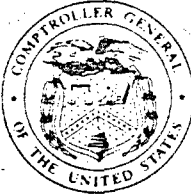


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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

[Propriety of Invoice Payment by Department of Navy] 10,523

FILE: B-190365

DATE: June 19, 1979

MATTER OF: Navy, Army and Air Force Institutes -- Payment of Invoice

DIGEST: Navy vessel requisitioned perishable goods from supplier and was subsequently diverted to different location, but did not cancel requisition. Supplier delivered goods to designated location. Navy never formally accepted goods but goods were moved by Navy to second location, where they were rejected because they had deteriorated. Navy did not notify supplier until next day. Since movement of goods was inconsistent with seller's ownership and could therefore be deemed constructive acceptance, and in view of delay in notification and fact that requisition had not been cancelled, invoice from supplier may be paid.

This responds to a request from the Department of the Navy, Fleet Accounting and Disbursing Center, Norfolk, Virginia, for an advance decision pursuant to 31 U.S.C. § 74 (1976) on the propriety of payment of an invoice. The invoice, in the amount of 98.50 pounds sterling, was sent to the Navy for payment by the Navy, Army and Air Force Institutes (NAAFI) of Nottingham, England, a supplier, for provisions which were rejected by the Navy. 1881

According to the information submitted, the U.S.S. Batfish (SSN-681) was scheduled to be in Faslane, Scotland on October 14, 1976, for a 3-day visit. Prior to entering port, the Batfish sent a radio message to the U.S.S. Holland (AS32), the supporting submarine tender, requesting that the tender provide bread, milk, and ice cream upon the arrival of the Batfish. At the time the message was transmitted, the Batfish did not know where it would be moored, but assumed that it would be at Faslane. Events on October 14, 1976, were complicated by a last minute change in the ship's berth assignment from Faslane to Holy Loch. The Supply Officer of the Batfish states that the requisition for the provisions should have been cancelled, but was not. 1882 1883 1884

The supplier, NAAFI, informed the Navy that the procedure normally followed when a ship is "deployed" (by which NAAFI apparently means when the ship's location is changed) is the immediate cancellation of all deliveries. This is possible, according to NAAFI, as notification of any deployment is normally received in advance of the requested delivery time. In this case, notification was received

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by NAAFI after provisions specifically ordered for "Delivery on arrival" had been delivered at the requested time and place. Thus, cancellation of delivery was not possible.

After the Batfish was moored at Holy Loch, contact was made with a Mess Management Specialist Chief Petty Officer on board the Holland to arrange for delivery of the requested provisions. The Supply Officer of the Batfish was notified that a small boat had been sent to Faslane for the provisions. The boat returned from Faslane without the supplies. Subsequently, at 2:30 p.m., on October 14, the Supply Officer was notified by the Holland that the provisions had been delivered to Cardwell Bay where they were to be picked up. However, due to drills on board the Batfish and the Holland, Batfish personnel did not arrive at Cardwell Bay until 5:30 p.m. to pick up the provisions. They found the provisions damaged and in a deteriorated state. The ice cream had melted, the milk had begun to separate, and many cartons were crushed. The provisions were rejected in toto, and the supplier was notified of the rejection at approximately 10:00 a.m., October 15, 1976.

The issue is whether, despite the rejection, the Navy is obligated to pay for the goods under the circumstances of this case.

The requisition, under the authority of 10 U.S.C. § 2304(a)(3) (1976), was made on a Navy Supply Form 48, "Order and Inspection Report (4270)." This purchase order form, which provides a method of purchasing that combines the order and inspection report on one document, is used for small purchases in the open market not in excess of \$10,000 (\$2,500 at the time of the subject transaction). Navy Supply Systems Command, Afloat Supply Procedures (NAVSUP Publication 485), Para. 3120 (ch. 25, 1977).

The purchase order is designed for use as an offer by the Government of a unilateral contract--the supplier's performance in exchange for the Government's promise to pay. Navy Contract Law (2d ed. 1959) 368. The purchase order form contains terms which must be accepted by the supplier, either formally or by rendering performance, before a valid and binding contract is consummated. 37 Comp. Gen. 258, 259 (1957). The form clearly states that supplies are to be furnished "on the terms specified on both sides of the order" (NAVSUP Form 48). On the face of the order is a "certificate of inspection" which must be completed by the inspector. Under the Navy procurement system, it is the inspector who is responsible for certifying the order for payment by his attestation that the items ordered have been delivered and accepted. In the absence of the inspector's certification, the

disbursing officer is not authorized to make payment. Navy Contract Law, supra, at 697.

Title to supplies ordinarily passes to the Government upon delivery and acceptance of the supplies. Until then, the contractor has complete responsibility with respect to such supplies absent a showing of damage to the supplies caused by the Government's negligence during the interval between delivery and acceptance or rejection. Id., at 537.

In this case, the Navy specifically requested "Delivery on arrival" at Faslane, and the supplier fully performed under the terms of the purchase order by delivering the provisions at the requested time and place. The Navy failed to notify the supplier of the new destination of the Batfish prior to delivery. Had the supplier been so notified, it would have cancelled the delivery under its normal procedure. Additionally, the record indicates that the Navy, in fact, exercised dominion over the provisions by moving them from Faslane to Cardwell Bay.

In a case involving the Veterans Administration (VA), a VA hospital did not issue a formal acceptance of an order of raw shrimp. Nonetheless, the Contract Appeals Board held that constructive acceptance must be implied from the acts and conduct of hospital personnel after the shrimp came into their possession. The Board stated:

"* * * Both the Uniform Sales Act and the Uniform Commercial Code provide that the buyer is deemed to have accepted goods when he performs any act inconsistent with the seller's ownership, or fails within a reasonable time to notify the seller of their rejection. U.S.A., Secs. 48 and 49; U.C.C., Secs. 2-602(1), 2-606, 2-607. These principles have been consistently applied by the courts and other appeals boards as expressive of Federal law applicable to Government contracts."
Mazur Bros. & Jaffe Fish Co., Inc. VACAB No. 512,
June 25, 1965, 65-2 BCA ¶ 4932.

In the situation at hand, the Navy similarly performed an act inconsistent with the seller's ownership. The Navy moved the provisions from Faslane to Cardwell Bay where it left the goods in a shed for 3 or more hours prior to inspection. Ice cream and milk are perishable and the Navy must be charged with knowledge that they will deteriorate if left in an unrefrigerated shed for that length of time. The record does not indicate that any precaution was taken to prevent spoilage.

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Additionally, the delay (of approximately 1 day) in communicating the notice of rejection was unreasonably long. Had the supplier been notified of the rejection earlier, it might have had the opportunity to correct any nonconformity in the delivery, or to reclaim the provisions before they had spoiled.

Under the circumstances of this case, we believe that the Navy's actions constituted an "acceptance" of the provisions. Accordingly, the NAAFI invoice may be paid.

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