DOCUMENT RESUME

03260 - [A2173302]

[Protest against Procurement Precluding the Use of Separate Charges]. B-188399. August 4, 1977. 3 pp.

Decision re: Storage Technology Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: General Services Administration.
Authority: 31 U.S.C. 665(a). 31 U.S.C. 712(a). 41 U.S.C. 11. 56 Comp. Gen. 142. 56 Comp. Gen. 167. 48 Comp. Gen. 497. B-182289 (1975). B-186313 (1977). Leiter v. United States, 271 U.S. 204 (1926). Goodyear Tire and Rubber Co. v. United States, 276 U.S. 287 (1928).

The protester objected to a solicitation amendment which eliminated the provision for separate charges in a contract for furnishing plug-to-plug memory requirements for currently installed automatic data processing equipment. The agency's decision to preclude the use of separate charges for failure to exercise renewal options in the procurement was not an abuse of agency discretion because competition existed on the basis of the terms solicited. (Author/SC)

Bert Japikse
Proc. II

DECISION

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

FILE: B-188399 DATE: August 4, 1977

MATTER OF: Storage Technology Corporation

DIGEST:

Agency decision to preclude use of separate charges for failure to exercise renewal options in ADP procurement is not abuse of agency discretion because competition existed on basis of terms solicited.

Storage Technology Corporation (STC) protests the solicitation amendment which eliminates the provision for "separate charges" in General Services Administration (GSA) RFP GSC-CDPR-T-0028 for furnishing plug-to-plug memory requirements for currently installed automatic data processing equipment (ADPE).

Essentially, the protester argues that it should be permitted to require a separate charge for the Government's failure to exercise renewal options. Although professing agreement in some respects with our decision in Burroughs Corporation, 56 Comp. Gen. 142 (1976), 76-2 CPD 472, modified, in part, affirmed, in in part, Honeywell Information Systems, Inc., 56 Comp. Gen. __, 77-1 CPD 256, B-186313, April 13, 1977 (herein Burroughs) and Honeywell Information Systems, Inc., 56 Comp. Gen. 167 (1976), 76-2 CPD 475 (herein Honeywell), STC contends that those cases have been misapplied by GSA, or that GSA has abused its discretion in refusing to permit separate charges in this instance.

Separate charges, in the past, have been used in an attempt to reconcile the conflict between the desirability to the Government of the use of long term ADPE leases, or leases with option to purchase provisions, and the statutory limitations in 31 U.S.C. §§ 665(a) and 712(a) (1970) and 41 U.S.C. § 11, which in part, prevent the obligation of funds in advance of their appropriation by the Congress. According to STC, the ability of small firms to compete for large Government ADPE contracts depends upon whether they can obtain financing. That, in turn, depends upon their ability to convince their financial sources that the equipment, which is frequently quite expensive, will remain installed.

In Burroughs we indicated that the Government may not pay separate charges which do not represent the reasonable value of work performed at the time the contract is terminated. The Government may not obligate itself to do so. We stated that such charges are 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." As noted in our decision, contracts executed and supported under authority of fiscal year appropriations can only be made within the period that such funds are available for obligation and may be made only to meet a bona fide need arising within that period. Leiter v. United States, 271 U.S. 204 (1926); Goodyear Tire and Rubber Co. v. United States, 276 U.S. 287 (1928); 48 Comp. Gen. 497 (1969); Storage Technology Corp., B-182289, April 25, 1975, 75-1 CPD 261

We recognized, in Burroughs, that separate charges may be permissible, in specific instances. For example, we stated:

> "* * * Payment of separate charges for early termination is proper if the only way the Government can obtain needed services or supplies * * * is by agreeing to pay such charges. * * *. This is to be contrasted with the highly competitive ADP industry where the Government does not have to pay charges to obtain ADP equipment and services. * * *."

Through counsel, SCI takes exception to the latter statement, asserting that the statement is not true in this instance. Moreover, it argues that to obtain competition a solicitation must be drawn so as "to enable and induce the bidder or offeror to submit the best price practicable." In this regard, the law requires only that a solicitation be free from ambiguity and not be drawn in an unduly restrictive manner. Ordinarily an agency enjoys broad discretion to define its requirements and the terms of its solicitations. We will not question a determination that particular requirements are necessary, absent evidence that the agency's broad discretion was abused.

In this instance, GSA determined that separate charges should not be permitted. It has relied upon our recommendation, in connection with Burroughs, that the use of separate charges be reviewed and may not be necessary. Further, GSA believes

competition is achieved without allowing separate charges, and was achieved in this case because at least two offers for each item were received from a total of ten firms. That a number of offers were received indicates that this case does not fall within the exception specifically mentioned in Burroughs, i.e., instances where the Government could not fill its needs without allowing separate charges.

In further support of its position STC points to situations in which the Government, as self insurer, has agreed to absorb the cost of damage resulting from contractor negligence. In such instances, the amount of the Government's liability is not established by the contractor's intentional unilateral act and the Government does not assume a liability contingent upon the exercise by Congress of the very power, i.e., to appropriate, which by law may not be encroached. By exposing such risks to competition we believe there will be greater assurance that such charges will not include inappropriate costs and will be limited to reflect the reasonable value of requirements which actually have been performed under the contract at the time the system is discontinued. See Burroughs Corporation, supra.

We believe the determination by GSA that separate charges should not be allowed is rationally supported in this case. Therefore, STC's protest is denied.

Deputy Comptroller General
of the United States