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**GOVERNMENT ACCOUNTABILITY OFFICE  
CONTRACT APPEALS BOARD**

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THE REGAL PRESS, INC.	)	
	)	
Appellant,	)	
	)	CAB No. 2019-03
v.	)	
	)	
Government Publishing Office	)	
	)	
Respondent.	)	
_____	)	

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

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

Board Members: Evan D. Wesser (Presiding)  
Louis A. Chiarella  
Stephanie B. Magnell

Decision

The Regal Press, Inc., of Norwood, Massachusetts, appeals the final decision of the U.S. Government Publishing Office (GPO) denying the appellant’s claim for \$289,259.55, plus prejudgment interest, incurred by Regal when it was required to reproduce letters on behalf of the White House and Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS). Specifically, Regal alleges that the contracting officer provided an oral authorization to proceed with producing the materials, and then the government subsequently made changes to the text of the letter, thus requiring Regal to reproduce the materials that were printed in accordance with the original text specifications. GPO denies liability, arguing that the government never provided a binding oral authorization to proceed and, therefore, Regal’s production of the letters according to the original text specifications was unauthorized.

We sustain the appeal in part.

## BACKGROUND

On January 13, 2014, GPO awarded Purchase Order No. 96985 (“Purchase Order”) to Regal for Program 772-S for “White House Stationery.” Amended Joint Stipulations of Fact (“AJSF”), ¶ 1. The Purchase Order’s original term ran through December 31, 2014, and GPO subsequently exercised options extending the term through December 31, 2017. *Id.* The Purchase Order was a requirements contract against which the government could issue print orders. Rule Four File (“R4”), exh. 23, Purchase Order, Contract Specifications at 128–129.<sup>1</sup> Print orders issued during the Purchase Order’s effective period, but not completed within that time, were to be completed by Regal within the time specified in the print order. *Id.* at 129. The parties’ rights and obligations respecting such print orders would be governed by the terms and conditions of the Purchase Order to the same extent as if completed during the Purchase Order’s effective period. *Id.*

The Purchase Order established requirements for prior-to-production (or “P2P”) samples. Specifically, the Purchase Order specified that: (i) samples were required to be submitted prior to commencement of production of the contract quantity; (ii) manufacture of the final product prior to approval of the samples submitted would be at the contractor’s risk; and (iii) the contractor must not print prior to receiving affirmative approval to proceed with printing, which the Purchase Order described as an “O.K. to Print.” *Id.* at 133. The Purchase Order also incorporated by reference the applicable provisions, clauses and supplemental specifications of GPO Contract Terms (GPO Publication 310.2). *Id.* at 127. The applicable GPO Contract Terms included Supplemental Specification 15, which establishes general requirements for proofs. Relevant here, Section 15 directs that:

Unless otherwise specified, the contractor must not proceed with production or print any portion of an order prior to receiving an “OK to proceed” or an “OK to print” from the Government.

Respondent Hearing Exhibit (“RHE”) P, GPO Contract Terms, GPO Pub. 310.2 (Rev. 01-18) at Supp. Specs., ¶ 15.

Additionally, the Purchase Order directed that if the government failed to approve, conditionally approve, or disapprove of the samples within the time specified, then the contracting officer would automatically extend the shipping schedule in accordance with Contract Clause 12 of the incorporated GPO Contract Terms. R4, exh. 23, Purchase Order, Contract Specifications at 133. Contract Clause 12 of the incorporated GPO Contract Terms, entitled “Notice of Compliance with Schedules,” generally provides:

In the event a delay is caused by any action of the Government, including failure to furnish ordering document, copy, and/or materials as scheduled, the shipping/delivery schedule will be extended automatically by the total

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<sup>1</sup> References herein to page numbers for R4 exhibits are to the Bates numbering furnished by GPO.

number of workdays that work was delayed PLUS 1 workday for each day of delay; such period of grace for any schedule will not exceed 3 workdays.

RHE P, GPO Contract Terms, GPO Pub. 310.2 (Rev. 01-18) at Contract Clauses, ¶ 12(b)(1); *see also* AJSF, ¶¶ 6, 12 (stipulating that delay in approval of the prior-to-production samples would result in a day-for-day extension (plus any applicable grace days) to the shipping schedule).

Also relevant to the issues in this appeal is Contract Clause 4, Changes, of the incorporated GPO Contract Terms. In relevant part, Section 4 provides that:

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of the contract in any one or more of the following:
  - (1) Specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the specifications.
  - (2) Method of shipment or packing.
  - (3) Place of delivery.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

\* \* \* \* \*

- (d) If the contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

RHE P, GPO Contract Terms, GPO Pub. 310.2 (Rev. 01-18) at Contract Clauses, ¶ 4.

Included in the "White House Stationery" being produced under Program 772-S was "Item Q," which was an engraved letterhead with an embossed Presidential Seal in gold coloring and the words:

The White House

Washington

in blue coloring ("Engraved Letterhead"). AJSF, ¶ 2. The Purchase Order established a fixed unit price of \$315.50/1,000 Engraved Letterhead. R4, exh. 7, Purchase Order,

Mod. No. 4 at 118. The government approved the final press proof of the Engraved Letterhead on October 23, 2017. *Id.*; R4, exh. 3, Press Proof for Engraved Letterhead, at 70.

On October 31, 2017, GPO issued to Regal Print Order No. 50001 (“Print Order”) against the Purchase Order. The initial GPO contracting officer for the Print Order was Brian Coleman; Regal’s primary point of contact for the Print Order was Ernest LaCroix. See, e.g., Hearing Tr. at 5:16–21; 12:2–12; 99:20–25. The Print Order, which was issued for USCIS, requisitioned the production of 800,000 copies of a letter from President Trump congratulating newly naturalized American citizens (“Presidential Letter”). AJSF, ¶ 3. In order to produce the Presidential Letter, Regal was required to perform additional tasks beyond the Purchase Order’s original specifications. The additional tasks included: (1) printing the text of the Presidential Letter on the Engraved Letterhead produced by Regal under the Purchase Order;<sup>2</sup> (2) inserting the Presidential Letter into customized printed envelopes provided by the government; and (3) delivering the assembled Presidential Letters and envelopes to the USCIS Eastern Forms Center in monthly quantities of 80,000, and to the USCIS Western Forms Center in monthly quantities of 20,000, or, in the event Regal produced less than 100,000 Presidential Letters in a month, Regal was to deliver 80 percent of that month’s production to the Eastern Forms Center and 20 percent to the Western Forms Center. AJSF, ¶ 5.

On December 5, the government approved Regal’s price proposal for the additional work required under the Print Order. AJSF, ¶¶ 7–8. Relevant to the issues presented, the government approved a total fixed unit price of \$489.71/1,000 assembled Presidential Letters, which consists of the following components: \$315.50/1,000 letters for the Engraved Letterhead; \$27.50/1,000 letters for the offset printing of the government-provided text; and \$146.71/1,000 letters for the machine insertion into the government-provided envelopes. R4, exh. 3, Price Negotiation Notes at 77; exh. 5, Print Order, Mod. No. 1 at 88.

Relevant here, the Print Order required Regal to deliver 10 pre-production samples of the Presidential Letter, and specified that GPO would hold the proofs for 1 day. R4, exh. No. 12, Print Order, at 111. The Print Order further directed that:

Order will be following instructions given by Office of Citizenship (Sarah Kurapatskie) – Price approv[al] required

- 10 Pre-production samples required. (Please note that The White House wants to review.) Please ship P2P samples to Sarah Kurapatskie at USCIS [address omitted] or Back-up: Brian Coleman at GPO [address omitted].

*Id.*

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<sup>2</sup> The printing portion consisted of printing a print-ready PDF file containing text provided by the government onto the Engraved Letterhead; Regal was not permitted to alter the text. Hearing Tr. 22:7–17; 23:1–3.

The second page of the Print Order stated that “5-10 Pre-production samples required,” and reiterated that pre-production samples were to be shipped to Ms. Kurapatskie at USCIS or “Back-up: Brian Coleman at GPO.” *Id.* at 112.

Beginning in November 2017, Regal requested from GPO samples of the customized envelopes so that Regal could test whether the letters could be machine inserted, or would need to be hand inserted. AJSF, ¶ 9. Although Regal was able to successfully confirm its ability to machine-insert the envelopes in January 2018, the government provided additional envelopes and asked Regal to again test whether the letters could be machine inserted. *See, e.g.*, Hearing Tr. 31:16–32:11. Regal subsequently reconfirmed that the letters could be machine inserted on May 10, 2018. AJSF, ¶ 10.

On January 31, 2018, the contracting officer emailed Mr. LaCroix to ask “[W]hen do you think we cannot [sic] expect the prior to production samples for the Presidential Letter?” AJSF, ¶ 12. On February 2, Regal delivered via commercial carrier the requisite pre-production samples to both USCIS and GPO. *Id.*, ¶ 13.

On February 5, Mr. LaCroix called Mr. Coleman to confirm GPO had received delivery of the pre-production samples. *Id.*, ¶ 14. As addressed herein, the parties’ dispute regarding the content of the February 5 call is the material issue presented in this appeal.

According to Regal, Mr. LaCroix contacted Mr. Coleman to confirm that the government had received the prior-to-production samples and ascertain whether Mr. Coleman found the samples to be acceptable. Specifically, Mr. LaCroix testified that:

I just wanted to confirm with Brian that he had, in fact, received the package on Friday because I, you know, tracked it to make sure it was there. And I just asked him what he, you know, what he thought of the samples. And he responded to me that, you know, they looked good.

Hearing Tr. 28:13–18.

Mr. LaCroix also contemporaneously prepared a hand-written memorandum to file regarding the call. Mr. LaCroix wrote:

BRIAN CONFIRMED RECEIPT OF PRODUCTION SAMPLES OF  
LETTERS

COMMENTED “LOOKED GOOD”

VERBAL BY PHONE

1 DAY HOLD PER PRINT ORDER HOLD DAY IS 2/5 DON’T COUNT  
DAY RECEIVED

Appellant Hearing Exhibit (AHE) 9, LaCroix Memo. at 1 (capitalization in original).

Mr. LaCroix believed that Mr. Coleman had approved the prior-to-production samples, added the memorandum to file to the production jacket, and notified Regal's quality control department that it could release the order into production. Hearing Tr. 29:3–18. As to the call itself, Regal's phone records show that on February 5, there was an outbound call to Mr. Coleman's office telephone number at 4:44 p.m.; the call lasted three minutes. AHE 8-B, Regal Call Log, row 586; see also AHE 11 (showing Mr. Coleman's office telephone number in his email signature). The parties also stipulated that the call occurred. AJSF, ¶ 14.

In contrast, Mr. Coleman testified that he did not recall discussing the prior-to-production samples of the Presidential Letter with Mr. LaCroix on February 5, 2018, or any time thereafter before the June and July 2019 email communications discussed herein. See, e.g., Hearing Tr. at 111:22–112:5 (Q: "Do you recall speaking to Mr. LaCroix on or around February 5, 2018?" A: "No, I do not recall speaking with him around February 5, 2018." Q: "Do you recall speaking to Mr. LaCroix after you received the pre-production sample regarding the presidential letter?" A: "Not to my knowledge. I don't recall if I did."). Notwithstanding that Mr. Coleman testified that he had no recollection of the call and that GPO subsequently stipulated to the fact that the call actually occurred, GPO rejects Regal's assertion that the government gave Regal authorization to proceed with producing the Presidential Letters. See Respondent Post-Hearing Response Br. at 2.

On February 10, Regal began production of the Presidential Letters. AJSF, ¶ 15. Prior to the submission of its claim, Regal would complete production of 700,000 Presidential Letters as follows:

February 2018	100,000 Presidential Letters
March 2018	100,000 Presidential Letters
April 2018	100,000 Presidential Letters
May 2018	150,000 Presidential Letters
June 2018	150,000 Presidential Letters
July 2018	100,000 Presidential Letters

*Id.*, ¶ 18.

On February 20, the contracting officer emailed Regal regarding its ability to store the government-provided envelopes. Specifically, the contracting officer asked: "GPO is preparing to print the 800,000 envelopes that will go along with the 800,000 letters that Regal is producing. If we ship all 800,000 envelopes to you, do you have the space to store them as you produce the letters?" AJSF, ¶ 16; R4, exh. 3, Email from B. Coleman at 71. On the same day, the contracting officer also emailed Mr. LaCroix to verify how many pallets the completed order of assembled Presidential Letters would take, as USCIS was "checking if they can store the entire order if you were to ship all at once." AJSF, ¶ 17; exh. 3, Email from B. Coleman at 71. The next day, Mr. LaCroix responded to Mr. Coleman's two February 20th emails. Mr. LaCroix asked if the government could furnish 200,000 envelopes at a time, and confirmed that the completed order would require 30 pallets. R4, exh. 3, Email from E. LaCroix at 71.

On May 21, Mr. LaCroix emailed GPO Plant Operations Liaison Sara Good and Mr. Coleman to inquire when Regal would be receiving the envelopes, and Ms. Good represented that the entity producing the envelopes “only sent us a dozen envelopes . . . . So we are waiting (again) for the preproduction quantity to arrive. Then we will print the [envelope] samples for approval.” AJSF, ¶ 11; R4, exh. 3, Email from S. Good at 66.

On June 11, Joy Henrichs, of the Executive Office of the President, emailed Ms. Kurapatskie and Mr. Coleman to confirm that she had received the prior-to-production sample for the envelopes, and was “routing it for approval.” AHE 15-A, Email from J. Henrichs at 1.

On June 19, Mr. LaCroix emailed Ms. Good and Mr. Coleman to inquire if there was “[a]ny word on the envelopes? We would like to start shipping the completed letterheads.” AJSF, ¶ 20; R4, exh. 3, Email from E. LaCroix at 66.

On July 10, Ms. Kurapatskie contacted Ms. Henrichs to check on the status of the White House’s review of the prior-to-production sample of the envelope. AHE 15-A, Email from S. Kurapatskie at 1. Later that day, Ms. Henrichs responded to Ms. Kurapatskie and included proposed text changes to the Presidential Letter. AHE 15-A, Email from J. Henrichs at 1; AJSF, ¶ 21. Shortly after receiving Ms. Henrich’s response, Ms. Kurapatskie emailed Mr. Coleman and stated: “We haven’t provided any approvals on the letter to The Regal Press. Should I get in touch with them about the edits and provide new artwork to them? To your knowledge, have they started printing?” AHE 15-A, Email from S. Kurapatskie at 1.

Later on July 10, shortly after receiving Ms. Kurapatskie’s email, thereafter, Mr. Coleman responded to Mr. LaCroix’s June 19th email. Mr. Coleman asked if Regal had “completed the letterheads?” R4, exh. 3, Email from B. Coleman at 75. The next day, Mr. LaCroix responded to Mr. Coleman that Regal had “approximately 500,000 completed to date.” R4, exh. 3, Email from E. LaCroix at 75. Two minutes after receiving Mr. LaCroix’s response, Mr. Coleman responded that “[t]hen we have a problem. Did you ever receive an approval of the prior to production samples? I received an email yesterday that the White House has some text changes to the letter.” R4, exh. 3, Email from B. Coleman at 75. Mr. LaCroix subsequently responded that “I sent the letter and envelope samples in for approval.” R4, exh. 3, Email from E. LaCroix at 75.

On August 3, Regal sent to GPO an invoice for \$240,100 for the 700,000 Presidential Letters produced by Regal between February and July 2018. The invoice sought payment for \$343/1,000 Presidential Letters, which covered the costs associated with the production of the Engraved Letterhead (\$313.50/1,000 letters) and offset printing of the text of the Presidential Letter (\$27.50/1,000 letters). The invoice did not include any claimed costs for the machine insertion of the letters into envelopes. R4, exh. 3, Regal Invoice No. 683287 at 76.

On August 13, Ms. Kurapatskie emailed Mr. LaCroix the new text specifications for the Presidential Letter. R4, exh. 9, Email from S. Kurapatskie at 102.

On or about August 17, David Love, the GPO Contracting Administrator, called Mr. LaCroix to notify Regal that Mr. Coleman had moved to a new position within GPO, and to confirm that GPO received Regal's invoice. Mr. Love indicated that GPO would need to modify the Print Order to authorize a partial payment, and requested additional information from Regal. AJSF, ¶ 22; R4, exh. 2, Contracting Officer's Determinations & Findings, at 6; exh. 3, Regal Notes re Call with D. Love at 78.

On August 20, Ms. Kurapatskie approved via email to Mr. LaCroix the prior-to-production samples of the Presidential Letter conforming to the revised text specifications. AJSF, ¶ 23; R4, exh. 9, Email from S. Kurapatskie at 101.

On August 22, Mr. Love contacted Regal's President regarding concerns with Regal's invoice for the 700,000 Presidential Letters. Specifically, Mr. Love represented that "I am told you did not have a written approval to proceed with production. I'll need to address this straightaway so everyone is on the same page." R4, exh. 3, Email from D. Love at 79.

On August 27, Regal received its first batch of 120,000 printed envelopes. AJSF, ¶ 24; R4, exh. 2, Contracting Officer's Determinations & Findings, at 6.

On August 30, GPO and Regal had a conference call to discuss Regal's invoice and the status of Regal's performance of the Print Order. R4, exh. 3, Show Cause Notice, at 83. Also on August 30, Ms. Kurapatskie again approved via email to Regal's President the prior-to-production samples of the Presidential Letters conforming to the revised text specifications. AJSF, ¶ 24; R4, exh. 9, Email from S. Kurapatskie at 101; exh. 3, Press Proof for Revised Presidential Letters (Aug. 30, 2018) at 81 (including Ms. Kurapatskie's signature and notation that "Ok for position, color, signature, seal. Beautiful!"); see also R4, exh. 3, Press Proof for Revised Presidential Letters (Sept. 17, 2018) (including Ms. Kurapatskie's signature and notation that "Ok for position, color, signature, seal").

On September 11, Regal delivered 400,000 Presidential Letters to the USCIS Eastern Forms Center. The delivered letters (1) conformed to the original text specifications, but (2) were not inserted into the government-provided envelopes. R4, exh. 3, Show Cause Notice, at 83; exh. 3, UPS Original Freight Bills at 84–85.

On September 20, GPO issued a show cause notice ("Show Cause Notice") to Regal, asserting that Regal had failed to perform in accordance with the Print Order's terms, and that GPO was considering terminating the Print Order for default. Specifically, Mr. Coleman's replacement as the GPO contracting officer, Edris Rhinehart, asserted that Regal "performed internal production requirements for 500,000 Presidential Letters without signature approval and then attempted to invoice GPO for a partial order without delivery receipts." R4, exh. 3, Show Cause Notice, at 83. Ms. Rhinehart further asserted that Regal had failed to provide a new production schedule for 800,000 Presidential Letters conforming to the revised text specifications. *Id.*



Additionally, the contracting officer asserted that the September 11 delivery to the USCIS's Eastern Forms Center was not in conformance with the Print Order's requirements because they were non-approved, and "were not inserted into the supplied M-771 envelopes however envelopes were included in this delivery." *Id.* The contracting officer directed that Regal "must coordinate a pick-up of all non-approved Presidential Letters and un-inserted envelopes at no expense to the Government." *Id.* Regal retrieved the letters on September 26. R4, exh. 3, UPS Original Freight Bills at 86–87.

Also on September 26, Regal replied to GPO's Show Cause Notice. In its response, Regal: (1) proposed a delivery schedule for the 800,000 Presidential Letters conforming to the revised text specifications; (2) asserted its right to entitlement for the previously produced 700,000 Presidential Letters conforming to the original text specifications; and (3) proposed as a compromise that GPO accept the 700,000 Presidential Letters conforming to the original text specifications and having Regal produce the balance of 100,000 Presidential Letters conforming to the revised text specifications. R4, exh. 3, Regal Response to Show Cause Notice at 91–92.

On May 20, 2019, Regal submitted its certified claim to GPO for \$267,925.35, plus prejudgment interest, incurred in producing the 700,000 rejected Presidential Letters. Regal's claim consisted of three claimed damages elements: \$240,100 for the costs of producing the rejected Presidential Letters (\$343/1,000 letters); \$5,325.35 in shipping costs incurred to transmit and retrieve the letters; and \$22,500 for costs incurred in storing the rejected letters through May 31, 2019. R4, exh. 4, Regal's Certified Claim, at 17.

On July 25, the current GPO contracting officer denied Regal's claim. Specifically, the contracting officer found that "[t]here is no documentation to support a verbal 'Okay to Print' was given to Regal Press by the Government prior to August 30, 2018," and GPO therefore determined "the printing of the letters without an 'Okay to Print' to be an unauthorized action." R4, exh. 1, Contracting Officer's Decision at 1.

On August 2, Regal filed this appeal and its complaint with the Board seeking \$267,925.35, plus interest thereon, for the costs incurred in connection with Regal's production of the 700,000 Presidential Letters conforming to the original text specifications, as well as the associated shipping and storage costs. AJSF, ¶ 29.

Following the completion of discovery, the Board conducted a one-day evidentiary hearing on November 23, 2020. During the hearing, the Board heard the testimony of Mr. LaCroix, Mr. Arthur Porcaro (Regal's General Manager), and Mr. Coleman. Following post-hearing briefing, Regal amended its claimed damages to seek \$289,259.55, plus prejudgment interest. The revised amount consists of: \$240,100 for the production of the 700,000 Presidential Letters conforming to the original text specifications; \$36,015 in profit; \$7,819.20 in storage costs; and \$5,325.35 for shipping costs. See, e.g., Appellant's Post-Hearing Br. (Jan. 19, 2021) at 13–15; Appellant's Response to Respondent's Supp. Br. on Entitlement (Mar. 8, 2021) at 1.

## DISCUSSION

### Entitlement

The resolution of this appeal requires our Office to address three disputed questions. First, did the GPO contracting officer provide Regal with an oral authorization to begin printing, *i.e.*, an “Ok to print”, during the February 5, 2018, telephone conversation? Second, assuming the contracting officer did provide assent to Regal during the telephone conversation, was the conveyance sufficient to constitute a legally binding authorization to proceed? Third, assuming that the contracting officer provided his assent and the oral conveyance was sufficient, did the Print Order otherwise require a separate authorization from GPO’s government customer? For the reasons that follow, we find that the contracting officer was authorized to and in fact provided a sufficient authorization to proceed to Regal, and that Regal was not obligated to obtain a separate authorization to proceed from GPO’s government customer.

As a consequence, when the government amended the text of the Presidential Letter after the contracting officer approved the prior-to-production samples, the government constructively changed the contract, thus entitling Regal to recover reasonable costs incurred in producing the Presidential Letters conforming to the original text specifications. Therefore, we sustain the appeal as to Regal’s right to an equitable adjustment.

### Appellant’s Basis for its Claim

Before addressing the above questions, we are compelled to briefly address the appellant’s argument that its claim is predicated on a termination of contract requirements by the government. To the extent that Regal argues that GPO’s rejection of the initially produced Presidential Letters that conformed to the original specifications amounts to a termination by the government, we disagree. In this regard, the government did not terminate, cancel, or otherwise descope any required element of performance of the Print Order. Rather, we find that this case presents a quintessential claim that the government constructively changed the contract when it changed its specifications after authorizing performance, and thus required Regal to incur additional costs to re-perform work in order to meet the government’s changed requirements.

A constructive change takes place when a contractor performs work beyond the contract requirements, without a formal change order under the Changes clause, due either to an informal order from, or through the fault of, the government. *Grunley Constr. Co., Inc.*, GAO CAB No. 2010-6, Nov. 26, 2012, 12-2 BCA ¶ 35,187 at 172,646; *In re M.A. Mortenson Co.*, ASBCA No. 53229, Dec. 29, 2004, 05-1 BCA ¶ 32,837 at 162,469–470 (*citing Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970)). A constructive change pursuant to government direction contemplates both a “change” element and “order” element from a government official with authority to direct the change. *Grunley Constr. Co., Inc.*, *supra* (citations omitted). Thus, to recover, the contractor must show that the government actually compelled the additional work. *Mortenson Co.*, *supra*. Where a constructive change is found to exist, the government must fairly compensate the contractor for the costs of the change. *Aydin*

*Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995). The measure of such an adjustment is the difference between the reasonable cost of performing without the change and the reasonable cost of performing with the change. *Atherton Constr., Inc.*, ASBCA No. 56040, Nov. 5, 2008, 08-2 BCA ¶ 34,011 at 168,191 (citations omitted).

Regal here alleges: (i) it performed in accordance with the Print Order's initial specifications and the contracting officer's authorization to proceed; (ii) the government subsequently changed its requirements when it amended the text of the Presidential Letter after authorizing Regal to commence performance, although the government did not issue a formal change order pursuant to the applicable Changes clause; (iii) Regal was compelled by the government to reproduce the letters in order to meet the changed text specifications; and (iv) the rework caused Regal to incur additional costs to reproduce letters in accordance with the changed specifications.<sup>3</sup> These allegations are consistent with an assertion that the government constructively changed the Print Order. See, e.g., *Custom Printing Co.*, GPOBCA No. 28-94, Mar. 12, 1997, 1997 WL 128720 at 23–24<sup>4</sup> (finding the government constructively changed the contract when it required the contractor to reprint student guides in a manner that was not required by the original contract specifications); *Harry and Keith Mertz Constr., Inc.*, AGBCA No. 94-165-1, Feb. 10, 1997, 97-1 BCA ¶ 28,802 at 143,666 (same, where the government directed the contractor to remove, re-grind, re-prep, and repaint 21 partitions and doors when those efforts were not contemplated by the contract's specifications); *Appeal of Randall H. Sharpe*, ASBCA No. 22800, May 18, 1979, 79-1 BCA ¶ 13,869 (same, where government inspector approved contractor's full priming of surfaces, contractor began applying finishing coats, and then the inspector subsequently required the contractor to rework and reapply prime coatings); *Hensel Phelps Constr. Co.*, AECBCA No. 34-7-66, May 1, 1967, 67-1 BCA ¶ 6324 (same, where government rejected and required the contractor to redo tank welds on the basis of oxidation and sensitization requirements not included in the original contract specifications).

Notwithstanding our rejection of the appellant's proffered theory of its claim, this point does not impede our consideration of the merits of the appeal or otherwise affect Regal's claim for entitlement to recover the additional costs incurred in complying with the government's constructive change. In this regard, as long as a claim continues to

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<sup>3</sup> The appellant argues that changes to the text specifications as occurred here are generally handled under Supplemental Specification No. 16, Author's Alterations. That provision, which is located in the Section titled "Proofs," in relevant part, provides for the contractor to be compensated for author's alterations consisting of all marks made by the author at variance with the original government-furnished material as submitted to the contractor. RHE P, GPO Contract Terms, GPO Pub. 310.2 (Rev. 01-18) at Supp. Specs., ¶ 16. This provision, however, generally applies to author's changes *prior* to approval of the proofs, and is inapplicable to the circumstances here where the changes were introduced *after* approval of the proofs.

<sup>4</sup> For citations to decisions issued by the Government Printing Office Contract Appeals Board (GPOCAB), references to page numbers are to the PDF page numbering generated by Westlaw.

arise from the same operative facts and requests essentially the same relief, then a mere change in legal theory for recovery does not necessitate resubmission to the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). As a constructive change theory of entitlement relies on the same operative facts and requests the same relief as was presented in Regal’s certified claim, we proceed to address the merits of the appeal.

#### February 5 Telephone Call

As addressed above, the central issue in dispute is whether the GPO contracting officer indicated his approval of the prior-to-production samples during the February 5, 2018, telephone call with Mr. LaCroix. As discussed above, the parties have stipulated that the call occurred, but dispute what Mr. Coleman relayed to Mr. LaCroix. AJSF, ¶ 14.

As recounted above, Regal contends that Mr. LaCroix inquired of Mr. Coleman his views with respect to the prior-to-production samples of the Presidential Letter, and that Mr. Coleman responded that the samples “looked good.” Mr. LaCroix then made a note of Mr. Coleman’s approval of the samples (“verbal[ly] by phone”) for Regal’s file, and Regal commenced production of the Presidential Letters. See AHE 9, LaCroix Memo. to File at 1.

In contrast, the respondent does not offer a specific, contrary version regarding the content of the discussion. Indeed, Mr. Coleman repeatedly testified that he had no recollection of participating in the stipulated February 5 conference call, or any other discussions with Regal regarding the prior-to-production samples. See, e.g., Hearing Tr. 111:22–112:5; 120:18–24; 149:8–12. Thus, this case does not reasonably present the Board with conflicting recollections of the content of the February 5 telephone conversation upon which we must weigh the credibility of the opposing witnesses’ testimony. Rather, the record presents us with Mr. LaCroix’s credible testimony—which was provided under oath in live testimony before the Board—about the contents of the discussion and his contemporaneous notation of his impression of that conversation, against Mr. Coleman’s absence of any recollection that the call occurred, let alone the content of the discussion.<sup>5</sup>

GPO nevertheless contests the notion that Mr. Coleman approved the prior-to-production samples. In support of its contention, GPO points to a number of matters that it suggests call into question the credibility of Mr. LaCroix’s testimony. As the following representative examples demonstrate, the Board is unconvinced by GPO’s arguments.

For example, GPO argues that Regal’s interpretation of Mr. Coleman’s comments as approving the prior-to-production samples is belied by Mr. LaCroix’s contemporaneous notation that the 1-day hold per the Print Order was February 5. AHE 9, LaCroix Memo.

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<sup>5</sup> Indeed, on July 10, Mr. Coleman asked Mr. LaCroix not whether Regal had commenced printing, but rather whether Regal had “completed the letterheads?”, indicating that Mr. Coleman was aware at that time that Regal had been printing the letters. R4, exh. 3, Email from B. Coleman at 0075.

to File at 1. GPO argues that the notation regarding the hold date would not have been necessary had Regal reasonably believed that approval had been given. We disagree. The mere fact that Mr. LaCroix noted the Print Order's 1-day hold period does not reasonably contradict his testimony and contemporaneous notation that Mr. Coleman indicated that the prior-to-production samples "looked good," and that Mr. Coleman had provided his "verbal [approval] by phone." Additionally, Regal did not commence performance on February 5; rather, the parties have stipulated that Regal did not commence performance until February 10. AJSF, ¶ 15. Thus, even assuming that the notation placed a conditional hold on Regal not to commence performance until after February 5, the parties have stipulated that Regal did not commence performance before the expiration of that condition.<sup>6</sup>

GPO also argues that that Mr. Coleman would not have approved the prior-to-production samples of the Presidential Letter when GPO had not also approved the envelopes that it was required to provide to Regal so that Regal could insert the Presidential Letters. As an initial matter, we note that the envelopes were being produced by an unrelated contractor under a different contractual agreement with GPO that was being administered by a different GPO contracting officer. Thus, we find no reasonable basis to conclude that GPO would not have separately reviewed and approved prior-to-production samples at different times for different products submitted by different contractors under different contractual agreements.

Additionally, Mr. LaCroix credibly testified that there were other business reasons why Regal and the government reasonably would have moved forward with the approval and production of the Presidential Letters while the parties waited for the envelopes to be produced. For example, Regal estimated that production of the 800,000 Presidential Letters would take approximately 3,000 hours. Hearing Tr. at 19:25–20:4. Additionally, Regal would order the entire quantity of paper needed to produce the 800,000 Presidential Letters at the beginning of the project in order to "get the best pricing available based on the quantity." *Id.* at 20:5–10. Failure to proceed expeditiously would potentially jeopardize the negotiated price for the paper, as well as require adjustments to Regal's printing schedules for other jobs. *Id.* at 71:18–72:8.

Thus, having found Mr. LaCroix's testimony regarding the content of the February 5 telephone conference with Mr. Coleman to be credible as well as consistent with his contemporaneous memorandum to file, and in the absence of any credible rebuttal of Mr. LaCroix's recollection, we find that Mr. Coleman orally represented to Regal on February 5 that the prior-to-production samples "looked good," and had provided his approval "verbal[ly] by phone."

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<sup>6</sup> We further note that Mr. Coleman testified that in a typical print job administered by GPO, review and approval of prior-to-production samples is usually completed in a number of days. Hearing Tr. at 150:16–22. He also testified that he did not believe that the printing portion of the Presidential Letter, consisting of adding offset text to the previously approved Engraved Letterhead, was a complicated print job. *Id.* at 151:20–25. The government has failed to advance any credible explanation for why the government's review and approval of the prior-to-production samples, which the Print Order contemplated would take 1 day, ended up taking multiple months.

## The Form of “Ok to Print”

Accepting Regal’s contention that Mr. Coleman orally notified Mr. LaCroix on February 5 that the pre-production samples “looked good” and provided his approval “verbal[ly] by phone,” we must next determine whether the contracting officer’s verbal statement was a sufficient and binding “Ok to print” in accordance with the Purchase Order’s and Print Order’s applicable requirements. For the reasons that follow, we conclude that this was a sufficient and binding authorization to proceed.

The purpose of proof approval and issuance of an “Ok to print” or “Ok to proceed” is to ensure compliance with contract specifications and appropriate levels of quality. *Harmony Printing & Dev. Co.*, GPOBCA No. 05-96, July 6, 1998, 1998 WL 640417 at 2. Additionally, the government imposes this strict requirement because it reserves the right to make changes to its requirements after it receives the proofs. *IPI Graphics*, GPOBCA No. 04-96, Apr. 9, 1998, 1998 WL 350490 at 2–3. Once the government accepts the proofs, however, “the initial risk placed on the contractor is obviously intended to shift to the Government.” *Harmony Printing & Dev. Co.*, *supra*. In this regard, “where the Government knows or should know of aspects of the job that should be checked or verified and this can be done by examining the proofs, the Government’s obligation is to take those aspects into account when reviewing proofs, and whether it does so or not, its approval of the proofs will operate to shift the risk to the Government if a problem with any of those aspects is subsequently discovered.” *Id.*

As an initial matter, we find nothing in the terms of the Purchase Order or Print Order that specifically requires that the contractor must obtain a *written* “Ok to print” prior to commencing performance. See, e.g., RHE P, GPO Contract Terms, GPO Pub. 310.2 at Supp. Specs., ¶ 15 (“Unless otherwise specified, the contractor must not proceed with production or print any portion of an order prior to receiving an ‘OK to proceed’ or an ‘OK to print’ from the Government.”). Indeed, GPO’s own Printing Procurement Regulation (“PPR”) provides that, upon approval of prior-to-production samples, “the Contracting Officer shall notify the contractor immediately *by telephone*,” with the telephone approval to be subsequently confirmed in writing. PPR, GPO Pub. 305.3 (Rev. 4-14), Chapter 13, § 4(2)(e) (emphasis added). Although the February 5 verbal authorization was not subsequently confirmed in writing by GPO, we do not believe that GPO’s failure to properly document the verbal authorization excuses it from liability when the contractor reasonably relied upon an oral approval provided by the contracting officer.

Additionally, we believe that Mr. Coleman’s response that the prior-to-production samples “look good” was sufficient to denote the government’s approval of the samples, especially here where the only record of the call shows that Mr. Coleman provided his “verbal [approval] by phone.” In this regard, there is no suggestion that Mr. Coleman in any way conditioned his approval by, for example, directing Regal to wait to produce the Presidential Letters until USCIS and/or the White House separately confirmed their approval. See, e.g., *Harmony Printing & Dev. Co.*, *supra* (denying appeal where government provided conditional approval of the proofs subject to revision and the contractor did not correctly implement the revisions); *Swanson Printing Co.*, GPOBCA

No. 27-94, Nov. 18, 1996, 1996 WL 812958 at 3 (same, where government conditionally approved the proofs but the contractor failed to comply with the government's request to delay performance for a period of time). Thus, under the totality of the circumstances and absent any compelling evidence refuting Regal's assertions regarding the content of the stipulated February 5, 2018, telephone call with the contracting officer, we find Mr. Coleman's verbal representation that the prior-to-production samples "look good" was a sufficient and binding authorization.

#### Approval by GPO's Government Customer

Finally, accepting that the GPO contracting officer provided a sufficient oral authorization to proceed to Regal, the Board must address whether the terms of the Print Order additionally required Regal to obtain USCIS's or the White House's authorization prior to commencing performance. For the reasons that follow, we do not find that the Print Order required Regal to obtain a separate authorization from GPO's government customer.

As set forth above, the Print Order provided that: the order was to follow instructions provided by Ms. Kurapatskie at USCIS; Ms. Kurapatskie was to be the primary point of contact for the prior-to-production samples; and the White House wanted to review the letters as well. R4, exh. 12, Print Order, at 0112. GPO effectively argues that these provisions required Regal to obtain the approval and authorization of USCIS or the White House prior to commencing production of the Presidential Letters. While the Print Order unequivocally provides that USCIS and the White House wished to review and approve the Presidential Letters, we do not find that the Print Order stripped the contracting officer of the authority to direct Regal's performance without separate authorization from GPO's government customer. In this regard, while the Print Order noted the role that GPO's customer wished to have in the procurement, those terms effectively delineated the relationship between GPO and its customer. Regal's direct contractual relationship is with GPO, and it reasonably could—and did—abide by the direction of GPO's contracting officer.

GPO's PPR clearly establishes the contracting officer's responsibility and authorization to direct administration of contracts. PPR, Chapter 1, § 3(2)(c) ("Contracting Officers are authorized to enter into *and administer* contracts for printing, binding, related supplies, and related services on behalf of GPO and to make related determinations and findings within the limitations of the authority delegated to them.") (emphasis added); *id.* at (3)(b) ("Contracting Officers assist in fulfilling the responsibilities of the Managing Director, Customer Services, to enter into *and administer* contracts for supplies or services on behalf of the Government and in the name of the United States.") (emphasis added). Furthermore, as discussed above, the PPR specifically directs that the contracting officer is responsible for notifying the contractor of the approval of prior-to-production samples. See *id.*, Chapter 13, § 4(2)(e).

Consistent with the foregoing provisions of GPO's PPR, Mr. Coleman also testified that that the GPO contracting officer has the authority to issue an okay to print to a contractor, although he noted that typically it was the agency customer that provided the approval. Hearing Tr. at 127:2–6, 147:5–12; see also *id.* at 112:18–113:3 (testifying

that there could be occasions where a customer notified the contracting officer of its approval, and the contracting officer could notify the contractor as well as directing the customer to respond to the contractor). Thus, even assuming that the Print Order delegated authority to GPO's government customer to provide Regal with an "Ok to print," we find nothing in such delegation that would also divest the GPO contracting officer's ability to also authorize performance, or otherwise require the contractor to obtain multiple authorizations to proceed.

Alternatively, even if it was theoretically possible for a purchase or print order to divest the GPO contracting officer of the ability to direct or manage performance in favor of GPO's government customer, the specific facts here do not support such a possibility. First, while the Print Order does designate Ms. Kurapatskie at USCIS as the primary point of contact for receipt of the prior-to-production samples, it also explicitly designates Mr. Coleman as the backup point of contact. R4, exh. 12, Print Order, at 112. Thus, the Print Order itself expressly recognizes that Mr. Coleman was one of two authorized individuals to receive the prior-to-production samples.

Second, the government's course of conduct demonstrates that Mr. Coleman was directly involved in the prior-to-production sample process. Specifically, it was Mr. Coleman who contacted Mr. LaCroix to check on the status of the samples. AJSF, ¶ 12. Thus, we find nothing unreasonable with Regal coordinating the status of the government's review with Mr. Coleman since he was the individual who specifically solicited the prior-to-production samples from Regal. Additionally, GPO has not argued, let alone provided any evidence to suggest, that Mr. Coleman communicated to Regal that he believed he lacked the ability to review and approve the prior-to-production samples, or otherwise directed Regal to communicate directly with USCIS or the White House. See Hearing Tr. 124:9–12 (Q: "Just to be clear, it wasn't Regal's responsibility to contact the White House and find out if there were changes [to the Presidential Letter], correct?" Mr. Coleman: "No. It is not their responsibility.").

In summary, we find that the government constructively changed the Print Order after the contracting officer verbally approved the prior-to-production samples, and the government then compelled Regal to reproduce the Presidential Letters conforming to the revised text specifications under threat of a termination for default (and, thus, Regal did not volunteer to perform the rework). On this record, we find that Regal is entitled to recover its reasonable costs incurred as a result of the government's constructive change.<sup>7</sup>

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<sup>7</sup> We note that our decision reaches a different result than a 1975 decision issued by GPO's General Counsel denying an appeal arising under similar circumstances. In *Wickersham Printing Co.*, GPOCAB CA 74-5, Feb. 26, 1975, 1975 WL 22180, the GPO General Counsel found that there was no controversy "that the contractor in good faith believed he had received the necessary approval" orally from government officials, but he nonetheless denied the appeal because there was no written evidence that an approval had been provided to the contractor. In this regard, the General Counsel explained that: "Statements made by GPO representatives showed that it was the normal, ordinary business practice at the GPO not to furnish 'an okay to print' without having first received the marked up proofs from the Department concerned; that



## Quantum

As a result of the constructive change to the Print Order, the appellant seeks \$289,259.55, plus prejudgment interest, which is comprised of four distinct claim elements:

1. \$240,100 for the production of the 700,000 Presidential Letters in accordance with the original specifications (\$343/1000 letters);
2. \$36,015 for lost profit on the production of the 700,000 Presidential Letters (15 percent);
3. \$7,819.20 for storage costs for the 700,000 Presidential Letters following the government's rejection of the letters (\$32.58 per pallet/month x 10 pallets x 24 months); and
4. \$5,325.35 for the costs incurred to ship the 700,000 Presidential Letters to the government and retrieve them following their rejection.

See, e.g., Appellant's Post-Hearing Br. (Jan. 19, 2021) at 13–15; Appellant's Response to Respondent's Supp. Br. on Entitlement (Mar. 8, 2021) at 1.

As set forth above, where a constructive change is found to exist, the government must fairly compensate the contractor for the costs of the change. *Aydin Corp*, 61 F.3d at 1577. In this regard, an equitable adjustment is basically a corrective measure designed to keep a contractor whole when the government modifies a contract. *Swanson Printing Co.*, *supra* at 7. The purpose of an equitable adjustment is to place a contractor in the position it would have been in had the change not occurred; *i.e.*, the adjustment also should not alter the contractor's profit or loss position from what

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although oral approvals are sometimes given in the interest of saving time, such oral advice is always followed by written confirmation." 1975 WL 22180 at 1–2. The GPO General Counsel denied the appeal because "[t]he contractor has offered no evidence to rebut the standard business practice stated above." *Id.*

As set forth herein, we find nothing in the applicable contract terms or regulations requiring that an "Ok to print" be issued in writing. Further, we disagree that the contracting officer's failure to confirm in writing a previously provided verbal approval excuses the government of the consequences of the contracting officer's verbal approval; in this regard, we find no basis to conclude that the appellant is responsible for the contracting officer's failure to comply with his administrative responsibilities to document a verbal approval. Relatedly, we find no basis to find that GPO's failure to coordinate with its government customer prior to notifying the contractor of GPO's approval of prior-to-production samples excuses the government for liability arising from the contracting officer's oral approval of the prior-to-production samples. The GPO contracting officer unquestionably has the authority to bind the government, and a contractor has a legal obligation to comply with a contracting officer's lawful directions.

it was before the change occurred. *Id.* The burden of proof in establishing the total amount of an equitable adjustment falls on the party who is claiming the benefit of the adjustment. *Id.*

For the reasons that follow, we sustain the appeal in part, as we find that Regal is entitled to recover \$224,270.50, consisting of (1) \$217,233.22 for the production of 633,333 Presidential Letters conforming to the original text specifications, and (2) \$7,037.28 for the storage of 9 pallets of the letters.

### Production and Storage of Presidential Letters

Regal seeks to recover \$240,100 for the costs to produce the 700,000 Presidential Letters conforming to the original text specifications. Regal's claim utilizes the bilaterally negotiated, Print Order fixed-unit price of \$343/1,000 Presidential Letters.

Respondent objects in part to this element of Regal's claim. Specifically, GPO argues that any recovery should be limited to 500,000 Presidential Letters based on Mr. LaCroix's contemporaneous estimate that as of July 11—the date that the contracting officer first raised concerns regarding Regal's unauthorized production—Regal had only produced approximately 500,000 letters. *See, e.g.*, R4, exh. 3, Email from E. LaCroix at 75. We disagree, however, that the proper quantity for which Regal is entitled to an equitable adjustment for is 500,000 letters.

First, Mr. LaCroix's own contemporaneous note indicated that he was only providing an estimate. *Id.* (representing that Regal had “*approximately* 500,000 completed to date”) (emphasis added); *see also* Hearing Tr. 93:18–94:5 (Mr. Porcaro testified that “on a job of this size, accurate numbers may not be an hourly or — or a daily update,” and that Regal would likely get an accurate count once “they were packed up and counted”). Second, and more critical to our analysis, is the fact that the parties stipulated that between February and the end of June, Regal produced 600,000 letters. AJSF, ¶ 18. Thus, adopting the parties' own stipulation, we begin our analysis that the floor for any recovery must be at least 600,000 Presidential Letters.

The Board must then resolve the costs for what, if any, additional quantity Regal is entitled to recover. The parties have stipulated that Regal produced an additional 100,000 letters in July. *Id.* The record further demonstrates that on July 11, Mr. Coleman notified Regal of his concerns that the production was unauthorized. Specifically, Mr. Coleman stated that “we have a problem,” and inquired whether Regal “ever receive[d] an approval of the prior to production samples” of the Presidential Letters. R4, exh. 3, Email from B. Coleman at 75. Regal argues that Mr. Coleman's July 11 concern that Regal produced the Presidential Letters without authorization is irrelevant to its claim for entitlement, because Mr. Coleman never actually instructed Regal to stop performing. We disagree under the circumstances presented here.

While we recognize that a contractor must generally continue performance during the pendency of any dispute with the government, where the contracting officer here raised his specific concerns with Regal regarding the apparent lack of authorization for the work, we believe it was incumbent on Regal to seek the direction of the contracting

officer before proceeding with further performance. As addressed above, the Purchase Order unequivocally directed that Regal was not to print absent authorization, and that any such printing without authorization would be at Regal's own risk. RHE P, GPO Contract Terms, GPO Pub. 310.2 (Rev. 01-18) at Supp. Specs., ¶ 15; R4, exh. 23, Purchase Order, Contract Specifications at 133. While Regal reasonably believed that it had previously received Mr. Coleman's verbal authorization, when the contracting officer called into question his prior authorization, we believe that it was incumbent on Regal to promptly raise the matter with the contracting officer.<sup>8</sup> Thus, under the specific facts presented here, we find that Regal is not entitled to recover any production costs incurred after July 11.

The Board is confronted with the problem that nothing in the parties' stipulations, nor the record, however, reflects what portion of the 100,000 Presidential Letters was produced before July 11, and what portion was produced after July 11. Taking the parties' stipulation that Regal produced 100,000 Presidential Letters in July, and finding that Regal is not entitled to recover production costs incurred after July 11, we believe an equitable adjustment for 33,333 of the letters is appropriate, which represents one third of the July production. Therefore, we find that Regal is entitled to recover the costs associated with producing 633,333 Presidential Letters conforming to the original text specifications, and, thus, that Regal is entitled to recover \$217,233.22.<sup>9</sup>

Additionally, we find that Regal is entitled to recover the costs that it incurred in storing the rejected 633,333 Presidential Letters during the pendency of the parties' dispute. Relevant here, the applicable Changes clause incorporated into the Purchase Order provides that if a change "includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property." RHE P, GPO Contract Terms, GPO Pub. 310.2 (Rev. 01-18) at Contract Clauses, ¶ 4(d). Thus, pending resolution of the parties' dispute and/or instruction from the contracting officer, Regal reasonably stored the Presidential Letters.

Regal's claim sought storage costs associated with storing 700,000 letters in 10 pallets. Thus, each pallet on average stored 70,000 letters. As we find that Regal is only entitled to recover the costs associated with 633,333 letters, we conclude that Regal is only entitled to recover the costs associated with storing those letters. Based on an average of 70,000 letters per pallet, storage of the 633,333 letters would take 9 pallets

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<sup>8</sup> Of course, the contracting officer should have provided clear instructions with respect to his expectations, including, for example, a direction to stop work or an admonishment that further performance would be at Regal's own risk. While the contracting officer's note that "we have a problem" and request for clarification with respect to whether Regal had obtained approval of the prior-to-production samples is lacking because of the absence of any specific direction to Regal, we do not find that it was so deficient as to fail to put Regal on notice with respect to the government's position that the prior production had not been authorized, and to convey that further production was not authorized.

<sup>9</sup> This figure was calculated by multiplying 633,333 by \$343/1,000 letters.

plus an additional 333 letters. While we recognize that a *de minimus* number of letters would require storage beyond 9 pallets, awarding Regal storage costs for a full additional pallet would result in a windfall recovery for the appellant. Therefore, we find that Regal is only entitled to recover the storage costs for 9 pallets, which amounts to \$7,037.28.<sup>10</sup>

### Profit

Regal seeks \$36,015 in profit on the production of the 700,000 Presidential Letters conforming to the original text specifications. Regal's General Manager, Mr. Porcaro, testified that he believed that the claimed 15 percent profit was slightly below average, but was acceptable to Regal. Hearing Tr. 83:10–22. For the reasons that follow, we find that the award of the claimed profit is not warranted.<sup>11</sup>

It is well established that an equitable adjustment includes “a reasonable and customary allowance for profit.” *The Clark Constr. Grp., Inc.*, GAO CAB No. 2003-1, Nov. 23, 2004, 05-1 BCA ¶ 32,843 at 162,568 (*quoting United States v. Callahan Walker Constr. Co.*, 317 U.S. 56, 61 (1942)). As stated above, however, an equitable adjustment is a corrective measure utilized to keep a contractor whole when the government modifies a contract, and may not properly be used as an occasion for reducing or increasing the contractor's profit or loss, or for converting a loss to a profit, or *vice versa*, for reasons unrelated to a change. *The Clark Constr. Grp., Inc.*, *supra*, at 162,569. A contractor who has underestimated his bid or encountered unanticipated expenses or inefficiencies may not properly use a change order as an excuse to reform the contract or shift his own risks or losses to the government. *Id.* (citations omitted). “In other words, [p]rofit is applied to the additional work only; it does not serve to reprice the entire contract or the unchanged work, and does not alter the original terms of the parties' bargain. The parties remain in the same relative profit or loss position on the bid work as before.” *Id.* (citations omitted).

Here, Mr. Porcaro testified that the claimed rate of \$343/1,000 Presidential Letters—which the parties bilaterally negotiated and is the fixed-unit price incorporated into the Print Order—does not include profit. Hearing Tr. 83:2–9. Rather, Mr. Porcaro testified that the way Regal priced the work under the Print Order “a good portion of [Regal's profit] ended up in the inserting portion of this — of this job.” *Id.*

The Board makes no findings with respect to whether or not Regal's contractual fixed-unit pricing for the production of the Presidential Letters (\$343/1,000 letters) or either of the individual sub-components—(1) the Engraved Letterhead (\$313.50/1,000 letters), or (2) the offset printing on the Presidential Letters (\$27.50/1,000 letters)—contained any (or a reasonable amount of) profit. We find, however, that Regal is not entitled to profit on the production because such an adjustment would result in a windfall to Regal,

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<sup>10</sup> This figure was calculated by multiplying \$32.58/month, by 9 pallets, by 24 months.

<sup>11</sup> We note that GPO raised other objections to Regal's recovery of profit. Because we deny Regal's claim for profit on other grounds, we need not resolve GPO's other objections.

rather than fairly compensate the appellant for the costs of complying with the government's constructive change.

In this regard, Regal only inserted one set of Presidential Letters into envelopes—which, in this case, were the Presidential Letters conforming to the government's revised text specifications. As set forth above, Regal never inserted into envelopes the 700,000 Presidential Letters that it produced in accordance with the original text specifications. Thus, the award of additional profit beyond the profit already built into the Print Order's bilaterally negotiated, fixed-unit prices is not warranted where such an award would actually put Regal in a better position than had the government never constructively changed the Print Order.

### Shipping Costs

Regal seeks \$5,325.35 for the costs it incurred to ship the original Presidential Letters to GPO and the costs incurred to retrieve the letters when they were rejected by the government. GPO objects to these costs arguing that it is not liable for the costs incurred to ship and subsequently retrieve nonconforming items.

For the reasons set forth above, we disagree with GPO's assertion that it properly rejected the initial production of the Presidential Letters as nonconforming where the letters conformed to the original text specifications, and therefore were only "nonconforming" because of the government's subsequent constructive change to the Print Order. We agree, however, with GPO's assertion that Regal's shipment of the Presidential Letters that were not inserted into the government-provided envelopes were not in conformance with the Print Order's specifications. The Print Order did not contemplate the delivery of individual components of the print job, but, rather, explicitly contemplated the delivery of "assembled letter(s) and envelope(s)." R4, exh.12, Print Order, at 0112. Therefore, we deny Regal's claim for the costs to ship and subsequently retrieve the nonconforming Presidential Letters that were not inserted into the government provided envelopes

### CONCLUSION

Based on the foregoing, the appeal is **SUSTAINED IN PART** with respect to the Appellant's entitlement to an equitable adjustment for the costs of producing and subsequently storing 633,333 Presidential Letters conforming to the original text

specifications and is otherwise DENIED. We therefore find that Appellant is entitled to recover \$224,270.50, plus applicable interest.

The appeal is sustained in part.

Dated: April 20, 2021

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

We concur:

/s Louis A. Chiarella  
Louis A. Chiarella  
Member

/s Stephanie B. Magnell  
Stephanie B. Magnell  
Member