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GOVERNMENT ACCOUNTABILITY OFFICE
CONTRACT APPEALS BOARD

LOUIS A. CHIARELLA
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. 2020-02
)	
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:	Jonathan L. Kang (Presiding) Peter H. Tran Heather Weiner

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. 92496 (Purchase Order), invitation for bids— Jacket No. 409-192 (IFB), which GPO issued for production of census questionnaires. As relevant to this Appeal, Colonial Press purchased paper in its performance of the Purchase Order. GPO partially terminated the Purchase Order for the convenience of the government, and the parties executed a settlement agreement. After the execution of the settlement agreement, appellant did not turn over the paper to GPO, and the

contracting officer issued a final decision asserting an affirmative claim of \$161,145.60 against Colonial Press for the value of the paper.

Appellant claims that it was not required to turn over the paper under the terms of the settlement agreement, and that respondent improperly issued a final decision asserting a claim for the value of the paper (Count I). Appellant claims in the alternative to Count I that if the settlement agreement obligated Colonial Press to turn over the paper, that it is entitled to payment for the costs of storing the paper (Count II). Appellant also claims in the alternative to Count I that it is entitled to payment for work that was not covered by the partial termination and was completed by appellant (Count III).

Respondent argues in response to Count I that the terms of the Purchase Order and the settlement agreement obligated appellant to turn over the paper to GPO, and as Colonial Press could not do so because it was no longer in possession of the paper, GPO was entitled to recover the value of the paper. Respondent argues in response to Count II that the costs of storing the paper were not presented as part of a claim to the government and were not part of the contracting officer's final decision, and are therefore not matters for the Board to consider in this appeal. Finally, respondent argues in response to Count III that the settlement agreement included payment for the work that was not covered by the partial termination, and that appellant is not now entitled to seek additional payment for this work.

Appellant has filed a motion for summary judgment on Count I. Respondent opposes appellant's motion and cross-moves for summary judgment on Counts I, II, and III; appellant opposes respondent's cross-motion. For the reasons set forth below, we DENY appellant's motion for summary judgment; GRANT in part and DENY in part respondent's cross-motion for summary judgment on Count I; and GRANT respondent's cross-motion for summary judgment on Count III. We also DISMISS Count II for lack of jurisdiction.

BACKGROUND

GPO issued the IFB on behalf of the Department of Commerce, Bureau of the Census. Resp. exh. 9, IFB at 1. The solicitation was for the purchase of 3,647,900 census questionnaires and 26,200 envelopes. *Id.* The IFB stated that the contractor was to furnish "[a]ll materials and operations, other than those listed under 'Government to Furnish,' necessary to produce the products in accordance with these specifications" *Id.* at 4. As relevant here, the solicitation required the contractor to use the following paper stock for the printed questionnaires, known as A80: "White Opacified Offset Book, basis weight: 50 lbs. Per 500 sheets, 25 x 38"; must meet the attributes of [Joint Committee on Printing (JCP)] Code A80." *Id.* at 2-3. The bidding period closed on July 12, 2019. *Id.* at 1.

On July 25, GPO issued Purchase Order No. 92496 to Colonial Press in the base amount of \$344,126. App. exh. 2, Purchase Order No. 92496 at 1. The Purchase Order was issued: "In strict accordance with our solicitation and your bid/offer dated Friday, July 12, 2019." *Id.* Colonial Press states that, upon award, it ordered 342,309 pounds of the required A80 paper. Complaint ¶ 3.

Relevant Purchase Order Provisions

The Purchase Order was subject to the provisions of the “GPO Contract Terms (GPO Publication 310.2, effective December 1, 1987 (Rev. 01-18)) and GPO Contract Terms, Quality Assurance Through Attributes Program for Printing and Binding (GPO Publication 310.1, effective May 1979 (revised 8-02)).” IFB at 1; Resp. exh. 3, GPO Terms & Conditions (Rev. 01-18) at 1. The relevant GPO Contract Terms permit the government to terminate performance, in whole or part, if it is in the government’s best interest. *Id.*, Contract Clauses, ¶ 19(a). The GPO Contract Terms provide that after receipt of a notice of termination, and except as directed by the contracting officer:

[T]he contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

* * * * *

(6) As directed by the Contracting Officer, transfer title and deliver to the Government (i) work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished by the Government.

* * * * *

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of property that is in the possession of the contractor and in which the Government has or may acquire an interest.

Id. ¶ 19(b).

The GPO Contract Terms further state that, as directed or authorized by the contracting officer, the contractor may sell or acquire the property or termination inventory, and any proceeds will be applied to reduce any payments to be made by the government, credited to the price or cost of the work, or paid in any other manner directed by the contracting officer. *Id.* ¶ 19(b)(9), (10). In addition, with respect to termination settlement amounts:

[T]he contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done.

Id. ¶ 19(d).

Termination and Settlement

On or about September 3, 2019, the government realized that it omitted the requirement for serialized barcoding from the specifications in the IFB and concluded that it needed to issue a new solicitation. Amend. Answer ¶ 4. GPO and Colonial Press exchanged emails on September 9 and 10, which addressed the respondent's notice regarding the serialized barcoding, and the government's intention to partially terminate the order. App. exh. 11, Email from GPO to Colonial Press, Sept. 9, 2019, at 1. GPO requested that Colonial Press agree to proceed with performance of certain items in the Purchase Order that had a "critical delivery date." *Id.*

In response to GPO's inquiry, Colonial Press advised that it would agree to performance of the non-terminated items, under certain stipulated conditions. App. Exh. 12, Email from Colonial Press to GPO, Sept. 10, 2019 at 1. As relevant here, appellant stated that "there is a termination issue that needs to be addressed right away, namely the disposition of cost already incurred for this job," which included most significantly "the paper and ink procured for the production of all items." *Id.* at 2. Appellant advised that these items could not be returned:

While a small amount of paper can be used for the partial termination job, the paper is customized and thus cannot be returned to the supplier without payment of a substantial restocking charge. The ink cannot be returned to the supplier. Rather than wait for our submission of a final termination settlement proposal, we ask that GPO purchase the excess paper now for use by the next contractor (i.e. include the paper as government furnished material in the procurement solicitation). Our cost for this paper (less any paper used for the partial termination job) is \$191,693.04.

Id.

On September 18, GPO issued Colonial Press a notice of partial termination for the convenience of the government for items 1–10 and 16–21, out of 28 total items, of the Purchase Order, in accordance with provision 19 of the GPO Contract Terms. App. exh. 3, Notice of Termination ¶ 1 (*citing* GPO Contract Terms, Pub. 310.2 ¶ 19). The termination was effective September 18, 2019.¹ *Id.*

The notice instructed Colonial Press to stop work on the terminated items, but to continue performance of the items of Jacket number 409-192 that had not been terminated: items 11–15, 22–26, and 27–28. *Id.* ¶ 1. Further, the letter directed Colonial Press to notify the contracting officer of the number of items completed under

¹ On or about September 26, 2019, GPO issued an IFB, Jacket 409-747, on behalf of the Department of Commerce, Bureau of the Census, resoliciting the requirement. Resp. exh. 10, Jacket 409-747 at 1; Amend. Answer ¶ 7. Jacket 409-747 sought 3,542,300 questionnaires. Resp. exh. 10, Jacket 409-747 at 1. The IFB also required A80 paper for this requirement. *Id.* at 2–3. The bid closed on September 30. *Id.* at 1.

the contract and to arrange for their delivery or other disposal. *Id.* ¶ 2(d). Finally, the letter advised appellant that, “[i]n connection with any settlement of your claim, it will be necessary for you to properly account for your termination inventory and the inventory of your subcontractors.” *Id.* ¶ 2(e).

On September 24, Colonial Press submitted a Settlement Proposal to GPO. App. exh. 4, Settlement Proposal at 1. In the Settlement Proposal, Colonial Press detailed its bid costs and proposed settlement amounts as follows:

	Bid Cost²	Settlement Proposal
Material	\$196,165.83	\$165,136.70
Labor	\$60,171.43	\$6,654.40
Overhead	\$27,129.32	\$25,230.26
General & Administrative Expenses	\$54,606.44	\$50,783.99
Profit	\$9,738.73	
Subtotal of Uncompleted Items		\$247,805.35
Items to be Completed		\$45,239.00
TOTAL	\$347,811.75	\$293,044.36 ³

Complaint ¶ 6; App. exh. 4, Settlement Proposal at 1.

The proposal also stated that the value of the non-terminated work to be completed, items 11–15, 22–26, and 27–28, was \$45,239.00. *Id.* Of the \$165,136.70 in material cost, \$161,145.60 was for unused A80 paper. App. exh. 4, Settlement Proposal at 3; Complaint ¶ 6. Colonial Press requested a total settlement amount of \$293,044.36. App. exh. 4, Settlement Proposal at 3.

On or about October 8, Colonial Press delivered items 11–15, 22–26, and 27–28 to the Census Bureau. Resp. exh. 4, Colonial Press Invoice No. 57671 at 2–8; see Resp. Response to Board Questions, Apr. 2, 2021, at 2. On October 10, Colonial Press submitted an invoice to GPO for items 11–15, 22–26, and 27–28, totaling \$45,239, which was the same amount identified in Colonial Press’s Settlement Proposal. Resp. exh. 4, Colonial Press Invoice No. 57671 at 2–8; see Resp. Response to Board Questions, Apr. 2, 2021, at 2.

² The Settlement Proposal provides the values for the individual items; the Board summed the values to obtain the total. See App. exh. 4, Settlement Proposal at 1. We note that the Settlement Proposal reflects a bid cost of \$347,811.75, while the Purchase Order was awarded for a price of \$344,126. *Id.*; App. exh. 2, Purchase Order at 1.

³ Although Colonial Press’s Settlement Proposal identified its settlement costs as \$293,044.36, this amount contains a \$0.01 calculation error; the sum of the costs is \$293,044.35. See App. exh. 4, Settlement Proposal at 3.

On December 2, Colonial Press emailed GPO requesting information about the status of the Settlement Proposal, and GPO responded that the proposal was under review. App. exh. 6, Email from Colonial Press to GPO, Dec. 2, 2019, at 3; Email from GPO to Colonial Press, Dec. 2, 2019, at 3. On December 9, Colonial Press again requested an update on the status of the proposal, and GPO again responded that it remained under review and advised that it could provide more information on December 10. *Id.*, Email from Colonial Press to GPO, Dec. 9, 2019, at 3; Email from GPO to Colonial Press, Dec. 9, 2019, at 2. On December 10, Colonial Press again sought from GPO an update on the review of the Settlement Proposal. *Id.*, Email from Colonial Press to GPO, Dec. 10, 2019, at 2; Email from GPO to Colonial Press, Dec. 12, 2019, at 2.

On December 12, GPO provided Colonial Press a Counter Proposal for the termination settlement as follows: “We would propose a final settlement all-inclusive of work produced and unreturnable materials of \$246,486.26.” App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. The Counter Proposal stated as follows:

Based on the information that we have and considering the work that was not produced (65% of the binding, 99.7% of the 16-page work, the bulk of the delivery, cartons/packaging, inline ink jetting) [t]here appears to be roughly a \$120,047.58 reduction.

The difference from that amount and the original contract price being \$224,078.42. Our research also determined that an estimated 10% should be added to this amount to account for overhead and G&A [general and administrative].

We would propose a final settlement all-inclusive of work produced and unreturnable materials of \$246,486.26.

We look forward to your response so that we can close this out.

Id.

That same day, Colonial Press requested clarification of the terms of the Counter Proposal: “We understand the term ‘all-inclusive’ to mean the partial terminated portion of the contract as well as the portion that was produced, shipped and invoiced. Is our understanding correct[?]” *Id.*, Email from Colonial Press to GPO, Dec. 12, 2019, at 1. GPO advised Colonial Press: “Your understanding is correct.” *Id.*, Email From GPO to Colonial Press, Dec. 12, 2019, at 1. On December 13, Colonial Press stated that it accepted the Counter Proposal: “Colonial accepts the government[']s counter proposal. Please let me know if you require any additional information.” Resp. exh. 8, Email from Colonial Press to GPO, Dec. 13, 2021, at 1.

On December 19, GPO issued a Contract Modification, signed by the contracting officer, stating:

You are notified that your Purchase Order 92496, Jacket 409-192, dated July 25, 2019 is hereby terminated for the convenience of the

Government in accordance with the provisions of the U.S. Government Publishing Office Contract Terms. This termination is effective September 18, 2019.

You will be reimbursed in the agreed upon amount of \$246,486.26 for work performed and articles delivered under the completed portion of this contract.

This supplemental agreement constitutes full and complete settlement of the amount due the contractor by reason of the complete termination of work under this contract and of all other claims and liabilities of the contractor and the U.S. Government Printing Office under this contract.

App. exh. 7, Contract Modification at 1. A representative for Colonial Press signed the Contract Modification on the same date. *Id.*

On December 19, GPO emailed Colonial Press and stated that GPO understood that Colonial Press had materials at its facility relating to Jacket 409-192, including ink and 287,760 pounds of A80 paper. Resp. exh. 1, Email from GPO to Colonial Press, Dec. 19, 2019, at 3. GPO asked Colonial Press whether it had use for the ink and paper on another project, and whether it would be willing to “buy back” any of the materials. *Id.* On January 8, Colonial Press advised GPO that “[w]e are unable to use the paper or ink for other projects.” *Id.*, Email from Colonial Press to GPO, Jan. 8, 2020, at 3.

On April 2, GPO informed Colonial Press that it sought recovery of the paper and asked if it was still in Colonial Press’s possession and in the same state and quality as when the contract was terminated. *Id.*, Email from GPO to Colonial Press, Apr. 2, 2020, at 2. In the absence of a response from Colonial Press, on April 17, GPO again asked Colonial Press for this confirmation. *Id.*, Email from GPO to Colonial Press, Apr. 17, 2020, at 2. On April 17, Colonial Press confirmed that it was in possession of the paper and that the paper was in the same state and quantity as at delivery. *Id.*, Email from Colonial Press to GPO, Apr. 17, 2020 (2:38 p.m.), at 1; Email from Colonial Press to GPO, Apr. 17, 2020 (2:51 p.m.), at 1.

On July 21, GPO notified Colonial Press that a contractor would arrange for pickup of the paper. Resp. exh. 2, Email from GPO to Colonial Press, July 21, 2020, at 2. GPO directed Colonial Press to document the state of the paper prior to its pickup. *Id.* Colonial Press responded on July 23 that the paper had been used and thus could not be collected by GPO’s contractor: “[S]ince our last communication discussing the paper, it has been used and is unavailable.” *Id.*, Email from Colonial Press to GPO, July 23, 2020, at 1–2.

On July 23, GPO asserted that the paper was government property as a result of the settlement agreement. *Id.*, Email from GPO to Colonial Press, July 23, 2020, at 1. The government also asserted that if the paper was not available for government collection, Colonial Press was obligated to purchase it from the government. *Id.*

Colonial Press responded that same day, confirming that the paper had been used and was no longer available. *Id.*, Email from Colonial Press to GPO, July 23, 2020, at 1. However, Colonial Press disputed that the paper had been the subject of the settlement agreement, contending that “the contract modification dated December 19, 2019 does not contain a stipulation, provision, or clause that would support the Government[']s assertion of a claim against the paper. It clearly states otherwise.” *Id.*

On July 30, GPO issued a contracting officer’s final decision (COFD) concerning the paper. App. exh. 8, COFD at 1. The COFD recounted generally the timeline discussed above, and advised Colonial Press that GPO would recover the value of the paper, as it was no longer in Colonial Press’s possession and available for collection by GPO. *Id.* Respondent assessed the value of the paper and the amount to be recovered as \$161,145.60, based on the cost breakdown set forth in Colonial Press’s Settlement Proposal of September 24, 2019. *Id.* The COFD informed Colonial Press of its right to appeal to the GAO Contract Appeals Board within 90 days of receipt of the COFD. *Id.* at 2. On August 21, 2020, Colonial Press timely filed its Notice of Appeal and Complaint. Colonial Press states that GPO has recovered \$161,145.60 through offsets on other contracts. App. Response Board Questions, Oct. 14, 2022.

DISCUSSION

This Appeal sets forth three counts. In Count I of the Complaint, Colonial Press alleges that it was not obligated to turn over the paper to the government under the terms of the settlement agreement, and that the offset of \$161,145.60 imposed by GPO on other contracts was a breach of the agreement. Complaint at ¶¶ 11–14. Counts II and III are raised in the alternative, in the event that the Board finds that GPO was entitled to recover the value of the unreturned paper. *Id.* ¶¶ 15–19. In Count II of the Complaint, Colonial Press argues that it is entitled to recover storage costs for the paper of \$39,900.09. *Id.* at ¶ 19. In Count III of the Complaint, Colonial Press argues that it is entitled to recover \$45,239 for performance of the non-terminated portion of the work. *Id.* ¶ 20–23.

Colonial Press filed a motion for summary judgment on October 9, 2020, contending that there are no genuine issues of material fact with regard to Count I, and that it is entitled to judgment as a matter of law. App. Mot. For Summary Judgment (MSJ) at 1. GPO filed a cross-motion for summary judgment on October 19, contending that there are no genuine issues of material fact with regard to Counts I, II, and III, and that it is entitled to judgment as a matter of law. Resp. Response to App. MSJ and Cross-MSJ at 6–9.

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. *Colonial Press Int’l, Inc.*, GAOCAB No. 2008-6, 20-1 BCA ¶ 37560. The party opposing summary judgment, however, must show an evidentiary conflict on the record; mere denials or conclusory statements are

not sufficient. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985).

The motion and cross-motion for summary judgment raise three primary issues: (1) whether appellant was required to turn over the A80 paper to the government under the terms of the settlement agreement, and the value of that paper; (2) whether appellant may claim the costs of storing the paper; and (3) whether the settlement agreement covered the work not terminated for convenience by the government. For the reasons discussed below, the Board finds that the parties' settlement of the termination of the Purchase Order covered the costs of the A80 paper (Count I) and non-terminated work (Count III). We find that appellant was required to turn over the paper to the government and thus, respondent is entitled to recover the costs of the unreturned paper. We also find that appellant has been paid for this amount for the non-terminated work. We also find, however, that there are genuine issues of material fact with regard to the value of the A80 paper, and thus the quantum of respondent's recovery. With regard to Count II, we conclude that this issue was never presented to the contracting officer for a final decision, and therefore dismiss this count as not within our jurisdiction to consider.

The Settlement Agreement

As an initial matter, the parties disagree as to which document constitutes the settlement agreement. On December 12, 2019, GPO issued a Counter Proposal to Colonial Press, which stated: "We would propose a final settlement all-inclusive of work produced and unreturnable materials of \$246,486.26." App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. Appellant accepted the Counter Proposal on December 13. Resp. exh. 8, Email from Colonial Press to GPO, Dec. 13, 2019, at 1.

On December 19, the parties signed a Contract Modification, which terminated the Purchase Order and stated: "You will be reimbursed in the agreed upon amount of \$246,486.26 for work performed and articles delivered under the completed portion of this contract." App. exh. 7, Contract Modification at 1. The Contract Modification further stated that "[t]his supplemental agreement constitutes full and complete settlement of the amount due the contractor by reason of the complete termination of work under this contract and of all other claims and liabilities of the contractor and the U.S. Government Publishing Office under this contract." *Id.*

Appellant contends that the Contract Modification is the final settlement agreement. App. Response to Board Questions, Oct. 12, 2021, at 6. As discussed below, appellant contends that differences between the Counter Proposal and the Contract Modification support its arguments regarding Claim I. *Id.* Respondent contends that the Counter Proposal is the final settlement agreement, and that the Contract Modification simply executes the terms agreed upon by the parties. Resp. Response to Board Questions, Oct. 12, 2021, at 3.

We agree with respondent that the Counter Proposal was the government's offer to settle appellant's termination claim, and that appellant accepted the government's offer. We also agree with appellant, however, that the language of the subsequent Contract

Modification states that it “constitutes full and complete settlement” of the claims and liabilities arising from the termination of the Purchase Order. Thus, because the parties memorialized the settlement agreement in the Contract Modification, we find that this document constitutes the actual settlement agreement.

Nonetheless, for the reasons addressed below, we find no basis to conclude that any differences between the Counter Proposal and the Contract Modification reflect a change to the terms offered by respondent and accepted by appellant in the Counter Proposal. For the sake of clarity, our discussion below refers separately to the Counter Proposal and the Contract Modification, rather than referring to either as the settlement agreement.

Count I - Paper and Offset

Colonial Press argues that it was not required to turn over the A80 paper it purchased prior to partial termination of the contract, and that GPO’s claim of \$161,145.60 to recover the value of the paper is a breach of the parties’ settlement agreement, as reflected in the Contract Modification. Amend. Complaint ¶¶ 11–14. Appellant raises two primary arguments: (1) respondent’s Counter Proposal excluded payment for the paper; (2) even if the Counter Proposal covered the paper, GPO subsequently waived its right to recover the paper through the Contract Modification.

Respondent argues that, upon termination of the Purchase Order, Colonial Press was required under the terms of the order to deliver items purchased for the government, and that neither the Counter Proposal nor the Contract Modification discharged this obligation. Amend. Answer ¶ 14. The respondent also argues that both the Counter Proposal and the Contract Modification included payment for the paper. *Id.* ¶ 13. For these reasons, respondent contends that appellant’s failure to deliver the paper following partial termination of the contract was a breach of its obligation that entitled the government to recoup the cost of the paper. *Id.* ¶ 14; Resp. Amend. Response to App. MSJ & Amend. Cross-MSJ at 7–9. We agree with respondent and therefore grant its motion for summary judgment with regard to appellant’s claim concerning appellant’s obligation to return the paper. We also conclude, however, that genuine issues of material fact remain as to the value of the paper, and therefore deny respondent’s motion for summary judgment as to this issue.

The Purchase Order and Materials Purchased for Performance

We first address the terms of the Purchase Order and appellant’s obligation regarding materials purchased for contract performance. Respondent contends that the Purchase Order, which incorporated the GPO Terms and Conditions, obligated appellant upon termination of the order to preserve and turn over the A80 paper it purchased for performance of the contract. Resp. Amend. Response to App. MSJ & Amend. Cross-MSJ at 8. The Contract Modification stated that the Purchase Order was “terminated for the convenience of the Government in accordance with the provisions of the U.S. Government Publishing Office Contract Terms.” App. exh. 7, Contract Modification at 1.

As discussed above, the Terms and Conditions require a contractor, upon notice of a termination, to “transfer title and deliver to the Government . . . supplies, and other material produced or acquired for the work terminated.” Resp. exh. 3, GPO Terms & Conditions (Rev. 01-18), Contract Clauses, ¶ 19(b)(6). Additionally, the contractor must “[t]ake any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of property that is in the possession of the contractor and in which the Government has or may acquire an interest.” *Id.* ¶ 19(b).

In further support of its argument, respondent notes that that GPO’s Counter Proposal to appellant’s Settlement Proposal provided for “a final settlement all-inclusive of work produced and unreturnable materials of \$246,486.26.” App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. Respondent contends that the term unreturnable materials refers to:

[A]ll materials that Appellant purchased for the completion of Jacket No. 409-192 Purchase Order No. 92496 (the “contract”), but that as a result of GPO’s termination for convenience (T4C), Appellant could neither: 1) use on the remaining part of the contract that was not [terminated for convenience] (items 11-15, 22-26, 27-28); 2) return to the paper manufacturer; or 3) use on another job with GPO.

Resp. Response to Board Questions, Oct. 12, 2021, at 2.

The Contract Modification signed by the parties stated that Colonial Press “will be reimbursed in the agreed upon amount of \$246,486.26 for work performed and articles delivered under the completed portion of this contract.” App. exh. 7, Contract Modification at 1. Respondent contends that nothing in either the Counter Proposal or the Contract Modification released appellant from its obligation under the GPO Terms and Conditions to turn over the A80 paper. For these reasons, respondent contends that appellant’s failure to turn over the paper entitles GPO to claim the cost of the paper.

Colonial Press does not dispute that respondent had an interest in the A80 paper: “Appellant does not contest that GPO retained a termination for convenience ‘interest’ in the unused paper which Colonial Press had a duty to protect and preserve under GPO Contract Terms, Contract Clause 19(b)(6)).” App. Response to Board Questions, Apr. 5, 2021, at 3. Instead, appellant contends that the Counter Proposal intentionally excluded payment for the A80 paper, thereby entitling Colonial Press to retain it. *Id.* at 2. Alternatively, appellant contends that “GPO voluntarily waived and relinquished this interest when the Settlement Agreement was executed.” *Id.* at 3 n.1.

Terms of the Counter Proposal and Contract Modification

First, appellant characterizes respondent’s Counter Proposal as rejecting appellant’s claim for the A80 paper. Colonial Press states that, in response to the notice of partial termination, it submitted a Settlement Proposal that itemized its incurred costs to date, and the anticipated costs of the non-terminated items to be performed, for a total of \$293,044.26. App. Response to Cross-MSJ at 3. GPO’s Counter Proposal offered the following: “We would propose a final settlement all-inclusive of work produced and

unreturnable materials of \$246,486.26.” App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2.

Appellant contends that the Counter Proposal reflected GPO’s intent to offer nothing for the paper or any of the other incurred costs, and to instead offer a higher amount for the non-terminated work to be completed. App. Response to Cross-MSJ at 3–4; App. Response to Board Questions, Apr. 5, 2021, at 2. In this regard, appellant states that while it estimated the value of the non-terminated work to be completed as \$45,239, the Counter Proposal offered \$246,486.26 for this work. *Id.* In its response to questions from the Board, appellant acknowledged that its argument concerning the settlement negotiations characterizes respondent’s Counter Proposal as “overpaying” for the non-terminated work, as follows:

What may be puzzling the Board is why GPO would agree to pay \$246,486.26 for work performed (i.e., the 140,800 Census Questionnaires) that Colonial Press was going to invoice for only \$45,239? The Contracting Officer never explained this decision prior to executing the Settlement Agreement (see, e.g., Email Chain dated December 12, 2019; Plaintiff’s Summary Judgment Exhibit 6), and now any explanation would be barred by the parole evidence rule, at least insofar as it might seek to contradict or modify the terms of the Settlement Agreement.

App. Reply to Board Questions, Apr. 5, 2021, at 2.

Appellant does not identify any specific language stating that GPO intended its Counter Proposal to be a rejection of Colonial Press’s incurred costs and an “overpayment” for the anticipated costs of the non-terminated work. Instead, appellant argues that its characterization was a reasonable inference:

Colonial Press had every reason to believe that the *quid pro quo* for reducing its total claims by \$46,558.10 – from \$293,044.36 (see Plaintiff’s Summary Judgment Exhibit 4) to \$246,486.26 – was its ability to retain the unused paper in the hope of offsetting this \$46,558.10 loss. At the very least, this loss constituted an exchange of consideration that makes the Settlement Agreement binding.”

Id. at 3.

Respondent denies that its Counter Proposal reflects the government’s intent to reject appellant’s claim for its incurred costs, and to overpay for the completed work as compensation. Amend. Answer ¶ 5; Resp. Amend. Response to App. MSJ & Amend. Cross-MSJ at 9. Instead, respondent notes that the Counter Proposal explained the basis for the government’s offer of \$246,486.26 as compared to appellant’s claim of \$293,044.36. App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. Specifically, as discussed above, the Counter Proposal stated that rather than accepting the appellant’s approach to adding up its anticipated and incurred costs, GPO based its Counter Proposal on the following calculation: (1) the bid award price, which included costs for

labor and materials; (2) deducting from the bid award price GPO's estimate of the value of the work not produced under the contract, as a result of the partial termination; (3) adding 10 percent to the resulting amount to account for overhead and G&A costs. App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2.

We find that nothing in the record supports appellant's characterization of GPO's Counter Proposal as reflecting an intent to deny payment for the paper, and to "over-pay" for the non-terminated work. Appellant has not presented any evidence to support its characterization of the intent of the contracting officer. Appellant's unsupported inference—that the government agreed to reduce the total value of claim by \$46,558.10, in exchange for allowing appellant to retain paper, the cost of which appellant stated was \$161,145.60—does not establish that there is a dispute or conflict regarding a material issue of fact.

Instead, the record supports respondent's explanation that the Counter Proposal was based on the bid award price, with a deduction for the estimated cost of the terminated work and an addition for overhead and G&A costs. App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. Respondent's explanation is also consistent with the parties' exchanges regarding the partial termination of the Purchase Order, wherein Colonial Press stated that the paper and ink purchased for performance of the contract could not be returned and should therefore be part of the termination settlement. App. Exh. 12, Email from Colonial Press to GPO, Sept, 10, 2019 at 1–2. As noted, respondent's Counter Proposal, which appellant accepted, stated that government's offer of \$246,486.26 included payment for "unreturnable materials." App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2.

On this record, we find no issue of material fact that supports appellant's assertion that GPO rejected Colonial Press's claim for reimbursement of the A80 paper, thereby entitling it to retain the paper.

Waiver of the Government's Right to Recover

The second argument advanced by appellant relies on what it contends was a waiver of the government's interest in the paper. As discussed above, appellant acknowledges that respondent retained an interest in the A80 paper purchased for the performance, following the termination of the order. App. Response to Board Questions, Apr. 5, 2021, at 3 n.1. Appellant also acknowledges that respondent's Counter Proposal stated that it covered "unreturnable materials," and that the A80 paper was unreturnable material. App. Response to Board Questions, Oct. 4, 2021, at 2. Notwithstanding these facts, appellant contends, in essence, that differences between the Counter Proposal and the Contract Modification reflected the government's intent to waive its right to collect the paper. See App. Response to Board Questions, Apr. 5, 2021, at 3 n.1.

Waiver occurs when a party intentionally relinquishes a known right. *Chugach Fed. Solutions, Inc.*, ASBCA No. 61320, 19-1 BCA ¶ 37,314 at 181,496. Waiver is an affirmative defense, for which the breaching party bears the burden of proof. See *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1299 (Fed. Cir. 2002). 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. See *ECC Int'l, LLC*, ASBCA No. 58875, 20-1 BCA ¶ 37,683 at 182,966. The burden of proving a contract provision was waived by the government is allocated to the contractor. See *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360 (Fed. Cir. 2005).

Here, the Contract Modification stated that payment was for "work performed and articles delivered under the complete portion of this contract." App. exh. 7, Contract Modification at 1. Appellant argues that because the A80 paper was not completed work, nor was the paper delivered to the government at the time the modification was signed, the government waived its right to recover the paper. App. Response to Board Questions, Apr. 5, 2021, at 3 n.1.

Respondent maintains that it retained its interest in the A80 paper, and thus denies that it waived that interest. See Resp. Amend. Response to App. MSJ & Amend. Cross-MSJ at 7–9. With regard to differences between the Counter Proposal and the Contract Modification, the respondent contends that the latter document merely formalized the terms to which the parties had agreed under the Counter Proposal: "The December 19, 2019 contract modification no. 2 is not the settlement agreement between the parties; it is as an official notification of the T4C, and the previously agreed settlement amount and its terms." Resp. Response to Board Questions, Oct. 12, 2021, at 3.

We find that the Contract Modification does not establish that the contracting officer knowingly or intentionally waived appellant's obligation to deliver the A80 paper. As discussed above, we find that the Counter Proposal was clear as to the basis for valuing the settlement. In this regard, the Counter Proposal took the bid award price and decremented that amount by an estimate of the terminated work. App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. Appellant expressly accepted this Counter Proposal. Resp. exh. 8, Email from Colonial Press to GPO, Dec. 13, 2019, at 1. While we agree with appellant that there is an apparent difference between the description of the work in the Counter Proposal ("We would propose a final settlement all-inclusive of work produced and unreturnable materials") and the Contract Modification ("for work performed and articles delivered under the completed portion of this contract"), we do not agree with appellant that this difference establishes that the contracting officer knowingly or intentionally waived appellant's obligation to deliver the A80 paper. App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2; App. exh. 7, Contract Modification at 1.

Additionally, we note that a waiver of the government's right to recover the A80 paper would, in essence, constitute a material modification to the Counter Proposal without consideration for such a modification. A modification must be supported by consideration to be binding. *International Oil Trade Center*, ASBCA No. 55377, 08-2 BCA ¶ 33,916 at 167,829 (a contract modification must include all the elements necessary to support contract enforceability, including consideration). Further, under the "pre-existing legal duty" rule, a promise to do what one is already obligated to do is not consideration. *Gardiner, Kamya & Assocs., P.C v. Jackson*, 369 F.3d 1318, 1322 (Fed. Cir. 2004); RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

As discussed above, we find the record does not support appellant's contention that the Counter Proposal reflected the contracting officer's intention to reject appellant's claim for the A80 paper and other incurred costs, and to instead "overpay" for the non-terminated work to be completed. Rather, the record shows that GPO's Counter Proposal was based on a deduction from the bid award price of the government's estimated value of the terminated work; that the Counter Proposal anticipated that the contractor would turn over to the government all undeliverable materials, including the A80 paper; and that appellant agreed to this Counter Proposal. Thus, even if Colonial Paper is correct that—notwithstanding appellant's obligation to turn over the A80 paper and the parties' agreement under the Counter Proposal for payment for the unreturnable paper—respondent subsequently and unilaterally agreed to waive its right to receive the A80 paper, such a waiver is a modification that is not supported by any consideration from appellant and therefore could not have been binding.⁴

In sum, we conclude that there is no genuine issue as to any material fact regarding appellant's duty to return the A80 paper. We therefore find that appellant is not entitled to judgment as a matter of law regarding its motion concerning Count I, and that GPO is entitled to judgment as a matter of law with regard to its cross motion for summary judgment concerning Count I as to appellant's duty to return the paper and respondent's entitlement to recover the costs of the paper. *Celotex Corp.*, 477 U.S. at 323. As discussed next, however, we must resolve the value of the paper to determine respondent's appropriate quantum of recovery.

Quantum of Recovery

Respondent's \$161,145.60 claim for the A80 paper is a government claim against appellant, meaning that respondent has the burden of establishing quantum. See *Alaska Aerospace Corp.*, ASBCA No. 59794, 16-1 BCA ¶ 36,498 at 177,842. The

⁴ Although respondent has not specifically argued that appellant's retention of the A80 paper would have resulted in an unjust enrichment, we note that appellant was paid \$246,486.26 under the termination settlement, but also seeks to retain the A80 paper appellant valued at \$161,145.60. Respondent states that the \$161,145.60 value was included in appellant's calculation of the bid award price and Settlement Proposal and was also an assumption of the government's Counter Proposal. Resp. Amend. Response to App. MSJ & Amend. Cross-MSJ at 7–9. Because the Counter Proposal was based on deducting the government's estimate of the value of the terminated work from the bid award price, we agree with the government that the value of the paper was reflected in the Counter Proposal's total amount of \$246,486.26. This same amount of \$246,486.26 was the amount paid to Colonial Press under the Contract Modification. To grant the appeal would result in appellant receiving \$246,486.26 under the termination settlement, as well as retaining the value of the A80 paper, which appellant represented had a cost of \$161,145.60, for a total of \$407,631.86—which is \$63,505.86 in excess of the bid award price. Appellant has not explained why this outcome would be reasonable.

COFD assessed the value of the paper as \$161,145.60, which was the value identified in appellant's settlement proposal. App. exh. 8, COFD at 1. As discussed above, appellant's settlement proposal identified its costs and requested a total of \$293,044.36. App. exh. 4, Settlement Proposal at 1. Respondent's counter-offer did not itemize costs, but instead took the overall bid price and deducted an estimate of the terminated work, for a total of \$246,486.26. App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. Appellant accepted this counter-proposal. Resp. exh. 8, Email from Colonial Press to GPO, Dec. 13, 2021, at 1.

Because respondent's counter-offer rejected appellant's settlement proposal and did not provide an itemized cost for the paper, and because respondent has not provided any other basis to value the A80 paper, the respondent has not established the quantum of the claim. For example, it cannot be said that respondent paid appellant \$161,145.60 for the A80 paper, or that respondent incurred costs in that amount to replace the paper. For these reasons, we find that there is a genuine issue of material fact regarding the value of the paper, and therefore the amount that respondent should recover from appellant. *Celotex Corp.*, 477 U.S. at 323. We therefore deny respondent's motion for summary judgment for Count I with regard to the quantum of recovery, and direct the parties to submit further briefing on this matter.

Count II—Storage Costs

Next, Colonial Press claims \$39,900.09 for the costs of storing the A80 paper. Complaint ¶ 19. Appellant contends that it is entitled to costs incurred for storage of the paper, from the date it was delivered to appellant's facility on September 4, 2019, to the date it was used by Colonial Press for other jobs in May and June of 2020. *Id.* ¶¶ 16, 18. Appellant states that this claim is raised in the alternative to its primary claim that GPO was not entitled to recover the costs of the A80 paper. *Id.* ¶¶ 17, 19; App. Response to Board Questions, Apr. 5, 2021, at 1. We find that this claim was not submitted to the contracting officer for a final decision, was not the subject of the COFD, and is therefore not within our Board's jurisdiction to consider.

The Contract Disputes Act (CDA) provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). For the Board to possess jurisdiction under the CDA, "the contractor must submit a proper claim—a written demand that includes (1) adequate notice of the basis and amount of a claim and (2) a request for a final decision." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010). In addition, the contractor must have received the contracting officer's final decision, or a deemed denial, on that claim. *Id.* A contractor who has appealed to the Board may increase the amount of its claim but may not pursue new claims not presented to the contracting officer. *Santa Fe Eng'rs, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987).

The Court of Appeals for the Federal Circuit explains that "we should treat requests as involving separate claims if they *either* request different remedies (whether monetary or non-monetary) *or* assert grounds that are materially different from each other factually or legally." *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir.

2015) (emphasis by the Court). Similarly, in *Lee's Ford Dock, Inc. v. Secretary of the Army*, the Court of Appeals held that a "claim is new when it 'present[s] a materially different factual or legal theory' of relief." 865 F.3d 1361, 1369 (Fed. Cir. 2017) (quoting *K-Con*, 778 F.3d at 1006). In *Lee's Ford*, the Court held that the Armed Services Board of Contract Appeals lacked jurisdiction when the contractor had presented to the contracting officer a claim for reformation based on mutual mistake and frustration of purpose, but at the Board had pursued a claim for knowing misrepresentation by nondisclosure. *Id.* at 1369–70.

Applying this test to the current matter, we conclude that appellant's storage costs claim is a new claim. Colonial Press did not include the costs of storing the paper in the claim that was presented to the government. See App. exh. 4, Settlement Proposal at 1. Neither the Counter Proposal nor the Contract Modification address storage costs. See Resp. exh. 8, GPO Counter Proposal at 1; App. exh. 7, Contract Modification at 1. Moreover, as appellant states, the claim for storage costs is raised in the alternative to its argument that the government is not entitled to claim the costs of the unreturned paper, and is therefore separate from the claim raised in Count I. Complaint ¶¶ 17, 19; App. Response to Board Questions, Apr. 5, 2021, at 1. For these reasons, we conclude that the claim for the costs of storing paper are separate from appellant's Count I claim that respondent was not entitled to claim the costs of the unreturned paper.

None of appellant's assertions regarding storage costs were presented to the contracting officer in a claim and, as a result, the contracting officer never had the opportunity to consider them and issue a COFD from which Colonial Press could appeal to the Board. Accordingly, the Board lacks jurisdiction to consider the storage claim. 41 U.S.C. § 7103(a)(1); *K-Con*, 778 F.3d at 1006; *Maropakis*, 609 F.3d at 1328. We therefore dismiss Count II.

Count III—Non-Terminated Work

Finally, Colonial Press claims \$45,239 for the non-terminated portion of the Purchase Order, comprising items which were delivered to and accepted by GPO (Nos. 11–15, 22–26, and 27–28). Complaint ¶ 21. Appellant states that this claim is raised in the alternative to its primary claim that GPO was not entitled to recover the costs of the A80 paper. Complaint ¶¶ 22–23; App. Response to Board Questions, Apr. 5, 2021, at 1. Respondent contends that parties' settlement agreement, as set forth in the Counter Proposal and Contract Modification, expressly covered the costs of the non-terminated work, and that appellant has therefore been paid for this amount. Respondent's Amend. Response to App. MSJ & Amend. Cross-MSJ at 7–9. We agree with respondent and therefore grant GPO's cross-motion for summary judgment with regard to appellant's claim concerning the non-terminated work.

As discussed above, GPO's September 19, 2019, notice of partial termination directed Colonial Press to complete purchase order items 11–15, 22–26, and 27–28. App. exh. 3, Notice of Termination ¶ 1. Appellant's September 24 Settlement Proposal included costs of \$45,239 for the non-terminated items. App. exh. 4, Settlement Proposal at 1.

GPO's December 12 Counter Proposal offered a settlement amount of \$246,486.26 that was "all-inclusive of work produced and unreturnable materials[.]" App. exh. 6, GPO Counter Proposal, Dec. 12, 2019, at 2. In email exchanges between the parties, GPO confirmed Colonial Press's understanding that the term "all-inclusive" meant "the partial terminated portion of the contract as well as the portion that was produced, shipped and invoiced." App. exh. 6, Email from Colonial Press to GPO, Dec. 12, 2019, at 1. On December 13, Colonial Press accepted the Counter Proposal. Resp. exh. 8, Email from Colonial Press to GPO, Dec. 13, 2021, at 1.

Colonial Press does not specifically dispute respondent's assertion that the settlement agreement expressly covered the costs of the non-terminated work. Appellant states that its claim for reimbursement of the costs of producing the non-terminated items is a "contingent" argument that rests on its interpretation that GPO's recovery of the costs of the unreturned A80 paper was a breach of the settlement agreement. App. Response to Board Questions, Apr. 5, 2021, at 1. Appellant contends that, if the Board finds in favor of GPO with regard to the paper, this would constitute a breach of the settlement agreement that entitles Colonial Press to claim the costs of the non-terminated work. *Id.*

As discussed above in connection with the appellant's claim regarding the A80 paper, we find that GPO did not breach the settlement agreement by asserting a claim to recover the cost of the unreturned paper. We also find that the settlement agreement included the costs of the non-terminated work. For these reasons 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 with regard to its motion for summary judgment concerning Count III.

CONCLUSION

For Count I concerning entitlement, we conclude that there is no genuine issue as to any material fact concerning appellant's duty to return the A80 paper and respondent's entitlement to recover the costs of the paper, and that GPO is entitled to judgment as a matter of law as to this issue. We also conclude, however, that there are genuine issues of material fact concerning the value of the paper, and that GPO is not entitled to judgment as a matter of law as to this issue. We conclude that Count II was not properly presented to the contracting officer for a final decision and is therefore not a matter within our Board's jurisdiction. We conclude that there is no genuine issue as to any material fact concerning Count III, and that GPO is entitled to judgment as a matter of law.

Appellant's motion for summary judgment on Count I is DENIED. Respondent's cross-motion for summary judgment on Count I is GRANTED in part and DENIED in part. Count II is DISMISSED, and therefore respondent's cross-motion for summary judgment on this count is DISMISSED as moot. Respondent's cross-motion for summary judgment on Count III is GRANTED.

Dated: October 21, 2022

/s/ Jonathan L. Kang
JONATHAN L. KANG
Presiding Member

We concur:

/s/ Heather Weiner
HEATHER WEINER
Member

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