

**DISPUTE REVIEW BOARD RECOMMENDATION**  
**FINANCIAL PROJECT ID. 231918-2-52-01 & 231919-2-52-01**  
**INTERSTATE 95 ( SR-9 )**  
**PALM BEACH COUNTY**

**RECEIVED**

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I95 MOBILITY 2000  
THE CORRADINO GROUP

June 19, 2006

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RE; I-95 (SR-9) Reconstruction from 10<sup>th</sup> Avenue North to South of SR-80,  
Contract ID: T 4016  
Palm Beach County

Subject: Dispute over Payment and Time for Hurricane Wilma and Tropical  
Storm Gamma.

The Dispute Review Board was convened for a hearing requested by the The Corradino Group regarding Payment and time extensions for washout repairs caused by Tropical Storm Gamma and time extension for delays caused by the lack of proper trucks to transport pre-stressed concrete beams as well as compensation for indirect overhead expenses and idle equipment during Hurricane Wilma. on the above captioned project. The hearing was held in the offices of The Corradino Group in West Palm Beach, Florida on June 13, 2006 at 8:30 AM.

Packages of information and position statements were presented to the Board by both parties and are made part of this recommendation.

**THE DEPARTMENTS POSITION**

The Corradino Group (TCG) respectfully submits this statement and explanation of its position regarding a dispute over compensation and time extensions in connection with Hurricane Wilma and Tropical Storm Gamma. The Contractor, Hubbard Construction Company, has requested the Board's review for a recommendation on the issue of entitlement.

There are three (3) separate but related issues that the Board is being asked to rule on. They are:

1. Tropical Storm Gamma – At issue is compensation for repairs to roadway washouts that occurred while Tropical Storm Gamma was at sea.
2. Hurricane Wilma Time Extension – At issue is disagreement over the time extensions determined by the Department for this project. On this issue, the Board is requested by Hubbard to find entitlement for Hubbard if the Department's determination was arbitrary or "without reasonable factual basis." The Department, however, asks the Board to rule that the Department's determination of non-compensable contract time extensions due to the effects of inclement weather pursuant to 8-7.3.2 is final, and that the Department's determination of the number of

calendar days to extend the respective "No Excuse Bonus" completion dates is likewise final on both projects.

3. Hurricane Wilma Idle Equipment/Indirect Costs – At issue is whether the Contractor should be compensated for hurricane-related compensation for idled equipment and "indirect impacts," or if he should be compensated in accordance with Section 7-14 of the Supplemental Specifications and the guidance spelled out in a memorandum from the State Construction Office in relation with the subject Specification.

## **Issue 1 – Tropical Storm Gamma**

### ***Background***

On January 23, 2006, the Contractor submitted a request for compensation for repair work caused by Tropical Storm Gamma. Included in the submittal is our Senior Inspector's acknowledgement of the work being performed and the personnel and equipment employed by Hubbard Construction during the repairs. While this is not proper notification under Article 5-12, we will concede that the intent of the Specification was met as to allow us to document the personnel and equipment for the work performed and will not present this as an argument for denial. However, the fact that we kept account of the labor, materials, and equipment does not establish the validity of the claim or method for computing any compensation for such claim.

It was and is our position that lack of maintenance contributed to the washouts north of 17<sup>th</sup> Avenue. In addition, even if this was not the case and the problem occurred due to a heavy rain storm, under the Contract, the Contractor is responsible for the Maintenance of the Project including repairs to washouts. Articles 7-14 and 120-11 are very specific to the responsibility of the contractor and when the Department may elect to compensate the Contractor for the repair of such damage.

The argument made by Hubbard that the damages were caused by Tropical Storm Gamma has no merit. Included in this submittal in *Exhibit 1* is an article from the Palm Beach Post's Storm 2006 with a Gamma recap and in *Exhibit 2* is a chart indicating the trajectory of all the storms in 2005 including Gamma. Both articles indicate that most of the effect occurred in the Caribbean and Central America with no affect to South Florida.

### ***Contract References***

Supplemental Specification 5-12 (pp.74) (in part) Claims by Contractor states:

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

5-12.2 Notice of Claim:

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

submit full and complete claim documentation as described in 5-12.3. However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5- 12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate. Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim." (Emphasis added)

Specification 7-14 Contractor's Responsibility for Work (pp. 68) states:

"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 non-execution 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.**" (Emphasis added)

Supplemental Specification 120-11: Maintenance and protection of Work (pp. 136) states:

"While construction is in progress, maintain adequate drainage for the roadbed at all times. Maintain a shoulder at least 3 feet [1 m] wide adjacent to all pavement or base construction in order to provide support for the edges. Maintain all earthwork construction throughout the life of the Contract, and take all reasonable precautions to prevent loss of material from the roadway due to the action of wind or water. **Repair, at no expense to the Department, except as otherwise provided herein, any slides, washouts, settlement, subsidence, or other mishap which may occur prior to final acceptance of the work.** Perform maintenance and protection of earthwork construction in accordance with Section 104. Maintain all channels excavated as a part of the Contract work against natural shoaling or other encroachments to the lines, grades, and cross-sections shown in the plans, until final acceptance of the project. (Emphasis added)

#### ***Department's Position***

1. The contractor is responsible for the maintenance of the project per section 7-14 and 120-11.
2. Neither the Department, nor the State of Florida, considered Gamma a threat to the South Florida area. Therefore a Declaration of Emergency was never instituted and consequently, the Department did not exercise its discretion under Section 7-14 for payment to contractors for rain storms.

The request for Tropical Storm Gamma should be denied in its entirety based on the Contract Specifications. While Hubbard Construction provided costs associated with washout repairs, it did not identify the provision in the Contract that entitles them to compensation on repairs to any roadway washouts, slides, settlement, subsidence, or other mishap which may occur regardless of the cause.

## **Issue 2 – Hurricane Wilma Time Extension**

### ***Background***

On October 24, 2005, Hurricane Wilma hit Florida and caused extensive wind and water damage to all ongoing I-95 projects in this county (seven projects at that time, three of them Hubbard's). Signs, lighting, earthwork, erosion control devices and MOT devices were affected. The Contractors were sent a letter on October 21<sup>st</sup> suspending all work at the end of the workday (**Exhibit 3**). Another letter was sent on October 26<sup>th</sup> notifying the Contractors that the suspension had been lifted (**Exhibit 4**). Therefore, all projects were shut down from October 22<sup>nd</sup> through October 26<sup>th</sup>.

We assessed the delays caused by the effects of inclement weather in accordance with Article 8-7.3.2, and granted four (4) non-compensable days accordingly: October 22<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, and 26<sup>th</sup> (**Exhibits 5 & 6**). Upon further review, October 21<sup>st</sup> and October 23<sup>rd</sup> were added as non-compensable weather days (**Exhibit 7**). The determination for the days to be granted was based upon a day by day comparison of the Controlling Items of Work and the Daily Reports documenting the work in progress. Days were granted for days when the Contractor was not able to work on controlling items of work at least 50% of the normal workday due to adverse weather conditions or due to necessary weather-related repairs. We also tracked the time and materials expended in weather-related repairs.

Hubbard initially requested a total of an 18 day extension to both the Contract Time and the "No Excuse Bonus" Time (**Exhibits 8 & 9**). This request was extended by an additional seven (7) days on March 24<sup>th</sup>, 2006 (**Exhibit 10**), and then again by two (2) days on April 17<sup>th</sup>, 2006 (**Exhibit 11**) for a total extension request of 27 days. The initial 18 day request was based upon preparation days before the storm, and days for delay to delivery of sheet piling for wall TW-24. This request was denied because the sheet pile wall did not fall on the Critical Path, and therefore was not eligible for a time extension. We cannot justify an extension for the sheet piling delay as they claim, since it is clear TW-24 was not a critical or controlling activity. While Hubbard provided one (1) schedule purporting this as critical (which was previously and subsequently changed to indicate other items as critical), it is clear and obvious that this was never critical given that while the sheet piles were delivered in early November, Hubbard did not in fact install them until February-March 2006, months after the delivery.

The additional 9-day request is based upon a delay in the delivery of beams for the C-51 Canal Bridge. This request is justified by Hubbard in a March 7<sup>th</sup>, 2006 letter received from their supplier that states "due to the lingering effects of last years hurricane season the number of trucks available to transport prestressed / precast concrete product has been reduced by approximately fifty (50%) percent." (**Exhibit 10**) However, Hubbard had plenty of time since the hurricane passed in October 2005 until March 2006 to schedule trucking for the beam delivery and any delay in delivery is not hurricane related, and therefore, not justifiable.

Specification 8-7.3.2 and Special Provision 8-13.1 are very clear in how Time Extensions are granted due to the effects of inclement weather. Specification 8-7.3.2 states:

"The Department will grant time extensions, on a day for day basis, for delays caused only by the effects of rains or other inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work resulting in:

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

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

Special Provision 8-13.1 states:

"In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the "No Excuse Bonus"

Completion Date. **In the event the Contractor and Department are unable to agree to the number of calendar days to extend the "No Excuse Bonus" Completion Date, the Department shall *unilaterally* determine the number of calendar days to extend the "No Excuse Bonus" Completion Date reasonably necessary and due solely to such catastrophic event and the Contractor shall have no right whatsoever to contest such determination, save and except that the Contractor establishes that the number of calendar days determined by the Department was arbitrary or without any reasonable basis.**

"The Contractor shall have no rights under the Contract to make any claim arising out of this "No Excuse Bonus" provision except as is expressly set forth in this Article." (Emphasis added)

The Department has followed these provisions and is able to justify extending Contract Time and Bonus Time by six (6) days.

Furthermore, the schedule narrative submitted by Hubbard on October 11<sup>th</sup>, 2005 with the Monthly CPM Schedule Update states that "the current schedule shows that we are now 61 working days behind schedule." (**Exhibit 12**) The schedule narrative submitted by Hubbard on November 7<sup>th</sup>, 2005 with the Monthly CPM Schedule Update states that "The current schedule shows that we are now 43 working days behind schedule." (**Exhibit 13**) So despite the impacts of the hurricane, Hubbard was able to make up 18 working days, yet they are requesting an additional 25 days be granted.

**Contract References**

Specification 8-6.1 Authority to Suspend Contractor's Operations (pp. 77) states (in part):

"The Engineer has the authority to suspend the Contractor's operations, wholly or in part, for such periods deemed necessary."

Specification 8-7.3.2 Contract Time Extensions (pp. 78-80) states (in part):

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

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

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

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

**No additional compensation will be made for delays caused by the effects of inclement weather."** (Emphasis added)

Supplemental Specification 8-7.3.2 Contract Time Extensions (pp. 88) further states:

**"...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)

Special Provisions 8-13.1 "No-Excuse Bonus" Payment and Waiver of Contractor Claims (pp. 28-29) state (in part):

The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the "No Excuse Bonus" Completion Date set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract by the "No Excuse Bonus" Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.

**In the event of a catastrophic event (i.e., hurricane or declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the "No Excuse Bonus" Completion Date. In the event the Contractor and the Department are unable to agree to the number of calendar days to extend the "No Excuse Bonus" Completion Date, the Department shall unilaterally determine the number of calendar days to extend the "No Excuse Bonus" Completion Date reasonably necessary and due solely to such catastrophic event and the Contractor shall have no right whatsoever to contest such determination, save and except that the Contractor establishes that the number of calendar days determined by the Department was arbitrary or without any reasonable basis." (Emphasis added.)**

#### ***Department's Position***

1. The Department suspended the Contractor's operations pursuant to 8-6.1 and granted an appropriate and reasonable time extension pursuant to 8-7.3.2 and 8-13.1. This suspension was due to, incidental to, and concurrent with inclement weather associated with Hurricane Wilma.
2. Hubbard has not sufficiently demonstrated that additional time is warranted and the time extension should remain at six (6) days since the basis of this request (TW-24 sheet pile wall) was not constructed until three (3) months after the delivery of the sheet piles. In addition, based on the schedule narratives from October 2005 to November 2005, Hubbard gained 18 working days on their schedule.

#### Issue 3 – Hurricane Wilma Idle Equipment/Indirect Costs

##### ***Background***

Hubbard Construction has requested payment for Idle Equipment as a result of "diverting labor resources to restore areas of the Project that were critical to the Department" (**Exhibit 14**) and for Indirect Costs associated with the time extension they are requesting. In addition to the overhead costs, Hubbard has requested additional Direct Costs for unexplained increased costs to set the Phase 2 beams at the C-51 Canal (the same beams in which they are requesting the additional nine (9) days). (**Exhibit 10**) However, as stated under Issue 2, Hubbard had more than sufficient time to schedule trucking for the beam delivery and any additional time needed to set the beams is not justifiable, nor should the Department bear the costs associated with Hubbard's lack of planning.

Article 7-14 of the Supplemental Specifications clearly define the Contractor's responsibility for the work and states: "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." (Emphasis added.)

Given the widespread damage from the hurricane across the State, and to ensure uniform, fair and equal treatment of affected contractors, **and using its discretion under Article 7-14**, on November 28, 2005 the State Construction Office issued DCE Memo 30-05 (**Exhibit 15**) providing direction as to payment for impacts resulting from the hurricanes. Pursuant to 7-14, the Department elected to pay for the following:

- Damage to material that was incorporated into the projects;
- Damage to material that would otherwise be permanently incorporated into the project;
- Reconstruction of permanent or temporary erosion control features in accordance with 104-7.1;
- Taking down and replacing Maintenance of Traffic (MOT) devices as directed by the District Construction Office, and;
- Repair of damaged post mounted MOT signs, deemed to be essential by the Engineer and damaged where left in place; and repair of damaged Changeable (Variable) Message Signs that were specifically directed by the Department to be placed on projects during the storm.

Furthermore, DCE Memo 30-05 continued on to state, **based on its discretion under Article 7-14**, that the following are non-compensable:

- Cost to protect/secure work not incorporated in the project;
- Per day MOT devices not in place on a project;
- Damage to MOT devices, whether in place or elsewhere, except under the exception provided above;
- Temporary works or material damage, except under the exception provided above;
- Idle labor;
- Idle equipment;
- Reduced production rates due to effects of inclement weather;
- Loss of Profits; and
- Home Office, Jobsite, and any other, Overhead.

Consistent with these instructions, TCG and the affected Contractors prepared estimates for the specified costs on each of our seven (7) I-95 projects, agreed on the costs and appropriate time extensions and closed the issue with those Contractors, except for Hubbard, who objected to the stipulation on idle equipment and sought to reserve their rights for additional compensation. Hubbard subsequently expanded their objections to include a request for additional time beyond that justified by the project records, and to request treatment of these weather-related impacts as extra work and compensable delays, disregarding completely the contract specifications that specifically address weather-related impacts (7-14 and 8-7.3.2).

In addition to payments that have been made per DCE Memo 30-05, non-payment for Idle Equipment and the other Indirect Costs requested has been denied for several reasons within the Contract. First, The Department **chose to exercise its option under 7-14** to reimburse the Contractor for this hurricane damage. DCE Memo 30-05 made it clear which items the Contractor would be compensated for due to the effects of Hurricane Wilma. Idle Equipment and Overhead costs are non-compensable. Please note that compensating Hubbard for this work **is not an obligation of the Department by the Contract**. Article 7-14 clearly states that until the Department's acceptance of the work, the Contractor is to take charge and custody of the work, and shall "rebuild, repair, restore, and make good, without additional expense to the Department" for any damage caused by the elements. Furthermore, Hubbard did not "submit a written notice of intent to claim to the Engineer within ten (10) days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation," in accordance with Article 5-12.2.2 of the Supplemental Specifications. **Further, pursuant to DCE Memo 30-05 we have voluntarily and in the Department's discretion agreed to compensate Hubbard for hurricane preparations and recovery.**

Second, in accordance with Article 8-7.3.2, other than a time extension, "no additional compensation will be made for delays caused by the effects of inclement weather." We have reviewed the daily reports and compared the work against the Controlling Items submitted and have determined that Hubbard is due a

time extension of six (6) days to both the Contract Time and the Bonus Time. Hubbard's request for time extension is 27 days. Regardless of the number of days the Contract Time is extended, this is the only remedy afforded to contractors by the Contract.

Finally, Hubbard is claiming for Compensation for Indirect Impacts of Delay in accordance with Article 5-12.6.2.2. This Specification is clear in that compensation under this section will occur only when the delay is "caused solely by the Department." Since the delay in this claim was caused by an Act of God, a hurricane, the Department was not the cause and therefore this Specification does not apply.

### ***Contract References***

Specification 7-14 Contractor's Responsibility for Work (pp. 68) states:

"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 non-execution 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.**" (Emphasis added)

Supplemental Specification 5-12.2.2 (pp.74) (in part) Claims by Contractor states:

"Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, **the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item,** as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay. The timely providing of a written notice of intent or preliminary time extension request to the Engineer are each a condition precedent to any right on behalf of the Contractor to request additional compensation or an extension of Contract Time for that delay, and the failure of the Contractor to provide such written notice of intent or preliminary time extension request within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for that delay." (Emphasis added)

Supplemental Specification 5-12.6.2 (pp.74) (in part) Claims by Contractor states:

"When the cumulative total number of calendar days granted for time extension due to delay of a controlling work item caused solely by the Department is, or the cumulative total number of calendar days **for which entitlement to a time extension due to delay of a controlling work item caused solely by the Department** is otherwise ultimately determined in favor of the Contractor to be, greater than ten calendar days the Department will compensate the Contractor for jobsite overhead and other indirect impacts of delay, such indirect impacts including but not being limited to unabsorbed and extended home office overhead, according to the formula set forth below and solely as to such number of calendar days of entitlement that are in excess of ten calendar days. No other jobsite overhead and other indirect impacts of delay shall be compensable under any circumstances whatsoever, nor shall the Contractor be entitled under any circumstances to receive compensation for jobsite overhead and other indirect impacts of



delay beyond the amount provided for herein. **Further, in the event there are concurrent delays to one or more controlling work items, one or more being caused by the Department and one or more being caused by the Contractor, the Contractor shall be entitled to a time extension for each day that a controlling work item is *delayed by the Department* but shall have no right to nor receive any monetary compensation for any indirect impacts for any days of concurrent delay. No compensation, whatsoever, will be paid to the Contractor for any jobsite overhead and other indirect impacts when the total number of calendar days granted for time extension due to delay of a controlling work item caused solely by the Department is, or the total number of calendar days for which entitlement to a time extension due to delay of a controlling work item caused solely by the Department is otherwise ultimately determined in favor of the Contractor to be, equal to or less than ten calendar days and the Contractor also fully assumes all monetary risk of any and all partial or single calendar day delay periods, due to delay of a controlling work item caused solely by the Department, that when cumulatively totaled together are equal to or less than ten calendar days and regardless of whether monetary compensation is otherwise provided for hereunder for one or more calendar days of time extension entitlement for each calendar day exceeding ten calendar days.** All calculations under this provision shall exclude weather days, days used for performing additional work, days included in supplemental agreements, and days of suspended work.

#### ***Department's Position***

1. The Department suspended the Contractor's operations pursuant to 8-6.1 and granted an appropriate and reasonable time extension pursuant to 8-7.3.2 and 8-13.1. This suspension was due to, incidental to, and concurrent with inclement weather associated with Hurricane Wilma.
2. The Contractor did not provide justification for his time extension request of 27 days. The original eighteen (18) days were requested based on the delivery of sheet piles for wall TW-24, this argument does not carry any credibility since the sheeting was delivered in November, however installation did not occur until February/March 2006. In addition, if we based the time on the narratives submitted by Hubbard on the schedule, the Contractor reduced the negative float on the schedule by eighteen (18) days.
3. The Department exercised its discretion under 7-14 to reimburse contractors for certain specified costs in connection with this weather event. This was done uniformly and equitably for all affected contractors and projects. While this was generally appreciated and accepted by affected contractors across the State, Hubbard rejected the Department's offer and chose to demand compensation and time it is not entitled to receive.
4. The Contractor is not entitled to compensable delays for delays caused by inclement weather; weather delays are non-compensable in accordance with 8-7.3.2. The Contractor's reference to sub-articles 5-12.6.2.1 (Compensation for Direct Costs of Delay) and 5-12.6.2.2 (Compensation for Indirect Impacts of Delay), both of which fall under Section 5-12.6 (Compensation for Extra Work or Delay), are not applicable; sub-article 5-12.6.2.2 clearly states: "All calculations under this provision shall exclude weather days, days used for performing additional work, days included in supplemental agreements, and days of suspended work." Moreover, the Contractor's characterization of weather-related repairs and delays as "directed extra work," subject to payment under sub-article 4-3.2 (Increase, Decrease or Alteration in the Work), misrepresents the key and central fact that all disputed damages were the result of inclement weather. Specifications 7-14 and 8-7.3.2 are the relevant and applicable specifications that address weather-related damages and delays.
5. The Contractor is not entitled to payment for equipment idled due to adverse weather. The Department recognizes the fact that contractors were impacted financially in various ways by the effects of inclement weather experienced by Hurricane Wilma. Although not contractually bound to do so, the Department made a good faith offer to all affected contractors to help offset these financial impacts with emergency funds.

It has long been understood and accepted in our industry that weather and other such delays, which are neither the Owner's fault nor the Contractor's fault, are a shared risk, with the Owner taking on the time element of that risk, and the Contractor absorbing the financial risk. Bramble and Callahan, for example, in

Construction Delay Claims (Section 3.22) state: "Because these delays are beyond the control of any of the parties, contracts and case law generally minimize the risk to all parties by a compromise: the contractor's late performance will be excused but no additional compensation will be awarded." Within its discretion and beyond its obligation, the Department uniformly and equitably helped contractors shoulder the financial burdens created by these storms. Hubbard made itself an exception. We hope the Board will enforce the terms of the Contract with its findings and recommendations, and reject the Contractor's attempt to make the Owner solely responsible for delays and damages caused by the weather and Acts of God.

## **CONTRACTORS POSITION:**

### **Compensation For Costs Relating to Tropical Storm Impacts – Direct Cost**

#### **Events**

Hubbard Construction Company, herein under referred to as "Hubbard", holds three (3) Florida Department of Transportation, herein under referred to as "Department", contracts that were affected by this Hurricane. This issue pertains to the widening and reconstruction of Project 231918-2-52-01/231919-2-52-01, SR9 (I-95) from 10<sup>th</sup> Avenue to South of SR 80 (Southern Boulevard) which began on January 5, 2004. This Project contains the 2000 Standard Specifications. The Project is overseen by the C.E.I. services of The Corradino Group herein under referred to as "Corradino".

#### **Issues**

Hubbard requests the Board to review one (1) claim topic for compensation as a result of the impact of the 2005 Tropical Storm Gamma. Tropical Storm Gamma struck the Project with severe rainfall, which impeded construction activities on the Project, and caused Hubbard to redirect its resources to the emergency repairs of areas damaged by the storm.

#### **Topics**

- 1) FDOT/ Corradino imposed orders for the emergency repairs necessary due to the impacts of this storm. Is Hubbard Construction entitled to compensation for restoration of damages caused by the effects of Tropical Storm Gamma?

#### **Contractor Position Statement**

When this Tropical Storm threatened, as it was authorized to do by the Contract terms, the Department, through TCG, directed Hubbard to take certain actions to repair from damages of the storm, Hubbard and its subcontractors complied with this directive, expecting additional compensation, in accordance with the Contract Documents.

TCG contends that "*the lack of maintenance... ..contributed to the washout north of 17<sup>th</sup> Ave*".

Attached are copies of the State of Florida Department of Transportation Stormwater Pollution Prevention Plan Construction Inspection Report for week ending 11/19 and 11/26/05. These reports specifically outline the areas where the post storm repair was made. A review of both reports indicates that no corrective action was required in the area that was repaired, prior to the storm.

Additionally, a review of the Progress meeting minutes, and Progress meeting Agenda for the same period of time reveals no mention of any problems with the erosion control devices prior to the storm. The aforementioned documents show that Hubbard did provide adequate maintenance for this area, and support our position that Hubbard should be reimbursed for all costs relative to this repair.

## **Basis of Entitlement**

### ***Jobsite Direct Cost***

Supplemental Specifications Section 5-12.6.1 provides that for extra work that the Engineer directs Hubbard to perform in anticipation of hurricane effect, Hubbard is entitled to be compensated for both direct, and indirect cost. The formula to calculate this entitlement is delineated in 4-3.2.

Corradino's directed Hubbard to restore the project to pre-storm conditions after the storm. Again and in compliance with 4-3.2, Hubbard is entitled to recovery of cost associated with the efforts expended to act on Corradino's direction to repair the Project.

On April 5, 2005 a Florida DRB board in the City of Jacksonville Florida ruled in favor of the contractor on the above referenced issues. A copy of that ruling is included for the Boards review and consideration.

## **Summary**

In closing, the Department/Corradino directed Hubbard to initiate emergency repairs, prior to recommencing normal construction operations. Hubbard complied with these directives, expecting additional compensation, in accordance with the Contract Documents. To date the Department has not fully complied with compensating Hubbard for its efforts.

The contract documents are clear. All necessary documentation to support this position is included in this package. The Department/Corradino has the right and the obligation to fully compensate the Contractor for performing this extra work.

## **Attachments:**

Disputes Review Board Recommendation involving compensation for costs relating to four 2004 Hurricanes – US-1/I-295/I-95/SR-9A Interchanges, F.I.N. Project Numbers: 209600-1-52-01, and 213290-1-52-01, in Jacksonville, District 2, Supplemental Specification Section 4-3.2, and 5-12.6.1, State of Florida Department of Transportation Stormwater Pollution Prevention Plan Construction Inspection Report for week ending 11/19 and 11/26/05, Progress meeting Minutes, and Progress meeting Agenda for 11/19, and 11/26/05

## **Compensation For Costs Relating to Hurricane Impacts – Indirect Cost/Time on Bonus/Time and Cost for Beam Delay/Idle Equipment Cost/Jobsite Direct Cost**

### **Events**

Hubbard Construction Company, herein under referred to as “Hubbard”, holds three (3) Florida Department of Transportation, herein under referred to as “Department”, contracts that were affected by this Hurricane. This issue pertains to the widening and reconstruction of Project 231918-2-52-01/231919-2-52-01, SR9 (I-95) from 10<sup>th</sup> Avenue to South of SR 80 (Southern Boulevard) which began on January 5, 2004. This Project contain the 2000 Standard Specifications. The Project is overseen by the C.E.I. services of The Corradino Group herein under referred to as “Corradino”.

### **Issues**

Hubbard requests the Board to review four (4) separate claim topics for compensation as a result of the impact of the 2005 Hurricane Wilma. Wilma struck the Project directly, and the Governor declared a state of emergency for the Hurricane which impeded construction activities on the Project.

### **Topics**

- 2) Is Hubbard Construction entitled to compensation for all of the bonus time impacts caused by evacuation preparations, FDOT/ Corradino imposed suspension orders, delays to the delivery of beams and effects of this hurricane of 2005?
- 3) Is the compensation to Hubbard limited by Memorandums 27-05, and 30-05 as it relates to idle time?
- 4) Is the compensation to Hubbard limited by Memorandums 27-05, and 30-05 as it relates to indirect cost?

- 5) Is the compensation to Hubbard limited by Memorandums 27-05, and 30-05 as it relates to jobsite direct cost?

## **Contractor Position Statement**

Hubbard contends that Florida declared a state of emergency when this Hurricane threatened. On this occasion, as it was authorized to do by the Contract terms, the Department directed Hubbard to take certain actions to prepare for the storm, to suspend construction until the Department authorized resumption, and to initiate emergency repairs, prior to recommencing normal construction operations. Hubbard and its subcontractors complied with this directive, expecting additional compensation, and Bonus time extensions in accordance with the Contract Documents.

## **Basis of Entitlement**

**Time on Bonus:** The Department contends that the hurricanes were weather-related events, and that the suspensions were due to the effects of the inclement weather, for which Hubbard is only entitled to non-compensable weather and Bonus days, on a day for day basis. This is not supported by the Contract. The Contract clearly identifies the difference between inclement weather and hurricanes.

### ***Inclement Weather***

Standard Specification Section 8-7.3.2 clearly states that:

*“for delays caused only by the effects of rains or other inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work “*

The term “inclement weather” is implicitly defined by that provision to refer to weather at the project site. The primary impact was not only the weather at the jobsite but the direction by the Department to cease work and prepare for flood and evacuees moving through the Projects. As well as the Corradino directed repairs, prioritized to occur prior to recommencing critical path operations.

### ***Hurricanes***

Catastrophic events are clearly identified in 8-13.1:

*“In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially effecting the Contractor’s operations on the Contract, the Contractor and the Department shall agree as to the number calendar days to extend the “No Excuse Bonus” Completion Date“.*

Based on this, it is clear that the Contractor is entitled to Bonus time, utilizing the industry wide, Contract required method of calculating the time, the CPM schedule. Sub article 8-13.1, clearly stipulates that the determination of time impacts caused by

catastrophic events is by utilizing the controlling items of work method, i.e. the CPM schedule method. For the 18 day delay, before, during the storm, and during restoration immediately after the Hurricane, the schedule was submitted to TCG on November 23, 2005. A copy of that letter is included in this package. For the delay to the sheeting wall TW-24 caused by the delay to the C-51 canal beam set, the schedule is included with this package. For convenience the relative portions of the bar chart are printed to show the effects. This is demonstrated by displaying the current approved target schedule, titled SCH1, with to date as-built applied, and a second version of that schedule titled SCH2, with the relative activities suspended during the relative time frames. The result of this delay shows the impacts. Based on this our total delay is 23 days, of which TCG recognizes 6 days. 18 days delay were caused before, during the storm, and during restoration immediately after the Hurricane, and 5 days of delay were incurred during the setting of the beams at the C-51 canal, which delayed resources from progressing at temporary wall TW-24. **The total Direct/Indirect cost associated with the time is \$123,070.53.** For convenience a copy of the current version of our calculation of Indirect/Direct Cost dated 5/30/06 is included.

Hubbard construction also contends that the Department waited until beyond the last possible minute to direct the securing of the project. The direction was given on Friday to start pick up on Saturday. We started on Thursday October 20, 2005. Considering that the Hurricane hit on Monday October 24, 2005, starting on Saturday would not have afforded us enough time to safeguard the project for the motoring public. We are requesting two days more than the time granted by TCG for this issue.

The break down of the delay time for impacts to critical temporary sheeting is found in our correspondence 00271 dated November 23, 2005:

*"Our steel sheet piling fabricator, as you are aware, was unable to commence shipment of temporary sheeting required for TW-17, and TW-24, which is critical path work, until Wednesday November 9, 2005. Please consider this request for the days lost due Hurricane driven impacts to this delivery schedule. The sheeting was originally scheduled for delivery on October 25, 2005. The standard delivery time for this shipment was 3 days, the delivery took four days. This request is for 12 additional days beyond those referenced in your correspondence of November 2, 2005.*

At that time we also submitted a schedule with the aforementioned impacts applied. It substantiated our position for the extra time. A copy of the bar chart version of that schedule is included with this submission; it has a data date of 10/21/05.

### **Idle Time**

Supplemental Specifications Section 5-12.6.1 provides that for extra work that the Engineer directs Hubbard to perform in anticipation of hurricane effect, Hubbard is entitled to be compensated for both direct, and indirect cost. The formula to calculate this entitlement is delineated in 4-3.2.

The Department and Corradino direction caused Hubbard to divert operators from scheduled activities to do labor intensive Hurricane recovery work. This work was

prioritized by Corradino to be done prior to restarting the scheduled activities. This direction caused several pieces of on site equipment to go to idle status until such time as the Corradino prioritized work could be completed.

Based on this Hubbard is due compensation for idle cost incurred by the Departments/Corradino's direction, and at the rate stipulated in the aforementioned subarticle. **The total amount of idle cost based on 4-4.2 is \$14,485.67**

### ***Jobsite Direct Cost***

Corradino directed Hubbard to secure the projects prior to the storms, and restore them to pre-hurricane conditions after the Hurricanes. Again and compliance with 4-3.2, Hubbard is entitled to recovery of cost associated with the efforts expended to act on Corradino's direction to secure and repair the Project.

There is nothing in this section that would limit our ability to collect for impacts that happened in March of 2006. When we set the phase 2 C-51 canal beams the transfer company was only able to provide approximately 50% of the originally planned delivery production. We compared this number to the original production. The actual cost was \$21,010.04, compared to the projected cost of \$15,757.55, **or an increase of \$5,252.50 for the delay to the C-51 Canal beam transfer.** The complete breakdown with back up correspondence is with our letter number 00307(revised) which is included with this package.

### ***Indirect Costs***

Supplemental Specifications Section 5-12.6.2 refers to "suspensions of work by the Engineer pursuant to 8-8.1", provided that such suspensions are not willful or intentional interferences with Hubbards performance. This article goes on to say that Hubbards remedy for any delays other than for extra work, is compensated. The formula to calculate this entitlement is delineated in Supplemental Specifications Section 5-12.6.2.1 for the direct cost, and 5-12.6.2.2 for the indirect costs. This compensation is a Contractual obligation of the Department, and **can not be unilaterally modified by the Department.**

On April 5, 2005 a Florida DRB board in the City of Jacksonville Florida ruled in favor of the contractor on the above referenced issues. A copy of that ruling is included for the Boards review and consideration.

### **Summary**

In closing, the Department/Corradino directed Hubbard to take actions to prepare for the storm, to suspend construction until the Department authorized resumption, and to initiate emergency repairs, prior to recommencing normal construction operations. Hubbard complied with these directives, expecting additional compensation, and Bonus time extensions in accordance with the Contract Documents. To date the Department has not fully complied with compensating Hubbard for its efforts, nor have they fully recognized the impacts to our CPM schedules.

The contract documents are clear. All necessary documentation to support this position is included in this package. The Department/Corrodino has the right and the obligation to fully compensate the Contractor for performing this extra work. A state of Florida Board has previously ruled in favor of the Contractor on these issues.

The amounts that we are seeking is:

1. Beam Delivery \$5,250.50.
2. Indirect/Directs for time\$123,070.53.
3. Idle equipment \$14,485.67.
4. 23 total days to the Bonus time, which includes 6 days granted by TCG.

**Attachments:** Disputes Review Board Recommendation involving compensation for costs relating to four 2004 Hurricanes – US-1/I-295/I-95/SR-9A Interchanges, F.I.N. Project Numbers: 209600-1-52-01, and 213290-1-52-01, in Jacksonville, District 2, Memorandums 27-05, and 30-05, Standard Specification Section 8-7.3.2, 8-13.1, Supplemental Specifications Section 5-12.6.1, 4-3.2, Supplemental Specifications Section 5-12.6.2, 8-8.1, Supplemental Specifications Section 5-12.6.2.1, Supplemental Specifications Section 5-12.6.2.2, Excerpts from shedule bar chart titled SCH1, and SCH2 , Electronic Diskettes with the 2 schedules, Calculation of Indirect/Direct Cost dated 5/30/06, related correspondence, schedule printouts, and e-mails, shedule bar chart with data date of 10/21/05.

#### **DEPARTMENTS REBUTTAL:**

The Corradino Group (TCG) respectfully submits this rebuttal to Hubbard Construction Company's (HCC's) position on the dispute over payment and time extensions for Hurricane Wilma and Tropical Storm Gamma.

First, it is quite obvious from a simple review of the District 2 AMEC Project DRB ruling Hubbard references in its position paper that the District 2 AMEC contract had significantly different contract provisions than in the Hubbard contract at issue here. The AMEC contract included a "Drawing M-15" requiring both an emergency evacuation plan and, per Note 5 thereof, a payment of compensation provision for emergency evacuation. (*see Pgs. 5 & 9 thereof*) Further, as noted by the AMEC DRB, the AMEC contract was let in 2001 and did not include the same language of 8-7.3.2 that is both in the 2004 Std. Specs. (*see Pg. 7 thereof*) nor as is included in the Hubbard contract at issue here. Finally, the specific facts and issues raised in the referenced District 2 AMEC DRB recommendation are different than here. Therefore, this DRB should disregard any consideration of the AMEC DRB in its deliberations here.

In reference to the substance of HCC's position paper for Tropical Storm Gamma, the Contractor's position seems to be that we should pay for their repair of a washout because we "directed" them to perform that work, and that this direction in and of itself makes it "extra work." We disagree. The simple facts are: a) There was a heavy rain on the project on November 19<sup>th</sup>, 2005, which may or may not have been related to a tropical storm then located off the north coast of Honduras, b) the rain storm caused several washouts along the project, and c) the Contractor had to repair the washouts, directed or not, as is his responsibility. The Contractor is required by the contract to repair any washouts which may occur prior to final acceptance of the work, at no expense to the Department, as referenced in our position paper and Supplemental Specifications 120-11 and 7-14. The specifications referenced by the Contractor (4-3.2 and 5-12.6.1) are not applicable to repairs for weather damage, and the DRB opinion from Jacksonville that the Contractor included is also irrelevant.



In reference to HCC's position paper for Hurricane Wilma, these facts are undisputed: a) Hurricane Wilma was a declared state of emergency for this area, b) its hurricane-force winds and rain directly affected this project, and c) this required preparations by the Contractor, a temporary suspension of operations, and post-hurricane repairs. d) The Department exercised their discretion under Article 7-14 and provided guidance to the District Construction Engineer under DCE Memo 30-05 for what they would consider compensation including extension to No Excuse Provisions in the contract. Consistent with the guidance provided by the Department to fairly and uniformly compensate all contractors affected by Hurricane Wilma, we kept track of the hurricane's impacts, costs and time, and made a good-faith effort to agree and settle with the Contractor on the number of days to extend the No-Excuse Bonus Completion Date and the cost considered by the Department.

The contractor's position and interpretation of Article 8-13.1 is incorrect and non-factual. Section 8-13.1 states

"In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially affecting the Contractors' operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the "No Excuse Bonus" Completion Date. In the event the Contractor and Department are unable to agree to the number of calendar days to extend the "No Excuse Bonus" Completion Date, ***the Department shall unilaterally determine the number of calendar days to extend the "No Excuse Bonus" Completion Date reasonably necessary and due solely to such catastrophic event and the contractor shall have no right whatsoever to contest such determination***, save and except that the Contractor establishes that the number of calendar days determined by the Department was arbitrary or without reasonable basis." (Emphasis added). This Article of the Special Provisions does not provide the provisions that the Contractor intends to introduce in their submittal.

Despite all of our efforts, we were unable to agree with the Contractor on an appropriate time extension. The Contractor's requests for time on the basis of the project schedule were inconsistent and often contradictory. We therefore had to proceed unilaterally on the basis of our records of the Contractor's production on critical items of work, and based on a day-for-day assessment of impacts. This method is consistent with the procedures for granting weather days contained in 8-7.3.2 of the Contract Specifications. We believe this determination was appropriate and that this is a "reasonable basis" for estimating the number of calendar days to extend the No-Excuse Bonus Completion Date, as referenced in 8-13.1 and highlighted in the above paragraph.

On the issue of idle equipment and indirect costs, the Contractor cites Supplemental Specifications 5-12.6.1 "Compensation for Direct Costs of Delay," and 5-12.6.2 "Compensation for Indirect Impacts of Delay." These sub-articles need to be read within the context of the entire article they fall under within the Specifications. Article 5-12.6.1 "Compensation for Extra Work" says the Contractor shall not be entitled to any compensation beyond that provided for in 4-3.2, in other words, he is not entitled for "compensation for delay" on "extra work." Article 5-12.6.2 "Compensation for Delay" limits the application of the sub-articles referenced by the Contractor essentially to cases where the Department willfully or intentionally interferes with and delays the Contractor, and then only after written notice of such from the Contractor. The Contractor is not entitled to compensation from the Owner for the direct or indirect cost of delays caused by a hurricane or an Act of God. The Contractor is also not entitled to compensation from the Owner for the direct costs of hurricane preparations or repairs. The Department has elected to share in many of these direct costs at its discretion, although not required to by the Contract, and that compensation is what we have offered HCC as we have offered every Contractor affected by Hurricane Wilma.

In summary, we do not believe the Contractor has demonstrated their basis for entitlement under this contract on any of the issues before the Board, and respectfully request the Board rule on that basis.

## **CONTRACTORS REBUTTAL**

The Contractor has chosen to submit his rebuttal in a very unorthodox manner. The Board will try and make it as clear as possible in this presentation.

Paragraphs marked "**Contractor Response**" will contain the Contractors rebuttal to the Departments position. It will be quite voluminous and probably not completely clear.

The Corradino Group (TCG) respectfully submits this statement and explanation of its position regarding a dispute over compensation and time extensions in connection with Hurricane Wilma and Tropical Storm Gamma. The Contractor, Hubbard Construction Company, has requested the Board's review for a recommendation on the issue of entitlement.

There are three (3) separate but related issues that the Board is being asked to rule on. They are:

4. Tropical Storm Gamma – At issue is compensation for repairs to roadway washouts that occurred while Tropical Storm Gamma was at sea.

**Contractor Response: TCG allegation that Gamma was never close enough to us to cause severe effects is unfounded. Their information is second hand provided by local news paper propaganda. However their own exhibits, reveals that it was strong enough to cause flash flooding killing 17 people from the rain. It washed out the project area that was properly protected with sand bags, sod, and murañ fabric.**

5. Hurricane Wilma Time Extension – At issue is disagreement over the time extensions determined by the Department for this project. On this issue, the Board is requested by Hubbard to find entitlement for Hubbard if the Department's determination was arbitrary or "without reasonable factual basis." The Department, however, asks the Board to rule that the Department's determination of non-compensable contract time extensions due to the effects of inclement weather pursuant to 8-7.3.2 is final, and that the Department's determination of the number of calendar days to extend the respective "No Excuse Bonus" completion dates is likewise final on both projects.

**Contractor Response: HCC rebuttal: 8-7.3.2 is not applicable, 8-13.1 is. TCG attempts to mix the language and requirements for both, and then calculate the time using 8-7.3.2 without considering all impact issues, and then arbitrarily arrives at a time extension of 6 days.**

6. Hurricane Wilma Idle Equipment/Indirect Costs – At issue is whether the Contractor should be compensated for hurricane-related compensation for idled equipment and "indirect impacts," or if he should be compensated in accordance with Section 7-14 of the Supplemental Specifications and the guidance spelled out in a memorandum from the State Construction Office in relation with the subject Specification.

**Contractor Response: Again TCG used the wrong specs. 7-14 does not apply. 5-12.6.1 does. 4-3.2 gives the formula to calculate the work.**

### **Issue 1 – Tropical Storm Gamma**

#### **Background**

On January 23, 2006, the Contractor submitted a request for compensation for repair work caused by Tropical Storm Gamma. Included in the submittal is our Senior Inspector's acknowledgement of the work being performed and the personnel and equipment employed by Hubbard Construction during the repairs. While this is not proper notification under Article 5-12, we will concede that the intent of the Specification was met as to allow us to document the personnel and equipment for the work performed and will not

present this as an argument for denial. However, the fact that we kept account of the labor, materials, and equipment does not establish the validity of the claim or method for computing any compensation for such claim.

**Contractor Response: Until the one e-mail (EXH. A) TCG never objected to compensation for repairs of the washouts caused by this storm. They collected information with HCC never rebutting the cost issue for compensation.**

It was and is our position that lack of maintenance contributed to the washouts north of 17<sup>th</sup> Avenue. In addition, even if this was not the case and the problem occurred due to a heavy rain storm, under the Contract, the Contractor is responsible for the Maintenance of the Project including repairs to washouts. Articles 7-14 and 120-11 are very specific to the responsibility of the contractor and when the Department may elect to compensate the Contractor for the repair of such damage.

**Contractor Response: The area of washouts historically washed during the heavy rains of 04 hurricane season which TCG paid for the restoration, as well as the added erosion prevention of the sand bags and special slope treatment.**

The argument made by Hubbard that the damages were caused by Tropical Storm Gamma has no merit. Included in this submittal in **Exhibit 1** is an article from the Palm Beach Post's Storm 2006 with a Gamma recap and in **Exhibit 2** is a chart indicating the trajectory of all the storms in 2005 including Gamma. Both articles indicate that most of the effect occurred in the Caribbean and Central America with no affect to South Florida.

**Contractor Response: Regardless of what TCG does with arbitrary documents, the fact is that the slope in question was protected with sandbags, thick Mylar slope matting, and pegged sod. Despite this protection, the severe water conditions presented by this storm caused this slope to wash out under the roadway. HCC acted under emergency conditions to secure this area and protect the motoring public. Why penalize the Contractor by not paying him for his efforts?**

#### **Contract References**

Supplemental Specification 5-12 (pp.74) (in part) Claims by Contractor states:

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

5-12.2 Notice of Claim:

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

part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5- 12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate. Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim." (Emphasis added)

**Contractor Response:** *It was unlikely that we could have given written notice before the work began. It took place on a weekend, under emergency conditions.*

Specification 7-14 Contractor's Responsibility for Work (pp. 68) states:

"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 non-execution 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.**" (Emphasis added)

**Contractor Response:** *In 2004, and in 2005 the department set a precedence of how they would pay for this situation. Not only did they set precedence, but they paid for the same condition cause etc. at this location in 2004. The only difference between 04 & 05 was that the slope in question had more erosion devices in place for the 05 storms.*

Supplemental Specification 120-11: Maintenance and protection of Work (pp. 136) states:

"While construction is in progress, maintain adequate drainage for the roadbed at all times. Maintain a shoulder at least 3 feet [1 m] wide adjacent to all pavement or base construction in order to provide support for the edges. Maintain all earthwork construction throughout the life of the Contract, and take all reasonable precautions to prevent loss of material from the roadway due to the action of wind or water. **Repair, at no expense to the Department, except as otherwise provided herein, any slides, washouts, settlement, subsidence, or other mishap which may occur prior to final acceptance of the work.** Perform maintenance and protection of earthwork construction in accordance with Section 104. Maintain all channels excavated as a part of the Contract work against natural shoaling or other encroachments to the lines, grades, and cross-sections shown in the plans, until final acceptance of the project. (Emphasis added)

**Contractor Response:** *The contractor has, and continues to pay for common washouts throughout the project over the last two and a half years. This is with the exception of the damages caused by the extreme rain associated with tropical storms & hurricanes. 4.3.2 Delineates the pay method.*

### ***Department's Position***

3. The contractor is responsible for the maintenance of the project per section 7-14 and 120-11.
4. Neither the Department, nor the State of Florida, considered Gamma a threat to the South Florida area. Therefore a Declaration of Emergency was never instituted and consequently, the Department did not exercise its discretion under Section 7-14 for payment to contractors for rain storms.

**Contractor Response: *It (the washout) was a threat to the public that navigated this area of I-95. Despite extreme methods of protection it washed away due to the catastrophic effects of this storm.***

The request for Tropical Storm Gamma should be denied in its entirety based on the Contract Specifications. While Hubbard Construction provided costs associated with washout repairs, it did not identify the provision in the Contract that entitles them to compensation on repairs to any roadway washouts, slides, settlement, subsidence, or other mishap which may occur regardless of the cause.

### **Issue 2 – Hurricane Wilma Time Extension**

#### ***Background***

On October 24, 2005, Hurricane Wilma hit Florida and caused extensive wind and water damage to all ongoing I-95 projects in this county (seven projects at that time, three of them Hubbard's). Signs, lighting, earthwork, erosion control devices and MOT devices were affected. The Contractors were sent a letter on October 21<sup>st</sup> suspending all work at the end of the workday (***Exhibit 3***). Another letter was sent on October 26<sup>th</sup> notifying the Contractors that the suspension had been lifted (***Exhibit 4***). Therefore, all projects were shut down from October 22<sup>nd</sup> through October 26<sup>th</sup>.

We assessed the delays caused by the effects of inclement weather in accordance with Article 8-7.3.2, and granted four (4) non-compensable days accordingly: October 22<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, and 26<sup>th</sup> (***Exhibits 5 & 6***). Upon further review, October 21<sup>st</sup> and October 23<sup>rd</sup> were added as non-compensable weather days (***Exhibit 7***). The determination for the days to be granted was based upon a day by day comparison of the Controlling Items of Work and the Daily Reports documenting the work in progress. Days were granted for days when the Contractor was not able to work on controlling items of work at least 50% of the normal workday due to adverse weather conditions or due to necessary weather-related repairs. We also tracked the time and materials expended in weather-related repairs.

**Contractor Response: *Why does TCG try to use 8-7.3.2? Is it only when it favors them? In the middle of page 5 of their papers they refer to 8-13.1 as if it applies to their argument. But here they dismiss it for the purpose of arbitrarily counting the time of the delay.***

Hubbard initially requested a total of an 18 day extension to both the Contract Time and the "No Excuse Bonus" Time (***Exhibits 8 & 9***). This request was extended by an additional seven (7) days on March 24<sup>th</sup>, 2006 (***Exhibit 10***), and then again by two (2) days on April 17<sup>th</sup>, 2006 (***Exhibit 11***) for a total extension request of 27 days. The initial 18 day request was based upon preparation days before the storm, and days for delay to delivery of sheet piling for wall TW-24. This request was denied because the sheet pile wall did not fall on the Critical Path, and therefore was not eligible for a time extension. We cannot justify an extension for the sheet piling delay as they claim, since it is clear TW-24 was not a critical or controlling activity. While Hubbard provided one (1) schedule purporting this as critical (which was previously and subsequently changed to indicate other items as critical), it is clear and obvious that this was never critical given that while the sheet piles were delivered in early November, Hubbard did not in fact install them until February-March 2006, months after the delivery.

**Contractor Response:** *The method that the department has had the contractor used for the past 20 plus years was utilized by us. The impacts of the 05 storms were locally applied to the approved. Schedule with updated as built information. The end gate of this process is delineated in our basis of entitlement. The total impact from the storm is 23 days.*

The additional 9-day request is based upon a delay in the delivery of beams for the C-51 Canal Bridge. This request is justified by Hubbard in a March 7<sup>th</sup>, 2006 letter received from their supplier that states "due to the lingering effects of last years hurricane season the number of trucks available to transport prestressed / precast concrete product has been reduced by approximately fifty (50%) percent." (**Exhibit 10**) However, Hubbard had plenty of time since the hurricane passed in October 2005 until March 2006 to schedule trucking for the beam delivery and any delay in delivery is not hurricane related, and therefore, not justifiable.

**Contractor Response:** *TCG is well aware that it would not be cost effective or feasible to pre-deliver the beams. We are talking about 54 each, 91' long type III beams. There is not enough staging area to pre-deliver this many beams, and the cost to bring large cranes in and out for the several weeks prior to the erection dates would be phenomenal.*

Specification 8-7.3.2 and Special Provision 8-13.1 are very clear in how Time Extensions are granted due to the effects of inclement weather. Specification 8-7.3.2 states:

"The Department will grant time extensions, on a day for day basis, for delays caused only by the effects of rains or other inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work resulting in:

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

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

**Contractor Response:** *8-7.3.2 does not apply. We are dealing with catastrophic events as represented by 8-13.1 although TCG recognizes this they continue to use the methods for counting the time as established by 8-7.3.2*

Special Provision 8-13.1 states:

"In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the "No Excuse Bonus" Completion Date. **In the event the Contractor and Department are unable to agree to the number of calendar days to extend the "No Excuse Bonus" Completion Date, the Department shall unilaterally determine the number of calendar days to extend the "No Excuse Bonus" Completion Date reasonably necessary and due solely to such catastrophic event and the Contractor shall have no right whatsoever to contest such determination, save and except that the Contractor establishes that the number of calendar days determined by the Department was arbitrary or without any reasonable basis.**

"The Contractor shall have no rights under the Contract to make any claim arising out of this "No Excuse Bonus" provision except as is expressly set forth in this Article." (Emphasis added)

**Contractor Response:** *Since HCC has used the nationally recognized CPM schedule to determine 23 days, and TCG has used the wrong method to calculate the time. 8-7.3.2 vs. 8-13.1 and they have not analyzed all the issues. it is clear that the number of days determined by TCG was arbitrary and without reasonable basis.*

The Department has followed these provisions and is able to justify extending Contract Time and Bonus Time by six (6) days.

**Contractor Response:** *TCG has given no justification, nor have they completely analyzed the impacts of this storm.*

Furthermore, the schedule narrative submitted by Hubbard on October 11<sup>th</sup>, 2005 with the Monthly CPM Schedule Update states that "the current schedule shows that we are now 61 working days behind schedule." (**Exhibit 12**) The schedule narrative submitted by Hubbard on November 7<sup>th</sup>, 2005 with the Monthly CPM Schedule Update states that "The current schedule shows that we are now 43 working days behind schedule." (**Exhibit 13**) So despite the impacts of the hurricane, Hubbard was able to make up 18 working days, yet they are requesting an additional 25 days be granted.

**Contractor Response:** *The issue is not about HCC's abilities to accelerate but the correct analysis of the impacts realized by the hurricane.*

#### ***Contract References***

Specification 8-6.1 Authority to Suspend Contractor's Operations (pp. 77) states (in part):

"The Engineer has the authority to suspend the Contractor's operations, wholly or in part, for such periods deemed necessary."

Specification 8-7.3.2 Contract Time Extensions (pp. 78-80) states (in part):

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

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

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

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

**No additional compensation will be made for delays caused by the effects of inclement weather.**" (Emphasis added)

Supplemental Specification 8-7.3.2 Contract Time Extensions (pp. 88) further states:

**"...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)

Special Provisions 8-13.1 "No-Excuse Bonus" Payment and Waiver of Contractor Claims (pp. 28-29) state (in part):

The parties anticipate that delays may be caused by or arise from any number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the "No Excuse Bonus" Completion Date set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract by the "No Excuse Bonus" Completion Date, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.

**In the event of a catastrophic event (i.e., hurricane or declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the "No Excuse Bonus" Completion Date. In the event the Contractor and the Department are unable to agree to the number of calendar days to extend the "No Excuse Bonus" Completion Date, the Department shall unilaterally determine the number of calendar days to extend the "No Excuse Bonus" Completion Date reasonably necessary and due solely to such catastrophic event and the Contractor shall have no right whatsoever to contest such determination, save and except that the Contractor establishes that the number of calendar days determined by the Department was arbitrary or without any reasonable basis." (Emphasis added.)**

**Contractor Response: This article applies, but TCG uses 8-7.3.2, in part to determine the counting of time, this is arbitrary, and without reasonable basis. The industry uses the impacts applied to the approved schedule (target) with as-built information applied. That is why we are required to submit and maintain a logic driven schedule in P3.**

#### ***Department's Position***

3. The Department suspended the Contractor's operations pursuant to 8-6.1 and granted an appropriate and reasonable time extension pursuant to 8-7.3.2 and 8-13.1. This suspension was due to, incidental to, and concurrent with inclement weather associated with Hurricane Wilma.
4. Hubbard has not sufficiently demonstrated that additional time is warranted and the time extension should remain at six (6) days since the basis of this request (TW-24 sheet pile wall) was not constructed until three (3) months after the delivery of the sheet piles. In addition, based on the schedule narratives from October 2005 to November 2005, Hubbard gained 18 working days on their schedule.

#### **Issue 3 – Hurricane Wilma Idle Equipment/Indirect Costs**

##### ***Background***

Hubbard Construction has requested payment for Idle Equipment as a result of "diverting labor resources to restore areas of the Project that were critical to the Department" (**Exhibit 14**) and for Indirect Costs associated with the time extension they are requesting. In addition to the overhead costs, Hubbard has requested additional Direct Costs for unexplained increased costs to set the Phase 2 beams at the C-51 Canal (the same beams in which they are requesting the additional nine (9) days). (**Exhibit 10**) However,



as stated under Issue 2, Hubbard had more than sufficient time to schedule trucking for the beam delivery and any additional time needed to set the beams is not justifiable, nor should the Department bear the costs associated with Hubbard's lack of planning.

**Contractor Response: The cost increase is explained. It is the difference between the projected cost and the actual cost, which was extended due to the delay in delivery of the beams. This delay was caused by Hurricane imposed trucking shortage.**

Article 7-14 of the Supplemental Specifications clearly define the Contractor's responsibility for the work and states: "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." (Emphasis added.)

Given the widespread damage from the hurricane across the State, and to ensure uniform, fair and equal treatment of affected contractors, **and using its discretion under Article 7-14**, on November 28, 2005 the State Construction Office issued DCE Memo 30-05 (**Exhibit 15**) providing direction as to payment for impacts resulting from the hurricanes. Pursuant to 7-14, the Department elected to pay for the following:

- Damage to material that was incorporated into the projects;
- Damage to material that would otherwise be permanently incorporated into the project;
- Reconstruction of permanent or temporary erosion control features in accordance with 104-7.1;
- Taking down and replacing Maintenance of Traffic (MOT) devices as directed by the District Construction Office, and;
- Repair of damaged post mounted MOT signs, deemed to be essential by the Engineer and damaged where left in place; and repair of damaged Changeable (Variable) Message Signs that were specifically directed by the Department to be placed on projects during the storm.

Furthermore, DCE Memo 30-05 continued on to state, **based on its discretion under Article 7-14**, that the following are non-compensable:

- Cost to protect/secure work not incorporated in the project;
- Per day MOT devices not in place on a project;
- Damage to MOT devices, whether in place or elsewhere, except under the exception provided above;
- Temporary works or material damage, except under the exception provided above;
- Idle labor;
- Idle equipment;
- Reduced production rates due to effects of inclement weather;
- Loss of Profits; and
- Home Office, Jobsite, and any other, Overhead.

Consistent with these instructions, TCG and the affected Contractors prepared estimates for the specified costs on each of our seven (7) I-95 projects, agreed on the costs and appropriate time extensions and closed the issue with those Contractors, except for Hubbard, who objected to the stipulation on idle equipment and sought to reserve their rights for additional compensation. Hubbard subsequently expanded their objections to include a request for additional time beyond that justified by the project records, and to request treatment of these weather-related impacts as extra work and compensable delays, disregarding completely the contract specifications that specifically address weather-related impacts (7-14 and 8-7.3.2).

In addition to payments that have been made per DCE Memo 30-05, non-payment for Idle Equipment and the other Indirect Costs requested has been denied for several reasons within the Contract. First, The Department **chose to exercise its option under 7-14** to reimburse the Contractor for this hurricane damage. DCE Memo 30-05 made it clear which items the Contractor would be compensated for due to the

effects of Hurricane Wilma. Idle Equipment and Overhead costs are non-compensable. Please note that compensating Hubbard for this work **is not an obligation of the Department by the Contract**. Article 7-14 clearly states that until the Department's acceptance of the work, the Contractor is to take charge and custody of the work, and shall "rebuild, repair, restore, and make good, without additional expense to the Department" for any damage caused by the elements. Furthermore, Hubbard did not "submit a written notice of intent to claim to the Engineer within ten (10) days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation," in accordance with Article 5-12.2.2 of the Supplemental Specifications. **Further, pursuant to DCE Memo 30-05 we have voluntarily and in the Department's discretion agreed to compensate Hubbard for hurricane preparations and recovery.**

**Contractor Response: The contract Document speaks for themselves. 5-12 allows for compensation, and delineates the method for calculation. The Department can't arbitrarily change this with a memorandum.**

Second, in accordance with Article 8-7.3.2, other than a time extension, "no additional compensation will be made for delays caused by the effects of inclement weather." We have reviewed the daily reports and compared the work against the Controlling Items submitted and have determined that Hubbard is due a time extension of six (6) days to both the Contract Time and the Bonus Time. Hubbard's request for time extension is 27 days. Regardless of the number of days the Contract Time is extended, this is the only remedy afforded to contractors by the Contract.

Finally, Hubbard is claiming for Compensation for Indirect Impacts of Delay in accordance with Article 5-12.6.2.2. This Specification is clear in that compensation under this section will occur only when the delay is "caused solely by the Department." Since the delay in this claim was caused by an Act of God, a hurricane, the Department was not the cause and therefore this Specification does not apply.

#### ***Contract References***

Specification 7-14 Contractor's Responsibility for Work (pp. 68) states:

"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 non-execution 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.**" (Emphasis added)

Supplemental Specification 5-12.2.2 (pp.74) (in part) Claims by Contractor states:

"Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, **the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item**, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay. The timely providing of a written notice of intent or preliminary time extension request to the Engineer are each a condition precedent to any right on behalf of the Contractor to

request additional compensation or an extension of Contract Time for that delay, and the failure of the Contractor to provide such written notice of intent or preliminary time extension request within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for that delay.” (Emphasis added)

**Contractor Response: 5-12.6.2.1 and 5.12.6.2.2 clearly stipulate the recovery of overheads. HCC was unaware that TCG wasn't in agreement until the receipt of TCG's 11/2/05 letter, that was received on 11/10/05. In that letter TCG gave HCC 10 days to respond. HCC responded within that timeframe.**

Supplemental Specification 5-12.6.2 (pp.74) (in part) Claims by Contractor states:

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

***Department's Position***

6. The Department suspended the Contractor's operations pursuant to 8-6.1 and granted an appropriate and reasonable time extension pursuant to 8-7.3.2 and 8-13.1. This suspension was due to, incidental to, and concurrent with inclement weather associated with Hurricane Wilma.
7. The Contractor did not provide justification for his time extension request of 27 days. The original eighteen (18) days were requested based on the delivery of sheet piles for wall TW-24, this argument does not carry any credibility since the sheeting was delivered in November, however installation did not occur until February/March 2006. In addition, if we based the time on the narratives submitted by Hubbard on the schedule, the Contractor reduced the negative float on the schedule by eighteen (18) days.

8. The Department exercised its discretion under 7-14 to reimburse contractors for certain specified costs in connection with this weather event. This was done uniformly and equitably for all affected contractors and projects. While this was generally appreciated and accepted by affected contractors across the State, Hubbard rejected the Department's offer and chose to demand compensation and time it is not entitled to receive.
9. The Contractor is not entitled to compensable delays for delays caused by inclement weather; weather delays are non-compensable in accordance with 8-7.3.2. The Contractor's reference to sub-articles 5-12.6.2.1 (Compensation for Direct Costs of Delay) and 5-12.6.2.2 (Compensation for Indirect Impacts of Delay), both of which fall under Section 5-12.6 (Compensation for Extra Work or Delay), are not applicable; sub-article 5-12.6.2.2 clearly states: "All calculations under this provision shall exclude weather days, days used for performing additional work, days included in supplemental agreements, and days of suspended work." Moreover, the Contractor's characterization of weather-related repairs and delays as "directed extra work," subject to payment under sub-article 4-3.2 (Increase, Decrease or Alteration in the Work), misrepresents the key and central fact that all disputed damages were the result of inclement weather. Specifications 7-14 and 8-7.3.2 are the relevant and applicable specifications that address weather-related damages and delays.
10. The Contractor is not entitled to payment for equipment idled due to adverse weather. The Department recognizes the fact that contractors were impacted financially in various ways by the effects of inclement weather experienced by Hurricane Wilma. Although not contractually bound to do so, the Department made a good faith offer to all affected contractors to help offset these financial impacts with emergency funds.

It has long been understood and accepted in our industry that weather and other such delays, which are neither the Owner's fault nor the Contractor's fault, are a shared risk, with the Owner taking on the time element of that risk, and the Contractor absorbing the financial risk. Bramble and Callahan, for example, in Construction Delay Claims (Section 3.22) state: "Because these delays are beyond the control of any of the parties, contracts and case law generally minimize the risk to all parties by a compromise: the contractor's late performance will be excused but no additional compensation will be awarded." Within its discretion and beyond its obligation, the Department uniformly and equitably helped contractors shoulder the financial burdens created by these storms. Hubbard made itself an exception. We hope the Board will enforce the terms of the Contract with its findings and recommendations, and reject the Contractor's attempt to make the Owner solely responsible for delays and damages caused by the weather and Acts of God.

## **BOARDS FINDINGS**

The Board heard testimony from both parties and was presented with position papers including back up supporting each parties position. It should also be noted the Contractors format of furnishing rebuttal to the Departments position paper was quite poor and lost a lot of importance due to the method in which it was presented.

A review of locally available weather data from the US Weather Service found that Tropical Storm Gamma was never a threat to Florida and did not travel North of Latitude 15 degrees North which when checked is between 750 and 1,000 miles South of our area. Palm Beach County lies at approximately 26 degrees North Latitude.

Any weather affecting this area would have been of a local nature and not a catastrophic event.

Hurricane memo DCE 30-05 relating to hurricane delays although not a contract document was provided to assure all Contractors were treated alike statewide as it relates to Hurricane delays and damage.

Weather days have always been non-compensable and have been a shared risk between Contractor and the Department. In almost all cases the present system of the Department giving time and the Contractor absorbing the financial portion has worked well. The outline as shown in DCE Memo 30-05 has been accepted by most contractors.

Testimony or position papers did not post a clear picture on the effects of Hurricane Wilma on the project or the employees of both the Engineer and the Contractor. The Board does know that many structures were damaged and utilities were interrupted for some time after the storm passed. Was the Contractor able to get concrete and other materials immediately after the storm and in the quantities required to service the project properly?

The Board did not find enough information to back up the position taken by the Contractor in detailing the request for additional time and why was the request made in three different steps instead of the initial request.

The Order of Emergency Status from the office of the Governor was issued on October 19, 2005 and a directive from the Engineer stopping all work was issued taking effect at the end of work on October 21, 2005. If the Boards records are correct the storm hit during the AM of October 22, 2005. Was enough time allowed to make the project safe and allow the Contractors employees enough time to make there own property safe and attend to family members safety.

The additional expense and delay caused by the lack of available trucks to deliver the prestressed concrete bridge beams. Movement of these beams is a very specialized service and done in a manner to prevent damage during transport. The truck tractors used to pull these rigs are standard but the trailer equipment is quite special as most is modified to steer from the rear, similar to a hook and ladder fire truck. The personnel performing this work are well trained and the service performed by very few companies. The fact that delivery services were delayed due to trucks not being available is not out of reason as most contractors would not require beam delivery during or immediately after a hurricane event. The owner of the units would want to put the units to work productively.

### **BOARDS RECCOMENDATION**

Topical Storm Gamma:

After review of all position material and testimony the Board finds the Contractor has **NO ENTITLEMENT** for time or money for damages allegedly caused by weather events relating to this Tropical Storm Gamma. As stated previously this storm was approximately 1,000 mile south of this area. Tropical Storm Alberto

which affected Florida during July 2006 was a lot closer and caused no damage to this area.

Hurricane Wilma:

The Board found the Contractor **COULD BE ENTITLED** for the additional costs of delivery of the concrete bridge beams provided he can document the additional cost satisfactorily to the Department. Included in the package was one very short letter from the supplier which is not sufficient proof. Were other haulers available? The Board simply does not have enough clear proof or information to make an informed recommendation.

The delay in delivery of the Temporary Sheet Pile Material may have been caused by Hurricane Wilma in some respects, but was not installed into the project until some months after the storm for this the Board finds the Contractor is **NOT ENTITLED** to additional compensation.

The issues of Idle equipment, indirect costs and office overhead have never been an item which has been compensated. Both the specifications and the DCE memo clearly state these are non-compensable items and for this reason the Board finds the Contractor is **NOT ENTITLED** to additional compensation.

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

I certify that I participated in the Hearings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.  
Respectfully submitted,

Dispute Review Board

John W. Nutbrown, Chairman  
Rammy Cone, Member  
Jimmie Lairacey, Member

  
DRB Chairman