James Spangenberg
Proc. I

01360

DECISION

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

FILE: B-186313 DATE: December 9, 1976

MATTER OF: Burroughs Corporation

DIGEST:

1. Since protester observed opening of best and final offer prior to designated time, protest against early opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered.

2. Protest based on procuring agency's administration of awardee's benchmark tests and allegation that awardee was improperly permitted to submit revised best and final offer after December 31, 1975, 2 p.m. closing time, which was filed in April 1976 and amended in June 1976 within 10 working days of when protester says it became aware of respective bases for protest, is timely under section 20.2(b)(2) of Bid Protest Procedures in absence of objective evidence to contrary. Protester is not required to demonstrate by concrete evidence that protest is timely.

3. Record does not support protester's contentions that awardee of ALP contract was permitted to: perform benchmark test requirements in less demanding manner than RFP required; wander in any material way from proposed system configuration; or utilize special computer software not meeting RFP requirements to pass tests.

4. Where concurrent with submission of best and final communication, offeror stated "arithmetic" error was made in cost tables which would result in price increase of "approximately $120,000," communication was ineligible for award consideration, since it proposed neither fixed, nor finitely determinable, prices which the Government would be bound to pay if award were to be based on communication. Also, since offeror's final technical submission proposed significantly different equipment configuration from that which underwent benchmark testing, proposal is unacceptable.

5. Because "approximate" pricing communication should not have been considered for award and, since offeror's "corrected" cost tables, modifying communication, were submitted unacceptably late, recommendation made that requirement be resolicited. Resolicitation also recommended since offeror was permitted to significantly correct unacceptable ADP configuration after closing time for best and final offers.

6. Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended systems life end. Payment of charges--a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"--would violate 31 U.S.C. § 665(a), 31 U.S.C. § 712a and 41 U.S.C. § 11, since charges represent part of price of future years' ADP requirements rather than reasonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory.

7. Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended systems life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability in violation of 31 U.S.C. § 665(a), 31 U.S.C. § 712a and 41 U.S.C. § 11.

8. If ADP contract is terminated for convenience of Government, payment of separate charges, which, by contract's provisions, are payable if Government returns equipment or otherwise terminates ADP system prior to intended 60-month systems life, would seem to be inconsistent with mandatory termination for convenience clause remedy, in that separate charges do not represent costs incurred in performance of work terminated and would clearly exceed basic contract's value.

9. Although some separate charges payable for termination of ADP system prior to intended system's multiyear life contained in contracts supported by fiscal year funds with multiple yearly options are illegal, it is proper to pay separate charges in cases where charges, taken together with payments already made, reasonably represent value of fiscal year requirements actually performed.

10. Inasmuch as payment of certain separate charges payable in event of termination of ADP system prior to intended multiyear life is illegal, indication in "fixed-price options clause" required to be included in such ADP procurements by Federal Property Management Regulation § 101-32.408-5 that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts supported by fiscal year funds with multiple yearly options. In addition, clause is unclear as to how separate charges are to be evaluated such that offerors are clearly unable to propose separate charges with any assurance that offers would not be rejected as unacceptable. Consequently, clause should be appropriately modified by GSA.

Background

By letters dated April 12 and June 28, 1976, the Burroughs Corporation (Burroughs) protested the award of a contract to Honeywell Information Systems, Inc. (Honeywell), under request for proposals (RFP) S2751008. The RFP was issued by the Mine Enforcement and Safety Administration (MESA), Department of the Interior, for the acquisition of an automatic data processing (ADP) system for a proposed 65-month period if option rights under the contract were completely exercised. The contract awarded is being funded with fiscal year funds.

To be eligible for award of the fixed-price contract contemplated by the RFP, an offeror had to successfully pass specified benchmark tests utilizing the equipment it proposed to furnish under the contract. Award was to be made to the offeror submitting the lowest priced offer (as evaluated) of those offerors which had successfully passed the benchmark tests. The RFP, as amended, informed offerors that the lowest offer would be determined by evaluating offerors' prices for the basic contract period and the option requirements involved as follows:

"II.2. FIXED PRICE OPTIONS

"The solicitation is being conducted on the basis that the known requirements exceed the basic contract period (and quantity) to be awarded, but due to the unavailability of funds, the option(s) cannot be exercised at the time of award of the basic contract (although there is a reasonable certainty that funds will be available thereafter to permit exercise of the options); realistic competition for the option periods (and quantity) is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a 'buy-in.' * * * Despite the foregoing, offerors are reminded that although the evaluation which will lead to contract award will be based on systems (items) life costs, the exercise of the option(s) is dependent not only on the continued existence of the requirement and the availability of funds, but also on an affirmative determination that such exercise is in the best interest of the Government."

The closing date was September 16, 1975, for receipt of initial proposals and October 20, 1975, for receipt of benchmark proposals. Burroughs, Honeywell, Digital Equipment Corporation (DEC) and International Business Machines (IBM) submitted timely initial proposals. IBM proposed an alternate system not in accordance with the RFP requirements; the company's proposal was therefore rejected by MESA as unacceptable. DEC's proposal was rejected when the company requested an extension of 8 weeks to complete the benchmark tests. In late November and early December, MESA determined that Burroughs and Honeywell had successfully passed the benchmark tests.

On December 16, 1975, Burroughs and Honeywell were advised that they were required to submit best and final offers no later than 2 p.m., December 31, 1975. Burroughs submitted its best and final offer on December 31, at 1:30 p.m. MESA states that Honeywell's best and final communciation was logged in at 1:50 p.m. Honeywell's communication was accompanied by a letter which stated in pertinent part:

"* * * The enclosed cost tables contain an error. They are currently being reprinted and will be in your hands by 3 PM today. The arithmetic error is approximately

$120,000 in evaluated cost and will result in an increase in cost to the tables enclosed."

As of the time "best and final" proposals were due, Burroughs' lowest offer was for an estimated evaluated price of $1,944,561 for a proposed "systems life" of 65 months; Honeywell's "uncorrected" cost tables reflected an estimated evaluated price of $1,784,395. MESA states that Honeywell's revised cost tables were delivered at 2:45 p.m., December 31, 1975. These tables indicated a total estimated evaluated price of $1,877,749, an increase of $93,354 over the "uncorrected" cost tables.

In January 1976, MESA found that both Burroughs and Honeywell had submitted technically acceptable best and final offers. After a detailed evaluation of the cost proposals was made, MESA found that Burroughs and Honeywell had not computed costs as specified in the RFP. Consequently, prices were reevaluated as follows:

Honeywell	$1,884,874
Burroughs	1,977,816

Contract No. S2761010 was then awarded to Honeywell on February 10, 1976, for a contract period extending to June 30, 1976, with options to renew to a maximum of 65 months. MESA informed Burroughs of Honeywell's award selection on February 10, 1976.

Burroughs' bases for protest are as follows: (1) Burroughs' best and final proposal was improperly opened before the "best and final" deadline; (2) Honeywell was improperly permitted to submit its "initial" best and final communication after the "2:00 p.m. deadline"; (3) Honeywell was permitted to: (a) perform the benchmark requirements in a "less demanding manner than was required by the RFP," e.g., the "data com" inquiries were run separate from the batch processing run; (b) use an "input-output" multiplexer (IOM) having more channels than the system proposed; and (c) use a COBOL compiler not complying with the RFP requirements; and (4) Honeywell was improperly permitted to submit its "revised" best and final proposal after the "2:00 p.m. deadline"; moreover, Honeywell's initial communication "neither had a firm price nor a method of deriving a firm price."

Is Burroughs' Protest Timely?

Both MESA and Honeywell assert that Burroughs' protest is untimely filed under section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R § 20.2(b)(2) (1976)), which provides:

> "* * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Argument is made that all bases of Burroughs' protest were known or should have been known by the company months before Burroughs actually filed its protest. Consequently, it is urged that Burroughs' protest should not be considered.

Burroughs, by contrast, argues that the bases for protest did not become known to it until April 1, 1976 (as to bases of protest Nos. 1, 2, 3 (a and b), and 4), and June 17 (as to basis of protest 3(c)).

Burroughs has stated that its representatives were present at the office designated for receipt of proposals from 1:25 p.m. until 2:03 p.m. on December 31; moreover, the company specifically admits its representatives were present when MESA officials opened Burroughs' best and final offer. Because of this admission, we think Burroughs must be held to have had knowledge about any irregularities relating to the early opening of its offer on December 31. Since the protest raising this issue was filed months after that day, Burroughs' first basis of protest is untimely filed under section 20.2(b)(2) of our Bid Protest Procedures, and will not be considered.

The allegation concerning the untimely receipt of Honeywell's "initial" best and final communication is based on the understanding of Burroughs' representatives that no other "best and final" proposal had been submitted as of the 2 p.m. closing time. In addition, Burroughs also knew that all offerors were required to submit best and final offers by that time. Consequently, when Burroughs learned of the award of a contract under the RFP to Honeywell on February 10, 1976, the protester must be presumed to have known--under its own version of the facts--that MESA permitted Honeywell to submit a proposal after the closing time. Since the protest raising this issue was not filed until April 1976, this issue must also be considered to have been untimely raised under section 20.2(b)(2) of our Bid Protest Procedures, and will not be considered.

We consider Burroughs' remaining bases for protest to be timely filed, however. Although Burroughs was told of the award selection immediately, it states it did not become aware of bases of protest 3 (a and b) and 4 until April 1, 1976, and basis of protest 3(c) until June 17, 1976. Since the conduct of the benchmark tests and the content of the cost proposals were not publicly disclosed, we are not in a position to question Burroughs' statements regarding when it became aware of its bases for protest. Nor has MESA or Honeywell presented any evidence which would indicate that Burroughs was aware, or should have been aware, of these bases for protest at an earlier date. Under these stated dates, Burroughs' April 12 protest (as amended by its letter of June 28, 1976) is timely filed under section 20.2(b)(2) of our Bid Protest Procedures.

We are unable to agree with Honeywell's assertion that Burroughs should be required to demonstrate by concrete evidence that its protest is timely. Rather, we believe, under the circumstances, that Burroughs' protest should be considered timely in the absence of objective evidence to the contrary.

Benchmark Tests

Burroughs' third ground of protest concerns alleged improprieties in the conduct of Honeywell's benchmark tests. In considering Burroughs' contentions, we, in consultation with a technical expert, have reviewed a substantial amount of the documentation surrounding the Honeywell benchmark tests.

Burroughs contends that Honeywell was permitted to run the "data com" inquiries separate from the batch processing run in violation of the RFP benchmark test requirements. However, from our review, we have been unable to find any evidence, nor has Burroughs furnished any concrete evidence, to support this contention.

Burroughs has also alleged that Honeywell used a 36-channel IOM for the benchmark tests. The Honeywell IOM, which is a part of the central processing unit (CPU), interfaces and transfers data between peripheral devices and the CPU system controller. Our review of Honeywell's technical proposal reveals that Honeywell offered an IOM with 18 channel slots together with an IOM "expansion" adding 9 more channel slots for a total of 27 channel slots. MESA states, and our review

confirms, that only 19 channel slots are utilized in Honeywell's proposed system.

We understand that a 37 channel slot IOM was used in the Honeywell benchmark tests. However, we agree with MESA and Honeywell that additional channel slots would not help Honeywell pass the benchmark tests or make the Honeywell system more capable, inasmuch as only 19 channel slots were being used. The devices connected to the CPU through the channel slots when the system is operated for the benchmark tests determine the system configuration that exists for operation in the tests. The presence of unused (unconnected) channel slots does not increase the capability of the tested system any more than the presence of unused electric sockets in a house increases a household's electric bill.

Burroughs has also asserted that a COBOL compiler not in compliance with the RFP requirement that "the COBOL compiler must be the full standard level 2 ANSI Standard COBOL X3.28-1968" was employed in the benchmark tests in conjunction with a special software program identified as "Charlie Brown." MESA states that the WWMCCS WW 6.0 COBOL compiler was proposed by Honeywell, used in the Honeywell benchmark tests, and delivered by Honeywell under the contract. Additionally, the Federal COBOL Compiler Testing Service (FCCTS), Department of the Navy, has stated that it had previously tested the Honeywell WWMCCS WW 6.0 COBOL compiler and that it conforms to the applicable RFP standards. Since FCCTS is the Federal authority on COBOL (See Federal Information Processing Standards Publication 21-1, December 1, 1975), we are satisfied that Honeywell's proposed COBOL compiler complied with the RFP requirements. The "Charlie Brown" referenced by Burroughs is apparently a library file containing the subroutines called for by the COBOL compiler in the Honeywell system.

From our review of the documentation concerning Honeywell's benchmark tests, we have found no evidence that Honeywell was permitted to perform benchmark requirements in a "less demanding manner than was required by the RFP" or to wander in any material way from its proposed system configuration in the conduct of the benchmark tests. Also, we have found no suggestion that any unfair or preferential treatment was afforded Honeywell during the tests.

Late Proposal

Concurrent with the submission of its best and final communication, Honeywell stated it had made an "arithmetic" error which would increase its price "approximately $120,000."

Burroughs has urged that by virtue of Honeywell's concurrent assertion of error Honeywell did not submit a proposal offering a firm-fixed price before the 2 p.m., December 31, 1975, closing date for receipt of best and final offers. Burroughs also contends that Honeywell's late "corrected" best and final communication should not have been considered for award.

The consideration of late offers and modifications is governed by section I.7 of the General Instructions of the RFP which provides:

"I.7. LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS

"(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered

* * * * *

"(b) Any modification of a proposal, except a modification resulting from the Contracting Officer's request for 'best and final' offer, is subject to the same conditions as in (a) (1) and (a) (2) of this provision.

"(c) A modification resulting from the Contracting Officer's request for 'best and final' offer received after the time and date specified in the request will not be considered unless received before award and the late receip is due solely to mishandling by the Government after receipt at the Government installation.

* * * * *

"(e) Notwithstanding (a), (b), and (c) of this provision, a late modification of an otherwise successful (selected) proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

The contracting officer has justified the acceptance of Honeywell's late "corrected" cost tables as follows:

> "Since Honeywell's offer was received before 2:00 P.M. and I was notified of the arithmetic error and that corrected cost tables would be provided in less than one hour, as Contracting Officer I decided that Honeywell's statement of 'approximately $120,000' would be the maximum change to the cost tables that I would accept and, therefore, Honeywell had submitted an acceptable offer consisting of the original $1,784,395 stated in their proposal plus $120,000 indicated in their letter for a total of $1,904,395. This offer was well below Burroughs' offer and made Honeywell the apparent low offeror. The revised tables delivered to our Headquarters Office at 2:45 P.M. December 31, 1975, indicated a total price of $1,877,749. Since this was an increase of $93,354, well under the 'approximately $120,000', I further considered this to be a late modification of an otherwise successful proposal which made its terms more favorable to the Government and accepted the proposal as authorized by paragraph (e) of the Late Proposals, Modifications of Proposals, and Withdrawal of Proposals clause contained in the RFP * * *. To do otherwise would have further reduced competition from two vendors to one for an already recognized arithmetic error in a very long, detailed and complex set of cost tables."

Neither MESA nor Honeywell has made any explanation of the nature of the alleged "arithmetic" error. However, during our review we noted that the technical portion of Honeywell's best and final communication proposed equipment different from that previously proposed and benchmark tested. Honeywell's best and final communication proposed only one code translator for the magnetic tape processor, although two translators were initially proposed and benchmark tested. Also, Honeywell's best and final communication did not propose the nine channel slot IOM expansion unit (discussed above) initially proposed and benchmarked. We also note that the cost figures for the CPU, of which the IOM expansion is considered a component, and for the tape processor, of which the code translators are considered parts, were the principle figures adjusted from the "uncorrected" cost table to the "corrected" cost tables. Consequently, it seems that the "arithmetic" error referenced by Honeywell might well have been caused by its inadvertent failure to include

the IOM expansion and code translators it proposed and benchmark tested.

Section II.2.1 of the RFP clearly required offerors to propose "fixed prices, or prices which can be finitely determinable" for the initial contract and option periods. See Computer Machinery Corporation, 55 Comp. Gen. 1151, 76-1 CPD 358, affirmed C3, Inc., B-185592, August 5, 1976, 76-2 CPD 128. Honeywell's best and final communication, however, did not propose any fixed of finitely determinable price which the Government would be bound to pay if award had been based on this communication. It is elementary that an offer must be sufficiently definite and certain to give rise to a binding contract. 17 AM. JUR. Contracts §§ 31, 75 (1964); 1 Corbin on Contracts § 11 (1963). If the consideration (price) stipulated in a contract is indefinite or uncertain, a primary purpose of contracting, i.e., to make the rights of the parties definite and certain, has been thwarted. See 13 Comp. Gen. 181, 183 (1934). Moreover, where competition is required for the award of a Government firm fixed-price contract, as here, it is essential that a definite and certain fixed price be stated in order for a proposal to be considered eligible for award, especially where price essentially determines award.

In the present case, it is clear that the Government could not bind Honeywell to the price quoted in its "uncorrected" cost tables in view of the concurrent assertion by Honeywell that this price was in error. This evidenced Honeywell's clear intent that the price tendered in its "initial" best and final communication was not to be considered a firm offer (proposal).

Moreover, Honeywell's price could not be rendered finitely determinable by merely adding $120,000 to the "uncorrected" evaluated price. Honeywell did not limit the amount of its alleged "arithmetic" error to $120,000, but rather stated that its offered price would be adjusted upwards "approximately $120,000" (emphasis supplied). By adding the term "approximately," any definiteness or certainty as to what fixed price Honeywell intended to offer was negated. Indeed, under the circumstances of the present case, it would appear that "approximately" would allow for other than de minimus variations from $120,000; that is, Honeywell's corrected price adjustment varied $26,646 or 22 percent from $120,000. Although the contracting officer

stated he would have limited the correction of Honeywell's evaluated price to $120,000, there is no authority for him to so limit the price. The term "approximately" does not mean "no more than," but rather allows for adjustments of greater than $120,000.

In addition, Honeywell's final technical submission was technically unacceptable. As discussed above, Honeywell proposed a significantly different equipment configuration from that which passed the benchmark tests. Although Honeywell's failure to include the IOM expansion and the second magnetic tape processor code translator in its final configuration may have been inadvertent, Honeywell effectively superseded its previous technically acceptable configuration. See Patty Precision Products Company, B-182861, May 8, 1975, 75-1 CPD 286. Since we understand that the benchmarked configuration has been installed, it seems clear that Honeywell was permitted to correct its apparent oversight after the closing date.

In view of the foregoing, Honeywell's "corrected" best and final offer should have been considered late under the RFP's "Late Offers and Modifications or Withdrawals" clause and not for consideration, since Honeywell's "initial" best and final communication was not the "otherwise successful proposal." Discussions with Burroughs as well as Honeywell should have been conducted and a new round of best and final offers been called, so that both Honeywell and Burroughs could have competed on an equal basis. See 51 Comp. 479 (1972); Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201, 75-2 CPD 144, modified by 55 Comp. Gen. 972, 76-1 CPD 240; Elgar Corporation, B-186660, October 20, 1976, 76-2 CPD 350.

Separate Charges

Before deciding what remedial action should be recommended with regard to Honeywell's contract because of the foregoing analysis, we must ascertain the effect of the "separate charges" proposed by Honeywell. Under this provision of the Honeywell contract, MESA is supposed to pay "separate charges" if it returns the Honeywell equipment or otherwise terminates the ADP system prior to the end of the intended 60-month "systems life." (Although contract term was 65 months, system equipment was scheduled to be installed in the seventh of 66 evaluated months.) Similar separate charges are at issue in various other bid protests pending in

our Office, in particular, Honeywell's protest of the General Services Administration (GSA) procurement of ADP equipment for the Navy under RFP CDPA-75-13, which is the subject of our decision of today (B-186940). The "separate charges" provision of Honeywell's contract reads as follows:

> "The prices and terms and conditions are predicated upon the Government's stated current intention to retain the proposed system under this contract by purchase and/or continuing rental for the entire system's life (contract evaluation months 7 through 66). The stated prices and discounts shall be valid unless and until the Government fails to acquire and retain the initial installation for said system's life. In this event, prices may revert to then current Honeywell list.
>
> "While the Government is not obligated to exercise its options to extend the term of this contract for the full 60-month system life, the parties hereto acknowledge that the stated prices and discounts and other terms and conditions are based on the Government's current intention to so extend the term of this contract. Accordingly, the Government agrees that for each proposed item of equipment not purchased or rented and retained on rental for the entire 60-month system life or respective remaining portion thereof, the Government shall pay to Honeywell an 'Early Lease Termination Charge' of 30% of the monthly list rental price (standard Honeywell list price as reflected in the then current Honeywell ADP Schedule or, in its absence, in Honeywell's then current commercial catalog) multiplied by the remaining number of respective months until the end of the 60-month system life. Thus, if an item is returned to Honeywell 15 months prior to the end of the 60-month system life period, the Government shall pay to Honeywell an 'Early Lease Termination Charge' of 4-1/2 month's rent at list rental price. The 'Early Lease Termination Charge' is similarly applicable to optional proposed augmentation equipment not retained on rental for the full 60-month system life or respective remaining portion thereof."

Honeywell's separate charges flow from the RFP's expressed reservation that there is only a "reasonable certainty" that all options would be exercised. ADP equipment represents a very large capital investment for a contractor. Should the equipment supplied under the contract be returned to Honeywell by MESA prior to the expiration of the systems life, either because of termination of the contract, failure to exercise an option, a desire by the Government to cut back the system to save money, or for any other reason, the contractor may well suffer a loss on the equipment it is supplying the Government if it is unable to find another user for the equipment. The separate charges quoted by Honeywell are apparently intended to protect against this contingency.

Moreover, the RFP essentially invited offerors to quote "separate charges" if they so desired by means of the following provisions:

"II.2.2. EVALUATION OF PRICES

"Offers will be evaluated for purposes of award by adding the total price of all optional periods and, if applicable, all stated optional quantities to the total price for the initial contract period covering the initial system or items. * * * Separate charges, if any, which will incur to the Government should the latter fail to exercise the options, will not be considered in the evaluation, except as stated II.2.3. below. (Emphasis supplied.)

"II.2.3. UNBALANCED PRICES

"An offer which is unbalanced as to prices for the basic and optional quantities may be rejected. An unbalanced offer is one which is based on prices significantly less than cost for some systems and/or items and prices which are significantly overstated for the other systems and/or items. In determining an offer which is unbalanced as to prices,

<u>the Government will evaluate separate charges, if any, which the Government will incur for failure to exercise the options</u>." (Emphasis supplied.)

These provisions are part of the "fixed-priced options" clause, which Federal Property Management Regulation (FPMR) § 101-32.408-5, 41 C.F.R. § 101-32.408-5 (1976), required be included in the present RFP. The regulation provides:

"When the Government has firm requirements for ADPE, software, or maintenance services which exceed the basic contract period (and quantity) to be awarded, but due to the unavailability of funds the option(s) cannot be exercised at the time of award of the basic contract (although there is a reasonable certainty that funds will be available thereafter to permit exercise of the options); realistic competition for the option periods (and quantity) is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a 'buy-in,' the * * * [fixed-price options] clause shall be inserted in solicitation documents."

Since the Honeywell contract is being funded with fiscal year appropriations, payment of the separate charges quoted by Honeywell would necessarily involve consideration of 31 U.S.C. § 665(a) (1970), 31 U.S.C. § 712a (1970), and 41 U.S.C. § 11 (1970), which provide:

31 U.S.C. § 665(a):

"No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations

made for such purpose, unless such contract or obligation is authorized by law."

31 U.S.C. § 712a:

"Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year."

41 U.S.C. § 11:

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportion, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

In 42 Comp. Gen. 272, 275 (1962), we summarized the import of these statutes as follows:

"These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to

expenditures required for the service of the particular fiscal year for which they are made."

Contracts executed and supported under authority of fiscal year appropriations, as here, can only be made within the period of their obligation availability and must concern a bona fide need arising within such fiscal availability. Leiter v. United States, 271 U.S. 204 (1926); Goodyear Tire and Rubber Company v. United States, 276 U.S. 287 (1928); 48 Comp. Gen. 497 (1969); Storage Technology Corporation, B-182289, April 25, 1975, 75-1 CPD 261. Those contracts entered into under fiscal year appropriations purporting to bind the Government beyond the fiscal year involved must be construed as binding upon the Government only to the end of the fiscal year. Leiter, supra. Specific affirmative action by the Government, in effect making a new contract and complying with the advertising requirements, is required in order to extend the term of the contract beyond the fiscal year. See 42 Comp. Gen., supra; Leiter, supra; Goodyear, supra.

These principles were applied in 36 Comp. Gen. 683 (1957), affirmed at 37 Comp. Gen. 155 (1957)--a similar case to that involved here. In the cited case, we were asked for our opinion as to the Atomic Energy Commission's authority to enter into a 5-year supply contract for magnesium. The proposed contractor intended to build a new plant for the supply of the mineral. In return for quoting a favorable base price, which could not otherwise be obtained for the mineral, the proposed contractor wanted the Commission to guarantee that, should the contract be terminated before the end of the 5-year period, it would recover a "sliding-scale" percentage (depending on the year of termination) of its capital costs for the plant as a termination penalty (separate charge).

We found that the proposed 5-year contract could not be entered into with fiscal year funds. We went on to say:

"Furthermore, even if the contract were to be executed on a one-year basis with renewals optional on the part of the Commission, question would arise as to the validity of the proposed termination charge provisions. * * *

"It has consistently been held by the accounting officers that [the above-quoted] statutes preclude the obligation of an appropriation made for the use of one fiscal year for needs of other years. In other words, a fiscal year appropriation such as the usual appropriations for the Commission may be obligated only for the procurement of supplies or services which are needed during that fiscal year. See 32 Comp. Gen. 565, and decisions there cited. The invitation for proposals and the proposed contract in the present case demonstrate that the maximum need of the Commission for the magnesium to be furnished is 7,000,000 pounds in any one year. Consequently, under the statutory limitations cited above, the maximum amount which properly may be obligated against any fiscal year appropriation is the [reasonable] cost of that quantity.

"It is understood that other contracts similar to that now proposed have been made by the Commission, and that there have been obligated under such contracts termination charges of a similar nature. The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity.

"The ultimate need of the Commission in these cases is for the supplies themselves, and, as stated above, in the present case the maximum annual need is for 7,000,000 pounds of magnesium. Any contract provision which would obligate the Commission to pay more than the [reasonable] cost of this quantity of magnesium in any one fiscal year as a penalty or damages for failing to renew the contract for subsequent fiscal years could not be considered as

pertaining to the needs of the current year. The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so. In other words, the termination charges represent a part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need.

"It is our opinion, therefore, that in the absence of special statutory authority the Commission properly may not execute the proposed contract.* * *" (Emphasis supplied.)

The Commission requested reconsideration of this decision. In 37 Comp. Gen. 155, *supra*, we acknowledged that we had approved arrangements similar to those suggested by the proposed magnesium contractor when the arrangement was the *only* way the Government could obtain the supply or service. See, for example, 8 Comp. Gen. 654 (1929), involving a utility contract for water service (discussed below). But we noted the Commission could meet its current and future magnesium needs from other sources without the construction of the new plant under the proposed scheme involving separate charges. Moreover, we concluded that the cost (including separate charges) of any particular fiscal year's magnesium needs under the scheme would be far in excess of the reasonable cost of the magnesium from the existing source. Consequently, we affirmed our prior decision.

It seems apparent that the separate charges present in the Honeywell contract actually represent a part of the price of the ADP requirements of future years rather than merely current needs under the contract. Honeywell's separate charges penalty is clearly intended to recapitalize the contractor for its investment based upon a full 60-month systems life if the Government fails to continue to use the equipment. Indeed, Honeywell's penalty is a percentage of all future years' rentals of discontinued system equipment based on Honeywell's "list prices" at the time of discontinuance. For example, if MESA were to terminate the contract in December 1976, Honeywell would be entitled, in theory, to payment of a penalty equal to 30 percent of Honeywell's "monthly list price" for the discontinued system equipment multiplied by 55 months--the then remaining intended contract life. An even more egregious example could have been demonstrated had MESA terminated the contract and paid the separate charges in the first few weeks or months of the contract. If the Government were liable for the charges involved, it is apparent that the Government's option "rights" under the Honeywell contract are essentially illusory, since the Government would have to pay a substantial penalty in lieu of exercising the option.

Honeywell's separate charges, therefore, do not reasonably relate to the value of the current fiscal year requirements which have actually been performed. Consequently, the charges are not based on a current fiscal year need, and payment of these charges would violate the above-quoted statutes. 36 Comp. Gen., supra; 48 id. 497; B-164908, July 6, 1970.

To be contrasted with the improper Honeywell scheme, the Government may properly pay a higher base rate for the first year than subsequent years of multiple year requirements covered by the same procurement funded with fiscal year appropriations. Award may be made under the circumstances set out in FPMR § 101-32.408-5 to an offeror proposing the lowest overall price adding the base contract price and the prices of all options intended to be eventually exercised, rather than to the offeror proposing the lowest initial price for the base contract period only. See B-162839, December 13, 1968; B-164908, July 6, 1970, supra. Award, in effect, is to be made to the offeror proposing the lowest overall average price for the projected contract life--assuming that there is a reasonable certainty that the options will be exercised. So long as the lowest overall offer is not "unbalanced"--e.g., based on prices significantly understated for some work and overstated for other work--any part of the higher initial contract price for the base period does not represent future year needs, since award, in fact, is being made to the lowest bidder for the entire intended contract term. See B-162839, supra; B-164908, July 6, 1970, supra. On the other hand, separate charges which do not represent the reasonable value of the performed work at termination--e.g., Honeywell's separate charges--can be directly linked to future year needs, since the charges actually compensate the contractor for the Government's failure to use the equipment in future years. Moreover, separate charges cannot be logically added to the base and option prices to determine the lowest-priced offer, since both these prices and the separate charges will not be paid because they are alternative in nature.

Additionally, Honeywell's separate charges are based, in part, on a percentage of "Honeywell's then current commercial catalog" prices. These catalog prices are to be used only if no current ADP schedule contract exists for the particular equipment. Honeywell's catalog prices are subject to change at any time solely within the exercise of Honeywell's discretion. Moreover, there is no requirement that Honeywell continue its ADP schedule contracts. Also, there is no limitation on how much Honeywell could decide to raise its catalog prices if it so desired (to be contrasted with ADP schedule contract prices where

the Government has the discretion not to enter into schedule contracts if the prices are considered too high, see Digital Equipment Corporation, B-180833, July 2, 1974, 74-2).

The effect of this provision would be to subject the Government to an indeterminate liability. We have consistently recognized that the Government may not be obligated to pay uncertain or potentially unlimited contingent liabilities, since it can never be said that sufficient funds have been appropriated to cover such contingencies. This violates the above-quoted statutes. See 16 Comp. Gen. 803 (1937); A-95749, October 14, 1938; 20 Comp. Gen. 95, 100 (1940); California-Pacific Utilities Company v. United States, 194 Ct. Cl. 703, 715 (1971). Consequently, Honeywell's separate charges are also invalid insofar as they may be based upon "Honeywell's then current catalog" prices.

Furthermore, if the Honeywell contract were terminated for the convenience of the Government, it seems that payment of the Honeywell separate charges would be inconsistent with the standard termination for convenience (T for C) clause remedy. This clause was included in the Honeywell contract by requirement of Federal Procurement Regulations (FPR) § 1-8.700 (Amend. 153, 1975).

The Honeywell separate charges do not represent costs incurred in the performance of the work terminated--the measure of recovery under the clause. Moreover, these charges would clearly exceed the value of the contract--the limit of recovery under the clause--if complete termination of the system occurred during the first few years. Consequently, payment of the Honeywell separate charges would allow for recovery of costs not cognizable under the T for C clause.

In the absence of an express waiver pursuant to FPR § 1-1.009 (Amend. 9, 1965), an agency is not authorized to agree to termination damages inconsistent with the T for C clause remedy. See B-155936, March 15, 1968; G. L. Christian & Associates v. United States, 160 Ct. Cl. 1 (1963), cert. denied 375 U.S. 954 (1963), where a claim for anticipatory profits arising from an early termination of a contract was denied, because the clause, which is reflective of long-standing policy, was incorporated in the contract by operation of law. In any case, by virtue of the RFP's Order of Precedence clause, the T for C

clause here clearly takes precedence over the separate charges provisions. Additionally, counsel for Honeywell (in a letter furthering its aforementioned protest (decided today) with GSA, where very similar separate charges provisions are involved) apparently admits that the separate charges are inconsistent with the T for C clause remedy, and that the clause would govern in determining any termination liability rather than the separate charges provisions.

This is not to say that all separate charges are violative of the above-quoted statutes. Payment of separate charges for early termination is proper if the only way the Government can obtain needed services or supplies (e.g., utilities) is by agreeing to pay such charges. See 8 Comp. Gen., supra; B-164772, August 16, 1968. This is to be contrasted with the highly competitive ADP industry where the Government does not have to pay separate charges to obtain ADP equipment and services. For example, Burroughs proposed no separate charges in the present case.

Also, the payment of separate charges for early termination, which, taken together with payments already made, reasonably represent the value of fiscal year requirements actually performed is proper, even when--as in most ADP related procurements--the goods or services can be obtained without allowing offerors to propose these charges. (See 48 Comp. Gen. 497, which inferentially modified 37 Comp. Gen., supra, as to the permissibility of allowing these charges, even though the goods or services might be obtained from some concerns without separate charges.) If the Government expresses a firm intent (notwithstanding the reservation of options) that the equipment is to be used for multiple years, a supplier may well discount its offered annual rental for the ADP equipment based upon usage for this projected term. If otherwise allowed by the procuring agency and subject to the T for C clause, it would be proper for an offeror, under the circumstances, to provide for the contingency that the equipment may not be used for the entire projected term by providing for recovering the reasonable value (e.g., ADP schedule price) of the actually performed work at termination based upon the shortened term. Any decision which may be inconsistent with this view should no longer be followed. See, for example, B-164900, July 7, 1972.

Inasmuch as the payment of certain separate charges is illegal, the indication of the FPMR "fixed-price options" clause that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts with multiple yearly options funded with fiscal year appropriations. This improper FPMR implication cannot act, however, to bind the Government to violate the congressionally mandated proscription against such charges contained in the above-quoted statutes.

In addition, we believe the FPMR clause is unclear as to how separate charges are to be evaluated. The clause states that separate charges for failing to exercise an option are only to be considered in determining whether an offer is "unbalanced" as to price. But, although "unbalancing" with regard to basic prices is defined in the clause, the specific mechanism for determining whether separate charges make an offer "unbalanced" is nowhere indicated by the clause. Nor are there any objective or common guidelines and standards in the clause by which an offeror could reasonably determine whether its separate charges made its offer unacceptable. Faced with the existing clause, offerors are clearly unable to propose separate charges with any assurance that their offers would not be rejected because of "unbalancing." Cf. Mobilease Corporation, 54 Comp. Gen. 242, 246 (1974), 74-2 CPD 185; Standard Services, Incorporated, B-182294, April 8, 1975, 75-1 CPD 212. Also, see GSA's methodology in applying the "unbalancing" tests to very similar separate charges in the aforementioned Honeywell protest (decided today).

Conclusion

We recommend that Burroughs and Honeywell be afforded an opportunity to submit new price proposals in a manner consistent with this decision. After negotiating with these sources, the Honeywell contract should be terminated for the convenience of the Government, if Burroughs is the successful offeror. In this event, Honeywell should not be paid separate charges; rather, settlement with Honeywell is required to be made in a manner consistent with the T for C clause. If Honeywell is successful at a price lower than that contained in its existing contract, the contract should be modified in accordance with Honeywell's final proposal. Also, a clause in the RFP to be used for resoliciting price proposals should expressly provide that Honeywell, as a condition of participating in the resolicitation, agrees to the modification scheme. Technical and benchmark proposals need not be solicited

from other sources in the present case, since no firm other than Burroughs was prejudiced by the foregoing procurement deficiencies.

We understand that there are various other extant ADP contracts containing separate charges which may be questionable under our analysis. We do not believe those otherwise properly awarded contracts containing such charges should be disturbed. However, if any of the systems covered by these contracts are terminated prior to their contemplated life, the payment of the illegal separate charges, as indicated in this decision, would be prohibited.

If GSA still wishes to allow separate charges in fiscal year funded contracts with multiple yearly options, the FPMR clause should be modified to specifically advise prospective offerors as to what separate charges are not acceptable, that is, a specific ceiling on separate charges should be stated. An appropriate ceiling on separate charges would seem to be the reasonable value (e.g., based on ADP schedule prices, catalog prices extant at contract execution or cost data) of the ADP requirements which have been actually performed under the contract at the time of discontinuance of the system. In any case, we believe that GSA may want to reevaluate the wisdom of permitting separate charges to be quoted at all in ADP procurements. We are bringing the problems we have found with the FPMR "fixed-price options" clause to the attention of the Administrator of GSA by letter of today, together with our recommendation that the FPMR clause be appropriately modified.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency(s) involved to the House and Senate Committees on Government Operations and Appropriations concerning the actions taken with respect to our recommendations.

Deputy Comptroller General
of the United States