

CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A LAWYER'S VIEW OF AVAILABILITY

"TO BE OR NOT TO BE?"

By Ed Seymour

So its Monday morning and in comes a breathless program manager with the usual rush requirement to buy ADPE. As the functional requirement specification is plopped on your desk, the program manager starts into this long explanation of how the gear needs to be state-of-the-art, but can not be experimental, beta, developmental or any other prototype of questionable function or reliability. At this point concerned that the building is on fire, the program manager says the procurement needs to be done ASAP, jumps up and bolts out the door. Now what?

The Choices

The problem for the contracting officer and for the program manager is to somehow specify that the ADPE needs to be on one hand *not* a discontinued or obsolete product and on the other hand *not* something still in the developmental laboratories. Unfortunately, the hardest way to describe something is by defining what it is not!

Solution #1: Formally Announced for Marketing Purposes

The General Services Administration (GSA) in their standard solicitation in Clause C.6 attempts to resolve the problem by merely requiring that the proposed equipment and software be formally announced for marketing purposes before the solicitation closing date. At first blush, this appears to solve the problem, except that it assumes that what is announced can also be produced. However, as noted by the GSBCA, what is formally announced for marketing purposes really provides no information on whether the announced product is of a developmental or production status or whether it exists at all. *Tisoft, Inc.*, GSBCA No. 9438-P, 88-3 BCA ¶ 20,840. In fact, a formal announcement for marketing purposes is simply a corporate test for market reaction. *Id.* Hmmm, not a lot of help with the problem.

Solution #2: In Current Production

Recently, the Veterans Administration (VA) adjusted the GSA standard solicitation's availability clause by substituting "in current production" for "formally announced for marketing purposes." In the VA's view, the term "in current production" would simply mean that the item is out of the design phase and is in assembly line production with the expectation by the offeror that such production will continue prior to some specified date (initial proposals, BAFOs, award, etc.). *Tisoft, Inc.* This seems simple enough, but alas the world is not perfect. *Tisoft, Inc.* protested this interpretation stating that "in current production" implies

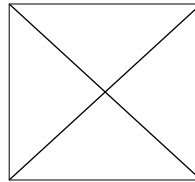
production of some quantity which should reflect the offeror's expected market share for the item. *Id.* The GSBCA disagreed with *Tisoft, Inc.* stating that such a definition arbitrarily restricts competition. *Id.* Instead the Board adopted the VA's interpretation AND noted that "in current production" does NOT necessarily mean production testing is completed or that the production is for any purpose beyond field testing. *Id.* Hmmm better, but maybe not THE great solution. But then again, maybe ongoing production or field testing is ok.

Solution #3: Commercially Available, Off-the-Shelf, AND In Current Production

Sometimes, there's something to be said for brute clarity. The Department of the Army negotiated a contract for a super minicomputer and peripherals and for clarity required that the proposed equipment be commercially available, off-the-shelf, and in current production. *Pyramid Technology Corp.*, GSBCA No. 8743-P, 87-1 BCA ¶ 19,580. The GSBCA found that due to uncontradicted evidence that the equipment proposed by the winning vendor was shipped to commercial customers, this was *per se* compliance with the requirement that the equipment be "commercially available, off-the-shelf and in current production," and consequently not developmental, prototype or obsolete. *Id.* Hmmm, this is the most restrictive specification, but it sure ties up the problem!

The Real Problem: What is the Government Requirement?

After countless Monday mornings, the real problem is trying to specify the Government's requirement for the ADPE procurement in question. Because of the time lag between the CD-435 and the award date, can the Government live with ADPE "formally announced for marketing purposes?" Or because of the nature of the products being bought and our knowledge of the production and field testing environment to which these products are put, can the Government live with ADPE "in current production?" Or do we just have to have "commercially available" gear? **As usual, it's decision time.**



From the Editor: Ed Seymour is a NOAA Corps officer assigned to the Contract Law Division and primarily works on NOAA contract matters.

👉 Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-