

## DISPUTE REVIEW BOARD RECOMMENDATION

August 12, 2011

E-Mailed August 12, 2011

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RE: FPN: 416119-1-52-01  
Contract No: E1G60  
Manatee County Automated Traffic Management System (ATMS) Phase 1  
Design Build  
Disputes Review Board Recommendation

Issue: Hub #2 and Signal Equipment Damage at Manatee Ave. and 9th Street West.

Gentlepersons:

The Owner, Florida Department of Transportation (Department), and Contractor, Highway Safety Devices, Inc. (HSD), requested a hearing on the above issue in accordance with the Dispute Review Board (DRB) Operating Procedures:

HSD stated in its May 27<sup>th</sup> 2011 request:

*HSD contests the Departments position that damage caused to ITS and signal equipment at Manatee Ave. and 9th Street West falls under the jurisdiction of specification 7-14. HSD has suffered damages in both monetary and time impacts as a result of the Department's position. It is the desire of HSD to have the Board hear both entitlement and quantum as it relates to this matter.*

On May 27<sup>th</sup> 2011 the DRB e-mailed the Department inquiring:

*Please confirm that the issues have been escalated pursuant to the Partnering agreement and are ripe for hearings on both entitlement and quantum on the dates requested. If so, please also confirm that the dates for hearings are agreeable.*

The Department stated in its June 13<sup>th</sup> 2011 response:

*This letter is in response to HSD's May 27, 2011 request for Hearings before the Disputes Review Board (DRB) and your request for the Department's confirmation of the same date.*

*... Hub #2 and Signal Equipment Damage at Manatee Ave. and 9th Street West. These issues relate to third party damages and it is the Department's position that it is governed by Specification 7-14, Contractor's Responsibility for Work. Entitlement on these issues has been escalated and the hearing should be for entitlement only.*

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 on August 8<sup>th</sup> 2011. Should entitlement be established, the DRB was not to decide the quantum of such entitlement at this time, as the parties would attempt to negotiate the value of entitlement.

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### CONTRACTOR'S POSITION:<sup>1</sup>

#### Detail of Position Statement:

*On Sunday, December 5, 2010 at 8:19 am a 3<sup>rd</sup> party vehicular accident caused damage to equipment installed on the Southwest corner of Manatee Avenue and 9<sup>th</sup> Street West. This accident caused extensive and catastrophic damage to ATMS devices Highway Safety Devices, Inc. (HSD) had previously installed in their permanent configuration. Further, this accident was beyond the control of HSD.*

*Contained within is a copy of the police report and several photos which detail the extent of the damage sustained to the equipment (Page 8-16). Upon notification of the accident, HSD immediately mobilized forces to the accident site to clean up the area and get this critical intersection equipment back on line in order to provide safe passage for pedestrian and vehicular traffic.*

*Then, beginning the morning of Monday, December 6, 2011 HSD staff began communication with vendors and subcontractors that would be affected by this accident to inform them of the incident. It was during this initial week after the accident that HSD was able to fully assess the damage to the impacted equipment and began to solicit quotes and proposals to replace the damaged equipment.*

*During the week of December 13<sup>th</sup>, one week after the accident occurred, HSD completed the issuance of all the necessary PO's to vendors and subcontractors to start the procurement of the major component pieces required to rebuild this intersection to pre-accident status (Page 17-22). The component pieces that were damaged in this accident have extensive lead times, as they are not simply off the shelf commercial items. Therefore, the procurement of these materials caused the project completion date of January 15, 2011 to be unattainable. HSD was able to receive and reinstall all the necessary component materials by mid March 2011. These materials were then physically reinstalled in the field and re-integrated. **On April 20, 2011 the hub was returned to pre-accident status.***

*Section 8-7.3.2 (Page 23-25) governs the addition of Contract Time and states in part "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."*

*Further, this spec states that "...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."*

*FDOT's refusal to grant contract time for this issue has resulted in the assessment of Liquidated Damages and is not consistent with Florida Statute 337.18 (2) (Page 26-28) which states "...The Department shall provide in its contracts for the determination of default on the part of any contractor for cause attributable to such contractor."*

*Clearly the delay incurred is not attributable to HSD. The delay was caused by others beyond our control and should not be subject to Liquidated Damages.*

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<sup>1</sup> For exhibits or pages referenced the reader should refer to the Parties full position papers.

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## Summary

HSD provides this package to the Disputes Review Board and requests your review and recommendation that HSD is entitled to additional contract time resulting from the impacts associated with the hub accident.

1. On December 5, 2010 a third party accident occurred on the project site that caused damage to installed material.
2. On December 6<sup>th</sup> HSD began procuring replacement materials to mitigate the time impacts.
3. The materials were not standard off the shelf and had long lead times, which exceeded the remaining contract time.
4. On April 20, 2011 the project was returned to pre-accident status.
5. The Contract provides for relief to the Contractor in cases like this. Namely, Specification Section 8-7.3.2 (2) states "The Department may grant an extension of Contract Time when a controlling item is work is delayed by factors not reasonably anticipated or foreseeable at the time of bid.....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."

## ***In closing, HSD seeks recognition of entitlement from the DRB:***

1. HSD is due contract time for impacts due to the vehicular accident which caused damages to the Hub and its components.

Highway Safety Devices appreciates the Board's review and consideration of our firms requests contained herein. We look forward to presenting this information in person and answering any questions the Board may have.

## **DEPARTMENT'S POSITION:**

### ***HUB #2 DAMAGE POSITION PAPER***

#### ***Issue:***

The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation regarding the repair and restoration of their HUB #2 site as a result of third party damages. A hearing date of August 8, 2011 has been set and the issue statement to be addressed is; "***Is the Contractor entitled to additional compensation for damage to the HUB #2 site caused by a third party to this contract?***".

#### ***Background of Issue:***

On December 10, 2010, HSD submitted a letter notifying the Department of the extent of damages to their HUB #2 site caused by a multi-car accident that occurred on December 5<sup>th</sup> in the City of Bradenton. (***Exhibits A1/A2***). HSD requested the Department to recognize that the damage was beyond their control and that time and liquidated damages impacts not be imposed. Attached to the letter was an accident report from the Bradenton Police Department (***Exhibit B1/B2/B3/B4***).

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*On December 22, 2010, HSD submitted a timeline/summary of the progress they have made in obtaining materials to repair the damage (Exhibits C1/C2). Also on December 22, 2010, HSD submitted a letter informing the Department that they were pursuing recovery of monetary damages through the at fault driver's insurance company. And, in the event those insurance coverage limits are capped, they requested the Department to compensate HSD for the damage to the controller cabinet only (Exhibit D1/D2/D3). On January 7, 2011 the Department sent an acknowledgement of HSD's December 22<sup>nd</sup> Notice of Intent to recover the cost for the controller cabinet (Exhibit E1/E2).*

*On February 21, 2011, HSD submitted a second Notice of Intent, this one to recover all costs associated with the equipment damaged by the third party accident (Exhibit F1). On February 25, 2011 the Department sent an acknowledgement to HSD's February 21<sup>st</sup> Notice of Intent to recover all costs (Exhibit G1/G2),*

*On May 27, 2011, HSD submitted a Request for Hearings on four issues to the Disputes Review Board (DRB). (Exhibit H1/H2). On June 13, 2011 the Department provided a response to the DRB regarding HSD's Request for Hearings (Exhibit I1/I2).*

*The project Design Build Division One Specification defines the responsibility of each party in the event of injury or damage to the work prior to its acceptance. This is contained in Article 7-14, Contractor's Responsibility for Work (Exhibit J1).*

### **Statement of Department's Position:**

*On December 5, 2010 a multi-vehicle accident caused damage to ATMS equipment installed, but not accepted, under this contract. This damage was caused through no fault of the Department.*

*Project Division One Specification Article 7-14, Contractor's Responsibility for Work, states, in part, "Until the Department's acceptance of the work, take charge and custody of the work,..." (Exhibit J1). The Article further states, "Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance,..."*

*The issue being addressed is; "Is the Contractor entitled to additional compensation for damage to the HUB #2 site caused by a third party to this contract?". The specifications are clear that work under this contract is the contractor's responsibility until it is accepted by the Department. Any injury or damage is to be repaired "without additional expense to the Department". Therefore, there is no entitlement for this claim.*

### **Conclusion:**

*The contract documents clearly show that until final acceptance HSD is responsible for the repair and restoration of damages of this nature without additional expense to the Department. Therefore, HSD is not entitled to additional compensation for impacts caused by the damage to the HUB #2 site.*

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## **TRAFFIC SIGNAL CONTROLLER CABINET DAMAGE POSITION PAPER**

### **Issue:**

*The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation regarding the repair of a traffic signal controller cabinet as a result of third party damages. A hearing date of August 8, 2011 has been set and the issue statement to be addressed is; “Is the Contractor entitled to additional compensation for damage to the traffic signal controller cabinet caused by a third party to this contract?”*

### **Background of Issue:**

*On April 15, 2011, HSD e-mailed a Notice of Intent to recover expenses for the repairs to a traffic signal controller cabinet damaged by a tractor-trailer on April 13, 2011 at the intersection of Manatee Avenue and 59<sup>th</sup> Street West (Exhibit A). On May 3, 2011, HSD submitted the Notice of Intent in letter form (Exhibit B). On May 3, 2011 the Department sent an acknowledgement to HSD’s May 3<sup>rd</sup> Notice of Intent to claim (Exhibit C1/C2).*

*The project Design Build Division One Specification defines the responsibility of each party in the event of injury or damage to the work prior to its acceptance. This is contained in Article 7-14, Contractor’s Responsibility for Work (Exhibit D).*

### **Statement of Department’s Position:**

*On April 13, 2011 an errant vehicle caused damage to a traffic signal cabinet installed, but not accepted, under this contract. This damage was caused through no fault of the Department.*

*Project Division One Specification Article 7-14, Contractor’s Responsibility for Work, states, in part, “Until the Department’s acceptance of the work, take charge and custody of the work,...” (Exhibit D). The Article further states, “Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance,...”.*

*The issue being addressed is; “Is the Contractor entitled to additional compensation for damage to the traffic signal controller cabinet caused by a third party to this contract?” The specifications are clear that work under this contract is the contractor’s responsibility until it is accepted by the Department. Any injury or damage is to be repaired “without additional expense to the Department”. Therefore, there is no entitlement for this claim.*

### **Conclusion:**

*The contract documents clearly show that until final acceptance HSD is responsible for the repair and restoration of damages of this nature without additional expense to the Department. Therefore, HSD is not entitled to additional compensation for impacts caused by the damage to the traffic signal controller cabinet at the intersection of Manatee Avenue and 59<sup>th</sup> Street West.*

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## CONTRACTOR'S REBUTTAL:

### Rebuttal to FDOT Position:

*There is a fundamental difference in the questions asked of the DRB by the FDOT and HSD. We would like to clarify HSD's request for consideration.*

*HSD: Is Highway Safety Devices due entitlement of contract time for delays it incurred as a result of damage to a traffic hub that was caused by others?*

*FDOT: Is the Contractor entitled to additional compensation for damage to the Hub #2 site caused by a third party to this contract?*

*FDOT: Is the Contractor entitled to additional compensation for damage to the traffic signal controller cabinet caused by a third party to this contract?*

*The parties should clearly understand the nature of HSD's request for entitlement. HSD is seeking a recommendation from the DRB on HSD's entitlement to **additional contract time** due to the accident that damaged the Hub and traffic signal equipment. **HSD has elected not to seek financial compensation from the FDOT for this issue, only contract time.***

*This reduces the DRB's decision to whether a contractor should be granted time for impacts caused by factors beyond its control.*

*The FDOT sites as its justification for not granting contract time Specification 7-14. The reimbursement language in that specification pertaining to damages due to unforeseeable causes is consistent with the language in Specification 8-7.3.2. However, Specification 8-7.3.2 more appropriately governs a request for contract time only.*

*HSD is not seeking direct financial gain for this issue from FDOT. We only seek additional contract time for the delay in the delivery of materials, reinstallation, and reintegration work that moved to the critical path as a result of the accident. For your reference, we have attached schedule pages 13 and 14 from HSD's December 15, 2010 schedule update submittal (pages 3-4). This schedule clearly shows that Activity #800 (Procure Replacement Equipment) as being a controlling item of work. The FDOT acknowledged the impact to the controlling items during the December 7, 2010 progress meeting (pages 5-7). The FDOT states **"The downtown fiber optic hub was struck by an errant vehicle. This will affect project completion."***

*On January 4, 2011, HSD sent an email requesting relief from liquidated damages due to impacts resulting of the hub accident. The FDOT rejected HSD's request (page 8). The FDOT's failure to grant the requested Contract time was done to exert financial leverage on HSD and therefore punitive.*

*In closing, HSD specifically asks the DRB to recommend entitlement for the following:*

- 1. HSD is entitled to additional contract time due to the vehicular accident which damaged certain ITS and signal equipment at the Hub #2 site.*

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### DEPARTMENT'S REBUTTAL:

#### HUB #2 DAMAGE HEARING REBUTTAL

The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation regarding the repair and restoration of their HUB #2 site as a result of third party damages. A hearing date of August 8, 2011 has been set and the issue statement to be addressed is; **“Is the Contractor entitled to additional compensation for damage to the HUB #2 site caused by a third party to this contract?”** The following statements are in response to the HSD Position Statement:

1. **RE: Page 3 – HSD has pursued the insurance carrier for the monetary damages associated with this incident:** This action shows that HSD recognizes the third party damage to the HUB #2 site is governed by Article 7-14 of the Division One specifications.
2. **RE: Page 5 – Date HUB was returned to pre-accident status:** The HUB reached pre-accident status at an earlier date.
3. **RE: Page 5 – Reference to Florida Statue 337.18 (2):** The comment is not relevant to the issue before the Board.
4. **RE: Page 6, Item 4 – Date project was returned to pre-accident status:** Project should have been ahead of pre-accident status at that time.
5. **RE: Page 6, Item 5 – Contract provides for relief to the Contractor in cases like this. Namely, Specification Section 8-7.3.2. (2):** This issue involves damage to installed material through no fault of the FDOT. The contract documents address this circumstance in Article 7-14 of the Division One Specifications and direct the DBF to repair the damage “without additional expense to the Department”. The specifications clearly state the responsibility of the DBF and there is no entitlement for this claim.

#### TRAFFIC SIGNAL CONTROLLER CABINET DAMAGE HEARING REBUTTAL

The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation regarding the repair and restoration of a traffic signal controller cabinet as a result of third party damages. A hearing date of August 8, 2011 has been set and the issue statement to be addressed is; **“Is the Contractor entitled to additional compensation for damage to the traffic signal controller cabinet caused by a third party to this contract?”** HSD did not submit a Position Statement for this issue, however the following question and comment are offered to the Board:

6. Has HSD pursued and/or received compensation from the at-fault driver's insurance carrier for the damage?
7. This issue involves damage to installed material through no fault of the FDOT. The contract documents address this circumstance in Article 7-14 of the Division One Specifications and direct the DBF to repair the damage “without additional expense to the Department”. The specifications clearly state the responsibility of the DBF and there is no entitlement for this claim.

### BOARD FINDINGS/EXPLANATION:

The Board makes no finding or recommendation regarding **TRAFFIC SIGNAL CONTROLLER CABINET DAMAGE** referenced in the Owner's Position and Rebuttal Paper as the Contractor has withdrawn its request for monetary compensation.

Extensive damage was caused by a third party to previously installed equipment on the Southwest corner of Manatee Avenue and 9<sup>th</sup> Street West on December 5<sup>th</sup> 2010. At that time the Contractual completion date was January 5<sup>th</sup> 2011. HSD promptly assessed the damage and solicited quotes to replace the damaged equipment. The equipment was not an “off the shelf

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item.” The equipment was ordered and due to necessary lead times this item became critical. The Hub was returned to pre-accident status April 20<sup>th</sup> 2011.

Contract specifications state in part:

### **DESIGN-BUILD SPECIFICATIONS.**

*(REV 12-19-07)*

### **DIVISION I GENERAL REQUIREMENTS AND COVENANTS**

#### **SECTION 7 LEGAL REQUIREMENTS AND RESPONSIBILITY TO THE PUBLIC**

##### **7-11 Preservation of Property**

*7-11.4 Traffic Signs, Signal Equipment, Highway Lighting and Guardrail: Protect all existing roadside signs, signal equipment, highway lighting and guardrail, for which permanent removal is not indicated, against damage or displacement. Whenever such signs, signal equipment, highway lighting or guardrail lie within the limits of construction, or wherever so directed by the Engineer due to urgency of construction operations, take up and properly store the existing roadside signs, signal equipment, highway lighting and guardrail and subsequently reset them at their original locations or, in the case of widened pavement or roadbed, at locations designated by the Engineer.*

*The Contractor is responsible for any repairs, replacement, etc., for such temporary and permanent features and shall not be entitled to any compensation.*

...

##### **7-14 Contractor's Responsibility for Work.**

*Until the Department's acceptance of the work, take charge and custody of the work, and take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever, arising either from the execution or from the nonexecution of the work. **Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance, except that in case of extensive or catastrophic damage, the Department may, at its discretion, reimburse the Contractor for the repair of such damage due to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, of the public enemy, or of governmental authorities.***

...

#### **SECTION 8 PROSECUTION AND PROGRESS**

##### **8-7 Computation of Contract Time.**

##### **8-7.3 Adjusting Contract Time:**

*Section 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.*

...



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*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.*

...

*As a condition precedent to an extension of Contract Time the Contractor must submit to the Engineer:*

*A preliminary request for an extension of Contract Time must be made in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work. If the Contractor fails to submit this required preliminary request for an extension of Contract Time, the Contractor fully, completely, absolutely and irrevocably waives any entitlement to an extension of Contract Time for that delay. In the case of a continuing delay only a single preliminary request for an extension of Contract Time will be required. Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement date of the delay, the cause of the delay, and the controlling item of work affected by the delay; and*

*Further, the Contractor must submit to the Engineer a request for a Contract Time extension in writing within 30 days after the elimination of the delay to the controlling item of work identified in the preliminary request for an extension of Contract Time. Each request for a Contract Time extension shall include as a minimum all documentation that the Contractor wishes the Department to consider related to the delay, and the exact number of days requested to be added to Contract Time.... If the Contractor fails to submit this required request for a Contract Time extension, with or without a detailed cost analysis, **depriving the Engineer of the timely opportunity to verify the delay and the costs of the delay**, the Contractor waives any entitlement to an extension of Contract Time or additional compensation for the delay.*

*Upon timely receipt of the preliminary request of Contract Time from the Contractor, the Engineer will investigate the conditions, and if it is determined that a controlling item of work is being delayed for reasons beyond the control of the Contractor the Engineer will take appropriate action to mitigate the delay and the costs of the delay. Upon timely receipt of the request for a Contract Time extension **the Engineer will further investigate the conditions, and if it is determined that there was an increase in the time or the cost of performance of the controlling item of work beyond the control of the Contractor, then an adjustment of Contract Time will be made**, and a monetary adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly.*

*The existence of an accepted schedule, including any required update(s), as stated in 8-3.2, is a condition precedent to the Contractor having any right to the granting of an extension of contract time or any monetary compensation arising out of any delay. Contractor failure to have an accepted schedule, including any required update(s), for the period of potential impact, or in the event the currently accepted schedule and applicable*

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*updates do not accurately reflect the actual status of the project or fail to accurately show the true controlling or non-controlling work activities for the period of potential impact, will result in any entitlement determination as to time or money for such period of potential impact being limited solely to the Department's analysis and identification of the actual controlling or non-controlling work activities. Further, in such instances, **the Department's determination as to entitlement as to either time or compensability will be final, unless the Contractor can prove by clear and convincing evidence to a Disputes Review Board that the Department's determination was without any reasonable factual basis.***

(Emphasis added)

The Weekly Progress Meeting Minutes of December 7<sup>th</sup> 2011, states in part:

*11. Current Issues*

*12/07 The downtown fiber optic hub was struck by an errant vehicle. **This will affect project completion** (see Other).*

...

**Fiber Optic Hub Damage**

*12/07 The fiber optic hub, hub UPS cabinet, and traffic controller cabinet located at Manatee Ave./9<sup>th</sup> Street West were destroyed by an errant vehicle. **HSD is in the process of getting options for new equipment replacement from the three vendors. This will impact system testing and project acceptance. Impacts are currently unknown.***

(Emphasis added)

Picture of the damages include:



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On December 10, 2010 HSD wrote the Department:

*On the morning of Sunday, December 5<sup>th</sup> extensive damage was caused by a multi-car vehicular accident to the ATMS equipment our firm installed under this contract located on the southwest corner of Manatee Ave and 9<sup>th</sup> Street. Based on our initial analysis of the material damaged from this event it appears all ATMS equipment (Controller cabinet, Hub cabinet, Hub switch, UPS cabinet, UPS device, etc.) is a total loss and will have to be re-procured. Certainly, **this accident was beyond the control of HSD**, but will set back the project completion schedule. HSD submit this letter seeking a consensus from the FDOT on how we are to proceed.*

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*For the record, the project team members have all worked diligently to position this project for an on-time completion in early January. The FDOT, TBE, PBS&J and HSD all performed admirably to push this project to this point. There is **no disputing the fact that prior to Sunday's accident, this project's fiber optic network was complete, OTDR tested and ready for the ATMS sub-system testing phase to commence.** The accident could not have occurred at a worst time and has impacted the project in many ways.*

*The reality is that HSD must now acquire new materials to replace those damaged in the accident. **The required replacement materials are not off the shelf items, but are instead hi-tech equipment that must be fabricated, configured and integrated to the specific requirements and specifications of this project.** This will take time.*

*In addition to procuring and re-installing the replacement devices, **HSD will need to re-configure and re-integrate the replacement devices.** Be reminded that this is work that had already been performed. Also, due to the destruction of the Hub cabinet and Hub switch, HSD has lost the ability to communicate with numerous ITS devices (controllers, Ruggedcom's, CCTV's, VDS's, and UPS's, etc.) on this project. **This has impacted our ability to finalize the integration efforts of those devices.** Further, the integration of these devices cannot recommence until communications are re-established through a new Hub switch.*

*Other impacts include the inability to start the subsystem or system testing, until after the repairs have been completed. Also, project training efforts will be impacted without having a complete system with which to train.*

*In seeking a solution, **HSD has been in communication with the various vendors and subcontractors who will provide either the products or services required to get this project back to the point it was before the accident occurred.** At this time, **HSD is unable to provide definitive answers as to the time impact this event will have on the project; but it is not unreasonable to assume the project could be impacted by three or four months.** We have already, and will continue to keep the Department informed as to the status of material procurement as we get that information.*

*Needless to say, there has been extensive and catastrophic damage to vital equipment that must now be re-procured, reinstalled, reintegrated. Then and only then can HSD proceed with the subsystem and system testing which must occur prior to final acceptance of the project. HSD is however continuing our efforts on the items we do have control of; namely the stand alone testing, as-builts, punch list, etc. As indicated in our schedule, HSD fully expects these activities to be completed prior to our current project deadline.*

*At this time, **HSD respectfully requests that the Department recognize the critical nature of the event that occurred and provide confirmation that the accident and its impact on the project schedule, as described above, was beyond our control and that any potential time and liquidated damage impacts that are a result of the accident will not be imposed on our firm.***

*For your ease of reference, I have attached an electronic copy of the accident report obtained from the Bradenton Police Department for your files.*

On December 14<sup>th</sup> 2010, HSD issued its first Purchase Order (PO) for the replacement equipment. Additional POs were issued on December 15<sup>th</sup> and December 17<sup>th</sup>. The December 17<sup>th</sup> PO contains the notation "**ADVISED 8-10 WEEK LEAD TIME.**"

The schedule update, Data Date 15Dec10, forecasts activity ID 810 "Complete Integration from Hub 2 accident" to be complete 11 April 2011.

The CEI review of this schedule in its letter of January 3<sup>rd</sup> 2011, states:

*TBE has reviewed your submittal of CPM Update No. 23 received on December 15, 2010 with a Data Date of December 15, 2010 ... and the Project Schedule Narrative. This update is not acceptable as it shows a completion date beyond contract time. However, **it is acknowledged that receipt of the HUB #2 replacement equipment is driving the completion date and unknown at this time.** Therefore, a re-submittal of the December update will not be required at this time.*

The work was actually complete April 20<sup>th</sup> 2011.

On December 22, 2010 HSD wrote the Department:

*Per our discussion yesterday please accept this correspondence as follow up to our letter dated December 10, 2010 where HSD provided a written request for preliminary additional time due to the third party vehicular accident that occurred at Hub location #2. In addition to the obvious time impacts this project will suffer*

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because of this accident our firm also seeks to make the Department aware of possible monetary impacts imposed on us because of this event. As discussed, **we are diligently pursuing the at fault drivers insurance company to recover the monies necessary to replace the equipment damaged.** That said, we do ask that if insurance coverage limits are capped to the extent we are unable to recover all monies due our firm the Department compensate HSD for the damage to controller cabinet only. The controller cabinet that was damaged was in its final configuration and providing beneficial use to the traveling public at the time of the incident. Attached is a copy of the purchase order our firm has issued to Naztec to replace the controller cabinet.

**As it relates to time our CPM update on 12/15/10 indicated an early finish date on the project of May 13, 2011. The time impact detailed in our schedule update that is beyond the approved contract time is due solely to the damage caused to various and critical ATMS equipment as a result of the accident.** This early finish date is obviously an estimate and is dependent on our ability to procure the necessary material in a timely manner. **While at this time an absolute completion date cannot be determined, we respectfully remind the Department of Section 7-14 and Section 8-7.3.2 as it relates to potential adjustments to contract time due to factor beyond the contractor's control.**

On December 22, 2010 HSD wrote the Department:

*As a follow up to our correspondence dated December 10, 2010 regarding the equipment damage that occurred due to a third party vehicular accident Highway Safety Devices (HSD) offers the following additional correspondence as follow up to the progress made in getting the materials procured in order to minimize the time impacts to the project.*

*In summary:*

- 12/5/10 Accident occurs at Hub Site #2 damaging several key equipment components to the project.*
- 12/6/10 HSD notifies all relevant subcontractors and vendors that accident occurred and HSD needs pricing and lead times on damaged components immediately.*
- 12/7/10-12/13/10 HSD has daily communication with vendors clarifying what is needed and pushing to get pricing and availability on needed materials in addition to modifying subcontracts to reflect additional work.*
- 12/14/10 HSD issues PO to Presidio for replacement hub switch.*
- 12/15/10 HSD issues PO to Ruggedcom for replacement edge switch*
- 12/15/10 HSD issues PO to Cooper Crouse-Hinds MTL for replacement hub cabinet.*
- 12/17/10 HSD issues PO to Naztec for replacement controller cabinet.*
- 12/17/10 HSD issues PO to Temple for replacement hub UPS cabinet and UPS with batteries.*
- 12/17/10 HSD replaces controller cabinet that was damaged with a spare from City of Bradenton. When replacement cabinet is received from Naztec, cabinet will be given to City.*

***At this time, all the materials required by our firm to rebuild the system have been released for delivery. Based on information we are receiving from vendors our firm is expecting an 8-10 week lead time from the date of release (issuance of PO) for certain components. This lead time closely conforms to the anticipated lead times shown on our December 15, 2010 CPM update.***

*We will of course keep the Department informed and updated as more certainty develops around material delivery dates. If we can answer any questions with regards to this event please contact us at your convenience.*

HSD amended its request to ask for time only.

The DRB finds that the Department was notified of the damage; it verified that the damage repair was driving the completion of the project and it knew the extent of the delay. There is no allegation that the Contractor was not diligent in procuring the necessary materials or that it delayed in making the necessary repairs when the materials became available. In fact, the December 2010, forecast date of April 11<sup>th</sup> was a reasonable estimate of the actual completion of April 20<sup>th</sup> given that the fabrication and delivery dates were in question.

## DISPUTE REVIEW BOARD RECOMMENDATION

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. ...**<sup>2</sup>

### **BOARD RECOMMENDATION:**

**Therefore, based on the materials supplied to the Board and presentations to the Board at the DRB hearing, the Board recommends entitlement of Highway Safety Devices, Inc. to additional contract time for the procurement and repair of the damaged work on the above referenced project.**

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 this issue and concur with the findings and recommendations.

Respectfully Submitted  
Disputes Review Board

John H. Duke Sr.; DRB Chairman  
Mick Jameson; DRB Member  
Rammy Cone; 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

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<sup>2</sup> DRBF Practices and Procedures Section 1 – Chapter 6