

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-212018, B-212018.2**DATE:** July 1, 1983**MATTER OF:** Amdahl Corporation; ViON Corporation**DIGEST:**

Solicitation required that equipment be in current production, state-of-the-art and commercially available. Common, ordinary meaning of these three terms is sufficiently broad that offerors might reasonably have interpreted these requirements differently. Recommendation is made that agency should clarify the meaning of these terms in this RFP and request new round of best and final offers.

Amdahl Corporation (Amdahl) and ViON Corporation (ViON) protest the award of a contract to the International Business Machines Corporation (IBM) by the Army under request for proposals (RFP) No. DAHC26-83-R-0007. The contract was awarded to IBM on May 23, 1983. Amdahl and ViON contend that IBM's offer of a model 3081-D computer did not satisfy the current technology and commercial availability requirements of the RFP. The General Services Administration (GSA) has filed comments which generally support the protesters' position. We sustain the protest.

The Army issued this RFP on February 10, 1983, to obtain an "IBM Model 3083-J08 or equal" computer with the capability of incremental upgrade to an "IBM Model 3081-K or equal" to replace an existing unit. Under the evaluation factors stated in the RFP, a determination of acceptability required, among other things, "That each and every mandatory requirement set forth in the Specification Section c is met." The parts of section "c" which concern us here were:

"Commercially available, off-the-shelf equipment is required. The Government may accept specifically engineered changes to offered equipment, if such changes enable

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the offered equipment to meet the requirements of this Specification. Equipment which must be developed to meet the requirement will be considered unacceptable."

"All equipment must be state-of-the-art technology and current production at the time proposals are submitted. Prototype or developmental equipment is not acceptable. Out-of-date, discontinued equipment is not acceptable."

"Equipment offered may be new or used. If used equipment is offered, this equipment shall be completely reconditioned by the original equipment manufacturer [OEM]."

IBM responded by stating that it met the first two requirements and stated that: "We are the OEM and will provide new equipment or equipment warranted equivalent to new in performance" in response to the third.

Amdahl and VION contend that the Army's acceptance of an IBM 3081-D in response to this solicitation was improper. They argue that the 3081-D is (1) not state-of-the-art, (2) not commercially available, and (3) not in current production, as specified in the mandatory requirements of the RFP. In support of this position, the protesters point to the IBM announcement of the 3081-G, dated September 3, 1982, which states that the 3081-D is no longer in new production. The protesters contend that this announcement confirms that the 3081-D has been replaced by the 3081-G and is, therefore, no longer "state-of-the-art." The protesters also state that IBM now markets the 3081-D only to the governmental sector and educational institutions and argue that this is not equivalent to being "commercially available," which they define as being available to the broad, general market, including both public and private sectors.

The Army and IBM contend that the 3081-D fully complies with the RFP provisions cited above. The Army points out that, in response to these protests, a three-person team was sent to inspect the IBM production facility in Poughkeepsie,

New York, and observed 3081-D's being built. The Army takes the position that as long as a product is being built, it is in "current production."

On the subject of "commercially available," the Army takes the position that this requirement is only to assure that the equipment has been proven in the commercial marketplace and points out that there are a substantial number of 3081-D's in the hands of private organizations. IBM contends that the 3081-D is commercially available because it is offered to the public sector, which IBM defines as a commercial market and argues that the 3081-D is "state-of-the-art" because it uses the same technology on the newer 3081-G and -K models.

GSA generally agrees with the protesters and also states that the purpose of the commercially available requirement is to assure that the Government obtains a reasonable price determined in the marketplace and to help assure that the Government is acquiring the most current technology. GSA contends that the purpose of the "current production" language is to assure that the Government is acquiring commercially viable state-of-the-art technology which will be maintained and supported for a long period of time and not acquiring equipment which a manufacturer is phasing out for competitive and technological reasons.

The IBM product line includes a line of large computers known as the "308X" series which ranges, for our purposes here, from the 3083 through the larger 3081, including the 3081-D, -G and -K, to the 3084-Q, IBM's largest processor. The 3081-D was the first of the series. These various models within the 308X series are, essentially, all constructed using the same "box" housing the power supply, cooling equipment, etc., and a frame to which different "TCM's" can be attached by plugging them in. The TCM's, or Thermal Conduction Modules, are special containers for the electronic chips and circuits which constitute the actual "computer" part of the system. (See Blodgett, Albert J., Jr, "Microelectronic Packaging," Scientific American, July 1983, Vol. 249, No. 1, pp. 86-96). Each model within the 308X series uses a particular set of TCM's, some of which are unique to that particular model; as a corollary, a model within the 308X series, for instance a 3081-G, may be

upgraded to a larger model, such as a 3081-K, by removing the TCM's which are peculiar to the 3081-G and replacing them with 3081-K TCM's without having to replace the entire "box."

IBM publicly announced the model 3081-G processor on September 3, 1982. The announcement stated that "During September 1982, IBM will convert on-order 3081 Model Group D processors to Model Group G processors with the same schedule date." This announcement also stated that the 3081-G is in new production and qualifies for the investment tax credit (ITC), but that "During September, the 3081 Model Group D will be changed to not in new production." In March 1983, IBM's GSA Automatic Data Processing (ADP) schedule contract was amended to indicate that, effective October 1, 1982, the 3081-D was not in new production.

IBM explains that the phrase "not in new production," on which the protesters rely, is used by IBM to describe machines which may no longer qualify for an investment tax credit (ITC) as "new machines" because they contain used or reconditioned parts. As IBM describes the situation, when a customer's 3081-D is upgraded to a 3081-K, the 3081-D TCM's are returned to IBM and inspected, reworked and/or rehabilitated as necessary, and then used to make another 3081-D. IBM states that the 3081-D is, therefore, still in production, but explains that its marketing is limited to the Federal, state, county and municipal governments, and educational institutions because these entities are not concerned about obtaining an ITC.

It is a basic principle of Federal procurement law that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. An ambiguity exists if specifications are subject to more than one reasonable interpretation. EMS Development Corporation, B-207786, June 28, 1982, 82-1 CPD 631.

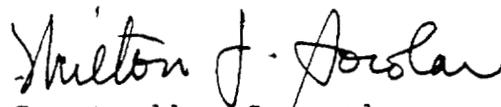
In our judgment, the three terms on which this protest has focused have sufficient latitude in their common, ordinary meanings to embrace all of the interpretations which the parties have proposed. For instance, while we generally agree with the protesters that "commercially available" would mean broadly and generally available to all markets, we are not prepared to find unreasonable the contention that a product sold only to a limited market is commercially available. Similarly, we think the term

"current" production is sufficiently imprecise to encompass the positions of both the protesters and the Army and IBM. We find a similar breadth of meaning in state-of-the-art. In sum, we find that the solicitation was sufficiently ambiguous, that the offerors may have interpreted these requirements differently and did not compete on a common basis.

The protest is sustained. In these circumstances, the Army should clarify the meaning of these terms in this RFP, initiate a new round of best and final offers and, if a more advantageous offer is received, take appropriate action to terminate the contract.

By letter of today, we are advising the Secretary of the Army of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, formerly 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for 
Comptroller General
of the United States