

Discussion of *M.E.S., Inc. and Travelers Casualty
& Surety Company of America v. United States*

2012 WL 1862359
Court of Federal Claims
May 23, 2012



presented by

Jay M. Mann

Member, Jennings, Strouss & Salmon, PLC
jmann@jsslaw.com

Facts

- M.E.S. contractor, Travelers Surety, on Post Office Project
- **6/99:** M.E.S. terminated for default (“t for d”) by Government, appealed to Post Office Board of Contract Appeals (POBCA)
- M.E.S. had strong position that t for d was wrongful
- Surety stood by its principal, refused to perform while M.E.S. appeal pending
- **11/01:** M.E.S. submitted certified claim to Government for additional compensation (change order work, differing site conditions, etc.)

Facts

- **7/04:** Government reprocured Project
- **6/05:** Project completed with new contractor
- **1/06:** POBCA denied M.E.S.'s appeal
- **9/07:** Court of Appeals for Fed. Cir. affirmed POBCA
- **2/10:** M.E.S. filed Complaint with Court of Federal Claims for additional costs/contract funds
- **3/10:** Government sued Surety on performance bond in E.D.N.Y.

Facts

- **2/11:** Surety filed Motion to Intervene in Court of Federal Claims case
- **7/11:** Surety filed Complaint in Intervention, in Court of Federal Claims case, to compel M.E.S. to turn over any affirmative recovery to Surety and to have Court determine Surety is correct party to receive contract funds owed by Government
- **9/11:** Surety paid money to settle Government's claim on performance bond in E.D.N.Y. case

Decision

- Surety is not equitable subrogee because did not complete Project; therefore, Court has no jurisdiction under the Tucker Act to determine if the Surety may recover from Government
- Court has no jurisdiction to adjudicate rights of indemnity between M.E.S. and Surety

Discussion

- Surety entitled to stand by its principal until adjudication of the t for d; therefore, should not be punished for not completing Project
- Surety paid on agreed amount to Government to settle performance bond claim; therefore, Surety should be an equitable subrogee to extent of its losses
- Surety is being punished (not allowed to be equitable subrogee) because did not enter into takeover agreement to complete the Project. Contrast with *Lumbermens* case, in which Surety punished for entering into takeover agreement (not allowed to assert overpayment defense).