

## DISPUTE REVIEW BOARD RECOMMENDATION

October 20, 2009

Mr. Matt Lewis, PE  
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URS Construction Services  
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Mr. Nathanael G. Winthrop, PE  
Project Manager  
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RE: Contract E1G79 (I-75 at Fruitville Rd/University Pkwy) DRB Hearing on Lighting Issue

Subject: Hearing Dated Sep. 23, 2009  
Disputes Review Board Recommendation  
Issue 1: Design and Reconstruction of Roadway Lighting Power Distribution

Dear Sirs,

Cone & Graham, Inc. (CGI) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of a dispute. The hearing was held on September 23 at the URS field office in Bradenton, FL. The parties furnished the Board position papers for review prior to the hearing. The Disputes Review Board was requested only to consider the question of entitlement. In accordance with your request the following recommendation is offered.

### **Issue: Whether there is Entitlement for the Relocation of the Existing Power Distribution for the High Mast Lighting System**

#### Background

The project is a Design-Build project. The scope of work involves design services and construction to widen and improve some of the ramps at the I-75/University Parkway and I-75/Fruitville Road Interchanges in Sarasota County. At the time of the hearing construction operations had not yet begun. During the design development process some of the existing high mast lighting power service distribution has been determined to be in conflict with the designed project drainage system components.

The issue before the DRB concerns the contractor's entitlement to compensation for added engineering fees, and for the cost of proposed relocation/replacement of the conflicting existing high mast lighting power service.

## Contractor Position

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation.

### Contractor Key Points

1. The project scope as defined to Design-Build proposers by the FDOT does not include a requirement to design and submit a lighting plan component set, and to perform the work to relocate/replace/and remove the existing high mast power conduits, cable, pull boxes and other associated work.

The RFP, in fact, excluded the responsibility and requirement for a lighting plan as indicated in the RFP Table of Contents.<sup>1</sup>

Table of Contents Page i.

Section VI Project Requirements And Provisions for Work  
K. Lighting Plan: (Not Applicable to this Project)  
S. Project Schedule [*No activities for Lighting are shown in the minimum requirements*]

Section V Design and Construction Criteria  
N. Lighting Plan (Not Applicable to this Project)

As the Department did not provide a set of Concept Plans as part of the RFP; the written project requirements, scope, and Design and Construction Criteria determine the Design Build contractor's entire effort to develop a responsive technical and price proposal for consideration by the Department. The Department did not provide any documents indicating the location of these buried lighting facilities prior to submittal of the contractor's price proposal.

2. The RFP is listed first in the governing order of documents in Subarticle 5-2 of the specifications.<sup>2</sup>

The Department did not provide any documents indicating the location of these buried lighting facilities prior to submittal of our price proposal. Our proposal did not include a lighting plan component set and was deemed a responsive proposal that met the requirements of the RFP. Our project schedule did not include any activities for the design and review of a Lighting Plan component set, or installation of lighting facilities and was approved and accepted by the Department. Our Schedule of Values submitted and approved by the Department and used for progress payments over several estimates does not include any costs associated with the installation of lighting facilities.

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<sup>1</sup> Design Build RFP, Table of Contents, Page i

<sup>2</sup> Division 1 Specifications, Subarticle 5-2

3. Given the time frame allocated for proposals and the stipend provided to proposers, the Design-Build proposers must base their proposals on the scope provided in the RFP.

Given the limited timeframe the various short listed DB teams have to prepare and submit a technical and price proposal and the paltry stipends, it is an unreasonable expectation for the DB team to be responsible for work excluded by the owner from the project scope, or take added time and effort to determine problems inherent to the RFP itself. It is also an unreasonable expectation for the DB teams to be responsible for additional risk beyond the RFP, or that we should have added contingencies to our price proposal outside of the RFP's scope and scoring criteria and yet somehow remain competitive in the selection process.

4. The existing conditions on this project made the determination of the locations of the roadway lighting power distribution difficult and not feasible prior to proposal submission.

With standard roadway lighting, adjacent and parallel to the alignment of a roadway, it is somewhat easier to determine the general limits of the buried facilities of the power service that feeds the lights. Each light will have it's own pull box, and concrete apron as part of a pole foundation or right next to each pole.

Unfortunately, this is not the case with high mast lights at an interchange. High mast lighting may be fed in groups, individually, as part of an underdeck lighting power service, or from almost any given direction to their location in the infield. It is not that CGI ignored an obvious existing location. CGI does not think either the owner along with our team understood that extent of the problem until we performed enough SUE locates to "chase" and determine the entire extent of the buried facility. FDOT buried lighting was not marked and flagged in the field by the Sunshine locate service as part of our utility investigative efforts. The buried conduit does not have a tracer wire to establish a tone, and a wand will not give you a certainty of depth. Just how much effort our designer expended to determine the limits depth and extent of the problem is provided in written detail in Attachment Q to the CGI Position Paper.

Buried conduits for lighting can be difficult to field locate as well. They may have been installed too shallow; they may have sweeps up from a ditch line, or from under a roadway to a pull box location. When trying to determine to permanent disposition of this facility, there are a variety of questions to address. Here are just a few:

- Can the conduits be field adjusted, either by lowering or relocating the conduits in conflict?
- Is there enough cable slack in the pull boxes to field adjust?
- Are the pull boxes in a condition to move, and do they meet current standards?
- Are there splices in the pull boxes that prevent adjustment?
- Does the owner want the entire system upgraded to meet current standards, i.e. cable gage, pull box spacing, pull box type and size, proposed slack in pull boxes, concrete mowing aprons, ground rods, voltage drop calcs, breakers, number of acceptable splices, load center upgrades etc.?
- Can the high mast lights be turned off for extended periods of time, or do they have to be constantly maintained?

These are all questions and issues that are resolved by a specialty engineer when developing a lighting plan for the project to be reviewed by the owner. Proposed conduits, cables, pull boxes, and other items

associated with lighting power services are an integral part of a lighting plan, regardless of whether you replace an actual pole or luminaire.

### **Contractor Position Summary**

As the primary document that defines the project description, scope, limits, design and construction criteria, applicable standards, minimum requirements, project duration, and technical scoring and pricing evaluation, it is entirely incumbent upon the owner to carefully review and craft this document to address the responsibilities of the selected short listed DB teams preparing a lump sum proposal for evaluation. There is no better way to consider the importance of the RFP than to reiterate the very definition provided by the Department in the contract documents. It states:<sup>3</sup>

#### **Request for Proposal. (RFP)**

The package to be provided to the short listed design-build firms in the adjusted score design-build method and to those design-build firms requesting a RFP in the low bid design-build method. *The RFP defines all functions and responsibilities by the firm. (Italics added)*

The Department clearly omitted the requirement for a Lighting Plan from the RFP. The Department also had access to pertinent as-built information, and neither reviewed this information in consideration of the RFP, nor provided it to the competing teams. Given either and especially the combination of these oversights, it was not likely for any of the DB teams to address the problem with the RFP in the four weeks between the pre-proposal meeting and final deadline for submission of questions/information. More importantly, it is not a contractual requirement for the DB team to do so.

Conversely, it certainly is not possible for the CGI team to omit a component set and related work required by the RFP for the project and be considered first, responsive and secondly, in conformance with contract requirements. For example, if the CGI team deleted a signal from an intersection in our proposal and replaced it with a 4 way stop in our signing and paving plan, I imagine our innovative cost effective approach would not be well received by the technical evaluation committee and a copy of the RFP attached to a tall pole and rightfully waived around while declaring us non-responsive. Frankly, CGI is surprised that the issue has not been resolved. For the Department to concede that it is not in the RFP, not in our proposal/"book of promises", not in our schedule of values and believe that there is some Gotch-Ya aspect to the contract that demands our performance at a loss is troubling and lacking in mutuality.

The CGI team has proceeded in good faith to address the issue, is currently performing the related design work and respectfully requests the Board to make a determination as to entitlement for the design and related construction costs.

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<sup>3</sup> Division 1 Specifications, Definition of RFP, page 8

## FDOT Position

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation.

### FDOT Key Points

1. The Design Build Contractor has a responsibility to investigate and consider any impacts to FDOT interstate infrastructure resulting from their design.

The Department contends that the existing conduit and pull boxes associated with interchange high mast lighting are a part of the Interstate infrastructure and that these facilities were impacted by the Design/Build Firm's design. In accordance with the contract documents, it is the responsibility of the Design/Build Firm to investigate and verify all existing conditions sufficient to support their design. It is also the responsibility of the Design/Build Firm to consider and address any impacts to the interstate infrastructure which are impacted as a result of their design.

This requirement is provided in the RFP and is quoted as follows.<sup>4</sup>

*"The Design/Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information. By execution of the contract, the Design/Build Firm specifically acknowledges and agrees that the Design/Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design/Build Firm and that any information is being provided merely to assist the Design/Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information."*

This point is also supported by the following additional provisions from the RFP:

RFP, Part I, Section A<sup>5</sup>

*"The Design/Build Firm shall be responsible for survey, geotechnical investigation, design, acquisition of all permits, purchase of mitigation credits from a permitted mitigation bank, any required modification of permits previously acquired by the Department, maintenance of traffic, demolition, and construction on or before the date indicated in their proposal. The Design/Build Firm will coordinate all utility relocations.*

*The Design and Construction Criteria (Section VI) sets forth requirements regarding survey, design, construction, and maintenance of traffic during construction, requirements relative to project management, scheduling, and coordination with other agencies and entities such as state and local government, utilities and environmental permitting agencies, and the public."*

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<sup>4</sup> RFP, Part V, Section P, page 17

<sup>5</sup> RFP, Part I, Section A, page 1

## RFP, Part III, Section J<sup>6</sup>

*"This Request for Proposal does not commit the Department to make studies or designs for the preparation of any proposal, nor to procure or contract for any articles or services. Proposers shall examine the Contract Documents and the site of the proposed work carefully before submitting a proposal for the work contemplated and shall investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents. Written notification of differing site conditions discovered during the design or construction phase of the project will be given to the Department's Project Manager."*

Based on these contract passages, it is clearly the responsibility of the Design/Build Firm to fully investigate the project site prior to submitting a bid and proposal package. The Design/Build Firm affirms they visited the project site on numerous occasions while preparing their bid and proposal as indicated on the Design/Build Proposal Form (Attachment 1) within their proposal.

*"The Proposer, hereby declares...we have carefully and to our full satisfaction examined the Request for Proposal, Proposal forms, and that we have made a full examination of the location of the proposed work..."*

### 2. Roadway lighting sheets are not required for minor lighting work.

Roadway lighting of a minor nature may be added directly to the roadway design sheets. The roadway lighting modifications in this project are minor. Consequently, roadway lighting sheets are not required and therefore, were not included in the RFB requirements.

## **FDOT Position Summary**

Based on their review of the project site, the Design/Build firm should assess and consider any impacts that their design has on the Interstate infrastructure. The Department contends that the Design/Build Firm should have reasonably expected that high mast lighting conduit may be encountered and impacted by their design. Furthermore, the Department asserts it is the responsibility of the Design/Build Firm to either relocate the facilities impacted by their design or prepare a design submittal so as to accommodate the existing interstate infrastructure without relocation.

Based on the requirements of the portions of the RFP referenced above, the Department hereby requests the Board find that the Design/Build Firm is not entitled to additional compensation for this issue.

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<sup>6</sup> RFP, Part III, Section J, page 6

## Disputes Review Board Findings

1. The project RFP specifically excludes the requirement for the Design Build Firm to develop lighting plans as a component of the design services requirement for the project.

The notation “Not Applicable to this Project” is included immediately following the Lighting Plans section title in the Table of Contents of the RFP.<sup>7</sup> Additionally, “Not Applicable to this Project” is included immediately following the Lighting Plans section title appearing in the body of the document.<sup>8</sup>

2. The required modifications to the roadway high mast lighting power distribution system were not minor.

The modifications required the preparation of lighting sheets and a system voltage calculation prepared by a professional engineer. At this time the exact quantities are not known, however the estimates are that several hundreds of feet of existing conduit, cable and pull boxes will need to be replaced with a new installation complying with current code requirements.

3. The contract provisions clearly assign responsibility for site investigation including researching all existing FDOT records to the Design Build Firm.<sup>9</sup>

### **P. Verification of Existing Conditions:**

The Design/Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information.

By execution of the contract, the Design/Build Firm specifically acknowledges and agrees that the Design/Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design/Build Firm and that any information is being provided merely to assist the Design/Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.

**2-4 Examination of Contract Documents and Site of Work.** Examine the Contract Documents and the site of the proposed work carefully before submitting a proposal for the work contemplated. Investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents. ....<sup>10</sup>

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<sup>7</sup> RFP, Table of Contents, page i

<sup>8</sup> RFP, Section K, page 12

<sup>9</sup> RFP, Section P, page 17

<sup>10</sup> Division 1 Specifications Section 2, subsection 2-4, page12

## **Disputes Review Board Analysis**

CGI has argued that the requirement to prepare Lighting Plans has been omitted from the contract and not included in the scope of work. The FDOT's counter position is that minor lighting may be added to the roadway lighting sheets, therefore can be included as part of the contractor's scope of work. The FDOT Plans Preparation Manual does provide for the inclusion of minor lighting on the roadway plans. However, as a factual matter, the DRB finds the lighting requirements on this project to be more than minor. Consequently, the requirement to prepare a lighting design is beyond the original scope of work. But, the question remains as to whether the additional requirement was caused by CGI.

Clearly, the contract provisions assign responsibility for site investigation to the Design-Build Firm. The Design-Build Firm's investigation is required to determine the conditions under which the prescribed scope of work is to be performed. However, the Design-Build Firm does not perform the investigation to determine the prescribed scope of work. The scope of work is provided in the contract documents. Only the Engineer may change the scope of work.

A no less important component of the Design-Build Contractor's responsibility for investigation is utilization of the information gained to develop a design, which is compatible with the site. It is not appropriate for a Design-Build Firm to develop a design that conflicts with existing owner infrastructure on the site, requesting additional compensation, when other reasonable design alternatives avoiding the conflict may have existed.

The DRB's review of the drainage design sketches provided with the hearing documentation suggested that in some locations the conflict between the existing lighting power distribution and the drainage designs is unavoidable, while in other locations an alternative location of the drainage component may avoid a conflict. . Neither in the position papers nor at the hearing, did the parties confront this issue. However, the DRB does not have the time or engineering information available to do a review of possible drainage design alternatives within the available right-of- way. This is a highly technical issue that should be resolvable between the drainage designers of the parties.

## **Disputes Review Board Recommendation**

The DRB's recommendation is that Cone and Graham, Inc. is entitled to compensation for added engineering fees, and for the cost of proposed relocation/replacement of the conflicting existing high mast lighting power service in those specific project locations where the conflict could not be avoided by a reasonably efficient and permissible alternative drainage design.

The DRB has not been asked to address quantification and does not offer an opinion with regard to quantification of additional cost. At this point it is the responsibility of Cone & Graham, Inc. and the FDOT to meet and reach an agreement with regard to appropriate quantification of the additional cost.

The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation. Please remember that a Boards recommendation requires acceptance or rejection within 15 days. Failure to respond to the DRB and other parties within the time frame constitutes an acceptance by both parties.

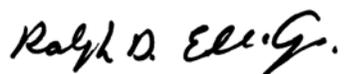
The Disputes Review Board is unanimous in its presentation of these recommendations for the issue.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,  
Disputes Review Board

Ralph Ellis Jr. – Chairman  
Robert A. Cedenno – Member  
Tom Rice - Member

Signed for all with the concurrence of all members.



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Ralph D. Ellis, Jr.  
Chairman