

CITY OF FORT LAUDERDALE

OFFICE OF THE CITY AUDITOR

*Carr, Riggs & Ingram (CRI) Interim Status Report #2 –
Parking Garage, Las Olas Boulevard Corridor Improvements
and Aquatic Center Renovation Projects*

Report #18/19-07

July 9, 2019



Memorandum

Memo No: 18/19-08

Date: July 9, 2019

To: Honorable Mayor and Commissioners

From: John Herbst, CPA, CGFO, CGMA
City Auditor

Re: Carr, Riggs & Ingram (CRI) Interim Status Report #2 - Parking Garage, Las Olas Boulevard Corridor Improvements and Aquatic Center Renovation Projects –
(Commission District 2)

As part of our audit workplan, we have engaged Carr, Riggs & Ingram CPAs, to conduct a continuous audit of the construction projects underway in the Beach CRA; including the Parking Garage, Las Olas Boulevard Corridor Improvements and Aquatic Center Renovations.

As these projects will be ongoing for several years, I will be bringing forward interim reports from CRI from time to time to keep the Commission, management, our neighbors, and the other impacted taxing districts informed as to issues that were identified during the audit.

In addition to the Interim Status Report, I would add that CRI has provided invaluable advice during the contract negotiations with Hensel Phelps for the Aquatic Center. Those comments have been communicated separately to management to aid them in their negotiations.

Attachments: CRI June 2019 Interim Report
CRI Report Re: Hensel Phelps Labor Burden
CRI Report Re: Hensel Phelps Contract Comments

Prepared by: John Herbst

Charter Officer: John Herbst



The City of Fort Lauderdale, Florida
Interim Status Report
Parking Garage, Las Olas Boulevard Corridor Improvements and
Aquatic Center Renovation Projects

Prepared By:
Carr, Riggs & Ingram
June 2019





June 25, 2019

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:

Pursuant to our agreement dated August 23, 2017, we were engaged to provide various contract compliance consulting services for the City of Fort Lauderdale Community Redevelopment Agency. Upon your request, we are providing the services performed and results thereof as of date of this interim report.

Our report is organized in the following sections:

- **Scope of Services and Procedures** – This section outlines the scope of services and the related procedures being performed or to be performed for each project.
- **Interim Results / Status** – This section provides the results and/or current status of the more significant items as of the date of this interim report since our previous interim report issued in March 2019.
- **Next Steps and Estimated Timetable** – This section provides next steps relative to the Las Olas and Aquatics Center projects and estimated timetable, including key milestones.

The findings and conclusions are based on our analysis of the processes, documents, records, and information provided to us by management. If our scope had been expanded, including performance of additional procedures and / or sample sizes in the period under review, it may have resulted in findings of questionable or inappropriate transactions. We reserve the right to supplement our findings in the event of any of these circumstances.

The procedures performed did not constitute an audit in accordance with generally accepted auditing standards. Accordingly, we express no opinion on any of the items assessed. Our procedures were performed in conformity with the *Statements on Standards for Consulting Services* of the American Institute of Certified Public Accountants.

Respectfully submitted,

A handwritten signature in black ink that reads 'Carr Riggs & Ingram, LLC'.

CARR, RIGGS & INGRAM LLC



Scope of Services and Procedures

CRI was engaged to conduct construction contract compliance services for the construction of the parking garage, Las Olas Boulevard corridor improvements and the Aquatic Center renovation. Our services include:

Engagement / Project Planning

We held an onsite entrance conference on 9/26/2017 with the City Auditor and an Assistant City Auditor of the City Auditor's Office (CAO) and the Project Manager for the Beach Community Redevelopment Agency (CRA) to establish overall project administration logistics and to gain a better understanding of the three projects and key activities and processes especially related to the monthly pay application submission and approval process. Additionally, for both the Las Olas Project and Aquatics Center Project we held an onsite facilitated session with the CRA Project Manager, the Assistant City Auditor, and representatives of Skanska (the "Construction Manager" or "CM") to review contract requirements and to establish proper reporting / submission protocols, controls, etc., related to: payment applications, change orders, project schedule, and budget.

Monthly Pay Application Reviews / Onsite Visits

The objective of the payment application review is to determine that the amount invoiced is a reasonable representation of work completed or stored to date and that the charges billed on the payment application are in accordance with the terms and conditions of the contract. Our review procedures checklist consists of 25 steps, which include the following: proper support for the CM's compensation and expenses (general conditions/requirements), signed subcontractor pay applications, proper support, review and approval for contingency usage, owner direct purchases, and change orders. We perform site visits to review the status/progress of the respective projects on a quarterly or as needed basis.

Contract review and Cost Proposal (GMP) Review

We perform contract reviews and GMP proposal reviews early in the project cycle to provide for greater clarity and specificity in the contract and GMP proposal and to help facilitate cost avoidance and cost recovery. We propose contract language improvements focusing on the key economic terms such as specificity of allowable vs. disallowable costs, change order mark-up and approval process, labor and burden/fringe rates, overhead and profit fee, etc.

Construction contract compliance cost verifications (milestone, closeout)

CRI will conduct milestone cost verification procedures for the Las Olas project and close-out cost verification procedures at the conclusion of each project. The objectives of the construction contract compliance milestone / close-out cost verification procedures are to ensure costs were incurred and billed in accordance with the terms and conditions of the contract. The construction contract compliance cost verification goes beyond the monthly pay application reviews to the CM's project records (job cost detail report) and underlying source documentation including vendor invoices, subcontracts, proof of payments, and lien releases. Additionally, as part of the cost verification, we obtain and review the CM's reconciliation of the final pay application to job cost detail to help ensure that what the CM billed does not exceed the CM's actual cost plus the agreed upon fee. Finally, we review contract compliance for the CM's project closeout/completion procedures including certificates of substantial completion, final completion, final releases, final inspection, punch-lists, back charges, etc.

EDSA Request for Additional Services

On June 3, 2019, the City Commission approved the CRA Board's request to increase our contract expenditures in order to engage us to perform a review of EDSA's funding request for additional services.



Interim Results / Status

Monthly Pay Application Reviews

We are in the process of performing monthly pay application reviews for the parking garage and Las Olas Boulevard corridor improvement projects and the Aquatic Center:

Project	Pay Applications Reviewed to Date	Completed & Stored to Date	Original GMP	Amended GMP	% Complete
Las Olas*	24 (Ap 2017 - Ap 2019)	\$30,026,158	\$49,379,324	\$38,896,810*	77%
Aquatic Center	7 (Oct 2018 – Ap 2019)	\$1,737,447	\$26,995,368	No change	6%

*Amount reflects two amendments to the original GMP: 1) an increase of \$1,517,486 (Change Order No. 2 \$1,517,486) previously approved by the City Commission; 2) A reduction in the GMP for estimated materials purchased directly by the City (Owner Direct Purchases) in the amount of \$12M – to be adjusted to actual at project completion. A temporary certificate of occupancy has been issued for the parking garage phase.

With each review, we provide the CRA project manager with feedback of our specific observations and our recommended actions based on our review for charges that may not be properly supported or disallowable based on the economic terms and conditions of the construction contract. Examples of observations noted and communicated to the CRA project manager included the following:

- Excess PTO charged by former project executive
- PTO charged by CM employee by calendar year in compliance with CM PTO policy
- Unauthorized overtime charges billed by CM for its hourly laborers
- Late charges incurred by the CM billed to the Owner
- Stale invoices; possible duplication (there were various vendor invoices submitted 90 days to over 1 year old)
- Subcontractor payment applications were missing lien releases
- Adjustments to the Schedule of values included in the pay application without proper approval provided
- Billing CM time incurred 6 to 12 mths prior
- Missing third-party (e.g. vendor invoice, receipt) for various charges submitted
- Lack of supporting documentation for allocation methodology (e.g. Technology)
- Unsigned Subcontractor payment application

Results /Management Actions: The CRA PM has addressed many of these items and others are in process. Additionally, the final disposition of these items will also be addressed as part of CRI’s comprehensive cost verifications performed at the milestone and project completion.

Labor Burden Analysis by CRI - Benchmarking

CRI performed an analysis of the burden rate billed compared to the actual cost incurred by the CM. In particular, we noted that the CM charged federal and state unemployment taxes that far exceeded the statutory amount that the CM paid to the federal and state government respectively – total estimated amount for unemployment taxes at project completion - \$70K (CRI Memo – Labor Burden Analysis, June 25, 2018).

Contract Review / Contract Development

We worked with the CRA project manager, the City Auditor, and the City’s procurement department in providing our observations / recommendations related to the development and negotiation of the Aquatic Center project by management. We provided proposed contract language improvements to the Design/Build standard draft contract related to the Aquatic Center project focusing on the key economic terms such as:

- Specificity of allowable and disallowable costs of work
- Well defined change order approval process and allowable mark-ups
- Labor burden – specifically defined with not-to-exceed amount
- Self-performed work – quality and pricing
- Clean-up – subcontractors normally responsible



Contract Negotiation / Price Proposal (GMP) Development – Aquatic Center

Additionally, we provided feedback regarding the revisions proposed by Hensel Phelps (“HP”) to the contract to assist management in their negotiations with HP (*CRI Memo Draft – regarding HP’s comments on the Draft Standard Contract*). Finally, we provided our feedback to the revised GMP proposed by HP and identified various cost saving/avoidance items. For example, the original negotiated fee (overhead and profit) to be paid to HP was 6%. The contract and GMP was restructured so that half of this fee (3%) would be paid from the contingency fund. However, the GMP also provided for HP to receive 50% of the total combined unused contingency fund remaining at the end of the project. Based on our experience with numerous construction projects in the public sector industry, we recommended that all remaining contingency funds should be returned to City – especially since all unused funds are public funds. Thus, we recommended that the total fee be capped at the originally negotiated fee of 6% such that no more than the 3% included in the contingency fund be paid to HP. Our understanding is that management took our recommendations into consideration in its negotiation of the final GMP with HP (*CRI’s Recommendations related to HP’s Price Proposal Form – Revised 08.02.18*, dated June 29, 2018).

Change Order No. 2 – Las Olas Garage & Corridor Improvements

We communicated throughout our pay application reviews as far back as early 2018 that the CM did not identify the nature of changes included in the “Approved Changes” column. During November 2018, CRI was informed about a large proposed change order (Change Order 2) to increase the GMP by \$1.5M for what were identified as increases to the original scope of work, extension of the schedule and various unforeseen conditions. These items, in some cases, were identified up to a year previously. CRI performed a detailed analysis of Change Order 2 at the request of the City resulting in estimated overbillings of approximately \$45K primarily related to excess CM fee markup not deemed allowable pursuant to the CM construction contract (*Las Olas Project – Change Order 2 Analysis by CRI, November 29, 2018*). The CM has agreed to credit back the City the excess CM fee markup, some of our other findings and is researching others. Additionally, CRI, the CRA PM, and the City Auditor agreed that the “Approved Changes” column in the monthly pay applications will be addressed as part of CRI’s comprehensive cost verification at the milestone and close-out for the Las Olas project noted below.

Site Visits

We have performed site visits on a quarterly and/or as needed basis. Most recently we performed site visits on November 28, 2018 and May 5, 2019.

EDSA Request for Additional Services

We performed a preliminary review of EDSA’s revised request and related support dated April, 1, 2019 and based on that review prepared a list of additional document requests. On June 17, 2019, we held a kick-off meeting with EDSA representatives and representatives of the CRA and City Auditor’s office to discuss their request and related support and to outline our review process and the additional documentation we will need to complete our review on behalf of the City.



Next Steps and Estimated Timetable / Milestones

Las Olas Improvement & Aquatic Center Projects

We will continue to perform our monthly payment application reviews and provide the CRA project manager with our observations and recommended actions for him to address. Additionally, here is our estimated timetable for our payment application reviews, milestone and closeout procedures for both projects based on the current, respective project schedules provided:

Project	Pay Applications Remaining	Milestone Cost Verification Timing	Completion Date	Closeout Cost Verification Timing
Las Olas*	7	September 2019*	November 2019	January 2020
Aquatic Center	18	NA	October 2020	December 2020

*The parking garage (Phase 1) was substantially complete in March 2019; however, the job cost financial close is estimated to be August or September 2019. Depending on the timing of the financial close of phase 1, we will conduct milestone cost verification procedures thereafter or wait and perform a full, final closeout cost verification in January of 2020 upon final completion of the Las Olas project as a whole.

EDSA Request for Additional Services

We are in the process of obtaining the additional support requested in order to complete our assessment of EDSA's request and provide our observations/recommendations to City management for their consideration. The estimated timeline to complete this assessment and related deliverable is contingent on the time it takes to obtain all the requested information and to address any follow-up matters we may have as a result of our assessment. The assessment itself should take about three weeks to complete subject to these factors.

Communication / Site Visits

We continue to communicate with the City Auditor's office and the CRA project manager as to the status of each project and address any concerns or questions as they arise on a weekly or biweekly basis in addition to the regular monthly payment application reviews and feedback. Finally, we will continue to perform site visits upon request based on the progress and completion of different phases of the respective projects.



June 25, 2018

Mr. John Herbst
 City Auditor/Community Redevelopment Agency Auditor

Dear Mr. Herbst:

The following provides our analysis and observations/recommendations related to State Unemployment Tax (SUTA); Federal Unemployment Tax (FUTA) and other adjustments related to Skanska’s labor burden for your consideration.

Analysis

Article 7.1.1 – Construction Phase General Conditions and General Requirements (hereinafter referred to as “General Conditions”).

In this section, the construction agreement with Skanska specifically defines the Construction Manager’s (CM) compensation for General Conditions or services performed for the Construction Phase. The following excerpt defines how the CM’s compensation for General Conditions performed, during the Construction Phase, shall be charged in the monthly pay application:

The General Conditions shall be invoiced and paid each month, based on actual costs at the agreed-upon billing rates attached hereto as Exhibit 2. (Article 7.1.1)

The agreed-upon billing rates schedule included “fringes” for which Skanska separately provided a breakout of the labor burden / indirect cost components as listed below (letter dated, March 31, 2017):

Project 2017 Burden Rate:

Social Security Tax	6.20%	
Medicare Tax	1.45%	
State Unemployment Tax	2.55%	
Federal Unemployment Tax	0.60%	
Workers Compensation	In CCIP	
Medical Insurance	20.20%	
Dental & Vision	0.50%	
Life Insurances	1.35%	
Retirement (401K & SEOP)	8.00%	(3% 401K and 5% SEOP)
Escalation (Lock In)	1.25%	Covers Changes through 2019

Total 42.10%
37.10 %

These “fringes” as identified on Exhibit 2 were negotiated to be fixed at 37.00% (1.37 mark-up of the base labor rates for each the CM personnel listed on Exhibit 2). Additionally, Exhibit 2 included a cost of living adjustment of 1.0325 as well as some per diem rates related to vehicles for some of the CM personnel, plus an undefined Overhead and Profit mark-up of 10%.

State Unemployment Tax (SUTA) / Federal Unemployment Tax (FUTA)

In our review of the rates for the above fringe items, we noted an error in how the Florida state unemployment tax rate (SUTA) was applied by the CM. The CM's mark-up rate presented is 2.55%, which does not take into account the annual statutory income limitation for SUTA, which for Florida is limited to \$7,000 of the taxable wage base for 2017 and 2018 per employee. This means that the SUTA payable to the state cannot exceed the SUTA rate times this capped taxable wage base. The CM applied the SUTA rate to each of their personnel's total taxable wages without taking into account this cap. Applying the cap, the SUTA is as follows for each CM project team personnel that earns \$7,000 or more annually (2.55 % x \$7,000 = \$178.50 per employee). Additionally, the cap as applied to FUTA: (0.6% x \$7,000 = \$42 per employee).

Actual Average Employee Salaries vs. the Annual Employee Salaries

CRI noted, based on the Skanska labor charged through PA#11, that the actual average employee base salary significantly exceeds the average employee base salary used in determining the specific percentages in the labor burden mark-up. This results in an overstatement of the burden rate components, which is compounded by the additional mark-up on these fringe items noted above with COLA (3.25%), vehicle allowances (2 to 4%) and Overhead and Profit (10%). Overall, including the SUTA and FUTA errors discussed above, we estimate the labor burden mark-up overage to be approximately 7.12%.

Observations and Recommendations

State Unemployment Tax / Federal Unemployment Tax (SUTA/FUTA)

Observation

Based on the analysis above, the CM appears to have miscalculated the SUTA / FUTA rates resulting in an overstatement of the actual amounts incurred and to be incurred by the CM .

Recommendation:

We recommend that the CRA project manager inform the CM of this error in the SUTA / FUTA calculation and request SUTA / FUTA be capped per employee at \$178.50 per employee for SUTA and \$42.00 per employee for FUTA pursuant to the statutory requirements.

The estimated financial impact of the above observation at project completion (approximately 2 yrs.):

Description	Calculation by CRI	Amount
SUTA / FUTA at CM rates	\$2,211,000* x 3.15% (SUTA & FUTA % in CM billing rates)	\$69,700
SUTA/FUTA - capped	\$178.50+\$42.00 = \$220.50 x 18 employees X 2 years	(\$7,300)
Total Variance	Estimated overage (project est. 24 months)	\$62,400

*We determined the estimated total base labor for the project as follows:

- \$3,537,000 - total scheduled value for Skanska Labor - PA#11 (based on loaded billing rates)
- 1.6 (estimated average burden/fringe mark-up based on Exhibit 2)
- \$3,537,000 / 1.6 = **\$2,211,000** (total estimated base labor for project at completion)

The estimated financial impact through PA#11 is as follows:

Description	Calculation by CRI	Amount
SUTA / FUTA at CM rates	\$936,000* x 3.15% (SUTA & FUTA % in CM billing rates)	\$29,500
SUTA/FUTA - capped	\$178.50+\$42.00=\$220.50 x 18 employees (prorated PA11)	(\$3,300)
Total Variance	Estimated overage (through PA#11)	\$26,200

*Total CM labor charged to date / 1.6 = estimated base labor (\$1,497,000/1.6 = \$936,000)

Recalculation of Skanska Burden Rate

Observation

The table below details our recalculation of the burden rate. Note that this recalculation includes the effect of the SUTA/FUTA errors noted above, and comes to the total estimated adjustment to the labor burden rate, including the effects of the average base salary rate noted in our comments above. The average base salary used by Skanska, in calculating the current burden component rates, is \$109,051. The actual base salary for Skanska employees on this project is \$127,166 - based on actual labor and labor burden charged in pay applications 1 through 11.

Recommendation:

We recommend that the CRA project manager request the CM to adjust the various burden component rates detailed in the attached Appendix. The financial impact in recalculating the burden rates based on the \$127,166 average salary for pay applications 1 – 11 (inclusive of the corrections related to SUTA and FUTA noted above) are as follows:

Calculation by CRI		Amount
Interim Estimated Overage – thru PA11	Total Labor thru PA11/ burden mark-up x the burden variance (\$1,497,000 / 1.6 x 7.12%)	\$66,600
Estimated overage at project completion	Total labor in scheduled value / burden mark-up x burden variance (\$3,537,000 / 1.6 x 7.12%)	\$157,400

See Appendix for more details in our recalculation of the respective labor burden components.

As part of the close-out contract compliance audit, CRI will recalculate the actual, final overage related to the labor burden charged by the CM.

This analysis, including the observations and recommendations, were consulting related and in no way constitute an audit, review or compilation made in accordance with standards established by the American Institute of Certified Public Accountants. Therefore, we do not express an opinion on any financial statements, accounts or items (such as above), nor are we in anyway expressing a legal opinion on this matter.

Appendix				
	Actual Avg Annual Salary - Base	\$ 127,166	(PA's 1-11)	
Burden component	Per CM	Per CRI	Variance	
Social Security	6.20%	6.20%	0.00%	
Medicare	1.45%	1.45%	0.00%	
SUTA	2.55%	0.14%	2.41%	
FUTA	0.60%	0.03%	0.57%	
WC	0.00%	0.00%	0.00%	
Medical	20.20%	17.32%	2.88%	
Dental & Vision	0.50%	0.43%	0.07%	
Life Insurances	1.35%	1.16%	0.19%	
401K	3.00%	3.00%	0.00%	
Escalation	1.25%	1.25%	0.00%	
Total	37.10%	30.98%	6.12%	
Fringe Mark-up	1.37	1.31	0.06	
COLA - Mkup	1.03	1.03	-	
Adj Burden	1.42	1.35	0.06	
Vehicle Mkup	1.03	1.03	-	
Adj Burden	1.45	1.39	0.06	
OH&P Mkup	1.10	1.10	-	
Total Burden Mkup	1.60	1.52	7.12%	
Total labor thru PA11/burden mark-up x burden variance:				
Estimated Overage - (\$1,497,000 / 1.6 x 7.12%)		\$	66,617	
Total labor scheduled value/burden mark-up x burden variance				
Estimated Overage - (\$3,537,000 / 1.6 x 7.12%)		\$	157,397	
<u>Recalculated by CRI</u>				
<u>SUTA:</u>			<u>Medical:</u>	
Rate	2.55%		Avg Sal.	127,166
Annual Cap	7,000		Prem	22,031
SUTA per Emp	178.50		Rate	17.32%
Emp Ave Sal	127,166			
Effective Rate	0.14%		<u>Dental&Vision:</u>	
			Avg Sal.	127,166
			Prem	548
<u>FUTA:</u>			<u>Life Insurances</u>	
Rate	0.60%		Avg Sal.	127,166
Annual Cap	7,000		Prem	1,469
FUTA per Emp	42.00		Rate	1.16%
Emp Ave Sal	127,166			
Effective Rate	0.03%			



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 contract 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 awarded 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 replaced 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.

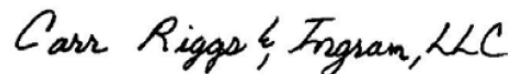
20. Article 26.11 - Hensel Phelps takes exception to this clause. This clause establishes that every provision in the contract is a material provision. This gives either party the ability to claim a failure to comply with any provision, regardless of how small or inconsequential, is material breach of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