

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

August 14, 2011

E-Mailed August 14, 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: Video Wall Damage

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 27th 2011 request:

HSD contests the Department's position that damage caused to the video wall by a contractor hired by Manatee County 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 27th 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 13th 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.

... Damage to the Video Wall. This issue relates to third party damage and it is the Department's position that it is governed by Specification 7-14, Contractor's Responsibility for Work. Entitlement on this issue 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 8th 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.

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

CONTRACTOR'S POSITION:¹

Detail of Position Statement:

On December 1, 2010 Highway Safety Devices, Inc. (HSD), its subcontractor Advanced Video, Inc. (AVI) and the manufacturer of the video wall, Christie Digital Systems USA, Inc. (Christie) certified under the direction of the CEI (Cardno), Consultant (PBS&J) and Manatee County. Subsequently, the wall certification was signed by Cardno and PBS&J (Page 10).

Sometime during the holiday period (December 23, 2010 and January 3, 2011), Manatee County performed work adjacent to the previously installed and certified video wall. This work included installing a decorative/theatrical curtain above and adjacent to the installed video wall. During the County's curtain installation the video wall was physically damaged which resulted in the voidance of the previous certification.

The Manatee TMC is an extremely secure facility. Access requires either a Manatee County authorized security card or a visitor must sign in at the front desk and be personally escorted to their destination. During the holiday period Manatee County maintained these tight controls over this facility.

*HSD had no advance knowledge of the curtain installation. As such, HSD was not afforded the opportunity to inspect or manage the curtain installation process to ensure that the means and methods the County's curtain installer utilized to construct his work would not damage the certified video wall. It is undeniable that the damage to the video wall happened due to an unforeseeable cause beyond the control of and without the fault or negligence of the HSD. **In fact, the damage to the video wall was caused by the Owner's deficiency in the management, coordination, and installation of the curtain work.***

Events

On January 12, 2011 AVI was on site preparing for stand-alone testing and notified HSD of the apparent damages to the wall. This is when we became aware of the damage. HSD had not performed any work on this wall since the certification. It was also on this date that HSD notified Cardno of the damage (Page 11). On January 13, 2011 HSD formally notified Cardno, via Notice of Intent, of damage to the video wall (Page 12).

Cardno concurred with HSD on January 13, 2011 that "...the video monitors were physically moved/misaligned by others working within the Traffic Management Center" and also acknowledged HSD's NOI on that date (Page 13-15).

On the morning of January 24, 2011 HSD forwarded to Cardno a detailed cost proposal outlining the costs to have AVI and Christie mobilize to the TMC and formally assess the damage to the video wall and subsequently provide a written detailed repair procedure (Page 16-21). After receipt of this initial assessment proposal, Cardno forwarded to HSD on January 24, 2011 correspondence that FDOT now considered the repair of the wall to be governed by Special Provision 7-14, and it was HSD's responsibility

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

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

to “rebuild, repair, restore and make good, without additional expense to the Department,” any damage to the video wall (Page 22).

Cardno in a February 3, 2011 letter stated that “HSD should pursue recovery of any impacts through the **responsible** party for the damage if you so desire” (Page 23).

Then on March 1, 2011 Cardno sent a letter to Mr. Tom Yarger with Manatee County recognizing Manatee County as the at fault party by stating “Your organization may be **responsible** for additional cost to the Contractor as a result” (Page 24).

The FDOT is attempting to separate itself from Manatee County in the administration of this project. It is the position of HSD that FDOT’s attempt to absolve themselves of liability for the direct actions of their fiduciary partner, Manatee County, is unjustified and inconsistent. It is clear that Manatee County is partnered with FDOT concerning activities that occur within this project.

This TMC will be a joint use facility that has been developed, funded and will be operated by FDOT & Manatee County. The ultimate build out of this TMC will include FDOT personnel to monitor and operate ITS infrastructure on FDOT highways. This is long term joint project between FDOT and Manatee County.

The TMC is governed by an Interlocal Agreement dated May 25, 2005 (Page 25-31). This Interlocal Agreement establishes not only a fiduciary relationship between FDOT and Manatee County but also outlines each party’s obligation to fund and staff certain aspects of the TMC. Specific attention is directed to the bottom of Page 1 of 7 of the Interlocal Agreement where it states: “WHEREAS the FDOT has adopted an ITS Master Plan for I-75 in Manatee, Sarasota and Charlotte Counties and desires the co-location of its future incident management center within the regional Traffic Management Center; and WHEREAS, the MPO (of which Manatee County is a part of) and FDOT have allocated funds to locate, develop and construct an ITS Traffic Management Center and related infrastructure as a step toward development and implementation of ITS applications within Manatee County”. Both the work performed by HSD within the TMC, as well as the installation of the theatrical curtain by the Manatee County are part of the development and construction of the TMC project.

Additionally, HSD refers the DRB to Section 4, Page 5 of 7 of the Interlocal Agreement which details the governance of the TMC and the ATMS. Specifically, this details the creation of an Intelligent Transportation System Management Team (ITSMT) to oversee this governance. The ITSMT includes appointed representatives from all participants, including FDOT and Manatee County.

This demonstrates FDOT and Manatee County’s co-ownership of the TMC and this project. FDOT’s attempt to absolve itself from its co-owner’s deficient actions is unsupported.

The remedies available to HSD for damage to the TMC Video Wall are governed in **Design Build Specifications Section 4-3.2 Increase, Decrease or Alteration in the Work**. (Page 32-34)

The remedies available to HSD for the granting of additional contract time due to damage to the TMC Video Wall are governed in **Design Build Specifications Section 8-7.3.2 Contract Time Extensions**

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

(Page 35): “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 (Page 36) “...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.”

Summary

HSD provides this package to the Disputes Review Board and requests your review and recommendation that HSD is entitled to time and monetary impacts for the damages caused to the video wall. It is understood that this hearing is for entitlement purposes only.

1. Manatee County and FDOT entered into an Interlocal Agreement in 2005 establishing their Co-ownership of the TMC.
2. On December 1, 2010 HSD and its team successfully certified, to the FDOT, the installation of a video wall at the Manatee TMC that was in conformance with the Contract Documents.
3. During the 2010 Holiday period, the previously certified video wall was damaged by the County’s curtain installation work.
4. HSD had no previous knowledge or control over the curtain installation work.
5. The County maintained control of the TMC during the 2010 Holiday period.
6. HSD had not performed any work on the video wall after the certification date.
7. Cardno stated “...the video monitors were physically moved/misaligned by others working within the Traffic Management Center”.
8. FDOT inferred that Manatee County may be responsible for the damage to the video wall.

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

1. HSD is due additional Contract time for this impact.
2. HSD is due reimbursement of all costs associated with the repair of the video wall.

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:

Issue:

The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation regarding the repair and restoration of their Video Wall installation 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 their Video Wall caused by a third party to this contract?***”.

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

Background of Issue:

On January 12, 2011, HSD sent an e-mail notifying the Department that the Video Wall had experienced damage to its alignment (Exhibit A1). On January 13, 2011, HSD submitted a Notice of Intent to seek additional compensation due to damage to the Video Wall by a third party (Exhibit B1/B2). On January 13, 2011, the Department sent an acknowledgement to HSD's January 13th Notice of Intent to claim (Exhibit C1/C2).

On January 24, 2011, the Department notified HSD that the damage to the Video Wall would be administered under Article 7-14 of the project specifications (Exhibit D1). HSD responded to the Department's letter on February 2, 2011 stating their disagreement with the Department's position and requested a meeting with the FDOT Sarasota Operations Center to discuss the issue (Exhibit E1/E2/E3). On February 3, 2011, the Department expanded on their position and notified HSD that a meeting would be scheduled as requested (Exhibit F1). A meeting was held at the FDOT Sarasota Operations Center on February 7, 2011 (Exhibit G1).

On February 10, 2011, HSD sent a follow-up letter to the February 7th meeting along with a copy of an Intermodal Agreement and requests the Department to reconsider its position (Exhibit H1 thru H9). On February 15, 2011, the Department notified HSD that its position was unchanged and that Article 7-14 of the specifications governs this issue (Exhibit I1).

HSD requested a Disputes Review Board (DRB) hearing on entitlement at the Board's February 22, 2011 meeting. The DRB set a date of March 28, 2011 for the hearing (Exhibit J1/J2). On March 2, 2011, HSD sent an e-mail suggesting postponement of the hearing (Exhibit K1). HSD began the repair work to the Video Wall on April 18, 2011 and it was completed on April 21, 2011.

On May 27, 2011, HSD submitted a Request for Hearings on four issues to the Disputes Review Board (DRB). (Exhibit L1/L2). On June 13, 2011 the Department provided a response to the DRB regarding HSD's Request for Hearings (Exhibit M1/M2).

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 O1).

Statement of Department's Position:

On January 12 and January 13, 2011 the Department was notified that the Video Wall installed, but not accepted, under this contract had been damaged by a third party (Exhibits A1/B1/B2). 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 O1). 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,..."

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

The issue being addressed is; “Is the Contractor entitled to additional compensation for damage to their Video Wall 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 Video Wall.

CONTRACTOR’S REBUTTAL:

Rebuttal of FDOT Position Statement:

The FDOT’s position on this issue is that the damage was caused by a third party. HSD, however, demonstrated that the FDOT and Manatee County are actually partners in this endeavor as evidenced by an Interlocal Agreement which details their joint obligation to fund, construct and manage the project.

HSD’s position that the FDOT and Manatee County are partners is further demonstrated by other actions in this project.

First, the FDOT relied on Manatee County in the coordination, administration and oversight of HSD’s Contract. FDOT enlisted Manatee to perform certain functions in the administration of this contract. In doing so, FDOT empowered Manatee County with certain roles of the Engineer’s Assistant under this Contract.

*Section 5-6 of the Design Build Specifications Division I General Requirements and Covenants which govern this project state that one of the Authorities and Duties of an Engineer’s Assistant is “...they are authorized to call to the attention of the Contractor any failure of the work or materials to meet the Contract Documents...”(page 4). Manatee County unquestionably fulfilled this role under this contract by providing inspections, punch-lists, test plan comments and as-built corrections to HSD. For example, on March 21, 2011 Manatee County provided punch list comments **directly** to HSD (pages 5-9). Additionally as recent as July 25, 2011 Manatee County generated an as-built punch list (pages 10-11). **It is important to understand that the FDOT obligated HSD to address all of these comments.** These project administration tasks are not the actions of a 3rd party.*

Secondly, FDOT established precedent for compensating HSD for impacts associated with Manatee County’s deficiencies in properly managing certain Contract obligations. The compensation occurred via Supplemental Agreements to HSD’s contract on two separate occasions and included both money and time considerations.

- 1. The first occasion was the coincidental conduit issue wherein FDOT compensated HSD for underground infrastructure work (conduit, pull boxes, tone wire, etc) that was to be installed as part of FDOT’s JPA with Manatee County (pages 12-14).*

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

Manatee County was deficient in the administration of the JPA Contract. FDOT assumed responsibility for the negligence and compensated HSD.

- 2. In the second occasion, FDOT compensated HSD for time impacts due to Manatee County's direct inability to administer and coordinate a separate project to modify the video wall opening (page 15).*

The above demonstrates FDOT and Manatee County's complicity in the administration of this project. In both instances, FDOT assumed responsibility for the impact to HSD due to Manatee County's actions.

Damage to the video wall occurred under the direct management and administration of the FDOT and its partner and Co-owner Manatee County. HSD believes that the examples listed above, the Interlocal Agreement and Specification Section 4-3.2 provide the guidance for entitlement. However, at the very minimum, the damage associated with this incident was unforeseeable and would be governed by Specification 8-7.2.3 and entitlement for time impacts would apply.

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

- 1. HSD is due additional Contract time for this impact.*
- 2. HSD is due reimbursement of all costs associated with the repair of the video wall.*

DEPARTMENT'S REBUTTAL:

*The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation regarding the repair and restoration of their Video Wall 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 their Video Wall caused by a third party to this contract?"** The following statements are in response to the HSD Position Statement:*

- 1. **RE: Page 3, Page 4 and Page 6, Item 4 – HSD did not know this work (curtain installation) was scheduled to commence and it was not authorized by HSD:** HSD's design for this project identified the work of wall coverings around the Video Wall being determined and installed by Manatee County (**Exhibit P1**). HSD had knowledge of this pending work. The RFP requires HSD to coordinate work at the TMC with Manatee County and gives a contact name, telephone number and e-mail address (**Exhibit Q1**). HSD is also responsible for coordinating construction activities with other construction projects that are impacted by or impact this project (**Exhibit R1**). It was HSD's responsibility to have knowledge of the pending work and coordinate accordingly.*
- 2. **RE: Page 4 and Page 5 – The damage happened due to an unforeseeable cause beyond the control of and without the fault or negligence of HSD:** Specification Article 7-14 requires HSD to "take every necessary precaution against injury or damage to the work..." (**Exhibit O1**). HSD had knowledge of the pending curtain work as it was part of their design of the project. Preventive measures should have been undertaken to protect their work from damage. Signs, barricades and communication with the Manatee County coordination contact are some steps that could have been implemented.*

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

3. **RE: Page 7 and Page 8, Item 1 – Manatee County and FDOT entered into an Interlocal Agreement in 2005 establishing their Co-ownership of the TMC:** *The Interlocal Agreement is just what the name says, an Interlocal Agreement for Cooperation and Coordination in the Operation of a Unified Intelligent Transportation Management System... which identifies goals, resources and operational procedures between local and state agencies. It identifies Manatee County as securing a location for the regional TMC and available funding sources, but does not create a “co-ownership” of the TMC. Ownership requires a lawful document giving that right (Exhibit S1/S2). Also, the RFP informed all prospective DBFs that “Manatee County has constructed a new TMC under a separate contract” (Exhibit Q1). It does not say Manatee County and the FDOT constructed the facility.*

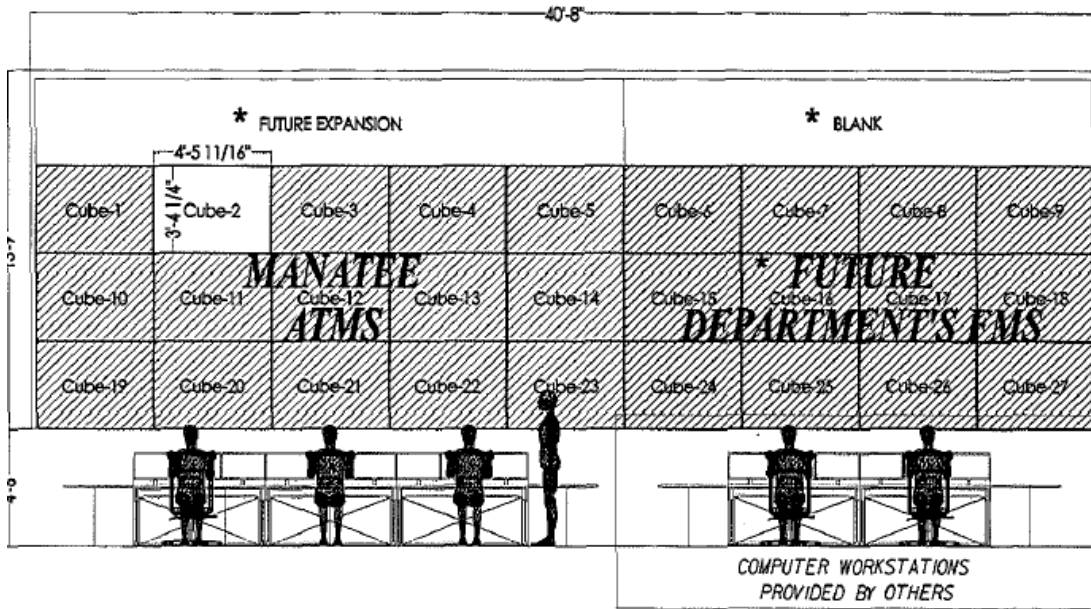
4. **RE: Page 7 and Page 8 – The remedies available to HSD are Specification Sections 4-3.2 and 8-7.3.2:** *This issue involves damage to installed material through no fault of the FDOT. The contract documents address this circumstance in Article 7-14 of the Division One Specifications (Exhibit O1) and direct the DBF to repair the damage “without additional expense to the Department”. In addition, as noted in Item No. 1 above, HSD had knowledge of the curtain installation project and had the responsibility to coordinate that work with the County. The remedy for damages occurring in this situation is identified in Specification Article 8-4.4, i.e. each contractor is responsible for any damage done by them (Exhibit T1). The specifications clearly state the responsibilities of the DBF and there is no entitlement for this claim.*

BOARD FINDINGS/EXPLANATION:

The Video Wall had been installed and calibrated by HSD and the “Display Systems - Monitoring Solutions Site Certification Check List” was checked off and signed by the Department’s Representative on December 1st 2010. The wall is installed within a secure facility whose access is monitored and controlled by Manatee County. Damage was caused to the wall during the Christmas holidays by a “third party” that was under the direction and control of Manatee County. It is alleged that the cause of the damage was negligence during the installation of the decorative/theatrical curtain by Manatee County’s installer.

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

Graphic of area:



* WALL COVERINGS FOR OPENINGS RELATED TO FUTURE EXPANSION & FUTURE DEPARTMENT'S EMS AND BLANK AREAS TO BE DETERMINED AND INSTALLED BY THE MAINTAINING AGENCY

On January 12th 2011, HSD e-mailed the Department's Representative:

*As you know AVI is onsite at the TMC completing their contracted work and preparing for the Stand Alone Test. Allan Dox informed me the **Video Wall has been knocked out of alignment and is not in conformance.** The **only known activity to occur in the TMC within the area around the video wall was the installation of the theatrical curtain.** The County installed the curtain the week between Christmas and New Years. AVI identified the video wall to be electrically and physically out of alignment. Scratches and rub marks to the kick plate are also visible which were not present when AVI was last on site.*

(Emphasis added)

On January 13th 2011, HSD wrote the Department's Representative:

Damage to Video Wall-Notice of Intent

*I am writing to inform you the DBF will realize **delays to the completion of this project and cost overruns due to damage to the video wall by a third party** that has been discovered by our video wall contractor, A VI. As per my earlier correspondence, it appears damage was done to the wall during the installation of the theatrical curtain installed by a county contractor during the Christmas break. Yesterday, while on site preparing for the stand alone tests, AVI noticed that components of the wall had been physically shifted vertically and the tolerances that the wall was previously constructed and tested to were no longer present. As you are aware, the **DBF has not have any personnel physically working on the video wall since prior to December 1, 2010** when the certification testing by the wall manufacturer was conducted in the presence of both TBE and County representatives.*

*Also, we would like to note **the County did not notify the DBF when the curtain installation was scheduled to be completed and therefore the DBF did not have opportunity to have someone on site to observe the work.***

At this time, please accept this as our written notice of intent to seek additional time and monetary impacts due to the damage caused on the wall. We await your direction to begin a resolution to this matter.

(Emphasis added)

On January 13th 2011, the Department's Representative responded to HSD via e-mail:

*See attached NOI acknowledgement. **We agree that by all appearances the video monitors were physically moved/misaligned by others working within the Traffic Management Center.***

(Emphasis added)

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

On January 13th 2011, the Department's Representative wrote HSD:

RE: Intent to File Claim

*This is written to **acknowledge receipt** of your letter dated January 13, 2011 wherein you informed us of **intent to file a claim for impacts related to damage to the video wall caused by a third party performing work within the Traffic Management Center.***

Should you plan to drop the claim, please notify us in writing indicating that the claim has been abandoned.

***Should you plan to pursue the claim, provide a complete claim package** including the following information:*

- 1. A detailed factual statement of the claim providing all necessary dates, locations, and items of work affected and included in each claim;*
- 2. The date or dates on which actions resulting in the claim occurred or conditions resulting in the claim became evident;*
- 3. 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;*
- 4. 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;*
- 5. A detailed compilation of the amount of additional compensation sought and a breakdown of the amount sought as follows:*
 - Documented additional job site labor expenses;*
 - Documented additional cost of materials and supplies;*
 - Provide, a list showing all equipment (other than small tools) for which the Contractor may request compensation, equipment identification number with serial number, manufacturer, year manufactured, model and description.*
 - A list of additional equipment costs claimed, including each piece of equipment and the rental rate claimed for each;*
 - Any other additional direct costs or damages and the documents in support thereof;*
 - Any additional indirect costs or damages and all documentation in support thereof.*
- 6. 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.*
- 7. On a weekly basis, provide the Project Administrator a copy of the Contractor's Daily records. (5-12.7 Mandatory Claim Record) " **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** "*
- 8. The Contractor will be required to certify the Claim by an officer or director with the authority to bind the Contractor as described by 5-12.9, Certificate of Claim.*

(Emphasis added)

On January 24th 2011, HSD wrote the Department's Representative:

*Manatee County Automated Traffic Management System- Phase I
Assessment of damage to video wall by outside contractor*

*Please accept this follow up to our correspondence dated January 13, 2011 regarding third party damage to the video wall. As you are aware the wall was physically, mechanically and electronically damaged by an outside contractor hired by the county during their installation of the theatrical curtain that now surrounds the wall. In November 2010 HSD, along with our subcontractor AVI, had the manufacturer (Christy) certify the installation of the wall. **The damage done to the wall has now voided that certification by Christie and Christy and AVI have expressed concerns regarding their warranty obligations given the wall's current state.***

Please review the initial cost proposal from our subcontractor, AVI, to have a Christy representative(s) and AVI representatives mobilize on site to determine not only the extent of the damage to the wall, but provide factory recommendations as to the most timely and cost effective way to repair it. Once Christy and AVI have had the opportunity to assess the wall, it is our intent to forward a second quote to the Department that will

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

include all labor, materials, equipment and subcontractor costs necessary to correct any deficiencies and recertify the wall.

It is currently not possible for us to determine the total time impacts this event will have on the project as time impacts are still ongoing so please recognize this as our intent to address time (including potential home office overhead) under separate correspondence.

(Emphasis added)

On January 24th 2011, the Department's Representative wrote HSD:

In response to your letters of January 13 and January 24, 2011, please be advised that the Department considers the repair of the damage to the video wall to fall under Section 7-14, Contractor's Responsibility for Work, of the Design-Build Specifications. It Is the Design-Build Firm's responsibility to "rebuild, repair restore and make good, without additional expense to the Department," any damage that has occurred.

(Emphasis added)

On February 2th 2011, HSD wrote the Department's Representative:

Highway Safety Devices, Inc. (HSD) is in receipt of your letter dated January 24, 2011 regarding the Department's position concerning damages to the video wall. HSD is in complete disagreement with the position the Department has taken by placing the responsibility for rectifying the impacts that have occurred on our firm. The Department has founded its position on Specification 7-14, Contractor's Responsibility for Work. Further, Cardno TBE has rejected HSD's project schedule, based on the mistaken premise that HSD is responsible for the video wall damages. HSD submits this letter providing information for consideration, requesting documents from the FDOT and seeking to arrange a meeting to discuss this issue.

All parties recognize the video wall was damaged by a third party contractor hired by the Manatee County Property Management Department. Specifically, the third party contractor (Manatee's Contractor) was hired by Manatee County to install a curtain over the top of HSD's video wall frame. The installation of the curtain was outside the scope of HSD's Contract. It is accepted that during the installation of the curtain, Manatee's Contractor caused damage to the video wall frame and video wall cubes. Be advised that the extent of the damage is yet to be determined.

For the record, HSD had no knowledge that a Contract had been issued for work to install a curtain over or around the video wall. Additionally, HSD was never notified or made aware of the work schedule to have the curtain installed over the wall. The FDOT and the County were negligent in procuring a contract for the curtain installation, failing to coordinate the work with HSD, and failing to oversee the curtain contractor. As such, HSD was never afforded the opportunity to coordinate the installation of the curtain around the structure to ensure the video walls integrity was maintained. Accordingly, the causes of the video wall damage were unforeseeable to HSD. Further, the damages were caused by actions and inactions of governmental authorities, namely the Department and Manatee County.

For the Department to attempt to absolve themselves from liabilities regarding this matter is difficult to comprehend. The Department references specification 7-14 Contractor's Responsibility for Work as the basis for its position. The specification requires a Contractor to take precautions against damage to the work. HSD now asks - how are we to protect the work from the Owner of the facility, when the Owner, Manatee County, has full access to the TMC site. Further, Manatee County has the right to issue contracts and then allow other parties to roam the TMC/Video wall site. HSD has no jurisdiction to prohibit Manatee County or its agents from being in the TMC. Specially, when HSD did not even know this work had been contracted or was scheduled.

Specification 7-14 clearly states that damages due to unforeseeable causes by Governmental Agencies are compensable, at the Department's discretion. HSD reminds the parties that the Department has already established precedent in two separate cases resolving impacts that Manatee County had directly on this project.

We cite the examples below:

- In Issue #1, the Department issued a Supplemental Agreement adding money and time to our contract for coincidental conduit that was not installed under a JP A contract between Manatee County and the Department.*
- In Issue #2, the Department issued a Work Order adding money and time to our contract as the result of poor craftsmanship by a contractor the Manatee County Property Management Department hired to make the necessary changes to the video wall opening.*

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

In these two previous issues, the Department compensated HSD for damages due to unforeseeable causes by a governmental authority, Manatee County. The Department's position to not compensate HSD for damages caused by itself and its partner, Manatee County, is unjust and may not be defensible. This is not the intent of Specification 7-14.

HSD is not in contract with Manatee County, as it relates to any work done within the TMC. Our firm has no recourse directly with Manatee County and certainly not with the contractor who installed the curtain. The Department should compensate HSD for the damages to the video wall.

HSD herein request documentation from the Department. Please forward a copy of the following documents:

- *The Department's JPA with Manatee County,*
- *Any contract(s) or agreements between the Department and Manatee County that relate to the Manatee County ATMS project or the Manatee County TMC, including provisions for the Department's future use of the FMS space,*
- *A copy of the Manatee County contract with the third party contractor who installed the curtain,*
- *Copies of the third party contractor's general liability insurance certificates,*
- *Copies of time sheets or daily work reports from the Manatee County inspector, in charge of overseeing curtain contractor's work product.*
- *Any photos taken during the installation of the curtain.*

In response to your letter dated January 27, 2011 we are of the strong opinion the schedule presented is an accurate representation of the project's critical path. Any changes to schedule activities at this time would be inconsistent with our belief.

(Emphasis added)

On February 3rd 2011, the Department's Representative wrote HSD:

*This letter is in response to your February 2, 2011 letter regarding the repair of the Video Wall. Highway Safety Devices (HSD) is correct in the assessment of the Department's position at this time. **If the damage to your work was done by a third party through no fault of the Department, then responsibility for the wall's repair falls under Specification Section 7-14 as you reference.***

*HSD has the responsibility to construct the project in accordance with the contract documents and to obtain Final Acceptance of it from the Department. As with the damage to HUB #2, **HSD needs to expeditiously pursue the repair work to minimize/eliminate any impact to the Final Acceptance date of the project.** Also as with the HUB #2 damage, **HSD should pursue recovery of any impacts through the responsible party for the damage if you so desire.** HSD is also responsible for any inaction on their part in the completion of the repairs.*

HSD has requested a meeting with the FOOT Sarasota Construction office to discuss their position. This will be scheduled. HSD has also requested documentation from the Department. This request will be forwarded to the Department for the FDOT items. The Manatee County items should be requested directly through them.

*In summary, HSD needs to be proceeding (sic) with the repair of the Video Wall and that pursuit needs to be shown in the project schedule, specifically the January 2011 update. HSD filed a Notice of Intent regarding the damage and the Department has issued direction for HSD to complete the repair under Specification Section 7-14. **If HSD feels that additional compensation is due from the Department, it should be pursued in accordance with the project specifications without delaying the repair work.***

(Emphasis added)

On March 4th 2011, the Department's Representative wrote Manatee County Property Management Department:

*Please be advised that the Florida Department of Transportation has been notified by Highway Safety Devices, the contractor for the above referred project, and that they intend to submit a claim for additional compensation. A copy of that notice is attached to this letter. The claim will be based on costs incurred due to alleged damage to the Video Wall during installation of the curtain. **Your organization may be responsible for additional costs to the Contractor as a result.** This is the same issue that had been previously brought to your attention.*

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

This office will furnish you additional Information in regard to the circumstances, which caused the Contractor to claim there has been a changed condition under the contract with the Department. We will keep records to document the actual conditions, which exist during this period.

(Emphasis added)

HSD alleges that an Interlocal Agreement dated May 25th 2005, between the FDOT and Manatee County establishes a fiduciary relationship between the Parties and each Party's obligation to fund and staff certain aspects of the TMC.

This Agreement states in part:

... *WHEREAS, Manatee County has taken the lead to identify and secure a location for the regional Traffic Management Center (TMC) to house not only that center but other County-specific functions;*

...

WHEREAS, the construction of the physical plant; including -fiber-optic networks, will require cooperation from each local government.

NOW, THEREFORE, it is declared to be the purpose of this Interlocal Agreement to define the nature of the relationship of the parties to this Agreement as related to the construction and operation of an ITS/ATMS Traffic Management Center and related infrastructure and the parties agree as follows:

...

4. IMPLEMENTATION AND OVERSIGHT

The parties agree that the long-term success of this regional transportation management agreement will depend on jurisdictional cooperation and coordination between the parties at a management level. Therefore, the parties hereby create the Intelligent Transportation System Management Team (ITSMT) to provide leadership, guidance and oversight of the daily operations of the TMC and ATMS. Upon adoption of this Agreement by the parties, the chief executive of each local jurisdiction and the FDOT District Secretary shall each appoint one (1) transportation professional to the ITSMT. Such persons shall continue to serve at the pleasure of the appointing authority.

...

Specific duties of the ITSMT shall include:

...

- *Help resolve disputes between the various parties to this Agreement concerning the operation: of the ATMS or TMC.*

...

Any party to this Agreement may request that the ITSMT take up a matter for discussion, recommendation or study. Notwithstanding any other provision herein, the parties acknowledge that in creating the ITSMT they are not, and do not intend to create a separate legal entity with any authority or status not provided for herein:

Each party maintains control over the work of their respective employees, contractors or agents.

(Emphasis added)

The Department cites that the Request for Proposal states in part:

CC. Adjoining Construction Projects:

The Design-Build Firm shall be responsible for coordinating construction activities with other construction projects that are impacted by or impact this project. This includes projects under the jurisdiction of local governments, the Department, or other regional and state agencies.

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

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.*

...

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

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

*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 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 DRB finds that Manatee County is not a signatory to the contract.

The DRB finds that the Department has an ongoing relationship with Manatee County.

The DRB finds that HSD was deprived of the opportunity to coordinate this work with the County.

The DRB finds that HSD is clearly entitled to compensation for damage done by a third party. Further, the DRB finds that the third party is Manatee County.

The DRB finds that there was no presentation by either Party that the Contract completion date was impacted. Therefore, the DRB declines to make a recommendation concerning time.

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. ...**²

² DRBF Practices and Procedures Section 1 – Chapter 6

DRAFT-DISPUTE REVIEW BOARD RECOMMENDATION

BOARD RECOMMENDATION:

Therefore, based on the materials supplied to the Board and presentations to the Board at the DRB hearing, the Board recommends that the Department use its influence with Manatee County to have Manatee County pay HSD for damages to the Video Wall forthwith. Absent payment by Manatee County, the Board recommends that the Department should use its discretion as is allowed under Contract Specification 7-14 to *“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.”*

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 "JH Duke", written in a cursive style.

John H. Duke, Sr.
DRB Chairman