GMP pitfalls

January 27, 2020

It is not uncommon for issues to arise when the Guaranteed Maximum Price (GMP) Proposal is submitted to the owner by a Construction Manager at Risk (CMR) or Design Builder (DB). Usually, such issues can be worked out to the satisfaction of the parties. However, such issues may arise because of a differing view with regard to the nature and purpose of a GMP.

In order to set the table for a discussion of the issues, it is necessary to have general familiarity with the CMR procurement process. While similar issues arise on private and public projects, the procurement processes for private projects are so varied that a universal description of them would be impossible. In short, for public projects in Ohio, both CMRs and DBs are selected through a two-step Request for Qualifications/Request for Proposals (RFQ/RFP) process. The RFQ process involves short-listing the most qualified firms without addressing pricing or contract provisions. The RFP process involves submission by the short-listed CMR or DB firms of pricing and technical proposals that are based upon contract documents included by the owner in the RFP. Of course, a complete design is rarely available at this stage, so the pricing proposal is typically based on a fee percentage and other pricing components that will be applied to the ultimate cost of the work. Following this submission, the owner selects the proposal it determines will provide “best value.” Following that determination, negotiation of some contract terms may occur. Ideally, the owner should require the firms submitting proposals to identify any such terms in their proposals. However, the pricing proposal, since it will be based on percentages and other factors that should automatically track the ultimate cost of the work, will be set.

Once the contract is signed, the CMR or DB commences their “preconstruction services,” which include participating in further developing the design and budget so a GMP proposal can be submitted to the owner. Typically, by the time a GMP proposal is

submitted, the owner is heavily invested in working with the CMR or DB and is working against a tight schedule. In other words, the owner may perceive that its bargaining position has been weakened at this point, should an issue arise.

When a CMR or DB submits the GMP proposal, it often includes a list of "Qualifications and Assumptions," "Assumptions and Clarifications," or other similar limitations on the GMP. Many of these may be related to the design or technical aspects of the project, and many may be perfectly justified and consistent with the contract terms and pricing that were accepted by the owner. But others may change the legal terms and pricing already agreed-upon by the parties. When all of the materials included in a GMP proposal are taken into account, it is not uncommon for the proposal to be comprised of hundreds of pages of documents for a moderately complex project. Unfortunately, owners may execute the GMP amendment without realizing that, buried within the GMP documents, are significant modifications of their rights and protections and even changes in pricing. However, even savvy and vigilant owners find themselves in a quandary. Do they quickly accede to the contract and/or pricing revisions submitted by the CMR or DB, or do they hold their ground and refuse to re-negotiate terms (which they are legally entitled to do) which could extend the time needed to reach an executable GMP?

It goes without saying that this situation is best avoided. While there are some steps that an owner can take to minimize its risk, they are not always effective. For example:

1. Selection of a large, well-known CMR or DB firm is not a guarantee that such issues will not arise.
2. Trust in the individuals with whom you will be working is excellent but is no guarantee against such issues arising at GMP time.
3. What about references? Bad references are helpful, but good references may be "cherry picked." There may be a reluctance by dissatisfied owners to be candid, or the owner may not realize that this scenario happened to them.

While an owner is not legally obligated to agree to a GMP proposal, assuming the contracts are drafted properly, it is best to include provisions in the contract that make the CMR or DB's insistence on changing contract terms or pricing as a condition of the GMP a "material breach" of contract by the CMR or DB. When a CMR or DB objects to this term during the initial contract negotiations, that is a red flag. It is more likely that the CMR or DB firm may be anticipating changing the terms upon which they were hired as part of the GMP process. It is advised that owner clients don't negotiate this term away. Is it a foolproof guarantee that you will be fully protected? No. But it does create a major disincentive for the CMR or DB to try to change key terms as part of the GMP.

Authors

Jack Rosati, Jr.

Partner

Columbus
614.227.2321
jrosati@bricker.com