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PROTECTION OF CONTRACT BALANCES AND CLAIMS IN THE HANDS OF FEDERAL OWNERS

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When faced with a principal tottering on the edge of default, one of the first priorities of the surety must be the protection of contract balances. While the default itself triggers certain rights in contract funds, it often is not advisable to wait for a default, as the surety can see a substantial erosion of its position while waiting for such a default to occur. The problem faced by a surety on federal projects is that the contracting officers are generally extremely rule bound, and the Federal Acquisition Regulations (FAR's) do not adequately address the surety's rights, and to some extent are hostile to those rights. Often a surety's secondary priority is the evaluation of any claims that the contractor has against the government owner. However, this assessment should occur simultaneously with the surety's focus on the potential default in order to protect the surety's standing to later assert such claims. This paper deals with the situation of a contractor who has not yet been defaulted but is obviously in trouble. It addresses two separate scenarios -- that of a cooperative principal who is prepared to secure the surety's interests, and that of a principal who refuses to do so.

The Uncooperative Principal: Freezing Funds on Federal Projects When Your Principal Has Not Yet Been Defaulted and Is Unwilling to Secure Your Position

The law is clear that the surety has an equitable right to contract funds.[1] Under the law of suretyship, contract funds held by the obligee are considered collateral to which the surety can turn to cover losses incurred should the contractor default on the underlying obligation and the surety is required to pay out under its bond.[2] Thus, unpaid contract funds in the hands of the Government are charged with an equity in favor of the surety which is superior to any right of the contractor and other creditors of the contractor.[3] A contractor no longer has any property right in the contract funds once the owner has written notice of outstanding bond claims.[4] It has been held that mere exposure to claims is sufficient in itself to justify a surety's request that the Government freeze contract funds on a public works project.[5] It has further been held that the surety's right to freeze contract balances is not contingent upon a formal default by the Government entity.[6]

The Government is required to use reasonable care in the custody and preservation of contract funds, and has an obligation to avoid actions that impair the surety's interest in contract proceeds which are payable for work done.[7] Accordingly, notice to the Government by the surety of a default under the bond makes the United States "a stakeholder with a duty of acting with reasoned discretion when a Miller Act surety alleges that the contractor has

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[1] *Pearlman v. Reliance Insurance Company*, 371 U.S. 132, 137, 83 S.Ct. 232, 235, 9 L.Ed. 2d 190 (1962).

[2] *Transamerica Premier Ins. Co. v. United States,* 32 Fed. Cl. 308, 313 (1994).

[3] *Federal Ins. Co. v. Community State Bank,* 905 F.2d 112, 114 (5th Cir. 1990); *USF&G v. Housing Authority of the Town of Berwick,* 557 F.2d 482, 484 (5th Cir. 1977); *Lambert v. Maryland Casualty Co.*, 403 So.2d 739, 752-53 (La.App 4th Cir. 1981) *aff'd* 418 So.2d 553 (La. 1982).

[4] *Home Indemnity Co. v. United States*, 376 F.2d 890, 893 (Ct. Cl. 1967).

[5] *Lambert, supra*, 403 So.2d at 753-54, and cases cited therein.

[6] *Id.*, at 753; see also *Transamerica, supra,* 32 Fed.Cl. at 314-15.

[7] *Transamerica, supra*, 32 Fed.Cl. at 313.

breached the contract by defaulting under one of the bonds."[8] This applies even if the principal is not in default under the contract. However, the extent of the duty imposed by case law on the Government differs depending on whether the surety seeks to recover progress payments disbursed to the contractor after notice by the surety, or retainage released to the contractor after the completion of the project. In the latter instance, the Government is virtually assured of liability if it releases funds to the contractor over the surety's protest and the surety has, in fact, suffered a loss under the bond. In the first instance, however, the Government's liability is less clear and more difficult to prove. The differing standards for release of progress payments and release of retainage at the conclusion of a project is set forth in the appellate court opinion of *Balboa Ins. Co. v. United States,* 775 F.2d 1158 (Federal Cir. 1985) and the Court of Federal Claims opinion in *Transamerica Premier Ins. Co. v. United States*, 32 Fed.Cl. 308 (1994).

As noted in *Balboa,* when the projects have not been completed, the Government has a great amount of discretion and flexibility in making payments because it has a legitimate interest in the completion of the work. "With respect to the surety, however, this discretion and flexibility is limited by its duty to exercise its discretion responsibly and to consider the surety's interest in conjunction with other problems encountered in the administration of the contract." [9] Nevertheless, because the Government is entitled to exercise its discretion, the surety bears an "unusually heavy burden of proof" in showing an abuse of that discretion.[10]

In balancing the competing interests of the Government and the surety in order to determine whether the Government has exercised reasonable discretion in distributing funds, a reviewing court should consider the following factors, as set forth in *Balboa*:

> Attempts by the Government after notification by the surety, to determine that the contractor had the capacity to complete the job;
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> Percentage of contract performance completed at the time of notification by the surety;
>
> (3) Efforts of the Government to determine the progress made on the contract after notice by the surety;
>
> (4) Whether the contract was subsequently completed by the contractor (not conclusive, but relevant to show the reasonableness of the contracting officer's determination of the progress on the project);
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> (5) Whether the payments to the contractor subsequently reached the subcontractors and materialmen (this goes to the equitable obligation of the Government to subcontractors and others to see that they will be paid; also, because

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[8] *Balboa Ins. Co.v.United States*, 775 F.2d 1158, 1162 (Federal Cir. 1985). The surety is required to give notice of the contractor's failure to pay its subcontractors and suppliers before a duty is imposed on the Government to use discretion in releasing contract funds. *Transamerica,* 32 Fed.Cl. at 314-15; see also, *Fireman's Fund Ins. Co. v. United States,* 909 F.2d 495, 499 (Fed. Cir. 1990).

[9] *Id*. at 1164, citing *Argonaut Insurance Co. v. United States*, 434 F.2d 1362, 1368 (Ct. Cl. 1970).

[10] *Id*.

the surety is liable to the subcontractors, any money that reaches them furthers the objectives of the surety as well as those of the Government);

Whether the Government contracting agency had notice of problems with the contractor's performance previous to the surety's notification of default to the Government;

Whether the Government's action violates one of its own statutes or regulations;

(8) Evidence that the contract could or could not be completed as quickly or cheaply by a successor contractor. [11]

The problem with evaluating any surety's claims under the *Balboa* factors is the lack of case law actually applying the factors. However, the following post-*Balboa* decision is instructive.

In *United Pacific Ins. Co. v. United States*, the Claims Court held that the Government abused its discretion in authorizing a progress payment to the contractor when, upon minimal investigation, the Government could have determined that the contractor had not performed the work invoiced.[12] After receiving the payment, the contractor did not use the funds to pay subcontractors and suppliers, whose claims were later paid by the surety. Notably, at the time the payment was released by the Government, the surety had not given notice of any claims. Nevertheless, the court held that the Government's "callous failure to inquire" into the veracity of the contractor's representations regarding job status "topples the equitable scales of justice" in favor of the surety.[13] The motivating factor behind the court's decision was the government's payment for materials which were not actually purchased by the contractor. The court in *United Pacific* also held that even though the contractor completed the project, the completion was one year late and occurred only after the surety had paid the subcontractors. The court aptly noted: "It is questionable whether the project could have been completed by the contractor without assistance from the surety. The necessity of plaintiff's intervention in light of this factor weighs in plaintiff's favor." [14]

In attempting to freeze funds, the surety often will run afoul of a particular section of the FAR's and its interaction with the seventh factor of *Balboa,* which in essence recognizes that governmental agencies should follow their own lawful rules and regulations. On this point, it is not uncommon for the federal owner to assert that it is "barred" by FAR 28.106-7(a) from withholding contract funds from the principal during the performance of the project. Specifically, FAR 28.106-7(a) provides that "[d]uring contract performance, agencies shall not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid". However, both the case law and other FARs require the Government to make good faith efforts to determine that subcontractors and suppliers have and will be paid before making progress payments. See 31 U.S.C. § 3903(b)(1)(B); FAR 232.970-1, discussed in detail below.

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[11] *Id.* at 1164-65. (citations omitted)
[12] *United Pacific Ins. Co. v. United States*, 16 Ct.Cl. 555 (1989).
[13] *Id.* at 558.
[14] *Id.* at 559.

FAR 232.970-1 provides:

232.970-1 Subcontractor assertions of nonpayment-

In accordance with Public Law 102-190, title VIII, section 806(a)(4), upon the assertion of a subcontractor or supplier of a DoD contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, purchase order, or other agreement with the prime contractor, the contracting officer may determine-

For a construction contract, whether the contractor has made—

Progress payments to the subcontractor or supplier in compliance with chapter 39 of title 31, United States Code (Prompt Payment Act);

(ii) Final payment to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a)(1)and (2) of this subsection, the contracting officer finds the prime contractor is not in compliance, the contracting officer may--

Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the contracting officer determines that a certification referred to in (a)(3) of this subsection is in accurate in any material respect, the contracting officer shall initiate administrative or other remedial action.

Thus, with regard to government projects, FAR 232.970-1 authorizes the contracting officer to investigate whether the contractor has failed to make payments and/or submitted false certifications, and withhold progress payments if permitted to do so by the contract. A principal's contract with the government is likely to authorize the government to withhold funds. Additionally, the *Balboa* court made clear the Government does have a duty to withhold payments if the factors set forth therein weigh in favor of the surety. Accordingly, there is ample authority for the Government to withhold progress payments despite FAR 28.106-7(a).

Additionally, the federal owner's release of contract balances once it is aware that the contractor has failed to make payments to subcontractors and suppliers arguably violates 31 U.S.C. § 3903(b)(1)(B). 31U.S.C. § 3903(b)(1)(B) provides that a progress payment to a contractor in connection with a construction contract may not be made unless the contractor certifies, among other things, that:

> payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this chapter; and
>
> (iii) the application does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

Further, 31 U.S.C. § 3105(e) imposes duties upon the certifying contractor to disclose a failure to pay a subcontractor for performance covered by the pay application pursuant to which a progress payment was tendered by the Government. As a practical matter, federal owners will not release contract funds to the contractor without such a certification. However, in the case of valid payment bond claims being asserted against the surety, the federal owners are on notice that the certification was false. To permit the Government to make payments based on a certification which it knows or should know is false would eviscerate the protection to subcontractors and suppliers provided under 31 U.S.C. § 3105(e).

Last, it can be argued that FAR 28.106-7(a) does not address the issue of the surety's right to the contract payments. Under its indemnity agreement with the principal, the surety is assigned the right to contract receivables on the bonded projects. Therefore, while the surety, as subrogee to the claims of the subcontractors and suppliers whose claims it satisfies, may not be entitled to stop progress payments under FAR 28.106-7(a), if applicable, the surety as assignee of the principal's rights is entitled to claim a priority right to payment of the contract funds over the principal.

II. The Cooperative Principal: Obtaining an Assignment of Contract Balances on Federal Projects and Asserting the Principal's Claims Against the Government

When a cooperative principal is in danger of default, the surety is wise to assess the existing potential for recovery against the owner before determining how to proceed with the principal. This recovery generally includes: (1) obtaining contract balances either through equitable subrogation as discussed above or (2) through the principal's assignment of contract funds and (3) the surety's assertion of the contractor's existing claims against the government owner. We will address the practical methods of achieving these types of recovery.

The applicable statute governing the assignability of federal contracts is the Assignment of Contracts Act, 41 U.S.C. §15 (hereinafter "the Act"). This Act prohibits "transfers" of government contracts and was designed to protect the government from conflicting claimants

and multiple liability. [15] Its sister act, the Assignment of Claims Act, 31 U.S.C. § 3727 prohibits the assignment of claims existing at the time of transfer but not to future claims.[16] The case law interpretation of both Acts is identical, and both contain an exception for the assignment of contracts/claims to financial institutions to give contracting parties the financial freedom to obtain financing.[17]

Courts have held that a surety does not qualify as a lending institution so the exception does not apply.[18] Further, a surety's equitable subrogation rights do not render a right of assignment against the government.[19] However, an invalid assignment against the government is still binding between the parties.[20] Thus, an assignment will give the surety preference over the principal to contract proceeds should a dispute later arise.[21]

Despite the prohibitions, the courts have not upheld these statutes to be as absolute as the language would imply.[22] Limits on the broad language have been applied, and the key to determining the assignability of these contracts is whether the assignment is within the "mischief Congress intended to prevent".[23] The statute was meant to insure that the government would "secure the personal attention and services of the contractor".[24] Thus, assignments for the benefit of creditors, receivers, and where personal performance was not required have been upheld.[25]

If the assignment does not deprive the government of the contractor's management and financial responsibility, it should be upheld.[26] While an assignment of contract proceeds to the surety may change the contractor's financial responsibility to the other subcontractors on the job, the government is still receiving the benefit of the contractor's work per the original contract. Arguably, the government's position from the assignment is more secure because the surety insures that the funds are being applied to the job costs.[27] In any event, the government can choose to recognize an assignment.[28] This can be achieved through novation as outlined in 41 CFR § 26.4 or through the government's acknowledgment of the assignment via its course of conduct and dealings with the contractor. [29]

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[15] *Martin v. National Surety Co.*, 300 U.S 588 (1937).

[16] *Rocky River Co., Inc. v. United States*, 169 Ct. Cl. 203 (1965).

[17] *General Cas. Co. of America v. Second Nat. Bk of Houston,* 178 F.2d 679 (5th Cir. 1949). As this is the only exception, the regulations for the Assignment of Claims Act, as prescribed in the Federal Acquisition Act ("FAR") § 32.800 *et seq.,* only address the procedure for a contractor's assignment of contract payments to a financial institution.

[18] *Id.*

[19] *Kane v. United States,* 26 Cl. Ct.655 (1992).

[20] *Pew Const. Co. Inc. v. Lipscomb*, 965 F.2d 1559 (11th Cir.1992).

[21] *United States v. Munsey,* 332 U.S. 234 (1947).

[22] *In re Adana Mortgage Bankers, Inc.,* 12 B.R. 977 (B.R. N.D. Ga., 1980).

[23] *Thompson v. Comm. of I.R.S.*, 205 F.2d 73 (3d. Cir.1953).

[24] *Id.* at 76

[25] *Id.*

[26] *Id.*

[27] See *Martin, supra* at 595.

[28] *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980).

[29] *Id.* at 745.

In *Tuftco,* the Department of Housing & Urban Development ("HUD"), awarded two contracts to Grant to manufacture mobile homes. Grant assigned the contract to Winchester but first discussed the assignment with the contracting officer. The contracting officer was also notified in writing of the assignment. On the second contract, the contracting officer acknowledged the assignment in writing. A dispute arose when the contracting officer did not forward all of the payments to Winchester pursuant to the assignment. The United States argued that the assignment was invalid under the Act and that it did not comply with the notice provisions required for financing agreements. The court held that the officer had authority to waive the anti-assignment clause and that waiver was determined from the contracting officer's course of conduct and dealings with Grant.[30] Therefore, although an assignment of federal contracts is prohibited under the Act, the assignment will be upheld if recognized by the government.

Tuftco also held that compliance with the notice provisions for financial institutions is not required unless that exception applied. However, it seems wise to provide notice to the government in accordance with the Act to eliminate any "communication breakdown" between the surety, the contractor and the contracting officer. 48 CFR § 232.805 requires the contractor to give the contracting officer a true copy of the original assignment, and three (3) copies of the notice of assignment and one copy of each to the disbursement officer. A copy of the assignment and notice should be filed with any UCC filing as well.

As a practical matter, while the regulations should allow a contracting officer to recognize an assignment of contract proceeds to a surety, experience shows that most follow a bright-line rule: assignments to financial institutions are recognized; assignments to others (including sureties) are not. In the case of a principal willing to assign proceeds, the surety's best approach is to select a bank which has no relationship to act as an escrow agent, and to have the contract proceeds assigned to that bank. Such assignments have a much greater chance of being recognized than direct assignments to sureties under the financial institution exception contained in 41 U.S.C. § 15 and 31 U.S.C. § 3727.

However, by using and recording the appropriate assignment documents, the assignments should be valid in any event as to third parties. Further, if the Government is properly notified and acknowledges the assignment, the surety will be in its most secure position in light of the anti-assignment provisions of the Acts.

III. Procedure for Pursuing Claims and Applicable Limitation Periods

The Contract Disputes Act of 1978, ("CDA"), 41 U.S.C. § 601, *et seq.* sets forth the requirements for a contractor's claim against the government which must be met before the contractor can file suit against the government. The claim must be in writing for a sum certain and certified by one with authority that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable. Further, the CDA, 41 U.S.C. § 601, *et seq.,* requires that a "contractor" submit all claims against the government "relating to a contract" in writing to the contracting officer within six years after the accrual of the claim.[31] A "contractor" is defined as "a party to a Government contract other than the

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[30] *Id.*
[31] 41 U.S.C. § 605(a).

Government." [32]

If the claim is less than $100,000, the contracting officer must issue a decision within 60 days from a written request for a decision within that period. If the claim exceeds $100,000, the contractor must either issue a decision within 60 days or notify the contractor when the decision will be issued.[33] If the contracting officer unduly delays decision, the contractor may request the court of claims to so direct the contracting officer. The contracting officer's decision is final unless an appeal or suit is timely commenced.[34] The contractor may appeal the decision of the contracting officer to the agency board of contract appeals within 90 days of receipt of his or her decision.[35] The contractor may also skip the board appeal and file suit in the Court of Federal Claims.[36] Suit must be filed within 12 months of the contractor's receipt of the decision of the contracting officer.[37] It appears in the contractor's best interest to file suit rather than appeal to the board of contract appeals because all findings of fact by the board of contract appeals are deemed final and will not be set aside by the Court of Federal Claims unless fraudulent, arbitrary, capricious, "so grossly erroneous as to necessarily imply bad faith", or unsupported by substantial evidence.

A surety is only required to proceed under the CDA on claims arising out of (1) a takeover agreement executed between the surety and the government, and (2) the underlying principal contract to the extent it is incorporated into the takeover agreement.[38] Therefore, when a surety has executed a takeover agreement, it must exhaust the administrative remedies under the Contract Disputes Act of 1978 ("CDA"), discussed above, before filing suit relative to any claims related to the takeover agreement.

A surety which does not execute a takeover agreement with the government is not a "contractor" under the CDA.[39] Similarly, even where the surety executes a takeover agreement, the surety's equitable subrogation claim does not fall under the CDA.[40] Thus, a surety seeking to enforce its right of equitable subrogation (or any other non-contract right which it may have) is not required to file a claim under the CDA before filing suit.[41] In fact, the case law indicates that the surety acting on its equitable subrogation rights is not permitted, in most cases, to participate in the administrative process.[42] Again, the basis for the differing treatment afforded various surety claims is that the CDA only applies to claims by a "contractor" against the United States.[43]

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[32] 41 U.S.C. § 601(4).

[33] 41 U.S.C. § 605(c).

[34] 41 U.S.C. § 605(b).

[35] 41 U.S.C. § 606.

[36] 41 U.S.C. § 609(a)(1).

[37] 41 U.S.C. § 609(a)(3).

[38] *Travelers Indem. Co. v. United States*, 16 Cl.Ct. 142, 153 (1988).

[39] *Westech Corp. v. United States*, 20 Cl.Ct. 745,749 (1990); see also *Universal Surety Co. v. United States*, 10 Cl.Ct. 794, 800 (1986) (holding that a surety is not a contractor under the CDA where the surety does not execute a takeover agreement with the government).

[40] *Transamerica Ins. Co. v. United States*, 31 Fed.Cl. 602 (1994).

[41] *Id.*

[42] *Westech, supra,* 20 Cl.Ct. at 749.

[43] *Transamerica, supra, 31 Fed.Cl. at 606.*

In *Transamerica*, the Federal Claims Court held that the CDA does not apply to a surety's equitable subrogation claim to contract balances even where the surety has executed a takeover agreement. The court noted that the CDA applies to the contract claims of a surety who executes a takeover agreement because the surety then becomes a contractor under § 601(4).[44] However, the court found that the CDA does not apply to the surety's equitable subrogation claim because it is not a contract claim.[45] The court based its opinion on the following factors: (1) the surety's equitable subrogation rights arise on the principal's default, prior to the execution of a takeover agreement by the surety; (2) the right of subrogation relates back to the date of execution of the bonds; (3) "contract retainage" for purposes of the surety's equitable subrogation rights is determined at the time of the principal's default; and (4) the surety has a right of equitable subrogation regardless of whether it executes a takeover agreement. [46]

It should be noted that the claims court has limited the surety's recovery under an equitable subrogation theory to recovery of contract balances held or improperly disbursed by the government.[47] In *Westech*, the court held that a surety which did not execute a takeover agreement was not permitted to assert the principal's claim for delay and acceleration damages against the government.[48] The court, without meaningful analysis, rejected the surety's argument that there is no difference between a completing surety and one who pays the costs of a completing contractor selected by the government. [49] The court held that the privity created by the surety's takeover agreement with the government gave the surety greater rights.[50] Thus, the implication of *Westech* is that where the surety executes a takeover agreement which incorporates the terms of the principal contract, the surety may assert the damage claims of its principal under the CDA.

It is clear that the Federal Claims Court has jurisdiction to hear a surety's claim of equitable subrogation to contract funds alleged to have been wrongfully disbursed by the Government to the contractor.[51] 28 U.S.C. § 1491(a)(1) provides that the Claims Court has "jurisdiction to render judgment upon any claim against the United States founded ... upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." The Claims Court has held that equitable doctrines, including the surety's right of equitable subrogation, may be used to confer jurisdiction on the Court under § 1491(a)(1).[52] The statute of limitations for filing suit in Federal Claims Court is six years from the date the claim first accrued.[53] For example, if the government made a wrongful

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[44] *Id.* at 605, citing *Transamerica Ins. v. United States*, 6 Cl.Ct. 367, 370 (1984).

[45] *Id.* at 606.

[46] *Id.* at 606-07. While the *Transamerica* case involved a claim for contract funds on a project other than the project on which the surety executed the takeover agreement, this was not critical to the court's decision. The court stated that the fact that the surety in that case was seeking recovery of funds on a contract other than that which generated the claim "only reinforces the court's conclusion." *Id.* at 607.

[47] *Westech, supra,* 20 Cl.Ct. at 749-50.

[48] *Id.*at 750.

[49] *Id.*

[50] *Id.* at 749.

[51] *Balboa, supra*, 775 F.2d at 1163; *Transamerica, supra*, 32 Fed.Cl. at 311; *Transamerica, supra,* 31 Fed.Cl. at 605; see also 28 U.S.C. § 1491.

[52] *Transamerica, supra,* 31 Fed.Cl. at 605.

[53] 28 U.S.C. § 2501.

payment, the time begins to run from the date of the first wrongful payment on each project.

It will often happen that a principal will have multiple federal projects, and that several owners will improperly release contract proceeds. Since all of the contracting entities are agencies of the United States, the United States is the proper party defendant.[54] In such a circumstance, there is no bar to bringing a single suit relative to all projects, and this would be the most cost-effective manner of proceeding. In fact, Court of Federal Claims Rule 18 provides that a party asserting a claim to relief "may join, either as independent or as alternate claims, as many claims as the party has against an opposing party."

Conclusion

The surety, who always has the right of equitable subrogation once a contractor threatens default, should put the government on notice of the potential default as early as possible to protect the remaining contract balances and improper disbursement of same. If the surety is evaluating whether to finance a contractor, it should attempt to have contracts assigned to a financial institution and deposited in an escrow trust account as described herein since the government may not comply with a contractor's direct assignment to the surety. If the cooperative principal has viable claims against the government which the surety wishes to pursue, the surety's standing to assert those claims will likely be challenged unless the surety enters into a takeover agreement with the owner. Obviously, the surety should address such issues in a takeover or financing agreement and record same as a UCC filing to give notice to third parties. These steps offer the best protection of the surety's rights and interests in contract balances and the principal's claims.

[54] 28 U.S.C. § 1491(a)(1).