



OFFICE OF INSPECTOR GENERAL

FLORIDA DEPARTMENT OF TRANSPORTATION

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Robert E. Clift
Inspector General

Seminole Gulf Railway Railroad Track and Rail Facility Relocation Agreement (Contract AOD48) Advisory Report 10C-4001

November 6, 2012

EXECUTIVE SUMMARY

In December 2009, the Office of Inspector General (OIG) received an anonymous complaint alleging that, "Seminole Gulf Railroad had been paid a large sum of money to provide rail work associated with a road expansion project along State Road 739 – Evans Avenue." The complainant said, "Gordon Fay and Seminole Gulf Railway received approximately five and half million dollars for work they did not complete."

As a result of the complaint, the OIG conducted a review of a Railroad Track and Rail Facility Relocation Agreement AOD48 (agreement) between the Florida Department of Transportation (department) and Seminole Gulf Railway Limited Partnership (SGLR) in District One. The purpose of the agreement was for SGLR to accommodate the construction of a portion of State Road (S.R.) 739 in Ft. Myers, Florida. The agreement was executed on April 26, 2006, for \$11,781,220. The total invoiced and paid on the agreement through October 30, 2007, was \$11,155,362.

The purpose of this review was to determine whether SGLR had performed all contractually obligated work specified in the agreement and whether SGLR was compensated for work not performed.

Those tasks within the agreement necessary to achieve the district's objectives of building the S.R. 739 road project were completed. In the agreement, these tasks were itemized and priced. The total value of the work in the agreement necessary to complete the department's objectives was \$5,280,900 (Appendix B). Our review disclosed this work has been completed.

While additional tasks were specified and priced in the agreement and appeared to be deliverables expected of SGLR because of the type of agreement used, this review disclosed these tasks valued at \$6,500,320, were not required by the department to complete the S.R. 739 road project. These were projections arrived at through negotiation between the department and SGLR to compensate SGLR for work that would need to be done by SGLR if they elected to return the features of their facility to conditions that existed before the S.R. 739 road project. We determined that, while SGLR has not elected to complete portions of this work, this is their business decision and does not impact the department.

The use of a Railroad Track & Facility Relocation Agreement created the appearance of over five million dollars in payments provided by the department for deliverables not obtained; however, neither party considered these items to be deliverables.

Our review identified the following finding:

- District One did not execute the appropriate type of agreement with SGLR to properly distinguish between required deliverables and settlement issues.

We recommend the district rectify the current finding by executing an addendum to the railroad track and rail facility relocation agreement. The addendum should: 1) clarify the required tasks by SGLR; and 2) clarify the business damages which were not “deliverables” to the department, but rather elements of SGLR’s settlement.

District One has reviewed this report and concurs with the findings and recommendations.

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RESULTS OF REVIEW

In December 2009, the OIG received an anonymous allegation regarding a Railroad Track & Rail Facility Relocation Agreement (AOD48) executed between the department and SGLR on April 26, 2006. The complainant alleged that:

“Seminole Gulf Railway had been paid a large sum of money to provide rail work associated with a road expansion project along State Road 739 – Evans Avenue.”

As part of the money paid, the complainant said:

“Gordon Fay and Seminole Gulf Railway received approximately five and half million dollars for work they did not complete.”

In response to the allegation, the OIG initiated a review to determine whether SGLR had performed all contractually obligated work specified in the agreement and whether SGLR was compensated for work not performed.

Seminole Gulf Railway Limited Partnership is a rail company located in Ft. Myers, Florida, which operates an entertainment dinner train and transports various materials and commodities. In 1987, SGLR entered into a 20-year lease agreement with CSX Transportation, Inc. (CSXT) for over 100 miles of rail extending from Desoto County to Collier County in Florida. District personnel indicated the lease was extended in 2007 after the initial 20-year term.

On April 26, 2006, the department entered into an agreement with SGLR for the relocation of railroad tracks and rail facility in Ft. Myers, Florida (Attachment A). The agreement to relocate the mainline railroad track operated by SGLR was necessitated by a pending road construction project on State Road 739. This lump-sum agreement for \$11,781,220 compensated SGLR for the work necessary to accommodate the road project and their business damages as a result of this project. The district made payments pursuant to four invoices submitted under the agreement, totaling \$11,155,362. A final invoice of \$625,858 was received on November 14, 2011. As of the date of this report, this invoice has not been paid pending approval by CSXT of whether the new wye completed by SGLR satisfies the requirements of the lease agreement between SGLR and CSXT.

SGLR was to construct and complete certain tasks within the agreement necessary for the department to complete the road project. Those tasks necessary to achieve the district's objectives of building the S.R. 739 road project were completed. The OIG performed site inspections with district personnel on August 23, 2011 and August 22, 2012. The site visits confirmed that all required tasks have been completed.

The OIG previously issued a preliminary report to SGLR in order to obtain comments regarding the results of this review. SGLR (Attachment B) provided a response containing additional information which affected the results of our review. In addition, the department's Office of the General Counsel provided our office with a response (Attachment C) containing relevant information.

After receiving and reviewing this additional information, our office has modified our preliminary findings and conclusions. These modifications have resulted in the following finding and conclusion.

Finding 1 – Agreement

Conclusion

District One did not execute the appropriate type of agreement with SGLR to properly distinguish between required deliverables and settlement issues. The form of the agreement created the expectation that all work specified in the agreement constituted deliverables.

Supporting Evidence

The agreement executed by District One with SGLR specifically references that receipt and acceptance of deliverables must follow the provisions of Section 287.058, Florida Statutes (F.S.), Contract document. The agreement included a detailed budget exhibit listing costs of items as though all items in the agreement are deliverables. This indicates the agreement is a procurement contract which must adhere to the requirements of Chapter 287, F. S., Procurement of Personal Property and Services, to protect the department's interests.

However, additional documentation and communication with District One and the Office of General Counsel staff has revealed the agreement with SGLR contains two separate objectives. The first objective was to construct and complete all necessary tasks to facilitate the road project. While a railroad track and rail facility relocation agreement is appropriate for this type of objective, a lump sum payment provision is only appropriate if the total does not exceed \$100,000. This provision is addressed in Section C.13, Negotiations and Agreements, Rail Manual, Topic No. 725-080-002 (March 2000).

District One and the Office of General Counsel have indicated that the second objective was to provide a settlement to SGLR for business damages caused as a result of the department's road construction project. Florida law allows for compensation to a business for lost profits and business damages due to an acquisition under Chapter 73, F.S., Eminent Domain. A separate

	<p>agreement should have been executed to provide for settlement damages.</p>
Cause	<p>Through negotiations with SGLR, the district modified a version of the standard rail relocation agreement template. District staff did not distinguish deliverables necessary for completing the road construction on S.R. 739 and settlement issues from SGLR business damages caused as the result of rail right of way purchased.</p>
Impact	<p>The inappropriate use of a railroad track and rail facility relocation agreement creates the appearance of over five million dollars in payments provided by the department for deliverables not obtained. However, it is the decision of the entity which endures the business damages how they expend settlement payments.</p>
Recommendation	<p>We recommend the District One Modal Development Administrator ensure:</p> <ul style="list-style-type: none">• required deliverables on rail agreements are properly indicated and the agreement is executed per Chapter 287, F. S., Procurement of Personal Property and Services; and• settlement issues for business damages are not included on a procurement contract and included on an agreement clearly indicating it is for business damages. <p>We recommend the district rectify the current finding by executing an addendum to the railroad track and rail facility relocation agreement. The addendum should: 1) clarify the required tasks by SGLR; and 2) clarify the business damages which were not “deliverables” to the department, but rather elements of SGLR’s settlement.</p>

APPENDIX A – PURPOSE, SCOPE AND METHODOLOGY

The **purpose** of this project was to determine whether or not SGLR has performed all contractually obligated work specified in the agreement and whether SGLR was compensated for work not performed.

The **scope** included a review of the agreement, a review of all invoices from April 26, 2006, through the present and an assessment of events that transpired from the negotiation of this agreement through the present.

Our **methodology** included:

- reviewing applicable laws, rules, regulations and procedures;
- examining the agreement, all invoices and other supporting documentation;
- performing site inspections; and
- interviewing personnel associated with the agreement.

APPENDIX B – AGREEMENT TASKS TO FACILITATE ROAD PROJECT

SGLR was required to complete the following tasks in order for the district to complete the S.R. 739 road project. This table was created using some items included in Exhibit B of Railroad Track and Rail Facility Relocation Agreement AOD48.

<u>CROSSING CONSTRUCTION</u>	<u>QTY</u>	<u>SURFACE</u>	<u>SIGNALS</u>	<u>TOTAL COST</u>
Franklin Street	38	Adv. Rail Seal	CB	\$63,850.00
Dora Street	38	Adv. Rail Seal	CB	\$63,850.00
South Street (Moody)	38	Adv. Rail Seal	Type III	\$225,000.00
Jeffcott Street (2 Tracks)*	38	Adv. Rail Seal	CB	\$108,850.00
Katherine Street *	38	Adv. Rail Seal	CB	\$63,850.00
South Street (Main)	60'	Concrete	Type III	\$457,500.00
Edison Ave. (At Evans)	60'	Full Depth Rubber	Type III	\$536,000.00
New Metro Xing	140'	Concrete	Type III	\$783,000.00
MLK	140'	Concrete	Lights & Relocate	\$547,000.00
Lemon Street	30	Adv. Rail Seal		\$66,000.00
<u>Total Crossing Construction</u>				<u>\$2,914,900.00</u>
<u>TRACK CONSTRUCTION</u>	<u>QTY</u>			
Main Line Track Lemon St. to South St.	3966	Feet		\$981,585.00
Three Switches	3	Each		\$195,000.00
Moody Spur Track Construction	1197	Feet		\$263,340.00
Four Switches	4	Each		\$260,000.00
Passing Track Construction	1070	Feet		\$235,400.00
One Switch	1	Each		\$65,000.00
S. Leg of WYE Track Construction	730	Feet		\$180,675.00
<u>Total Track Construction</u>				<u>\$2,181,000.00</u>
<u>REMOVAL & DISPOSAL</u>	<u>QTY</u>			
MLK Main Line Crossing	140	Feet		\$0.00
MLK West Leg of WYE crossing Crossing	140	Feet		\$0.00
Main Line Track	2959	Feet		\$0.00
North Leg of WYE	750	Feet		\$0.00
Sub Track 38 400'	400	Feet		\$0.00
Lump Sum	1			\$185,000.00
<u>Total Removal & Disposal</u>				<u>\$185,000.00</u>
TOTAL				<u>\$5,280,900.00</u>

APPENDIX C – MANAGEMENT RESPONSE



Florida Department of Transportation

801 North Broadway Avenue
Bartow, FL 33830

RICK SCOTT
GOVERNOR

ANANTH PRASAD, P.E.
SECRETARY

MEMORANDUM

To: Robert E. Clift, Inspector General

From: Billy Hattaway, P.E., District Secretary

Copies: Joseph Gilboy, Carlos Mistry

Subject: Response to Report 10C-4001

A handwritten signature in black ink, appearing to read "Billy Hattaway", written over the "From:" line.

We reviewed Advisory Report 10C-4001, dated October 18, 2012, from your office summarizing the audit you conducted of the April 26, 2006 Railroad Track and Rail Facility Relocation Agreement, (Agreement) between the Florida Department of Transportation (FDOT) and Seminole Gulf Railway Limited Partnership (SGLR), and respond as follows:

The District concurs with the findings and recommendations.

The District agrees with the finding that the use of a Railroad Track and Rail Facility Relocation Agreement was not appropriate to accomplish both objectives of the parties: 1) facilitating the timely construction of the road project; and 2) compensating SGLR for business damages caused by the project.

The District agrees with the recommendations and will: 1) pursue execution of an addendum to the Agreement to: a) clarify the required tasks by SGLR; and b) clarify the business damages which were not "deliverables" to the FDOT, but rather elements of the settlement with SGLR, and 2) use separate agreements in the future in situations involving both standard rail relocation agreements and settlement of business damage claims arising from the relocation under governing eminent domain principles.

The District appreciates the work of the Inspector General and will respond to any further concerns.

DISTRIBUTION, PROJECT TEAM AND STATEMENT OF ACCORDANCE

Distribution:

Billy Hattaway, District 1 Secretary
Andrew J. DeNering, Assistant General Counsel
Anthony J. Stevens, Assistant General Counsel
Arlene Barnes, District Rail Administrator

Information Distribution:

Ananth Prasad, P.E., Secretary
Francis Gibbs, Chief of Staff
Gerald B. Curington, General Counsel
Paul Martin, Assistant General Counsel
Richard Biter, Assistant Secretary for Intermodal Systems Development
Juan Flores, State Freight and Logistics Administrator
Fred Wise, State Rail Office Manager
Brian Peters, Assistant Secretary for Finance and Administration
Robin Naitove, Comptroller
Brian Blanchard, P.E., Assistant Secretary for Engineering and Operations
G. Bruce Fay, President, Seminole Gulf Railway, L.P.

Project Team:

Engagement was conducted by Carlos Mistry, Audit Team Leader; and
Kim Likens, Senior Investigator
Under the supervision of:
Joseph W. Gilboy, Intermodal Audit Manger
Kristofer Sullivan, Director of Audit; and
Howard Greenfield, Director of Investigations
Approved by: Robert E. Clift, Inspector General

Statement of Accordance

The mission of the department is to provide a safe transportation system that ensures the mobility of people and goods, enhances economic prosperity, and preserves the quality of our environment and communities.

The mission of the Office of Inspector General is to promote integrity, accountability and process improvement in the Department of Transportation by providing objective fact-based assessments to the DOT team.

This work product was prepared pursuant to Section 20.055, Florida Statutes, in accordance with the applicable Principles and Standards for Offices of Inspectors General as published by the Association of Inspectors General and the International Standards for the Professional Practice of Internal Auditing as published by the Institute of Internal Auditors, Inc.

This report is intended for the use of the agency to which it was disseminated and may contain information that is exempt from disclosure under applicable law. Do not release without prior coordination with the Office of Inspector General.

Please address inquiries regarding this report to the department's Office of Inspector General at (850) 410-5800.

ATTACHMENT A – RAIL TRACK & RAIL FACILITY RELOCATION AGREEMENT

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**STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
RAILROAD TRACK & RAIL FACILITY RELOCATION AGREEMENT**

FINANCIAL PROJECT NO.	ROAD NAME OR NO.	COUNTY NAME	PARCEL & R/W NO.	FAP NO.
195766-1-57-01	SR739-Evans Ave.	LEE	12014 (Relocate)	N/A

THIS AGREEMENT, made and entered this 26th day of April, 2006, by and between the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (hereinafter, "DEPARTMENT"), and SEMINOLE GULF RAILWAY LIMITED PARTNERSHIP (hereinafter, "SGLR"), a foreign limited partnership organized and existing under the laws of Delaware, authorized to do business in Florida, with its principal place of business in the City of Fort Myers, County of Lee, State of Florida, for the relocation of railroad tracks and rail facility in Ft. Myers, Lee County Florida.

EXHIBITS LIST

All exhibits listed below are attached hereto and incorporated into this Agreement:

Exhibit A:	Work Schedule, Project Description & Responsibilities, Scope of Railroad Track & Highway Crossing Construction, Scope of Railroad Signal Work to be Performed by Seminole Gulf Railway, Scope of Railroad Related Work to be Performed by Department's Contractor
Exhibit B:	Budget, Payment Schedule
Exhibit C:	Railroad Crossings Index No. 560
Exhibit D:	Railroad Grade Crossing Traffic Control Devices Index No. 17882
Exhibit E:	Railroad Grade Crossing Traffic Control Devices, Schedule of Annual Cost of Automatic Highway Grade Crossing Traffic Control Devices
Exhibit F:	State of Florida Department Of Transportation Contract Plans
Exhibit G:	State of Florida Department of Transportation Railroad Plans

1. WHEREAS, the DEPARTMENT is constructing a portion of the State Highway System located on SR739 (the new Evans Avenue), in Fort Myers, Florida, under Financial Project ID 195766-1-57-01, (hereinafter, "PROJECT") as depicted in the DEPARTMENT'S Contract Plans attached hereto as Exhibit G and incorporated herein, and the DEPARTMENT'S Railroad Plans, attached hereto as Exhibit F and incorporated herein.
2. WHEREAS, construction of the PROJECT will require relocation of the mainline railroad track, which is owned and operated by SGLR, to an existing rail corridor as depicted in Exhibit G.
3. WHEREAS, construction of the PROJECT will require the existing north wye track and the existing Public Service Delivery Facility owned by SGRLP be relocated.
4. WHEREAS, SGLR has reached an agreement for the relocation of its Public Service Delivery Facility and north wye track with the DEPARTMENT.

NOW, THEREFORE, in consideration of the mutual undertakings as herein set forth, the parties hereto agree as follows:

I. SEMINOLE GULF RAILWAY LIMITED PARTNERSHIP RESPONSIBILITIES

1. All work on the PROJECT shall constitute the "On-Site" location. All relocation work not located on the PROJECT shall constitute the "Off-Site" location.
2. SGLR agrees to perform all On-Site work required on page 3 of Exhibit A and Exhibit F in accordance with page 1 of Exhibit A and the plans and specifications for the Railroad Work which have been previously approved by the DEPARTMENT (Exhibits F and G).
3. SGLR agrees that compliance with the work schedule listed on pages 1 and 2 of Exhibit A is of the essence.
4. SGLR agrees to construct and complete all On-Site work obligations listed on page 3 and 4 of Exhibit A on or before the date on which the DEPARTMENT completes the PROJECT.
5. SGLR agrees to perform all work in a commercially reasonable manner and using such methods so as not to cause a delay to the DEPARTMENT'S contractor in the prosecution of the PROJECT. For the purposes of this Agreement, it is agreed that the continued operation of the railroad services by SGLR as permitted under this Agreement and under the Temporary Lease dated April 26, 2006 between SGLR and the DEPARTMENT, shall be deemed not to delay the DEPARTMENT'S contractor.
6. Upon execution of this Agreement, SGLR shall grant to the DEPARTMENT and its Agents access to the rail corridor operated upon by Seminole Gulf Railway for the purpose of constructing those improvements intended to be built by a third party contractor and listed in Exhibit G Construction Plans, and Exhibit F Railroad Plans.
7. SGLR shall commence all Off-Site work listed on page 3 of Exhibit A upon execution of this agreement. SGLR agrees to complete all Off-Site work on a schedule that does not conflict nor interfere with its On-Site work obligations and On-Site work completion requirement.
8. SGLR shall provide the property on which SGLR shall construct the new Public Service Delivery Facility, and the new wye track.
9. SGLR shall only use new parts, equipment, components and materials for the construction and completion of all work listed above in paragraphs 4 on the mainline track from Lemon St to South Street including turnouts, crossings and signals. Signal equipment for SR 82 (MLK) will be relocated and lights upgraded.
10. SGLR shall provide all engineering and on-site supervision required for work listed above in paragraphs 4 and 7.

11. SGLR using its own work force shall install automatic crossing traffic control devices at SR 739 Evans Avenue (hereinafter, "SR 739") and SR 82 Dr. Martin Luther King Jr. Boulevard (hereinafter, "SR 82") Standard Railroad Crossings in accordance with:
 - A. Exhibit A, page 2 "Scope of Railroad Track Work to Be Performed by Seminole Gulf Railway"; and
 - B. Exhibit D, "Railroad Grade Crossing Traffic Control Devices" Index Number 17882; and
 - C. Rule 14-57.011, Florida Administrative Code, which is incorporated by reference into this agreement.
12. In the event any emergency or safety issue occurs on the PROJECT location after normal business hours, which is 8:00 am - 5:00 pm or during the weekends and holidays, SGLR shall take necessary measures to correct the situation and notify the DEPARTMENT at the beginning of the first day of business after the occurrence.

II. STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION RESPONSIBILITIES

1. The DEPARTMENT shall complete all work required to be performed on page 5 of Exhibit A.
2. The DEPARTMENT shall provide by August 1, 2007 notice to commence construction on the relocation of the mainline track to SGLR.
3. The DEPARTMENT shall require its contractor to furnish Railroad Protective Public Liability and Railroad Protective Property Damage Liability Insurance in a combined amount of TWO MILLION (\$2,000,000) for all personal injuries, death or property damage, per occurrence arising during the policy period. The maximum dollar amounts of coverage to be reimbursed by Federal funds, with respect to bodily injury, death or property damage, is limited to a combined amount of SIX MILLION (\$6,000,000) per occurrence unless approval for larger amounts by the FHWA Division Administrator is made a part of this Agreement. The DEPARTMENT will also require its contractor to furnish SGLR with a Certificate of Insurance showing that the contractor carries liability insurance (applicable to the job in question) in the amount of TWO MILLION (\$2,000,000) for all personal injuries, death, or property damage, per occurrence arising during the policy period. Such insurance is to conform with the requirements of the U.S. Department of Transportation, Federal Highway Administration, Federal-Aid Policy Guide, 23 C.F.R., Subchapter G, Part 646, Subpart A, and any supplements thereto or revisions thereof.

III. PAYMENT TERMS

1. The DEPARTMENT shall pay to SGLR an inclusive lump sum of ELEVEN MILLION SEVEN HUNDRED AND EIGHTY-ONE THOUSAND TWO HUNDRED AND TWENTY DOLLARS AND NO CENTS (\$11,781,220.00) (hereinafter "Lump Sum") based on the Payment Schedule which shall include the cost of the following items that are listed in Exhibits A & B attached hereto and incorporated herein:
 - A. Furnish and install at-grade crossings
 - B. Furnish and install crossing traffic control devices
 - C. Off site location and construction of a Public Service Delivery Facility
 - D. Off site location and installation of a new wye track and storage/passing track.

- E. The cost of watchmen or flagging services when the DEPARTMENT'S contractor is carrying out work adjacent to the SGLR'S tracks and whenever the contractor is performing work requiring movement of employees, trucks, or other equipment across the tracks of SGLR, or when at other times SGLR and DEPARTMENT shall agree that such a service is necessary
- F. All SGLR rail project related engineering expense including SGLR on site supervision.
- G. Attorney Fees:
 - (1) It is specifically understood and agreed by the parties that the "Lump Sum" herein includes all attorney fees of every kind and nature, that may be related to, connected with, or flowing from the transaction, relationship or the dealings between the parties in this matter, or arise with respect to compensation for eminent domain.
 - (2) It is understood and agreed by SGLR that the inclusion of all attorney fees in the "Lump Sum" was a relied upon inducement for the Department to enter into this agreement.
 - (3) SGLR represents that no attorney was involved in either the agreement process or the ultimate agreement reached by the parties except for contractual review as to the documents related to this transaction.
 - (4) SGLR agrees to defend, indemnify and hold harmless the DEPARTMENT from any and all claims, loss, damage, costs or judgments for attorney fees, of every kind and nature, that may be related to, connected with, flowing from the transaction, relationship or the dealings between the parties in this matter or arise with respect to compensation for eminent domain.
- 2. If the DEPARTMENT fails to provide notice by August 1, 2007 as required in section II.2 above, an adjustment based on the Consumer Price Index (hereinafter, "CPI") shall apply as follows: the CPI shall apply from August 2, 2007 to the date the DEPARTMENT provides notice to SGLR required in section II.2 above, to any remaining unpaid balance due to SGLR after August 1, 2007. This adjustment will be reflected in the next scheduled payment. All remaining scheduled payments thereafter shall be consistent with the payment schedule in Exhibit B. The DEPARTMENT may at its option avoid this payment adjustment by prepaying the remaining unpaid balance due to SGLR.
- 3. The DEPARTMENT shall promptly compensate SGLR upon receipt of Payment Schedule invoices as provided for in Exhibit B and in accordance with Section 215.422, Florida Statutes.
- 4. SGLR shall submit to the DEPARTMENT Payment Schedule Invoices #5 in accordance with applicable Section 215.422 Florida Statutes and within one hundred eighty (180) days from the completion of the project, for all remaining charges as provided for in Exhibit "B".
- 5. Payment shall be made only after receipt and approval of goods and services unless advance payments are authorized by the State Comptroller under Section 215.422(14), Florida Statutes.

6. If a payment is not available within 40 days, a separate interest penalty at a rate as established pursuant to Section 215.422(3)(b), Florida Statutes, will be due and payable to SGLR in addition to the invoice amount, interest penalties of less than one (1) dollar will not be enforced unless SGLR requests payment. Invoices which have to be returned to SGLR because of SGLR preparation errors will result in a delay in the payment. The invoice payment requirements do not start until a properly completed invoice is provided to the DEPARTMENT.
7. Subject to Section V 6 (Force Majeure) In the event that SGLR fails to complete its obligation as listed in On Site Improvements Exhibit A and in accordance with the work schedule in Exhibit A, or fails to comply with any other obligation under this Agreement or under law, and such failure directly results in a delay to the DEPARTMENT'S contractor's timely performance under a previously mutually agreed upon work schedule, then the amount payable to SGLR by the DEPARTMENT under this Agreement shall be reduced by the amount of One Thousand (\$1,000) Dollars for each day that the DEPARTMENT'S contractor is delayed by such failure
8. A Vendor Ombudsman has been established within the Department of Banking and Finance. The duties of this individual include acting as an advocate for contractors/vendors who may be experiencing problems in obtaining timely payment(s) from a state agency. The Vendor Ombudsman may be contacted at (850)410-9724, or by calling the State Comptroller's Hotline, 1-800-848-3792.
9. REQUIRED FLORIDA STATUTE PROVISIONS
 - A. In accordance with Section 287.0582, Florida Statutes, the following provision is included in this Agreement:

The DEPARTMENT'S obligation to pay under this section is contingent upon an annual appropriation by the Florida Legislature.
 - B. The State of Florida's performance and obligation to pay under this Agreement is contingent upon an annual appropriation by the Legislature. In the event this Agreement is in excess of \$25,000 and has a term of more than one year, the provisions of Section 339.135(6)(a), Florida Statutes, are hereby incorporated:

"The DEPARTMENT, during any fiscal year, shall not expend money, incur any liability, or enter into any contract which, by its terms, involves the expenditure of money in excess of the amounts budgeted as available for expenditure during such fiscal year. Any contract, verbal or written, made in violation of this subsection is null and void, and no money may be paid on such contract. The DEPARTMENT shall require a statement from the Comptroller of the DEPARTMENT that such funds are available prior to entering in any such contract or other binding commitment of funds. Nothing herein contained shall prevent the making of contracts for periods exceeding one year, but any contract so made shall be executory only for the value of the services to be rendered or agreed to be paid for in succeeding fiscal years; and this paragraph shall be incorporated verbatim in all contracts of the DEPARTMENT which are for an amount in excess of (\$25,000.00) and which have a term for a period of more than one year."
 - C. In accordance with Section 287.058, Florida Statutes, the following provision is included: If this contract involves units of deliverables, then such units must be received and accepted in writing by the Contract Manager prior to payments.

- D. In accordance with Section 215.422, Florida Statutes, the following provisions are included: Contractors providing goods and services to the DEPARTMENT should be aware of the following time frames. Upon receipt, the DEPARTMENT has five (5) working days to inspect and approve the goods and services. The DEPARTMENT has 20 days to deliver a request for payment (voucher) to the Department of Banking and Finance. The 20 days are measured from the latter of the date the invoice is received or the date the goods and services are received, inspected, and approved.

IV. MAINTENANCE TERMS

1. After the automatic crossing devices (hereinafter, "DEVICES") have been installed and/or adjusted and found to be in satisfactory working order by the parties, the DEVICES shall immediately be placed into service.
2. The DEPARTMENT shall be one hundred percent (100%) responsible for the Exhibit E maintenance costs for the DEVICES located at SR 739 and SR 82 so long as the DEVICES are on the State-Maintained Highway System. Exhibit E maintenance costs "Schedule of Annual Cost of Automatic Highway Grade Crossing Traffic Control Devices" are subject to future revisions.
3. If the DEVICES located at SR 739 and SR 82 are no longer required at the point of installation, upon notification to the DEPARTMENT, they may be removed to another location as agreed upon and at the expense of the party requiring such removal or relocation.
4. After the DEVICES have been placed into service, SGLR its successors or assigns shall operate and maintain the DEVICES until it is agreed between the DEPARTMENT and SGLR or its successors and assigns that the DEVICES are no longer necessary; or until the crossing on which a DEVICE is located becomes abandoned or legal requirement(s) occur that require operation of the signal(s) to cease.
5. The cost of any adjustment, relocation, or replacement of the DEVICES shall be assumed by the party initiating such action, unless such action is the result of loss or damage to DEVICES in which events shall be deemed as an event initiated by the DEPARTMENT.
6. Should the use of the DEVICES be abandoned due to removal of the roadway then all rights hereby granted to the DEPARTMENT shall thereupon cease and terminate and the DEPARTMENT will, at its sole cost and in a manner satisfactory to SGLR, remove said crossing(s) and restore SGLR property to the condition previously found, provided that SGLR may, at its option, remove the said crossing(s) and restore its property, and the DEPARTMENT will, in such event, upon bill rendered, pay to SGLR the reasonable cost incurred by it in such removal and restoration, provided such costs are accrued as specified in paragraph 5 above.

7. Upon completion of the PROJECT, the DEPARTMENT shall be responsible for the maintenance cost of SGLR'S trackbed and rail components plus the highway roadbed and surfaces for the width of the rail ties within the crossing areas for the crossings located on SR 739 and SR 82. The parties agree that at SGLR option, and only after notification to the DEPARTMENT that includes a work estimate, SGLR may perform such periodic maintenance work and bill the DEPARTMENT directly for the costs reasonably incurred. Future improvements and/or replacement will be mutually agreed upon by both parties and at the expense to the DEPARTMENT.
8. The City of Fort Myers shall continue to be responsible for the maintenance costs of all other traffic control devices and other at grade crossings installed as a part of this PROJECT.

V. GENERAL PROVISIONS

1. The parties acknowledge that this PROJECT is of an urgent nature and that the terms of this Agreement do not establish a precedent for future agreements. The parties agree that this Agreement is for Financial Project Number 195766-1-57-01 only. The parties acknowledge that this Agreement in no way supersedes or cancels the Railroad Reimbursement Master Agreements entered into by the parties on November 13, 1987.
2. SGLR covenants and agrees that it will indemnify and hold harmless the DEPARTMENT and all of the DEPARTMENT'S officers, agents, and employees, and agents other than DEPARTMENT'S contractors, from any claim, loss, damage, cost charge, or expense arising out of any act, action, neglect, or omission, by SGLR during the performance of the contract, whether direct or indirect, and whether to any person or property to which the DEPARTMENT or said parties may be subject, except that neither SGLR nor any of its subcontractors will be liable under this section for damages arising out of injury or damage to persons or property directly caused or resulting from the gross negligence or willful misconduct of the DEPARTMENT or DEPARTMENT'S contractor, or their respective officers, agents, or employees. Notwithstanding the foregoing, SGLR'S liability for claims relating to delays allegedly caused by SGLR shall be limited as set forth in Section V.5 of this Agreement.
3. Except for costs related to the Lump Sum Amount required by this agreement, records of costs incurred under terms of this Agreement shall be maintained and made available upon request to the DEPARTMENT at all times during the period of this Agreement and for three years after final payment is made. Copies of these documents and records shall be promptly furnished to the DEPARTMENT upon request. Records of costs incurred includes SGLR'S general accounting records and the PROJECT records, together with supporting documents and records, of SGLR and all subcontractors performing work on the project, and all other records of SGLR and subcontractors considered necessary by the DEPARTMENT for a proper audit of costs.
4. In the event the DEPARTMENT'S contractor provides a Notice Of Intent to make a claim against the DEPARTMENT relating to a delay alleged to be caused by SGLR in the completion of SR789 Evans Avenue railroad work, which directly delays the DEPARTMENT'S contractor's timely performance under a previously mutually agreed upon work schedule, the DEPARTMENT will, in accordance with the DEPARTMENT'S procedure, notify SGLR of the its contractor's notice of intent, and SGLR will there after keep and maintain daily filed reports, and all other records, of the Evans Avenue railroad work relating to the intended claim of the contractor.

5. In the event the DEPARTMENT'S contractor makes any Claim against the DEPARTMENT relating to a delay alleged to be caused by SGLR in the completion of the SR739 Evans Avenue railroad work, which directly delays the DEPARTMENT'S contractor's timely performance under a mutually agreed upon work schedule, the Department will notify SGLR and SGLR will use commercially reasonable efforts to cooperate with the DEPARTMENT in analyzing the Claim within a reasonable time. SGLR shall not be responsible to the DEPARTMENT'S contractor with respect to any claim made by the DEPARTMENTS contractor, and the liability of SGLR to the DEPARTMENT shall be limited to the amounts set forth in III.7 above (Performance of the SR739, Evans Avenue railroad work).
6. Force Majeure: Neither SGLR not the DEPARTMENT shall be liable to the other for any delays, losses, damages, penalties or failure of performances under this Agreement, or in accordance with the Schedule, to the extent such delays, losses, damages, penalties or non-performance is due to an act of God; act of the public enemy; strike or other like dispute; flood; riot or civil disturbance; interference by civil or military authorities; fire; explosion; lack or failure of sources of supply of materials, fuel or power; restriction or prohibition as the result of any law, ordinance or regulation of any national, state or local governmental authority; named storms affecting SGLR'S lines or operations in Southwest Florida or any other event beyond the control of the non-performing party and which could not have been avoided or overcome by the exercise of due diligence; provided that the party claiming the excuse from performance has (a) promptly notified the other party of the occurrence and its estimated duration, (b) promptly used commercially reasonable effort to remedy or mitigate the effect of the occurrence to the extent possible, and (c) resumed performance as soon as reasonably possible.
7. In accordance with Section 287.133(2)(a), Florida Statutes, the following provisions are included:
 - A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases for real property to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in s.287.017 for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list.
8. An entity who has been placed on the discriminatory vendor list may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity.

Office of Inspector General
Florida Department of Transportation

FP #195766-1-57-01
SGLR RELOCATION AGREEMENT
Page 9 of 9

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers.

BY: [Signature]

President DATE 4/20/06
TITLE

Seminole Gulf Railway, L.P.
By its General Partner
Seminole Gulf Railway, Inc.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION

BY: [Signature]

Deputy Director of Transportation Development DATE 4/26/06
TITLE

Legal Review

Approved as to
Funds Available

By: [Signature] By: 4-14-06
Attorney-DOT Date Comptroller-DOT Date
4-21-06

FINANCIAL PROJECT NO. 195766-1-57-01
EXHIBIT "A"
WORK SCHEDULE

OFFSITE IMPROVEMENTS

Off-site rail improvements as outlined in this Agreement shall commence prior to beginning work on the main line rail relocation and shall be completed on a schedule which does not interfere with completion of the main line relocation work.

ONSITE RAIL IMPROVEMENTS

The Department is anticipating its Contractor will begin work activities in August of 2006. The utility relocations, drainage work, and Railroad sub-grade and sub-ballast work is expected to last until August of 2007. When the sub-grade and sub-ballast work is complete and delivered to Seminole Gulf Railway's satisfaction, and all work by the Contractor at Edison Ave. and SR 82, MLK Blvd. is completed to permit construction of the new crossings at these locations, the Department will provide Seminole Gulf Railway a period of six (6) months to complete all work associated with the main line south of SR 82, MLK Blvd. and north of Edison Ave. (Track, crossings, signal work, and the removal of all rail infrastructure from the Department's right-of-way). The balance of the railroad work elsewhere can be completed while the Department's Contractor engages in road work activity.

MOODY SPUR IMPROVEMENTS

The schedule for all railroad work on the Moody Spur will be developed by Seminole Gulf Railway and coordinated with the Department's Contractor at the commencement of the construction project. Generally, the Moody Spur work will be undertaken after the main line relocation referenced above is complete.

PROJECT DESCRIPTION AND RESPONSIBILITIES

PROJECT LOCATION: SR 739, Evans Avenue, Fort Myers, Florida.

A. PROJECT DESCRIPTION: This project shall include Preliminary Engineering, design, upgrade, construction and relocation of new and existing Highway Grade Crossings, Automatic Highway Grade Crossing Warning Devices, Railroad main line track, spur track, team/storage track, and wye track. All work performed will be accomplished in accordance with AREMA and Seminole Gulf Railway specifications. In addition there will be other off-site projects undertaken by Seminole Gulf Railway in order to relocate railroad facilities that are impacted due to the new Evans Avenue alignment. These projects shall include, but are not limited to, the relocation of the north leg of the wye track, and the Public Service Delivery Facility located at the wye in Fort Myers, FL.

B. SUMMARY OF WORK: This project shall be divided into individual work tasks that will require coordination and planning as a whole in conformance with constraints as set forth in the attached Agreement and the Highway and Railroad construction plans and specifications. A substantial portion of the work covered under this Agreement will be taking place on, or adjacent to, active Railroad tracks that provide both passenger and freight operations. Work shall be phased to allow continued operation of the Railroad, with the exception of necessary "work windows" or allotted construction times as designated by the Railroad.

Scope of Railroad Track Work to Be Performed by Seminole Gulf Railway.

All Railroad work is to be in conformance with the AREMA Standards and Seminole Gulf Railway Specifications unless otherwise noted. Materials shall meet or exceed Seminole Gulf Railway specifications and standards. Seminole Gulf Railway shall furnish all labor, materials, tools, equipment, permits, services and incidentals required for the timely performance of the work.

Scope of Railroad Track and Highway Crossing Construction.

Seminole Gulf Railway shall:

- Install Rubber Rail Seal Crossing Surfaces at Franklin Street, Dora Street, Katherine Street, South Street (Moody Spur), Jeffcott Street.
- Install Full Depth Rubber Crossing Surface at Edison Avenue.
- Install Concrete Crossing Surfaces at the South Street Crossing (Main Line) New Evans Avenue Crossing, and the new crossing at Dr. Martin Luther King Jr. Blvd.
- Perform all sub-grade work associated with the Highway Grade Crossings and all track work South of Edison Avenue and North of Dr. Martin Luther King Jr. Blvd.
- Construct the new Main Line Track between Dr. Martin Luther King Jr. Blvd. and Edison Avenue.
- Construct Main Line switch and new connections to the South leg of the Wye.
- Construct the Double ended passing/storage track South of Edison Avenue.
- Construct the temporary track to facilitate construction of the new MLK crossing alignment, and cut over of the South leg of the Wye.
- Rebuild Moody Spur to facilitate associated Grade Crossing work and tie-in to new Main Line alignment.
- Remove and properly dispose of existing Main Line track structure after new Main Line is put into service.
- Construct a new Wye facility extending from the Main Line near Railroad Milepost AX-967 in conjunction with relocated Industrial Lead.
- Construct new Public Delivery facilities.
- Construct new equipment servicing facilities to permit construction of new Wye.

Scope of Railroad Signal Work to be Performed by Seminole Gulf Railway.

Seminole Gulf Railway shall:

- Install new Automatic Highway Grade Crossing Warning Systems including gates at South Street crossing (Moody Spur), South Street Crossing (Main Line), Edison Avenue, and the New Evans Avenue Crossing.
- Upgrade the existing Automatic Highway Grade Crossing Warning System at Dr. Martin Luther King Blvd. with L.E.D. lights, L.E.D. Gate Lights, install Railroad portion of Traffic Signal Pre-Emption circuits as necessary, and install necessary circuitry so as to interface with the new Automatic Highway Grade Crossing Warning System at the new Evans Ave. Crossing. Relocate existing signal located on the Southwest quadrant of the crossing closer to the new Main Line track.
- Install Railroad portion of Traffic Signal Pre-Emption circuits as necessary at Edison Avenue Crossing, install necessary circuitry so as to interface with the new Automatic Highway Grade Crossing Warning System at the new Evans Ave. Crossing.
- Retire existing Automatic Highway Grade Crossing Warning System at Market Street.
- Install Crossbuck's and Stop Signs as necessary on crossings on the Moody Spur.

Scope of Railroad Related Work to be Performed by Department's Contractor.

In support of the Seminole Gulf Railway's track construction, the FDOT Contractor shall perform the following as described herein and as shown in the construction plans:

- All sub-surface work within the remaining right-of-way of the Railroad (i.e. utility relocations, drainage etc.) as shown in the Highway and Railroad construction plans.
- Prepare, furnish and construct the sub-grade and sub-ballast for the final Main Line track from engineering station 173+61 +- (North side of Edison Avenue) to engineering station 200+53 +- (South side of MLK Blvd.) to AREMA and Seminole Gulf Railway Specifications. Once the sub-grade and sub-ballast are complete, the Department's Contractor will provide Seminole Gulf Railway an unrestricted "work window" of six (6) months to construct the track and crossings within this area.
- Prepare, furnish and install all milling and roadway resurfacing so as to interface with, and in support of the installation of the Highway Grade Crossings constructed by Seminole Gulf Railway under the scope of the track work to be performed by Seminole Gulf Railway. All resurfacing at Railroad Highway Grade Crossings shall be done to Seminole Gulf Railway Standards and Specifications.
- Provide all surveying necessary to establish the centerline of track, top of rail elevations and Railroad right-of-way limits as defined by Property Deed in land purchase with The Florida Department of Transportation.

Office of Inspector General
Florida Department of Transportation

FP #195766-1-57-01
EXHIBIT "B"
Page 1 of 3

FINANCIAL PROJECT NO. 195766-1-57-01
EXHIBIT "B"
BUDGET

CROSSING CONSTRUCTION		QTY	SURFACE	SIGNALS	TOTAL COST
AK 965.63	Franklin Street 623282P XD-m8	38	Adv. Rail Seal	CB	\$63,850.00
"	Dora Street 623295W XD-m8	38	Adv. Rail Seal	CB	\$63,850.00
"	South Street (Moody) 623255K XA-m8	38	Adv. Rail Seal	Type III	\$225,000.00
"	Jeffcott Street (2 Tracks)* 623196S XD-m8	38	Adv. Rail Seal	--CB	\$108,850.00
"	Katherine Street* 623297Y XD-m8	38	Adv. Rail Seal	CB	\$63,850.00
"	South Street (Main) 623289M XA-m8	60'	Concrete	Type III (Cant.)	\$457,500.00
"	Edison Ave. (At Evans) 623281H XA-m8	60'	Full Depth Rubber	Type III (Bridge Combo)	\$365,000.00
"	New Metro Xing Evans Ave. XA-m8	140'	Concrete	Type III (Cant.)	\$783,000.00
964.45	MLK 623275E XA-m8	140'	Concrete	Lights & Relocate	\$547,000.00
964.35	Lemon Street 623274X XD-m8	30	Adv. Rail Seal		\$66,000.00
<u>Total Crossing Construction</u>					<u>\$2,914,900.00</u>

TRACK CONSTRUCTION

Main Line Track Lemon St. to South St.	3966	Feet		\$247.50	\$981,585.00
Three Switches	3	Each		\$65,000.00	\$195,000.00
Moody Spur Track Construction	1197	Feet		\$220.00	\$263,340.00
Four Switches	4	Each		\$65,000.00	\$260,000.00
Reset Unld. Pit Moody Spur	L.S.				\$18,000.00
Passing Track Construction	1070	Feet		\$220.00	\$235,400.00
One Switch	1	Each		\$65,000.00	\$65,000.00
So. Leg of WYE Track Construction	730	Feet		\$247.50	\$180,675.00
Constr. Temp. Connection to North Leg of WY.	700	Feet		\$220.00	\$154,000.00
<u>Total Track Construction</u>					<u>\$2,353,000.00</u>

REMOVAL & DISPOSAL

MLK Main Line Crossing	140	Feet			\$0.00
MLK West Leg of WYE crossing Crossing	140	Feet			\$0.00
Main Line Track	2959	Feet			\$0.00
North Leg of WYE	750	Feet			\$0.00
Stub Track 38 400'	400	Feet			\$0.00
Lump Sum	1				\$185,000.00
<u>Total Removal & Disposal</u>					<u>\$185,000.00</u>

TOTAL SHEET 1

\$5,452,900.00

* Switch in Crossing.
Note: All track and crossing construction to be built on prepared roadbed.

Office of Inspector General
Florida Department of Transportation

FP #195766-1-57-01
EXHIBIT "B"
Page 2 of 3

<u>RELOCATE WYE TRACK</u>	<u>UNIT</u>	<u>COST</u>	<u>TOTAL COST</u>
Switches	3 Each	\$65,000.00	\$195,000.00
Track Construction	2170 Feet	\$220.00	\$477,400.00
Drainage, Fill, Land, Relocate Utilities	L.S.		\$626,000.00
<u>Total Relocate Wye Track</u>			<u>\$1,298,400.00</u>
 <u>RELOCATE PUBLIC DELIVERY TRACK</u>			
Switch	1 Each	\$65,000.00	\$65,000.00
Track Construction	1270 Feet	\$220.00	\$279,400.00
Land	260000 Sq. Ft.	Lump Sum	\$1,300,000.00
Land Development	1 Each	\$250,000.00	\$250,000.00
Culverts / Drainage	1 Each	\$55,000.00	\$55,000.00
Paving	80,000 Sq. Ft.	\$3.85	\$308,000.00
Utilities	1 L.S.	\$40,000.00	\$40,000.00
<u>Total Relocate Public Del. Trk.</u>			<u>\$2,297,400.00</u>
 <u>RELOCATE STORAGE TRACK AND RUN-AROUND TRACK</u>			
Switches	2 Each	\$65,000.00	\$130,000.00
Track Construction	1000 Feet	\$220.00	\$220,000.00
<u>Total Relocate St. Trk.</u>			<u>\$350,000.00</u>
 <u>RELOCATE MAINTENANCE FACILITIES</u>			
Switches	2 Each	\$65,000.00	\$130,000.00
Track Construction	1200 Feet	\$220.00	\$264,000.00
Jacking Pit	L.S.	\$110,000.00	\$110,000.00
Utilities, Elec. Pwr. Water, Sen	L.S.	\$220,000.00	\$220,000.00
Access Road Construction	L.S.	\$165,000.00	\$165,000.00
Environmental Containment	L.S.	\$120,000.00	\$120,000.00
Drainage Relocation	L.S.	\$82,500.00	\$82,500.00
<u>Total Relocate Maint. Facilities</u>			<u>\$1,091,500.00</u>
 <u>RELOCATE PASSENGER PLATFORM</u>			
Removal & Relocation Costs	L.S.	\$82,500.00	\$82,500.00
<u>Total Relocate Passenger Platform</u>			<u>\$82,500.00</u>
<u>Sub Total- Sheet 2</u>			<u>\$5,119,800.00</u>
<u>Total Sheet 2</u>			<u>\$5,119,800.00</u>
<u>Total Sheet 1</u>			<u>\$5,452,900.00</u>
Administration, Legal, Engineering, Project Management, Flagging Services			<u>\$1,208,520.00</u>
			<u>\$11,781,220.00</u>

PAYMENT SCHEDULE

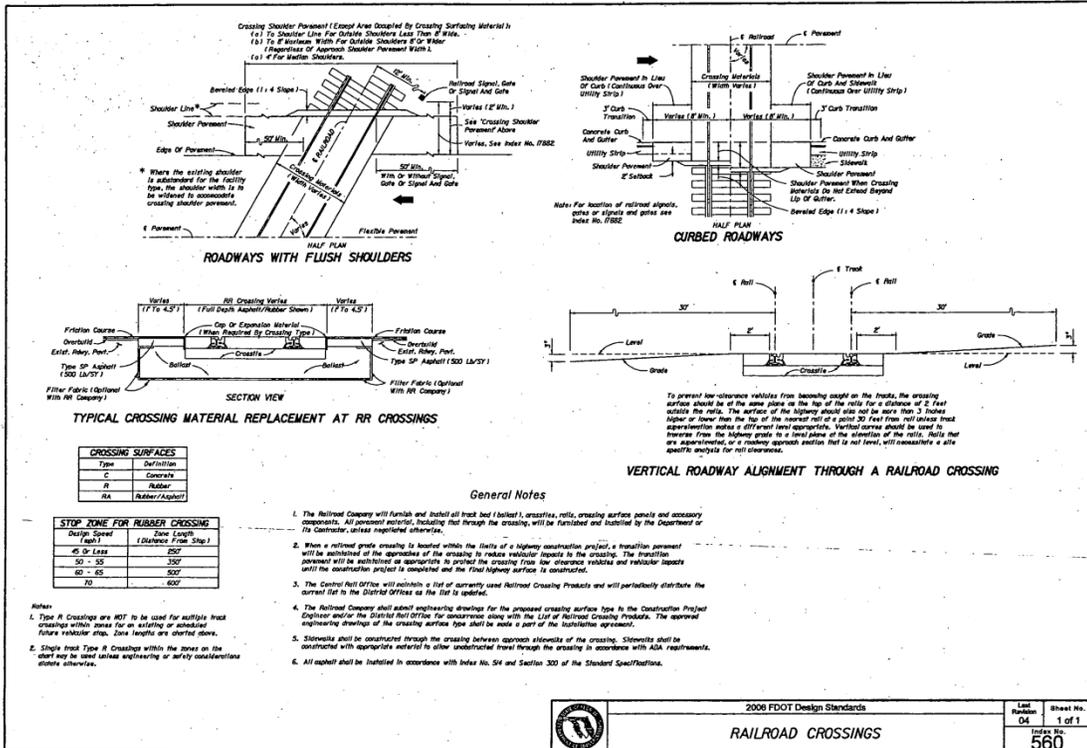
Seminole Gulf Railway may Invoice the Department per the following schedule:

<u>INVOICE</u>	<u>DUE</u>	<u>AMOUNT</u>
1	May 1, 2006	\$2,962,740.00
2	August 1, 2006	\$2,559,900.00
3	August 1, 2007	\$2,816,361.00
4	November 1, 2007	\$2,816,361.00
5	at the completion and acceptance of all Rail work	<u>\$ 625,858.00</u>
	Total	\$11,781,220.00

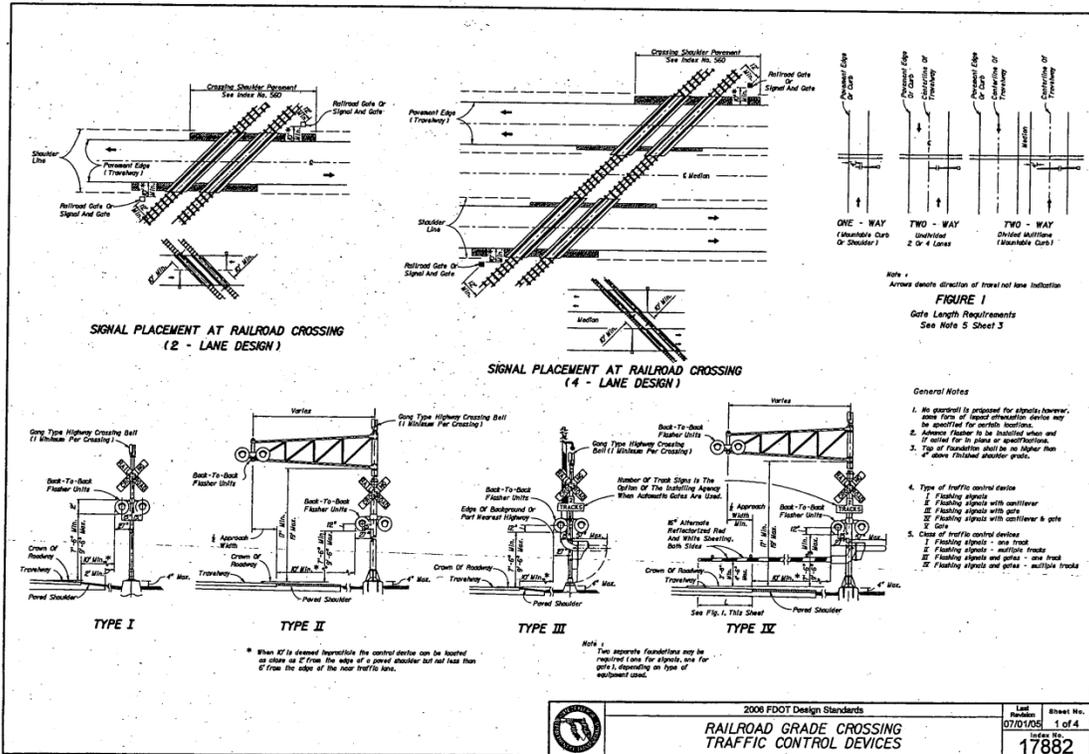
Special conditions: Should Seminole Gulf Railway receive their Notice to begin construction on the Main line Track relocation prior to August 1, 2007, the due date for Invoices 3 and 4 will be adjusted to the earlier date with the same time frame (3 months) between Invoices 3 and 4 providing their construction activities begin before August 1, 2007.

Office of Inspector General
Florida Department of Transportation

FP #195766-1-57-01
Exhibit "C"

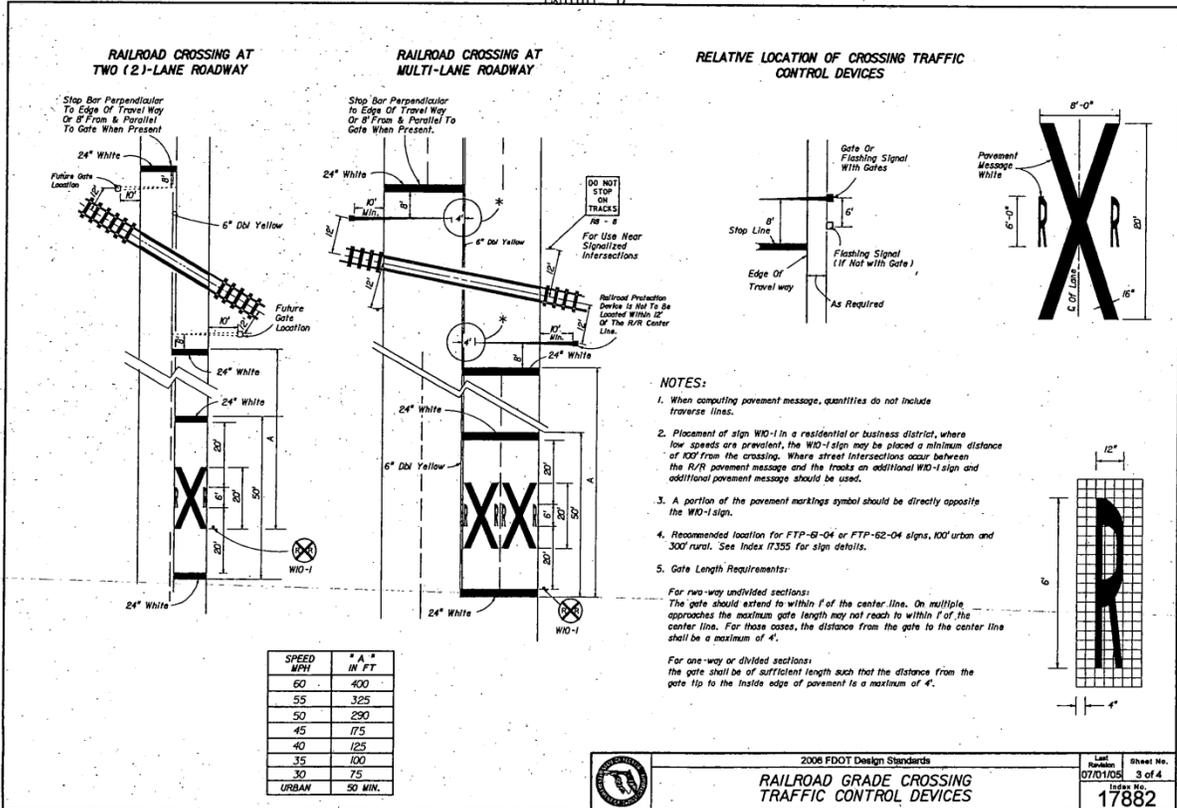


FP #195766-1-57-01
 Exhibit "D"

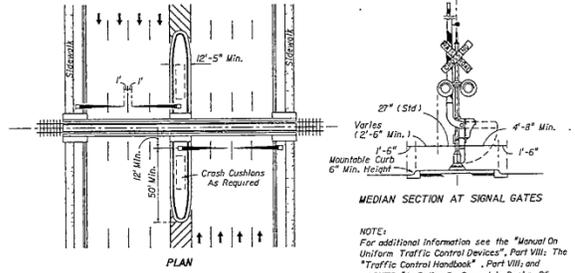
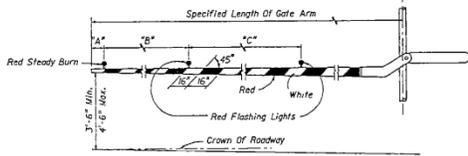


EP #195766-1-57-01

Exhibit "D"



FP #195766-1-57-01
Exhibit "D"



RAILROAD GATE ARM LIGHT SPACING

Specified Length Of Gate Arm	Dimension "A"	Dimension "B"	Dimension "C"
14 Ft.	6"	36"	5'
15 Ft.	18"	36"	5'
16-17 Ft.	24"	36"	5'
18-19 Ft.	28"	41"	5'
20-23 Ft.	28"	41"	5'
24-28 Ft.	28"	5'	5'
29-31 Ft.	36"	6'	6'
32-34 Ft.	36"	7'	7'
35-37 Ft.	36"	9'	9'
38 And Over	36"	10'	10'

**MEDIAN SIGNAL GATES FOR
MULTI LANE UNDIVIDED URBAN SECTIONS**

(THREE OR MORE DRIVING LANES IN ONE DIRECTION, 45 mph OR LESS)

NOTE:
For additional information see the "Manual On Uniform Traffic Control Devices", Part VIII; The "Traffic Control Handbook", Part VIII; and AASHTO "A Policy On Geometric Design Of Streets And Highways".



2006 FDOT Design Standards

**RAILROAD GRADE CROSSING
TRAFFIC CONTROL DEVICES**

Leaf Revision: 00 Sheet No: 4 of 4
Index No: 17882

Office of Inspector General
Florida Department of Transportation

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
RAILROAD GRADE CROSSING TRAFFIC CONTROL DEVICES

725-090-41
RAIL
OGC - 01/06

FP #195766-1-57-01
Exhibit "E"

FINANCIAL PROJECT NO.	ROAD NAME OR NUMBER	COUNTY NAME	PARCEL & R/W NUMBER	FAP NUMBER
195766-1-57	SR82 - MLK JR BLVD	LEE	12014 (relocate)	N/A

COMPANY NAME: SEMINOLE GULF RAILWAY LIMITED PARTNERSHIP

A. FDOT/AAR XING NO.: 623275-E RR MILE POST TIE: AX964.45

B. TYPE SIGNALS PROPOSED IV CLASS III DOT INDEX: 17882

**SCHEDULE OF ANNUAL COST OF AUTOMATIC
HIGHWAY GRADE CROSSING TRAFFIC CONTROL DEVICES**

Annual Maintenance Cost Exclusive of Installation

<u>CLASS</u>	<u>DESCRIPTION</u>	<u>COST*</u>
I	Flashing Signals - One Track	\$2,086.00
II	Flashing Signals - Multiple Tracks	\$2,760.00
III	Flashing Signals and Gates - One Track	\$3,146.00
IV	Flashing Signals and Gates - Multiple Tracks	\$3,950.00

AUTHORITY: FLORIDA ADMINISTRATIVE RULE 14-57.011
Public Railroad-Highway Grade Crossing Costs

EFFECTIVE DATE: July 22, 1982

GENERAL AUTHORITY: 334.044, F.S.

SPECIFIC LAW IMPLEMENTED: 335.141, F.S.

*This schedule will become effective July 1, 2006 and will be reviewed every 5 years and revised as appropriate based on the Consumer Price Index for all Urban Consumers published by the U.S. Department of Labor.

*Office of Inspector General
Florida Department of Transportation*

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
RAILROAD GRADE CROSSING TRAFFIC CONTROL DEVICES

725-090-41
RAIL
OGC - 01/06

FP #195766-1-57-01

Exhibit "E"

FINANCIAL PROJECT NO.	ROAD NAME OR NUMBER	COUNTY NAME	PARCEL & R/W NUMBER	FAP NUMBER
195766-1-57	SR739 - Evans Ave.	LEE	12014 (signals)	N/A

COMPANY NAME: SEMINOLE GULF RAILWAY LIMITED PARTNERSHIP

A. FDOT/AAR XING NO.: 623277T RR MILE POST TIE: NEW

B. TYPE SIGNALS PROPOSED IV CLASS III DOT INDEX: 17882

**SCHEDULE OF ANNUAL COST OF AUTOMATIC
HIGHWAY GRADE CROSSING TRAFFIC CONTROL DEVICES**

Annual Maintenance Cost Exclusive of Installation

<u>CLASS</u>	<u>DESCRIPTION</u>	<u>COST*</u>
I	Flashing Signals - One Track	\$2,086.00
II	Flashing Signals - Multiple Tracks	\$2,760.00
III	Flashing Signals and Gates - One Track	\$3,146.00
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Office of Inspector General
Florida Department of Transportation



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04/14/2006 03:49 PM

To PD101AB@dot.state.fl.us
cc
bcc

Subject FUNDS APPROVAL/REVIEWED FOR CONTRACT AOD48

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
FUNDS APPROVAL

Contract #AOD48 Contract Type: AC Method of Procurement: R
Vendor Name: SEMINOLE GULF RAILWAY LP
Vendor ID: VF460704250001
Beginning date of this Agmt: 04/28/06
Ending date of this Agmt: 10/01/08

Description:
195766, SR 739 (Wye) Railroad mainline relocation, xing inst
allations, signal reloc & installations, etc

ORG-CODE *EO *OBJECT *AMOUNT *FIN PROJECT *FCT *CFDA
(FISCAL YEAR) *BUDGET ENTITY *CATEGORY/CAT YEAR
AMENDMENT ID *SEQ. *USER ASSIGNED ID *ENC LINE(6S)/STATUS

Action: LOA Funds have been: APPROVED

55 013040101 *HC	*563007 *	11781220.00	*19576615701	*127 *
2006	*55150200		*088717/06	
W001	*00	* AGREE	*0001/04	

TOTAL AMOUNT: *\$ 11,781,220.00 *

FUNDS APPROVED/REVIEWED FOR ROBIN M. NAITOVE, CPA, COMPTROLLER
DATE: 04/14/2006



Florida Department of Transportation

JEB BUSH
GOVERNOR

DENVER J. STUTLER, JR.
SECRETARY

CERTIFIED MAIL
May 3, 2006

Mr. Gordon Fay, President
Seminole Gulf Railway, LP
4110 Centerpointe Dr, Suite 207
Ft. Myers, Florida

RE: RAILROAD TRACK & RAIL FACILITY RELOCATION AGREEMENT &
TEMPORARY LEASE
FM# 195766-1-57-01
New SR 739, From Hanson St to SR 82 (Martin Luther King Blvd)
Ft. Myers, Lee County, Florida

RECEIVED
MAY 0 2006

Dear Mr. Fay

Public Transportation Office

Attached you will find a set of the final executed Railroad Track & Rail Facility Relocation Agreement and Temporary Lease, both effective April 26, 2006 for the above referenced project. Our Right of Way Department will be forwarding separately the Quick Claim Deed and Business Damage Waiver.

As part of the project coordination a Mandatory Pre-Bid Conference has been scheduled for June 6, 2006, from 10:00 a.m. to 12:00 p.m. at the District Southwest Area Office. As you are aware a major portion of this project consists of Railroad construction and relocation work and a portion of the Agenda for this conference will be for Seminole Gulf to discuss the rail work and schedule. A meeting will be schedule with you to discuss this conference and work out details ahead of time.

Please feel free to contact this me or John Starling with any further questions. Thanks for your assistance in making this project happen.

Sincerely,

Arlene G. Barnes

Arlene G Barnes
District Rail Administrator

AGB:agb
Attachment

Cc: Mike Dross, Rail Office, Tallahassee w/attachment
Tom Garcia, Ft. Myers Operations w/attachment
Brenda Hall, FDOT w/attachment
John Starling, Jacobs w/attachment

Florida Department of Transportation
801 N Broadway Ave, Bartow 33830
Office (863)519-2349, Fax (863) 534-7039
E:mail: Arlene.Barnes@dot.state.fl.us

ATTACHMENT B – SGLR RESPONSE TO PRELIMINARY REPORT



SEMINOLE GULF RAILWAY LP

"Modern Transportation—Old Fashioned Service"

4110 CENTERPOINTE DRIVE SUITE 207, FORT MYERS, FLORIDA 33916

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April 20, 2012

Joseph Maleszewski
Director of Audit
Florida Department of Transportation
Office of Inspector General
605 Suwannee Street MS 44
Tallahassee, FL 32399-0450

Re: Railroad Track and Facility Relocation Agreement (Contract AOD48)
Response to Inspector General Draft Report 10C-4001

Dear Mr. Maleszewski:

On behalf of Seminole Gulf Railway, L.P. ("SGLR"), we write in response to the draft Inspector General Report 10C-4001 (the "Draft Report") prepared by the Office of Inspector General ("OIG") of the Florida Department of Transportation relating to the performance by Seminole Gulf Railway, L.P. under the Railroad Track and Facility Relocation Agreement dated April 26, 2006 (the "Agreement"). We received the Draft Report on March 19, 2012, and as we agreed, our response is due April 23, 2012. We appreciate the opportunity to provide you with additional information for your consideration.

In the enclosed Response of Seminole Gulf Railway L.P. (the "Response"), we respond in detail to the Draft Report's proposed findings. As explained in our Response, the Draft Report's proposed critical findings against Seminole Gulf are unwarranted and cannot be sustained in light of the substantial factual evidence and explanations provided herein. In making this "lump sum" agreement, the parties' overall purpose was to ameliorate the anticipated disruption and damages to the railway and its operations during the multi-year construction of State Road 739 into Ft. Myers. Stated simply, the agreement was intended primarily to address SGLR's concerns and to minimize its damages cause by the highway's construction --not to bestow a benefit on or to provide services to FDOT. Consequently, as the facts demonstrate, SGLR has complied with the agreement, either with the letter of the agreement or by providing alternative performance --some at substantial cost to it-- that achieves the aims of the agreement.

As an initial matter, we believe it is crucial in interpreting the Agreement and the parties' obligations therein that OIG understand how the Agreement came about and the key considerations that went into its negotiation. First, the Agreement was negotiated as a result of FDOT's threat to take railroad property by eminent domain for the Evans Road highway

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realignment project if the parties could not negotiate a contract for the relocation of the SGLR railroad facilities affected by the project. Second, the parties did not intend for this to be a construction contract. Rather, as the title of the Agreement suggests, this was an agreement to relocate SGLR's track and facilities: SGLR would relocate its main line track to the edge of its right of way and would remove and replace its existing north wye track and its existing public service delivery facility. In turn, the "on-site" portions of the work needed to be completed in such a time so as not to delay the highway realignment project, but the "off-site" work (the replacement of railroad facilities), however, did not have a time frame – delays in obtaining replacement facilities were at SGLR's risk.

Third, the most important feature of the Agreement is that it provides for a lump sum payment, and intermediate contract payments are based not on a percentage of the contract's completion, but on a date or schedule and nothing more. The importance of the lump sum means that payment is for all the contractual duties and tasks together. For example, though the Agreement includes as an exhibit a "budget" for several items, these budgets and their descriptions and costs were simply agreed upon estimates upon which the lump sum was based. They should not be treated as detailed line items and costs, and the attempt of the Draft Report to measure whether SGLR is entitled to payment for a portion of the work based on these budgets is simply wrong and is not an appropriate interpretation of the Agreement. Such an approach is inconsistent with a lump sum project which by its nature does not anticipate price breakdowns or individual cost items.

The "lump sum" nature of the Agreement covers not only the "on-site" and "off-site" projects that were needed to be completed in order to relocate SGLR's rail line and other facilities that were being displaced by FDOT's Evans Road realignment highway construction project, but also includes payments for business damages to which SGLR would otherwise have been entitled. See Response Section I (attached Business Damages Claim & Waiver (which recites that the Agreement includes payments for business damages)). If FDOT had acquired the property by eminent domain, SGLR would have been entitled to business damages which would have included damages to the interruption of its business during the relocation and construction project, the cost of replacement facilities, and attorneys' fees. These business damages were not separately enumerated in the "budget," but rather were included in the lump sum amount.

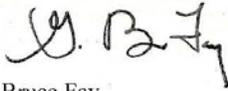
Finally, our enclosed Response provides additional detail about the background of the Agreement and addresses each of the "variances" suggested by the Draft Report. We have provided substantial back-up documentation and photographic evidence to support our written response.

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We will supply any additional information that you believe you need to complete your report. We also invite you to revisit the sites discussed in our Response, and to review with us any further concerns you may have before releasing final payment to us.

Sincerely,

Seminole Gulf Railway, L.P.

A handwritten signature in black ink, appearing to read "G. Bruce Fay". The signature is written in a cursive, somewhat stylized font.

G. Bruce Fay
President

ATTACHMENT C – ADDITIONAL INFORMATION FROM DEPARTMENT OGC

Additional Information regarding Agreement AOD48

Provided by Paul Martin, Assistant General Counsel, Florida Department of Transportation

Date: September 11, 2012

The Office of the General Counsel has prepared this clarification in order to explain the facts underlying the Railroad Track and Rail Facility Relocation Agreement (Relocation Agreement) which is the subject of the inquiry by the Office of Inspector General (OIG). It is understandable that the OIG interpreted the Relocation Agreement as a procurement under which the District had not yet received some listed deliverables, given its references to Chapter 287, Florida Statutes. However, neither party contemplated this being a contractual services procurement agreement. Rather, the parties' lawyers interpret the Relocation Agreement to be an eminent domain condemnation settlement agreement through which the District acquired right of way required for road and bridge construction. This condemnation settlement agreement included settlement of all anticipated costs and fees, as well as compensation for the "cost to cure" as a portion of the severance damages suffered by the long-term lessee, Seminole Gulf (SGLR). A "cost to cure" is an eminent domain principle and a measurement used in calculating severance damages that compensates the landowner or lessee for expenses that would be incurred by that party in mitigating the effect the taking of the right of way parcel has on the remainder of the property. These divergent interpretations indicate that the Relocation Agreement was, at best, in-artfully drafted; and at worst, insufficient to accomplish the desired result. The current difficulty in determining the parties' intended purpose of the Relocation Agreement and clarifying any misunderstanding is further compounded by the departure from the District of those employees who participated in the negotiations and drafting of the Relocation Agreement. The District has conducted a comprehensive investigation of the underlying facts surrounding the negotiations and resulting Relocation Agreement.

The road project underlying the Relocation Agreement required the acquisition of part of a railroad corridor owned by CSX and leased to SGLR. The relationship between CSX and SGLR impacted the road project and issues addressed in the Relocation Agreement. CSX leased the corridor and railroad facilities to SGLR, which operates a railroad business within the corridor, through a 1987 lease agreement which was renewed in 2007 for an additional 20 years, and which provides for an additional renewal, if exercised in 2027, to extend through 2047. The lease agreement required SGLR to maintain the rail facilities and return them to CSX at the termination of the lease. The District needed to acquire rights from both CSX and SGLR in order to perfect its title for the road right of way needed through the rail corridor. The quitclaim deed from CSX to the Department was dated April 24, 2006 and the Relocation Agreement with SGLR was dated April 26, 2006. The need for the relocation of the "wye" and the rail facilities was an essential requirement in the separate agreements executed by the Department with CSX and with SGLR.

The lease between CSX and SGLR addresses the need for relocation of rail facilities under certain circumstances. The lease provides (Par. 5.05) that if relocation of SGLR's improvements to property other than the leased property is required, then CSX and SGLR shall enter into a supplement to the lease agreement which provides for the termination of the lease agreement as to the affected property and the substitution of the property upon which the improvements are to be relocated. The existence of this lease required that the Department acquire the rights of both CSX and SGLR in order to construct the road project. The District obtained a quitclaim deed from CSX that conveyed its underlying fee interest

in the corridor but did not convey SGLR's leasehold interest. The Relocation Agreement with SGLR intended to acquire SGLR's leasehold interest for the Department for compensation. This compensation included: 1) payment for the estimated cost of the relocation of certain rail facilities so SGLR could remain in business ("cost to cure" as severance damages); 2) payment for SGLR's business losses, and 3) SGLR's estimated legal costs and fees.

The Relocation Agreement detailed the work necessary for both the Department and SGLR to achieve their objectives. The on-site work solely benefited the Department and it was imperative that the work be completed in a timely manner to clear the corridor to allow the road project to be completed on schedule. The on-site work included the construction of several active rail crossings and active signals. The District has verified that the on-site work was completed timely and as specified in the Relocation Agreement. The off-site work solely benefited SGLR and was intended to mitigate the anticipated damages to SGLR's business for which the negotiated agreement provided compensation for the cost associated with a "cure" of these damages. The off-site work included tasks anticipated to be performed by SGLR for its sole benefit: purchasing property for relocating the "wye," reestablishment of public service facilities, track removal and relocation of its maintenance facilities. The anticipated cost of the off-site work was a damage sustained by SGLR in order to remain in business after the taking of its interest for which compensation was required. Completion of this off site work was not necessary for the District to construct its road project. It should be noted in a typical eminent domain case that a cure proposed to assist in assessing the value of the remainder property interest may or may not be implemented by the property owner. For these reasons, the off-site work itemized in the Relocation Agreement was not a true "deliverable" to the Department. It is understood that today's clarification may not fully explain why the off-site work was included in the Relocation Agreement and why it was described in such detail making it appear to be a deliverable. In hindsight, the District's lawyers should have: declined to use a form relocation agreement; selected a format more appropriate for a right of way settlement agreement, at least, so far as the off-site work is concerned; and worded the Relocation Agreement quite differently.

The intended relocation of the rail facilities is addressed in the quitclaim deed of the underlying fee from CSX to the Department. In the deed, CSX reserved a permanent easement over the wye track to be relocated and a temporary operating easement over the entire premises conveyed "provided all rail work is completed and rail operations have been shifted to the relocated track." This contemporaneous document indicates that although CSX was not a party to the Relocation Agreement, it was an additional beneficiary of the off-site work under the terms of the lease between CSX and SGLR. It is of more import to the Department that completion of the off-site work detailed in the Relocation Agreement affects the expiration of the operating easement reserved in the quitclaim deed from CSX to the Department.

The itemized off site work simply reflected the elements of the "cost to cure" damages paid to SGLR as part of the lump sum payment and was primarily for the benefit of the business operations of SGLR and ultimately for the satisfaction of the requirements of the lease agreement between CSX and SGLR. An on-site inspection on August 22, 2012 by the District's rail and legal offices, along with an OIG representative, reviewed all variances to the off-site work identified by the OIG in its report. The inspection verified that SGLR substantially complied with the off-site work provisions in the Relocation Agreement with no adverse impact to the District's facilities and the convenience and safety of the travelling public.

Furthermore, some of the off-site work identified by the OIG report as work not performed was impractical to perform exactly as specified in the Relocation Agreement. For example, the Relocation Agreement envisioned that SGLR would relocate the wye track to adjacent land SGLR was going to acquire specifically from CSX; however, that land subsequently was sold by CSX to a third party which necessitated SGLR finding a different location for the wye track because the adjacent parcel was no longer available to SGLR.

Additionally, changing business conditions resulting from the collapse of the housing market and prolonged downturn in the economy caused SGLR to change its business model and to rehabilitate certain existing facilities rather than construct and use a single public service facility as contemplated in the original Relocation Agreement. SGLR rehabilitated or constructed six public delivery facilities instead of reestablishing a single facility as per the agreement. These actions, not contemplated at the time of the execution of the Relocation Agreement, were necessitated by changing market conditions. In fact, the Tarpon Street facility is scheduled for operation in November 2012. These departures from the off-site work identified in the Relocation Agreement did not prevent the Department from completing its road project and provided no inconvenience or safety concerns for the traveling public. The District suggests that in those instances the “off site” work actually performed complies substantially with the objectives of the Relocation Agreement and, in some instances, is of better quality, i.e. concrete rail crossings are of superior quality as rubber, require less maintenance and last longer. Any such variances to the off-site work identified in the Relocation Agreement did not prevent the Department from completing its road project and provided no inconvenience or safety concerns for the traveling public.

The present paramount concern is that the off-site work that was performed by SGLR satisfied the requirements of the lease agreement between SGLR and CSX. It is important to the Department that CSX is satisfied with the location of the “wye” track as reconstructed, and that “all rail work is completed and rail operations have been shifted to the relocated track.” That has been accomplished and CSX has expressed its satisfaction.

A satisfactory resolution of the issues raised in the IG report can be reached if it can be agreed that the performance of the off-site work is not a “deliverable” to the Department, but rather, a benefit to SGLR and CSX, an unnamed third party beneficiary to the Relocation Agreement. The only services to be performed by SGLR in the Relocation Agreement that constituted true “deliverables” to the Department were those reflected in the on-site work, which cleared and improved the right of way for the road construction. Performance of the off-site work was not for the benefit of the Department, was not essential for the completion of the road project, and the lack its performance impacts neither the convenience nor the safety of the traveling public. On the other hand, the performance by SGLR of the certain elements of the off-site work and acceptance of same by CSX is essential to the Department because it defines the location of the permanent easement reserved for the relocated “wye” and generates the condition required for the release of the temporary easement reserved by CSX in the quitclaim deed.

The following corrective action will address any remaining concerns regarding this matter. The District intends to execute an addendum to the Relocation Agreement which specifies the true nature of the agreement as a “lump sum” settlement. Such an addendum would: 1) clarify the objectives of each of the parties; and 2) state that the off-site work was not a “deliverable” to the Department, but rather,

elements of SGLR's damages and services required to be performed by SGLR for the benefit of both CSX and SGLR in order to comply with the provisions of the lease agreement between CSX and SGLR. Such an addendum to the Relocation Agreement would provide clear language for the invoicing and payment of the final installment of the "lump sum" settlement to be paid upon written acknowledgment obtained from CSX, the unnamed third party beneficiary of the off-site work, that: a) the performance of certain elements of the off-site work satisfied the requirements of the lease agreement between CSX and SGLR; b) that CSX is satisfied with the location of the "wye" and its permanent easements, as relocated by SGLR; and c) that "all rail work is completed and rail operations have been shifted to the relocated track" in compliance with the conditions in the quitclaim deed from CSX to the Department for the expiration of the temporary operating easement.

Hopefully, this response clarifies the true purposes of what should have been created in the form of a settlement agreement and adequately addresses the concerns of the Inspector General. However, if the Inspector General has further concerns, we would be happy to provide further clarification.