UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 24, 2025

CBCA 7547

CRYSTAL CLEAR MAINTENANCE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Marques O. Peterson of Pillsbury Winthrop Shaw Pittman LLP, Washington, DC; and Mary E. Buxton and Dinesh C. Dharmadasa of Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, CA, counsel for Appellant.

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

Before Board Judges **BEARDSLEY** (Chair), **SULLIVAN**, and **CHADWICK**.

SULLIVAN, Board Judge.

Crystal Clear Maintenance (CCM) appealed the General Services Administration's (GSA) claim for the costs to repair flood damage allegedly caused by CCM's failure to perform aspects of its maintenance contract for the Little Rock, Arkansas bankruptcy courthouse building. The parties submitted the appeal for a decision under Board Rule 19. We find that GSA has failed to carry its burden to prove its claim and grant the appeal.

Findings of Fact

I. Contract and Its Terms

In September 2019, GSA awarded to CCM a maintenance services contract for five federal buildings in and around Little Rock, Arkansas. Exhibit 22 at 239, 241.[1] The contract required CCM to "provide management, supervision, labor, materials, equipment and supplies" and be "responsible for the efficient, effective, economical, and satisfactory operation, scheduled and unscheduled maintenance, and repair of equipment and systems" located within the five buildings. *Id*. at 293. The contract term was one base year and four option years. *Id*. at 246. The contracting officer's representative (COR) was identified as the "primary Government representative[] for the administration of the contract" but did not have authority to modify the contract. *Id*. at 254.

Contract performance began on November 1, 2019. Complaint, ¶ 19. As part of the transition from the previous contract, the scope of work for the contract provided that CCM, GSA and the previous contractor would conduct "a complete and systematic initial inspection together during the startup or transition phase of the contract. The purpose of this inspection shall be to discover and list all deficiencies that may exist in the equipment and systems." Exhibit 22 at 302.[2] The contract also required CCM "to inspect the condition of all equipment and systems" as part of the transition and provide an itemized estimate for repairing any deficiencies identified in the initial inspection with GSA. *Id*. at 303. Neither the report of the initial inspection, nor any testimony about that initial inspection, is included in the record.

"Normal working hours" were defined in the contract as "the hours of building operations under most circumstances when all services shall be provided to all occupants." Exhibit 22 at 300. The contract also contemplated that CCM would not provide services when the building was closed for weather resulting in a reduction of the payment due to CCM for those days that "the building(s) is closed due to inclement weather." *Id*. at 348. CCM was responsible for responding to emergency service requests, defined as "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" among other emergencies. *Id*. at 312. During normal working hours, CCM was required to "respond to

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[1] "Exhibit XX at XX" refers to the exhibits and the bates numbers on those exhibits in the appeal file submitted by the parties.

[2] The predecessor contractor was C&W Government Services (C&W), which held a contract from November 2018 to November 2019. Exhibit 23 at 1-2.

emergency service request[s] immediately (within the shortest possible time consistent with the mechanic's location)." *Id*. After working hours, CCM was obligated to respond within one hour. *Id*.

II. Events Surrounding the Flood

In November 2020, GSA issued an email with an attached document entitled "Freeze Protection," which included a section on testing the low temperature detection thermostat (or freeze stat sensor).[3] Exhibit 3 at 5, 8-9. The first step listed was to verify that the sensor was installed in the correct location (i.e., downstream of the hot water coil). *Id.* It is not clear that CCM received the email with the attached instructions.

Prior to the arrival of the winter storms in February 2021 that precipitated the Little Rock bankruptcy courthouse flood, the COR emailed freeze protection instructions to CCM for all of the systems in the building. Exhibit 1. For the heating systems, he explained that "[u]sually the [Building Automation System (BAS)] takes care of freeze protection," but because of "overrides that [had] been put in place for COVID," CCM needed to "close off the outside air dampers," verify their closure, and ensure that "sump pump heaters in cooling towers" worked properly. *Id.* CCM complied with the COR's directions. Exhibit 6 at 18-19. CCM also removed all overrides in the BAS and reviewed its freeze protection procedures. *Id.*

On February 15, 2021, the day before the flooding occurred at the Little Rock bankruptcy courthouse, the COR texted CCM's project manager, stating, "[t]he Little Rock triplex is closed tomorrow." Exhibit 6 at 20.[4] The building manager at the Batesville courthouse, one of the five buildings covered on the contract, also texted CCM's project manager and told CCM to "stay home" and "treat [the day] like your weekends." *Id*. Based on this communication, CCM assumed that CCM employees were not expected to report to the closed building on February 16, 2021, but would be on-call in case of emergency. *Id.*

On February 16, 2021, the day of the flooding, CCM's morning report states that the building was closed, that no staff were on site, and that once travel conditions improved,

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[3] The description of the thermostat is found in the record at Exhibit 25, pages 600 to 605. GSA refers to this sensor as a "freeze stat sensor."

[4] According to the contracting officer's first decision, the Little Rock triplex does not include the bankruptcy courthouse. Exhibit 10 at 193. GSA did not explain why the COR communicated this information to CCM. It is undisputed that the bankruptcy courthouse was closed on the day in question.

CCM would send personnel to the building to reset any triggered freeze stat sensors. Exhibit 6 at 20; Exhibit 35. GSA disputes that the COR received the morning report. GSA's Rule 19 Reply Brief at 9.[5] At approximately 11:45 a.m. on February 16, 2021, the coils for air handling unit (AHU) 7 located in the Little Rock bankruptcy courthouse burst. Exhibit 2 at 3; Exhibit 37. At that time, no CCM employees were on site. *See* Exhibit 6 at 21. At 4:12 p.m., a court employee notified GSA of flooding in the courthouse and GSA promptly called CCM to notify CCM of the water intrusion. Exhibit 10 at 193. CCM arrived approximately forty-five minutes later and shut off the water. *Id.*

While investigating the cause of the burst coils, GSA determined that the freeze stat sensor for AHU-7 was installed on the wrong side of the unit, the opposite side from the heating and cooling coils. Exhibit 8 at 25. This sensor, when in the correct location, monitors the outside ambient air temperature and trips an alarm when the temperature falls below thirty-five degrees. *Id.* A tripped sensor initiates a freeze protection sequence. *See* Exhibit 25 at 600. When the freeze protection sequence is initiated, the hot water valve opens, the outside air dampers close, and cooling fans shut down. *Id.* GSA determined that in its incorrectly located position, however, the sensor could not sense the outside ambient air temperature. Exhibit 8. GSA concluded that this is why, when the ambient air temperature fell below freezing, the freeze stat sensor did not send an alarm or initiate the freeze protection sequence. *Id.*; Exhibit 28 at 695. GSA theorized that had the sensor been installed in the correct location, it would have notified CCM through the BAS and the freeze protection sequence would have been initiated. Exhibit 10 at 192; Exhibit 27 at 654-55.

The parties agree that Mr. Keathley, the project manager for both C&W and CCM, relocated the freeze stat sensor for AHU-7.[6] GSA's Rule 19 Reply Brief at 4 n.2; *see* Exhibit

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[5] The day after the flooding, the COR sent an email to several individuals, including a CCM email address, which stated:

> [W]hen the building is closed [due] to inclement weather[,] the contractor is still responsible to be at the building to make sure the building is operating properly and to make sure that there are no issues. The only times that the Contract is off is on the Federal Holiday's [sic] and if the President signs a Holiday Order. This is per your contract. Please make sure the building is staff[ed].

Exhibit 36.

[6] GSA asserts that CCM is responsible for the actions of Mr. Keathley, as an employee, pursuant to the theory of *respondeat superior*. GSA's Rule 19 Reply Brief at 12-

31 at 813; Exhibit 41 at 871. The parties dispute when the sensor was relocated, who, if anyone, directed Mr. Keathley to relocate the sensor, and whether GSA knew about the relocation. To answer these questions, the parties attempted to depose Mr. Keathley but could not locate him to serve the subpoena issued by the Board.

The record contains an affidavit signed by a former C&W employee which states that Mr. Keathley relocated the freeze stat sensor in February 2019. Exhibit 25 at 598-99. According to the affidavit, GSA's equipment specialist directed Mr. Keathley to relocate the sensor because its alarm kept sounding. *Id.* at 598. Mr. Keathley asked the former C&W employee to move the sensor, but the former employee refused to do so and resigned. *Id.* at 598-99. Subsequently, Mr. Keathley moved the sensor himself. *Id.* at 599; Exhibit 30 at 790-91. In a later telephonic deposition, the former C&W employee could not recall signing the affidavit and retracted the statement that GSA's equipment specialist directed the relocation of the freeze stat sensor. Exhibit 30 at 790-93. He did, however, maintain that Mr. Keathley moved the sensor at GSA's direction. *Id.* at 786, 790-93. As to when Mr. Keathley moved the sensor, the former employee testified that February 2019 was the general timeframe which accords with the affidavit. Exhibit 30 at 789-90.[7]

GSA's equipment specialist denied that he told Mr. Keathley to move the freeze stat sensor. Exhibit 28 at 713. GSA's equipment specialist also testified that he conducts quarterly inspections and that he was surprised he had not discovered that the sensor had been relocated:

> I'll tell you I find it hard to believe that I believe [sic] my quarterly inspections never captured it. The way it was relocated was obvious on the exterior of the cabinet that it had been moved. . . . Not by factory design. So any previous inspection should have caught that, yes, if they looked at that unit.

Id. at 719.

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13. Given the existence of the contract between the parties, we need not consider this tort theory of liability.

[7] GSA asserts that, based upon the former employee's deposition testimony, the affidavit should be stricken from the record. GSA's Rule 19 Reply Brief at 6. GSA failed to object to the affidavit by the date set by the Board for objections to exhibits in the appeal file. Order (Nov. 21, 2024). Moreover, the former employee testified as to the substance of the statements in the affidavit. He could not recall signing the affidavit but explained that recent health issues have occupied his attention. Exhibit 30 at 785-93. We deny GSA's motion to strike as untimely.

CCM provided evidence of other possible causes of the burst coils. GSA's equipment specialist revealed in his deposition that, during the weather event, coils on two other AHUs also froze and burst, another one at the Little Rock bankruptcy courthouse and one at the Batesville courthouse. Exhibit 28 at 716. The freeze stat sensors on these AHUs were installed in the correct location and CCM was not held responsible for the resulting damage. *Id.* He also testified that it is not unusual for AHUs to break as a result of age but he did not know the age of AHU-7. *Id.*[8] Also, when CCM investigated the cause of the burst coil, it found a faulty spring in the sensor. Exhibit 6 at 19. After testing the AHU, CCM determined that this faulty spring prevented the sensor from initiating the freeze protection sequence. *Id.*

III. Contracting Officer's Claim and CCM's Appeal to the Board

In July 2021, the contracting officer issued a claim letter to CCM demanding payment for some of the repair costs incurred, asserting that the damage was caused by CCM's failure to (1) test the freeze stat sensor prior to the predicted cold weather, and (2) have personnel on site during the cold weather incident. Exhibit 10 at 190-93. The contracting officer asserted a demand for $173,978.19, which was the sum of costs incurred to remove the water from the facility and to repair two coils in the air handling unit. *Id*. at 194. Although the contracting officer identified the purchase and task orders on which these costs were incurred, *id*., neither of these orders, nor any other supporting cost documentation, is included in the appeal file.

In October 2022, GSA issued an "Updated Demand for Payment" to CCM. Exhibit 15. The contracting officer asserted that the total cost of the repairs owed to GSA was $741,797.50, the sum of the amount of $173,978.19, previously asserted, and a new demand for $567,819.31 for costs incurred on another task order to repair the damaged portions of the building. *Id*. at 226-227. Again, neither the referenced task order nor any other supporting cost information is included in the appeal file.[9] CCM filed its appeal following the issuance of this second demand letter.

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[8] Although the record does not contain any information on the age of AHU-7, the photos in the record appear to show that AHU-7 is an older unit. *See* Exhibit 8 at 26-30.

[9] In response to an interrogatory asking how GSA calculated the amount due, GSA identified two task orders and one purchase order and stated the amounts incurred for each. Exhibit 31 at 816. This interrogatory response, which simply restates the information included in the contracting officer's demand letters, is the only other reference to damage amounts in the record.

In November 2024, the parties notified the Board of their election to have the Board decide the case on the written record pursuant to Board Rule 19. That notice did not include a request that the Board bifurcate the consideration of liability and damages, and the parties made no such request in previous filings or discussions with the presiding judge. On November 21, 2024, after conducting a teleconference with counsel for the parties, the Board entered a scheduling order that set dates for the submission of final appeal file exhibits, the filing of objections, if any, to those exhibits, and the filing of the parties' briefs. The Board's order did not provide for bifurcation of proceedings to first decide issues of liability. Order (Nov. 21, 2024).

Discussion

The parties elected to proceed under Board Rule 19, which provides that the Board will decide the appeal on the written record provided by the parties. 48 CFR 6101.19 (2024). Pursuant to Rule 19, parties may submit "(1) any relevant documents or tangible things they wish the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and, (3) briefs or memoranda of law that explain each party's positions and defenses." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551 (citing Rule 19), *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016). The Board is permitted to make findings of fact based upon those submitted materials and decide questions of law based upon those findings. *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (citing *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶16,487, at 81,967). The Board may make credibility determinations, "even if such findings require 'credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved.'" *1-A Construction*, 15-1 BCA at 175,551. The party's evidence still must establish by a preponderance of the evidence that it is entitled to relief. *Id*. "A party . . . acts at its peril, in a Rule [19] procedure, where it fails to provide the Board sufficient factual information, supported by affidavits or probative documentary evidence." *Sefco Constructors*, VABCA 2747, et al., 93-1 BCA ¶ 25,458, at 126,802 (1992).

GSA asserted a government claim and bears the burden to prove liability, causation, and resultant damages. *Roberts v. United States*, 357 F.2d 938, 949 (Ct. Cl. 1966); *Twigg Corp*., GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,975 (citations omitted). We examine each of these elements in reverse order.

Damages. With regard to damages, GSA must prove both the fact of damage and the amount of damage to a reasonable certainty. "[C]laimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere

speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961) (citing *Winn-Senter Construction Co. v. United States*, 110 Ct. Cl. 34, 63 (1948)).

GSA has failed to prove damages. The record contains the allegations of damage from the contracting officer but no proof that the amounts sought are correct. Given that the contracting officer identified the task and purchase orders on which the costs were incurred, it should have been a relatively simple task for GSA to put into the record evidence of costs incurred. GSA failed to do so. Instead, GSA offered to provide damages once the Board decides the issue of entitlement. GSA's Rule 19 Initial Brief at 10; GSA's Rule 19 Reply Brief at 2 n.1. Deferring its obligation to prove damages would have been proper if GSA had sought a bifurcated proceeding. It did not. Instead, GSA agreed with CCM that the Board would decide the matter on the written record pursuant to Rule 19. That record does not contain any proof of damages. Thus, GSA has failed to meet its burden.[10]

Causation. GSA has also failed to establish causation. GSA must prove that the damage from the burst pipe was "caused, in whole or in part" by the contractor's "negligence . . . in the performance of [or failure to perform] work under the contract." *United Facility Services Corp. v. General Services Administration*, CBCA 7618, 24-1 BCA ¶ 38,631, at 187,794-95; *see also Tas Group, Inc. v. Department of Justice*, CBCA 52, 08-1 BCA ¶ 33,866, at 167,620. As the non-breaching party, GSA must satisfy the "but for" causation test and "show that but for the breach, the damages alleged would not have been suffered." *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997) (citations omitted). Under the preponderance of the evidence standard, we need to find that it "is more probably true than not" that CCM's actions or non-actions *did* cause AHU-7's coils to freeze and burst. *United Facility Services Corp. v. Department of the Treasury*, CBCA 6032, 24-1 BCA ¶ 38,669, at 187, 976 (quoting 48 CFR 2.101). If the question of whether CCM caused the damage is "too close to call," then GSA has not met its burden. *Ortiz v. Principi*, 274 F.3d 1361, 1364-65 (Fed. Cir. 2001).

GSA has not established by a preponderance of the evidence that the relocated freeze stat sensor caused the coils in AHU-7 to freeze and burst. There are other possible reasons for the burst coil which GSA has not adequately refuted. First, during the storm, both a coil on another AHU at the Little Rock bankruptcy courthouse and a coil on an AHU at the Batesville courthouse froze and burst. On both of these AHUs, the thermostat or freeze stat

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[10] Given our determination that GSA has also failed to meet its burden with regard to causation and liability, we decline to exercise our authority under Board Rule 4(f) to require GSA to add the necessary evidence to the appeal file. *See Hearthstone, Inc. v. Department of Agriculture*, CBCA 3725, 15-1 BCA ¶ 35,895, at 175,482.

sensor was located in the correct position. As a result, it is not clear that a correctly located sensor on AHU-7 would have prevented the damage. Second, GSA's equipment specialist explained during his deposition that breaks do occur due to the age of the unit. Third, CCM determined that a faulty spring in the sensor, not the location of the freeze stat sensor, was the cause of the sensor failing.

GSA cites the deposition testimony of its equipment specialist and the COR stating that the relocated freeze stat sensor caused the coils in the AHU to freeze and burst. But, without further explanation from GSA as to why the relocated sensor caused the coils on this AHU to burst when other coils with properly located sensors also burst, the panel cannot find that it is more probably true than not that the relocated sensor caused the resulting damage.

GSA asserts that it does not contend that the relocation of the freeze stat sensor was the singular cause of the flood, GSA's Rule 19 Reply Brief at 7-8, but offers no other causation theory. GSA has not explained how the flooding was discovered or how, if CCM personnel had been in the building, the flooding would have been discovered earlier or prevented. Without more, our focus remains on GSA's failure to prove by a preponderance of the evidence that the relocation of the sensor caused the flood.

Liability. GSA asserts two bases for CCM's liability: (1) CCM should have alerted GSA that the freeze stat sensor had been moved, and (2) CCM personnel should have been on site to prevent the flood. We address the second allegation first.

GSA has not established that CCM personnel were required to be on site during the weather event, notwithstanding the COR's direction following the event. The contract provides that CCM personnel are to be on site to provide services to tenants during normal working hours and that reductions in contract payments may be made if the buildings are closed due to inclement weather. Moreover, the contract acknowledges that CCM is charged with responding to floods, not preventing them. CCM met its obligation to respond within an hour when it was notified of the flood. Pursuant to the terms of the contract, CCM was not obligated to be on site at all times to prevent the flood. Thus, GSA fails to establish liability with this allegation.

GSA's reliance upon the Board's decision in *United Facility Services Corp. v. General Services Administration*, CBCA 7618, 24-1 BCA ¶ 38,535, is misplaced. In *United Facility*, the Board did not find that the contractor was required to be in the building; instead, the Board found the contractor liable, in part, because contractor personnel failed to respond

within the time required for emergencies during non-business hours. *United Facility*, 24-1 BCA at 187,317.[11] Here, CCM responded within the time required in its contract.

GSA also asserts that CCM failed in its obligation to notify GSA during the first fifteen months of the contract that the sensor had been moved. GSA's Rule 19 Reply Brief at 11. GSA does not seek to establish that CCM moved the sensor or when it was moved. Thus, we are left with the evidence that the sensor was moved during the previous contract with C&W. To establish liability, GSA relies (1) upon the requirement in the contract that CCM, at the time of contract transition, survey all equipment and notify GSA of any problems, and (2) the November 2020 direction to check the location of the sensor. GSA's Rule 19 Initial Brief at 3, ¶ 6[12]; GSA's Rule 19 Reply Brief at 11. However, the contract clause requiring CCM to conduct an inspection upon contract transition also required CCM, GSA, and the predecessor contractor, collectively, to conduct an initial inspection to make sure that all equipment was in working order. GSA's equipment specialist testified that an inspection would have revealed that the sensor had been moved, and, therefore, GSA should have discovered that the sensor had been moved during this initial inspection. The record is silent as to whether this contract transition inspection occurred and if so, what was discovered. Given that GSA had an equal obligation to conduct an inspection that would have revealed the relocated sensor, we decline to impose liability on this basis.

Decision

The appeal is **GRANTED**.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

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[11] GSA's claim in United Facility arose from the same weather event involved in this case. *United Facility*, 24-1 BCA at 187,314.

[12] GSA cites a provision of the contract regarding outdoor irrigation systems. We believe the correct clause of the contract is 5.1.2, which contained the requirement stated above.

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge