UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 27, 2014

CBCA 2579

U.S.I.A. UNDERWATER EQUIPMENT SALES CORPORATION,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Joseph G. Billings of Miles & Stockbridge, P.C., Baltimore, MD, counsel for Appellant.

Wilbert Jones, Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **DRUMMOND** and **SHERIDAN**.

SOMERS, Board Judge.

The United States Coast Guard (USCG, Coast Guard, or respondent) placed an order against the Federal Supply Schedule contract of U.S.I.A. Underwater Equipment Sales Corporation (U.S.I.A. or appellant) for 777 dry suits. According to the Coast Guard, the suits leaked during testing. The Coast Guard terminated the contract for cause. Appellant appealed the termination. The Coast Guard claims entitlement to reprocurement costs. After a hearing on the merits and after reviewing the records, as well as extensive prehearing and posthearing submissions, we find that the evidence supports the Coast Guard's decision to terminate the contract for cause and deny the appeal. However, because the Coast Guard failed to properly assert its claim for excess reprocurement costs, we do not possess jurisdiction to entertain that claim.

Findings of Facts

On August 25, 2010, the contracting officer for the Coast Guard issued request for quotations (RFQ) no. HSCG23-10-Q-QW2859. The RFQ invited companies to submit a quote for 522 boat crew dry suits on a firm, fixed-price basis, in accordance with the company's GSA Schedule 84 contract. The single page of specifications attached to the RFQ identified three model numbers that would be acceptable for submission. This included U.S.I.A.'s Model CG/8880.

U.S.I.A. had two active contracts, the GSA Schedule 84 contract (GSA schedule contract) and a Coast Guard indefinite delivery indefinite quantity (IDIQ) contract (the IDIQ contract). U.S.I.A. submitted a price quote for dry suits, using the U.S.I.A. model number for its IDIQ contract, rather than the model listed on the GSA schedule contract. The Coast Guard contacted U.S.I.A. about the model numbers, and U.S.I.A. confirmed that the dry suit on the GSA schedule contract was the same as the one on the IDIQ contract. Although the GSA schedule contract quoted a price of $849 per dry suit, U.S.I.A. based its proposal using the IDIQ contract price of $599 per dry suit. The Coast Guard and U.S.I.A. agreed that U.S.I.A. would deliver these dry suits under the same terms and per unit prices provided for in its IDIQ contract.

On September 25, 2010, the Coast Guard placed an order against U.S.I.A.'s GSA schedule contract for 777 dry suits, valued at $465,423, to be delivered within seventy-five days. The size of the order exceeded the maximum order on the GSA schedule contract, which was $50,000. Nonetheless, U.S.I.A. accepted the order and started performance.

The order signed by the contracting officer contained different terms from those set forth in the RFQ. The order included an additional paragraph in section E, entitled "E2. Inspection and Acceptance Requirements." Paragraph E2 required, among other things, that the dry suits be submitted to an immersion test, in accordance with the Coast Guard's maintenance procedure, in order to check for leaks. The Coast Guard added this provision unilaterally.

U.S.I.A.'s GSA contract, under which the order was issued, includes Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions – Commercial Items, which provides:

> Inspection/Acceptance: The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance.

This clause does not identify specific testing procedures.

U.S.I.A. shipped one hundred suits to the USCG Training Center in Yorktown, Virginia, on November 10, 2010. Upon inspection, the Coast Guard determined that the neck and wrist seals of the suits did not comply with the specifications. Consequently, on November 19, 2010, the Coast Guard issued a cure notice notifying U.S.I.A. that the suits had failed inspection.

The parties discussed the problem and agreed that U.S.I.A. could use different material for the neck and wrist seals. On December 12, 2010, the parties executed a bilateral modification to the delivery order. The modification stated that "[t]he purpose of this modification is to change the delivery date, change the specification, and add a first article requirement."[1] The modification detailed the changes to the specifications, increased the price, and extended the delivery date to 150 days after award, February 22, 2011.

On December 29, 2010, U.S.I.A. shipped 120 dry suits with the newly configured neck and wrist seals to the Yorktown Training Center, where they were received by the Coast Guard on January 7, 2011. The Coast Guard tested three of the suits. It found that all three suits leaked at the relief zipper. On January 12, 2011, the contracting officer told U.S.I.A. not to send any more suits until the parties had a chance to discuss the matter.

The Coast Guard tested more of the modified dry suits on January 18 and 24, 2011. On January 18, the Coast Guard tested sixty-six of the 120 suits and determined that all of the suits leaked. On January 24, testing revealed that another thirty-nine of the 120 suits leaked. The Coast Guard videotaped both testing sessions.

Meanwhile, on January 19, 2011, U.S.I.A. sent one hundred more dry suits to USCG, together with an invoice for $59,900. The contracting officer contacted U.S.I.A. by e-mail on January 27, 2011, advising that the Coast Guard had received the second shipment of one hundred suits. Because so many of the first shipment of dry suits had failed testing, the contracting officer informed U.S.I.A. that the Government would not accept any more shipments until the issue could be resolved.

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[1] The modification did not provide any details about what was intended by the "first article requirement," and, in fact, testimony at the hearing confirms that neither the Coast Guard nor U.S.I.A. considered a "first article requirement" to have been added to the contract requirements.

That same day, U.S.I.A. questioned whether the tests had been properly conducted and requested a conference call to discuss the problem. The contracting officer promised that a conference call would be scheduled early the following week. Desiring to deal with the issue more immediately, U.S.I.A.'s Jerry Langan, U.S.I.A.'s Vice President of Underwater Equipment Sales, responded to the contracting officer as follows: "All I need is a couple of minutes with someone today. This is a critical issue for our company."

The contracting officer did not contact U.S.I.A. until February 1, 2011, when the contracting officer issued a second cure notice. Meanwhile, the Coast Guard ordered 149 dry suits from another contractor for delivery to the Yorktown Training Center. The Coast Guard did not tell U.S.I.A. about this purchase. In the February 1, 2011, cure notice, the contracting officer advised U.S.I.A. that the Government considered U.S.I.A.'s failure to supply acceptable dry suits to be a condition endangering performance of the delivery order. The contracting officer warned U.S.I.A. that it would terminate the order for cause under the terms and conditions of FAR 52.212-4(m)[2] unless the condition was cured within fifteen days after receipt of the notice. U.S.I.A. immediately contacted the contracting officer, stating that U.S.I.A. is "still waiting for a response on the conference call. We are extremely concerned with the problems and really would like to know what the issues are."

On February 2, 2011, the contracting officer responded that "[t]he results of the tests were attached to the cure notice. We can discuss this matter, but you're still obligated to cure this [within] the time frame of the notice." U.S.I.A. then told the Coast Guard that U.S.I.A. had "issued a call tag to have the suits picked up at the delivery site. We will examine the suits to see what exactly is the problem." When U.S.I.A. had not received the suits back, on

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[2] FAR clause 52.212-4(m) states:

> The 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 or conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated the contract for default, such termination shall be deemed a termination for convenience.

February 11, 2011, U.S.I.A. stated that "[u]nfortunately we have yet to receive the suits back from Yorktown to test them. Which is an issue seeing as how we are required to send back the cure notice within the 15 days." U.S.I.A. finally received the suits on February 14, 2011.

U.S.I.A. reinforced the suits in a further attempt to eliminate any leakage problems. It proposed sending five more suits to the Coast Guard for additional testing before sending the bulk of the order, and requested to "have a U.S.I.A. representative come out to Yorktown and assist and observe the testing of these suits after they have been received by the US Coast Guard. We feel this is extremely important to make sure that everyone is comfortable and confident in our suits." It also offered to pay for the Coast Guard's technical representative to come to its manufacturing facilities to observe U.S.I.A.'s manufacturing and testing procedures. On February 16, 2011, the contracting officer responded to U.S.I.A. by advising that the Coast Guard's goal at that point was to arrange for an independent party to test a sample of both sets of suits – meaning the modified suits from the January 19, 2011, shipment and the suits that were reinforced following the February 1, 2011, cure notice.

Over the course of the next few months, U.S.I.A. repeatedly requested that the Government return the one hundred suits that had been sent to the Coast Guard on January 19, 2011. During one e-mail exchange on March 31, 2011, U.S.I.A. stated that it had 700 "nearly completed" suits on its production floor, had spent "a tremendous amount of money" on the order, was experiencing "severe financial strain," and was concerned that the Coast Guard had neither returned the one hundred suits for evaluation nor paid the $59,900 invoice for those suits. U.S.I.A. complained that it had not heard from the Coast Guard in nearly two months. According to U.S.I.A., the Coast Guard did not respond to its inquiries. During this time, on April 20, 2011, the Coast Guard ordered 333 dry suits from another manufacturer for delivery to Yorktown Training Center, again without U.S.I.A.'s knowledge.

On May 26, 2011, the Coast Guard notified U.S.I.A. that it had made arrangements for the Navy to test the suits. The Coast Guard requested that U.S.I.A. send twenty-five dry suits to the Navy for testing. The parties sent e-mail messages back and forth. Ultimately, U.S.I.A. agreed to send suits to the Navy facility.

Kimberly Allen Johns, President of U.S.I.A., testified that, prior to delivering the twenty-five reinforced dry suits to the Navy, U.S.I.A. conducted an immersion leak test on each. Following inspection, U.S.I.A. determined that none of the dry suits leaked. U.S.I.A. did not videotape this testing.

On July 5, 2011, the Navy received the twenty-five reinforced dry suits from U.S.I.A. Later that month, on July 25, 2011, the Navy tested a total of twenty U.S.I.A. suits: ten suits

from the one hundred shipped to the Coast Guard on January 19, 2011, and ten of the twenty-five reinforced suits sent directly to the Navy.

The Navy sought to model its testing procedures on those employed by the Coast Guard. To that end, the Coast Guard provided the Navy with the testing procedures set forth in paragraph E2 of the delivery order. The Coast Guard also provided the Navy with the results from its January 18 and January 24 tests.

During the July 25, 2011, testing performed by the Navy, the water temperature of the testing pool was 80 degrees Fahrenheit, and the ambient air temperature was 78-80 degrees Fahrenheit. The Navy test participants wore thermal undergarments consisting of 65% cotton and 35% polyester. According to the August 8, 2011, report of the testing results, the Navy reported that nineteen out of the twenty suits leaked from the waist down. The report also stated that 100% of the suits experienced some other level of leakage.

The Navy videotaped the majority of the testing performed on July 25, 2011. The videotapes of this testing (as well as the other videotapes) were presented during the course of the hearing.[3] The video documentation of the testing is neither complete nor edited in a way that makes clear exactly which suit (meaning pre-cure or post-cure) is being tested. Despite this, the video documentation of the Navy testing reveals that some of the undergarments appear to be wet, at least to some extent.

The Coast Guard issued a show cause notice to U.S.I.A., dated September 1, 2011, and provided U.S.I.A. with a copy of the Navy's report containing the testing results. The notice gave U.S.I.A. ten days to show cause as to why its contract should not be terminated.

On September 7, 2011, U.S.I.A. responded, pointing out that the value of the order exceeded the maximum order limitation under U.S.I.A.'s GSA schedule contract, and indicated that U.S.I.A. had decided to decline the task order. U.S.I.A. noted that the Coast Guard had failed to pay for any of the one hundred suits delivered on January 27, 2011. In a separate letter, U.S.I.A. said that it no longer wished to work with the Coast Guard on the order, stating:

> The inability of the United States Coast Guard to cooperate and communicate with U.S.I.A. in opening a meaningful dialog, not returning phone calls, not answering e-mails, not involving us in the process in a timely manner has led

[3] The videotapes are in evidence and have been reviewed completely in the course of the Board's review of the record.

> us to this point. [U.S.I.A.'s representative is] happy to discuss this matter with any authorized Coast Guard representative at any time.

By letter dated September 16, 2011, the Coast Guard terminated the order for cause in accordance with FAR clause 52.212-4(m). The termination letter stated:

> Consistently between November 2010 and July 2011, U.S.I.A. supplied faulty products that did not meet the requirement set forth in the task order. As detailed in the testing results . . . the suits repeatedly failed testing and inspection procedures with such problems as leakage from the seams and tearing of the seals. These products are not compliant with the task order and suitable for use by USCG personnel.

The termination letter states that the Coast Guard "intends to seek damages in the amount of reprocurement costs." The Coast Guard returned eighty-eight of the one hundred suits to U.S.I.A. on September 19, 2011. The Coast Guard did not pay for any of the suits.

According to the Coast Guard, it purchased 423 dry suits as replacement suits from another manufacturer at a cost of $380,172.10 to cover suits under the U.S.I.A. order before it terminated the contract. It later purchased 660 suits from a third manufacturer, 354 allegedly purchased as replacement suits at a cost of $247,584. In sum, the Coast Guard alleges it purchased 777 suits at a total cost of $627,756.10 to replace the suits originally ordered from U.S.I.A.

In its prayer for relief, the Coast Guard requested payment of reprocurement costs of no less than $627,756.10. The Coast Guard has amended the request for repayment of reprocurement costs in its post-hearing brief, and now seeks excess reprocurement costs in the amount of $100,663.40.

At the hearing, both parties presented witness testimony. Among the witnesses was Randolph Lawson, a special projects officer with the Navy Experimental Diving Unit. Mr. Lawson led the testing of the dry suits conducted at the Navy facility. This witness described the testing process. The subjects wore regular cotton long johns. Each test subject examined the suit to ensure that the wrist and neck dams were intact. The subject waxed the zipper and sprinkled talcum powder in the wrist, hands, and neck dam. The subject then donned the suit and went into the water in the pool, keeping his or her hands and neck out of the water. After fifteen minutes, the subject exited the water.

Mr. Lawson testified that he videotaped the subjects as they doffed the suits. Mr. Lawson and his team determined that 100% of the suits had some form of leakage.

Mr. Lawson acknowledged that he did not remember whether he was aware at the time which of the suits were post-cure and which were pre-cure. Both parties used Mr. Lawson's videotape of the testing and asked him questions about the testing as the tape played in the courtroom. Some of the wet spots described by Mr. Lawson could be discerned visually from the videotape. Others could not. Nor could one easily discern simply from looking at or listening to the videotape whether the damp spots were from the pool or from sweat from the individual. Mr. Lawson did testify, however, that the wet spots that he observed were more consistent with leaks than sweat.

As noted previously, Mr. Johns testified about the testing procedure used by U.S.I.A. Mr. Johns explained the importance of wearing proper undergarments and of conducting the testing at lower temperatures. Mr. Johns testified that none of the dry suits leaked during his testing. Mr. Johns stated that the videotaped testing revealed that the Navy had used improper testing procedures by failing to properly dust talcum power on the seals, wearing cotton undergarments, and wearing wristwatches while donning the suits.

After the hearing, the parties filed post-hearing briefs and reply briefs.

Discussion

Termination for Cause

The question presented in this appeal is whether the Coast Guard properly terminated U.S.I.A.'s contract for cause. A termination for cause (similar to a termination for default but for commercial items) is "a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1697, 10-1 BCA ¶ 34,380, at 169,745 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969))). Such a termination is a government claim and the Government bears the burden of proof that its action was justified. *Lisbon*, 828 F.2d at 764-65. 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. *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,971; *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,742.

The Coast Guard has met its burden to show that the termination was proper. U.S.I.A. failed, on multiple occasions, to provide dry suits that met the specifications. The Coast Guard was more than justified in terminating U.S.I.A.'s contract for cause in light of the company's failure to provide adequate dry suits. These dry suits failed to meet specifications

despite U.S.I.A.'s attempts to modify the suits after the issuance of two cure notices. The Coast Guard confirmed this failure by conducting multiple tests.

U.S.I.A. argues that it did not agree to the Coast Guard's testing procedures, and that the Coast Guard failed to perform the tests properly. The GSA contract under which the delivery order was issued permits the Government to test the items purchased. FAR clause 52.212-4 provides that the "Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance." It does not mandate any particular type of testing procedure. After a review of all of the evidence presented, including videotaped evidence showing the damp spots, we conclude that the Coast Guard used an appropriate methodology for testing the dry suits. While U.S.I.A. may have used a different process for testing the suits and may have reached different results, U.S.I.A. failed to present persuasive evidence that the Coast Guard's testing was improper.[4]

Reprocurement Costs

Since the Coast Guard properly terminated U.S.I.A.'s contract for cause, it is entitled to receive its costs to reprocure the dry suits that U.S.I.A. had agreed to provide. FAR clause 12.403(c)(2) instructs the Government to acquire similar items from another contractor and to charge the defaulted contractor for any excess reprocurement costs.

In order to recover reprocurement costs, the Government must prove that: (1) the reprocured supplies or services are the same as or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize excess costs. *Cascade Pacific International v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985). In addition, in order to obtain these costs, the contracting officer must fulfill certain requirements set forth in the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (Supp. IV 2011). Specifically, "each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." *Id*. § 7103(a)-(3).

[4] U.S.I.A. presented numerous arguments in support of its claim, including the following: The Coast Guard did not properly amend the order to specify the testing procedure set forth in paragraph E2 of the order; the Coast Guard did not prove that the suits leaked; and the Coast Guard breached the order, excusing U.S.I.A.'s performance. All arguments set forth in U.S.I.A.'s briefs have been considered.

Here, the Coast Guard has alleged that it procured similar dry suits to replace the ones that it had intended to procure from U.S.I.A.[5] The Coast Guard contends that it procured 149 replacement dry suits at the same time that it issued the February 1, 2011, cure notice to U.S.I.A. It apparently procured 333 more dry suits on April 20, 2011. The Coast Guard placed both of these orders before the July 25, 2011, testing conducted by the Navy of the dry suits that U.S.I.A. had reinforced pursuant to the February cure notice. Based upon the timing of these purchases, it is not reasonable to conclude that these items were purchased by the Coast Guard to replace those items purchased from U.S.I.A. U.S.I.A. still had the opportunity to cure any defects at this point. The Coast Guard had agreed to test the dry suits to see whether they met the specifications. Because of this agreement, until the Coast Guard completed such testing, the Coast Guard had no reason to terminate the contract for cause.

The Coast Guard purchased dry suits from a third manufacturer on September 26, 2011. This purchase occurred after September 16, 2011, when the Coast Guard issued the notice of termination for cause. While it is quite possible that the Coast Guard could establish that these items were procured to replace the items initially purchased from U.S.I.A., the Coast Guard's claim for reprocurement costs is premature.

As noted above, the CDA requires each claim to be the subject of a written decision by the contracting officer. 41 U.S.C. § 7103(a)(3). The Court of Appeals for the Federal Circuit has held that "a final decision by the contracting officer on a claim . . . is a 'jurisdictional prerequisite' to further legal action thereon." *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995); *see also England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004). Here, the contracting officer has not issued a final decision assessing excess reprocurement costs in a sum certain against the contractor. All that has occurred is

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[5] Respondent apparently attempted to supplement the appeal file with the invoices for the procurement of the dry suits by the submission of a motion on December 9, 2011. Exhibits appended to the motion included invoices for the procurement of the dry suits. However, because respondent submitted these documents through the Board's electronic filing system in a file format not permitted under the Board's Rules, the filing was rejected. See 48 CFR 6101.1(b)(5)(iii) (2011). Apparently the parties never realized that the documents had not been filed properly, despite the fact that the Board never took action on the motion. The existence of these exhibits only came to the Board's attention because the parties referenced these exhibits in the joint pretrial statement submitted on April 26, 2013. In fact, respondent did not reference the exhibits in its post-hearing brief. For the purpose of this analysis, the Board will take note of the existence of the invoices, despite the fact that the actual invoices have not been properly filed with the Board.

that the Government mentioned the possibility of a future assessment of reprocurement costs of an undetermined amount. Until the Government issues a final decision assessing excess reprocurement costs, and U.S.I.A. appeals the final decision, we do not possess jurisdiction to entertain the Government's prospective claim. *Diamante Contractors, Inc. v. Department of the Interior*, CBCA 2017, 11-1 BCA ¶ 34,679, at 170,821 (citing *Job Line Construction, Inc.*, EBCA C-9408177, 95-1 BCA ¶ 27,429, at 136,693 (1994)); *see also Introl Corp.*, ASBCA 27610, 84-1 BCA ¶ 17,000.

Decision

The appeal is **DENIED**. The Government's demand for excess reprocurement damages is dismissed for lack of jurisdiction.

JERI KAYLENE SOMERS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

PATRICIA J. SHERIDAN
Board Judge