June 29, 2018

Mr. John Herbst
City Auditor/Community Redevelopment Agency Auditor
Community Redevelopment Agency, City of Fort Lauderdale
100 North Andrews Avenue
Ft. Lauderdale, FL 33301-1016

Dear Mr. Herbst:

The following represents CRI's comments for management's consideration regarding Hensel Phelps' ("HP" or "DBF") comments on the Draft Standard Contract included as an addendum to the RFP – APPENDIX B – Contract Comments within Hensel Phelps Technical Proposal Volume 1 of 2. HP's contract exceptions are quoted from APPENDIX B, which is followed by CRI's comments for management's consideration.

1. Article 1 - GUARANTEED MAXIMUM PRICE (GMP)
    a. Hensel Phelps takes exception to specific language within this clause and requests the City remove the language in this section that requires the GMP to include "unknown" onsite and off-site conditions. The risk of unknown conditions cannot be borne by the Design / Builder as it relates to guaranteeing a maximum price of the project. This would require the City to include a contingency budget in the GMP that would most likely make this project infeasible.
    a. Hensel Phelps takes exception to specific language within this clause and requests the City remove the language in this section that requires the GMP to include off-site conditions since they are outside the limits of the project and risks cannot practically be determined based on the RFP and the scope of the project.
    a. This clause is also in direct conflict with Article 11.11 of the contract which states that the DBF is only responsible for "observable and/or documented conditions" or "conditions ordinarily encountered generally recognized as inherent to the character of the work to be provided for in the project."

CRI's comments:
CRI did not propose or edit these provisions to the original standard contract drafted by management. Based on our industry experience, we understand and agree with the DBF's line of reasoning and concerns to be required contractually to cover all "unknown" conditions. Further, we have not seen such a provision to cover all "unknown" conditions in any of the construction contracts we have reviewed. Finally, the provision in Article 11.11, is in line with what we have seen and does seem adequate to address this matter.

2. Article 7.1 – Liquidated Damages - Under this clause the DBF is subject to liquidated damages for not meeting the interim milestone of "Design, Construction Document, and Permitting Completion". The City should consider that tying liquidated damages to an interim milestone that does not affect the overall completion of the project does not ensure the completion of the project on time. Liquidated damages are intended to assign a value to damages incurred by the City. The City would not be harmed by the DBF not meeting an interim milestone.

CRI's comments:
CRI did not propose these provisions to the original standard contract drafted by management. CRI notes that unless there is a critical event associated with interim milestones, there are not typically liquidated

damages tied to them. This is a matter of management judgment as how critical it is for the DBF to meet this milestone in light of the DBF's above comments.

3. Article 9.2 – Contract Price - Hensel Phelps takes exception to the City's stating the DBF fee may not to exceed 3%. The DBF fee shall be as submitted with the proposal or as negotiated prior to execution of the contract.

CRI's comments:
CRI proposed this percentage relative to the Overhead and Profit (OHP) fee related only to the construction of the project and does not include the Design fees portion. Based on our experience in the industry, for a project of this size, the fee structure range would be as follows:

- Design Fee – 6 to 7% of GMP
- Pre-construction Fee – 0.5% - 1.0% of the GMP
- OHP fee – 2 to 5% of the GMP

So combined, the fee percentage range to work within would be 8.5 to 12.5% of the GMP, excluding the fees themselves. Further, in our experience, the fees percentage is based on total cost of work, which means contingency allowance would also be excluded from the base. How to treat this is up to management. If the fee was based on cost of work excluding contingency, then the fee would need to be applied to contingency costs as incurred. Given the large contingency allowance, management might consider basing the fee percentage on the estimated cost of work, excluding contingency. The Design fee should cover all of the Design related labor and materials during the design, pre-construction, construction and closeout phases of the project typical of a separate Architect Engineer (AE) contract.

4. Article 9.2[.2].B.1 – Direct Cost Items – Hensel Phelps takes exception to capping labor burdens at 35%. Hensel Phelps labor burdens exceed this amount and all labor burdens should be reimbursable with appropriate back-up since they are direct cost of work. As an alternate, Hensel Phelps would suggest agreeing on billable rates that are inclusive of all labor burdens on the project.

CRI's comments:
Management may always negotiate the proposed labor burden cap of 35%. In our industry experience, the typical burden range is 30 to 40%. Further, CRI recommends that management not agree upon a fixed billing rate that includes labor burden. Circumstances and estimates that are built into labor and labor burden can change substantially that could result in a material amount of cost that exceeds what the DBF actually incurs. As a cost plus contract with a GMP, the Owner is not supposed to pay more than the DBF actually incurs. In addition, to protect the Owner from what might be exorbitant labor burden costs from the DBF that exceed industry and market norms, we recommend keeping the current contract direct cost language regarding labor and labor burden as well as a not to exceed amount for the labor burden percentage within the recommended range of 30 to 40%.

5. Article 9.2[.2].B.5. - Hensel Phelps takes exception to specific language within this clause, which gives the City the right to determine whom Hensel Phelps rents equipment from.

CRI's comments:
This provision does not actually give the City the right to determine which vendor/supplier HP has to use for equipment rental. HP is the one who decides which two suppliers to obtain bids from and this is only required if the monthly equipment rental exceeds $500/month. Further, the provision then says that the Owner chooses from one of these two bidders (solicited by HP) based on the advice of HP. Management could revise this part of the provision to say that if the two bids are within a certain percentage (5%), HP could choose the supplier.

6. Article 9.2[.2].B.6. - Hensel Phelps takes exception to specific language within this clause, which establishes a minimum threshold of $150,000 subcontract that the City will reimburse subcontractor bond costs. Hensel Phelps is at risk for the performance of all subcontractors and our company policy requires that all subcontracts in excess of $50,000 be bonded. Unless the City is willing to take the risk of subcontractor defaults this limitation should be removed from the contact and all bond costs should be reimbursable.

CRI's comments:
CRI recommends that the City negotiate the terms of this provision based on HP's response and revise this provision as management deems appropriate.

7. Article 9.2[.2].B.6 - Hensel Phelps takes exception to specific language within this clause which gives broad authority to the City to direct Hensel Phelps to perform or not perform in whole or in part any portion of the General Conditions Work on the project. The scope of work performed by Hensel Phelps on the project will be negotiated with City.

CRI's comments:
CRI notes that the above reference appears to be incorrect and that HP is referring to Article 9.2.2.B.13. Article 9.2.2.B.13 could be removed at management's discretion, as it appears that Article 9.2.2.B.14 and elsewhere adequately addresses Article 9.2.2.B.13 relative to the performance of General Conditions work.

8. Article 9.2[.2].C.22 – Hensel Phelps takes exception to specific language within this clause which states that costs for tools and equipment less than $500 in individual cost are not reimbursable. All costs associated with the tools and equipment that are purchased for the project and are able to be turned over to the City should be reimbursable under a GMP contract.

CRI's comments:
This provision can be removed if management is satisfied with the provision of Article 9.2.2.B.4 that says:

> "Tools and equipment with a cost less than $1,000 shall be considered part of the DESIGN/BUILDER's fee and will not be considered as costs that require reimbursement from the Owner unless DESIGN/BUILDER obtains written approval from the Owner prior to incurring the referenced cost."

The effective difference if the Article 9.2.2.C.22 is removed is that the threshold for cost reimbursement of small tools and equipment would increase from $500 to $1,000.

9. Article 9.2[.2].C.23 – Hensel Phelps takes exception to this clause which states that any cost not specifically identified as allowable shall be non allowable as a cost of work. It is not possible for a contract clause to identify every item that may fall under cost of work. This clause should be stricken as to not provide such broad and unilateral rights to the City to deny any specific cost not identified in Article 9.2.1.B

CRI's comments:
CRI recommends that this provision not be removed; however, the following clause could be added at the end of Article 9.2.2.C.23: "unless pre-approved in writing by the Owner." Removing entire clause would undo the cost control measures enumerated in Article 9.2.2. Otherwise, HP would be given the unilateral right to charge any items they deem to be related to the project.

10. Article 9.2.3 - Hensel Phelps takes exception to specific language within this clause, which states that the City shall not be required to pay any costs that exceed the GMP and that the DBF shall have no claim against the City for any such costs. This broad language negates the DBF rights to file a claim where the cost might exceed the GMP value. Furthermore this clause does not provide for the DBF to be paid for changes or directives issued by the City that create costs which exceed the GMP value since the City has dictated the Owner contingency that is included in the GMP.

CRI's comments:
CRI notes that it appears that the DBF is referring to Article 9.3. As such, CRI recommends, for consistency, that the following clause be added after the sentence that ends "on account thereof" "except as elsewhere permitted by this Agreement, as may be increased or decreased by Change Order pursuant to Article 10." The City could also reference Article 14 – Resolutions of Disputes.

11. Article 9.4.1 - Hensel Phelps takes exception to specific language within this clause which states that "front end loading" or the increasing of any schedule of value item above the actual costs in the schedule of values will be considered a material breach of contract. At the time the schedule of values is developed it is not possible to know the actual cost of every item in the schedule of value and consequently the DBF cannot be in material breach of contract for doing something required by one section of the contract in a way that the DBF cannot comply with other terms in the contract. In addition, the same clause requires back up to be submitted for actual costs expended with each billing. It is not possible to "front end load" or get paid for costs over and above actual costs as the contract is written.

CRI's comments:
CRI notes that this is a clause that could be removed at the City's discretion. This matter of "front end loading" is sufficiently addressed in Article 9.4.1.

12. Article 9.9 - Hensel Phelps takes exception to specific language within this clause which states that the City's Project Manager can subjectively determine that the remaining unpaid funds in the GMP are insufficient to complete the project and that the City may withhold payment to the DBF until they determine the DBF has completed sufficient work to warrant payment. This clause should be amended to identify objective criteria for an evaluation prior to withholding payment to the DBF.

CRI's comments:
This was not a provision proposed or edited by CRI. This provision as written is subjective and would be difficult to provide objective criteria for evaluation. CRI notes that the provision in Article 9.4.7 addresses the conditions whereby the City can withhold final payment.

13. Article 9.12 – Hensel Phelps takes exception to this clause, which states that payment will be made through the CITY's P-Card system. This is in contradiction to the Q/A as answered and Hensel Phelps has included no credit card fees or costs associate with receiving payments through the P-Card System

CRI's comments:
This was not a provision proposed or edited by CRI and CRI has no recommendation regarding this matter.

14. Article 11.10 - Hensel Phelps takes exception to specific language within this clause which states that the DBF warrants any aspect of the Design Criteria Package. The DBF did not produce the DCP and provides no warranty related to it accuracy, compliance with code or any other aspects. The DBF will warrant that the design produced by the DBF team complies with the technical requirements defined by the DCP and that the design produced by the DBF's team will be warranted in accordance with contract. In addition, the Design Builder must be able to rely on the Design Criteria Package provided by the City because it is the only information which defines the requirements of the project. This is a fundamental premise of Design Build contracting and is covered under the Spearin Doctrine and supported by significant case law.

CRI's comments:
This was not a provision proposed or edited by CRI. This is more of a legal matter and CRI recommends that the City attorney be consulted.

15. Article 11.12 - Hensel Phelps takes exception to this clause. This clause is also in direct conflict with Article 11.11 of the contract, which states that the DBF is only responsible for "observable and/or documented conditions" or "conditions ordinarily encountered generally recognized as inherent to the character of the work to be provided for in the project." In addition, the DBF cannot ascertain the exact locations of all utilities without being awarding the project and executing the design and investigative phase of the project.

CRI's comments:
This was not a provision proposed or edited by CRI. This is more of a project scoping matter and CRI recommends that the City CRA Project manager address this comment.

16. Article 11.12 - Hensel Phelps takes exception to specific language within this clause, which defers resolution of claims to after Final Completion. Disputes need to be resolved within a reasonable time frame and though practical in many instances, claims should not by contract be deferred until after the project is 100% complete.

CRI's comments:
This was not a provision proposed or edited by CRI. Additionally, it appears HP may have the incorrect Article reference based on their comment noted.

17. Article 23.1. - Hensel Phelps takes exception to this clause. This clause is a "no damages for delay clause". If the City delays the project, the City should be responsible for all costs associated with the delays. Without this fundamental responsibility the City could delay the project indefinitely or repeatedly without any accountability putting the Design Builder at risk for liquidated damages or costing the design builder and its subcontractors unquantifiable costs that could not reasonably be predicted and included in the GMP to the City.

CRI's comments:
This was not a provision proposed or edited by CRI. This is more of a project scoping/legal matter and CRI recommends that the City CRA Project manager address this comment in consultation with the City attorney.

18. Article 24.1 - Hensel Phelps takes exception to this clause. This clause limits the liability of the City to $1,000 for any claim or breach of contract. This is an unreasonable clause that negates and conflicts with all other clauses in the contract that identifies how changes and disputes are handled under the contract. This clause allows the City to operate contrary to every clause in the contract and only be liable for $1,000 for each breach regardless of the damage caused by each breach. By way of example the City could refuse to pay Hensel Phelps and our subcontractors millions of dollars for approved in place work and create a breach covered by Article 16 of the Contract. The Design Build firm could only then under this proposed clause recover $1,000 for millions of dollars of work the City agrees has been completed.

CRI's comments:
This was not a provision proposed or edited by CRI. This is more of a project scoping/legal matter and CRI recommends that the City CRA Project manager address this comment in consultation with the City attorney.

19. Article 26.2 - Hensel Phelps takes exception to specific language within this clause which identifies a Construction Manager role. Hensel Phelps also takes exception to the language which expands audit writes to flow down to subcontracts which are Lump Sum Contracts. It is not practical nor will

the City benefit from a competitive bidding market once design is complete if lump sum competitive bids cannot be taken and protected.

CRI's comments:
CRI notes that where Article 26.2 says "Construction Manager" this should be replace with DESIGN/BUILD TEAM. The flow down audit clause does not remove the protection afforded the lumpsum subcontracts competitively bid prices. This flow-down audit clause provides for access to the subcontractor records, where deemed necessary, relative to pricing beyond the lumpsum amounts such as pricing for contingency usage and change orders. Nowhere does this audit clause say the lumpsum competitively bid price can be challenged. A clarification to this effect could be added at management's discretion in consultation with the City's attorney.

20. Article 26.11 - Hensel Phelps takes exception to this clause. This clause establishes that every provision in the contract is a material provision. This gives either party the ability to claim a failure to comply with any provision, regardless of how small or inconsequential, is material breach of contract and is justification for termination of the Contract

CRI's comments:
This was not a provision proposed or edited by CRI. This is more of a legal matter and CRI recommends that the City address this comment in consultation with the City attorney.

Disclaimer: This report is solely for the use of the City and represents CRI's comments to be utilized in an advisory capacity only. Management is responsible for all decision-making associated with CRI's comments noted in this document. Further, the City should consult with the City attorney before incorporating any changes into the contract documents related to the Aquatic Center renovation project.

Respectfully submitted,

Carr Riggs & Ingram, LLC

CARR, RIGGS & INGRAM LLC