



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 20, 2022

CBCA 7142

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.

This appeal is the second of two that appellant, ORSA Technologies, LLC (Orsa), filed with the Board involving contracts with the Department of Veterans Affairs (VA) for the delivery of nitrile gloves during the COVID-19 pandemic. The contracts were awarded by different VA offices, but the terms of both contracts were fairly similar. In both cases, which the Board docketed as CBCA 7141 and 7142, the VA contracting officers terminated Orsa's contracts for cause after Orsa did not deliver any gloves by the contractual deadlines. In both cases, Orsa challenges the terminations and blames marketplace forces caused by the COVID-19 pandemic for its inability to acquire the necessary nitrile gloves, even though both contracts required Orsa to have had the gloves "on hand" when it entered the contracts.

By decision dated January 18, 2022, we denied Orsa's challenge to the termination for cause in the first appeal, CBCA 7141, finding the VA's decision not to allow Orsa to provide a substitute glove for the brand required by the contract and to terminate the contract following a failure to deliver justifiable. *ORSA Technologies, LLC v. Department of Veterans Affairs*, CBCA 7141 (Jan. 18, 2022). This case differs from CBCA 7141 in that, here, the VA agreed to accept substitute gloves, twice agreed to extend Orsa's delivery deadline, and twice agreed to price increases. Nevertheless, Orsa ultimately never delivered any gloves. Orsa's arguments that the Board should view Orsa's failure to deliver after the VA agreed to the last delivery deadline extension as excusable are unfounded. Orsa was well aware of what it now calls a "perfect storm" of events that created glove supply difficulties when it agreed to that last revised deadline. We grant the VA's motion for summary judgment and deny Orsa's challenge to the termination for cause in this appeal.

Statement of Undisputed Facts

The Request for Quotes

On or about October 30, 2020, the VA's VISN17 Network Contracting Office in San Antonio, Texas, issued a request for quotation (RFQ) for a simplified acquisition of as many as fifty million "nitrile gloves per attached salient characteristics and price/delivery schedule," to be delivered to the Defense Logistics Agency (DLA) in Marengo, Indiana. Appeal File, Exhibit 1 at VA000004, VA000009.¹ That RFQ was, in many ways, very similar (although not an exact match) to the RFQ at issue in CBCA 7141 except that, where the RFQ in CBCA 7141 anticipated delivery of gloves within forty-five days after award, the RFQ in this case anticipated delivery within thirty days. *See id.* at VA000004 ("Delivery shall be 30 calendar days or sooner, after receipt of order."). Like the RFQ at issue in CBCA 7141, the RFQ here included the "Commercial Items (Oct 2018)" clause at Federal Acquisition Regulation (FAR) 52.212-4 (48 CFR 52.212-4 (2020)), *id.* at VA000012-17, and provided that the VA was not making "a request for manufacturing but [instead was making] a request for quantity on hand to be delivered within 30 calendar Days from order." *Id.* at VA000007; *see id.* at VA000061 (defining "on hand" as "in-stock and available for immediate delivery"). The RFQ further provided that "[c]ontracts that are awarded based on submitted quotes will have 30 calendar days 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 VA000007. In addition, the RFQ indicated that, if the supplier was not the original equipment manufacturer (OEM)

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

of the nitrile gloves, “the Authorized Supplier must provide an Authorized Distributor Letter from the OEM that is still in effect,” that the “Authorized Supplier shall maintain its Authorized Distributor status of all manufacturers and distributors of supplies throughout the life of this agreement,” and that “[f]ailure to do so will render the quote submitted as non-responsive and not eligible for award.” *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.” Exhibit 1 at VA000002, VA000007. Any gloves proposed would have to pass a technical capability review:

Technical Capability: VA evaluation team will review submitted [Personal Protective Equipment (PPE)] Source Questionnaire Nitrile Gloves and offered gloves must also meet or exceed the salient characteristics of the technical specifications found with Section B.2 Statement of Work.

Id. at VA000041. Nevertheless, the offeror did not have to propose to deliver all fifty million gloves requested in the RFQ – it could “submit a quote for all or some of the line items” and in quantities less or more than identified in each line item of the RFQ. *Id.* at VA000009.

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 1 at VA000020. 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 Quotes and the Contract Award

On November 6, 2020, Orsa submitted a quotation in response to the RFQ offering to supply the VA with 10,000,000 boxes of Supérieur Brand Nitrile Textured Exam Gloves, with each box containing 100 gloves, at a price of \$9 per box and a total cost of \$90,000,000. Exhibit 4 at VA000131, VA000174. In response to the 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 “10 million within 30 days of award”; that it was an “Authorized Dealer and Reseller” of the gloves; that none of its proposed products “are gray market or counterfeit”; and that the gloves would be shipped “factory direct” to the required VA location. *Id.* at VA000161.

It is unclear from the record exactly what happened after Orsa submitted that quote. For reasons unexplained in the documents in the record, there was no immediate contract award to Orsa in response to its November 6, 2020, quote. Although it seems clear that the October 30, 2020, RFQ provided the terms of the contract at issue in this appeal, the next activity identified in the record is an email dated December 22, 2020, from Orsa's Chief Executive Officer (CEO) to the VA contract specialist for this contract in which Orsa's CEO represented that Orsa had "87 million gloves ready to deliver within 14 days" at a cost of "\$13.00 a box." Exhibit 9 at VA000270. Subsequently, on December 30, 2021, the VA contract specialist sent Orsa's CEO an email indicating that "[a]ttached is the resultant delivery order from your quote dated on 12/28/2020." Exhibit 10 at VA000312. Orsa's December 28, 2020, quote is not in the record, but the record contains an executed copy of purchase order no. 701-C-10042 under contract no. 36-C-25721-P-0283 (the contract), dated December 30, 2020, which called for Orsa to deliver 538,390 boxes of Supérieur nitrile gloves no later than January 26, 2021, at a cost of \$13 per box (100 gloves per box) and a total price of \$6,999,070. Exhibit 11 at VA000420-25. Repeating language from the original 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 30 Days from order" and that "[c]ontracts that are awarded based on submitted quotes will have 30 calendar days to deliver the awarded quantities, or the contract will be terminated for cause." *Id.* at VA000423. The contract also included the clause at VAAR 852.212-72, "Gray Market and Counterfeit Items (Mar 2020)," and the October 2018 commercial items clause at FAR 52.212-4. *Id.* at VA000427, VA000441.

Performance Under the Contract

Orsa's CEO sent an email to the VA contract specialist on January 7, 2021, confirming that "delivery is still on schedule to deliver Superieur Gloves to DLA Marengo IN" by January 26, 2021. Exhibit 12 at VA000445. On January 15, 2021, however, Orsa's CEO emailed that, "[w]ith all Importers buying advanced freight ahead of Chinese New Year (Chinese Ports Shut down for 2 – 3 Weeks), it is creating some addition[al] freight expense and or delays in delivery time line." Exhibit 13 at VA000448. Orsa offered to deliver the gloves no later than February 5, 2021 (a delay beyond the original January 26, 2021, delivery deadline), if the VA would pay an additional \$1.50 per box to cover the cost of air freight. *Id.* Orsa indicated that, absent the requested air freight supplement, it would need an extension until February 22, 2021, to deliver the gloves. In need of the gloves, the VA took the first option, executing bilateral modification P00001 on January 16, 2021, through which the parties agreed to reduce the number of gloves required, add the extra \$1.50-per-box air freight cost, and extended the delivery date to February 5, 2021. Exhibit 14 at VA000455.

Orsa did not deliver any nitrile gloves by the revised February 5, 2021, delivery date. Instead, Orsa sent the VA a letter that day explaining why it was not yet able to deliver any nitrile gloves:

It is with grave embarrassment and disappointment that we inform all interested parties of our inability to fulfill this contract.

From the outset, we have used multiple brokers with known suppliers for the Supérieur glove. The global pandemic has created sustained pressure on suppliers, shippers, 3rd party inspection (SGS), raw material costs and their availability which has been further complicated by outbreaks leading to shutdowns in factories and even entire provinces where the goods are produced.

All of our Supérieur suppliers have been and continue to be negatively impacted. We were advised that the Ever-Global plant was shut down temporarily due to an outbreak and has just recently come back online. Much of the stock that was available prior to the shutdown (ready stock country of origin) has been taken up or is at a much higher price point than could be supported. Throughout this process we've cultivated new suppliers for this particular glove only to be met with similar delivery issues. As the suppliers have failed, we've attempted to secure alternate glove options and sources and have been successful in locating sources of ready stock only to be hindered by the availability of 3rd party SGS scheduling (10-14 days) as well as airfreight availability and sometimes even cost as ready stock has increased significantly in the last 2 months and most severely in the last 30 days.

Exhibit 15 at VA000461. Nevertheless, Orsa advised the VA that “[w]e have approximately 233,000 boxes of nitrile gloves [that] meet all the requirements ready to ship” and “request 2 weeks extension to complete . . . the delivery of inventory.” *Id.* at VA000460.

Subsequently, on February 10, 2021, Orsa sent the VA an email proposing that Orsa be allowed to substitute Cardinal Health Flexal 200 gloves (the Cardinal Health gloves) for the Supérieur gloves identified in the contract, as “[t]here is [sic] 1 Million Boxes [of the Cardinal Health gloves] in the US and we can deliver within 2 weeks.” Exhibit 17 at VA000472-73. The VA’s contract specialist responded the same day, asking, “If the gloves are on US soil, can they be delivered earlier than 2 weeks?” *Id.* at VA000472. Orsa’s response was “most likely just add a buffer.” *Id.* The VA contract specialist also requested a sample glove to be evaluated for technical acceptability. *Id.*

On February 12, 2021, Orsa's CEO notified the VA contract specialist that Orsa has "an opportunity to provide the full 478,000 in exact sizing of the Cardinal Flexal Gloves next week" and that "[t]he total amount of gloves available is 5 Million Boxes." Exhibit 18 at VA000484. Orsa asked that the VA "send a representative" to Los Angeles for a joint inspection "to ensure that the gloves we are requesting to exchange for the Superieur Gloves proposed meet 100% of the government requirements before we delivery [sic] these gloves to the VA." *Id.* It does not appear from the record that the VA sent a representative, but, on February 16, 2021, Orsa's CEO told the VA that Orsa was "awaiting an inspection of" the Cardinal Health gloves "to ensure they meet the requirement outlined in the awarded contract." Exhibit 33 at 1. He reported that Orsa "[c]oncurrently" was "working deals" with various suppliers in Houston, New Orleans, and Los Angeles to obtain nitrile gloves that it could deliver to the VA. Exhibit 19 at VA000485.

On February 18, 2021, Orsa's CEO emailed the VA contract specialist that Orsa had "secured, inspected and [is] arranging financing and delivery of Chemo rated Nitrile gloves (Cardinal Health Flexal 200)" and that "[w]e have access to 25MM boxes of Cardinal Health Flexal 200's on the ground in the US." Exhibit 21 at VA000503. Orsa reported that "we are ready to start delivery next week with the primary focus delivering the following to Marengo IN on or before 26 February 2021." *Id.* On February 19, 2021, Orsa's CEO emailed the VA contract specialist that the per-glove price would have to increase to \$0.15 per glove or \$15 per box of 100. Exhibit 21 at VA000505.

On February 19, 2021, the VA issued and Orsa executed modification P00002 to the contract, changing the nitrile gloves that Orsa was to deliver from Supérieur gloves to Cardinal Health gloves, reducing the quantity of gloves that Orsa would be delivering, increasing the pre-glove unit price from \$0.13 to \$0.15, increasing the total contract price from \$6,936,655 to \$6,960,000, and establishing a new delivery date of February 26, 2021:

Pursuant to FAR 52.212-4(c) Contract Terms and Conditions – Commercial Items – Changes. [Contract Line Item Number (CLIN)] quantities, delivery date will be 26 February 2021 and a price increase of \$.13 to \$.15 cents per glove due to glove supply shortage.

CLIN 1 SMALL NITRILE GLOVES FROM 80,000 BOXES (1 BOX = 100 EA) TO 34,000 BOXES (1 BOX = 200 EA).

CLIN 2 MEDIUM NITRILE GLOVES FROM 160,000 BOXES (1 BOX = 100 EA) TO 82,000 BOXES (1 BOX = 100 EA).

CLIN 3 LARGE NITRILE GLOVES FROM 160,000 BOXES (1 BOX = 100 EA) TO 82,000 BOXES (1 BOX = 100 EA).

CLIN 4 EXTRA LARGE NITRILE GLOVES FROM 80,000 BOXES (1 BOX = 100 EA) TO 34,000 BOXES (1 BOX = 200 EA).

Exhibit 22 at VA000539; *see id.* at VA000540-41 (reflecting change to “Cardinal Health Flexal” gloves with a delivery date of February 26, 2021).

Yet, questions about whether the gloves would be delivered and the provenance of the gloves remained. On February 24, 2021, the VA contract specialist emailed Orsa’s CEO to confirm a conversation earlier that day:

By 8 am Central Time on 2/25, you must provide a signed letter showing where these gloves come from and that you are an authorized distributor. Even if these gloves are not Cardinal, we want evidence of where they came from and that you are authorized to sell.

By 8 am Central Time on 2/25, he must provide an address and time that we can have a third party inspection team examine the gloves on Friday, 2/26.

If all requested information is not submitted by 8AM CST on 2/25/2021, the termination for cause process will begin due to the inability to fulfill terms and conditions of the contract.

Exhibit 23 at VA000543.

On February 25, 2021, Orsa’s CEO notified the VA contract specialist that it was having problems in procuring the Cardinal Health gloves but indicated that it had a lead on an offering of Kimberly Clark KC500 nitrile gloves that Orsa could arrange to deliver. Exhibit 24 at VA000561. The CEO then notified the VA contract specialist of additional leads on Hartalega GloveOn Palama 200 nitrile gloves and Hi-Care Thai nitrile gloves. *Id.* at VA000564-66, VA000591-94. That same day, Orsa’s CEO notified the VA contract specialist that Orsa had “located and arranged an in person inspection of 11,448,800 individual Nitrile Gloves ready for sale and delivery from Myrtle Beach SC” that could “be inspected” at a specific location in Myrtle Beach, with the identified gloves being a mix manufactured by six different companies: Med Pride, Palm Care, Aurelia Transform, Brightway, Procure, and Safeko. Exhibit 26 at VA000619.

The contractual deadline of February 26, 2021, for delivery of the Cardinal Health gloves passed without any delivery.

Subsequently, on March 2, 2021, Orsa emailed the VA contract specialist to let him know that Orsa had forwarded supporting documents for yet another brand of gloves,

Medical Supply Company of Switzerland (MSCS) nitrile gloves from GAIA Corporation (Thailand) Limited, that Orsa indicated it might be able to provide and that it had attempted to deliver a sample glove for testing. Exhibit 36 at 1. The VA rejected the submission as unacceptable. Complaint ¶ 27; Answer ¶ 27. In its summary judgment response, Orsa asserts that the VA's rejection was unreasonable, Appellant's Summary Judgment Response at 17, but the record contains no evidence about the VA's rejection of the substitution request or its reasonableness.

The Termination Decision and Orsa's Appeal

On March 16, 2021, the VA contracting officer issued a final decision terminating Orsa's contract for cause based upon Orsa's "not providing an authorized distributor letter and an address and time so we can have a third-party inspection team examine the gloves" and Orsa's failure to deliver the Cardinal Health gloves by the due date of February 26, 2021. Exhibit 27 at VA000630. 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 was "100% prepared to deliver INTCO Touch Flex Nitrile Gloves" – yet another nitrile glove brand – "immediately from current inventory [that] is in the US (Orange County CA)." Exhibit 29 at VA000635. The record does not identify any response from the VA.

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. The VA subsequently filed its motion for summary judgment.

Discussion

The Validity of the VA's Termination Decision

Pursuant to FAR 52.212-4(m), the commercial items termination for cause provision included in Orsa's contract, "[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."

If a contractor challenges a termination for cause 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.” *ORSA Technologies*, CBCA 7141, slip op. at 9 (quoting *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,340). “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.” *Id.* (citing *1-A Construction & Fire v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913).

In this case, the VA has satisfied its burden of showing that the termination for cause was valid. Under the contract, as modified by modification P00002, Orsa was required to deliver Cardinal Health nitrile gloves by February 26, 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 February 26, 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. The VA did not terminate the contract for cause until March 16, 2021, after Orsa missed the February 26, 2021, delivery deadline to which it had agreed in modification P00002. In a commercial items contract, no cure notice is required “for late delivery.” FAR 12.403(c). Although Orsa argues that a cure notice was required here because there are “broader issues at play” during a pandemic, Appellant’s Summary Judgment Response at 16, whether a cure notice is necessary as a prerequisite to termination is governed by the language of the termination clause itself. The language of Orsa’s contract does not impose a requirement for a cure notice prior to termination for late delivery, even if there is a pandemic. For the same reasons that we explained in *ORSA Technologies*, CBCA 7141, slip op. at 9, we reject Orsa’s argument that a cure notice was required in the circumstances here.

Excusable Delays. Orsa argues that its inability to deliver the Cardinal Health nitrile gloves by February 26, 2021, was excused because of difficulties resulting from COVID-19. Orsa’s argument borders on the frivolous. Orsa signed a contract modification on February 19, 2021, agreeing to deliver the required nitrile gloves within the next seven days (that is, by February 26). Orsa did not deliver. “It is well established a contractor is responsible for ‘ensuring that the labor, materials, and equipment necessary for timely delivery are available to it.’” *Mule Engineering, Inc.*, ASBCA 60854, 17-1 BCA ¶ 36,728

(quoting *Sack Sinha & Associates, Inc.*, ASBCA 46916, 96-2 BCA ¶ 28,346). “If a contractor fails to so ensure, it must suffer any consequences arising from that failure.” *Id.* (quoting *Sack Sinha*).

Orsa devotes the bulk of its summary judgment briefing to arguing that the VA should have known from Orsa’s original quote for this contract that Orsa did not actually have nitrile gloves “on hand” (despite the RFQ requirement for “on hand” gloves) when it obtained the contract and that a “perfect storm” of problems resulting from the COVID-19 pandemic excuse its failure to locate and procure acceptable nitrile gloves in a timely manner. Yet, what the Government knew about Orsa’s inventory at the time of the original contract award is irrelevant to the validity of the VA’s termination decision. Orsa signed bilateral contract modification P00002 on February 19, 2021, agreeing to a new delivery deadline of February 26, 2021. “It is well established that the ‘action of the parties in agreeing upon a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement.’” *Sack Sinha* (quoting *RFI Shield-Rooms*, ASBCA 17374, 77-2 BCA ¶ 12,714). “In establishing a new delivery date, the parties agree to ‘let bygones be bygones’ and ‘[a]ny delinquencies on the part of either the contractor or the Government [a]re ‘washed out.’” *Environmental Devices, Inc.*, ASBCA 37430, et al., 93-3 BCA ¶ 26,138 (quoting *Winder Aircraft Corp.*, ASBCA 4364, et al., 58-2 BCA ¶ 2044). That is, “[i]n agreeing to a new delivery schedule, a contractor erases the ability to raise pre-existing causes of delay.” *Bulova Technologies Ordnance Systems LLC*, ASBCA 57406, 14-1 BCA ¶ 35,521; see *Lit-Ning Products Co.*, GSBCA 3894, 74-2 BCA ¶ 10,816 (“The effect of the extension of the delivery schedule made by Modification No. 2 precludes considering this [pre-modification] delay since the presumption is that all delays and their causes were considered when this new delivery schedule was agreed upon by both parties.”). “Where the parties have executed a contract modification containing a new delivery date, as here, the contractor must perform by the new date unless delayed by an excusable cause arising *after* the modification.” *Environmental Devices* (emphasis added).

Orsa has identified no new basis for delay that occurred after it executed modification P000002 on February 19, 2021, that could be considered excusable. In fact, most of the events about which Orsa complains, including import limitations on gloves from a large nitrile glove manufacturer in July 2020 and the temporary COVID-caused shutdown of many manufacturing facilities for that same glove manufacturer in November 2020, occurred before the VA even awarded the contract at issue here. Even if some described events occurred after the original December 30, 2020, contract award date, the only events that could be of relevance to Orsa’s challenge to the termination decision are those that occurred after the February 19, 2021, date upon which the parties mutually established a new delivery deadline. Orsa has identified nothing new that happened between February 19 and the February 26 due date.

Orsa cites to the COVID-19 pandemic as the basis of its excusable delay claim. It argues that it does not matter whether it could have or should have anticipated its post-modification delays because, since the “Excusable Delays” provision in FAR 52.212-4(f) expressly mentions “epidemics,” it does not matter whether causes of delay were foreseeable when it executed the contract modification. We rejected that argument in *ORSA Technologies*, CBCA 7141, slip op. at 11-13, explaining there that the “Excusable Delays” clause only excuses delays that, as expressly stated in the clause, are “beyond the reasonable control” of the contractor. That limitation precludes excusing foreseeable delays. *Id.* at 11-12. Because the causes of delay that Orsa cites in this case were foreseeable when it executed modification P000002, Orsa has identified no viable excuse for its contract delivery failure. *See Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 16-1 BCA ¶ 36,373 (finding that the purpose of the excusability proviso in FAR 52.212-4(f) is “to protect the contractor against the unexpected” and that the events listed in the proviso are not “always to be regarded as unforeseeable, no matter what the attendant circumstances are” (quoting *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123 (1943))).

Orsa also offers a declaration from its CEO in which he attests that the reason for Orsa’s inability to deliver the Cardinal Health gloves after executing modification P00002 was “due to events beyond its control [resulting from] unforeseen impacts [from] COVID that continued to get worse” and asserts that “[t]he available supply of gloves dropped precipitously” after it executed the modification “and ORSA had difficulty securing the required supply.” Declaration of Jonathan Woodruff (Nov. 22, 2021) ¶ 19. Orsa’s CEO also attests that, had the VA extended its delivery deadline rather than terminating the contract, Orsa “would have been able to locate an acceptable source of the gloves to satisfy the VA’s needs” and that, had the VA allowed additional glove substitutions, Orsa “could have secured multiple alternative options.” *Id.* ¶¶ 21–22. The declaration says nothing about why, when it executed modification P00002, Orsa should not have anticipated problems in acquiring the required nitrile gloves (gloves to which Orsa had previously represented it already had access) and provides no basis for the affiant’s confidence that Orsa “would have” obtained acceptable nitrile gloves in the future. A declaration based upon such conjecture and speculation provides no basis for defeating a motion for summary judgment. *See Applied Cos. v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998) (“It is well settled that ‘a conclusory statement on the ultimate issue does not create a *genuine* issue of fact.’” (quoting *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed. Cir. 1990))). The CEO’s generalized reasons for post-modification delays conflict with the clear evidence of record showing that Orsa was well aware when it executed modification P00002 of the delays and difficulties in obtaining nitrile gloves that had been occurring for months. Given Orsa’s repeated history of representing that it had nitrile gloves in hand and only later telling the VA that it did not, the speculation in the declaration that Orsa could have and would have

delivered gloves with further extensions and substitutions is simply not credible. The declaration provides no basis for overcoming the VA's entitlement to summary judgment.

Orsa also asks that we postpone any decision on the VA's summary judgment motion in favor of a hearing at which it intends to "call an expert witness who will testify that the 'perfect storm' [affecting the] nitrile glove market was not foreseeable at the time of contract award and that this prevented [Orsa] from delivering the gloves by the contract delivery date as revised." Appellant's Summary Judgment Response at 13. If Orsa had evidence to produce in response to the VA's summary judgment motion, it should have included it in its response brief. *ORSA Technologies*, CBCA 7141, slip op. at 8 (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)). Further, evidence of whatever "perfect storm" existed "at the time of contract award" is irrelevant to this case given that, on February 19, 2021, Orsa executed modification P00002, agreeing to deliver nitrile gloves by February 26, 2021. As discussed above, that bilateral modification rendered all earlier delays and the reasons for those delays immaterial to this case. The only relevant excusable delay analysis relates to unanticipated and unforeseeable delays that developed after February 19, 2021, the date upon which the parties agreed to a new delivery schedule. *Sack Sinha; Environmental Devices*. Orsa has identified no unforeseeable delays that occurred between February 19, 2021, and the February 26, 2021, delivery deadline.

The VA's Refusal to Approve Another Glove Substitution. Orsa complains that, after Orsa failed to deliver the Cardinal Health gloves that the VA had agreed to allow Orsa to substitute for the Supérieur gloves, the VA inexcusably failed to give Orsa yet *another* opportunity – after Orsa failed to meet the first three contractual delivery deadlines – to deliver a different brand of nitrile gloves than the one required by modification P00002. Having failed to deliver the Cardinal Health gloves by the February 26, 2021, deadline, Orsa sent the VA an email on March 2, 2021, stating that it had access to MSCS nitrile gloves by GAIA Corporation (Limited) Thailand that it thought it could deliver. Exhibit 36 at 1. The VA rejected the proposed substitute as unacceptable, and Orsa argues (without any supporting evidence) that the replacement gloves met the VA's needs and that the rejection was unreasonable. Representations of counsel without any supporting evidence, like those in Orsa's summary judgment response, are insufficient to create a genuine issue of material fact sufficient to defeat the Government's summary judgment motion. *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed. Cir. 1984).

In any event, the VA had no obligation to accept Orsa's post-breach substitution request. See *Southern Systems, Inc.*, ASBCA 43797, et al., 00-1 BCA ¶ 30,762 ("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."). Orsa had committed itself by contract (as amended by modification P00002) to deliver Cardinal Health gloves to the VA by February 26, 2021. By failing to deliver by that deadline, Orsa breached

its obligations under the contract. For the reasons that we explained in *ORSA Technologies*, CBCA 7141, slip op. at 14-15, the VA had no obligation to accept Orsa's requests to substitute unapproved nitrile gloves for those that Orsa had committed itself through contract to deliver. In fact, in light of the history of Orsa's repeated misrepresentations about its ability to deliver "on hand" nitrile gloves under this contract, delivery delays and extensions, and contract price increases that the VA had been forced to accept in an effort to get gloves that it desperately needed, the VA's refusal to accept yet another substitution request and another delay was more than 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