

## Note from the Field

### Customer, Contracting, and Commerce (C3) Process: Acquisition Reform and Partnering with Industry

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#### Introduction

Since 1991, the United States Army, Europe (USAREUR), has experienced significant reductions in force.<sup>1</sup> The lack of force structure has resulted in many other reductions throughout the USAREUR theater. One of those areas of particular interest to a contracting office is the number of customer personnel with technical skills that provide support to the contracting office. For example, the number of Directorate of Public Works (DPW) engineers available to draft statements of work and specifications for engineer related projects has plummeted severely.<sup>2</sup>

The contracting office challenge is the same as most other activities within the Army structure—"do more with less." The Regional Contracting Office (RCO) of the United States Army Contracting Command, Europe, located in Seckenheim, Germany, was faced with the question, "How does a contracting office support the DPW customer when the DPW no longer has the capability of researching and designing projects?" The lack of internal DPW assets in Fiscal Year (FY) 1996 resulted in the RCO not receiving a single DPW project that year.<sup>3</sup> In FY

1997, the RCO began the C3 process and received sixty-four DPW-type projects that were processed without internal DPW assets.<sup>4</sup> Through FY 1998, the RCO processed approximately 250 DPW-type projects.<sup>5</sup> This represents an incredible growth curve for the RCO's workload.

This growth in the RCO's workload came from the RCO having a series of discussions with its DPW customers and with various industry and commerce representatives to determine partnering possibilities.<sup>6</sup> Commerce responded overwhelmingly to the inquiries.<sup>7</sup> Every aspect of the DPW process is mirrored in commerce and is readily available. Industry has many approaches to completing actions that range from off the shelf applications to state of the art. The choice for the three parties—customer, contracting, and commerce—was obvious. It involved a teaming or partnering arrangement that ultimately was titled the C3 partnering process.<sup>8</sup> While the concept originated with the DPW customer in mind, it works as well with service activities other than DPWs.<sup>9</sup> Because the concept shows promise of increasing application, contract law practitioners should be familiar with the essential elements, summarized below.

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1. The most notable example is VII Corps, which deployed to the Persian Gulf but did not return to Germany. Currently, only the 1st Armored Division and 1st Infantry Division remain in Germany.

2. For example, implementing the Directorate of Engineering and Housing 2000 standard within the 26th Area Support Group (Heidelberg, Mannheim, Kaiserslautern, and Darmstadt Base Support Battalions) eliminated the design branches from each of the DPWs.

3. Reporting statistics from FY 1996 for RCO Seckenheim.

4. *Id.*

5. *Id.*

6. These discussions resulted from an Acquisition Development Assistance Team that the RCO created for discussions with its customers and industry representatives. The team members consist of at least one contracting officer, at least one contracting specialist, and an attorney advisor.

7. During FY 1997 and FY 1998, discussions were held with industry representatives in construction and service fields.

8. To overcome the lack of personnel resources in the government, teaming with industry to use their personnel resources instead was the goal.

9. The C3 process works with those contracting actions in which an adequate statement of work does not exist. It has been successfully used with custodial, demolition, shipping, and other service type actions.

## The Process<sup>10</sup>

The partnering process is a modified version of the Federal Acquisition Regulation (FAR) Part 14.501<sup>11</sup> two-step solicitation process. It focuses on blending industry into the acquisition process, using industry's resources, and easing the burden on the customer. The process provides its own market research. It mirrors industry's approach to business, and is performance based. The process reduces the workload on the RCO's customers, provides a high-speed avenue for contracting, and transfers the burden of ambiguous statements of work to the contractor.

The process starts with a short, simple request from the customer for a particular product or service. The request is usually less than one full page and sometimes as little as a single paragraph. The request only gives the bare outline of the proposed project. The intent is that industry will fill in the gaps.

Typically, on the same day the request is received at the contracting office, the synopsis requirements are completed and a request for technical proposals is sent to industry. The request for technical proposals requires very little change from one solicitation to the next and consists primarily of boilerplate language. As a result, the effort involved in starting a solicitation is minimal. The request also establishes the date for the site visit.

The site visit, which usually occurs only five to ten days after the issuance of the request for technical proposals, is attended by the customer, contracting office personnel from both the contracting and administration branches, and numerous industry representatives. On more complex projects, the contracting officer and the legal advisor attend the site visit. The site visit is critical to establishing common knowledge among the three parties.

At the site visit, the customer escorts the industry representatives through the project area. Industry is able to engage in a free flowing discussion of the project requirements. The information flow is monitored by the contracting office representatives but is rarely hindered by them. It is natural for the contracting office personnel to address relevant issues that are important to the acquisition process, such as making sure all questions are fully answered and the same information is given to all of the contractors. This gives all of the parties the opportunity to see the entire project. Industry representatives typically take photographs or make on-site drawings during the visit.

This site visit approach involves the industry representatives in the planning phase of each project. If the project is phased

into separate future requirements, industry is informed on how the current project impacts future ones. Industry is allowed to make suggestions on how to integrate the current project into future projects and save the customer time and money. In essence, industry is asked not only for its input into how the current project should be worked but also how the current project will fit into the overall operations of the customer.

At the end of the site visit, industry representatives are queried as to how much time is necessary for the submission of their technical proposals. They are cautioned that their proposals will form the basis of the contract's statement of work and will be binding on them. The time chosen by industry for submission of the technical proposal is typically less than thirty days and quite often as short as ten days, depending on the complexity of the requirement.

On receipt of the technical proposals by the contracting office, the proposals are immediately forwarded to the customer for review. Seven to fourteen days has been the range of time for technical review. The customer is allowed to communicate with industry with oversight from the contracting office either with individual contractors or groups. Industry representatives are welcome to engage in discussions with all government representatives, submit oral presentations or any other means they believe will enhance the understanding of their proposal. Once all discussions are completed, all questions are answered, and industry has submitted their final technical proposals, the invitation for bids (IFB) is issued to begin the second step. The first step is typically completed within four weeks.

The second step is a standard sealed bid solicitation package. Industry once again decides the length of time for submission of bids. The time is normally about one week. Once the bids are received, they are analyzed and the award is made to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the government considering only price and the price-related factors specified in the solicitation. The entire process averages about six weeks with simpler packages being processed in as little as three to four weeks and more complex packages averaging about three months.

## The Advantages

### *Partnering*

"Partnering with industry" has become a new buzz phrase in government acquisition.<sup>12</sup> The C3 process extends that concept

10. The C3 process detailed in this section was developed at the RCO in Seckenheim, Germany. The C3 process is not a formal regulation. This section explains the process and gives various deadlines; these were developed based on the needs of this RCO, and may be adopted or adapted to suit the needs of other RCOs or contracting offices. There is no formal standard operating procedure for the process although the RCO has created training slides for classroom instruction and maintains an aggressive "on the job" training program.

11. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.501 (June 1997) [hereinafter FAR].

12. William J. Myslowiec, Chief, Contracting Branch, RCO Seckenheim.

to the internal government system. The contracting office is the channel that administers the procurement of goods and services, the customer is the activity that generates the requirements, and industry is the source for satisfying those requirements. In all informal partnering, there has to be some sense of trust between the parties. Typically, trust is based in communication. The process uses site visits, oral discussions, and visual information to facilitate communication and partnering.

### *Market Research*

Market research is required by FAR 10.001 and common sense.<sup>13</sup> The first step of the two-step process automatically satisfies the requirements for market research on each project. By including industry in the solicitation process, the contracting officer obtains the best and most current product information available in the market place. The site visit and subsequent technical proposals provide all of the information necessary to make intelligent procurement decisions.

### *Commercial Business Approach*

The focus of the C3 process is adopting industry's normal commercial approach, minus up-front pricing. When industry approaches a civilian customer, it prepares a proposal and submits it for review. The customer reviews the proposals from several sources, considers the different approaches and weighs the cost of each, ultimately selecting the best overall value. The C3 process allows the same approach for receiving technical proposals, reviewing them and applying cost-related factors to obtain the best overall value for the customer.

### *State of the Art*

The process authorizes industry to submit solutions that provide the most recent information and products available. Instead of relying on descriptions that are potentially years out of date, the customer obtains the latest products and methodologies available in the market place. Industry remains competitive and survives by keeping up with those things that make them more efficient and productive in the commercial world. The C3 process allows industry to suggest whatever may be the newest approach to solving a problem and then uses that approach inside the government.

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13. FAR, *supra* note 11, at 10.001.

14. FY 1996, 1997 and 1998 statistical reports from RCO Seckenheim.

15. *Id.*

16. The solicitations all contain a subject to availability of funds clause. There is no requirement to have funds available at the beginning of the solicitation process. Likewise, most administrative approvals, such as the DA Form 4283 for facilities engineering work requests, must be approved before award but do not require approval before the solicitation begins. Past practice at RCO Seckenheim was to hold a solicitation until all administrative approvals and funding were received from the requiring activity.

### *Performance Based Contracting*

To obtain performance based contracting, the ultimate goal of the contract is described, but the method of accomplishment is left to industry to devise. The C3 process obtains the same result by providing a simplified job description to industry and not telling industry how to proceed. In most cases, even for complex projects, the job description is a simply written, short paragraph that gives a general overview of the desired project end-state. It allows industry to establish the means to achieve the end and also allows industry to identify more than one method. This allows industry to be creative in its approach to solving the government's problems.

### *Reduced Customer Workload*

In the past, the contracting customer had to prepare a lengthy statement of work (SOW) and a detailed independent government estimate (IGE). This usually took months to accomplish and caused the customer to use off-the-shelf statements of work (which were typically very old) to save effort. These statements of work also invariably allowed errors and ambiguities to creep into the process. Those problems had to be solved using non-budgeted money. The C3 process shifts the burden of preparing the statement of work to industry and also shifts the liability for ambiguities to industry. It also places the burden for inspection of work on industry. The technical proposals establish a self-inspection system, which enables the customer to inspect the inspection system rather than the entire performance of the contractor.

### *High Speed Contracting*

Normal solicitation time, including the time associated with a customer generating a SOW and IGE, can be six to nine months.<sup>14</sup> The C3 process has produced awarded contracts in four to six weeks on average.<sup>15</sup> This happens in part because the solicitation typically starts the day after the customer provides the simplified job description to the contracting office and proceeds without waiting for funding and other bureaucratic approvals.<sup>16</sup> It does not eliminate these obstacles. Instead, it starts the solicitation and allows the funding and approval process to catch up before award.

Claims, especially in DPW-type projects, typically arise from problems in the SOW. By transferring the drafting of the SOW to industry, the legal burden for ambiguities is also transferred. When an ambiguity arises, the government is entitled to its reasonable interpretation of the industry drafted SOW.<sup>17</sup> With the burden shifted to industry, the number of claims for equitable adjustment decrease dramatically. In the approximately 250 C3 contracts, with an average value of \$98,000, awarded to date by RCOS, there have been no claims for equitable adjustment.<sup>18</sup>

*Part 15 Access*

Two-step sealed bidding accesses the additional flexibility contained in the new Part 15 of the FAR.<sup>19</sup> The first step of the procedure allows the contracting officer to use any of the procedures contained in Part 15 that are helpful in completing a solicitation action so long as pricing is reserved to the second step. This hybrid approach to contracting gives the contracting officer great flexibility and latitude in solving problems for the customer.

*Simplified Acquisition Procedures*

The process is not dependent on whether the acquisition is above or below the simplified acquisition procedures threshold. If an assessment can be made during the site visit that the value of the project will be below the threshold, the acquisition can proceed as a request for quotations or other simplified procedure. Likewise, the process does not prevent the use of the commercial products acquisition procedures.

The authority for two-step sealed bidding is contained in FAR 14.501.<sup>20</sup> It allows a combination of Parts 14 and 15 of the FAR when adequate specifications are not available. Its objective is the development of a descriptive statement of the government's requirements and is used particularly for complex items. The first step is the request for technical proposals, which are submitted by industry and then evaluated by the customer for technical acceptability.<sup>21</sup> This step allows for site visits, clarifications, questions, presentations, and any other reasonable action that the contracting officer might take to clarify the technical requirements. The second step provides for submitting prices and considering price related factors,<sup>22</sup> which allows the customer to obtain the best overall value.

The request for technical proposals describes the supplies or services required; informs industry that the C3 two-step solicitation process will be used; states the requirements of the technical proposal; establishes the evaluation criteria for the technical proposals; and sets the date and time for receipt of the technical proposals.<sup>23</sup> The request also informs industry that only those technical proposals that are determined as acceptable will submit prices in the second step.<sup>24</sup> Because the possibility exists that there will be differences between the technical proposals submitted by the various industry representatives, the letter informs them that they are submitting their bids on the basis of their own technical proposals.<sup>25</sup> Vendors can also submit more than one technical proposal if the request indicates that multiple proposals are allowed.<sup>26</sup>

Vendors must be informed that their technical proposals should be acceptable as submitted without clarifications as a determination on acceptability may be made on the basis of the original submissions.<sup>27</sup> Vendors that submit unacceptable proposals must be notified that they are unacceptable and must be given a debriefing if one is requested in writing.<sup>28</sup>

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17. International Fidelity Ins. Co., ASBCA No. 44256, 98-1 BCA 29,564.

18. See *supra* note 14.

19. Pacific Utility Equipment Co., B-259942, May 16, 1995, 95-2 CPD ¶ 114.

20. FAR, *supra* note 11, at 14.501.

21. *Id.* at 14.501(a).

22. *Id.* at 14.501(b).

23. *Id.* at 14.503-1.

24. *Id.* at 14.503(a)(7).

25. *Id.*

26. *Id.* at 14.503(a)(10).

27. *Id.* at 14.503(a)(8).

28. *Id.* at 14.503(g).

The second step begins if there are sufficient acceptable technical proposals to ensure adequate price competition.<sup>29</sup> If not, the contracting officer can authorize additional time to make additional proposals acceptable.<sup>30</sup> Under any circumstances, technical proposals are not discussed with any offeror other than the one that submitted the proposal.<sup>31</sup> If it is necessary to discontinue the two-step solicitation, all of the vendors must be notified.<sup>32</sup> If the first step resulted in no acceptable technical proposals or if only one proposal was determined to be acceptable, the solicitation can be continued through negotiation methods.<sup>33</sup>

An identical IFB is issued in the second step to all of the offerors even though there may be minor differences in the various technical proposals, and it proceeds as a normal Part 14 solicitation.<sup>34</sup> If more than one technical proposal was submitted by a single offeror, a bid is submitted on each acceptable technical proposal.<sup>35</sup>

### The General Accounting Office

The General Accounting Office (GAO) has dealt with a number of different issues within the two-step bidding process. Since the C3 partnering process derives from Part 14.501 of the FAR, the decisions from the GAO on Part 14.501 apply.<sup>36</sup>

A common issue that arises is the extent of revision to the technical proposal that an offeror is allowed to make. The

intent of the C3 and two-step processes is to include as many offerors in the second pricing step as possible through the Part 15 negotiation procedures. The contracting officer, however, is not obligated to include a technical proposal in the second step that requires extensive revision.<sup>37</sup> In determining whether a technical proposal requires extensive revision, the contracting officer is held to a "reasonableness standard."<sup>38</sup> Protests for improprieties in requests for technical proposals must be filed by the date set for receipt of the proposals.<sup>39</sup> This rule is the same whether the solicitation is in the two-step format or the negotiated format.

The site visit plays an important role in the entire C3 partnering process. A vendor is not excluded, however, from a solicitation simply on the basis that it did not attend a site visit.<sup>40</sup> Attending a site visit, or not, is a matter of responsibility for the contracting officer to determine, and attendance at the site visit is not a precondition of a responsibility determination.<sup>41</sup>

Likewise, the review of technical proposals by customer specialists and technicians that find a proposal to be not acceptable is sufficient if the review was performed in a fair and reasonable manner.<sup>42</sup> The standard for overturning a technical review follows the customary bases: erroneous, arbitrary, or not made in good faith.<sup>43</sup> A past successful offeror cannot rest on its laurels of past performance when it comes to submitting a technical proposal on a current solicitation no matter how capable that offeror may be.<sup>44</sup>

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29. *Id.* at 14.503(f)(1).

30. *Id.* at 14.503(f)(2).

31. *Id.* at 14.503(f)(1).

32. *Id.* at 14.503-1(i).

33. *Id.* at 14.503(i).

34. *Id.* at 14.501(b).

35. *Id.* at 14.201-6(s), 14.503-1(a)(10), 52.214-25(c).

36. *See infra* footnotes 37 through 46.

37. Shughart & Assocs., Inc., B-226970, July 17, 1987, 87-2 CPD ¶ 56.

38. *Id.*

39. *Id.*

40. Gebruder Kittelberger GmbH & Co., Comp. Gen., B-278759 (Dec. 8, 1997). This protest directly involved the C3 Partnering Process although the GAO made reference to FAR 14.501 rather than "C3."

41. A contracting officer cannot simply make a determination that a failure to attend a site visit automatically makes a bidder non-responsible. The contracting officer must also determine, based on reasonable and relevant factors such as scope and complexity, that the site visit was critical to understanding the project and that a failure to attend would prevent the bidder from obtaining information that was crucial to successfully completing the contract.

42. Baker & Taylor Co., B-218552, June 19, 1985, 85-1 CPD ¶ 701.

43. *Id.*

It is common to insert additional requirements in the second step of the solicitation. There is no objection to doing this even if it means that an acceptable second step bidder might withdraw from the solicitation. The GAO addressed this issue in a solicitation that added bonding requirements in the second step.<sup>45</sup> An offeror with an acceptable technical proposal withdrew from the solicitation before submitting bids because it could not obtain the required bonding. The offeror protested the inclusion of the new bonding requirement without any notice of it in the first step and asked for proposal preparation costs. The GAO denied the proposal preparation costs under the theory that delivery or performance requirements may be presented in the first step but are not legally required. The GAO held that there is no objection to combining separate first step actions into a single second step invitation for bids if the facts and circumstances of the different combined projects logically flow into a single action.<sup>46</sup>

The IFB makes use of price related factors to distinguish between acceptable proposals that offer substantially different approaches to the requirement. The FAR lists price related factors, in what appears to be an exclusive list.<sup>47</sup> The GAO, how-

ever, has interpreted the list to be non-exclusive and expandable by the contracting officer if there is a reasonable basis for doing so.<sup>48</sup> In essence, any reasonable and relevant cost-related factor, such as life cycle, time, or efficiency, can be factored into a contract to determine the overall lowest cost to the government.

### Conclusion

The C3 partnering process is a valuable tool for a contracting office. It is not an end all to the contracting process. It does not replace the standard invitation for bids or request for proposals as those tools still have viable places in a contracting office; however, it can be used for an extremely wide range of contract actions. The RCO in Seckenheim has used it on actions as diverse as construction, custodial, job order contracts, vehicle repair, asbestos abatement and computer operations. The process can be applied to most contract-type actions and is especially suitable when communication is critical, when the customer does not have adequate resources, or when time is of the essence.

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44. *Id.*

45. Diversified Contract Servs., Inc., B-234660, June 22, 1989, 89-1 CPD ¶ 590.

46. Gebruder Kittelberger GmbH & Co., Comp. Gen., B-278759 (Dec. 8, 1997).

47. FAR, *supra* note 11, at 14.408-1(a)

48. ACS Const. Co., Inc., B-250372, Feb. 5, 1993, 93-1 CPD 106; Tek-Lite., B-230298, Mar. 8, 1988, 88-1 CPD ¶ 241.