
**Office of the Inspector General
Corporation for National and Community Service**

**Audit of
Corporation for National and Community Service
Contract No. 95-001
With TvT Associates, Inc.**

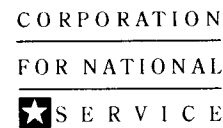
**Report Number 99-10
May 12, 1999**

Prepared by:
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Under CNS OIG MOU # 94-046-1027
With the Department of State
Contract # S-OPRAQ-94C-0468-23

This report was issued to Corporation management on August 2, 1999. Under the laws and regulations governing audit follow up, the Corporation must make final management decisions on the report's findings and recommendations no later than January 29, 2000, and complete its corrective actions by August 2, 2000. Consequently, the reported findings do not necessarily represent the final resolution of the issues presented.

**Office of the Inspector General
Corporation for National and Community Service**



**Audit of Corporation for National and Community Service
Contract No. 95-001 With TvT Associates, Inc.
(OIG Report Number 99-10)**

Cotton & Company, LLP, under contract to the Office of the Inspector General, audited the amounts claimed by TvT Associates, Inc. under Contract No. 95-001. The audit covered the costs (\$4,094,004) claimed during the period from December 28, 1994 through December 31, 1998 and included tests to determine whether costs reported to the Corporation were documented and allowable in accordance with the terms and conditions of the contract. We have reviewed the report and work papers supporting its conclusions and agree with the findings and recommendations presented.

The auditors found that TvT Associates, Inc. did not use contract-specified billing rates and claimed labor, consultant, and other direct costs that were unallowable and unallocable in accordance with contract terms and conditions and the *Federal Acquisition Regulation*. As a result, we have questioned \$294,094 of costs claimed under the contract.

In addition, the auditors requested that TvT provide written representations related to the contract. However, TvT's July 20, 1999 letter failed to include one of the representations; specifically that no events had occurred subsequent to the period that would require an adjustment to the amounts claimed. TvT representatives stated that, subsequent to the audit, TvT submitted revised invoices to the Corporation. Cotton & Company regards TvT's failure to provide all of the requested representations as a limit on the scope of its work, and has qualified its opinion on the Schedule of Contract Costs.

We provided a draft of this report to the Corporation and TvT. TvT's response, included as Appendix A, contains assertions that the Corporation mismanaged the contract and directed TvT to bill incorrectly under the contract. The Corporation indicated that it would address the issues raised in this report and TvT's response in its final management decision (Appendix B).

**OFFICE OF INSPECTOR GENERAL
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
AUDIT REPORT NUMBER 99-10**

**AUDIT OF
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
CONTRACT NO. 95-001 WITH
TVT ASSOCIATES, INC.**

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May 12, 1999

Inspector General
Corporation for National and Community Service

We audited costs claimed by TvT Associates, Inc., to the Corporation for National and Community Service under Contract No. 95-001 for the period December 28, 1994, to December 31, 1998. The Corporation awarded the contract for the period December 28, 1994, to September 30, 1998. Work was authorized to continue on open task orders through March 31, 1999. Under this time-and-materials contract, TvT provided assistance to the Corporation in developing and performing evaluations and management studies of Corporation grants, programs, and activities.

The audit objectives were to determine if (1) costs claimed are allowable and were incurred for actual contract effort, adequately supported, and charged in accordance with TvT's cost accounting system, contract terms, applicable laws and regulations including the *Federal Acquisition Regulation*, and applicable cost accounting standards; (2) TvT complied with contract terms and conditions; and (3) TvT's accounting system and system of internal accounting control were adequate as related to this contract.

Except as discussed in the following paragraph, we performed the audit in accordance with generally accepted auditing standards and *Government Auditing Standards* issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the amounts claimed against the contract, as presented in the Schedule of Contract Costs, are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the Schedule. An audit also includes assessing the accounting principles used and significant estimates made by the auditee, as well as evaluating the overall financial schedule presentation. We believe our audit provides a reasonable basis for our opinion.

In accordance with generally accepted auditing standards we requested that TvT provide certain written representations regarding its costs claimed, its accounting system, and other related matters. In a letter dated July 2, 1999, TvT declined to provide any of the requested

representations. After subsequent discussions with TvT, TvT provided a management representation letter dated July 20, 1999. The letter contained all of the requested representations except for the following:

No events have occurred subsequent to December 31, 1998, that would require adjustment to, or disclosure in, the financial reports or invoices submitted, other than items that have been adjusted as a result of the audit and that have been already disclosed to you.

According to TvT representatives they declined to provide the requested representation because subsequent to our audit TvT submitted revised invoices to the Corporation.

RESULTS IN BRIEF

Costs Claimed

We questioned \$294,094, or approximately 7 percent, of the \$4,094,004 claimed under the contract. The majority of these costs, \$237,546, were questioned because TvT added a “multiplier” to consultant and other direct costs billed that included indirect costs and profit. The *Federal Acquisition Regulation* (FAR) 16.601 states that a time-and-materials contract provides for acquiring material at cost, including, if appropriate, material handling costs. It further states that material handling costs are to include only direct and indirect costs allocated in accordance with the contractor’s usual accounting procedures; profit may not be included. According to FAR 16.102, cost-plus-a-percentage-of-cost contracts may not be used.

We also questioned \$58,383 claimed for intermittent employees. As defined in the contract, intermittent employees are temporary employees located onsite at the Corporation. TvT based costs billed on each employee’s actual salary rate plus a multiplier for indirect costs and profit. TvT did not, however, use contract-specified billing rates. The contract and negotiation memorandum indicated that multipliers of 1.85 and 1.87 were applied to intermittent labor costs in the base year and option years, respectively, to calculate billing rates identified in the contract. TvT applied multipliers of 1.95 and 2.01 to labor costs in the base year of the contract and 1.87 in the option years. We recalculated base year costs using the 1.85 multiplier and questioned excess costs.

The Schedule of Contract Costs provides additional information on these and other costs questioned based on the results of our audit.

Compliance

The results of our tests of compliance regarding claimed costs disclosed that TvT claimed labor, consultant, and other direct costs that were unallowable and unallocable in accordance with contract terms and conditions and the FAR, as described above and as detailed in the Notes to the Schedule of Contract Costs.

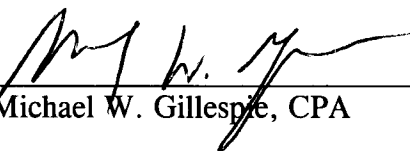
Internal Control

We noted a matter involving the internal control structure and its operations that we consider a reportable condition under the standards established by the American Institute of Certified Public Accountants. TvT's procedures and controls for preparing invoices under the Corporation contract are inadequate. The time and materials type contract specified billing rates and categories for full-time employees, intermittent employees, and consultants. TvT did not use the contract-specified billing rates or identify the labor or consultant categories on the invoices. TvT based costs billed on amounts paid to employees and consultants plus a multiplier for indirect costs and profit. The failure to identify labor or consultant categories and utilize the contract-specified billing rates resulted in incorrect invoices.

Response to Draft Report

On June 2, 1999, OIG provided a draft of this report to the Corporation and TvT, inviting comments. The Corporation's July 2nd response did not comment on the report. The Corporation stated it would address the findings and recommendations in the audit resolution process. TvT's response, through legal counsel, contained certain assertions concerning the Corporation's management of the TvT contract. TvT asserted that the Corporation mismanaged the contract, directed the contractor to hire named individuals, and even directed it to bill the Corporation incorrectly under the contract. TvT asserted that this incorrect billing method resulted in underbilling and underpayment of more than \$900,000. Given the nature of TvT's comments, and the assertions of additional significant liability on the part of the Corporation, OIG provided a copy of TvT's response to the Corporation in order to allow the Corporation to provide additional information or comments. On July 22, 1999, in a memorandum dated July 21, 1999, the Corporation tersely stated that it would address the substantive issues of TvT's response in its final management decision. TvT's response is included in this report as Appendix A. The Corporation's responses are included in Appendix B.

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May 12, 1999

Inspector General
Corporation for National and Community Service

INDEPENDENT AUDITORS' OPINION

We audited costs claimed by TvT Associates, Inc., to the Corporation for National and Community Service for Contract No. 95-001 for the period December 28, 1994, to December 31, 1998. Costs claimed are summarized in the Schedule of Contract Costs. Costs claimed summarized in the schedule are the responsibility of TvT management. Our responsibility is to express an opinion on costs shown in the schedule based on our audit.

Except as discussed in the following paragraph, we conducted our audit in accordance with generally accepted auditing standards and *Government Auditing Standards* issued by the Comptroller General of the United States. These standards require that we plan and perform the audit to obtain reasonable assurance that the financial schedules are free of material misstatement. An audit includes examining, on a test basis, evidence supporting amounts and disclosures in the financial schedules. It also includes assessing accounting principles used and significant estimates made by management, as well as evaluating the overall financial schedule presentation. We believe that our audit provides a reasonable basis for our opinion on costs claimed.

In accordance with generally accepted auditing standards we requested that TvT provide certain written representations regarding its costs claimed, its accounting system, and other related matters. TvT provided all of the requested representations except for the following:

No events have occurred subsequent to December 31, 1998, that would require adjustment to, or disclosure in, the financial reports or invoices submitted, other than items that have been adjusted as a result of the audit and that have been already disclosed to you.

According to TvT representatives they declined to provide the requested representation because subsequent to our audit TvT submitted revised invoices to the Corporation.

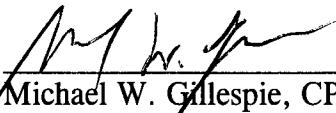
This schedule is intended to present allowable costs incurred under the contract in accordance with the *Federal Acquisition Regulation* (FAR) and contract terms and conditions. Therefore, it is not intended to be a complete presentation of TvT's revenues and expenses.

In our opinion, except for questioned costs in the Schedule of Contract Costs and the effects, if any, of matters that may have come to our attention had TvT not declined to provide the written representation described above, the financial schedule referred to above presents fairly, in all material respects, costs claimed by TvT as these costs relate to the contract for the audit period December 28, 1994, to December 31, 1998, in conformity with the FAR and contract terms and conditions.

In accordance with *Government Auditing Standards*, we have also issued reports dated May 12, 1999, on our consideration of TvT's internal control structure and on its compliance with laws and regulations.

This report is intended for the use of the Inspector General and Corporation management. This report is a matter of public record, and its distribution is not limited.

COTTON & COMPANY, LLP

By: 
Michael W. Gillespie, CPA

FINANCIAL SCHEDULE

SCHEDULE OF CONTRACT COSTS

**Corporation for National and Community Service Contract With
TvT Associates, Inc.
Contract No. 95-001
December 28, 1994, to December 31, 1998**

	Claimed Costs	Questioned Costs	Notes
Labor	\$ 224,110	\$ (2,571)	1
Intermittent Labor	1,047,515	59,119	2
Consultants	2,486,053	208,372	3
Other Direct Costs	<u>336,326</u>	<u>29,174</u>	4
Total	<u>\$4,094,004</u>	<u>\$294,094</u>	

NOTES TO SCHEDULE OF CONTRACT COSTS

1. TvT billed \$224,110 for work performed by its full-time employees. It based costs on each employee's actual salary rate plus a multiplier for indirect costs and profit. TvT did not use the billing rates or labor categories specified in the contract. We recalculated labor costs based on contract-specified labor rates and categories and determined that TvT underbilled the Corporation by \$2,571. We accepted the underbilled costs and reduced questioned costs accordingly by \$2,571.
2. We questioned \$59,119 in salaries and wages for "intermittent" employees. As defined in the contract, intermittent employees are temporary employees located onsite at the Corporation. Questioned costs are as follows:
 - a. TvT billed \$1,047,515 for work performed by "intermittent" employees. It based costs on each employee's actual salary rate plus a multiplier for indirect costs and profit. According to TvT representatives, these individuals were former National Civilian Community Corps employees that the Corporation requested TvT to hire for this contract. TvT classified these employees in its records as "permanent temporary" employees, and they worked full-time at the Corporation offices. TvT provided fewer benefits than it provided to its permanent employees. The contract included six fixed hourly rates for "intermittent" employees identified as "Level 1" through "Level 6."

However, we found that TvT did not use contract-specified billing rates or identify on the invoices the "level" of any of the "intermittent" employees. The contract and negotiation memorandum indicated that multipliers of 1.85 and 1.87 were to be applied to "intermittent" labor costs in the base year and option years, respectively, to calculate billing rates identified in the contract. However, TvT applied multipliers of 1.95 and 2.01 to labor costs in the base year of the contract and 1.87 in the option years. In lieu of questioning all costs billed, we used the actual salary rate paid to each employee and we recalculated base year costs using the 1.85 multiplier and questioned excess costs of \$58,383.
 - b. TvT used an incorrect hourly rate to calculate costs for an "intermittent" employee working on Task Order No. 2 for the period January 16 through March 15, 1996. It used an hourly rate of \$53.43, although the hourly rate shown on the invoices was \$51.24. We questioned the \$736 difference.
3. TvT billed \$2,486,053 for consultant costs, which consisted of \$2,031,178 paid to the consultants plus \$454,875 designated as a "multiplier." The multiplier, which included indirect costs plus profit, varied:

January 1 to August 15, 1995	29 percent
August 16 to December 31, 1995	25 percent
January 1, 1996 to December 31, 1998	20 percent

The contract included six fixed hourly rates for consultants identified as “Level 1” through “Level 6”. However, TvT did not use contract-specified billing rates. Further, the invoices did not identify the “level” of any of the consultants, and no other documentation was available detailing the determination of consultant levels by TvT or the Corporation at the time the work was performed. Accordingly, we could not recalculate consultant costs using the contract-specified rates.

Generally consultant costs incurred under time and materials type contracts are treated as other direct costs with material handling or general and administrative costs added to the amounts billed. However, the contract does not specify an indirect cost rate applicable to other direct costs. In lieu of questioning all costs billed in excess of actual costs paid to the consultants, we applied TvT’s general and administrative (G&A) rates specified in its negotiated indirect cost rate agreement with the U.S. Agency for International Development to amounts paid to consultants. These rates are:

1995	10.64 percent
1996	14.16 percent
1997	12 percent (provisional rate)
1998	12 percent (provisional rate)

We calculated G&A costs of \$246,503 and questioned the \$208,372 difference between the \$454,875 billed and \$246,503.

4. TvT billed \$336,326 of other direct costs, which consisted of \$273,867 of costs plus \$62,459 designated as a “multiplier.” TvT calculated the multiplier, which included indirect costs plus profit, using the rates shown in Note 3, above. We recalculated G&A costs of \$33,285 using the methodology described in Note 3. For the reasons stated in Note 3, we questioned the difference between the \$62,459 billed and \$33,285, or \$29,174.

**INDEPENDENT AUDITORS' REPORTS ON COMPLIANCE
AND INTERNAL CONTROL STRUCTURE**

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May 12, 1999

Inspector General
Corporation for National and Community Service

INDEPENDENT AUDITORS' REPORT ON COMPLIANCE

We audited costs claimed by TvT Associates, Inc., to the Corporation for National and Community Service under Contract No. 95-001 for the period December 28, 1994, to December 31, 1998, and have issued our report thereon dated May 12, 1999.

Except for the scope limitation described in our report on page 4, we conducted our audit in accordance with generally accepted auditing standards and *Government Auditing Standards* issued by the Comptroller General of the United States. These standards require that we plan and perform the audit to obtain reasonable assurance that the financial schedules are free of material misstatement.

Compliance with applicable laws and regulations related to the contract is the responsibility of TvT management. As part of obtaining reasonable assurance that costs are free of material misstatement, we performed tests of compliance with certain provisions of laws and regulations related to the contract. Our objective was not, however, to provide an opinion on overall compliance with such provisions. Accordingly, we do not express such an opinion.

The results of our tests of compliance regarding claimed costs disclosed the following material instance of noncompliance that is required to be reported herein under *Government Auditing Standards*.

TvT claimed labor, consultant, and other direct costs that were unallowable and unallocable in accordance with contract terms and conditions and the *Federal Acquisition Regulation*. As discussed in the Notes to the Schedule of Contract Costs, TvT:

- Did not use the billing rates or labor categories specified in the contract for its full-time employees, intermittent employees, and consultants.

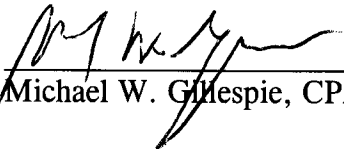
- Applied a “multiplier,” to other direct costs that inappropriately included profit. The multiplier should have been limited to indirect cost.

We recommend that the Corporation direct TvT to limit claimed costs to those allowable under applicable cost principles and contract provisions.

We considered the above material instance of noncompliance in forming our opinion on whether TvT costs claimed under contract award for the period December 28, 1994 to December 31, 1998, are presented fairly, in all material respects, pursuant to contract terms and conditions and the *Federal Acquisition Regulation*. Because of the material instance of noncompliance and matters described in the Schedule of Contract Costs, our opinion on the schedule is qualified.

This report is intended for the use of the Inspector General and Corporation management. This report is a matter of public record, and its distribution is not limited.

COTTON & COMPANY, LLP

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May 12, 1999

Inspector General
Corporation for National and Community Service

INDEPENDENT AUDITORS' REPORT ON INTERNAL CONTROL STRUCTURE

We audited costs claimed by TvT Associates, Inc., to the Corporation for National and Community Service under Contract No. 95-001 for the period December 28, 1994, to December 31, 1998, and have issued our report thereon dated May 12, 1999.

Except for the scope limitation described in our report on page 4, we conducted our audit in accordance with generally accepted auditing standards and *Government Auditing Standards* issued by the Comptroller General of the United States. These standards require that we plan and perform the audit to obtain reasonable assurance that the financial schedule is free of material misstatement.

TvT management is responsible for establishing and maintaining an internal control structure. In fulfilling this responsibility, estimates and judgments by management are required to assess expected benefits and related costs of internal control structure policies and procedures. The objectives of an internal control structure are to provide management with reasonable, but not absolute, assurance that assets are safeguarded against loss from unauthorized use or disposition, and that transactions are executed in accordance with management's authorization and recorded properly to permit the preparation of financial schedules in accordance with generally accepted accounting principles. Because of inherent limitations in any internal control structure, errors or irregularities may nevertheless occur and not be detected. Also, projection of any evaluation of the structure to future periods is subject to the risk that procedures may become inadequate because of changes in conditions or that the effectiveness of the design and operation of policies and procedures may deteriorate.

In planning and performing our audit, we obtained an understanding of TvT's internal control structure. We obtained an understanding of the design of relevant policies and

procedures and whether they have been placed in operation, and we assessed control risk to determine our auditing procedures for the purpose of expressing an opinion on claimed costs and not to provide an opinion on the internal control structure. Accordingly, we do not express such an opinion.

We noted a matter involving the internal control structure and its operations that we consider a reportable condition under the standards established by the American Institute of Certified Public Accountants. Reportable conditions involve matters coming to our attention relating to significant deficiencies in the design or operation of the internal control structure that, in our judgment, could adversely affect an organization's ability to record, process, summarize, and report financial data consistent with the assertions of management in the financial schedules.

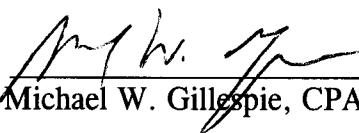
TvT's procedures and controls for preparing invoices under the Corporation contract are inadequate. The time and materials type contract specified billing rates and categories for full-time employees, intermittent employees, and consultants. TvT did not use the contract-specified billing rates or identify the labor or consultant categories on the invoices. TvT based costs billed on amounts paid to employees and consultants plus a multiplier for indirect costs and profit. The failure to identify labor or consultant categories and utilize the contract-specified billing rates resulted in incorrect invoices.

We recommend that the Corporation direct TvT to prepare invoices in accordance with the terms and conditions of the contract.

We believe that the matter described above is a material weakness. A material weakness is a reportable condition in which the design or operation of one or more of the specific internal control elements does not reduce to a relatively low level the risk that errors or irregularities in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions. Our consideration of the internal control structure would not necessarily disclose all matters in the internal control structure that might be material weaknesses under standards established by the American Institute of Certified Public Accountants.

This report is intended for the use of the Inspector General and Corporation management. This report is a matter of public record, and its distribution is not limited.

COTTON & COMPANY, LLP

By: 
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APPENDIX A

TVT ASSOCIATES, INC.'S RESPONSE

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July 2, 1999

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**Re: Response of TvT Associates, Inc. to Draft Audit of CNCS Contract No.
95-001 by Cotton & Company**

Dear Mr. Gillespie:

On behalf of TvT Associates, Inc. ("TvT"), the undersigned counsel hereby timely submits TvT's response to the above-captioned audit concerning Corporation for National and Community Service ("CNCS") Contract No. 95-001 ("the Contract") with TvT. As set forth herein, TvT takes exception to certain findings and conclusions of the Cotton & Company ("Cotton") audit, and asserts TvT's entitlement to \$956,037.41 owed to it by CNCS under the terms of the Contract.¹

A. Labor – Full-Time Employees

In the audit, Cotton questioned the amounts paid to TvT for its full-time employees. Cotton concluded that TvT actually had underbilled the amount due, because TvT

¹ For ease of reference, TvT has organized its response in accordance with the structure followed by Cotton in the audit.

erroneously billed its full-time employees based upon actual salary rate plus a multiplier (representing indirect costs and profit), rather than on the Contract-specified fixed rates by labor categories. Cotton thus recalculated the amount due based upon the Contract-specified rates and categories, which resulted in the determination that TvT had underbilled CNCS in the amount of \$2,571.00 with respect to full-time employees. TvT does not take exception to Cotton's finding only as to the amount TvT asserts its entitlement to the \$2,687.76 for full-time employees owed to it by CNCS under the billing terms set forth in the Contract. TvT agrees that the amount paid to TVT for labor incurred in performance of the Contract properly should have been calculated based upon the rates and categories specified in the Contract.

B. Labor – “Intermittent” Employees

As part of the audit, Cotton also questioned TvT's billed costs concerning “intermittent” (i.e., “direct temporary” or “permanent temporary”) employees.² Most of these individuals were former National Civilian Community Corps (“NCCC”) employees that CNCS directed TvT to hire for this Contract. Cotton questioned the amount TvT billed for these employees because TvT: (1) did not use the billing rates specified in the Contract; and (2) did not identify on the invoices the “level” of these employees. Instead, TvT erroneously billed these employees based upon actual salary rate plus a multiplier for indirect costs and profit. Even though a multiplier should not even have been used, Cotton

² Although the audit refers to the employees at issue here as “intermittent employees,” following Contract Modification 1 these employees correctly are termed “direct temporary employees.” In order to avoid confusion, however, TvT uses the term “intermittent employees” in its response as that term is used, albeit incorrectly, in the audit.

claimed the amount of the base year multiplier applied by TvT was too high. Cotton therefore recalculated the “intermittent” employee billings and concluded that TvT billed CNCS an excess of \$58,383.00 with respect to these employees.

TvT takes exception to Cotton’s findings regarding “intermittent” employees. As Cotton admits, the Contract is a fixed rate, time and materials, labor hours (“T&M”) contract. Neither the type nor the terms of the Contract were affected by the incorrect billing methods used by TvT at the direction of the CNCS Contracting Officer (“CO”) on the Contract. During the course of contract performance, the CO not only directed TvT how to bill but also told TvT who to hire and at what rates³. Furthermore, on, at least one occasion, the CO instructed TvT to utilize his numbers when his accounting showed a different amount remaining on a task order than TvT’s accounting showed.

Importantly, and as Cotton concluded, the incorrect billing practices directed by the CO did not change the Contract type to anything other than a T&M contract. TvT never treated the Contract as anything but a T&M contract. Rather, TvT simply invoiced the work performed per the CO’s direction. Thus, any incorrect billing on this Contract was solely the responsibility of CNCS, which maintained complete control over the method of billing throughout the course of performance. In short, the CO fully controlled the Contract funds. TvT, reasonably assumed that CNCS was properly managing and following the Contract

³ For the first two years of contract performance, the CO or the Contracting Officer’s Technical Representatives (“COTRs”) expressly directed TvT to hire certain employees and/or consultants. Following a review by the Inspector General that discouraged such practice, the COTRs instead instructed its “selected” potential employees and/or consultants to send their resumes directly to TvT, with the understanding that they then would be hired for the contract. From the outset and throughout the life of the contract, CNCS continued to set pay rates for the employees and consultants.

budget, had no way to determine how the CO was computing the rates that he was providing to TvT.

TvT, in good faith, followed the erroneous direction of the CO regarding billing and did so to its serious prejudice. As a result of the CO's improper direction, TvT was denied the correct amount of payment guaranteed under the binding terms of the Contract. More specifically, at the behest of the CO, the parties mistakenly used a formula consisting of "intermittent" employee costs plus multiplier instead of relying on the fixed rates stated in the Contract. Despite the incorrect billing practices improperly directed by the CO, the binding terms of the Contract, including the fixed labor rates, properly control the amount of payment due to TvT. In fact, "[a] firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract." FAR 16.202-1. Thus, the only remedy is to recalculate the moneys owed to TvT in accordance with the Contract terms and pay TvT at the Contract-specified fixed labor rates agreed to by the parties.

The Contract provides that "[l]abor rates include wages, overhead, G&A expenses and profit and are fixed pursuant to negotiations. Pricing of this term is comprised of the following elements . . . Direct Intermittent Labor." Contract Clause B.2 (listing the fixed rates, including the hourly rate for direct intermittent employees, levels 1 through 6). These "intermittent" employees' rates were negotiated and essential to contract performance. In fact, the parties expressed a clear intent to be bound by the fixed rates agreed to in the Contract; an intent that lasted throughout the Contract as evidenced by contract modifications addressing the fixed hourly rates. See, e.g., Contract Modifications 1, 2

(setting forth the fixed hourly rates for “intermittent” employees); Contract Modification 3 (raising the fixed hourly rates for “intermittent” employees). The Contract provisions and modifications setting fixed rates for “intermittent” employees thus dictate the proper payment terms. Indeed, the Contract terms are controlling. The bargain that the parties made upon entering into the Contract, with its fixed labor rates and express terms, clearly was the bargain that the parties intended and therefore is the bargain to which CNCS should be bound. See Maykat Enters., GSBICA No. 7346, July 11, 1984, 84-3 BCA ¶ 17,510 (imposing upon the Government the binding agreement that it had made with the contractor).

TvT’s submission, at the CO’s direction, of bills that did not conform to the terms of the Contract and CNCS’ payment of those amounts, did not alter the terms of the Contract or otherwise diminish CNCS’ obligation to honor those terms. CNCS’ payments were simply ministerial acts that were not supported by consideration, and had no impact on the contract amount. Cresto & Lanphere, Inc., AGBCA No. 84-208-1, Oct. 2, 1984, 84-3 BCA ¶ 17,653, at 4291 (the Government, by clerical error, included in modifications an amount higher than that stated in the contract; the error had no binding effect and the contractor was required to return any overpayments). TvT, following the erroneous direction of the CO, made a mistake in billing that was not supported by consideration. Moreover, CNCS was aware or should have been aware of this error. Accordingly, the parties’ contractual obligations are unaltered. See id.; Maykat, 84-3 BCA ¶ 17,510, at 131299. The Government has no special status that permits it to disavow its contracts; nor does a billing mistake permit the Government to avoid its contractual obligations. See Maykat, 84-3 BCA ¶ 17,510.

In further responding to Cotton's concerns, TvT notes that it did not list the "level" of each "intermittent" employee on invoices because such was not required under the Contract. Nor did CNCS request that TvT list the level of each "intermittent" employee on invoices. Moreover, the assigned "level" of a particular "intermittent" employee was irrelevant during contract performance. Nonetheless, and contrary to Cotton's assertions, it is in fact possible to assign each of the "intermittent" employees to a labor category or level as specified in the Contract. In fact, TvT already has performed this task in calculating the amount owed to TvT by CNCS under the Contract.

Moreover, CNCS itself indirectly established the labor levels by assigning a pay rate for each employee commensurate with the employee's past experience and job description. Based upon the pay rates set by CNCS and the resumes and/or job descriptions of the employees, TvT assigned each employee a labor level and rate per the terms of the contract. For example, the original hourly rates stated in the contract for level 1 and 2 "intermittent" employees were \$83.25 and \$74.00 respectively. See Contract Clause B.2. If an "intermittent" employee was paid an hourly rate set by CNCS that was under \$83.25 but above \$74.00, that employee clearly can be placed into the level 1 category. An "intermittent" employee paid \$74.00 would fall under level 2, and so on. The level for each employee was readily apparent from the invoices submitted by TvT to CNCS, based upon a comparison of the pay ranges established in the Contract and the rates actually paid at CNCS' direction.

At the exit interview, the auditor stated that the sole reason why TvT could not be paid at the Contract-specified fixed rates was because the auditor was unable to determine

the appropriate level for each employee and consultant. Because TvT has performed this task, the only obstacle to the correct method of calculating payments has been removed. As such, CNCS should proceed with payment in accordance with the terms of the Contract, i.e., at the fixed rates specified therein. Given Cotton's clear conviction that the Contract-specified fixed labor rates and categories provide the proper basis for billing calculations, those rates and categories should be utilized to recalculate the appropriate amounts due under the Contract with respect to "intermittent" employees, as done with respect to full-time employees.

This conclusion is unaltered by the existence of any alleged administrative error with respect to the application of a base-year multiplier to actual costs. Under the circumstances, i.e., because the use of any multiplier was incorrect, the actual multiplier applied is irrelevant—the billings should have been based upon the fixed rates stated in the Contract. In addition, any such administrative billing error necessarily was the result of the improper billing directives issued by the CO, upon which TvT reasonably relied to its unfair economic detriment. Accordingly, the amounts to be paid to TvT for "intermittent" employees should be recalculated based upon the Contract-specified fixed rates and employee levels agreed to by the parties, just as the full-time employee rates were recalculated in accordance with the terms of the Contract. Based upon the employee levels stated in the Contract and the application of the corresponding Contract-specified billing rates, CNCS owes TvT \$740,640.44 for "intermittent" employees.⁴

⁴ In recalculating this amount for the years 1996 forward, TvT used the fixed rates established for direct temporary employees ("direct intermittent employees") in Contract Modification 1. The direct temporary employee labor category was added after CNCS directed TvT to hire these employees at a higher fringe rate

C. Consultants

As with “intermittent” employees, Cotton also questioned TvT’s billed costs concerning consultants on the basis that TvT: (1) did not use the billing rates specified in the Contract; and (2) did not identify on the invoices the “level” of the consultants. TvT takes exception to Cotton’s findings concerning consultants and contends that consultants correctly should have been billed based upon the fixed labor rates and categories agreed upon by the parties in the Contract, which are readily identifiable in the Contract and invoices submitted by TvT to CNCS.

Cotton further questioned the consultant costs billed based upon the fact that the Contract was a T&M type contract under FAR 52.232-7, *Payments under Time-and-Materials and Labor-Hour Contracts* (APR 84). According to Cotton, the consultant costs were incorrectly billed because consultant costs incurred under T&M contracts generally are treated as other direct costs with material handling or general and administrative (“G&A”) costs added to the amounts billed. Cotton’s position seems to be that the consultants should be treated like material costs for which no fee can be charged. Cotton provided his support for its position.

than was applicable to intermittent employees. Significantly, Contract Modification 1 clearly shows that CNCS knew that fixed rates were to be paid for these employees under the Contract.

With respect to “intermittent” employees, Cotton further determined that TvT used an incorrect hourly rate to calculate costs for an “intermittent” employee working on Task Order No. 2 for the period January 1 through March 15, 1996. Consequently, Cotton questioned a difference of \$736.00 billed to CNCS. Although TvT acknowledges this mathematical error, it is irrelevant in light of the fact that this employee, as all other employees, should have been paid based upon the fixed rate for the applicable labor category specified in the Contract. Any mathematical error in calculating this individual employee’s costs on another basis therefore does not alter the fact that TvT is owed a total of \$740,640.44 for “intermittent” employees, calculated at the fixed rates agreed to in the Contract.

Prior to addressing the rates upon which the billings were calculated, TvT first takes issue with Cotton's position on fee (profit). Clearly, TvT had the right to charge a fee for the consultants. The fee was not a "material handling cost"; labor is not a "material." Labor is labor and must be treated the same as with TvT's own employees. Furthermore, the Contract and negotiated rate memorandum, which control the payment terms, state that consultants will be billed at a fixed hourly rate that included a fee. See Contract Clause B.2. CNCS thus agreed to that condition when it awarded the Contract to TvT. Indeed, the CNCS approved "loaded" rate for consultants is apparent throughout the course of contract performance, as is evident from the correspondence between the parties discussing the use of "loaded" rates.

FAR 16.601(a)(1) also specifies that the Government acquire supplies or services under a T&M contract: "on the basis of . . . direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit." Id. Case law also demonstrates that consultant costs are direct costs. See Software Research Assocs., ASBCA No. 33578, July 18, 1988, 88-3 BCA ¶ 21,046. The instant case is similar to Software Research Associates, where the Government argued that consultants' work should be paid at actual costs like materials, and therefore that the contractor was not entitled to negotiated hourly rates for consultants that included additional overhead and profit. Disagreeing with the Government, the ASBCA concluded that the consultants performed work just as employees did, and therefore should be compensated on the same basis as the employees. The same is true here. Thus, TvT is entitled to payment of the negotiated fixed rates for the consultants just like the full-time and "intermittent" employees.

Moreover, the terms of the Contract are binding on the parties and were not affected by the incorrect billing methods used by TvT at the direction of the CO. In fact, the CO directed TvT how to bill, told TvT who to hire, at what rates, and, on one occasion, instructed TvT to utilize his numbers when CNCS' accounting system showed a different amount remaining on a task order than TvT's accounting showed. As previously stated, the incorrect billing practices directed by the CO did not change the Contract type to anything other than a T&M contract.

TvT reasonably assumed that CNCS was properly managing and following the Contract budget. From the onset of contract performance, CNCS directed TvT to hire certain consultants "recommended" by CNCS at specified rates. Frequently, these rates were lower than the firm fixed price rates clearly set forth at Contract Clause B.2 for six (6) "levels" of consultants. Indeed, CNCS representatives already had negotiated rates with and essentially had "hired" certain consultants before those consultants ever spoke with TvT representatives. Moreover, CNCS, in breach of the Contract, directed TvT to utilize the lower rates for billing purposes.

TvT, in good faith, followed the erroneous direction of the CO regarding billing and did so to its serious detriment. As a result of the CO's improper direction, TvT was denied the correct amount of payment guaranteed under the binding terms of the Contract. More specifically, at the behest of the CO, the parties mistakenly used a formula consisting of consultant costs and multiplier instead of relying on the fixed rates stated in the Contract. Despite the incorrect billing practices improperly directed by the CO, the binding terms of the Contract properly control the amount of payment due to TvT. The only remedy is to

recalculate the moneys owed to TvT in accordance with the Contract terms and pay TvT at the Contract-specified fixed labor rates agreed to by the parties.

The Contract provides that “[l]abor rates include wages, overhead, G&A expenses and profit and are fixed pursuant to negotiations. Pricing of this term is comprised of the following elements . . . Consultants.” Contract Clause B.2 (listing the fixed rates, including the hourly rate for consultants, levels 1 through 6). Listing the consultants’ fixed labor rates under the Contract section titled “other direct costs,” does not transform these labor rates into material costs, as Cotton knows. See Software Research Assoc., 88-3 BCA ¶ 21,046. In fact, the parties expressed a clear intent to be bound by the fixed rates agreed to in the Contract; an intent that lasted throughout the Contract as evidenced by contract modifications addressing the fixed hourly rates. See, e.g., Contract Modifications 1, 2 (setting forth the fixed hourly rates for consultants); Contract Modification 3 (raising the fixed hourly rates for consultants). The Contract provisions and modifications setting fixed rates for consultants thus dictate the proper payment terms.

TvT’s submission, at the CO’s direction, of bills that did not conform to the terms of the Contract and CNCS’ payment of those amounts, did not alter the terms of the Contract or otherwise diminish CNCS’ obligation to honor those terms. CNCS’ payments were simply ministerial acts that were not supported by consideration, and had no impact on the contract amount. Cresto, 84-3 BCA ¶ 17,653, at 4291. TvT, following the erroneous direction of the CO, made a mistake in billing that was not supported by consideration. Moreover, CNCS was aware or should have been aware of this error. Accordingly, the parties’ contractual obligations are unaltered. See Maykat, 84-3 BCA ¶ 17,510, at 131299. The Government

has no special status that permits it to disavow its contracts; nor does a billing mistake permit the Government to avoid its contractual obligations. See Maykat, 84-3 BCA ¶ 17,510.

In further responding to Cotton's concerns, TvT again notes that it did not list the "level" of each consultant on invoices because such was not required under the Contract. CNCS also never requested that TvT list the level of consultant on invoices. In light of the fact that CNCS representatives directed TvT to hire named consultants at specific rates other than those set forth in the Contract, the assigned "level" of a particular consultant was irrelevant during Contract performance. Nonetheless, and contrary to Cotton's assertions, it is in fact possible to assign each of the consultants to a labor category or level as specified in the Contract. In fact, TvT already has performed this task in calculating the amount owed to TvT by CNCS under the Contract.

As with the "intermittent" employees, CNCS itself indirectly established the labor levels for consultants by assigning a pay rate for each consultant commensurate with the consultant's past experience, educational level, and the statement of work. Based upon the pay rates set by CNCS and the resumes of the consultants, TvT assigned each consultant a labor level and rate per the terms of the contract. For example, the original hourly rates stated in the contract for level 1 and 2 consultants were \$53.38 and \$51.60, respectively. See Contract Clause B.2. If a consultant was paid an hourly rate under \$53.38 but above \$51.60, that consultant clearly can be placed into the level 1 category. A consultant paid \$51.00 would fall under level 2, and so on. The level for each consultant should have been

readily apparent from the invoices submitted by TvT to CNCS, based upon a comparison of the pay ranges established in the Contract and the hourly rates actually paid.

At the exit interview, the auditor stated that the sole reason why TvT could not be paid at the Contract-specified fixed rates was because the auditor was unable to determine the appropriate level for each employee and consultant. Because TvT has performed this task, the only obstacle to the correct method of calculating payments has been removed. As such, CNCS should proceed with payment in accordance with the terms of the Contract, i.e., at the fixed rates specified therein. After reviewing the Government's breach of the Contract, and calculating the difference between what was billed and what was owed for consultants, TvT has determined that CNCS owes TvT \$212,709.21 for consultants.

D. Other Direct Costs - Fee on Travel and Other Materials

As a result of the audit, Cotton determined that TvT billed CNCS a total of \$273,867.00 in other direct costs (i.e., travel and other materials), plus a \$62,459.00 multiplier that included indirect costs and profit. Cotton concluded that the multiplier was incorrectly applied to these other direct costs because it included a fee. Utilizing the same methodology that it used to recalculate the consultant costs, Cotton calculated a G&A amount on the other direct costs totaling \$33,285.00. Accordingly, Cotton questioned the \$29,174.00 difference between the multiplier amount claimed by TvT and the audit-adjusted G&A amount.

TvT takes exception to this recalculation and maintains that the multiplier properly was applied to the other direct costs billed to CNCS. In the negotiated rate memorandum, the parties expressly agreed to the application of a multiplier, which included a fee (profit),

to these costs. In addition, TvT's proposal accepted by CNCS specifically stated that the multiplier for such costs included a fee. Thus, contrary to what Cotton says, CNCS' agreement with TvT did not limit the multiplier to G&A. CNCS agreed to pay a fee in awarding the Contract to TvT and cannot now disavow that agreement.

E. Compliance

Based upon these "findings," Cotton concluded that TvT billed labor, consultant, and other direct cost amounts that were unallowable and unallocable in accordance with the terms of the Contract and FAR. Because of this alleged "material instance of noncompliance," Cotton qualified its opinion on the Schedule set forth in the audit. TvT takes issue with the determination that the administrative billing errors made by TvT, constitute a "material instance of noncompliance." Indeed, it is CNCS that has breached the Contract by improperly directing the use of its former employees, manipulating the Contract budget and purposefully underpaying TVT. TVT maintains its entitlement to the amounts set forth in the Contract and is submitting corrected invoices by separate cover.

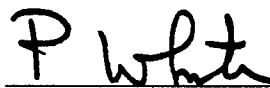
Conclusion

For the reasons set forth above, TvT is entitled to payment in the amount of \$956,037.41, which is the money owed to TvT under the Contract. TvT's submission of erroneously calculated bills, which occurred at the improper direction of the CO, nor CNCS' payment of those amounts, altered the terms of the Contract or otherwise diminished CNCS' obligation to honor the terms to which it agreed.

Michael W. Gillespie
July 2, 1999
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If you have any questions or require additional information, please do not hesitate to contact the undersigned.

Sincerely,

Handwritten signature of Paralee White in black ink, consisting of a large 'P' followed by 'White' in a cursive script.


Paralee White
Lisa K. Miller
Counsel for TvT Associates, Inc.

cc: Mary A. Tondreau
President
TvT Associates, Inc.

APPENDIX B

THE CORPORATION'S RESPONSE

MEMORANDUM

DATE: 7/2/99
TO: Luise Jordan, OIG
CC: Simon Woodard, Director, Procurement Services
Wilsie Minor, Assistant General Counsel
FROM: Wendy Zenker, COO 
RE: OIG Report 99-10, Draft Audit of TvT Associates, Inc.


The subject draft report cites conditions and deficiencies pertaining to the performance of TvT Associates under contract CNCS 95-001. We have reviewed the draft report and do not have specific comments at this time. We will address the findings and recommendations in the final management decision.



MEMORANDUM

DATE: July 21, 1999

TO: Luise Jordan, OIG

FROM: Wendy Zenker, COO 

cc: Simon G. Woodard, Director, Office of Procurement
Wilsie Minor, Assistant General Counsel

RE: TvT Response to OIG Draft Audit Report

Thank you for sharing the information provided by TvT in response to your draft audit report. There are a number of allegations made by TvT that must be reviewed before any conclusions may be drawn. We will address the substantive issues of TvT's response in the Corporation's final management decision.

