

Construction Manager@Risk Subcommittee Meeting Minutes
(Kick-off Meeting)

Date: May 22, 2007

Place: Turnpike Headquarters (Turkey Lake Plaza)
Building 5315/Room 1093/1st Floor Auditorium

Time: 10:00 am until 3:00 pm

Agenda items:

1. The meeting started with introductions:

The following individuals were in attendance:

Brian Blanchard FDOT, David Sadler FDOT, Derek Fusco FDOT, Doug Cox Jacobs, Scott Bear CH2MHill, Dave Whaley PCL, Nelson Bedenbaugh FDOT, Tom Crossman FDOT, Dave Pupkiewicz Gibbs and Register, Bob Burleson FTBA, Robert Bostian FDOT, Joe Borello FDOT, Jim Martin FDOT, Charlie Herndon CH2MHill, Duane Aldrich FDOT, Micelle Reddin Trauner Consulting, Ted Trauner Trauner Consulting, Mike Davis FDOT, Frank Elmore FDOT, Mike VanDerHeyden FDOT, Clay McGonagill FDOT and Mark Croft FDOT.

New Business:

- 1. CM@Risk Presentation** – Doug Cox made a presentation to educate the task team on CM@Risk. The presentation discussed the advantages of CM@Risk and Jacobs experience on a CM@Risk project with Lee County. The project included phased construction on three bridges which included the reconstruction of the Sanibel Island Bridge and Toll Plazas. The CEI was in the CM contract but the CEI reported to the county. Doug felt using CM@Risk on this project resulted in time savings and eliminated risk for the County.

The team discussed the advantages of CM@Risk at great length. There is a time savings, less risk for the owner, owner controls the design and selects his own designer, value engineering is built into the project, etc. Allowing the Construction Manager (CM) to self perform work helps the CM control the scheduled work better. In D2, two rest areas used CM@Risk. One contract allowed self-performing, the other did not. CM@Risk works best for complicated projects with unknowns and with sequential work. It was decided the Department should not be doing CM@Risk projects just to try it. The Department needs to

select the right type of projects to try it out on. It was felt that the Bridge of Lions may have been a good candidate project to do CM@Risk on.

A copy of Doug's presentation will be posted on the web.

2. **CM@Risk State Construction Office (SCO) Website-** A generic CM@Risk agreement/contract, copies of the Pinellas County and Lee County CM@Risk contracts, and links to the D-2 Rest Area and MIC CM@Risk projects are currently on the State Construction Office website.

Dave Whaley will provide a copy of an AIA A111 GMP document and this can be posted on the web.

3. **District 4 CM@Risk Bascule Bridge Repair Project Status Report** – District 4 is in the process of writing a CM@Risk Agreement for the repair of two bascule bridges. Joe Borello and Clay McGonagill briefed the team on the status of putting together the Advertisement, Agreement and Specifications for the project. The current plan is to require the CM to be pre-qualified and allow the CM to self-perform. We need to define self-performance. Competitive bids can be required on materials only or materials/labor combined.

Upon completion of the District 4 CM@Risk agreement, it will be posted on the web also.

4. **Memorandum stating Florida Attorney General's opinion on CM@Risk contracts with phases of work.** – The Florida Attorney General has opined that the phasing of work under a master construction or program manager at risk agreement where the guaranteed maximum price for each phase is negotiated separately does not comply with the requirements of the Consultant's Competitive Negotiation Act. The City is under Section 287.055 of the Florida Statutes. However, Clay McGonagill stated that Section 287.055 of the Florida Statutes only applies to City's and County's and not the Department since Section 287.055 exempts out Section 337.11 of the Florida Statutes.

Clay felt that if the Department plans to use CM@Risk on a larger broader scale, he did feel the need for Section 337 of the Florida Statutes to be modified through legislation with regard to CM@Risk.

It was also discussed that the CM@Risk is under the \$120 million innovative cap and this cap could create a problem for the Department in the future. Derek Fusco checked with Ken Leuderalbert on the \$120 million cap and received the following response The Department has had plenty of reserve in the past under this cap. If the Department remains on the same path, we should be fine. But if there is a change in direction, such as a new technique that we apply to a number of projects, we may hit up against the cap.

5. **CM@Risk – Generic Agreement/Contract** – We discussed the need to revise the generic CM@Risk agreement on the SCO website for future FDOT roadway/bridge projects. As CM@Risk projects evolve, there will be a need to develop a template for a CM@Risk Agreement.
6. **CM@Risk Draft Guidelines** - The CM@Risk Guidelines have been started and will be sent out to the team for review and comment. Please return any comments you may have to Derek Fusco by June 29, 2007
7. **Open Floor** - Required rework by the contractor for work not meeting Specifications and potential quality control issues on CM@Risk contracts were discussed.
8. **Date, time and place for next meeting?** To be determined.



CITY ATTORNEY'S OFFICE MEMORANDUM

TO: Mayor and City Council
FROM: Dolores D. Menendez, City Attorney
DATE: February 27, 2007
SUBJECT: Attorney General Opinion/Consultant's Competitive Negotiation Act

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STATE CONSTRUCTION
ENGINEER'S OFFICE

Attached is a copy of the Florida Attorney General opinion received in this office earlier today. This is the opinion that Council directed the City Attorney's office to obtain following the receipt of the State Auditor General's report. In essence, the attorney general has opined that the phasing of work under a master construction or program manager at risk agreement where the guaranteed maximum price for each phase is negotiated separately does not comply with the requirements of the Consultant's Competitive Negotiation Act.

By way of background, especially for those members of Council who were not on Council when the City originally approved the use of the construction manager at risk (hereinafter CMAR) contract, the City has been using this type of contract for public works projects since the late 1990's. At that time, the then-City Attorney, Bruce Conroy, recommended, in response to the litigation the City became involved in as a result of the design-bid-build approach that previously was used for utility expansion, that the City Council retain special counsel to negotiate the terms of a contract for the next phase of the UEP with the selected firm, Brown & Root. The City thereafter retained the law firm of Foley & Lardner, a firm that specializes in construction law, to negotiate and prepare the contract. The contract that is in use today for the current phase of the UEP is essentially the same as the previous contract, prepared by Foley & Lardner, with the exception of some changes that were negotiated in response to recommendations from auditor Richard Townsend who was hired by the City to audit the UEP. The Attorney General has not taken issue with those changes.

In essence, therefore, the City's UEP program has utilized the master CMAR methodology, under which the guaranteed maximum price (GMP) for each phase is negotiated separately, without challenge for almost ten years. Moreover, the City has not encountered any of the multitude of problems that were experienced when the City utilized the design-bid-build approach.

The City is not alone in its use of the construction manager at risk approach. Other state agencies, local governments and school boards have been successfully using this approach over the same time period, likewise without challenge. The construction manager at risk concept has become commonplace in the State of Florida, at least partly in reaction to the shortcomings of the design-bid-build approach. In this regard, I attach, for your convenient reference, a white paper that was prepared by a professor and a project manager from the South Florida Water Management District concerning

the Construction Manager At Risk approach and its benefits.

Throughout this time, no reported court cases have invalidated the use of CMAR contracts with negotiated phases by public entities. Additionally, no statutes expressly prohibit the use of such contracts. When the state statutes have been amended in recent years, the amendments have expanded, not restricted, the use of CMAR, such as by school boards. It appears, therefore, that the trend has been to expand the use of CMAR contracts by local governments.

As the Council may recall, the request for an Attorney General's opinion that this office submitted was accompanied by a memorandum of law that analyzed the legislative history of the statute and the caselaw relating to statutory construction. The memorandum also pointed out to the Attorney General the proliferation of the use of this type of methodology by local governments throughout the state of Florida. In accordance with the rules of the Attorney General's office that require an opinion from the submitting entity's attorney, I opined that the statute does not require the negotiation of the GMP for all phases prior to the start of any construction. Unfortunately, the Attorney General's opinion was not only contrary, but was also rather conclusory in nature and did not address pertinent issues such as statutory construction and proliferation of the use of such contracts by many Florida public entities.

The rendering of this contrary opinion by the attorney general indicates, in the opinion of this office, that the statute is vague and in need of clarification by the Florida legislature. I note that the statute has not been significantly amended since design-build provisions were inserted in 1989, and the statute appears to not have kept pace with innovations in the construction industry vis-à-vis project delivery methods. If the City is interested in continuing to utilize the CM at risk with negotiated phases methodology, I recommend that the City work toward effectuating such legislative change, perhaps in concert with the Florida League of Cities and other governmental entities.

As I have previously stated, an attorney general opinion is not the equivalent of a court decision and has no direct effect on the statutes or contracts in question. Nor does it render any of our existing contracts null and void.

Additionally, with respect to the current UEP contract, for instance, the City has several options. It can choose to treat the Attorney General Opinion as just that and continue with the current program. The Council should be aware that if it selects this approach, someone could file a legal challenge alleging that the City failed to comply with Section 287.055, Florida Statutes. Please note, however, that current caselaw indicates that only disappointed proposers would have standing to file such a challenge. In the case of Godheim v. City of Tampa, 426 So.2d 1084, (Fla. 2nd DCA 1983), the Second District Court of Appeal (the same District Court Cape Coral is in) ruled that a taxpayer does not have standing to challenge a local government's alleged non-compliance with the Consultant's Competitive Negotiation Act. In addition, it appears that the statute of limitations for such an action would be four years from the date the contract was entered into. In this instance, the current contract was entered into September 10, 2004, so a challenge would have to be filed within four years of that date. Please be advised that no reported cases have invalidated such a contract and the Consultant's Competitive Negotiation Act contains no criminal or civil penalty provisions.

If Council chooses not to continue with the current program, it could, in accordance with the current contracts, give notice of termination of current program or construction manager at risk contracts and all currently pending work authorizations. In addition to the UEP contract, a similar master CMAR contract has been approved for transportation capital projects. Please note, however, that under the provisions of these contracts, such termination could result in a significant cost to the City. In addition to the fiscal ramifications of termination, a decision not to proceed with the CMAR contract with negotiated phases methodology could negatively impact future development in the City by delaying important projects such as the new reverse osmosis and wastewater treatment plant and the expansion of the existing plants necessary to address capacity issues.

A third option available to City Council is to continue with the current work authorizations, but, once those are completed, terminate the master agreement and initiate a process to procure new contracts using either a CMAR contract without negotiated phases or a different project delivery method. Again, however, this approach may have some cost and time delay factors to consider, but such factors would probably not be as significant as in the foregoing option.

While the City might have preferred that the Attorney General had reached a different opinion, the value of his opinion is that it emphasizes the need for legislative clarification of the Consultant's Competitive Negotiation Act. Ultimately, the City, as well as other state and local governmental entities, will benefit from such legislative clarification.

Please do not hesitate to contact this office if you have any questions or desire any further information.


DOLORBS D. MENENDEZ
City Attorney

Attachment

**Cc: Terrance Stewart, City Manager
Chuck Pavlos, Public Director
Mark Mason, Financial Services
Bonnie J. Vent, City Clerk
Dona Newman, City Auditor**

CM @ RISK MEETING 5/22/07

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