

## **INCUMBENT'S POOR PERFORMANCE DOES NOT JUSTIFY SOLE SOURCE PROCUREMENT**

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Federal Acquisition Regulation (“FAR”) Subpart 6.3 deals with “Other Than Full and Open Competition” and identifies seven statutory authorities that permit contracting without providing for full and open competition. These are:

- 1) Only one responsible source and no other supplies or services will satisfy agency requirements (“sole source procurement”).
- 2) Unusual and compelling urgency.
- 3) Industrial mobilization; engineering, developmental or research capability; or expert services.
- 4) International agreement.
- 5) Authorized or required by statute.
- 6) National Security
- 7) Public Interest

Of particular interest to most government contractors, and probably the most contentious, is the first exception, the “sole source” exception. But this exception has serious boundaries, and poor performance by an incumbent does not justify its use. *Utech Products d/b/a Endosoft, LLC v. United States*, No. 20-315C (Fed. Cl. May 28, 2020).

*Utech* involved the procurement by the Veterans Health Administration (“VA”) of software for gastrointestinal electronic medical records. The VA found several technical glitches in the software, and the VA concluded that the system used by the incumbent (known as the Endosoft system) didn’t satisfy the VA’s needs enough to prevent impact on patient care workflow and schedules. The VA formed a workgroup to evaluate a competing system (known as Provation), and concluded that while EndoSoft had weaknesses, the Provation software had no weaknesses. A subsequent VA market report recommended sole sourcing the requirement to Provation. The required Justification & Approval (“J&A”) identified Provation as the only source meeting the requirements, and identified eight Endosoft inadequacies that justified a sole source procurement. After a protest by Endosoft at the Government Accountability Office (“GAO”) which was dismissed because of a procedural failure, Endosoft filed in the Court of Federal Claims.

The Court sustained the protest, noting that “the animating force driving the VA’s decision to seek a new computer system was a preference for Provation over Endosoft.” The insufficient performance found by the VA served as the premise of the market research report, and the eight performance shortcoming that the report identified found their way into two J&A’s.

The Court noted that the fact that “a new contractor could perform better the same functions an incumbent contractor currently performs is insufficient, even if true, to justify a sole-source award. Thus, Endosoft’s poor performance did not and could not justify abandoning standard competitive procedures when seeking a replacement.” The court rejected the VA’s argument

that only Provation had authorization to use a particular data export tool, which the VA considered a requirement. The court found that at least one other potentially responsible contractor could satisfy the agency's minimum need, thereby undermining the sole source justification.

Takeaway: Just because an agency is dissatisfied with an incumbent's performance, it must still meet all of the requirements if the agency elects to conduct a sole source procurement for the replacement.

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