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

B-174744

April 20, 1973

The National Cash Register
Company
Dayton, Ohio 45409

Attention: Ben E. Olive
Assistant General Counsel

Gentlemen:

Further reference is made to your letter of January 4, 1973, and prior correspondence, concerning your claim for payment of $437,317.87, representing amounts withheld by the United States Army Electronics Command (ECOM), under contract Nos. DAAB05-67-C-2529 and DAAB05-69-C-0202.

The subject contracts, awarded in 1968, provided for the installation of the Army's DSU/GSU system to mechanize certain supply and stock management functions in the field. The systems installed under the above contracts were the NCR 500 series magnetic ledger card computer systems acquired by the Army on a lease with option to purchase basis pursuant to General Services Administration Federal Supply Schedule contract No. GS-00S-67211 for fiscal year 1968. The DSU/GSU amendments to the FSS contract under which the computers were placed on rental includes the following provision as amendment No. 5:

> NCR will provide the initial spare parts in each van or fixed site location in the amount of $3,654.91 and will supply initial depot spare parts stock in the amount of $1,613.98 per system on those systems to be maintained by the Government personnel. However, NCR will retain title to these stocks of parts so long as the systems remain on a rental contract. Should the systems be purchased, title to these parts will be passed to the Government at no additional cost. Additional parts required beyond those mentioned above will be purchased by the Government.

It is reported by the Army that both the using activity, Computer Systems Command, and NCR interpreted the above language as providing for payment to NCR for any parts "consigned" thereunder

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and not returned to NCR at the end of the rental period, unless the systems were purchased. Because of the administrative burden involved in accounting for the spare parts under this interpretation of the provision, the Army reports that as a result of a meeting between GSA and ECOM representatives in June 1968, it was orally agreed that the Army would purchase the parts under the installation contracts in lieu of taking them on a consignment basis under the rental contract, and that GSA would amend the FSS contract by deleting the language relating to spare parts and obtaining a corresponding reduction in the lease price. Based upon this understanding the ECOM contracting officer included a line item in the installation contracts under which parts for 83 systems were furnished by NCR and the amount claimed here ($437,317.87) was paid by the Army.

The FSS contract was not amended and subsequent to payment of the above amount, GSA advised ECOM that the rental contract provided that NCR was required to furnish the Army the initial spare parts for each system of the value referred to in amendment No. 5, and that the Army was under no obligation to pay for any parts used in maintaining these systems. Based upon GSA's interpretation, the Army was advised to recoup the $437,317.87 paid NCR, and such amount was withheld from payments otherwise due under the two installation contracts.

It is your position that the provision in question is properly interpreted to mean that the initial stock of parts of the value of $5,268.89 was to be consigned to the Army upon its rental of a system; that the Army was required to account for the parts by either paying for them as they were used or paying for them if not returned at the end of rental period; and that, as an inducement to purchase the system, NCR would convey title to the remaining consigned parts at the time of purchase. You assert that this interpretation is compelled by the language of the provision itself and that when read in conjunction with other provisions of the contract any other interpretation would produce inconsistencies and conflicts. Specifically, you cite the following provision of the rental contract:

> In those instances where the Government wishes to maintain the 500 system using Government Trained Personnel and Government purchased parts, NCR will make no additional charges over and above the cost of equipment it priced without maintenance.

Thus, you conclude from reading this provision together with the previously quoted clause that when the Government maintains the systems, it uses Government furnished parts, and that when NCR

supplies a stock of parts, it does so on consignment only and that the Government must thereafter pay for the stock. Furthermore, you contend that the meeting in June 1968 between GSA and NCOM, and the Army's actions thereafter, indicate that there was agreement as to the consignment interpretation, and that the difficulties thereafter resulted solely from a change of mind by the GSA representative.

It is GSA's position that amendment No. 5 was intended, and should be so interpreted, to provide the Army initial repair parts in the amount of $5,268.09, at no cost, for maintenance of each system by Government personnel in lieu of NCR providing the maintenance and parts as called for in the basic FSS contract. It is noted that the provision in question is preceded by the words "The above prices include:", which refers to the "Cost Per System - Monthly Rental (without maintenance)". Therefore, it is GSA's position that the provisions of the installation contracts calling for the Army to pay for the initial spare parts are invalid as NCR was already bound to furnish these initial parts as needed, at no cost under the rental contract.

In this connection, it is reported that while, in the past, spare parts were purchased outright under such installation contracts, amendment No. 5 to the GSA rental contract was executed for the specific purpose of handling the requirements of the DSU/GSU program and only after a competitive solicitation had been conducted. The record indicates that the governing factor in selecting NCR as the contractor for the GSA rental was that initial spare parts would be provided as a "no charge" item and as a part of the overall rental package deal.

In our judgment the GSA contract is subject to two possible interpretations. The first is that barring a purchase of the systems the Government is required either to pay for or return the spare parts. The other possible interpretation is that, assuming no purchase of the systems, the Government is required to pay for or return those spare parts which were not used in the maintenance of the systems. The latter interpretation corresponds with the position adopted by the GSA. We think it is significant that one of the factors in the selection by GSA for award was this very interpretation. Further, we believe that the contrary interpretation, particularly in the latter stages of the lease period, could encourage maintenance and repair of the systems on some "bailing wire" basis in the interests of short range economy even where it clearly would be to the long term benefit of the systems to replace weak or worn out parts with new components. It appears to us that a contract interpretation which would permit and even encourage actions so obviously inimical to the long range interests

of the systems should not be lightly adopted without an indication that the parties intended such a result. While you insist that the first interpretation should be adopted, we believe the GSA interpretation to be at least equally as reasonable based on the record before us.

It has long been the rule that the Government accounting and administrative officers should reject or disallow all claims as to which they believe there may be a substantial defense in law or as to the validity of which they are in doubt. See Longwill v. United States, 17 Ct. Cl. 288, 291 (1881); Charles v. United States, 19 Ct. Cl. 316, 319 (1884). From the record before us, we must conclude that there is substantial doubt as to the validity of NCR's claim.

Accordingly, we must reject your claim for payment of $437,317.87.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States