

REGIONAL DISPUTES REVIEW BOARD RECOMMENDATION

April 1, 2004

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Community Asphalt Corporation
14005 NW 186th Street
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Saud Khan, Project Manager
FL Department of Transportation
1655 NE 205th Terrace
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**RE: Financial Project Number 249614-2-52-01, Krome Avenue Intersection
Improvements, Contract No. E-6B49, Miami-Dade,
Regional Disputes Review Board Recommendation
Additional Compensation for Utility Relocation**

Dear Sirs:

The Florida Department of Transportation (Department) and Community Asphalt Corporation (CA) requested a hearing concerning the issue of additional compensation for utility relocation. Summaries of FDOT's and CA's positions were forwarded to the Regional Disputes Review Board (RDRB), and a hearing was held on March 19, 2004.

ISSUE: "Is the contractor entitled to additional compensation for utility relocation work?"

Contractor's Position

Community Asphalt Corporation contends they have been seriously impacted by the additional costs of utility relocations on this project. They request entitlement for compensable contract time due to delays caused by utilities, and compensation for the difference between monies being billed by the utility companies and the Department estimate that was submitted to each bidder prior to the letting.

The scope of work of Florida Power and Light (FPL), Bellsouth and Adelphia consisted of transferring conductive lines from the existing utility poles to new utility poles, which FPL was to install. This was to be done on five intersections on Krome Avenue. Throughout the course of construction on this project, they claim to have been repeatedly delayed due to the utility companies and their inability to coordinate and perform their work in a timely fashion. FPL completed the first intersection by November, and continued progressively to the other intersections. By December, Adelphia was capable of transferring their lines, as they are on higher poles than BellSouth's lines at these locations. On January 9, 2004, both Adelphia and Bellsouth were made aware of the readiness of the poles for transfer and were asked to mobilize and perform their work. Neither of the two companies has transferred any of their lines to the new poles as of this date. According to the project schedule, Phase II, Utility Relocation was to begin by December 1, 2003, and be completed by January 14, 2004.

They are seeking compensable time for the delay that was incurred from the 14th of January to the time the work is completed.

A discord exists between Community Asphalt Corporation and the Department regarding the difference between monies being billed by the utility companies and the Department's estimate. Prior to the bid letting, a letter was written to representatives of each of the utility companies involved in the project requesting that they submit an estimate for the value of their respective work. A response was received from each, denying CA's request and stating that they had previously submitted estimates to the Department and CA should obtain those numbers from the Department. In a Technical Questions and Answers correspondence dated April 22, 2003, the issue was raised by one of the bidders and an estimate from the Department was requested. The Department responded by supplying the bidders with dollar amounts for the work to be performed by FPL (\$500,000), Adelphia (\$40,000) and Bellsouth (\$200,000). As it turns out, these values were underestimated and the actual value of the work was: FPL (\$717,236), Bellsouth (\$355,169.52), and Adelphia has not sent an invoice nor mobilized to the worksite after numerous phone calls and correspondence.

Community Asphalt Corporation is seeking the following compensation:

Delay/Compensation:

$$\text{Per Spec \#5-12.6.2.1} \quad \frac{\$5,392,344 \times 8\%}{225 \text{ days}} = \$1,917.28 / \text{day}$$

Compensation from Estimate:

1. FPL - \$717,236.00 - \$500,000.00 = \$217,236.00
2. Bellsouth - \$355,169.52 - \$200,000.00 = \$155,169.52
3. Adelphia - N/A

Mr. Ariel Millan, P.E., of Gannett Fleming, Design Firm for Community Asphalt Corp., wrote FPL on April 15, 2003, requesting the assistance of FPL to provide the following information. He asked that the information be returned no later than Friday, April 25, 2003.

1. Cost and Time to design the relocation of FPL's facilities – existing poles located along Krome Avenue approximately 1000 feet North and South of each of the intersections.
2. Cost and Time to construct the relocation of FPL's facilities on a per pole basis.

The response received from Juana Telleria from FPL by email to Ariel Millan, dated April 24, 2003, states that "...I'll not be able to give you more info than what I already have given to FDOT. Please contact them."

Ariel Millen also wrote to Bellsouth Communications on April 15, 2003, asking the same questions as written to FPL. He received a response from Steve Massie, Project Manager for Bellsouth stating "...*Estimates of "Cost and time to design/construct the relocation of BST's facilities.."* have been provided to your client previously..." ... "Please contact your client to determine the status and availability of this information."

On April 15, 2003, Ariel Millan also wrote to Adelphia Communications asking the same information as requested of FPL and Bellsouth. As of this date, Community Asphalt Corp., has not had any delays resulting from Adelphia and does not anticipate any delays or charges for this utility work.

In the Technical Questions and Answers prior submitted to the 3 Design-Build Teams, the following question was submitted to the Department on the utility relocations:

"Question: In light of our team's efforts to comprise an estimate for the possible necessary relocations of existing utilities in the project scope, we have been very unsuccessful in obtaining any necessary information from the involved parties (i.e. FPL, Bellsouth, AT&T, MDWS, etc.) The general response that we have been receiving upon asking for any relevant information has been redirected to the FDOT. Apparently since the utility companies have not established a contract with the GC/Design-Build Team, they are not at liberty to disclose any such information and thus have acknowledged that all relevant information has already been sent to the FDOT. It is our opinion that in order to make this design-build presentation more organized, competitive and comparable as possible, FDOT should release some if not all necessary information to all three teams involved so that a more accurate result may arise from the presentation...."

"Reply: District 6 acknowledges the difficulties the DB firms may be having in obtaining reimbursable utility relocation estimates. In fact, we have found out that the problem has also occurred in other Districts. Therefore, we are now releasing to all DB firms the reimbursable estimates in our possession..."

FPL	\$500,000	(FPL's estimate)
Bellsouth	\$200,000	(Bellsouth's estimate)
Adelphia	\$ 40,000	(FDOT's estimate)

"I must remind all parties that the above information and any other utility information given is not guaranteed by FDOT to be necessarily accurate or reliable and that the three DB firms must do their own research, including field visits, in order to formulate their individual proposals, for which they are entirely responsible. Non-reimbursable utility relocations are, of course, paid by the Utility Companies themselves."

On September 18, 2003, FPL furnished a cost estimate for the utility work for \$717,236.00.

On October 7, 2003, Bellsouth gave Community Asphalt construction charges of \$74,130.65. On October 30, 2003, Bellsouth gave a construction charge of \$123,273.76 and on December 4, 2003, Bellsouth gave a construction charge of \$74,371.25, which totaled \$355,169.52.

The contractor feels that in order to be competitive with the other two bidders, he had to use the estimates given to the Department, because that is what the other bidders would have used and because they could not obtain any information from the utility owners. Since this was specialty work, they could not obtain estimates from other sources as no one else does this type of work.

Therefore, the contractor feels that he is entitled to the difference between what he bid and what is charged by the utility owners.

Community Asphalt Corp. furnished 7 photographs of the utility poles showing some of the delays or problems and the Department was asked to look at them prior to giving them to the RDRB. The Department had no objections to the photographs being presented to the board.

Department's Position

Community Asphalt submitted a request for additional compensation over and above the Lump Sum contract amount. Based on invoices presented to date, this amount is \$249,011.66. The Design-Build firm contends that it was not possible to get an estimate for utility relocation from the utility owners prior to bid. Contract E-6B49 was advertised as a Design-Build Contract with CEI services included in one Lump Sum unit price. This is in addition to a no bid contingency pay item of \$50,000.00. The Design-Build Team headed by Community Asphalt Corp. is responsible for completion of design, construction as well as provide CEI services for intersection improvements at five locations.

Plans provided at the time of advertisement by the FDOT include Preliminary Roadway, Signing and Pavement Marking, Lighting and Utility Adjustment apart from other information as listed in the Request for Proposal (RFP). The information provided in these Utility Adjustment Plans could be used as a basis for cost estimating.

The design and construction criteria (Attachment C of the RFP) describes project concept and scope of work at the referenced five intersections. Clear direction to Bidders are provided in Section 1 (page 1 of 23) and the Department's Project Objective #5 – "relocate utilities as needed to accommodate turn lanes, clear zones, shoulders, increased radii, and required storm drainage system." This instruction was also given in the Advertisement for Bid which is Attachment "A" of the RFP. Ref. Index 17 (Attachment "A", page 1 of 2) and (Attachment "C", page 1 of 23).

Section III.D of Attachment "C" is dedicated to Utilities. Contact phone numbers are provided and bidders were instructed that "all utility poles within the project limits shall

be relocated to the R/W line.” This section further states – “The Design-Build Firm shall include in the bid the cost of design and relocation of Adelpia’s aerial facilities. This is in addition to the cost of relocating (design and construction) above mentioned reimbursable poles and aerial facilities belonging to FPL and Bellsouth. Ref. (Index 17) (pages 22 and 23).

In it’s mandatory response to “Technical Questions and Answers” the Department has stipulated that estimates provided were not guaranteed – “I must remind all parties that the above information and any other utility information given is not guaranteed by FDOT to be necessarily accurate or reliable and that the three DB firms must do their own research, including field visits, in order to formulate their individual proposals, for which they are entirely responsible. Non-reimbursable utility relocations are, of course, paid by the Utility Companies themselves.” This information was transmitted to the three short-listed Design-Build teams. (Ref. (Index 11).

This clearly demonstrates that the Department places the burden of design and utility relocation on the Design Build Team, the cost of which is to be included in the lump sum contract amount. Community Asphalt Corp. failed to protect their interest in the bid by accepting the Department’s estimate, which was not guaranteed. Furthermore, the Department is of the opinion that if unable to obtain direct quotes from Utility owners, Community Asphalt Corp. should have sought relocation cost estimates from other sources with related expertise.

At the hearing, the Department emphasized that the contractor was bound to “relocate utilities as needed to accommodate turn lane, shoulders, increased radii and required storm drainage system” as noted in Attachment A. FDOT feels that their April 22, 2003 letter on Technical Questions and Answers as to estimated utility costs has the disclaimer *“I must remind all parties that the above information and any other utility information given is not guaranteed by FDOT to be necessarily accurate or reliable and that the three DB firms must do their own research, including field visits, in order to formulate their individual proposals, for which they are entirely responsible. Non-reimbursable utility relocations are, of course, paid by the Utility Companies themselves.”*

Based on the above, the Department’s position is that Community Asphalt Corp. is bound by the contract to include all reimbursable relocation costs in their Lump Sum Contract amount and therefore not entitled to any additional compensation.

Rebuttal Statement:

The Department furnished a rebuttal statement dated March 15, 2004, addressing the issue of additional compensation for utility relocation. They are requesting that the board rule only on entitlement for these issues at this time. Community Asphalt agreed that the ruling should only be on entitlement at this time. The Board only rules on entitlement and quantum if both parties are in agreement. Therefore the ruling will be on entitlement only.

Also on the rebuttal, the Department felt that the Design-Build Firm was contractually responsible for having the required expertise on the Team to independently estimate the potential cost of such utility relocations, including taking in to account the readily apparent Adelphia, Bellsouth and FPL aerial facilities and whatever design proposals the Team was intending to submit.

RDRB Findings

According to the Project Selection Guidelines of the Department, examples of projects that may not be Design-Build contracting candidates are listed below:

Use of D-B contracting on these type projects requires written approval by the State Roadway Design Engineer:

1. Major Bridge rehab/repair with significant unknowns
2. Rehab of movable bridges
3. **Urban construction/reconstruction with major utilities, major subsoil, R/W or other major unknowns**
4. Mill and resurfacing

Design Build (D-B) contracting should be considered on the following types of projects:

1. Projects that demand an expedited schedule and can be completed earlier.
2. **Projects that require minimum Right of Way acquisition and utility relocation.**
3. Projects that can have a well defined scope for all parties (Design & Construction).
4. Projects that have room for innovation in the design and/or construction effort.
5. Projects with low risk of unforeseen conditions.
6. Projects with low possibility for significant change during all phases of work.

This project was not a good candidate for a Design-Build project because it was an urban reconstruction project with major utilities. The Krome Avenue utility relocations were a significant part of the contract, approximately 20%. The reimburseable utility cost was approximately 45% greater than the Department's estimate. A significant item cost is classified at greater than 25% for a single item of work.

The difference is the Department feels that costs for utility relocation falls with the Design-Build Firm. The Contractor feels that the costs for utility relocation were underestimated and they were unable to obtain costs from the utility owners, so they had to rely on the estimates provided to the Department by the utility owners. There was no way to obtain estimates from other sources relative to private utilities.

RDRB Recommendation

Based on the evidence provided, the Board finds entitlement to the contractor for additional reimbursement costs from the utility owners. The utility relocation estimate provided by the Department detailing costs for FPL, Bellsouth and Adelphia dated April 22, 2003, was the only estimate for utility adjustments that could be obtained by the contractor. Design-Build Request for Proposal (RFP), Attachment "C", pages 22 and 23 of the contract states that *"FPL, Bellsouth, and Adelphia have aerial facilities outside the existing FDOT right of way (R/W) and are, therefore, reimbursable. The existing pole line belongs to FPL and the other two UAOs are attached to said pole line."*

At the time this contract was bid, the Design-Build Firms were unable to obtain cost estimates from the utility owners due to the proprietary nature of the estimate and was an unforeseen cost.

Entitlement is only for cost beyond the utility costs given by the Department's estimate in their April 22, 2003 letter. The Regional Disputes Review Board recommends that all costs for utility relocation from the utility owners be certified and audited for fair payment to all concerned.


The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the RDRB and the other party concerning your acceptance or rejection of the RDRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in the Hearings of the RDRB regarding the Dispute indicated above and concur with the findings and recommendations.

Respectfully Submitted,

Regional Disputes Review Board

Frank E. Proch, Regional Dispute Review Board Chairman
John Nutbrown, Regional Dispute Review Board
Joe Capeletti, Regional Dispute Review Board



RDRB Chairman

CC: Ignacio Halley, Manny Aguiar, Mark Croft