

## **DRB HEARING**

### **OHL/Community Asphalt Corp. vs. FDOT District Four**

FDOT Project No. 227775-1-52-01

Contact No. E4N82

County: Broward

**“ Is OHL/Community Asphalt Corp entitled to additional time and costs for the efforts to design and construct the sewer lines from the trunk line on SR-7 to the City of Hollywood’s future lift Station on N. 59th Terrace?”**

February 18, 2019 9:00 AM

#### **Members of the Dispute Review Board:**

Rammy Cone, Member

Jim Weeks, Member

Bill Deyo, Chairman

#### **Project Information:**

Type: Design-Build      Designer: Wantman Group, Inc.      CEI: Eisman & Russo

Contract Amount: \$29,568,100.      Duration: 1403 days

**Scope of Work:** Upgrade SR-7 from Fillmore Street to south of Stirling Road, including 6 lanes, raised median, sidewalks, drainage, signalization, lighting, ATMS communications, and a new water and sewer system for the City of Hollywood.

**Location:** SR-7 from Fillmore Street to Stirling Road, Broward County, Florida

## **Contractor's Position:**

The OHL Team respectfully submits the following position regarding entitlement for additional time and costs for the efforts to design and construct the sewer lines from the trunk line on SR-7 to the City of Hollywood's lift Station on N. 59th Terrace. The basis of entitlement is that additional work was required to complete the sewer installation as directed by FDOT and the fact that there was no way a bidder could have assumed or would have known that the limits of the sewer extended passed the FDOT limits.

### **Position Statement – Summary**

Over the course of the Design Phase of the E4N82 contract, OHL's lead engineer WGI, completed design of the proposed utilities required by the Design-Build RFP under FPID 227775-1-56-01. The Department entered into a Utility Work by Highway Contractor Agreement with the City of Hollywood to perform the proposed utility work in conjunction with the roadway project. Therefore, the utility work was differentiated into a separate project for financial reasons. Design included new sanitary sewer, two water mains, lateral connections and all associated features such as valves and meters.

### **Pre-Award (Procurement Phase)**

During the procurement phase, the Request for Proposal (RFP) data was provided by the FDOT. This data included an abundance of information pertaining to the project and were split into two categories, Attachments and Reference Documents. The RFP defines a Reference Document as documents that are being provided for reference and general information only. Our focus is on Reference Document No. 2 Concept Utility Plans and the associated Concept Utility CADD file reference document provided by the FDOT. These files were developed by the City of Hollywood and ultimately handed over to FDOT for inclusion into the project documents sent out to all Design Build Teams pursuing the project. The Concept Utility Plans PDF on Sheet U-18 provides a note describing that the sanitary sewer design/construction is to be capped at the FDOT work limits which is consistent with what the CADD file represents justifying our technical proposal approach. Any additional work the City of Hollywood claims was to be incorporated falling outside the FDOT work limits was deemed future work as it depicted how a future project would tie into the Design Build scope of work accommodating a future lift station which is to be constructed by the City of Hollywood. The FDOT work limits on Sheridan end at the curb return tie-in point meaning the construction of the sanitary sewer is to end at this point as well (Attachment 01 - Page 4). The OHL Team moved forward utilizing the City of Hollywood/FDOT provided CADD file ending the sanitary sewer design and construction at the FDOT work limits. A clip from the FDOT provided CADD file can be found in (Attachment 02 - Page 7).

This design was submitted to FDOT with our final Technical Proposal Plans April 2014 (Attachment 03 – Page 8). At this time the Department had the responsibility to review the Technical Proposals submitted and develop questions/comments on the submittal to clear up any concerns they may have had. These questions were provided to the Team for review and a meeting was held in May 2014 to discuss the questions and/or concerns with the FDOT reviewers. The questions provided by the FDOT do not include any concerns with the design of the sanitary sewer (Attachment 04 – Page 9).

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The OHL Team proceeded to bid the design plans submitted to FDOT taking into account any necessary changes based on the questions and/or comments during the Question and Answer meeting. Again, no questions or concerns on the design and scope of the sanitary sewer plan was mentioned.

### **Post-Award (Final Design and Construction Phase)**

Immediately following award, a design coordination meeting was held with the City to review our design approach to ensure all parties were in agreement. These meeting minutes can be found in Attachment 05 – Page 10 and again no comments or concerns with work limits pertaining to the sanitary sewer. Following the design coordination meeting, the OHL Team was required to make three submittals to FDOT for review and comment. These submittals were as follows:

- 90 Percent Plans
- Final Plans
- Construction Plans (Plans ready to be stamped Released for Construction)

The water and sewer plans were submitted to FDOT at each of these phase submittals where again no comment was made on the design of the sanitary sewer limits at Sheridan Street. These plan submittals and comments can be found in Attachment 06

– Page 13.

The OHL Team also made supplemental submittals directly to the City of Hollywood ensuring the City was aware of the design

and that they were given every opportunity to make comments on issues they may have had. These submittals were as follows:

- 65 Percent Plans
- 100 Percent Plans

These supplemental plan submittals along with the City of Hollywood comments can be found in Attachment 07 – Page 18. Both the 65 percent and 100 percent plans submitted to the City depict the sanitary sewer limits on Sheet 22. These limits remained constant from the Technical Proposal submittal through Final design. The City of Hollywood did provide comments on the plans submitted and even had comments on Sheet 22 but never questioned or commented on the design limits.

Following all submittals the Team proceeded to acquire permits from Broward County Wastewater and Florida Department of

Environmental Protection. Each of these permits were based of the design plans and required City of Hollywood review and approval. The approved permit applications can be found in Attachment 08 – Page 28.

In July 2015, the design plans were approved and stamped Released for Construction by the FDOT. It was not until July 2016, a year later and over two years from project award that the City of Hollywood commented on the sanitary sewer work limits at

Sheridan Street. The email notifying the Team of the additional sewer can be found in Attachment 09 – Page 43.

### **Position Statement – Conclusion**

The RFP states *“The Design-Build Firm shall include all coordination, design and construction services necessary to install the utilities in general conformance with the utility concept plans supplied in the RFP. The Design-Build Firm may make adjustments to the utility plans to avoid/mitigate utility conflicts, improve maintenance of traffic, ensure connectivity and compatibility with existing facilities, or achieve other similar plan benefits. However, the Design-Build Firm shall not propose changes which would result in decreasing the capacity, service life, maintainability, or otherwise negatively affect the service provided.”* (Attachment 10 – Page 44) The design presented during the procurement phase, which was ultimately approved by FDOT and Released for

Construction, is in fact designed in general conformance with the utility concept plans provided in the RFP. The design provided

## **FDOT Position**

### **I. PROJECT DESCRIPTION**

OHL/Community Asphalt (CAC) (herein referred to as the Design-Build Firm (D/B Firm)) entered into a contractually binding agreement with the Florida Department of Transportation – District IV on June 17, 2014. The original contract amount was \$29,568,100.00 and original contract duration was 1403 days. The purpose of the contract was for the design and reconstruction of SR-7 from Fillmore Street to south of Stirling Road. The improvements along this corridor include construction of three travel lanes in each direction separated raised medians, new curb and gutters, sidewalks, bicycle lanes, ADA ramps, a new closed drainage system with detention ponds and conveyance swales, upgrading existing and installing new signalized intersections, new lighting and ATMS communications throughout the corridor. The project also includes the design and installation by the D/B Firm of a new water system and a new sanitary sewer system along SR-7 on behalf of the City of Hollywood.

### **II. ISSUE IN DISPUTE**

#### **D/B Firm Issue Statement**

OHL/Community Asphalt Corp is requesting the DRB to provide recommendation of Entitlement for additional time and costs for the efforts to design and construct the sewer lines from the trunk line on SR-7 to the City of Hollywood's lift Station on N. 59th Terrace. The basis of entitlement is that extra work was required to complete additional work requested/directed by FDOT, OHL/Community Asphalt Corp maintains that this was not part of their original scope.

#### **Department's Position**

It is the Department's position that during design of the project, the D/B Firm omitted the connection of the force main and sanitary sewer line from SR-7 to the future City of Hollywood's lift station as provided on sheet U-23 of the RFP Utility concept plans .

### **III. BACKGROUND INFORMATION**

- A. On July 19th, 2016, the City of Hollywood noticed that the section of the sanitary sewer system, from the SR-7 trunk line to the lift station on N. 59th Terrace, was not included in the approved RFC plans as it was intended to be designed and constructed as shown in the Utility Concept Plans included in the RFP
- B. CEI corresponded with the Designer and asked them to review and address this section sanitary sewer lines from the SR-7 trunk line to the lift station on N. 59th Terrace. The D/B Firm responded with their position that the approved RFC plans met the intent of the RFP, their reasons as follow:
  - i. In the RFP, the Department provided water and sewer concept plans in PDF and CADD forms. Although the PDF file shows the section of sanitary sewer from the SR-7 trunk line to the lift station on N. 59th Terrace, the CADD files do not show it, and apparently the D/B Firm designed the project per CADD file .

- ii. The CAD file provided by the Department in the RFP documents shows the limits of the sanitary sewer lines end at the FDOT work limits. The section of sewer lines from the SR-7 trunk line to the lift station on N. 59th Terrace are past the Department Work limits.
  - iii. The D/B Firm's Technical proposal never included this section of Sanitary sewer lines
  - iv. The D/B Firm submitted 90%, 100% and RFC and this section was not mentioned in the comments from the City.
- C. The Department directed the D/B Firm to design and construct the section of Sanitary sewer lines from the SR-7 trunk line to the lift station on N. 59th Terrace .
  - D. The D/B Firm submitted a Notice of Intent to Claim (NOI) .
  - E. The CEI responded to NOI.
  - F. This work was completed at the end of October 2017.

#### IV. FDOT'S POSITIONS & ACTION REQUESTED

##### A. **Contract Requirements** (*Italics will be used throughout the documents to quote sections of the RFP*).

- 1) **Governing Documents:** Per Division I of the contract specifications, section 5-2 (page 39 of 116) "*in case of discrepancy, the governing order of documents is a follow:*
  - i. *Request for Proposal (RFP) Packages*
  - ii. *Special Provisions*
  - iii. *Technical Special Provisions*
  - iv. *Plans*
  - v. *Design Standards*
  - vi. *Developmental Specifications*
  - vii. *Supplemental Specifications*
  - viii. *Standard Specifications*

**Supportive Information:** Contract documents show the RFP as the top reference document in the hierarchy of documents when there are questions or discrepancies in information between documents. The information presented in our position below will reference the RFP.

- 2) **RFP direction to construct:** The FDOT's Request for Proposal (RFP) for this project, Section V (Design and Construction Criteria), subsection P (Utility plans (22775-1-56-01) – (Page 59 of 71) states: "*The Design-Build Firm shall include all coordination, design and construction services necessary to install the utilities in general conformance with the Utility Concept Plans supplied in the RFP*"

**Supportive Information:** The RFP clearly directs the D/B Firm to design and construct the sewer system in conformance with the utility concept plans. Per the attachment, it was the intent of the City of Hollywood to have the D/B Firm design and install this section of sewer.

- 3) **The City's Utility Concept plans were provided as "Reference Documents":** The RFP clearly states (Pages 3 and 4 of 71): *"The following documents (Reference Documents) are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for reference and general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these reference documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived."*

**Supportive Information:** The sewer lines disputed by the D/B firm, which was incorporated into the RFP through Section V (Design and Construction Criteria) subsection P (Utility Concept Plans)

**Contract Requirements (cont.)**

- 4) **The Waiver of irregularities in the RFP** states (page 12 of 71) :
- i. *Any design submittal that are part of a proposal shall be deemed preliminary*
  - ii. *Preliminary design submittals may vary from the requirements of the Design and Construction Criteria. The Department, at their discretion, may elect to consider those variations in awarding points to the proposal rather than rejecting the entire proposal.*
  - iii. *In no event will any such elections by the Department be deemed to be a waiving of the Design and Construction Criteria.*
  - iv. *The Proposer who is selected for the Project will be required to fully comply with the Design and Construction Criteria for the price bid, regardless that the proposal may have been based on a variation from the Design and Construction Criteria.*

**Supportive Information:**

- i. The Waiver of Irregularities in the RFP, clearly tells all proposed bidders that any designs submittals such as Technical proposals are deemed "preliminary" in nature and as such can vary from the Design and Construction criteria; however, the final design shall fully comply with the Design and Construction Criteria, which in this case includes the design and construction of the section of sanitary sewer lines in question.
- 5) **RFP Commitment 7** (page of 23 of 71) , *"Design-Build Firm Responsibility: the proposed water and sewer utilities for the City of Hollywood shall be designed and constructed in general conformance and to meet the intent of the design as shown in the conceptual utility plans included with this RFP".*

**Supportive Information:** In addition to Section V (Design and Construction Criteria), subsection P, of the RFP, this section also directs the D/B Firm to design and construct the

sanitary sewer system as shown on the Utility Concept Plans, which includes the connection of the SR-7 Sewer truck line to the lift Station on N. 59<sup>th</sup> Terrace.

**B. Department's Position to D/B Firm's statements**

- 1) It is the D/B Firm position that in the RFP the Department provided water and sewer concept plans in PDF and CADD forms and that although the PDF file shows the section sanitary sewer in question, the CADD files did not show it, therefore the D/B Firm designed the project per CADD file.

**Department's Supportive Information**

- i. The RFP did not include any CADD files, contrary the allegations made by the D/B firm.
- ii. RFP Reference Document #2, Utility Concept Plans, in pdf was the only document provided the D/B Firm by the FDOT for the work disputed by the contractor.
- iii. FDOT Procurement office produced record copy original DVD with all files provided to bidders, which shows that no such CADD file was included for the disputed work .
- iv. Contract Requirements RFP, section 3, clearly states: *"All information contained in these reference documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived."*
- v. Per the RFP, section III, subsection D & F:

*"D) Pre-Proposal Meeting (Page 10 of 71) Attendance at the pre-proposal meeting is mandatory. Any affirmatively declared proposer failing to attend will be deemed non-responsive and automatically disqualified from further consideration. The purpose of this meeting is to provide a forum for the Department to discuss with all concerned parties the proposed Project, the design and construction criteria, Critical Path Method (CPM) schedule, and method of compensation, instructions for submitting proposals, design exceptions/variations, and other relevant issues. In the event that any discussions at the pre-proposal meeting require, in the Department's opinion, official additions, deletions, or clarifications of the Request for Proposal, the Design and Construction Criteria, or any other document, the Department will issue a written addendum to this Request for Proposals as the Department determines is appropriate. No oral representations or discussions, which take place at the pre-proposal meeting, will be binding on the Department. FHWA will be invited on oversight Projects, in order to discuss the Project in detail and to clarify any concerns. Proposers shall direct all questions to the Departments Question and Answer website:*

*<https://www3.dot.state.fl.us/BidQuestionsAndAnswers/Proposal.aspx/SearchProposal>*

F) Questions and Answers Session, (page 10 of “The Department may meet with each Proposer, formally, for a Question and Answer session. FHWA shall be invited on FA Oversight Projects. The purpose of the Q & A session is for the Technical Review Committee to seek clarification and ask questions, as it relates to the Technical Proposal, of the Proposer. The Department shall terminate the Q & A session promptly at the end of the allotted time. The Department shall audiotape record or videotape all or part of the Q & A session. All audiotape recordings or videotape recordings will become part of the Contract Documents. The Q & A session will not constitute “discussions” or negotiations. Proposers will not be permitted to ask questions of the Department except to ask the meaning of a clarification question posed by the Department. No supplemental materials, handouts, etc. will be allowed to be presented in the Q & A session. No additional time will be allowed to research answers. Within one (1) week of the Q & A session, the Design-Build Firm shall submit to the Department a written clarification letter summarizing the answers provided during the Q & A session. The Design-Build Firm shall not include information in the clarification letter which was not discussed during the Q&A session. In the event the Design-Build Firm includes additional information in the clarification letter which was not discussed during the Q&A session and is not otherwise included in the Technical Proposal, such additional information will not be considered by the Department during the evaluation of the Technical Proposal”

OHL/CAC’s Contract with the Department includes all the questions that were made to the Department by all D/B Firms at the time of bidding. There was no question asked by any firm regarding the work disputed by the D/B firm.

- 2) The section of sewer lines from the SR-7 trunk line to the lift station on N. 59th Terrace falls within the project work limits \_

**Department’s Supportive Information**

Although this sanitary sewer lines fall outside of SR-7’s reconstruction limits on Sheridan Street, it does not fall outside of the work limits. The D/B Firm designed and constructed over 640 LF of drainage pipe and structures outside of the SR-7 reconstruction limits on Sheridan Street and on N 59th Terrace, in the same area where the Sanitary Sewer lines were installed.

- 3) The D/B Firm Technical proposal did not include the Sanitary sewer lines in question,  
**Department’s Supportive Information**
  - i. Failure of the DBF to include every RFP requirement in their technical proposal does not relieve them of their contractual obligation to complete all work in the contract.



- 4) 90% plans, 100% plans and RFC plans were submitted to the City for review and this section was not mentioned in the comments from the City of Hollywood.

**Department's Supportive Information**

- i. Per Division I, section 5-4 of the contract, *"Errors and omissions discovered in the plans or specifications are the total responsibility of the Design-Build Firm. The errors and omissions shall be brought to the attention of the Engineer of Record as well as the Engineer. Resolution of the question by Engineer of Record is intended, and will not at additional cost to the Department"*
- ii. Failure by a reviewer to catch an error does not constitute acceptance of that error by the reviewer or owner.

**Action Requested**

Based on the contract documents, contract requirements, and supportive information shown above it is a clear contract requirement the D/B Firm is required to design and construct the sanitary sewer system as shown on the Utility Concept Plans, which includes the connection of the SR-7 Sewer truck line to the lift Station on N. 59<sup>th</sup> Terrace. The Department respectfully requests the DRB to find no entitlement for additional time and/or compensation for the design and installation of the sanitary sewer system between the SR-7 trunk line and the City's lift Station on N. 59<sup>th</sup> Terrace.

**V. CONCLUSION**

D/B Firm has no entitlement for additional time and costs for the efforts to design and construct the sewer lines from the trunk line on SR-7 to the City of Hollywood's lift Station on N. 59<sup>th</sup> Terrace, nor any portion thereof, based on the following summation of facts:

- A. The RFP states "The Design-Build Firm shall include all coordination, design and construction services necessary to install the utilities in general conformance with the utility concept plans supplied in the RFP".
- B. The Utility Concept plans were incorporated into the RFP by reference of Section V (Design and Construction Criteria), subsection P (Utility plans (22775-1-56-01)
- C. The City's Utility Concept plans (in pdf) were provided in the "Reference Documents"
- D. The RFP does not list any CADD files in the list of Referenced Documents and therefore are not part of the contact, only the Utility Concept Plans were provided in the RFP.

### **DRB Responsibility:**

As agreed to by the Contractor and the FDOT, the DRB convened a hearing to determine entitlement for redesign of the Sheridan Street tie in of the sanitary sewers (gravity and force) to the City of Hollywood future lift station on N. 59<sup>th</sup> Terrace.

### **DRB Findings:**

1. The Utility Concept plans were incorporated into the RFP by reference of Section V (Design and Construction Criteria), subsection P (Utility plans (22775-1-56-01)
2. The City's Utility Concept plans (in pdf) were provided in the "Reference Documents"
3. 90% plans, 100% plans and RFC plans were submitted to the City for review and the missing section of sewer tie-in was not mentioned in the comments from the City of Hollywood. The Board finds this oversight very troubling. While this action by the City shows an extreme lack of due diligence and error by their review staff, the contract as written absolves the City of any delay or remuneration to the Contractor.
4. There were no City of Hollywood CADD files in the list of Referenced Documents and therefore are not part of the contract; only the Utility Concept Plans were provided in the RFP. If these City CADD files had been in the Reference Documents, there would have been clear ambiguity and the Contractor would have prevailed.
5. CADD files from the City of Hollywood were received by OHL/Community Asphalt through a Records Request to FDOT during the Technical Preparation period.

### **DRB Conclusion:**

The DRB has reviewed OHL/Community Asphalt's position and is aware of their position regarding additional work the City of Hollywood claims was to be incorporated falling outside the FDOT work limits and how OHL/Community Asphalt deemed this future work as it depicted how a future project would tie into the Design Build scope of work accommodating a future lift station which is to be constructed by the City of Hollywood.

The DRB has reviewed the FDOT position regarding design and construction of the sewer tie-in for the future lift station on 59<sup>th</sup> Terrace which includes:

1. The RFP and associated documents clearly show the intent of the City of Hollywood to have the sewer lines design and constructed to a point of tie in to the City's future lift station on 59<sup>th</sup> Terrace.
2. CADD files were not in the list of Referenced Documents and therefore are not part of the contract.

### **DRB RECOMMENDATION:**

**The DRB concludes that the project RFP and associated documents clearly indicate the required design and construction of the Sheridan Street tie-in to the City of Hollywood's future lift station site on 59<sup>th</sup> Terrace.**

After thorough consideration of the submittals, contract provisions, the DRB agrees with the FDOT position that OHL/Community Asphalt is not entitled to time and/or money for the extra cost of designing and constructing the sewer lines to tie in to the City of Hollywood's future lift station.

The DRB recommendation is the unanimous decision of the Dispute Review Board Members.

Respectfully submitted with the concurrence of all members,

*Bill Deyo*  
Bill Deyo, P.E. Chairman

Bill Deyo, DRB Chairman  
Rammy Cone, DRB Member  
Jim Weeks, DRB Member  
March 4, 2019