

LEE COUNTY BOARD OF COUNTY COMMISSIONERS  
 AGENDA ITEM SUMMARY

BLUE SHEET NO: 20040742 -UTL

**1. REQUESTED MOTION:**

**ACTION REQUESTED:**

Approval of Florida Department of Transportation (FDOT) Utility Agreement Resolution, Utility Work Agreement, and Memorandum of Agreement for utility adjustments along Metro Parkway (SR 739) from Winkler Avenue to Hanson Street.

**WHY ACTION IS NECESSARY:**

Proposed FDOT roadway project and its drainage facilities will conflict with an existing Lee County Utilities (LCU) potable water main. The total estimated cost to adjust portions of this water main is \$37,464.00. No portion of the work is considered to be reimbursable by FDOT. In order to provide for the least impact to the general public and improved coordination of work, the required utility work needs to be completed by formal agreement with FDOT.

**WHAT ACTION ACCOMPLISHES:**

Agreements and other similar documents are required to be approved by the BOCC.

**2. DEPARTMENTAL CATEGORY: 10**  
**COMMISSION DISTRICT #: 3, 5**

*C10D*

**3. MEETING DATE:**

*06-22-2004*

**4. AGENDA:**

- X CONSENT
- ADMINISTRATIVE
- APPEALS
- PUBLIC
- WALK ON
- TIME REQUIRED: \_\_\_\_\_

**5. REQUIREMENT/PURPOSE:**

- (Specify)
- STATUTE \_\_\_\_\_
  - ORDINANCE \_\_\_\_\_
  - ADMIN. CODE \_\_\_\_\_
  - X OTHER Resolution, Agreement, MOA

**6. REQUESTOR OF INFORMATION:**

- A. COMMISSIONER: \_\_\_\_\_
- B. DEPARTMENT: Lee County-Public Works
- C. DIVISION/SECTION: Utilities Division
- BY: Rick Diaz, P.E., Utilities Director
- DATE: *6/7/04*

**7. BACKGROUND:**

The FDOT intends to construct a new roadway extending Metro Parkway from Winkler Avenue to Hanson Street (Project No. 195718-1-56-03 and -04). The FDOT project includes the installation of drainage structures and pipes, which will conflict with certain portions of an existing LCU 16-inch diameter water main. This project will require the adjustment of this existing water main in accordance with Section 337.403, Florida Statutes. Section 337.401, Florida Statutes, mandates that utilities are subservient to transportation and roadway purposes within rights-of-way and shall be relocated or adjusted at the utility owner's expense when conflicts occur.

(CONT'D.)

**MANAGEMENT RECOMMENDATIONS:**

**9. RECOMMENDED APPROVAL**

(A) DEPARTMENT DIRECTOR	(B) PURCH. OR CONTRACTS	(C) HUMAN RESOURCES	(D) OTHER	(E) COUNTY ATTORNEY	(F) BUDGET SERVICES				(G) COUNTY MANAGER
					OA	OM	Risk	GC	
<i>[Signature]</i> Date: <i>6-7-04</i>	<i>[Signature]</i> Date: _____	NA Date: _____	<i>[Signature]</i> B. Dearborn Date: <i>6/8/04</i>	<i>[Signature]</i> M. Crumpton Date: <i>6/9/04</i>	<i>[Signature]</i> Date: <i>6/9/04</i>	<i>[Signature]</i> Date: <i>6/10</i>	<i>[Signature]</i> Date: <i>6/9/04</i>	<i>[Signature]</i> Date: <i>6-10-04</i>	<i>[Signature]</i> Date: <i>6-7-04</i>

**10. COMMISSION ACTION:**

- APPROVED
- DENIED
- DEFERRED
- OTHER

Rec. by CoAtty  
 Date: *6/9/04*  
 Time: *11:45 AM*  
 Forwarded To:  
*[Signature]*  
*6/9/04*

RECEIVED BY  
 COUNTY ADMIN: *[Signature]*  
*6/9/04*  
 4:20 PM SET  
 COUNTY ADMIN  
 FORWARDED TO: *PR*  
*6-10-04*  
 1:30 PM

LCU's estimated portion of the total construction cost to perform the non-reimbursable utility adjustments is \$37,464.00.

Funds will be available in Account No. 20710048730.506540.

Five original document sets are attached for the Chairman's signature:

- Utility Agreement Resolution
- Utility Work Agreement
- Memorandum of Agreement

All five (5) sets need to be returned to LCU to obtain FDOT signatures.

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STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION  
**RESOLUTION**  
 UTILITY AGREEMENT

FORM 710-010-13  
 UTILITIES  
 10/98

FPN				COUNTY	S.R.#	FAP NO.
195718	2	56	03/04	Lee	739	N/A

**WHEREAS**, the State of Florida Department of Transportation, hereinafter referred to as the **FDOT**, proposes to construct or reconstruct a transportation facility identified above, hereinafter referred to as the **Project**; and

**WHEREAS**, in order for the **FDOT** to proceed with the Project, it is necessary for the Lee County Utilities Division, hereinafter referred to as the **UAO**, to execute and deliver to the **FDOT** the agreement identified as Utility Work Agreement – State Road 739 (Metro Boulevard) Winkler Avenue to Hanson Street, hereinafter referred to as the **Agreement**;

**NOW, THEREFORE, BE IT RESOLVED BY THE UAO:**

That John Albion, Chairman – Lee County Board of County Commissioners be hereby authorized and directed to execute and deliver the Agreement to the FDOT.

- A certified copy of this Resolution be forwarded to the FDOT along with the executed Agreement.

THE FOREGOING RESOLUTION was offered by Commissioner \_\_\_\_\_, who moved its adoption. The Motion was seconded by Commissioner \_\_\_\_\_ and, upon being put to a vote, the vote was as follows:

- Commissioner: Bob Janes \_\_\_\_\_
- Commissioner: Doug St. Cerny \_\_\_\_\_
- Commissioner: Ray Judah \_\_\_\_\_
- Commissioner: Andy Coy \_\_\_\_\_
- Commissioner: John Albion \_\_\_\_\_

DULY PASSED AND ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

ATTEST:  
 CHARLIE GREEN, CLERK

BOARD OF COUNTY COMMISSIONERS  
 OF LEE COUNTY, FLORIDA

BY: \_\_\_\_\_  
 DEPUTY CLERK

BY: \_\_\_\_\_  
 CHAIRMAN

APPROVED AS TO FORM

\_\_\_\_\_  
 OFFICE OF THE COUNTY ATTORNEY

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION  
**UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT**  
(AT UTILITY EXPENSE)

710-010-22  
UTILITIES  
02/03  
Page 1 of 8

Financial Project ID:	195718-2-56-03/04	Federal Project ID:	N/A
Work Program Item No. (old):	N/A	County/Section No:	Lee / 12011
State Job No. (old):	N/A	District Document No:	1

**THIS AGREEMENT**, entered into this \_\_\_\_\_ day of \_\_\_\_\_, year of \_\_\_\_\_, by and between the **STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION**, hereinafter referred to as the "**FDOT**", and the Lee County Utilities Division, \_\_\_\_\_, hereinafter referred to as the "**UAO**";

**WITNESSETH**

**WHEREAS**, the **FDOT** is constructing, reconstructing, or otherwise changing a portion of a public road or publicly owned rail corridor, said project being identified as Metro Boulevard Ph 2 from Winkler Avenue to Hanson Street, State Road No.: 739, hereinafter referred to as the "Project"; and

**WHEREAS**, the **UAO** owns or desires to install certain utility facilities which are located within the limits of the Project hereinafter referred to as the "Facilities" (said term shall be deemed to include utility facilities as the same may be relocated, adjusted, installed, or placed out of service pursuant to this Agreement); and

**WHEREAS**, the Project requires the location (vertically and/or horizontally), protection, relocation, installation, adjustment or removal of the Facilities, or some combination thereof, hereinafter referred to as "Utility Work"; and

**WHEREAS**, the **FDOT** and the **UAO** desire to enter into a joint agreement pursuant to Section 337.403(1)(b), Florida Statutes for the Utility Work to be accomplished by the **FDOT's** contractor as part of the construction of the Project; and

**WHEREAS**, the **UAO**, pursuant to the terms and conditions hereof, will bear certain costs associated with the Utility Work;

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants contained herein, the **FDOT** and the **UAO** hereby agree as follows:

**1. Design of Utility Work**

- a. **UAO** shall prepare, at **UAO's** sole cost and expense, a final engineering design, plans, technical special provisions, a cost estimate, and a contingency Utility Work Schedule (said contingency schedule to be used in the case of a bid rejection) for the Utility Work (hereinafter referred to as the "Plans Package") on or before September 30, year of 2004.
- b. The Plans Package shall be in the same format as the **FDOT's** contract documents for the Project and shall be suitable for reproduction.
- c. Unless otherwise specifically directed in writing, the Plans Package shall include any and all activities and work effort required to perform the Utility Work, including, but not limited to, all clearing and grubbing, survey work, and shall include a traffic control plan.
- d. The Plans Package shall be prepared in compliance with the **FDOT's** Utility Accommodation Manual and the **FDOT's** Plans Preparation Manual in effect at the time the Plans Package is prepared, and the **FDOT's** contract documents for the Project. If the **FDOT's** Plans Preparation Manual has been updated and conflicts with the Utility Accommodation Manual, the Utility Accommodation Manual shall apply where such conflicts exist.
- e. The technical special provisions which are a part of the Plans Package shall be prepared in accordance with the **FDOT's** guidelines on preparation of technical special provisions and shall not duplicate or change the general contracting provisions of the **FDOT's** Standard Specifications for Road and Bridge Construction and any Supplemental Specifications, Special Provisions, or Developmental Specifications of the **FDOT** for the Project.

- f. **UAO** shall provide a copy of the proposed Plans Package to the **FDOT**, and to such other right of way users as designated by the **FDOT**, for review at the following stages: 30%, 60%, and 90%

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Prior to submission of the proposed Plans Package for review at these stages, the **UAO** shall send the **FDOT** a work progress schedule explaining how the **UAO** will meet the **FDOT's** production schedule. The work progress schedule shall include the review stages, as well as other milestones necessary to complete the Plans Package within the time specified in Subparagraph a. above.

- g. In the event that the **FDOT** finds any deficiencies in the Plans Package during the reviews performed pursuant to Subparagraph f. above, the **FDOT** will notify the **UAO** in writing of the deficiencies and the **UAO** will correct the deficiencies and return corrected documents within the time stated in the notice. The **FDOT's** review and approval of the documents shall not relieve the **UAO** from responsibility for subsequently discovered errors or omissions.
- h. The **FDOT** shall furnish the **UAO** such information from the **FDOT's** files as requested by the **UAO**; however, the **UAO** shall at all time be and remain solely responsible for proper preparation of the Plans Package and for verifying all information necessary to properly prepare the Plans Package, including survey information as to the location (both vertical and horizontal) of the Facilities. The providing of information by the **FDOT** shall not relieve the **UAO** of this obligation nor transfer any of that responsibility to the **FDOT**.
- i. The Facilities and the Utility Work will include all utility facilities of the **UAO** which are located within the limits of the Project, except as generally summarized as follows: N/A

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These exceptions shall be handled by separate arrangement.

- j. If any facilities of the **UAO** located within the project limits are discovered after work on the project commences to be qualified for relocation at the **FDOT's** expense, but not previously identified as such, the **UAO** shall file a claim with the **FDOT** for recovery of the cost of relocation thereof. The filing of the claim shall not necessarily entitle the **UAO** to payment, and resolution of the claim shall be based on a determination of fault for the error. The discovery of facilities not previously identified as being qualified for relocation at the **FDOT's** expense shall not invalidate this Agreement.
- k. The **UAO** shall fully cooperate with all other right of way users in the preparation of the Plans Package. Any conflicts that cannot be resolved through cooperation shall be resolved in the manner determined by the **FDOT**.
- l. Upon completion of the Utility Work, the Facilities shall be deemed to be located on the public road or publicly owned rail corridor under and pursuant to the Utility Permit: \_\_\_\_\_

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*(Note: It is the intent of this line to allow either attachment of or separate reference to the permit).*

## 2. Performance of Utility Work

- a. The **FDOT** shall incorporate the Plans Package into its contract for construction of the Project.
- b. The **FDOT** shall procure a contract for construction of the Project in accordance with the **FDOT's** requirements.
- c. If the portion of the bid of the contractor selected by the **FDOT** which is for performance of the Utility Work exceeds the **FDOT's** official estimate for the Utility Work by more than ten percent (10%) and the **FDOT** does not elect to participate in the cost of the Utility Work pursuant to Section 337.403(1)(b), Florida Statutes, the **UAO** may elect to have the Utility Work removed from the **FDOT's** contract by notifying the **FDOT** in writing within 30 days from the date that the **UAO** is notified of the bid amount. Unless this election is made, the Utility Work shall be performed as part of the Project by the **FDOT's** contractor.
- d. If the **UAO** elects to remove the Utility Work from the **FDOT's** contract in accordance with Subparagraph 2. c., the **UAO** shall perform the Utility Work separately pursuant to the terms and conditions of the **FDOT's** standard relocation agreement, the terms and conditions of which are incorporated herein for that purpose by this reference, and in accordance with the contingency relocation schedule which is a part of the Plans Package. The **UAO** shall proceed immediately with the Utility Work so as to cause no delay to the **FDOT** or the **FDOT's** contractor in constructing the Project.

- e. The **UAO** shall perform all engineering inspection, testing, and monitoring of the Utility Work to insure that it is properly performed in accordance with the Plans Package except for the following activities:

N/A

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and will furnish the **FDOT** with daily diary records showing approved quantities and amounts for weekly, monthly, and final estimates in accordance with the format required by **FDOT** procedures.

- f. Except for the inspection, testing, monitoring and reporting to be performed by the **UAO** in accordance with Subparagraph 2. e., the **FDOT** will perform all contract administration for its construction contract.
- g. The **UAO** shall fully cooperate with the **FDOT** and the **FDOT's** contractor in all matters relating to the performance of the Utility Work.
- h. The **FDOT's** engineer has full authority over the Project and the **UAO** shall be responsible for coordinating and cooperating with the **FDOT's** engineer. In so doing, the **UAO** shall make such adjustments and changes in the Plans Package as the **FDOT's** engineer shall determine are necessary for the prosecution of the Project.
- i. The **UAO** shall not make any changes to the Plans Package after the date on which the **FDOT's** contract documents are mailed to Tallahassee for advertisement of the Project unless those changes fall within the categories of changes which are allowed by supplemental agreement to the **FDOT's** contract pursuant to Section 337.11, Florida Statutes. All changes, regardless of the nature of the change or the timing of the change, shall be subject to the prior approval of the **FDOT**.

### 3. Cost of Utility Work

- a. The **UAO** shall be responsible for all costs of the Utility Work and all costs associated with any adjustments or changes to the Utility Work determined by the **FDOT's** engineer to be necessary, including, but not limited to the cost of changing the Plans Package and the increase in the cost of performing the Utility Work, unless the adjustments or changes are necessitated by an error or omission of the **FDOT**. The **UAO** shall not be responsible for the cost of delays caused by such adjustments or changes unless they are attributable to the **UAO** pursuant to Subparagraph 4.a.
- b. The initial estimate of the cost of the Utility Work is \$37,464.00. At such time as the **FDOT** prepares its official estimate, the **FDOT** shall notify the **UAO** of the amount of the official estimate for the Utility Work. Upon being notified of the official estimate, the **UAO** shall have five (5) working days within which to accept the official estimate for purposes of making deposits and for determining any possible contribution on the part of the **FDOT** to the cost of the Utility Work, or to elect to have the Utility Work removed from the **FDOT's** contract and performed separately pursuant to the terms and conditions set forth in Subparagraph 2. d. hereof.
- c. At least Thirty ( 30 ) calendar days prior to the date on which the **FDOT** advertises the Project for bids, the **UAO** will pay to the **FDOT** an amount equal to the **FDOT's** official estimate; plus 2 % for administrative costs of field work, tabulation of quantities, Final Estimate processing and Project accounting (said amounts are to be hereinafter collectively referred to as the "Allowances"); plus 10% of the official estimate for a contingency fund to be used as hereinafter provided for changes to the Utility Work during the construction of the Project (the "Contingency Fund").
- d. Payment of the funds pursuant to this paragraph will be made (choose one):
- directly to the **FDOT** for deposit.
  - as provided in the attached Memorandum of Agreement between the **UAO**, the **FDOT**, and the State of Florida, Department of Financial Services, Division of Treasury. Deposits of less than \$100,000 to be escrowed must be pre-approved by the Department of Financial Services and **FDOT** Comptroller's Office prior to execution of this agreement.

- e. If the portion of the contractor's bid selected by the **FDOT** for performance of the Utility Work exceeds the amount of the deposit made pursuant to Subparagraph c. above, then subject to and in accordance with the limitations and conditions established by Subparagraph 2. c. hereof regarding **FDOT** participation in the cost of the Utility Work and the **UAO's** election to remove the Utility Work from the Project, the **UAO** shall, within fourteen (14) calendar days from notification from the **FDOT** or prior to posting of the accepted bid, whichever is earlier, pay an additional amount to the **FDOT** to bring the total amount paid to the total obligation of the **UAO** for the cost of the Utility Work, plus Allowances and 10% Contingency Fund. The **FDOT** will notify the **UAO** as soon as it becomes apparent the accepted bid amount plus allowances and contingency is in excess of the advance deposit amount; however, failure of the **FDOT** to so notify the **UAO** shall not relieve the **UAO** from its obligation to pay for its full share of project costs on final accounting as provided herein below. In the event that the **UAO** is obligated under this Subparagraph 3.e. to pay an additional amount and the additional amount that the **UAO** is obligated to pay does not exceed the Contingency Fund already on deposit, the **UAO** shall have sixty (60) calendar days from notification from the **FDOT** to pay the additional amount, regardless of when the accepted bid is posted.
- f. If the accepted bid amount plus allowances and contingency is less than the advance deposit amount, the **FDOT** will refund the amount that the advance deposit exceeds the bid amount, plus allowances and contingency if such refund is requested by the **UAO** in writing and approved by the Comptroller of the **FDOT** or his designee.
- g. Should contract modifications occur that increase the **UAO's** share of total project costs, the **UAO** will be notified by the **FDOT** accordingly. The **UAO** agrees to provide, in advance of the additional work being performed, adequate funds to ensure that cash on deposit with the **FDOT** is sufficient to fully fund its share of the project costs. The **FDOT** shall notify the **UAO** as soon as it becomes apparent the actual costs will overrun the award amount; however, failure of the **FDOT** to so notify the **UAO** shall not relieve the **UAO** from its obligation to pay for its full share of project costs on final accounting as provided herein below.
- h. The **FDOT** may use the funds paid by the **UAO** for payment of the cost of the Utility Work. The Contingency Fund may be used for increases in the cost of the Utility Work which occur because of quantity overruns or because of adjustments or changes in the Utility Work made pursuant to Subparagraph 2. h. Prior to using any of the Contingency Fund, the **FDOT** will obtain the written concurrence of the person delegated that responsibility by written notice from the **UAO**. The delegatee shall respond immediately to all requests for written concurrence. If the delegatee refuses to provide written concurrence promptly and the **FDOT** determines that the work is necessary, the **FDOT** may proceed to perform the work and recover the cost thereof pursuant to the provisions of Section 337.403(3), Florida Statutes. In the event that the Contingency Fund is depleted, the **UAO** shall, within fourteen (14) calendar days from notification from the **FDOT**, pay to the **FDOT** an additional 10% of the total obligation of the **UAO** for the cost of the Utility Work established under Subparagraph 3. e. for future use as the Contingency Fund.
- i. Upon final payment to the Contractor, the **FDOT** intends to have its final and complete accounting of all costs incurred in connection with the work performed hereunder within three hundred sixty (360) days. All project cost records and accounts shall be subject to audit by a representative of the **UAO** for a period of three (3) years after final close out of the Project. The **UAO** will be notified of the final cost. Both parties agree that in the event the final accounting of total project costs pursuant to the terms of this agreement is less than the total deposits to date, a refund of the excess will be made by the **FDOT** to the **UAO**. In the event said final accounting of total project costs is greater than the total deposits to date, the **UAO** will pay the additional amount within forty (40) calendar days from the date of the invoice. The **UAO** agrees to pay interest at a rate as established pursuant to Section 55.03, Florida Statutes, on any invoice not paid within the time specified in the preceding sentence until the invoice is paid.

#### 4. Claims Against UAO

- a. The **UAO** shall be responsible for all costs incurred as a result of any delay to the **FDOT** or its contractors caused by errors or omissions in the Plans Package (including inaccurate location of the Facilities) or by failure of the **UAO** to properly perform its obligations under this Agreement in a timely manner.
- b. In the event the **FDOT's** contractor provides a notice of intent to make a claim against the **FDOT** relating to the Utility Work, the **FDOT** will notify the **UAO** of the notice of intent and the **UAO** will thereafter keep and maintain daily field reports and all other records relating to the intended claim.

- c. In the event the **FDOT's** contractor makes any claim against the **FDOT** relating to the Utility Work, the **FDOT** will notify the **UAO** of the claim and the **UAO** will cooperate with the **FDOT** in analyzing and resolving the claim within a reasonable time. Any resolution of any portion of the claim directly between the **UAO** and the **FDOT's** contractor shall be in writing, shall be subject to written **FDOT** concurrence and shall specify the extent to which it resolves the claim against the **FDOT**.
- d. The **FDOT** may withhold payment of surplus funds to the **UAO** until final resolution (including any actual payment required) of all claims relating to the Utility Work. The right to withhold shall be limited to actual claim payments made by the **FDOT** to the **FDOT's** contractor.

## 5. Out of Service Facilities

No Facilities shall be placed out of service unless specifically identified as such in the Plans. The following terms and conditions shall apply to Facilities placed Out-of-Service:

- a. The **UAO** acknowledges its present and continuing ownership of and responsibility for out of service Facilities.
- b. The **FDOT** agrees to allow the **UAO** to leave the Facilities within the right of way subject to the continuing satisfactory performance of the conditions of this Agreement by **UAO**. In the event of a breach of this Agreement by the **UAO**, the Facilities shall be removed upon demand from the **FDOT** in accordance with the provisions of Subparagraph e. below.
- c. The **UAO** shall take such steps to secure the Facilities and otherwise make the Facilities safe in accordance with any and all applicable local, state or federal laws and regulations and in accordance with the legal duty of the **UAO** to use due care in its dealings with others. The **UAO** shall be solely responsible for gathering all information necessary to meet these obligations.
- d. The **UAO** shall keep and preserve all records relating to the Facilities, including, but not limited to, records of the location, nature of, and steps taken to safely secure the Facilities and shall promptly respond to information requests of the **FDOT** or other permittees using or seeking use of the right of way.
- e. The **UAO** shall remove the Facilities at the request of the **FDOT** in the event that the **FDOT** determines that removal is necessary for **FDOT** use of the right of way or in the event that the **FDOT** determines that use of the right of way is needed for other active utilities that cannot be otherwise accommodated in the right of way. Removal shall be at the sole cost and expense of the **UAO** and without any right of the **UAO** to object or make any claim of any nature whatsoever with regard thereto. Removal shall be completed within the time specified in the **FDOT's** notice to remove. In the event that the **UAO** fails to perform the removal properly within the specified time, the **FDOT** may proceed to perform the removal at the **UAO's** expense pursuant to the provisions of Sections 337.403 and 337.404, Florida Statutes.
- f. Except as otherwise provided in Subparagraph e. above, the **UAO** agrees that the Facilities shall forever remain the legal and financial responsibility of the **UAO**. The **UAO** shall reimburse the **FDOT** for any and all costs of any nature whatsoever resulting from the presence of the Facilities within the right of way. Said costs shall include, but shall not be limited to, charges or expenses which may result from the future need to remove the Facilities or from the presence of any hazardous substance or material in or discharging from the Facilities. Nothing in this paragraph shall be interpreted to require the **UAO** to indemnify the **FDOT** for the **FDOT's** own negligence; however, it is the intent that all other costs and expenses of any nature be the responsibility of the **UAO**.

## 6. Default

- a. In the event that the **UAO** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in this Agreement, the **FDOT** may exercise one or more of the following options, provided that at no time shall the **FDOT** be entitled to receive double recovery of damages:
  - 1. Terminate this Agreement if the breach is material and has not been cured within sixty (60) days from written notice thereof from **FDOT**.
  - 2. Pursue a claim for damages suffered by the **FDOT** or the public.
  - 3. If the Utility Work is reimbursable under this Agreement, withhold reimbursement payments until the breach is cured. The right to withhold shall be limited to actual claim payments made by **FDOT** to third parties.



4. If the Utility Work is reimbursable under this Agreement, offset any damages suffered by the **FDOT** or the public against payments due under this Agreement for the same Project. The right to offset shall be limited to actual claim payments made by **FDOT** to third parties.
  5. Suspend the issuance of further permits to the **UAO** for the placement of Facilities on **FDOT** property if the breach is material and has not been cured within sixty (60) days from written notice thereof from **FDOT**.
  6. Pursue any other remedies legally available.
  7. Perform any work with its own forces or through contractors and seek repayment for the cost thereof under Section 337.403(3), Florida Statutes.
- b. In the event that the **FDOT** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in the Agreement, the **UAO** may exercise one or more of the following options:
1. Terminate this Agreement if the breach is material and has not been cured within sixty (60) days from written notice thereof from the **UAO**.
  2. If the breach is a failure to pay an invoice for Utility Work which is reimbursable under this Agreement, pursue any statutory remedies that the **UAO** may have for failure to pay invoices.
  3. Pursue any other remedies legally available.
- c. Termination of this Agreement shall not relieve either party from any obligations it has pursuant to other agreements between the parties nor from any statutory obligations that either party may have with regard to the subject matter hereof.

#### 7. **Force Majeure**

Neither the **UAO** nor the **FDOT** shall be liable to the other for any failure to perform under this Agreement to the extent such performance is prevented by an act of God, war, riots, natural catastrophe, or 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 remedied or mitigated the effect of the occurrence to the extent possible, and (c) resumed performance as soon as possible.

#### 8. **Indemnification**

##### **FOR GOVERNMENT-OWNED UTILITIES,**

To the extent provided by law, the **UAO** shall indemnify, defend, and hold harmless the **FDOT** and all of its officers, agents, and employees from any claim, loss, damage, cost, charge, or expense arising out of any acts, action, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement, whether direct or indirect, and whether to any person or property to which **FDOT** or said parties may be subject, except that neither the **UAO**, its agents, employees, or contractors will be liable under this section for damages arising out of the injury or damage to persons or property directly caused by or resulting from the negligence of the **FDOT** or any of its officers, agents, or employees during the performance of this Agreement.

When the **FDOT** receives a notice of claim for damages that may have been caused by the **UAO** in the performance of services required under this Agreement, the **FDOT** will immediately forward the claim to the **UAO**. The **UAO** and the **FDOT** will evaluate the claim and report their findings to each other within fourteen (14) working days and will jointly discuss options in defending the claim. After reviewing the claim, the **FDOT** will determine whether to require the participation of the **UAO** in the defense of the claim or to require the **UAO** to defend the **FDOT** in such claim as described in this section. The **FDOT's** failure to notify the **UAO** of a claim shall not release the **UAO** from any of the requirements of this section. The **FDOT** and the **UAO** will pay their own costs for the evaluation, settlement negotiations, and trial, if any. However, if only one party participates in the defense of the claim at trial, that party is responsible for all costs.

## FOR NON-GOVERNMENT-OWNED UTILITIES,

The **UAO** shall indemnify, defend, and hold harmless the **FDOT** and all of its officers, agents, and employees from any claim, loss, damage, cost, charge, or expense arising out of any acts, action, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement, whether direct or indirect, and whether to any person or property to which **FDOT** or said parties may be subject, except that neither the **UAO**, its agents, employees, or contractors will be liable under this section for damages arising out of the injury or damage to persons or property directly caused by or resulting from the negligence of the **FDOT** or any of its officers, agents, or employees during the performance of this Agreement.

The **UAO's** obligation to indemnify, defend, and pay for the defense or at the **FDOT's** option, to participate and associate with the **FDOT** in the defense and trial of any damage claim or suit and any related settlement negotiations, shall arise within fourteen (14) days of receipt by the **UAO** of the **FDOT's** notice of claim for indemnification to the **UAO**. The notice of claim for indemnification shall be served by certified mail. The **UAO's** obligation to defend and indemnify within fourteen (14) days of such notice shall not be excused because of the **UAO's** inability to evaluate liability or because the **UAO** evaluates liability and determines the **UAO** is not liable or determines the **FDOT** is solely negligent. Only a final adjudication or judgment finding the **FDOT** solely negligent shall excuse performance of this provision by the **UAO**. The **UAO** shall pay all costs and fees related to this obligation and its enforcement by the **FDOT**. The **FDOT's** delay in notifying the **UAO** of a claim shall not release **UAO** of the above duty to defend.

### 9. Miscellaneous

- a. Time is of essence in the performance of all obligations under this Agreement.
- b. The Facilities shall at all times remain the property of and be properly protected and maintained by the **UAO** in accordance with the current Utility Accommodation Manual in effect at the time the Plans Package is prepared and the current utility permit for the Facilities; provided, however, that the **UAO** shall not be obligated to protect or maintain any of the Facilities to the extent the **FDOT's** contractor has that obligation as part of the Utility Work pursuant to the **FDOT's** specifications.
- c. The **FDOT** may unilaterally cancel this Agreement for refusal by the **UAO** to allow public access to all documents, papers, letters, or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by the **UAO** in conjunction with this Agreement.
- d. This Agreement constitutes the complete and final expression of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, or negotiations with respect thereto, except that the parties understand and agree that the **FDOT** has manuals and written policies and procedures which may be applicable at the time of the Project and the relocation of the Facilities.
- e. This Agreement shall be governed by the laws of the State of Florida. Any provision hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions hereof.
- f. All notices required pursuant to the terms hereof may be sent by first class United States Mail, facsimile transmission, hand delivery, or express mail and shall be deemed to have been received by the end of five business days from the proper sending thereof unless proof of prior actual receipt is provided. The **UAO** shall have a continuing obligation to notify each District of the **FDOT** of the appropriate persons for notices to be sent pursuant to this Agreement. Unless otherwise notified in writing, notices shall be sent to the following addresses:

If to the **UAO**:

Utilities Director (c/o Michael G. Crumpton, PE), Lee County Utilities Division  
P.O. Box 398  
Fort Myers, FL 33902

If to the **FDOT**:

District Utility Administrator, FDOT District 1  
801 North Broadway  
Bartow, FL 33831-1249

**10. Certification**

This document is a printout of an **FDOT** form maintained in an electronic format and all revisions thereto by the **UAO** in the form of additions, deletions, or substitutions are reflected only in an Appendix entitled "Changes To Form Document" and no change is made in the text of the document itself. Hand notations on affected portions of this document may refer to changes reflected in the above-named Appendix but are for reference purposes only and do not change the terms of the document. By signing this document, the **UAO** hereby represents that no change has been made to the text of this document except through the terms of the appendix entitled "Changes To Form Document."

You **MUST** signify by selecting or checking which of the following applies:

- No changes have been made to this Forms Document and no Appendix entitled "Changes To Form Document" is attached.
- No changes have been made to this Form Document, but changes are included on the attached Appendix entitled "Changes to Forms Document."

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement effective the day and year first written.

**UTILITY:** Lee County Utilities Division

**BY: (Signature)** \_\_\_\_\_ **DATE:** \_\_\_\_\_

(Typed Name: John Albion)

(Typed Title: Chairman - Lee County Board of County Commissioners)

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**Recommend Approval by the District Utility Office**

**BY: (Signature)** \_\_\_\_\_ **DATE:** \_\_\_\_\_

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**FDOT Legal Review**

**BY: (Signature)** \_\_\_\_\_ **DATE:** \_\_\_\_\_

**District Counsel**

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**STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION**

**BY: (Signature)** \_\_\_\_\_ **DATE:** \_\_\_\_\_

(Typed Name: Michael J. Williams, PE)

(Typed Title: Director of Production)

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**FEDERAL HIGHWAY ADMINISTRATION (if applicable)**

**BY: (Signature)** \_\_\_\_\_ **DATE:** \_\_\_\_\_

(Typed Name: \_\_\_\_\_)

(Typed Title: \_\_\_\_\_)

## MEMORANDUM OF AGREEMENT

THIS AGREEMENT, made and entered into this \_\_\_\_, day of \_\_\_\_\_, 20\_\_\_\_, by and between the State of Florida, Department of Transportation, hereinafter referred to as "FDOT" and the State of Florida, Department of Financial Services, Division of Treasury, hereinafter referred to as "Treasury" and Lee County, a political subdivision of the State of Florida, hereinafter referred to as the "Participant".

### WITNESSETH

WHEREAS, "FDOT" is currently constructing the following project:

Main Financial Project No.: 195718 - 2 - 56 - 03 and - 04  
County: Lee

hereinafter referred to as the "Project".

WHEREAS, FDOT and the Participant entered into a **Locally Funded Agreement** dated \_\_\_\_\_, 20\_\_\_\_, wherein FDOT agreed to perform certain work on behalf of the Participant in conjunction with the Project.

WHEREAS, the parties to this AGREEMENT mutually agreed that it would be in the best interest of the FDOT and the Participant to establish an interest bearing escrow account to provide funds for the work performed on the Project on behalf of the Participant by the FDOT.

NOW THEREFORE, in consideration of the premises and the covenants contained herein, the parties agree to the following:

1. An initial deposit in the amount of \$ 37,464.00 (Thirty Seven Thousand Four Hundred Sixty Four Dollars and No Cents) will be made by the Participant into an interest bearing escrow account established by the Department for the purposes of the project. Said escrow account will be opened with the Department of Financial Services, Division of Treasury, Bureau of Collateral Management on behalf of the FDOT upon receipt of this Memorandum of Agreement. Such account will be an asset of FDOT.
2. Other deposits will be made only by the Participant as necessary to cover the cost of additional work prior to the execution of any Supplemental Agreements or Amendments.

3. All deposits shall be made payable to the Department of Financial Services, Revenue Processing and mailed to the FDOT Office of Comptroller for appropriate processing at the following address:

Florida Department of Transportation  
Office of Comptroller  
3717 Apalachee Parkway,  
Mail Station 42  
Tallahassee, Florida 32311  
ATTN: LFA Section

**A copy of this Agreement should accompany any deposits. When the check is mailed to Tallahassee, the District Office should instruct the Participant to mail the District Office a copy of the check.**

4. The FDOT's Comptroller or designee shall be the sole signatories on the escrow account with the Department of Financial Services and shall have sole authority to authorize withdrawals from said account.
5. Unless instructed otherwise by the parties hereto, all interest accumulated in the escrow account shall remain in the account for the purposes of the project as defined in the LFA.
6. The Treasurer agrees to provide written confirmation of receipt of funds to the FDOT.
7. The Treasurer's Office further agrees to provide periodic reports to the FDOT.

\_\_\_\_\_  
STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION  
COMPTROLLER,

APPROVED AS TO FORM:

\_\_\_\_\_  
COUNTY ATTORNEY'S OFFICE

\_\_\_\_\_  
STATE OF FLORIDA  
DEPARTMENT OF FINANCIAL SERVICES  
DIVISION OF TREASURY

BOARD OF COUNTY COMMISSIONERS  
OF LEE COUNTY, FLORIDA

BY: \_\_\_\_\_  
JOHN ALBION, CHAIRMAN

CONTACT ADDRESS

Utilities Director (c/o Michael G. Crumpton, PE)  
Lee County Utilities Division  
P. O. Box 398  
Fort Myers, Florida 33902-0398

FEDERAL EMPLOYER I.D. NUMBER

59-6000702