



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 20, 2009

CBCA 718

BLACKSTONE CONSULTING, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Cynthia Malyszek of Malyszek & Malyszek, Los Angeles, CA, appearing for Appellant.

Mel Myers, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **VERGILIO**.

BORWICK, Board Judge.

Blackstone Consulting, Inc. (BCI or appellant) submitted claims for improper deductions from amounts due under a janitorial services contract with the General Services Administration (GSA or respondent) and for lost profits on unexercised option years on that contract. BCI alleged that respondent's deductions and its failure to exercise contract options were bad faith retaliation for BCI's submission of a sexual harassment complaint concerning the husband of one of respondent's officials. The contracting officer (CO) of GSA denied the claims, resulting in this appeal. We tried entitlement only in a three-day hearing. We conclude that respondent's officials did not retaliate against BCI for submission of the sexual harassment complaint, and that the contract deductions were in accordance with the contract's terms and were proper and reasonable. We conclude that BCI has not established that its abandonment of the contract under the Mutual Cancellation clause of the contract was a product of government duress. We conclude that BCI is not entitled to relief, beyond

payment for unpaid invoices that the contracting officer had already granted. The appeal is thus denied.

Findings of Fact

Contract term and standard clauses

1. On or about December 29, 2003, respondent awarded contract GS05P04GAC0043 to BCI for janitorial services for the John C. Kluczynski (JCK) Federal Building and the United States Post Office (USPO) Loop Station, Chicago, Illinois. Request for Equitable Adjustment (REA) ¶ II; Appeal File, Exhibit 1 at 18¹. The contract had an effective date of February 19, 2004, and incorporated the terms of Request for Proposals GS05P03GAC0007. *Id.*

2. The base period of BCI's contract ran from February 19, 2004, through July 31, 2004. Appeal File, Exhibit 1 at 18. The base period was shorter than one year because BCI had taken over the contract from another contractor which had unilaterally terminated its performance. Transcript at 615-18.

3. The contract had four one-year options exercisable unilaterally by the Government. Appeal File, Exhibit 1 at 92 (§ F, ¶¶ B, C). Under the standard Federal Acquisition Regulation (FAR) clause incorporated into the contract, the Government could exercise the option upon thirty days' written notice to the contractor, provided the Government gave a preliminary written notice of its intent to extend at least sixty days before the contract expired. *Id.* at 156 (¶ 83, FAR 52.217-9--Option to Extend the Term of the Contract (Mar. 2000)). On July 30, 2004, respondent exercised the first option year, extending the contract term through July 31, 2005. *Id.* at 10. On July 29, 2005, respondent exercised the second option year, extending the contract term through July 31, 2006. *Id.* at 2.

4. BCI's unit price for the base period was as follows. The prices shown are monthly prices (except for the pro-rated partial months).

JCK Building	\$29,272.67	Pro-Rated Feb.19-29
	\$121,272.65	March 1-April 30
	\$120,072.65	May 1-July 31
USPO	\$4,739.42	Pro-Rated Feb. 19-29

¹ Pagination reference is to the handwritten consecutive pagination in Appeal File, Exhibit 1.

\$19,634.89

March 1-July 31

Appeal File, Exhibit 1 at 19. For the second option year, the monthly unit price for contract service at the JCK building was \$133,344.80, and for the USPO was \$21,225.21. *Id.* at 4.

5. The contract contained a Mutual Cancellation clause, whereby either the Government or the contractor could unilaterally cancel the contract without cost, effective 120 calendar days after receipt of written notice. Appeal File, Exhibit 1 at 89 (§ E, ¶ G).

6. The total cleaning area of the JCK building was 1,106,276 square feet (BOMA measurement). Appellant's Exhibit 80. The USPO cleaning space was about 200,000 square feet. Transcript at 885-86.

Contract cleaning requirements

7. Required cleaning services were to be performed at frequencies determined by the contractor, except for special areas such as restrooms or the fitness center, determined by the contracting officer's representative (COR) to require more frequent cleaning. Appeal File, Exhibit 1 at 66 (§ C, ¶ L). Performance was measured by results, not the frequency or method of performance. *Id.* Evaluation of results was based on tenant satisfaction, the contracting officer or designee's inspection, International Facility Management Association (IFMA) surveys, and best trade practices. *Id.* Final results were the determining factor for the success or failure of the contract. *Id.*

8. All interior spaces (excluding mechanical spaces and elevator pits) were to be free of obvious dirt, dust, and debris. Appeal File, Exhibit 1 at 66 (§ C, ¶ L(1)a). All vertical surfaces (excluding windows) and horizontal surfaces were to be freshly cleaned and polished and have no accumulation of dust, dirt, marks, streaks, smudges, or fingerprints, including items above and beneath eye level. *Id.* Dusting was to be accomplished by damp cloth with no dry-dusting allowed. *Id.* Wood paneling was to be free of soil substances, dust streaks, and spots while carpets and rugs were to be free of obvious spots and stains and were to be free of dirt and debris, spots, gum-crusted material, and removable stains. *Id.* All floors were to be maintained in accordance with best trade practices with all bare floors and moldings to shine and be bright and clean. *Id.*

9. Drinking fountains were to be cleaned to be free of water marks and any other debris and maintained at a high level of sanitation; metal surfaces in entrances, lobbies, elevators, all exterior building fixtures, and corridors were to have a polished and lustrous appearance. Appeal File, Exhibit 1 at 67 (§ C, ¶ L(1)b-c). Rest rooms were to be cleaned and sanitized with a disinfectant cleaner; fixtures in the rest rooms were to be cleaned,

polished, and free of encrustation, dust, streaks, and odor. *Id.* at 67 (§ C, ¶ L(1)e). Lobby areas in the JCK building and USPO were to be policed on a constant basis during regular business hours to ensure those areas were free of debris and obvious dirt. *Id.* at 69 (§ C, ¶ L(3)d).

10. Respondent's quality expectations in meeting the above requirements were set forth in section J, exhibit 2 of the contract. Appeal File, Exhibit 1 at 66 (§ C, ¶ L). Section J, exhibit 2 is a multi-page document entitled Cleaning Performance Standards, which contains forty-eight standards. For the sake of brevity, only pertinent examples of those standards are set forth below:

1. BRIGHT METAL POLISHING: Bright metal surfaces shall have a polished and lustrous appearance.

....

10. DAMP MOPPING AND SPRAY BUFFING: Floors shall be slip resistant, free of marks, skipped areas, streaks and mop strands. Walls, baseboards and other surfaces shall be free of splashing and markings from equipment. The finished area shall have a uniform lustre. There shall be no buildup of finish in corners or crevices.

....

13. DUSTING There shall be no obvious dust streaks. Corners, crevices, molding and ledges shall be free of all obvious dust. There shall be no oils, spots or smudges on desk glass or dusted surfaces.

Appeal File, Exhibit 1 at 227 (§ J, Exhibit 2).

11. BCI was responsible for collection and removal of all trash, Appeal File, Exhibit 1 at 82 (§ C, ¶ P.1), including the segregation and removal of recyclable material. *Id.* at 83 (§ C, ¶ P.3).

12. The contract required the continuous presence of BCI's project manager or the project manager's COR-approved alternate. Appeal File, Exhibit 1 at 96 (§ H, ¶ A(2)a). The contract also required at a minimum, for the JCK building after 1:00 p.m. until work was completed for the day, two supervisors--one working and one non-working, one of whom could be the project manager at BCI's discretion. For the USPO the contract required at least

one working or non-working supervisor on-site when work was being performed at that location. *Id.*, Exhibit 1 at 97 (§ H, ¶ A(2)d).

Contract inspections

13. Section E of the contract contained the standard Inspection of Services - Fixed Price clause, found at FAR 52.246-4 (Aug. 1996), which provided in pertinent part at subsection B:

(2) The contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(3) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

.....

(5) If any of the services do not conform with contract requirements, the Government may require the contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may—

(a) Require the contractor to take necessary action to ensure that future performance conforms to contract requirements; and

(b) Reduce the contract price to reflect the reduced value of the services performed.

Appeal File, Exhibit 1 at 87-88.² Additionally, subsection C of section E of the contract provided that “the hourly rate to be used when calculating deductions” shall be the rate shown on line item 0006 in section B for the base or option year covered. *Id.* at 88 (§ E,

² That clause is also contained with different paragraph numbering in the standard clause section of the contract at Appeal File, Exhibit 1 at 165.

¶ C). The rate “will be multiplied by the number of productive and administrative hours needed to complete the task as determined by the Contracting Officer’s Representative.” *Id.*

14. The contract mandated that the contractor submit a complete quality control plan (QCP), to be accepted by the contracting officer prior to the award of the contract, Appeal File, Exhibit 1 at 62 (§ C, ¶ H), and a custodial quality assurance plan (CQAP), *id.* at 64 (§ C, ¶ K). Among other requirements, the QCP required the contractor to submit to the Government quarterly self-evaluation reports. *Id.* at 62 (§ H). The CQAP required the contractor to meet with the COR not less than twice a month during the first three months of the contract, and thereafter at a frequency chosen at the COR’s discretion but not less than once per month. *Id.* at 64 (§ C, ¶ K(2)a). The CQAP also required meetings of the contractor, respondent, and the tenant agencies, at about the same frequency. *Id.* (§ C, ¶ K(2)b). Written minutes of all meetings were to be kept and signed by the COR and by the contractor’s on-site supervisor. Should the contractor not agree with the minutes, the contractor was obligated to indicate such non-concurrence in writing to the contracting officer within one week of receipt of the minutes. *Id.* at 64-65.

15. Contract work was inspected using a numerical scoring system of 1 through 5 as follows: 1--completely unacceptable; 2--partially acceptable; 3--acceptable; 4--above average; 5--exceptional. Appeal File, Exhibit 1 at 66 (§ C, ¶ K(7)).

Contracting personnel

16. Toranda Roberson was the warranted CO for respondent, Jill Slechter was the administrative CO (ACO), and Gina Carter was the COR on the contract. Transcript at 824, 1086, 1549.

17. BCI is a privately held corporation, operating in twelve states and the District of Columbia. Transcript at 608-09. At the time of the hearing on the merits, BCI had between twenty and twenty-five contracts with the United States Government. *Id.* at 611. The president of BCI is Mr. Ronald Blackstone and the director of its human resources (HR) department is Karen Cash. *Id.* at 606, 610.

Contract performance

18. When BCI took over the contract, by the admission of its president, its leadership team was “not the strongest we would have hoped for.” Transcript at 614. BCI arranged for new supervisory personnel and kept the existing labor force belonging to the Service Employees International Union (SEIU). *Id.* at 616-17.

19. Respondent recorded early performance problems on the contract. On April 23, 2004, the COR advised BCI that many areas of the JCK building had not been cleaned and vacuumed. The COR reported the presence of debris throughout the twenty-third floor; that several offices on the fourth, thirty-fifth, and thirty-sixth floors had not been vacuumed; and that the entry door to room 3600 contained smears and run-downs. Appeal File, Exhibit 2. The COR expressed displeasure and sought assurances from BCI that problems like the ones noted would not reoccur. *Id.* On April 26, 2004, BCI's project manager, Shateau Shorter, advised the COR that BCI had taken corrective measures to ensure that the employees cleaned deficient areas. *Id.* at 3.

20. Performance problems continued, however. On August 6, 2004, the COR wrote BCI that in July, there were fourteen instances of trash not being emptied, eight instances when floors were not vacuumed, and areas of heavy dust and recycling not being pulled in accordance with BCI's work schedule. The COR noted that, in July, she had received forty-four service calls for recycling. Appeal File, Exhibit 4. On August 10, recognizing that there were problems, BCI stated that it would retain a swing-shift control reviewer to make sure that work was accomplished. *Id.*, Exhibit 5.

21. Performance problems persisted throughout August 2004, including twenty-eight instances where restrooms were found to have been insufficiently policed or maintained (e.g., lacking toilet paper and other paper products). Appeal File, Exhibit 6. The COR attributed this condition to BCI's assigning only one person to police the more than 150 bathrooms in the JCK building. *Id.* In addition, the COR noted unclean elevators and carpet spotting in many areas. Again, the COR noted that BCI had allocated only one person to clean the carpets in the JCK building. *Id.* The JCK building has about one million square feet of carpeting that needed daily attention. *Id.*, Exhibit 19. By letter of August 18, BCI promised to improve by adjusting employee route schedules, installing a quality control inspector, and adding additional utility hours to the normal work schedule. *Id.*, Exhibit 7.

22. On August 20, 2004, the COR wrote BCI that inspection the night of August 19 had revealed that BCI had missed cleaning the entire thirty-fourth floor of the JCK building. Appeal File, Exhibit 8. The COR warned that due to the recurring nature of the deficiencies, deductions would be taken and demanded a remedial action plan. *Id.*

23. On August 24, the COR advised BCI that there was unsatisfactory floor cleaning on the east and north sides of the USPO lobby, including debris under the floors and tables, and that the locker rooms in the fitness center had not been properly cleaned for a three-day period. Appeal File, Exhibit 11.

24. In response to the August 20 letter, BCI promised to add its own quality control

inspectors and stated that it had replaced two “substandard performers” on their routes to increase the quality of the work on those routes. Appeal File, Exhibit 11. In response to the August 24 letter, BCI stated that it was adding another utility position to address service calls throughout the day to enable the quality control inspectors to focus on quality control. Additionally, BCI sent its president to the JCK building to “re-focus and direct the systems that BCI had in place to be more effective.” Appeal File, Exhibit 12.

25. BCI’s president and respondent held a meeting on August 31, 2004, after which BCI promised to improve in the areas of subcontract management, service calls, and quality control inspection systems. BCI stated it was adding a utility position to address service calls, and that it would team two dusters to insure that personnel are dusting each and every floor of the JCK building. BCI stated that it had used a carpet cleaning machine to clean carpets in the JCK building and that it had purchased a new carpet cleaning machine that would be forthcoming within the month. Appeal File, Exhibit 15.

26. Quality control problems persisted to the end of 2004 and throughout 2005. On April 11, 2005, in response to complaints from the USPO, GSA inspected the post office lobby and found numerous deficiencies in the cleaning, including visible streaks and marks on black-waxed floors in the USPO lobby, and streaks with wax drips on floors behind tables on the Adams Street and Dearborn Avenue sides of the building. A USPO employee had reported that on the work level of the USPO, large areas of the black wax were wet in the morning, tables and mats were not put in their proper places after waxing, mail carts were moved, workers could not locate their mail, and there were spots and stains on the carpets. Appeal File, Exhibit 16.

27. Floor and mat care seemed to be particularly frustrating to respondent’s contracting personnel. On April 20, 2005, the ACO sent the following e-mail message to the COR with copies to BCI personnel:

I don’t understand why BCI is consistently and continuously baffled with floor/mat care. I’ll say this BCI, when you don’t want to do something you are consistent. You left the mats (and floors) in the Post Office a mess and have continued that in the JCK lobby. As I have said repeatedly, these are **HIGH PROFILE BUILDINGS**.

Appeal File, Exhibit 16 at 8. At around this time, GSA seriously considered not exercising BCI’s first year option. *Id.* The ACO wrote the COR that “[m]onitoring a contract is one thing but we have taken on the role of BCI Project Managers and we should deduct for the time we spend doing that. I am weary and without much hope that BCI will ever be able to stand on its own.” *Id.* at 2.

28. However, the COR responded to the ACO that contract deductions might be the incentive for BCI to improve its performance. Appeal File, Exhibit 16 at 1. The ACO asked the COR, “When will GSA be able to leave this contractor to work on [its] own? They have had the contract for 14 months and still don’t grasp the concept of quality control.” *Id.*

29. On May 5, 2005, respondent informed BCI of deficiencies found the night before in the cleaning of the north corridor and in the main lobby area of the USPO facility, which were a continuation of deficiencies that had been found earlier. Appeal File, Exhibit 17. On May 13, 2005, the ACO notified BCI of a deduction from its invoice of \$517.68 for lack of contractually required supervisor coverage at the USPO facility for April 18, 21, and 22, and for several instances where minimum supervisory requirements were not met at the JCK building because the supervisor was assisting at the USPO facility. *Id.* Exhibit 18. A deduction of \$395.30 was assessed for damage to bathroom fixtures which the ACO concluded was due to BCI’s use of improper chemicals or improper application of chemicals. *Id.*

30. On July 19, 2005, the ACO expressed to BCI considerable frustration about the quality of BCI’s work, stating that BCI had not yet fixed the carpet cleaning problem and had inadequate quality control. Appeal File, Exhibit 19.

31. In September 2005, respondent deducted \$801.54 for lack of supervisory coverage at the JCK building for September 1-2 and September 6-9. BCI had one supervisor doing double-duty at the USPO and JCK building to accommodate vacation schedules when the contract called for two supervisors. Appeal File, Exhibits 21-22.

32. On November 16, 2005, the COR recorded that trash was not emptied from room 1064, the seventeenth floor, and room 3718 of the JCK building; that dusting and vacuuming was skipped in one office; that work was not being done in accordance with established time frames; that there were supervisory and night shift concerns; that problems were beginning to arise with trash pick-up; and that there were ongoing and continuous recycling problems. Appeal File, Exhibit 23. The ACO also recorded a compliment for clean-up in room 408, but noted that vacuuming was not being done daily in that room. *Id.*

The reduction in force

33. In December 2005, respondent suffered a reduction in force (RIF) of its inspection personnel in the Chicago office. Appeal File, Exhibit 24. Until the RIF there had been two full-time inspectors for respondent on the contract. Transcript at 862-63, 867. Respondent replaced the two full-time inspectors with three or four part-time employees from respondent’s Office of Buildings Management who had no previous experience as inspectors.

Id. at 862, 867. In the opinion of the ACO, after the removal of the inspectors, BCI's performance declined because "everybody [became] laid back and relaxed." *Id.* at 870.

Contract performance after the reduction in force

34. On December 7, a progress meeting summary stated that on the floor housing the Department of Labor (DOL), trash had not been emptied in Room 800 for three days. It was also reported that freight elevator lobbies needed a thorough cleaning. Appeal File, Exhibit 29. Tile floors in room 230 and the second floor mail room were not being buffed as needed. *Id.*

35. By written memorandum of January 3, 2006, the COR advised BCI officials of its poor service on the twenty-third floor of the JCK building: spots throughout the floor; waiting area contained a soda bottle that had remained for a few days; heavy dust on chairs in the waiting area; recycle overflow in the kitchen; debris on the floor of the public bathroom; and no seat covers in one of the stalls. Appeal File, Exhibit 26. The COR advised BCI of on-going complaints regarding the uncleanliness of the second floor women's bathroom. The COR reported that oftentimes, there was no paper or seat covers in that bathroom. The COR reminded BCI that it had promised a revised policing schedule for the bathroom two weeks prior to the January 3 memorandum but that she had not seen any improvement. *Id.*

36. On February 7, 2006, the COR advised BCI that respondent would take deductions of \$3166.12 for vacant space and for supervisory hours not worked from BCI's monthly invoice of \$151,403.97. Appeal File, Exhibit 21.

37. On February 10, 2006, the COR and BCI's project manager, Janis Jackson, walked through the USPO. The COR observed that the black floor areas of the USPO were not adequately cleaned and mopped, that BCI's cleaning schedule showed that only one person was responsible for cleaning all of the black floor areas, and that more hours might have to be devoted to that task. The COR expressed concern about lack of daily quality control and supervisory coverage. Appeal File, Exhibit 28. The ACO testified that BCI used four people to perform all contract tasks on the USPO space of 200,000 square feet. Transcript at 885-86.

38. On February 10, the COR again advised BCI of unsatisfactory cleaning on the twenty-third floor of the JCK building the previous night. Appeal File, Exhibit 30. The COR walked the floor around 8:30 a.m. and found debris in the interview and conference rooms. *Id.* Additionally, the floor was not thoroughly vacuumed. The only part of the floor that had

been vacuumed was the waiting area. *Id.* The COR advised BCI that respondent would take deductions in accordance with the contract's inspection clause. *Id.*

39. On February 27, 2006, BCI's project manager issued a memorandum to the COR regarding the cleaning of the USPO. BCI promised to schedule additional personnel daily to help with the workload throughout the USPO, particularly on the work level. BCI stated it was working with its vendors to find a more efficient method to clean areas treated with black wax. BCI also promised improved quality control coverage for the USPO site. Appeal File, Exhibit 33.

Sexual harassment complaint

40. On February 28, 2006, BCI's director of human resources, Ms. Cash, advised the ACO that one of BCI's employees had complained to BCI about inappropriate conduct towards her by an IRS employee who was also the husband of respondent's COR. Appellant's Exhibit 30. BCI, in a letter signed by Ms. Cash, stated that it felt it had the obligation to advise respondent of these events "so that you can inform your human resources department for further handling." *Id.* On March 3, respondent's ACO turned the matter over to the IRS employee's supervisor--Melinda Geddes--for investigation and resolution. Appeal File, Exhibit 55 at 2; Transcript at 894. According to the ACO, she advised Ms. Cash that GSA had no jurisdiction over the IRS and suggested that Ms. Cash contact Ms. Geddes. Transcript at 893-94. According to the ACO, Ms. Cash refused to deal with the IRS. *Id.* at 895-96.

41. In subsequent conversations between the ACO and Ms. Cash, Ms. Cash suggested that the COR be relieved of her responsibilities under the contract. Respondent refused that suggestion because of a shortage of capable CORs. Transcript at 904-05. The ACO suggested to Ms. Cash that BCI's employee be removed from the floor where the IRS employee worked and assigned to work in other areas of the building. According to the ACO, Ms. Cash refused that suggestion because it would have victimized the employee again. *Id.* at 907. That line of reasoning made no sense to the COR; she felt that if the employee was uncomfortable being in daily contact with the IRS employee, it would have been better for the employee to move from the floor and let her work elsewhere in the building. *Id.*

42. The COR testified that she was upset about this matter. Transcript at 1259. Whenever the COR personally inspected that part of the JCK facility where the BCI employee-complainant worked, she had the BCI project manager accompany her to avoid an appearance of impropriety. *Id.* at 1267.

Inspections after sexual harassment complaint

43. On March 2, 2006, the COR, in an e-mail message to the ACO and to BCI, stated that BCI had not been providing supervisory coverage required under the contract, that the night supervisor had been out that week, and that there had been days when supervisory coverage was not provided. Appeal File, Exhibit 33. The COR noted that missing supervision had been at issue for several months. The COR requested BCI's plans to assure the required supervisory coverage. The COR also advised that deductions would be taken for supervisory hours not worked. *Id.*

44. BCI's general manager apologized for the lack of coverage and explained that the assigned supervisor's son took seriously ill that week. BCI stated that it would submit substitute supervisors for respondent's background clearance. Appeal File, Exhibit 34. The substitute supervisor that BCI had called in lacked a current security badge. *Id.* On March 3, BCI informed the ACO that the new chief operating officer at BCI "would work internally" to address respondent's concerns. *Id.* at 5.³ BCI did not dispute the COR's conclusions.

45. In an e-mail message on March 10, the COR noted that there continued to be a lack of supervisory coverage in the evening. On the evening of March 9, there was one supervisor although two supervisors were required. Appeal File, Exhibit 34. On March 20, the COR noted in another e-mail message to BCI and the ACO that BCI had not provided respondent with plans to address the lack of evening supervision. *Id.*

46. On March 10, the COR issued two notices of unsatisfactory performance to BCI, the first notice for BCI's performance in its vacuuming and dusting on the tenth floor of the JCK building, Appeal File, Exhibit 35, and the second notice for BCI's performance in its vacuuming and dusting in Room 380, *id.*, Exhibit 36. The first notice advised BCI that on March 8, the COR walked through the tenant spaces on the tenth floor and found heavy dust throughout. *Id.*, Exhibit 35. She noticed several areas containing debris on the floor. *Id.* The office of the regional administrator for DOL was on the tenth floor. When the COR spoke to the administrator's assistant, she was informed that the assistant had her own dust wand because dusting services were not being provided. *Id.* Follow-up inspections were conducted on March 9 and 10 and the unsatisfactory conditions persisted. *Id.* The second notice advised BCI that when the COR inspected the tenant space in Room 380, she found

³ The pagination reference is to the typewritten pagination of the appeal file exhibit. The exhibit starts with typewritten pagination "2," so the page referenced is actually the fourth consecutive page of the exhibit.

heavy dust in several areas of the office, as well as debris on the floor throughout the office. This condition also persisted on March 9 and 10. *Id.*, Exhibit 36.

The inspection of March 14

47. Respondent and BCI conducted a joint inspection of the ground and work levels of the USPO on March 14. Appeal File, Exhibit 39. Respondent's inspector was Robbie Jones, an employee of respondent's Office of Buildings Management who had been conducting inspections for nine years. Transcript at 1501, 1503. She conducted the inspection with the COR, another employee of respondent's buildings management office, and BCI's Janis Jackson. *Id.* at 1505-06. This was the first inspection she had conducted of the USPO. *Id.* at 1507. Ms. Jones testified that she did not read the contract before she inspected the building because "I already knew how to inspect, I knew what we were looking for." *Id.* at 1507. Ms. Jones testified that she was the author of the inspection report, *id.* at 1524, and that no one, including the COR, influenced her to write a negative inspection report, *id.* at 1525. She stated that "no one influenced me on this, or any of my work. No one ever influences me." *Id.* She also testified that she did not hear about the allegation of sexual harassment by a BCI employee until after she had submitted her inspection report. *Id.* at 1519-20.

48. The inspector gave BCI an unsatisfactory rating for sixteen items. For example, the inspector found heavy dust on the working level of the USPO near the soda machines, near the freight elevator, and throughout the work level of a staging area. Appeal File, Exhibit 39 (Contract Cleaning Inspection Report). The inspector also found heavy dirt located at the revolving doors on the north side of the USPO and streaks on what the inspector called the north side. *Id.* The COR stated in her notice of unsatisfactory performance to BCI:

Of special note is the overall condition of the lobby floor. There are several areas that are not being mopped daily. We saw many areas with spots, streaks, stains, etc., especially under tables and near doors. In addition, there are several areas where the buffing is not being done and/or not done properly. There are areas . . . where there are lines in the floor where you can see where the buffing was done and where it was not.

. . . .

Your February 27th plan to address conditions at the Post Office has not been effective. Not only have deficiencies not been corrected, but continue to grow.

The overall condition of the lobby floor has declined dramatically. It does not appear that the daily cleaning is being performed in the lobby and on [the] work level.

Id. at 3-4.⁴ The COR's notice of deficiency stated that deductions would be imposed. *Id.* The record reveals no substantive or credible evidence that calls into question these or the earlier conclusions regarding uncleanliness and inadequate performance.

49. On March 14, 2006, in an e-mail message to BCI and the COR, the ACO proposed taking a 100% deduction from BCI's invoice for the USPO cleaning to "solve this ongoing deficiency." Appeal File, Exhibit 40 at 2. BCI's president responded that a 100% deduction would not be appropriate and that BCI would be working diligently to insure that quality service would be forthcoming at the USPO. *Id.*

50. On March 21, BCI wrote the COR that it had sought to satisfy the concerns expressed in the notice of deficiency on the USPO ground level by training the responsible employees and by instituting a "disciplinary process." Appeal File, Exhibit 41 at 1. BCI also sought to blame the poor cleaning of the USPO work level on the lack of black waxing and the enormous amount of equipment stored on the USPO work level. Black wax is a floor finish in the buildings, but the black wax process was not included in BCI's contract. Transcript at 851. However, BCI performed black waxing on a delivery order basis pending negotiation of a modification. *Id.* at 854-55. BCI stated that lack of black waxing left the floor uneven and patchy, which drastically impacted the daily maintenance of the floor. *Id.*

51. The COR, in her reply memorandum of March 21, advised BCI that the primary deficiency found in the report, dust build-up, was not related to the lack of black waxing; and that in the COR's opinion, the quality problem arose from BCI's assigning only two employees to clean the USPO work level comprising almost 50,000 square feet.⁵ She also stated that BCI should expect equipment on the work level of a post office. The COR stated that the quality control improvements BCI had promised for the USPO ground level had not

⁴ As with Appeal File, Exhibit 34, the pagination reference is to the typewritten pagination of the appeal file exhibit. The exhibit starts with typewritten pagination "2", so the reference is to the second and third consecutive pages of the exhibit.

⁵ The ACO testified that BCI assigned four people to perform all contract work at the USPO. In contrast at the time of the hearing, the successor contractor had assigned eight people to perform that work. Transcript at 881-82. She also testified that BCI assigned thirty-one or thirty-two employees to the JCK building; whereas the successor contractor assigned about fifty-five people. *Id.* at 1027.

materialized one week later. Appeal File, Exhibit 42. She also noted that a BCI cleaner had left a dirty vacuum cleaner bag on top of a computer keyboard at the USPO, generating a complaining phone call from a USPO supervisor to respondent's assistant property manager. *Id.* The COR's view that BCI's performance was not hindered by lack of black waxing is credible.

52. On March 30, an officer with the Immigration and Naturalization Service (INS) at the JCK building called respondent to complain that the INS area was a mess, that his area had not been cleaned, and that the public area had debris all over the floor. Appeal File, Exhibit 44. Consequently, the COR issued a notice of unsatisfactory performance. *Id.*, Exhibit 45.

53. BCI's invoice for the month of March 2006 for both the JCK building and the USPO was \$154,570.09. Appellant's Exhibit 80. By single-spaced, two-page letter of April 7, 2006, the COR issued a deduction notice to BCI deducting \$4393 for vacant space, \$1098 for fifty hours of missing supervisory coverage, and \$15,355 for the unsatisfactory performance at the USPO, for a total deduction of \$21,276.08.⁶ *Id.* By subsequent e-mail message of April 14 to BCI of three-quarters of a page, single spaced, the COR explained that respondent deducted the \$15,355 from what the COR said was BCI's monthly price of \$20,474.31 for contract service at the USPO. Appeal File, Exhibit 47.⁷ The COR explained that the original suggestion of the ACO was to deduct the full amount of the invoice for unsatisfactory performance, but that a lesser amount was decided. *Id.* The COR wrote in her e-mail message:

Please keep in mind that the unsatisfactory performance goes back not only to March, but to February when we tried a more informal approach of working with your team to not only identify, but [to] correct deficiencies. This

⁶ In fact, the COR and ACO originally had disagreed on the amount of deductions to be taken from BCI's invoice for the USPO. The ACO wanted to "hit [BCI] in the pocket," to "make [BCI] perform." Transcript at 919. The ACO thought a 100% deduction was appropriate because respondent received no value from BCI's work at the USPO. *Id.* at 921. The COR thought a 50% reduction in the invoice was appropriate. *Id.* The ACO and COR reached a compromise figure of 75%. *Id.* at 922.

⁷ There is no explanation in the record why the COR used the \$20,474.31 figure rather than the \$21,225.21 figure stated in the unit price schedule for option year two. *See* Appeal File, Exhibit 1 at 4. The \$751.21 discrepancy does not affect our decision. Similarly, the total invoice price for the items stated in the unit price schedule was \$154,570.01, not \$154,570.09. *Id.* The \$.08 discrepancy does not affect our decision.

unfortunately was not effective and we had to resort to a more formal approach to addressing the unsatisfactory performance. As a note, prior to the loss of our custodial inspectors, these areas had previously been identified as problematic and inspection reports show similar deficiencies.

Id.

54. The ACO explained at the hearing on the merits that she and the COR would have calculated the deductions through use of a deductions formula based upon a labor rate for work BCI had not done. However, the amount of work BCI did not do for the month of March was so large that the deduction would have been “huge.” Transcript at 923. Consequently, in this instance, the officials decided on a percentage reduction. *Id.*

55. Regarding missing supervisory coverage, BCI’s project manager testified that during the March to May 2006 time frame, the COR would not allow any of BCI’s previous managers who had worked in the building to substitute as supervisors. Transcript at 69-70. However, the COR testified that she never disapproved BCI’s use of temporary supervisors who were properly approved and badged as supervisors. *Id.* at 1121-22. The COR allowed BCI’s project manager to act as a supervisor when her shift as a project manager was over. *Id.* For the specific dates of April 18-22, BCI never requested the COR to approve substitute supervisors when the regular supervisor was not present. *Id.* at 1233.

56. On April 21, the COR issued a notice of unsatisfactory performance to BCI noting that an inspection that afternoon had found dust build-up on the floor in the northwest side of the lock box area and that the floor under the main lobby runners contained extremely heavy dirt and dust build-up. Appeal File, Exhibit 49. The COR stated that this condition was a continuing deficiency that had continued not to be addressed. *Id.* The notice stated that deductions would be taken but requested advice from BCI on how it proposed to prevent these problems from happening in the future. *Id.*

57. On April 26, BCI canceled the contract under the mutual cancellation clause of the contract. REA at 4; Appeal File, Exhibit 51. BCI stated in pertinent part:

We have reached the conclusion that there is no chance of [BCI] being successful on this project. While we certainly understand the nature of ‘challenging customers’ . . . , the actions of the contracting officer, contracting officer representative and quality assurance personnel over the past [four to eight] weeks demonstrates that we are being held to standards that are unreasonable and that we can not adequately resolve. While we acknowledge that we are not perfect, we can not continue to operate in an environment

where deficiency notices and associated deductions are assessed based on very subjective criteria.

For the record, we are also quite troubled by the fact that many of the deficiency notices and deductions started occurring after we pointed out and provided detailed information about an alleged sexual harassment complaint against the contracting officer representative's husband by one of our employees. While we wrestled with the decision to bring this matter to JCK's attention given the COR's relationship with the accused, we ultimately felt that it was our fiduciary duty to do so. We can't help but feel that recent actions are a form of retaliation for our decision.

Id., Exhibit 51 at 2. Per the Mutual Cancellation clause of the contract, the cancellation would have been effective one hundred and twenty days later, i.e., on August 24, 2006. However, option year two--and the contract, if additional options were not exercised--expired by its terms on July 31, 2006. *Id.*, Exhibit 1 at 2.

58. On November 21, 2006, BCI submitted its REA to respondent, seeking \$450,929.99 in damages as follows:

Supervisory & Postal Deductions

September 1-30, 2005	\$801.54
April 1-30, 2005	517.68
March 1-31, 2006	1098.00
Postal	15,355.00
January 1-31 2006	109.80
April 1-30, 2006	2294.82
Total Deductions	\$20,176.84
Cost of replacement employees	2786.82
Unpaid invoices	92,345.27
Lost profit	291,251.90
Settlement costs	44,369.16
Claim total	\$450,929.99

REA at 9. The REA does not allocate BCI's alleged lost and anticipatory profits claim between the unexercised option periods three and four. The REA also asserts:

On April 26, 2006, Blackstone sent a letter notifying [respondent] that

Blackstone was exercising its 120-day cancellation right under the terms of the contract. In the letter Blackstone expressed the unreasonable level of scrutiny and unjustifiable performance deductions [respondent] began imposing on Blackstone after the sexual harassment complaint.

....

Following Blackstone's [employee's] submission of [a] sexual harassment complaint against the COR's husband, Blackstone became the victim of retaliatory invoice deductions. For work done the same month the complaint was filed the GSA arbitrarily deducted 75% from [BCI's] invoice for unspecified performance deficiencies. Despite a clear conflict the COR was not switched with an unbiased person and the GSA's only recommendation to [BCI] was to simply move the employee to the another floor. The GSA's actions served no other purpose than to do harm to [BCI], and as such amount to bad faith conduct on the part of the GSA.

REA at 4, 6.

59. On April 26, 2007, BCI filed its appeal on a "deemed denial" basis. Notice of Appeal. Appellant later reduced and amended the quantum of its claim as follows:

Supervisory & Postal Deductions

September 1-30, 2005	\$801.54
April 1-30, 2005	517.68
March 1-31, 2006	1098.00
Postal	15,355.00
January 1-31 2006	109.80
April 1-30, 2006	2294.82
Total Deductions	\$20,176.84 ⁸
Cost of replacement employees	2786.82
Unpaid invoices	9,245.27
Lost profit	291,251.90
Settlement costs	52,247.91

⁸ The amended claim contains the incorrect figure of \$20,276.84. We correct the error.

Claim total \$375,708.74

Amended Claim; Appellant's Response to Respondent's Motion to Dismiss, Exhibit 1.

60. On April 30, 2007, contracting officer Toranda Roberson issued her decision denying the claim. She decided that the \$15,355 deduction from the March invoice was proper in light of the numerous deficiency notices for the USPO and the ineffective corrective measures that BCI had put in place. Appeal File, Exhibit 55. She denied that the deductions subsequent to the sexual harassment complaint were retaliatory. She determined that the deductions were "the product of good stewardship by the COR" and that the Government would not pay for services it did not receive. *Id.*, Exhibit 55 at 2. Regarding supervisory deductions, she determined they were allowed by the contract clauses. She denied the claim for lost profits because there had been no breach; she also denied the claim for unpaid invoices. She found that fourteen of the fifteen unpaid invoices were for unsatisfactory work. She remitted a \$839.34 payment for one invoice.

61. Respondent filed a motion to dismiss that portion of the claim relating to the unexercised option years. Appellant responded by stating that it would prove at trial that respondent's retaliatory deductions left appellant with no option but to cancel the contract and that but for the retaliation, respondent would have awarded option years three and four. Appellant's Opposition to Respondent's Motion to Dismiss at 2-3. We granted the motion as to option year four because the claim for option year four was too speculative given that appellant canceled the contract before respondent had decided to exercise option year three. We permitted BCI to maintain its claim that BCI would not have canceled the contract and that respondent would have exercised option year three but for the retaliation of respondent. *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770.

62. The Board bifurcated the proceedings into entitlement and quantum. The Board tried entitlement only from June 16 to June 19, 2008.

Discussion

Appellant's contentions of bad faith and improper actions are not supported by the record in this matter. Appellant has not demonstrated entitlement to relief. As explained below, the record demonstrates that appellant cleaned and supervised inadequately throughout the contract. Respondent's conclusions of unsatisfactory performance and deductions are justified fully.

Appellant's contentions

Appellant claims that it was the victim of respondent's over-intrusive inspections conducted in violation of the contract and improper deductions in violation of the deduction formula in the contract's Inspections clause. Appellant's Brief at 2. Appellant argues that respondent acted by using "improper contract clauses to accomplish [its] goal to cause [appellant] financial harm." *Id.* Appellant suggests that respondent could deduct no more than the amount specified in the hourly-rate deduction formula--see Finding 13--set forth at § E, ¶ C of the contract. Appellant's Brief at 21, 23.

With regard to the deduction of April 7, 2006, appellant argues that the large deduction was punitive, done without reason, and therefore malicious. Appellant's Brief at 3. Appellant argues that the deduction of April 7 "was in retaliation for the allegation of [sexual] harassment submitted by appellant to respondent on February 28, 2006." *Id.* at 5. Appellant suggests that because the largest deduction was subsequent to the sexual harassment complaint, despite worse performance problems in the first years of the contract, the deduction was retaliatory. *Id.* at 23.

Appellant contends, therefore, that "appellant opted to utilize the mutual cancellation clause for fear of continuing punishments that were both unjustified and not delineated." Appellant's Brief at 3. As bad faith breach damages, appellant seeks lost profits for the unexercised option years of the contract. In short, appellant poses a combination of bad faith, breach, and duress claims.

A tribunal may award damages for unexercised option years of a contract if a contractor proves that the decision not to exercise an option was a product of bad faith or so arbitrary and capricious as to be an abuse of discretion. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *Nova Express*, PSBCA 5102, et. al., 08-1 BCA ¶ 33,763; *IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,674, *aff'd*, 274 Fed. Appx. 8981 (Fed. Cir. 2008), *cert. den.*, 129 S.Ct. 595 (2008).

Burden of proof and analysis

Recently, we set forth the standard of proof necessary to successfully maintain a claim of bad faith:

[A]s a general principle, we presume that government officials act in good faith in the discharge of their duties. Overcoming that presumption presents

[appellant] with a high hurdle. We recently stated in *Greenlee*, 07-1 BCA at 166,063, “a contractor who asserts that a government official was motivated by bad faith in the conduct of his duties bears the burden of proving its assertion by clear and convincing evidence - ‘evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is *highly probable*.’”

Innovative (PBX) Telephone Services, Inc., v. Department of Veterans Affairs, CBCA 44, et al., 08-1 BCA ¶ 33,854, at 167,584 (citing *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002)); *see also North Star Alaska Housing Corp. v. United States*, 76 Fed.Cl. 158, 187 (2007) (burden of proof equated to specific intent to injure plaintiff, i.e., conduct that is designedly oppressive, such as a government conspiracy to get rid of a contractor). A custodial contractor must show that respondent’s inspection procedures were motivated only by malicious intent to injure the appellant and not by an intent to improve appellant’s performance. *Harris Systems International, Inc. v. United States*, 5 Cl. Ct. 253, 264 (1984).

As applied to failure to exercise options, one of our predecessor boards, the General Services Board of Contract Appeals (GSBCA), succinctly noted that a contractor must prove that failure to exercise the option was motivated by bad faith. *Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 151,025, *aff’d. sub nom. Aspen Helicopters v. Mineta*, 243 F.3d 561 (Fed. Cir. 2000) (Table).

Retaliation claim

Here, BCI has not established by credible evidence, much less by clear and convincing evidence, that the evaluation and deduction resulting from the March 14, 2006, inspection was motivated by a BCI employee’s filing a sexual harassment complaint about the COR’s husband. BCI’s performance on the contract--both in the JCK building and the USPO--was, at best, unsatisfactory from the beginning of its contract performance. As early as April 2004, the COR noted BCI’s cleaning deficiencies in the JCK building. Finding 19. On August 20, 2004, the COR noted cleaning deficiencies at the USPO facility. Finding 23. BCI’s performance problems, both at the JCK building and the USPO facility, continued in 2005, despite BCI’s numerous, but unfulfilled, promises to improve its performance. Findings 19, 21, 23-27, 29. The performance deficiencies were so numerous that in April 2005, some nine months before the filing of the sexual harassment complaint, respondent’s contracting officials seriously considered not exercising BCI’s option. Finding 27. However, as an alternative the COR had suggested deductions as a way of encouraging BCI to improve its performance. Finding 28. BCI’s unsatisfactory performance continued well into the summer and fall of 2005. Findings 29-32. BCI did not dispute the inadequacies as

they arose; rather, BCI offered explanations with promises of improved performance. Findings 19, 21, 23-27, 29.

Subsequent to the RIF of permanent GSA inspectors, BCI's performance problems persisted. The COR expressed concerns about the sufficiency of the USPO cleaning effort as late as February 10, noting inadequate cleaning of black floor areas and BCI's lack of quality control due to lack of supervisory coverage. Finding 37. Again, BCI, in apparent agreement with respondent's criticism, promised improved performance. Finding 39. Problems with BCI's performance continued with the JCK building as well. *See, e.g.*, Finding 35 (detailing spots throughout the twenty-third floor of the JCK building and heavy dust and debris in the bathrooms).

In March 2006, the COR detailed the continual lack of supervisory coverage that had been at issue for several months. Findings 43, 45. BCI did not disagree with the comments and, once again, agreed to improve its performance. Finding 44. The cleaning of the JCK building continued to be a problem for BCI, which was noted by the COR on March 10. Finding 46. The parties conducted a joint inspection on March 14, with the inspector exercising her independent judgment on the adequacy of the cleaning.⁹ Findings 47, 48. After that inspection, respondent's officials found the lobby floor of the USPO building to be filthy and BCI's improvement plan of February 27 to be ineffective. Finding 48.

The INS floors continued to be a mess, even as late as March 30. Finding 52. Continued inspection in late April 2006, just before BCI canceled the contract under the mutual cancellation clause, showed heavy dust and dirt build-up in the JCK building. Finding 55.

The evidence of record establishes BCI's unsatisfactory performance in both buildings. The ongoing and unremedied failures in cleaning and supervision by BCI justified the findings of unsatisfactory performance and the deductions. BCI has not established by clear and convincing evidence that the COR or any other of respondent's officials retaliated, through use of harsh inspections and the resulting deduction, against BCI for the BCI employee's filing of a sexual harassment complaint. The inspections conducted by respondent's officials and the deficiencies noted were consistent from the commencement of the contract up until BCI's cancellation of the contract. The deficiencies the COR noted in the cleaning of the JCK building and USPO after the filing of the sexual harassment

⁹ The inspector did not read the contract's cleaning standards before the inspection but relied upon her ten years of experience as a custodial inspector when conducting the inspection. Finding 47. BCI has not demonstrated that in conducting the inspection, the inspector applied a standard more stringent than that stated in the contract.

complaint merely continued the COR's pattern of identifying BCI's unsatisfactory performance since the inception of the contract. Additionally, the respondent had considered deductions as a way to spur BCI's improvement in performance as early as April 2005.

We considered the testimony of BCI employees that the post-February 2006 deductions were retaliatory. *See, e.g.*, Transcript at 166-76, 216-17, 279-80. We found this testimony to be conclusory and without further support. We came to a different conclusion after examining the whole record.

Improper deduction claim

BCI has not convinced us that the deduction of April 7, 2006, was improper. BCI's suggestion that respondent was limited by the Inspection of Services clause to the deduction formula is incorrect. The Inspection of Services clause provides that respondent may reduce the contract price by the "reduced value of the services performed." Finding 13. Such a provision gives respondent the right to deduct an amount beyond the itemized rate in the deduction formula set forth in § E, ¶ C of the contract to reflect the actual damage to respondent from having to operate in unclean facilities. *Harbert International Services*, ASBCA 36983, 90-1 BCA ¶ 22,449, at 112,717-18 (1989) (service contract clause allowed agency to assess "all cost" deduction in addition to that specified in deduction formula); *Mutual Maintenance Co. v. General Services Administration*, GSBCA 7637, et al., 91-1 BCA ¶ 23,287, at 116,782 (1990); *Trinity Services, Inc.*, GSBCA 5825, 81-1 BCA ¶ 15,034, at 74,385-85. Consequently, the deductions formula applies when the respondent's contracting officials decide to base deductions on labor hours that would have been necessary to complete the work in a satisfactory manner. However, the Inspections clause does not limit the officials to use only a labor-hours methodology in calculating the "reduced value of the services performed." Here the ACO and COR decided to augment the labor hours methodology because the amount of work BCI had not done would have skewed the deduction. Finding 54. Given that the majority of contract performance at the USPO was unsatisfactory, we find that a 75% reduction was reasonable. The reduction reflected not only the amount it would have taken to complete the work, but the inconvenience and discomfort to building tenants of working in a dirty facility. BCI has not demonstrated that the 75% deduction overstates the reduced value to the Government of the unperformed work.

We do not regard the percentage deduction in this case as punitive. While the deduction was 75% of the invoice for the USPO, it represented only a little more than a 10% reduction from the total contract invoice of \$154,570.09. Finding 53. In the context of the continuing performance deficiencies detailed above, and BCI's promises of improved performance that were not met, noted in findings 21, 24, 39, 44, 49, we cannot conclude that the deduction in this case was inappropriate.

Moreover, we do not find the reasons for the deductions to be vague and non-specific, as appellant argues. The COR was a meticulous record-keeper, and she explained the reasons for the deduction to BCI at length. Findings 48, 53. Having given appellant numerous opportunities to improve its unsatisfactory performance identified well before the filing of the sexual harassment complaint, respondent took this deduction after careful consideration. Findings 37, 39.

Appellant's exercise of the Mutual Cancellation clause

BCI claims it exercised its right per the Mutual Cancellation clause to unilaterally cancel the contract under duress. Finding 57. The elements of duress are: (1) one side involuntarily accepted the terms of the other; (2) circumstances permitted no other alternative; and (3) the circumstances were the result of the coercive acts of the opposite party. *Corners & Edges, Inc. v. Department of Health and Human Services*, CBCA 693, 08-2 BCA ¶ 33,961, at 168,021 (citing *Louisiana Pacific Corp. v. United States*, 656 F.2d 650, 652 (Ct. Cl. 1981)). For government acts to be found coercive, “[s]ome wrongful conduct must be shown, to shift to the defendant the responsibility for bargains made by plaintiff under the stress of financial necessity.” *DKW Construction, Inc., v. General Services Administration*, CBCA 438, 08-1 BCA ¶ 33,755, at 167,093 (2007) (quoting *Johnson, Drake & Piper, Inc.*, 531 F.2d 1037, 1042-43 (Ct. Cl. 1976)). Here the record does not establish a wrongful act by respondent. Additionally, BCI had a number of alternatives other than walking away from the contract. It might have devoted more resources to the contract in order to improve its performance; it could have also challenged respondent's inspection reports and the propriety of the deductions while continuing contract performance.

Finally, appellant has not established what it said it would establish in responding to respondent's motion to dismiss for failure to state a claim—that respondent would have exercised the next option period but for the alleged retaliation. Finding 61. BCI unilaterally canceled the contract ninety-six days before contract expiration. Finding 57. The record does not suggest that respondent had even considered whether or not to exercise the remaining contract options at that time. However, the record does suggest that respondent might not have chosen to exercise the remaining contract option because of BCI's unsatisfactory performance, an option that was considered as early as April 2005, some nine months before the filing of the sexual harassment complaint. Finding 27.

Decision

The appeal is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

JOSEPH A. VERGILIO
Board Judge