



EVAN D. WESSER
Chair

GOVERNMENT ACCOUNTABILITY OFFICE
CONTRACT APPEALS BOARD

PETER H. TRAN
Vice Chair

441 G Street, NW • Rm. 7182 • Washington, DC 20548
(202) 512-3342 • cab@gao.gov

_____)	
COLONIAL PRESS)	
INTERNATIONAL, INC.)	
	Appellant,)	
)	
v.)	CAB No. 2020-04
)	
GOVERNMENT PUBLISHING)	
OFFICE)	
)	
	Respondent.)	
_____)	

Appearance for the Appellant: Anthony Hawks, Esq.
Hawks Law Office

Appearance for the Respondent: James Goodman III, Esq.
Nicole E. Goldstein, Esq.
U.S. Government Publishing Office

Board Members: Peter H. Tran (Presiding)
Heather Weiner
Evan D. Wesser

DECISION

Appellant, Colonial Press International, Inc. (“Colonial Press”), appeals a contracting officer’s final decision by respondent, the Government Publishing Office (“GPO”) in connection with Purchase Order No. 79239 for the production of Medicare handbooks issued by the Department of Health and Human Services. GPO awarded this contract to Colonial Press, from which three print orders were issued. Relevant to this appeal, Colonial Press completed delivery of the handbooks in February 2020 and GPO made final payment for the print orders in March 2020. Subsequently, GPO issued contract

modifications imposing a decrement in price to each of the print orders. The price decrement for all three print orders amounted to a total of \$199,490.59. Because payment on the three print orders had already been completed, GPO recovered this amount, in full, by administratively offsetting payments due on other contracts that Colonial Press had with GPO. Colonial Press submitted a claim to GPO on October 30, 2020, requesting restoration of the entire \$199,490.59 amount, with interest. The contracting officer issued a final decision, denying the claim on December 1, 2020. On December 2, 2020, Colonial Press appealed the contracting officer's final decision to the Board.

On September 9, 2022, at the conclusion of discovery, the parties elected to submit their cases on the record without a hearing, pursuant to Rule 17 of the Government Accountability Office Contract Appeals Board ("CAB" or "Board") Rules of Procedure.¹ For the reasons stated below, the Board **GRANTS** the appeal.

BACKGROUND

This appeal involves the contract awarded under the invitation for bids ("IFB") solicitation entitled Medicare Handbook (Medicare and You) ("M&Y Handbooks"), which GPO awarded as Program 199-S (the "contract") on behalf of the Department of Health and Human Services, Centers for Medicare and Medicaid Services. On August 31, 2018, GPO awarded the contract to Colonial Press as Jacket No(s). 407-137 (covering Fiscal Year 2019) and 411-456 (covering Fiscal Year 2020). Jacket No. 407-137 included Print Order 80010, and Jacket No. 411-456 included Print Orders 80011 and 80012. Complaint ¶ 1. In general terms, the contract required the production of a set number of M&Y Handbooks as specified in the three issued print orders.

Under the awarded contract, the text paper for the handbooks was required to conform to the standards set forth in Government Paper Specification Standards ("GPSS") No. 12, dated March 2011. R4, Tab 1, Contract at 20.² Specifically, the contract required the text paper to meet the following specifications: "White Offset Book, basis weight: 40 lbs. per 500 sheets, 25x38 [inches], equal to JCP [Joint Committee on Printing] Code A60."³ *Id.*; Answer ¶ 2.

¹ Shortly after the appeal was filed, the parties requested the Board assign a neutral to facilitate an alternative dispute resolution (ADR) mediation. The ADR proved unsuccessful, and the appeal was returned to the assigned members of the Board to proceed with discovery. During the proceedings, the parties submitted, among other matters, cross-motions for partial summary judgment, which were denied. The Board found there were material facts in dispute, thus, rendering summary judgment inappropriate. Ruling on Cross-Motions for Summary Judgment at 10–11.

² References to page numbers of R4 tabs are to the Bates numbering provided by GPO.

³ The GPSS explains that "each item of paper is identified by a paper code which indicates both class and grade." R4, Tab 21, GPSS at 111. For JCP A60, the "A" refers to the class of printing paper and the 60 to the grade "offset book." *Id.*

Relevant here, JCP A60 denotes a number of measureable paper attributes (e.g., acidity, basis weight, bursting strength, thickness, brightness, opacity, and color). R4, Tab 21, GPSS at 125. The paper attribute at issue in this appeal is the text paper *opacity*.⁴ Answer ¶ 26. In accordance with the JCP Code A60 specification, the text paper’s opacity was required to meet the following standard:

Opacity: Average not less than (percent) 86%

Answer ¶ 26; R4, Tab 21, GPSS at 125. The GPSS instructs that testing for the JCP Code A60 paper shall “be conducted in accordance with methods in Part 2” of the GPSS. *Id.* Part 2 of the GPSS states that the methods “used in measuring the characteristics of papers” are the methods employed by the Technical Association of the Pulp and Paper Industry (“TAPPI”). *Id.* at 239. With regard to opacity, the GPSS identified the TAPPI T-425 method as the standard to use in testing. *Id.* at 240.

To comply with the contract’s opacity requirement—86 percent for JCP Code A60 paper—the contractor must satisfy the acceptance criteria established by the GPSS, or be assessed demerits⁵ and defects according to the following chart:

<u>Deviation from requirement</u>	<u>Category</u>	<u>Demerits</u>
Less than 1 percentage point	Minor	4
1 to 2 percentage points	Major	12
More than 2 percentage points	Critical	36
OR		
Individual specimen averaging more than 0.5 percentage point below the stated minimum value.		

Id. at 252.

Consistent with the contract’s requirement, Colonial Press furnished the required prior-to-production paper samples (PTPPS) to GPO for inspection and testing on January 22,

⁴ Opacity, as used here, “is a fundamental optical property of paper as a whole, yet the measurement of opacity is determined by a ratio of reflectance measurements.” Supp. R4, Tab 24, TAPPI T-425 at 1. The opacity of a sheet of paper “is influenced by thickness, the amount and kind of filler, degree of bleaching of the fibers, coating, and the like.” *Id.*

⁵ The GPO Quality Assurance Through Attributes Program (“QATAP”), GPO Pub. 310.1, “provides for the evaluation of paper characteristics by inspection and testing in accordance with the standards” in Part 2 (Testing Standards and Definition of Terms) of the GPSS. R4, Tab 23, QATAP at 324. According to QATAP, demerits are assessed for each characteristic that deviates from nominal values or specified standards. *Id.*

2019.⁶ Answer ¶¶ 2–3. On January 28, 2019, the contracting officer sent Colonial Press a letter stating that the submitted samples “have been tested and are equal to the contract specifications.” R4, Tab 5, PTPPS Approval at 66.

GPO issued Print Order 80010 on September 30, 2019, for the production of 1,006,971 M&Y Handbooks. Colonial Press completed delivery of the handbooks on November 12, 2019, and received payment for this delivery on December 20, 2019. Answer ¶ 7. On October 23, 2019, GPO issued Print Order 80011 for the production of 210,816 M&Y Handbooks. Colonial Press completed delivery on December 3, 2019, receiving payment on January 27, 2020. *Id.* ¶ 8. GPO issued Print Order 80012 on January 17, 2020, for the production of 972,507 handbooks. Colonial Press completed delivery on February 25, 2020, and received payment on March 23, 2020. *Id.* ¶ 9.

On January 16, 2020, GPO issued the first notice of defect, stating that an “[e]xamination of random copies on . . . Print Order 80010 & 80011, for the CMS has revealed the following defect(s): 4-3 Paper Attribute: Text & Cover stocks do not equal specifications.” R4, Tab 6, 1st Defect Notice at 67. This defect notice indicated that each print order “has been determined rejectable,” and the “Government may require that each order be decreased by up to 20.3[%] of the invoice billing price.” *Id.* The notice instructed Colonial Press to furnish a “written explanation” within five calendar days “of why these defects occurred and the steps being taken to assure that these problems will not appear in future procurements” *Id.* GPO followed with a second notice of defect, issued on March 23, 2020. But for the additional reference to Print Order 80012 in the notice, the language in the second defect notice was virtually identical to the first defect notice. R4, Tab 13, 2nd Defect Notice at 74.

In response to inquiries from Colonial Press concerning the defect notices, the contracting officer sent the appellant an email on April 2, 2020, providing some details regarding the testing of the print orders. The correspondence from the contracting officer provided, among other things, information regarding: the testing method employed; the equipment used for testing; the basic procedures for testing; and the fact that all “samples and sample averages tested from print orders were below 84 [percent].” R4, Tab 14, Parties’ Emails at 78–79.

The respondent did not disclose any further testing information until GPO sent an email to the appellant on August 25, 2020, providing opacity test results for Print Orders 80010, 80011, and 80012. The information in the email is summarized as follows:

⁶ Specifically, the contract requires: “The contractor must not print prior to receipt of an ‘O.K. to Print’ Prior to the commencement of production of the contract production quantity, the contractor shall submit to the Government not less than 50 samples of the text stock and 50 samples of the cover stock to be used in the production of the contract requirements, as specified under [the contract].” R4, Tab 1, Contract at 18.

Print Order 80010: Ten samples tested. Minimum of 81% v. Maximum of 84%. Opacity average = 83% (+/- 1%), resulting in 36 demerits

Print Order 80011: Ten samples tested. Minimum of 80% v. Maximum of 83%. Opacity average = 81% (+/- 1%), resulting in 36 demerits

Print Order 80012: Ten samples tested. Minimum of 80% v. Maximum of 84%. Opacity average = 82% (+/- 1%), resulting in 36 demerits

Answer at ¶ 16; R4, Tab 14 Parties' Emails at 75–76.

On September 15, 2020, GPO issued Contract Modification No. 1 to Print Order 80010 stating that “[a]n inspection of random copies supplied by the customer agency for this order revealed the following defects: 4-3 Paper Attribute – text stock not equal to specifications.” The contract modification then imposed a price “reduction equal to 12 percent of the invoiced billing price . . . made in accordance with [QATAP].” The 12 percent reduction was then calculated as equaling \$85,871.01. R4, Tab 15, Contract Modification at 83.

On the same date, GPO also issued contract modifications to Print Orders 80011 and 80012, each asserting the same rationale, that “[a]n inspection of random copies supplied by the customer agency for this order revealed the following defects: 4-3 Paper Attribute – text stock not equal to specifications.” The contract modifications then imposed a price “reduction equal to 12 percent of the invoiced billing price . . . made in accordance with [QATAP].” The 12 percent reduction imposed by the modifications was \$37,817.99 for Print Order 80011 and \$75,801.59 for Print Order 80012. R4, Tab 16, Contract Modification at 84; R4, Tab 17, Contract Modification at 85. Thus, the total amount reduced by the three contract modifications was \$199,490.59.

GPO recovered the \$199,490.59, in full, by setoff of the following amounts that were due or owing on other contracts that GPO had with Colonial Press:

GPO Contract	Invoice No.	Invoice Due Date	Invoice Amount
JKT#412-994	59723	September 21, 2020	\$35,024.00
JKT#413-089	59745	September 23, 2020	\$46,285.00
JKT#411-142	59733	September 29, 2020	\$ 1,487.11
JKT# 724-670	59751	September 30, 2020	\$ 725.00
JKT#411-142	59747	October 4, 2020	\$ 9,082.27
JKT#747-592	59734	October 7, 2020	\$72,498.45
JKT#413-073R1	59784	October 7, 2020	\$20,266.00
JKT#411-142	59785	October 7, 2020	\$ 1,624.55
JKT#740-811	59808	October 15, 2020	\$10,000.00
JKT#411-142	59809	October 19, 2020	\$ 1,219.64
JKT#411-142	59810	October 19, 2020	\$ 1,278.57
		TOTAL	\$199,490.59

Answer ¶ 20.

On October 30, 2020, Colonial Press submitted a claim, pursuant to Clause 5—Disputes of the contract and Ch. XV, Section 1.2, of GPO’s Printing Procurement Regulation. R4, Tab 19, Claim. The claim essentially requested a rescission of the contract modifications and restoration of payment with respect to Print Orders 80010, 80011, and 80012 in the aggregate amount of \$199,490.59. Answer ¶ 21; R4, Tab 19, Claim at 93–95.

The contracting officer for Program 199-S issued a final decision, denying Colonial Press’s claim on December 1, 2020. Answer ¶ 22; R4, Tab 20, COFD at 99. The following day, Colonial Press filed this appeal of the final decision with the Board on December 2, 2020.

DISCUSSION

Standard of Review

The parties have elected to submit this case for a decision on the record without a hearing under Rule 17 of the CAB’s Rules of Procedure. Submission on the written record “does not relieve the parties from the necessity of proving the facts supporting their claims or defenses.” CAB Rule 17(a); *see also Ravenna Arsenal, Inc.*, ASBCA No. 17802, 74-2 BCA ¶ 10,937, at 52,064 (discussing Armed Services Board of Contract Appeals’ Rule 11, which is comparable to CAB Rule 17). “While [the Board] can make inferences from [the] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party’s evidence must establish,” by a preponderance of the evidence, that it is

entitled to relief. *Schoenfeld Assocs., Inc.*, VABCA No. 2104, *et al.*, 87-1 BCA ¶ 19,648, at 99,472.

Unlike a motion for summary judgment, which must be adjudicated on the basis of a set of undisputed facts, the boards, necessarily, “may make findings of fact on disputed facts,” pursuant to the procedures for submission of the case on the record. *U.S. Coating Specialties & Supplies, LLC*, ASBCA No. 58,245, 20-1 BCA ¶ 37,702 at 183,031. Based upon those submitted materials, the boards are entitled to make findings of fact, even if such findings require “credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved,” and can decide issues of law based upon those factual findings. *Bryant Co., Inc.*, GSBCA No. 6299, 83-1 BCA ¶ 16,487, at 81,967. It is well established that a party “acts at its peril, in a Rule [17] procedure, where it fails to provide the Board sufficient factual information, supported by affidavits or probative documentary evidence.” *Finmarc Mgmt., Inc.*, CBCA No. 7065, 22-1 BCA ¶ 38,198; *Sefco Constructors*, VABCA No. 2747, *et al.*, 93-1 BCA ¶ 25,458, at 126,802. In determining the reliability of conclusory statements in affidavits and deposition testimony, the Board will:

look at whether there is other corroborative evidence supporting the statement, whether the other facts and circumstances surrounding the allegations make the allegations more believable than not, and to what extent the parties’ version of the events and conclusions differ or can be reconciled. In weighing these elements, however, the moving party’s position must be more reliable than its adversary in order for us to find in its favor.

1-A Constr. & Fire, LLP, CBCA No. 2693, 15-1 BCA ¶ 35,913 (quoting *Schoenfeld Assocs., Inc.*, *supra.*).

Burden of Proof

“Setoff” or “administrative offset” arises when the government reduces payment or refuses to pay the amount due under a contract as means of collecting sums improperly paid to the contractor on another contract or unrelated transaction. *IBM Corp.*, ASBCA No. 28,821, 84-3 BCA ¶ 17,689. Generally, the government has the right to set off any claim it has against a contractor by refusing payment of funds that are otherwise due to the contractor. *Jung Ah Indus. Co., Ltd.*, ASBCA No. 22,632, 79-1 BCA ¶ 13,643. Here, GPO implemented the administrative offset of an aggregate amount of \$199,490.59 through the issuance of three contract modifications.⁷ Complaint ¶¶ 17–

⁷ The parties refer to these setoffs as “price reductions” throughout the proceedings and in the record. The government’s actions here—in withholding all or portions of payments due under separate contracts that it has with Colonial Press as a means of collecting sums that GPO views as improperly paid under Print Orders 80010, 80011, and 80012—is more accurately identified as a setoff or administrative offset. See *IBM Corp.*, *supra.* The government’s ability to unilaterally impose a price reduction or

19. In response, Colonial Press submitted a claim to the contracting officer, seeking rescission of the contract modifications and restoration of the entire amount of the offset. R4, Tab 19 at 87–96. The contracting officer, in denying the claim, asserted that GPO was entitled to the setoff payment amounts under the contract’s warranty clause—*i.e.*, the agency asserted the offsets were appropriate because of the appellant’s breach of warranty. R4, Tab 20 at 97–99. As a result, Colonial Press now appeals the contracting officer’s final decision.

Although Colonial Press appeals the contracting officer’s final decision, there is no dispute that an invocation of a contract’s warranty clause is a claim by the government. Answer ¶ 25. Therefore, in an appeal of a claim for breach of warranty, the government bears the burden of proving, by a preponderance of the evidence, that the appellant breached the contract’s warranty clause. *See Mutual Maint. Co., Inc.*, GSBCA No. 7496, 85-2 BCA ¶ 18,098 (finding deductions from contracts by administrative offset to be a government claim and that the government has burden of proof in defending appeal of claim).

Breach of Warranty

Colonial Press completed delivery on all three print orders, with final shipment delivered on February 25, 2020. GPO made payment on the three print orders, with the final payment completed on March 23, 2020. Answer ¶¶ 7–9. Thus, performance of the contract was completed. The parties agree that the matter at issue in this appeal is GPO’s claim of breach of warranty under Clause 15 (Warranty) of the contract for Print Orders 80010, 80011, and 80012—which are essentially presented as Counts 1, 2, and 3, respectively, in the Complaint. Answer ¶¶ 23, 24–36.

As with all contracts awarded by GPO, the Program 199-S contract explicitly incorporated the provisions and clauses of GPO Contract Terms, GPO Pub. 310.2. R4, Tab 1, Contract at 2. Relevant here, the warranty clause of the GPO Contract Terms states, in pertinent part:

Notwithstanding inspection and acceptance by the Government of supplies furnished under the contract, or any condition of the contract concerning the conclusiveness thereof, the contractor warrants that for 120 days from the date of final payment—

withhold (full or partial) payment on a contract is available where final payment on the contract has not been completed. *See Stable Constr. Co.*, ASBCA No. 38,138, 89-3 BCA ¶ 22,241. Here, where payment on the three print orders had already been completed when GPO asserted its right to a decrement in price on Purchase Order 70239, GPO’s act—in reducing or withholding payments on other existing contracts with Colonial Press—constitutes an administrative offset.

(i) All supplies furnished under the contract will be free from defects in material or workmanship and will conform to all requirements of the contract[.]

R4, Tab 22, GPO Contract Terms at 286. This clause, as do comparable warranty clauses found in contracts with agencies in the executive branch, permits the government to avoid the conclusiveness of acceptance of delivery and to avail itself of certain remedies after acceptance, when furnished goods are found to be defective.⁸ *Vanier Graphics, Inc.*, GPOBCA No. 12-92 (May 17, 1994); *ABM/Ansley Bus. Materials*, GSBCA No. 9367, 93-1 BCA ¶ 25,246. Thus, when the government seeks a remedy under a warranty clause, it bears the burden of establishing a breach of warranty. *Philadelphia Biologics Ctr.*, ASBCA No. 32,622 *et al.*, 88-3 BCA ¶ 21,147.

In order to prevail on a breach of warranty claim, the government must show, by a preponderance of the evidence, that (1) it gave timely notice to the contractor; (2) the defect was the responsibility of the contractor; and (3) the government did not cause or contribute to the defect. *French Bray, Inc.*, GPOBCA No. 16-96 (August 21, 1998); *Midwest Bank Note Co.*, GPOBCA No. 13-95 (June 22, 1998) (“When the Government asserts a warranty claim against a contractor, the Government must show, by a preponderance of the evidence . . .”). In breach of warranty claims, the government bears the burden of proving all elements of its claim. *Camrex Reliance Paint Co., Inc.*, GSBCA No. 6166, 83-1 BCA ¶ 16,485. Conversely, for Colonial Press to prevail on its appeal of GPO’s breach of warranty claim, the appellant need only show that respondent has failed to meet its burden in proving one of these elements. *French Bray, Inc.*, *supra*.

Here, the parties do not contest the first element, *i.e.*, the appellant does not challenge the timeliness of GPO’s notice of defect to Colonial Press. *See Complaint passim*. Rather, the parties dispute whether GPO has met its burden in proving the second and third elements of its breach of warranty claim. Where, as here, we find the third element to be dispositive, we address first whether GPO has met its burden with regard to this element of the claim—that is, proving the government did not cause or contribute to the claimed defect.

Government Contribution to Defect

It is a well-settled doctrine of public contract law that the government is entitled to strict compliance with its contract specifications. *Vanier Graphics, Inc.*, *supra*; *Dependable Printing Co., Inc.*, GPOBCA No. 5-84 (September 12, 1985). The strict compliance rule is enforced either by rejecting the defective product or, if the government deems it in its

⁸ Because GPO is part of the legislative branch of the United States government, the Federal Acquisition Regulation (“FAR”) is inapplicable to the contract. *Custom Printing Co. v. United States*, 51 Fed. Cl. 729, 733 (2002). Nevertheless, the “Warranty” clause contained in the GPO Contract Terms is similar to the FAR’s “Warranty of Supplies of a Noncomplex Nature” clause. *See FAR 52.246-17*.

best interest, by accepting the nonconforming supplies at a discounted price. *Vanier Graphics, Inc.*, *supra*. From this statement of “black letter” law, GPO reasons that it had the right to obtain the exact supplies for which it bargained and to assert its remedies under the warranty clause when supplies were not delivered to specification. Respondent Rule 17 Brief (“RRB”) ¶¶ 13–19.

The record reflects that on January 22, 2019, in accordance with the terms of the contract, and in response to GPO’s request for 100 PTPPS, Colonial Press furnished the requested paper samples to GPO for inspection and testing. Answer ¶ 3. On January 28, 2019, the contracting officer sent Colonial Press a letter stating that the submitted samples “have been tested and are equal to the contract specifications.” R4, Tab 5 at 66. Relevant here, GPO’s testing report, dated January 23, 2019—which was not provided to Colonial Press at the time—revealed that the result was 84 percent for the average opacity of the tested samples. R4, Tab 4 at 64. Under the terms of the contract, the text paper was required to conform to the specifications set forth in JCP Code A60 of the GPSS. It is undisputed that the minimum acceptable average for opacity under JCP Code A60 is 86 percent. Answer ¶ 26. Despite the fact that GPO’s own report for the PTPPS testing denoted a result of an 84 percent average for paper opacity—a result that failed to meet the contract specification requiring a minimum average of 86 percent—the contracting officer issued a written notification to Colonial Press informing the appellant that the paper samples had been tested and were “*equal to the contract specification*.” R4, Tab 5 at 66 (emphasis added). The agency characterizes this error—*i.e.*, notifying Colonial Press that the submitted samples had actually met the contract specifications—as “inadvertently reported” or “incorrect.” RRB ¶ 8; RRB, Exhibit C ¶ 6. Significantly, GPO never corrected this erroneous notification, nor did the agency communicate, in any manner, to Colonial Press that the testing conducted on the PTPPS indicated the paper samples had failed to meet the minimum average opacity requirement (86 percent) for JCP Code A60.

According to Colonial Press, the paper samples provided to GPO for testing were produced by *Suzano Papel e Celulose*, a Brazilian paper company, which manufactures a White Offset Book paper, trademarked as Prisma Bright. Appellant’s Rule 17 Brief (“ARB”), Seruga Affidavit ¶ 2. The manufacturer’s specification for the Prisma Bright paper describes the paper as having an average opacity of 86 percent, per the “ISO 2471” standard of measurement established by the International Organization of Standardization (“ISO”). ARB, Seruga Affidavit ¶ 2, Exhibit 1. Although the Prisma Bright paper was advertised as having an 86 percent average opacity under the ISO 2471 standard of measurement, Colonial Press avers that it did not have confirmation that the paper would meet the contract specification for an 86 percent average opacity when tested under the TAPPI T-425 method required by the contract. ARB, Seruga Affidavit ¶ 4. According to Colonial Press, upon receiving GPO’s notice, and relying on the contracting officer’s confirmation that the paper samples had been tested to be “equal to the contract specifications,” the appellant proceeded with the purchase of the Prisma Bright paper to perform on the Program 199-S contract. *Id.* ¶ 5; see also Complaint ¶ 6.

As noted, on September 30, 2019, GPO issued Print Order 80010 for the production of 1,006,971 M&Y Handbooks. Colonial Press began shipment on October 15, 2019, and completed delivery of the handbooks on November 12, 2019, receiving final payment for the print order on December 20, 2019. Answer ¶¶ 7. Similarly, On October 23, 2019, GPO issued Print Order 80011 for the production of 210,816 M&Y Handbooks. Colonial Press began shipment on November 25, 2019, and completed delivery on December 3, 2019, receiving final payment for the second print order on January 27, 2020. *Id.* ¶ 8. GPO issued the third order, Print Order 80012, on January 17, 2020, for the production of 972,507 M&Y Handbooks. Colonial Press began shipment on February 6, 2020, and completed delivery on February 25, 2020, receiving final payment for the third print order on March 23, 2020. *Id.* ¶ 9.

The record reflects that the first time GPO notified Colonial Press of any problem with the paper attributes of the produced handbooks was on January 16, 2020, when GPO issued the first notice of defect. R4, Tab 6 at 67. Relevant to this discussion, the only information in the written notice regarding the alleged defect was the following: “Examination of random copies on . . . Print Order 80010 & 80011, for the CMS has revealed the following defect(s): 4-3 Paper Attribute: Text & Cover stocks do not equal specifications.” *Id.*

Here, the record reveals that between January 28, 2019—when the contracting officer issued the testing notice to Colonial Press incorrectly informing the appellant that the submitted PTPPS had met the contract specifications—and January 16, 2020—after GPO had issued and received delivery of two print orders (80010 and 80011—GPO had never informed nor communicated to Colonial Press that the tested Prisma Bright paper samples had not met the contract’s specification for opacity. The erroneous notification by the contracting officer, and the nearly 12 months of silence by GPO, allowed Colonial Press to unwittingly believe that the Prisma Bright paper it had submitted for prior-to-production paper testing met the contract specifications. Colonial Press’s chief operating officer affirms that, based on the written testing notice, “and in direct reliance on [the contracting officer’s] approval of the Prisma Bright® paper, [he] authorized the purchases of Prisma Bright® paper that [Colonial Press] then used to perform Program 199-S.” ARB, Seruga Affidavit ¶ 5. We find on this record that the government’s actions, here, played a not insignificant part in Colonial Press’s decision to use the Prisma Bright paper in performance of the contract.

Moreover, the respondent, which bears the burden of proving this element—as well as every other element—makes no effort to address its actions in this regard. The only response from GPO on this matter is provided in the contracting officer’s final decision, denying Colonial Press’s claim. In addressing Colonial Press’s contention that GPO contributed to the alleged defect, the contracting officer contends:

The Government did not contribute to the defect This logic is inherently inaccurate based upon the manufacturing process for paper. Production variances throughout manufacturing causes deviations in paper attributes throughout the run. Samples pulled from a section of the

lot may be found to meet the JCP requirements, while the balance of the lot may not. It is the contractor's responsibility to ensure your paper manufacturer maintains the required paper standards.

Furthermore, contractor-furnished paper samples serve as an initial verification procedure prior to starting production. . . . Approval of the initial paper samples submitted does not constitute a prior approval or acceptance of the final production run.

R4, Tab 20 at 99.

While it may be true that it is the contractor's responsibility to maintain the paper standards as defined in the contract, and that initial approval of the paper samples does not constitute prior approval of the final production run, the contracting officer's argument, does not, in any way, address the government's responsibility to correctly notify the appellant of the results of the PTPPS submitted for testing. That is, to the extent that the government knew that the contracting officer's notice was in error, it had a duty to correct that error once GPO became aware of it. *Stevens Graphics, Inc.*, GPOCAB No. 4-81 (March 22, 1982) ("Government does have a duty to disclose material information that it exclusively possesses when nondisclosure would damage the contractor."). Here, there is no question that the government was obligated to notify Colonial Press that testing of the PTPPS had revealed that the paper failed to meet the contract's opacity specification. Had the government timely notified Colonial Press of the PTPPS failure, the appellant would have been afforded the opportunity to mitigate or avoid any losses on the performance of the contract. *Id.* (holding government "is obliged to notify contractors of test results . . . within a reasonable time of learning of those results . . . so that the contractor can mitigate his losses"). In failing to provide this information, GPO effectively deprived Colonial Press of any opportunity to mitigate or address the defect before starting performance on the contract.

Furthermore, the contracting officer's arguments do not speak to why GPO never apprised Colonial Press of the error in the almost 12 months preceding the first defect notice. Rather the record demonstrates that (1) on January 28, 2019, GPO erroneously informed Colonial Press the submitted paper samples met the contract specifications—and by implication, confirming that the paper's average opacity met the 86 percent requirement; (2) at no time did GPO ever inform Colonial Press that the notification of the testing results was in error;⁹ and (3) GPO issued two print orders and accepted

⁹ In this regard, there is nothing in the record that provides any insight on how or when GPO became aware that the contracting officer's testing notification was in error. Thus, it cannot be ascertained from the record before us—and GPO has made no attempt to elaborate—whether the error in the PTPPS notification came to light only after the government issued the first defect notice, or if the government had been aware of the notification error at some point prior to the time GPO issued the first print order on September 30, 2019, and, for reasons unknown, declined to inform Colonial Press of the error in the notification.

delivery of those two print orders before notifying Colonial Press, for the very first time, that there was an issue with the paper used in the production of the M&Y Handbooks.

Despite having the burden to prove all elements of its breach of warranty claim, GPO has proffered little to no information on when it became aware of the mistake in the contracting officer's testing notification. Had the error been readily identifiable, and the GPO declined to timely notify the appellant of the error, then GPO's actions clearly contributed to Colonial Press's reliance on the mistaken notification, to the firm's detriment in performing the contract. Even if the notification error had not been discovered until it was brought to GPO's attention by Colonial Press's response to the defect notice, the respondent cannot entirely evade the part it played when the contracting officer incorrectly notified the appellant that the tested PTPPS met the contract specifications. Ultimately, the issue of when GPO became aware of the error in the notification is not as germane as the fact that the appellant was never informed of the error—*i.e.*, that the Prisma Bright paper samples did not meet the contract's opacity requirement. Without this information, Colonial Press had no indication that it needed to address this issue—an issue which seemingly could have been addressed by the appellant in the nearly 8 months between issuance of the PTPPS testing notice (January 28) and GPO's issuance of the first print order (September 30). See ARB, Seruga Affidavit ¶ 2 (“I would never have allowed Prisma Bright® paper to be used in Program 199-S if GPO had rejected this paper for any reason.”).

Print Order 80010 and Print Order 80011

On these facts, with regard to Print Orders 80010 and 80011, we cannot find that the government has met its burden to prove that its actions did not contribute to the defect alleged in its claim of breach of warranty. It is clear from the record—and the respondent has failed to demonstrate otherwise—that GPO's actions in erroneously notifying Colonial Press that the PTPPS had been tested and met the contract specifications (and not timely communicating the error of the notification) contributed to the appellant's decision to purchase and use the Prisma Bright paper in the performance of the contract. The government's position—that, regardless of its actions, Colonial Press was required to provide products conforming to the contract specifications under the warranty clause of the contract—is not persuasive.

With respect to contracts with the government for the provision of goods, “acceptance, under the terms of the contract, is conclusive except in limited situations.” *ABM/Ansley Bus. Materials, supra citing California Power Sys., Inc.*, GSBCA No. 7462, 86-1 BCA ¶ 18,598, at 93,367; see also, *Zebra Corp.*, GSBCA No. 4723, 80-2 BCA ¶ 14,484, at 71,392. This provision has been construed to mean that the government's acceptance of goods, even if nonconforming, is final, and that “the contractor has no further liability under the contract.” *California Power Sys., Inc., supra*. There are two contractual mechanisms by which the government can avoid the conclusiveness of

acceptance.¹⁰ First, acceptance is not deemed conclusive in the face of a showing of a “latent defect, fraud, [or] gross mistake amounting to fraud.”¹¹ *Vanier Graphics, Inc., supra*. Second, the contract contains a warranty provision which also “overrides the conclusiveness of inspection and acceptance of goods by the Government.” *Id.* (citing *Z.A.N. Co.*, ASBCA No. 25,488, 86-1 BCA ¶ 18,612). To avoid the conclusiveness of acceptance through application of the warranty clause, the government must meet its burden to show that the warranty applied. *ABM/Ansley Bus. Materials, supra*. To do so, the respondent must prove the elements of a breach of warranty claim. *Id.* Here, we find the respondent, GPO, has failed to do so.

The facts, here, are straightforward. On January 28, 2019, GPO (mistakenly) notifies Colonial Press that the submitted PTPPS met the contract specifications. GPO does not correct the notice nor does it have any further communication with Colonial Press regarding the paper attributes or the PTPPS testing. On September 30, 2019, GPO issued Print Order 80010, and Colonial Press completed delivery on November 12, 2019, receiving payment on December 20, 2019. On October 23, 2019, GPO issued Print Order 80011, and Colonial Press completed delivery on December 3, 2019, receiving payment for the second print order on January 27, 2020. The first notification GPO provided to Colonial Press regarding any issue with the paper attributes was on January 16, 2020, when GPO issued the first notice of defect. By that time, Colonial Press had already completed delivery of the two print orders.

¹⁰ When supplies are tendered to the government pursuant to a contract, the government ultimately must accept or reject those supplies. *Wintech Int'l, Inc.*, GPOBCA No. 15-95 (Sept. 15, 1998). Acceptance of the supplies, which may be explicit or implied, is understood to mean that title to the supplies has transferred to the government and that the government, except as noted above, may no longer reject them. *Id.* GPO's Printing Procurement Regulation is silent, however, as to how and when acceptance takes place. The only GPO guidance appears in its “Warranty” clause, where the term is defined for purposes of that clause as “the act of an authorized representative of the Government by which the Government assumes . . . ownership of existing supplies” R4, Tab 22, GPO Contract Terms at 287. Additionally, under the “Payments on Purchase Order” clause (Clause 24), GPO pays its contractors upon receipt of contractor vouchers, which may precede quality assurance inspection, and which has led GPO on more than one occasion to assert that payment alone is not an indicator of acceptance. *Id.* at 293; see *French Bray, Inc., supra*; *Vanier Graphics, Inc., supra*. Thus, with respect to GPO's contract terms, no conclusion regarding acceptance can be drawn from the mere fact of payment. *French Bray, Inc., supra*. However, despite the contract's payment provision, GPO's pursuit of its claim here under the warranty clause—which states “[n]otwithstanding inspection and acceptance . . . the contractor warrants”—suggests that the respondent has tacitly conceded acceptance has occurred. See *id.*; *Wintech International, Inc., supra*. Finally, as GPO has not raised acceptance as an issue, the Board does not consider the question of acceptance here to be in dispute.

¹¹ Neither party has raised latent defect as a concern in this proceeding.

Accordingly, on these facts, with respect to Print Order 80010 and Print Order 80011, we find that GPO has failed to meet its burden in proving that its actions did not contribute to the defect alleged in the government's breach of warranty claim.

Print Order 80012

With regard to Print Order 80012, the following additional facts are germane to the discussion. GPO issued the first defect notice on January 16, 2020. Relevant here, the entirety of the defect notice was as follows:

Examination of random copies on Jacket 411-456, Program 199S, Print Order 80010 & 80011, for the CMS has revealed the following defect(s):

4-3 Paper Attribute: Text & Cover stocks do not equal specifications.

The order has been determined rejectable. The Government may require that each order be decreased by up to 20.3 of the invoice billing price.

Your written explanation of why these defects occurred and the steps being taken to assure that these problems will not appear in future procurements is requested by 1/21/2020. Address your reply to the undersigned, [contact information].

The original copy of this letter and defective samples will follow this facsimile transmission.

A copy of this correspondence will be placed in your file and the substance will be considered whenever your firm is in line for an award. Future occurrences may result in a reduction in your quality level rating.

R4, Tab 6 at 67. Other than the lone statement, "4-3 Paper Attribute: Text & Cover stocks do not equal specifications," there are no other details or description in the notice that informs Colonial Press which paper attribute is alleged to be defective or, for that matter, what was the actual measurement of the defective attribute. As there are a number of paper attributes, this statement, without more, provided no useful information on which Colonial Press could address the government's concern.

Here, the parties disagree on what happened next. According to the appellant, in a letter dated January 20, 2020, Colonial Press requested from GPO, the following:

- Test results for each print order, describing the number of samples tested, attributes measured, defects noted, demerits assigned and the PQI¹² index of the samples.

¹² The GPSS describes the Product Quality Index (PQI) in this manner:

- A detailed description of the testing methods utilized.
- Documentation showing how demerits assigned to each print order was translated into discounts take.
- A list of the testing equipment used, its age, current condition, maintenance records, frequency of calibration and calibration record.

Complaint ¶ 12. The respondent, for its part, disclaims that GPO received any such correspondence from Colonial Press. Answer ¶ 12 (“[GPO] ha[d] no record of the previous responses [to the First Defect Letter that the Appellant] claim[ed] to have sent”). Despite the government’s position, however, Colonial Press avers—and the record indicates—that GPO delivered, on January 28, 2020, “a quality control sample from [Colonial Press’s] Print Order 80011 shipment” in response to the Colonial Press’s request. Seruga Affidavit ¶ 7.

The facts are also clear that, on January 17 2020, 1 day after GPO sent Colonial Press the first defect notice, the respondent issued Print Order 80012 on the contract. Answer ¶ 9. At this point, Colonial Press had no more information regarding the alleged defect than it had when GPO issued Print Orders 80010 and 80011.¹³ As was the situation with the first two print orders, GPO never informed the appellant that the PTPPS testing conducted in January of 2019 had resulted in a finding that the paper samples failed to meet the minimum average opacity requirement of 86 percent. Moreover, Colonial Press had been misled by the contracting officer’s confirmation notice that the tested samples had met the contract specifications. Again, the first indication any problems existed with the paper was only provided to Colonial Press through GPO’s issuance of

The following acceptance criteria shall be employe[d] to evaluate the paper’s conformance to specification. Paper that does not meet all specification values shall be accepted with no discount providing that the minimum acceptable Product Quality Index (PQI) has been met. The PQI for a specific paper is determined by assigning demerits to each deficient quality characteristic based on test results. The demerits assigned will vary with the category of deficiency. A *minor defect* shall be assigned 4 demerits, a *major defect* 12 demerits and a *critical defect* 36 demerits.

R4, Tab 21 at 251 (emphasis is in original).

¹³ Despite asserting that the defect was found based on examination “of random copies on . . . Print Order 80010 & 80011,” the defect notice does not provide any specificity regarding the alleged defect or the testing until the contracting officer responded to the appellant’s inquiries on April 2, 2020. R4, Tab 6 at 67. We note that the only reports of testing conducted on Print Orders 80010 and 80011 are provided by GPO at Tabs 7 and 8 of the Rule 4 file. R4, Tabs 7–10. Curiously, those material test reports are all dated March 9, 2020, well after the January 16, 2020, defect notice. To the extent that GPO had reports of any testing conducted on samples from any of the print orders before issuing the first defect notice, the government did not provide them in the administrative record submitted to the Board.

the first defect letter. Even then, the only substantive information provided in the notification from GPO was the obtuse statement: “4-3 Paper Attribute: Text & Cover stocks do not equal specifications.” R4, Tab 6 at 67.

The record also demonstrates that, in response to Print Order 80012 issued on January 17, 2020, Colonial Press began delivery of the handbooks on February 6, 2020, and completed delivery on February 25, 2020. Answer ¶¶ 9. Colonial Press received final payment for Print Order 80012 on March 23, 2020, which, by happenstance, was the same day that GPO issued the second defect notice to the appellant. Answer ¶¶ 9, 14. Thereafter, a series of emails were exchanged between the parties which resulted in GPO providing more details to Colonial Press regarding the nature of the alleged defects found in the testing of samples from the delivered print orders. R4, Tab 14 at 75–82.

We need not pursue what other events occurred subsequently, where the record, up to this point, shows that the government’s actions in contributing to the alleged defect in Print Orders 80010 and 80011 also contributed to the alleged defect in Print Order 80012. That GPO issued the first notice of defect 1 day before issuing Print Order 80012, does not change the nature of the government’s actions that contributed to the defect alleged in the government’s breach of warranty claim. Here, despite finding alleged defects in the paper opacity of Print Orders 80010 and 80011, GPO issued another print order to Colonial Press only 1 day after notifying the appellant of the defects. Subsequently, GPO not only took delivery of all the shipments on Print Order 80012—which had been completed on February 25, 2020—but also made final payment on the print order on March 23, 2020.¹⁴

As discussed above, the record demonstrates that GPO had knowledge of the exact nature of the alleged defect—*i.e.*, the paper opacity measurement—yet failed to disclose that information to Colonial Press before issuing the first two print orders. Furthermore, when given the opportunity, on January 16, 2020, to provide Colonial Press with adequate information regarding the nature of the alleged defect—so that it

¹⁴ Colonial Press does not raise the subject of waiver with respect to the government’s action in this instance—*i.e.*, issuing another print order and making payment on delivery of that order, after notifying the appellant of the alleged defect in the prior print orders. A waiver may occur when the government permits the contractor to deviate from the contract requirements. See *Gresham & Co. v. United States*, 200 Ct. Cl. 97, 470 F.2d 542 (1972); *General Motors Corp., Delco Radio Div.*, ASBCA No. 15,807, 72-1 BCA ¶ 9405 (finding government was held to have waived the reliability requirement by knowingly authorizing the contractor to proceed with production despite nonconformity with reliability criteria). To establish waiver by the government, an appellant must demonstrate that the contracting officer knowingly rescinded the government’s right to require compliance with a contractual requirement. *Colonial Press Int’l, Inc.*, GAO CAB 2020-02 (Oct. 21, 2022). Again, because we find that GPO has failed to prove its claim for breach of warranty, we need not address whether the government waived the contract requirement in this respect.

may be addressed by the contractor—GPO declined to do so, despite having knowledge of the exact nature of the defect. Instead, GPO issued a defect notice that described the alleged defect in a broad and obtuse manner that would require additional details in order for the notification to be relevant. Without information regarding the specific opacity defect—which the agency had in its exclusive possession—Colonial Press could not have been expected to correct the alleged defect before GPO issued the next print order, which, in this instance, was the very next day. Moreover, GPO not only issued Print Order 80012, but took delivery and made payment on the print order, before ever notifying Colonial Press that the alleged defect was actually the opacity of the text paper. GPO’s actions, even when viewed in the best light possible, cannot be found to meet the necessary element that the government not contribute to the defect. As such, with respect to Print Order 80012, we also find that the respondent has failed to meet its burden in proving that its actions did not contribute to the defect alleged in the government’s breach of warranty claim.

CONCLUSION

We conclude that GPO has not meet its burden in proving that the government did not contribute to the defect alleged in the government’s claim of breach of warranty. The government, therefore, has failed to prove its claim for breach of warranty. Accordingly, we need not address the parties’ other arguments. This appeal is **GRANTED**. Colonial Press is entitled to \$199,490.59, the full amount retained by GPO through administrative offset. The appellant is also entitled to interest pursuant to the Contract Disputes Act, starting from the date the contracting officer received Colonial Press’s claim until the date of payment. 41 U.S.C. § 7109.

Dated: August 30, 2023

/s/ Peter H. Tran
PETER H. TRAN
Presiding Member

We concur:

/s/ Heather Weiner
HEATHER WEINER
Member

/s/ Evan D. Wesser
EVAN D. WESSER
Member