

## **Highlights from FDOT/FICE Liaison Committee Meeting, held April 23, 2010, at D7 Headquarters**

### Meeting Attendees:

On location in District 7: Byron Williams; Kevin Thibault; Brian Blanchard; Dan Metz; Scott Gobar; Ken Hartmann; Bob Keller; Ed McKinney; Robert Behar; Jim Moreno; John Temple; Ronald Fountain; Carla Perry

Attending via video-conference: Art Wright; David Sadler; John Garner; Paul Steinman; Bob Crim; Angela Serpico; Phil Pitts; Jerry Rudd; Robert Skoglund; Paul Wai; Annette Brennan; Chela Wood; Richard Norris

Via telephone: Adrian Share; Morteza Alian

### Topics Discussed:

#### Conflict of Interest Policy (Restrictions on Consultants' Eligibility to Compete for Department Contracts, Policy No. 375-030-006)

The draft Conflict of Interest policy completed internal review at FDOT, and was distributed via e-mail to FICE consultant members for review on 4/7/10. Comments were due back on 4/30/10.

The following comments were received from FICE:

Comment: Sec 2.1, Para 2 of the procedure states that a firm that prepares the RFP or “other solicitation documents” is not eligible for CEI. However in Sec. 6, Para. 3 there is no mention of “other solicitation documents” when discussing the RFP. It would seem that the plans prepared by the prime EOR before the switch would fall in the “other solicitation document” category which would make the EOR before the switch ineligible to be on the D/B team. Additionally, the EOR before the switch gives the D/B contractor an unfair advantage, since the EOR before the switch can reduce his price because he has already been paid for the design. On large projects, the EOR’s fee will be substantial which would give the D/B contractor who uses the EOR before the switch a sizable monetary advantage.

Brian Blanchard’s response: The draft procedure as written still leaves it up to the discretion of the District Secretary whether the EOR before the switch would be allowed to compete for the D/B project. The rule of thumb used is that the EOR prior to the switch would be conflicted out of the design-build project if the plans were developed to more than 25%. This has not been codified in procedure, to allow the District Secretary the flexibility of using his/her engineering judgment and assessing each project on a case-by-case basis. If it is a complex project with a specialized design, it might be a lesser percentage, which is why 25% was not included in the procedure. It depends on the type of project, and how far the plans were developed.

Comment No. 2: Would a company be precluded if it were to hire the employee who was directly responsible for preparing the Design Build Criteria Package. In other words John Doe prepares the Design Build Criteria Package for firm X and leaves firm X to work for firm Y. Would firm Y be conflicted out.

Response: Yes, this would constitute a conflict-of-interest. The draft procedure will be modified to address this scenario.

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Comment: Section 3.3, third paragraph of the draft procedure allows a sub to the EOR to participate on the CEI team with the approval of the District Secretary. The fifth paragraph excludes that for geotechnical engineers on the EOR team performing foundation related tests and inspections. It is a standard accepted “best practice” in the geotechnical engineering profession for the geotechnical engineer in the design phase to inspect foundation during the construction phase. The geotechnical engineer during the design phase bases his/her recommendations on a small sampling of the subsurface materials and a relatively few number of tests. Actual foundation conditions may only become more fully apparent during the construction phase, and the design geotechnical engineer is best suited to evaluate the actual conditions and make appropriate recommendations. This speeds up the construction process and reduces the cost of the contractor’s down time. Other agencies have seen fit to have similar language in their policies to what FDOT is proposing, but have the flexibility to allow the geotechnical engineer to participate in foundation inspections for overly challenging projects. I think it would give FDOT more flexibility to eliminate the fifth paragraph and rely on the third paragraph to guide FDOT.

Response: In the private sector the same geotechnical engineer normally designs and inspects the construction of foundations without independent oversight. The Department has previously allowed design geotechnical engineers to perform the CEI geotech functions of setting pile lengths & driving criteria, and evaluating construction cores for drilled shaft construction on projects they designed. However, the design & construction recommendations both required District Geotechnical Engineer concurrence, and the construction recommendations also require District Construction Engineer concurrence.

FDOT decided to discontinue the practice largely because of construction claims which normally raise objectivity questions in their justifications. The Department may lose the most qualified engineer to make the CEI decisions, however, this decision helps protect the Department from some claims, reduces any chance of the appearance of impropriety, and the next best qualified engineer will be familiar with the county’s geology and the design engineer’s report.

Comment: FDOT allows the geotechnical engineer on the design phase to inspect/test foundations during construction on design build contracts. I don’t see much of a difference.

Response: In Design-Build, the design modifications are often concurrent with foundation construction. The design is based on the equipment the contractor has available and the contractor’s specific expertise. The Department is not financially responsible for any alleged construction cost overruns due to a construction CEI member of the design team. The Department is purchasing a suitable foundation designed, built and inspected.

The Department reviews the designs and verifies the capacity of the constructed foundation by an independent engineer.

For any design-bid-build projects which are switched to D/B, FDOT agreed to provide a list of the prime EOR and all known EOR subs in the advertisement for the D/B project. This topic was discussed with the Professional Services Administrators at the PSA meeting on 4/27/10. The PSAs agreed to do so, and asked Central Office for boilerplate language to use in the ad.

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### Assessment of D1/D7 Regional Meeting/Future Regional Meetings

The District 1/District 7 Regional Meeting adhered to the agenda time frames, and ended on time. According to responses from the paper evaluation form distributed after the conference, the Legislative Update from Kevin Thibault was well received. The suggestion was also made to move the FDOT Leadership discussion to an earlier time-slot on future agendas. District 1 and District 7 had a large number of consultant project managers who attended, which was positively received by the consultants.

### FICE Transportation Conference, May 26- 27, 2010

256 people are currently registered. 40 of those registered are FDOT staff. FDOT has approved a total of 50 staff to attend the FICE Transportation Conference.

### DBE Update

Art Wright reported that the Equal Opportunity Office is planning to establish DBE contracting goals for the HSR project. The Federal Railroad Administration does not currently have a DBE program. Blackmon-Roberts will soon begin outreach to DBE firms for HSR contracts. Art also discussed the DBE Task Team which has been formed to re-examine the Department's use of specialty codes. The Task Team is considering doing away with specialty codes and using NAICS codes for determining DBE credit instead.

### SB 1964- Senate Bill 1964

Provides for limited liability for engineers, surveyors and mappers, architects, interior designers, and registered landscape architects as a result of construction defects resulting from the performance of a contract. Provides that, if a contract requires professional liability insurance, the contract may not limit the liability of the design professional inconsistent with the insurance requirements, etc. This bill was ordered enrolled on 4/28/10, which means that it has passed both houses of the legislature in identical form and has been converted into an act for presentation to the Governor or Secretary of State.

### Red Light Camera Bill

The Florida House & Senate passed legislation which would allow city and county governments to install traffic infraction detectors (red-light cameras) at intersections, to detect red-light runners and send tickets to the vehicle's owner. First-offense tickets could cost \$158. Proceeds will be distributed to the General Revenue Fund, the county or municipality, and the Department of Revenue for the Department of Health Administrative Trust Fund. FDOT will provide the specifications, testing procedures, placement, and the signage which should be MUTCD standard signage.

### Limitations on Liability for Latent Design Defects

Section 95.11, Florida Statutes includes the following provision:

**95.11 Limitations other than for the recovery of real property.--**Actions other than for recovery of real property shall be commenced as follows:

WITHIN FOUR YEARS.--

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*An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.*

Consultants reiterated their concern regarding perceived differences between liability for consultants versus contractors. The statute of limitation for contractors is 820 days, versus four years for engineers. The current language appears adequate for the design EOR and will provide approximately the same ending date for limitations on liability. For the CEI, ownership would be upon acceptance of the work on which the error is based and could provide a different ending date from the contractor for limitations on liability. FDOT concurred that the “trigger date” (date when time-clock starts) for CEI consultants needs to be better defined. The Department did not object to language for CEI consultants.

### Contact Mailer

FICE Transportation Committee members were concerned that consultant staff who signed up for FDOT information using the FDOT Contact Mailer application were receiving notice of FDOT employment vacancies. Brian Blanchard stated that Contact-Mailer would be modified to prompt consultants to enter a personal e-mail address in order to receive notice of FDOT employment vacancies. Consultants must select this category to receive a notice.

### Miscellaneous Topics

There are a number of consultants concerned that the large number of low bid design-build contracts let under ARRA might be the beginning of a trend for the Department. The Department’s response is that DBLB is the preferred option if there is no opportunity for innovation. If the project needs to be let quickly and the funding obligated quickly, we will do LBDB. For example, good candidates for DBLB would be resurfacing or a project where plans are developed to 75% and the project is switched from design-bid-build to design build since there is little room left for innovation. The Department anticipates the same number of upcoming DBLB projects as in years previous to the stimulus program.

### Training for FDOT and Consultant Personnel on Cost Savings Incentive Proposals

FDOT and FICE discussed educating Department staff and consultants in order to encourage the further use of the cost savings initiative. Specifically, FICE would like to work with the Department on training staff and consultants to understand that Cost Savings Proposal’s provide valuable benefits to the people of Florida and should not be construed as a negative reflection on the original design. The Cost Savings Proposal will be discussed at the upcoming FICE annual conference, FICE/FDOT regional meetings, contractor quarterly meetings, and other upcoming meetings.