UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 30, 2024

CBCA 7618

UNITED FACILITY SERVICES CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William Weisberg of Law Offices of William Weisberg PLLC, McLean, VA, counsel for Appellant.

Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **RUSSELL**, and **GOODMAN**.

LESTER, Board Judge.

Respondent, the General Services Administration (GSA), is seeking to recover money from appellant, United Facility Services Corporation (UFS), for damages caused by a burst frozen water pipe in a federal courthouse building in Memphis, Tennessee, for which UFS, by contract, was providing operations and maintenance (O&M) services. UFS filed this appeal to challenge the Government's claim. This decision is being issued following the parties' presentation of witness testimony at a hearing on April 17, 2024.

Previously, by decision dated February 27, 2024, the Board granted summary judgment to GSA on its argument that UFS had breached its contractual obligation to respond within no more than thirty minutes to an emergency call about the burst pipe,

entitling GSA to damages. *United Facility Services Corp. v. General Services Administration*, CBCA 7618, 24-1 BCA ¶ 38,535, at 187,319. GSA's recoverable damages for UFS's four-hour delay, to be established at the hearing, would be the difference between the damage that would necessarily have resulted within that thirty-minute response-time grace period and the full damage that actually occurred.

There was a second potential breach of contract, however, that was not addressed in the February 27 summary judgment decision. Under its contract, UFS was required to make reasonable attempts to protect the building from damage caused by reasonably foreseeable freezing temperatures. GSA's summary judgment motion did not address that issue, and it remained open for development at the hearing.

During the hearing, UFS's president volunteered that he had long known that piping in the area of the burst pipe was too close to an uninsulated exterior wall of the building and that, as he had previously told GSA on several occasions, the pipe was going to freeze and burst when it got too cold outside. After learning of the impending freezing temperatures in February 2021 (which was predicted days in advance of the weather event), UFS did nothing to attempt to limit damage or protect the uninsulated pipes from freezing, instead believing that GSA was at fault for not providing better insulation. In fact, UFS let all of its building engineers stay home during the weather event and then let its project manager leave the building for more than four hours, even though, as UFS's president acknowledged, UFS knew that pipes were likely to freeze and burst. Although UFS is not strictly liable under its contract for the fact that a pipe burst, it is liable under the terms of its contract for damages from a burst that, as here, it could reasonably have foreseen and made no effort to prevent. Further, having accepted this contract knowing of the conditions in the building, it cannot validly complain that GSA should have given it a better building to maintain.[1]

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[1] UFS suggests in its post-hearing briefing that the Board, in its summary judgment decision, held that UFS was not liable for failing to attempt to protect the building from freezing temperatures. The Board made no such ruling. GSA's motion for summary judgment focused solely on UFS's failure to have an employee on-site when the pipe burst. During briefing, neither party sought a ruling on the adequacy of UFS's preparations for freezing temperatures or knowledge of the likelihood of a pipe burst. Further, in a scheduling order issued a few hours after its summary judgment decision, the Board notified the parties that the April 17 hearing would "address all unresolved issues in this appeal (including quantum issues)." Order (Feb. 27, 2024) at 2. And, at the beginning of the April 17 hearing, the Board indicated that its "summary judgment decision did not find that [UFS] was strictly liable for the mere fact that a pipe burst, but [that] if GSA wants to pursue such an argument, it can do so here," since "[t]he summary judgment motion just didn't address that." Hearing Transcript at 8. It was clear that UFS's liability for breach of its

Having breached its obligation to attempt to protect the building from reasonably foreseeable (and, in this case, anticipated) damage, UFS is responsible for the damage caused by the burst pipe. Because GSA has established through virtually uncontroverted evidence that it incurred $526,478.46 to remedy the damage caused by the flooding, it is entitled to recover that amount from UFS.

Findings of Fact

I. UFS's Contract

On September 30, 2016, GSA and UFS executed a fixed-price contract, no. GS-04-P-16-EW-A-7021 (contract 7021), under which UFS would provide O&M services at the Clifford David-Odell Horton Federal Courthouse (Odell courthouse) in Memphis, Tennessee, for a twelve-month period beginning November 1, 2016, preceded by a thirty-day phase-in period running from October 1 through 31, 2016. Appeal File, Exhibit 2A at 63, 65.[2] The contract contained four one-year options, all of which GSA exercised, that extended UFS's performance under the contract to October 31, 2021. Exhibit 1 at 16-17, 31-32, 42-43, 54-55.

As detailed in the Board's February 27 decision, *see United Facility Services*, 24-1 BCA at 187,312-14, UFS's contract required it to "provide staff to ensure services are continued without disruption to the tenant" and to "ensure employees maintain communications access with the [contracting officer] or his/her designee to allow contact by the Government at all times during normal working hours and to effectively communicate with Government personnel." Exhibit 2A at 102 (clause C.8.1). It also required UFS to provide staff "as necessary to meet all requirements of the contract" and "to ensure services are continued without disruption to the tenant," *id.* at 103 (clause C.8.1); "maintain uninterrupted utilities services . . . so as to preserve the asset value of the facility and its systems and to otherwise minimize operating costs to the Government without compromising other Contract objectives or requirements," *id.* at 111 (clause C.21.1); and have "a system for onsite work force personnel to report potentially hazardous conditions in the building to the [contracting officer] or designee" and to "provide reasonable assistance to security or emergency response personnel as needed." *Id.* at 117-18 (clause C.29). It required UFS to "respond to emergency service request[s]," including those dealing with "broken water pipes, . . . immediately (within the shortest possible time consistent with the mechanic's location) during normal working hours and within 30 minutes." *Id.* at 114 (clause C.23.2). And it

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contractual obligation to protect piping in the building from freezing temperatures was an open issue for the hearing.

[2] Unless otherwise noted, all exhibits are found in the appeal file.

provided that UFS "shall provide all labor, materials and equipment necessary for the protection of Government personnel, equipment, furnishings, buildings, and facility accessories (such as parking lots, fences, etc.) from damage caused by Contractor's negligence." *Id.* at 118 (clause C.30).

Another contract provision, clause C.21.8, required UFS to "be responsible for any necessary operation and prevention of damage to equipment during on and off duty hours . . . due to inclement weather, high wind events, or freezing temperatures." Exhibit 2A at 113.[3] Similarly, clause C.29 required UFS to "make reasonable efforts to prevent hazardous conditions and property damage" at the Odell courthouse, albeit without expressly mentioning freezing temperatures. *Id.* at 117.

The contract also contained clause C.40.9, titled "Force Majeure (Uncontrollable Events)," which read as follows:

> The Contractor shall not be responsible for deficiencies or breakdowns caused by vandalism, misuse by people other than Contractor employees, abuse by people other than Contractor employees, or acts of God including natural disasters *unless the Contractor could have reasonably foreseen such events and prepared accordingly to prevent such deficiencies or breakdowns*.

Exhibit 2A at 131 (emphasis added).

II. UFS's Knowledge of Building Conditions

When awarded contract 7021, UFS had already been providing O&M services at the Odell courthouse for the prior five years under a predecessor contract. Hearing Transcript at 153-54. As UFS's president, Steven R. Brown, testified at the hearing, when GSA awarded contract 7021 in 2016, UFS was "very aware that this [was] an older building and

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[3] Although the contract did not contain a specific definition or list of the "equipment" that UFS was to protect from damage, the piping at issue here is sufficiently tied to the sprinkler system equipment to be covered under clause C.21.8. *See* Exhibit 2A at 82 (in clause C.1.1, describing UFS's "equipment and systems" responsibilities as including, among other things, (1) plumbing and domestic water equipment and (2) fire protection and life safety systems and equipment, including sprinkler systems); *see also Schaeffer Piano Manufacturing Co. v. National Fire Extinguisher Co.*, 148 F. 159, 164-68 (7th Cir. 1906) (describing sprinkler system as "equipment"); *Toll Brothers Inc. v. Century Surety Co.*, No. 07-1296, 2013 WL 3009721, at *1 (E.D. Pa. June 17, 2013) (same).

that it was very poorly maintained for many, many years." *Id.* at 154. Mr. Brown described the building's known condition as follows:

> From the mechanical equipment all the way down to exit overhead garage doors, which we were in charge of maintaining[, t]he systems within the building were very tired. And, the government was not renovating the building. There w[ere] no upgrades being done. It was held together with duct tape and a hammer half the time. And I'm being nice about it. There w[ere] coils in the building that were leaking into courtrooms. And equipment just being broken and then just left instead of it being replaced, it would just be taken out of service.

Id. at 155.

In fact, Mr. Brown testified specifically about UFS's knowledge of uninsulated piping in parts of the building that were exposed to outside air and the likelihood that such piping would freeze and potentially burst if outdoor temperatures were sufficiently below freezing:

> [F]rom the minute we took this building the 10 years prior to our last day of the contract, we had complained about non-insulated pipes in the building that w[ere] exposed to outside air. There [are] plenums, which allow fresh air to come in and out of the building. And you're talking about 7, 12 degrees during the winter in a snow storm. It is no shock that they finally had a real pipe burst, but it's not the first time. There's documented, many documented instances where they've had coils freeze over and break.

Hearing Transcript at 166-67.

By February 2021, the date of the incident at issue, UFS had already had nine years of familiarity with the state of the building. Hearing Transcript at 153-54.

III. The Incident

As National Weather Service records indicate, temperatures in Memphis fell below freezing on the evening of February 10, 2021, and remained there for the next nine days, falling to lows of 14° on February 14 and 9° on February 15 and a record low of 1° on February 16, 2021. https://www.weather.gov/wrh/climate?wfo=meg (last visited July 28, 2024). In addition, on February 14 and 15, 2021, a total of 5.3 inches of snow fell in Memphis. *Id.* This weather was far from typical for the area.

On February 16, 2021, at approximately 1:00 p.m. Central Time (CT), a frozen pipe that was related to the building's sprinkler system burst inside a locked room at the Odell courthouse, causing flooding. Exhibit 6 at 415; Respondent's Motion for Summary Judgment, Statement of Undisputed Material Facts (SUMF) ¶ 3; Appellant's Statement of Material Facts (SMF) ¶ 1.

Before the pipe burst, the UFS project manager, who had checked in at the building that morning, had departed for what turned out to be a lunch of more than four hours, and there were no other UFS employees in the building. Exhibit 6 at 415, 421; Respondent's SUMF ¶¶ 4-5, 7; Appellant's SMF ¶ 1; Complaint ¶ 6. The two UFS mechanics who were normally at the building during normal business hours were not at work that day, having been allowed to stay home because of inclement weather, and UFS's administrator had called out sick that day. Exhibit 6 at 415.

The GSA building manager was notified at approximately 1:00 p.m. CT by a twenty-four-hour automated monitoring system that a brown liquid was coming from the locked room and that the fire department needed access to it. Exhibit 6 at 421. At 1:04 p.m. CT, the GSA building manager called the UFS project manager about the flooding, but the UFS project manager did not respond. Exhibit 6 at 415, 421; Respondent's SUMF ¶ 6. The GSA building manager then contacted the Federal Protective Service (FPS) for assistance. Exhibit 6 at 421. The UFS project manager did not return to the building until almost four hours later (arriving by approximately 4:41 p.m. CT) because of what he said was "something personal." *Id.* at 422; Respondent's SUMF ¶ 7.[4] By the time that the UFS project manager arrived and cut off the flow of water, the basement, first floor, and mezzanine levels of the building had suffered substantial flooding.

IV. Work to Repair Damage Caused by the Pipe Burst

On March 3, 2021, the GSA contracting officer executed a $75,000 task order to UFS, separate and apart from contract 7021, for water extraction services at the Odell courthouse, services that UFS had begun providing through a subcontractor on February 16, 2021.

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[4] At the hearing, UFS's president testified that, as he understood it, the UFS project manager's delay in returning to the building was caused by weather and that he began trying to return as soon as he received GSA's emergency call. Hearing Transcript at 180-83. That testimony, which is hearsay, is inconsistent with all other evidence in the record. While UFS had listed its project manager as a fact witness, it elected not to call him. Therefore, there was no explanation of what he originally told GSA was a "personal" reason for his delayed return. In such circumstances, we reject the UFS president's unsupported explanation for the project manager's delayed return.

Exhibit 7 at 424-46; Hearing Transcript at 157. GSA paid UFS in full for the extraction work on March 26, 2021. Exhibits 9, 10; Hearing Transcript at 51-52, 157.

On or about June 7, 2021, after seeking competitive offers from six contractors with existing indefinite-delivery indefinite-quantity contracts, GSA awarded a task order to Katmai Support Services, L.L.C. (Katmai), in the amount of $451,478.46 for "build back repairs required due to water intrusion" from the burst pipe at the Odell courthouse. Exhibit 11 at 448-49; *see* Hearing Transcript at 42-44. GSA paid Katmai the contract price for its work on March 11, 2022. Exhibits 12, 13.

The costs of the UFS water extraction work and the Katmai "build back" work, which total $526,478.46,[5] were necessarily incurred to repair damage from the burst pipe, are reasonable, and are adequately supported in the record.[6] *See* Hearing Transcript at 38-48. Although GSA suffered other damage from the burst pipe, including destruction of furniture, it is not seeking compensation for that damage.

V. GSA's Demands for Reimbursement

The contracting officer sent a demand letter to UFS on June 2, 2021, notifying UFS of its "liability for major damage caused in the [Odell courthouse] due to [the] pipe burst on February 16, 2021." Exhibit 3 at 402. She indicated that, "[a]s a result of the extensive damage done to the building, several floors of office/tenant spaces have to be renovated to bring the spaces back to its [sic] original state for occupancy. The amount of water dispersed was extensive and caused major flooding to the first floor, the Mezzanine, the basement, and office tenant spaces and equipment." *Id.* at 403. She indicated that, at that time (which was a few days before the June 7, 2021, task order award to Katmai), GSA had estimated its total damage as $451,478.46. *Id.* In support of her payment demand, the contracting officer cited several provisions of the contract that she believed UFS had violated, including clauses C.8.1, C.21.1, C.21.8, C.29, and C.30. *Id.* at 403-04. She asserted that UFS's "failure to adequately perform the duties outlined above resulted in the damage to the building." *Id.* at 404.

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[5] In its post-hearing brief, GSA repeatedly tells us that it is entitled to reimbursement of $529,478.46, which is $3000 more than the total of the two contracts that it cites in support of its claimed damages. It appears that GSA's identified total is a mathematical error. Because the two contracts upon which GSA relies to support its claimed damages total $526,478.46, that is the total damage amount that GSA has established.

[6] To the extent that UFS's witness questioned whether these costs include an upgrade to the facility, *see* Hearing Transcript at 168-69, the evidence is too speculative to merit a reduction in the established damages.

By letter dated June 9, 2021, UFS responded to GSA's demand letter and disclaimed any responsibility for the damages to the building, which it asserted were caused by an act of God that was excusable under the contract's Force Majeure clause (clause C.40.9):

> This clause was written for just this situation. An emergency inclement weather event was in progress. Snowfall and temperatures both reached historical levels (one high, one low). Travel was treacherous. The Mayor had declared a State of Emergency. This was a classic force majeure event. As such, the contractor is not liable for any part of the $451,478.46 in damages referenced in your letter.

Exhibit 4 at 406-07.

The contracting officer responded by letter dated October 14, 2021, asserting that the Force Majeure clause "only applies to damages caused by Acts of God 'unless the Contractor could have reasonably foreseen such events and prepared accordingly to prevent such deficiencies or breakdowns.'" Exhibit 6 at 419. She represented that, "although the pipe freezing and bursting may be considered an Act of God, the Contractor could reasonably have foreseen the subsequent damage and prepared accordingly to prevent the deficiencies and breakdowns that followed." *Id.* She identified GSA's total damages at that point as $529,478.46. *Id.* at 422.

On December 7, 2022, the GSA contracting officer issued a final decision, which incorporated the contracting officer's demand letter from June 2, 2021, and demanded the payment of $505,492.92 (an unexplained decrease in the dollar amount identified in the October 14, 2021, letter, as well as a lower figure than that being sought here) for "damages caused at the Odell [courthouse] as a result of the pipe burst and flooding due to the contractor's failure to adequately perform the duties outlined in the terms and conditions of the contract." Exhibit 6 at 413. The contracting officer included in the decision a notice of UFS's appeal rights under the CDA. *Id.* at 414.

VI. Proceedings Before the Board

UFS filed its notice of appeal with the Board on December 20, 2022, challenging the contracting officer's assertion of the government claim. On November 9, 2023, after the parties had completed discovery, GSA filed its motion for partial summary judgment, which the Board granted on February 27, 2024. In its decision, the Board found that GSA had established UFS's breach of its obligation to respond to emergency calls within thirty minutes. *United Facility Services*, 24-1 BCA at 187,319. The Board then scheduled a hearing on all issues remaining in the appeal, including but not limited to quantum, to commence April 17, 2024. By order dated April 11, 2024, the Board directed that, because

the claim at issue is a government claim (for which the Government bore the burden of proof), GSA should present its case-in-chief first at the hearing, followed by UFS.

At the commencement of the April 17 hearing, GSA indicated that, in addition to establishing the amount of its damages, it intended to pursue at the hearing its argument that, in addition to breaching an obligation to respond to emergency calls within thirty minutes, UFS had also breached its separate contractual obligation to exercise reasonable care in preventing damage to the building in response to freezing temperatures. Hearing Transcript at 21-22. GSA then called two witnesses: the contracting officer for the Katmai "build back" reconstruction contract and the contracting officer's representative for contract 7021, who prepared an independent government estimate for the cost of remedying the water damage to the building. They established the costs that GSA incurred to remedy the water damage to the courthouse, but neither witness was at the courthouse during the flooding, and neither was able to segregate the damage that occurred within the first thirty minutes after the pipe burst from the total damage that GSA suffered. Similarly, neither could address questions from counsel for UFS about whether flooding in the first thirty minutes after the pipe burst was sufficient to cause tiles in the basement, which were secured to the floor with an asbestos glue, to delaminate, creating friability issues that may have significantly affected GSA's overall restoration costs. GSA closed the presentation of its case-in-chief without addressing those proximate cause issues.

UFS then presented its witness, Mr. Brown. Like GSA's witnesses, Mr. Brown was not at the Odell courthouse when the flooding occurred. He testified, though, that he was very familiar with the building from years of having dealt with it under two contracts. He testified that the pipe that burst was in a controlled internal space but, as he long had known, "was exposed to outside. It was a bearing wall pipe. It was attached to a bearing wall, and then it was . . . outside air right near it. So, that's why the pipe froze. And the pipe was broken in multiple spots, not in one. So it wasn't a one-break. This was a fatigued pipe." Hearing Transcript at 173. He also testified that, as UFS had long known, the pipe was not wrapped or insulated. *Id.* at 169. He represented that "[a]nything that is exposed to outside air in a building with an environment like this one, or basically the state, their winters, their springs, has to be insulated. There was conversation about insulating the pipes. Nothing was ever done." *Id.* Nevertheless, he also testified that "[w]e are a maintenance contractor. We maintain what is given to us. So, our job is to keep it running at all extent. Whatever we have to do to keep it running." *Id.* at 170.

At the parties' request, the Board allowed the parties to submit sequential post-hearing briefing. GSA filed its post-hearing brief on June 21, 2024; UFS filed its response brief on July 1, 2024; and GSA filed its reply brief on July 11, 2024.

Discussion

I. UFS's Breach, and GSA's Damages

"The party alleging a breach of contract"—here, the Government—"bears the burden of proving the breach." *Technical Assistance International, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998). Further, "before the contractor may be held liable for damage to property . . . pursuant to [the breach], there must appear by a preponderance of the evidence, besides the fact of damage . . . , (1) that the damage was 'occasioned,' i.e., caused, in whole or in part by (2) negligence or fault on the part of the contractor, (3) in the performance of [or failure to perform] work under the contract." *American Stevedores, Inc.*, ASBCA 5286, 60-2 BCA ¶ 2686, at 13,557; *see MOPAC Contracting/Engineering, Inc.*, AGBCA 83-144-1, 87-2 BCA ¶ 19,707, at 99,784 ("In assessing damages, the Government bears the burden of proof."). That is, after establishing a contract breach, the Government must show that the contractor's negligence was the proximate cause of the damages that the Government is seeking. *Harold J. Redding & Associates*, ASBCA 1611, 1955 WL 8984 (Nov. 14, 1955).

The Board previously found UFS liable for a breach of the contract requirement mandating that UFS respond to emergency calls within thirty minutes. Had UFS satisfied that contract obligation, the water flowing out of the burst pipe would have lasted no more than thirty minutes, given the uncontested fact established on summary judgment that, "[t]o stop the flow of water into the room in which the pipe had burst," access to which the missing UFS project manager controlled, "all that was necessary was to turn a valve that was located in the room near the pipe." *United Facility Services*, 24-1 BCA at 187,314. Further, at the hearing, GSA established that it incurred a total of $526,478.46 in repairing damage caused by the burst pipe. What GSA did not present at the hearing was any evidence comparing the water damage that the building would have suffered during the initial thirty-minute grace period that UFS had to respond to the emergency call and the actual damages that GSA ultimately suffered as a result of the four-hour delay.

"The remedy for breach of contract is damages sufficient to place the injured party in as good a position as it would have been had the breaching party fully performed." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005). Normally, we would calculate proximate cause damages by "perform[ing] the necessary comparison between the breach and non-breach worlds"—in this case, the total costs that GSA actually incurred and the potentially more limited costs that GSA would have incurred from flooding even if UFS had responded within thirty minutes of the emergency call—and then award GSA the difference between those two calculations. *Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1273 (Fed. Cir. 2008).

GSA's failure to present any evidence allowing for a breach/non-breach world comparison would be problematic if not for UFS's breach of another contract obligation that eliminates the need for such a comparison. UFS's contract expressly required that UFS "be responsible for any necessary operation and *prevention of damage* to equipment during on and off duty hours . . . due to inclement weather . . . or *freezing temperatures*," Exhibit 2A at 113 (emphasis added), and "make reasonable efforts to prevent hazardous conditions and property damage" at the Odell courthouse. *Id.* at 117. UFS was supposed to have "a system for onsite work force personnel to report potentially hazardous conditions in the building to the [contracting officer] or designee" and to "provide reasonable assistance to security or emergency response personnel as needed." *Id.* at 117-18. And it was "required to perform the services required by the Contract and as identified by the [contracting officer] or their designee [t]o the extent allowed during all emergency situations." *Id.* at 179. These provisions do not impose strict liability on UFS for every pipe that bursts, but they impose an obligation on UFS to make reasonable efforts to protect against known dangers when it becomes aware that freezing temperatures may affect the building.

UFS has admitted that it did not do that. It made clear that it was aware of predictions of unusual weather and freezing temperatures coming to Memphis and had long known the piping at issue was uninsulated, near exterior walls subject to outdoor airflow, and likely to freeze and burst. Despite this knowledge, UFS made no effort to monitor the pipes or attempt to reduce the possibility that they would freeze. In the circumstances here, the fact that UFS knew of the likelihood of burst pipes but had no engineers or other personnel on site during the weather event and made no effort to protect the building (through, for example, strategically placed temporary heaters or insulated tarps) constituted a breach of its obligations under the contract. Absent this breach, GSA would have suffered no damage, given either that the pipe at issue would not have burst or, if it had, a responsible UFS employee would have been there monitoring the pipes during what UFS calls an unprecedented freeze. The responsible UFS employee could quickly have unlocked the room in question and turned the valve to stop water flow. Exhibit 6 at 422; Respondent's SUMF ¶ 9. Based upon this contract breach, GSA is entitled to recover the entire $526,478.46 that it incurred to remedy the water damage.

II. UFS's Defenses to the Breach

A. UFS's "Act of God" Defense

Like it did in response to GSA's summary judgment motion, UFS argues that it cannot be held liable for the burst pipe because it was caused by an "Act of God"—that is, freezing temperatures that were extreme for the Memphis area. The contract defines "Acts of God" as "unanticipated grave natural disasters or other natural phenomenon of an exceptional, inevitable, and irresistible character; *the effects of which could not have been prevented or*

avoided by the exercise of due care or foresight." Exhibit 2A at 85 (clause C.2.3) (emphasis added). "If the [contractor] could not reasonably foresee any injury as the result of his act [or failure to act], or if his conduct was reasonable in light of what he could anticipate, there is no negligence, and no liability." *Peter Kiewit Sons' Co.*, IBCA 1789, 90-1 BCA ¶ 22,525, at 113,057 (1989) (quoting William L. Prosser, *Handbook on the Law of Torts* 250 (4th ed. 1971)). Nevertheless, a "contractor would ordinarily be liable for loss or damage resulting partly from an act of God . . . if their intervening negligence was of such magnitude that it substantially increased the damage that would otherwise have occurred—in other words, if they, rather than the natural occurrence, should be considered the supervening or proximate cause of the damage." *Id.* at 113,059.

Here, clause C.21.8 of UFS's contract expressly required UFS to "be responsible for any necessary operation and prevention of damage to equipment . . . due to inclement weather . . . or freezing temperatures," Exhibit 2A at 113, and clause C.29 similarly required UFS to "make reasonable efforts to prevent hazardous conditions and property damage" at the Odell courthouse. *Id.* at 117. As we discussed in our February 27 summary judgment decision, UFS cannot blame an "act of God" for its failure to meet contractual obligations that required it to anticipate and attempt to protect against reasonably foreseeable occurrences. "A *force majeure* clause interpreted to excuse the [contractor] from the consequences of the risk he expressly assumed [and the work to address emergencies that he expressly agreed to perform] would nullify a central term of the contract." *United Facility Services*, 24-1 BCA at 187,318 (quoting *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986)).

In this case, there is no question that the freezing temperatures which caused the pipe in the Odell courthouse to burst were reasonably foreseeable. They were predicted days earlier, they had been ongoing for several days before the pipe burst, and UFS had agreed in its contract to take responsibility for trying to protect the building from freezing temperatures when reasonably foreseeable. The contract placed upon UFS an obligation to make reasonable efforts to minimize the possibility of damage. *See Sovereign Construction Co.*, GSBCA 712, 1964 BCA ¶ 4148, at 20,187 (Although a severe "drop in temperature was an act of nature for which neither party to the contract was responsible[,] . . . [t]his does not . . . absolve Appellant from its contractual obligation to have prevented the freeze [of pipes in the building] since the evidence indicates Appellant could have done so." (citations omitted)). The evidence in this case makes clear that UFS made *no* effort to avoid frozen pipes. It allowed all of its building engineers to stay home on the day in question, despite knowing of uninsulated piping that, as Mr. Brown testified, was prone to freezing and bursting. The record is devoid of any attempt by UFS to shield or heat areas of the building that UFS knew had pipes prone to freezing. And UFS allowed the only employee that it had on-site the day the pipe burst (and the only one with a key to the room in question) to leave

for more than four hours. In the circumstances here, UFS's actions amount to a breach of its contract obligation to attempt to protect the building from freezing temperatures.

B. UFS's Recharacterization of the Contract Requirements

At the hearing, UFS's president asserted that "it [was] not [UFS's] responsibility to sit as a babysitter and almost sit there and wait for pipes to break." Hearing Transcript at 176. He testified that UFS's "job is to notify them and let them know that hey, you have a possibility that eventually you're going to have a pipe freeze." *Id.* at 176. "[I]t is my responsibility to have people onsite, but not when it's an emergency, or you can't drive or get to work." *Id.* at 177; *see id.* at 177-78 ("You can't predict when a pipe is going to freeze, or if something is going to break down. You can advise the government of what's going on, but I can't sit there and say okay, you don't want to spend money on this so I'll have a guy stand under a pipe when it gets below 32 degrees. That's not our job."); *id.* at 180 ("You're paying me to do the [preventative maintenance] in your building . . . on items that run on a daily basis. If there's an act of God, or excessive freezing, or a hurricane, you're not paying me for that."). Mr. Brown's characterization of UFS's contract conflicts with the actual contract language. *See* Exhibit 2A at 113, 117. UFS cannot avoid liability for breach by misdescribing the contract requirements.

C. UFS's Complaints About Building Conditions

UFS also blames GSA for handing it a building to maintain that did not have all of the upgrades and protections that UFS thinks it should have had, and it attempts to shift responsibility for deficiencies in the building and the piping to GSA. Yet, UFS's remedy for its complaints about the building was simple: it did not have to bid for or accept this contract. But it did, even though it knew of the building's condition. In doing so, UFS voluntarily assumed certain contractual responsibilities, including duties that it was required to perform when it became aware of an impending weather event that UFS could reasonably foresee might affect the building. Having accepted the contract with knowledge of the building's deficiencies, it could not ignore a weather emergency and blame GSA for not giving it a better building to operate and maintain.

In these circumstances, UFS is responsible for all damage resulting from the burst pipe, which GSA has established totals $526,478.46.

III. CDA Interest

In its post-hearing reply brief, GSA asks us to apply interest pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), to its damages award. Although the CDA provides for interest on contractor claims, *see id.* § 7109(a)(1), it contains no

corresponding provision providing interest to the Government on a successful government claim. *Odyssey International, Inc.*, ASBCA 62085, et al., 21-1 BCA ¶ 37,861, at 183,851; *see Maggie's Landscaping, Inc.*, ASBCA 56748, 11-2 BCA ¶ 34,807, at 171,293 ("No CDA interest shall run on the amount of the government's claim."), *reconsideration granted on other grounds*, 11-2 BCA ¶ 34,849; John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 1097 (5th ed. 2016) ("[T]he Act does not provide for interest on government claims."). GSA has not identified any other basis, outside the CDA, for an award of interest. GSA's request for interest is denied.

Decision

UFS's appeal is **DENIED**, and GSA's claim, as adjusted, is granted. UFS shall pay $526,478.46 to GSA as compensation for damage caused by UFS's breach of its contractual obligation to attempt to protect the Odell courthouse from freezing temperatures. GSA is not entitled to CDA interest.

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

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Allan H. Goodman
ALLAN GOODMAN
Board Judge