UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DENIED;
APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED;
APPEAL GRANTED: June 5, 2025

CBCA 7891

KING & GEORGE, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jamar T. King of Thompson Hine LLP, Miamisburg, OH; and Edward T. DeLisle and Andrés M. Vera of Thompson Hine LLP, Washington, DC, counsel for Appellant.

Alexander C. Vincent, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **O'ROURKE**, and **KANG**.

O'ROURKE, Board Judge.

Respondent, the General Services Administration (GSA or agency), filed a motion for summary judgment asking the Board to affirm the agency's interpretation that the contract permitted payment deductions for staffing vacancies, regardless of the performance-based, firm-fixed-price structure of the contract and appellant's satisfactory performance record. Appellant, King & George, LLC (K&G), initially acquiesced to the deductions by reducing monthly invoices to match GSA's calculations, which were based on the labor rates of the vacant positions. GSA points to this course of dealing as evidence that K&G shared the

agency's interpretation of how the contract's deductions and staffing clauses worked together to ensure a "mutual win" for both parties.

After GSA presented K&G with a bilateral modification deobligating $742,931.51, the total amount of deductions for the base year of the contract, K&G expressed concern about the deductions and ultimately refused to sign the modification which also contained a release of claims. GSA then issued the modification unilaterally. K&G submitted a claim to recoup the deductions, contending that the contract authorized deductions for unsatisfactory performance or omitted tasks but not for staffing shortfalls. The contracting officer denied the claim, and this appeal ensued.

In its motion, respondent argues that the contract's minimum staffing requirements were, in and of themselves, performance requirements and that for each day a position remained vacant, the vacancy amounted to a failed performance. K&G opposes the motion, citing the lack of any language in the contract that expressly authorized deductions for vacant positions. K&G further contends that the agency's misinterpretation of the contract's terms caused GSA to administer this fixed-price contract as if it were a labor-hour contract, depriving K&G of full compensation for its work. The result, according to K&G, was that GSA received the entire scope of work at a substantially discounted price.

K&G's own dispositive motion asks the Board to affirm K&G's interpretation of the deductions and staffing clauses—that deductions could *not* be taken solely on the basis of staffing vacancies. Deductions, K&G asserts, could only be assessed for missed or unsatisfactory work. K&G also maintains that the minimum staffing requirements were mere suggestions and that any finding to the contrary would render the performance-based, fixed-price structure of the contract meaningless. In its appeal, K&G seeks to recoup funds that it alleges were improperly deducted when the agency breached the contract and constructively changed the contract's terms.

For the reasons that follow, we find that the contract did *not* permit payment deductions based solely on staffing vacancies. Under the clear terms of the contract, only performance failures justified the assessment of deductions, and staffing shortfalls could not reasonably be considered performance failures. Since K&G only disputes deductions based on staffing vacancies, we deny respondent's motion, grant appellant's motion, and grant the appeal.

Statement of Undisputed Facts

The parties filed cross motions for summary judgment, asking the Board to affirm their respective interpretations of the deductions clause as applied to the facts in this case.

To decide these motions, we reviewed the parties' pleadings, submitted pursuant to Board Rule 8(f) (48 CFR 6101.8(f) (2024)), and other relevant information in the appeal file. We establish the following facts as material and undisputed.[1]

I. The Solicitation - Terms Relevant to This Dispute

In January 2018, GSA issued a solicitation for facilities operations and maintenance services for nine federal buildings in Florida. The buildings were geographically dispersed throughout the state. Three were in Tampa, two were in Orlando, two were in Jacksonville, one was in Fort Myers, and one was in Ocala.

The solicitation sought proposals for a firm-fixed-price contract from small businesses under the 8(a) program and established a period of performance of one base year and three option years. The solicitation contemplated making a single award utilizing lowest-priced, technically acceptable source selection procedures. The successful offeror was required to provide "all management, supervision, labor, materials, supplies and equipment" and to "plan, schedule, coordinate and assure effective performance of all services described herein." Appeal File, Exhibit 1 at 0048.[2]

A. The Requirement for Performance-Based Services

The solicitation contained multiple references to the performance-based nature of the contract. The first sentence of section B, "Services, Ordering and Prices," stated:

> This solicitation contains a work statement for a performance-based service. This means that the government has described WHAT is to be accomplished, not HOW to accomplish it, and states a basis for determining whether finished work meets the Government quality requirements. It does not state detailed procedures for accomplishing the work unless there are safety, security or communication requirements.

Exhibit 1 at 0048.

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[1] Appellant filed a partial motion for summary judgment excluding from the motion its claim against respondent for breach of the duty of good faith and fair dealing. This decision concerns appellant's claims for breach of contract and constructive change based on the agency's interpretation of the deductions clause.

[2] All exhibits are found in the appeal file, unless otherwise noted. The page numbers cited are the bates numbers on the exhibits.

Section C of the solicitation, the statement of work, informed interested offerors: "[t]his is a Performance Based Service[s] Contract which focuses on the needs of the customer rather than on how the contractor meets those needs." Exhibit 1 at 0051. The same section emphasized the concept of "shared success" through government and contractor partnering and effective communication and instructed all parties to act "proactively to reduce service cost; therein providing an incentive for the contractor." *Id*.

Section C.1.0 of the solicitation, with the heading "General," announced: "This is a Performance Based Work Statement (PWS) for Facilities Engineering: Operations, Maintenance and Janitorial Related Services. . . . This PWS describes the minimum requirements of [GSA] and acceptable outcomes to be performed by the Operations and Maintenance Contractor." Exhibit 1 at 0051. This concept was repeated at the top of the next page: "A higher level of effective communication between the Government and Contractor is essential for partnering and for this performance based service contract to succeed." *Id*. at 0052.

Section C.2.61 of the solicitation defined a "Performance Based Work Statement" as "a procurement strategy that seeks to issue technical requirements that set forth outcomes for performance instead of specific requirements on how to perform the service." Exhibit 1 at 0093. It further explained, "This strategy shifts the risk of performance to the Contractor by allowing the Contractor to design the methods of achieving the desired results as defined by the performance quality standards established by the Government." *Id*.

Interested offerors were instructed to use GSA's "Guiding Principles for Sustainable Buildings" to perform the contract. The seventh principle on the list stated, "This is a fixed-price contract and while working with the Government in obtaining goals, the Contractor is motivated to find improved methods of performance . . . to increase its profits. Results of an effective partnership should reflect a 'mutual win' situation." Exhibit 1 at 0054.

B. The Minimum Staffing Clause

Notwithstanding the solicitation's performance-based language, section C.1.2 of the solicitation, titled "Personnel," stated, "The Contractor shall adhere to the staffing levels, which include Government mandated minimum staffing . . . as well as other proposed staff that were submitted in their price quote prior to award as part of the bid proposal." Exhibit 1 at 0059. Section C.1.2.2.1 explained the minimum staffing requirements as follows:

> The Government has determined the following MINIMUM staff levels and skill sets (Trades) to be maintained during the performance of this PWS. These staffing levels as determined by the Government are limited to hourly

> full time (40 Hours per week [full time equivalent (FTE)]) **productive employees**. The contractor is cautioned that these are MINIMUM levels only and this does not limit or require the contractor from providing additional hourly full time or part time productive employees.

Id. at 0060.

The solicitation listed the names of all nine buildings and identified the minimum productive staffing levels for each one. For example, the facility in Ocala required one full-time heating, ventilation, and air conditioning (HVAC) technician, two full-time janitors, and one part-time janitor. The facility in Fort Myers required two full-time HVAC technicians and five full-time janitors. The United States Courthouse Annex in Orlando required three full-time HVAC technicians, one full-time general maintenance worker, and ten full-time janitors. Exhibit 1 at 0061. The combined minimum staffing requirement for all trades at all nine buildings was fifty-four FTEs and one part-time employee (PTE).

Notwithstanding the solicitation's prescribed staffing levels, the contractor was instructed to submit a staffing plan that assigned "sufficient numbers of staff at the various levels of expertise to ensure all scheduled and unscheduled services [were] performed and conditions [were] maintained to avoid any disruption to the tenant." Exhibit 1 at 0059. The contractor was permitted to assign additional hourly full-time or part-time productive employees but not fewer than the prescribed minimum staffing levels. *Id*. at 0060. Any changes to the proposed staffing levels had to be approved by the contracting officer. *Id*. at 0059. The contractor had to notify the contracting officer within five days of the loss of any personnel impacting the FTE requirement for a particular facility. *Id*. at 0060-61. The contractor also had to demonstrate that it was "actively seeking replacement employees to maintain minimum staffing levels." *Id.* at 0061.

C. Invoicing, Payment, and the Deductions Clause

Section G.1 of the solicitation, titled "Payments," instructed that payments for services rendered were made "on a calendar month basis, in arrears, upon [the] submission of an invoice." Exhibit 1 at 0277. The solicitation included a deductions clause in section G.5.A, titled "Application of Criteria for Deductions (Non-Performance[])." *Id.* at 0278. It stated, in relevant part:

> If the Contractor fails to perform satisfactorily, omits, or fails to reschedule tasks required . . . the Contracting Officer . . . shall give the Contractor written notice of the failure or omission. Once notified, if the Contractor does not complete the work within the time allotted . . . the work may be performed by

> other means and the cost thereof shall be deducted from monies due or to become due the Contractor. Failure of the Contractor to perform, or if the omitted or unsatisfactory work cannot be rescheduled, a cost determined by using current industry market value shall be deducted from monies due or to become due the Contractor.

Id. at 0278. The clause prescribed distinct calculations for applying deductions to daily and periodic services. For daily services it stated: "[c]osts to be deducted under this paragraph will be determined by using the hourly rates as specified in Section G, Paragraph C below." *Id*. The referenced provision, "Section G, Paragraph C," did not exist. However, there was a "Paragraph C" under "Section G.6" which contained a formula for calculating payment deductions for reduced and added cleanable space expressed in square footage. *Id*. at 0278-79. The last sentence in that paragraph specifically stated that the same formula would be used "to determine deductions for unsatisfactory or non-performance of services and addition of space not covered in the original contract." *Id*. at 0280. For periodic services, the clause stated: "[i]f the Contractor does not complete the work within the time allotted by the Contracting Officer or his designated representative, the work may be performed by other means and the cost thereof shall be deducted from monies due or to become due the Contractor." *Id*. at 0279. The clause made no mention of deductions for staffing shortfalls.

Deductions were also referenced in Section E.1.4. of the solicitation, titled "Government Quality Assurance." This provision addressed inspections and monitoring compliance with contract requirements by agency quality assurance evaluators (QAE), whose responsibilities included "recommending deductions from contract payment for nonperformance or unsatisfactory performance." That section also referred to "correcting defects and omissions," "rework," and inspections performed "after completion of the tasks." *Id.* at 0273.

The solicitation included various other references to deductions. Section C.1.4.1, titled "Contracting Officer's Representative (COR)," authorized the COR to "recommend deductions based on findings in the Quality Assurance Report." Exhibit 1 at 0075. Section C.5.6.2, "Operations," cautioned interested offerors that failure to operate an asset prudently "may result in deductions and [an] unsatisfactory performance evaluation." *Id*. at 0119. Section G.2, "Unexpected Building Closures," stated that deductions would not be assessed in the event of a building closure due to inclement weather or for other official reasons. *Id*. at 0278.

Section E.2., "Failure to Perform," stated that "[i]n the event work is performed unsatisfactorily, the Contractor will be requested in writing to correct the deficiencies within 10 calendar days." Exhibit 1 at 0274. This section also cautioned that "[i]f the work remains

deficient, the deficiency will be handled in accordance with FAR 52.212-4," the Commercial Items clause. *Id*. The Commercial Items clause included a provision for terminations for cause in paragraph m "in the event of any default by the Contractor." *Id*. at 0287. The clause also addressed changes to the terms and conditions of the contract in paragraph c, which could only be implemented by written agreement of the parties. *Id.* at 0283-91.

II. Appellant's Proposal and Contract Award

On March 3, 2021, K&G submitted an offer in response to the solicitation. In its offer, K&G proposed staffing consistent with the minimum staffing requirement of fifty-four full-time employees and one part-time employee. Exhibit 2 at 0403-04. K&G also proposed staffing consistent with the specified trade mix. *Id*. at 0451-52. GSA awarded the contract, which incorporated the solicitation terms discussed above, to K&G on April 20, 2021. Exhibit 4 at 0490.

III. Contract Performance

A. Deductions for Staffing Vacancies

Despite not being fully staffed consistent with the minimum required staffing levels at all facilities, K&G began performing the base year of the contract on June 1, 2021. The parties used a spreadsheet (the FTE tracker) to identify and track vacant positions. As employees were vetted and successfully cleared by security for building access, K&G's project manager would update the spreadsheet with new employee information. GSA had access to the spreadsheet. The parties would regularly discuss the spreadsheet and the status of each vacancy. Filling the vacancies was a slow process. Exhibits 3, 8, 9, 14, 18, 25; *see generally* Exhibit 65 (deposition of the contracting officer's representative). Occasionally, a previously filled position became vacant due to the departure of an employee or an extended absence as a result of an injury or illness. Also, because employees had to record their presence on a building sign-in sheet, daily absences were observable. Exhibit 1 at 0072. This information was then fed into the FTE tracker and verified by both parties. Although the number of vacancies declined each month, K&G did not meet the minimum staffing requirements at any of the facilities during the base year, which concluded on May 31, 2022. Respondent's Motion for Summary Judgment at 19.

On July 8, 2021, the agency's building management specialist emailed K&G's project manager stating, "After discussing the situation with the acquisition team, including the Contracting Officer, it has been decided that deductions will be taken for any employee that was not working on-site, 'boots on the ground', for the month of June." Exhibit 11 at 0593. GSA used the FTE Tracker to calculate and assess deductions against K&G for vacant

positions and daily absences. GSA calculated the deductions using the annual labor costs of each position in K&G's proposal. Exhibit 47 at 1616. A review of the deduction worksheets shows that GSA would divide the annual salary of a position by 365 to come up with a daily pay rate. If a position was vacant, GSA would multiply the daily rate by thirty to calculate the deduction for a particular month. If a position was filled at the mid-month point, or was already staffed but the employee was absent for a few days, GSA calculated a daily rate for deductions to reflect the vacancy period or an employee's absences, whichever was the case. Next, GSA would calculate the total costs of all vacancies and absences for a particular month on a deductions spreadsheet and send it by email to the contractor's project manager for review.[3] GSA asked the contractor to submit its monthly invoice for the firm-fixed-priced amount of the contract, minus the assessed deductions. K&G complied with that direction and was paid accordingly. *See* Exhibits 13 at 0605, 47 at 1616-17.

Although K&G complied with this process each month of the base year, evidence in the record shows that K&G expressed concern about the deductions to GSA at various times, and for different reasons. On one occasion, K&G inquired about whether the agency was amenable to waiving deductions for situations where an employee's contractor information worksheet (CIW) had been submitted and a final fitness review was pending. No changes to the deductions process were made in response to this request. Complaint ¶ 38. K&G also questioned some of the assessed deductions for employee absences. For example, GSA did not credit K&G for eight days of work performed by a particular employee because the employee had not signed the building access sheet and appeared to be absent on those days. K&G learned, however, that the employee had, in fact, been on site working that entire period. After the parties discussed the matter, GSA revised the deductions worksheet to credit K&G for those eight days. Another example involved deductions being assessed for an employee who was injured on the job and on extended medical leave. K&G disagreed with GSA's assessment of deductions under those circumstances since the position was filled and the work was getting done. GSA nonetheless assessed deductions for this position due to the employee's lengthy absence. Exhibit 43 at 0976; *see also* Complaint ¶ 40.

For the first month of the base year (June 2021), the deductions worksheet showed the following: ten of the fifty-five positions were vacant, thirty-four of the positions were "currently on-site but in final fitness review," ten positions showed that the CIWs had been submitted, and one new employee entered on duty. Exhibit 11 at 0593-95. Based on that

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[3] GSA also assessed deductions against K&G for three months of water treatment activities that were required under the contract but not performed. K&G did not include the water treatment deductions in its claim, so those deductions are not part of this appeal.

information, GSA assessed deductions for twenty employees—the ten vacancies and the ten positions with CIWs. Deductions for staffing shortfalls for the month of June totaled $124,941.53. *Id.* at 0595. K&G submitted an invoice to GSA which subtracted June's deductions from the firm-fixed-price contract amount, and GSA paid the invoice. Exhibit 13 at 0605.

In November 2021, K&G reached out to its Tampa-based subcontractor, Frontline Enterprises, LLC (Frontline), informing Frontline that GSA had been assessing deductions against K&G for staffing vacancies and that K&G intended to pass those deductions on to Frontline. K&G explained that "GSA deducts per person until [the person is] physically on site." Exhibit 54 at 1914. Frontline disagreed with the deductions, characterizing the contract as performance-based and pointing to the language in the PWS that required specific outcomes without specifying how to achieve them. Frontline also pointed out that there had been no complaints about the services it had been providing under the required scope of work, despite the vacancies. K&G agreed that the contract was performance based but also expressed its understanding that GSA had the authority to assess deductions against K&G for not complying with the minimum staffing requirements in the contract. *Id.* at 1910. Frontline informed K&G that its subcontract with K&G did not contain the minimum staffing provisions set forth in K&G's contract with GSA. Notwithstanding those facts, K&G and Frontline amended their subcontract to allow K&G to pass on the staffing deductions to Frontline. *Id*. at 1909.

B. Bilateral Modifications PS0001 and PS0007

On July 23, 2021, the parties executed a bilateral agreement (modification no. PS0001), which deobligated $130,823.53 from the contract price for June 2021, the first month of performance.[4] The modification stated, in relevant part:

> The purpose of this modification is to partially reconcile the obligation amount for the period of performance to reflect deductions for the period 06/01/2021 through 06/30/2021. . . . Deductions are being made for the month of June 2021 due to FTE vacancies and interruption of services covered under the PWS in accordance with the notice of deduction dated 8 July 2021. . . . As a result of this modification, the monthly contract price for June is decreased by

[4] Since the parties executed a bilateral modification for the deductions pertaining to June 2021, the funds deducted for that month were not included in K&G's claim and, consequently, are not part of this appeal.

> $130,832.53 from $410,939.79 to $280,216.26. . . . The contractor will invoice for the $280,216.26 for their June invoice submission.

Exhibit 13 at 0605.

Although the parties followed the same procedure for the remaining months of the base year (assessing deductions for staffing vacancies and absences, then paying monthly invoices in amounts that reflected those deductions), the parties did not execute monthly bilateral modifications to deobligate the deducted funds. Instead, in August 2022, a few months after GSA executed the first option year of the contract, GSA proposed a single additional bilateral modification (PS0007) to deobligate $742,931.51 in base year funds that remained on the contract as a result of monthly deductions assessed against K&G for the period covering July 1, 2021, to May 31, 2022. Exhibit 38.

The modification, drafted pursuant to 49 CFR 52.212(c) (2022) (FAR 52.212-4(c)), the Changes clause, stated that deductions were assessed "due to the FTE vacancies and interruption of services covered under the PWS." The interruption of services referred to in the modification consisted of $8284 in water treatment and testing analysis services, which GSA deducted in July 2021 ($3802) and August 2021 ($4482). Exhibits 16 at 0618, 20 at 0640.[5] By September 2021, K&G finalized its agreement with a subcontractor to perform the water treatment and testing analysis services at each location. Although K&G's claim includes the entire amount of the deobligated funds ($742,931.51), K&G expressly abandoned its claim to recoup the deductions assessed for water treatment and testing activities ($8284). *See* Appellant's Statement of Undisputed Material Facts (Appellant's SUMF) in support of partial motion for summary judgment, ¶¶ 31, 47. The modification also stated that K&G "received notice every month for each deduction, submitted invoices for the deducted amounts, and has received payment."[6] Exhibit 38 at 0822. Modification PS0007 included a breakdown of the monthly payments after deductions were made and calculated the total deobligation for the base year of performance by subtracting the total base year payments ($4,089,696.09) from the originally obligated base year amount of $4,832,627.60. *Id.*

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[5] These totals were calculated by adding up amounts in the water treatment column of the July 2021 and August 2021 deduction worksheets.

[6] We interpret the phrase "submitted invoices for the deducted amounts" to mean that K&G submitted monthly invoices to GSA not for the firm-fixed-price originally bid but rather for a reduced amount to account for the deductions that were assessed.

When K&G initially received modification PS0007, K&G did not sign it as it had with the first bilateral modification. Months went by with no action on the modification. GSA routinely followed up on the matter, inviting K&G to discuss the terms of the modification and answer any questions. GSA told K&G that the modification merely memorialized what the parties had already agreed to each month through the deduction worksheets, invoices, and payments. Modification PS0007 was seventy-three pages in length and included a contractor's statement of release of claims on the last page:

> In consideration of the modification agreed to herein as complete and equitable adjustments for the contractor's minimum staffing deficiency, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the price adjustment/deductions.

Exhibit 38 at 0822-24. The deductions worksheets given to K&G each month did not contain a release of claims. It is not clear whether a release was included on any other relevant documents, such as invoices from K&G to GSA or on payment receipts. However, neither party asserts that K&G signed a release of claims for subsequent months of performance.

C. Unilateral Modification PA0007

On April 20, 2022, GSA issued the modification *unilaterally*, deobligating all $742,931.51 in funds remaining on the base year of the contract. The proposed bilateral modification (PS0007), and the unilateral modification that was ultimately issued (PA0007), appear to be mirror images of each other with the exception of the modification coding (PS versus PA or "supplemental versus administrative") and the signature requirements in section E of the Standard Form (SF) 30.[7] Exhibit 39.

D. K&G's Response to Modification PS0007

By letter to the contracting officer, dated February 6, 2023, K&G explained that it had not signed modification PS0007 because it objected to GSA's assessment of deductions against K&G for staffing vacancies. K&G's position was that the terms of the contract did not permit such deductions, and, therefore, K&G would not sign the modification which would decrease the value of its contract by $742,931.51. K&G made reference to the performance-based provisions in the contract, observing that the contract limited the

[7] Although the modification contained the date "4/20/2021," in section 10B of the SF 30, the year indicated (2021) appears to be a clerical error, as it was issued in 2022.

assessment of deductions to "performance failures, not for utilizing resources differently than GSA expected for successful performance." K&G also pointed to its firm-fixed-price structure in an effort to highlight a potential conflict between the contract's terms and the agency's actions—notwithstanding the minimum staffing requirements outlined in the contract and K&G's failure to meet them. K&G maintained that it had not failed in its performance of the contract and that at no time did GSA claim that FTE vacancies resulted in work not being performed, stating that "[r]egardless of the number of FTEs utilized, K&G adequately performed under the terms of the contract." Exhibit 41 at 0965-66.

Alternatively, K&G argued that GSA's assessment of deductions was improper because GSA failed to comply with the procedures outlined in the contract, which required GSA to give K&G adequate notice of the proposed deductions and provide K&G with an opportunity to address them, which GSA did not do. K&G further argued that GSA's actions were inconsistent with the contract's firm-fixed-price terms, under which K&G should be paid the contract price regardless of the actual costs of performance. "By seeking to impose deductions for failing to utilize the number of FTEs the agency expected, GSA is treating the contract as a cost or labor hour based contract." Exhibit 41 at 0966.

Once K&G determined that the staffing deductions were improperly assessed against its contract, K&G attempted to submit its invoices for the full firm-fixed-price amount of the contract as bid rather than the reduced amounts GSA imposed to account for staffing deductions. GSA disagreed with K&G's changed interpretation and directed K&G to continue submitting invoices that reflected the deductions or risk having the invoice rejected and not paid. K&G complied with this direction but made it clear that it was submitting the reduced invoices under protest and that K&G reserved its right to challenge the deductions in a subsequent claim to recoup them. Exhibits 40 at 0958-62, 42 at 0969.

IV. K&G's Claim, the Contracting Officer's Final Decision, and K&G's Appeal

On April 27, 2023, K&G submitted a certified claim to the contracting officer disputing the deductions and seeking payment in the amount of $742,931.51, which represented the amount of the deobligation for the base year of the contract with the exception of the first month of performance. Exhibit 43 at 0970. On June 14, 2023, the contracting officer issued a final decision denying the claim in its entirety. Exhibit 47 at 1617. On September 12, 2023, K&G appealed the denial to the Board.

Discussion

Before us are the parties' cross motions for summary judgment. The issue central to each motion is whether the contract permitted the agency to assess deductions based *solely*

on vacant positions, regardless of whether the contractor adequately performed the required services. GSA argues that the minimum staffing requirement was a performance requirement that, when not met, authorized the assessment of deductions. K&G, on the other hand, contends that deductions could only be assessed for unsatisfactory performance of required tasks or for not performing the tasks at all—and only after providing notice of the same and giving K&G an opportunity to correct defective work—none of which happened according to K&G. K&G also points to the firm-fixed-price structure of the contract as prohibiting GSA from administering the contract as if it were a labor hour contract. K&G insists that as long as the required tasks were completed satisfactorily, GSA could not discount the value of those tasks through the assessment of deductions.

Finally, K&G asserts that its cooperation with GSA during the base year of the contract with regard to assessing deductions, invoicing, and payment does not now deprive K&G of the opportunity to dispute those actions. K&G asserts that it did not agree to waive its right to pursue full compensation for the work that it performed from July 1, 2021, through May 31, 2022.

I. Standards of Review for Cross Motions for Summary Judgment and Contract Interpretation

In deciding these motions, we apply the familiar standards for resolving matters on summary judgment when both parties move for a favorable result. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to a judgment as a matter of law. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); Rule 8(f) (48 CFR 6101.8(f) (2024)). When both parties move for summary judgment, the Board will evaluate each party's motion on its own merits and resolve all justifiable inferences against the party whose motion is under consideration. *CH2M-WG IDAHO, LLC v. Department of Energy*, CBCA 6147, 19-1 BCA ¶ 37,339, at 181,593, *motion for reconsideration denied*, 19-1 BCA ¶ 37,408. Simply because both parties moved for summary judgment, as in this case, the Board is not required to grant either motion as a matter of law. *Rita R. Wadel Revocable Living Trust and 229 Jebavy Road, LLC dba Ludington Industries Building v. General Services Administration,* CBCA 6558, et al., 24-1 BCA ¶ 38,523, at 187,271 (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)). Here, we find no material dispute of fact that would preclude us from considering the legal arguments presented by the parties with regard to the assessment of deductions for staffing vacancies. The parties agree that deductions were assessed for staffing vacancies. They disagree on whether the contract permitted such deductions, which is a matter of contract interpretation.

Interpretation of contract language is primarily a matter of law, and disagreements concerning the legal interpretation of contract documents do not create factual disputes that preclude summary judgment. *See M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205-06 (Fed. Cir. 2004); *South Texas Health System v. Department of Veterans Affairs*, CBCA 6808, 23-1 BCA ¶ 38,420, at 186,707; *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, et al., 14-1 BCA ¶ 35,805, at 175,114. Contract interpretation begins with the plain language of the agreement. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009); *1425-1429 Snyder Realty, LLC v. Department of Veterans Affairs*, CBCA 6433, 22-1 BCA ¶ 38,049, at 184,762. "If the plain language of the contract is unambiguous on its face, the inquiry ends." *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 5540, et al., 18-1 BCA ¶ 37,048, at 180,349 (citing *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002)). If, on the other hand, a contract term is subject to more than one reasonable interpretation, the term is considered ambiguous, and the Board must decide which party's interpretation should prevail. *GCC Technologies, LLC v. Department of Education*, CBCA 7129, 21-1 BCA ¶ 37,976, at 184,437; *see also E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1341-42 (Fed. Cir. 2004).

II. Amount of the Claim

GSA's unilateral modification deobligated $742,931.51 from the contract, which included $8248 in deductions relating to water treatment services. K&G states that it does not seek recovery of deductions by GSA for the water treatment services. Appellant's SUMF ¶ 31. Appellant also states, however, that its claim sought "$742,931.51—the entire amount of the improperly [*sic*] Staffing Deductions, but no portion of the Water Treatment Deductions." *Id.* ¶ 47. Because K&G abandoned its claim to recoup the deductions pertaining to water treatment, it should have reduced its claim to $734,683.51. Our decision here treats the claimed amount as $734,683.51.

III. GSA's Arguments in Support of Its Motion

GSA moves for summary judgment and makes the following seven arguments in support of its motion: 1) that the minimum staffing levels set forth in the contract were mandatory performance requirements; 2) that the notice requirements of the deductions clause were fully satisfied or excused; 3) that the opportunity to cure mentioned in the deductions clause did not apply to staffing deficiencies; 4) that K&G's failure to provide all of the minimum staff required during each month of the base year was unexcused and therefore a breach of contract which entitled GSA to assess deductions as a remedy; 5) that K&G's failure to provide the required water treatment services during the first three months of performance was unexcused and therefore, a breach of contract subject to deductions;

6) that the staffing deductions that K&G seeks to recover were calculated correctly; and 7) that the water treatment deductions were calculated correctly.

In support of its motion, GSA maintains that the contract authorized deductions for both defective performance *and* non-performance. More specifically, GSA contends that failing to staff a particular position constituted "non-performance," and under clause G.5.A, "if the omitted or unsatisfactory work [could not] be rescheduled, a cost determined by using current industry market value [would] be deducted from monies due to or to become due the Contractor." Exhibit 1 at 0278. GSA further argues that K&G's actions demonstrated that K&G agreed with GSA's interpretation of the deductions clause. Not only did K&G fail to dispute the monthly assessment of deductions in real time, but K&G also issued invoices consistent with GSA's deductions, then passed the deductions on to K&G's subcontractor. From GSA's perspective, the fact that K&G "suddenly reversed course" does not negate K&G's earlier statements and actions which aligned with GSA's interpretation and indicated a common understanding of how the staffing and deductions clauses would interact.

We are not persuaded by these arguments. The plain language of the deductions clause did not authorize deductions for staffing vacancies. Rather, the assessment of deductions was triggered in the event that K&G failed to perform satisfactorily, omitted tasks, or failed to reschedule the unsatisfactory or omitted tasks. Deductions were also permitted in the event K&G failed to perform *at all* or if the omitted or unsatisfactory work could not be rescheduled. These words contain no ambiguity regarding the circumstances that permitted the assessment of deductions. Since a vacant position was not identified as such a circumstance, the agency attempted to construe the vacancy as a performance failure. In *Phoenix Management, Inc. v. General Services Administration*, CBCA 7091, 22-1 BCA ¶ 37,977 (2021), the Board accepted the construction of staffing vacancies as performance failures. In that case, however, the language of the contract expressly permitted deductions for failing to staff the contract as required and to calculate the deductions by subtracting the "total number of personnel provided" from the "total number of personnel proposed." *Phoenix Management*, 22-1 BCA at 184,442.

The case before us is different. Here, the plain language of the deductions and staffing clauses did not authorize deductions solely on the basis of staffing shortfalls. Other terms in the contract underscore this conclusion. When the contract referred to the assessment of deductions, those references were consistently made in the context of performing work. Examples include the following: "fails to perform satisfactorily," "fails to reschedule tasks," "complete the work within the time allotted," "perform [the work] by other means," "non-performance of services," "correcting defects and omissions," "rework," "inspections performed after completion of tasks," and "failure to operate an asset prudently." The assertion that staffing was a performance requirement in the same way as

water testing, vacuuming, or servicing an air handler belies the plain language of these contract terms. We recognize that a staffing shortfall could lead to a performance failure or omission–situations which *would* be subject to deductions–but a staffing shortfall in and of itself did not amount to a performance failure under this contract.

Furthermore, GSA exercised both the first and second option years of the contract despite persistent staffing shortfalls—actions that typically repudiate performance-related concerns and do not call for deductions. This incongruity demonstrates that GSA assessed deductions solely for staffing vacancies without poor performance, an interpretation that is not corroborated by either clause. The deductions served, therefore, not as an offset for unsatisfactory or omitted work but rather as a penalty for performing the same work with fewer FTEs than the contract prescribed. *See Cavanagh Co.*, GSBCA 7612, 86-2 BCA ¶ 18,878, at 95,232 (Because deductions functioned like liquidated damages, some injury must be shown to assess them. To permit deductions where no injury is shown "would be to allow an undeserved penalty."). Yet, in the instant case, we find no evidence that K&G performed tasks poorly. The agency has not been harmed. Where an agency suffers no material injury, it is well-established that applying the deductions clause despite receiving satisfactory services amounts to an unenforceable penalty. *See Omni Corp. v. Unites States*, 41 Fed. Cl. 585, 595 (1998) (finding deductions unjustified where short staffing did not result in actual injury to the Government).

This does not mean that K&G could ignore the minimum staffing requirements without consequence. K&G contends that the staffing clause did not mandate minimum staffing levels but rather "merely inform[ed] the level of staff that the Agency believe[d] [necessary] to satisfy its performance obligations." We reject this interpretation as contrary to the clear terms of the staffing clause which plainly stated that specified minimum staffing levels and skill sets were to be maintained during performance, then proceeded to list those levels and trades, building by building. K&G pointed to the *Omni* decision in support of its position, but in that case, the "minimum personnel requirements" did not prescribe a specific minimum number of employees to accomplish the work, as the contract did in the instant case.

We also note that K&G was working to staff the facilities consistent with the levels prescribed by the contract, which is what K&G committed to do in its proposal.[8] Relevant

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[8] To the extent that K&G now disputes the validity of a minimum staffing specification within a performance-based contract, we construe this as a dispute over the contract's terms which should have been raised prior to contract award. *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 5540, et al., 18-1 BCA ¶ 37,048, at 180,351, at

here, however, is that when K&G fell short of meeting the required staffing levels, GSA should have looked to FAR 52.212-4(m), "termination for cause," as the proper remedy—not the deductions clause. GSA also could have addressed staffing shortfalls by enforcing the deductions clause as written, by offsetting the contract for work performed by third parties, or by assessing deductions for unsatisfactory work or omitted tasks. Instead of pursuing those options, however, GSA exercised the first two option years while continuing to discount the contract through the assessment of deductions for vacant positions, a course of action that was not permitted by the contract's plain terms.

GSA also argues that K&G's compliance with the assessment of deductions for vacant positions during the base year substantiates the parties' common understanding that the terms of the contract permitted this process or that K&G waived its right to challenge the deductions and recoup the deducted funds. This course of dealing argument may have been persuasive had we determined that the contract's terms were ambiguous, but where the terms are clear, extrinsic evidence is not required. "Extrinsic evidence will not be received to change the terms of a contract that is clear on its face." *Government Marketing Group v. Department of Justice*, CBCA 71, 08-1 BCA ¶ 33,834, at 167,454 (citing *SCM Corp. v. United States*, 675 F.2d 280, 284 (Ct. Cl. 1982)). Further, K&G did not waive its right to file a claim for the deductions by cooperating with GSA while investigating its rights under the contract. Nor is there any evidence that K&G signed a release of claims with respect to the staffing deductions. For all of these reasons, we deny GSA's motion for summary judgment. We find that GSA was not permitted by the terms of the contract to assess deductions for staffing vacancies.

IV. K&G's Partial Motion for Summary Judgment

In its complaint, K&G asserts three separate counts: 1) that the agency breached the contract by assessing deductions for staffing vacancies despite K&G's satisfactory performance; 2) that the agency's unilateral modification deobligating $742,931.51 constituted a constructive change under the contract, which entitled K&G to full compensation; and 3) that the agency breached the covenant of good faith and fair dealing

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37,048 (citing *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,184, at 176,539 ("The patent ambiguity doctrine is typically applied to preclude a contractor who recognized or should have recognized an ambiguity in a solicitation, but who failed to seek clarification of the ambiguity before bidding, from later relying upon its own unilateral interpretation of the ambiguous provision." (citing *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997)))).

when it hindered K&G's performance in various ways, such as the employee on-boarding process and inducing K&G to invoice for amounts less than what it was entitled to invoice.

K&G's motion seeks summary judgment for the first two counts of its complaint. Regarding the first count, K&G contends that GSA breached the contract since the contract's terms did not permit GSA to assess deductions against its firm-fixed-price contract solely for staffing shortfalls. For the reasons already explained above, we agree with appellant's interpretation of the deductions clause and find that GSA's assessment of deductions for vacant positions violated the contract's clear terms. Accordingly, we grant appellant's motion with respect to the first count.

As to count two—that GSA's unilateral modification deobligating $742,931.51 constituted a constructive change to the contract—there is no dispute that GSA unilaterally modified the contract under FAR 52.212-4(c), the Changes clause, to deobligate $742,931.51. A plain reading of that clause shows that the clause did *not* authorize unilateral changes of this nature. Classifying the modification as administrative may have enabled the agency to effectuate the deobligation without K&G's participation but that did not make the action permissible. The agency ignored the express terms of the clause and unilaterally modified the contract. Whether the agency's actions amounted to a breach of contract or a constructive change, however, does not impact the result on summary judgment. The modification action was simply the mechanism to finalize the improper staffing deductions, depriving K&G of earned compensation. Accordingly, we grant appellant's motion as to the second count.

Although K&G did not include count three in its motion, we find that our decision as to counts one and two grants K&G the full relief it seeks. No additional relief could be awarded by the Board by considering count three on the merits. For these reasons, we dismiss count three as moot. In summary, we find that: 1) GSA improperly assessed deductions against K&G for staffing vacancies; 2) the parties' course of dealing was irrelevant since the language of the deductions clause was unambiguous; 3) GSA unilaterally modified the contract to deobligate $742,931.51 in violation of the Changes clause; 4) K&G abandoned its claim to recoup water treatment deductions; and 5) K&G did not sign a release of claims for the period of performance addressed in its appeal. Therefore, appellant is entitled to summary judgment on its claim to recoup $734,683.51 in unauthorized staffing deductions.

Decision

Respondent's motion for summary judgment is denied. Appellant's partial motion for summary judgment is granted, and the appeal is **GRANTED**. GSA shall pay to K&G $734,683.51, plus interest under the Contract Disputes Act, 41 U.S.C. § 7109 (2018), running from the date of the contracting officer's receipt of K&G's claim to the date of payment.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan L. Kang
JONATHAN L. KANG
Board Judge