

DISPUTE REVIEW BOARD RECOMMENDATION

September 19, 2006¹

E-Mailed September 19, 2006

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RE: SR 25 (US 27) FROM A PT S OF BLUE HERON BAY BLVD TO A PT N OF CR 547
Project Number 403890-1-52-01
Polk County

Issue No. 3: Delays and Extra Work Impacts

Dear Sirs:

The Owner, Florida Department of Transportation (Department) and Contractor, Ranger Construction Industries, Inc. (Ranger) requested a hearing to determine **entitlement** of Ranger to **“Impacts to Contract Time Associated with various Delays and Extra Work encountered** on the above referenced project. Should entitlement be established, the Dispute Review Board (Board) was not to decide the quantum of such entitlement at this time.

Pertinent issues, correspondence and other information relating to the Department’s and the Contractor’s positions were forwarded to this Board for review and discussion at the hearing that was held initially on May 4th 2006. This hearing was continued to September 8th, when additional information and issues including Delays in Final Inspection were heard. The Board was also asked to consider “additional information” on the previously heard “High Water” Issue.

Issue 1 - Delayed Response by the Department Effecting Water Connections:

Issue 2 - Delay Caused by Unavailability of Landscape Trees

Issue 3 - Delay in Planting Purple Coneflowers and Dune Sunflowers

Issue 4 - Delay and Extra Work for Modification to Structure S-404

Issue 5 - Extra Work — Side Drain at Pump Station Driveway

Issue 6 - Removal of Calamondins

Issue 7 - Delay Response to Plan Change at South Tie-In

Issue 8 - Delays in Final Inspection

Issue 9 - Extra Work – Relocation of Medjool Palms at Bates and Patterson Roads

Issue 10 - Effects of High Water/Weather

CONTRACTOR’S POSITION:

Ranger believes that the Department has not recognized the true impact of delays and extra work in granting time extensions.

¹ September 18th revised September 19th to correct typo as to date in recommendations for Issues 7 & 8.

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This has occurred as a result of the following issues:

Delay in plan clarification of water tap installation

Delay caused by unavailable landscape trees and plants

Delay and Extra Work for plan errors of drainage structure

Delay and Extra Work associated with landscape removal and relocations

Delay to final inspection caused by Department's misinterpretation of the contract

Issue Statement

Issue 1 - Delay in plan clarification of water tap installation

On January 26th Ranger requested clarification as to who the responsible party was for tapping an existing water main owned by the City of Haines City to supply landscape irrigation. Over the next several months the Department attempted to gain resolution to this question. There was confusion on behalf of the Department on this issue during that time to which final resolution did not occur until October 19, 2005. This directly impacted controlling items of work, however, no contract time adjustment was made. In fact the Department stopped contract time on August 16, 2005, prior to the resolution to the issue.

Issue 2 - Delay caused by unavailable landscape trees and plants

On November 9, 2005 Ranger notified the Department that several types of proposed trees and plants were not available at the size specified in the plans. As a result of this notification, the Department acknowledged there was an on-going, area-wide shortage resulting in the lack of specified trees. The Department authorized a change due to the area-wide shortage, however no contract time adjustment was made. This changed condition directly impacted controlling items of work.

Issue 3 - Delay and Extra Work for plan errors of drainage structure

Ranger notified the Department of a plan error associated with structure S-404 and a changed site condition associated with an unidentified driveway. The notification of the plan error came prior to expiration of allowable contract time. However, final resolution did occur until after the Department stopped contract time. Extra work authorized by the Department was performed as a result of the plan error and changed site condition however, no time adjustment or payment has been for this work.

Issue 4 - Delay and Extra Work associated with landscape removal and relocations

After expiration of contract time the Department directed the removal and, in some cases, relocation of landscape trees that were originally installed per the plans. The Department has acknowledged that this was extra work. However, no time adjustment or payment has been made.

Issue 5 - Delay to final inspection caused by Department's misinterpretation of the contract

Ranger requested final inspection per the contract on February 1, 2006. The contract affords the Engineer 7 days to reply. The Department's reply consisted of four punch lists over the next two months. Ranger diligently performed the work on each punch list as it was generated. Each item on the subsequent punch list could have been included in the initial punch list thus expediting the completion. The intent of Specification 5-10.2 is to prevent just such an occurrence.

*The above issues have all been presented to the Engineer. The Engineer replied to Issues 1 thru 4 on March 9, 2006. In that reply, the Engineer acknowledged entitlement was not at issue but the amount of days were. Therefore, **Ranger request the Board rule on quantum as it relates to the amount of time justified.***

In accordance with the terms of the contract between Ranger Construction Industries, Inc. (Ranger) and the Florida Department of Transportation (The Department) for U.S. 27 Polk County, Florida, Ranger requests the Disputes Review Board provide a recommendation for the following issue:

Is Ranger entitled to a time extension of 273 days due to extra work and delays?

Introduction:

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Ranger is the prime contractor for the project and HNTB Company (HNTB) is the Department's Construction Engineer and Inspector.

The award of the contract was based on an A+B method of bid for which the as-bid dollar amount (A) was \$6,701,959.10 and the **as-bid time amount (B) was 300 days**. The contract also includes an incentive bonus provision for completion on or prior to the 300th day, and a disincentive penalty for completion after expiration of allowable contract time. The incentive/disincentive is based on a Daily Value of \$5000. The contract also contains a provision for liquidated damage assessment of \$3730 per day for each day the project continues after expiration of allowable contract time.

Construction began on July 19, 2004 at which time day 300 was May 14, 2005. The **Department granted 94 days of additional contract time** resulting in a recognized completion date of August 16, 2005. The Department began assessment of liquidated damages and disincentive penalty from that date. (See Exhibit A)

The **Department established the construction phasing** to be utilized which is shown in the Traffic Control Plans. Ranger's baseline schedule shows that Ranger intended to follow the Department's planned phasing with a completion date of May 12, 2005. (See Exhibit B) A brief description of the phasing is as follows:

- Phase 1 construction of drainage and temporary pavement along median side of inside lanes of northbound and southbound roadway
- Phase 2 milling and resurfacing of the existing asphalt roadway
- Phase 3 construction of new outside lanes and shoulders for northbound and southbound roadways
- Phase 4 Construction of the median including irrigation
- Phase 5 Completion of median work, landscape, friction course and striping

The baseline schedule shows the completion of Phase 3 prior to the start of Phase 4. Phase 4 work is divided into five sections identified by stations. The baseline schedule shows completion of the irrigation work in each section prior to Phase 5 starting. Phase 5 includes the median landscape work, which is a critical activity (Activity 5030), prior to the paving of the friction course.

On **December 23, 2004, (contract day 158 of the original 300), Ranger was on schedule to complete the project within contract time**. This is shown in the monthly update of the CPM schedule dated December 23, 2004. (See Exhibit C).

Subsequent to this time, the Department added extra work, took unreasonable time in replying to Ranger's clarification requests and failed to fulfill their obligations under the contract which resulted in delays to the project for which no time extension has been granted.

What follows is a brief discussion of delay issues and extra work which, individually and collectively, justify a time extension through final acceptance.

A time-line showing the individual delay issues is included in Exhibit D.

Issue 1 – Delayed Response by the Department Effecting Water Connections:

(See Attachment – "Issue 1" for supporting documentation)

The Contract Plans called for seven metered connections to an existing water main that ran along the outside slope of the northbound roadway (See Exhibit E). According to the Contract Plan phasing the **connections to the water main should be performed in Phase 3**. The connection to the water main is needed so that the irrigation system in the median can be completed in Phase 4. The **irrigation system needed to be complete prior to the installation of the median landscaping which is required to be complete prior to the placement of friction course**. Although there was some float (zero to 14 days depending on the section) inherent in the median irrigation work (activity 4285, 4290, 4295, 4300, 4305), it was extinguished by the lack of clear response provided by the Department. This resulted in the median irrigation system becoming critical.

On **January 26, 2005, Ranger requested clarification as to who was responsible for tapping the City of Haines City's water main**. The Contract Documents did not clearly identify who was responsible for this work. The custom in the industry is that the owner of the water main is the party who

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performs the tapping, in this case the City of Haines City. This was Ranger's understanding as is indicated by Ranger's letter dated February 2, 2005 to HNTB.

Over the next several months the Department was confused as to who was responsible for this work. (See Attachment Issue I- Summary of Events). As a result, **final resolution did not occur until October 19, 2005, when an additional 1500 feet of pipe was installed because of an authorized change by the Department.** This was 266 days after the initial inquiry by Ranger.

Ranger attempted to mitigate the Department's delayed response by working in other areas, however on **June 22, 2005, the critical path was now affected.** This is indicated in Ranger's letter dated June 20, 2005, which placed the Engineer on notice of the impact.

Effect on Critical Path

A review of the updated schedule dated June 29, 2005, shows that **Phase 3 was completed two days prior on June 27, 2005.** (See Exhibit F). It also shows that the Grading of Slopes was complete on June 22, 2005. This is the date that, according to the baseline schedule, **all taps should be complete.** Ranger mitigated the delayed response by the Department by starting Phase 4 activities prior to the completion of Phase 3. However, as of June 22" the tapping of the water main had not yet taken place due to the lack of clear direction from the Department. Since the **tapping of the water main is required prior to the installation of irrigation and landscaping, which needs to be complete prior to paving the friction course, the lack of clear direction from the Department impacted the completion of the project starting June 22, 2005.**

While awaiting resolution of this issue, the **Department began assessment of liquidated damages and disincentive penalty on August 17, 2005.** (See Exhibit A)

Applicable Contract Provisions

According to the Standard Specifications, Section 1-3 Definitions, a Delay is defined as "Any **unanticipated event**, action, force or factor which extends the Contractor 's time of performance of any controlling work item under the Contract. The term "delay" is intended to cover all such events, actions, forces or factors, whether styled "delay", "disruption", "interference", "impedance", "hindrance", or otherwise, which is **beyond the control of and not caused by the Contractor**, or the Contractor 's subcontractors, materialmen, suppliers or other agents." (Emphasis added, See Exhibit G)

According to Supplemental Specification 8-7.3.2 Contract Time Extension, "The Department may grant an extension of Contract Time when a controlling item of work is **delayed** by factors **not reasonably anticipated or foreseeable** at the time of bid." Furthermore, the specification states "When **failure** by the Department to **fulfill an obligation** under the Contract results in delays to the controlling construction operations, the Department will consider such delays as a basis for granting a time extension to the Contract." (Emphasis added, See Exhibit H)

Standard Specification 5-4 Errors or Omissions in Contract Documents states, "Do not take advantage of any apparent error or omission discovered in the Contract Documents, but **immediately notify the Engineer** of such discovery. The Engineer **will** then make such corrections and interpretations as necessary to reflect the actual spirit and intent of the Contract Documents." (Emphasis added, See Exhibit I)

The Engineer was immediately notified once Ranger identified the issue on January 26, 2005. Final resolution was not obtained until October 19, 2005, 266 days after Ranger's initial inquiry. It was unreasonable at the time of bid to have anticipated that 266 days would be required to clarify the Contract Documents and gain final resolution to an issue such as this. Because of this inordinate amount of time, Ranger contends the Department failed to fulfill their obligation under specification 5-4. Since this failure by the Department resulted in delays to controlling construction operations on June 22, 2005, the Department was unjustified in stopping contract time and assessing liquidated damages.

Issue Identified:	January 26, 2005
Effected Critical Path Activity on:	June 22, 2005
Delay Issue Resolved:	October 19, 2005

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Delay: 120 days (June 22th to Oct 19th)

Issue 2 – Delay Caused by Unavailability of Landscape Trees

(See Attached – "Issue 2" for supporting documentation)

On November 9, 2005, Ranger notified the Department that several types of proposed trees were not available at the size shown in the Contract Plans due to an area-wide shortage. As a result of this notification, a meeting was conducted on November 30, 2005 with the Department's Landscape Architect to discuss the situation and the recognition of the area-wide shortage by the Department. As a result of that meeting, another meeting was held on December 5, 2005 to discuss using smaller, substitute trees and a monetary credit from Ranger.

At the December 5th meeting several other issues were also discussed as is documented in the December 8th and December 12th letters from the Department to HNTB. In the December 12th letter the Department authorized substitution of smaller size trees due to the unavailability of the proposed trees. The last paragraph on page 1 of the December 12th letter from the Department states there is a "lack of market availability of substantial size trees statewide" and because of this "recurring issue on other landscape projects" the Department can accept substitute trees. (Emphasis added)

The December 12th letter was forwarded to Ranger on December 14th directing Ranger to propose the plant substitutions. This directive placed the burden of finding acceptable substitutes on Ranger and their landscape subcontractor without any time or cost consideration of the time Ranger spent to develop a remedy to an unanticipated event that was known to the Department.

The lack of availability of the proposed trees due to the area-wide shortage was in no way caused by Ranger or their landscape subcontractor. However, Ranger is being unduly assessed liquidated damages throughout the time we expended to search for the original trees, submit a request for relief, get authorization from the Department for a change in the contract and acquire the new trees.

Calculations of the time affects are shown under Issue 3 below.

Issue 3 – Delay in Planting Purple Coneflowers and Dune Sunflowers

(See Attached – "Issue 3" for supporting documentation)

Another issue raised in the Department's December 8th and 12th letters that impacted Ranger is the planting of the Purple Coneflowers and Dune Sunflowers. There are approximately 6952 of these plants in the contract. (See Exhibit J). The nurseries that grow these plants were adversely affected by the severe weather events in south and central Florida during 2005 making the plants unavailable when needed in accordance with the project schedule. The Department agreed to have these plants installed in March of 2006 when they were anticipated to be available, but again, no time extension was given to get to March 2006.

On March 6, 2005, Ranger forwarded a letter to the Engineer with an attachment from the landscape subcontractor indicating that the plants would not be available until early April. On March 29, 2005, at the weekly progress meeting, the Department indicated that their intent was to still have the subject plants installed under the contract.

Effects on Critical Path

According to the approved baseline schedule, the median landscaping (Activity 5030) is critical and is a predecessor to the friction course. (See Exhibit B)

The updated schedule dated November 13, 2005, shows the median landscaping activity has 10 days of float with a late finish date of November 28, 2005, due to Ranger's mitigation of the water tap delay Issue 1 above. (See Exhibit K). Therefore, the effect to the critical path due to the unavailable plants occurs on November 29, 2006. This is the date by which the median landscaping should be complete.

Applicable Contract Provisions

According to Supplemental Specification 8-7.3.2 Contract Time Extension, "The Department will consider the **delays in delivery of materials** ...that affect progress on a controlling item of work as a basis for granting a time extension if such delays are **beyond the control of the Contractor** or

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supplier. Such delays may include an **area-wide shortage**, industry-wide strike, or a natural disaster that affects all feasible sources of supply". (*Emphasis added, See Exhibit H*)

As of the date of this Position Paper, the Purple Coneflowers and Dune Sunflowers were anticipated to be available in mid April 2006. Assuming April 30th as the completion date **yields a time extension of 153 days from November 29, 2005.**

Issue 2 & 3 Identified: November 9, 2005
Effected Critical Path Activity (5030) on: November 29, 2006
Issue Resolved: April 23², 2006 (Anticipated)
Delay: 146³ days (Nov. 29, 2005 to April 23, 2006)

Issue 4 – Delay and Extra Work for Modification to Structure S-404

See Attached – "Issue 4" for supporting documentation)

A **plan error was identified on September 9, 2005**, in which the proposed elevation of the inlet top for structure S-404 as shown in the plans was approximately 1.5 ft. too low for the surrounding area.

This was brought to the attention of the Engineer via a field meeting that same day, September 9th. At that time several suggestions were made by Ranger in an effort to mitigate the plan error. After numerous progress meetings in which Ranger reminded the Engineer that direction was needed, it wasn't until **December 15, 2005 that HNTB sent a letter to Ranger with a hand-drawn sketch showing a modification to the inlet top.**

There was no plan revision or completed Work Order issued by the Engineer in accordance with the Department's policy as set forth in the Construction Project Administration Manual (CPAM). (See Exhibit L). However, Ranger performed the extra work in an act of good faith and to expedite the project when it was evident the Engineer was not going to issue a Work Order.

After the extra work was complete, the Engineer determined that it was not in compliance with the intent in his hand-drawn sketch. He then issued another directive on March 23, 2006, indicating a change to the inlet slot and the addition of 2.9 c.y. of embankment. This was an additional change from the original revision to which Ranger, on March 31, 2006, again submitted a price to perform. The unneeded duplication of the extra work is the reason that the Department has policies in place as to the proper implementation of extra work authorizations by the Engineer.

According to Supplemental Specification 8-7.3.2 Contract Time Extension, "The Department may grant an extension of Contract Time when a controlling item of work is **delayed** by factors **not reasonably anticipated or foreseeable** at the time of bid." Furthermore, the specification states "When **failure** by the Department to **fulfill an obligation** under the Contract results in delays to the controlling construction operations, the Department will consider such delays as a basis for granting a time extension to the Contract." (*Emphasis added, See Exhibit H*)

Again, Ranger complied with section 5-4, Errors and Omissions in immediately bringing this plan error to the Engineer's attention on September 9, 2005. The final revision from the Engineer was not issued until March 23, 2006, with the work completed on April 13, 2006. This is 216 days after the initial notification by Ranger.

The drainage system at this median location, station 2147+50, is a critical activity. (number 4115). (See Exhibit B)

The **actual dates that this work was performed are within the delay time for issues 2 and 3 above.** Therefore, since only one calendar day can be granted these days are not included in the overall delay.

Issue 5 — Extra Work — Side Drain at Pump Station Driveway

(See Attached — "Issue 5" for supporting documentation)

² April 30th changed to April 23rd at the hearing

³ 153 days changed to 146 days at the hearing.

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A changed site condition occurred as a result of an **existing driveway to a pump station at station 2158+00 RT not being shown on the original plan sheets**. The exact date that Ranger notified the Department is not known, but it prompted an email dated July 20, 2005, from the EOR, Tom Segers of H.W. Lochner. Mr. Segers' email requested HNTB to perform a site investigation and reply back to him with information so that he could perform his redesign. Instead, that email was merely forwarded via fax to Ranger on August 10, 2005 with no direction to Ranger.

On **September 22, 2005**, HNTB sent Ranger a letter with direction to "install one 36" RCP at the above referenced location." There was no plan sheet revision showing all necessary information to perform this extra work nor was there a Work Order included showing the requisite detail or the agreed to price. Ranger requested, in a letter also dated September 22, 2005 to HNTB, additional information in the form of detailed drawing showing all required information to perform the extra work.

Later that same day, HNTB merely replied with letter number 104 which stated a reiteration of the previous direction to install a 36" RCP being fit to the existing conditions.

Ranger proceeded to perform the extra work without an executed work order in an effort to mitigate further delays stemming from the lack of direction on the issue. Again, **the Engineer was not in compliance with the Department's CPAM in initiating this authorized change**.

The Engineer has not recognized any time considerations for this issue. In addition the Engineer has charged liquidated damages during the time Ranger was waiting for clear direction and was performing the extra work.

In accordance with Section 5-4, Errors and Omissions in the Contract Documents, Ranger brought this changed condition to the Engineer's attention prior to expiration of allowable contract time. While Ranger was waiting on proper direction from the Department, the Engineer stopped contract time and began assessment of liquidated damages and since Ranger in no way caused this changed condition, and was waiting on directive to perform the extra work, the Department was not justified in stopping contract time.

The actual dates that this work was performed are within the delay time for issues 2 and 3 above. Therefore, since only one calendar day can be granted these days are not included in the overall delay.

Issue 6 — Removal of Calamondins

(See Attached — "Issue 6" for supporting documentation)

On **January 17, 2006**, HNTB sent Ranger letter number 123 entitled "Landscape Directive" to Ranger directing Ranger to **remove all Calarnondins that have been planted and replace them with mulch due to their potential for contracting canker**. In the progress meeting minutes dated January 18, 2006 HNTB requested a price for this work establishing that this work was extra work under the contract.

A price was submitted by Ranger on January 25, 2006 for \$2,366.57, which was subsequently reduced to \$844.07 due to elimination of MOT items by HNTB. However, to date there has not been a completed Work Order for this extra work despite the fact that Ranger proceeded to complete the work in good faith. Again, the Engineer is not in compliance with the Department's policies as shown in CPAM.

Ranger performed the extra work during which no time consideration was made and liquidated damages were continuing to be assessed by the Department.

The actual dates that this work was performed are within the delay time for issues 2 and 3 above. Therefore, since only one calendar day can be granted these days are not included in the overall delay.

Issue 7 - Delay Response to Plan Change at South Tie-In

(See Attached – "Issue 7" for supporting documentation)

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On April 5, 2005, Ranger requested clarification regarding the connection at the south end of the project with the adjacent project. This was requested because the existing roadway immediately to the south was under construction by another FDOT road contractor, Cherry Hill Construction Co. Cherry Hill's project was not contemplated in the design of Ranger's project and therefore the adjustments to the design was warranted to prevent confusion to motorists traveling through the transition area.

On January 26, 2006, during the application of the friction course, Ranger, in compliance with section 5-4, asked if the Department wanted to change the planned striping at the south end to prevent conflicting lane markings in light of the adjacent roadway project. The Department replied that the striping is to be done per plan which Ranger then performed and completed on January 29, 2006. On February 1 and 15, 2006, Ranger requested the Engineer again examine the planned striping since it appeared to Ranger to be in conflict with the adjacent project. The Engineer then realized the planned striping would conflict with the adjacent project and agreed to issue a plan revision for the extra work.

On March 24, 2006, Ranger received a response from the Engineer with a hand drawn sketch showing revised striping in the area in question. Again, the plan revision was not in compliance with Department's own policies. Once it was received, Ranger's subcontractor was contacted and the striping was completed on March 29, 2006.

No time consideration was made for the delayed response by the Engineer for this issue. In addition, liquidated damages were assessed during this time.

Striping is a critical activity in Phase 5 (Activity 5020) and as such a time extension should be given from the time the planned final striping was complete until the plan revision was complete. Ranger understands that this impact overlaps with issues 2 and 3 above and therefore only one calendar can be granted. However, the calculation is shown below for informational purposes.

<i>Issue 7 Identified:</i>	<i>January 26, 2006</i>
<i>Effected Critical Path Activity (5020) on:</i>	<i>February 1, 2006</i>
<i>Issue Resolved:</i>	<i>March 29, 2006</i>
<i>Delay:</i>	<i>59 days</i> (Jan. 29, 2006 to March 29, 2006)

Issue 8 – Delays in Final Inspection⁴

(See Attached – "Issue 8" for supporting documentation)

On February 1, 2006, Ranger requested an official punch list from the Engineer in accordance with Standard Specification 5-10.2, Inspection for Acceptance. (See Exhibit A1). On February 15th a detailed list of remedial work entitled "Ranger Punch List" was provided to Ranger. Although this was beyond the 7 days allowed in the contract, Ranger made no objection and immediately began work on the remedial work.

At the progress meeting held March 15, 2006, Ranger was notified by the Engineer that the Department's maintenance office is going to perform a "walk-thru" inspection to develop the "punch list". When Ranger questioned the perpetual punch lists and why DOT maintenance is now involved, the Department replied that it was their standard procedure. The Department's maintenance office conducted a walk-thru inspection on March 22, 2006, 50 days after Ranger's request for inspection and 36 days after Ranger received a detailed punch list from the Engineer. The March 22nd walk-thru prompted yet another list that was given to Ranger on March 23rd which lacked sufficient detail to perform the work. At the progress meeting on March 29th, and in Ranger's letter that same day, Ranger requested more specific information regarding this latest list. The Engineer replied that he did not owe Ranger specific information. This is contrary to specification 5-10.2 which requires the Engineer to "detail the remedial work" and then base subsequent inspections on the remedial work. The purpose of this specification is to prevent perpetual punch lists causing a never-ending project.

On March 29th Ranger notified the Engineer that we had completed the remedial work on the February 15th list and request final acceptance. The Engineer denied this request.

⁴ This Issue was updated in the Contractor's position paper dated August 25, 2006.

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Over the next several months the Engineer issued numerous punch lists each being more vague than the prior. On April 4th Ranger received an "Action List". This "Action List" contained three types of items; those that were previously accepted by the Engineer, those that were a result of third party damage thus considered maintenance and those that required Ranger to determine the acceptability.

Ranger completed each list to the satisfaction of the on-site inspector, notified the Engineer and even received acceptance letters from the Engineer for individual sections of the roadway. However, each time Ranger requested Final Acceptance the Engineer refused and issued a new list. Many of the items on the new list were in areas that were already accepted by the Engineer. The majority of these items were the repair of ruts along the shoulder and damaged sod. It was evident that since the roadway was fully functional, the repairs that the Engineer was requiring were a result of damage by third parties such as cars and trucks parking on the grassed shoulder.

In addition, Ranger would complete repair work based on the Engineer's direction and to his satisfaction only to have him recant his acceptance due to FDOT Maintenance overruling him.

On June 7th a DRB meeting was held where discussions took place regarding a comprehensive list of remedial work and who has the authority to decide Final Acceptance. Ranger's contention was that, except for the first punch list of February 15th, the Engineer has been evasive as to the extent of needed corrections and was requiring major rework in areas previously accepted. This was evident at the field walk-thru on June 7th. During that walk-thru the Engineer was non-committal and equivocal in his direction as to the limits of shoulder corrections. Also, his method of measuring the acceptability criteria was inaccurate and was unable to be duplicated. Furthermore, he made no consideration to the fact that the shoulders had been in place for several months, had likely settled and there was no prior mention of any problems with shoulder grades. Also during the June 7th walk-thru the Engineer identified 13 signs to be replaced since he determined them to be "damaged". The Engineer failed to consider that the signs in question had been in place for months and have been exposed to the conditions of an open, fully functional roadway and contained only minor imperfections. Moreover, there was no mention of non-compliant signs neither at the time of their initial installation nor on the February 15th punch list.

As a result of the Department's failure to follow the specifications, their wavering on acceptance, their inability to make definitive decisions and their unreasonable interpretation as to what constitutes conformity to plans, Ranger has been detrimentally harmed through additional costs, liquidated damages and liability.

Effects on Critical Path

Activity 1035 – Project Clean Up/Punch List is a critical activity on the approved baseline schedule. As such any delay to it causes a delay in the completion of the project. Ranger complied with section 5-10.2 and requested final inspection. Per that specification the Engineer has seven days to inspect and provide a list of remedial work to the Contractor. That list was received by Ranger on February 15th. This was eight days beyond the seven allowed. Ranger completed that list to the satisfaction of the Engineer's representative on March 29th. Due to repetitive punch lists as described herein, Final Acceptance was not given until July 21st

Applicable Contract Provisions

According to the Standard Specifications, Section 1-3 Definitions, a Delay is defined as "Any **unanticipated event**, action, force or factor which extends the Contractor's time of performance of any controlling work item under the Contract. The term "delay" is intended to cover all such events, actions, forces or factors, whether styled "delay", "disruption", "interference", "impedance", "hindrance", or otherwise, which is **beyond the control of and not caused by the Contractor**, or the Contractor's subcontractors, materialmen, suppliers or other agents." (Emphasis added, See Exhibit G)

According to Supplemental Specification 8-7.3.2 Contract Time Extension, "The Department may grant an extension of Contract Time when a controlling item of work is

It is unreasonable to expect that Ranger should have anticipated at the time of bid that the Engineer would have taken over 5 months to develop a final inspection list. It is clear that the Engineer violated specification 5-10.2 and thus failed in his obligation under the contract. It is also evident

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that this failure delayed the controlling item of work, Activity 1035– Project Clean Up/Punch List and thus a time extension is warranted as follows:

Date Ranger requested Final Inspection:	February 1, 2006
Date Engineer obligated to perform:	February 8, 2006
Date Engineer provided remedial list:	February 15, 2006
Effective Delay:	7 Days (Feb. 9th to Feb. 15th)
Date Ranger completed work on list:	March 29, 2006
Date of Final Acceptance:	July 21, 2006
Effective Delay:	114 Days (March 30th to July 21st)
<u>Total Delay for this Issue</u>	121 Days

Issue 9 - Extra Work – Relocation of Medjool Palms at Bates and Patterson Roads

(See Attached – "Issue 9" for supporting documentation)

On February 15, 2006 the Department issued a directive to relocate palm trees at the corners of Bates and Patterson Roads. The original location of these trees were per Department directions. As a result the relocation is considered extra work. Ranger submitted a price for the work on March 6, 2006. Again, no work order was executed prior to the work beginning which is not in compliance with the Departments policies.

The Department has not granted any time for this extra work and in fact has continued the assessment of liquidated damages while the extra work was being performed.

The actual dates that this work was performed are within the delay time for issues 2 and 3 above. **Therefore, since only one calendar day can be granted these days are not included in the overall delay.**

Various Examples of Lack of Performance by the Department

(See Attached – "Issue VAR" for supporting documentation)

The following is an example of untimely responsiveness, lack of performance and failure to follow Department procedure by the Engineer throughout the project. Ranger feels this demonstrates a pattern that, collectively, shows the degree to which the Engineer was deficient in his obligations and duties under the contract resulting in detrimental effects to Ranger.

Delay of 5 Months for Acceptance of Original Baseline CPM Schedule –

According to Special Provisions 8-3.2, the Engineer will review and accept the schedule within 30 days of submittal. Ranger submitted the baseline schedule on June 25, 2004. The Engineer replied with comments on July 14, 2004 to which Ranger replied on July 19, 2004. All this was within the 30 days stipulated in the contract. However, the Engineer sent no other replies to Ranger's baseline schedule until December 16, 2004, approximately five months late, which consisted of their acceptance of the schedule.

First Weather Letter Not Issued Until 6 Months after the Start of Construction –

The first contract day was July 19, 2004. According to the Department's policies the reporting of weather days is to be done monthly by the Engineer so that proper progress can be measured. The Engineer did not issue the first weather letter until January 31, 2005, 6 months after the start of the project.

Delay in Reporting LBR Verification Test Results –

The Engineer failed to timely report failing verification test results related to limerock base. Initially, the Engineer denied Ranger's request for time consideration stating that there was no impact to production. The Engineer's interpretation of the issue and his basis for not recognizing any time impacts was proved wrong. Ultimately a Supplemental Agreement was issued by the Department providing payment for delays incurred as a result of the lack of responsiveness by the Department's agent in providing timely response to test results.

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Non – Response to Request for Meeting to Contest Deficiency Letters –

Ranger received two Deficiency Letters. One on August 8, 2005 and another on October 12, 2005. Ranger contested the issuance of the letters in writing on August 10 and October 18, 2005, respectively and requested a meeting to discuss the issue. No reply was given by the Engineer related to Ranger's request and to date the meeting has not taken place.

Non-Payment for Hurricane Wilma Impacts –

On November 29, 2005, Ranger submitted a certified request for payment for extra costs incurred as a result of Hurricane Wilma. The certified request was in accordance with Department guidelines and State Construction Engineer memo. To date no payment or time consideration has been issued for this impact and liquidated damages continued to be assessed.

Untimely Issuance of Revised Plans –

On March 9, 2006, the Department issued a revised signing plan sheet to correct a plan error. The plan revision was completed and submitted by the EOR to the Department two years earlier on April 12, 2004. According to the Department, the revision "may not have made it all the way to where it needed to go". Once received, Ranger immediately acted on the plan change and forwarded the revision to the subcontractor for pricing and implementation. The subcontractor began procurement of the sign at which time the Engineer rejected Ranger's request for an additional payment of \$347 for mobilization.

Throughout the contract the Department's agent has displayed a history of untimely responses, arbitrary interpretation of specifications and a lack of fulfillment of contractual duties.

The result of which has caused undue harm to Ranger in the form of delays to clarification requests, inefficient scheduling of resources, non-payment for extra work, unneeded duplication of work, unjustified withholding of liquidated damages and disincentive, added indirect and overhead costs, added job site costs, additional liability and unjustifiably low CPPR grades.

Good faith performance by each party is the basis for all contracts. It is Ranger's contention that the lack of adherence to the contract requirements to the degree demonstrated by the Department's agent is evidence of actions that do not rise to the level of good faith.

Ranger requests the Board to consider the facts presented here in their recommendation of entitlement and damages.

SUMMARY OF DELAY IMPACTS⁵

Issue 1	120 Days
Issue 2 & 3	153 Days
Issue 7	59 Days*
Issue 8	Ongoing

Total Delay (Issues 1, 2 & 3) = 273 days

* these days overlap with issues 2 & 3 and therefore not included in the 273 total

CONTRACTOR'S REBUTTAL⁶:

Please allow this to be Ranger's rebuttal to the Department's Position Paper for the above referenced issue.

⁵ These "Impact" days are taken from the April 19, 2006 Contractor Position paper.

⁶ Rebuttal Dated April 27, 2006.

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It is evident the Department is in agreement that extra work has been added to the contract after the expiration of allowable contract time. However, it is also evident the Department is not recognizing the effects of the delays leading up to the extra work and how those delays impacted the contract completion.

The following is a rebuttal to the Department's position to show how the various extra work and delays impacted the critical path activities of the project. The issues are discussed below using the title shown in Ranger's Position Paper with the corresponding HNTB title in parenthesis.

Delayed Response by the Department Effecting Water Connections (Relocation of Irrigation Tap)

Ranger and HNTB are in agreement that the irrigation water connection at station 2095+20 was relocated 1500 feet to station 2110+00 and was completed by November 1, 2006. However, this was the final resolution to a lengthy delay caused by the Department's confusion as to who was responsible for the water connection work. This confusion is acknowledged by the Department in their letter of March 9, 2006, (attached) which was a reply to Ranger's time extension request regarding this issue.

The delay in receiving clear direction from the Engineer and the resulting extra work directly affected the critical path activities of the project. A review of the original baseline schedule indicates such. (See Attached Original Baseline Schedule)

The best way to illustrate this is to look backwards from the last activity on the project and identify the predecessor activities with zero float.

Under the section in the baseline schedule entitled "GENERAL", activity 9999 (Project Completion) is a zero duration milestone.

Its predecessor is activity 1035 (Project Clean Up/Punch List) with zero float.

Its predecessor is activity 5020 in Phase 5 (Friction Course & Perm. Pav't Markings) with zero float.

Its predecessor is activity 5030 (Median Landscaping) with zero float.

Its predecessor is activity 4245 in Phase 4 (Grassing Phase 4, Sta 195/220) with zero float.

Its predecessor is the activity 4305 (Irrigation Phase 4, Sta 195/220) with zero float.

The irrigation and grassing activities in the other four sections of Phase 4 follow the same logic, however they have up to 14 days float as is indicated in activity 4285 (Irrigation Phase 4, Sta 2075/2105).

The predecessor to activity 4285 is 4200 (Finish Grading) and 4175 (Curb & Gutter). This is determined by looking at the early start date of 3/14/05 for activity 4285 and comparing it to the early finish date, 3/14/05, of 4200 and the late finish date, also 3/14/05 of 4175.

The remaining predecessor activities in Phase 4, namely activities 4150, 4125, 4100, 4075, 4050 and 4000 are sequentially related and are critical with either zero or one day float.

Lastly, the predecessor to the start of Phase 4 is activity 3085 (Grassing – Roadway Widening Right) in Phase 3 also with zero float.

It was Ranger's intent based on the original baseline schedule to complete one phase before beginning the next.

On June 20, 2005, almost 6 months after Ranger requested confirmation from the Engineer as to the responsible party for the connection, there were still no taps made. Ranger notified the Engineer on June 20, 2005 that the lack of water connections was affecting the completion of the irrigation system and installation of the landscaping. (Ranger Letter dated June 20, 2005 included in Ranger Position Paper)

This is evident upon reviewing the updated schedule dated June 29, 2005. (Attached) This schedule shows that activity 3085, Grassing – Roadway Widening Right in Phase 3 was started on June 22 and completed on June 27, 2005. It also shows Ranger mitigated the delay by performing Phase 4 work prior to getting resolution to the water connection issue.

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The water connection taps were to be completed prior to the grassing along the right roadway widening in Phase 3. The water connection taps are needed to make the irrigation system functional, which is needed prior to the installation of landscaping. The installation of the landscaping is needed prior to the friction course and project completion. Since all these activities have zero float, the lack of water connections directly effected the completion of the project.

Therefore, June 22, 2005 is the date that Ranger began to be effected by the delays caused by the Department on this issue. The Department stopped contract time on August 16, 2005 and began assessment of liquidated damages and disincentive penalty from that date. To date no time consideration or compensation has been made by the Department for the delay or the extra work.

Ranger's records indicate the extra work of installing the additional 1500 feet of pipe that resulted from the delay was completed on October 19, 2005. This is the date the impact ended. HNTB indicates the extra work was completed on November 1, 2005. Ranger does not wish to receive any time that is not justified and as such is still only requesting time consideration from June 22 to October 19, 2005. This equals 120 days.

Extra Work – Side Drain at Pump Station Driveway (Addition of Side Drain and Driveway)

Ranger and HNTB are in agreement that a 36 inch side drain was added at an existing driveway that was not shown on the plans. However, what is not mentioned in the HNTB Position Paper is that the plan error was identified prior to expiration of contract time and although the work may have been completed on February 1, 2006, there has been no consideration made for any time or cost impacts.

As stated in Ranger's Position Paper, the dates that the extra work was performed overlap issues 2 & 3 of Ranger's Position Paper and therefore, **we realize only a single calendar day for a given delay will be granted.**

Delay and Extra Work for Modification to Structure S- 404 (Modification of S-404)

Again, Ranger and HNTB are in agreement that there was a plan error regarding inlet S404. The error was found by Ranger and immediately brought to the attention of the Engineer on September 9, 2005. On December 15, 2005 the Engineer provided Ranger with a hand-drawn sketch of his modification. Ranger performed the work to expedite the project only to be notified by the Engineer that he did not show all the information on his hand-drawn sketch that he intended to. The Engineer then issued another directive on March 23, 2006, seven months after the initial notification by Ranger and seven weeks after Ranger formally requested final inspection of the project. To date, no time consideration or payment for the delay or extra work has been issued by the Department.

Ranger's DRB Hearing Request Letter dated April 14, 2006, identified five issues where we believe the Department has not recognized the true impact of delays and extra work. They are as follows:

- 1) Delay in plan clarification of water tap installation
- 2) Delay caused by unavailable landscape trees and plants
- 3) Delay and Extra Work for plan errors of drainage structure
- 4) Delay and Extra Work associated with landscape removal and relocations
- 5) Delay to final inspection caused by Department's misinterpretation of the contract

Since HNTB has offered a position only on items 1, 3 and 4, we are under the belief that the Department has agreed with Ranger on issues 2 & 5.

In response to the last paragraph in HNTB's Position Paper, we believe we have shown, through our Position Paper and rebuttal, how the delays and extra work have impacted the completion of the project. Regarding the water taps, when one considers that the friction course cannot be completed prior to the adjacent landscaping and landscaping cannot be installed until irrigation lines are functioning and irrigation lines cannot be functional until a water source is connected, it is very evident how the completion of the project is effected. This logic is supported by the baseline schedule.

In response to HNTB's statement that as of April 19, 2006, there is no projected completion date, again we are in complete agreement with this statement, but not for the reason given by HNTB. Ranger complied with specification section 5-10.2, Inspection for Acceptance, and requested an inspection for acceptance on February 1, 2006. The Department has not complied with that

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specification. Ranger has been diligent in pursuing all work on this project including the many maintenance items shown in the Department's multiple punch lists over the last three months.

We look forward to discussing these items in further detail at the hearing on May 4.

CONTRACTOR'S POSITION⁷:

Request for Disputes Review Board (DRB) Recommendation:⁸

Ranger Construction Industries, Inc. (Ranger) was the prime contractor for the widening and resurfacing of the rural multilane mainline, SR 25 (US 27), in Polk County from Blue Heron Bay to CR 547, Project ID 40389-1-52-01 (Project) for the Florida Department of Transportation (Department).

During the course of the Project, Ranger encountered unforeseen and unanticipated wet conditions that caused disruptions/impacts to its planned means and methods to perform the work, to its planned sequencing of the work, and to its planned schedule of the work. The disruptions/impacts resulted in Ranger incurring additional time and additional costs to perform the work and complete the Project. Ranger submitted a claim to the Department requesting additional Contract Time and additional equitable compensation as a result of the disruptions and impacts related to the wet conditions. The Department denied Ranger's request.

In accordance with the terms of the contract between Ranger and the Department, Ranger requests the Disputes Resolution Board **provide a recommendation for the following:**

Is Ranger entitled to an additional 110 days of additional Contract Time as a result of adverse impacts to its work caused by unforeseen and unanticipated wet conditions?

Reasons for Entitlement:

The Contract Drawings showed elevations of the ground water in the vicinity and/or beneath the roadway at regular intervals along the length of the Project. At the following areas, Ranger encountered groundwater conditions that were significantly higher than shown by the Contract Documents and which resulted in unanticipated wet conditions that adversely impacted Ranger's work:

Right or Northbound side of the Project

- Between Sta. 2075+94.72 and Sta. 2110+00
- Between Sta. 206+00 and Sta. 212+00

Left or Southbound side of the Project

- Between Sta. 2075+94.72 and Sta. 2085+00
- Between Sta. 2109+00 and Sta. 2128+00
- Between Sta. 204+00 and Sta. 212+00

The actual average water elevations recorded by Ranger between October 7, 2004, and August 7, 2005, confirm that the water elevations were significantly higher than the elevations shown by the Contract Documents. A comparison of the actual average water elevations encountered at those locations to the water elevations shown by the Contract Documents is shown in Exhibit A.

In its initial DRB hearing position paper, the Department acknowledged that the water elevations were significantly higher than the levels shown by the Contract Documents. The Department stated; "The Department acknowledges the conditions cited by RCI. The water table was significantly above the levels shown in the plans."

The Department further stated; "The project experienced significant rainfall in the months proceeding the start of construction and during the early part of the project. This caused the water level in the lakes to rise and result in additional encroachment onto the Project limits."

⁷ Position Dated August 25, 2006.

⁸ This is Issue 10 - Effects of High Water.

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Ranger, in its initial DRB hearing position paper and its response to the Department's position paper, established:

- Ranger relied on the information provided by the Contract Documents to be correct
- The actual wet conditions encountered were not as those shown by the Contract documents
- The unforeseen wet conditions encountered were beyond Ranger's control
- During the course of the Project, Ranger provided notification to the Department that the unforeseen wet conditions were having an adverse impact to Ranger's work and that it intended to request additional Contract Time accordingly
- Phase 3 embankment, stabilization, base, and asphalt work activities were disrupted and productivity adversely impacted as a result of the unforeseen wet conditions
- Phase 3 embankment, stabilization, base, and asphalt work activities were on the critical path of the Project
- Ranger was essentially on schedule at the start of Phase 3, but was behind schedule at the conclusion of Phase 3 as a result of the unanticipated wet conditions
- The Project design requirements for clear zone were compromised due to the unanticipated higher water elevations

New information obtained by Ranger shows the actual water elevations for various areas of the Project resulted in the clearance between ground water elevations and the bottom of the roadway base course to be less than Department's design. In accordance with the Department's Plans Preparation Manual, Table 2.6.3 Criteria for Grade Datum, the minimum required clearance between the water elevations and the bottom of the roadway base course for rural multilane mainline roadways is 3 feet. (See Exhibit B) At some locations the actual average water elevation was only 0.5 feet below the bottom of the roadway base and at over one-half of the locations noted above, the clearance was 1.5 feet or less. (See Exhibits A and C)

Thus, based upon the new information obtained by Ranger, it is clear that either there is a defect in the design and/or Contract Documents or the wet conditions encountered were not foreseen or anticipated by the Department at the time of bid.

Section 8-7.3.2 of the Contract Specifications states:

"The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonable anticipated or foreseeable at the time of bid "

Section 8-7.3.2 further states:

"When failure by the Department to fulfill an obligation under the Contract results in delays to the controlling construction operations, the Department will consider such delays as a basis for granting a time extension to the Contract. "

If the Department's design and/or Contract Documents of the Project are not defective, then the Department did not foresee or anticipate the water elevation rising to the actual elevations encountered and the resulting wet conditions. If the Department did not foresee or anticipate the water elevation rising to the actual elevations encountered and thus prepared its design accordingly, Ranger cannot be expected to have foreseen or to have anticipated the water elevation rising to the actual elevations encountered and the resulting wet conditions. If the Department foresaw or anticipated the water elevation rising to the actual elevations encountered, then the Department's design and/or Contract Documents were defective and the Department failed to fulfill its obligation.

The higher water elevations and resulting unforeseen wet conditions continued throughout the duration of Phase 3 work which consisted of construction of new outside lanes and shoulders for the northbound and southbound roadways. The unforeseen wet conditions directly impacted Ranger's Phase 3 embankment, stabilization, and base work activities, which subsequently resulted in impacts to the paving and other activities

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Ranger had planned to perform those Phase 3 work activities in 107 calendar days (October 4, 2004, through January 18, 2005) as shown on Ranger's baseline schedule (Exhibit D). However, even though Phase 3 embankment, stabilization, base, and pavement work commenced essentially on schedule on October 6, 2004, (2 days later than originally planned), those Phase 3 activities were not completed until July 7, 2005, a period of 275 calendar days.

For period of October 6, 2004, through July 7, 2005, the Department, via Supplemental Agreement (SA) No. 3, granted an additional 41 Contract Days for items not related to wet conditions (See Exhibit E). It should be noted by the statement included in SA No. 3, that the Department acknowledged that stabilization and limerock placement were both critical path activities.

Statement included in SA No. 3: "The delay affected stabilization and limerock placement, both critical path activities,..."

For the same period, October 6, 2004, through July 7, 2005, the Department also granted 22 "Weather Days" (See Exhibit F).

Thus, the additional time required to perform Phase 3 embankment, stabilization, base, and pavement work as a result of the unanticipated wet conditions, and for which the department has not granted additional Contract Time, is 105 calendar days (275 days, less 107 days, less 41 days, less 22 days).

Ranger's records indicate that for the period of October 6, 2004, through July 7, 2005, there were an additional 14 days when work was actually stopped due to wet conditions or "recovery" and for which the Department failed to grant "Weather Days". (See Exhibit F)

The unexpected wet conditions continued throughout the period of the Phase 3 work and resulted in disruptions to Ranger's planned sequence of the construction of the Phase 3 work, the outside widening for the northbound and southbound roadways.

Ranger had planned to commence the outside widening of one side of the Project from one end of the Project and proceed toward the other end of the Project, and then do the same for the remaining side, in a steady progressive "train" of activities; clearing and grubbing, followed by embankment work, followed by stabilization or subgrade work, followed by base work, followed by asphalt paving, followed by slope grading and ditch work, followed by grassing. (See Exhibit D) Although time frame of some of the activities in the "train" overlapped, impacts or disruptions to previous activities impacted the subsequent activities in the "train".

Since the water elevations remained higher than expected throughout the period of the Phase 3 work, Ranger was unable to postpone work in the areas of the high water until after the water elevations receded. Ranger was forced to work in those areas with the water at the higher than expected elevations and with the resulting unforeseen and unanticipated wet conditions.

When placing and compacting the earthwork and base work material in the areas of the high water, the water migrated upward into the earthwork and/or base material preventing Ranger from achieving the necessary compaction without stopping the earthwork or base work in that area; moving to another area to work (either a dry or wet area) until the upward migrated water dissipated; then relocating back to the area of the water migration. Ranger had to repeat the move-in/move-out process many times in one area until the necessary compaction could be achieved.

Since Ranger was forced to relocate from one area to another, between wet and dry areas and forward and backward along the length of the Project, rather than proceed in consistent progression in one direction along the length of the Project, Ranger's "train" of work activities was disrupted in the dry areas as well as the wet areas. Thus, the disruptions resulted in lost productivity in the dry areas as well as the wet areas and extended the duration of the Phase 3. The impact to the completion of Phase 3 resulted in a like impact to the completion of the entire Project since the completion of Phase 3 was on the critical path of the Project.

Due to the nature of the disruptive impact of the unforeseen wet conditions had to Ranger's Phase 3 work, it was unreasonable for Ranger to compile records for "cause and effect" analysis for specific days of the additional time Ranger incurred to perform its work.

The reasonableness of the 105 day impact to Ranger's work resulting from lost productivity due to the unforeseen wet conditions is reflected by a study regarding factors affecting productivity published

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by the Mechanical Contractors Association of America. (See Exhibit G) The intent of the study was to develop basic criteria or standards that would contribute to fair and equitable adjustments for situations related to lost efficiency or lost productivity. The study notes the following 43% average percentage of loss of productivity for factors Ranger could incur as a result of the disruptions and impacts to its Phase 3 work caused by the unforeseen wet conditions:

- Disruption of labor rhythm and scheduling related to morale and attitude 15%
- Reassignment of manpower, moving of forces 10%
- Dilution of supervision related to analysis and plan changes, scheduling
Changes, providing direction and instructions to labor force 15%
- Errors caused by out-of-sequence work and dilution of supervision 3%
43%

When the 43% average percentage of loss productivity is applied to the actual time required to perform the Phase 3 activities, the resulting time impact is 91 days.

- Time period to perform Phase 3 embankment, stabilization, base, and pavement work (10/6/2004 through 7/7/2005) 275 days
- Weather days granted (10/6/2004 through 7/7/2005) (22) days
- Additional Contract Time granted via SA No. 3 (10/6/2004 through 7/7/2005) (41) days
- Adjusted time required to perform Phase 3 embankment, stabilization, base, and pavement work (275 days, less 22 days, less 41 days) 212 days
- Additional time required resulting from lost productivity (43% of 212 days) 91 days

The number of days of lost productivity indicated by the study is intended to serve as a reference. Thus, the study confirms that the 105 days of impact indicated by the actual events is reasonable, especially when the 14 days of work stoppage not granted by the Department are included (91 days plus 14 days = 105 days).

At the present time, the Department has established August 16, 2005, as the revised last day of Contract Time and has not granted any "Weather Days" beyond that date although Ranger continued to work and incur delays due to weather after that date. Ranger's records also indicate the Department has also failed to grant an additional 5 "Weather Days" period to August 16, 2005, excluding the period of the Phase 3 work (10/6/2004 through 7/7/2005) (See Exhibit H).

SUMMARY OF REQUEST FOR ADDITIONAL CONTRACT TIME

- Impact to Phase 3 due to unforeseen wet conditions 105 Days
- "Weather Days" outside Phase 3 Period that were not granted by the Department. 5 Days
- Total 110 Days

CONTRACTOR'S REBUTTAL⁹:

Subject: **Rebuttal - September 8th DRB Hearing Position Paper – Delays and Extra Work Impacts**

Please allow this to be Ranger's rebuttal to the Department's Position Paper for the above referenced issue.

Firstly, a point of clarification is warranted in the section entitled "Background" of the Department's position paper. **The three issues listed were in fact submitted to the Department prior to the May 4th hearing in several letters requesting resolution as well in Ranger's Position Paper dated April 19, 2006. It wasn't until the commencement of the May 4th hearing did the Department vocalize they were not prepared to discuss the three remaining issues.**

⁹ Rebuttal Dated August 31, 2006.

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Issue 7 – South Tie –In

On several occasions Ranger requested the Engineer examine the contract plans related to striping the south end of the project. Those requests yielded either no response from the Engineer or a response to just follow the plans. The last request by Ranger for the Engineer to review the plan striping finally resulted in the Engineer realizing a change was required. The revised striping plan was given to Ranger on March 23rd. This was sent to our subcontractor who immediately rearranged his other obligations to perform the revised striping. The striping was completed on March 28th, prior to Ranger's request for final acceptance on March 29th.

Refer to the Engineer's statement in the second to last sentence in the 31rd paragraph on page 2 which states:

"The contractor could not have placed the temporary striping [sic] until the lanes were open."

This thinking is completely opposite-logic from normal road construction, is a violation of Standard Index Series 600 as well as MUTCD. We maintained a closed lane so that our project and the south project were consistent. By removing our lane closure before a revised striping detail was provided would have resulted in 3 lanes instantaneously becoming 2 lanes without any transition. Since our project consisted of 3 lanes and the adjacent project consisted of only 2, to think one would remove the MOT and open the lanes before having the transitional stripes in place is not a sound engineering decision.

Regarding the closing paragraph, if the Department is basing denial of compensation for this issue on whether or not a notice of intent to file claim was submitted it needs to be realized that the Department did not follow the prescribed method detailed in the contract and their own procedures manual for initiating a proper contract change when they revised the striping plan. As such, Ranger was not afforded the opportunity to negotiate a fair price and thus have the knowledge that, because an agreement was not reached, a dispute had arisen.

Issue 8 – Delay to Final Inspection

The Department has included a copy of Standard Specification 5-10 in their position paper. However, it appears their position paper does not accurately reflect the language in the specification. In reading the specification one can see that it is driven by a condition. In contract terms, a condition is an act or event, the occurrence of which creates a duty to perform. Here, the condition is notification by the contractor, as is indicated by the language "Upon notification..." This was done by Ranger on February 1st.

The duty that the condition creates is an inspection by the Engineer as indicated by the language "the Engineer will make an inspection..." The specification continues that "if any or all work is found to be unsatisfactory, the Engineer will detail the remedial work required to achieve acceptance". That was done and sent to Ranger on February 15th, upon which Ranger relied.

Except for being 8 days beyond the time allowed in the contract, the Engineer's performance to that point was consistent with the specification. Ranger immediately performed the work on the remedial list, which was also consistent with the direction in section 5-10.

Regarding the contract items that the Department contends were outstanding at the time of the punch list request, these have no merit on this subject for the following reasons:

- *Friction Course* – the area shown is 116 lane-ft. of the 79,488 lane-ft. on the project. Less than 0.15%. It was the last friction course being placed and as such the last truck's delivery was short by 116 feet. It was agreed to by the Engineer to complete the 116 feet while performing any straight edge corrections. Thus, there is no basis to allege that the project did not warrant a punch list due to this.
- *Pavement Markings/Delineators* – Ranger did not receive the revised striping plan from the Engineer until March 23rd. As such, completion could not have happened prior to March 23m. Again, Ranger did not ask for final acceptance until March 29th. The Engineer's logic is completely baseless when, while Ranger is waiting on his direction, he states all contract work was not complete, referring to the very work we are waiting on him for.

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- *Fencing – the fence referenced is approximately 300 feet from the roadway, and was only a small portion of the total perimeter fence. Further it was completed before Ranger requested final acceptance.*
- *Drainage – all drainage was installed. The work referred to was corrective work which was completed prior to our request for final acceptance on March 29th.*
- *Landscaping – we are in agreement with the Engineer regarding this. However, the remaining landscape work was the installation of the 7000+/- Purple Cone Flowers and Dune Sun Flowers that the Department directed not to be installed until April due to area-wide shortages.*

On page 9 of the Department's position paper reference is made to a "semi final" inspection. Again, this is not supported by any contract provision.

It also states in the first paragraph of page 9 that the deficiencies found during the March 22nd semi final inspection "were so numerous and widespread throughout the project that listing them with specific locations was impractical". Again, it seems illogical that on February 15th a detailed list containing exact locations and required fixes can be given to Ranger but 5 weeks later the deficiencies are too numerous to give specifics. This merely indicates the lack of clear direction and compliance with the specifications.

The Department's position paper goes on to state that it is the Engineer's "sole right" to include any entity desired in project inspections. Again, Ranger cannot find any language in the contract that supports this position. The phrase "sole right" does not appear anywhere in section 5-10. Ranger does not disagree that the Engineer can utilize whatever input he deems necessary if he feels he is not qualified in specific features, does not have the requisite expertise or does not have the authority to perform the duties under the contract. However he cannot violate the contract in doing so.

Issue 9 — Relocation of Palms

The Department's position paper indicates in the second to last sentence "The contractor has been paid via a Unilateral Supplemental Agreement dated May 18th, 2006 and fully executed June 16th, 2006 for this work which was accomplished without impact to contract time". A copy of the Unilateral S.A. is included in the Department's position paper and shows 0 days. This is curious to Ranger since the Engineer is on record that he feels Ranger is due 5 or 6 days for this issue. If 5 or 6 days is viewed by the Engineer as being warranted then why haven't they been granted? Is it because the Engineer's authority has been diminished and he is being overruled by the Department personnel? Ranger feels this is another example of the lack of good faith dealing by the Department.

Ranger will utilize the forum of the hearing on September 8th to continue with the rebuttal of the Department's position.

DEPARTMENT'S POSITION¹⁰:

Background

The contractor submitted a request for time and compensation dated February 16, 2006. That package cited four issues: Irrigation/Landscape Issue; Addition of Side Drain at Pump Station Driveway; Modification of Structure S-404; and Removal of Calamondins. The contractor asked for a time extension to March 10, 2006.

Contractor's Claim

RCI requested a time extension from the end of contract time, August 16, 2005 to March 10, 2006 based on the impacts from these issues.

The request was denied in a March 9, 2006 letter. Department's Position

The Department agrees that some extra work has been added to the contract. This work is as follows:

¹⁰ 1st Owner Position Paper for May 4th, 2006 hearing.

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- *Relocation of irrigation tap*
- *Addition of side drain and driveway at lift station*
- *Modification of Structure S-404*
- *Removal of Calamondins*

The particular circumstances surrounding this work are detailed below. Relocation of Irrigation Tap

The irrigation system water connection at Station 2095+20 was relocated to Station 2110+00 due to the excessive depth of the water main at the plan location. This work was completed by November 1, 2005 (see attached daily report).

Addition of Side Drain and Driveway

A driveway was added to provide access to a sanitary lift station at 2156+50 Right. This also required the installation of a 36" side drain. This work was completed on February 1, 2006 (see attached daily report).

Modification of S-404

The offset for Structure S-4 was incorrectly shown in the plans. The intended plan location was in the middle of the median ditch. The actual location was partially under the southbound median curb and gutter. This error was not found until the pipe and structure were installed and the curb and gutter poured. The inlet top was modified to permit the inlet to function and not interfere with the curb and gutter. To date the inlet has been modified and the ditch grade corrected. The only remaining work is to sod the corrected area. This will be accomplished as the contractor completes the required resodding on the project.

Removal of Calamondins

The landscape plans showed the planting of 24 Calamondins in four locations. However it was determined that these plants were in a prohibited area. The Calamondins were removed, deposited in an approved disposal site and the locations replaced with mulch. This work was accomplished on January 24, 2006.

Pursuant to Supplemental Specification 8-7.3, Adjusting Contract Time, time will be granted based on the extent that the extra work delays the contract completion. The contractor has not shown how performance of the work discussed above delayed the completion of the project. In fact, as of April 19, 2006, the projected completion date is unknown to the contractor. This is not due to extra work or Department delays but rather the inadequate workforce dedicated to the project.

DEPARTMENT'S REBUTTAL¹¹:

Department Rebuttal Comments

Note: For the purposes of this rebuttal paper the referenced baseline schedule is the contractor's accepted baseline schedule with the calendar modified to add the granted weather and SA days. All actual dates are obtained from the contractor's March 2006 schedule update. These schedules are Exhibits 1 and 2 respectively.

Issue 1: Delay caused by Irrigation Issues

It is true that there was some confusion about who would perform the taps for the irrigation system and also true that one tap had to be rerouted, but the contractor's interpretation of the impacts of those facts is inaccurate. The contractor states that the taps were required by June 22, 2005 to avoid impacting the critical path. This is not true. The taps are needed before the irrigation system can function, not before it can be installed. The late finish for the irrigation system on the baseline schedule was 7/8/05 (Activity 4305). But by July 2005 the schedule has slipped so much that the early finish was in September (Exhibit 3). The first irrigation activity started on 6/30/05 (Activity 4300), Activities 4285 and 4295 started in late October and Activity 4305 started in December. It is important to note that the predecessor activity to 4300 is the grading of the median. This activity, 4215, did not start until 8/3/05. It is unclear how the contractor expected to begin the installation of

¹¹ 1st Rebuttal May 4th hearing.

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the irrigation system when the ground was not to final grade. In fact, during the grading process a significant section of irrigation pipe was damaged and had to be replaced after the grading was completed.

A photographic time study of Station 2080+00 is shown in Exhibit 7. This area is served by the rerouted tap. The first photo taken in 6/28/05 and shows that the northbound median curb and gutter is in place but the southbound is unimproved. The next photo, taken on 8/24/05 (just after the expiration of allowable contract time) shows little additional work. The photo dated 10/19/05 shows the curb and gutter is under construction but the median grading has not been performed. The photo dated 11/2/05 (after the rerouted tap was completed) shows that the median is still ungraded. The next three photos dated 11/16, 12/1 and 12/14 show the progress through the placement of the irrigation and landscaping. It is clear that the contractor was not ready to place either at the time specified in the baseline schedule. It is also clear that the responsibility for the delay was not due to the need to reroute the irrigation supply.

All irrigation is shown completed by December 8, 2005, 50 days after the contractor acknowledges the resolution to the irrigation questions and 38 days after the rerouted supply line was completed. The Department contends that the delay in installing the irrigation system is the responsibility of the contractor. The table below details the actual dates the irrigation predecessor activities were performed. The contractor's request for time does not address the reasons that these activities are late.

Activity ID	Activity Description	Actual Start	Actual Finish
4175	<i>Curb & Gutter Phase 4, Sta 2075/2105</i>	<i>6/8/2005</i>	<i>11/10/200</i>
4180	<i>Curb & Gutter Phase 4, Sta 2105/2310</i>	<i>7/25/2005</i>	<i>11/10/200</i>
4185	<i>Curb & Gutter Phase 4, Sta 2130/2139</i>	<i>6/21/2005</i>	<i>8/12/2005</i>
4190	<i>Curb & Gutter Phase 4, Sta 2139/195</i>	<i>7/12/2005</i>	<i>11/10/200</i>
4195	<i>Curb & Gutter Phase 4, Sta 195/220</i>	<i>7/1/2005</i>	<i>11/10/200</i>
4200	<i>Finish Grade Phase 4, Sta 2075/2105</i>	<i>7/25/2005</i>	<i>12/9/2005</i>
4205	<i>Finish Grade Phase 4, Sta 2105/2130</i>	<i>8/1/2005</i>	<i>12/9/2005</i>
4210	<i>Finish Grade Phase 4, Sta 2130/2139</i>	<i>8/3/2005</i>	<i>12/9/2005</i>
4215	<i>Finish Grade Phase 4, Sta 2139/195</i>	<i>8/5/2005</i>	<i>12/9/2005</i>
4220	<i>Finish Grade Phase 4, Sta 195/220</i>	<i>8/8/2005</i>	<i>12/9/2005</i>
4285	<i>Irrigation Phase Pase 4, Sta 2075/2105</i>	<i>10/27/200</i>	<i>12/8/2005</i>
4290	<i>Irrigation Phase 4, Sta 2105/2130</i>	<i>10/28/200</i>	<i>12/7/2005</i>
4295	<i>Irrigation Phase 4, Sta 2130/2139</i>	<i>10/31/200</i>	<i>12/8/2005</i>
4300	<i>Irrigation Phase 4, Sta 2139/195</i>	<i>6/30/2005</i>	<i>12/8/2005</i>
4305	<i>Irrigation Phase 4, Srta 195/220</i>	<i>12/1/2005</i>	<i>12/8/2005</i>

Issue 2: Delay caused by Landscaping Trees

The contractor has not requested time; therefore this issue is not addressed.

Issue 3: Delay caused by Groundcover Availability

The contractor's states that they are due 153 days because their subcontractor can not obtain the groundcover plants stipulated in the plans. According to the contractor the planting of the groundcover was completed on April 21, 2006. This work is regular contract work, not added or revised work. It was performed concurrently with other regular work (Exhibit 4). That other work is not complete and is controlling the project time. Pursuant to Article 8-7.3.2, the planting of the groundcover is not a controlling item of work and did not impact contract time, therefore there is no basis for granting additional time.

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Issue 4: Delay caused by Modifications to S-404

Issue 5: Delay caused by Lift Station Sidedrain

Issue 6: Delay caused Removal of Calamondins

The Department's position on these issues is similar. None meet the requirements of Article 8-7.3.2. All the work described was completed concurrently with ongoing regular work that is still not complete. Copies of the Engineer's Weekly Summary in Exhibit 4 show that regular work has been on going since contract time expired. Since the first of the year, this work includes sodding, curb and gutter repair, inlet repair, irrigation repair, landscaping maintenance, signal repair, pavement marking, fence placement, drainage repair, sign installation, pipe desilting and other activities.

Issue 7: Delay caused by South Tie In

Issue 5: Delay in Final Inspection

Issue 6: Relocation of Palms

These issues are not being addressed. They have not been previously presented to the Department for review in accordance with the DRB guidelines. (sic)

Summary

The contractor attempts to shift responsibility for the late completion from themselves to the Department and CEI. This is not substantiated by the facts. The tables in Exhibits 5 and 6 examine the history of the project. Table 1 compares the actual durations to the baseline durations. Table 2 compares the actual dates to the baseline late dates. A review of Table 1 shows that most activities took much longer to complete than originally planned. Of note is Activity 4B010, Excavate Pond 4B. This took 174 days longer than originally estimated. The issues in the contractor's request have no impact on the progress of this activity. Similarly, Table 2 shows that the activities constructing Ponds 4B and 6B were late in starting by up to 236 days. This directly impacts the critical path and accounts for the majority of the current 250 day delay to the project. These activities were supposed to be performed in Phase 3 and were preceded only by the completion of Phase 2. If the contractor was on schedule at the conclusion of Phase 2 then why were these activities late?

DEPARTMENT'S POSITION¹²:

Issue: Contract Time Issues (Continuation)

Background

The contractor's Position Paper for the May 4, 2006 Disputes Review Board hearing addressed three issues that were not previously submitted to the Department. The DRB postponed hearing these issues until September 8, 2006. These issues are:

- *Issue 7 – Delay Response to Plan Change at South Tie In*
- *Issue 8 – Delays in Final Inspection*
- *Issue 9 – Extra Work – Relocation of Medjool Palms at Bates and Patterson Roads*

Contractor's Claim

The contractor has not requested any time or monetary compensation for these Issues 7 and 8 to date. They have requested \$7,707.12 and 5 days for the relocation of palms, Issue 9.

Department's Position

The Department's position is presented in the following sections.

The supporting documentation for Issue 8, Delay to Final Inspection, is contained in the Appendix. The exhibits are numbered. For example, the two page Exhibit 1 is labeled 1-1 and 1-2, Exhibit 2 is 2-1, 2-2, etc.

Issue 7 – South Tie In

The south end of Project 403890-1 interfaces with another project under construction. There have been some coordination issues with that project. Unfortunately, Ranger's Position Paper confuses three of the issues. The clarification request on April 5, 2005 was for the responsibility for a drop off condition at the project

¹² 2nd Owner Position Paper for September 8th, 2006 hearing.

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beginning. Ranger contended that the contractor for the adjoining project created a drop off when they shifted traffic. What actually occurred was that Ranger created the drop off when they removed the existing shoulder the night before. Ranger corrected the problem without incident. The September 7, 2005 direction was to delete friction course from the north end of the northbound lanes.

Issue 7, as described, concerns the addition of a temporary white edge line to create a merge for southbound traffic. This was necessary because upon completion of this project there would be three lanes of traffic and only two lanes available on the adjacent project. The contractor asked about the configuration of the permanent markings once the friction course was placed. They were uncertain if they were to stripe for two or three lanes. The contractor was told to place the permanent stripping for three lanes per Plan Sheet S-5 (page 4). They were also told that the contractor on the adjoining project would be responsible for placing the MOT devices to create the merge.

Ranger was directed to place the removable pavement markings because it was an existing pay item in their contract and not included in the contract on the adjoining project. Ranger performed this work on March 28, 2006 when they removed the MOT devices and opened the previously closed traffic lanes. The photographs on the following page show the conditions before and after the opening. The contractor could not have placed the temporary stripping until the lanes were open. The contractor on the adjoining project placed the MOT signs and drums for the merge.

Clearly, Ranger was not damaged or delayed by the direction to install the removable pavement markings. They were paid the contract price for this work of \$1.20 per linear foot. Furthermore, Ranger did not submit a Letter of Intent to Claim pursuant to either sections 5-12.2.1 or 5-12.2.2. Therefore, the Department contends that Ranger is not entitled to any additional compensation for this issue.

Southbound Merge Pavement Markings

Photo of south end of project taken on March 23, 2006. The contractor had not shifted traffic.



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Photo of same location on April 17, 2006. The edgeline was placed by Ranger on March 28, 2006.

Issue 8 – Delay to Final Inspection

The process of obtaining a final product that complied with the plans and specifications has been quite difficult. Work performed by Ranger and their subcontractors has often been substandard. They have stated on several occasions that they were complete with the work when in fact they were not.

5-10 Final Inspection.

5-10.1 Maintenance until Acceptance: Maintain all Work until the Engineer has given final acceptance in accordance with 5-11.

5-10.2 Inspection for Acceptance: Upon notification that all Contract Work, or all Contract Work on the portion of the Contract scheduled for acceptance, has been completed, the Engineer will make an inspection for acceptance. The inspection will be made within seven days of the notification. If the Engineer finds that all work has been satisfactorily completed, the Department will consider such inspection as the final inspection. If any or all of the Work is found to be unsatisfactory, the Engineer will detail the remedial work required to achieve acceptance. Immediately perform such remedial work. Subsequent inspections will be made on the remedial work until the Engineer accepts all Work.

Upon satisfactory completion of the Work, the Department will provide written notice of acceptance, either partial, conditional or final, to the Contractor.

Until final acceptance in accordance with 5-11, replace or repair any damage to the accepted Work. The cost of such Work will be negotiated.

5-10.3 Partial Acceptance: At the Engineer's sole discretion, the Engineer may accept any portion of the Work under the provisions of 5-10.2.

5-10.4 Conditional Acceptance: The Engineer will not make, or consider requests for conditional acceptance of a project, except as provided in Section 465 for conditional acceptance of movable bridge projects.

5-11 Final Acceptance.

When, upon completion of the final construction inspection of the entire project, the Engineer determines that the Contractor has satisfactorily completed the work, the Engineer will give the Contractor written notice of final acceptance.

The Specifications for Final Inspection and Acceptance are shown to the left. It states that the contractor must notify the Engineer that all Contract Work is complete and the Engineer will make an inspection for acceptance. Ranger submitted a letter at the weekly progress meeting held on February 1, 2006 stating that they have substantially completed the contract work and requested an inspection and punch list. They also requested inspection of the landscaping. This request was discussed at the progress meeting. The contractor stated that they wanted to get started on resolving deficiencies while they completed regular work. Ranger also requested that the remedial work be signed off as it was

completed. The PA agreed with the caveat that he must also approve of the repairs. This discussion did not address the Final Inspection of the project which could not be held because the project was incomplete.

DISPUTE REVIEW BOARD RECOMMENDATION

The CEI conducted an inspection of the work and notified Haines City who began an inspection of the landscaping and irrigation. The city provided Ranger with a punchlist on February 13, 2006 (Exhibit 1) and the CEI on February 15, 2006 (Exhibit 2). Since regular contract work remained, both these lists were preliminary. Ranger began addressing the items on the list as well as performing the remaining regular work. A major deficient item, the curb and gutter, was not included in the punchlist. Instead it was addressed in the field by marking the areas in need of repair or replacement with paint. At the time of Ranger's request the following regular items of work were incomplete:

- *Friction Course*
- *Fencing*
- *Pavement Markings*
- *Drainage*
- *Delineators*
- *Landscaping*

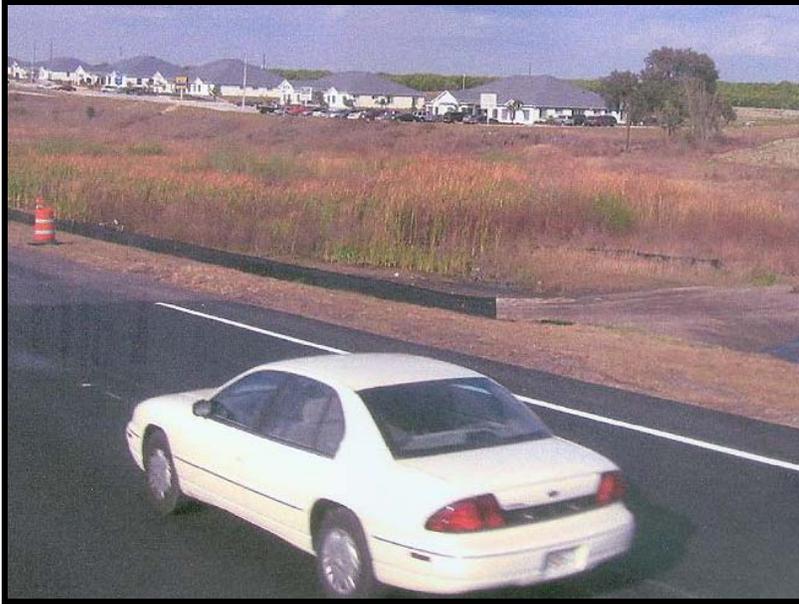
In addition, the contractor was performing drainage repairs, grading repairs and had not submitted the drainage videos.

Examples of Remaining Work

Missing Friction Course on February 9, 2006.



DISPUTE REVIEW BOARD RECOMMENDATION



February 23, 2006 photo showing completed Friction Course

Examples of Remaining Work



February 9, 2006 photo that shows Pond 4 with missing sod and fencing.

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*Pond 4 on
February 23 with
completed fence
and sod.*



DISPUTE REVIEW BOARD RECOMMENDATION

Examples of Remaining Work



Series of photos of north end of northbound lanes. The friction course was deleted in this area to facilitate traffic shifts on the upcoming adjoining project.

Top photo date is February 9, 2006. The next was taken March 24. Both show that the permanent markings are missing. The bottom photo with the permanent markings was taken April 17.



DISPUTE REVIEW BOARD RECOMMENDATION

When the contractor completed most of the items on the preliminary punchlist a semi final inspection was scheduled. It is a semi final inspection because there remained numerous contract items that were incomplete or substandard. This inspection was held on March 22, 2006 with Ranger and FDOT in attendance. The letter dated March 23, 2006 (Exhibit 3) describes the deficiencies noted during this inspection. These deficiencies were so numerous and widespread through out the project that listing them with specific locations was impractical. The contractor's representatives were shown, in detail, what was deficient. The contractor did not question the deficiencies found at the inspection but instead sent a letter (Exhibit 4) questioning the inclusion of the Department's maintenance personnel. The contractor was told that this work must be completed before the Department would be scheduled to perform a final inspection.

Ranger's objection about the inclusion of the maintaining agencies in the inspections is groundless. It is customary to include the maintaining agencies such inspections. In addition, it is the Engineer's sole right to include any entity desired in project inspections.

The contractor's continued protests that they did not understand the project deficiencies prompted a second walk thru on March 29, 2006 with the CEI and the contractor. This inspection continued for several days and yielded the list shown as Exhibit 8. This list was provided to the contractor on April 4, 2006. Note that several items on this list were also on the preliminary punchlist. Ranger replied that they would perform the work but felt that it was extra work and reserved their right to file a claim.

On April 14, 2006 Ranger submitted a letter (Exhibit 13) stating they were complete. This statement was false. In an effort to reduce the amount of rework due to third party damages it was agreed that the CEI would accept portions of the work. The project was separated into sections and sections were accepted as they were completed. The intent was to compensate the contractor for replacing sod damaged by other parties in accepted sections.

On May 24, 2006 Ranger was issued a letter addressing deficient items in the median. Many remained from the April 4 list. Others were newly caused by the contractor's activities. A second review with FDOT maintenance was performed on May 30, 2006. The remaining deficiencies were low shoulders in many locations, damaged or improperly installed signs, and improperly placed pull boxes. Ranger responded on May 30, 2006 by stating that they were again complete with all corrections (Exhibit 28). That statement was refuted by the CEI in a June 1, 2006 letter (Exhibit 29).

The CEI performed a detailed review of the project and delineated the shoulder deficiencies. On June 7, 2006, a joint review of the project was held with Ranger, the Department and the DRB members. The list of shoulder deficiencies was validated during the review. One section was removed where the roadway is in a superelevation and the shoulder is sloped differently. On June 8, 2006, the contractor was provided a list of shoulder, sign and pull box deficiencies (Exhibit 31). On June 9, 2006, Ranger replied stating that they believed the list to be vague and questioning the methods used to obtain the data (Exhibit 32). The CEI replied with an invitation for Ranger to propose an alternative method if they desired. In addition, a revised that deleted the superelevated section inadvertently included, was attached (Exhibit 33).

Ranger resumed work on the project on June 14, 2006. By June 22 they had addressed all items with the exception of replacing the damaged signs. The signs were replaced on July 21, 2006 and the project was accepted (Exhibit 43).

The delay in acceptance of the project is the responsibility of the contractor. They consistently performed work of poor quality. In addition, they caused damage to their work that had to be repaired. A key example is the low shoulders. Ranger was not permitted to begin friction course until the excessive drop off was corrected. Ranger responded with a road widener and proceeded to fill, regrade, and resod the shoulders throughout the



DISPUTE REVIEW BOARD RECOMMENDATION

project. Unfortunately, they left a windrow of material at the shoulder break. Ranger attempted to correct the windrow by running a bulldozer along the shoulder break. This effort destroyed the sod and produced the low shoulders that had to be addressed later in the project. A second example is the damaged signs. The contractor taped coverings for conflicting signs to the sign face. The removal of the tape and glue residue resulted in the damaged sign facing.



Finally, the quality of the repair work was generally very poor. The photos on the next page shows substandard sod placement typical of the work performed. Often the contractor's repair work resulted in additional work needed to remove debris or repair damage to previously acceptable work.

The Department contends that the contractor is responsible for the time taken to provide a project that only marginally meets the requirements of the plans and specifications. There remains deficient curb and gutter and slopes prevalent on the project. The contractor is not due any additional compensation or time for this issue.

DISPUTE REVIEW BOARD RECOMMENDATION

Examples of Poor Quality Workmanship

Photo of sod repairs in median. This sod was placed on top of existing sod and did not thrive. Note the debris left from curb repairs.¹³



This May 10, 2006 photo shows a partial pallet of sod left along the US 27. Ranger in a May 9, 2006 letter stated the project was complete on May 8.

Issue 9 – Relocation of Palms

Ranger was directed to relocate palm trees at two locations. At Bates Road and US 27 one palm tree obstructed a stop sign. This palm was relocated a few feet away. At the second location two palm trees were planted too close to an inlet. This created an extreme slope that did not meet the plan requirements. These trees were also relocated a few feet away. The contractor has been paid via a Unilateral Supplemental

¹³ 02/24/06

DISPUTE REVIEW BOARD RECOMMENDATION

Agreement dated May 18, 2006 and fully executed June 16, 2006 (page 13) for this work which was accomplished without impact to contract time. *The Department contends that the contractor is not entitled to additional compensation for this issue.*

DEPARTMENT'S REBUTTAL¹⁴:

FIN 403890-1-52-01

US 27 from Blue Heron Bay Blvd. to CR 547

Issue 7 – Delay Response to Plan Change at South Tie In

Issue 8 – Delay in Final Inspection

Issue 9 – Extra Work – Relocation of Medjool Palms at Bates and Patterson Roads

This Rebuttal Paper addresses only Issue 8. The contractor did not include information on Issues 7 and 9 in their Position Paper dated August 25, 2006.

Department Rebuttal Comments

The contractor's, August 25, 2006, Position Paper is disjointed with little or no correlation between the text and the supporting documentation, much of which was already provided in their April 19, 2006 submittal. To facilitate the Board's review of this issue, **the contractor's text is reproduced in italics; the owner's comments follow in bold.**

On February 1, 2006, Ranger requested an official punch list from the Engineer in accordance with Standard Specification 5-10.2, Inspection for Acceptance. (See Exhibit A1). On February 15 a detailed list of remedial work entitled "Ranger Punch List" was provided to Ranger. Although this was beyond the 7 days allowed in the contract, Ranger made no objection and immediately began work on the remedial work.

In their February 1, 2006 letter, Ranger stated that they had substantially completed the contract work and requested an inspection and official punchlist. They did not request a Final Inspection which could not be done until all work is complete. As shown in the owner's Position Paper, Ranger was, in fact, not substantially complete.

At the February 1, 2006 Progress Meeting, Ed Mackiewicz, with Ranger, asked if they were at a point to request a Preliminary Punchlist. Scott Huret, HNTB Project Administrator replied that HNTB would begin the following week to review the project and provide Ranger with the preliminary list the end of that week (February 10, 2006). A partial list was provided to the contractor at the February 8, 2006 progress meeting. The full list was provided at the February 15, 2006 progress meeting.

Mr. Huret discussed the review method for correcting deficiencies. Upon correction of the deficiency the contractor would notify the inspector. If the inspector agreed then he would notify Mr. Huret who had the approval authority. Ranger agreed.

At the progress meeting held March 15, 2006, Ranger was notified by the Engineer that the Department's maintenance office is going to perform a "walk-thru" inspection to develop the "punch list". When Ranger questioned the perpetual punch lists and why DOT maintenance is now involved, the Department replied that it was their standard procedure. The Department's maintenance office conducted a walk-thru inspection on March 22, 2006, 50 days after Ranger's request for inspection and 36 days after Ranger received a detailed punch list from the Engineer. The March 22 walk-thru prompted yet another list that was given to Ranger on March 23 which lacked sufficient detail to perform the work. At the progress meeting on March 29 and in Ranger's letter that same day, Ranger requested more specific information regarding this latest list. The Engineer replied that he did not owe Ranger specific information. This is contrary to specification 5-10.2 which requires the Engineer to "detail the remedial work" and then base subsequent inspections on the remedial work. The purpose of this specification is to prevent perpetual punch lists causing a never-ending project.

On March 29 Ranger notified the Engineer that we had completed the remedial work on the February 15 list and request final acceptance. The Engineer denied this request.

FDOT Maintenance forces were invited for a project review on March 22. The purpose was not to perform a Final Inspection but rather to seek their input in the as the maintaining agency on the

¹⁴ 2nd Rebuttal September 8th hearing.

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condition of the project. The project was not complete at the time. The CEI and the contractor were aware of deficiencies and incomplete work.

Ranger understood that the punchlist provided on February 15 was preliminary. They also understood that other parties would be called in to participate in the Final Inspection. This was discussed at both the February 1st and the February 8th meetings. There is no reason for them to dispute the inclusion of the Department's maintenance forces. Ed Mackiewicz, Ranger's Senior Project Manager, has a CEI background. He was a Senior Project Engineer on Department projects in District 5. District 5 invites maintenance forces to participate in semifinal and final inspections. District 5 CEI's include maintenance comments and observations in their punchlists. Projects in District 5 are not accepted until these comments and observations are addressed.

Ranger's letter of March 29, stating that they were complete and asking for acceptance is an example of their mindset and complete disregard of the facts. They knew the February 15 punchlist was preliminary. They participated in the March 22 review, knew the results and ignored them. Many of these deficiencies were on the preliminary punchlist and discussed at progress meetings on 2/1/06, 2/8/06, 2/15/06, (no 2/22/06 meeting), 3/8/06, 3/15/06, (no 3/22/06 meeting), 3/29/06, 4/5/06, 4/12/06, 4/19/06, and 4/26/06. Ranger was advised on March 29, that once the project was complete a final inspection would be held.

Over the next several months the Engineer issued numerous punch lists each being more vague than the prior. On April 4 Ranger received an "Action List". This "Action List" contained three types of items; those that were previously accepted by the Engineer, those that were a result of third party damage thus considered maintenance and those that required Ranger to determine the acceptability.

Ranger completed each list to the satisfaction of the on-site inspector, notified the Engineer and even received acceptance letters from the Engineer for individual sections of the roadway. However, each time Ranger requested Final Acceptance the Engineer refused and issued a new list. Many of the items on the new list were in areas that were already accepted by the Engineer. The majority of these items were the repair of ruts along the shoulder and damaged sod. It was evident that since the roadway was fully functional, the repairs that the Engineer was requiring were a result of damage by third parties such as cars and trucks parking on the grassed shoulder.

In addition, Ranger would complete repair work based on the Engineer's direction and to his satisfaction only to have him recant his acceptance due to FDOT Maintenance overruling him.

The April 4th Action List was compiled in response to Ranger's statements on March 29 that they did not understand what deficiencies remained. Following the progress meeting, HNTB and Ranger performed another project review and noted the outstanding deficiencies. During this review, the contractor did not object to any item deemed deficient or raise any contentions that the deficiencies were caused by third parties.

On June 7 a DRB meeting was held where discussions took place regarding a comprehensive list of remedial work and who has the authority to decide Final Acceptance. Ranger's contention was that, except for the first punch list of February 15 the Engineer has been evasive as to the extent of needed corrections and was requiring major rework in areas previously accepted. This was evident at the field walk thru on June 7. During that walk-thru the Engineer was non-committal and equivocal in his direction as to the limits of shoulder corrections. Also, his method of measuring the acceptability criteria was inaccurate and was unable to be duplicated. Furthermore, he made no consideration to the fact that the shoulders had been in place for several months, had likely settled and there was no prior mention of any problems with shoulder grades. Also during the June 7 walk-thru the Engineer identified 13 signs to be replaced since he determined them to be "damaged". The Engineer failed to consider that the signs in question had been in place for months and have been exposed to the conditions of an open, fully functional roadway and contained only minor imperfections. Moreover, there was no mention of noncompliant signs neither at the time of their initial installation nor on the February 15 punch list.

The engineer has not been evasive, non-committal or equivocal on the subject of corrections needed to achieve final acceptance. The contractor failed to perform satisfactory work in a timely manner to achieve acceptance. Two complete joint reviews were held of the project: the first on March 22 and the second on March 29 which lasted three days. Ranger's representatives Mark Webber, Bill Bentley and Doug Vining were present. The contractor was fully aware of the deficiencies present.

DISPUTE REVIEW BOARD RECOMMENDATION

They made no objection or protest. In fact the only protest to date by Ranger has been the inclusion of FDOT maintenance in the reviews.

A second review by FDOT maintenance was held on May 25. The purpose of this review was to determine the minimum the contractor would have to correct to obtain an acceptable project. By this point it was obvious that Ranger had no intention or was unable to produce a product that fully met the plan and specification requirements. Maintenance agreed to accept the project provided that the graded shoulder met the specification requirements. The shoulders were not deficient due to settlement or third party damages. They were deficient due to Rangers actions.

During this review it was observed that several signs were damaged. These signs were **not damaged when installed**. They were **damaged later by the contactor when they removed tape and tape residue**.

The June 7 meeting was an attempt to come to resolution and gain acceptance of this project. The method of determining the acceptability of the shoulders was demonstrated to the Board and Ranger. The results were repeatable and accurate. Ranger was asked to provide an alternative method and was silent.

As a result of the Department's failure to follow the specifications, their wavering on acceptance, their inability to make definitive decisions and their unreasonable interpretation as to what constitutes conformity to plans, Ranger has been detrimentally harmed through additional costs, liquidated damages and liability.

Ranger's damages are fully their responsibility. They have feigned ignorance about project deficiencies and the process of final inspection and acceptance. They knew that the February 11t punchlist was preliminary. They asked for it. They also .that the project was not complete on February 1, March 29, April 14, May 10, and May 30, the dates of Ranger's letter requesting acceptance or stating completion. On numerous occasions Ranger's management was asked to review the project with the CEI to see the deficiencies. They refused. Ed Mackiewicz spent approximately five minutes reviewing the project on March 29 and then left. He assured the CEI that he would personally supervise the corrective actions and then never visited the project. His only substantial time spent on the project was at the June 7 review. Perhaps if Ranger was as interested in completing a quality project rather than building a claim this project would have been accepted months earlier.

BOARD FINDINGS:

The applicable specifications read:

4-3.7 Differing Site Conditions: During the progress of the work, **if subsurface or latent physical conditions** are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature **differing materially from those ordinarily encountered** and generally recognized as inherent in the work provided for. in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work.

Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and **cause an increase or decrease** in the cost or **time required for the performance of any work** under the.: Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. The Engineer will notify the Contractor whether or not an adjustment of the Contract is warranted.

The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has provided the required written notice.

The Engineer will not allow a Contract adjustment under this clause for any effects caused to any other Department or non-Department projects on which the Contractor may be working.

...

DISPUTE REVIEW BOARD RECOMMENDATION

SECTION 5

CONTROL OF THE WORK

5-10 Final Inspection.

5-10.1 Maintenance until Acceptance: Maintain all Work until the Engineer has given final **acceptance** in accordance with 5-11.

5-10.2 Inspection for Acceptance: Upon **notification** that all Contract Work, or all Contract Work on the portion of the Contract scheduled for acceptance, has been completed, the **Engineer will make an inspection for acceptance**. The inspection will be made **within seven days of the notification**. If the Engineer finds that all work has been satisfactorily completed, the Department will consider such inspection as the final inspection. If any or all of the Work is found to be unsatisfactory, the **Engineer will detail the remedial work** required to achieve acceptance. Immediately perform such remedial work. **Subsequent inspections will be made on the remedial work** until the Engineer accepts all Work.

Upon **satisfactory completion of the Work**, the Department **will provide written notice of acceptance**, either partial, conditional or final, to the Contractor.

Until final acceptance in accordance with 5-11, replace or repair any damage to the accepted Work. The **cost of such Work will be negotiated**.

...

5-11 Final Acceptance.

When, upon completion of the final construction inspection of the entire project, the Engineer determines that the Contractor has satisfactorily completed the work, the Engineer will give the Contractor written notice of final acceptance.

5-12 Claims by Contractor.

5-12.1 General: **When the Contractor deems** that extra compensation or a **time extension is due beyond that agreed to by the Engineer**, whether due to delay, additional work, altered work, **differing site conditions**, breach of Contract, or for **any other cause**, the Contractor shall follow the procedures set forth herein for preservation, presentation and resolution of the claim.

5-12.2 Notice of Claim:

5-12.2.1 Claims For Extra Work: **Where the Contractor deems** that additional compensation **or a time extension is due** for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the **Contractor shall notify the Engineer in writing** of the intention to make a claim for additional compensation before beginning the work on which the claim is based, and **if seeking a time extension**, the Contractor shall also **submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay**. **If such notification is not given** and the **Engineer is not afforded the opportunity for keeping strict account** of actual labor, material, equipment, **and time**, the Contractor waives the claim for additional compensation **or a time extension**. Such notice by the Contractor, and the fact that the Engineer has kept account of the labor, materials and equipment, and time, shall not in any way be construed as establishing the validity of the claim or method for computing any compensation or time extension for such claim. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete claim documentation as described in 5-12.3. However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate.

Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and

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complete claim documentation, **are each a condition precedent to the Contractor bringing suit against the Department** for the items and for the sums or time set forth in the Contractor's written claim, and the **failure to provide such notice of intent, preliminary time extension request, time extension request,** claim and full and complete claim documentation within the time required **shall constitute a full, complete, absolute and irrevocable waiver by the Contractor** of any right to additional compensation **or a time extension for such claim.**

5-12.2.2 Claims For Delay: Where the Contractor deems that additional compensation **or a time extension is due on account of delay, differing site conditions,** breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and **if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay.** The timely providing of a written notice of intent or preliminary time extension request to the Engineer **are each a condition precedent to any right** on behalf of the Contractor to request additional compensation or an extension of Contract Time for that delay, and the failure of the Contractor to provide such written notice of intent or preliminary time extension request within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for that delay. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete documentation as described in 5-12.3. There shall be no Contractor entitlement to any monetary compensation or time extension for any delays or delay impacts, whatsoever, that are not to a controlling work item, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2(c), and then only to the extent the Contractor could not reasonably mitigate such idleness.

5-12.3 Content of Written Claim: As a condition precedent to the Contractor being entitled to additional compensation or a time extension under the Contract, for any claim, the Contractor shall submit a written claim to the Department which will include for each individual claim, at a minimum, the following information:

- (a) A detailed factual statement of the claim **providing all necessary dates, locations, and items of work affected** and included in each claim;
- (b) The date or dates on which actions resulting in the claim occurred or conditions resulting in the claim became evident;
- (c) Identification of all pertinent documents and the substance of any material oral communications relating to such claim and the name of the persons making such material oral communications;
- (d) Identification of the provisions of the Contract which support the claim and a statement of the reasons why such provisions support the claim, or alternatively, the provisions of the Contract which allegedly have been breached and the actions constituting such breach;

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(e) A detailed compilation of the amount of additional compensation sought and a breakdown of the amount sought as follows:

- (1) documented additional job site labor expenses;
- (2) documented additional cost of materials and supplies;
- (3) a list of additional equipment costs claimed, including each piece of equipment and the rental rate claimed for each;
- (4) any other additional direct costs or damages and the documents in support thereof;
- (5) any additional indirect costs or damages and all documentation in support thereof.

(f) **A detailed compilation of the specific dates and the exact number of calendar days sought for a time extension**, the basis for entitlement to time for each day, all documentation of the delay, and a breakout of the number of days claimed for each identified event, circumstance or occurrence.

...

5-12.6 Compensation for Extra Work or Delay:

5-12.6.1 Compensation for Extra Work: Notwithstanding anything to the contrary contained in the Contract Documents, the Contractor shall not be entitled to any compensation beyond that provided for in 4-3.2.

5-12.6.2 Compensation for Delay: Notwithstanding anything to the contrary contained in the Contract Documents, the additional compensation set forth in 5-12.6.2.1 and 5-12.6.2.2 shall be the Contractor's sole monetary remedy for any delay other than to perform extra work caused by the Department **unless the delay shall have been caused by acts constituting willful or intentional interference by the Department** with the Contractor's performance of the work and then only where such acts continue after Contractor's written notice to the Department of such interference. **The parties anticipate that delays may be caused by or arise from any number of events during the term of the Contract, including, but not limited to,** work performed, work deleted, change orders, supplemental agreements, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right-of-way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, suspensions of work by the Engineer pursuant to 8-6.1, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, **weather**, weekends, holidays, special events, suspension of Contract time, or other events, **forces or factors sometimes experienced in construction work. Such delays or events** and their potential impacts on the performance by the Contractor **are specifically contemplated and acknowledged by the parties** in entering into this Contract, and shall not be deemed to constitute willful or intentional interference with the Contractor's performance of the work without clear and convincing proof that they were the result of a deliberate act, without reasonable and good-faith basis, and specifically intended to disrupt the Contractor's performance.

5-12.6.2.1 Compensation for Direct Costs of Delay: For any delay claim, the Contractor shall only be entitled to monetary compensation for the actual idle labor, equipment and materials costs incurred beyond what reasonable mitigation thereof the Contractor could have undertaken, nor shall any indirect costs be recoverable for any delay, except as provided for in 5-12.6.2.2.

5-12.6.2.2 Compensation for Indirect Impacts of Delay: When the cumulative total number of calendar days granted for time extension due to delay of a controlling work item caused solely by the Department is, or the cumulative total number of calendar days for which entitlement to a time extension due to delay of a controlling work item caused solely by the Department is otherwise ultimately

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determined in favor of the Contractor to be, greater than ten calendar days the Department will compensate the Contractor for jobsite overhead and other indirect impacts of delay, such indirect impacts including but not being limited to unabsorbed and extended home office overhead, according to the formula set forth below and solely as to such number of calendar days of entitlement that are in excess of ten calendar days. No other jobsite overhead and other indirect impacts of delay shall be compensable under any circumstances whatsoever, nor shall the Contractor be entitled under any circumstances to receive compensation for jobsite overhead and other indirect impacts of delay beyond the amount provided for herein. Further, **in the event there are concurrent delays** to one or more controlling work items, one or more being caused by the Department and one or more being caused by the Contractor, the **Contractor shall be entitled to a time extension for each day that a controlling work item is delayed by the Department but shall have no right to nor receive any monetary compensation for any indirect impacts for any days of concurrent delay**. No compensation, whatsoever, will be paid to the Contractor for any jobsite overhead and other indirect impacts when the total number of calendar days granted for time extension due to delay of a controlling work item caused solely by the Department is, or the total number of calendar days for which entitlement to a time extension due to delay of a controlling work item caused solely by the Department is otherwise ultimately determined in favor of the Contractor to be, equal to or less than ten calendar days and the Contractor also fully assumes all monetary risk of any and all partial or single calendar day delay periods, due to delay of a controlling work item caused solely by the Department, that when cumulatively totaled together are equal to or less than ten calendar days and regardless of whether monetary compensation is otherwise provided for hereunder for one or more calendar days of time extension entitlement for each calendar day exceeding ten calendar days. All calculations under this provision shall exclude weather days, days used for performing additional work, days included in supplemental agreements, and days of suspended work.

...

5-12.7 Mandatory Claim Records: After giving the Engineer notice of intent to file a claim for extra work or delay, the **Contractor must keep daily records** of all labor, material and equipment costs incurred for operations affected by the extra work or delay. These **daily records must identify each operation affected by the extra work or delay and the specific locations where work is affected by the extra work or delay, as nearly as possible**. The Engineer may also keep records of all labor, material and equipment used on the operations affected by the extra work or delay. The **Contractor shall**, once a notice of intent to claim has been timely filed, and **not less than weekly** thereafter as long as appropriate, **provide the Engineer a copy** of the Contractor's daily records and be likewise entitled to receive a copy of the Department's daily records. The copies of daily records to be provided hereunder shall be provided at no cost to the recipient.

...

SECTION 8

PROSECUTION AND PROGRESS

8-7 Computation of Contract Time.

...

8-7.3 Adjusting Contract Time:

8-7.3.2 Contract Time Extensions: **The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid.** The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of the Contract Time period. When failure by the Department to fulfill an obligation under the Contract results in delays to the controlling construction operations, the Department will

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consider such delays as a basis for granting a time extension to the Contract. Whenever the Engineer suspends the Contractor's operations, as provided in 8-6, for reasons other than the fault of the Contractor, the Engineer will grant a time extension for any delay to a controlling item of work due to such suspension. The Department will not grant time extensions to the Contract for delays due to the fault or negligence of the Contractor.

The Department does not include an allowance for delays caused by the effects of inclement weather in establishing Contract Time.

The Department will handle time extensions for delays caused by the effects of inclement weather differently from those resulting from other types of delays. The Department will consider these time extensions only when rains or other inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work resulting in:

(1) The Contractor being unable to work at least 50% of the normal work day on pre-determined controlling work items due to adverse weather conditions; or

(2) The Contractor must make major repairs to work damaged by weather, provided that the damage is not attributable to the Contractor's failure to perform or neglect; and provided that the Contractor was unable to work at least 50% of the normal workday on pre-determined controlling work items.

No additional compensation will be made for delays caused by the effects of inclement weather.

The Engineer will continually monitor the effects of weather and, when found justified, grant time extensions on either a bimonthly or monthly basis. The Engineer will not require the Contractor to submit a request for additional time due to the effects of weather. The Department will consider the delays in delivery of materials or component equipment that affect progress on a controlling item of work as a basis for granting a time extension if such delays are beyond the control of the Contractor or supplier. Such delays may include an area-wide shortage, an industry-wide strike, or a natural disaster that affects all feasible sources of supply. In such cases, the Contractor shall furnish substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage, an industry-wide strike, etc.

...

Make a preliminary request for an extension of Contract Time in writing to the Engineer within ten calendar days after commencement of a delay to a controlling item of work. If the Contractor fails to provide this required notice, the Contractor waives any rights to an extension of the Contract Time for that delay. In the case of a continuing delay, the Engineer will require only one request. **Include with each request for an extension of time a description of the dates and cause of the delay,** a complete description of the magnitude of the delay, and a **list of the controlling items of work affected by the delay.** **Within 30 days after the elimination of the delay** or the receipt of a written request from the Engineer, submit all documentation of the delay and a request for the exact number of days justified to be added to the Contract Time. If claiming additional compensation in addition to a time extension, include with the documentation a detailed cost analysis of the claimed extra compensation. The **Contractor's failure to deliver the required notice or documentation within the required period constitutes an irrevocable waiver of an extension to the Contract Time for that delay.** **The Contractor's failure to provide sufficient documentation, justification, records, etc., to support a request for additional Contract Time is a valid basis for the Department to deny the request either in part or entirely.**

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The CPAM states in part:

Topic No. 700-000-000
Construction Project Administration Manual Effective: July 1, 2002
Project Closeout Revised: April 30, 2004
Project Acceptance 12-1-1

Section 12.1

PROJECT ACCEPTANCE

12.1.1 Purpose

To provide a uniform basis for granting partial, conditional and final acceptance of a project.

12.1.2 Authority

Section 334.048, Florida Statutes
Sections 5-10, 5-11, 8-6, 8-7 and 465-9, Standard Specifications for Road and Bridge Construction
FHWA Approved: April 27, 2004

12.1.3 Definitions

Conditional Acceptance: The acceptance of a project or portion of a project with certain performance conditions. Present specifications allow **Conditional Acceptance for Movable Bridges, 465-9**. Any other items to be considered for conditional acceptance shall be specified in the special provisions of the contract. The performance period may commence before all work on other items is completed.

Contract Time Extension: Contract time extensions are defined in **Section 8-7.3 of the Standard Specifications**. **Section 7.2** of this manual provides detailed instructions for granting contract time extensions.

Final Acceptance: Acceptance of a project by the Engineer after all items of work have been completed satisfactorily.

Final Inspection: An inspection conducted by the Engineer which finds that all work has been satisfactorily completed.

Partial Acceptance: Acceptance of a portion of a project for which all contract work has been satisfactorily completed and inspected.

Semifinal Inspection: An inspection conducted by the Engineer within seven days after notice from the Contractor of presumptive completion of a unit of a project or the entire project.

12.1.4 Preliminary Field Inspection

(A) Resident Level Responsibilities

When the Project Administrator determines that the project or specified portion of the project is 90% complete, he may notify the Contractor and a representative of the maintaining unit that the project is near completion. If the Contractor agrees, then the Project Administrator will meet with the Contractor's representative and a representative of the maintaining unit to review the project and determine if the project is sufficiently complete to warrant a semifinal inspection. This field inspection is a recommendation; it is not a requirement of this procedure or the specifications. It should be undertaken in the spirit of cooperation to insure a more timely and problem-free, semifinal inspection.

12.1.5 Semifinal Inspection

(A) Resident Level Responsibilities

After the Contractor has notified the Project Administrator that the project or portion of the project is presumptively complete, the Project Administrator, Resident Engineer and the Contractor will perform the semifinal inspection within seven (7) days of notice. A representative of the maintaining unit will be invited to attend. If, at the semifinal inspection, all construction provided for and contemplated by the contract is found complete to the Engineer's satisfaction, such inspection shall constitute the final inspection, as prescribed in **Section 12.1**.

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If, however, at any semifinal inspection any work is found unsatisfactory, in whole or in part, the Engineer shall compile a "punch list" of work to be done. A copy of the "punch list" will be furnished to the Contractor, with the indication that the work so noted must be completed prior to final inspection. Time shall continue to be charged on the project.

Any "punch list(s)" furnished to the Contractor shall state that it is not to be construed as the "final" list. It shall also state that items damaged beyond the control of the Contractor and prior to the final inspection must be corrected prior to final acceptance.

If damage occurs to a pay item between the time the Contractor gives notice of presumptive completion and the time the Project Administrator conducts the semifinal inspection, a time extension may be granted according to **Section 8-7.3.2** of the **Standard Specifications** and **Section 7.2** of this manual. The contract time extension for replacement or repair of the pay item, which has been damaged, may be granted provided the damaged pay item is the only pay item requiring additional work. If damaged pay items as well as incomplete pay items are listed on the punch list, a time extension for the damaged or defective pay items shall not be granted until the other incomplete pay items are completed.

Should unique circumstances arise, the State Construction Office should be consulted for direction, as well as the FHWA on FHWA Full Oversight projects.

Some projects may require representatives from the District Construction Office, the State Construction Office or another specific field of expertise to participate in the semifinal inspection. Other interested governmental agencies will be invited to participate. The FHWA shall be notified and invited to attend the inspection of FHWA Full Oversight projects.

12.1.6 Partial Acceptance

(A) Resident Level Responsibilities

The Department may accept a portion of a project as defined in **Specification 5-10.2**.

Once the Department has accepted the project or a portion of the project, the Project Administrator shall provide written notice of acceptance to the Contractor and the Contractor's obligations for indemnification, defense and to hold the Department harmless under **Section 7-12.1**, shall cease for the accepted portion of the project. However, the Contractor shall be responsible under **Section 7-12.1** only as it applies to direct performance of work items of final striping, landscape establishment period, signalization "burn-in" or any other contract item which requires performance or maintenance more than 20 days after the completion of all other contract items for the accepted portion of the project.

12.1.7 Final Inspection

(A) Resident Level Responsibilities

Whenever all materials have been furnished, all work has been performed, and all the Construction contemplated by the contract has been satisfactorily completed **the final inspection is to be done per Section 5-10 of the Standard Specifications.**

Projects found satisfactorily complete during the semifinal inspection:

Projects found "complete to the Engineer's satisfaction" during the semifinal inspection do not need to be re-inspected. Proceed to **Final Acceptance, Section 12.1.9** of this procedure.

Projects found incomplete during the semifinal inspection:

When the Contractor has completed the "punch list" items, the Engineer shall make another inspection of the project.

- (1) If the punch list items are incomplete since the last inspection, the Engineer shall continue to charge contract time.
- (2) **If all punch list items are found satisfactorily complete, proceed to Final Acceptance, Section 12.1.9.**

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Upon completion of FHWA oversight projects, the FHWA Transportation Engineer shall be contacted to schedule a final inspection if the project was not final accepted during the semifinal inspection.

12.1.8 Conditional Acceptance

(A) Resident Level Responsibilities

Conditional acceptance is given when all work has been satisfactorily completed except for pay items that contain "Performance" periods for moveable bridges.

- (1) Conditional acceptance under these circumstances is governed by **Section 465-9** of the **Standard Specifications** as appropriate.
- (2) The performance period may commence before all work on other items is completed. On movable bridge projects, the performance period will begin when all items of work, including punch list items, are complete and the project has been conditionally accepted. Time can only stop on projects when all other work, including punch list work, has been fully completed.
- (3) Other pay items may be conditionally accepted when specified in the special provisions of the project contract.

When the Project Administrator sends the Contractor a letter stating the project is Conditionally Accepted, the Project Administrator is to advise the Contractor whether or not time is stopped. A copy of this letter is to be sent to the District Construction Office for their appropriate action.

12.1.9 Final Acceptance

(A) Resident Level Responsibilities

When the District Construction Engineer or Resident Engineer is satisfied that all items of work are completed satisfactorily as called for in the contract, the project will be accepted.

The District Construction Engineer or Resident Engineer will notify the Contractor in writing that the Project has been final accepted. On Consultant CEI projects, the Consultant shall seek the Department's Construction Project Manager input prior to issuing Final Acceptance to the Contractor.

A final accounting of Liquidated Damages must be promptly submitted to the Office of Comptroller, Attn: Federal-Aid Manager (MS-42).

A **Final Inspection and Acceptance of Federal-Aid Project, Form No. 700-010-32**, is to be completed by the District Construction Engineer and submitted to the FHWA on all Federal Aid Exempt projects. Delegation of the District Construction Engineer signature authority for this form is not permitted. A copy of Final Inspection and Acceptance of Federal-Aid Project, **Form No. 700-010-32**, is to be sent to the Director, Office of Construction (MS-31), Federal Aid Office (MS-21), and the Comptroller's Office, Attention: Federal Project Account Section (MS-42).

For both In-house and Consultant designed projects, a written, post construction evaluation (**Constructability Grade Computation**) of the design effort is required in accordance with **CPAM Chapter 13.2, Constructability Grade**.

The Department's **Materials Manual, Topic No. 650-000-000** should be reviewed to ensure timely issuance of Materials Statements and all required materials documents.

12.1.10 Information Transmittal

(A) Resident Level Responsibilities

Transmittal of the latest, accurate, contract condition data is essential to the management of the Department's resources. The present **Contract Reporting System (CRS)**, and Site Manager in the future, allows data entry for the following changes in contract conditions.

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These conditions are:

- (1) Notice of Beginning of Construction;
- (2) Notice of Conditional Acceptance of Construction; and
- (3) Notice of Completion of Construction.

To ensure that data about the "Notice of Completion" is properly transmitted, a paper copy of the "Notice of Completion" should be sent to the FHWA Transportation Engineer and the proper maintaining authority. The exact date and time of completion should be noted.

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...**¹⁵

BOARD RECOMMENDATION:

Therefore, based on the materials supplied to the Board and presentations to the Board at the DRB hearing, the Board recommends as to:

Issue 1 – Delayed Response by the Department Effecting Water Connections:

No entitlement - since the connections were made in sufficient time so as to not affect the completion of the project.

Issue 2 – Delay Caused by Unavailability of Landscape Trees

Entitlement – to that number of days that the work may have occurred after August 16th 2005 including redressing in the area affected. (Only one day per calendar day should there be concurrent impacting activities.)

Issue 3 – Delay in Planting Purple Coneflowers and Dune Sunflowers

Entitlement – to that number of days that the work may have occurred after August 16th 2005 including redressing in the area affected. (Only one day per calendar day should there be concurrent impacting activities.)

Issue 4 – Delay and Extra Work for Modification to Structure S-404

Entitlement – to that number of days that the work may have occurred after August 16th 2005 including redressing in the area affected. (Only one day per calendar day should there be concurrent impacting activities.)

Issue 5 — Extra Work — Side Drain at Pump Station Driveway

Entitlement – to that number of days that the work may have occurred after August 16th 2005 including redressing in the area affected. (Only one day per calendar day should there be concurrent impacting activities.)

Issue 6 — Removal of Calamondins

Entitlement – to that number of days that the work may have occurred after August 16th 2005 including redressing in the area affected. (Only one day per calendar day should there be concurrent impacting activities.)

¹⁵ DRBF Practices and Procedures Section 1 – Chapter 6

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Issue 7 - Delay Response to Plan Change at South Tie-In

Entitlement – to that number of days that the work may have occurred after March 22nd 2006¹⁶. (Only one day per calendar day should there be concurrent impacting activities.)

Issue 8 - Delays in Final Inspection

The Contractor requested inspection and “official punch list” on February 1st 2006. The Owner’s representative furnished a punch list on February 15th. This was a detailed list and contained:

item description, a column for date inspected, and columns for inspector initials and contractor initials upon completion.

Albeit that it was furnished to the contractor 14 days later, this list complied with Specification 5-10.2. It “**detailed the remedial work required to achieve acceptance**”.

Engineer will **detail the remedial work** required to achieve acceptance. Immediately perform such remedial work. **Subsequent inspections will be made on the remedial work** until the Engineer accepts all Work.

Upon satisfactory remediation of the Work, according to 5-10.2 the Department was to provide written notice of acceptance.

Upon **satisfactory completion of the Work**, the Department **will provide written notice of acceptance**, either partial, conditional or final, to the Contractor.

Until final acceptance in accordance with 5-11, replace or repair any damage to the accepted Work. The **cost of such Work will be negotiated**.

Contrary to the Department’s CPAM Section 12.1 Project Acceptance, whose stated purpose in Section 12.1.1 is:

“To provide a uniform basis for granting partial, conditional and final acceptance of a project.”

Section 12.1.5 Semifinal Inspection states in part:

(A) Resident Level Responsibilities

After the Contractor has notified the Project Administrator that the project or portion of the project is presumptively complete, the Project Administrator, Resident Engineer and the Contractor will perform the semifinal inspection within seven (7) days of notice. **A representative of the maintaining unit will be invited to attend**. If, at the semifinal inspection, all construction provided for and contemplated by the contract is found complete to the Engineer's satisfaction, such inspection shall constitute the final inspection, as prescribed in **Section 12.1**.

The Engineer had not had a “representative of the maintaining unit” review the project prior to issuing this “punch list”. Nor had the Engineer advised the Contractor that:

¹⁶ March 22nd 2005 typo corrected to read March 22nd 2006

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"...punch list(s)" furnished to the Contractor shall state that it is not to be construed as the "final" list. It shall also state that items damaged beyond the control of the Contractor and prior to the final inspection must be corrected prior to final acceptance.

Section 12.1.7 Final Inspection of the CPAM further states:

Whenever all materials have been furnished, all work has been performed, and all the Construction contemplated by the contract has been satisfactorily completed the final inspection is to be done per Section 5-10 of the Standard Specifications.

...

- (1) If the punch list items are incomplete since the last inspection, the Engineer shall continue to charge contract time.
- (2) If all punch list items are found satisfactorily complete, proceed to Final Acceptance, Section 12.1.9.

Section 12.1.9 Final Acceptance of the CPAM states:

...

When the District Construction Engineer or Resident Engineer is satisfied that all items of work are completed satisfactorily as called for in the contract, the project will be accepted.

On March 22nd the Contractor completed the "Punch List" in accordance with the Contract:

He requested inspection by the Owner, the Owner inspected the work and detailed remedial work required, the Contractor performed said remedial, the remedial work was re-inspected and signed-off on. There was no documentation provided to the Board that this "Punch List" was preliminary.

Entitlement – to that number of days that the work may have occurred after March 22nd 2006¹⁷. (Only one day per calendar day should there be concurrent impacting activities.)

Issue 9 - Extra Work – Relocation of Medjool Palms at Bates and Patterson Roads

Entitlement – to that number of days that the work occurred after March 22nd 2006 including redressing in the area affected.

Issue 10 - Effects of High Water/Weather

The Board received additional information relating to the High Water issue heard on January 30th 2006. This information was considered.

It was and remains the Board's opinion that based on the information provided; for this type of "changed condition" the Contractor would be entitled to time but not compensation should he provide sufficient documentation, justification, records, etc., to support a request for additional Contract Time beyond that already granted by the Owner.

Since that recommendation was tendered to the Parties, entitlement to additional time has been established between the parties. As of this hearing, the quantum of such entitlement has not been agreed upon. Therefore, should one of the

¹⁷ March 22nd 2005 typo corrected to read March 22nd 2006

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Parties request, the Board will receive position papers, hear the quantum of the issue and render its recommendation.

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

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

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

Respectfully Submitted
Disputes Review Board

John H. Duke, Sr.; DRB Chairman
Rammy Cone; DRB Member
Gary Geddes; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "J H Duke", with a stylized flourish at the end.

John H. Duke, Sr.
DRB Chairman