

# DISPUTE REVIEW BOARD RECOMMENDATION

August 17, 2011

E-Mailed August 17, 2011

Wes Goldberg  
Project Manager  
Highway Safety Devices, Inc.  
16125 Old US 41  
Ft. Myers, FL 33912  
[westong@highwaysafetydevices.com](mailto:westong@highwaysafetydevices.com)

H.R. Howarth, PE  
Sr. Project Engineer  
Cardno TBE, Inc.  
380 Park Place Blvd. Suite 300  
Clearwater, FL 33759  
[Dick.Howarth@CardnoTBE.com](mailto:Dick.Howarth@CardnoTBE.com)

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: Delay in Test Plan Review

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:

*It is the position of HSD that the Department exceeded their contractually allowable review time of twenty (20) work days in the review of test plan documents submitted for approval concerning the subsystem and system test plans. As a result of this delay, HSD has been impacted in their ability to successfully test the project within certain timeframes. This has resulted in additional liquidated damages being imposed on HSD by the Department. 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.*

*... Delay in Test Plan Review. This issue relates to an alleged extended review time causing a delay. The Department's position is that the notice requirements of Specifications 5- 12.1, General; 5-12.2.2, Claims for Delay, and 8-7.3.2, Contract Time Extensions, were not met and entitlement is waived. 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 15<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.

# DISPUTE REVIEW BOARD RECOMMENDATION

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

### *Detail of Position Statement:*

*On November 29, 2010 HSD submitted a complete test plan for review and approval that included Standalone, Subsystem and System Operational Testing (Page 7-8)*

*Per the Minimum Technical Requirements of this contract, **Test Plans & Procedures**, "The Department shall review submitted test procedures and forms and shall provide comments or approval to the DESIGN-BUILD FIRM within twenty-one (21) calendar days after receiving the testing documentation." (Page 9-10)*

*HSD did not receive comments for the Subsystem Test and System Operational Test procedures that were submitted on November 29, 2010 until February 18, 2011, a total of 81 calendar days. As detailed in the MTR's for the project, the Department had 21 calendar days to provide comments or approval of the submitted Subsystem Test and System Operational Test plans. As such, the Department exceeded their allowable review time by sixty (60) calendar days.*

*Design Build Specification Section 8-7.3.2 governs the addition of Contract Time and states in part: "When failure by the Department to fulfill an obligation under the Contract results in delays to the controlling items of work, the Department will consider such delays as a basis for granting a time extension to the Contract." (Page 11-12)*

### **Summary**

*HSD provides this package to the Disputes Review Board and requests your review and recommendation that HSD is entitled to time impacts for the Department's delayed review of the Subsystem Test and System Operational Test plans. It is understood this hearing is for entitlement purposes only.*

- 1. HSD submitted a complete test plan for Department review and approval on November 29, 2010.*
- 2. The MTR states: "The Department shall review submitted test procedures and forms and shall provide comments or approval to the DESIGN-BUILD FIRM within twenty-one (21) calendar days after receiving the testing documentation."*
- 3. The Department did not return comments to HSD for the Subsystem Tests or System Operational Tests until February 18, 2011, eighty-one (81) calendar days after the test plans were submitted.*

### ***In closing, HSD specifically seek a recommendation of entitlement from the DRB:***

- 1. HSD is due contract time for impacts due to the delayed test plan review.*

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

---

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

# DISPUTE REVIEW BOARD RECOMMENDATION

## **DEPARTMENT'S POSITION:**

### ***TEST PLAN REVIEW POSITION PAPER***

*The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation and a time extension regarding the review of the Test Plan. A hearing date of August 15, 2011 has been set and the issue statement to be addressed is; “Is the Contractor entitled to additional compensation and a time extension regarding the review of the Test Plan?”*

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

*At the October 20, 2009 DRB meeting, HSD stated they would submit the comprehensive test plan by the next meeting (Exhibit A1/A2). On September 14, 2010, HSD submitted the first draft of the comprehensive test plan (Exhibit B1/B2/B3/B4). On October 11, 2010, the Department responded that the test plan was not acceptable (Exhibit C1).*

*On October 27, 2010, HSD submitted the Traceability Matrix (Exhibit D1/D2). The Department sent comments on the Matrix to HSD on November 16, 2010 (Exhibit E1). On November 30, 2010, HSD submitted Test Plan Revision 1 (Exhibit F1/F2/F3/F4). The Department sent comments on the Test Plan to HSD on December 7, 2010 (Exhibit G1).*

*On December 8, 2011, HSD submitted Test Plan Revision 2 (Exhibit H1/H2). The Department sent comments on the Test Plan to HSD on December 20, 2010 and January 3, 2011 (Exhibits I1 & J1). On January 10, 2011, HSD submitted a revised Test Plan Revision 2 (Exhibit K1/K2). The Department sent comments on the Test Plan to HSD on January 14, 2011 (Exhibit L1). Contract time ended on January 15, 2011.*

*On January 20, 2011, HSD submitted Test Plan Revision 3 (Exhibit M1/M2). The Department requested information from HSD on February 14, 2011 (Exhibit N1) and sent comments on the Test Plan to HSD on February 16, 2011 (Exhibit O1).*

*On February 21, 2011, HSD submitted a Notice of Intent to seek additional compensation due to the Department's not performing a timely review of the November 30, 2010 Test Plan submittal (Exhibits P1). On February 26, 2011 the Department notified HSD that their Notice of Intent sent on February 21<sup>st</sup> did not comply with the notification requirements of the project specifications (Exhibit Q1), On February 28, 2011, HSD submitted a letter in response to the Department's February 26<sup>th</sup> letter with a Contractor's Time Extension Request and February 2011 schedule update attached (Exhibits R1/R2/R3/R4).*

*On March 11, 2011, HSD submitted Test Plan Revision 4 (Exhibit S1/S2). The Department sent comments on the Test Plan to HSD on March 14, 2011 (Exhibit T1). Also on March 14, 2011, additional information was received from Naztec (Exhibit U1). The Department sent comments on the Test Plan to HSD on March 21, 2011 (Exhibit V1). On March 31, 2011, HSD submitted Test Plan Revision 5 (Exhibit W1/W2). Test Plan submittals and reviews are graphically shown on a timeline (Exhibit X1).*

*On May 27, 2011, HSD submitted a Request for Hearings on four issues to the Disputes Review Board (DRB). (Exhibit Y1/Y2). On June 13, 2011 the Department provided a response to the DRB regarding HSD's Request for Hearings (Exhibit Z1/Z2).*

## DISPUTE REVIEW BOARD RECOMMENDATION

*Request for Proposal (RFP) Section V-Q.2, Project Requirements and Provisions for Work/ Submittals/Milestones defines the allowable submittal review time and defines when that time begins (Exhibit AAI). The project Design Build Division One Specification defines the notification requirements when seeking extra compensation or a time extension from the Department. These notification requirements are shown in Section 5-12, Claims by Contractor, (Exhibit BB1/BB2/BB3) and Section 8-7.3.2, Contract Time Extensions, (Exhibit CCI/CC2). Section 8-7.3.2, Contract Time Extensions, also defines the time frame when the Department may allow an extension of time (Exhibit CCI/CC2).*

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

*In the February 21, 2011 Notice of Intent, HSD identified an alleged delay that occurred from January 6, 2011 to February 18, 2011, i.e. 44 calendar days (Exhibit PI). According to the NOI, the cause was the Department's inability to provide a timely review of the November 30, 2010 Test Plan submittal.*

*HSD submitted Revision 1 of the Test Plan on November 30, 2010 (Exhibit F1/F2/F3/F4), the Department provided comments to HSD on December 7, 2010 (Exhibit G1), HSD submitted Revision 2 of the Test Plan on December 8, 2010 (Exhibit H1/H2), the Department provided comments to HSD on December 20, 2010 & January 3, 2011 (Exhibits I1 & J1) and HSD re-submitted Revision 2 of the Test Plan on January 10, 2010 (Exhibit K1/K2). The RFP defines the allowable submittal review time (20 work days) and that the review time will begin upon receipt of a complete submittal (Exhibit AAI). Reviews were performed on the submittals and transmitted to the HSD within the allowable review times (Exhibit XI).*

*Project Division One Specification Article 5-12.2.2, Claims For Delay, states, in part, "... 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,..." (Exhibit BB1/BB2/BB3). Project Division One Specification Article 8-7.3.2, Contract Time Extensions, has similar language and states, in part, "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." (Exhibit CCI/CC2).*

*The issue being addressed is; "Is the Contractor entitled to additional compensation and a time extension regarding the review of the Test Plan?" The RFP states that review time begins upon receipt of a complete submittal (Exhibit AAI). Therefore in providing supplements to previous submittals the time re-starts when the revision and/or missing information is received. The documentation clearly shows the Department has provided responses to Test Plan submittals within the allowable time frame (Exhibit XI). In addition, the specifications are clear that the contractor must submit a Notice of Intent and a preliminary request for an*

## **DISPUTE REVIEW BOARD RECOMMENDATION**

*extension of Contract Time within ten calendar days after the commencement of a delay to a controlling work item (Exhibit BB1/BB2/BB3 & Exhibit CC1/CC2). According to HSD's NOI, the alleged 44 calendar days delay commenced on January 6, 2011. Written notification was given to the Department on February 21, 2011 and was not in accordance with contract requirements. Therefore, there is no entitlement for this claim.*

### **Conclusion:**

*The Department has provided timely reviews of proposed Test Plan submittals in accordance with the requirements of the contract documents. Further, the contract documents clearly show the time frame for providing a written notification to the Department when the contractor deems that extra compensation or a time extension is due them. HSD did not provide timely notification and, according to the project specifications; have waived their right to additional compensation or a time extension for this claim. Therefore, HSD is not entitled to additional compensation or a time extension regarding the review of the Test Plan.*

## **CONTRACTOR'S REBUTTAL:**

### **Rebuttal of FDOT Position Statement:**

*It is the position of HSD that the Department did not provided complete and timely review of Test Plan submittal documentation, as required by Minimum Technical Requirement (MTR) 2.10 (pages 9-12). This MTR requires the FDOT to provide comment to a test plan submittal within 21 calendar days after receiving the testing documentation.*

*On the Manatee ATMS Phase 1 project, the Department lost control of the submittal review/approval procedure leading to disarray, tardy comments and ultimately a process gone awry. The disarray in the FDOT's administration of this process impacted the project schedule.*

*The submittal review/approval process in FDOT Contract provides for an orderly exchange of information between the Contractor and the Department concerning the test plans to be implemented or executed on a project. This process allows the Department to provide input to the Contractor on his proposed approach to meeting the contract requirements. HSD understands there can be multiple exchanges, with submittals leading to comments, which then require re-submittals and so forth. However, with each step the test plan should be closer to reaching its acceptance.*

*It is important to remember that the approval of the test plan is a predecessor to the execution of that test plan. Accordingly, testing could not begin until the test plans had been approved. The FDOT recognizes the importance of an orderly and timely submittal review process and has established a 21 calendar day review time, specifically for test plans.*

*On this project, HSD designed, procured and installed ITS equipment and systems and was obligated to gain acceptance of these installed devices by the execution of test plans to demonstrate compliance with the Contract's requirements. HSD submitted Stand Alone Test Plans for both the Field Devices and the TMC equipment. Additionally, HSD submitted a Subsystem Test Plan.*

*The FDOT enlisted four (4) different entities to provide comments on the submitted Test Plans. The entities are Manatee County, TBE, SWRI – Southwest Research Institute and PBS&J.*

## **DISPUTE REVIEW BOARD RECOMMENDATION**

*For ease of reference, HSD has provided a schedule review matrix to more clearly define the different reviewers and the different Test Plans commented on (page 13).*

*Typically, in cases of multiple reviewers the FDOT must manage the process to ensure that timely and complete responses are provided to the Contractor in accordance with the Contract. On this project, the FDOT failed to properly manage the test plan submittal review and approval process. The late reviews and disorderly administration of the submittal review process impacted this project's critical path.*

*In their Position Paper, the FDOT claims (on page 3, 3rd paragraph) that timely and complete test plan reviews were performed on this project. Further, the FDOT has provided a schedule Exhibit XI, proposing to document their timely and complete reviews of HSD's submitted test plans. However, a closer inspection of the comments received from the various reviewers will actually reveal untimely and incomplete responses from the FDOT. Additionally, Exhibit XI is flawed because it uses 20 work days as an allowable review time, instead of the 21 calendar days actually allowed by the governing specification, MTR 2.10.*

*The FDOT also states that subsequent submittals re-set the reviewer's allowed time. This statement is misleading, in that HSD's re-submittals addressed reviewer's comments received prior to the re-submittal date. A resubmittal does not relieve the FDOT from providing a COMPLETE and TIMELY review of the previously submitted Test Plan.*

*HSD herein provides further details and rebuttal to statements in the FDOT's position paper dated August 1, 2011. HSD herein references and includes the test plans submitted on 9/7/10, 11/30/10, 12/8/10, 1/10/11, and 1/20/11 as part of this rebuttal. However, as these test plan submittals are literally hundreds of pages each, we have chosen to not attach herein but will have copies available at the DRB meeting. These test plans are part of the project documentation and contain no previously undisclosed information.*

1. **TBE PP Statement:** *“On October 11, 2010, the Department responded that the test plan was not acceptable (Exhibit C1).”*

**HSD Response:** *HSD acknowledges receipt of Standalone test plan and Subsystem test plan comments from TBE, Manatee County and SWRI on October 11, 2010. However, there were no comments on the Standalone or Subsystem test plans from the most important reviewer, PBS&J, the sub-consultant ultimately responsible for providing acceptance of the project testing.*

2. **TBE PP Statement:** *“The Department sent comments on the Test Plan to HSD on December 7, 2010 (Exhibit G1).”*

**HSD Response:** *The comments received on 12/7/10 were from TBE's reviewer and only addressed the Standalone test plan for the Field Devices, as identified in (pages 14-17). However, there were no comments from SWRI, Manatee County or PBS&J. Further, the comments provided by TBE did not address the previously submitted TMC equipment Standalone Test Plan or the Subsystem Test Plan.*

*HSD addressed the TBE's 12/7/10 field device Standalone test plan comments and resubmitted the Standalone test plan in its entirety to DOT on 12/8/10, which is recognized as REV 2 (pages 18- 20).*

## DISPUTE REVIEW BOARD RECOMMENDATION

Again, this test plan only modified the field device Standalone test plan. There were no changes to the TMC Standalone test plan or to the Subsystem test plan in this submittal.

3. **TBE PP Statement:** “The Department sent comments on the Test Plan to HSD on December 20, 2010 and January 3, 2011 (Exhibits II & JI).”

**HSD Response:** The comments received from DOT’s reviewers on 12/20/10 were from SWRI only (pages 21-32). There were no comments from TBE, Manatee County or PBS&J.

The comments received on 1/3/11 included TMC Stand Alone Test Plan comments from PBS&J. There were no comments from TBE, Manatee County or SWRI.

These PBS&J comments were the first generated by PBS&J (FDOT) that addressed HSD’s Test Plan submittal. However, these PBS&J comments only addressed the TMC equipment Standalone Test Plan (pages 33-46) and failed to provide comment on the Subsystem Test Plan. Also, these comments were in response to HSD’s 11/30/10 submittal and therefore were 13 days late.

It is important to recognize that by 1/3/11, when PBS&J first provided comments, HSD had already submitted **three** versions of the Test Plan that addressed other reviewer’s comments.

4. **TBE PP Statement:** “On January 10, 2011, HSD submitted Test Plan Revision 2.”

**HSD Response:** This re-submittal included only revisions to the Standalone test plan in response to Standalone comments received on 12/20 and 1/3/11. **This submittal did not include a re-submittal of the Subsystem Test Plan.**

5. **TBE PP Statement:** “The Department sent comments on the Test Plan to HSD on January 14, 2011 (Exhibit LI).”

**HSD Response:** The comments received from FDOT’s reviewers on 1/14/11 were only from PBS&J. Further, these comments were in response to HSD’s re-submitted Standalone test plan dated 1/10/11, which addressed PBS&J Standalone comments dated 1/3/11. tab6

6. **TBE PP Statement:** “On January 20, 2011, HSD submitted Test Plan Revision 3 (Exhibit MI/M2). The Department requested information from HSD on February 14, 2011 (Exhibit NI) and sent comments on the Test Plan to HSD on February 16, 2011 (Exhibit OI).

**HSD Response:** The Test Plan submittal of 1/20/11 addressed previous standalone test comments from TBE and PBS&J. It also addressed Standalone test plan comments previously received from SWRI.

It is important to note the 1/20/11 submittal was HSD’s fifth Test Plan submittal and PBS&J had still failed to provide a single comment regarding any of the submitted Subsystem Test Plans. Further, the 11/30/10 Subsystem Test Plan submittal was identical to the 1/20/11 Subsystem Test Plan Submittal. HSD made no changes to the Subsystem Test Plan, between these two submittals.

The February 16, 2011 comments PBS&J provided are its first comments to the Subsystem test plans. As such, these 2/16/11 PBS&J comments must pertain to the 11/30/10 Subsystem Test Plan submittal, and not the 1/20/11 submittal referenced by the Reviewer.

## DISPUTE REVIEW BOARD RECOMMENDATION

*In response to the 11/30/10 Subsystem Test Plan submittal, the FDOT and all of its reviewers were obligated to “provide comments or approval to the DESIGN-BUILD FIRM within twenty-one (21) calendar days after receiving the testing documentation”, as outlined in MTR 2.10. Accordingly, the FDOT’s full response was due on 12/21/10, but was not received until 2/16/11 a full fifty-eight (58) days beyond the allowed review time.*

7. **TBE PP Statement:** “Request for Proposal (RFP) Section V-Q.2, Project Requirements and Provision for Work/Submittals/Milestones defines the allowable submittal review time and defines when that time begins (Exhibit AA1)”

**HSD Response:** DOT has referenced an inappropriate specification regarding the allowed review time for Test Plan submittals. Section V-Q.2 of the RFP states “The Design-Build Firm’s schedule shall allow for a 20-day working review time for each **design** submittal. The review time will begin upon receipt of a complete submittal.” The context of the paragraph containing this reference is obviously related to construction plan **design** submittals (pages 47 & 48).

*The issue before the Board obviously does not pertain to construction plan **design** submittals, but Test Plan submittals. The MTR’s for this project specifically identify the Department’s allowable review time for Test Plan submittals and is the appropriate governing specification. Section 2.10 of the MTR states: “The DEPARTMENT shall review submitted test procedures and forms and shall provide comments or approval to the DESIGN-BUILD FIRM within twenty-one (21) calendar days after receiving the testing documentation”(pages 9-12).*

8. **TBE PP Statement:** “On February 26, 2011 the Department notified HSD that their Notice of Intent sent on February 21<sup>st</sup> did not comply with the notification requirements of the project specifications (Exhibit Q1).”

**HSD Response:** As stated in HSD’s letter dated February 21, 2011 (TBE PP Exhibit P1) HSD notified the Department pursuant to Specification 5-12.2.2 that the FDOT’s inability to provide timely review of the proposed Test plans had impacted the project. This 2/21/11 letter serves as the Notice of Intent and as a preliminary request for Contract time and is within the required 10 days. Further, HSD’s 2/28/11 letter seeks additional Contract time under 8-7.3.2 and includes a Contractor’s Time Extension Request, again in compliance with the Contract.

*The impact was identified on 2/16/11, the day PBS&J provided the first comments to HSD on the Subsystem Test Plan. Prior to this date, HSD had no knowledge of any comments from PBS&J as it relates to the Subsystem Test Plan.*

*Further, prior to this date, the test plan review was not on the project schedule’s critical path. Upon receipt of the 2/16/11 comments, HSD began to anticipate that the test plan execution would become critical and therefore provided notice. Ultimately, the Subsystem Test Plan approval and execution did become this project’s controlling item of work.*

*On 2/28/11, HSD submitted a monthly schedule update (pages 49-63) with a 2/23/11 data date. This schedule included new activities to represent the Test Plan re-submittal and FDOT approval that would be*



## **DISPUTE REVIEW BOARD RECOMMENDATION**

required, after the FDOT's 2/16/11 comments. This schedule update clearly shows the test plan approval now to be a controlling item of work. Subsequent to the resolution of the Hub accident and the video wall re-certification, the approval and execution of the test plan remained the controlling item of work until project completion. Upon review of the FDOT's PP submittal, Exhibit R4, the FDOT has modified HSD's original February 23, 2010 schedule. The FDOT must have relieved the project completion date constraint to show zero or positive float on activities 620, 840 and 724. We note this discrepancy to the DRB.

In conclusion, the additional 58 days taken by PBS&J to review and provide comment on HSD's Subsystem Test Plan effectively prohibited HSD of the opportunity to timely resolve the test plan differences that ultimately delayed the project acceptance until July 21, 2011. It is this lost contract time that HSD seeks.

The project record shows the FDOT's lack of control during the Test Plan Submittal review and approval process. There were multiple reviewers submitting partial or incomplete reviews, with PBS&J not reviewing the Subsystem test plan, until after HSD's 5<sup>th</sup> submittal.

The Subsystem test plan was ultimately approved on June 29, 2011. This approval led directly to the Subsystem Test Plan execution, the subsequent 14-day system test and a July 21, 2011 project final acceptance date. As such, there can be no denying that the Subsystem test plan approval was a controlling item of work, which was delayed by the FDOT's inability to provide timely and complete reviews of HSD's test plan documentation.

**For this reason, HSD requests that the DRB recommend entitlement for the addition of Contract time for this issue.**

### **DEPARTMENT'S REBUTTAL:**

#### **TEST PLAN REVIEW HEARING REBUTTAL**

The Design/Build firm, Highway Safety Devices, Inc. (HSD) has submitted a request for additional compensation and a time extension regarding the Department's review of their Test Plan submittal. A hearing date of August 15, 2011 has been set and the issue statement to be addressed is; **"Is the Contractor entitled to additional compensation and a time extension regarding the review of the Test Plan?"** The following statements are in response to the HSD Position Statement:

1. **RE: Page 3 – The Department did not timely review submitted test procedures as outlined in the contract.:** The Request for Proposal defines the beginning of a review time as the receipt of a complete submittal (Page 3). Additions and revisions to the Test Plan occurred frequently and each submission of a Revised Test Plan constituted the re-start of the review time. Reviews were performed on the submittals and transmitted to HSD within the allowable review times (Page 4).
2. **RE: Page 4 & Page 5, Item 1– HSD submitted a complete test plan for review and approval that included Standalone, Subsystem and System Operational Testing:** The Department agrees with this statement which shows that HSD submitted a single document for review. However the Test Plan was not complete and required several revisions (6).
3. **RE: Page 4 & Page 5, Item 2 – Reference to Minimum Technical Requirements regarding a twenty-one (21) calendar day review time:** The Request for Proposal allows a 20 work-day review time (Page 3).

## DISPUTE REVIEW BOARD RECOMMENDATION

*This is the review time used during the project and is exemplified by HSD's February 21, 2011 Notice of Intent and their February 28, 2011 letter, time extension request and schedule update (Pages 5, 6, 7, 8, 9) and in their December 2010 & January 2011 schedules updates (Pages 10, 11, 12, 13).*

4. **RE: Page 4 & Page 5 Item 3 – HSD submitted the Test Plan on November 29, 2010 and did not receive comments until February 18, 2011:** *These dates reference one submittal date and one comment return date and both are inaccurate. They should be November 30, 2010 and February 16, 2011 (Pages 14, 15, 16, 17, 18). There were numerous exchanges of comments during this time frame including comments returned on December 20, 2010 (Pages 19 thru 31). HSD made multiple re-submittals of the Test Plan with the Department receiving Test Plan revisions on December 8, 2010 (Revision 2), January 10, 2011 (Re-submit Revision 2) and January 20, 2011 (Revision 3) (Pages 32, 33, 34, 35, 36, 37).*
5. **RE: Page 4 – Design Build Specification Section 8-7.3.2 governs the addition of Contract Time...:** *This specification states that the Department may grant an extension of time if certain conditions are satisfied (Pages 38, 39, 40). For example: the delay occurs to a controlling item of work, a written preliminary request for an extension of time made within ten calendar days after the start of a delay and a written request for a time extension made within 30 days after the end of the delay. These and other conditions must be met for entitlement to occur under this specification. As HSD has not complied with these contract requirements, entitlement to additional compensation and an extension of contract time is not warranted.*

### **BOARD FINDINGS/EXPLANATION:**

The October 9<sup>th</sup> 2009 DRB Meeting No. 4 Minutes state in part:

(3) *SCHEDULE FOR FUTURE.*

*By next meeting:*

- *Submit proposal for additional contract time and costs related to additional design.*
- *Submit proposal for construction impacts due to coincidental conduit issues.*
- **Submit comprehensive test plan.**
- *Working on 100% design documents.*
- *Obtain railroad permit.*

On September 14, 2010, HSD e-mailed the Department's Representative:

*I left the Acceptance Test Plan on a CD outside your office yesterday at 4 pm. Please confirm you have received this file for submittal to FDOT.*

On September 14, 2010, the Department's Representative transmitted the Test Plan via e-mail:

*To: Roberts, Mark A; Dick Howarth; Duvall, Katherine; Sorensen, Jonathan M; Jon Wunderlich; Sage Kamiya; Bob Agrusa; Martinez, Jesus A.; Nichols, James*

*Subject: FPN 41611915201, Manatee County ATMS, Comprehensive Test Plan Review*

*HSD submitted the first draft of the Comprehensive Test Plan, and I placed it on the FTP site:*

*<ftp://ftp.dot.state.fl.us/fdot/d1/sarasotaops/41611915201/Comp Test Plan/>*

*Please review and return comments to me by COB Friday, October 8. If you have any questions please advise.*

## DISPUTE REVIEW BOARD RECOMMENDATION

On October 11, 2010, the Department's Representative e-mailed HSD:

**Subject:** RE: FPN 41611915201, Manatee County ATMS, Comprehensive Test Plan Review

**Attachments:** Requirements\_Testing\_Verification\_Matrix-1 0-11-201 0.pdf; ATMS phase I test plan comments\_Manatee County.doc; CardnoTBE\_CTP 9-10-10\_Comments.docx; Manatee ATMS Review Comments\_Acceptance Test Plan\_Jesus Martinez.docx

*The Department has completed its review of the Comprehensive Test Plan (first submittal). **The plan is not acceptable due to the following reasons:***

- System components were omitted from the acceptance plan in their entirety.
- A significant number of project requirements have been omitted from the acceptance plan.
- The "Evaluation/Traceability Matrix" is incomplete.
- The acceptance plan did not include a schedule, as required in the MTRs, detailing time frame for each standalone test, sub-system test, and sequence of testing and duration of each of the testing procedures.
- The test plan varies in formats, with some sections not including form/procedures configuration as required by the MTRs.

*See attached comments in Word format that must be addressed individually. In addition the pdf file attached may be used as a guide for test items needed.*

On October 27, 2010, HSD e-mailed the Department's Representative:

**Subject:** FPN 41611915201, Manatee County ATMS, Comprehensive Test Plan Matrix Submittal

**Attachments:** Final Test Schedule.xls; Requirements\_Matrix-V6-10-27-10-REV1.xlsx

*Per our discussion last week the DBF has completed the Traceability Matrix that outlines how we intend to show conformance with the various contractual requirements of the project. We of course would appreciate an expeditious review by all appropriate parties given the time constraints the project is under. In addition, **we would hope to have a conference call, similar to the one we had last week, in the coming days to answer any questions the Department or its representatives may have. Upon concurrence of the matrix, we will be prepared to submit the actual test plans themselves again for review and approval immediately.** Also, as discussed, we have included a bar chart schedule that outlines our intended test sequence (with dates) as required.*

On November 16, 2010, the Department's Representative e-mailed HSD:

**Subject:** FPN 41611915201, Manatee County ATMS Phase 1, Requirements Testing Verification Matrix, 11/16/10

**Attachments:** 4161191\_RTVM\_11-16-10.xlsx

*See attached matrix. **The Department has inserted a column on the right side with our comments for the DBF's proposed verification methods.** Also, beginning at item #2026 are additional comments that need to be addressed.*

**We can have a teleconference on Friday morning 11/19 at 9:00AM if needed to discuss, please advise.**

On November 30, 2010, HSD e-mailed the Department's Representative:

**Subject:** Manatee Ph I Final Test Plan Submittal- Part 1 of 2

**Attachments:** Manatee Acceptance Test Rev 1 Part 1. pdf

*Per our discussion today, please discard the two test plan emails sent last night by Erik. Sorry for the confusion. Attached is part 1 of 2 of the version of the plan, along with the traceability matrix in part 2 of 2, we ask the Department to approve so testing can begin on the project. Part 2 of 2 will immediately follow.*

*Please confirm receipt of documents.*

## DISPUTE REVIEW BOARD RECOMMENDATION

That same day November 30, 2010, HSD e-mailed the Department's Representative:

**Subject:** *Manatee Ph I Final Test Plan Submittal- Part 2 of 2*

**Attachments:** *matrix\_final.xlsx; Manatee Acceptance Test Rev 1 Part 2. pdf*

*Part 2 of 2.*

*Remember, the matrix is formatted for "legal" size paper due to length.*

*Please confirm receipt.*

On December 07, 2010, the Department's Representative e-mailed HSD:

**Subject:** *Manatee Ph I Final Test Plan Submittal- Part 2 of 2*

**Attachments:** *CTP Field-Testing\_12-7-10\_Comments.docx*

*See attached comments that must be incorporated into the Test Plan prior to Field Testing. Please revise Test Plan and resend.*

*As discussed, prior to Testing we will need a copy of the project IP Address table for field verification.*

On December 08, 2010, HSD e-mailed the Department's Representative:

**Subject:** *FW*

**Attachments:** *Manatee Acceptance Test Rev 2 Part 1.pdf*

*Per your comments yesterday I have made the revisions to Appendix A of the test plan.*

On December 08, 2010, the Department's Representative e-mailed HSD:

*To follow up on our conversation, the block diagrams are not required for these tests.*

On December 10, 2010, the SWRI Reviewer e-mailed:

**To:** *Howard Holley*

**Cc:** *Dick Howarth; Johnson, Joshua S.*

**Subject:** *Comments on Manatee County Acceptance Test Documentation*

**Attachments:** *Manatee ATMS Review Comments\_Acceptance Test Plan\_Jesus Martinez\_12-10-10.docx*

*Attached are my comments on the Manatee County Test Plan. **These comments include the Subsystem Tests. HSD has some work to do.***

*I will be at a conference next week (Mon-Wed), and later in San Antonio for meetings, but I can try to break away for a conference call to discuss the comments.*

*I am available all day today if you have any questions.*

On December 20, 2010, the Department's Representative e-mailed HSD:

**Subject:** *FPN 41611915201, Manatee County ATMS Phase 1, Test Plan Comments*

**Attachments:** *Manatee ATMS Review Comments\_Acceptance Test Plan\_Jesus Marlinez\_12-10-10.docx*

*See attached comments from SWRI for the Test Plan as per your request. These comments have not been reviewed by the Department and therefore are not considered full, comprehensive, or final.*

The attached 11 page "MANATEE ATMS - REVIEW COMMENTS" contains the note:

*Date review comments submitted: 12/10/10*

On January 03, 2011, HSD e-mailed the Department's Representative:

**Subject:** *Test Plans*

**Checking to see how you are coming on the test plans.**

## DISPUTE REVIEW BOARD RECOMMENDATION

On January 03, 2011, the Department's Representative e-mailed HSD:

**Subject:** FPN 41611915201, Manatee County ATMS Phase 1, Test Plan Comments, 1/3/11

**Attachments:** 4161191 Stand-Alone Test Plan Review- Central Components Only 1-3-11.docx

...see attached comments for the TMC stand-alone testing. Other comments will be forthcoming (e.g., Cisco switches, ATMS.now, etc.).

The attached 13 page "STAND-ALONE PLAN REVIEW – CENTRAL COMMENTS ONLY" contain the note:

*FDOT Comments January 3, 2011*

On January 06, 2011, the Department's Representative e-mailed HSD:

**Subject:** RE: FPN 41611915201, Manatee County ATMS Phase 1, Test Plan Comments, 1/3/11

*The Department will need time to review the revised Test Plan prior to commitments for a testing schedule. If the revised plan is received today, and it is reviewed and acceptable, it is possible for testing to begin next week, but no earlier than Wednesday.*

On January 10, 2011, the Department's Representative e-mailed:

*To: Martinez, Jesus A.; Jon Sorensen*

*Cc: Nichols, James; Dick Howarth; Sage Kamiya; bob.agrusa@mymanatee.org; Jon Wunderlich*

**Subject:** RE: VFPN 41611915201, Manatee County ATMS Phase 1, Test Plan Comments, 1/10/11

**Attachments:** SAT 1-10-11, REV2.pdf; 4161191 Stand-Alone Test Plan Review- Central Components Only DBF Responses 1-10-11.docx

*All,*

*See attached DBF responses to the last round of comments for the TMC stand alone testing, and a revised test plan for those items dated 1/10/11.*

**Jon S., Jesus:**

*The DBF has purportedly incorporated all comments where the response column was left blank. Please respond to those comments first and return to me on Wednesday, January 12, and then comments for the TP on Friday, January 14.*

*If we need to discuss first we can set up a telecom any time beginning tomorrow .....*

On January 14, 2011, the Department's Representative e-mailed HSD:

**Subject:** RE: FPN 41611915201, Manatee County ATMS Phase 1, Test Plan Comments, 1/14/11

**Attachments:** 4161191 Stand-Alone Test Plan Review - Central Components Only FDOT Comments 1-14-11.docx

*See attached Department comments for the latest Test Plan. We will have a teleconference to discuss on Monday, January 17, 10:00 AM, call-in information below. Our goal is to assist the DBF with achieving a Test Plan that is acceptable. If appropriate DBF parties are not available please advise.*

The attached 10 page "STAND-ALONE TEST PLAN REVIEW – CENTRAL COMMENTS ONLY" contain the note:

*FDOT Comments January 14, 2011*

On January 20, 2011, the Department's Representative e-mailed HSD:

**Subject:** RE: FPN 41611915201, Manatee County ATMS Phase 1, Revised Test Plan Comments, 1/20/11

*All,*

*HSD submitted a revised Test Plan this afternoon, and I placed it on the FTP site:*

*<ftp://ftp.dot.state.fl.us/fdot/dl/sarasotaops/41611915201/Test%20Plan%201-20-11/>*

## DISPUTE REVIEW BOARD RECOMMENDATION

*This was developed in response to our teleconference on Monday, 1/17 and should have addressed those items.*

*A couple of mentions:*

***HSD is striving to begin testing next week, but the Plan needs to be acceptable before scheduling commitments are made. D.J. Connor called me on Wednesday afternoon to indicate he discovered that prior versions of the Plan included intermingling of Section 10 (CCTV/hub UPS) and Section 13 (TMC UPS) requirements. This is supposedly corrected now.***

*Jon S. and Jesus are taking the lead here, and we are requesting that they continue to provide the valuable feedback. Jesus, feel free to contact Jon S. directly during your review and vice-versa. Let me know how much time is need to review this version, and advise immediately if glaring omissions are found.*

On February 11, 2011, the Department's Representative e-mailed HSD:

***Subject: FPN 41611915201, Manatee County ATMS Phase 1, Stand Alone Testing 1/26 - 1/28 Comments***

*See attached Department comments for the TMC stand-alone testing performed 1/26 through 1/28.*

On February 14, 2011, the Department's Representative e-mailed HSD:

***Subject: RE: FPN 41611915201, Manatee County ATMS Phase 1, Stand Alone Testing 1/26- 1/28 Comments***

*It was agreed at our last teleconference call with the project team that Naztec would go through the MTR (RTVM) and note whether each of the central software requirements (Section 3.0 of MTRS) will be delivered/demonstrated for the project. We need this response from Naztec to complete review of the subsystem test plans.*

On February 16, 2011, the Department's Representative e-mailed HSD:

***Subject: RE: FPN 41611915201, Manatee County ATMS Phase 1, Test Plan Comments, 2/16/11 Attachments: 4161191 Stand-Alone Test Plan Review- Central Components Only FDOT Comments 1-14-11.docx; Test Plan\_Comments\_02-16-11.docx***

*See attached comments for the subsystem and system testing. These comments need to be addressed and the Test Plan re-submitted. I am also attaching the TMC stand alone comments previously sent, comments on that list need to be incorporated as well.*

On February 21, 2011, HSD wrote the Department's Representative:

***Pursuant to section 5-12.2.2 Claims for Delay please accept this as our Notice of intent to seek additional compensation and a time extension due to the Department's (FDOT) inability to provide a timely review of the proposed testing documents previously submitted by the Design Build Firm (DBF).***

*On November 30, 2010 the DBF submitted for review our proposed Stand Alone, Subsystem and System test plan in its entirety to FDOT. While Stand Alone test comments and dialogue were properly exchanged between the DBF and FDOT **on February 18, 2011 we received comments for the first time on the Subsystem and System tests.** Per the contract documents, all comments were due to our firm on or before January 5, 2011. As such, FDOT exceeded their allowable review time by forty-four (44) calendar days for the Subsystem and System tests.*

On February 26, 2011, the Department's Representative wrote HSD:

***HSD has submitted a Notice of Intent to seek additional compensation and a time extension regarding the Department's review of your test plan submittal. The time period of impact stated in your February 21, 2011 Notice letter is from January 6, 2011 through February 18, 2011.***

***Specification Section 5-12.2.2, Claims for Delay, referenced in your letter, states in part; ... 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 days after***

## DISPUTE REVIEW BOARD RECOMMENDATION

*commencement of a delay to a controlling work item, as to such delay and providing a reasonable complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay, ... "*

*This **Notice of Delay does not comply with the notification requirements** of Specification Sections 5-12.1, 5-12-2- 2 and 8-7.3.2 and HSD has waived its right to additional compensation or a time extension for this issue.*

On February 28, 2011, HSD e-mailed the Department's Representative:

*Subject: CPM Schedule and response to TBE letter 2/18/11 & 2/26/11*

*For your consideration.*

The attached 14 page "CPM Network Diagram" is HSD's schedule with a Data Date of 23FEB11.

On February 28, 2011, HSD wrote the Department's Representative:

*In response to the Department's position that Highway Safety Devices, Inc. (HSD) did not adequately submit a time extension request pursuant to 8-7.3.2 our firm offers the following. **HSD was not aware that we had an issue with regards to the approval of the submittal of the Subsystem and System testing until we received comments on 2/18/11. It was not until we received these comments and incorporated your activities from your Letter dated 2/18/11 that the approval of the test plan became critical to the project completion.** It was at that time that the delay started and began to impact the project. As such, we have provided notice within 10 days of the commencement of the delay.*

*It is not prudent, nor industry practice, to submit time extension requests for delay(s) that could possibly happen, as would have been the case had we filed notice between 1/6/11 thru 2/17/11. In addition, **HSD did not file a notice prior to the comments received on 2/18/11 because this issue was not impacting the critical path prior to that time.** Only once comments were received and a resubmittal of the documents became necessary did this issue become critical.*

*Per contract requirements, we have included the February CPM update.*

On March 11, 2011, HSD e-mailed the Department's Representative:

***Subject: Manatee Phase I Acceptance Test Documentation Revision 4***

*Below you will find a link to a share file that contains **the DBF's revision 4 to the project's test documentation.***

*The file "Manatee Acceptance Test Rev 4" is formatted for 8.5x11. The file "Attachment\_C\_rev4" is formatted for 11x17. **Together these documents complete our proposed submittal.***

*As discussed today, **please ensure the reviewers recognize that the traceability matrix (Attachment C) is what should be used as the master tool to guide the reviewers through the test plans and also provide verification that all MTR sections are being addressed either through an inspection, demonstration or test procedure.** If any questions arise during the review, I request that I be contacted directly to help provide any clarification necessary in order to assist in the efficient and timely review of this submittal.*

*We appreciate your cooperation.*

*<https://highwaysafetydevices.sharefile.com/d/s6e21c809943425db>*

On March 14, 2011, Sorensen, Jonathan M e-mailed:

*To: Duvall, Katherine; Martinez, Jesus A.; Howard Holley*

*Cc: Muse, Terry; Roberts, Mark A*

*Subject: RE: 416119-1 RTVM & Test Plan Review*

*As per your request, I have **attached my review comments (in progress) for the System Acceptance Test Plan.** As you are probably aware, we have already executed most of the testing for "Attachment*

## DISPUTE REVIEW BOARD RECOMMENDATION

A" (*Stand-Alone Testing*), therefore I focused my interim review on the "ATMS Subsystem Test" section of the plan (Attachment B, Pg. 106 of the Test Plan).

In addition, Jesus, Howard, DJ and myself **held a call earlier this afternoon to discuss HSD's proposed approach, as well as to attain further clarification with regards to specific subsystem testing methodologies.** Although the approach does lead to some additional concerns with regards to sequencing of test points, Jesus and I have agreed to the proposed scheme, with two caveats:

1) we will adjust the order of subsystem tests so that we can commence subsystem testing with a less "arduous" subsystem than the ATMS subsystem, and

2) we have agreed that **if it becomes apparent during initial testing that testing of specific MTRs are being omitted, testing is deemed incomplete, or that the test approach is not following specific project requirements, we will cease testing, re-examine and modify the overall approach.**

Also, it should be noted that we still have not received the matrix review comments or the product submittal data for the adaptive software module from Naztec, which may impact our review time. However, with that being said, I am aiming to finish the entire subsystem test plan review by COB Friday.

Please feel free to contact me should you have any questions regarding subsystem testing, the proposed approach or my review comments.

On March 14, 2011, the Department's Representative e-mailed HSD:

**Subject:** FPN 41611915201, Manatee County ATMS Phase I, Test Plan Version 4 Subsystem Testing Comments

**Attachments:** Manatee ATMS-Subsystem\_Testing\_Review\_Comments\_3-14-11.docx

As discussed at today's telephone meeting, see **attached review comments for the subsystem testing.**

On March 14, 2011, the Department's Representative e-mailed:

**To:** Sorensen, Jonathan M

**Cc:** Roberts, Mark A; Dick Howarth; Nichols, James; Martinez, Jesus A.; Duvall, Katherine; Jon.Wunderlich@mymanatee.org; sage.kamiya@mymanatee.org

**Subject:** RE: 416119-1 RTVM & Test Plan Review- Naztec Verification of Features

**Attachments:** Certification of functions. pdf; Manatee Project Controller Features. pdf

See attachments as received from Naztec and **let us know if this satisfies requirements.**

On March 21, 2011, the Department's Representative e-mailed HSD:

**Subject:** FPN 41611915201, Manatee Phase I Acceptance **Test Documentation Revision 4**

**Attachments:** 4161191\_Stand\_Aione\_Testing\_Comments\_for\_Central\_Components\_Tested\_Jan\_26-28\_2011.docx; Test Plan\_Comments\_02-16-11.docx; Manatee County Test Plan Version 4\_Comments\_SwRI\_3-17-11.docx; Manatee\_ATMS-Subsystem\_Testing\_Ver. 4\_Comments\_3-18-11.docx

See attached comments for the Rev. 4 Test Plan.

I am also **attaching the TMC stand-alone testing results comments and the TP comments dated 2/16/11 sent previously. We have not received DBF responses for these.**

On March 31, 2011, HSD Representative e-mailed the Department's:

**Subject:** Manatee Phase I revision 5 to test plan and RTVM.

**Attachments:**

Below is a link to HSD's share file that contains **our revision 5 to the test plan and the RTVM.** Please contact me if you have any questions.

<https://highwaysafetvdevices.sharefile.com/d/s97f74a48bd64453a>



# DISPUTE REVIEW BOARD RECOMMENDATION

Contract Specifications state in part:

## **DESIGN-BUILD SPECIFICATIONS.**

**(REV 12-19-07)**

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

#### **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 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)

# DISPUTE REVIEW BOARD RECOMMENDATION

*DESIGN-BUILD REQUEST FOR PROPOSALS For Manatee County Advanced Traffic management System revised March 26, 2008 contains in part:*

## **V. PROJECT REQUIREMENTS AND PROVISIONS FOR WORK**

### **Q. Submittals:**

*The Design-Build Firm shall supply all design documentation necessary to detail all materials to be used on this project. **Documentation shall allow for proper identification, scheduling, design, installation, and testing of the entire system as identified in Section I, paragraph A – Scope of Services.** Documentation shall include, but is not limited to, plans, product/catalog cut-sheets, and equipment/material manufacturer literature.*

...

### **2. Milestones:**

...

*Before construction activities can begin, signed and sealed design Final Plans must be reviewed by the Department. Component submittals shall be complete submittals along with all supporting information necessary for review. The work must represent logical work activities and must show impact of future work on this project. Any modification to the construction due to subsequent design changes as the result of design development is solely the risk of the Design-Build Firm. Upon review by the Department, the plans will be stamped “Released for Construction”, initialed and dated by the Department reviewer. **The Design-Build Firm’s schedule shall allow for a 20-day working review time for each design submittal.** The review time will begin upon receipt of a complete submittal. No fabrication, casting or construction will occur until all related design, shop drawings, plans, specifications, and mix design comments are resolved.*

...

## **V. Quality Management Plan (QMP):**

...

### **2. Construction:**

*The Design-Build Firm shall be responsible for developing and maintaining a Construction Quality Control Plan in accordance with Section 105 of Standard Specifications, which describes their Quality Control procedures to verify, check, and maintain control of key construction processes and materials.*

*The sampling, testing and reporting of all materials used shall be in compliance with the **Sampling, Testing and Reporting Guide (STRG) provided by the Department.** The Design-Build Firm will use the Department’s database(s) to allow audits of materials used to assure compliance with the STRG. The Department has listed the most commonly used materials and details in the Department’s database. When materials being used are not in the Department’s database list, the Design-Build Firm shall use appropriate material details from the STRG to report sampling and testing. Refer to the “Access Instruction for LIMS” for more information on how to gain access to the Department’s databases:*

...

### **AA. Testing:**

*The Department or its representative will perform verification and resolution testing services in accordance with the latest Specifications. On all Federal Aid Projects, the Department or its representative shall perform verification sampling and testing on site as well as off site locations such as press-stress plants, batch plants, structural steel and weld, fabrication plants, etc.*

**Testing must include a traceability matrix and be conducted using the System Engineering Process.**

*The Design-Build Firm will provide verification testing services in accordance with the latest Specifications with the exception that the firm performing Quality Control testing and the Verification testing will be independent entities. The Department or its representative will perform resolution testing services in accordance with the latest Standard Specifications.*

**The Design-Build Firm shall submit a comprehensive Test Plan to the Department for review and approval, thirty (30) days prior to the planned start of any activity.** The Design-Build Firm shall follow it throughout the project. The Test Plan Submittal shall indicate the tests and procedures to be used at various test stages of testing during design/development and deployment

# DISPUTE REVIEW BOARD RECOMMENDATION

of this project. **The submittal shall include identification of tests/development of a list of tests, a description of each test, schedule for conducting the tests (i.e. factory, pre-installation, post-installation, final acceptance tests, etc.), test procedures and test forms to be utilized during each test.**

Upon Department review and approval of the submittal, the tests, procedures and test forms shall be used by the Design-Build Firm to verify system performance and to record the results of all testing for this project in accordance to the schedule. Furthermore, the Department maintains the right to have testing performed and/or observed by a third party.

**The Design-Build Firm shall also develop as part of the Test Plan Submittal a Test Evaluation Matrix to be used as a tool to cross-reference each planned test to a specific contract requirement to be verified.** This will provide a mechanism to ensure that all contract requirements have been tested successfully and verified.

Any deviations or changes to the approved Test Plan shall be resubmitted for review and approval by the Department fourteen (14) calendar days prior to any planned test activity stage. No tests shall be conducted until the Department has approved the Test Plan.

**DESIGN-BUILD CRITERIA PACKAGE FOR MANATEE COUNTY ADVANCED TRAFFIC MANAGEMENT SYSTEM dated May 12, 2008 Addendum 6 contains in part:**

## **2.0 GENERAL REQUIREMENTS**

### **2.10 Testing Requirements**

The DESIGN-BUILD FIRM shall demonstrate to the DEPARTMENT through testing how each of the selected products meet the functional requirements as defined for this project and in this document. Testing shall include, but is not limited to each of the main components of the ATMS (central hardware and software, video wall components, local controller hardware and software, network hubs, field cabinets, CCTV cameras and system sensors). The DEPARTMENT reserves the right to require certifications from the manufacturer for materials and equipment that may not require formal testing to ensure compliance, and to require testing on questionable materials or equipment at no additional expense to the DEPARTMENT. The DEPARTMENT reserves the right to withhold any payments due if a determination is made that the materials or equipment do not comply with the requirements and evaluation criteria.

Testing requirements defined in this section are to be supplemental to specific testing requirements defined in each section of this requirements document.

Testing shall provide verification and documentation that all requirements as defined in this document, contract documents, and the requirements defined in the test plan produced by the DESIGN-BUILD FIRM are met by the furnished subsystem components. Testing of the equipment and system shall include the following hierarchical testing scheme:

- Proof of Concept Test
- Factory Acceptance Test
- Standalone Test
- Subsystem Test
- System Operational Test

### **Test Plans & Procedures**

The DESIGN-BUILD FIRM shall submit the test plans, testing procedures and forms to the DEPARTMENT for review at least forty-five (45) calendar days prior to performing the associated tests. The DEPARTMENT shall review submitted test procedures and forms and shall provide comments or approval to the DESIGN-BUILD FIRM within twenty-one (21) calendar days after receiving the testing documentation.

The test plans and test procedures together shall provide a two-step description of each test. The test plans shall provide a high-level functional summary of the methods used for verifying each feature of the hardware, software, and firmware being tested. The test procedures shall detail the step-by-step activities associated with each test. The following information shall be included in the test plan:

- An implementation plan and detailed schedule (PERT and GANTT Microsoft Word format);
- Record-keeping procedures and forms;

## DISPUTE REVIEW BOARD RECOMMENDATION

- *Procedures for monitoring, correcting, and retesting variances;*
- *Procedures for controlling and documenting all changes made after the start of testing;*
- *A list of individual tests to be performed, the purpose of each test segment, and the appropriate functional design specification reference describing the feature being tested;*
- *Test Evaluation/Traceability Matrix;*
- *Identification of special hardware or software tools or test equipment to be used during the test;*  
*and*
- *Copies of any certified test data to be used in lieu of testing.*

*At a minimum, the test procedures shall include:*

- *Testing the network for full-loading at full-build-out conditions;*
- *A step-by-step outline of the test sequence to be followed, showing a test of every function of the equipment or system to be tested;*
- *A block diagram representing the configuration of the test;*
- *A description of the expected operation outputs and test results;*
- *An estimate of the test duration and a proposed test schedule;*
- *A data form to be used to record all data and quantitative results obtained during the test;*
- *A description of any special equipment, setup, manpower, or conditions required for the test; and*
- *Pass/Fail criteria for each test.*

*The DESIGN-BUILD FIRM shall address any comments provided by the DEPARTMENT. If required, the DESIGN-BUILD FIRM shall resubmit the plan and procedures with the required modifications/additions for review and final approval by the DEPARTMENT. When the plans and procedures are approved, the DESIGNBUILD FIRM shall perform the tests and document the results.*

*The DESIGN-BUILD FIRM shall furnish and maintain all required test equipment necessary to conduct the testing. The test equipment (both hardware and software) shall be made ready for the DEPARTMENT'S use at the time it is needed. The DESIGN-BUILD FIRM shall notify the DEPARTMENT of the time, date and place of each test at least fourteen (14) calendar days prior to the date the test is planned. The DESIGN-BUILD FIRM shall, if requested by the DEPARTMENT, postpone any test for up to seven (7) days. Such postponements shall not be grounds for extensions of completion time.*

HSD alleges that the Department exceeded its contractually allowable review time of twenty (20) work days in the review of test plan documents submitted for approval concerning the subsystem and system test plans. As a result of this delay, HSD has been impacted in their ability to successfully test the project within certain timeframes.

There is disagreement as to whether the Department had 20 working or 21 calendar days to review and provide comments or approval of the plan. The Department believes that the time is 20 working days while the Contractor believes that it is 21 calendar days, although in its CPM submittal, the time allowed for this activity is 20 working days.

The Department points to subsection V. PROJECT REQUIREMENTS AND PROVISIONS FOR WORK, subsection Q. Submittals:, subsection 2. Milestones of the DESIGN-BUILD REQUEST FOR PROPOSALS For Manatee County Advanced Traffic management System revised March 26, 2008 which states in part:

*The Design-Build Firm's schedule shall allow for a 20-day working review time for each design submittal.*

## DISPUTE REVIEW BOARD RECOMMENDATION

The DRB finds that this is referencing design submittals not test plan review. The allowable time for test plan review is 21 calendar days. The applicable contract section is subsection 2.0 GENERAL REQUIREMENTS, subsection 2.10 Testing Requirements of the DESIGN-BUILD CRITERIA PACKAGE FOR MANATEE COUNTY ADVANCED TRAFFIC MANAGEMENT SYSTEM dated May 12, 2008 Addendum 6 which states in part:

**Test Plans & Procedures**

***The DESIGN-BUILD FIRM shall submit the test plans, testing procedures and forms to the DEPARTMENT for review at least forty-five (45) calendar days prior to performing the associated tests. The DEPARTMENT shall review submitted test procedures and forms and shall provide comments or approval to the DESIGN-BUILD FIRM within twenty-one (21) calendar days after receiving the testing documentation.***

The Department had four entities that were to review the test plan; TBE, Manatee County, Southwest Research Institute (SWRI) and PBS&J. HSD first submitted the test plan for review on September 14<sup>th</sup> 2010. It is worthy of note that only SWRI reviewed the complete submittal while PBS&J did not review the submittal. Manatee County and TBE only reviewed “Stand Alone Test Components” and “Subsystem Test Components.” This submittal was found unacceptable as being incomplete for multiple reasons as detailed in the Department’s October 11<sup>th</sup> 2010 e-mail. At this time, the CPM activity for review comments was not on the critical path.

HSD alleges that submissions continued to be made, parts of which were reviewed by one or two reviewers but never by the group as a whole and that it was not until February 18<sup>th</sup> 2011 that it received comments for the “Subsystem Test and System Operational Test procedures” that were submitted on November 29, 2010. HSD makes the observation that they were entitled to a complete review of each of their submittals.

In late 2010, the Contractual completion was January 15<sup>th</sup> 2011. In December 2010, two events occurred on the project (Hub and Video Wall Damage). These individually and/or collectively became critical and affected the ability of the Contractor to complete the project as planned at that time. The Contractor submitted a schedule update DD 23Feb11 that purports to demonstrate that the controlling activity had become the timely review of the test plan. The DRB does not accept this schedule as an accurate status of the criticality of the review process. The only way that the review process became critical in this schedule was by showing progress on the hub repair activities that actually brought the forecast date back for activity 810 “Complete Integration from Hub 2 Accident” as shown in its 15DEC10 DD schedule from April 11<sup>th</sup> 2011

## DISPUTE REVIEW BOARD RECOMMENDATION

to March 22<sup>nd</sup>. The DRB has previously noted that this Activity was not complete until April 20<sup>th</sup>.

The DRB finds that the test plan review was not critical and therefore not a controlling item of work at the time the Contractor submitted its Notice of Intent.

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 finds no entitlement of Highway Safety Devices, Inc. to additional compensation or contract time prior to February 18<sup>th</sup> 2010 on the above referenced project for untimely test plan review.**

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:



John H. Duke, Sr.  
DRB Chairman

---

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