



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: January 25, 2010 REPORT NO.: 10-008

ATTENTION: Honorable Council President and City Council

SUBJECT: Construction Manager at Risk - Implementing Ordinance

REFERENCE: Construction Manager at Risk - Implementing Ordinance

REQUESTED ACTION: Approval of the proposed Construction Manager At Risk Ordinance.

STAFF RECOMMENDATION: Approve the proposed Construction Manager At Risk Ordinance.

SUMMARY: There are several construction project delivery systems commonly used throughout the construction industry. The most traditional delivery system is Design-Bid-Build (D-B-B). D-B-B consists of three separate steps: the project is designed, the resulting plans and specifications are put out for bid, and then the project is built after the contract is awarded to the low, responsive and responsible bidder. Design-Build (D-B) is an alternative method of project delivery in which one entity (Design-Builder) provides both engineering design and construction services. Another alternative project delivery method is the Construction Manager at Risk (CMAR). With CMAR, the owner contracts with both an architect/engineer and a construction manager simultaneously under two separate contracts. This project delivery method allows constructability analysis, cost analysis, value engineering, and schedule development and analysis to be completed by the construction manager during the design phase of the project. Each delivery method provides its own set of advantages and challenges, and is best suited for different types of projects.

Proposition B was placed on the March 2004 ballot (Attachment 1), to obtain local voter approval of an amendment to the City's Charter authorizing the use of CMAR. Proposition B was approved, which added Section 94.4 (Attachment 2) to the City Charter. The adoption of implementing ordinances by the City Council is required to provide for the letting of municipal public works contracts using a combination of (1) design review and management services and (2) construction and construction management services by a single entity for a guaranteed maximum price pursuant to a process of best value and competitive negotiations.

Subsequent to passage of the Charter change, several workshops were held with local construction industry representatives and other stakeholders to share viewpoints and provide input for the development of the implementing ordinance (Attachment 3).

The proposed ordinance provides definitions and guidelines for the award, use, and evaluation of Construction Manager at Risk contracts for public works projects. The ordinance addresses a number of areas of stakeholder interest. The issues enumerated below are some of the major points of discussion, and list staffs' recommendations.

1. Bids should be solicited from subcontractors only when construction documents are as complete as possible.

Staff concurs with position, with the proviso that the City shall retain the right to authorize "fast track" CMAR projects when accompanied by a finding of emergency or other compelling need to expedite a construction project without fully completed drawings.

The CMAR contract is a cost-plus-a-fee contract with a Guaranteed Maximum Price (GMP). The total cost is the sum of the CM's fee, the CM's contingency, the General Conditions for construction, the subcontracts, and an estimate for unbid subcontracts. The CM agrees to pay all costs that exceed the GMP and are not a result of changes in the contract documents.

The GMP is subject to adjustment if the client or the architect/engineer makes changes to the contract scope or requirements. If the CM provides a GMP prior to the completion of construction documents, and items not logically implied by the design documents are later added, the CM may increase the GMP

As noted in the ordinance, the City would generally direct the CM to seek bids when the construction documents are as complete as possible. However, to make fully completed drawings a fixed requirement eliminates one of the advantages of CMAR, namely the ability to accelerate a project in order to gain earlier use of the facility, realize return on investment, or enable challenging deadlines to be met. In fact, this flexibility can accelerate the commitment of funds and project completion by early establishment of GMP and project phasing which allows the design to be fully completed in stages, allowing subcontractors early access to the completed parts of the construction documents. This approach is frequently used in both the public and private sectors, where site, foundation and structural work can be started while the other parts of the design documents are being developed.

When using a phased GMP approach, is it essential that the CM firm maintain an up-to-date conceptual cost estimate for the entire project to ensure that the overall project budget is met. Selecting CM firms with demonstrated high-level skills in conceptual cost estimating and cost modeling is key to the success of the phased GMP approach.

Mandating that all projects be fully designed before a GMP is sought eliminates the important flexibility and hampers the City's ability to fully utilize the benefits of this contracting tool during the critical extenuating circumstances that they would be most useful.

2. Certain major trades/sub-contractors should be mandated to be included on the CM "team" at the pre-construction services phase before award of contract.

Mandating that major trades be included on the CMAR team early in the process is not recommended. In most instances, a competent CM firm will have the in-house expertise needed

to address relevant pre-construction services. During the early stages in a typical project's development schedule, the following conditions generally apply.

- a.) The CM firm will have been evaluated and selected based on their relevant experience and record in meeting the GMP for similar projects.
- b.) The CM firm will be responsible for meeting the GMP for the project, and would not unnecessarily take on additional risk using unqualified or incomplete analyses.
- c.) There is no design available to the CM firm, making selection of key subcontractors problematic. The CM firm does not have criteria to use for subcontractor selections.
- d.) Selection of subcontractors is best done in a collaborative manner, with the owner and the CM firm working together to identify the most qualified team.

The proposed ordinance allows the CM, in situations where additional expertise is required during the design phase of the project, to either incorporate specific trades on the team or retain outside consultant expertise.

Mandating that major trades be included at the earliest stage of the project would deny the City the opportunity to provide input regarding the selection and evaluation criteria for key subcontractors on the CMAR team. In addition, the City would lose the benefit of having competition among the key subcontractors, each of whom will have different approaches and advantages. Lastly, the ability to assemble the best team based on the scope of services is essential. There are potential instances of an especially challenging design, for which the fundamental design approach is still to be decided, that could result in selection of an unqualified subcontractor if the CM is required to form the team at the very beginning of the project.

3. Do everything you can to prevent bid shopping.

We absolutely agree that bid shopping cannot be tolerated on any project. There's no evidence that CMAR promotes bid shopping over other project delivery approaches. Additionally, there are public contracting laws that prohibit bid shopping and mandate sanctions if it occurs. More fundamentally, any owner, and especially any public entity like the City, has a fiduciary responsibility to ensure that bid shopping to meet a budget target does not occur. Just as the owner is responsible for participating in the evaluation of subcontractors, the owner must also seek candid feedback from the subcontracting community about prior practices of CM firms. Those CM firms found to have a documented history of bid shopping should not be hired.

In conclusion, CM At Risk is yet another tool for the City to use when and where appropriate for construction projects. As such, the implementing ordinance would serve to supplement the existing design/build and design/bid/build models already in place.

FISCAL CONSIDERATIONS: None with this action.

PREVIOUS COUNCIL or COMMITTEE ACTIONS:

City Manager's Report 03-209, issued October 17, 2003 – "Construction Manager (CM) At Risk Project Delivery Method": Rules Committee Agenda of October 22, 2003.

City Manager's Report 03-239, issued November 21, 2003 – "Construction Manager At Risk": City Council docket of November 24, 2004.

On December 9, 2009, the Committee on Natural Resources and Culture approved the Construction Manager at Risk Ordinance item to be forwarded to the full City Council.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

Several workshops were held with local construction industry representatives, Subcontractors Associations, Engineering Industry representatives, Taxpayers Association and other stake holders.

KEY STAKEHOLDERS AND PROJECTED IMPACTS: Construction and Engineering Groups.



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