UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT GRANTED IN PART:
February 27, 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), seeks summary judgment on the entitlement portion of its claim against appellant, United Facility Services Corporation (UFS). GSA asserts that UFS is liable for $505,492.92 in damages caused by a burst frozen water pipe in a courthouse building for which UFS, by contract, was providing operations and maintenance (O&M) services. GSA's motion does not address quantum issues.

GSA asserts that, under its contract, UFS was required to have O&M employees on-site at all times during normal operating hours and that, when the frozen pipe burst inside a locked room during a period of adverse winter weather, UFS had no staff on-site and did

not respond to emergency calls, which precluded GSA and other responders from accessing the locked room in which the pipe had burst. In UFS's absence, almost four hours passed before the Federal Protective Service (FPS), the local fire department, and GSA could access the control system for the piping and shut off water running through the burst pipe. GSA seeks to require UFS to reimburse it for the costs of restoring the building, which GSA alleges was heavily damaged during the almost four hours of flooding.

Although UFS has provided very little information in response to GSA's motion for summary judgment, we see no language in GSA's contract that expressly states that UFS's O&M staff had to be on-site at all times during normal working hours. Nevertheless, the contract plainly required UFS to have staff available to address emergencies (such as a burst pipe) and required UFS to respond to any emergency service call within, at the most, thirty minutes, something that UFS admits it did not do. We reject UFS's argument that, because there was a recent snowstorm, UFS can invoke the force majeure clause in the contract to escape any responsibility for failing to satisfy that contractual obligation. UFS's contract tasked it with responsibility for emergencies in the building, required it to prepare for and have an action plan in place for emergencies (inclusive of inclement weather emergencies), and created an obligation that UFS respond to emergency service calls within no more than thirty minutes. To the extent that UFS could raise some kind of argument that it was impossible for employees with keys to the locked room in which the pipe had burst to get to the courthouse building (even though the local fire department was able to do so), it has not introduced *any* evidence into the record to support such an assertion, a fatal failure in response to a summary judgment motion.

Accordingly, we grant GSA's motion for summary judgment in part, finding that UFS breached its contractual obligation to respond within thirty minutes after GSA made its emergency service call. Nevertheless, triable issues of fact remain regarding the extent to which UFS's breach of its duty to be available to address emergencies caused damage beyond that which would have been incurred if UFS had timely responded to GSA's emergency service call. By separate order, the Board will schedule a hearing in this matter to resolve the remaining issues, including quantum.

Statement of Undisputed Facts

The Contract

On September 30, 2016, GSA and UFS executed a fixed-price, incrementally-funded contract, no. GS-04-P-16-EW-A-7021, under which UFS would provide building services for a twelve-month period beginning November 1, 2016 (with a thirty-day phase-in period

beginning October 1, 2016). Appeal File, Exhibit 2 at 63, 65-66.[1] The contract contained four options, each of which allowed GSA to extend the contract term by an additional twelve months over the course of the following four years. *Id.* at 63, 65-69, 156.

Under one of the line items in the contract, UFS was required to provide O&M services at what is now known as the Odell Horton Federal Building, a federal courthouse in Memphis, Tennessee (Horton courthouse), Exhibit 2 at 63, 66, including all "management, supervision, labor, materials, equipment, and supplies" at that site. *Id.* at 82 (clause C.1.1). Specifically, UFS was "responsible for the efficient, effective, economical, and satisfactory operation, scheduled and unscheduled maintenance, and repair of equipment and systems located within the property line" of the Horton courthouse. *Id.* The contract's work statement provided for "a performance-based service," meaning "that the Government has described WHAT is to be accomplished, not HOW to accomplish it," and did not identify "detailed procedures for accomplishing the work unless there [were] safety, security or communication requirements." *Id.* at 79 (section B). "The Contractor [was] responsible for the day-to-day examination and monitoring of all work performed to ensure compliance with the contract requirements . . . ." *Id.* at 154 (section E.1.1).

Pursuant to section C.21.1 of the contract, UFS was responsible for ensuring continuing building operations at the Horton courthouse at all times:

> The Contractor shall provide building operations services for all systems covered by this Contract, so as to maintain uninterrupted utilities services, and environmental conditioning to tenants during normal working hours, and at other times as described in this document, 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.

Exhibit 2 at 111.

Section C.8 of the contract, titled "General and Administrative Requirements," contained several contractual provisions identifying minimum performance requirements. Section C.8.1, titled "Minimum Staffing and Ability to Contact and Communicate with the [Contracting Officer] or their designee," identified the following UFS employee obligations regarding safety hazard reporting and contact availability:

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[1] Unless otherwise noted, all exhibits referenced in this decision are found in the appeal file. The page numbers cited are the Bates numbers on the exhibits.

> The Contractor must provide staff to ensure services are continued without disruption to the tenant. The Contractor must 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.
>
> The Contractor must immediately notify the [contracting officer] or his/her designee and other designated Government representative of any recognized safety hazard that might severely affect the building occupants.
>
> The onsite technicians must have sufficient skills to immediately respond to a variety of service requests involving multiple trades, including the operation of building control and energy management systems. Operators must be certified where applicable.
>
> Outside of normal working hours, the Contractor must maintain some designated form of communication with on-call staff to allow the Government to contact such on-call staff at any time for emergency response.
>
> The contractor must provide staff as necessary to meet all requirements of the contract.
>
> . . . .
>
> The Contractor shall:
>
> Provide the minimum qualified staff and onsite technicians to ensure services are continued without disruption to the tenant. The Contractor must be able to respond immediately to a variety of service requests involving multiple trades, including the operation, troubleshooting, and maintenance of building control and energy management systems. . . .
>
> Maintain communication with the Government during normal duty hours and after hours for emergencies. (See Section C.8.2, Communication Equipment).
>
> Immediately notify the [contracting officer] or their designee of any recognized safety hazard that might severely affect the building occupants.

Id. at 102-03.

Section C.8.2, Contractor Communication Equipment, required UFS key personnel, such as project managers, to have portable equipment so that GSA could communicate with them about emergencies at the building:

> The Contractor shall provide key operational personnel (managers, supervisors, and duty mechanics) with portable electronic means to communicate with GSA for service requests, emergencies, status of projects, etc. Electronic communication methods may include . . . Text messaging device[,] . . . Fax . . . [, and] Electronic Mail . . . .

Exhibit 2 at 103-04. Electronic mail for key personnel was to "be established and monitored on a 24 hour basis in order to receive or communicate with the [contracting officer] or his/her designee customer agency and tenant needs." *Id.* at 104.

Clause C.8.4 of the contract required UFS to provide service request and administrative support during normal working hours, as follows:

> The Contractor shall operate a service request and administrative support function during normal working hours, to act as a central point of contact for the Government and building occupants to take service requests, and track and maintain service request records in the [Computerized Maintenance Management System].

Exhibit 2 at 104. Normal working hours were identified in the contract as between 7 a.m. and 5 p.m. Central Time (CT). *Id.* at 112 (clause C.21.8).

The contract also required UFS to have an "on-site supervisor," who was "a person designated in writing by the Contractor who has authority to act for the contract on a day-to-day basis at the work site." Exhibit 2 at 93 (clause C.2.69).

UFS was required under clause C.29 to "make reasonable efforts to prevent hazardous conditions and property damage" at the Horton courthouse and "promptly [to] report such conditions or activities to the [contracting officer] or their designee or [FPS] personnel." Exhibit 2 at 117. UFS was to "establish a system for onsite work force personnel to report potentially hazardous conditions in the building to the [contracting officer] or [their] designee" and to "provide reasonable assistance to security or emergency response personnel as needed." *Id.* at 117-18. UFS also was required, under clause C.21.8, 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." *Id.* at 113.

UFS had to "operate the facility and participate in emergency operations in support" whenever needed, Exhibit 2 at 111 (clause C.21.3), and to have in place an emergency operating plan that "include[d] . . . [the] position and contact phone number of each Contractor person, what each position is responsible for in each emergency, general administrative support the Contractor will provide during emergencies and any subcontractor support and contact information." *Id.* (clause C.21.4). "The Contractor [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, including, but not limited to fires, accident and rescue operations, Contractor personnel strikes, civil disturbances, natural disasters, and utility service outages." *Id.* at 179 (clause H.21).

The contract provided that UFS "shall respond to emergency service request[s] immediately (with the shortest possible time consistent with the mechanic's location) during normal working hours and within 30 minutes." Exhibit 2 at 114 (clause C.23.2); *see id.* (clause C.23.1 ("The Contractor shall respond to emergency service requests (during normal working hours) . . . at all times.")).[2] Pursuant to the definitions in clause C.23.2, emergency service requests were "service requests where the work consists of correcting failures that constitute an immediate danger to personnel or property, including but not limited to: broken water pipes." *Id.* Clause C.23.1 provided that "[t]he [contracting officer] or his designee [were allowed to] transmit work orders to the Contractor for . . . emergency service request[s] . . . orally, by email, by creation of a work order by a Government employee or representative, or by generating an automated work order." *Id.* To ensure that GSA knew who to contact in case of an emergency, UFS was required, as a part of contract start-up, to provide the GSA contracting officer, "within 5 calendar days prior to contract services start date, a list of key personnel and emergency contact information." *Id.* at 101 (clause C.5.1); *see id.* at 145 (clause C.44). When there was an emergency situation, "[t]he Contractor [was required to] remain on the job until the emergency situation has been secured and adequate temporary repairs have been made." *Id.* at 114 (clause C.23.2).

The contract provided that, "[i]f damage [to the building] is caused by Cont[r]actor negligence, the Contractor shall be liable for the full cost of repair." Exhibit 2 at 129 (clause C.40.1).[3] The contract also contained a "Force Majeure (Uncontrollable Events)" clause

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[2] In contrast, for emergencies that occurred *after* normal working hours, UFS had to respond to emergency call back service requests "within one (1) hour." Exhibit 2 at 114 (clause C.23.3).

[3] In attachments incorporated into the contracting officer's final decision, the contracting officer referenced the inclusion of FAR 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in UFS's federal supply contract no. GS-21F-0129W. *See* Exhibit 6 at 417, 421. That clause provides that, if the contractor "causes damage" to the

(clause C.40.9), however, which excused UFS's responsibility for damages caused by, among other things, acts of God:

> 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.

Id. at 131. The contract defined "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." *Id.* at 85 (clause C.2.3).

The contract also required UFS to obtain insurance covering its work on the government installation and to provide GSA with a copy of its certificate of insurance, verifying the contractor's coverage for commercial general liability. Exhibit 2 at 286 (incorporating by reference Federal Acquisition Regulation (FAR) 52.228-5 (Jan 1997) (48 CFR 52.228-5 (2016)).

The Incident

The following factual recitation comes directly from the record, including respondent's statement of undisputed material facts:

1. On February 16, 2021, at approximately 1 p.m. CT, a frozen pipe burst inside a locked room at the Horton courthouse, causing water flooding. Exhibit 6 at 415; Respondent's Statement of Undisputed Material Facts (Respondent's SUMF) ¶ 3; Appellant's Statement of Material Facts (Appellant's SMF) ¶ 1.

2. When the pipe burst, the UFS project manager, who had checked in at the building that morning, was at lunch, and there were no other UFS employees in the building.

Government's property by failing to "use reasonable care to avoid damaging existing buildings, equipment, and vegetation on the Government installation, . . . the Contractor shall be liable for the cost" of "repair or replacement." 48 CFR 52.237-2 (2016). GSA has not referred to any evidence in the record, however, showing that FAR 52.237-2 is incorporated into or applies to the contract at issue in this appeal.

Exhibit 6 at 415, 421; Respondent's SUMF ¶¶ 4-5; Appellant's SMF ¶ 1; Appellant's Complaint ¶ 6.[4]

3. The GSA building manager was notified at approximately 1 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 project manager did not respond. Exhibit 6 at 415, 421; Respondent's SUMF ¶ 6. The GSA building manager then contacted the FPS for assistance. Exhibit 6 at 421. Ultimately, 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. To stop the flow of water into the room in which the pipe had burst, all that was necessary was to turn a valve that was located in the room near the pipe. Exhibit 6 at 422; Respondent's SUMF ¶ 9. Nevertheless, the room with the burst pipe was locked, and only the UFS project manager had keys for the room. Exhibit 6 at 422; Respondent's SUMF ¶ 8.

5. In the project manager's absence, the FPS and the local fire department worked to attempt to break into the locked room, without success, before the project manager returned, and they were able to access it and stop the flooding. Exhibit 6 at 422; Respondent's SUMF ¶¶ 8, 10.

6. As a direct result of almost four hours of flooding, extensive damage was done to the Horton courthouse building as the water dispersed to several floors and caused major, extensive flooding to the first floor, the mezzanine, and the basement. Exhibit 6 at 422; Respondent's SUMF ¶ 10.

In its response to GSA's statement of undisputed material facts, UFS represented that it concurred with and adopted the facts alleged in the first two numbered paragraphs above. Appellant's SMF ¶ 1. Although UFS did not specifically respond to the facts alleged in paragraphs three through six above, it stated in its opposition to GSA's motion for summary judgment that "GSA's Motion has accurately described *undisputed* material facts in this Appeal." Appellant's Opposition to Respondent's Motion for Summary Judgment (Appellant's Opposition) at 1. UFS alleged, however, that "[t]he weather events of February 16, 2021 (i.e., record snowfall and accompanying freezing temperatures) constituted an Act

[4] UFS has represented that two UFS mechanics who were normally at the building during normal working hours were not in the office because of the inclement weather and that UFS's administrator had called out sick that day. *See* Exhibit 3 at 402.

of God, as stated in GSA's October 14, 2021, Letter to [UFS]"[5] and that those weather events "prevented [UFS] employees from reaching the building to attempt to ameliorate the effects of the Act of God weather event." Appellant's SMF ¶¶ 2-3.

GSA's Claim

By letter dated June 2, 2021, the GSA contracting officer notified UFS of its liability for the courthouse damage caused by the burst pipe. Exhibit 3 at 402. GSA asserted in the letter that "[t]he contractor's failure to adequately perform [its] duties [under the contract] resulted in the damage to the building." *Id.* at 404. It claimed that "[t]he contractor's key personnel are required to be on-site during the tenant's normal working hours" and that, "[h]ad the contractor's employees been on-site when the incident occurred, the employees would have turned off the water valve and [sic] the onset which would have prevented the water damage from the pipe burst." *Id.* In the letter, the contracting officer asserted that, based on the calculations of a GSA estimator, the total estimated amount of damage to the building from the flooding (or from UFS's failure to switch off the valve that would have stopped water from flowing into the courthouse building) was $451,478.46. *Id.* at 403. The GSA contracting officer gave UFS until June 15, 2021, to inform GSA of the remedy that UFS would use to compensate GSA for damages to the Horton courthouse. *Id.* at 405.

UFS responded to the GSA contracting officer by letter dated June 9, 2021, asserting that the damages to the building were caused by an emergency inclement weather event during which "[s]nowfall and temperatures both reached historical levels (one high, one low)." Exhibit 4 at 407. Because "[t]his was a classic force majeure event," UFS asserted, it "is not liable for any of the $451,478.46 in damages referenced in your letter," citing clause C.40.9 of the contract in support. *Id.*

The contracting officer replied in a letter dated October 14, 2021, providing greater detail about the basis of GSA's position that UFS was liable for the water damages incurred at the courthouse and asserting that it was UFS's failure to respond to emergency calls that caused the bulk of the building damage. Exhibit 5. She rejected UFS's position that the contract's force majeure clause excused UFS from any responsibility for the extent of the water damage, as follows:

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[5] National Weather Service records indicate that, on the evening of February 10, 2021, temperatures in Memphis fell below freezing 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 Feb. 24, 2024). In addition, on February 14 and 15, 2021, a total of 5.3 inches of snow fell in Memphis. *Id.*

> 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." In this instance, 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. While the burst pipe may have caused some amount of damage, the extent of the damage is due to the Contractor's failure to adequately perform its responsibilities under the Contract.

Id. at 408 (emphasis omitted). She indicated that, as of the date of the letter, GSA's total estimated damages resulting from the flooding had risen to $529,478.46. *Id.* at 411. She directed UFS to notify her office no later than October 21, 2021, of the remedy that UFS proposed to provide to compensate GSA for the damages to the courthouse. *Id.* at 412.

On December 7, 2022, the GSA contracting officer issued a final decision demanding payment by UFS of $505,492.92 (an increase from her original demand but a reduction from the amount identified in her October 14, 2021, letter) for the damages resulting from the burst pipe and flooding at the Horton courthouse. Exhibit 6 at 413. She indicated that UFS's liability was based on its "failure to adequately perform the duties outlined in the terms and conditions of the contract," and she incorporated by reference as part of the decision her prior letters to UFS dated June 2 and October 14, 2021. *Id.* She noted that, "[b]etween December 2021 and September 2022, GSA [had] communicated with the assigned Complex Liability Claims Specialist" from UFS's insurer, Utica National Insurance Group, regarding GSA's claim against UFS and that the insurance company, in an email dated September 19, 2022, had offered GSA a final settlement of $190,038.83. *Id.* at 413-14. The contracting officer indicated that GSA did not accept that offer and demanded payment of the full $505,492.92 in damages allegedly incurred. *Id.* at 413. The GSA contracting officer advised UFS of its right to appeal the decision to this Board or to file suit in the United States Court of Federal Claims.

UFS's Appeal

UFS filed a notice of appeal with the Board on December 20, 2022, challenging the contracting officer's assertion of the government claim. After the complaint and answer were filed, the Board issued a scheduling order directing that discovery, inclusive of both written discovery and depositions, would conclude no later than October 20, 2023; that any dispositive motions were due by November 9, 2023; and that the Board would conduct a hearing in the appeal beginning January 10, 2024.

GSA filed its motion for summary judgment on November 9, 2023. At the parties' request, the Board suspended the scheduled hearing pending resolution of GSA's dispositive motion. UFS filed a two-page opposition to the motion on November 30, 2023. UFS did not submit a statement of genuine issues in response to GSA's proposed statement of uncontroverted material facts, but, in its brief, it indicated that GSA had accurately described the undisputed facts. Appellant's Opposition at 1. Nevertheless, because UFS represented in its brief that GSA's motion "neglected to address the *disputed* issues raised by [UFS] in its Appeal," *id.*, but did not elaborate on the extent to which the disputed issues, which appeared to relate to the severity of the snowstorm occurring when the frozen pipe burst, involved disputed facts, the Board directed UFS to file its own statement of material facts that identified, in a paragraph-by-paragraph manner, the facts that it believed warranted judgment against GSA and in its favor, with citations to supporting evidence in the record. UFS filed its statement of material facts on January 12, 2024, in which it identified the following disputed fact in this appeal:

> Whether or not the Act of God weather event prevented [UFS] employees from returning to the government facility to assist in ameliorating the effects of that concededly Act of God weather event which caused damages to the Government facility; i.e., whether or not the Act of God event (which triggered the force majeure clause in the contract) only caused the initial damaging event (as Respondent appears to concede) or also prevented [UFS] from limiting damages to the facility from that event (as [UFS] asserts and the Respondent noted [in its statement of undisputed material facts])?

Appellant's SMF ¶ 4. UFS cited to no evidence in the record showing that UFS employees could not return to the Horton courthouse during the events in question and instead indicated that it "intends to elucidate [such facts] through testimony" at a hearing. *Id.*

GSA filed a reply to UFS's statement of material facts on January 26, 2024.

Discussion

I. Summary Judgment Standard

Summary judgment is a wholly acceptable and favored procedural means for disposition of claims as to which there are no genuine issues of material fact in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "The moving party bears the burden of demonstrating the absence of genuine issues of material fact," and "[a]ll justifiable inferences must be drawn in favor of the nonmovant." *Au'Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,890. To preclude entry of summary judgment, "the party opposing summary judgment must show an evidentiary conflict on the

record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,205 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

II. UFS's Breach

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 2 at 102. It had to operate "a service request and administrative support function during normal working hours," *id.* at 104; "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; "be able to respond immediately to a variety of service requests involving multiple trades," *id.*; "make reasonable efforts to prevent hazardous conditions and property damage" at the Horton courthouse, *id.* at 114; have "a system for onsite work force personnel to report potentially hazardous conditions in the building to the [contracting officer] or [their] designee" and to "provide reasonable assistance to security or emergency response personnel as needed," *id.* at 117-18; and "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." *Id.* at 113. "The Contractor [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.

GSA argues that, under these provisions, UFS was required to have at least one employee on site at all times during normal working hours, available to deal with emergencies, and that its failure to do so breached the contract. Although there is language in the contract identifying a requirement for an "on-site supervisor," who would have "authority to act for the contract on a day-to-day basis at the work site," Exhibit 2 at 93, and some suggestion that mechanics should be nearby, *id.* at 114, the clauses stop short of expressly stating that the on-site supervisor and mechanics could never leave the property during normal working hours for lunch or other reasons. GSA has not pointed to any other language in the contract that expressly mandates an on-site presence at every moment during normal working hours. Accordingly, we cannot find any contract breach merely from the temporary absence of UFS employees at the site.

Nevertheless, the contract clearly requires UFS to maintain communications access with the contracting officer or his or her designee "at all times during normal working hours"

and to respond to any emergency service request that GSA makes "immediately (with the shortest possible time consistent with the mechanic's location) during normal working hours and," at the most, "within 30 minutes" of the call. Exhibit 2 at 102, 114. UFS plainly did not come close to satisfying those contractual requirements. The GSA building manager reached out to the UFS project manager at 1:04 p.m. CT on the day that the pipe burst. The UFS project manager initially did not respond and then did not return to the building to unlock the room in which the pipe had burst for almost four hours. "Failure to perform a contractual duty when it is due is a breach of the contract." *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000) (quoting *Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996)); *see Restatement (Second) of Contracts* § 235(2) (1981) ("When performance of a duty under a contract is due[,] any non-performance is a breach."). GSA has established that UFS breached its contractual duty.

III. UFS's Claim of Excusability

Once a breach of contract is established, the burden shifts to the breaching party to establish that an affirmative defense excuses the breach. *Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014). UFS's only defense to the breach is that the damage to the Horton courthouse building was caused by an act of God, which, it claims, precludes UFS's liability. Under the contract's force majeure clause, UFS "shall not be responsible for deficiencies or breakdowns caused by . . . acts of God including natural disasters," but only if the contractor could not "have reasonably foreseen such events and prepared accordingly to prevent such deficiencies or breakdowns." Exhibit 2 at 131; *see Taisei Rotec Corp.*, ASBCA 50669, 02-1 BCA ¶ 31,739, at 156,799 ("A force majeure is defined as a 'superior or irresistible force' which is 'outside the control of the parties' and cannot be avoided by the 'exercise of due care.'" (quoting *Black's Law Dictionary* 645 (6th ed. 1990)).

Here, there is no dispute that there were freezing temperatures and a snowstorm in Memphis on the day that the pipe burst in the Horton courthouse, which are considered "acts of God" under the contract clause. Nevertheless, UFS's job under the contract was to anticipate and address weather-related problems that might affect the building. Clause C.21.8 of the contract expressly provided that UFS, as the operations manager at the building, was "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 2 at 113. UFS was required to anticipate and plan for problems that might result from freezing temperatures, like frozen pipes that could burst. Further, in response to an emergency service call, UFS had to respond within no more than thirty minutes, *id.* at 114, which it did not do.

Contrary to what UFS believes, GSA is not attempting to place strict liability upon UFS for all damages that might result from a burst pipe — the contract does not demand that UFS preclude pipes from bursting during periods of freezing temperatures (even if, as O&M, it might attempt to take precautions to minimize frozen pipes), and it does not necessarily place liability on UFS for the damage resulting from water that might begin immediately flooding a building right after the pipe bursts — but the contract absolutely requires UFS, as the O&M for the building, to anticipate frozen pipes, to prepare for the need to address a burst pipe, and timely to respond when it learns that a pipe has burst. "A contract is a contract is a contract, and if the language is unambiguous [we] have no choice not to apply that language." *United States v. Kelley*, 145 F.R.D. 432, 434 (E.D. Mich. 1993). GSA, while not charging UFS with responsibility for the mere fact that the pipe burst, properly is complaining that UFS did not meet its contractual obligations in *responding* to the burst pipe. "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." *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986). By waiting almost four hours before responding to GSA's emergency call about a burst pipe (located in a locked room to which only the UFS project manager had the keys), UFS breached its obligations under its contract to deal with the exact type of emergency situation that the contract contemplates. UFS cannot rely on the force majeure clause to eradicate that obligation.

Perhaps there might be circumstances in which, despite the fact that a contract requires the O&M contractor to anticipate and plan for the type of weather emergencies and freezing temperatures that affected the building here, a weather event is so massive that the contractor cannot reasonably be expected to respond to emergency service calls in a timely manner. "Although any severe weather disturbance could be characterized as an 'Act of God,' it must be of such unanticipated force and severity as would fairly preclude charging [the contractor] with responsibility for damage." *United States Lines, Inc.*, ASBCA 20828, 77-1 BCA ¶ 12,261, at 59,042 (1976). UFS has presented nothing to show that we have such a situation here. Instead, UFS tells us in its response to GSA's summary judgment motion that, at a later date, it will present its evidence, through hearing testimony, and that the testimony will show how weather conditions precluded its employee from returning to the Horton courthouse building to turn off the water value for the burst pipe. Given that UFS has already conceded that the UFS project manager has confessed that he did not return to the building because of "something personal," Respondent's SUMF ¶ 7, it is difficult to imagine what testimony UFS could now present to overcome that admission, particularly given that the local fire department, FPS, and GSA employees were all able to reach the building despite the cold weather and the prior day's snow event.

In any event, we need not try to imagine scenarios that would create excuses for UFS's nonperformance because, in response to a summary judgment motion, the nonmovant

cannot simply say that it will present evidence in the future that will rebut the movant's case. "The nonmoving party's opposition . . . must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial." *Dreiband v. Nielsen*, 319 F. Supp. 3d 314, 319 (D.D.C. 2018). Conclusory statements that other evidence exists are simply not sufficient to preclude summary judgment. *Mingus Constructors*, 812 F.2d at 1390-91; *see Siska Construction Co.*, VABCA 3470, 92-1 BCA ¶ 24,578, at 122,606 (1991) ("Simple assertion that genuine issues of material fact exist or mere statements or conclusions concerning such facts or issues are not sufficient to prevent entry of summary judgment.").

UFS was required in its summary judgment response brief to lay out its force majeure defense, to explain specifically why UFS employees justifiably did not plan for or respond to the emergency service call for almost four hours, and to support its explanation with at least some actual evidence (whether through contemporaneous documents, deposition testimony, or witness declarations). UFS did not do so and, even now, has not provided the Board with any specific justifications, beyond the fact that there had been a snow event the prior day and below freezing temperatures for several days, for not having planned for the possibility of burst pipes and other weather-related building issues. Ultimately, it is the party seeking to invoke a force majeure defense who must establish the defense. *Switlik Parachute Co. v. United States*, 573 F.2d 1228, 1234 (Ct. Cl. 1978); *Pocono Pines Assembly Hotels Co. v. United States*, 69 Ct. Cl. 91, 103 (1930). Having failed to present *any* evidence in support of its defense beyond the fact that the snow event happened, UFS has presented no basis for precluding summary judgment to GSA on entitlement. *See Saber Ridge Farms*, IBCA 1738-11-83, 85-3 BCA ¶ 18,201, at 91,366-67 (To prevail on an "act of God" defense, the contractor must show not only the act of God occurred but also that the act of God "caused its failure to perform.").

Decision

For the foregoing reasons, GSA's motion for summary judgment on entitlement is **GRANTED IN PART** to the extent that UFS inexcusably breached its obligation to respond to GSA's emergency service call within thirty minutes after it was placed. The Board will schedule by separate order the hearing in this matter, which was previously postponed at the parties' request pending resolution of GSA's motion for summary judgment.

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

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge