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CUNNINGHAM
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DECISION



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

FILE: B-188566

DATE: January 20, 1978

MATTER OF: Informatics, Inc.

DIGEST:

1. Concern selected for award of software services contract by National Aeronautics and Space Administration (NASA) admits that it determined which employees of incumbent contractor currently performing services would be "likely to accept employment" with concern based on indirect questioning about facts mainly relating to employees' community ties. Manner in which concern actually conducted questioning is at complete variance with manner questioning was represented to NASA during negotiations leading to selection which advanced "overwhelming desire" of employees to accept employment. Other representations made to NASA during selection process are also at variance with methods and results of actually conducted questioning.
2. Representations to NASA about methods, manner, and results of questioning of incumbent contractor's employees are not "subject to differing opinions" and differing results of later survey cannot reasonably be attributed to employees' memory lapses or unwillingness to respond to inquiries.
3. Selected concern's submission of significant misstatement to NASA about method, manner, and results of survey of incumbent employees' willingness to accept employment with concern if successful in competition was material in evaluation leading to selection.
4. Nothing in NASA's "Report of Investigation" containing interviews of selected concern's employees supports November 23, 1976, representation of concern that incumbent employees' direct responses formed basis for numbers and categories of reported employee commitments in event selected concern should be awarded contract.
5. Award to selected concern in view of submission of significant misstatement to NASA would provoke suspicion and mistrust and reduce confidence in competitive procurement system. Cf. The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD 1940. Thus, recommendation made under Legislative Reorganization Act of 1970 that selected concern's proposal be excluded from consideration for award.

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By telegram of March 10, 1977, Informatics, Inc., protested the actions of the National Aeronautics and Space Administration's (NASA) Ames Research Center in selecting only Computer Sciences Corporation (CSC) for final negotiations under RFP 2-25841 for computer software services. NASA selected CSC, in part, because of the company's perceived competitive edge (that is a "discriminator" in favor of CSC) in the "Mission Suitability" evaluation standard of the RFP.

In its initial protest correspondence Informatics alleged that NASA improperly evaluated those parts of its proposal relating to the "Mission Suitability, Cost and Past Performance" evaluation standards of the RFP. Specifically, Informatics alleged:

"* * * Informatics not only fails to see that there was a significant discriminator in any area of Mission Suitability but rather believes that the totality of a proper evaluation would have revealed that Informatics in fact was superior in Mission Suitability, that there was a substantial cost risk associated with CSC's lack of commitment from critical Informatics' personnel (thereby completely negating any minute CSC cost advantage) and also that if past performance had been adequately assessed, the Board would have found Informatics to be substantially superior in this critical area of evaluation."

In further correspondence, Informatics raised additional grounds of protest titled, as follows: "Bias" (on the part of a NASA employee who evaluated proposals); "Relative Weights and Scoring Systems"; "Project Manager"; "Commonality"; "NASA Failure to Conform to PRD"; and "Proposed Scoring Analysis."

Because of the conclusions reached in our decision, we consider it necessary to discuss only the issue regarding CSC's alleged lack of a commitment from Informatics' employees.

The overall standards which NASA used to evaluate proposals were: Mission Suitability factors, Cost factors, Experience and Past Performance, and Other factors. The Mission Suitability factors were further divided into subfactors as follows:

"Understanding the Requirement:

"(a) narrative summary,

"(b) distribution of work force

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"(c) staffing standards

"(d) approach to filling the positions

"Management Plan:

"(a) approach for efficiently managing the work

"(b) work control procedures, training plans, etc.

"(c) project organization

"Key Personnel:

"(a) capability of key personnel

"(b) judgment in identifying which positions are key

"Corporate Resources:

"(a) availability of back-up for key personnel

"(b) availability of back-up for other personnel

"(c) 'home office' management and technical assistance."

Under the subfactor entitled "Understanding the Requirement--Approach to Filling the Positions" offerors were to describe their approach to filling the positions described in the offeror's "narrative summary." The RFP further provided that a "plan for filling the positions initially shall be included, i.e., employee sources, etc."

Initial proposals were received from three firms, including Informatics and CSC. All three were found to be in the competitive range and were invited to oral discussions held during November of 1976.

NASA's procurement officer posed the following written question to CSC by letter dated November 10, 1976: "What is the nature of the commitment you have from the employees of the other incumbent contractor you have proposed to hire?" CSC's Director, San Francisco Operations, responded in writing by letter dated November 23, 1976, as follows:

"During June and early July of this year CSC West Coast marketing representatives and members of the divisional staff conducted a telephone survey of the local PMI/Informatics technical staff. The purpose of the survey was to discuss professional opportunities at CSC and to ascertain the staff's willingness to join CSC should their company's local business base suddenly contract as a result of this specific procurement. In contrast to letters of intent and/or contingent offers of employment, this manner of assessing the retention index was considered the least disruptive to ongoing work and least disquieting to the overall staff morale of the other incumbent.

"The gross result of the survey indicates an overwhelming desire of the incumbent staff (well over 80%) to remain in the Bay Area and to continue their technical work at ARC as employees of CSC.

"The statistical findings of the survey are based on a sample of 60 individual interviews conducted after working hours, during evenings and on weekends. Of the 60 persons surveyed, 36 stated they would join CSC should CSC become the successful bidder. Another 10 persons thought they would join CSC's staff, but had preferred to remain uncommitted until the time that CSC is actually successful in this procurement. Of the remaining persons, 8 would probably join CSC in order to continue their ARC projects, 3 had no opinion, and 3 would definitely not join for personal reasons.

"Therefore, 46 of the 60 persons surveyed, which represents 77 percent of the sample, would join CSC if invited to do so. Another 8 persons (13 percent) would probably be favorably inclined toward a professional relationship with CSC should CSC be successful in this re-compete (SIC). The potential incumbent retained labor base, consisting of 54 persons, is more than adequate to staff the 45 positions CSC has identified in its proposed Staffing Plan.

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"As a matter of record, when CSC originally bid for the Simulation Laboratory Support Service contract in 1970, the contract preceding NAS 2-7806, the telephone survey was used effectively. In that procurement, CSC had retained on behalf of ARC 97 percent of the incumbent staff when, in fact, the survey showed that an 80-percent retention rate was probable." (Emphasis supplied.)

Subsequent to receipt of best and final offers, the Source Evaluation Board made its final evaluation and presented its findings to the Source Selection Official. On February 28, 1977, Informatics was informed of NASA's intention to conduct final negotiations for the award with only CSC. NASA's reasons for selecting CSC were set forth by the responsible NASA selecting official as follows:

"Following the presentation of the Board, I summarized the key issues to consider in making my decision. It is clear that CSC has the competitive edge in Mission Suitability. With regard to Cost, the differences are so slight, they are not a significant discriminator. Even though cost is not considered a significant discriminator, it is noted that our evaluations concluded that the probable cost of doing business with CSC is slightly lower than the other competitors.

"There is also no basis for a discriminator in our Experience and Past Performance Factor evaluation or in our Other Factor evaluation.

"Because of the higher Mission Suitability score and since Mission Suitability is the only area where we found significant discriminators, I chose Computer Sciences Corporation for final negotiations and award to perform the Computer Software Services for Ames Research Center."

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Informatics, after filing the protest with our Office, said it was also informed by NASA that "[It] had found the probable costs of CSC and Informatics to be within one percent of each other and that the two offers were judged equal or about equal in Past Performance * * * [Understanding the Requirement, Management Plan, Key Personnel, and Corporate Resources]." Informatics was also told that the "single discriminator" between the two proposals was in one Mission Suitability subfactor--(Understanding the Requirement--Distribution of Workforce) where Informatics was assigned a lesser score.

Notwithstanding the divergent scores in the "single discriminator" area, Informatics was further informed by NASA that the difference between the proposals was not great. As NASA said in its April 4 letter to Informatics:

"Our selection of Computer Sciences Corporation's (CSC) proposal on the basis of its Mission Suitability attractiveness is not intended to mean that we considered the Informatics proposal to be poor nor is it to be implied that we consider Informatics to be a firm unsuited for the work identified in our procurement. We viewed your offer as a very good proposal and considered you in the Competitive Range up to the point of selection. We did not, therefore, find any overwhelming weaknesses in your proposal, so even though we may present some findings as 'weaknesses' our view is that we found more strength in the CSC offer than we found in the Informatics offer and our choice was one good offer over another good offer."

Expanding on its initial ground of protest relating to CSC's alleged lack of labor resources commitment from Informatics' employees (to be hired by CSC in the event CSC was selected for award), Informatics later alleged that the "statements made by CSC to the Source Evaluation Board (a) about the conduct of a telephone survey regarding solicitation of Informatics' employees, and (b) the result of the solicitation are erroneous and misleading."

NASA's procurement officer's initial comments on the "lack-of-labor-resources-commitment" issue raised by CSC were that "[T]hey [CSC] provided a good explanation as to how they could successfully fill the positions" and that "[W]e [NASA's proposal evaluation board] could find no basis for not believing the CSC statements." Further, the comments show that the procurement officer thought it was important for an offeror to be able to demonstrate that it would obtain the needed workforce.

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The Assistant Administrator for Procurement, NASA, subsequently replied to the "commitment" issue raised by Informatics as follows:

(1) Offerors were required to have commitments only for positions considered "key";

(2) CSC proposed committed key personnel (all eight of whom are currently employees of CSC and all of whom have expressed willingness to work on the instant procurement);

(3) With regard to staffing of the non-key personnel involved in the Informatics' ground of protest, NASA supports the procurement officer's positions that "CSC provided a good explanation as to how they could successfully fill the positions and that the [Board] could find no basis for not believing the CSC statements";

(4) The Informatics employees whom CSC proposed to use for "non-key personnel" positions were not "critical" in that comparable skills were available either from within CSC or the local labor market; hence, GAO and court precedent cited by Informatics for the proposition that it was improper for NASA to rely simply on the representations of CSC regarding the availability of "critical employees" is not applicable;

(5) CSC's confidence in obtaining the services of non-key personnel is backed up by its offer to absorb any costs which might be incurred if CSC decided not to hire locally (that is, not to hire Informatics' employees).

GAO AUDIT

Our Office made an audit to investigate further the accuracy of the statements, quoted above, made by CSC to NASA about the results of a CSC telephone survey which allegedly showed the commitment of Informatics' labor-resources to CSC in the event CSC should be awarded the contract in question.

CSC represented to NASA that, of the 60 Informatics' employees surveyed during June and early July 1976, 36 said they would join CSC should CSC become the "successful bidder"; 10 thought they would join CSC but preferred to remain uncommitted until CSC was actually successful in the procurement; 8 said they would probably join CSC; 3 had no opinion; and 3 said they would definitely not join CSC.

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We interviewed 61 of a total of 95 Informatics employees identified as working with the company in June and July 1976 in programming support contracts at Ames Research Center. (The remaining 34 persons were no longer employed by Informatics, or were said to be on leave or out of town.) Fifty-nine persons said they had not been contacted by CSC during the June-July 1976 time period. Of the two who had been contacted, only one said it was by telephone, and both said their discussions were in the context of a personal contact with an acquaintance at CSC.

When asked about contacts after July 1976, 37 of the 59 persons who had not been contacted during the June-July 1976 time period said they had had personal discussion with CSC representatives of possible future employment. All 37 indicated by date or by reference that their contacts had occurred after the March 1977 announcement of CSC's selection. The remaining 22 persons said they had had no direct contact with anyone from CSC on the subject of employment.

We allowed CSC, Informatics, and NASA to comment on the results of our audit.

The CSC Director, San Francisco Operations, who signed the letter to NASA responding to the "commitment" question which contained the statements about the telephone survey has submitted an affidavit which reads as follows:

"I am employed by the Computer Sciences Corporation as Director, San Francisco Operation, which has responsibility for Computer Sciences' contracts at the Ames Research Center of the National Aeronautics and Space Administration.

"I have been employed in that capacity since 1973.

"As part of my duties as Director, I was in charge of the efforts to bid on NASA RFP No. 2-25841 issued May 11, 1976, which now forms the basis of the protest by Informatics-FMI.

"My duties included supervision of the Company's activities in canvassing incumbent Informatics-FMI employees to determine their commitment to their work, to the Ames Research Center, and to the San Francisco area.

"These activities extended over a period of time, beginning in the winter of 1975-1976 and extending through July of 1976.

"The survey was conducted by means of talking with Informatics-PMI employees directly, asking certain Informatics-PMI employees and others questions about their fellow employees and telephone calls by Computer Sciences' employees to incumbent Informatics-PMI employees.

"The purpose of the survey was to gather information about the incumbent employees which would allow us to conclude whether or not these employees would remain at Ames if the identity of the contractor changed.
[Emphasis supplied.]

"The type of facts which we sought included, for example, whether they owned a house in the area, marital circumstances, whether they were involved in community activities, whether they had children in the local schools, whether and where their spouse was employed, etc.

"As information was obtained about the Informatics-PMI staff, notes were compiled and a tally was made of the number of incumbent employees who we had concluded would be likely to accept employment with Computer Sciences, the number who were not likely to stay, etc. [Emphasis supplied.]

"On the basis of the notes and tallies of the survey, our previous experience in hiring incumbent employees at Ames Research Center, and our considerable past hiring experience with contracts throughout the country, we prepared the response to NASA's interrogatory.

"And based on the foregoing, I was absolutely convinced that CSC could fully staff the work required by the RFP in the manner as described in our proposal."

CSC's counsel also furnished comments on the results of our audit and the above affidavit as follows:

- (1) The affidavit provides facts that led CSC employees to believe that a number of incumbent employees would be available to staff the contract work;
- (2) The correctness of CSC employees' belief is confirmed by the fact that now, 1 year later, CSC has in hand a significant number of employment applications from Informatics' employees at Ames Research Center;

- (3) As CSC does not seek "commitments" from prospective employees currently employed by an incumbent contractor because of the practico's "unsettling effect on employees," all that GAO should consider is whether CSC and NASA had a reasonable basis for their conclusions covering the number of Informatics' personnel that would be retained by a new contractor;
- (4) As a result of CSC's thorough study of the potential of hiring the Informatics staff, CSC concluded that it could hire incumbent employees;
- (5) GAO's audit seems to contain a misinterpretation of the information which CSC submitted to NASA in response to a query about the company's staffing plans. That is, it concludes that the survey was made only by telephone during a short period of time. The language, on review, seems to allow the interpretation which GAO has made, but it is not conclusive and perhaps the (CSC) selection of words was unfortunate in view of the actual efforts made by CSC. Nonetheless, the matter is one subject to differing opinions;
- (6) Even if the CSC submission was a misstatement, GAO must consider whether the misstatement was material in the evaluation of proposals in the light of CSC's reasonable conclusion--that it could hire at least 45 Informatics' employees based on steps taken to assure itself that incumbent employees could be hired;
- (7) CSC did not ask the incumbent's staff if they would take a job in the event CSC was successful but to confirm that they had ties to the area which increased the probability that they would seek employment with the successful contractor;
- (8) In many cases CSC did not need to contact Informatics' employees in order to determine the probability that they would join CSC in the event of award; in other cases information about Informatics' employees was requested by persons not representing CSC; as to others it is surely possible that they were reluctant to discuss their employment intentions with GAO or Informatics' officials or that they simply do not remember.

ANALYSIS

CSC clearly represented to NASA that 60 Informatics' employees had been interviewed by telephone during June and early July 1976, and that the responses formed the basis for the numbers and categories of employee commitments reported to NASA. CSC now admits that it determined which Informatics' employees would be "likely to accept employment" based on indirect questioning "beginning in the winter of 1975-1976 and extending through July 1976" about facts mainly relating to the employees' community ties.

Thus the manner in which CSC actually conducted the survey is at complete variance with the manner represented to NASA. Further, the "likely-to-accept-employment" conclusion made by CSC is also at complete variance with the CSC representation to NASA that "36 [Informatics' employees] stated they would join CSC should CSC become the successful bidder." Manifestly, the remaining CSC representations to NASA concerning the 24 other employees allegedly interviewed are also completely at variance with the actually conducted survey since the representations clearly state that Informatics employees' direct responses rather than CSC conclusions about "likely responses" prompted the representations. We therefore reject CSC's argument that the CSC representations to NASA are "subject to differing opinions."

Moreover, the results of our audit of Informatics' employees—in combination with the statements in the CSC affidavit—confirm that the manner of the actual survey and the reported results are also completely at variance with the CSC representations to NASA. Thus, we cannot attribute the varying survey results to employee "memory lapses" or unwillingness to respond to our inquiries.

We have also examined a document, entitled "Report of Investigation," containing the results of interviews which NASA obtained from several employees of Informatics and CSC concerning the circumstances of the CSC representation. Analysis has also been made of comments which CSC and Informatics submitted to our Office on the report.

We find nothing in the interviews which supports the November 23, 1976, CSC representations that direct responses of Informatics' employees formed the basis for the numbers and categories of employee commitments contained in the representations. Specifically, we find nothing in the interviews supporting the CSC representations that:

1. "The gross result of the survey indicates an overwhelming desire of the incumbent staff * * * to * * * continue * * * as employees of CSC[;]"
2. "* * * 60 individual interviews [were] conducted after working hours, during evenings and on weekends[;]"
3. "Of the 60 persons surveyed, 36 stated they would join CSC should CSC become the successful bidder. Another 10 persons thought they would join CSC's staff * * *. Of the remaining persons, 8 would probably join CSC * * *, 3 had no opinion, and 3 would definitely not join * * * [;]"
4. "Therefore, 46 of the 60 persons surveyed, which represents 77 percent of the sample, would join CSC if invited to do so." (Emphasis supplied.)

The remaining CSC arguments are essentially of a single thread although advanced separately. Thus, CSC argues that a "misstatement" resulting from an "unfortunate" selection of words should not be considered material since CSC had a reasonable basis--stemming from data collected under its actual survey--to conclude that it could fully staff the proposed contract.

It is clear that the CSC misstatement was relied upon by NASA in evaluating CSC's proposal. The record shows that the procuring officer thought it was important for an offeror to be able to demonstrate that it would obtain the needed work force--otherwise NASA would never have asked CSC to specify the "nature of the commitment [CSC had] from the employees of the * * * incumbent contractor [CSC] * * * proposed to hire." The number of Informatics' employees proposed to be used by CSC represents a significant portion of the contract work force. Further, it is apparent in assigning CSC a superior score in the "Understanding the Requirement--Work Force Distribution Plan" evaluation subfactor of the RFP and in assigning CSC a score equal to Informatics' score in the "Understanding the Requirement--Approach to Filling the Positions (Initial Staffing)" evaluation subfactor. Since the maximum score that could be assigned in these subfactors was more than 12 times the present total scoring differential between the CSC and Informatics' proposals, it is not possible for us to find that the misstatement was other than material.

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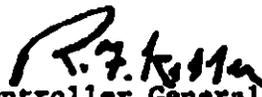
Further, in our view, it is not appropriate to speculate—as CSC apparently would have us do—that CSC's proposal could have received the same score even if the survey had been correctly described. In this view, it is also inappropriate to take note of CSC's post-selection efforts in regard to recruitment of Informatics employees.

DECISION

We conclude that CSC's employee submitted a significant misstatement concerning the manner and the results of the survey in question. In the course of discussions in negotiated procurements contracting agency representatives frequently ask for information from an offeror. The agency has a right to rely on the factual accuracy of the responses. Given the importance of such discussions and the delays and other difficulties which would be experienced if agency personnel were required to verify each response, we believe that the submission of a misstatement, as made in the instant procurement, which materially influences consideration of a proposal should disqualify the proposal. The integrity of the system demands no less. Any further consideration of the proposal in these circumstances would provoke suspicion and mistrust and reduce confidence in the competitive procurement system. Cf. The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD 194.

We are therefore recommending that NASA exclude CSC's proposal from consideration for award under the RFP. This recommendation is made under the authority of the Legislative Reorganization Act of 1970.

Protest sustained.


Deputy Comptroller General -
of the United States