

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

*KRATZER*

27995

FILE: B-210800

DATE: April 17, 1984

MATTER OF: Computer Sciences Corp.

## DIGEST:

1. GAO will question a determination concerning the technical merit of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. Protester has failed to make such a showing with respect to NASA's determination that the two proposals submitted are technically equal.
2. Allegation that offeror violated 18 U.S.C. § 1001 (1982) by misrepresenting its past performance and its success in obtaining commitments of employees does not appear to be supported by the record, and in any event is a matter for consideration by the Department of Justice, not GAO.
3. GAO will not question an affirmative responsibility determination absent a showing of fraud or bad faith by government officials or a demonstration that the offeror failed to meet definitive responsibility criteria.
4. Agency determinations resulting from a cost comparison analysis will not be disturbed unless they clearly lack a reasonable basis.
5. Allegation that an agency has entered an illegal personal services contract is without merit where RFP and selected proposal clearly indicate that the contractor, not the government, will exercise supervisory authority over the contractor's employees.
6. Illegal conflict of interest is not proven where protester has merely alleged facts

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(former contracting agency employee now works for awardee) that at most establish a potential for improprieties.

Computer Sciences Corporation (CSC) protests the award of a contract to SYRE, a joint venture, under request for proposals (RFP) No. 2-30551(CSL) issued by the National Aeronautics and Space Administration (NASA) for scientific and support services at the Ames Research Center, Moffett Field, California. NASA determined that the proposals submitted by CSC, the incumbent contractor for this requirement, and SYRE were of equal technical merit, and awarded the contract to SYRE on the basis of its lower evaluated costs.

CSC contends that SYRE has misrepresented to NASA that it has obtained commitments from CSC's current employees and questions whether SYRE will be able to obtain the personnel to perform the contract. CSC believes that SYRE's ratings for experience and past performance is suspect and alleges that SYRE has committed an act of industrial espionage against CSC which should render it ineligible for award. CSC alleges that SYRE embellished the resumes of its key personnel and requests an investigation of the matter.

CSC attacks the reasonableness of NASA's cost realism analysis, and contends that certain inordinately low costs proposed by SYRE reflect a lack of understanding of the requirements of the RFP.

CSC also questions whether the NASA has entered an illegal personal services contract and suggests the procurement may be tainted by a conflict of interest.

We deny the protest.

NASA solicited offers to provide scientific and support services for the Simulation Computer Facilities at the Ames Research Center. The support services include a variety of activities ranging from the construction of simulator cockpit components to the programming of simulation hardware.

NASA received two proposals in response to the RFP, one from CSC and one from SYRE, a joint venture consisting of Syscon Corporation and Republic Management Computer Sciences, Inc. A source evaluation board judged the proposals against the evaluation criteria mission suitability, experience and past performance, and other factors. The two proposals were assigned identical adjectival ratings for the three elements of the mission suitability criterion. Additionally, NASA found both proposals to be acceptable with respect to experience and past performance. Since the proposals were considered to be of equal technical merit cost became the determinative selection factor. SYRE proposed costs of \$15,813,332 and CSC proposed costs of \$18,187,915. NASA conducted a cost realism analysis of the cost proposals and concluded that SYRE's proposed costs were understated by \$1,578,780 bringing SYRE's evaluated cost to \$17,392,112. NASA found CSC's costs to be overstated by \$124,501 resulting in an evaluated cost of \$18,063,414. Since its evaluated cost was \$671,302 less than CSC's, NASA awarded the contract to SYRE.

#### COMMITMENTS OF INCUMBENT'S EMPLOYEES

CSC speculate that SYRE's proposal indicates that SYRE has secured commitments from CSC's present employees to work for SYRE. CSC polled its employees and found that only 7 of the 95 employees who responded had been contacted by SYRE. On this basis CSC asserts that SYRE could not possibly have commitments from a significant number of CSC employees. CSC argues that if SYRE represented that it has commitments, the representation is false and consequently SYRE's proposal should be rejected for intentionally misleading the agency. Aside from any possible misrepresentation, CSC doubts SYRE's ability to furnish a sufficient number of qualified personnel and questions the rating of "good" SYRE received for under the subcriterion staffing plan.

CSC's argument on misrepresentation is not supported by the record. SYRE, in its proposal, estimated that it could retain more than 80 percent of CSC's employees, but SYRE did not represent that it had secured commitments from

CSC's employees. Rather, SYRE set forth a plan under which it would recruit the employees after it was awarded a contract. It is obvious that there was no misrepresentation concerning commitments of employees, and we will not conduct an investigation of the matter as CSC requests. See Monchik-Weber Associates, Inc., B-196433, August 8, 1980, 80-2 CPD 102.

Concerning CSC's argument that SYRE's rating for staffing plan was improper, we point out that it is neither our function nor our practice to conduct a de novo review of technical proposals and make an independent determination of their relative technical merit. It is the function of the procuring agency to exercise informed judgment and discretion in the evaluation of proposals. Our review is limited to examining whether the agency's evaluation was fair, reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. See Reliability Sciences, Incorporated, B-205754.2, June 7, 1983, 83-1 CPD 612.

CSC has not demonstrated that NASA's evaluation of SYRE's staffing plan was unreasonable. NASA premised its conclusion that SYRE could secure CSC's employees on SYRE's proposal to offer the employees no less than their present salary; on SYRE's aggressive recruiting plan; on Syscon's past experience of retaining high percentages of employees during the phase-in of similar contracts; and on SYRE's telephone survey indicating a general employee interest in maintaining employment at Ames rather than relocating with CSC in the event CSC was not awarded a contract.

CSC argues that NASA, by relying on the telephone survey, has equated an indication by the surveyed employees of a desire to remain at Ames with an expression of intent to work for SYRE. This argument assumes that offerors were required to secure commitments or statements of intent from prospective employees prior to the award of a contract. This assumption is incorrect. Although the RFP requests offerors to identify the commitments by key personnel,

there is no requirement to obtain commitments from other employees. The RFP merely requires the submission of a staffing plan indicating an understanding of the resources required, and the provision of a record of recruiting success for similar requirements.

CSC also asserts that the telephonic survey, since it did not request employees to indicate an intent to work for SYRE, is the antithesis of aggressive recruiting. It is obvious, however, that the recruiting plan requested by the RFP and contemplated by SYRE's proposal is to commence after the award of the contract, not prior to the submission of proposals as CSC's argument suggests. We find NASA's conclusion concerning SYRE's staffing plan to be reasonable on its face and CSC has not presented any evidence or argumentation which would indicate otherwise.

#### PAST PERFORMANCE AND EXPERIENCE

Both CSC and SYRE received ratings of acceptable for the past performance and experience evaluation criterion. CSC questions SYRE's rating on the ground that NASA was unaware that a subcontract held by Syscon, one of the joint venturers, had been terminated by Ford Aerospace under a Navy prime contract and that Syscon was experiencing major contract performance problems with respect to Naval facilities at China Lake and Vallejo, California. CSC contends that either SYRE excluded these contracts from the list of relevant experience in its proposal, possibly violating 18 U.S.C. § 1001, or, if SYRE did list these contracts, that NASA did not properly investigate this aspect of SYRE's proposal.

CSC's allegations concerning major performance difficulties with Navy contracts at China Lake and Vallejo are without merit. SYRE's proposal referred to a contract for effectiveness analysis services at the Naval Weapons Center, China Lake, California and to a contract for engineering, technical writing and drafting services at the Naval Electronics Systems Engineering Center, Vallejo, California. NASA sent contract performance questionnaires to both facilities and received a response from the Naval

Weapons Center which indicated satisfactory performance on the part of Syscon. NASA did not receive a response regarding the other contract prior to the selection, but during the pendency of this protest the contracting officials at the Naval facility advised NASA that Syscon's performance was satisfactory. Thus, CSC is incorrect both in its speculation that SYRE failed to mention the contracts and in its assertion that Syscon was experiencing performance difficulties.

CSC is correct, however, that SYRE did not list the subcontract with Ford Aerospace in its proposal and that the contract has been terminated. Ford Aerospace officials informed NASA, after this protest was filed, that it terminated the contract for convenience because the company deemed it in its interest to perform the services in-house.

Nonetheless, the termination was for convenience, not for default, and it does not establish that NASA's evaluation of SYRE's past performance and experience was unreasonable. SYRE listed numerous related contracts performed by Syscon and Republic and NASA's investigation of these contracts, by questionnaire and telephone inquiry, revealed that the performance of the contracts by the two firms was rated as adequate to superior. There was no way for NASA to know of the subcontract, and even if it had, there would still be a reasonable basis (adequate to superior ratings on all other contracts) to support a finding of acceptable past performance.

Concerning SYRE's failure to mention the Ford Aerospace subcontract in its proposal, we point out that the RFP requested information about only these contracts for more than \$1 million. The record does not indicate whether this effort exceeded this threshold. In any event, the statutory provision cited by CSC criminally proscribes knowing concealment of a material fact in any matter within the jurisdiction of any department or agency of the United States. The question of whether a firm has violated a criminal statute is within the jurisdiction of the Attorney General and the federal courts, not the General Accounting Office, and therefore we will not consider CSC's allegation. See Aarid Van Lines, Inc., B-206080, February 4, 1982, 82-1 CPD 92.

Last, CSC suggests that SYRE's failure to list the subcontract calls into question SYRE's credibility and integrity. Business integrity and honesty are matters relating to a firm's responsibility and in this case, NASA has determined SYRE to be responsible. We will not review allegations against an affirmative determination of responsibility absent a showing of fraud or bad faith on the part of agency officials or a showing that the offeror did not meet definitive responsibility criteria set forth in the solicitation. Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD 25. CSC has not made either showing.

#### INDUSTRIAL ESPIONAGE

CSC alleges that Syscon has attempted an act of industrial espionage at the Ames facility. Prior to the selection of SYRE, CSC reported to NASA that at least one Syscon employee gained access to a library at Ames by representing himself as a NASA employee in order to secure certain propriety data of CSC. NASA found the allegation to be groundless. NASA pointed out that Syscon, which holds a quality assurance contract at Ames, has unlimited access to the library and that in any event, the library is a NASA facility, not a CSC facility where proprietary information could be expected to be found.

CSC argues that NASA's findings are based on speculation, that NASA did not actually investigate the matter or question the employee involved. CSC also believes NASA's finding is inconsistent with the fact that the employee falsely represented himself as a NASA employee. The protester contends that the incident indicates that Syscon lacks business integrity and its proposal should have been rejected on this basis.

We note that NASA did make inquiries concerning the incident and satisfied itself that an act of industrial espionage had not occurred. In any event CSC's allegation concerns the responsibility of SYRE. NASA has determined that SYRE is responsible, and as noted above such

determinations will not be reviewed absent circumstances not evident here. See Keco Industries, Inc., B-204719, July 6, 1982, 82-2 CPD 16.

#### EMBELLISHMENT OF RESUMES

CSC states that it has heard rumors to the effect that the resumes furnished by SYRE were embellished to make the key personnel appear to be more qualified than they actually are. CSC requests that we investigate the matter in order to assure the integrity of the procurement process.

Although we have on occasion conducted investigations of protester allegations on our own initiative, we generally do not conduct investigations pursuant to our bid protest function for the purpose of establishing a protester's speculative statements. Western Ecological Services Company, B-201097, April 30, 1981, 81-1 CPD 333. Therefore, we deny the request for an investigation.

#### COST REALISM ANALYSIS

SYRE proposed a total cost of \$15,813,332. In assessing SYRE's cost proposal, NASA conducted an independent salary survey, and determined that SYRE understated salaries for engineering staff and technicians. NASA also determined that SYRE would require additional technicians to perform the contract. Consequently, NASA determined that SYRE's cost would be \$1,578,780 greater than stated in cost proposal, making the total probable cost \$17,392,112. In comparison, NASA determined that CSC's proposed cost of \$18,187,915 was overstated by \$123,501, resulting in a probable cost of \$18,063,414.

The conduct of a cost realism analysis is the function of the contracting agency and we will not disturb determinations made by the agency as a result of such an analysis unless they clearly lack a reasonable basis. Management Services Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD 74; Moshman Associates Inc., B-192008, January 16, 1979, 79-1 CPD 23.

CSC believes the approximately 1.6 million "adjustment" of SYRE's proposal exceeds the proper exercise of

discretion and judgment to the point of irrationality. CSC points out that SYRE proposed technician salaries 25 percent lower than CSC currently pays its technicians. CSC states that it pays technicians well over the "going rate" for technicians in the area because of the unique technician skills demanded by the effort. The protester contends that SYRE proposed ridiculously low salaries without surveying the salaries of CSC's current employees, leaving NASA to figure out realistic technician salaries. CSC believes that NASA has impermissibly rewritten SYRE's proposal by determining realistic salaries and adjusting SYRE's proposal to reflect them. Additionally, CSC believes that SYRE's proposal of inordinately low salaries reflects a lack of understanding of the RFP's requirements. On this basis, CSC suggests that SYRE should not have received rating of excellent for the evaluation sub-criterion understanding the problem.

First, NASA has not in any sense rewritten the SYRE's proposal. We have frequently emphasized the importance of analyzing proposed costs to determine whether they are realistic predictions, since, regardless of an offeror's proposed costs, the government will be obligated under a cost reimbursement contract to reimburse the contractor for its allowable costs. See Dynalectron Corporation, et al., 54 Comp. Gen. 562 (1975), 75-1 CPD 17, affirmed, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341. Clearly, NASA did not rewrite SYRE's cost proposal, but rather determined for its own evaluation purposes what the probable and realistic cost of contracting with SYRE would be.

Next, the fact that SYRE's proposed salaries were substantially lower than CSC's does not in itself present a basis upon which to question the selection. As NASA points out, SYRE did not have access to CSC's salary data and the RFP did not require offerors to conduct a survey of the salary of incumbent personnel. SYRE's proposed salaries were consistent with general data (to which SYRE did have access) for technician salaries in the area, and were well above the applicable Service Contract Act wage determinations set forth in the RFP. Under the circumstances, it would not appear that SYRE's proposed salaries resulted from bad faith or lack of diligence in ascertaining wages as CSC's arguments seem to suggest, but rather reflected a

reasonable attempt to estimate technician wages in the area. We observe that SYRE promised in its proposal to offer incumbent employees at least their current salaries. Since NASA, in contrast to SYRE, was aware of the current salaries of CSC's employees, its assessment of the probable cost of SYRE's fulfilling this contractual promise was appropriate.

Last, given the above discussion, it is clear that SYRE's understatement of technician salaries does not raise an inference that SYRE did not understand the requirement of the RFP or the resources necessary to accomplish the requirements. Rather, the understatement reflects a lack of data regarding CSC's salaries for technicians. Therefore, CSC has not presented a basis upon which to question the reasonableness of SYRE's rating of excellent for understanding the problem.

CSC alleges that SYRE's cost proposal was deficient and the cost analysis was unreasonable in other less significant respects. First, CSC observes that SYRE proposed lower salaries for managerial personnel than CSC is now paying and surmises from this that SYRE will have to bring in management personnel from elsewhere. CSC contends that NASA did not consider costs to SYRE of relocating management personnel, an expense that CSC speculates would amount to at least \$560,000.

SYRE's proposed management structure includes a contract director, a deputy contract director, four managers and eleven group leaders. Although SYRE's salaries for upper level management are less than CSC's, its salaries for group leaders are greater, for the most part, than CSC's. SYRE's cost proposal states that ten managers will be relocated, two from the east coast and the remainder from other points on the west coast, at a cost substantially less than that asserted by CSC. These costs are based on the relocation cost experience of Syscon and they do not appear to be facially unreasonable. Given the fact that the salary rate designated by SYRE for group leaders is greater than or equal to the salaries CSC proposed for group leaders, it is reasonable to assume SYRE could fill the seven remaining positions without incurring additional relocation expenses. Consequently, we find reasonable NASA's acceptance of SYRE's estimated cost of relocation.

Next CSC questions whether SYRE's first year costs were for an 11-month effort plus a phase-in period of 1 month or for a full 12-month effort, the costs of which, under the RFP, are separately evaluated. CSC contends that if only the costs were for only 11 months, NASA did not compare the two firms' costs on an equal basis since CSC proposed costs based on 12 months of performance.

SYRE's cost proposal was in fact evaluated on 12 months of performance in the first year and therefore CSC's assertion is without basis.

CSC contends that SYRE's overhead costs are so low, 29 percent of direct labor costs compared with CSC's 33 percent, that either SYRE does not comprehend the technical effort or the firm plans to engage in wage-busting. CSC believes SYRE consequently should have been disqualified from the competition.

We fail to see how a low overhead rate supports an inference of lack of understanding of the technical effort required. In any event, we have closely examined SYRE's cost proposal and find that it provides essentially the same panoply of fringe benefits as CSC's proposal, but at slightly lower rates. NASA found that SYRE had included all compensation required by law and thus found no indication of "wage-busting." We can conceive of no reason why a relatively low overhead rate would disqualify an offeror. We reject CSC's arguments.

CSC asserts that NASA improperly penalized CSC with respect to indirect costs. CSC states that its indirect costs were high in part because it included indirect support by five individuals. CSC contends that SYRE did not include similar indirect costs and that SYRE in fact plans to provide indirect support from a Syscon facility at no cost.

CSC is simply incorrect in its assertion that it was penalized for its higher overhead costs. As NASA indicates, CSC's management structure built in more indirect costs than did SYRE's and these costs were properly

reflected in CSC's proposal. SYRE did offer to provide certain indirect support services without charge, as CSC asserts, but we do not perceive any basis upon which to object to such an arrangement. As a result of SYRE's willingness to absorb certain costs, CSC's indirect costs were higher than SYRE's and this contributed to the overall cost advantage represented by SYRE's proposal. We would not describe awarding on the basis of lower costs as penalizing other offerors, and in any event, there is nothing improper in so awarding a contract.

Last, CSC asserts that SYRE understated its costs by proposing inadequate staffing levels. This contention has no foundation in the record.

The government estimate set forth in the RFP is that 145 direct workyears will be required to perform the contract. SYRE proposed to supply 145 workyears and as noted, NASA determined that an additional technician workyear would be necessary under SYRE's staffing plan. NASA therefore added the cost of the technician manyear in determining SYRE's realistic costs. In contrast, CSC proposed 139 direct workyears, to which NASA added one engineer workyear in connection with the cost realism analysis. Thus, SYRE's staffing level is consistent with the government estimate and greater than that of CSC itself. In our view, CSC has not provided any facts to support its allegation and we find no basis to conclude that SYRE's staffing level was inadequate.

In conclusion, CSC has neither presented a basis upon which to question the reasonableness of NASA's assessment of the relative costs of the two firms, nor has it demonstrated that certain low costs proposed by SYRE indicate a failure to comprehend the technical effort required by the RFP.

#### ILLEGAL PERSONAL SERVICES CONTRACT

NASA discerned a weakness in CSC's proposal in that the degree of lower level management was excessive. Thus, NASA rated CSC as good with respect to the evaluation subcriterion management plan, while assigning an adjectival rating of excellent to SYRE. CSC believes NASA's criticism indicates a desire by NASA to supervise contractor

employees directly, raising an inference that NASA has in effect entered an illegal personal services contract with SYRE's employees.

The general rule, established by decisions of our Office and the former Civil Service Commission, is that personal services may not be obtained on a contractual basis, but rather must be performed by personnel employed in accordance with the civil service and classification laws. Contracts for services are proscribed if they establish an employer-employee relationship between the government and contracting personnel. United States Advisory Commission on Public Diplomacy, B-202159, November 6, 1981, 81-2 CPD 404. The critical factor in determining whether an employer-employee relationship exists is the presence of actual supervision of contractor personnel by government officers and employees. Lodge 1858, American Federation of Government Employees et al. v. Webb, 580 F.2d 496 (D.C. Cir. 1978); Consultant Services-T.C. Associates, B-193035, April 12, 1979, 79-1 CPD 260.

Certain provisions of the RFP and SYRE's proposal refute CSC's contention that the contract gives NASA supervisory authority over SYRE's employees. The statement of work provides that:

"the contractor shall be responsible for management and administration of all tasks assigned under the contract and bears the total responsibility for the technical and financial performance of the contract. The contractor's assigned Contractor Director is the main point of contact between the government and the contractor for technical direction and financial controls. However, he may delegate specific technical areas to key members of his staff."

The statement of work continues by setting forth specific supervisory responsibilities of the contractor. Thus, the RFP unambiguously assigns managerial responsibility to the contractor, not to NASA.

In response to the managerial requirements of the RFP, SYRE proposed a management structure consisting of a contract director, a deputy contract director, four managers and six group leaders. CSC proposed a very similar management structure except that it included seventeen lower level managers in contrast to SYRE's six. Thus at the lowest level of management SYRE proposed one supervisor (group leader) for every twenty-five employees as opposed to CSC's one supervisor for every nine employees. This statistic reasonably led NASA to regard SYRE's structure as more efficient and less costly than CSC's, but it does not provide a plausible basis for asserting that the contract would in effect delegate supervisory authority to NASA. Given the language employed by the RFP and the management plan established by SYRE's proposal, we find that under the tests established by the courts and our Office, the contract cannot plausibly be characterized as a personal services contract. See Consultant Services - T.C. Associates, supra.

#### CONFLICT OF INTEREST

CSC believes that SYRE's efforts to secure a contract may have violated conflict of interest laws or regulations. CSC points out that a former NASA employee whose responsibilities included oversight over CSC's prior contract for support services at Ames, is now employed by Syscon and/or SYRE. CSC alleges that the employee was instrumental in the writing of SYRE's proposal and may have participated in other aspects of the competition. CSC cites the United States Claims Court decision in CACI, Inc.-Federal v. U.S., 1 Cl. Ct. 352 (1983), for the proposition that the employee's activities on behalf of SYRE violated conflict of interest strictures and require the rejection of SYRE's proposal.

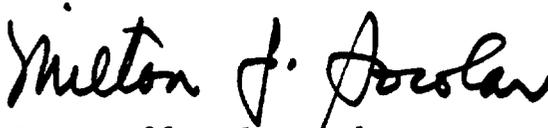
The record indicates that a former NASA employee, with the responsibilities alleged by CSC, became associated with Syscon prior to the issuance of the RFP. NASA reports that once the employee announced his plans to leave the government, NASA isolated the employee from matters relating to this procurement. The employee did not after becoming employed with Syscon attempt to influence the selection, nor did he participate in the preproposal conference, site visit, oral discussions or negotiations.

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We find that CSC's allegation does not provide a basis upon which to question the award. 18 U.S.C. § 207 does impose criminal penalties on former government employees who represent anyone but the government on specific matters in which the former employee participated or over which he had responsibility as an employee. There is no evidence, however, that the employee represented SYRE in any manner and consequently we see no basis to suggest a violation of the statute. Moreover, the interpretation and enforcement of this statute is generally the responsibility of the Department of Justice, not this Office. Bray Studios, Inc., B-207723, B-207746, October 27, 1982, 82-2 CPD 373.

Additionally, the Claims Court decision CSC cites was recently reversed on the basis that the mere potential for improprieties is not a basis upon which to enjoin the award of a contract. CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983). Since CSC has at best established no more than a mere potential for improprieties, we reject CSC's contention. See Ionics Incorporated, B-211180, March 13, 1984, 84-1 CPD \_\_\_\_.

We deny the protest.

for   
Comptroller General  
of the United States