so long as it has outstanding advances to the assignor, while the Court of Claims holds that the only effect of the Act is to make the contract proceeds assignable for financing purposes, so that the assignee's right to the proceeds is no greater than the assignor's right.

The split between the Fifth Circuit and the Court of Claims applies only to those cases in which the retained percentages are still in the

64. 40 U.S.C. § 270(a) (1964).

65. Prairie State Bank v. United States, 164 U.S. 227 (1896).

66. United States v. Munsey Trust Co., 332 U.S. 234 (1947); Henningsen v. United States Fidelity & Guar. Co., 208 U.S. 404 (1908). The "equitable priority" theory of *Munsey Trust* seems to have been superseded in favor of recognition of a direct claim to payment by Home Indem. Co. v. United States, 376 F.2d 890 (Ct. Cl. 1967), but the case has not yet been expressly overruled.

67. Nat'l Sur. Corp. v. United States, 133 F. Supp. 381 (Ct. Cl. 1955); Modern Indus. Bank v. United States, 101 Ct. Cl. 808 (1948); Hardin County Sav. Bank v. United States, 65 F. Supp. 1017 (Ct. Cl. 1946).

68. General Cas. Co. v. Second Nat'l Bank, 178 F.2d 679 (5th Cir. 1949), *aff'g* Coconut Grove Exch. Bank v. New Amsterdam Cas. Co., 149 F.2d 73 (5th Cir. 1945).

69. Fidelity & Deposit Corp. v. United States, No. 345-65 (Ct. Cl. April 19, 1968); National Sur. Corp. v. United States, 133 F. Supp. 381 (Ct. Cl. 1955); Royal Indem. Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950).

hands of the Government. There is accord on the principle that once the proceeds are paid by the Government to the assignee, the surety loses its priority by way of subrogation as the proceeds so paid are not recoverable under the 1951 amendment to the Act.[70] Similarly, the priority of the surety under the performance and payment bonds applies only to those payments earned after default by the assignor since the surety has no right or subrogation until the default occurs.[71]

It seems clear that the final decision as to whether the assignee or payment bond surety will prevail in any given case lies in the hands of the disbursing officer designated in the contract, since a direct payment to the assignee would be conclusive under the 1951 amendment, whereas a decision to withhold payment will give rise to a Tucker Act suit,[72] under which the surety would prevail in the Court of Claims.[73]

Conclusion

Although it is apparent from the preceding discussion that there are certain risks involved when advances are made to a contractor under the provisions of the Assignment of Claims Act of 1940, it should be recognized that in the great majority of cases the risks to the assignee are minimal. Receivables financing through the medium of an assignment seem to be the most simple and efficacious method of financing defense production, while at the same time providing the assignee with a great deal of security under the 1951 amendment to the Act. In short, it is felt that the financing of production through the medium of progress payments coupled with an assignment of such payments to a financial institution, or the simple expedient of assigning the contract proceeds prior to entering into production, is the best means by which the majority of contracts may be financed.

70. American Fidelity Co. v. National City Bank, 266 F.2d 910 (D.C. Cir. 1959); Bank of Arizona v. National Sur. Corp., 237 F.2d 90 (9th Cir. 1956).

71. National Union Fire Ins. Co. v. United States, 304 F.2d 465 (Ct. Cl. 1962).

72. 28 U.S.C. § 1491 (1964).

73. It is intriguing to speculate as to the situation that might result when a federal tax lien enters the picture, since in such a case where payment is made directly to the assignee under a contract containing the "no set-off" clause, the assignee will prevail over the Government and the surety; whereas if payment is made to the surety, the surety will prevail over the assignee and the Government will prevail over the surety, since tax liens have priority over the claim of a Miller Act surety. United States v. Munsey Trust Co. 332 U.S. 234 (1947); Standard Accident Ins. Co. v. United States, 97 F. Supp. 829 (Ct. Cl. 1951).