

Appeal of –)
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Haig’s Quality Printing, Inc.) CAB No. 2007-6
)
Under Jacket No. 336-942)
Purchase Order No. 93261)

Appearances for the Appellant: George E. Cromer, Esq.
George E. Cromer, Esq., P.C.

Appearances for the Government: Julie Kelley Cannatti, Esq.
Roy E. Potter, Esq.
U.S. Government Printing Office

DECISION

Haig’s Quality Printing, Inc. appeals the default termination of its contract (Jacket No. 336-942, Purchase Order No. 93261) by the U.S. Government Printing Office (GPO).¹ Appellant argues that the GPO’s default termination of the contract was improper. The GPO asserts that the default termination was proper and, as a result thereof, claims that it is entitled to the recovery of excess procurement costs in the amount of \$142,257.

The GPO moves for summary judgment. Haig’s opposes the motion. We grant GPO’s motion for summary judgment.

¹ We consider this appeal pursuant to our authority under Section 1501 of title I of division H of the Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2249-50 (Dec. 26, 2007) (to be codified at 31 U.S.C. § 720 note) and the Rules of Procedure of the Government Accountability Office Contract Appeals Board, 73 Fed. Reg. 60,609 (Oct. 14, 2008) (to be codified at 22 C.F.R. Part 22).

BACKGROUND

On September 11, 2007, GPO awarded Haig's a fixed-price contract in the amount of \$949,571.00 for the production and delivery of 8 million pamphlets for the "Shining Stars," Learn-to-Read program, administered by the National Institute for Literacy. The contract resulted from a competitive invitation for bids (IFB) issued by GPO; the Government received five bids in response to the IFB and determined that Appellant was the lowest responsive, responsible bidder. See Complaint, Dec. 12, 2007, exh. A, IFB and Bid Abstract, at 5. In general terms the pamphlets were to be 9 ½" square in size, 8-page, saddle-stitched, and self-covered. The contract required Haig's to submit both proofs and stock/paper (hereinafter paper) to GPO for review and approval, and stated the contractor was not to begin actual printing prior to receipt of an "OK to print" from the Government. The contractor was to deliver 4 million pamphlets by October 15 and the remaining 4 million pamphlets by October 31. Rule 4 (R4), Tab 2, Contract, at 1-4.

Relevant to the dispute here, the contract did not specify a particular paper by either brand name or manufacturer. Rather, the contractor was to furnish paper in accordance with a designated government specification: Joint Committee on Printing (JCP) A261 No. 1, Dull Coated Text, 100 pound basis weight. *Id.* at 2. JCP A261 was one of many specifications within the GPO Government Paper Specification Standards (No. 11, Feb. 1999) (GPSS), which also contained common definitions of terms, paper testing standards, and acceptance criteria. Among other things, the JCP A261 specification included requirements as to the paper's thickness, bursting strength, gloss, and general appearance. For 100-pound paper, JCP A261 established a thickness average of .0047 inches, together with an allowable tolerance of .0005 inches. JCP A261 also mandated that the "precision requirements" of the GPSS acceptance criteria were generally applicable as to paper sampling and testing, including paper thickness. *Id.*, Tab 26, Specification JCP A261.

The GPSS acceptance criteria are employed to determine a paper's conformance to the applicable specification. *Id.*, Tab 27, Acceptance Criteria, at 129. The acceptance criteria establish a system for judging a paper's degree of defect from the specification values by the assignment of "demerits," as well as the Government's remedies when confronted with a nonconforming product. Specifically, the degree to which a paper sample varies from each specified requirement determines both the designated degree of defect (minor, major, or critical) and the corresponding number of assigned demerits (4, 12, or 36).² The total number of demerits are then added together and subtracted from 100, resulting in a paper's "paper quality index," or PQI score. Paper not meeting all specification values but having a PQI score of 70 or higher is to be considered as having met the intent and requirement of the specification, and accepted by the Government at the contract price. By contrast, paper having a PQI score below 70 is considered to be critically defective and subject

² The GPSS acceptance criteria also included narrative definitions for the terms "minor defect," "major defect," and "critical defect."

to outright rejection. *Id.* at 129-30. With regard to paper thickness, the GPSS acceptance criteria established three different sets of standards: one for postal cards and 100-percent cream-white index paper; a second for “precision requirements”; and a third for “regular requirements.”³ As to the paper thickness for “precision requirements,” as mandated here by JCP A261, the GPSS acceptance criteria were as follows:

Deficiency	Category	Demerits
Less than 2 percent	Minor	4
2 - 4 percent	Major	12
More than 4 percent	Critical	36

Id. at 130.

On October 1, Haig’s delivered to GPO, among other things, paper samples for review and approval. Complaint, Dec. 12, 2007, ¶ 13. The GPO tested the paper and determined that it did not meet the JCP A261 specification in the areas of thickness, gloss, and burst, and assessed a total of 84 demerits. As to paper thickness, the GPO test results were as follows:

Characteristic	Requirement	Test Results	Difference (Demerits)
Thickness ⁴	.0047”	.00579”	+23% (36)

R4, Tab 6, GPO Test Report.

On October 2, GPO informed Haig’s of the paper test results and provided the contractor with a copy of the test report. *Id.*, Tab 7, GPO Record of Telephone Call. Haig’s responded to the GPO test report that same day. In its reply, the contractor set forth the paper manufacturer’s specifications and asserted that, as to gloss and burst, its paper samples met the JCP A261 requirements. With regard to paper thickness, Haig’s stated that the manufacturer’s specification was .0056 inches, as compared to the specification requirement of .0047 inches and the GPO test result of .00579 inches. The contractor argued, however, that the difference in paper thickness—.0009 inches beyond the JCP A261 specification requirement and .0004 inches beyond the

³ The essential difference between the different standards here was the percentage at which a deficiency would be considered minor (4 demerits), major (12 demerits), or critical (36 demerits). AR, Tab 27, GPSS Acceptance Criteria, at 129-30.

⁴ In various instances in the record, including in the GPO test report here, paper thickness is also referred to as “caliper.” See R4, Tab 6, GPO Test Report.

permissible variance--was not a significant one.⁵ *Id.*, Tab 8, Haig's Reply to GPO Test Report, at 1-2.

On October 5, GPO again informed Haig's that its paper did not pass inspection and that the Government would not approve the printing of the job on the paper samples submitted.⁶ The GPO also asked the contractor whether it intended to print on paper specified in the contract, while Haig's insisted that the paper it had submitted was the same or better than that called for in the contract specifications. The Government also informed Haig's that a Cure Notice regarding its paper defects would be forthcoming. *Id.*, Tab 11, GPO Record of Telephone Call.

On October 5, GPO issued a Cure Notice regarding Haig's inability to provide paper that conformed to the contract requirements. *Id.*, Tab 10, Cure Notice. On October 9, Haig's responded to the Cure Notice and asserted that its paper samples met or exceeded the dull-coated, burst, and gloss requirements. The contractor's reply also included independent lab test results in support of its assertions here. Haig's did not, however, dispute that its paper samples failed to comply with the applicable thickness specification. In fact, Appellant's independent test results confirmed the GPO test results as to paper thickness noncompliance (.0056 inches, as compared to the specification requirement of .0047 inches and the government test result of .00579 inches).⁷ Further, Haig's reply to the GPO Cure Notice did not state how, or if, it would provide a paper that complied with all contract requirements. *Id.*, Tab 14, Haig's Response to Cure Notice, at 1-3.

On October 10, GPO informed Haig's that it was "OK to print," but that the paper would again be tested for conformance at the press sheet inspection stage. Later that same day, however, the Government notified Haig's that it should not proceed with any production arrangements until additional GPO testing of the paper had been completed. *Id.*, Tab 15. On October 11, GPO again informed Appellant that it still had issues with the contractor's paper samples and would let the contractor know of the testing outcome as soon as possible. *Id.*, Tab 17. On October 15, GPO issued a Notice of Default Termination to Haig's because of the contractor's inability to

⁵ The contractor also alleged that during printing, under the pressure of the press cylinders, the paper thickness difference would become even smaller, *Id.*, Tab 8, Haig's Reply to GPO Test Report, but provided no support that its final product would actually comply with the JCP A261 thickness requirement.

⁶ The GPO also apparently informed Haig's at this time that its paper was considered to be a "satin," and not "dull-coated" as required by the contract. *See id.*, Tab 14, Haig's Response to Cure Notice, at 1.

⁷ We note that Haig's response here also contained a statement from the paper manufacturer acknowledging that the paper was manufactured to a specified basis weight but not also to a specified thickness. *Id.*, Tab 14, Haig's Response to Cure Notice, at 2.

produce the job on paper required per the contract specifications. *Id.*, Tab 22. The Appellant filed its notice of appeal with our Board on October 17.⁸

The GPO undertook efforts to reprocur its requirement here (*i.e.*, 8 million “Shining Stars,” Learn-to-Read pamphlets) after its termination of Appellant’s contract. The Government utilized the bids that had been competitively submitted in response to the original IFB. The GPO determined that Monarch Litho, Inc. was the next lowest, responsive, responsible bidder, *id.*, Tab 24a, and Monarch reaffirmed its original September 10 price. On November 16, GPO awarded a reprourement contract (Jacket No. 340-520, Purchase Order No. 94632) to Monarch at the price of \$1,114,111.00. The GPO made final payment to Monarch after completion of contract performance in the amount of \$1,091,828.78, as a result of the prompt payment discount offered by Monarch in its bid (2 percent within 20 days). *Id.*, Tab 25, Declaration of GPO Chief, Examination & Billing Branch. The increased cost to GPO associated with the default termination of Haig’s was \$142,257.78 (\$1,091,828.78 - \$949,571.00 = \$142,257.78).

DISCUSSION

Haig’s argues that GPO’s default termination was improper.⁹ Specifically, Haig’s asserts that because its paper was in compliance with the JCP A261 specification and because the contractor had utilized its best efforts to perform the contract, GPO’s default termination was unjustified. Complaint, Dec. 12, 2007, at 7-8. The GPO argues that its default termination was proper in light of Haig’s inability to provide a paper that complied with applicable contract specifications, and counterclaims that it is also entitled to excess reprourement costs in the amount of \$142,257 from the contractor.

⁸ Haig’s has also invoked the provision contained in the GPSS Acceptance Criteria and at 44 U.S.C. § 514 (2000) which states, “[t]he Joint Committee on Printing shall determine differences of opinion between the Public Printer and a contractor for paper respecting the paper’s quality; and the decision of the Committee is final as to the United States.” To date the Joint Committee on Printing has elected not to consider this matter, and we need not determine whether other remedies are in fact available to Haig’s to consider its appeal here.

⁹ The Appellant alleges that the Government’s default termination constituted a “breach of contract.” Complaint, Dec. 7, 2007, at 7-8. We disagree. The contract here incorporated by reference GPO contract clause No. 20, Default, which expressly stated that, “If, after termination, it is determined that the contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.” GPO Contract Terms, (Dec. 1, 1987), Contract Clause No. 20(g), Default. Accordingly, we treat Appellant’s complaint as alleging that the default termination was improper.

On June 30, 2008, GPO filed a motion for summary judgment, pursuant to Rule 6 of the applicable Rules of the Contract Appeals Board (June 2008), contending that there are no material facts in dispute, and that it is entitled to favorable judgment as a matter of law. As relevant to this decision, GPO asserts that there is no dispute that Appellant's paper sample did not comply with the applicable thickness requirement, that this defect alone provided GPO with an adequate basis for default termination, that Haig's was provided with a Cure Notice and an opportunity to remedy the undisputed deficiency, and that Haig's never indicated that it would comply with all paper specification requirements. GPO Motion, June 30, 2008, at 2-7; GPO Motion Supplement, Sept. 15, 2008, at 2-3. In its opposition to the motion, Haig's originally asserted that its paper samples met or exceeded all JCP A261 specification requirements. Haig's Opposition, July 29, 2008, at 4. Haig's now maintains while its paper did not comply with the thickness requirement, that deficiency by itself did not provide GPO with an adequate basis (*i.e.*, sufficient demerits) for the default termination. Haig's Opposition Supplement, Sept. 12, 2008, at 2-6.

It is well established that a motion for summary judgment is only appropriate where there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Factual conflicts and ambiguities are not to be resolved as part of a motion for summary judgment, and all doubts as to the existence of genuine issues as to material facts should be resolved against the moving party. *American Pelagic Fishing Co., LP v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.¹⁰ *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed.

¹⁰ In its complaint, Appellant also initially alleged that the default termination was the result of a conspiracy between government personnel and other printers in the Los Angeles, California area to deny Haig's the job here. Complaint, Dec. 7, 2007, at 8-9. The burden of proving bad faith by the Government is a very onerous one and, to constitute bad faith, there must be some specific intent to injure the other party or actions motivated alone by malice. *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1236 (Fed. Cir. 2002). Appellant has made general allegations of bad faith but has offered no evidence in support of those allegations. For example, Appellant does not explain why GPO would award it the contract if it wanted to deny Haig's the work as alleged. Moreover, in response to Respondent's motion for summary judgment, Haig's has not asserted this conspiracy or bad faith as a genuine issue of material fact that would prevent this Board from granting the motion. We find Appellant's mere allegation of bad faith insufficient to preclude summary judgment. See *Plum Run, Inc.*, ASBCA Nos. 46091 *et al.*, 97-2 BCA ¶ 29,193.

Cir. 1984). For the reasons set forth below, we find that there are no genuine issue as to any material fact and that GPO is entitled to judgment as a matter of law.¹¹

As a general rule, the government is entitled to insist on strict compliance with unambiguous contract specifications, and need not accept a nonconforming product. *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 291 (Fed. Cir. 1985); *Advanced Eng'g & Planning Corp., Inc.*, ASBCA Nos. 53366, 54044, 2005-1 BCA ¶ 32,935; *Blake Constr. Co. v. United States*, 28 Fed. Cl. 672 (1993). Slight defects are still defects, *Mech-Con Corp.*, GSBCA No. 8415, 88-3 BCA ¶ 20, 889, and the fact that a contractor's product meets or exceeds specifications in certain regards does not excuse its failure to meet all applicable specification requirements.

We find there to be no dispute regarding the fact that the paper submitted by Haig's did not comply with all contract requirements. As a preliminary matter, there is no dispute as to the applicable specification regarding the contractor's paper: JCP A261. There is also no dispute that JCP A261 established, for 100-pound paper, a thickness average of .0047 inches and an allowable tolerance of .0005 inches. Further, there is no dispute that paper submitted by Haig's did not comply with the unambiguous thickness requirement or permissible variance. The GPO found the paper thickness to be .00579 inches, and the contractor's own independent test results (and manufacturer's specifications) determined its paper thickness to be .0056 inches. While there exists a small difference between the parties' test results, this variation amounts to one regarding the degree to which the paper submitted by Haig's was noncompliant (not whether it was compliant). Accordingly, this does not amount to a genuine issue of material fact.

We also find there to be no dispute that Haig's was provided with the proper notice and opportunity to remedy its nonconforming paper, and refused to do so. The Government must notify the contractor in writing of its failure to perform any provision of the contract and give the contractor a reasonable opportunity in which to cure such failure before undertaking a default termination. GPO Contract Clause No. 20, Default; *Univex Int'l*, GPO BCA No. 23-90, July 31, 1995, 1995 GPOBCA LEXIS 22; *see* Federal Acquisition Regulation (FAR) clause 52.249-8, Default (Fixed-Price Supply and Service). On October 2, GPO informed Haig's of the GPO test results and provided the contractor with a copy of test report: while Haig's did not contest the paper thickness deficiency, it did not offer to cure the defect. The GPO and Haig's then orally discussed the paper deficiencies (including thickness) on October 5, and again the contractor did not offer to cure the defect. Finally GPO issued a Cure Notice on October 9, informing Haig's in writing of the alleged defect (*i.e.*, the inability to provide paper that conformed to all contract requirements), advising the

¹¹ We deny Appellant's discovery request which concerns facts that do not form the basis of our summary judgment finding (*e.g.*, GPO's paper testing). Summary judgment need not be denied merely to satisfy the speculative hope that discovery will result in the uncovering of evidence to support a complaint. *Pure Gold, Inc.*, *supra*, 739 F.2d at 627.

contractor that as a result thereof the GPO might terminate the contract for default, and providing Haig's with another opportunity to cure the specified deficiencies. Again while Haig's did not dispute that its paper did not comply with the thickness requirement, neither did the contractor state how or if it would cure the defect (*e.g.*, by using a different paper). In sum, the Government provided Haig's with three opportunities to either refute the GPO's findings as to paper thickness or state what it would do to bring its product into compliance with unambiguous requirements. The contractor's representations that its paper generally met or exceeded the JCP A261 specification requirements simply failed to cure the undisputed area of nonconformance.

Haig's does not dispute that its paper was nonconforming as to thickness, that GPO provided it with adequate notice thereof, or that the contractor did not offer to cure this defect. The Appellant instead argues that the paper thickness deficiency did not by itself provide GPO with a sufficient basis for the default termination of the contract. The Appellant claims that its paper should have received only 12 demerits (not 36 demerits) for noncompliance with the JCP A261 thickness requirement, thereby resulting in a PQI score of above 70 at which a paper is deemed to be acceptable. Haig's calculation that only 12 demerits were warranted under the GPSS acceptance criteria is based on two prerequisites: (1) that the "regular requirements" (as opposed to the "precision requirements") for paper thickness are applicable here; and (2) that the proper starting point for determining the degree (*i.e.*, the percentage) to which its paper deviated from the applicable thickness requirement includes consideration of the allowable tolerance. Because its paper thickness (.0056 inches) was only 7.69 percent greater than the JCP A261 thickness requirement and allowable tolerance combined (.0047 inches \pm .0005 inches, or .0052 inches), and the GPSS acceptance criteria for "regular requirements" apply, Appellant argues, a thickness deficiency of 4 – 8 percent results in only 12 demerits. Haig's Opposition Supplement, Sept. 12, 2008, at 2-6. We disagree.

As set forth above, specification JCP A261 established the applicable paper thickness requirement: an average thickness of .0047 inches, together with an allowable tolerance of .0005 inches. More importantly here, the same specification also expressly mandated that the "precision requirements" of the GPSS acceptance criteria were applicable as to paper thickness. R4, Tab 26, Specification JCP A261. The GPSS acceptance criteria as to the thickness of precision requirements in turn established that a deficiency of more than 4 percent was considered to be a critical defect, thereby resulting in 36 demerits. *Id.*, Tab 27, Acceptance Criteria, at 130.

Haig's ignores the plain language within JCP A261 establishing that the "precision requirements" of the GPSS acceptance criteria were applicable as to paper thickness, and offers no explanation as to why only selected portions of the specification—the paper thickness requirement but not also the associated acceptance criteria—should be enforced. In light of the fact that the GPSS acceptance criteria for "precision requirements" established that a thickness defect of more than 4 percent would result in 36 demerits, and Appellant's admission that its paper was at a minimum

7.69 percent deficient, we need not decide whether the appropriate starting point includes the allowable thickness tolerance as Haig's suggests.

In sum, the record reflects that in accordance with the applicable contract provisions, GPO determined the thickness deficiency in the paper submitted by Haig's warranted 36 demerits, thereby resulting in a PQI score of 64 (100 – 36 = 64). Further, the contract's acceptance criteria expressly established that paper having a PQI score below 70 was considered to be critically defective and subject to outright rejection. As the Government had a contractual right to reject Appellant's paper based on the thickness defect, and because Haig's never offered to cure the defect even after being given adequate notice and opportunity to do so, we find Haig's undisputed noncompliance with the paper thickness requirement provided GPO with sufficient basis to terminate the contract for default.

We also find GPO entitled to excess procurement costs in the amount of \$142,257. Upon a default termination the contractor shall be liable to the government for any excess costs incurred in acquiring supplies or services similar to those terminated for default. GPO Contract Clause No. 20(b), Default; *see also* FAR §§ 49.402-6, *Ed Grimes*, GSBCA Nos. 7652 (7345)- REIN 7653, 89-1 BCA ¶ 21,528. The government must show that its assessment is proper by establishing that: (1) the reprocured supplies or services were the same as or similar to those involved in the termination; (2) the government actually incurred excess costs; and (3) the government acted reasonably to minimize the excess costs resulting from the default termination. *Cascade Pac. Int'l, supra*, 773 F.2d at 293; *National Printing & Copying*, VABCA Nos. 7211GPO, 7345GPO, 2006-1 BCA ¶ 33,183.

Here the record clearly reflects that the repurchased supplies were identical to those terminated. Additionally, the award to Monarch was made based on the bids that had been competitively submitted in response to the original solicitation only 2 months earlier. This satisfied the Government's obligation to secure as reasonable a price as practicable, thereby mitigating Appellant's damages. *See National Printing & Copying, supra*, 2006-1 BCA ¶ 33,183 (utilizing the next lowest responsible bidder on the original procurement is considered presumptively reasonable as a measure for mitigating procurement damages). Lastly, GPO actually incurred excess costs of \$142,257, which includes providing Haig's with credit for Monarch's prompt payment discount. Haig's does not dispute any of these aspects of the GPO's procurement action. The Government, accordingly, is entitled to recover the excess costs incurred for repurchase of the 8 million "Shining Stars" Learn-to-Read pamphlets.

The appeal of Haig's is denied and the GPO's counterclaim for excess procurement costs in the amount of \$142,257 is sustained.

Dated: October 24, 2008



Louis A. Chiarella, Presiding Member
Contract Appeals Board



James A. Spangenberg, Chairman
Contract Appeals Board



Glenn G. Wolcott
Contract Appeals Board