



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 18, 2022

CBCA 7141

ORSA TECHNOLOGIES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John M. Manfredonia of Manfredonia Law Offices, LLC, Cresskill, NJ, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **LESTER**, **SULLIVAN**, and **O'ROURKE**.

LESTER, Board Judge.

Appellant, ORSA Technologies, LLC (Orsa), challenges a Department of Veterans Affairs (VA) contracting officer's decision terminating Orsa's contract for cause, and the VA asks the Board to enter summary judgment in its favor. Under the contract at issue, Orsa had forty-five days after award to supply the VA with nitrile gloves that it was supposed to have had "on hand" at the time of contract award. Orsa failed to make delivery. Orsa blames marketplace forces caused by the COVID-19 pandemic for its inability to acquire the necessary nitrile gloves. Because Orsa was well aware of the pandemic when it executed the contract at issue and was supposed to have had the gloves "on hand" when it entered the contract, it cannot use the pandemic as a cause of excusable delay. Accordingly, we grant

the VA's motion for summary judgment and deny Orsa's challenge to the termination for cause.

Statement of Undisputed Facts

The Request for Quotes

On January 6, 2021, the VA's Network Contracting Office 9 (90C) in Murfreesboro, Tennessee, issued a request for quotation (RFQ) for the procurement of "nitrile gloves per attached salient characteristics and price/delivery schedule." Appeal File, Exhibit 2 at VA000063.¹ The RFQ, which included the "Commercial Items (Oct 2018)" clause at Federal Acquisition Regulation (FAR) 52.212-4 (48 CFR 52.212-4 (2020)), specifically stated that the VA was looking for a supplier who already had acceptable nitrile gloves on hand (rather than a supplier who would need to have the gloves manufactured) and could deliver them within forty-five days² after contract award to the Defense Logistics Agency in Birmingham, Alabama:

[Veterans Health Administration] requests Nitrile Examination Gloves as per specifications listed below. *This is not a request for manufacturing but a request for quantity on hand to be delivered within 45 calendar days from order.*

.....

Contracts that are awarded based on submitted quotes will have 45 calendar days from receipt of order (award date) to deliver the awarded quantities, or the contract will be terminated for cause and negative performance will be reflected within the Contractor Performance Assessment Reporting System (CPARS) and the Federal Awardee Performance and Integrity Information System (FAPIIS).

Id. at VA000066 (emphasis added). The RFQ further explained that, if the supplier was not the original equipment manufacturer (OEM) of the nitrile gloves, it would have to provide

¹ Unless otherwise noted, all exhibits referenced in this decision are found in the appeal file.

² The RFQ, as originally issued, identified a delivery deadline of thirty days after contract award. Exhibit 1. Later the same day that it issued the RFQ, however, the VA issued an amendment reflecting a forty-five-day deadline. Exhibit 2.

an authorized letter from the OEM officially designating the supplier as a distributor for the gloves:

If the potential Authorized Supplier is not the OEM (original equipment manufacturer), the Authorized Supplier must provide an Authorized Distributor Letter from the OEM to the potential Supplier that is still in effect. The Authorized Distributor Letter from the OEM shall include for each product(s) proposed authorizing the quoter as a distributor for the proposed products(s). The letter must either state specific product(s) proposed or that the quoter is an authorized distributor for all the manufacturer's products. . . . The Authorized Supplier shall maintain its Authorized Distributor status of all manufacturers and distributors of supplies throughout the life of this agreement.

Id.

The nitrile gloves to be offered in the quote had to be a brand name or equal to specific OEM numbers associated with "Bosma Enterprises, Nitrile Textured Exam Glove," and the offeror had to provide evidence that "the item(s) being quoted meet or exceed the mandatory technical requirements," inclusive of "OEM product specifications, OEM product literature with supporting FDA, ASTM, AMMI NIOSH certifications, testing, etc." Exhibit 2 at VA000067. In its quote, the offeror had to identify the OEM for the gloves being offered, as well as the glove OEM number for each offered glove. *Id.* at VA000068. It also had to "include clear and readable photos of the nitrile glove boxes proposed along with photos of the glove itself." Exhibit 3 at VA000119. "Failure to provide this evidence as separate electronic files [would] render the quote submitted as technically unacceptable and not eligible for award." Exhibit 2 at VA000067; *see* Exhibit 3 at VA000119.

The RFQ also included the clause at VA Acquisition Regulation (VAAR) 852.212-72 (48 CFR 852.212-72) titled "Gray Market and Counterfeit Items (Mar 2020)," which provided that "[t]his procurement is for new [OEM] items only" and that "[n]o gray market items shall be provided," with "gray market items" being defined as "OEM goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory." Exhibit 2 at VA000078. The clause also required that the vendor "be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system, verified by an authorization letter or other documents from the OEM." *Id.*

Orsa's Quote

On January 13, 2021, Orsa submitted a quotation in response to the RFQ offering to supply the VA with 50,000,000 Supérieur Brand Nitrile Textured Exam Gloves at \$0.13 per glove, or a total cost of \$6.5 million, in the following sizes and quantities: 7.5 million small-size nitrile gloves (OEM no. NBR027); 17.5 million medium-sized nitrile gloves (OEM no. NBR028); 17.5 million large-sized gloves (OEM no. NBR029); and 7.5 million extra-large-sized gloves (OEM no. NBR030). *See* Exhibit 5 at VA000135, VA000181. In response to a Personal Protective Equipment (PPE) Source Questionnaire that accompanied the RFQ, Orsa represented that the quantity of nitrile gloves that it had “on hand (in-stock and available for immediate delivery)” was “2 million boxes (200 million gloves) within 35 days of award”; that it was “an authorized distributor, distributing FDA-approved products manufactured by an approved manufacturer”; that none of its proposed products “are gray market or counterfeit”; and that the gloves would be shipped directly from the OEM’s warehouse:

Products are factory-direct. [REVS RX, LLC (REVS RX)] is US OEM and imports directly from factory [in Vietnam]. ORSA is the Authorized reseller and ships directly from REVS RX warehouse.

Id. at VA000172-73.

During the process of reviewing Orsa’s quote, the VA on January 15, 2021, informed Orsa that it “need[ed] clarification of the actual OEM of the glove and OEM Name.” Exhibit 26. Although Orsa’s quote identified REVS RX as the OEM, other documentation accompanying the quote referenced another company, Ever Global Enterprise Corporation (Ever Global). *Id.* In response, Orsa clarified that Ever Global was “the OEM located in Vietnam” but that Orsa had “relationships with three different distributors/resellers for the Superieur brand gloves, one of them being [REVS RX] who has an allocation [from Ever Global] as indicated on the letters submitted with our quote.” *Id.*

On January 20, 2021, a VA contract specialist notified Orsa that its quotation had passed the VA’s technical evaluation review but that, “[b]efore we can proceed to review your offer, I would like to verify your original offer hasn’t changed. . . . Please verify no change to your original glove type, quantity by size, price per glove and delivery within 45 calendar days from Award.” Exhibit 9 at VA000292. The contract specialist noted that “I cannot express how important it is to verify you can deliver[] within 45 calendar days from Award.” *Id.* Orsa responded later that day, stating that “[w]e are confirming that our original offer has not changed” and that “[w]e can deliver the Superieur branded glove within the 45 days.” *Id.* at VA000291. On January 22, 2021, the VA contracting officer contacted

Orsa's OEM, REVS RX, and verified that Orsa was a REVS RX authorized reseller. Exhibit 8 at VA000287.

The Contract

The VA awarded contract no. 36-C-24921-P-0241 (the contract) to Orsa on January 22, 2021, for "an acquisition for surge supply of [50,000,000] nitrile gloves for hospital staff in response to the increased usage caused by COVID-19." Exhibit 10 at VA000298 (Block 20), VA000304. In its description of the gloves being purchased, the contract listed the specific glove OEM numbers that Orsa had identified in its quote. *Id.* at VA000304. The contract indicated that Orsa had forty-five calendar days to deliver the gloves, providing that "[t]he No Later Than Delivery Date for entirety of order is 03/08/2021." *Id.* at VA000298. Like the RFQ, section B.2 of the contract stated that "[t]his is not a request for manufacturing but a request for quantity on hand to be delivered within 45 calendar days from order" and that "Contracts that are awarded based on submitted quotes will have 45 calendar days from receipt of order (award date) to deliver the awarded quantities, or the contract will be terminated for cause." *Id.* at VA000301. The contract also included the requirement previously identified in the RFQ that, if the contractor "is not the OEM," it "must provide an Authorized Distributor Letter from the OEM" and "shall maintain its Authorized Distributor status . . . throughout the life of this agreement." *Id.* at VA000301.

Performance Under the Contract

On February 13, 2021, REVS RX informed the VA contracting officer by email that it had terminated its reseller relationship with Orsa. Exhibit 13 at VA000339. The VA sent an email to Orsa's Chief Financial Officer (CFO) on February 15, 2021, inquiring about the REVS RX notification and asking, "Since Revs RX was your supplier for the gloves that you submitted and that were deemed technically acceptable, what is your company's plan?" Exhibit 14 at VA000342. Orsa's CFO responded by email on February 16, 2021, stating that Orsa was "scheduled to review [on the ground (OTG)] stock later today in Los Angeles" and that he had "already communicated with Mr. Dickey [who was a VA point of contact under the contract] about the possibility for a substitution." *Id.* at VA000341. In that email, the CFO explained Orsa's concerns about working with REVS RX:

Not to dig too deep regarding this particular Superieur supplier but their need for when funds transferred did not align to how we ([purchase order (PO)] financier) needed the funds to transfer. There is too much risk with transferring funds prior to the goods arriving in the US.

Id. at VA000341.

Within five minutes of receiving the Orsa CFO's email, the VA contracting officer responded that, "[t]o clarify, only the brand of glove that was submitted with your offer, ultimately approved and awarded is allowed. No substitutions are permitted. . . . Do you have a different supplier for the same brand of glove lined up?" *Id.* Orsa's CFO responded as follows:

There are other suppliers for the Superieur glove, it is more the time horizon for getting this particular glove from Vietnam given the source country specific issues with the lack of labor due to Chinese New Year and some of the recent logistic challenges they are facing with shipping containers.

We were attempting to provide an equivalent glove in the Flexal 200 [from Cardinal Health] that would make the 3/8 delivery date since it is OTG USA and we have high confidence that we can obtain this through multiple channels if approved. If no consideration can be given to a substitute glove, then I will refocus my attention of getting the Superieur glove.

Exhibit 16 at VA000352. That email was consistent with another email that Orsa's CFO sent to the VA contracting officer on February 16, 2021, in which he described the difficulties that Orsa was having in obtaining Supérieur gloves:

At the time of award we had three suppliers of the Superieur gloves that have essentially either been delayed or have dropped out. Our PO to the original supplier was rejected after two weeks as they stated they had low confidence that they could secure the product. Since then we have developed alternate suppliers but are now faced with product access issues (Vietnam) due to the Chinese New Year as stored ready stock is not able to move. To compound this, there is a shortage of readily available shipping containers. The end result is that the Superieur brand glove is delayed and cannot be available for the original 3/8 delivery. We have sought out OTG Superieur without positive results so we have turned our attention to locating a comparable OTG glove that meets the original specifications.

Exhibit 15 at VA000343.

On February 22, 2021, Orsa's CFO notified the VA contracting officer that Orsa had "located a sizable lot of OTG Superieur brand nitrile gloves and [was] attempting to negotiate a carve-out to meet the 500k requirement" and was "also working to verify other OTG, or soon to be OTG, sources for this glove." Exhibit 17 at VA000356. Nevertheless, the VA contracting officer's inquiries on March 1 and 4, 2021, as to whether Orsa had

“secured a new supplier(s) for the gloves,” Exhibit 19 at VA000364-65, went essentially unanswered.

The contractual deadline of March 8, 2021, for delivery of the nitrile gloves passed without delivery of any gloves.

The Termination Decision and Orsa’s Appeal

On March 9, 2021, the VA contracting officer issued a final decision terminating Orsa’s contract for cause “due to the fact that your company is unable to provide the required nitrile gloves by the established delivery date of 08 March 2021.” Exhibit 20 at VA000370. In his decision, the VA contracting officer provided Orsa with notice of its appeal rights.

Subsequently, on April 19, 2021, Orsa notified the VA contracting officer that it “is 100% prepared to deliver INTCO Touch Flex Nitrile Gloves immediately from current inventory [that] is in the US (Orange County CA).” Exhibit 23 at VA000392. The VA contracting officer responded by indicating that he had terminated the contract for cause and that appropriate appeal procedures were identified in the termination decision. *Id.* at VA000390.

On June 4, 2021, Orsa filed this appeal with the Board, requesting that the termination for cause be converted to one for the Government’s convenience.

Discussion

Standard of Review

The standard of review for a summary judgment motion is well-established. “Summary [judgment] is appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law.” *Gardner Zemke Co. v. Department of the Interior*, CBCA 1308, 09-1 BCA ¶ 34,081 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). “Although the onus is on the moving party to persuade us that it is entitled to summary [judgment], the movant may obtain summary [judgment], if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party’s case.” *Id.* “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Orsa's Request to Defer Decision

Orsa indicates in its summary judgment response that it plans to call an expert witness at the hearing in this appeal to testify about how a “perfect storm” of events, which affected the nitrile glove market and allegedly prevented Orsa from delivering gloves by the contract deadline, was not foreseeable at the time of contract award. Appellant’s Summary Judgment Response (Nov. 22, 2021) at 12. It asserts in its brief that “[s]uch evidence is not yet in the record,” that “to deprive ORSA of the opportunity to develop such record would constitute premature dismissal of a novel case precipitated by a novel virus,” and that the Board “should deny Respondent’s [Summary Judgment] Motion and allow such expert testimony.” *Id.*

Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, if a party responding to a summary judgment motion lacks the factual information that it needs to respond to the motion, it must file an affidavit or declaration showing “that, for specified reasons, it cannot present facts essential to justify its opposition” and must request time to obtain that evidence. Here, Orsa submitted no such declaration or affidavit. Instead, it relies on “[c]onclusory statements that other evidence exists” that it has not yet placed into the record, which is “simply not sufficient to preclude summary judgment.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). We have provided Orsa with a full opportunity to submit evidence into the record, but Orsa has chosen not to present (or even lay out) its proposed expert witness testimony as part of its summary judgment response. In these circumstances, we decline Orsa’s invitation to defer resolution of the VA’s pending summary judgment motion in favor of a future hearing. In any event, the anticipated expert testimony is not factual in nature but involves expert opinion evidence about why the alleged “perfect storm” was not foreseeable, a legal issue upon which the Board does not need expert witness guidance. *See Stobie Creek Investments, LLC v. United States*, 81 Fed. Cl. 358, 360 (2008) (“Expert testimony that testifies about what the law is or directs the finder of fact how to apply law to facts does not ‘assist the trier of fact to understand the evidence or to determine a fact in issue’ within the contemplation of Fed. R. Evid. 702.”).

The Validity of the VA’s Termination Decision

FAR 52.212-4(m), the commercial items termination for cause provision included in Orsa’s contract, provides that “[t]he Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions” 48 CFR 52.212-4(m).

If a contractor challenges such a termination before the Board, “the government initially has the burden of proving that the termination for cause was valid.” *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260 (quoting *KSC-TRI*

Systems, USA, Inc., ASBCA 54638, 06-1 BCA ¶ 33,145 (2005)). “Once the agency has satisfied its threshold burden to support a termination for [cause], the burden shifts to the contractor to establish that its failure to comply with the terms and conditions of the contract[] was excusable.” *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,340; see *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537 (“If the Government presents a prima facie case that the termination was proper, the burden shifts to the contractor to rebut the prima facie case.”). To the extent that the contractor claims that excusable delays impacted its performance and entitled it to extra time to perform, the contractor bears the burden of proving excusability. *I-A Construction & Fire v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913.

In this case, the VA easily satisfies its burden of showing that the termination for cause was valid. Under the contract, as written, Orsa was required to deliver 50,000,000 nitrile gloves by March 8, 2021. Orsa did not deliver any gloves by the due date, and the VA contracting officer subsequently terminated the contract. “A contractor’s failure to make timely delivery of agreed-upon goods establishes a prima facie case of default.” *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1363 (Fed. Cir. 2008). The VA has established its prima facie case.

Orsa’s Defenses to the Termination

Because the VA has met its threshold burden, Orsa has the burden of showing that it was excused from meeting the March 8, 2021, deadline. It raises the following arguments:

Lack of a Cure Notice. Orsa argues that the termination was defective because the VA was obligated but failed to provide Orsa with a cure notice before termination. Orsa acknowledges that, in a commercial items contract, no cure notice is required “for late delivery.” Appellant’s Summary Judgment Response (Nov. 22, 2021) at 18 (citing FAR 12.403(c)). Given that the VA did not terminate the contract until after Orsa missed its March 8 contractual delivery due date, no cure notice was required. Orsa argues, however, that it was not actually late. Because of excusable delays, Orsa argues, March 8 was not a valid delivery date, and delivery was not really due until some unknown date in the future, creating a need for a cure notice. We have found no case precedent holding that a contractor’s allegation of excusable delay – an allegation that, in this case, was first raised during litigation – somehow creates an obligation on the Government’s part to issue a cure notice despite a missed contractual delivery deadline. We reject Orsa’s argument that a cure notice was required in the circumstances here. See *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848 (Because “the termination here post-dated the delivery date established in the contract,” no cure notice was necessary, despite allegations of excusable delay.).

Excusable Delay. Orsa argues that its inability to deliver the Supérieur nitrile gloves by March 8, 2021, was excused because of difficulties resulting from COVID-19. The “Excusable Delays” provision within FAR 52.212-4 provides that an “excusable delay” is one that is “beyond the reasonable control” of the contractor:

The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

48 CFR 52.212-4(f). Orsa explained the excusable nature of its delivery delay as follows:

After contract award, the nitrile glove market significantly deteriorated due to the COVID-19 pandemic. This adverse impact permeated throughout the glove market supply chain, from raw materials, manufacturing, buying/selling, shipping and inspection. A company called “Top Glove” located in Malaysia, the world’s largest glove supplier with a 60% market share, shut down many of its factories due to the COVID-19 outbreak. In some instances, entire provinces where the gloves are produced were shut down or quarantined. The United States had also placed a detention order on gloves produced by Top Glove due to forced labor concerns. This placed a significant strain on the glove market. Further, Ever Global, the manufacturer for Supérieur gloves, was also shut down due to COVID-19 outbreak in their manufacturing facility. The nitrile glove market was in chaos due to the COVID-19 pandemic and the ban on gloves produced by Top Glove. There were reports of cash buyers jumping ahead of the line by offering astronomical prices for large stocks of gloves so they can resell them at inflated prices. These events, individually and collectively, caused post-bid repercussions in the nitrile glove market and caused a “perfect storm,” which was unforeseeable, excusable and prevented Appellant from delivering the gloves by the contract delivery date.

Complaint (July 6, 2021) ¶ 24.

In response to Orsa’s allegations, we note initially that, under its contract, Orsa was obligated to have its gloves “on hand,” “in-stock,” and “available for immediate delivery” when it was awarded the contract. As indicated in the factual discussion above, the VA was so concerned about ensuring timely delivery and the in-stock nature of the product being offered that a VA representative reconfirmed Orsa’s access to the Supérieur gloves just before making award, informing Orsa that “I cannot express how important it is to verify you

can deliver[] within 45 calendar days from Award.” Exhibit 9 at VA000292. The contract itself stated that it was for a “surge supply” of gloves needed for hospital staff “in response to the increased usage caused by COVID-19.” Exhibit 10 at VA000298. In its summary judgment response, however, Orsa acknowledges that, “[a]fter the Contract award, ORSA had difficulty *securing* the Supérieur gloves.” Appellant’s Summary Judgment Response (Nov. 22, 2021) at 15 (emphasis added). Under the contract, Orsa was not supposed to have had to secure the gloves post-award – Orsa was supposed to have them “on hand.” Similarly, although Orsa complains in the prior paragraph that Ever Global, the manufacturer of the Supérieur gloves, shut its manufacturing facility down at some point because of COVID infections, the solicitation for this contract specifically stated that “[t]his is not a request for manufacturing but a request for quantity on hand to be delivered within 45 calendar days from order.” Exhibit 2 at VA000066. It is difficult to understand how Orsa can support an excusable delay claim with arguments which indicate that, at the outset of the contract, Orsa had misstated its compliance with contract requirements and was unprepared to meet them.

Another problem with Orsa’s excusable delay claim is that the majority of the difficulties about which Orsa complains occurred or began *before* Orsa submitted a quote for and was awarded the contract at issue here. As the VA establishes in attachments to its summary judgment briefing, the Top Glove closure of twenty-eight of its manufacturing facilities because of COVID-19 infections occurred in November 2020, two months before Orsa’s contract award, and the importation hold on Top Glove products because of forced labor concerns began even earlier (in July 2020). The “perfect storm” to which Orsa cites was well in play when it accepted this contract. In fact, the entire reason that the VA was seeking to purchase large quantities of nitrile gloves was *because of* the COVID-19 pandemic and this “perfect storm.” Then-existing difficulties in obtaining such gloves were clearly an impetus for the VA’s solicitation requirement that only offerors with nitrile gloves “on hand” and “in-stock” could bid on the contract.

Plainly, the issues about which Orsa complains were foreseeable when it entered into this contract. The phrases “beyond the control” and “beyond the reasonable control,” as used in standard FAR excusable delay provisions, have been interpreted as meaning that, “[i]f an event is . . . *foreseeable* at the time of contracting and the contractor enters into the contract without making provisions to protect itself, the event may be held not to be beyond its control because it assumed the risk.” John Cibinic, Jr., James A. Nagle, & Ralph C. Nash, Jr., *Administration of Government Contracts* 489 (5th ed. 2016). Excusable delay clauses implement the well-established common-law principle that, “if certain very unusual situations ar[i]se *after* the execution of the contract, such situations might not have been within the scope of the contract and that the seller should be excused as a matter of law.” *Independent Coal & Coke Co.*, GSBCA 428, 1960 WL 12102 (Jan. 27, 1960) (emphasis added). To the extent that the unusual situation begins *before* the contract is awarded, however, it is “not an unfor[e]seeable risk beyond [the contractor’s] fault and control” and

provides no excuse for delay. *Hitemp Wires Co.*, ASBCA 11638, 67-1 BCA ¶ 6252. *See, e.g., Allied Contractors, Inc.*, IBCA 265, 1962 BCA ¶ 3501 (A nationwide steel strike that began months before the contractor submitted its bid “cannot qualify as an unforeseeable cause of the delay [in obtaining steel], within the meaning of the contract provision.”); *Woodington Corp.*, ASBCA 37885, 91-1 BCA ¶ 23,579 (1990) (Because “appellant knew or should have known of” a strike that had been ongoing for two months prior to contract award, that strike could not be a basis for an excusable delay claim.); *Hitemp Wires* (“[T]he effect of military operations already in progress at the time of award, as here, will not excuse contract performance thereby made more onerous and costly. The escalation of the military effort in Viet Nam was well underway by June 1965, and its effect on the copper market was clear, continuing, and visible to appellant as a fabricator and supplier of copper products.”).

Orsa argues that, because the commercial items contract clause lists “epidemics” in its definition of “excusable delays,” it is automatically entitled to a time extension any time there is a pandemic. It also argues that the absence of the word “unforeseeable” in FAR 52.212-4(f), a word that is included in some other FAR excusable delay and default clauses, means that foreseeability was intentionally excluded from and is not a part of the excusability analysis under FAR 52.212-4. The Court of Appeals for the Federal Circuit essentially rejected those positions in *General Injectables & Vaccines*, 519 F.3d at 1364-65, holding that the drafters of FAR 52.212-4 intended to incorporate longstanding common-law rules that traditionally have applied to excusability analyses into FAR 52.212-4. As we held in *Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 16-1 BCA ¶ 36,373, the purpose of the excusability proviso in FAR 52.212-4, consistent with those longstanding common-law principles, is “to protect the contractor against the unexpected,” and that purpose “and its grammatical sense both militate against holding that the listed events are *always* to be regarded as unforeseeable, no matter what the attendant circumstances are.” *Asheville Jet Charter* (quoting *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123 (1943)) (emphasis added). Instead, for any type of claimed excusable delay, the contractor must establish that the events causing the delay were truly unforeseeable:

Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there could be no possible reason why the contractor, who of course

anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

Id. (quoting *Brooks-Calloway*, 318 U.S. at 123).

Elimination of the unforeseeability requirement from the excusable delay provision would severely limit the Government's ability to respond to a pandemic, as we can see from the facts of this case. Here, as a pandemic of great impact established itself across the world, the Government immediately needed to obtain safety equipment in an expedited manner to respond to that pandemic and to attempt to protect the health of staff, patients, and the public at its hospitals. The Government issued a solicitation designed to obtain that safety equipment as quickly as possible, attempting to guarantee fast delivery by limiting competition to contractors with those materials "on hand" and "in-stock," with delivery of that "on hand" safety equipment to be made within forty-five days after contract award. Orsa argues that such time-is-of-the-essence delivery requirements in contracts executed in response to a pandemic are essentially unenforceable. Under Orsa's theory, if there is a pandemic, the Government is simply obligated to wait to receive materials necessary to respond to the pandemic until the contractor is ready. How, without an unforeseeability element in the excusable delay analysis, can the Government ensure timely receipt of materials needed to address public safety during epidemics or products needed to respond to epidemics? It cannot. Accordingly, we reject Orsa's argument. Because the delays about which it complains were foreseeable at the time of contract award, they provide no basis for an excusable delay.

Finally, even if Orsa legitimately had been unaware when submitting its quote of the COVID-caused nitrile glove supply issues about which it now complains, Orsa would still be required to establish that the COVID-19 pandemic, rather than other issues under Orsa's control, actually caused its delays. *See, e.g., Yumang, O'Connell & Associates*, AGBCA 83-171-1, 84-2 BCA ¶ 17,313; *Montgovmry-Macri Co.*, IBCA 59, et al., 1963 BCA ¶ 3819. The mere existence of a pandemic does not mean that we simply assume, without evidence, that the pandemic actually affected the contractor's ability to perform. *See Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870 (stating that the listing in the clause of the types of available excusable delays "does not give the contractor carte blanche to rely upon such excuses" without evidence of impact). The contract at issue here required Orsa to have the Supérieur gloves that it contracted to provide "on hand," "in-stock," and "available for immediate delivery" to better guarantee that the VA would receive them on time. Under the contract, since Orsa was acting as a supplier for an OEM who supposedly had the gloves on hand, Orsa had to provide a letter from its OEM confirming Orsa's distributor status and maintain its authorized supplier status throughout the contract period. Soon after contract award, the OEM notified the VA that it had

rescinded its agreement with Orsa and that Orsa was no longer its distributor.³ In response to the VA's concerns about the termination of that relationship, Orsa told the VA that the REVS RX's "need for when funds transferred did not align to how we . . . needed the funds to transfer. There is too much risk with transferring funds prior to the goods arriving in the US." Exhibit 14 at VA000341. Orsa's financial disputes with its OEM are not the type of disputes that the "Excusable Delays" clause was intended to address.

Orsa's Request to Substitute Products. Orsa asserts that the VA's refusal to allow it to substitute a different nitrile glove from Cardinal Health, which it was looking into obtaining, for the Supérieur gloves invalidates the termination for cause. We disagree.

"The general rule is that the Government is entitled to strict compliance with its specifications and," absent a clause that states to the contrary, "is not obligated to accept substitutes." *Southern Systems, Inc.*, ASBCA 43797, et al., 00-1 BCA ¶ 30,762; see *American Electric Contracting Corp. v. United States*, 579 F.2d 602, 608 (Ct. Cl. 1978) ("It is settled that the Government is entitled to obtain precisely what it contracts for as long as it does not mislead the contractor."). The contract here does not contain the clause at FAR 52.236-5, Material and Workmanship, or a similar clause that might have, in appropriate circumstances, allowed for a post-award substitute of an equal product. Orsa was not entitled to substitute a different product for that designated in the contract.

That the VA was not obligated to accept a substitute is particularly appropriate in the circumstances here. Before contract award, the gloves that Orsa proposed went through a technical acceptability review process within the VA to determine whether the gloves would meet the VA's safety and quality needs. The solicitation also made clear that the VA had concerns about gray market products that might not provide the type of protections against COVID-19 and other diseases that the VA was hoping to obtain, and the VA was entitled to assurance that the products it was purchasing to protect against the spread of COVID-19 were of sufficient quality. Orsa had no contractual right to insist that the VA undertake

³ We note that the VA may have another potentially viable basis for its termination decision. A tribunal "may sustain a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason." *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994). The contract here required that Orsa "shall maintain its Authorized Distributor status of all manufacturers and distributors of supplies throughout the life of this agreement." Exhibit 2 at VA000066. Orsa failed to satisfy that obligation, as REVS RX revoked Orsa's distributor status as of February 13, 2021. Because we uphold the termination for cause for other reasons, we need not decide whether Orsa's loss of approved distributor status provides a sufficient independent termination ground.

additional post-award efforts to review additional products, potentially one after the other, for technical acceptability. *See American Electric Contracting*, 579 F.2d at 608 (finding no right to substitute a product that would have to go through technical review and qualification for one that had completed that process pre-award).

In addition, even though Orsa asserts that the VA should have allowed it to provide the Cardinal Health nitrile gloves as a substitute, nothing in the record establishes that Orsa actually could have obtained those gloves or presented them to the VA in the time frame required by the contract, if ever. The record indicates that, on February 16, 2021, Orsa told the VA that it was “*attempting* to provide an equivalent glove in the Flexal 200 that would make the 3/8 delivery date.” Exhibit 16 at VA000352 (emphasis added). Even though Orsa represented that “we have high confidence that we can obtain this through multiple channels if approved,” *id.*, Orsa did not have and never got those replacement gloves, making the work that the VA would have had to perform to review the Cardinal Health gloves for technical acceptability and quality potentially for nothing. On April 9, 2021, after the contract was terminated, Orsa told the VA not that it could provide the Cardinal Health gloves, but that it had yet another entirely different glove, INTCO Touch Flex nitrile gloves, to deliver, although those gloves would also require a technical acceptability and quality evaluation. Exhibit 23 at VA000392. The VA did not contract for repeated speculation about whether Orsa could obtain acceptable nitrile gloves for delivery and repeated technical evaluations of different potential nitrile gloves that might, or might not, become available.

This contract was written for a need during a pandemic. It required Orsa to have the contracted-for gloves “on hand” and “in-stock and available for immediate delivery” at contract award. Time was of the essence, and the VA was attempting to obtain workable nitrile gloves from multiple sources, awarding several contracts for nitrile gloves in addition to Orsa’s. Orsa’s representations that it had the gloves “on hand” turned out not to be accurate. Orsa had no right to require the VA to expend significant time trying to assist Orsa in finding an acceptable nitrile glove when the VA needed a contractor ready and able to comply with contract requirements. The VA’s termination for cause was justified.

Decision

For the foregoing reasons, the VA's motion for summary judgment is granted. Orsa's appeal is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge