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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-187178

DATE: October 1976

MATTER OF: Metro Machine Corporation

**DIGEST:**

Notwithstanding completion and acceptance of job order under Master Contract for Repair and Alteration of Vessels, contracting officer may set off reasonable estimate of cost of work remaining to be performed under warranty clause, where necessity for such work became apparent prior to presentation for payment of contractor's final invoice. 50 Comp. Gen. 263 (1970) distinguished.

Metro Machine Corporation (Metro) has filed a claim in this Office, requesting payment of \$2,500 alleged to have been improperly withheld from final payment on Job Order No. 13 under Master Contract for Repair and Alteration of Vessels, N00033-70-C-0032, with the Military Sealift Command (Navy). Metro asserts that the funds were withheld contrary to our decision in 50 Comp. Gen. 263 (1970).

In that case we held that the Navy could not withhold final payment under contract provisions substantially identical to those involved here, pending expiration of the warranty period. In that regard, we indicated that we were "unaware of any general basis for ruling that an express warranty in a contract excuses or suspends the obligation to make payment after a contractor has completed performance." We stated that:

"\* \* \*when the Government accepts redelivery of the vessel without reservation it is accepting the contractor's work under the inspection clause and is presumed to have exercised its rights to inspect that work."

Consequently, we held that the Government acted improperly in refusing to complete final payment when the vessel upon which the work was performed was returned without reservation.

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While it appears that in this instance work was performed by Metro on the USNS Mosopelea, and that this vessel was returned to the Government, it further appears that it was discovered that the generator upon which repairs were made was burning excessive quantities of lubrication oil and smoking heavily. Metro acknowledges that this condition is subject to the contract's guarantee provisions (clause 11). Because Metro delayed in submitting its invoice for final payment, payment was not made before the faulty condition was discovered.

Although the contracting officer has attempted to distinguish between "acceptance" and "completion of work," we agree with Metro that as explained in the cited decision, the work is to be treated as completed and accepted for purposes of payment when the vessel is redelivered without reservation.

The Government is permitted to set off the estimated amount of claims due the United States by withholding amounts due under Government contracts. Nabisco, Inc., B-164506, October 29, 1975, 76-1 CPD 189. Also, set-off for estimated debts is authorized notwithstanding absence of final resolution of a contract dispute underlying the debt. Frank Briscoe Co., B-161283, March 16, 1976, 76-1 CPD 177; B-178368, September 24, 1973. Set-off is not rendered improper simply because the debt and available funds may be attributable to the same transaction.

We are advised by the Navy that although the ship was made available to Metro for correction of the deficiencies noted, the condition was not adequately corrected. Metro has been recently afforded a second opportunity to cure these deficiencies.

In the circumstances, we see no basis to question the Navy's action in seeking to withhold funds to offset its actual claim against Metro. Regarding Metro's complaints that the ship was not made available immediately when the deficiencies were discovered, it appears that it was impossible to do so, but that the ship was made available as soon as practicable. Moreover, while clause 11 of the contract establishes a policy whereby the Government will attempt to afford the contractor an opportunity

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to cure contractual deficiencies, the clause does not require that the Navy do so, and the Navy could have set off the costs of repairs against any available funds due Metro.

Accordingly, Metro's claim is denied.

Deputy

*R. F. K. H.*  
Comptroller General  
of the United States