

## **Board of Contract Appeals**

General Services Administration  
Washington, D.C. 20405

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND  
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON JUNE 4, 2004**

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GRANTED: May 26, 2004

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GSBCA 16124-ED, 16125-ED

NCS PEARSON, INC.,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

David S. Cohen and John J. O'Brien of Cohen Mohr, LLP, Washington, DC, counsel for Appellant.

Jeffrey C. Morhardt and Jose Otero, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

**NEILL**, Board Judge.

These two cases involve claims by NCS Pearson, Inc. (NCSP or NCS) against the Department of Education for \$340,500, said to have been improperly withheld from NCSP on two of its contracts with the Department. NCSP has filed a separate claim for the withholdings made under each of the contracts. Separate decisions have been issued by the contracting officer on the claims and separate appeals of those decisions have been filed at the Board. While the terminology in the contracts differs to some degree, we have, nonetheless, consolidated the two appeals because they involve similar issues. Pursuant to

Board Rule 111, the parties have elected to have both cases submitted on the record without a hearing. For the reasons set out below, we grant both appeals.

GSBCA 16124-ED - - The "TIV-WAN" Contract Claim

Findings of Fact

The Contract

1. On July 14, 1995, the Department of Education awarded contract PM95016001 to NCSP. This contract, commonly referred to as the "Title IV Wide Area Network" or "TIV-WAN" contract, called for the establishment of a wide area network linking thousands of network users across the United States, its territories, and certain designated foreign countries to student financial assistance programs and delivery systems which are established under Title IV of the Higher Education Act of 1965. The TIV-WAN allows users to receive files and financial aid data and to access bulletin boards and electronic mail. Appeal File, GSBCA 16124-ED, Exhibit 5, Attachment A at C-1 to -3; Joint Stipulations, GSBCA 16124-ED, 1-3.

2. The contract provided for four discreet sets of activities and products. The first set or phase was for network planning. The second phase was for network development and implementation. The third phase was for operation. A final phase provided for transition to a successor contractor upon completion of the contract. Appeal File, GSBCA 16124-ED, Exhibit 5 at C-114.

3. The contract is described as: (1) a firm-fixed-price contract (as defined under subpart 16.202 of the Federal Acquisition Regulation (FAR)) for planning products, implementation products, and task orders designated by the contracting officer as fixed-price task orders; (2) a fixed-price, indefinite-quantity contract (as defined under FAR 16.202 and 16.504) for operations products/services; and (3) a time-and-materials, indefinite-quantity contract (as defined under FAR 16.504 and 16.601) for task order requirements designated by the contracting officer as time-and-materials task orders. Appeal File, GSBCA 16124-ED, Exhibit 5 at 1, see 48 CFR 16.202, 16.504, 16.601 (1994) (FAR 16.202, 16.504, 16.601).

4. One contract provision of particular relevance to this dispute is clause C.11.1, entitled "General." It reads in part as follows:

The contractor shall provide and commit sufficient, qualified staff who must be available for assignment under this contract as [of] the date the contract is awarded, to fulfill the requirements for maintenance, operational support, system development and enhancement efforts of this contract. No substitution of personnel identified as "key" personnel shall be allowed for the first 180 calendar days of this contract without the prior written approval of the ED [Education Department] Contracting Officer. In the event of [sic] that key personnel leave the Contractor's employment or otherwise become unavailable to the Contractor, the Contractor shall notify ED within one (1) workday of learning of the leaving or unavailability of the key person. Unless stated otherwise in Contractor preaward submissions, ED shall assume 100% dedication for all key positions. The Project Manager requirement is 100%.

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The Contractor shall not divert key personnel to other assignments without advance written consent of the ED Contracting Officer.

Appeal File, GSBCA 16124-ED, Exhibit 5 at C-119.

5. The contract identifies six personnel positions as "key," namely: the project manager, two senior systems analysts, a telecommunications specialist, a network administrator, and a manager of customer services. Appeal File, GSBCA 16124-ED, Exhibit 5 at C-119 to 123.

6. Another contract provision, C.11.3, entitled "Task Order Personnel," reads in part:

Task Order personnel shall be in addition to any full-time or part-time personnel proposed and required to provide Title IV WAN System services and system operations. The time of Key personnel is not changeable to Task Order work as these individuals are dedicated to the scope of the Title IV Wan System project, inclusive of performances associated with Task Orders and other contract modifications.

Appeal File, GSBCA 16124-ED, Exhibit 5 at C-123.

7. Two other contract provisions relating to task orders are C.10.1, entitled "Task Order Initiation," and C.10.2, entitled "Task Order Review." C.10.1 reads in part:

Key personnel are not billable in Task Order work. Their sense of duties is defined as the entire Project inclusive of Task Orders which may be in existence.

Appeal File, GSBCA 16124-ED, Exhibit 5 at C-115. C.10.2 reads in part:

The Project Manager, Senior Systems Analyst and Telecommunications Specialist shall not be billed on Task Orders as their involvement is defined to be project-wide and dedicated full time irrespective of hours worked.

Id.

#### The Origin of This Dispute

8. The dispute which is the subject of this appeal stems from an audit report issued by the Department of Education's Office of Inspector General (OIG) on May 6, 1999 (the "TIV-WAN audit report"). Joint Stipulations, GSBCA 16124-ED, 4.

9. The OIG's auditors made the following observation in this report:

Three key personnel, identified by NCS as working full time on the TIV-WAN contract, charged approximately 3,300 hours to new work under the TIV-WAN contract, as well as to other NCS contracts (primarily Department of Education contracts). Since key personnel costs were included in the fixed price of deliverables specified in the original contract, this action resulted in about \$249,900 in overcharges to the TIV-WAN contract. . . . We recommend that NCS refund the \$249,900 in overcharges to the TIV-WAN contract and adhere to the terms of the TIV-WAN contract with the Department of Education.

Appeal File, GSBCA 16124-ED, Exhibit 6 at 3. The three positions occupied by the key personnel said in the audit report to have charged time to new work and other NCSP contracts are the customer service manager and the two senior systems analysts. Id., Attachment A at Attachment 1.

10. The OIG's auditors computed the amount of damages the Government allegedly suffered by taking a direct labor rate for the individuals involved, marking it up for management and supervision overhead, general and administrative costs (G&A), fee, and facilities capital cost of money, and then multiplying this figure by the number of hours the

individuals worked on other than base TIV-WAN contract work. Appeal File, GSBCA 16124-ED, Exhibit 6 at 4; Joint Stipulations, GSBCA 16124-ED, 16.

### NCSP's Proposal

11. In its original technical proposal for the TIV-WAN procurement, NCSP included a section dealing with project staffing. In this section, NCSP identified the key personnel and task order personnel as well as others who would be serving on the WAN project. The proposal states:

It will take many more people than just the key, required, and Task Order personnel to deliver the Title IV WAN. We have included resumes for some, but not all of these additional personnel. They are all current employees of NCS or GEIS [General Electric Information Services, one of NCS's subcontractors] and resumes for the rest of them can be provided if ED would like to review them.

Appeal File, GSBCA 16124-ED, Exhibit 1 at 2-52.

12. As required by the solicitation, NCSP bid the project manager for the TIV-WAN project as 100% committed to the contract. This is apparent from the project manager's resume. Each resume of the key personnel contained in NCSP's proposal is cast in a similar format. The initial entry on each resume identifies the individual's labor category. A second entry identifies the individual by name. A third entry is entitled: "Project Commitment & Availability." Additional entries deal with the individual's education and specialized experience. For the project manager, NCSP wrote after the entry of "Project Commitment & Availability" the statement: "100 percent." The phrase "100 percent" does not appear after the entry of "Project Commitment & Availability" for any of the other key personnel. Instead, one reads simply the phrase: "Available upon contract award." Appeal File, GSBCA 16124-ED, Exhibit 1 at 2-77, -147, -169, -197, -215, and -241.

13. Figure 2-20 in this same staffing section of NCSP's technical proposal provides a brief summary of the experience and education of twenty-three staff members NCSP planned to use in the event of contract award. Another exhibit in this section, Figure 2-21, lists, by labor category, these same persons as well as nine additional staff members. A third exhibit in the staffing section, Figure 2-22, is a person-loading or staffing chart covering the planning and implementation phases of the project. Nearly all the names appearing on this

third chart are the same as those listed by labor category on the previous chart. The person-loading chart shows the estimated hours each listed individual will work, per week, for the first ten months of contract performance. Id., Exhibit 1 at 2-45, -53, -54.<sup>1</sup>

14. The person-loading chart set out in Figure 2-22 of NCSP's technical proposal shows that the three staff members proposed for the key positions later identified by the OIG's auditors as having "charged approximately 3,300 hours to new work under the TIV-WAN contract, as well as to other NCS contracts," were not expected to work full-time on the contract. The weekly hours shown on the chart for the individuals proposed by NCSP for each of the three positions vary widely from week to week. In terms of averages, however, the hours proposed for the first individual, the customer service manager, are approximately fourteen hours per week, while those proposed for the other two individuals, the two senior systems analysts, average approximately twenty-four and seventeen hours per week. Appellant's Opening Brief, Exhibit 1.

15. After reviewing NCSP's technical proposal, the Government submitted several questions regarding the contents of the proposal. One question concerned the information provided by NCSP on the many individual staff members identified in the proposal. The question read: "Exactly what staff members will be devoted to WAN full-time?" In a written reply to the question, NCSP identified by name ten of the many individuals listed by labor category in Figure 2-21. Finding 13. These persons would be "devoted to WAN full-time." In addition to these ten individuals, NCSP identified by name an additional nine persons who had not been previously listed on the chart in Figure 2-21. These individuals would also be "devoted to WAN full-time." Finally, NCSP also identified three positions which it planned to fill after contract award. The three individuals in these positions would also be "devoted to the WAN full-time." NCSP's answer to this question concluded:

All other employees have been bid based upon the workloads described in the RFP. As the workloads change, these employees can be assigned different levels of dedication to the WAN project depending upon whether workloads are increasing or decreasing.

Appeal File, GSBCA 16124-ED, Exhibit 3 at 29-30.

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<sup>1</sup> Figure 2-22 was inadvertently omitted from the copy of the NCSP proposal submitted by the Government for inclusion in the appeal file for this case. A copy, however, can be found at Exhibit 1 of the NCSP opening brief.

16. NCSP's reply to the Government's question regarding personnel devoted full-time to the WAN project prompted a subsequent question. This time, the Government referenced NCSP's reply and asked:

Although the answer to Question #15 contains a list of proposed WAN staff, justify that the staffing pattern and selection of labor categories will be sufficient to deliver all WAN deliverables during the base year and the first option year.

Appeal File, GSBCA 16124-ED, Exhibit 4 at 1.

17. In reply to this follow-up question regarding staffing, NCSP explained that the staffing pattern and labor categories selected for purposes of supplying the WAN deliverables were based, in large part, on the company's experience in implementing and operating the Department's General Electronic Support (GES) network. Based upon this experience, NCSP contended that it was able to determine the appropriate labor categories and the level of effort needed to produce the deliverables on time and with high quality. In answering this follow-up question on the proposed staffing pattern and labor categories selected, NCSP referred, in passing, to the listing previously provided of staff that would be devoted full-time to the TIV-WAN and to the listing in the original technical proposal, by labor category, of these and other individuals "who are not bid full time." Appeal File, GSBCA 16124-ED, Exhibit 4 at 1.

#### NCSP's Claim and the Contracting Officer's Final Decision

18. In June of 2001, the Department, acting on the recommendation of the OIG's auditors, withheld \$249,900 from NCSP's invoices on the TIV-WAN contract. By letter dated October 16, 2002, counsel for NCSP submitted a claim for this amount and requested that the contracting officer issue a decision on the matter. Appeal File, GSBCA 16124-ED, Exhibit 14; Joint Stipulations, GSBCA 16124-ED, 5-6.

19. By letter dated February 6, 2003, the contracting officer issued a final decision rejecting NCSP's claim. Appeal File, GSBCA 16124-ED, Exhibit 15. In her decision, she readily concedes that the person-loading or staffing chart set out in Figure 2-22 of NCSP's technical proposal, see Findings 13-14, is sufficient evidence that NCSP did not bid a full-time employee (FTE) equivalent for the three key personnel in question. She apparently remains convinced, however, that this did not relieve NCSP of its obligation under the contract to ensure 100% dedication for all key personnel positions. Appeal File, GSBCA 16124-ED, Exhibit 15 at 10.

20. As to the two questions the Government asked NCSP regarding staffing patterns, the contracting officer states that, based upon the answers provided, the Department inferred that NCSP intended to distinguish between staff who "would be available full-time and staff who would not be available full time within the context of the RFP [request for proposals] language." Appeal File, GSBCA 16124-ED, Exhibit 15 at 5.

21. Finally, with regard to any harm suffered by the Government as a result of NCSP's alleged breach, she writes:

While it remains speculative whether diminished effort on the overall TIV WAN contract occurred (as asserted by the audit report), it is clear that monetary damages were suffered when NCS used employees who were proposed as dedicated to the performance of the basic contract 100% full time and billed their time to task order work under the TIV WAN and other NCS contracts when expressly prohibited, or without the consent of the contracting officer, respectively. Furthermore, it was not permissible for NCS key personnel to work on other work under the contract if assuming *arguendo*, that NCS' intent from its proposal submissions, was to take exception to SOW [statement of work] § C.11.1 by the bid of hours less than the NCS 1,496 FTE equivalent.

Appeal File, GSBCA 16124-ED, Exhibit 15 at 7.

22. In their opening brief, counsel for appellant have submitted for the record summary sheets from a briefing prepared by the contracting officer on the OIG's audit of the TIV-WAN contract. Among the various bullet statements set out on the summary sheets are two which explain succinctly why she did not believe NCSP to be free of its obligation to dedicate key personnel 100% to the contract simply by bidding these position at less than their FTE equivalent. The bullets read:

- The CO [contracting officer] does not dispute that NCS did not bid these individuals [key personnel] using a FTE cost base.
- The RFP requirement was not to **bid** the individuals full time. The government does not dictate pricing strategy. The RFP requirements were to dedicate key personnel 100% (full time).

Appellant's Opening Brief, Exhibit 2 at 8.



23. NCSP filed a notice of appeal of the contracting officer's decision on April 29, 2003.

Declaration of NCSP's Contracts and Pricing Manager

24. Mr. Mark Cutler, NCSP's Contracts and Pricing Manager, has provided for the record a declaration given under penalty of perjury pursuant to 28 U.S.C. § 1746 (2000). He explains that he is responsible for the preparation of proposals and management of contracts performed by NCSP. He, therefore, participated in the pricing of the original TIV-WAN proposal and provided information to the OIG's audit staff during the work that they performed. He explains his company's policy regarding the recording of time by employees:

NCSP has established standard policies which employees are required to follow regarding the recordation of the time they spent on various matters. Under NCSP's procedures, employees are required to record the hours they work and the matters on which they are working regardless of whether or not the hours are billed to the government or any other customer. Thus, if an employee on a particular day worked 2 hours on proposal preparation, 2 hours on a separate administrative task and 4 hours on a fixed price contract, he would make three different entries on his time sheet to three different cost codes -- one entry for each of the matters on which he worked. This is true even though none of the hours would be directly billed to the government. . . . Employees are required to record their time even on fixed price contracts where time is not billed to the government.

Declaration of Mark Cutler (Cutler Declaration) (Apr. 9, 2004) ¶¶ 1-2.

25. Mr. Cutler has further declared that he has reviewed the OIG's workpapers provided by the Department of Education during the course of discovery. This included a review of the auditors' spreadsheet which provides the calculation of the backcharges in the TIV-WAN dispute. He explains:

These documents prove that the government auditors based their calculations on NCSP's internal employee time records. The auditors examined NCSP's internal employee time records and any time a key person worked on a CPS<sup>[2]</sup>

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<sup>2</sup> "CPS" refers to another contract awarded to NCSP by the Department of Education, the Central Processing System Contract. It, like the TIV-WAN contract, was reviewed by the OIG's auditors. A claim regarding the CPS contract is the subject of the

or TIV WAN task order, a CPS or TIV WAN modification, or any work of any kind, other than what the auditors determined to be CPS or TIV WAN base contract work, the auditors recorded the hours, multiplied them by various escalation rates or factors and disallowed the resulting costs.

Cutler Declaration ¶ 4.

#### NCSP's Contract Performance

26. The parties to this dispute are in agreement that NCSP provided the fixed-price deliverables called for in the TIV-WAN contract and they were accepted by the Government. The Government has not alleged any significant problems with NCSP's work or the quality of the deliverables. The Government has also agreed that it has no evidence that the use of key personnel on new work under the TIV-WAN contract or on other contracts resulted in or contributed to any material deficiency on the TIV-WAN contract. Joint Stipulations, GSBCA 16124-ED, 11-12.

#### Discussion

We turn first to the Government's contention that it is entitled to withhold payment from NCSP because of work done on other NCSP contracts by three key personnel assigned to the TIV-WAN contract. The parties have stipulated that the total hours worked by these employees on contracts other than the TIV-WAN contract amount to 1906.5 hours. The parties have likewise agreed that, using the methodology employed by the OIG's auditors, Finding 10, charges for this number of hours would amount to \$143,891.79. Joint Stipulations, GSBCA 16124-ED, 18.

The TIV-WAN contract provides that "unless stated otherwise in Contractor preaward submissions, ED shall assume 100% dedication for all key positions." Finding 4. In determining whether key personnel assigned to the TIV-WAN contract could be diverted to work on other NCSP contracts, therefore, it is critical that we first determine whether NCSP, in its preaward submissions, provided information sufficient to rebut the Government's assumption that, in addition to the project manager, all other key personnel positions would be 100% dedicated to the contract.

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companion case in this decision, GSBCA 16125-ED.

The contracting officer clearly believes that, notwithstanding the bidding of the three key personnel positions in question at less than FTE equivalent levels, as evidenced in the person-loading or staffing chart in NCSP's technical proposal, it was still reasonable to assume 100% dedication of these key positions. Findings 19, 22. She is undoubtedly of the firm opinion that the 100% commitment required of the project manager is likewise an absolute requirement for all other key personnel.

We disagree with the contracting officer's views. It makes little sense to us that a contractor would intend to totally dedicate an employee 100% to a single contract when the contractor's estimate of the time that employee will put in on the contract is significantly less than the time the employee would normally work on a full-time basis. Such an arrangement would inevitably lead to the employee either sitting idle for extensive periods of time or else deliberately breaching the 100% commitment by working on something other than the contract to which he or she has been assigned.

The Government explains NCSP's bidding key personnel, other than the project manager, on less than a full-time basis as nothing more than an aggressive competitive pricing strategy for a fixed-price contract. Respondent's Opening Brief at 8. Even if this should be correct, we would still expect the Government, in analyzing such an offer, to recognize that this arrangement renders unreasonable any further assumption on the Government's part that the offeror plans to commit 100% of the time of these individuals to any resulting contract.

In short, we are not persuaded that it is reasonable for the Government to continue to assume that, upon award, it is entitled to 100% of the time of an employee who is shown in the offeror's proposed staffing plan as not bid on an FTE equivalent basis.

The documentation in the record strongly suggests to us that the Government was in fact aware that, aside from the program manager, NCSP was not offering any key personnel on an exclusive 100% dedicated basis. The hours listed on the person-loading chart and the entries on the resumes of the key personnel regarding their project commitment and availability provided ample indication of how NCSP planned to use its key personnel staff. Findings 12-14.

We also are convinced that the Government was aware of the consequences of NCSP's decision not to bid these key personnel on a full-time basis. In the exchange of questions and answers on staffing in the discussions which followed submission of NCSP's proposal, no assurance was sought that the five remaining key personnel positions would be dedicated 100% to the contract. Instead, the inquiry shifted perceptively from the initial assumption

of 100% dedication of key personnel to a broader issue of who, among all the staff identified in the proposal, would be "devoted to WAN full-time." In reply, NCSP identified twenty-two individuals and positions. Finding 15.

NCSP now contends that its intent in stating that this many individuals would be "devoted" to the contract full-time, meant that these individuals would not be bid as key on any other contract and would be *available* full-time to TIV-WAN. Appellant's Opening Brief at 21-21. We find this interpretation preeminently reasonable for three reasons.

First, the express difference in the degree of "Project Commitment & Availability" indicated on the resume of the project manager as contrasted with the resumes of the other key personnel is a highly convincing indication that the other key personnel, although readily available from the time of contract award, would nevertheless not be committed to the contract in the same strict sense as the project manager would be. See Finding 12.

Second, the sheer number of individuals NCSP indicated it would devote full-time to the contract makes it unreasonable for the Government to assume that these individuals would be totally committed to the contract in the strict and restrictive sense now claimed. The solicitation itself required a 100% dedication only for the project manager. For the remaining five key personnel, the solicitation established no such unalterable requirement but only an assumption which could be rebutted through a preaward submission. Finding 4. Given the proposal submitted by NCSP and the subsequent assurance given by NCSP in reply to the Government's first question regarding staffing that a total of twenty-two individuals and positions would be "devoted to WAN full-time," we consider it only reasonable to conclude that the commitment given referred rather to full-time availability rather than to exclusive dedication. See Finding 15.

Finally, we accept the contractor's explanation of what was intended in stating that this many staff members would be devoted full-time to the contract because the contracting officer, herself, appears to have understood NCSP's answer in the manner intended. She writes that, from the answers given, the Department inferred that NCSP intended to distinguish staff who "would be *available* full-time and staff who would not be available full time within the context of the RFP language." Finding 20 (emphasis added).

Contrary to the contracting officer's own conclusion regarding the purport of NCSP's answers to the Government's questions regarding staffing, the Government now appears to be arguing that the principal purpose of these questions was to confirm that the Government could continue to assume that all key personnel would be 100% dedicated to contract performance. Respondent's Opening Brief at 6. We understand the context of those

questions to be other than that now suggested by the Government. As already noted, the first inquiry perceptively shifted the focus of the inquiry from 100% dedication of key personnel to who precisely, of all the staff proposed, would be "devoted to WAN full-time." As to the second question, it clearly concerned the reliability of proposed staffing patterns and labor categories. The reference to full-time personnel was little more than a comment in passing. See Findings 15-17.

In conclusion, convinced as we are that, with the exception of the project manager, NCSP did not offer any other key personnel on the same restrictive 100% basis now claimed by the Government, we see no reason why these individuals could not have been assigned periodically to work on other contracts. We are not persuaded that the Government had a contractual right to 100% of their time if NCSP, in its proposal, indicated that it did not plan to use them exclusively on the TIV-WAN contract and circumstances did not require that they work additional hours in order to ensure acceptable provision of deliverables under the contract. Since the Government has not alleged any significant problems with NCSP's work or the quality of the deliverables, Finding 26, we conclude that there was no need that they be available beyond the degree to which they actually were.

Before closing our discussion concerning this first allegation, we note that, although it is our conclusion that NCSP was free to divert periodically the three key personnel to work on other contracts to its own economic benefit, this nonetheless required the consent of the contracting officer. See Finding 4. Had NCSP conferred with the contracting officer as required by the contract, there is every possibility that this dispute might never have arisen. The Government does not maintain, however, that the damages it now claims flow from a breach of this contract requirement. Rather, it maintains that the damages flow from breach of a requirement that the Government contends exists in the contract but which we conclude does not, namely, a requirement that the three key personnel identified by the auditors be 100% dedicated to the contract in the same manner as the project manager was. Consequently, although NCSP regrettably did not comply with the contract requirement to seek the contracting officer's consent before assigning these individuals to other tasks, we do not view this lapse as justifying in any way the relief to which the Government now claims it is entitled. Accordingly we can find no basis for the Government's withholding payment to NCSP based upon the fact that these three key personnel were periodically assigned to work on other contracts.

This brings us to the Government's second allegation, namely, that the Government was justified in withholding payment from NCSP because the contractor allegedly charged the Government for time spent by the same three key personnel on task orders issued under the TIV-WAN contract. The parties have stipulated that the total hours worked by these

employees on new work under the TIV-WAN contract amount to 1389.5 hours. The parties have likewise agreed that using the methodology employed by the OIG's auditors, Finding 10, charges for this number of hours would amount to \$106,029.30. Joint Stipulations, GSBCA 16124-ED, 14.

In her decision, the contracting officer contends that, even if it was NCSP's intent from its proposal submissions to take exception to what she describes as the requirement for 100% dedication of key personnel, it was still improper for these individuals to bill their time to task order work on the TIV-WAN contract because this was forbidden under the contract. Finding 21. Again, we must disagree. Given the nature of NCSP's proposal, we are not persuaded that the contract provision prohibiting key personnel from billing their time for task order work applied to the three key personnel identified by the auditors.

It is, of course, correct that the contract contains a provision prohibiting key personnel from charging or billing for time spent on task order work. It expressly states that the time of key personnel is not chargeable to task order work. The provision itself explained why this is so. Key personnel are deemed to be dedicated to the entire scope of the contract inclusive of performances associated with task orders and other contract modifications. Findings 6-7. This provision is obviously premised on the solicitation's assumption that all other key personnel will be 100% dedicated to contract performance just as the project manager is required to be. Where that assumption has been rebutted through pre-award submissions, however, as we have concluded in the instant case, we do not see the prohibition as applicable. Key personnel offered on a part-time basis are obviously not dedicated to the entire scope of the contract inclusive of performances associated with task orders and modifications. In the case of the TIV-WAN contract, the prohibition undoubtedly still applies to the project manager, but we do not view it as applicable to the other three key personnel identified by the OIG's auditors. As we have already noted, the Government does not have a contractual right to that portion of the FTE equivalent of these employees which was not bid unless, of course, additional availability is required in order to ensure successful performance of the contract. If the contractor wishes to include some of that un-bid time in a task order proposal, we see no reason why it cannot do so.

We, therefore, do not view the withholding of funds based upon this second allegation as any more justified than the withholding based upon the first. The amounts withheld by the Department at the recommendations of the OIG's audit report must be released to claimant with interest from the date on which the claim for them was received by the contracting officer.

GSBCA 16125-ED -- The "CPS" Contract ClaimFindings of FactThe Contract

27. On August 15, 1995, the Department of Education awarded contract PM95009001 to NCSP. The contract, commonly referred to as the "CPS" contract, called for the development, implementation, and operation of the Department's central processing system. A major function of this system is to process student application information and determine the student's eligibility for financial assistance. This includes receiving the student application information electronically, performing matches with internal and external data bases such as those of the Social Security Administration, and printing and mailing student aid reports. Appeal File, GSBCA 16125-ED, Exhibits 1 at 1 (unnumbered), 2 at C-1; Joint Stipulations, GSBCA 16125-ED, 1-3.

28. The contract provided for the accomplishment of contract responsibilities using a phased approach. Phase one provides for system conversion and development; phase two for system implementation, testing, and acceptance; and phase three for production and maintenance. Appeal File, GSBCA 16125-ED, Exhibit 1 at C-8 to -9.

29. Like the TIV-WAN contract, see Finding 3, the CPS contract is described as: (1) a firm-fixed-price contract (as defined under subpart 16.202 of the FAR) for products of phases one and two and for fixed-price task orders; (2) a fixed-price, indefinite-quantity contract (as defined under FAR 16.202 and 16.504) for phase three requirements; and (3) a labor-hour, indefinite-quantity contract (as defined under FAR 16.504 and 16.602) for task orders designated by the contracting officer as labor hour task orders. Appeal File, GSBCA 16125-ED, Exhibit 1 at 2.

30. One contract provision of particular relevance to this dispute is clause H.16, entitled "Key Personnel." It reads in part as follows:

The personnel designated as key personnel in the contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, or otherwise substituting any other personnel for specified personnel, the contractor shall notify the contracting officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact

on the contract effort. No diversion or substitution shall be made by the contractor without the written consent of the contracting officer . . . .

Appeal File, GSBCA 16125-ED, Exhibit 1 at 30.

31. The contract identifies the following five positions as key personnel positions: (1) the project manager, (2) the mainframe development manager, (3) the personal computer development manager, (4) the operations manager, and (5) the data base administrator. Appeal File, GSBCA 16125-ED, Exhibit 1 at 29.

32. Another contract provision, C.9.1, entitled "Staffing," sets out seventeen labor categories (five of which cover the five key personnel). This provision further states that there shall be one staff member per labor category except for the category of clerical and other support staff, which shall have a minimum of two staff members. With regard to this minimum staffing configuration, clause C.9.1 also states:

The Contractor shall commit specific staff on a full-time, dedicated basis to meet the minimum staffing configuration.

Appeal File, GSBCA 16125-ED, Exhibit 2 at C-143.

33. Finally, clauses C.10.2 and C.10.3 discuss task order procedures, initiation, and review. Clause C.10.2 has the following provision regarding the work of key personnel on task order work:

All key personnel dedicated to this project shall be made available for participation in task order work and the Contractor shall not bill for these hours.

Appeal File, GSBCA 16125-ED, Exhibit 2 at C-165. Clause C.10.3 sets out the requirements for a task order proposal and notes among other things that it should include the names and labor categories of personnel to be assigned to work on each task order. Id.

#### The Origin of This Dispute

34. The dispute which is the subject of this appeal stems from an audit report issued by the Department of Education's Office of Inspector General (OIG) on May 15, 2000 (the "CPS audit report"). Joint Stipulations, GSBCA 16125-ED, 4.



35. In their report, the OIG's auditors stated that two designated key personnel had charged 720 hours to other NCSP contracts and three key personnel had charged 487.5 hours to new work under the CPS contract. These practices, according to the auditors, resulted in overcharges to the CPS contract since key personnel costs were included in the fixed-price of deliverables specified in the original contract. In addition, according to the auditors, diverting these staff members to work on other contracts resulted in diminished effort to the overall CPS project. By applying the contract labor rates for the individuals involved, the auditors determined that these hours represented approximately \$90,600 in duplicated charges. In the opinion of the auditors, this situation occurred because NCSP did not adhere to the terms of the contract that prohibited diverting key personnel to other assignments and charging key personnel on new work. Appeal File, GSBCA 16125-ED, Exhibit 5 at 1-2. The auditors recommended, therefore, that the \$90,600 be recovered from NCSP. Id. at 3.

36. The OIG's auditors computed the amount of damages the Government allegedly suffered by taking a direct labor rate for the individuals involved, marking it up for management and supervision overhead, G&A, fee, and facilities capital cost of money, and then multiplying this figure by the number of hours the individuals worked on other than base CPS contract work. Appeal File, GSBCA 16125-ED, Exhibit 5 at 2; Joint Stipulations, GSBCA 16125-ED, 22.

#### NCSP's Claim and the Contracting Officer's Final Decision

37. In June of 2001, the Department, acting on the recommendation of the OIG's auditors, withheld \$90,600 from NCSP's invoices on the CPS contract. By letter dated October 16, 2002, counsel for NCSP submitted a claim for this amount and requested that the contracting officer issue a decision on the matter. Appeal File, GSBCA 16125-ED, Exhibit 13; Joint Stipulations, GSBCA 16125-ED, 5-6.

38. By letter dated February 6, 2003, the contracting officer issued a final decision rejecting NCSP's claim. Appeal File, GSBCA 16125-ED, Exhibit 14. In her decision, she specifically refers to the contract's Key Personnel clause, which expressly states that key personnel are essential to the work being performed under the contract and cannot be diverted to other programs without the written consent of the contracting officer. She also notes that the contract required NCSP to commit specific staff on a full-time, dedicated basis to meet the minimum staff configuration and that the contractor was not permitted to bill for hours spent by key personnel on task order work. Id. at 2. The contracting officer denied NCSP's claim for payment of the withheld funds because NCSP, notwithstanding these

contract provisions, did in fact permit dedicated personnel to work on other than CPS programs and billed for hours put in on CPS task order work by key personnel. Id. at 3-6.

39. With regard to any harm suffered by the Government as a result of NCSP's violation of these contract provisions, the contracting officer writes:

While it remains speculative whether diminished effort on the overall CPS contract occurred (as asserted by the audit report), it is clear that monetary damages were suffered when NCS used employees who were proposed as dedicated to the performance of the basic contract full time and billed their time to task order work under the CPS and other NCS contracts when expressly prohibited, or without the consent of the contracting officer, respectively.

Appeal File, GSBCA 16125-ED, Exhibit 14 at 4.

#### Declaration of NCSP's Contracts and Pricing Manager

40. As mentioned earlier in Finding 18, Mr. Mark Cutler, NCSP's Contracts and Pricing Manager has provided for the record a declaration given under penalty of perjury pursuant to 28 U.S.C. § 1746. The explanations provided in his declaration regarding the recording of time by company employees and his assistance to the OIG's audit staff in their audit of the TIV-WAN contract likewise apply to their audit of the CPS contract.

41. Similarly, our conclusions in Finding 19 regarding Mr Cutler's review of the work papers of the OIG's auditors and the methodology used by them to calculate backcharges in the TIV-WAN dispute are equally valid for the backcharges sought in this dispute which has arisen in relation to the CPS contract.

#### NCSP's Contract Performance

42. The parties to this dispute are in agreement that NCSP provided the fixed-price deliverables called for in the CPS contract and they were accepted by the Government. The Government has not alleged any significant problems with NCSP's work or the quality of the deliverables. The Government has also agreed that it has no evidence that the use of key personnel on new work under the CPS contract or on other contracts resulted in or contributed to any material deficiency on the CPS contract. Joint Stipulations, GSBCA 16125-ED, 12-13.

### Discussion

As with the claim in GSBCA 16124-ED, we consider first whether the Government was entitled to withhold payment from NCSP because key personnel assigned to the CPS contract were periodically diverted to work on other contracts. The parties have stipulated that the total hours worked by these employees on other contracts amount to 720 hours. They likewise have agreed that, using the methodology employed by the OIG's auditors, Finding 36, charges for this number of hours would amount to \$52,453.80. Joint Stipulations, GSBCA 16125-ED, 21.

The provisions in the CPS contract regarding dedicated personnel are significantly different from those found in the TIV-WAN contract. As noted earlier, in the TIV-WAN contract, there is a requirement that one of the key personnel, the project manager, be dedicated 100% to the contract. So far as the remaining key personnel are concerned, however, there is nothing more in the contract than a working assumption that these key personnel shall be 100% dedicated, but this assumption may be nullified by an offeror through pre-award submissions. Diversion of key personnel to other projects, however, requires the consent of the contracting officer. See Finding 4.

The CPS contract contains a similar provision regarding the substitution of key personnel and their diversion to other programs. See Finding 30. The contract's provision regarding dedicated staffing, however, in contrast to the provisions of the TIV-WAN contract, goes far beyond the project manager and the other key personnel. It extends to a minimum of one person for each of sixteen of the seventeen labor categories and two persons for the remaining labor category (clerical and other support staff). Finding 32. Although no mention is made of 100% dedication, the contract nonetheless requires that the contractor commit specific staff "on a full-time, dedicated basis" to meet this minimum configuration. Id. Most significantly, the full-time dedication of these employees is not simply a rebuttable working assumption, but rather a contract requirement. Id.

Given this difference in the staffing provisions of the two contracts, we view the contracting officer's objections to the diversion of key personnel assigned to the CPS contract as having more merit than similar objections raised in connection with the TIV-WAN contract. The CPS contract actually requires full-time dedication of key and other personnel and expressly states that key personnel shall not be diverted to other programs without the written consent of the contracting officer. Assignment of key personnel to programs outside

the contract without the agreement of the contracting officer, therefore, can readily be viewed as a breach of the contract.<sup>3</sup>

It would appear that breaches of this nature did occur. The parties have stipulated that 720 hours were worked on other NCSP contracts by two key personnel assigned to the CPS contract, and there has been no showing on appellant's part that this was done with either the written or oral agreement of the contracting officer.

This gives rise to the inevitable question of whether any damages resulted from the contractor's periodic breaches of these contract requirements. NCSP, taking refuge in the stipulation of the parties that the Government has not alleged any significant problems with NCSP's work or the quality of the deliverables, contends that no harm has been done. The Government, on the other hand, contends that these employees have already been paid for their full-time employment on the CPS contract. To pay again for services rendered by them on other Department contracts is to pay them twice. As for the assignment of these employees to work on NCSP's contracts with customers other than the Government, this is viewed by the Government as a deprivation of services for which it has already paid.

While the arguments of both parties have an initial appeal, we conclude, on balance, that NCSP's position is preferable to that of the Government. It is, of course, well-established that a breach of contract by a party against whom it is enforceable always gives rise to a claim for damages. Restatement (Second) of Contracts § 346 (1981). There are, however, situations where the breach causes no loss or the loss caused cannot be proven with reasonable certainty. In such instances, the injured party will get judgment for only a very small sum in nominal damages. *Id.* The apparently satisfactory performance of NCSP

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<sup>3</sup> NCSP argues that the diversion of key personnel to work on other contracts was excusable in view of the deletion of several of the deliverables under the CPS contract. Appellant points out that the 720 hours worked by key personnel on other contracts are few when compared to the number of key personnel hours deleted from the contract. Appellant's Opening Brief at 24-26. The parties have stipulated that the deletion of at least thirty deliverables on the original contract involved the deletion of at least 3048 key personnel hours. Joint Stipulations, GSBCA 16125-ED, 14. While this undoubtedly may have constituted a persuasive argument for releasing key personnel from their full-time commitment to the CPS contract, it hardly excused NCSP from its duty under the contract to first confer with the contracting officer and seek her agreement on the partial release of these employees before assigning them to other tasks.

on the CPS contract renders it impossible for the Government to prove that it is entitled to anything more than nominal damages at best.

The Government contends that the absence of any complaint as to the deliverables or the contracting officer's admission that it is speculative whether there was diminished effort on the deliverables "is beside the point." Respondent's Reply Brief at 10. Counsel write:

The clear, actual damage here is a result of duplicate charges in direct violation of the terms of the TIV-WAN and CPS contracts. The Department was charged duplicate charges and paid for those charges. It should not have been charged for them or paid for them.

Id.

Given the facts in this case, we find this allegation of duplicate charges to be flawed. It is based upon an excessively rigid interpretation of the contract requirement that certain staff, including key personnel staff, be committed on a full-time, dedicated basis to meet the contract's minimum staffing configuration. Serious as this requirement may be, we are not prepared to say that it results in the Government's owning absolutely and unconditionally all of the available time of these employees. If contract performance is proceeding at an acceptable level and those committed to working full-time on the contract find that they have additional time or are disposed to work overtime, we do not see why their employer cannot utilize them for other work, to the company's financial benefit. The employees committed to work full-time on the CPS contract were not indentured servants, the fruit of whose work belonged entirely to the Government. Where the Government has the right to the full-time commitment of the contractor's personnel, we will read this as requiring the employee to give the highest priority to working on contract tasks -- to the exclusion of work on any other projects if necessary. If the contract tasks are performed adequately, however, the Government can scarcely lay claim to the benefits derived by the contractor from the periodic use of the employee's excess time on other projects or endeavors.

The contract provision requiring the contracting officer's consent for the assignment of key personnel to other projects underscores how difficult it may be sometimes to determine whether temporary or periodic assignment of key personnel to another project will adversely diminish the overall contract effort. The requirement to confer first with the contracting officer and obtain permission before diverting the personnel to another project existed for good reason. As we have previously noted, had appellant complied with this requirement, this dispute might well have been avoided. In disregarding the requirement, NCSP ran a serious risk if contract performance had ultimately proven to be less than

satisfactory. In the absence of any complaints in this regard, however, we remain unpersuaded that the time recorded by these employees on other projects was, in fact, required to ensure successful performance of the CPS contract. As such, therefore, this time did not belong to the Government and the Government cannot now claim any economic benefit which might be associated with it.

Given the absence of any substantive complaint regarding NCSP's performance on the CPS contract, we find no breach of the requirement that NCSP commit staff on a full-time, dedicated basis to meet the contract's minimum staffing configuration. For the same reason, we find no compensable breach in NCSP's failure to obtain the contracting officer's consent before diverting key personnel to other programs.<sup>4</sup>

Accordingly, we can find no basis for the Government's withholding of payment to NCSP based upon the fact that the two key personnel assigned to the CPS contract and identified by the OIG's auditors were periodically assigned to work on other contracts but without the consent of the contracting officer.

We turn finally to the question of whether the Government was entitled to withhold payment from NCSP because of charges allegedly passed through to the Government for work done by three key personnel assigned to the CPS contract on new work called for under that contract. The parties have stipulated that the total hours recorded by these employees as having been spent on this new work is 427.5 hours. Joint Stipulations, GSBCA 16125-ED, 16. The parties likewise have agreed that using the methodology employed by the OIG's auditors, Finding 36, charges for this number of hours would amount to \$37,495.91. Joint Stipulations, GSBCA 16125-ED, 17.

The Government relies on NCSP's internal time records to prove that NCSP did, in fact, charge for the time spent by key personnel on CSP task orders. We find reliance on these records unpersuasive for three reasons.

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<sup>4</sup> Arguably, the breach of this requirement, even in the absence of any proof of loss, gives rise at least to a right to nominal damages. It is not within our power, however, to grant nominal damages as a remedy under the Contract Disputes Act. Our authority to grant relief does not extend beyond "any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims." 41 U.S.C. § 607(d) (2000). Nominal damages, however, are not recoverable in that court. Nortz v. United States, 294 U.S. 316, 327 (1935); Marior & Rye Valley Railway. Co. v. United States, 270 U.S. 280, 282; (1926); George Hyman Construction Co. v. United States, 30 Fed. Cl. 170, 173 n.4 (1993).

First, it does not surprise us that the three key personnel identified by the OIG's auditors recorded time spent working on various task orders. The contract most certainly envisioned key personnel doing task order work. What it prohibited was the contractor charging for this time. Finding 33. Further, NCSP's Contracts and Pricing Manager, in an un rebutted declaration given under penalty of perjury, has explained that the recording of time by company personnel was in accordance with established company policy regardless of whether or not the hours are billed to the Government or any other customer. Findings 24, 40. The fact, therefore, that NCSP's time records show time spent by key personnel on task orders does nothing to prove that the Government was charged for this time. Consequently we must reject any suggestion that, in the mere assertion of this fact, respondent has somehow met its burden of going forward and shifted the burden of proof to appellant.

Second, the alleged vagueness of the task order proposals is hardly reason to assume that designated key personnel were included in the proposals as part of the labor mix to be charged to the Government for the fixed-price deliverable in question. The audit report complains that the labor component of NCSP's task order proposals did not identify individuals, as required by the contract, but only labor categories, thus rendering it impossible for Department officials to monitor the use of key personnel in the pricing of new tasks. Appeal File, GSBCA 16125-ED, Exhibit 5 at 2. Government counsel in their reply brief have provided us with an example of such a proposal. Respondent's Reply Brief, Attachment 6. The supposition on the auditors' part appears to be that, in failing to identify by name the individuals who would be working on proposed task orders, the NCSP deliberately concealed the fact that the time of some key personnel was included in the direct labor component of these proposals. We cannot accept such a supposition in the absence of substantive proof.

Finally, we remain unconvinced by government counsels' argument that NCSP's cost methodology confirms that these internal time records reflect actual billing. In their reply brief, counsel write:

That methodology, which was relied on by the auditors in their working papers to determine the amount of time spent on new work and other work[,] specifically states that direct labor "is the productive work performed by NCS employees who *charge* to a cost objective, specific Program Special Service Number (PGM-SSN) element."

Respondent's Reply Brief at 3.

Respondent has not persuaded us that the "charge" to a cost objective in NCSP's internal employee time records necessarily results in a direct charge to the customer. The un rebutted explanation of NCSP's Contracts and Pricing Manager indicates otherwise. See Findings 24, 40. Furthermore, one exhibit provided by counsel in support of their argument is a short explanation written by NCSP concerning its "Cost Estimating Methodology." It is in this exhibit that we find the contractor's description of "direct labor" quoted by government counsel in their reply brief and set out above. From the title of the exhibit, it is clear that the context is that of cost *estimating*. The data provided by the internal time records of company employees is described by NCSP as one of several sources used in the development of direct cost rates using a cost pool concept. Respondent's Reply Brief, Exhibit 1 at 3 (unnumbered). Given this explanation, it appears that, at least as far as NSCP practice is concerned, time "charged" to a cost objective by reference to a specific PGM-SSN element is used rather for the formulation of direct labor cost rates to be used in *estimating* the cost of future work, rather than as a basis for billing a customer for the work being done and recorded at that time by the company employee.

This would appear to be particularly true in the case of fixed-price task orders, where the price of the task to be added to a contract is normally the subject of negotiations and agreement prior to the contractor's employees recording time spent later on actual performance of the task. The parties have stipulated that, of the nine CPS task orders on which the OIG's auditors disallowed time spent by key personnel, eight were fixed-price task orders -- as opposed to task orders which might have been designated by the contracting officer as labor-hour task orders. See Finding 29. (Of the ninth task order we know nothing since the Government was unable to locate it.) Joint Stipulations, GSBCA 16125-ED, 17. Assuming these task orders were negotiated in the usual fashion, we would hardly expect time records established after final agreement on the task order's fixed-price to serve as the basis for pricing those orders.

Given the lack of convincing evidence that NCSP did in fact charge for the time expended by key personnel on CPS task orders, we find no basis for the Government withholding payment on the mere supposition that that NCSP did so.



Decision

NCSP's appeals of the contracting officer's decisions in GSBCA 16124-ED and GSBCA 16125-ED are **GRANTED**. The amounts withheld by the Government should be paid forthwith to appellant with interest, in accordance with the Contract Disputes Act, 41 U.S.C. § 611, from the dates the contracting officer received NCSP's claims for payment of the amounts withheld.

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EDWIN B. NEILL  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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CATHERINE B. HYATT  
Board Judge