SUMMARY STATEMENT

ITEM NO. DRPA-15-003


COMMITTEE: Operations & Maintenance

COMMITTEE MEETING DATE: January 7, 2015

BOARD ACTION DATE: January 21, 2015

PROPOSAL: To revise the General and Special Provisions of the Authority’s Construction Contract Documents.

PURPOSE: To update the Authority’s standard construction specifications to incorporate best practices in the construction industry and further the interests of the Authority.

BACKGROUND: General and Special Provisions are included in with the Contract Documents for all of the Authority’s Capital Construction Projects. The General Provisions set forth the contractor’s minimum acceptable performance requirements and the rights, responsibilities and relationships of the parties involved in the performance of the contract. The Special Provisions provide additional requirements specific to the project under consideration not satisfactorily covered by the General Provisions.

The contract specifications currently being used were last updated in the 1980’s. Over the years, technical, editorial and organizational changes to the General Provisions were incorporated by the Special Provisions. The revised specifications have removed outdated provisions, undefined terms, and inconsistent requirements and obligations; and are more consistent with those used by other public agencies and other public owners in this Philadelphia area. A memorandum summarizing the proposed changes to the General and Special Provisions is included with the attached Exhibit “A”. 
| **SUMMARY**: | **Amount**: | N/A |
| | **Source of Funds**: | N/A |
| | **Capital Project #**: | N/A |
| | **Operating Budget**: | N/A |
| | **Master Plan Status**: | N/A |
| | **Other Fund Sources**: | N/A |
| | **Duration of Contract**: | N/A |
| | **Other Parties Involved**: | N/A |
| | **Estimated Number of Jobs Supported**: | N/A |
RESOLVED: That the Board of Commissioners of the Delaware River Port Authority Board adopts a resolution revising the General and Special Provisions of the Authority’s Construction Contract Documents.

SUMMARY:

Amount: N/A
Source of Funds: N/A
Capital Project #: N/A
Operating Budget: N/A
Master Plan Status: N/A
Other Fund Sources: N/A
Duration of Contract: N/A
Other Parties Involved: N/A
Estimated Number of Jobs Supported: N/A
MEMORANDUM

DATE: January 15, 2015
TO: Kristen K. Mayock
FROM: Patrick J. Kearney
SUBJECT: New DRPA Contract Documents
          Executive Summary

The Contract Document were jointly developed by a team consisting of outside legal (Duane Morris) and the Authority (in-house legal, engineering, and contract administration). Mike Venuto reviewed all of the Contract Documents with Duane Morris and explained the contracting challenges and contract administration problems that the Authority had previously experienced. Overall, the Authority’s Contract Documents included many outdated provisions, undefined terms, and inconsistent requirements and obligations. As a result, Duane Morris reviewed the documents with the goal of updating and streamlining the documents, and ensuring that the Authority’s interests were protected.

After Duane Morris completed its review and proposed suggestions, Mike Venuto and several of his engineers reviewed the Contract Documents and provided Duane Morris with multiple binders of comments and questions.

Duane Morris also met with the Authority’s legal team several times to discuss certain legal issues. Based on the collective efforts of the team, the revised Contract Documents provide more protections for the Authority and clearly identify the contractor’s obligations.

Although the Contract Documents are balanced in the Authority’s favor, the Contract Documents are not “unfair” to the Contractors. To the contrary, the Contract Document are consistent with contracts used by other public and private owners in the Southern New Jersey/Philadelphia area with risk allocated to the appropriate party.
HIGHLIGHTS OF CERTAIN CHANGES/REVISIONS.

The Contract is a large, integrated document. Section E (the General Provisions) is 90 pages. Therefore, redlined comparisons were provided to the Authority’s team to identify the exact changes in the Contract Documents. This section is designed to provide the Authority with a high-level summary of some of the more significant changes that were made to protect the interests of the Authority and shift more risk to the Contractor, when appropriate.

1. Minimize “surprise” claims. We understand that traditionally contractors have attempted to submit claims at the end of the Project. In order to minimize the number of surprise claims in the future, we have placed several new provisions into the Contract that will make Contractor’s identify a claim earlier in the process and that will allow the Authority to mitigate the size of these potential claims earlier.

   A. New partial and final releases. All Contractors and Subcontractors are required to submit a partial (or final) release with their payment applications. See D-8 to D-11. In these releases, the Contractor is required to verify that the Authority’s payment of the money requested is in exchange for a release of all rights, causes of actions, and claims related to changes in the schedule and work, delay, extended general conditions, inefficiency, and loss of productivity, among other things. These types of releases have been enforced in the Commonwealth of Pennsylvania, the State of New Jersey, and other jurisdictions. The releases also have a blank space for the contractors to identify any claims that they want to “preserve.”

   B. Change Orders. E.4.7 provides that a change order shall constitute a final settlement of all matters relating to the Change in the Work. In addition, all Change Orders will include the following language: “Through acceptance of this Change Order, the Contractor acknowledges that it has reviewed the progress of the Work related to this Project and the potential impact of the additional Work on the progress of the Project in the future. As a result, this Change Order includes compensation to the Contractor for any and all effects, delays, and inefficiencies or similar demands associated with the Project and the Contractor recognizes and understands that there is no basis for any such claim in the future.” The goal of this provision is that when an issue is raised and addressed, the matter is completely resolved and not raised again at the end of the project.

   C. Contractor Representations and Warranties. E.22.3 provides that the Contractor has visited the site, familiar with local conditions, and determined that the Contract Documents enable the Contractor to perform the Contract and timely complete the Project. This provision, along with others, provide the Authority with additional support to defeat a Contractor’s claims for extras or leverage a reasonable business deal.

2. Protections against delay. The Authority, like most owners, wants its projects completed on time so that its activities are not unnecessarily interrupted. Towards that end, the Contract Documents grant the Authority several new rights and remedies to address a contractor’s slow performance.
A. Construction schedules. Under E.8.2., the Contractor is required to include a sworn and verified statement that “Our company understands that the meeting of the milestone dates listed in this schedule is critical to maintaining the Project schedule and meeting the Substantial Completion Date of each phase. In signing this schedule, our company agrees to this schedule and further to dedicate whatever resources that are required to complete the Work of our Contract in order to meet these deadlines.”

B. Extraordinary Measures. Under E. 8.3, if the Authority determines that the Contractor’s performance could result in delays to the completion of the project, the Authority can direct the Contractor to perform additional shifts, work overtime, or supply additional manpower, at no cost to the Authority.

C. No Damages for Delay. If the Authority delays the project, the Contractor is only entitled to additional time, and no monetary compensation. Courts have developed several exceptions to these types of provisions, but this provision places the Authority in a stronger position to limit the Contractor’s potential recovery.

D. Waiver of Consequential and Incidental Damages. The Contractor waives certain “soft” costs in E.10.10. This is important because Contractors typically include these costs to inflate the dollar amount of a claim.

3. New Payment and Performance Bond Form. See D-3 to D-7. The forms allow the Authority to collect all costs, expenses, and damages including attorneys’ fees, if the Authority is required to make a call on a bond.

4. Deletion of requirement that Contractor must self-perform at least 50% of the work. The Authority is concerned with getting the best possible price for the work. By eliminating this provision, the Authority has the opportunity to have more bidders, which brings more competition and better pricing.

5. Bid Bond. The revised Contract deletes the cashier’s check requirement for a bid bond and reduces the value of the required bid bond. Previously, the Authority required a 100% bid security, comprised partly of a 3% cashier’s check. For the Authority’s large projects, the bid bond has been reduced to 15% or 20%. Consistent with this past practice, industry standards, and to encourage more bidders, the Authority will require bid security in the form of a bond for 25% of the value of the bid.

6. Checklist. The new Contract Documents have a checklist for the Contractors and the Authority in order to ensure that everyone is aware of all of the new forms and requirements. The Authority has also created a graphical warning to make sure that Contractors understand that the Authority’s form of contract has changed.