

**Lee County Board of County Commissioners
Agenda Item Summary**

Blue Sheet No. 20061503-UTL

1. Action Requested/Purpose:

Approval of additional funds in the amount of \$100,313.84 to pay FDOT per the Florida Department of Transportation (FDOT) Utility Agreement Resolution, Utility Work Agreement, and Memorandum of Agreement for utility adjustments along Metro Parkway (SR 739) from Hanson Street to State Road 82 (documents approved under Blue Sheet No. 20040089-UTL).

2. What Action Accomplishes:

The non-reimbursable utility relocation portion of the apparent low bid is \$100,313.84 greater than the estimated \$381,266.00 previously paid to FDOT. Per the Memorandum of Agreement, Lee County agreed to pay the difference if the selected bidder exceeded the already deposited amount.

3. Management Recommendation:

Approval.

4. Departmental Category: 10 – Utilities

CIOC

5. Meeting Date:

11-28-06

6. Agenda:

- Consent
- Administrative
- Appeals
- Public
- Walk-On

7. Requirement/Purpose (specify)

- Statute
- Ordinance
- Admin. Code
- Other

Approval

8. Request Initiated:

Commissioner _____
 Department Public Works
 Division Utilities
 By: Douglas L. Meurer 11-14-2006
 Douglas L. Meurer, P.E., Director

9. Background:

The FDOT (Project No. 195766-1-56-03 and -04) intends to construct a new roadway extending Metro Parkway from Hanson Street to State Road 82. The FDOT project includes installation of drainage structures and pipes, which conflicts with certain existing Lee County Utilities (LCU) water main facilities. This project will require the adjustment or relocation of these existing water mains in accordance with Section 337.401 and Section 337.403, Florida Statutes.

(CONT'D.)

10. Review for Scheduling:

Department Director	Purchasing or Contracts	Human Resources	Other	County Attorney	Budget Services				County Manager / P.W. Director
					Analyst	Risk	Grants	Mgr.	
<u>J. Lavender</u> Date: 11-14-06	N/A	N/A		<u>[Signature]</u> S. Covert Date: 11/15/06	<u>[Signature]</u> 11-15-06	<u>[Signature]</u> 11/15/06	<u>[Signature]</u> 11/15/06	<u>[Signature]</u> 11-16-06	<u>J. Lavender</u> Date: 11-14-06

11. Commission Action:

- Approved
- Deferred
- Denied
- Other

RECEIVED BY COUNTY ADMIN: [Signature]
 11-15-06
 8:54 AM
 COUNTY ADMIN FORWARDED TO: [Signature]
 11-14-06
 3PM

Rec. by CoAtty
 Date: 11/14/06
 Time: 4:25 PM
 Forwarded To: [Signature]
 11/15/06
 9:00 AM

As deemed necessary by the FDOT, LCU has subordinated certain utility easements that it owned to FDOT. As these easements contained a portion of the subject water main facilities, the cost to relocate those facilities is considered to be reimbursable and will be totally funded by FDOT.

The actual bid amount (\$429,982.00 plus 10% contingency and 2% administration fees) is \$481,579.84. LCU's estimated portion of the total construction cost to perform the non-reimbursable utility adjustments and relocations is \$381,266.00, which is on deposit with FDOT. Therefore, the additional funds required from the County is \$100,313.84 (whereas the check needs to be cut on December 5 and mailed ASAP).

Funds will be available upon approval of carryovers in Account No.: 20710048730.506510

Attachments:

E-mail dated 11-8-06

Copy of Memorandum of Agreement (2004)

Copy of Utility Work Agreement (2004)



Hoskins, Kim P.

From: george.radford@dot.state.fl.us
Sent: Wednesday, November 08, 2006 1:43 PM
To: Hoskins, Kim P.
Cc: Mamott, Thomas A.; Velez, Sergio I.; jerrold.whitt@dot.state.fl.us; delong@pbsj.com; Steven.Walls@dot.state.fl.us
Subject: RE: Bid Tab Request, FPI: 195766-1

Kim,

Item 0999-25 on page 13 where the description reads, "Initial Contingency Amount (Do Not Bid)" is a contingency item loaded into the system for construction so that monies would be available for them to work with, without having to do an SA. This item # & monies will be included in the 10% contingency, not in the bid amount-Material/Labor.

Original Eng Cost Est in JPA	\$337,900.00	
Bid Amount-Material/Labor		\$429,982.00
On deposit with FDOT from Lee Cty.		-\$381,266.00
10% Contingency (includes money for item # 0999-25)		+\$ 42,998.20
2% CEA		+\$ 8,599.64

Total due from County **+\$100,313.84**

Should you have any further questions, please let me know.

Thanks,

George

George Radford
Utility Project Manager/TBE Group, Inc.
Office Phone: 863-519-2528
Cell Phone: 863-990-8902
Fax: 863-519-5136
E-Mail: george.radford@dot.state.fl.us

"Hoskins, Kim P."
<KHoskins@leegov.com>

11/07/2006 03:25
PM

<george.radford@dot.state.fl.us> To

"Mamott, Thomas A."
<MAMOTTTA@leegov.com>, "Velez,
Sergio I." <VELEZSI@leegov.com> cc

Subject

RE: Bid Tab Request

George,
I've reviewed the bid, and it appears everything is in order: quantities matching our estimate and non-reimbursable vs. reimbursable. My only question is Item 0999-25 on Page

13 where the description reads, "Initial Contingency Amount (Do Not Bid)." The lump sum for that item is \$1,500. We are already adding a 10% Contingency (per the JPA) on top of the bid, but this item is within the bid, from where we figure said 10% Contingency and the 2% CEA (administrative fees). Could you please explain this before we take it to the Board?

I spoke with our attorney, and since the difference between the Agreement amount and the apparent low bid is over \$100,000, regardless of language in the Agreement stating we owe the difference, he recommends we have Board consent.

Assuming we receive the answer to our question in a timely fashion, there is a possibility of making the November 21st meeting, if we are able to "walk-it-through" departmental review. It will more likely be presented at the November 28th meeting, with a check cut on December 5th.

Thanks,
Kim P. Hoskins, PE
Engineer Manager I
Lee County Utilities
Phone - (239) 479-8571
Fax - (239) 479-8176
khoskins@leegov.com

-----Original Message-----

From: Steven.Walls@dot.state.fl.us [mailto:Steven.Walls@dot.state.fl.us]

Sent: Tuesday, November 07, 2006 8:47 AM
To: Hoskins, Kim P.
Cc: george.radford@dot.state.fl.us; chris.smith@dot.state.fl.us
Subject: Re: Bid Tab Request

Kim,

As requested please see attached file. Please remember that this file is Confidential.

(See attached file: T1209_breakout.doc)

If I can be of further assistance, please advise.

Steve Walls
District Estimates Coordinator
District 1
(863)519-2612
SC 557-2612
Fax (863)534-7172
SC Fax 515-0564

This communication is confidential and intended only for the recipient(s).

Any other use, dissemination, copying, or disclosure of this communication is strictly prohibited. If you have received this communication in error, please notify sender and destroy it immediately

"Hoskins, Kim P."

<KHoskins@leegov.

com>

To

<steven.walls@dot.state.fl.us>

11/06/2006 11:09

cc

AM

<george.radford@dot.state.fl.us>,

"Mamott, Thomas A."

<MAMOTTTA@leegov.com>, "Velez,

Sergio I." <VELEZSI@leegov.com>,

"Miller, Kristin A."

<MILLERKA@leegov.com>

Subject

Bid Tab Request

Steve,

In order for us to obtain the remaining non-reimbursable amount of our JPA for Metro (Hanson to SR82), we need evidence of the apparent low bid.

If you could please forward that information, we will get a check as soon as possible.

Thank you,

(Embedded image moved to file: pic31111.jpg) Kim P. Hoskins, PE Engineer Manager I Lee County Utilities Phone - (239) 479-8571 Fax - (239) 479-8176 khoskins@leegov.com

-----Original Message-----

From: george.radford@dot.state.fl.us

[mailto:george.radford@dot.state.fl.us]

Sent: Friday, November 03, 2006 11:47 AM

To: Hoskins, Kim P.

Cc: Velez, Sergio I.; Mamott, Thomas A.; jerrold.whitt@dot.state.fl.us; delong@pbsj.com

Subject: Re.: JPA with Lee County Utilities; FPI: 195766-1, SR-739, Metro Pkwy, from Hanson Street, north, to SR-82

Kim,

This is in reference to the JPA Agreement, Utility Work by Highway Contractor Agreement, dated April 27, 2004, between the Department and Lee County Utilities.

The Department has received bids on this project. It appears the low bidder will be awarded the contract. First posting date will be November 15, 2006.

The low bid amount came in over the anticipated engineer's cost estimate and monies on deposit from the County. The Department needs \$101,995.00 from the County prior to the posting date of November 15, 2006. OR, if that date can not be met, advise a date the County can meet.

The following is how the above mentioned amount was calculated:

Original Engineers Cost Estimate	\$381,266.00
----------------------------------	--------------

Bid Amount	\$431,482.00	
\$431,482.00		
On Deposit with the Department from Lee County	\$381,266.00	-\$381,266.00
10% Contingency	\$ 43,149.00	+\$
43,149.00		
2% CEA	\$ 8,630.00	+\$
8,630.00		
 Total Due from County		 \$101,995.00

Please advise with a response concerning submitting the funds on or by the above mentioned posting date or a date the City can meet.

Thanks,

George

George Radford
Utility Project Manager/TBE Group, Inc.
Office Phone: 863-519-2528
Cell Phone: 863-990-8902
Fax: 863-519-5136
E-Mail: george.radford@dot.state.fl.us

MEMORANDUM OF AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of MAY, 2004, 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".

RECEIVED
DEPT. OF TREASURY
DIV. OF FIN. SVCS.
MAY - 7 AM 11:06
STATE OF FLORIDA

WITNESSETH

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

Main Financial Project No.: 195766 - 1
County: Lee

hereinafter referred to as the "Project".

WHEREAS, FDOT and the Participant entered into a **Locally Funded Agreement** dated April 27, 2004, 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 \$ 378,448.00 (Three Hundred Seventy Eight Thousand Four Hundred Forty Eight 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.

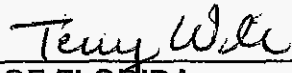
4. The FDOT's Comptroller or designee shall be the sole signatories on the escrow account with the Department of Financial Services and shall have sole authority to authorize withdrawals from said account.

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 ~~of~~ 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,


STATE OF FLORIDA
DEPARTMENT OF FINANCIAL SERVICES
DIVISION OF TREASURY

APPROVED AS TO FORM:


COUNTY ATTORNEY'S OFFICE

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

BY: 
JOHN ALBION, CHAIRMAN

CONTACT ADDRESS

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

FEDERAL EMPLOYER I.D. NUMBER

59-6000702

- 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

If to the UAO:

Utilities Director (c/o Mike Crumpton), 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) John E. Albion

DATE: 2-17-04

(Typed Name: John Albion)

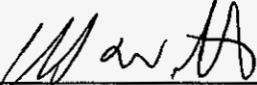
(Typed Title: Chairman - Lee County Board of County Commissioners)

APPROVED AS TO FORM

OFFICE OF COUNTY ATTORNEY

Recommend Approval by the District Utility Office

BY: (Signature)  DATE: 4-22-04

FDOT Legal Review

BY: (Signature)  DATE: 4/26/04
District Counsel

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

BY: (Signature)  DATE: 4-27-04

(Typed Name: Michael J. Williams, PE)

(Typed Title: Director of Production)

FEDERAL HIGHWAY ADMINISTRATION (if applicable)

BY: (Signature) _____ DATE: _____

(Typed Name: N/A)

(Typed Title: N/A)

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

Financial Project ID: 195766-1-56-03 / -04	Federal Project ID: N/A
Work Program Item No. (old): N/A	County/Section No: LEE / 12014
State Job No. (old): N/A	District Document No: 1

THIS AGREEMENT, made and entered into this 27th day of Apr., year of 2004, by and between the **STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION**, hereinafter referred to as the "FDOT", and LEE COUNTY, A POLITICAL SUBD. OF THE STATE OF FLORIDA, 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 from Hanson Street to State Road 82 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, 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 FDOT, 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 a final engineering design, plans, technical special provisions, and a cost estimate for the Utility Work (hereinafter referred to as the "Plans Package") on or before May 29, 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 is updated and conflicts with the FDOT's 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

- 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: Draft, Preliminary, & 100%

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: No Exceptions

These exceptions shall be handled by separate arrangement.

- j. 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**.
- k. 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

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

- l. The cost of any design work performed pursuant to this paragraph 1 shall be reimbursed by a separate agreement.
- m. As part of the final submittal of the Plans Package, the **UAO** shall also submit an estimate of the amount of the cost of the Utility Work that should be paid for by the **UAO**, hereinafter referred to as the "**UAO Participating Amount**". The determination of that amount shall be based on the credit required for any increase in the value of the new Facility and for any salvage derived from the old Facility. These credits shall be determined as follows:

- (1) Increase in value credit.
 - (a) Expired Service Life. If an entirely new Facility is constructed and the old Facility retired, credit for the normally-expected service life of the old Facility applies.
 - (b) Upgrading. A percentage of the total cost of the Relocation Work, based on the extent of the betterment obtained from the new Facilities will be applied.
- (2) Salvage Value. The **FDOT** shall receive fair salvage value credit for any salvage which will become available to the **UAO** as a result of the Utility Work.

The submittal shall show the calculation of the **UAO Participating Amount** in detail for each of the credits required above. The **FDOT** shall review the calculations and advise the **UAO** of any objections. In the event that the parties cannot come to an agreement as to the **UAO Participating Amount**, the **FDOT's** determination of the amount shall prevail.

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. 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

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 the **FDOT**.

- d. Except for the inspection, testing, monitoring and reporting to be performed by the **UAO** in accordance with Subparagraph 2. c., the **FDOT** will perform all contract administration for its construction contract.
- e. The **UAO** shall fully cooperate with the **FDOT** and the **FDOT's** contractor in all matters relating to the performance of the Utility Work.
- f. 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.
- g. 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. Except as otherwise provided herein, the **FDOT** 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 **UAO**. The **FDOT** shall not be responsible for the cost of delays caused by such adjustments or changes to the extent they are attributable to the **UAO** pursuant to Subparagraph 4.a.
- b. At such time as the **FDOT** prepares its official estimate, the **FDOT** shall notify the **UAO** of the **UAO** Participating Amount, determined in accordance with Subparagraph 1.m. hereof.
- c. At least Thirty (30) days prior to the date on which the **FDOT** advertises the Project for bids, the **UAO** will pay to the **FDOT** the **UAO** Participating Amount.
- d. If the **UAO's** percentage contribution to the portion of the bid of the contractor selected by the **FDOT** which is for performance of the Utility Work (calculated by dividing the **UAO's** Participating Amount by the amount of the **FDOT's** official estimate) exceeds the amount of the deposit made pursuant to Subparagraph c. above, then 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 percentage contribution of the **UAO**. If said portion of the bid is less than the amount on deposit, the excess deposit shall be returned to the **UAO**.
- e. The **FDOT** may use the funds paid by the **UAO** for payment of the cost of the Utility Work.

f. 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.

g. Upon final payment to the contractor, the **FDOT** intends to have its final and complete billing of all costs incurred in connection with the Utility Work within three hundred sixty (360) days. All cost records and accounts shall be subject to audit by a representative of the **UAO** within three (3) years after final close out of the Project.

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**.

5. Out of Service Facilities

No Facilities shall be placed out of service unless specifically identified as such in the Plans Package. 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 **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. In the event that the out of service Facilities would have qualified for reimbursement only under Section 337.403(1)(a), Florida Statutes, 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. In the event that the out of service Facilities would have qualified for reimbursement for other reasons, removal of the out of service Facilities shall be reimbursed by the **FDOT** as though it had not been placed out of service. 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** until such time as the breach is cured.
 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.