



In the Matter of:

Disputes concerning the payment of prevailing wage rates and proper classifications by

**LIBERTY MUTUAL INSURANCE
COMPANY d/b/a/ LIBERTY BOND**

ARB CASE NO. 00-018

**SERVICES, as Surety under Performance and
Payment Bonds and Party Taking Over
Contract of FRED BRUNOLI & SONS, INC.**

ALJ CASE NO. 99-DBA-11

DATE: June 30, 2003

and

**FRED BRUNOLI & SONS, INC.,
Prime Contractor**

**With respect to laborers and mechanics
employed by Brunoli under United States
Coast Guard Contract No. DTCG47-96-EFK20
for Chase Hall Renovations at the Coast Guard
Academy in New London, Connecticut.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Liberty:

Matthew Horowitz, Esq., Wolf, Horowitz, Etlinger, & Case, LLC, Hartford, Connecticut

For Administrator, Wage and Hour Division:

Ford F. Newman, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Acting Solicitor of Labor, U.S. Department of Labor, Washington, D.C.

For Intervenor Building and Construction Trades Department, AFL-CIO:

Terry R. Yellig, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the Davis-Bacon Act

(DBA or the Act)¹, 40 U.S.C.A. § 276a *et seq.* (West 2001) and the regulations at 29 C.F.R. Parts 5 and 7 (2002). Liberty Mutual Insurance Company d/b/a Liberty Bond Services (Liberty Mutual or Liberty) seeks review and reversal of a November 4, 1999 Administrative Law Judge (ALJ) decision and order (D. & O.).

The ALJ held that Liberty Mutual, a performance bond surety which took over performance of and completed a Federal construction contract on behalf of Fred Brunoli & Sons, Inc. (Brunoli), its bonded prime contractor, was liable for DBA prevailing wage violations Brunoli committed before Liberty Mutual took over. Further, the ALJ ruled that the United States Coast Guard (Coast Guard) properly withheld from Liberty Mutual \$83,400.30 of contract payments otherwise due Liberty for completing the Coast Guard contract. The Administrator, Wage and Hour Division (Administrator), had earlier directed the Coast Guard to withhold the contract monies to satisfy the defaulted contractor's alleged DBA prevailing wage violations.

In this final decision and order we affirm the ALJ's conclusions and order but supplement the legal principles and authority he cited.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear and decide appeals taken from ALJs' decisions and orders concerning questions of law and fact arising under the DBA and the numerous related Acts which incorporate DBA prevailing wage requirements. *See* 29 C.F.R. § 5.1; 29 C.F.R. § 6.34; 29 C.F.R. § 7.1(b).

In reviewing an ALJ's decision, the Board acts with "all the powers [the Secretary of Labor] would have in making the initial decision. . . ." 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 7.1(d) ("In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary of Labor. The Board shall act as fully and finally as might the Secretary of Labor concerning such matters.") Thus, "the Board reviews the ALJ's findings *de novo*." *Lloyd T. Griffin, Jr., et al.*, ARB Nos. 00-32, -33, ALJ No. 91-DBA-94, slip op. at 2 (ARB May 30, 2003); *Thomas & Sons Bldg. Contractors, Inc., et al.*, ARB No. 00-050, ALJ No. 1996-DBA-37, slip op. at 4 (ARB Aug. 27, 2001). *See also* *Sundex, Ltd. and Joseph J. Bonavire*, ARB No. 98-130, ALJ No.1994-DBA-58, slip op. at 4 and cases cited therein (ARB Dec. 30, 1999).

¹ The Act requires prime contractors and subcontractors to pay prevailing rates of wages, as determined by the Secretary of Labor, to all laborers and mechanics that perform work on Federal public construction contracts in excess of \$2,000. The Secretary of Labor predetermines these prevailing wages, including fringe benefits, by locality (generally, the county where the construction is to remain). The prevailing wage rates and labor standards provisions establishing the Act's requirements are included in each covered contract and made part of the requirements of Federal construction projects.

BACKGROUND

I. Factual History

The parties reached an agreement concerning the material facts. See “Partial Consent Findings.” Reference in this decision to these consent findings or the accompanying attached exhibits areas follows: “PCF at __, para. __” and “Ex. __.” The ALJ adopted these consent findings in toto. D. & O. at 2-4.

In short, this dispute arose as follows. On September 26, 1996, the Coast Guard awarded a Federal construction contract in the amount of \$5,224,600 to Brunoli for renovations to Chase Hall, a Coast Guard Academy food services facility located in New London, Connecticut. *Id.* at 2. The contract was subject to and contained the labor standards provisions of the Act. Ex. 1 at C-1(m). Attached to the contract was the applicable DBA wage determination specifying the prevailing wage rates required to be paid all laborers and mechanics working on the Chase Hall renovation project. D. & O. at 2, para. 3. As the prime contractor on the project, Brunoli was obligated under the Act and the terms of the contract to make or ensure proper payment of the prevailing wages to employees of all subcontractors, as well as its own employees. Ex. 1 at C-1(m).

All DBA covered contracts are also subject to the requirements of the Miller Act, 40 U.S.C.A. § 270(b) (West 2001), which requires prime contractors such as Brunoli to obtain both a payment bond to ensure recompense to suppliers of goods and services used in the construction project and a performance bond to ensure completion of the terms of the construction contract. Liberty Mutual was the surety for both the payment and performance bonds. D. & O. at 2, para. 4. The payment bond on the project (in the amount of \$2.5 million) is not at issue here.² The performance bond, in the full amount of the contract, guaranteed Brunoli’s performance of all the terms and conditions of the Coast Guard contract. *Id.* In the event of Brunoli’s failure to perform the terms of the contract, the performance bond required Liberty Mutual to either complete the construction contract or compensate the Coast Guard for its losses caused by the prime contractor’s default, including the costs of contract reprocurement and completion of the construction work.

The Coast Guard defaulted Brunoli on October 31, 1997, and paid it for work performed through August 1997. PCF para. 5; Ex. 4. On January 7, 1998, the Coast Guard and Liberty Mutual entered into an agreement entitled “Surety Takeover Agreement Pursuant to Performance Bond” (Takeover Agreement). PCF para. 6; Ex. 5. Subsequently, the Coast Guard and Liberty Mutual attached the Takeover Agreement to a modification of the original Coast Guard/Brunoli contract. The Coast Guard and Liberty Mutual signed the contract modification in January 1998. PCF para. 5, Ex. 5.

² The Miller Act provides claimants a private right of action against the payment bond surety. None of the employees on the Coast Guard contract made claims for prevailing wages pursuant to the payment bond.

The Takeover Agreement recites that the Coast Guard requested Liberty Mutual “under its Performance Bond to assist in the completion of the work remaining to be performed under the Contract.” *Id.* at Ex. 5, p. 4. The Takeover Agreement further noted that Liberty Mutual “is interested in completing the Contract in order to avoid the delay and inconvenience of re-letting by the [Coast Guard] and based on assurances that in doing so it will receive the contract and retainage payments as hereafter set forth” *Id.* Liberty Mutual agreed to “arrange for completion of the work required of the Original Contractor [Brunoli] under the Contract (and modifications thereof) *in accordance with the terms and conditions of the Contract.*” Ex. 5 at 5, ¶ 1 (emphasis added). Further, the Takeover Agreement expressly incorporated all documents that were part of the original Coast Guard/Brunoli contract for the renovation of Chase Hall. As noted above, the original contract between the Coast Guard and Brunoli specifically incorporated the DBA prevailing wage labor standards provisions and the applicable wage determination.

In exchange for completing the contract, Liberty Mutual was to receive all remaining undisbursed contract funds (including any amounts withheld from Brunoli) up to the amount of contract completion costs it incurred. Ex. 5 at 6, para. 4(a). The Takeover Agreement also provided that the monies payable to Liberty Mutual “are not subject to reduction or set-off for any liability that the Original Contractor [Brunoli] may have to the Government *and which is not or may not be covered by the performance bond.*” Ex. 5 at p. 6, para. 4(b) (emphasis added).

After execution of the Takeover Agreement, the Wage and Hour Division reported to the Coast Guard the results of its DBA compliance investigation of Brunoli’s performance. On June 29, 1998, the Wage and Hour Division requested the Coast Guard withhold \$83,400.30 in contract funds to cover the amount of prevailing back wages it found to be owed to 28 of Brunoli’s employees. PCF at para. 7. In a letter dated July 6, 1998, the Coast Guard confirmed withholding that amount. *Id.* at para 10.

Pursuant to routine DBA enforcement procedures, the Wage and Hour Division issued charging letters to both Brunoli and Liberty Mutual, alleging that Brunoli committed DBA prevailing wage violations in performance of the project. By these charging letters, Liberty Mutual and Brunoli were offered the opportunity to request an administrative hearing to contest the allegations of the investigation and the contract withholding action. Brunoli failed to request the proffered administrative hearing opportunity. *Id.* at para. 11. Accordingly, the violations as alleged in the charging letter became final as to Brunoli. 29 C.F.R. § 5.11(d).

Liberty Mutual timely requested an administrative hearing on September 1, 1998. The ALJ issued a “Decision and Order Approving Partial Consent Findings and Decision and Order” on October 12, 1999. This October 12 Decision and Order was subsequently vacated because it had been issued prior to the parties filing reply briefs. D. & O. at 2. After considering the entire record, including reply briefs, the ALJ issued the Decision and Order now on review before the Board.³

³ This final and appealable decision and order was entitled “Order Vacating Decision and Order Approving Partial Consent Findings and Decision and Order and Amended Decision and Order Approving Partial Consent Findings and Decision and Order.”

II. The ALJ's Decision and Order

The ALJ began his discussion of the issues presented in this case by presuming that since the DBA “was enacted to protect laborers and mechanics . . . from substandard wages,” the Act “must be given such reasonable construction as will insure that every laborer and mechanic is paid the wages and fringe benefits” to which the law entitles them. D. & O. at 4, citing *Quincy Housing Authority (Quincy Housing)*, WAB No. 87-32, slip op. at 6 (Feb. 17, 1989)⁴ (Administrator has superior right over claim of local government housing authority, made on behalf of surety, to undisbursed contract funds withheld for prevailing wage violations).

The ALJ considered the question of priority to the withheld funds under various theories. The Administrator argued that by the Takeover Agreement, Liberty Mutual consented to modification of the original contract (as was eventually done by the Coast Guard and Liberty Mutual). As a mere substitute for the original prime contractor (Brunoli), the Administrator argued that Liberty did not gain greater rights than Brunoli, but was liable for the prevailing wages Brunoli owed to the laborers and mechanics.

Liberty Mutual argued that the Takeover Agreement absolved it of any liabilities that Brunoli may have owed the government and which arose prior to the takeover. Liberty further argued that its right to the contract monies was superior because the Administrator ordered the Coast Guard to withhold the funds after the effective date of the Takeover Agreement.⁵

The ALJ concluded that Liberty was not entitled to the contract funds under a theory of subrogation, since it did not pay the prevailing wage obligations owed by Brunoli. If Liberty had satisfied the prevailing wage claims, it would have been entitled by subrogation to the withheld amounts in the absence of any other claims by the government. But since the prevailing wages remained unpaid, the ALJ found that awarding the funds to Liberty Mutual “would result in a

⁴ The Wage Appeals Board (WAB) issued final agency decisions pursuant to the DBA (and its related Acts) on behalf of the Secretary of Labor prior to the establishment of the Administrative Review Board in 1996.

⁵ Although Liberty Mutual challenged the Administrator's right to contract funds that had not accrued for payment to Brunoli, the ALJ gave short shrift to the argument, ignoring any discussion of the meaning of the DBA provision arguably limiting withholding to accrued monies. *See* 40 U.S.C.A. § 276a. The ALJ instead concentrated on the remedial nature of the DBA, noting, “the Takeover Agreement cannot trump the Davis-Bacon Act.” D. & O. at 9. After this Petition for Review was filed with the Administrative Review Board, the parties and the Building and Construction Trades Department, AFL-CIO were offered (and accepted) the opportunity to brief the specific question of the meaning of “accrued” funds in the Act and how, if at all, that would affect disposition of this matter. This issue is discussed in detail below.

situation where the Surety has priority to withheld funds that Brunoli, itself, did not have.” D. & O. at 8. In so finding, the ALJ adopted the reasoning of the Supreme Court:

From *Prairie State Nat. Bank of Chicago v. United States* . . . to *American Surety Co. v. Sampsell* . . . , we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money.

United States v. Munsey Trust Co., 332 U.S. 234, 240 (1947) (citations omitted) (Federal government entitled to set off against contract funds withheld from surety a contractor’s debt to government arising from another, unrelated contract). The ALJ also relied upon *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962) (government has right to apply withheld funds to pay laborers and materialmen and they in turn had a right to be paid from the withheld funds). Accordingly, the ALJ held that the Administrator, not Liberty Mutual, was entitled to the withheld contract funds.

DISCUSSION

In discussing Liberty Mutual’s Petition for Review we first address the statutory and regulatory bases underlying the Administrator’s directive that the Coast Guard withhold the contract funds. Then we consider Liberty Mutual’s arguments as to why it is entitled to the withheld contract monies.

I. The Legal Framework and The Parties’ Arguments

A. *The Miller Act*

All Federal construction contracts that are subject to the DBA are also governed by the Miller Act, which requires that prior to the award of Federal construction contracts to a bidder:

[S]uch person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as “contractor”: (1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States. (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the

use of each such person.

40 U.S.C.A. § 270a(a). Here, Liberty Mutual was both the payment and the performance bond surety for the Coast Guard's construction project. In short, the purpose of a payment bond is to ensure that subcontractors, employees of the prime contractor and subcontractors, and materialmen have an avenue to seek restitution in the event they are not paid by a prime contractor on a Federal construction project. These persons and entities do not have privity of contract with the Federal government and therefore could not make direct claims against the government for alleged losses.

On the other hand, a performance bond surety is required to ensure that all of the Federal government's contract requirements are performed to completion. This includes, of course, completion costs of a Federal construction project where the prime contractor has been defaulted and does not complete the project. The Administrator argues that Liberty Mutual (as performance bond surety), in addition to its responsibility to see project construction through to completion, is further liable for completing all of the other terms of the Federal contract. This responsibility includes complying with DBA contract provisions that required Brunoli to pay prevailing rates to the laborers and mechanics employed on the project. *See* Stmt. of the Adm. in Response to Pet. for Rev. at 8-10; Adm. Supp. Brief at 7-8.

B. The DBA's "Accrued Payments" Clause

In the event that prevailing wage violations are committed under a covered contract, the Act provides that:

[T]here may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

40 U.S.C.A. § 276(a) (emphasis added).⁶

Based on this language, Liberty argues that since Brunoli defaulted, no further contract funds, i.e., “accrued payments,” were due to Brunoli. Therefore, Liberty posits, the Administrator cannot withhold funds to which Brunoli was not entitled. *See* Pet. for Rev. at 28-33; Liberty Reply Mem., generally. Moreover, Liberty asserts, the Act only permits withholding accrued funds due the contractor that actually committed the violations. Pet. for Rev. at 33-35. Therefore, since Brunoli committed the violations, Liberty Mutual argues that withholding contract funds which had accrued to it as the completing surety was contrary to the terms of the Act. *Id.* at 33-36.

We agree with Liberty Mutual that no contract funds accrued to Brunoli. Nevertheless, the funds were properly withheld from Liberty Mutual because it completed the construction contract, and the contract monies therefore accrued to Liberty. Thus, those accrued funds were subject to withholding because of Liberty’s obligation to the Coast Guard to complete the entire contract. This obligation included the requirement to ensure the proper payment of prevailing wages on the project.

We further conclude that since Liberty Mutual was the completing surety, it was also “the contractor” from which the accrued contract funds were properly withheld pursuant to the Administrator’s withholding power. The Act does not explicitly prohibit contract withholding from sureties who do not commit prevailing wage violations. Additionally, one of the Act’s principal enforcement tools is the provision that makes prime contractors liable for *subcontractors’* prevailing wage violations. 40 U.S.C.A. § 276a(a). We find that the relationship between Liberty and Brunoli is analogous to that between a prime contractor and a subcontractor. Thus, we reject Liberty’s argument that it cannot be held liable for backwages due as a result of violations committed by Brunoli, its own bonded prime contractor.

⁶ Withholding contract monies for prevailing wage violations is the Administrator’s remedy pursuant to the Act. 40 U.S.C.A. § 276a. The private rights of action provided under Miller Act payment bonds constitute the sole remedy that underpaid laborers and mechanics may themselves initiate. 40 U.S.C.A. § 270b(a). The “protection offered by the Davis-Bacon Act and the Miller Act are not mutually exclusive.” *Unity Bank & Trust Co. v. United States*, 5 Cl. Ct. 380, 385 (1984). “[I]f such withheld amounts are insufficient to cover the wage underpayments, the employees have a statutory cause of action against the contractor and its sureties to recover the balance owed. . . . Thus, the employees’ failure to seek recovery from the surety before the expiration of the Miller Act Bonds does not preclude them from availing themselves of the additional remedies afforded them under the Davis-Bacon Act. Nor does their inaction on the Miller Act Bonds alter the priority of their claims in relation to [the surety’s] to the withheld moneys.” *Id.*

Liberty Mutual has directed our attention to no authority supporting the contention that withholding may only be made from an original (defaulted) prime contractor that actually committed prevailing wage violations. Liberty Mutual's interpretation of the Act would lead to the anomalous situation of relieving a completing performance bond surety of its obligations to ensure completion of all its defaulted (and bonded) prime contractor's specifications under the contract. We decline to read this limitation into the Act.

C. "Unaccrued" Funds

In addition to the Administrator's authority to withhold accrued payments, the Department of Labor regulation implementing the Act's withholding provision authorizes contracting officers, upon their own initiative or at the Administrator's request, to suspend the "payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled." 29 C.F.R. § 5.9. An "advance" of contract funds implies payment of funds other than those that were accrued and otherwise legally due and owing a contractor, i.e., what might be termed "unaccrued funds." Suspending advances "until sufficient funds are withheld" clearly contemplates and permits contracting officers to withhold these "unaccrued" contract funds. Therefore, we agree with the Administrator and conclude that the Department's regulation at 29 C.F.R. § 5.9 supports the Administrator's authority to withhold unaccrued funds such as advances. *See* Adm. Supp. Brief at 10.

Our foregoing conclusions mirror the overarching Congressional concern evidenced in the Act's 1935 amendments, which included the withholding clause. Congress sought to ensure that laborers and mechanics on Federal construction projects would be paid prevailing wages. *See* S. Rep. No. 1155, Comm. on Ed. and Lab. to accompany S. 3303 at 3 (Aug. 9, 1935) (withholding provision "also provides for laborers or mechanics aggrieved by failure to pay the required rates of wages or by the kick-back by including a stipulation permitting a contracting officer to withhold from money otherwise due the contractor such amounts as he considers necessary to reimburse such employees."). Thus, neither the DBA's terms nor the legislative history indicate Congress's intention to limit the Administrator's withholding authority to the detriment of the laborers and mechanics that are the intended beneficiaries of the Act.

II. The *Westchester* Case is Controlling

A. *Westchester* and Liberty Mutual's Arguments

The facts in *Westchester Fire Ins. Co. v. United States*, 52 Fed. Cl. 567 (2002) (*Westchester*) are almost entirely on point with the operative facts in this matter. Indeed, we

conclude that the holding in *Westchester* disposes of all Liberty Mutual's arguments.

In *Westchester*, the Court of Federal Claims, which has jurisdiction *inter alia* to decide claims arising under contracts to which the United States is a party, was presented with the scenario of a prime contractor that had been defaulted by the contracting agency (coincidentally, the Coast Guard). Because the prime contractor (Zanis) had been defaulted, no accrued funds were due and owing it. However, no takeover agreement was involved in *Westchester*; the Coast Guard, rather than the performance bond surety, assumed the obligations of completing the contract. The Administrator alleged that one of prime contractor Zanis's subcontractors had committed prevailing wage violations of nearly \$70,000, and he requested that the Coast Guard withhold that amount. Eventually, the Coast Guard claimed excess costs for contract completion against Westchester, the payment and performance bond surety. These costs included the alleged back wage liability.

Westchester filed a complaint in the United States Court of Federal Claims arguing that since it did not commit the wage violations, it was entitled to the entire unpaid balance of Zanis's contract without any offset for the prevailing wage violations. Rejecting the surety's arguments, the *Westchester* court held that "contractual obligations" the surety undertook in the performance bond "preclude it from asserting a superior right to the contract funds withheld by the Coast Guard to recompense [the subcontractor's] workers for Davis-Bacon . . . violations. By law and contract, *the claims of the subcontractor's workers to the subject funds took priority over Westchester's claim thereto* as the performance bond surety." *Id.* at 583 (emphasis added).

The court also made special note that the outcome would not have been different had a takeover agreement been in effect:

Had Westchester entered into a surety takeover agreement with the Coast Guard, *it could not have avoided using the funds to pay [the subcontractor's] workers in any event because the amount represented an outstanding legal and contractual obligation of the prime contractor. . . .* Westchester cannot achieve a result in this litigation that it had no legal grounds to demand from the Coast Guard [at the time of the prime contractor's default and the commission of the violations].

Westchester, supra at 583 (emphasis added).

The clear import of the *Westchester* decision is that the Administrator's DBA wage claims take priority over the rights of a performance bond surety that, like Liberty Mutual here,

has not satisfied all of the bonded contractor's obligations, including the obligation to ensure the payment of prevailing wages. As discussed below, the Board rejects Liberty Mutual's arguments that attempt to distinguish the facts in this matter from those in *Westchester*.

First, Liberty Mutual asserts that the Takeover Agreement obligated the Coast Guard to give "all of the Undisbursed Contract Funds for the completion of the Project" to Liberty, and that, therefore, this case is distinguishable from *Westchester*. This argument has no merit for two reasons. As noted above, the *Westchester* court opined that even had a takeover agreement existed, the surety still would have been liable. Furthermore, as we earlier concluded, "completion" of the "contract" included not only renovation of the Coast Guard facility, but also payment of Brunoli's prevailing wage liability.

The Takeover Agreement, by its very own terms, requires that Liberty be responsible for all of Brunoli's liabilities that were or could have been subject to the performance bond. Liberty and the Coast Guard agreed that Liberty Mutual would be held blameless only for Brunoli's liabilities to the government that *were not covered by the performance bond*. Ex. 5 at 6, para. 4(b) and at 7, para. 4(d). Brunoli's prevailing wage obligations arose directly from the DBA labor standards provisions and wage determination contained in the Coast Guard contract specifications. As a term of the construction contract, the requirement to pay prevailing wages was or could have been covered by the performance bond, and Liberty Mutual's Takeover Agreement therefore did not absolve it of liability for Brunoli's prevailing wage violations.⁷

Second, Liberty argues that it is not liable for the performance bond obligation to ensure prevailing wage payments because laborers or mechanics on the Coast Guard contract did not file payment bond claims against it. Presumably, such claims would be time barred after the running of the 90-day Miller Act statute of limitations on payment bond claims. Liberty has offered no support for this proposition, and we reject this groundless contention.

The *Westchester* court summarized the relative rights of the surety and the employees on a Federal construction contract:

In the final analysis, the contractual obligations Westchester undertook when it issued its surety bonds to [the contractor] preclude it from asserting a superior right to the contract funds withheld by the Coast Guard to recompense . . . workers for Davis-Bacon . . . violations. By law and by contract, the claims of the subcontractor's

⁷ Liberty Mutual cites to the Federal Acquisition Regulations (FAR) in support of its argument that its Takeover Agreement absolves it of all Brunoli's liabilities to the government arising before the date of the agreement. However, there is nothing in the FAR sections concerning sureties and takeovers that states all of a defaulting contractor's debts to the government arising prior to takeovers are extinguished. In fact, the section of the FAR that Liberty cites makes specific note of the fact that "any takeover agreement must require the surety to complete the contract" 48 C.F.R. § 49.404(e).

workers to the subject funds took priority over Westchester's claim thereto as the performance bond surety.

Westchester, supra, at 583. Thus, just as the Administrator (on behalf of the subcontractor's employees) in *Westchester* had a superior right to the contract funds, similarly, we conclude that the Administrator's claim to the withheld contract funds on behalf of Brunoli's employees takes priority over Liberty Mutual's claim.

B. *Westchester and Quincy Housing*

Quincy Housing, supra, concerned a labor standards dispute in which the Administrator and the petitioner (a housing authority constructing federally assisted residential units) vied for priority to withheld contract funds. There, the WAB rejected an argument similar to that which Liberty makes concerning unaccrued funds. It held:

[T]he *Department of Labor has priority rights to all funds remaining to be paid* on a federal or federally-assisted contract, to the extent necessary to pay laborers and mechanics employed by contractors and subcontractors under such contract the full amount of wages required by federal labor standards laws and the contract

Quincy Housing, slip op. at 6-7 (emphasis added). The WAB did not explain what it meant by "funds remaining to be paid" within the context of the "accrued funds" language of the Act. But earlier in the decision the WAB referenced the fact that some of the disputed contract funds had not been earned by the construction contractor. These monies would have been "unaccrued funds" and, under Liberty Mutual's theory, unreachable by the withholding clause. However, the WAB approved the Administrator's withholding in *Quincy Housing*, implicitly rejecting Liberty's argument here. We therefore reject this argument.

Liberty also asserts that *Quincy Housing* establishes a hierarchy of priority based on the date that claims "accrue." In this case, the Administrator's request for withholding was made after Liberty and the Coast Guard entered the Takeover Agreement. Accordingly, Liberty Mutual argues, its claim to the contract funds arose first in time and was therefore superior to the Administrator's prevailing wage claim. However, we observe that in *Quincy Housing* the WAB noted only briefly and without explanation that the Administrator's wage claim was superior to the surety's because it had "accrued" prior in time to the housing authority's claim. *Id.* at 7. We accord no weight to this language in *Quincy Housing*. Furthermore, *Westchester* makes it clear that such considerations of being first in time to make a claim are not relevant.⁸

⁸ Even if the timing of competing claims to withheld funds was relevant here, we find that the operative date the wage claims arose was the date the violations were committed. Brunoli's violations occurred prior to the date of the Takeover Agreement and the Administrator's claim

Finally, the case law Liberty Mutual cites in support of the Petition for Review does not persuade us that the ALJ's conclusions are erroneous or that *Westchester* does not apply. Thus, we reject as authority *Transamerica Ins. Co. v. United States*, 6 Cl. Ct. 367 (1984), *Security Ins. Co. of Hartford v. United States*, 428 F.2d 838 (Ct. Cl. 1970), and *Trinity Universal Ins. Co. v. United States*, 382 F.2d 317 (5th Cir. 1967). These cases are distinguishable from the present matter since, in each, the sureties completed all requirements of the underlying contracts. Moreover, in each case the government was attempting to offset claims which were clearly not the sureties' responsibilities under the terms of their performance bonds, i.e., contract payments made by the government in error to a defaulted contractor (*Transamerica*) and contractors' payroll tax liabilities (*Trinity* and *Security Insurance*).

III. Recoupment and Setoff Theories

The Administrator argues that even if the Act prohibits withholding unaccrued contract funds or prohibits withholding accrued funds from a non-violating completing surety, the government is still entitled to the withheld funds for prevailing wage payments under the common law theories of recoupment and setoff. Adm. Supp. Br. at 15-18.

Recoupment is the common law right "to recover a loss by a subsequent gain" in situations where the claim arises out of the same "transaction" (in this case, the Coast Guard contract). BLACK'S LAW DICTIONARY 1146 (5th ed. 1979). Setoff (or set-off) is the common law right of a creditor to deduct a debt it owes (the contract funds) from a claim it has against the debtor arising from the action; a "transaction extrinsic" to the underlying claim. *Id.* at 1230.

The Administrator argues that the government has the same rights to recoupment and setoff as do private parties. The Administrator asserts that Liberty's wage debt arises from the Coast Guard contract (which established the prevailing wage obligations for Brunoli); in this case, the government's remedy would be recoupment. Alternatively, argues the Administrator, Liberty Mutual was obligated under the performance bond to complete all of the terms of the Coast Guard contract, and Liberty's Takeover Agreement specifically noted that Brunoli's liabilities arising prior to the takeover were the surety's responsibility if the liabilities were otherwise coverable by the performance bond. Under this second theory, the government's common law remedy for recovery of the back wages would be setoff.

The back wage debt owed by Liberty to the Administrator for the benefit of the affected

therefore arose first in time, irrespective of when the Administrator notified the Coast Guard of the violations and requested contract withholding.

Brunoli employees may be recouped from the withheld contract funds, since the back wage liability arose from the terms of the Coast Guard contract. If the wage debt is viewed as arising from Liberty's performance bond obligations, we conclude that the Administrator may setoff the debt against the contract funds.

CONCLUSION

Liberty Mutual was obligated to complete the entire Coast Guard contract, including the responsibility to ensure the payment of prevailing wages. And although Liberty did not violate the Act, nevertheless as the completing surety here, it is also the "contractor" from whom "accrued payments" may be withheld. Therefore, whether the funds are deemed "accrued" or "unaccrued," and notwithstanding the terms of a takeover agreement to the contrary, the Administrator properly withheld contact monies from Liberty to pay prevailing back wages to the Brunoli laborers and mechanics. Moreover, the Administrator may also rely on recoupment or setoff to claim the funds on behalf of the Brunoli employees. Accordingly, the Administrative Law Judge's Decision and Order dated November 4, 1999, is **AFFIRMED** as supplemented by the reasoning herein and the Petition for Review is **DENIED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge