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NOOR INTERNATIONAL CORP., INC. )  
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Appellant, )  
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v. )  
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U.S. GOVERNMENT PRINTING )  
OFFICE, )  
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)  
Respondent. )  
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CAB No. 2013-03

Appearance for the Appellant: Max Saleem, Vice President  
Noor International Corp., Inc.

Appearance for the Respondent: Roy E. Potter, Esq.  
Pegah Vakili, Esq.  
U.S. Government Printing Office

Board Members: Frank Maguire (Presiding)  
Scott H. Riback  
Cherie J. Owen

DECISION

Noor International Corp., Inc. (Noor), appeals the final decision of the Government Printing Office (GPO) contracting officer, imposing a price discount of \$2,999.91 with regard to purchase order No. R9346, Jacket 677-519, for color-coded pallet labels. Noor asserts that the contracting officer's decision to impose a price discount was improper. The respondent has filed a motion for summary judgment.

We deny the appeal.

## BACKGROUND

On February 13, 2013, Noor was issued purchase order No. R9346, Jacket 677-519, by the GPO to produce and deliver color-coded pallet labels of varying types for use on the USNS Charles Drew. Rule 4 File (R4), Tab 2, at R3. Pertinent here, the purchase order provided:

**MATERIAL FURNISHED:** Contractor to pickup at GPO. . .  
Five similar printed samples. . .

\* \* \*

**PAPER:** . . . White, Gloss Finish Vinyl with aggressive permanent, pressure-sensitive adhesive, .004" to .005" thick.

Id. (emphasis in original).

On April 4, 2013, GPO contacted Noor and advised that the delivered labels were "suspect" of having a defect in that they were produced "on stock less than .004" to .005" thick." R4, Tab 4, at R8. On April 8, 2013, Noor responded and advised the GPO manager as follows:

We have been using the Same Stock, Size, PMS & Fluorescent inks as Material Furnished on this Jacket and previous others for the past 8 years.

We Exactly matched to the Specification, Material Furnished, 5 Similar Stock Samples & Attachments. Check Page 2 of Specification, Material Furnished.

R4, Tab 6, at R12. Noor cited four previously-completed purchase orders, with the "Same Specification," including a purchase order in November, 2004, with regard to which, Noor asserts, "it was decided and mutually agreed that thicker stock is not suitable." Id.

On April 15, 2013, the contracting officer received a test report from the GPO quality control department, advising that the samples submitted for testing were unacceptable on the basis of the following deficiencies:

The caliper without backing is 3 MILs. This is 2 MILs less than specifications ask for. GPO paper testing determined that the substrate was a type [of] polyester, not vinyl. The job can be reprinted using stock that is 5 MIL vinyl without the backing, or a discount of 20.3% can be taken against the job.

R4, Tab 7, at R14. On April 17, 2013, the contracting officer issued a contract modification stating in relevant part:

Purchase Order R9346, Jacket 677-519 is hereby reduced by 20.3% for the following reasons:

4-3, Paper Attribute, NPS: Produced on stock less than .004" to .005" thick, and produced on a substrate other than Vinyl.

Purchase Order R9346, Jacket 677-519 is hereby **reduced** in the amount of \$2,999.91.

R4, Tab 8, at R16 (emphasis in original). On April 18, 2013, Noor advised the contracting officer that the discount was "not acceptable." R4, Tab 9, at R17. Noor requested that GPO "discuss" the purchase order with a particular named individual, since, it asserted, previous orders had been "approved by her." Id. Also on April 18, the contracting officer responded:

We can't account for the other orders you listed. I don't know what the specifications listed for stock nor do we have any test results of the samples.

The samples from jacket 677-519 have been tested by our Quality control Department in Washington, DC and have been determined that they do not meet the specifications.

This is GPO's final decision.

R4, Tab 10, at R18.

## APPEAL

Noor filed a timely notice of appeal of the contracting officer's final decision on April 24, 2013, and a complaint on May 22, 2013. Noor asserts that it was required to "follow the reprint sample for stock, that is close to the stock specified on the purchase order." Complaint at 1. Noor further asserts that over the past 8 years, it has furnished the same stock on previous jackets, which "has been accepted." Id.

GPO asserts that the contract modification was justified since the appellant "failed to meet the plain terms of the contract." Answer at 1. Further, GPO asserts that the "MATERIAL FURNISHED" identified in the purchase order "was provided after award solely for the purpose of illustrating the print type and the creation of new artwork." Id. at 1-2. GPO also asserts that, even if Noor's allegations regarding previous contracts are true, Noor's "failure to meet the requirements of a previous procurement" does not authorize its "failure to meet the requirements of this procurement." Id. at 2.

GPO filed a motion for summary judgment on Sept. 26, 2013, contending that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of

law.<sup>1</sup> A motion for summary judgment is appropriate where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In considering a motion for summary judgment, the Board will view the evidence and any disputed factual issues in the light most favorable to the party opposing the motion, here, the appellant. Data Computer Corp. of Am. v. United States, 80 Fed. Cl. 606, 612 (2008). The party opposing summary judgment, however, must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. Inventory Discount Printers, GAO CAB No. 2011-11, 2011 GAO CAB Lexis 1, May 31, 2011.

#### Compliance with Purchase Order

Here, the purchase order unambiguously indicated that delivered labels were to be “.004” to “.005” thick” and have vinyl substrate. R4, Tab 3, at R6. The GPO inspection found that the samples delivered by Noor satisfied neither of those requirements. R4, Tab 7, at R14. In fact, Noor does not assert that it delivered labels that satisfied the explicit thickness and vinyl requirements of the purchase order and does not challenge the accuracy of GPO’s inspection results. Noor concedes that it derived pertinent requirements, not from the explicit, stated requirements in the purchase order, but, rather, from the samples delivered to it under the Material Furnished clause, above. Complaint at 1; R4, Tab 12, at R20.

Noor asserts that the GPO should have tested the “Material Furnished” samples, “rather than following the stock specified on the purchase order.” Complaint at 1. GPO points out, however, that the “samples” referenced in the “Material Furnished” provision in the purchase order do not refer to the thickness and vinyl requirements set forth explicitly elsewhere in the purchase order. Answer at 2. We agree with GPO that “matching” the samples, which is not referenced in the purchase order, is not a substitute for compliance with the explicit requirements set forth in the “PAPER” requirements section of the purchase order. Any interpretation of the purchase order permitting “matching” of samples as a substitute for compliance with the purchase order’s explicit requirements would not be a reasonable interpretation of the purchase order, since it would render meaningless the explicit requirements in the “PAPER” section of the purchase order, including the thickness and vinyl substrate requirements, contrary to the principle that an interpretation which gives a reasonable meaning to all parts of a contract will be preferred to one which leaves a portion of it meaningless. Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Although Noor indicates that the samples were “close to the stock specified on the purchase order,” Complaint at 1, “close” is not sufficient here, given the explicit requirements set forth in the purchase order.

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<sup>1</sup> Noor did not respond to the Motion for Summary Judgment on the merits, but simply advised, “Noor International Inc. Finds not Reasonable and Disagree.” Noor Response to Motion for Summary Judgment, Nov. 19, 2013.

## Course of Dealing

Noor points to its previous work for GPO where, it asserts, it supplied labels identical to those delivered under this purchase order, which were accepted by GPO. See generally, R4, Tab 6, Noor Letter, Apr. 8, 2013. An authorized government official, by his or her actions, may be held to have waived contractual requirements if the contractor reasonably believes that a required specification has been waived as a result of a “course of dealing.” Gresham & Co. v. United States, 470 F.2d 542, 554; 200 Ct. Cl. 97 (1972). Noor proffers four specific examples of previous purchase orders in which, it asserts, it provided labels identical to those delivered here, without rejection by GPO:

Purchase Order No R6641, Jacket No. 790-245, Nov. 29, 2004, USS Carl Vinson.<sup>2</sup> R4, Tab 6, Noor Letter, Apr. 8, 2013. With regard to this purchase order, Noor asserts that “[a]fter testing various stock and adhesive it was decided and mutually agreed that thicker stock is not suitable for the Roll product.” Id. Noor advises, “Since then we are using the same stock and moreover it has been accepted.” Id. GPO, however, indicates that it no longer has pertinent records from 2004. R4, Tab 11, GPO “Comments on Noor Int’l Letter,” Apr. 25, 2013.

Purchase Order No. T5014, Jacket No. 530-415, Dec. 2, 2008, USNS Supply. R4, Tab 6. GPO advises that “this jacket is no longer in GPO PROC [GPO Printing Request Order Control].” R4, Tab 11.

Purchase Order No. R3937, Jacket No. 677-604, Jan 27, 2010, USS Rainier. R4, Tab 6. GPO indicates that the stock thickness specified in this purchase order was “.004” - “.005” and that “[n]o testing was done on those samples.” R4, Tab 11.

Purchase Order No. R5735, Jacket No. 777-284, Dec. 7, 2010, USNS Bridge. R4, Tab 6. Noor asserts that delivery of these samples was “approved by the person in charge.” Complaint at 1. GPO advises that the specified stock thickness on this purchase order was “.003” and that “[n]o testing was done on these samples.” R4, Tab 11.

Waiver is not demonstrated by an agency’s merely passive acceptance of non-conforming items. See, e.g., Hoboken Shipyards, Inc., DOTBCA No. 1920, 90-2 BCA ¶ 22,752, at 114,191-92 (inspector’s failure to require correction of defects is insufficient to waive agency’s right to demand correction). In order for a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. Data Computer Corp. v. United States, supra, at 617. The waiver must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. Id. The contractor must show a “course of dealings so consistent and numerous as to cause the reasonable expectation that the same deviation would be automatically allowed.” Kvass

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<sup>2</sup> In the original, “Carr Vision.”

Construction Co., ASBCA No. 45965, 94-1 BCA ¶¶ 26,513, Nov. 12, 1993, at 191,973. Further, the contractor must demonstrate that the agency was aware of the nonconformity, W.S. Jenks & Son, GSBCA No. 10513, 92-1 BCA ¶¶ 24,502 at 122,282 (1991), and that the nonconformity was waived by someone with appropriate authority. United Computer Supplies, Inc., v. United States, 43 Fed. Cl. 351 at 8 (1999), aff'd, 230 F.3d 1382 (Fed. Cir. 2000).

Of the four examples of prior purchase orders proffered by Noor, none meets all of these requirements. With regard to purchase orders Nos. T5014, R3937, and R5735, Noor does not assert, and the record does not indicate, that GPO was aware, prior to acceptance, that the labels were nonconforming. In fact, with regard to purchase orders Nos. R3937 and R5735, GPO advises, without rebuttal from Noor, that no testing was done on the samples, substantially eliminating the likelihood that any nonconformity would have been known to GPO prior to acceptance. Rather, these examples, at best, appear to be instances in which Noor asserts that it delivered non-conforming labels, but no action was taken by GPO, *i.e.*, to the extent there was agency "acceptance," that acceptance was passive. As indicated above, however, waiver is not demonstrated by an agency's merely passive acceptance of non-conforming items. See, e.g., Hoboken Shipyards, Inc., supra, at 114,191-92.

Further, although Noor asserts that its labels were accepted by GPO in each of the four examples, it does not assert, and the record does not indicate, that such acceptance was by an authorized GPO official -- here, the contracting officer.<sup>3</sup> In its letter to GPO dated April 18, 2013, Noor requested that GPO "discuss" previous contracts with a particular named individual, since, it asserted, previous orders had been "approved by her." R4, Tab 9, at R17. Noor does not assert, however, that this individual was a contracting officer with waiver authority.<sup>4</sup>

With regard to purchase order No. R6641, Noor does assert that "[a]fter testing various stock and adhesive it was decided and mutually agreed that thicker stock is not suitable for the Roll product." R4, Tab 6. Noor advises, "Since then we are using the same stock and moreover it has been accepted." *Id.* GPO advises with regard to this purchase order that it no longer has pertinent records from 2004. R4, Tab 11, GPO "Comments on Noor Int'l Letter," Apr. 25, 2013. Here, Noor provides no details (such as the GPO official involved) or documentation in support of its position. See also R4, Tab 9. Further, as indicated above, Noor does not assert or demonstrate that the person entering into the asserted mutual agreement was a contracting officer with waiver authority.

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<sup>3</sup> GPO Contract Terms provide at Clause 1, "Contractual Responsibility," as follows: "Modifications shall have no force or effect unless addressed before the fact to and subsequently confirmed in writing by the Contracting Officer." GPO Publication 310.2, Dec. 1, 1987 (Rev.6-01). See Horizon Graphics, Inc., GAOCAB No. 2006-8, Sept. 27, 2007.

<sup>4</sup> GPO asserts, without rebuttal by Noor, that this individual is employed by another government agency and has no "Contracting Officer authority for GPO." Contracting Officer Statement, March 31, 2014.

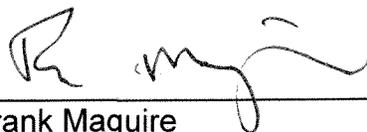
Finally we note that, in any case, even were we to find that any of the examples proffered by Noor constituted a persuasive example of prior waiver by the government, those examples would not necessarily demonstrate a "course of dealings so consistent and numerous as to cause the reasonable expectation that the same deviation would be automatically allowed." Kvass Construction Co., *supra*, at 2. See, e.g., Data Computer Corporation, *supra*, at 618 (single waiver of right to establish final indirect cost rates "does not extend" to remaining contracts); Doyle Shirt Mfg. Corp. v. United States, 462 F.2d 1150, 199 Ct. Cl. 150, 154 (1972) (government not bound by its waivers in three prior contracts); Appeal of John Lambastes Co., ASBCA No. 24100, 80-2 BCA ¶ 14,571, June 30, 1980 (waiver in two previous contracts was insufficient to support waiver of the contract at issue).

We find, therefore, that the examples of prior contracts proffered by Noor, considered either individually or in total, do not demonstrate a "course of dealing" between GPO and Noor. When details of alleged prior contracts and prior course of dealing are lacking, we cannot make a finding of waiver. Nash Metalware Co., Inc., GSBCA Nos. 11951, 11952, 94-2 BCA ¶ 26780, at 133,183. Accordingly, viewing the evidence and any disputed factual issues in the light most favorable to Noor, the record does not support a finding of a consistent "course of dealing" between Noor and GPO that would result in the waiver of the explicit purchase order requirements with regard to thickness and vinyl content. See, e.g., Basic Marine, Inc., ENGBCA No. 5299, 97-1 BCA ¶ 19,426, at 4.

## CONCLUSION

We conclude that there is no genuine issue as to any material fact and that GPO is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, *supra* at 323. Thus, GPO was entitled to reduce the amount due Noor under Purchase Order R9346, Jacket 677-519, in the amount of \$2,999.91. The motion for summary dismissal is granted. The appeal is denied.

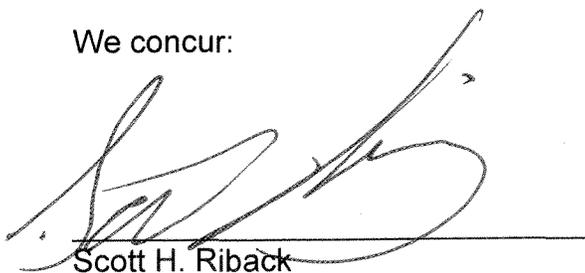
Dated: June 10, 2014



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Frank Maguire  
Presiding Member

We concur:



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Scott H. Riback  
Member



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Cherie J. Owen  
Member