

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

## FINDINGS AND RECOMMENDATIONS

**Matter: Contract Dispute of Dynamic Security Concepts, Inc.  
Under Contract No. DTEA03-00-D-00014**

**Docket: 05-ODRA-00346**

*Appearances:*

For Dynamic Security Concepts Inc.: Robert Conlan, Esq. and Patrick F. Linehan, Esq.  
Sidley Austin LLP,  
Washington, D.C.

For the William J. Hughes  
Technical Center:

Diane Cherinchak-Loughrin, Esq.  
William R. Sheehan, Esq.  
James J. Drew, Esq.  
Office of the Center Counsel

## I. Introduction

On April 14, 2005, Dynamic Security Concepts, Inc. (“DSCI”) filed a Contract Dispute with the Federal Aviation Administration (“FAA” or “Agency”) Office of Dispute Resolution for Acquisition (“ODRA”). The Contract Dispute, docketed as 05-ODRA-00346, arises under Contract DTFA03-00-D-00014 (the “NASiCMM®/Security Contract” or “Contract”), which was awarded and administered by the FAA William J. Hughes Technical Center (“Center”). The Contract was awarded on June 1, 2000 for a five year period. The contract term subsequently was extended until November 30, 2005.

The Contract was an Indefinite Delivery Indefinite Quantity (“IDIQ”) type and contained a \$400,000.00 guaranteed minimum amount of work. The Contract provided support

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services to the FAA's Airway Operational Support ("AOS") organization in the area of process improvement and security, which in the most general sense encompasses assessments, evaluation and documentation of agency data and operations.

The subject Contract Dispute ("Dispute" or "Claim") asserts that DSCI suffered serious harm due to the Center's breach of its obligation to deal with DSCI fairly and in good faith. DSCI alleges among other things, that task orders being properly performed by DSCI were terminated or not renewed so that work could be transferred to other favorite contractors. Contract Dispute at 1. DSCI summarized its allegations as follows:

[T]hese improper actions were engineered or precipitated by or through at least one FAA Tech Center employee, Michael Virga, who served as the Contracting Officer Technical Representative ("COTR") on the ... Contract for a period beginning May 1, 2003, and who harbors an extreme personal animus toward DSCI and its founder, Ms. Susan Hopkins, that was and remains well known among cognizant FAA officials. ... Mr. Virga was also permitted to disparage DSCI and the ... Contract vehicle so as improperly to taint and create a poisoned atmosphere with respect to both, thereby constructively debarring DSCI from receiving new or additional orders under this and other contracts, including subcontracts with third parties. ... Mr. Virga, either directly or indirectly and with the participation or knowledge of other FAA employees, cancelled, blocked, transferred, interfered with, failed to renew or otherwise improperly impeded the award of tasks to DSCI, under the Contract and otherwise.

DSCI Post-Hearing Submission, dated May 18, 2007 ("DSCI Post Hrg. Subm.") at 1-2. DSCI's claim asserts entitlement to damages in the form of lost revenue arising from the alleged breach, "conservatively estimated" to be \$14,252,608. Contract Dispute at 1-2, 6-11.

In response, the Center asserts that DSCI's Post-Hearing Submission "is full of unbelievably inaccurate and exaggerated depictions of documents and testimony from the depositions and the Hearing," which are contrary to the contemporaneously prepared contract documents. Center Post-Hearing Submission, dated June 4, 2007 ("Center Post Hrg. Subm.") at 1. According to the Center:

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Mike Virga served as an exemplar of the dedication required of a ... COTR. He assumed those duties when asked to replace a COTR that had grown “too close” to the contractor. According to the Contracting Officer that he served, he raised the quality of oversight and provided her with detailed statements of work with clearly defined deliverables. He identified problems that arose during the period for which he was responsible, and discovered those that had languished under his predecessors. When former DSCI personnel harassed him with anonymous threatening phone calls, he immediately sought legal advice. He presented all the allegations relayed to him by anonymous callers – now known to be two DSCI insiders – to the DOT [Department of Transportation] Inspector General [hereinafter, “the DOT-IG”] and cooperated in two DOT-IG investigations, one of which was spun up against him by the management of DSCI. In both such investigations, he was cleared of wrongdoing.

Center Post Hrg. Subm. at 3-4. The Center further asserts the “Agency and its employees acted in good faith and had rational, legitimate reasons for all their actions” and that DSCI’s contentions are unsubstantiated, speculative, and essentially based on unreliable hearsay evidence. *Id.* at 4.

For the reasons set forth below, the ODRA finds that DSCI has failed to satisfy its burden of proving bad faith in the administration of the Contract in this case. The record shows that: (1) DSCI’s Indefinite Delivery, Indefinite Quantity Contract guaranteed that DSCI would receive a minimum of \$400,000 of work over the life of the Contract; (2) DSCI in fact received more than \$14 Million of work, including \$2.9 Million of work during the time that the allegedly malicious FAA employee served as the Contracting Officer’s Technical Representative; (3) the Contract and its individual task orders expired by their own terms and were not terminated by the Center; (4) the Center has demonstrated rationales unrelated to bad faith for not renewing or extending the Contract; and (5) DSCI has failed to demonstrate a nexus between alleged malice of an FAA employee and Agency actions related to the Contract. The ODRA therefore recommends that the Administrator deny DSCI’s claim in its entirety.

## **II. Findings of Fact**

### **A. The Nature and Terms of the Contract**

1. The Center awarded the Contract to Dynamic Security Concepts, Inc. (“DSCI”) on June 1, 2000. DSCI Hearing Exhibit No. 2, Binder B (hereinafter “Hrg. Exh. B2”). DSCI was the sole bidder in the procurement. DSCI Hrg. Exhs. A88 and D24.
2. The Contract required advisory, facilitation, internal assessment, and training services to assist various integrated product teams (“IPTs”) in developing, field testing, and implementing process improvement relative to the National Airspace System (“NAS”) using the FAA’s integrated Capability Maturity Model (iCMM)®. DSCI Hrg. Exh. B2, Section C.2.
3. The Contract supported the Center’s Operational Support Directorate (“AOS-1”) which is responsible for the maintenance and operational support of the NAS.<sup>1</sup> DSCI Hrg. Exh. A1. The Program Management Division, AOS-20, was within AOS-1 and itself was composed of two branches: AOS-21, responsible for Information System Security, and AOS-22, responsible for Quality and Standards, including process improvement. DSCI Hrg. Exh. A3. AOS-1 also contained an organization known as AOS-300, which was responsible for hardware and software engineering in support of the “en route” aspects of the NAS. DSCI Opp. 2<sup>nd</sup> Mot. Dis. Exh. 5: DSCI Hrg. Exh. A3.
4. The FAA’s iCMM is an adaptation of a model of best practices for software development called the Capability Maturity Model (“CMM”) which is a collection of instructions an organization can follow with the objective of gaining better

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<sup>1</sup> AOS was headquartered in Washington, D.C. and maintained divisions located at the Technical Center in New Jersey. DSCI June 13, 2006 Opposition to Center 2<sup>nd</sup> Mot. Dis. (“DSCI Opp. 2<sup>nd</sup> Mot. Dis.”) Exhs. 1 and 2.

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control over its software development processes. DSCI Hrg. Exh. A14. CMM was initially developed by the military and issued by the Software Engineering Institute at Carnegie Mellon University in 1989, and since that time, the model has been revised several times. *Id.* The model is prescriptive in nature and identifies the following five levels of process maturity against which an organization may be evaluated: (1) Initial, ad hoc or chaotic processes; (2) Repeatable processes; (3) Defined or institutionalized processes confirmed as standard; (4) Managed processes that are measured; and (5) Optimized processes that are deliberately improved. *Id.*

5. The FAA's iCMM was developed to harmonize the use by FAA divisions of multiple capability maturity models. Center Second Motion to Dismiss, dated May 25, 2006 ("Center 2<sup>nd</sup> Mot. Dis.") Tab 6 §1.2; DSCI Hrg. Exh. A15. The FAA's iCMM, which was initially released in 1997, applies not only to software development, but is used to measure and improve process maturity more generally with respect to Agency operations. The goal of the development of a common FAA iCMM was to realize high quality solutions to Agency and user needs, achieve predictable costs and schedules, and increase productivity. DSCI Hrg. Exh. A15. The record also shows that the initial FAA iCMM was revised into a second version in September of 2001. Center 2<sup>nd</sup> Mot. Dis. Tab 8.
6. The objective of the Contract was to assist FAA managers obtain a Level 2 maturity under the FAA iCMM with component systems supporting the NAS while deploying new NAS systems at the nation's air traffic centers. DSCI Hrg. Exh. B2, Section C.1. *citing* PDD63 and ARA Goal #7.10, 1600.1d Personnel Security Program, 1600.56 Guidelines for FAA Participation in DOD.ISP.
7. The Contract describes the goal and context of this effort as follows:

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The FAA has formed a unique teaming arrangement with fellow FAA organizations to facilitate the rapid fielding of software and hardware equipment and processes.

Each Integrated Product Team (IPT) is currently responsible for the entire life cycle of the NAS systems such as DSR, HOST and DARC. Each IPT is also responsible for establishing and maintaining FAA-iCMM based process improvement methodologies, training in process improvement techniques and tools, maintaining a repository of re-usable work products, and assisting the related FAA organizations and personnel to streamline and integrate their processes with the goal of achieving significant improvements in quality, capacity, and productivity during the transition, deployment, and maintenance phase of legacy and newer systems.

DSCI Hrg. Exh. B2, Section C.1.

8. The Contract was awarded to DSCI as an IDIQ time and materials Contract with a guaranteed minimum of \$400,000 of work over the five year term of the Contract. DSCI Hrg. Exh. B2, p. 1, Section G.6 and Section H, Clause 3.2.4-20. As indicated by testimony of Ms. Barnard, DSCI Vice President of Operations/Contracts, and sister of Ms. Hopkins, DSCI President and CEO, DSCI understood that work would be tasked and funded via task orders, based on the Statement Of Work (“SOW”). March 15, 2007 Hearing Transcript (“Hrg. Tr.”) 103:24–104:14. DSCI further understood that the Contract was IDIQ in nature with a guaranteed minimum of \$400,000. According to Ms. Barnard, DSCI believed that “as long as funding ... is coming through delivery orders, everything is negotiated, and unless there was funding problems, the work would go on” for the entire Contract period of 60 months. *Id.* 104:14-106:10.
9. Section F.1 of the Contract provided that “[t]his contract shall become effective 1 June 2000 and shall continue in effect for 60 months dependent on funding received.” DSCI Hrg. Exh. B2, Section F.1.

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10. The period of performance under the Contract ran through May 31, 2005, and was extended by the Center for an additional six months – through November 30, 2005 – as a result of Contract Modification No. 5.<sup>2</sup> DSCI Hrg. Exh. B2. As explained below, the record shows that the Contract and all task orders issued under it ended by their own terms and not as a result of any termination issued by the FAA.
11. Contract Section H.5 provided for a minimum contract ordering obligation of \$400,000.00, with a contract maximum quantity of 310,200 hours, which could not be exceeded. DSCI Hrg. Exh. B2, Section H.5.
12. The Contract also specified a not-to-exceed amount of \$10,000.00 for travel and \$20,000.00 for materials for each year. DSCI Hrg. Exh. B2, Section B.
13. The labor categories available under the Contract included: Program Manager, Senior Systems Engineer, Senior Information Systems Specialist, Documentation Specialist, System Security Analyst, Engineering Aide, and Administrative Assistant. DSCI Hrg. Exh. B2, Section B.
14. Contract Section C.3 designated the positions of Program Manager, Senior Systems Engineer and Senior Information Systems Specialist as key personnel who were considered essential to the work being performed and whose removal, replacement or diversion from the work required consent from the Contracting Officer. DSCI Hrg. Exh. B2, Section C.3.

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<sup>2</sup> The Contract was modified twenty-two times. The modification numbers did not follow in sequence due to the FAA's national conversion to the PRISM procurement system, which required a change to the modification numbering system. As a result, Contract Modification Nos. 1 – 14 under the previous accounting system were followed by Modification No. 2 under the PRISM procurement system (Modification 1 was inadvertently issued. Center's September 26, 2006 Final Submission ("Center Fin. Sub.") at 2; Center Post Hrg. Subm. at 18, *note* 12.

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15. Contract Revision No. 5 added the Information Security Architect as a fourth key personnel position on July 19, 2001. DSCI Hrg. Exh. B2, Revision 5. The addition of this position was due to urgent technical security needs which had developed under the Contract. *Id.* As a result, the Center undertook a review “to revise the contract schedule labor hours, travel, and ODC’s [other direct costs], by tradeoff adjustments to underutilized labor categories and the redetermination of current travel and ODC requirements impacted by this additional new labor category and on-going security plans and program implementation efforts.” DSCI Hrg. Exh. B2, Revision 5.
16. Contract Revision No. 14, dated November 12, 2003, deleted a sentence in Section C.3 of the SOW that required all key personnel to be resident at the Center. DSCI Hrg. Exh. B2, Revision 14. In addition, the Modification increased the not-to-exceed amounts for other direct costs (“ODCs”) of travel and materials. *Id.*
17. Each labor category had an estimated number of labor hours that could be ordered by the Center. DSCI Hrg. Exh. B2, Section B. The total estimated annual quantity of labor hours, covering all labor categories, for each year, respectively, was 62,040 hours. *Id.* The Contract listed different rates, inclusive of overhead, for contractor employees working onsite at the Center and for those working offsite. *Id.*
18. The Contract required the maintenance of a secure facility where offsite security work could be performed.<sup>3</sup> DSCI Hrg. Exh. B2, Section H.4 and Tab E.

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<sup>3</sup> The costs of maintaining a secret facility were included in DSCI’s overhead, and included such costs as employing a facility security officer, maintaining secret clearances of personnel, providing necessary training and reporting, maintaining a special alarm system, segregating the computer networks. March 15, 2006 Hrg. Tr. 106:19-108:15.



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19. Section C.2.1 of the SOW provided that orders issued under the Contract would be classified under six primary work areas:

Work Area 1: Data Collection for Strategic Planning  
Work Area 2: Process Improvement & Implementation  
Work Area 3: Education, Team Building, and Change Management  
Work Area 4: Data Management  
Work Area 5: Special Studies Activities  
Work Area 6: Common Tasks: General Management and Administration

DSCI Hrg. Exh. B2, Section C.2.1.

20. Section C.2.1.1, Work Area 1, Data Collection for Strategic Planning, provides in part that the “Contractor shall develop, perform and maintain each IPT iCMM implementation planning and strategic information systems planning for designated NAS systems. These plans set the overall direction of the future that integrates each IPT’s processes, people and technology into concrete achievable goals.” DSCI Hrg. Exh. B2, Section C.2.1.1. This Section also states that strategic information system planning includes the provision of an information management strategy based on each IPT’s strategic plan and a set of architectures to:

1. Document the current environment and guide future development of open data sharing systems.
2. Document a technical strategy for optimum use of new information technologies (*e.g.* COTS/CAS).
3. Implement continuous process improvement principles to ensure quality throughout the NAS. Architectures include an information architecture to capture high level information requirements supportive of the strategic plan, a system architecture detailing major data bases and applications needed to support processes, and a technical infrastructure required for the data bases and applications.

*Id.*

21. Section C.2.1.2, Work Area 2, Process Improvement & Implementation, provides in part that the “Contractor shall apply the techniques and methodologies currently used by the DSR ISMT iCMM to support the development, documentation, training, field testing, and implementation of processes to address applicable

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Process Areas (PAs) not covered by current IPT processes.”<sup>4</sup> DSCI Hrg. Exh. B2, Section C.2.1.2.

22. Section C.2.1.3, Work Area 3, Education, Team Building, and Change Management provides, in part, the “Contractor shall communicate to FAA managers, leads, and staff the approaches to strategic planning, the development of processes, the development of information technology solutions and/or organizational changes and related activities .... Developing and implementing strategies for management of change and aspects of the organization’s change expectations are also covered.” DSCI Hrg. Exh. B2, Section C.2.1.3.
23. Section C.2.1.4., Work Area 4, Data Management, describes this effort as being linked to all the other areas and shall include “all aspects of data management; planning, development of policies, processes, procedures, guidelines, metrics and standards, and awareness training.” DSCI Hrg. Exh. B2, Section C.2.1.4.
24. Clause C.2.1.5, Work Area 5, Special Studies Activities/ Security, provides in part that “[i]t is anticipated that during the course of this contract, a need will arise for special studies and analysis efforts to evaluate specific areas of concern of each IPT” and efforts under this section were to address sub-areas within Work Area 1, defined as follows:
  1. Identification of special study topics and requirements
  2. Identification of expertise required to perform the study
  3. Providing data management support during execution and reporting of the special studies
  4. Providing complete documented reports which address identified topics and requirements

DSCI Hrg. Exh. B2, Section C.2.1.5.

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<sup>4</sup> The Contract expressly specifies implementation of the same “techniques and methodologies used by the DSR ISMT iCMM,” which incidentally was supported by DSCI under a separate contract. *See* Finding of Fact (“FF”) 46, *infra*.

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25. In pertinent part, Section C.2.1.6, Work Area 6, Common Tasks, General Management/Administration, states:

The Contractor shall develop and maintain general working plans and documentation. Documentation shall include, but not be limited to:

- (1) Delivery order proposals (Contractor's proposed solution to address individual delivery orders)
- (2) Monthly status reports, cost and technical (in accordance with Clause F)
- (3) Minutes of meetings
- (4) Special management and administration reports, as required
- (5) Project reports as required in individual delivery orders.

DSCI Hrg. Exh. B2, Section C.2.1.6.

26. The Contract provides that any supplies or services to be furnished "shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from date of contract through 60 months thereafter." DSCI Hrg. Exh. B2, Section H, Clause 3.2.4-16.

27. The Contract further contains Section 3.2.4-20, "Indefinite Quantity (July 1996)," which states in pertinent part:

- (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
- (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the "Ordering" clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the maximum. The Government shall order at least the quantity of supplies or services designated in the Schedule as the minimum.

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DSCI Hrg. Exh. B2, Section H, Clause 3.2.4-20.

28. Contract Section 3.8.2-20, which pertains to Qualifications of Employees, provides that “contractors with limited access or low risk access to FAA information, facilities, or resources shall submit fingerprint cards to the Contracting Officer” and Section 3.13-2, Security Requirements, sets forth terms that apply to the extent that the Contract involves access to information classified as “Confidential,” “Secret,” or “Top Secret.” DSCI Hrg. Exh. B2, Section H, Clauses 3.8.2-20 and 3.13-2.
29. Contract Section H.4 further requires key contractor personnel to have a secret clearance in addition to having a secret facility clearance. DSCI Hrg. Exh. B2, Section H.4. This requirement was amended to require contractor personnel to be cleared to Secret at the time of award. DSCI Hrg. Exh. B2, Amendment Modification 1.
30. Contract Section G.4 provides that “[n]o oral statement of any person, and no written statement of anyone other than the Contracting Officer, or his/her authorized representative shall modify or otherwise affect the terms or meaning of the schedule or specifications. All requests for interpretation or modification shall be made in writing to the Contracting Officer.” DSCI Hrg. Exh. B2.
31. Also, upon award, other sections pertaining to security were incorporated into the Contract, one of which, Clause 3.13-6, Contractor Personnel Suitability Requirements, in pertinent part provides definitions for *classified*, as opposed to *sensitive* information. DSCI Hrg. Exh. B2, Revision 1. It states that *classified* information “means official information or material that requires protection in the interest of national security and is classified for such purpose by appropriate classification authority in accordance with the provisions of Executive Order 12958,

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Classified National Security Information, in accordance with the provisions of Executive Order 12968, Access to Classified Information.” *Id.* The section defines *sensitive* information as “any information which if subject to unauthorized access, modification, loss, or misuse could adversely affect the national interest, the conduct of Federal programs, or the privacy to which individuals are entitled under Section 552a of Title 5, United States Code (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy. Sensitive data also includes proprietary data.” *Id.*<sup>5</sup>

32. The total amount of funds obligated under the Contract was \$14,372,694.14 and the total number of hours ordered was 184,964.98 hours. Center 2<sup>nd</sup> Mot. Dis., Tab 4.
33. Ten task orders were issued under the Contract and each task order specified an estimated number of hours and a monetary ceiling. DSCI Hrg. Exh. B2.
34. The five task orders at issue in the instant Contract Dispute are Task Order Nos. FLJ001, FLJ005, FLJ006, FLJ007 and FLJ008. *Id.*
35. Task Order No. FLJ001 (“Task Order No. 1”), which was issued simultaneously with the Contract award on June 1, 2000, satisfied the agency’s minimum ordering obligation of \$400,000.00 under the Contract. DSCI Hrg. Exh. B2, Tab A. This Task Order was in support of Display System Replacement (DSR) work, and included “administrative support.” *Id.*

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<sup>5</sup> This revision also incorporated Clause 1.13-8, which permits foreign nationals to be contractor employees, provided that they are lawfully admitted for permanent residence or present other evidence that employment will not affect their immigration status. *Id.*

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36. Task Order No. FLJ005 (“Task Order No. 5”) was issued on September 18, 2000 for AOS-20 Information System Security (ISS) Risk Mitigation support, including security certification and authorization process (SCAP) support. DSCI Hrg. Exh. B2, Tab E. A SCAP is an assessment of the security risk/vulnerability of a system in the NAS along with a plan of action to address any identified risks/vulnerabilities. *Id.*
37. Task Order No. FLJ006 (“Task Order No. 6”) was issued on September 18, 2000 for NAS Operational Laboratory Suitability Support (“NOLSS”) and later added Test and Evaluation (“T&E”) Gold Standards Support. DSCI Hrg. Exh. A19.
38. Task Order No. FLJ007 (“Task Order No. 7”) was issued on September 24, 2001 for the AOS Information System Security (ISS) Support Special Test Facility. DSCI Hrg. Exh. B2, Tab G.
39. Task Order No. FLJ008 (“Task Order No. 8”) was issued on April 15, 2002 for Airport Security Technology Integration (ASTI) Project Management Support in support of the Aviation Security Division (AAR-500) that had been part of the Agency. DSCI Hrg. Exh. B2, Tab H. Following the events of September 11, 2001, this division was transferred to the Transportation Security Administration (TSA) and became the Transportation Security Laboratory. DSCI Hrg. Exh. B10.
40. Task Order No. 6 ended on April 17, 2001 with a labor ceiling of 5479.9 hours and a cost ceiling of \$334,830.90. DSCI Hrg. Exh. B2, Tab F.
41. Task Order No. 7 ended on February 28, 2003 with a labor ceiling of 746.92 hours and a cost ceiling of \$100,000.00. Center Hrg. Exh. 41.
42. Task Order No. 1 ended on May 31, 2005 with a labor ceiling of 56,908.5 hours and a cost ceiling of \$3,359,715.37. DSCI Hrg. Exh. B2, Tab A.

43. Task Order No. 8 ended and was closed out on June 2, 2005 with a total of 5,609 labor hours and a total cost of \$516,608.33. DSCI Hrg. Exh. C8; Center Hrg. Exh. 171.
44. Task Order No. 5 ended on November 30, 2005 with a labor ceiling of 99,970.50 hours and a cost ceiling of \$8,930,776.93. Center Hrg. Exh. 41.
45. As indicated in the above Finding of Facts (“FF”) Nos. 35-44, with the exception of Task Order No. 8, the DSCI Contract has yet to be “closed out.” DSCI Hrg. Exh. C8; Center Hrg. Exh. 171.

**B. The FAA and DSCI Personnel Involved**

Susan Hopkins

46. Ms. Hopkins founded DSCI in 1995. At all times relevant to this Contract Dispute, Ms. Hopkins served as DSCI’s President and Chief Executive Officer. DSCI Hrg. Exh. A13, ¶¶ 1, 9. Ms. Hopkins has expertise in aviation related software engineering, including process improvement and Information Security. DSCI Hrg. Exh. B21. Since October 1996, DSCI worked under various contracts with the FAA to implement CMM on various FAA processes and systems. DSCI Hrg. Exh. A13, pp. 1-3; March 13, 2007 Hrg. Tr. 16:7-16:16; 18:7-18:17. Under a DSCI subcontract with a company called E & I Systems, Ms. Hopkins participated in the development of the FAA’s iCMM, Version 1, released in 1997, and was recognized by the FAA for these efforts by being listed as one of the “buddies” in the report – someone “who provided consultation and early review of work products.” DSCI Hrg. Exh. A16, at 1-9 and 1-10; DSCI Hrg. Exh. B21. Specifically, such “buddies” were recognized for providing special domain knowledge and for participating in peer reviews. *See* DSCI Hrg. Exh. A16, “Acknowledgments.” Additionally, DSCI worked under a contract to implement

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the FAA iCMM within the FAA's Display System Replacement project which involved the display system that air traffic controllers currently use to control air traffic. March 13, 2007 Hrg Tr. 35:3-15. This effort enabled DSR to achieve Level 2 certification in three Process Areas, making DSR the first FAA system to achieve a Level 2 rating on any CMM model. DSCI Hrg. Exh. A13, at 3.<sup>6</sup>

47. At the time of award, Ms. Hopkins was identified as the Program Manager. DSCI Hrg. Exh. B2, Section H, Clause 3.8.2-17. Ms. Hopkins was replaced as Program Manager by another individual on October 24, 2000 pursuant to Modification No. 3. AR, Tab 2.

### Lori Barnard

48. Ms. Barnard is Ms. Hopkins' sister and has served as DSCI's Vice President of Operations since January 2001. April 26, 2006 Deposition of Lori Barnard ("Barnard Depo.") 7:4-5, 8:3. Ms. Barnard's primary responsibilities included managing administrative issues concerning DSCI's contracts. Barnard Depo. 8:3-7.

### Anna M. Marinaro

49. Ms. Marinaro was the Administrative Contracting Officer assigned to the Contract effectively from the date of its award to DSCI. March 8, 2006 Deposition of Anna Marinaro ("Marinaro Depo.") 7:16-18. As Contracting Officer, Ms. Marinaro was responsible for appointing Contracting Officer's Technical Representatives ("COTRs") to serve as her "eyes and ears" on the Contract. Marinaro Depo. 105-106, 212:9-11. The first COTR she appointed was Donna DiPasquale, who served beginning on June 12, 2000 until her death in late 2001. She was followed by Ms. Schuman, appointed on December 14, 2001, Michael Virga, appointed in May 2003, and subsequently, Cheryl Matthews who was

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<sup>6</sup> The record also shows that Ms. Hopkins has strong ties to the Center. For example, she worked to develop the day care center as a volunteer. March 13, 2007 Hrg. Tr. 7:18-19.



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appointed as the alternate COTR for Mr. Virga in August 2003. DSCI Hrg. Exh. B84.

50. By delegation of authority, the Contracting Officer granted to each of the above COTRs various authorities and responsibilities under the Contract. These included, *inter alia*, the following:

- Perform surveillance of the contract work and conduct inspections that are necessary to assure compliance with the contract terms and conditions.
- Assist the contractor in interpreting the contract specifications or technical requirements provided that any interpretation or clarification that the COR provides is within the limitations of the delegation, *e.g.*, not outside the scope of or a change to the Contract.
- Obtain and maintain a listing of employees who will be working at the site.
- Review the Contractor's performance of the technical requirements of the contract in accordance with the contract terms, funding, conditions and specifications. Notify the Contracting Officer in writing, of any indication that the terms of the contract are not being met.
- Report any observed fraud, waste, or inefficiencies to the Contracting Officer.
- Review and evaluate the technical aspects of contractor proposals and furnish evaluation comments and recommendations to the Contracting Officer.
- Recommend needed change orders to the Contracting Officer when in the best interest of the Government.
- Alert the Contracting Officer as to any potential or existing problems.
- Maintain an arms-length relationship with the contractor.
- Conduct business with industry in a manner that is above reproach.

DSCI Hrg. Exh. B19 and B84; Center Hrg. Exh. 88.

### Diane Schuman

51. Ms. Schuman had been an FAA employee since approximately 1980. She was the second COTR on the Contract and served from December 14 through April of

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2003. She was appointed after the passing of Ms. DiPasquale, who had been gravely ill and telecommuted five days a week during the end of her service to the Federal government. February 23, 2006 Deposition of Diane Schuman (“Schuman I Depo.”) 8:21–15, 9:1–4. Ms. Schuman had worked with Ms. Hopkins in Air Traffic Control before Ms. Hopkins left CSC in 1995. DSCI Hrg. Exh. 13 ¶6; Schuman I Depo. 16:25–17:6. Ms. Schuman also was involved in the Contract in its earliest stages, helping to draft the Contract language with respect to security issues, and she served on the Technical Evaluation Panel. Schuman I Depo 15:5–17:6. Ms. Schuman’s husband, Ed Schuman, retired from the Center as a Division Manager in AOS-300 to work for Technology and Management Associates, Inc. (“TMA”), a company that subcontracted work to DSCI. DSCI Hrg. Exh. D25. Ms. Schuman worked in the AOS-300 organization and at various times during DSCI’s contract performance reported to Mr. Tran, Mr. Steve Carver and Mr. Bud Hanlin, who served as managers. April 3, 2006 Deposition of Steve Carver (“Carver Depo.”) 17:17–19:1; Schuman I Depo 8:2–9:4; 22:15–19, 17:7–22; 78:4–84:1; Center Hrg. Exhs. 84 and 174. Ms. Schuman did not have much knowledge about process improvement, but was involved in drafting the “security portion” of the Contract’s SOW. Schuman I Depo 15:1–16:25.

52. Ms. Schuman was removed as COTR from the NASiCMM Contract by her manager, Mr. Hanlin, who reports that he questioned Ms. Schuman’s objectivity and effectiveness in administering the Contract due to her relationship with Ms. Hopkins. Center Hrg. Exh. 173. (September 15, 2006 Declaration of Jean Druce, including Attachment A, four pages of Mr. Tran’s handwritten notes dated January 14, 2003 and May 22, 2003); Center Hrg. Exh. 174 (September 15, 2006 Declaration of Bud Hanlin); Hrg. Tr. 228:16–24; 219:11–25 and 220:14–19.

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Michael Virga

53. Michael Virga succeeded Ms. Schuman as COTR and served on the subject Contract from May 1, 2003 through June 2, 2004. Marinaro Depo. 103:12-104:15; March 17, 2006 Deposition of Michael Virga (“Virga I Depo.”) 324:2-325:11; 323:19-325:11; Center Hrg. Exh. 11 (Virga COTR Appointment Letters). Mr. Virga has been an FAA employee since April 1998. Virga I Depo. 53:17-54:2. From that time through late 2000, Mr. Virga worked in the FAA’s AOS-300 organization, and more specifically, worked in the AOS-20 organization commencing in November 2000. Virga I Depo. 139:3-7, 152:15-24. From about November 2001 through November 2003, Mr. Virga reported to Mr. Tran who then was serving as AOS-20 Manager. Virga I Depo. 129:5-134:11; 138:21-139:7; 148:4-149:25; 193:1-10; 195:4-9; Center Hrg. Exh. 10.
54. Mr. Virga has expertise in process improvement and played a significant role in the later development of iCMM, namely as an author of Version 2 of the iCMM, dated September 2001. Center 2<sup>nd</sup> Mot. Dis. Exh. 8. Mr. Virga had been involved in CMM efforts with the FAA since 1996. Virga I Depo. 77:3-85:19, 87:7-92:2, 96:15-101:18; DSCI Hrg. Exh. A12. He became an FAA employee in April 1998 when he was hired by AOS-300 and assigned to process improvement efforts. March 13, 2007 Hrg. Tr. 170-172; Virga I Depo. 129:2-134:11, 138:20-141:10.
55. While Mr. Virga served as COTR, Cheryl Matthews was the alternate COTR for part of the time. Center Hrg. Exhs. 85, 88 and 41.
56. Mr. Virga continued to serve as COTR on the Contract until June 2, 2004, when he was reassigned on advice of Center Counsel due [DELETED] in part by Mr. Virga’s receipt of anonymous telephone calls warning him about DSCI’s [DELETED] practices. Virga I Depo. 332:20-334:10, 339:5-340:6; March 31, 2006

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Deposition of Richard Thoma (“Thoma Depo.”) 71:22-75:8; March 14, 2004 Hrg. Tr. 266:1-267:15. The calls, which Mr. Virga perceived to be of a threatening nature, had been made by two former employees of DSCI. March 21, 2006 Deposition of Michael Virga (“Virga II Depo.”) 510:14–514:25; Thoma Depo. 71:22-75:8, 73:16-75:8; Center Hrg. Exh. 177.

### Richard Thoma

57. Mr. Thoma has been employed by the FAA since about 1975 and currently serves as the Director of the Safety and Operations Support Office within the Technical Operations service unit of the FAA’s ATO. Prior to the formation of the ATO, Mr. Thoma served as Director of the AOS organization (AOS-1) from about May 3, 2003 through the transition to the ATO. Center Final Submission, dated September 26, 2006 (“Center Fin. Sub.”), Tab 7; March 31, 2006 Deposition of Richard Thoma (“Thoma Depo.”) 8:8-21:14; March 14, 2007 Hrg. Tr. 258:13-258:17.
58. Mr. Thoma met with Ms. Hopkins in August of 2003 regarding her concerns with the administration of DSCI’s Contract, and the conduct of Mr. Virga and Mr. Tran. Thoma Depo 44:10-45:5, 116:17-117:4.

### Vincent Tran

59. From approximately October of 2002 until his departure in November of 2003, Mr. Tran served as the Manager of the FAA’s AOS-20 organization at the Center<sup>7</sup> and supervised Mr. Virga. Virga I Depo: 177:8-15. Mr. Tran was perceived as having difficulty working with his employees, and was reassigned in October 2003 to the position of Division Manager in AOS-300 by Mr. Thoma. March 14, 2007 Hrg. Tr. 261:1-25; 262:13-20. Mr. Tran subsequently resigned from the FAA.

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<sup>7</sup> Mr. Tran replaced Ed Schuman after Mr. Schuman retired, and more or less supervised Mr. Carver and Ms. Schuman. Mr. Tran later replaced Ms. Schuman with Mr. Emerick. April 3, 2006 Deposition of Steve Carver (“Carver Depo.”) 52:22-53:9.

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Thoma Depo. 43:1–50:24; Virga I Depo. 176:8–177:15; 181:22–182:21; 184:18–185:2.

Bernard Hanlin

60. Mr. Hanlin has been an FAA employee since 1971. In 2002, he became division manager of ATO-E, and was responsible for the automation systems for all of En Route and Oceanic. DSCI Hrg. Exh. B72. His direct supervisor was Gregg Dvorak, followed by Mr. Thoma in 2003. March 14, 2007 Hrg. Tr. 202:2-203:11. He was Ms. Schuman's supervisor when she was SCAP Lead. *See generally* DSCI Hrg. Exh. B72. Mr. Hanlin replaced Ms. Schuman with Mr. Virga because Mr. Hanlin believed that Ms. Schuman had developed an inappropriately close relationship with DSCI's President and CEO, Ms. Hopkins. *See* FFs 52, 168, 197-198.

Dennis Emerick

61. Mr. Emerick is an FAA employee who serves as an information systems security officer at the Center. As of 2002, Mr. Emerick was responsible for security policy development and emergency response planning for the AOS organization. In late 2003, he succeeded Ms. Schuman to become SCAP lead for AOS-20 and was responsible for overseeing all SCAP work. March 15, 2007 Hrg. Tr. 4:12-22; 6:5-7:15; DSCI Hrg. Exh. B29.

Steve Carver

62. Mr. Carver has been an FAA employee since about 1978 and served as Information Security Systems Manager for the NAS at the Center. He served as an Information Security Officer at the Center starting in 2000, and in 2001 became Branch Manager of AOS-21, the Security branch for the entire AOS organization and a sub-branch of AOS-20 under Mr. Tran. Carver Depo. 12:12-13:1; 13:10-20; 17:13-18:2. Although Mr. Carver was a technical manager under Mr. Tran, Ms. Hopkins explained that "[i]t was a peculiar scenario because Carver was the

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technical manager ... Vincent was the division manager. Vincent thought that Carver reported to him, but Carver really took technical direction and reported to ... Vincent's boss." March 13, 2006 Hrg. Tr. 88:22-89:1-5.

### Laurel Wittman

63. Ms. Wittman has been an FAA employee since 1991. She has held the position of manager for the Acquisition Services Group, ACX-52 at the Center since July 2003. Ms. Wittman supervises Ms. Marinaro, the Contracting Officer. Hrg. Exh. B2-10, July 6, 2005 Deposition of Laurel Wittman ("Wittman Depo.") at 1. Prior to July 2003, she was a contracting officer within that group. March 15, 2007 Hrg. Tr. 64:3-11; DSCI Hrg. Exh. B10.

### Jean Druce

64. Ms. Druce has been an FAA employee since 1984. Since 2002, she has held the position of program analyst and has been responsible for budget formulation, budget execution and tracking of expenditures. March 15, 2007 Hrg. Tr. 35:10-22; DSCI Hrg. Exh. B73. Ms. Druce worked with Mr. Virga on the issue of funding involving Task Order No. 8. *See* FF 162, *infra*.

### Lisa Bercher

65. Ms. Bercher has full-time worked for the FAA since January 1995. March 21, 2006 Deposition of Lisa Bercher ("Bercher I Depo.") 5:16-22. Prior to that time, Ms. Bercher had worked with Ms. Hopkins as a co-op student working at the Center in 1992 and 1993. Bercher I Depo. 14:12-25; 15:1-10. During the periods relevant to this Contract Dispute, Ms. Bercher held various positions within the FAA's AOS Division, including "T & E Gold Lead" under Task Order No. 6, which pertained to the NAS Operational Laboratory Suitability Support ("NOLSS"). Bercher I Depo. 60:4-61:24. She was replaced by Mr. Virga as T&E Gold Lead after taking a month-long trip with Ms. Hopkins and another DSCI employee to Hawaii and Guam—a trip which had been approved by Ed Schuman, who at the time worked in

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the AOS division. March 21, 2006 Deposition of Lisa Bercher (“Bercher II Depo.”) 75-81. Ms. Bercher, like Ms. Schuman, socialized with Ms. Hopkins, such as going to barbecues and out to dinner. Bercher I Depo. 48:11-25, 49:1-18.

Rebecca Deloney

66. Ms. Deloney has been an FAA employee (with breaks in employment) since about 1980. April 4, 2006 Deposition of Rebecca Deloney (“Deloney Depo.”) 10:19-25. From approximately 1994 until January 1999, Ms. Deloney worked in the AOS organization and reported to the Director of AOS. Deloney Depo. 57:5-62:7. In January 1999, Ms. Deloney was transferred to the FAA’s office of the Chief Information Officer, and then returned to the AOS organization in November 2000, reporting to the AOS Director. During her assignments in the AOS organization Ms. Deloney served as Mr. Virga’s second level supervisor, among other roles, including Director of AOS-3 and “acting” Director of AOS-2. Deloney Depo. 207:12-16; Deloney Depo. 10:19-147:6; Center Fin. Sub. Exh. 9.

[DELETED]

67. [DELETED]

68. [DELETED]

Deborah Williams

69. Ms. Williams has been an FAA employee since 1971. During the period relevant to the Contract Dispute, Ms. Williams worked as a Model Work Environment Officer at the staff level within AOS. March 10, 2006 Deposition of Debbie Williams (“Williams Depo.”) 57:25-59:15. Ms. Williams was assigned to investigate allegations by Ms. Schuman as well as several FAA and DSCI employees that Mr. Virga had conducted himself inappropriately in the workplace under the FAA’s Model Work Environment Policy. Williams Depo. 36:16-18; 29:1-3; 59:4-15. As a result of this effort, Ms. Williams produced a report

containing numerous quotes from her interviews with Center personnel (some with and some without attribution), *e.g.* “[b]ad energy was going on around the room” and “AOS-20 is in too much turmoil, in-fighting and backstabbing.” The report records for the most part only subjective views of AOS employees about their work environment. It contains no substantive information about the Contract. It concludes with a recommendation that “[t]he manager must establish and maintain a model work environment ... [and] there is a critical need for the employees to be given the AOS Model Work Environment Workshop.” *See* DOT-IG Report of Investigation No. 042R0141001 dated December 8, 2005 (“DOT-IG ROI I), Attachment No. 1, May-June 2003 “Inquiry Into Inappropriate Behavior within the AOS-20 Division” authored by Ms. Debbie Williams.

**C. Administration of the Contract**

1. The Individual Task Orders At Issue

70. The unique facts and circumstances surrounding administration of each pertinent individual task order are set forth below.

*a. Task Order No. 1*

71. Task Order No. 1 supported the Display System Replacement (DSR) work, and included “administrative support.” *See* FF No. 35, *supra*.

72. By email dated April 9, 2003, while serving as COTR, Ms. Schuman provided to the Contracting Officer additional labor categories to add to the NASiCMM Contract to provide a broader choice of qualifications and billing rates. DSCI Hrg. Exh. B96.



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73. By email, dated April 30, 2003, AOS-300 commenced preparation of a purchase request for “secretarial support” through December of 2003 under the NASiCMM Contract. DSCI Hrg. Exh. B41.
74. The Contracting Officer received a purchase request for a “secretary” from Mr. May, a manager in AOS, on or about May 5, 2003. Center Hrg. Exhs. 13 and 16; March 14, 2007 Hrg. Tr. 100:3-16; Center 2<sup>nd</sup> Mot. Dis. Tab 27; Center Fin. Subm. Tab 25.
75. The Contracting Officer responded to Ms. Schuman’s April 9, 2003 email on May 5, 2003 stating “I guess this ties in with the PR that I received today which provides funding for Secretaries on this contract, which are not labor categories on this contract.” DSCI Hrg. Exh. B96.
76. The Contracting Officer responded to Mr. May’s request for a “secretary” by indicating that there was no labor category of “secretary” under the Contract but there was an “administrative assistant” labor category. She also requested justification for any labor positions requested to ensure that the requirement was not for personal services. DSCI Hrg. Exhs. A89 and B42.
77. The manager, Mr. May, indicated that the position of Administrative Assistant had already been in place for over a year. He explained that he did not have any information as to the nature of the Contract but was asked to provide some funding since the position supported his branch. DSCI Hrg. Exh. A89 and B42.
78. By email dated May 8, 2003, the COTR, Mr. Virga, approved the request indicating that:

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I am new as the COTR on this contract. I did some investigation and this is not a personal services type contract providing secretarial services. There is a category of Administrative Assistance and this is the services that is suppose [sic] to be provided. If this is different then we may have a legal contract issue.

I just approved the SOW/PR based upon the Administrative Assistance for \$49K and this covers all ADMIN support through 12/31/03.

DSCI Hrg. Exh. B41.

79. Subsequently, the COTR, Mr. Virga informed the Contracting Officer that “For work area #6, it appears to be ok, but it still warrants further discussion to ensure that this is not personal services work. As currently written, it appears ok. I do plan on meeting with the AOS-300 manager to discuss staffing levels and labor mix and goals to ensure he agrees with the effort.” Center Hrg. Exh. 17; DSCI Hrg. Exh. B43.
80. Task Order No. 1 subsequently was revised by Revision No. 18 in order to relate the work back to the iCMM Contract under Work Area 6. The revision provided that “DSCI will provide administrative support to FAA AOS Branches 330, 340, 350, 360 and 370 for project activities.” DSCI Hrg. Exh. B2, Tab A.
81. On May 21, 2003, the manager, Mr. May, informed the Contracting Officer that he had reviewed the SOW and had a significant objection to it, stating “most of the Admin Assistant tasking that supports AOS-370 is outside the scope of iCMM.” Center Hrg. Exh. 19; DSCI Hrg. Exh. B44.
82. DSCI’s May Monthly Status Report for Task Order No. 1 indicated that DSCI provided administrative support to the AOS Branches. This administrative support included tasks such as recording time and attendance for Agency employees,

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preparing travel orders for Agency employees, ordering of office supplies and scheduling conference rooms. Specifically, the Status Report describes the work as:

[a]dministratively support the AOS-330, 340, 30, 360 and 370 branches including the planning, organizing and coordination of a wide range of office support functions including clerical duties, office activities, administrative responsibilities, and automated application functions for the Branch Managers, Branch employees, and AOS Division as required.

Center Hrg. Exh. 12.

83. By email dated June 18, 2003, the Contracting Officer informed Mr. Virga that “clarification of the duties of Administrative Assistants under this contract” was necessary. Center Hrg. Exh. 23. She advised him that all services provided by all labor categories, including that of Administrative Assistants must be efforts directly associated with the scope of the Contract. DSCI Hrg. Exh. B8. She further instructed Mr. Virga to:

provide a copy of the contract statement of work to all [his] ... technical monitors, and ensure that all labor categories and all labor hours are ordered strictly for the support of this contract only. To deviate from the statement of work would result in a misappropriation of funds.

DSCI Hrg. Exh. B8.

84. By email dated June 26, 2003, the Contracting Officer informed Mr. Virga that she did not have sufficient information to make a decision yet on the issue of whether the Administrative Assistant positions were within the scope of the Contract and requested a “technical” recommendation from the COTR in writing. Mr. Virga responded by email of the same date, opining “as the COTR that the Administrative Assistance is outside the scope of this contract.” He further indicated that most of the Administrative Assistants “do not support the ‘process improvement’ portion of the high level scope rather than general administrative

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assistance work for a branch.” DSCI Hrg. Exh. A95; Center Hrg. Exh. 25, March 13, 2007 Hrg. Tr. 313:1-314:25.

85. Mr. Virga subsequently reviewed the revised SOW with the DSR team managers who were receiving support under Task Order No. 1 and they agreed to the SOW revisions which included the preparation of an AOS-300 Administrative Desk Procedures manual as a deliverable. Consistent with the FAA iCMM, the desk procedures would document the steps to be followed when performing administrative tasks in AOS-300, such as preparing travel orders. This revised SOW was included in Revisions 21 and 22 to Task Order 1. DSCI Hrg. Exh. B2, Tab A; Center Fin. Subm. Tab 1; July 14, 2005 Center Motion to Dismiss (1<sup>st</sup> Mot. Dis.) Tab 33.
86. By letter dated July 7, 2003, DSCI notified the Contracting Officer that it was “protesting” the period of performance expiration date of July 31, 2003 set forth in Revision 20, and requested that the Contracting Officer revisit her determination that the Administrative Assistant support provided to the AOS 300 Branch Offices is outside of the scope of the Contract. In this regard, DSCI requested that the Contracting Officer indicate in writing the rationale for “terminating the period of performance” for these positions. DSCI Hrg. Exh. B8.
87. By letter dated July 11, 2003, the Contracting Officer explained to DSCI the basis for her decision:

Following Government discussion of the Administrative Assistants duties, it was determined by the undersigned Contracting Officer that the duties being performed under these positions were not totally consistent with the scope of work in the base contract ....

Since the current duties of the Administrative Assistants have migrated to general secretarial functions fulfilling other FAA organizational goals not specifically related to the scope or intent

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of subject base contract, it was my intent that Revision No. 20 correct this problem. .... Revision No. 20 also changed the language of the delivery order so that the Administrative Assistants working this effort could work contract specific items through July 31, 2003.

DSCI Hrg. Exh. B8.

88. The period of performance for the administrative assistant work under Work Area 6 was scheduled to end August 15, 2003 with the delivery of the desk procedures. DSCI Hrg. Exh. B2, Tab A, Revision No. 25.

89. During the November 2003 timeframe, the Agency was operating under a Continuing Resolution.<sup>8</sup> This situation created delay in the funding of a purchase request for DSR support through December 31, 2003. The record shows that the funding delays continued through at least February 2004. DSCI Hrg. Exh. B93-94.

90. After the expiration of Task Order No. 1, the support work being performed by the “administrative assistants” under the NASiCMM Contract was continued by DSCI working as a subcontractor for TMA, as such work was within the scope of work for the TMA contract under the labor category of “clerk-typist.” *See DOT-IG ROI* at Tab 15; Barnard Depo 29:13-16.

*b. Task Order No.5*

91. Task Order No. 5 supported the AOS-20 Information System Security (ISS) Risk Mitigation efforts, including security certification and authorization process (SCAP) support. *See FF No. 36, supra.* A SCAP is an assessment of the security

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<sup>8</sup>A Continuing Resolution is a type of temporary appropriation legislation enacted by Congress, when the new fiscal year is about to begin or has begun, to provide budget authority for Federal agencies and programs to continue in operation until the regular appropriations acts are enacted. *See www.Senate.gov.*

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risk/vulnerability of a system in the NAS along with a plan of action to address any identified risks/vulnerabilities. DSCI Hrg. Exh. B2, Tab E.

92. DSCI assisted AOS-21 with determining AOS-21's security requirements and resulting budgetary requirements in the Information System Security ("ISS") area for FY'02 and FY'03. Center Hrg. Exh. 183A-H; Center 2<sup>nd</sup> Mot. Dis., Tab 11.
93. In 2002, DSCI had access to Agency budgetary requests pertaining to Agency FY'04 funding. Center Hrg. Exh. 183E. For example, in April of 2002, a document entitled "FY 2004 Program Requirements Discretionary Increase Justification" was circulated by email among FAA personnel, including Ms. Deloney, Mr. Tran and Mr. Carver. This document contained a summary which listed possible candidates for increased resource requests in support of AOS operations. The first request on the list involved the task of completing 30 SCAPs and identifies the amount of \$3,000,000 for contract support and materials. This information was forwarded to Ms. Hopkins of DSCI from AOS employee Mr. Carver by email, dated April 19, 2002. DSCI Hrg. Exh. C15.
94. The SCAP office comes in contact with "sensitive security information" but not "classified" information that would require a secret clearance. March 15, 2007 Hrg. Tr. 24:18-20.
95. Mr. Virga was identified to succeed Ms. Schuman as COTR several months prior to the date of his actual appointment. When Ms. Hopkins was informed by Mr. Tran in January of 2003 of the possible appointment of Mr. Virga, she objected based on her belief that he was "not a nice person," had "a history of not getting along with people," and had animosity towards DSCI. She immediately went to Mr. Carver to voice her objection against Mr. Virga, telling him "it was not a good idea." According to Ms. Hopkins, Mr. Carver and Mr. Shuman also communicated to Mr. Tran, their objections to the appointment of Mr. Virga as COTR on the

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Contract. March 13, 2007 Hrg. Tr. 93:23-94:21 The record shows that Ms. Schuman, by email dated February 27, 2003 to the Contracting Officer, requested that his assumption of COTR duties be postponed since she believed Mr. Virga needed to have his security clearance upgraded. DSCI Hrg. Exh. C3.

96. By email dated March 7, 2003, Mr. Virga advised the Contracting Officer that Ms. Schuman “feels that I need a security clearance to act as the COTR for the DSCI contract.” He stated:

My intent as COTR is to ensure that the Contract Deliverables are met on schedule, they are acting in scope of the contract, resources are applied correctly and time applied to the contract is accurate. I am expecting the TOR to act as the technical expert to ensure that the deliverables meet the technical requirements. Therefore, I will not need to know the details of the deliverables that are security sensitive.

DSCI Hrg. Exh. C4.

97. A meeting was held on April 15, 2003, which initially included Center personnel and DSCI representatives. DSCI Hrg. Exh. A29. Following a briefing by DSCI representatives, the meeting continued among the Center personnel only. April 25, 2006 Deposition of Susan Hopkins (“Hopkins Depo.”) 366:1-22. Meeting minutes prepared by DSCI do not indicate any controversy ensued during the first part of the meeting which DSCI attended. DSCI Hrg. Exh. A29. During the follow-on meeting that included only Center personnel, the Contracting Officer raised the issue of Mr. Virga’s lack of a security clearance. *See* “DOT-IG ROI I, Attachment No. 1, May-June 2003 “Inquiry Into Inappropriate Behavior within the AOS-20 Division” authored by Ms. Debbie Williams. Various witnesses had divergent views of the tone of the meeting and of the behavior at the meeting of Ms. Hopkins and Mr. Virga. *Id.*, DSCI Hrg. Exh. A30.

98. Although Mr. Virga did not have a secret clearance when Mr. Tran recommended him as COTR on April 21, 2003, Mr. Tran addressed the issue of how classified

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information would be handled by simultaneously delegating to another Center employee, Mr. James Kelley, who had a secret clearance, responsibility as a Technical Officer Representatives (“TORs”) to review any technical matter which might require a secret clearance. Center Hrg. Exh. Tab 188; DSCI Hrg. Exh. B95.

99. The record indicates that prior to when Mr. Virga was appointed as COTR, there were no TORs appointed who could verify and monitor technical performance under each Task order. Although Ms. Schuman had expertise in the area of security, she did not in the area of process improvement. DSCI Hrg. Exh. B63. In contrast, Mr. Virga had expertise in the area of process improvement, but not security. The appointment of Mr. Kelley, as the TOR to monitor the technical SCAP issues did not extend to the iCMM work, where Mr. Virga has expertise. *See FF. No. 54.*

100. By email, dated April 22, 2003, Mr. Hanlin advised Ms. Schuman she would be reporting to another supervisor and suggested that she work more at the Technical Center than at DSCI, as “the first order of business.” Center Hrg. Exh. 51; DSCI Hrg. Exh. B82. In response, Ms. Schuman advised him that she had been working mostly at the Center the past few weeks, but now:

need[ed] to resume working with my team at DSCI to do SCAP’s .... Beginning May 1<sup>st</sup>, I will no longer be COTR on DSCI contract. I met with Vince [Tran] yesterday and removed myself from lead role from some of their projects and people as well as some of the AIS work and travel requirements since I can no longer work these hours (40-50 hours a week for the past few months). I’m beginning to “burn out” due to the additional stress of the security situation and the hours being worked. I have handed off the ATB SCAP work to Dennis Emerick. I am still the SCAP Lead for AOS and handle the \$\$.

*Id.*



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101. The record shows that not all AOS contractor employees performing security related work were required to have secret security clearances. For example, in the case of [DELETED], Mr. Emerick explained:

[DELETED] was not brought in to perform SCAPs nor did he work on SCAPs during FY04. ... [he] came on board, under the existing CTA contract, to support ... [the AOS-21 Branch Manager] with security technical expertise. .... The CTA contract under which [DELETED] worked did not require a secret security clearance.

DSCI Hrg. Exh. B29.

102. Another issue that arose under Task Order 5 pertained to the status of DSCI employees. By letter dated March 18, 2003, DSCI advised the Contracting Officer that Mr. David Dustin, who was employed as an Information Security Architect under the NASiCMM Contract, was terminating his employment with DSCI. DSCI Hrg. Exh. B35. DSCI further advised that Mr. Dustin had his own company, Dustin Security Solutions, Inc., and was available to provide continued support under the NASiCMM Contract as an Independent Consultant at a rate consistent with DSCI's off-site billing rate for the Information Security Architect position. *Id.* DSCI requested that Mr. Dustin be allowed to continue working under the Task order as a consultant. *Id.*

103. By letter, dated April 24, 2003, the Contracting Officer denied DSCI's request, but offered an alternative of retaining Mr. Dustin under the Contract on a part time basis to continue his role as Information Security Architect under the Contract. DSCI Hrg. Exh. B36. That alternative was rejected by DSCI. *Id.* As for DSCI's request to add a consultant position to the NASiCMM Contract, the Contracting Officer explained:

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Since the level of effort stipulated under said Contract, which was competitively bid, provides for specific priced labor categories, your request to add a Consultant would: (1) severely change the terms of the current contract; (2) would result in the unreasonable consumption of contract labor hours and labor dollars, and (3) gives the connotation that personal services are being requested, which are prohibited by this contract.

DSCI Hrg. Exh. B36.

104. Circumstances changed during the Summer of 2003 with respect to funding for SCAPS work. At that time, a new ISS Program Office, AAF-51, was created in Washington, D.C., which impacted the AOS-20 SCAP work. DSCI Hrg. Exh. B29, Carver Depo. 112:4-8. All NAS SCAP activity was to be directed by the new AAF-51 office at FAA Headquarters, instead of the individual divisions, *e.g.*, AOS-200, AOS-300 and AOS-500, making their own determinations as to SCAP activities at the Center. DSCI Hrg. Exh. B29.
105. The Security Program Office informed the Center that pursuant to a White House requirement, all identified DOT systems were required to have a SCAP completed by July 1, 2004. DSCI Hrg. Exh. B28. A new “lite” or Level 1 SCAP process was developed to allow completion of the SCAPs by the White House deadline. DSCI Hrg. Exh. B29.
106. During early August of 2003, there was confusion as to who was serving as the TOR for the DSCI NASiCMM Contract that resulted in delay in the approval of invoices. Mr. Kelly had understood that he was to serve as TOR for only a non-SCAP portion of the Contract, and that Ms. Schuman would serve as the TOR for the SCAP portion of the Contract. *Id.* The confusion was resolved when Ms. Schuman advised Mr. Kelly by email dated August 4, 2003 that he was to serve as the TOR for the entire ISS area and she had made a decision “not to be involved with this contract at all.” DSCI Hrg. Exh. B82.

107. Meanwhile, by email dated August 18, 2003, DSCI transmitted an estimate to continue the support of the two existing Senior Systems Engineers and to add one Information Security Architect to support the SCAP efforts from September 2, 2003 through December 31, 2003. DSCI Hrg. Exh. B92. Mr. Tran responded to the information by email dated August 20, 2003, stating “the contract requires specific tasks and deliverables so my question is what specific work will be accomplished for this cost estimate? We don’t yet have any specific priorities, objectives or funding for fy04 ....” *Id.* Mr. Thoma, who was copied on the message, agreed, stating “[w]e need to know what they will be doing ... not what it takes to keep them on the contract payroll.” DSCI Hrg. Exh. B92. By mail, dated August 20, 2003, Mr. Tran provided an update to Mr. Thoma regarding issues under the NASiCMM Contract. *Id.* Mr. Tran indicated that he was advised to go to the DOT-IG by legal counsel, the contracts manager and the security office. DSCI Hrg. Exh. B92.

108. The previous SCAP work performed within the AOS-20 using DSCI support during FY ’03 was on nine AOS-300 Division systems. These SCAPS were comprehensive Level 3 SCAPS, performed at costs as high as \$300,000 per system. These SCAPS had just been completed in September 2003 and the systems did not need any additional work until after July 1, 2004. DSCI Hrg. Exh. B2, Tab E; Center 2<sup>nd</sup> Mot. to Dis. Tabs 14 and 15; Center Fin. Subm. Tab 6; Center Hrg. Exhs. 153, 166 and 172.

109. Except for one system, all new systems assigned by the new ISS Program Office to AOS-20 for a SCAP were outside the AOS-300 area of responsibility.<sup>9</sup> The SCAPS of these systems were supported by other experienced SCAP contractors. *Id.*

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<sup>9</sup>For FY’ 04, AOS-300 had only one system that needed a SCAP performed; AOS-500 had six and AOS-200 had seven. Each division, AOS-20, AOS-300 and AOS-500, had its own ISS lead, certification team, and support contractor, under the purview of AOS-20. Center Hrg. Exhibits 159, 166 and 172; Center 2<sup>nd</sup> Mot. Dis. Tabs 15 and 17; Center Fin. Subm. Tab 6.

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110. Dennis Emerick was the AOS-20 SCAP lead in FY '04. At this time, AOS-20 assumed a quality assurance function for the SCAP work to ensure standardization of the documents produced by the various divisions. He utilized four DSCI employees to support this effort, and continued to do so through September 30, 2005. DSCI Hrg. Exhs. B29, 32 and 33.
111. Funding of SCAP work that was required to be completed by July 1, 2004 was lacking. The final funding allocations were not determined until January of 2004. *Id.*
112. Another issue developed later with respect to a DSCI employee's secret security clearance. By email, dated March 17, 2004, DSCI Information Security Architect, Mr. Davis, requested that the FAA waive the requirement for him to maintain a Department of Defense ("DoD") Secret Clearance under the NASiCMM Contract. DSCI Hrg. Exh. B95. He indicates that although the Defense Security Service had denied his application for a secret clearance, he had the necessary clearance for accessing sensitive security information. *Id.* His request for a waiver of the requirement stemmed from the anticipated need for extensive interaction with DoD involving information classified up to the Secret level, which absent the waiver, would limit his ability to provide support under the NASiCMM Contract. DSCI Hrg. Exh. B95.
113. Subsequently, on April 14, 2004, by email to the Contracting Officer and Mr. Virga, the FAA Office of Security and Investigations denied facility access to Mr. Davis "based upon security/suitability issues as reported in his background investigation conducted by OPM on 09/04/2003" and requested that he be removed from performance under the Contract. *Id.* By letter, dated April 14, 2004, DSCI advised the Contracting Officer and the Security Office that Mr. Davis was removed from the Contract. DSCI Hrg. Exh. B95.

*c. Task Order No. 6*

114. Task Order 6 concerned NAS Operational Laboratory Suitability Support (“NOLSS”) and later, Test and Evaluation (“T&E”) Gold Standards Support. *See FF No. 36 supra*; DSCI Hrg. Exh. A19.
115. The SOW for this Task Order described the effort as providing operational laboratory suitability technical support and funded the effort through November 30, 2000. Included in this effort was the evaluation of T&E Gold Standard and current AOS Configuration Management Processes and methodology. The Task Order authorized travel as needed “e.g., trips to evaluate laboratories and contents for evaluation of applicability to FAA needs.” DSCI Hrg. Exh. A19.
116. The period of performance was subsequently extended and funded through March 31, 2001. The Statement of Work was revised to expand the T&E Gold Standard efforts. As for the deliverables, the SOW specified only that “[m]onthly inputs to the NAS iCMM contracts administrator in electronic data format detailing efforts in progress” were required. Otherwise, all AOS-20 deliverables were to be “developed in concert with FAA personnel and delivered upon completion.” As for authorized travel under the SOW, it simply stated that “[a]ll travel will be subject to approval by COTR.” DSCI Hrg. Exh. A20.
117. Following a February 2001 trip at FAA expense to Hawaii and Guam by Ms. Bercher, FAA T&E Gold lead, Tamara LeFebvre, DSCI employee, and Ms. Hopkins, Ms. Bercher was reassigned. Bercher I Depo. 47:14–48:5; March 13, 2006 Hrg. Tr. 72:1–25. This trip, although approved by AOS manager Ed Schuman, raised concerns from AOS management. March 13, 2007 Hrg. Tr. 72:14–73:14.

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118. On March 30, 2001, Task Order No. 6 was extended and funded through April 17, 2001. DSCI Hrg. Exh. B-2 Tab F.
119. Mr. Virga replaced Ms. Bercher and became the T&E Gold lead sometime around the April 2001 timeframe. March 13, 2007 Hrg. Tr. 207:14-17. During her final days as NOLSS Lead, Ms. Bercher worked on securing an additional year of funding for the program. Bercher I Depo. 41:12-15.
120. Mr. Virga initially attempted to place the T&E Gold work under Task Order No. 6 with DSCI under the iCMM Contract. Center Hrg. Exhs. 198-201.
121. On April 17, 2001, DSCI gave a briefing to Mr. Virga as to the status of the T & E Gold Standard efforts. March 13, 2006 Hrg. Tr. 209:18 – 216:20; DSCI Hrg. Exh. A22. After the meeting, Ms. Hopkins had the impression that Mr. Virga was pleased and would continue to work with DSCI in support of this effort. *Id.*
122. Mr. Virga had been tasked by the AOS management team to evaluate the T&E Gold Standard program. Mr. Virga concluded that DSCI was performing a laboratory suitability study, when the FAA really needed a standard developed, and that the suitability study should be a by-product of the standard. DSCI Hrg. Exh. A26; March 13, 2007 Hrg. Tr. 342:1–343:25.
123. A draft SOW was developed and used to discuss the follow-on work under the Task Order with DSCI. The technical requirements included: §3.1 Program Evaluation Support; §3.2 Program Structure Support; §3.3 NOLSS; §3.4 Test and Evaluation Gold Standard Support; and §3.5 AOS-20 Program Management Support. DSCI Exh. A23. In discussions with DSCI, Mr. Virga indicated that AOS required that development of a “base line” T&E Gold Standard be completed by the end of the fiscal or calendar year, and viewed the NOLSS effort as essentially complete. DSCI Hrg. Exh. D18, p. 309. Rough estimates of the cost of

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performance were discussed between Mr. Virga and Ms. Hopkins. Ms. Hopkins informed Mr. Virga that DSCI could not meet the Agency's requirements for completion of the T&E Gold Standard, unless it could double its personnel and that would cost the FAA twice as much. March 13, 2007 Hrg. Tr. 213:9-25, 214:1-6; DSCI Hrg. Exh. A26. Mr. Virga believed this did not meet the requirements. *Id.* 342:23-25; 343:1-14. According to Mr. Virga's notes, DSCI's estimate of \$300,000 addressed the cost of performance of the T&E Gold Standard without §3.3 of the SOW, which pertained to the NOLSS. DSCI Hrg. Exh. A23.

124. Ms. Hopkins did not believe that Mr. Virga understood the scope of the work effort. March 13, 2007 Hrg. Tr. 73:15-24.
125. The Agency subsequently used another contract vehicle to perform the T&E Gold Standard work. March 13, 2007 Hrg. Tr. 232:1-6.
126. Mr. Virga testified that he knew at the time that another company, CTA Inc. ("CTA"), and its subcontractor, Programatix, supported a task similar to the T&E Gold Standard, so that it would be logical to inquire as to the interests and capabilities of that team to do the task. Additionally, Mr. Virga testified that he also spoke with people in the FAA who worked on similar tasks, as well as with Programatix and CTA about their capabilities and interest in the T&E Gold Standard. March 13, 2007 Hrg. Tr. 221:4 – 223:22.
127. Virga also testified that he prepared the SOW that CTA probably used to develop a proposal for the work, and that their representatives briefed Mr. Tran and Mr. Virga on its proposal. March 13, 2007 Hrg. Tr. 222:14-223:2. The Center viewed as a positive feature the fact that CTA had a Broad Information Technology

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Services (“BITS”) Contract<sup>10</sup> that provided for ceiling rates, which could be negotiated down. Mr. Tran wanted to make sure that the Center was getting the best value for its money. March 13, 2006 Hrg. Tr. 222:25 – 223:25.

128. As for the length of time it would have taken the team to prepare such a proposal, in addition to his earlier deposition statement that such an effort “would not take long” and “take maybe a month,” Mr. Virga testified at the hearing that due to the nature of the BITS contract vehicle, the procurement process was quicker because a list of products and services that could be acquired was already established. March 13, 2006 Hrg. Tr. 224:1–25.

129. On April 27, 2001, CTA submitted a draft SOW to AOS-20 under its BITS contract to provide T&E Gold Standard Support and NOLSS Support, along with other support of the AOS-20 mission. DSCI Hrg. Exh. A24. The draft SOW also sets forth specific deliverables under each task and deadlines for each, including the delivery of a T&E Gold Standard 210 days after award. *Id.*

130. Mr. Virga also testified that the contracting officer on the BITS contract ultimately made the decision to use CTA and Programatix for this task order, based upon his and Mr. Tran’s recommendation. March 13, 2006 Hrg. Tr. 231:13-231:17; 232:3-6.

131. The Contracts Systems Support Branch, ASU-370, located in Washington, D.C., issued a Task Order to CTA, Inc. on May 18, 2001 for T&E Gold Standard Support, NOLSS Support and other related activities in support of the AOS-20 mission. The Task Order was signed by Contracting Officer, Viola Mitchell. The attached

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<sup>10</sup> The BITS (“Broad Information Technology Services”) Contract is a multiple award Indefinite Delivery Indefinite Quantity (IDIQ) acquisition. It provides a broad range of IT support services and resources for administrative, research/development and operational activities. The services provided by BITS are intended to support any administrative and operational IT related requirements of the FAA, and can be used by all FAA and DOT organizations. *See generally* <http://www.faa.gov/aboutfaa/bits/>.



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“Work Plan,” for the most part, incorporates the CTA draft SOW provisions, but unlike the draft SOW submitted by CTA, it also adds the language “[t]his support will be provided by CTA along with its teammate, Programatix.” DSCI Hrg. Exh. A25.

132. DSCI’s President and the Contracting Officer signed Revision 5 to Task Order 6 on September 19, 2002 that stated “[a]s a result of the completion of the subject delivery order requirements, it is hereby agreed by the parties to deobligate unliquidated funding ....” DSCI Hrg. Exh. B2, Order 6, Revision 5.

### *d. Delivery Order No. 7*

133. Task Order No. 7, *see* FF No. 38 *supra*, concerned an AOS ISS Support Special Test Facility. DSCI Hrg. Exh. B2, Tab G.

134. Earlier in the year, in February of 2001, DSCI had been researching and identifying facilities space to house its “rapidly growing staff.” DSCI Hrg. Exh. B54. DSCI further indicated that it was actively seeking “office space to accommodate FAA expansion as well as DSCI’s expansion. *Id.* In this regard, DSCI stated:

DSCI and the FAA are looking for long term leasing. Our current (FY00) office requirements are stated below. Offices and space to accommodate up to 50 DSCI employees and up to 100 FAA personnel, including executive offices, employee work areas, conference space, laboratory space for testing software, and storage space. The space will need to have the ability to be wired for secure and unsecured Local area networks (LAN) and wide area network (WAN). DSCI and the FAA have an immediate need for occupancy.

DSCI Hrg. Exh. B 54; Center Hrg. Exh. 98.

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135. A “MEMO TO FILE” was prepared by the Contracting Officer on June 5, 2001, reporting that she had received a call from DSCI advising her that the FAA needed to set up a secured facility and DSCI was looking at office space to house future employees who would be involved in this effort. In response to this information, the Contracting Officer directed DSCI to provide written notification and justification of the proposed facility change and the impact to the Contract to her for evaluation. DSCI Exh. A107 and B55.
136. A draft SOW for Task Order No. 7, dated August 13, 2001, contemplated the establishment of a Special Test Facility (“STF”) at the Conectiv Building in Mays Landing, New Jersey. Center Hrg. Exh. 100; DSCI Hrg. Exh. B56. The draft SOW included as technical requirements: (1) coordination and configuration management of all requirements between FAA and the Conectiv Building; (2) STF lab setup; (3) transitioning resources to the new facility; (4) monitoring all requirements to ensure completion/compliance using approved check sheets and reports; and (5) implementing a property tracking system. DSCI Hrg. Exh. B56.
137. An email message, dated September 14, 2001 from Jean Druce, AOS-20 budget officer, to the COTR, Ms. Schuman, indicated that sometime during a meeting during the week of September 10, 2001, “AFZ and AOP agreed to provide AOS with the additional funding AOS had requested for the planned RMMS security remediation activities.” DSCI Hrg. Exh. A108 and B57. The email also clarified that this agreement, contrary to Ms. Schuman’s stated understanding, did not provide AOS with the additional funding “as a result of the air disaster [9/11] this week.” *Id.*
138. By email dated September 21, 2001, the Contracting Officer indicated that only \$100,000.00 was actually obligated for these activities. DSCI Hrg. Exh. B53. Hence, the broad scope of the September 21, 2001 SOW, which specified that the

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four following tasks could not be accomplished given the value of the funds available:

TASK 1: This task allows for the technical and financial planning of a special AOS ISS Test Facility Lab, minimum of 1,000 square feet, to be located off-site (from the WJHTC) in Mays Landing, New Jersey.

TASK 2: Set-up and installation of a special AOS ISS Test Facility (offsite).

TASK 3: Operation and maintenance of the special AOS ISS Test Facility.

TASK 4: Technical Support for the AOS Special Test Facility to provide prototype testing of ISS development in support of the NAS operational systems.

Center Hrg. Exhs. 102 and 103; DSCI Hrg. Exh. B53.

139. The draft SOW was revised and narrowed so that the final version of the SOW contained only Tasks 1 and 2. The final version of the SOW is reflected in Task Order 7, which was issued on September 24, 2001 and obligated \$100,000 -- \$58,214.73 for labor and \$41,785.27 for other direct costs. DSCI Hrg. Exh. B2, Tab G.

140. The final SOW for Task Order 7 states as its "Objectives" the following:

TASK 1: This task allows for the technical and financial planning of a special AOS ISS Test Facility Lab to be located off-site (from the WJHTC) in Mays Landing, New Jersey. The minimum space required is 1000 sq. ft.

TASK 2: Facility fit-up and procurement of cabling, alarm system, and connection equipment for the special AOS ISS Test Facility (offsite).

DSCI Hrg. Exh. B2, Tab G.

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141. Notwithstanding the reduced number of “tasks”, however, the final version of the SOW still maintains most of the same requirements as were in the draft SOW. In a section entitled “Technical Requirements,” DSCI is to provide support to AOS to perform the following activities: “STF Laboratory Setup” -- which included the transition of equipment to the new facility, coordination of the move with various FAA offices -- and “STF Laboratory Operation” which included the coordination of and procurement of equipment and supplies to support operations of the facility.<sup>11</sup> DSCI Hrg. Exh. A57 (*compare* DSCI Hrg. Exh. B53).
142. At the time Task Order 7 was issued, DSCI was located in a small house on Main Street in Mays Landing, New Jersey. Center Hrg. Exh. 48; March 13, 2007 Hrg. Tr. 153:24-25 and 154:1-2. Ms. Hopkins subsequently formed “DSO”, a real estate management company, and bought the Hamilton Plaza facility, which contained multiple units. Hopkins Depo. 95:18-20. DSCI’s office was relocated to the Hamilton Plaza facility where Ms. Hopkins subsequently established the ISS Test Facility under Task Order 7. Hopkins Depo. 96:11-21; Barnard Depo. 38:12-17.
143. DSCI proceeded to renovate its corporate office space to accommodate the special facility laboratory, incurring approximately \$150,000.00 for infrastructure fit-ups. DSCI Hrg. Exh. A56. DSCI later claimed in a letter, dated September 12, 2003, that “[i]t was agreed at this time that DSCI would recoup the investment of the fit-up costs for this facility utilizing the 8% off-site loading for 10 FTE billed on the task order over a 2 ½ year period beginning October 1, 2001. *Id.* This agreement has “been acknowledged by all of AOS-20 management and has been briefed to and toured by AOS-1 (both the previous and current AOS-1 managers).” *Id.*

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<sup>11</sup> Additionally, separate and apart from Task Order 7, DSO had two leases with the Agency for other space at its Hamilton Plaza facility – a July 16, 2002 lease that ended on March 31, 2005 for 1,000 square feet, and a July 1, 2003 lease that ran through June of 2005 for 2,000 square feet. DSCI Hrg. Exhibit B60.

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144. In the briefing referenced in the September 12, 2003 letter, COTR Schuman, along with others, had indicated that the facility costs were being absorbed via current contractor support, *i.e.*, “Continue to partner with DSCI and have DSCI absorb facility cost of \$134k via off-site (8%) OH of current contractor support — AOS funds 10 DSCI personnel for 2.2 years.” DSCI Hrg. Exh. A58. The briefing also presented the Center with another option for funding AOS special facilities costs of “janitorial services, utilities, snow removal, building maintenance, etc.” namely by “Open a Lease, Pay \$134k to DSCI as facility set-up costs, then \$60k per year rent.”<sup>12</sup> *Id.* DSCI sought to obligate the Center to either lease the facility from DSO or pay off-site rates for 10 positions for 2.2 years, even though the Contract required DSCI to maintain a secure facility where offsite security work could be performed at higher offsite rates.<sup>13</sup> Barnard Depo. 36:4-17; 45:4-12; 48:12-22; 49:1-20; Center Hrg. Exh. 97.

145. The record does not indicate that any additional funding for “testing” at the ISS Special Test Facility was ever received by AOS. Center Hrg. Exhs. 106 and 109.

146. Task Order No. 7 was revised eight times at no additional cost to the Center. DSCI Hrg. Exh. B2, Tab G.

147. Revision No. 5, dated May 15, 2002 and signed by DSCI’s Vice President, Ms. Barnard, stated:

This will confirm telecon agreement between the parties on May 14, 2002. Due to delays in the determination of the Government’s requirements for the ISS-STF, the parties hereby agree to extend the expiration date of subject delivery order from May 15, 2002

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<sup>12</sup> Other estimated costs for additional AOS uses were identified as Training/Workshops, Extended Stay Apartment and Offsite Data Management Support (3 FTE). DSCI Hrg. Exhibit A58.

<sup>13</sup> Under the Contract, Task Order 10, dated August 13, 2002, included payment for offsite space at the Hamilton Plaza facility through December 31, 2002. DSCI also was being paid the higher offsite rates for work at its facility under Task Order 5. Center Hrg. Exhs. 113 and 114; DSCI Hrg. Exhibit B2, Tabs E and J; Barnard Depo. 36:4-17; 44:4-12.

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through August 30, 2002, at no additional cost to the Government beyond the current ceiling cost.

DSCI Hrg. Exh. B2, Tab G, Revision 5.

148. Subsequently, Revision No. 6, dated August 29, 2002 and also signed by Ms. Barnard, stated:

This will confirm telecon agreement between the parties on August 29, 2002. Due to continued delays in the determination of the Government's requirements for the ISS-STF, the parties hereby agree to extend the expiration date of subject delivery order from August 30, 2002 through November 30, 2002, at no additional cost to the Government beyond the current ceiling cost.

DSCI Hrg. Exh. B2, Tab G, Revision 6.

149. The last revision to Task Order No. 7 was Modification No. 8, dated November 27, 2002, which extended the task order until February 28, 2003.<sup>14</sup> *Id.*

150. By email dated April 9, 2003, [DELETED] requested that Ms. Hopkins relieve her of all DSO responsibilities, citing concerns that actions planned were not "ethical or morally responsible." DSCI Hrg. Exh. B61.

151. The alternate COTR, Ms. Cheryl Matthews, discovered that DSCI was billing the Center at the higher offsite rates for eight employees who were actually performing onsite at the Center. DCSI Hrg. Exh. B5, B63. In this regard, Ms. Matthews concluded that "the contractor assumed requirements, none of which were documented in the contract, as justification for billing the government off-site labor rates in order to absorb the start-up costs for commercial space that houses the DSCI corporate offices." *Id.* On September 5, 2003, Ms. Matthews reported her

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<sup>14</sup> The date on the modification contains a typographical error, inadvertently stating the date of February 28, 2002.

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findings to the Center management, Mr. Virga and the designated Contracting Officer. DSCI Hrg. Exh. B5 and B63; Center Hrg. Exh. 115.

152. By letter dated September 12, 2003, DSCI attempted to explain to the Contracting Officer how the off-site billing rates came to be applied to the labor categories of Task Order No. 5. DSCI Hrg. Exh. A56.
153. The Contracting Officer, by email dated September 24, 2003, notified DSCI that it would not be paying the higher offsite rates for DSCI employees working onsite. Center Hrg. Exh. 116; DSCI Hrg. Exh. B11. On behalf of DSCI, Ms. Barnard responded by letter of the same date that “[w]hile DSCI agrees that this arrangement was a needed and viable solution to the immediate security needs of AOS-20 in the aftermath of September 11, 2001, we recognize that the requirement and utilization of this laboratory has not developed to date. DSCI feels that the current agreement is no longer economically feasible for the FAA or DSCI” with respect to the requirement for and use of the facility. DSCI Hrg. Exh. B11. In order to offset the fit-up costs incurred by DSCI in the development of this facility, we require a customer with the financial resources to recover our investment costs and will need to be able to enter into an agreement with another customer by October 1, 2003.” Center Hrg. Exh. 116; DSCI Hrg. Exh. B11.
154. To address the above issue of offsite rates, the Center sought to negotiate a “facility usage fee” which would be applied as an indirect rate and proportionally charged to all DSCI clients who would be utilizing the same building. Center Hrg. Exh. 123. The purpose of this fee would be to compensate DSCI for use of the facility until the Center’s equipment could be removed. Center Hrg. Exh. 123; DSCI Hrg. Exh. B11 B68. DSCI invoiced the Center for the facility usage fee to cover the period of August 1, 2003 through October 15, 2003. Center Hrg. Exh. 124.

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### *e. Task Order No. 8*

155. Task Order No. 8 supported the Aviation Security Division (AAR-500) which, following the events of September 11, 2001, was relocated to the Transportation Security Laboratory (“TSL”)—which is part of the Transportation Security Administration (“TSA”). Center Hrg. Exh. 125.
156. At the end of July 2003, there was a purchase request for more work under Task Order No. 8. Center Hrg. Exh. 129. Mr. Virga raised an issue with the SOW on July 30, 2003. *Id.* He questioned whether, instead of process improvement of program management functions, the work DSCI was performing included the actual program management of a TSL program. *Id.* In this regard, by email dated August 7, 2003, the Contracting Officer reminded “everyone that the scope of this contract is process improvement with some security, not the actual process of performing project management, which is apparent in the deliverables wording of the current s.o.w. furnished.” DSCI Hrg. Exh. B97.
157. In late March 2004, the Contracting Officer received another purchase request for Task Order No. 8. Center Hrg. Exh. 135. At the time, Mr. Virga and TSL were addressing several issues, including the problem with funding of work being done by DSCI for TSA under the Contract. *Id.* According to TSL, this was to be the final extension of the task. Center Hrg. Exh. 136; DSCI Hrg. Exh. B99.
158. TSA and FAA accounting systems were not compatible and thus accounting codes for the TSA system could not be utilized for purposes of funding work performed under FAA contracts. DSCI Hrg. Exh. B10; March 15, 2006 Hrg. Tr. 167: 20 –22.
159. When it was determined that the NASiCMM Contract provided support to TSA, the Manager of the Acquisition Services Group, Ms. Wittman, instructed the



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Contracting Officer and the COTR to stop supporting TSA under the Contract. DSCI Hrg. Exh. B10; March 15, 2006 Hrg. Tr. 167:8-11.

160. The Center and TSA had entered into Service Level Agreements (“SLAs”) and agreed that the Center would award and administer separate contracts directly for TSL. The SLAs were of general application regarding all contracting work for TSA. The Center did not execute SLAs with contractors or regarding any contractors. Center Hrg. Exhs. 164 and 171.
161. This Agency-wide action regarding contract work for the TSL affected several contracts, including the NASiCMM Contract. Hrg. Exh. 164.
162. The efforts made by the Center to keep the work under the NASiCMM Contract are reflected in a June 14, 2004 email from Jean Druce, AOS-20 Budget Officer to the Contracts Manager, Ms. Wittman. Center Hrg. Exh. 141. This email indicates that Mr. Virga worked closely with Ms. Jean Druce to try to add funding to Task Order 8 so as to allow DSCI to continue to do work for the TSA under the Contract. In this regard, Ms. Druce’s June 14, 2004 email advises Ms. Wittman that “Mr. Virga and I have spend a great deal of time trying to assist the TSA with processing their Interdepartmental Procurement Request; however, we have yet to discern the correct accounting procedure for doing so.” DSCI Hrg. Exh. A50. Ms. Druce testified at the hearing that, on behalf of Andy Lee of the TSA, “Mike [Virga] asked me and ... [her supervisor] if there was any way we could help them” and “that Andy had expressed he couldn’t add funding to the contract because contracts couldn’t accept their accounting data any more.” March 15, 2007 Hrg. Tr. 45:15-24. Ms. Druce testified that Mr. Virga tried very hard to help transfer this work to TSA and that “[i]t was just simply out of our control. It was an accounting issue that we couldn’t fix, but Mike was vigorously working” to get it resolved. March 15, 2007 Hrg. Tr. 54: 1-14.

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163. The work being performed for TSL under the NASiCMM Contract was subsequently subcontracted to DSCI under an existing TSL contract, DTFAC-03-00013, where DSCI was being paid the same amount as under the NASiCMM Contract. Center Hrg. Exhs. 142, 164, and 171; March 15, 2007 Hrg. Tr. 168:10–12; Center 2<sup>nd</sup> Mot. To Dis. Tab 35, Center Fin. Subm. Tab 8.

164. The decision to stop supporting TSL through DSCI's Contract was made by the Manager of the Acquisition Services Group, Ms. Wittman, who explained:

Prior to 9/11/2001, TSL was Aviation Security (AAR-500) and was part of the FAA. Post 9/11, AAR-500 was no longer part of the FAA and moved to TSA and became the TSL. As a result, TSA and FAA lines of accounting were not compatible and could not be cited on the same contract. I was unaware that DSCI supported TSL through contract DTFA03-00D-00014 which was awarded on behalf of the FAA's Airway Operational Support (AOS) organization. Once I found out, I required that both the CO ... and the COTR ... stop supporting TSL through this FAA contract. I made this decision and I was not influenced in any manner by the CO or the COTR ....

Through a service level agreement with TSL, the Technical Center began to award separate and distinct contracts for TSL directly. The work that was being performed for TSL under DTFA03-00-D-00014 was subsequently subcontracted to DSCI under TSL contract DTFAC-03-C-00013.

DSCI Hrg. Exh. B10 and B49.

165. According to Ms. Wittman, unlike the DSCI Contract, the TSL contract DTFAC-03-C-00013 with Galaxy was awarded by the Center in 2003 for TSL using TSL funds pursuant to the terms of the SLA for the benefit of TSL. DSCI Hrg. Exh. B79.

166. DSCI signed a full release, "DOT Contractor's Release – form DOT F 4220.4," relative to Task Order 8 on August 19, 2004. Center Hrg. Exh. 144.

167. The final invoice under Task Order 8 was submitted to the Center for \$16,399.18, which was paid by the Center on September 14, 2004. Center Hrg. Exh. 125.

**2. Appointment and Tenure of Mr. Virga**

168. As early as October 24, 2001, Ms. Marinaro expressed concerns to Mr. Tran and others about the performance of Ms. Schuman as COTR on the Contract and requested that AOS identify a different COTR to handle task orders. DSCI Hrg. Exh. 85. In response to those concerns, Mr. Tran indicated that, on behalf of AOS-20, he would “try to do a better job with our part of the contract responsibilities to ensure compliance and integrity.” DSCI Hrg. Exh. B85. Subsequently, Mr. Virga was appointed COTR several months later after Mr. Hanlin also approached Mr. Tran and recommended to Mr. Tran that Ms. Schuman be replaced by someone in AOS-20. Mr. Hanlin and Mr. Tran mutually agreed that Mr. Virga would be nominated as the new COTR to replace Schuman because Mr. Virga was a hard worker, was conscientious, and was extremely knowledgeable in process improvement and iCMM. Center Hrg. Exhs. 174 and 173 (attachment to Jean Druce declaration – 1/14/03 Tran notes); March 14, 2007 Hrg. Tr. 228:16-24; 219:11-25 and 220:14-19.

169. Mr. Virga testified that he did not want the job as COTR, as he was busy with other responsibilities, which required him to travel. March 13, 2007 Hrg. Tr. 255:8–22; March 14 Hrg. Tr. 14:20–16:11; Center Hrg. Exh. 54. Few employees, however, were available to assume the role as COTR. March 14, 2007 Hrg. Tr. 228:19-24.

170. The Contracting Officer indicated that she was pleased with performance of Mr. Virga and Ms. Matthews with respect to the duties of COTR and saw improvement from the performance of the prior COTR, Ms. Schuman, in the quality of the

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drafting SOWs, monitoring of Contract performance, as well as surveillance/inspections/assurance of technical compliance. Declaration of Anna M. Marinaro, DSCI Hrg. Exh. B62.

171. Mr. Thoma also viewed Mr. Virga as technically very capable and hard working and that he was very meticulous about his work duties. March 14, 2007 Hr. Tr. 263-264:16-10.

172. Mr. Thoma testified that he never wanted to have Mr. Virga removed from the DSCI Contract, but that he was instructed to do so by his immediate supervisor, the reason being related to the DOT-IG investigation. March 14, 2007 Hrg. Tr. at 265:8-267:9.

173. During the period when Mr. Virga was COTR, the Center obligated an additional \$2,950,003.01 of work under the Contract to DSCI. Center Hrg. Exhs. 85, 88 and 41.

### **3. DSCI's Efforts to Remove Mr. Virga as COTR and Secure Additional Funding Under the Contract**

174. DSCI viewed the performance of Mr. Virga differently. Ms. Hopkins actively lobbied against Mr. Virga's appointment and his continued performance as COTR. She advised Mr. Tran that she had a bias against him and could not be objective about Mr. Virga. Center Hrg. Exh. 173, attachment to Jean Druce declaration 5/22/03 Tran notes; March 13, 2007 Hr. Tr. 111:1-25; 255:20-22 and March 14, 2007 Hrg. Tr. 24:10-13.

175. Ms. Matthews, who served as Mr. Virga's alternate COTR, reported that she had observed hostility directed toward Mr. Virga and Mr. Tran by DSCI officials:

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While at the [DSCI] facility, I ran into Sue Hopkins and she began making negative statements about Mike Virga and Mr. Tran. I reminded both Ms. Bernard and Ms. Hopkins that I would not be an audience for their negative remarks about Mr. Virga and Mr. Tran and that I was there to work with them .... DSCI seemed to have a chip on their shoulder about Mr. Virga that they openly expressed to other FAA personnel. They seemed to resent any questioning of their activities and took it as a personal affront.

DSCI Hrg. Exh. B62.

176. In Hearing testimony, Ms. Hopkins' described Mr. Virga, and Mr. Tran both as "out of control" and "doing the same nutsy stuff." March 13, 2007 Hrg. Tr. 130:1-25.

177. [DELETED]

178. [DELETED]

179. [DELETED]

180. [DELETED]

181. In an attempt to have Mr. Virga removed from the position of COTR, DSCI provided to the Contracting Officer by fax an unsigned draft letter, dated July 9, 2003, that summarized its complaints in his regard. DSCI Hrg. Exh. 64.

182. By email, dated July 11, 2003, the Contracting Officer responded to the above draft letter, advising DSCI that the Contracting Officer believed that there was no reason to remove Mr. Virga from his COTR assignment at that time. DSCI Hrg. Exh. A65. The Contracting Officer also prepared a memorandum for the record ("MFR") which she appended to her email response to DSCI. The MFR referenced DSCI's draft letter and identified the following actions she took in response thereto:

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Discussions regarding Contractor's dissatisfaction with the COTR was [sic] held between C.O., C.O.'s Supervisor ... and legal [counsel] on 7/9/03. Since the Contracting Officer has not been approached by any other FAA or contractor personnel on the complaints from contractor, and it is believed that Mr. Virga has been providing the Contracts Office with adequate technical assistance, the parties seemed to be in agreement that no change was necessary at this time. ... [Legal counsel] also advised that he meet [sic] separately with Mr. Vince Tran and Mr. Virga, earlier and he expressed that what he got from their conversation was that Mr. Virga was trying to do his job as COTR. ... [Legal counsel] advised that I review Mr. Virga's performance to date and make a determination. Due to the discoveries that Mr. Virga made on the Administrative Assistants, and our joint effort to ensure that the contract performance accurately reflects the intent of the contract, and absent any adverse personnel action against Mr. Virga, the undersigned C.O. released the ... [email dated July 11, 2003] to the contractor to have Mr. Virga remain as COTR on subject contract.

DSCI Hrg. Exh. C7.

183. On August 13, 2003, Ms. Hopkins met with Mr. Thoma by way of introduction from Ed Schuman. Thoma Depo. 128:1-129:25. Ms. Deloney also attended the meeting. March 13, 2007 Hr. Tr. 130:12-15. During the meeting Ms. Hopkins complained to Mr. Thoma about Mr. Virga. March 14, 2007 Hrg. Tr. 263:21-264:10; Thoma Depo. 127:13-131:25.

184. After the meeting, by email, dated August 13, 2003, Mr. Thoma informed Mr. Tran as to his impressions of meeting with Ms. Hopkins, which he described as a "good meeting." DSCI Hrg. Exh. A67 and B92.

185. Ms. Hopkins met with Mr. Tran on August 15, 2003, after which Mr. Tran reported back to Mr. Thoma by email stating the following:

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- I just got back from meeting with Sue. It was a good meeting. We kept it cordial, professional and even had a few good laughs. She reiterated that the cotr position is a key factor [and] Mike should not be the one because of objectivity. She did say she already filed formal complaint and it's up to me. Ball was now on my court, etc.
- She gave me a cost estimates for cy04 (jan-dec) for various ISS activities totaling just over \$4.5 M
- I agreed to take a look at the data and work with appropriate folks to evaluate best options to improve our relationship and asked for her cooperation so it's not all up to me. We agreed to continue to work together to improve things.

*Id.*

186. Also, by email dated August 18, 2003, Ms. Hopkins apprised Mr. Thoma of the meeting she had with Mr. Tran during which they discussed AOS issues. Her view was that these issues were negatively impacting the morale and integrity of DSCI employees and the reputation of DSCI, as well as causing negative economic impact to DSCI. Among other things, Ms. Hopkins informed Mr. Thoma that DSCI needed funds committed by August 31, 2003, or additional DSCI employees would be terminated, and that she had presented to Mr. Tran an estimate of dollars, labor resources and tasking which is consistent with ISS projects proposed in AOS-21. DSCI Exh. A66 and B92.

187. DSCI also memorialized the meeting in writing in a separate document for the file. The document, which is dated August 15, 2003, is consistent with the email message Ms. Hopkins sent to Mr. Thoma setting forth her belief that problems could be resolved within the AOS organization with an objective COTR. The document also indicates that as a result of the problems, DSCI employee morale and integrity had suffered, as well as its reputation, and that “[e]conomic lost to DSCI over the last 4 months represents 25% of AOS-21 ISS effort, excluding DSCI’s typical annual growth mean of 20%.” DSCI further advised that “immediate rectification of the negative economic impact would include replacing

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the loss of DSCI positions (totaling 5 on the ISS task order alone) and that DSCI had presented [to Mr. Tran] ... an estimate of dollars, labor resources, and tasking which is consistent with your FY03 & FY04 AOS-20 ISS Program Plan.” DSCI Hrg. Exh. 68.

188. Following the report of the meeting from Ms. Hopkins, Mr. Thoma asked Mr. Tran as to the nature of the cost estimates Ms. Hopkins provided to him. Mr. Thoma also questioned how DSCI would be doing CY-04 estimates of \$4.5M if AOS had not yet tasked them to do so. *Id.*

189. [DELETED]

190. [DELETED]

191. [DELETED]

192. There was never any determination on the part of the Agency [DELETED] that Mr. Virga as COTR had any conflict of interest or that he had done anything improper. Hrg. Exh. 177.

193. Ms. Hopkins testified that she believed that the Inspector General was not objective and did not do its job properly in investigating Mr. Virga. March 13, 2007 137:1-138:25.

**4. Ms. Hopkins’ Relationship with Ms. Schuman**

194. Ms. Hopkins had a favorable opinion of Ms. Schuman as COTR, and admitted that the reason for the heightened scrutiny of DSCI was because she and Ms. Schuman had become too close. March 13, 2007 Hrg. Tr. 167:1-25-169:25.



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195. Ms. Schuman's association with DSCI during the time when she served as COTR raised concerns on the part of the Contracting Officer as to her impartiality. The Contracting Officer wrote an email, dated September 26, 2001 to Mr. Tran stating that she was "very uncomfortable with the mounting situation that AOS-20" was putting her in with respect to the processing of procurement requests. DSCI Hrg. Exh. B85. Specifically, the Contracting Officer complained that Ms. Schuman's Independent Government Cost Estimate ("IGCE") identically matched a proposal she had received from DSCI. *Id.* Ms. Schuman responded directly to the Contracting Officer's concerns, by email dated September 27, 2001, recommending that the Contracting Officer speak to her management about having the Contract assigned to someone else. The Contracting Officer then addressed the nature of her concerns directly to Ms. Schuman, stating:

A major point that you missed was that Independent Government Estimates are required to be independent, prepared by Government technical personnel and not prepared by contractors. Again, the detail of your IGCE and the contractor's proposal was identical. This could interest an IG Investigator, and could impair DSCI from receiving future awards.... At the one and only meeting that I had with you, you discussed your intentions to establish a independent lab. I don't recall receiving any formal technical justification in writing from your office, citing the authority or details requiring this change. I later heard "rumors" that it was going to cost \$10 Million; and then a PR showed up with only \$100,000, with a S.O.S. for a full blown requirement, which I had to request get modified to complement the PR amount. Are you the manager of AOS-20 or is Vince?

DSCI Hrg. Exh. B85.

196. Ms. Hopkins socialized with Ms. Schuman while Ms. Schuman was COTR of the NASiCMM Contract and apparently they were good friends. For example, on April 17, 2002, Ms. Schuman had dinner with Ms. Hopkins in Washington, D.C., stayed in the same hotel room with Ms. Hopkins that evening, and then was driven home

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the next morning by Ms. Hopkins in her car. Center Hrg. Exh. 174; Hopkins Depo. 160:1–162:22; [DELETED] Schuman I Depo. 57:14–25; 58:1–25; 59:1–19.

197. Ms. Schuman spent extended periods of time at the DSCI facility and had her own telephone extension there. Ms. Schuman was eventually directed by her supervisor, Mr. Hanlin, to spend less time at the DSCI facility and more time at the Technical Center. Center Hrg Exhs. 37 (at DSCI Bates no. DSCI002223) and 51; March 14, 2007 Hrg. Tr. 210:16–25, 211:1–7; 243:5–13.

198. Ms. Schuman also was counseled by Mr. Hanlin about maintaining a professional relationship with Ms. Hopkins. Center Hrg Exh. 174; March 14, 2007 Hrg. Tr. 244:15–25.

199. Ms. Hopkins admitted at the hearing that DSCI got information from Ms. Schuman and others regarding what they told the DOT-IG. [DELETED].

200. Such collaboration between Ms. Schuman and Ms. Hopkins are corroborated by contemporaneous notes in the record, dated “5/2?/4” and maintained in DSCI’s files, which state:

FAA Diane Schuman interviewed with IG

Per Diane, questions asked include  
Did DSCI ever fire anyone at FAA’s request?  
Did DSCI ever have “travel Fraud?  
?relationship between DSCI & TMS (Ed)?

DSCI Hrg. Exh. B86.<sup>15</sup>

### **5. *DSCI’s Relationship with Other Contracting Partners***

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<sup>15</sup> The referenced “Ed” likely referred to Mr. Ed Schuman, the husband of Ms. Schuman.

201. In her declaration Ms. Hopkins states that “a high-level employee from Harris” informed her that “Harris was discouraged from subcontracting to DSCI” based on information provided by Mr. Thoma about the NASiCMM Contract. DSCI Hrg. Exh. A13, ¶ 55. Mr. Thoma, however, testified that he never suggested to anyone at Harris or implied that they should not use DSCI as a subcontractor. March 14, 2007 Hrg. Tr. 285:17–25.

202. Ms. Hopkins also testified that she was told by another FAA Contracting Officer that he was counseled by Ms. Deloney and Mr. Virga not to do business with DSCI and that DSCI was “hiding in the bushes,” “dirty” and “unethical.” March 13, 2007 Hrg. Tr. 141:1–25. Ms. Deloney, in her declaration, dated July 8, 2005, denies ever taking any action to harm or cause a problem for DSCI or for any officer of that company, stating:

I have absolutely no personal animosity against the company or any of its principals or employees. In addition, I have had many conversations with Mike Virga, and he has never said anything to indicate any personal animosity toward this company or anyone in the company.

DSCI Hrg. Exh. B14.

**D. The Department of Transportation Inspector General Investigation**

203. By letter, dated November 5, 2003, DSCI requested that the office of its Congressman, Representative Frank A. LoBiondo, intervene on its behalf. In this regard, DSCI’s letter states:

Our current funding expires on December 31, 2003. Based on recent conversations with our current FAA technical leads, DSCI is convinced that Mr. Tran and Mr. Virga intend to use that opportunity to again transition our current work to another contractor. Should this occur, the impact is not solely on DSCI as a business – all our employees will lose their jobs. Without your

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immediate intervention we fully believe our company will be forced out of business by the end of this calendar year.

DSCI Hrg. Exh. A72.

204. By letter, dated December 12, 2003, Congressman LoBiondo requested that the FAA Administrator, Marion C. Blakey, investigate DSCI's "alleged malevolent treatment" by the COTR and "take the necessary action to remedy the situation." The Congressman also advised the Administrator that he purportedly had been "able to verify many of the allegations." DSCI Hrg. Exh. A73.

205. [DELETED].

206. Mr. Virga received several anonymous telephone calls warning him about DSCI. Mr. Virga reported these calls to the Center Counsel, security office, contracts office, and subsequently, the DOT-IG. Center Fin. Subm. Tab 3; Center Hrg. Exh. 175; March 14, 2007 Hrg. Tr. 17:1–24:25.

207. [DELETED]

208. [DELETED]

209. [DELETED]

210. [DELETED]

211. [DELETED]

212. [DELETED]

213. [DELETED]

214. [DELETED]

215. [DELETED]

216. [DELETED]

217. [DELETED]

218. [DELETED]

219. [DELETED]

220. [DELETED]

221. In the end, neither of the DOT-IG Investigations found any wrongdoing on the part of Mr. Virga or any other FAA employee related to DSCI. *See* DOT-IG's Redacted Versions of ROIs, dated December 2004 and October 12, 2005. DSCI Exh. A74.

**E. The ODRA Adjudication Process**

222. On April 14, 2005, DSCI filed the subject Contract Dispute.

223. On July 14, 2005, following a brief alternative dispute resolution effort, the Center filed the Agency Response, along with a Motion to Dismiss ("Mot. Dis."), which was opposed by DSCI in a filing dated August 1, 2005. In its Motion to Dismiss, the Center alleged that DSCI's claim that the Agency acted in bad faith by

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not placing further task orders and continuing certain work under the Contract, amounts to mere speculation and is not a proper subject of a contract dispute. Mot. Dis. at 3. On August 23, 2005, the ODRA issued a decision denying the Center's Motion, and finding that DSCI's claim was not barred as a matter of law and that facts could be presented to establish bad faith. *See ODRA Decision on Motion to Dismiss*, dated August 23, 2005.

224. A significant discovery effort followed, with extensive production of documents and records, as well as the taking of 17 depositions. After the conclusion of discovery, the Center filed a second Motion for Dismissal or Summary Decision on May 25, 2006, which was opposed by DSCI in a filing dated June 13, 2006. The Center also filed a Reply to DSCI's Opposition on June 22, 2006.

225. On June 27, 2006, the ODRA issued a letter confirming receipt of the parties' filings in connection with the Center's second Motion to Dismiss and advising that it would "consider and rule on the Motion at an appropriate time." The letter further established an adjudication schedule for further proceedings. *ODRA Letter to the Parties*, dated June 27, 2006.<sup>16</sup>

226. Adjudication of the issues of entitlement and quantum were bifurcated, *see ODRA Status Conference*, dated May 12, 2006, and DSCI filed its Final Submission on entitlement on September 1, 2006.<sup>17</sup> The Center filed its Final Submission on entitlement on September 26, 2006. These submissions were followed by additional filings which briefed the issue of whether a hearing was necessary in this case.

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<sup>16</sup> The Center's second Motion to Dismiss essentially reiterated the position of its first Motion, *i.e.*, that DSCI has no claim as a matter of law. The ODRA hereby denies the Center's second Motion to Dismiss. *See ODRA Decision* dated August 23, 2005.

<sup>17</sup> DSCI's Final Submission indicated that it no longer was pursuing the Information Security aspect of its claim, which related to the FAA's decision not to approve for work under the Contract an Information Architect that DSCI had employed as a subcontractor to DSCI. DSCI Fin. Subm. F.N. 2, p. 7.

227. At a status conference on November 7, 2006, the ODRA granted DSCI's request for a hearing, finding that credibility determinations may be required for the resolution of certain issues in controversy. *ODRA Status Conference Memorandum*, dated November 8, 2006. The ODRA advised that, to the extent any party intended to rely on deposition testimony obtained during discovery, the party was required to identify such testimony in their post hearing submissions by referencing the deposition page and line number, in order for deposition testimony to be considered by the ODRA in the preparation of the Findings and Recommendations. *Id.*

228. The ODRA held an evidentiary hearing on the record at the Center on March 13 through 15, 2007, during which nine witnesses testified.<sup>18</sup> At the conclusion of the hearing, the ODRA asked each party if there were any other witnesses that it wished to present, and the Center and DSCI responded in the negative. March 15, 2007 Hrg. Tr. 188:4-12.

229. Final Post Hearing Submissions were filed by DSCI and the Center on May 18, 2007, and June 1, 2007, respectively, and the record was closed on June 4, 2007.<sup>19</sup>

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<sup>18</sup> The ODRA notes that proceedings in this case were streamlined and significantly narrowed in scope by the active participation of the ODRA Neutral, who assisted the parties in facilitating communications and helping the parties to reach agreements on various issues throughout the course of the litigation.

<sup>19</sup> In addition to the transcript from the hearing, hearing exhibits and post-hearing submissions of the parties, the record contains the following:

Agency Response and Exhibits 1 – 14

DSCI [DOT]-IG Reports of Investigations, dated December 13, 2004 and September 21, 2005

Agency Motion to Dismiss and Exhibits 1 – 57

DSCI Opposition to Motion to Dismiss and Exhibits 1 – 74, Exhibits A-O (protected), and Deposition Tr., i.e., *Arrasmith, Barnard, Bercher, Carver, Deloney, Gallagher, [DELETED], Hopkins, Maccarone, Virga, Williams, Marinaro, Schuman, Thoma*

Agency Reply to DSCI Opposition to Motion to Dismiss and attachments *[DELETED]*

Agency Final Submission and Exhibits 1 – 33

DSCI Final Submission and Exhibits 75 – 108

### III. DISCUSSION

#### A. Statement of the Issue

The legal issue presented in this dispute is whether the Center breached the duty of good faith and fair dealing in its administration of the Contract, *i.e.*, whether there is clear and convincing evidence of “egregious conduct” that occurred with “some specific intent to injure the contractor” or “malice or conspiracy.” It has been held that the exercise of discretion with respect to the duty of good faith and fair dealing flowing from a particular contract is distinguishable from the exercise of discretion by the Agency generally in managing its operations and determining how best to procure the supplies and services it needs to fulfill its mission. *Protest of Royalea’L Aviation Consultants*, 04-ODRA-00304; *Royalea’L Aviation Consultants v. Administrator of the Federal Aviation Administration*, No. 04-2412 (1<sup>st</sup> Cir. October 7, 2005), *dismissed as moot*.

#### B. The Nature of the Contract

An indefinite delivery and indefinite quantity (“IDIQ”) contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, and requires that the government order only a contractually-stated minimum quantity of supplies or services. *J. Cooper & Associates, Inc. v. United States*, 53 Fed.Cl. 8 (2002). Once the government has purchased the minimum quantity stated in an IDIQ contract, it is free to purchase additional supplies or services from any other source it chooses. *Id.* It is the specified minimum quantity that prevents an IDIQ contract from being illusory and unenforceable. *Id.* at 17. By entering into an IDIQ contract, the contractor takes the risk that no more than the minimum quantity will materialize. *Dot Systems, Inc. v. United States*, 231 Ct. Cl. 765, 1982 WL 25218 (June 25, 1982) (unpublished decision).

By contrast, in a requirements contract the buyer agrees to purchase from the seller all its requirements for the specified goods or services during the period of the contract.



*Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493, 43 S. Ct. 592, 594, 67 L.Ed. 1086 (1923). In a requirements contract, the seller's promise to satisfy the buyer's requirements and the buyer's promise to purchase *all* its requirements from the seller, provide the mutuality of obligation making the contract fully enforceable. *Mason v. United States*, 222 Ct.Cl. 436, 615 F.2d 1343, 1342 *citing* 1A Corbin, Contracts § 156 (1963 & Supp.1971).

Here, it is indisputable and undisputed that the Contract was an IDIQ type. The IDIQ nature of the Contract is reflected in numerous provisions, *e.g.*, Section G.6, H.5, and Section H, Clauses 3.2.4-16 and 3.2.4-20. The Contract expressly states that: (1) it is an IDIQ contract with a guaranteed minimum quantity of \$400,000.00, FFs 8, 11 and 27; (2) services to be furnished under the Contract will be ordered by issuing task orders at any time during the life of the Contract, which is the date of award through 60 months thereafter; and (3) the total estimated quantities set forth in its provisions, *e.g.*, FFs 11 and 17, are estimates only and are not purchased by the Contract. FFs 26 and 27. The Contract promises only that “[t]he Government shall order at least the quantity of ... services designated in the Schedule as the minimum” during the life of the Contract. FF 27. In no way does the Contract promise that the Center will purchase *all* its requirements under the SOW from DSCI. Moreover, as was evidenced by the testimony of its Vice President, Ms. Barnard, DSCI understood the nature of the Contract to be IDIQ, and that the work would be tasked and funded through task orders based on the SOW. FF 8.

### **C. The Duty of Good Faith and Fair Dealing**

It is well established that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” *See Centex Corp. v. United States*, 49 Fed.Cl. 691, 708 (2001); Restatement (Second) of Contracts § 205 (all contracts, including government contracts, contain an implied covenant of good faith and fair dealing).

The covenant of good faith and fair dealing includes the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract. *Restatement (Second) of Contracts*, § 205 (1981); 13 Richard A. Lord, *Williston on Contracts* § 38:15, at 437-38 (2000); *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir.1990); *Polito v. Continental Cas. Co.*, 689 F.2d 457, 463 (3d Cir.1982); *Concrete Specialties v. H.C. Smith Constr. Co.*, 423 F.2d 670 (10th Cir.1970). The duty applies in government contracts just as it does in contracts between private parties. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed.Cir.2003); *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed.Cir.2000); *Malone v. United States*, 849 F.2d 1441, 1445, *modified*, 857 F.2d 787 (Fed.Cir.1988).

1. The Contract's Terms and the Scope of the Duty of Good Faith

DSCI asserts that a contracting party to an IDIQ contract “can and should reasonably expect ... that a government agency will deal fairly and in good faith with the contractor,” and that a breach of the covenant of good faith and fair dealing does not require breach of an independent contractual duty in order to be actionable. DSCI Post Hrg. Subm. at 85. DSCI further argues that this covenant is designed to “protect against bad faith actions under contracts that would otherwise be **discretionary**,” and that those discretionary actions include Agency decisions as to whether it will order work in excess of the contractually stated minimum. *Id.* at 85 (emphasis in original).

In support of its position, DSCI relies on *North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158 (2007), which involved a contract to design and build a 400-unit military housing project, and included an agreement that the housing units would be leased back to the Army for a specified period of years. Under the terms of the lease back, the contractor in *North Star* was to provide maintenance and operational services in exchange for an annual rental payment, as well as a “discretionary” incentive fee. *Id.* In

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this regard, the lease provided that payment of the incentive fee was payable by the Government “at its option” and “for the period of time for which [North Star’s] performance of the obligations and responsibilities ... are evaluated and found by the Government to substantially exceed the established standards.” *Id.*, at 160. Moreover, the amount of the incentive fee was to be calculated based on performance standards and procedures set forth in the lease. *Id.* The court in *North Star* found that the Government breached express provisions in the lease repeatedly and interpreted them in a manner purposefully designed to prevent the contractor from successfully performing the contract and earning the incentive fee. *Id.*

In response to DSCI’s arguments, the Center acknowledges that under certain scenarios, a bad faith breach of an IDIQ contract could occur, provided that there is a breach of an explicit or implicit promise made to the contractor. The Center asserts, however, that DSCI’s theory of a bad faith breach arising from “the failure to receive continuing work, maintaining work, or to reach the contract’s maximum” is legally flawed because there was never any promise in this case by the Center to continue, maintain, or otherwise reach the Contract’s estimated value, “either explicitly, impliedly, or by law.” Center Post Hrg. Subm. at 56-57.

The Center asserts that DSCI’s reliance on *North Star* is misplaced, because here, unlike in *North Star*, “the FAA never ceased to meet all of its obligations under the contract.” The Center points out that in *North Star* “the government’s breach of its duties of good faith and fair dealing warranted restoration of North Star’s *contractual entitlements*.” Center Post Hrg. Brief at 60 (emphasis in original). The Center asserts that “North Star was contractually entitled to regular payments, and thus suffered identifiable, *quantifiable* damages when they were withheld or deducted,” while in contrast, DSCI was never entitled to any task orders in excess of the Contract minimum, and thus it seeks remedies which, in effect are a “series of belated protests.” Center Post Hrg. Subm. at 60-61 (emphasis in original).

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The ODRA finds the *North Star* case to be factually distinguishable from the instant case since *North Star* did not involved an IDIQ contract, but rather a design-build lease contract. Moreover, there are no provisions in the instant Contract that are similar to the discretionary incentive fee payment provision and the performance standards governing it, which were part of the lease in *North Star*. *Id.*, at 205. The payment of the discretionary incentive fee payment in *North Star* was governed by express terms in the lease, relative to trash removal, maintenance, inspection and transfer of housing units, which were found by the Court to have been breached. Thus, in *North Star*, breach of the covenant of good faith and fair dealing first required the breach of an independent contractual duty in the lease, *i.e.*, the duty to fairly and reasonably interpret the lease performance standards which impacted payment of the incentive fee. *See North Star, supra*, at 188 *citing Bradley v. Chiron Corp.*, 136 F.3d 1317, 1326 (Fed. Cir. 1998) (implied covenant cannot be used to expand or override contractual duties in a manner that conflicts with contract provisions). *See Jarvis v. United States*, 43 Fed.Cl. 529, 534 (1999) (implied duties of good faith and fair dealing do not form the basis for entirely new contract terms, particularly where those terms are inconsistent with express terms in the agreement); *see also Alaska v. United States*, 35 Fed.Cl. 685, 704 (1996), *aff'd*, 119 F.3d 16 (Fed.Cir.1997) (implied duties of good faith and fair dealing must attach to a specific substantive obligation, mutually assented to by the parties).

In contrast, DSCI's assertion that the Contract was "nominally an IDIQ contract," and that DSCI reasonably expected that task orders would be issued throughout the five-year term of the Contract, DSCI Post Hrg. Subm. at 84, FN 44, ignores the plain language of the Contract and, in contravention of *North Star* and the cases cited therein, attempts to expand the Center's contractual obligations. Essentially, DSCI is alleging a breach of the implied duty of good faith and fair dealing with respect to a contractual obligation *that simply does not exist*. DSCI's attempts to utilize the language describing the Contract's duration in support of its position are unavailing. The fact that the Contract states it "shall continue in effect for 60 months dependent on funding received," FF 9, does not mean, when read in the context of the entire Contract, that the FAA was required to

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continue to order services “so long as the requirement and funding exist” and that orders for work will continue for the entire contract period of 60 months unless there are “funding problems,” as was believed by Ms. Hopkins’ sister, Ms. Barnard. FF 8. The ODRA rejects DSCI’s assertion that the phrase “dependent on funding received” created a contractual commitment tied solely to funding availability.

DSCI’s interpretation of the Center’s contractual obligation is neither consistent with the express terms of the Contract, nor with DSCI’s admission of the IDIQ nature of the Contract. FFs 8, 11, 26 and 27. DSCI’s position also is contrary to the elementary rule of contract interpretation that “all parts of a contract must be read together and harmonized if at all possible.” *United Pacif. Ins. Co. v. United States*, 204 Ct. Cl. 686, 691-92, 497 F.2d 1402, 1405 (1974); *see also Protest of Johnson Controls Security Systems, LLC*, 05-ODRA-00360. “When a contract is set forth in writing, it is the entire writing which embodies the agreement of the parties, not individual sections or clauses.” JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* (3d ed.1995) at 156. *See also Mason v. United States*, 222 Ct. Cl. 435, 445, 615 F.2d 1343, 1348, *cert. denied*, 449 U.S. 830, 101 S.Ct. 98, 66 Ed.2d 35 (1980) (contractor interpretation of clause was incompatible with other clauses and would have rendered the Guaranteed Minimum Quantity clause superfluous). It also is axiomatic that general language in a contract cannot be interpreted to override and materially change express and explicit language that defines the fundamental nature of the contract. *Petchem, Inc.*, ASBCA No. 52362 *et al.*, 01-2 BCA ¶31,656.

DSCI’s interpretation would render the guaranteed minimum amount stated in the Contract at clause F.1 superfluous, and would conflict with the language of Section 3.2.4-20, Indefinite Quantity Clause. FF 27. *See Park Vill. Apartments v. United States*, 25 Cl.Ct. 729, 733 (1992) (unambiguous terms of the contract, not the unilateral beliefs of one of the parties, define the parties’ respective obligations). DSCI’s interpretation is unreasonable because it would change the fundamental nature of the IDIQ Contract by converting it into a requirements-type contract, a cardinal change which would require a

new competition. *See Krygoski Construction Company, Inc. v. United States*, 94 F.3d 1537, 1543 (Fed. Cir. 1996). Moreover, DSCI's interpretation potentially could render the Contract illegal, as an agency generally cannot commit funding for future fiscal years in advance of an appropriation. The Antideficiency Act, 31 U.S.C. §1341, prohibits government officials and employees from making expenditures or incurring obligations in excess of available appropriations or in advance of existing appropriations.

The ODRA concludes that the Contract contained no express or implied terms that required the Center to order work from DSCI in excess of the stated minimum requirement.<sup>20</sup>

## 2. The Applicable Standard and Burden of Proof

In contract disputes, the burden of proof generally lies with the claimant, who must prove the case by a preponderance of the evidence. *Contract Dispute of Strand Hunt*, 99-ODRA-00142, citing *E. Avico, Inc.*, 00-ODRA-00149. In cases involving claims of bad faith actions of government officials, however, the claimant is held to a higher standard of proof. It long has been recognized that public officials are presumed to act in good faith, or "conscientiously in the discharge of their duties." *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976) (quoting *Librach v. United States*, 147 Ct. Cl. 605,

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<sup>20</sup> DSCI's Post-Hearing Submission raises for the first time the allegation that the Center also breached its duty to cooperate with and not hinder the performance of DSCI. The implied duty of cooperation and noninterference is inherent in any contract. *Renda Marine, Inc. v. United States*, 66 Fed.Cl. 639 (Fed.Cl.2005). In order to prove a breach of the duty to cooperate and not hinder performance, a claimant normally has the burden of showing that the breach affected an implied or express term of the contract resulting in a *constructive change* in performance of the ordered work. *Strand Hunt*, *supra*, citing *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 2000-1 BCA ¶ 30,826, quoting from *J.A. Jones Construction Co.*, ASBCA No. 43344, 96-2 BCA ¶ 28,517 at 142,420. DSCI's breach claim, however, is not based on factual allegations that Government actions changed the *performance* of the work ordered, *e.g.*, changed its level of difficulty, the manner in which it was performed, or increased its cost. *See George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947). Rather, DSCI's claim is based on allegations that animus and ill-will harbored by contracting officials reduced the quantity of work that DSCI expected would be ordered under the Contract. The record in this case does not support an action based on the breach of the duty to cooperate and not hinder performance. Therefore, the ODRA finds as a matter of law that to the extent DSCI is alleging a breach of the duty to cooperate and not hinder performance, that claim summarily should be denied.

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612 (1959)); *United States v. Gleason*, 175 U.S. 588, 607 (1900) (“required, in absence of evidence of bad faith . . . to presume that [the official] acted with due regard to his duty”). See also *Galen Medical Associates, Inc. v. U.S.*, 369 F.3d 1324 (May 25, 2004) (presumption that Government officials act in good faith can only be overcome by “almost irrefragable proof” which amounts to clear and convincing evidence of specific intent to do harm); *The Libertatia Assocs., Inc. v. United States*, 46 Fed. Cl. 702, 707 (2000).

In this case, DSCI asserts that there should be no presumption that government officials act in good faith in the performance of their duties and that the “well nigh irrefragable” burden of proof standard should be abandoned in favor of the standard articulated in *Tecom, Inc. v. United States*, 66 Fed. Cl. 736 (2005). DSCI Post Hrg. Subm. at 86. In opposing DSCI’s position, the Center relies on the analysis in *Royalea’L Aviation Consultants, supra*, and long-standing court precedent which recognize that government officials are presumed to act in good faith and that a “party alleging bad faith on the part of the Government must ordinarily come forward with ‘well nigh irrefragable’ proof in order to rebut the presumption.” See *Royalea’L Aviation Consultants, supra*. The Center cites to recent cases by the Court of Federal Claims, issued after *Tecom*, that have continued to acknowledge the validity of the presumption. Center Post Hrg. Subm. at 54-55, citing *United Enterprise & Associates v. U.S.*, 70 Fed. Cl. 1, 24 (March 21, 2006) and cases cited therein; *North Star Alaska Housing Corp. v. U.S.*, *supra*; *Textron, Inc. v. U.S.*, 74 Fed. Cl. 277 (November 17, 2006); *Comprehensive Health Services, Inc. v. United States*, 70 Fed. Cl. 700 (May 31, 2006); *System Fuels, Inc. v. United States*, 66 Fed. Cl. 722 (July 29, 2005).

In *North Star*, a case heavily relied on by DSCI, the standard was articulated as follows:

When a contractor alleges bad faith, in order “to overcome the presumption of good faith, . . . the proof must be almost irrefragable.” *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1323 n. 2 (Fed. Cir. 2003). Translated into more common parlance, “well nigh irrefragable proof” has been described as “clear and convincing evidence.”

*Am-Pro Protective Agency, Inc. v. United States* 281 F.3d 1234, 1239-40 (Fed Cir. 2002). “In the cases where the court has considered allegations of bad faith, the necessary ‘irrefragable proof’ has been equated with evidence of some *specific intent to injure the plaintiff*.” *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756, 770 (1982) (emphasis in original); *see also Galen Med. Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir.2004); *Librach v. United States*, 147 Ct. Cl. 605, 614 (1959); *cf. Tecom, Inc. v. United States*, 66 Fed.Cl. 736, 757-72 (2005). Courts have found bad faith when confronted by a course of government conduct that was “designedly oppressive,” *Struck Const. Co. v. United States*, 96 Ct. Cl. 186, 222, 1942 WL 4411 (1942), or that “initiated a conspiracy” to “get rid” of a contractor, *Knotts v. United States*, 128 Ct. Cl.489, 121 F.Supp. 630, 636 (1954).

*North Star, supra*, at 187-188.

In its analysis of the presumption of good faith, the Court in *North Star* also recognized the significance of regulations prescribing standards of conduct for government officials, and quoted from the Federal Acquisition Regulations at §1.602-2 that “[c]ontracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract and safeguarding the interests of the United States and its contractual relationships.” *Northstar* at 209. Similarly, the presumption of good faith comports with AMS requirements and standards of conduct for FAA officials, set forth in the FAA Toolbox, *T3.1.3 Fundamental Principles (Revision 1, October 2005)*. This section states “[t]ransactions relating to the expenditure of funds require the highest degree of public trust and an impeccable standard of conduct” and “[t]he general rule is to strictly avoid any conflict of interest or even the appearance of a conflict of interest in FAA contractor relationships.” The FAA Toolbox, *T3.1.3* also requires compliance with 5 C.F.R. 2635, Standards of Ethical Conduct for Employees of the Executive Branch, and 18 U.S.C. 201-209, 216.<sup>21</sup>

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<sup>21</sup> Section 2635.106 of the Regulation provides among other things that “a violation may be cause for appropriate corrective or disciplinary action” and “does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person.” This includes allegations that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex, national origin, age, or handicap. 5 C.F.R. Part 2635.106(c).



In the ODRA's view, the good faith presumption, and the clear and convincing standard of proof required to rebut it, are grounded in sound public policy, and *Tecom* notwithstanding, are supported by strong and well-settled legal precedent. The ODRA therefore declines DSCI's invitation to do away with the presumption of good faith conduct of government officials. *See Tecom* 66 Fed. Cl. at 769, 771. Rather, the ODRA continues to follow the standard as articulated in *Royalea'L*, *supra*, and the ODRA Decision Denying the Center's Motion to Dismiss in this case, dated August 23, 2005, *i.e.*, proof of bad faith "egregious conduct" requires a clear and convincing showing of "some specific intent to injure the contractor or a showing of malice or conspiracy," a standard which is consistent with recent decisions of the Court of Federal Claims.<sup>22</sup> *United Enterprise & Associates*, *supra*; *North Star Alaska Housing Corp.*, *supra*; *Textron, Inc.*, *supra*; *Comprehensive Health Services, Inc.*, *supra*; *System Fuels, Inc.*, *supra*.

#### **D. The Parties' Allegations Regarding Bad Faith**

DSCI argues that the evidence produced in discovery demonstrates that the Agency breached its obligation to DSCI to administer the Contract in good faith. DSCI Post Hrg. Subm. at 3. DSCI asserts that Center employees, and in particular, Mr. Virga, expressed their intent to harm DSCI, and that hostility and ill will toward DSCI was known within the relevant FAA organizations. DSCI further asserts Mr. Virga took numerous actions to effectuate his intent to injure DSCI, and DSCI suffered harm traceable to and explained by his actions. DSCI Post Hrg. Subm. at 3 and 94. DSCI also alleges that FAA officials had full knowledge of these actions, but "turned a blind eye and took no effective or otherwise proper corrective action." *Id.* at 3. DSCI contends that the hearing testimony supports these claims, and specifically, that the testimony of Ms. Marinaro

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<sup>22</sup> Decisions of the Court of Federal Claims, as well as those of the Boards of Contract Appeals and the Government Accountability Office, are not binding on the FAA; however, they may be viewed as "persuasive authority." *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated).

confirmed that the Contracting Officer “exercised little or no independent judgment or authority” and “simply bowed to the demands and wishes of Mr. Virga and others.” *Id.* at 4. In sum, DSCI argues that “[a]lthough not all of the government actors share the same degree of culpability, the Agency as a whole is culpable in the extreme,” and that the alleged bad faith actions affected every aspect of the Contract’s administration. *Id.* at 104-105.

The Center responds that DSCI’s claim is based on speculative beliefs and extra-contractual expectations which are unsubstantiated and without merit. Center Post Hrg. Subm. at 1. The Center further argues that its administration of the Contract was based on “rational, legitimate business reasons” which are supported by testimony “as well as the wealth of documents that were prepared contemporaneously with the occurrence of the actions.” *Id.* As for the alleged hostility of Mr. Virga and others, the Center asserts that these allegations reflect a “vendetta” harbored by DSCI which arose after the appointment of Mr. Virga and was in response to his “by-the-book commitment to his work.” *Id.* at 3. In this regard, the Center contends that DSCI senior management mistakenly expected that DSCI was entitled to all work that fell within the SOW and “believed that they had a seat at the table where program decisions were made and were privileged to determine the requirements of the Agency.” *Id.* The Center further contends that DSCI wrongly believed that “close personal relationships with government personnel would insure their continued receipt of delivery orders and additional work” and that the identification and correction of problems in the administration of the Contract was “tantamount to bad faith.” *Id.*

#### **E. Credibility of the Hearing Witnesses**

Nine witnesses testified at the hearing over the course of three days.<sup>23</sup> *See ODRA Conference Memorandum*, dated November 8, 2006. The ODRA had granted DSCI’s

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<sup>23</sup> The witnesses were chosen by the respective parties and the parties confirmed prior to the conclusion of the hearing that there were no other witnesses that they wished to call. FF 228.

request for a hearing, finding that credibility determinations might be required. Among those who testified, DSCI specifically challenges the credibility of Mr. Virga, Mr. Thoma, Ms. Marinaro, Mr. Hanlin and Mr. Emerick. DSCI Post Hrg. Subm. at 9-27. The Center challenges the credibility of Ms. Hopkins and her sister, Ms. Barnard, especially with respect to their allegations of hostility and personal animus on the part of FAA officials. Center Post Hrg. Subm. at 6 – 11.

1. Michael Virga

DSCI's allegations of malice chiefly center on one person, Mr. Virga, who served as COTR on the DSCI Contract from May 1, 2003 to June 2, 2004. FF 53. DSCI asserts that Mr. Virga "demonstrated through his testimony numerous and significant credibility issues to such an extent that no weight should be given to his testimony or statements in defense of DSCI's claims." DSCI Post Hrg. Subm. at 9. DSCI challenges Mr. Virga's actions with respect to Task Order 6 as evidencing an overall lack of credibility. Specifically, DSCI points to an alleged "transfer of work" from DSCI to another company, [DELETED]. DSCI Post Hrg. Subm. at 12-13. The Center responds to DSCI's attacks on Mr. Virga's credibility by highlighting what it views as extreme distortions of fact by DSCI. Center Post Hrg. Subm. at 28-32.

Based on his demeanor at the hearing, as well as his testimony, which the ODRA finds to be consistent overall with the contemporaneous record, the ODRA finds Mr. Virga to be a competent and credible witness, with specific and detailed knowledge about the facts in dispute. The ODRA accepts as truthful Mr. Virga's testimony that he never confronted Ms. Hopkins or told her "nobody wants to work with you. I want to turn your lights out." March 13, 2007 Hrg. Tr. 89:22-90:16; 254:15-255:5. As discussed further herein, Mr. Virga's testimony on this point is consistent with the credible testimony of other witnesses, as well as the contemporaneous record, which show that Mr. Virga properly performed his duties as COTR in an arm's-length professional manner, making reasonable interpretations of contract provisions and objective, fact-based assessments of

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DSCI's performance. In fact, the record demonstrates that Mr. Virga attempted to facilitate DSCI's continuation of work under the Contract, FFs 85 and 162, and that more than \$2.9 Million of work was tasked to DSCI under the Contract during the time he served as COTR. FF 173.

[DELETED]

DSCI also questions Mr. Virga's "purported memory lapses" and inability to recall the substance of his meeting with the Workplace Investigator, Ms. Williams. DSCI compares Mr. Virga's testimony in this regard with a statement that was actually authored by Mr. Tran in a formal complaint to the DOT-IG. DSCI Post Hrg. Subm. at 16. Although DSCI suggests that Mr. Virga should have remembered the meeting because it caused him a "great deal of anxiety," the record shows that the pertinent part of the statement was actually authored by Mr. Tran, who wrote:

In my opinion, these allegations [made against us] were unfounded, not substantiated and amounted to hearsay. However, as a result of this "investigation," Mr. Virga and I were subjected to gossip and rumors in the workplace thus undermining our effectiveness as well as generating a great deal of anxiety.

DSCI Hrg. Exh. D15.

DSCI also suggests that Mr. Virga's testimony that he received contract documentation in a "dumpster" demonstrates his lack of credibility. However, Mr. Virga testified that the "dumpster" in question was actually a plastic recycling container. March 14, 2007 Hrg. Tr. 228:16-24. In any event, Mr. Virga's testimony in this regard was uncontradicted.

In sum, with respect to material matters relevant to the issue of alleged malice and bad faith, the ODRA finds Mr. Virga's testimony to be credible.

2. Susan Hopkins and Lori Barnard

The Center challenges the credibility of Ms. Hopkins by identifying statements she made which allegedly demonstrate a lack of integrity and extreme personal animus directed toward FAA officials, particularly Mr. Virga. Center Post Hrg. Subm. at 6-12. Based on Ms. Hopkins demeanor at the hearing, the ODRA considers her testimony to be unreliable, self serving and speculative with respect to the alleged bad faith motives and actions of Mr. Virga and other FAA officials.

Ms. Hopkins admitted to her bias and lack of objectivity concerning Mr. Virga. FF 174. The record further reflects that Ms. Hopkins expressed hostility toward Mr. Virga and Mr. Tran. FFs 175, 176 and 177. Moreover, Ms. Hopkins' testimony as to why she believed FAA officials took certain actions was speculative and based in large part on second hand information, some of which came from unidentified sources. For example, Ms. Hopkins testified that there were "a lot of discussions in the hallways, a lot of people saying [Mr. Virga was] saying a lot of bad things" about DSCI. March 13, 2007 Hr. Tr. 51:11-16. Ms. Hopkins also recounts one of her early encounters with Mr. Virga when she met him in a hallway, and "his whole body tightened up" and she assumed his body language was the result of animosity towards DSCI. March 13, 2007 52:9-24. Such testimony does not substitute for objective, credible evidence of malice.

Ms. Hopkins also testified that Mr. Virga told her "nobody wants to work with you. I want to turn your lights out." March 13, 2007 Hrg. Tr. 89:22-90:16. This testimony is not corroborated. At the hearing, Mr. Virga denied that he ever confronted Ms. Hopkins or made such statements. March 14, 2007 Hrg. Tr. 254:15-255:5. The ODRA finds Ms. Hopkins' testimony regarding Mr. Virga to be inconsistent with the objective facts regarding the administration of the Contract during Mr. Virga's tenure. During the period when Mr. Virga was COTR, the Center obligated an additional \$2,950,003.01 of work under the Contract to DSCI, FF 173, and the performance periods for all task orders ongoing when Mr. Virga was appointed COTR, were extended and performance

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continued thereunder. Furthermore, the record shows that Mr. Virga revised the SOW under Task Order 1 to allow DSCI's administrative staff to perform work in compliance with the Contract's scope, and that he worked diligently with others to find a way to allow DSCI to continue its TSL work under Task Order 8. FFs 78-85, 162. Finally, no DSCI task orders were terminated while Mr. Virga was the COTR on the Contract.

Ms. Barnard's testimony also lacks credibility. FFs 48 and 175. She demonstrated a lack of understanding with respect to the IDIQ nature of the Contract, believing that DSCI was contractually entitled to have task orders issued to it for the entire 60 month period as long as there was funding available. FF 8. Ms. Barnard also demonstrated a lack of understanding with respect to the restriction on personal services work performed by the administrative assistants under Task Order 1.<sup>24</sup> For example, Ms. Barnard wrongly believed that the work involved was not personal services because the administrative assistants under Task Order 1 did not support an *individual* person, but rather supported AOS' general administrative needs, *i.e.*, "they supported a group, and that group was in the process of implementing process improvement into their workload." She believed that the Contract contemplated administrative support such as taking meeting minutes, arranging travel, collecting time cards, and ordering supplies. March 15, 2007 136:1-139:24; 139:15-25.

### 3. Richard Thoma

[DELETED]

DSCI also challenges Mr. Thoma's credibility based on an alleged request by him to Ms. Williams that she exclude Ms. Hopkins' comments from her report. DSCI Post Hrg. Sub. at 16. Mr. Thoma, however, flatly denied that he instructed Ms. Williams to remove

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<sup>24</sup> In Federal government contracts, personal services contracts generally are prohibited because they create an employer-employee relationship through continuous Government supervision of contractor employees. *See, e.g.*, AMS §3.8.2.3.2, FAA Toolbox T3.8.2 and Federal Acquisition Regulation §37.104

information obtained from Ms. Hopkins from a report that she presented to him. March 14, 2007 Hrg. Tr. 279:8-21. Rather, the record shows Mr. Thoma was critical of Ms. Williams' report, as he believed it contained hearsay, *Id.* at 280:22-24, and that, in his opinion, "[t]he report focused less on what the original tasking was ... and more about gathering information from anyone willing to talk about what was going on at the Tech Center, and it involved lots of people and lots of complaining about a lot of people." *Id.* at 281:1-15; DSCI Hrg. Exh. A25.

The ODRA finds Mr. Thoma to be a credible and objective witness, whose material testimony was consistent with the testimony of other credible witnesses, as well as the contemporaneous record.

4. Anna Marinaro

DSCI asserts that Ms. Marinaro evidenced "an apparent inability or unwillingness independently to assess and to report facts completely and forthrightly" and was afraid to express disagreement or inconsistency with Mr. Virga or any aspect of the Agency's defense of this dispute. DSCI Post Hrg. Subm. at 9 - 10.

Notwithstanding DSCI's assertions regarding her credibility, the contemporaneous record confirms Ms. Marinaro's testimony that she had issues with the performance of the two prior COTRs, Donna DiPasquale and Ms. Schuman, and addressed them. DSCI Hrg. Exh. B85. In particular, Ms. Marinaro testified that the SOW documentation that had been prepared by Ms. Schuman while she was the COTR was deficient. March 14, 2007 Hrg. Tr. 75:2-22, 76:22-25, 78:15-17, 82:19-24; FF 72, 75, 195. *See* DSCI Hrg. Exh. B85 (describing work product as "either incorrect, deficient, and fragmented" and criticizing the independent government estimate as having been prepared by DSCI); *see also* FF 195. Most importantly, it was Ms. Marinaro who first requested that Ms. Schuman be replaced as COTR because of concerns about her lack of objectivity towards DSCI. FF 168; DSCI Hrg. Exh. B85.

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Ms. Marinaro's opinion that Mr. Virga performed well as COTR was consistent with the testimony of other witnesses about Mr. Virga's performance and with contemporaneous documents. For example, a comparison of the task orders in the record that were issued under Ms. Schuman as compared to those issued under Mr. Virga show Mr. Virga's task orders to be much more specific, especially with respect to deliverables. *Compare* SOWs contained in DSCI Hrg. Exh. B2, Tab A, issued before Mr. Virga's appointment as COTR, with those issued by him, *e.g.*, Revision 22.

DSCI further alleges that Ms. Marinaro was not forthcoming with respect to Mr. Virga's behavior during a program review meeting on April 15, 2003 when he allegedly lost his temper and criticized DSCI and its performance. DSCI Post Hrg. Subm. at 20. Ms. Marinaro's view of the meeting does not confirm DSCI's account. In Ms. Marinaro's opinion, the meeting was not "out of control, ugly and hostile." *Compare* DSCI Post Hrg. Subm. at 20-21 (*citing* DSCI Hrg. Exh. A30) with Center Hrg. Exh. 44. The ODRA accepts as credible Ms. Marinaro's statements that she viewed the discussions at the meeting to reflect the fact that the program office was still working out internal issues with respect to the nomination of a COTR, including whether there was a need for the COTR to have a security clearance. This perspective is consistent with the contemporaneous record which shows that Mr. Virga had not yet officially been appointed as COTR. FF 53. According to Ms. Marinaro, "they were attacking him about the secret clearance" and "he's a human being, but he didn't jump up and act crazy" but "dealt with it as best he could." March 14, 2007 Hrg. Tr. 17:1-21:25; 23:1-25:15; 115:7-9.

As for her treatment of DSCI's complaints and lobbying against Mr. Virga, the ODRA finds Ms. Marinaro acted reasonably and responsibly. When she received an unsigned "unofficial letter" from DSCI complaining about Mr. Virga, she consulted with counsel, advised DSCI of her decision not to replace Mr. Virga in an official signed letter, and wrote a memo for the record. At the hearing, she credibly explained that her response



was based on her personal knowledge of how Mr. Virga was operating as COTR and that she was satisfied he was doing the job. March 14, 2007 Hrg. Tr. 136:8-139; DSCI Hrg. Exhs. A64 and C7.

Ms. Marinaro's actions were in accordance with her responsibilities as Contracting Officer to secure assistance from legal and other advisors as well as to consult with other contracting officials. In this regard, there is "no implied prohibition" against the contracting officer first obtaining and agreeing with the views of others. *North Star, supra*, at 209, quoting from *Pacific Architects & Eng'rs, Inc. v. United States*, 203 Ct.Cl. 499, 491 F.2d 734, 744 (1974); see also *J.A. Terteling & Sons, Inc. v. United States*, 182 Ct. Cl. 691, 390 F.2d 926, 927 (1968); *Jacob Schlesinger, Inc. v. United States*, 94 Ct. Cl. 289, 307 (1941).

The ODRA finds Ms. Marinaro's testimony to be consistent with the contemporaneous Contract record, as well as with credible testimony of other witnesses. The contemporaneous record shows that Ms. Marinaro appropriately exercised independent judgment and authority concerning the task orders at issue. See, e.g., FFs 76, 83, 84, 87, 151 and 168.

5. Bernard Hanlin

DSCI asserts that the hearing testimony of Mr. Hanlin demonstrated that little or no weight should be given to his declaration, which the Agency previously submitted to the ODRA in these proceedings. DSCI Post Hrg. Subm. at 9. The Center responds that Mr. Hanlin's hearing testimony actually bolstered his declaration statements, particularly with respect to his concerns about Ms. Schuman's conduct as COTR. Center Post Hrg. Subm. at 38.

Based on the testimony of Mr. Hanlin and his demeanor, the ODRA finds him to be a straightforward and credible witness whose testimony is consistent with the record in this

case, as well as the credible testimony of others. His concern that Ms. Schuman was inappropriately close to Ms. Hopkins is consistent with the evidence in the record, including the Contracting Officer's concerns about Schuman's objectivity and Ms. Hopkins' own admission that she and Ms. Schuman were too friendly. FFs 52, 60, 194-198, and 212. The record indicates that Mr. Hanlin conferred with Mr. Tran as to the nomination of Mr. Virga as COTR, and that they mutually agreed that Mr. Virga would be nominated. FF 168. Nothing in his testimony suggests that Mr. Hanlin was not credible about "mutually" deciding with Mr. Tran to nominate Mr. Virga. Moreover, there was no obligation for Mr. Hanlin to consider DSCI's preferences in the matter. March 14, 2007 Hrg. Tr. 231:9-232:4; 231:22-231:24. The ODRA finds Mr. Hanlin to have been a forthright and completely credible witness.

6. Dennis Emerick

DSCI argues that Mr. Emerick's testimony should be given little or no weight because of purported inconsistencies between his declarations and hearing testimony. DSCI Post Hrg. Subm. at 9. DSCI asserts that Mr. Emerick's declarations "portray much of the SCAP work during the relevant period as managed" by Mr. Carver and this conflicts with Mr. Tran's making the decisions as to the placement of SCAP work. This would not detract from Mr. Emerick's credibility since Mr. Tran was Mr. Carver's supervisor. FF 93.

Also, there is no merit to DSCI's argument that Mr. Emerick's credibility is subject to question due to the fact that a CTA employee lacked a Secret Clearance and Mr. Emerick lacked knowledge about Presidential Directive PDD-63 ("PDD-63") regarding the need for Secret Clearances. DSCI was not the only contractor performing SCAP work. FF 109; Center Hrg. Exh. 172. Whether another individual providing support services to AOS under an *entirely different contract* has a Secret Clearance, and whether that individual was required to have a Secret Clearance under PDD-63, has no bearing on Mr. Emerick's credibility. The ODRA will not speculate that, as DSCI argues, Mr. Emerick

intentionally was “telling only part of the story.” Based on Mr. Emerick’s demeanor and the directness of his testimony, the ODRA concludes that Mr. Emerick is a credible and reliable witness.

**F. The Actions and Activities of DSCI and Ms. Schuman**

**1. DSCI was Closely Involved With Center Operations**

The record shows Ms. Hopkins had close personal and professional ties with Center operations, as a contractor, volunteer, and member of the close-knit Center community. FFs 46, 51, 65, 196-200, and 212. *See also* March 13, 2007 Hrg. Tr. 126:11-18. During the time prior to the award of the Contract, Ms. Hopkins participated in the development of the FAA’s iCMM Version 1. FF 46. DSCI also provided CMM support under other contract vehicles. FF 46. In fact, the language of the Contract’s SOW under Section C.2.1.2. specifies that the contractor shall apply the techniques and methodologies currently used by the DSR ISMT iCMM to support process improvement and implementation efforts. This reference to “techniques and methodologies” refers in part to efforts which were supported by DSCI under a separate contract. FFs 20, FN 4 and FF 46. DSCI was the only bidder in the competition that led to the award of the Contract. FF 1.

**2. DSCI Developed Inappropriately Close Relationships to Center Personnel, Particularly Ms. Schuman**

The record shows that Ms. Hopkins had an inappropriately close relationship with COTR Ms. Schuman, who served as the second COTR under the Contract. Ms. Schuman had worked with Ms. Hopkins in Air Traffic Control before Ms. Hopkins left CSC in 1995. FF 51. Ms. Schuman also was involved in the Contract in its earliest stages, helping to draft the Contract language with respect to security issues, and she served on the Technical Evaluation Panel that recommended DSCI for award. FF 51.

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Ms. Hopkins had a high opinion of Ms. Schuman and they were good friends. FFs 194 and 196. They socialized together, worked together, and even traveled together. FFs 196 and 212. This was also the case with Ms. Bercher, who traveled with Ms. Hopkins to Hawaii and Guam, and socialized with both Ms. Hopkins and Ms. Schuman. FFs 65 and 117. It was Mr. Schuman, as a manager in AOS, who had approved the trip to Hawaii and Guam taken by Ms. Hopkins and Ms. Bercher. FF 65.

Ms. Hopkins believes that her close friendship with Ms. Schuman resulted in heightened scrutiny of DSCI. FF 194. Ms. Schuman spent a significant amount of time at DSCI facilities, so much so that it raised concerns on the part of Mr. Hanlin, her supervisor, who directed Ms. Schuman to spend more time at the Center. FF 197. Also, with respect to the allegations made in, and prosecution of, the contract dispute, Ms. Hopkins and Ms. Schuman, among others, coordinated and shared information. FFs 199 and 200. DSCI also had a contractual relationship with a company that employed Ms. Schuman's husband after he retired as a Division Manager in AOS. FF 51. It was Ms. Schuman's husband who first introduced Ms. Hopkins to Mr. Thoma in August of 2003, when they met to discuss DSCI's complaints about Mr. Virga and Mr. Tran. FF 183.

While serving as COTR, Ms. Schuman attempted to add additional labor categories to the Contract for secretarial support categories, which later were determined by the Contracting Officer to be personal services and outside of scope of the Contract. FFs 72, 74-75, and 76-87. Ms. Schuman also sought to prevent Mr. Virga from replacing her as COTR as soon as he was identified to be her successor by her supervisor, Mr. Hanlin and Mr. Tran. FF 95. She immediately raised the issue about his not having a security clearance to the Contracting Officer, FF 95 – 96, notwithstanding the fact that the SCAP office does not normally come into contact with "classified" information that would require a security clearance. FF 94.

As COTR, Ms. Schuman was involved in the establishment of a Special Test Facility under Task Order 7 issued to DSCI. FF 137. Notably, the Contract already required

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DSCI to maintain a secure facility where offsite security work could be performed. Testimony at the hearing indicated that such costs were included in DSCI's overhead, and included employing a facility security officer, maintaining secret clearances of personnel, providing necessary training and reporting, maintaining a special alarm system and segregating computer networks. FF 18, FN 3.

The record shows that months before the Contracting Officer learned of the plans for a secured facility, DSCI was actively seeking, on behalf of the FAA, "long term leasing" of office space to "accommodate up to 50 DSCI employees and up to 100 FAA personnel." FF 134. In fact, it was DSCI that first advised the Contracting Officer of the FAA's need for a secured facility. FF 135. Moreover, in support of this effort, Ms. Schuman prepared an Independent Government Cost Estimate ("IGCE"), which subsequently was challenged by the Contracting Officer as being identical in detail to DSCI's cost proposal, as well as unjustified and potentially of interest to the DOT-IG. FF 195. In addition, the initial draft of the task order contained four tasks, with tasks 3 and 4 involving the operation and maintenance of the test facility and "Technical Support for the AOS Special Test Facility to provide prototype testing of ISS development in support of the NAS operational systems." FF 138. Subsequently, the scope was reduced to two tasks (planning, set-up, and installation of the facility). FF 139. Even so, the final version of the Task Order 7 maintained many of the original activities associated with the third and fourth tasks of the draft order by incorporating them in a section entitled "Technical Requirements." FF 141.

Following the issuance of the task order — which specifically obligated \$58,214.73 for labor and \$41,785.27 for other direct costs — DSCI proceeded to renovate its corporate office space to accommodate the special facility laboratory and incurred approximately \$150,000 in infrastructure fit-up costs. FFs 139 and 143. Later, with the support and participation of Ms. Schuman, DSCI presented briefings to the Center as to how these facility costs were being absorbed by the Contract, and proposed to the Center other options for covering these costs, *e.g.*, a lease to include "janitorial services, utilities, snow

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removal, building maintenance, etc.” FF 144. The DOT-IG found in this regard, despite the lack of a written agreement pertaining to the facility’s continued operations, “the actions of several FAA employees gave DSCI the ‘impression’ that the lab was to remain operational” and terms were negotiated for billing the FAA until the lab was disassembled. FF 218. Notably, during the time when Ms. Schuman was COTR, DSCI assisted AOS-21 with determining AOS-21’s security requirements and resulting budgetary requirements in the ISS area. FF 92.

The close relationship of Ms. Schuman and DSCI is reflected in the events of April of 2003, when Ms. Schuman was told by her supervisor to work more at the Center than at DSCI. She responded that she needed to work with her “team at DSCI to do SCAP” work and that although she was no longer COTR on the DSCI Contract, she would still be the SCAP Lead for AOS and would “handle the \$\$.” FF 100. A few months later, responsibility for all SCAP activities and funding was transferred to FAA Headquarters. FF 105. Headquarters subsequently established new directives on systems that would be SCAP’ed, moving most of the work outside of the AOS-300 area of responsibility. FF 109. By that point, Ms. Schuman had made a decision “not to be involved with this contract at all.” FF 106.

### 3. DSCI was Biased Against Mr. Virga and Actively Lobbied Against His Appointment and for his Removal as COTR

The record shows that Ms. Hopkins did not consider Mr. Virga to be a “nice person” and actively lobbied against Mr. Virga’s appointment and retention as COTR. FFs 95 and 174. Ms. Hopkins has admitted that she was biased against him and could not view him objectively. FF 174. The alternative COTR, Cheryl Matthews, observed hostility directed toward Mr. Virga by Ms. Hopkins, as well as by Ms. Barnard. FF 175. At the hearing Ms. Hopkins described Mr. Virga, as well as Mr. Tran, as “out of control” and “doing the same nutsy stuff.” FF 176. [DELETED].

In an attempt to have Mr. Virga removed from the position of COTR, DSCI provided the Contracting Officer with an unsigned draft letter in July 2003, complaining about Mr. Virga. FF 181. After being informed by the Contracting Officer that she saw no reason to remove Mr. Virga as COTR, FF 182, Ms. Hopkins met with Mr. Thoma in August of 2003 to complain about Mr. Virga, as well as Mr. Virga's supervisor, Mr. Tran. Ms. Hopkins subsequently met with Mr. Tran to complain about Mr. Virga's alleged lack of objectivity and the need for his removal. FFs 185 and 187. [DELETED]

#### **G. Mr. Virga's Actions as COTR**

1. Mr. Virga was Appointed as COTR to Establish Appropriate Contract Administration and Compliance

Mr. Virga succeeded Ms. Schuman as COTR on the DSCI Contract on May 1, 2003. FF 53. His appointment as COTR came about after Mr. Hanlin approached Mr. Tran and recommended to Mr. Tran that Ms. Schuman be replaced by someone in AOS-20 due to concerns about her close relationship with DSCI. FFs 52 and 60. Months earlier, Ms. Marinaro also had raised concerns about Ms. Schuman's performance as COTR and asked that she be replaced. FF 168. Mr. Hanlin and Mr. Tran mutually agreed that Mr. Virga would be nominated as the new COTR to replace Ms. Schuman. FF 168. Few employees were available to assume the role of COTR, and even though Mr. Virga did not want the job, he accepted it. FF 169. DSCI has not demonstrated that the appointment of Mr. Virga as COTR was unjustified or motivated by bad faith.

Mr. Virga was viewed as technically very capable, hardworking and meticulous about his work duties. FF 171. As COTR, he was responsible for, *inter alia*, assuring compliance with the Contract's terms and conditions, interpreting the Contract specifications or technical requirements within the scope of the Contract, reviewing contractor performance of the technical requirements of the Contract, alerting the Contracting Officer as to any potential or existing problems, and maintaining an arms-length relationship with the contractor. FF 50. The Contracting Officer was pleased with his

performance. FF 170. The Contracting Officer indicated that his performance was better than the performance of Ms. Schuman had been in terms of the quality of the SOWs, monitoring of Contract performance, and ensuring technical compliance with the Contract. FF 170. During his time as COTR, Mr. Virga appropriately addressed and resolved issues that arose under the task orders. *See* Discussion, Section H, *infra*, at 98 – 112.

2. Objective Facts Contradict DSCI's Unsupported Allegations

During the period when Mr. Virga was COTR, the Center obligated an additional \$2,950,003.01 of work under the Contract to DSCI. FF 173. The performance period was extended for those orders that were ongoing when Mr. Virga was appointed COTR. Furthermore, the record shows that in many instances, Mr. Virga assisted DSCI by finding a way for it to continue to provide services under the Contract. Finally, no work was “terminated” by Mr. Virga or anyone else while he was COTR. FF 40, 41, 42, 43 and 44.

By contrast, there is no doubt that animosity was directed toward Mr. Virga by DSCI, Ms. Schuman and Ms. Bercher. Because Mr. Virga represented a threat to the close relationship between Ms. Hopkins and Ms. Schuman, Mr. Virga was attacked by both DSCI and Ms. Schuman when he was identified to be Ms. Schuman's successor as COTR. FF 95. Mr. Virga continued to be attacked through the end of the Contract, with DSCI lobbying against Mr. Virga to his superiors. FF 181-188. In addition, he received several anonymous telephone calls from DSCI employees warning him about DSCI. FF 206. The ODRA concludes that Ms. Schuman raised the issue of the Secret Clearance as an obstacle to Mr. Virga's appointment as COTR. FF 211. Moreover, it was this very issue that precipitated the controversy which arose during the April 15, 2003 project review and led to Ms. Schuman's filing Equal Employment Opportunity and Hostile Work Environment complaints against Mr. Virga. FFs 211 and 69.



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Ms. Bercher also disliked Mr. Virga, calling him “rude” and “hostile.” She encouraged Agency employees to complain to Ms. Williams about the AOS-20 work environment. Bercher I Depo. 56:19-25; 57:1-23. Even so, Ms. Bercher admitted that she had never heard Mr. Virga say he would harm or take work away from DSCI, or make unprofessional remarks about Ms. Hopkins. Bercher I Depo. 18:6-11; 93:1-3. Ms. Bercher also admitted that when Mr. Virga questioned the technical quality of DSCI’s work, it was not personal in nature. Bercher I Depo. 44:7-8; 43:18-35; 44:1-6. Nor had Ms. Bercher heard Mr. Tran make negative comments about DSCI other than on technical points. *Id.* at 52:19-23. The DOT-IG Report found no correlation between the AOS Model Work Environment investigation results and the alleged misconduct by Mr. Virga concerning DSCI. FF 219. Nor did the DOT-IG find any wrongdoing on the part of Mr. Virga or anyone else at the Center related to DSCI. FF 221.

DSCI relies on *Libertatia Associates, Inc., v. United States, supra*, as supportive of its claim. Unlike the instant case, that case involved the termination of a requirements-type contract for default. In that case, the court found credible testimony given at trial provided adequate evidence of specific intent to injure the plaintiff. The testimony included an admission by the contracting officer’s representative (“COR”) that he told employees of the plaintiff that “they should think of him as ‘Jesus Christ’ and the ... [contracting officer] as ‘God’.” *Id.* at 707-708. The *Libertatia* Court also found evidence at trial of intimidation, coercion, animosity on the part of the COR, coupled with a failure on the part of the Contracting Officer to exercise independent judgment in administering the contract. Based on this evidence, the court found the termination for default improper, and converted it to a termination for convenience.

The ODRA finds the facts in the instant dispute to be in stark contrast with those in *Libertatia*. Besides the fact that the contract in *Libertatia* was not an IDIQ-type contract and imposed distinctly different legal obligations on the parties, in the instant case the record shows that none of the task orders at issue here were terminated by Mr. Virga or

anyone else. Rather, they ended according to their own terms. Moreover, the contemporaneous record and credible testimony show that here, unlike the situation presented in *Libertatia*, the Contracting Officer exercised independent judgment in administering the contract and raised concerns about Ms. Schuman's inappropriately close relationship to DSCI. Even if the ODRA were to assume that Mr. Virga did not have a warm feeling for DSCI — which would not be surprising given Ms. Hopkins' personal attacks on him before, during and after the time he assumed the role of COTR — DSCI has not established that any such feelings on Mr. Virga's part resulted in malicious Contract administration actions by Mr. Virga or the Center.

#### **H. The Administration of the Contract's Task Orders**

DSCI's allegations of breach of the duty of good faith focus on five task orders under the Contract. The administration of each of these is discussed below.

##### **1. Task Order 1**

According to DSCI, “[n]o stronger evidence of bad faith – indeed, complete and vindictive abdication of responsibilities toward a contractor – could be imagined” in connection with Task Order 1, which involved a determination that the work being performed by the Administrative Assistants was outside the scope of the Contract. DSCI Post Hrg. Subm. at 100. DSCI characterizes this determination as a “decision to terminate DSCI”. *Id.* In response, the Center asserts that its actions concerning Task Order 1 were taken as corrective action to prevent Center personnel from violating the restrictions on personal services contracting, and as such, were completely justified.

Task Order 1 supported Display System Replacement (“DSR”) work and included “administrative support.” FF 71. It was issued simultaneously with the Contract award on June 1, 2000. FF 35. It ended on May 31, 2005 with a cost ceiling of \$3,359,715.37. FF 42. During the course of performance of this Task Order, DSCI began providing

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secretarial support type services to AOS-300 under Section C.2.1.6, Work Area 6, Common Tasks, General Management/Administration. The Contract, however, did not encompass secretarial support tasks. FF 25. The record also shows that specific labor categories set forth in the Contract did not contain secretarial-type positions. FF 13. Nor did the SOW contemplate “secretarial support” in any way. FF 19.

Thus, it was appropriate for the Contracting Officer to question a request for secretarial support based on the above section. It also was appropriate for the Contracting Officer to be concerned that AOS-300 was improperly requesting personal services and to request clarification to determine whether the request was in accordance with the Contract.<sup>25</sup> FFs 74 and 76. Notably, Mr. Virga had initially approved the request, but cautioned that the services needed to qualify as “Administrative Assistance” under the Contract. FF 78. Mr. Virga investigated the issue further and learned that the support services at issue were outside the scope of the iCMM Contract, FFs 79-82, and included “clerical duties, office activities, administrative responsibilities, and automated application functions for the Branch Managers, Branch employees, and AOS Division as required.” FF 82. Based on this information, the Contracting Officer was concerned that out-of-scope work by administrative assistants would result in a “misappropriation of funds,” and instructed Mr. Virga to obtain further clarification of the nature of the services being provided by DSCI under this task order. FF 83. She also requested that Mr. Virga provide her with a “technical” recommendation in this regard. FF 84. Mr. Virga reported to the Contracting Officer that most of the administrative assistants did not support process improvement efforts, but rather general administrative assistance work for the branch. FF 84. Mr. Virga then revised the SOW, with the assistance of the managers, to include a deliverable that would fit under the scope of the Contract, *i.e.*, an AOS-300 Administrative Desk

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<sup>25</sup> See generally AMS §3.8.2.3.2 and the FAA Toolbox T3.8.2 Service Contracting regarding use of contract vehicles to establish what is tantamount to an employer-employee relationship between the FAA and the contractor’s personnel.

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Procedures manual. FF 85. The period of performance of the task order was scheduled to end on August 15, 2005, with the delivery of the desk procedures manual. FF 88.

DSCI objected to these actions and forwarded a letter to the Contracting Officer characterizing the expiration of the task order as a “termination” and questioning her determination that the administrative assistance support DSCI provided to AOS-300 Branch was outside the scope of the Contract. FF 86. The Contracting Officer responded by letter explaining that it was her intent to correct the problem of duties of administrative assistant positions migrating into general secretarial functions that were not specifically related to the scope or intent of the Contract. FF 87. In fact, the record shows that this work subsequently was continued by DSCI, as a subcontractor for TMA, the employer of Ms. Schuman’s husband, under the labor category of “clerk-typist.” FF 90.

DSCI has not demonstrated that the Center’s actions, and specifically those of Mr. Virga, taken in connection with the administrative assistance work under Task Order 1, were motivated by malice or intent to injure DSCI. Rather, the ODRA finds that these actions were appropriate and justified, as well as consistent with proper contract administration.

### 2. Task Order 5

Task Order 5 supported the AOS-20 ISS Risk Mitigation efforts. This included SCAP support which involves assessing the security risk/vulnerability of a system. FF 91. Task Order 5 was issued on September 18, 2000, FF 36, and ended by its terms on November 30, 2005 with a cost ceiling of \$8,930,776.93. FF 44.

DSCI argues that the failure to give DSCI additional SCAP work in Fiscal Year 2004 was “not on the basis of any rational or justifiable position but, rather, on the basis of Mr. Tran’s alleged decision to move work away from DSCI in the late summer of 2003, after DSCI voiced to Mr. Tran, Mr. Thoma, Ms. Marinaro, Ms. Deloney and others within the

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FAA its legitimate, specific concerns” about Mr. Virga. DSCI Post Hrg. Subm. at 98. The objective facts show otherwise. Circumstances changed during the Summer of 2003 with respect to funding for SCAP work due to the establishment of a new ISS Program Office at FAA Headquarters, which impacted the AOS-20 SCAP work. FF 104. At that time, all NAS SCAP activity began to be directed by a new office located at FAA Headquarters, instead of the individual divisions, *e.g.*, AOS-200, AOS-300 and AOS-500. Thus AOS-300 could no longer make its own determinations as to SCAP activities. FF 104. The previous SCAP work performed within AOS-20 using DSCI support during FY '03 was on nine AOS-300 Division systems, costing as much as \$300,000 per system. These SCAPs had been completed in September 2003 and did not require any additional work until after July 1, 2004. FF 108.

All new systems assigned by the new ISS Program Office to AOS-20 for a SCAP, with the exception of one system, were outside the AOS-300 area of responsibility. FF 109. Ms. Schuman’s replacement as AOS-20 SCAP lead for FY '04 was Dennis Emerick. At the time, AOS-20 assumed a quality assurance function for the SCAP work to ensure standardization of the documents produced by the various divisions. Mr. Emerick used four DSCI employees to support this effort, and continued to do so through September 30, 2005. FF 110. DSCI’s allegations regarding bad faith reduction in its SCAP work, ignore the fact that requirements under the Contract changed as a result of a new direction in Agency policy, funding priorities, and management structure. DSCI has failed to demonstrate that bad faith or malice was involved in the administration of the Contract with respect to its performance of SCAP work for AOS-300.

The record further shows that DSCI mistakenly or audaciously believed it had a role to play in AOS’s security requirements planning and budgeting process, and that those processes should have accommodated DSCI’s need for additional work. For example, before funding for FY '04 was established, DSCI provided an estimate to Mr. Tran of the cost to continue the support of three positions through December 2003, without identifying the Contract tasks and deliverables these positions would support. FF 107.

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*See also* FF 185. Ms. Hopkins also informed Mr. Thoma that DSCI needed funds committed by August 31, 2003, or else additional DSCI employees would be terminated. FF 186. At that time, Ms. Hopkins, in a memo to the file, noted that economic loss to DSCI over the prior four months represented 25% of the AOS-21 ISS effort “excluding DSCI’s typical annual growth mean of 20%.” FF 187. The record shows that the real harm came from DSCI’s unrealistic expectations about its role under the Contract and from the fact that 70 to 80% of DSCI’s total revenue was attributable to the SCAP work. March 15, 2007 Hrg. Tr., 153:15-154-3. The ODRA finds that DSCI wrongly believed that the Contract’s funding could be justified based on DSCI’s corporate financial needs, and its extra-contractual expectations of revenue growth, rather than the needs or management priorities of the Agency.

DSCI also attempts to prove bad faith by highlighting allegedly inconsistent treatment of the requirement for a Secret Clearance among contractor personnel supporting AOS, with the treatment of Mr. Virga, who lacked a Secret Clearance but served as COTR on an AOS support contract. DSCI’s Contract expressly required that its key personnel be cleared to Secret at the time of award, FF 29, even though the record shows that the SCAP office normally comes in contact with “sensitive security information” but not “classified” information that would require a Secret Clearance. FF 94. Even so, to address the possibility that classified information could be the subject of the Task Order, a Technical Officer Representative (“TOR”) with a Secret Clearance was delegated responsibility to review any technical matter that might require a Secret Clearance. FF 98. There is no basis for the ODRA to conclude that the appointment of a TOR was unreasonable. Moreover, even though Mr. Virga himself lacked a Security Clearance, it was not inconsistent with his duties as COTR to assist the Contracting Officer with her determination that DSCI employee, Mr. Davis, had to be removed from the Contract based upon his inability to obtain the proper clearance. FFs 112 and 113. The Contract required key employees to have a Secret Clearance at the time of award, FF 29, and Mr. Virga had the responsibility of ensuring that DSCI complied with this contract requirement. FF 50. DSCI has not demonstrated that Mr. Virga’s efforts in this regard

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were malicious or involved bad faith. In sum, the ODRA finds no unfair treatment, egregious conduct or malice on the part of any Center employee with respect to Task Order 5.<sup>26</sup>

### 3. Task Order 6

DSCI's argument on this point is more in the nature of a bid protest than a contract dispute. DSCI argues that Mr. Virga's tasking additional NOLSS/T&E Gold Standard work to another contractor rather than tasking it to DSCI was unjustified. DSCI Post Hrg. Subm. at 97. DSCI argues that the Task Order that was issued to CTA for the subject work was for \$349,270.02, which was more than the \$300,000 estimated for DSCI to do essentially the same tasks, and that the period of performance ran to March 29, 2002. DSCI Post Hrg. Subm. at 95-96. According to the Center, however, "DSCI did not understand the Agency's requirement and was unable to embrace the change that was occurring with NOLSS T&E Gold where the emphasis was on the standard and NOLSS was ending." Center Post Hrg. Subm. at 89. Task Order 6, which was issued on September 18, 2000 for NOLSS and later, Test and Evaluation ("T&E") Gold Standards Support, FF 37, ended on April 17, 2001 with a labor ceiling of 5479.9 hours and a cost ceiling of \$334,830.90. FF 40.

The SOW for this Task Order described the effort as providing operational laboratory suitability technical support and authorized travel as needed "e.g., trips to evaluate laboratories and contents for evaluation of applicability to FAA needs." FF 115.

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<sup>26</sup> DSCI also alleges that Mr. Tran unjustifiably tasked the work to another contractor who employed for the work a foreign national with no Security clearance. The record shows otherwise. The record shows that not all AOS contractor employees performing security related work were required to have a secret clearance. There is no evidence that the CTA employee, [DELETED], who was cited by DSCI as an example of improper contract administration, was required by CTA's contract to possess a secret security clearance. According to Mr. Emerick, he was not. FF 101. DSCI seeks review by the ODRA of whether Center management complied with Presidential Directive PDD-63 regarding protection of critical infrastructure, when it assigned an employee who lacked a secret clearance as COTR to a contract that required secret clearances for all its key labor positions, and delegated to another Center employee responsibility for reviewing any technical matter that required a secret clearance. FF 98. Such an issue is not relevant to a determination of a breach of the duty of good faith. The ODRA therefore will not address it here.

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Specifically, as to deliverables, they were to be “developed in concert with FAA personnel and delivered upon completion.” As for authorized travel under the SOW, it simply stated that “[a]ll travel will be subject to approval by COTR.” FF 116. Before Mr. Virga became lead on this task order, that position was held by Ms. Bercher, who was a friend of Ms. Hopkins. FF 65. In addition, she traveled to Guam and Hawaii with Ms. Hopkins and others in connection with this task order for approximately one month. FF 117. This trip, although approved by AOS manager Ed Schuman, raised concerns by AOS management. FF 117. On March 30, 2001, the Task Order was extended and funded through April 17, 2001. FF 118. During this time, Ms. Bercher worked on securing an additional year of funding from the program. FF 119. Not everyone considered DSCI’s work to be exemplary, as Ms. Bercher believed, Bercher II Depo. 82:19-84:20, Bercher II Depo. 51:12-52:4, and sometime in April 2001 AOS replaced Ms. Bercher with Mr. Virga as T&E Gold Lead, before Ms. Bercher could secure funding for DSCI for the next year’s effort. FFs 65, 119. Even Ms. Hopkins testified as to the improper appearances created as a result of the trip Ms. Bercher and Ms. Hopkins had taken to Guam and Hawaii. FF 117.

As Lead, Mr. Virga was tasked by the AOS management team to evaluate the T&E Gold Standard program. FF 122. Mr. Virga initially attempted to place the T&E Gold work under Task Order 6 with DSCI under the iCMM Contract and DSCI briefed him on the status of DSCI’s T&E Gold Standards on April 17, 2001. FFs 120 and 121. Mr. Virga concluded that DSCI was performing a laboratory suitability study, when what the FAA really needed a standard developed. Mr. Virga believed that the suitability study should be a by-product of the standard. FF 122. Mr. Virga discussed the follow-on work with DSCI based on a draft SOW which he had developed. As part of the requirements, Mr. Virga discussed with DSCI the development of a “baseline” T&E Gold Standard by the end of the fiscal or calendar year and that the NOLSS effort was essentially complete. FFs 123 and 125. DSCI was aware of this change in the direction of the program. Center Hrg. Exhs. 196, 197 and 201.



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Mr. Virga and Ms. Hopkins also discussed rough estimates of the cost of performance. Ms. Hopkins indicated to Mr. Virga that in order for DSCI to meet the requirement, it would need to double its personnel resources and be given a year to complete the work. FF 123. Mr. Virga believed this timeframe did not meet the requirements. Ms. Hopkins viewed Mr. Virga as not understanding the scope of the work effort. FF 124. Mr. Virga knew of another company, CTA which had supported a task similar to the T&E Gold Standard and was also under contract with the FAA. Mr. Virga inquired about that team's interest and capability to do the task. FF 126. Mr. Virga provided to that team a draft SOW on which to develop a proposal for the work and subsequently Mr. Virga and Mr. Tran were briefed on the team's proposal. The Center viewed as a positive feature the fact that CTA had a BITS Contract, which would streamline the process of procuring the services. FFs 127 and 128. The contracting officer on the BITS contract, not Ms. Marinaro or Mr. Virga, ultimately made the decision to issue a task order to CTA for this work. FFs 130 and 131. The SOW contained in the task order sets forth specific deliverables, activities and deadlines for each, including the delivery of a T&E Gold Standard 210 days after award, which was within the timeframe that had been specified by AOS. FF 129.

The only administrative action in the record that took place with respect to Task Order 6 after the appointment of Mr. Virga as COTR was Revision 5, which was a September 19, 2002 bilateral modification, signed by DSCI's president and the Contracting Officer, deobligating unliquidated funding with respect to Task Order 6. FF 132. Consequently, the Center argues that DSCI's allegation concerning removal of the T&E Gold work was knowingly waived and also is untimely because all events relating to the claim had occurred which fixed liability, events of which DSCI was very well aware. Center Post Hrg. Subm. at 86. Thus, the Center argues that since the Contract Dispute was filed almost four years later, the allegation with respect to the T& E Gold Standard work is untimely under 14 C.F.R. §17.25(h).

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The ODRA has reviewed the issue as it relates to allegations of an overall pattern of alleged bad faith conduct that purportedly commenced when Mr. Virga was appointed as COTR. As Task Lead, Mr. Virga was charged with taking the program in a different direction from that which Ms. Hopkins envisioned, and there is no indication that the award of the follow-on work to CTA was improper. Moreover, given the IDIQ nature of the Contract, there was no obligation for the Center to use DSCI for the work. As the Technical Lead for this program, Mr. Virga's recommendation that the work be tasked to another company, CTA was justified by his belief that DSCI's vision for NOLSS T&E Gold Standard was different from that of the Program Office's vision, and most importantly, because DSCI itself had indicated that it could not satisfy the requirements for the work without additional time, and personnel resources. DSCI has not demonstrated that Mr. Virga's activities, or those of the other Agency personnel involved with Task Order 6, were malicious or involved bad faith.

#### 4. Task Order 7

Task Order 7, which was issued on September 24, 2001, concerned an AOS ISS Support Special Test Facility. FFs 38 and 133. It ended on February 28, 2003 with a labor ceiling of 746.92 hours and a cost ceiling of \$100,000.00. FF 41. The record is not clear as to the specific origin of this requirement, as it is not clearly supported by documentation in the record. It appears to have been involved with DSCI's efforts to expand its office space to house its own "rapidly growing staff." FFs 134, 135 and 142.

The draft SOW for this Task Order contemplated the establishment of a Special Test Facility for the Center which essentially would be managed by DSCI. FF 136. The establishment of this facility was considered to be separate and apart from that already required to be maintained by DSCI in the Contract, and included in DSCI's overhead. FF 18, FN 3. Also, contrary to DSCI's representations, FF 153, funding for this task order was not provided as a consequence of the terrorist attack on the World Trade Center on September 11, 2001. FF 137.

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Only \$100,000.00 was obligated for the activities specified in the draft SOW; and accordingly, the four tasks which it contemplated, were reduced to two. Those that were eliminated involved the broadest tasks, three and four, *i.e.*, the “operation and maintenance of a special AOS ISS Test Facility” and technical support for the facility to “provide prototype testing” of information system security development in support of NAS operational systems. The final SOW specified only two tasks as “Objectives,” *i.e.*, technical and financial planning of an off-site special Test Facility Lab, and the fit-up and procurement of cabling, alarm system, and connection equipment. In this regard, of the \$100,000.00 obligated for this task order, \$58,214.73 was for labor and \$41,785.27 was for other direct costs. FFs 139 - 140. Notwithstanding the two limited objectives, the final SOW also references activities such as transitioning equipment to the new facility, coordinating the move with various FAA offices, and coordinating and procuring equipment and supplies to support operations of the facility. FF 141.

DSCI proceeded to renovate its corporate office space to accommodate the special facility laboratory, incurring approximately \$150,000.00 for infrastructure fit-ups. FF 143. Although DSCI later claimed that it was agreed that DSCI would recoup its investment of the fit-up costs for the facility by using the off-site rate for ten Full Time Employees (“FTE”) over a two and one-half year period, there is no formal documentation of such an agreement, or any other indication that the Contracting Officer, or an individual authorized on her behalf, agreed to it. FFs 30 and 143-144. Although DSCI asserts that it had proposed to the Center, as an alternative to leasing the off-site laboratory, that the Center commit to funding “other work under the Contract – specifically under Order No. 5 – at off-site rates to be performed at the off-site facility,” the record does not support a finding that the Center accepted this proposal or agreed to fund ten employees performing the SCAP work for at least 2.2 years under Task Order 5. DSCI Post Hrg. Subm. at 102-103. Moreover, no additional funding for this task order was received by AOS. FF 145. It was revised eight times at no additional cost to the Center. FFs 146-148. The last modification of Task Order 7 was Modification No. 8,

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dated November 27, 2002, which extended the task order until February 28, 2003. FF 149. At that time, Ms. Schuman was serving as the COTR on the Contract. FF 51.

Despite the lack of a documented agreement, DSCI billed the Center higher offsite rates on Task Order 5 for eight employees who were actually working onsite at the Center. This situation was discovered by the alternate COTR, Ms. Cheryl Matthews, and reported to Mr. Virga and the Contracting Officer on September 5, 2003. FFs 151 and 152. When the Contracting Officer notified DSCI that it would not be paying the higher offsite rates for DSCI employees working onsite, DSCI responded that it recognized that the requirement and utilization of this laboratory had not developed and the “current agreement is no longer economically feasible for the FAA or DSCI.” DSCI further indicated that, in order “to offset the fit-up costs incurred by DSCI in the development of this facility, we require a customer with the financial resources to recover our investment costs and will need to be able to enter into an agreement with another customer by October 1, 2003.” FF 153.

Because the Center had equipment housed in the facility that needed to be removed, the Center negotiated a “facility usage fee” which was applied at an indirect rate and proportionally charged to all DSCI clients using the facility. This allowed DSCI to be compensated until the Center’s equipment could be removed. DSCI invoiced the Center for the facility usage fee to cover the period from August 1, 2003 through October 15, 2003. FF 154.

DSCI argues that there was no basis for the Center’s refusal to honor its “agreement” to pay the off-site rates for onsite DSCI personnel, and such refusal “obviously and undeniably was an act of bad faith, totally unjustified, and detrimental to DSCI’s economic interests.” DSCI Post Hrg. Subm. at 103. The record shows that the task order was limited in its scope, but expanded into work that was not authorized. DSCI incurred additional costs as a result of this unauthorized work. The fact that DSCI was unable to secure a binding agreement with the Center that would have enabled DSCI to recoup the

costs of unauthorized work does not provide evidence of bad faith on the part of the Center.

5. Task Order 8

Task Order 8 was issued on April 15, 2002 for Airport Security Technology Integration (ASTI) Project Management Support in support of the Aviation Security Division (AAR-500). Following the events of September 11, 2001, this division was transferred to the Transportation Security Administration (“TSA”) and became the Transportation Security Laboratory (“TSL”). FFs 39 and 155. The Task Order ended and was closed out on June 2, 2005 with a total of 5,609 labor hours and a total cost of \$516,608.33. FF 43.

DSCI argues that “substantial evidence adduced during discovery demonstrates that Mr. Virga and other Agency personnel attempted to thwart DSCI’s TSL work at every turn through delay tactics and the harassment of TSL personnel, providing compellingly strong evidence that Mr. Virga had set his sights on killing DSCI’s TSL efforts.” DSCI Post Hrg. Subm. at 101. To the contrary, the record shows that Mr. Virga and other Center personnel actually attempted to help DSCI continue its TSL work under the Contract, even though the TSL had been transferred to a new agency, the TSA.

The record shows that Mr. Virga’s actions with respect to Task Order 8 were consistent with his duties as COTR. For example, at the end of July 2003, there was a purchase request for more work under Task Order 8. With respect to that purchase request, Mr. Virga raised an issue with the SOW on July 30, 2003, questioning whether, instead of process improvement of program management functions, the work DSCI was performing included the actual program management of a TSL program. In this regard, by email dated August 7, 2003, the Contracting Officer reminded “everyone that the scope of this Contract is process improvement with some security, not the actual process of performing project management, which is apparent in the deliverables wording of the current s.o.w.

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furnished.” FF 156. Such concerns were legitimate and within the scope of Mr. Virga’s and the Contracting Officer’s contract management duties.

Also, when the Contracting Officer received in late March 2004 a purchase request from TSL for Task Order 8, which was to be the final extension of the task, Mr. Virga was required to address the issue of how to fund work for TSA under the Contract which had been originally awarded based on funding provided for the FAA. FF 157. The record shows that following the transfer of the function of TSL to TSA after September 11, 2001, problems began to arise due to the fact that TSA and FAA accounting systems were not compatible and thus accounting codes for the TSA system could not be utilized for purposes of funding work performed under FAA contracts. FFs 158 and 164. When the Manager of the Acquisition Services Group, Ms. Wittman, learned that DSCI’s Contract was providing support to TSA, she decided to stop this activity and instructed the Contracting Officer and the COTR accordingly. FFs 159 and 164. Although in some instances, the Center and the TSA had entered into Service Level Agreements (“SLAs”) whereby the Center would award and administer contracts for TSL, these SLAs were of general application regarding all contracting work for TSA. FF 160. Moreover, the Agency-wide action regarding contract work for TSL affected several contracts, and not just the DSCI Contract. FF 161.

Nevertheless, Mr. Virga and others went to considerable efforts to attempt to find a way to enable DSCI to continue performance for TSL under the Contract. These efforts, in part, are reflected in a June 14, 2004 email from Jean Druce, AOS-20 Budget Officer to the Contracts Manager, Ms. Wittman. This email indicates that Mr. Virga worked closely with Ms. Jean Druce to try to add funding to Task Order 8 and advises that “Mr. Virga and I have spend a great deal of time trying to assist the TSA with processing their Interdepartmental Procurement Request; however, we have yet to discern the correct accounting procedure for doing so.” Ms. Druce credibly testified at the hearing that, on behalf of Andy Lee of the TSA, “Mike [Virga] asked me and ... [her supervisor] if there was any way we could help them” and “that Andy had expressed he couldn’t add funding

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to the contract because contracts couldn't accept their accounting data any more." Ms. Druce, whom the ODRA found highly credible, testified that Mr. Virga tried very hard to help transfer this work to TSA and that "[i]t was just simply out of our control. It was an accounting issue that we couldn't fix, but Mike was vigorously working" to get it resolved. FF 162.

The facts show that, even though DSCI was unable to continue to provide the work to the TSA's TSL under the Contract, the work subsequently was subcontracted to DSCI under an existing TSL contract, DTFAC-03-00013. FFs 163 and 165. The TSL contract, unlike DSCI's Contract, had been awarded by the Center in 2003 for TSL using TSL funds pursuant to the terms of an SLA entered into for the benefit of TSL. FF 165.

With respect to the TSL work, the testimony and contemporaneous record shows that Mr. Virga did not exceed the scope of his authority as COTR when he raised issues in connection with Task Order 8. Moreover, there is no credible evidence that Mr. Virga took actions to intentionally delay the transfer of funding which was originally appropriated to the Center for the TSL work under DSCI's Contract. Rather, the record shows that Mr. Virga and Ms. Druce together tried to assist DSCI to resolve this funding problem, but that it was outside of their control. For these reasons, the ODRA finds no credible evidence that the actions of Mr. Virga and other Center personnel in connection with Task Order 8 were motivated by bad faith. Rather, the ODRA finds Mr. Virga's actions in this regard were consistent with his responsibilities as COTR, and that he in fact acted, along with other Center personnel, in support of attempting to continue DSCI's work for the TSL, but ultimately was unsuccessful.

The Center further asserts that the complete release by DSCI, with no exceptions noted, FF 166, renders any claims with respect to Task Order 8 subject to dismissal as moot. Center Post Hrg. Subm. at 77. DSCI in turn, responds by arguing that it had been misled when it signed the DOT Contractor Release as part of Task Order No. 8's formal close-out, because DSCI believed the Center had a legitimate basis for terminating Task Order

No. 8. DSCI Post Hrg. Subm. at 102. The ODRA concludes that the formal close-out of this task order was not a “termination.” Rather, the task order expired by its own terms. FF 43. For the reasons stated above, the ODRA does not view DSCI’s claim with respect to the TSL work as waived by the formal close-out of the task order. The ODRA, however, finds that DSCI has failed to demonstrate malice or bad faith in connection with the administration of this Task Order. The record establishes that there were difficulties in billing for the work DSCI had done for the TSL and, inasmuch as the TSL had been transferred to the TSA, it was not unreasonable for the FAA to ultimately require that the work involved be accomplished under a TSA contract rather than the Contract with DSCI.

**I. DSCI Has Not Demonstrated Clear And Convincing Evidence of Agency Actions Motivated by Malice in the Administration of the Contract**

DSCI alleges that the Center breached its duty of good faith and fair dealing principally as the result of the actions of Mr. Virga. DSCI also alleges that other individuals, *i.e.*, Mr. Tran, Mr. Thoma, Ms. Marinaro, Ms. Deloney, Mr. Emerick and Mr. Hanlin, in varying degrees, intended to do harm to DSCI, or alternatively, knew of such intent, but failed to take corrective action. The Center responds that “this case is actually an example of the Center regaining effective control of a support services contract” and “Mr. Virga was asked by management to take on the thankless job of ‘cleaning up’ the lax administration of prior COTRs and he reluctantly agreed. Any tensions that resulted from this effort simply reflect the fact that DSCI had become far too personally vested in the prior COTR and deeply embedded in the AOS planning and budgeting process.” Center Post Hrg. Subm. at 96. The Center further takes the position that DSCI had unjustified expectations that, notwithstanding the IDIQ nature of the Contract, their work would continue up to the full potential value of the Contract.

As discussed above, proof of a breach of the duty of good faith and fair dealing requires clear and convincing proof of egregious conduct, specific intent to injure, malice or



conspiracy. *See* Discussion, Section A, *supra*. Although the standard of proof in bad faith claims requires clear and convincing evidence, the ODRA finds that in this case, DSCI did not even meet the traditional preponderance of the evidence standard of proof. DSCI has failed to demonstrate that Mr. Virga or other Center personnel acted with malice against DSCI. DSCI's unsupported contention that Mr. Virga was motivated to do harm to DSCI as a result of DSCI's successes in CMM, or as a result of personal rivalry with Ms. Hopkins, amounts to mere suspicion and speculation. DSCI's allegations of animosity are based primarily on Ms. Hopkins' testimony, which the ODRA finds not credible, for the reasons discussed previously. *See* March 13, 2006 Hrg. Tr. 123:1-12:25; 115:1-25 and 130:1-25. In any event, mere suspicion of bad faith does not amount to evidence of wrongdoing. *See CACI, Inc. – Federal v. United States*, 719 F.2d 1567, 1582 (Fed Cir. 1983), *J. Cooper & Assocs., Inc. v. United States*, 53 Fed. Cl. 8, 25 (2002), *aff'd*, 65 Fed. Appx. 731 (2003) (Table). Similarly, DSCI's assertion that Mr. Tran was motivated to harm DSCI and enlisted Mr. Virga as his ally in that regard, DSCI Post Hrg. Subm. at 55, also amounts to sheer speculation. The ODRA finds that Mr. Virga was appointed because of well-founded management concerns about the less than arms-length dealings between Ms. Schuman and Ms. Hopkins, and not as a result of hostility harbored by any Center employee toward DSCI.<sup>27</sup>

DSCI also contends, but has not demonstrated that it lost other business as a result of the bad faith actions of Mr. Virga—which it claims adversely affected its reputation and its opportunity to be a subcontractor on other contracts. Such opportunities allegedly included a contract between Harris Corporation and the FAA. Contrary to DSCI's allegations, Mr. Thoma credibly testified that he did not discuss DSCI with Harris Corporation, FF 201, and DSCI has not identified the alleged Harris official involved. In

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<sup>27</sup> There is no credible support for DSCI's charge that Mr. Virga implemented a "targeted campaign" to defame DSCI, namely by allegedly making false accusations regarding the competence of DSCI employees, falsification of employee security clearances, illegal billing of other direct costs relating to the off-site facility, and falsification of invoices. In support of these contentions, DSCI relies primarily on statements made by Ms. Hopkins, Ms. Barnard, Ms. Schuman, and Ms. Bercher. Contemporaneous documents in the record do not support these allegations. Moreover, for the reasons previously discussed, the ODRA does not consider the statements and testimony of these individuals to be reliable.

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addition, Ms. Hopkins' testimony recounts an incident in which "[o]ne of my employees, [is] going to a 4<sup>th</sup> of July meeting in Pennsylvania ...an hour from this area. And she's talking with these gentlemen. And they're beginning to describe how they have a friend that works at the tech center. An, oh, this company DSCI, they're horrible." March 13, 2007 Hrg. Tr. 126:11-18. [DELETED] in her deposition recounted a conversation she had with individuals in the community that "someone has it out for DSCI" and that "DSCI was "low balling bids" and was being "investigated." Center Post Hrg. Subm. at 93, Center Post Hrg. Subm. Tab 4. The fact that DSCI may have been the subject of negative gossip is not proof of bad faith actions taken by the Agency.<sup>28</sup>

As indicated above, the ODRA found the task orders at issue to have been properly administered, and that the Agency's exercise of discretion, in managing its operations and determining how best to procure the supplies and services it needs to fulfill its mission, has not been shown to be tainted by malice or other evidence of bad faith.

## CONCLUSION

In the final analysis, DSCI completely has failed to demonstrate by clear and convincing evidence that the Center breached the duty of good faith and fair dealing in the administration of the Contract. DSCI either misunderstood or willfully ignored the IDIQ nature of the Contract. DSCI's extra-contractual expectation was that, so long as funds were available, DSCI was contractually entitled to receive \$20 million of work. FF 8. DSCI has engaged in an unprincipled and unjustified personal attack and smear campaign both before and after his appointment, on an individual, Mr. Virga, and others at the Center. Mr. Virga had been tasked by the Center to address what the Center admits was an inappropriately close relationship between DSCI and the prior COTR. Mr. Virga was

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<sup>28</sup> As for Ms. Deloney's alleged interference with DSCI's attempt to receive a subcontract under a BITS II contract, the only evidence in support of this allegation is that of Ms. Hopkins' testimony that Ms. Deloney identified DSCI as a "dirty" contractor to Mr. Maccarone. Mr. Maccarone's deposition testimony on this point does not corroborate Ms. Hopkins' charge. March 29, 2006 Deposition of Mr. Maccarone 26:1-29:25. Nor are there corroborating documents in the record.

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appointed to replace Ms. Schuman, a COTR who had lost her objectivity in the administration of the Contract. Notwithstanding Ms. Hopkin's allegations of bad faith by the Center personnel, the objective record discloses the following:

- a. DSCI received more than \$14 Million of work under an IDIQ contract that guaranteed only a minimum of \$400,000 of work;
- b. DSCI received more than \$2.9 Million of work during the time period when the person it principally charges as being biased and malicious was involved with the Contract;
- c. The Contract and all task orders thereunder ended by their own terms and not as the result of any termination of work by Mr. Virga or anyone else at the Center;
- d. The record demonstrates sound business and administrative reasons unrelated to malice or bad faith for the Center's decisions regarding work that was not placed under the Contract.

For the foregoing reasons, the ODRA recommends that the Administrator deny DSCI's claim in its entirety, as DSCI has failed to satisfy its burden of proving bad faith in the administration of the Contract in this case.

-S-

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APPROVED:

-S-

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