

August 6, 2008

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I-75 RTMC and I-75 Corridor FMS and ITS Integration Project
414733-1-52-01; 416412-1-52-01; and 416413-1-52-01

ISSUE:

Is the Contractor entitled to additional compensation for extending the Cable TV service for 1.19 miles from its existing termination to the project site?

CONTRACTOR'S POSITION:

The Florida Department of Transportation (the "Department") has demanded that Miller pay to extend the Comcast cable TV service over a mile from the nearest existing cable lines to the RTMC. The Request for Proposal ("RFP") does not require the Contractor to pay to extend the Comcast service to the RTMC and Miller did not include this cost in its proposal. Miller filed a notice of intent to claim for this additional cost on May 13, 2008.

Attachment C to the RFP provides the Design-Build Minimum Technical Requirements ("the MTR") for the project. Section 17 of the MTR describes the utility requirements, including power service, satellite TV, cable TV and internet service. The Contractor acknowledges that Article 17.1 requires the Design-Build firm to install the following utilities in the RTMC:

- Power service
- Satellite TV
- Cable TV; and
- Internet Services

The aforementioned systems will be installed under this contract in coordination with the local service provider and with the Department for the installation of the equipment. The Contractor points out that he is instructed by the RFP to provide power and pay the electric utility for the extension of power lines to several locations along Alligator Alley. If the Department intended for the Contractor to pay for the extension of the Cable line they would have addressed it in the MTR as they did for the power lines along Alligator Alley.

The Department's reliance on the subsections on Pages 21 and 30 of the RFP covering the bidder's responsibility for "Verification of Existing Conditions" is misplaced. The

language in these sections explaining Miller's obligation to verify existing conditions states:

By executing this contract, the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations.

The above provisions regarding verification of existing conditions outline a customary industry practice that a contractor is required to verify conditions at the site of the project. In rebutting the FDOT Position Paper, Miller maintains that the "site investigation" language is limited to the site of the project (the RTMC) and does not include offsite utilities. In no way do these provisions suggest that Miller had an obligation to investigate the distance between the project site and off-site utility services, such as Cable TV service. Their rebuttal goes further in alleging that contract language calling for the installation of cable service "in" or "into" the RTMC does not obligate Miller to pay the cost of extending service offsite.

The Contractor maintains that it is the industry standard that the Owner pays for the extension of utilities to the project, not the Contractor. Miller did not include the extension of cable service in their bid because of this practice and for the reasons given above.

OWNER'S POSITION:

The Department contends that the Department, by stating in the RFP the bidder is to include the cost of extending power on Alligator Alley, was obligated to also list other utility extensions they expected the Design-Build Firm to pay for, has no contractual basis or merit. The reason that the RFP specifically detailed the areas in the I-75 corridor, specifically "Alligator Alley", was that the Department did not want solar powered devices, except for the Safety Barrier Cable System beacons which were already solar powered. The Department knew that obtaining the power in these areas would be difficult and therefore specifically elaborated on this situation.

The normal usage of the words "shall procure" means to "do whatever it takes to make it so". Part of what it takes to procure and install the Cable TV service to the RTMC is 1.19 miles of CATV service that should have been in the proposer's bid price.

The Department's position is that its RFP envisioned the proposers taking all necessary steps to ascertain all conditions necessary to provide all the services and benefits outlined in the RFP. Miller's Technical Proposal assured the Department's selection team that they (Miller Electric Company) had done just that through "intense field reviews" and by designing a "complete solution" for this project.

BOARD FINDINGS:

Installation of the cable TV system is covered in the Design-Build Minimum Technical Requirements (MTR) under section 17. The Board finds that the language of this Section does not make clear who is responsible for extending cable service for considerable distances from existing terminals to the RTMC site.

Section 17 calls specifically for the proposer to include the cost of extending electric power along Alligator Alley while saying nothing about the cost of a significant off-site extension for cable TV. This creates an ambiguity in the contract language. It is not clear if the RFP is citing the Alligator Alley electric power because the Department does not want solar power, as they allege, or because this is a special case where they want the Design-build Firm to cover the cost of the utility extension.

The Board finds, as does the Department, that the use of the word “procure” connotes more than one act or step is necessary to obtain something. However, this is the usual case when providing a utility to a building where arrangements must be made for feeds, meters, and the contractor must act as intermediary between the utility and the owner/end user—even when the existing service is to the property line. Thus “procuring” the cable TV service could reasonably be interpreted by bidders as requiring the usual steps without paying for significant off-site utility installation.

The Department had an opportunity in Section 17.3. Functional Requirements, 17.6. Construction Requirements or 17.11. Basis of Payment, to clearly specify that it expected proposers to include whatever offsite extensions are necessary, regardless of length or cost. This was not done in the opinion of the Board.

The Board does find, however, that under the verification of existing conditions provision of the RFP, Miller had a responsibility at bid time to ascertain where the cable TV terminus was and include a reasonable fee for work to extend service from near the RTMC property to the building. Under the contract language from the RFP discussed above in the Board Findings (4 Paragraphs above), Miller could assume the bulk of the 1.19 mile extension would be arranged by the Department and the utility. The Board suggests that ¼ mile is a reasonable (negotiated between the parties) length for Miller to have included in its bid for connecting to an offsite terminus.

Based on our review of the contract documents, and position papers with rebuttals we find the contract does not clearly specify that extensive offsite utility extensions are to be included in the contract price. The RFP, in citing payment for power extensions only, contributed to this lack of clarity. Miller should have included a reasonable fee for work to extend service from near the RTMC property to the building.

BOARD RECOMMENDATIONS:

The Board recommends entitlement for the cost of extending the cable TV service to a point within ¼ mile of the RTMC property.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent or preclude the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required in 15 days. Failure to respond constitutes an acceptance of this recommendation by that party.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully submitted
Disputes Review Board

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| Peter A. Markham | DRB Chairman |
| Michael Bone | DRB Member |
| Felix Peguero | DRB Member |

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS

DRB Chairman.