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

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October 10, 2005

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RE; I-95 (SR-9) Reconstruction from 10th Avenue North to South of SR-80,
Contract ID: T 4016
Palm Beach County
**Dispute over Methodology to Determine Compensation for Repairs to Temporary Impact Attenuators**

The Dispute Review Board was convened for a hearing requested by the Contractor Hubbard Construction Company (HCI) on September 21, 2005

Packages of information and position statements were presented to the Board by both parties and excerpts are included in this recommendation.

## CONTRACTORS POSITION

Widening and reconstruction of SR 9 (1-95) from 10th Avenue North to Summit Boulevard began on January 5, 2004. Since that time, Hubbard Construction has been directed by the Engineer to repair and/or replace temporary quad guard attenuators that have been damaged by the traveling public.

Upon completion of the unforeseen work, Hubbard Construction submitted a detailed cost breakdown and requested compensation for repairs made to the damaged quad guards. Our request for additional compensation was submitted in accordance with section 102-13 .12.1 of the Supplemental Specifications, and section 4-3.2 of the Standard Specifications.

With reference to section 102-13.12.1, the specification states that "Restoration of damaged attenuator will be paid for at the invoice price plus 20 %, for the new parts authorized by the Engineer. Payment for restoration will be full compensation for all necessary work and materials". Please be advised that the restoration of the damaged attenuators was performed by Bob's Barricades, a subcontractor to Hubbard Construction Company. Upon completion of the work, Bob's Barricades submitted an invoice to Hubbard Construction for the actual cost of the material plus 20 % markup as compensation for the "necessary work and materials".

Following receipt of this invoice from our subcontractor, Hubbard Construction Company submitted our request for additional compensation in accordance with section 4-3.2 of the standard specifications. Paragraph (d) of this specification states that "The Contractor will be allowed a mark-up of 10 % on the first $50,000 and a mark-up of 5 % on any amount over 550,000 on any subcontract directly related to the additional or unforeseen work. A subcontractor mark-up will be allowed only by the prime contractor and a first tier subcontractor".

Paragraph (e) of this specification states that "The Contractor will receive a mark-up of 1.5 % on the overall total cost of the additional or unforeseen work for insurance and bond".

Hubbard is entitled, per the Specifications, to mark up these costs. The Specifications are both relevant to this issue, one compliments the other. By reading them as complementary there is no discrepancy, but the Specifications would allow Hubbard its markup on the subcontractor's work.

On June 6, 2005, Hubbard Construction received correspondence from Corradino. In that letter Corradino has misinterpreted the Specifications. Their interpretation is that only the mark - up referenced in section 102-13.12 applies. Hubbard Construction has no argument that the 20% that is referenced in this section should be applied. The problem with TCG's interpretation is that it only incorporates a portion of the Contract documents, when clearly more than one section applies to this situation. Clearly, and as per the previous ruling by the DRB, the Contractor is also entitled to the mark-ups delineated in 4-3.2 of the Standard Specifications. Again, Hubbard contends that this is not the case, the Subcontractor is not trying to say that the 20% is for all markups, but the 20% is to cover the subs cost for labor to install the parts. They also deny the bond cost. Hubbard submits that bond cost is a premium assessed by the Surety on the additional cost of the work. It is unrealistic to believe that 20% is to cover the Subcontractor's labor and markup, along with the Contractor's markup and bond as well. This is completely contradictory to the markup allowances in 4-3, and is further proof that the Contractor's markup is not included. The Owner's interpretation on the Specification is not in keeping with what is written in the book.

While the Owner wants to submit proof that their interpretation is correct, Hubbard submits that the Owner has had the same interpretation as Hubbard and has paid the markups on other projects. This is delineated in section four (4) of this DRB presentation. This is further proof that Hubbard is correct in interpreting that the two Specifications are complementary as pointed out in section 5-2.

In addition, when challenged on the Project FIN # 231937-1-52-01 the board ruled in favor of the Contractor. For your convenience a copy of this ruling is attached. Upon review it is evident that in the DRB ruling, the 20% was not a profit mark-up, but the cost of new parts only. The Boards findings stated that:

> *'It should be noted the 20% markup allowed under Section 544 of the Specifications is not a profit mark-up for the Contractor but covers the labor for installing the parts by the Sub-Contractor as authorized and directed by the Department.'*

The only difference between this Contract and the one that the DRB ruled on November 15, 2003 (project 1), is that there is a separate section specifically for temporary quad guards.

In summary, Hubbard Construction and our subcontractor has fully complied with the above referenced specifications while requesting compensation for attenuator restoration on the 1-95 from 10th Avenue North to Summit Boulevard Project."

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## DEPARTMENTS POSITION

The Traffic Control Plans identify several locations where the use of Temporary Vehicular Impact Attenuators is necessary. Some of the attenuators have been damaged by third parties and the Contractor is requesting payment for the associated repairs. HCC is requesting payment for repairs of damaged temporary attenuators at the invoice cost of parts plus 20% for his subcontractor performing the repairs, plus a 10% mark-up on his subcontractor's invoice for HCC, and a 1.5% mark-up for bond and insurance, citing allowable mark-ups for "extra work" per article 4-3.2 of the Standard Specifications. We are paying for MOT costs to do the repairs. Compensation for MOT is not an issue in this dispute; the only issue is what mark-up is appropriate under the contract for temporary attenuator repairs.

The 1-95 Regional Dispute Review Board (DRB) heard similar arguments and provided its recommendations in November 2003 for 1-95 Project 1 (FM No. 231937-1-52-01). In that case, we argued

that Section 544 of the Standard Specifications (Vehicular Impact Attenuators) explicitly addressed payment for repair of damaged attenuators. The Board ruled that Section 544 did not apply to temporary attenuators, only permanent attenuators, and that-since the applicable specification in Section 102 was "mute as to repairs of damaged / temporary attenuators"-this was extra work and the Contractor was entitled to the requested mark-ups in accordance with Section 4-3.2. The Department accepted the Board's recommendations and has paid accordingly on that project.

The difference in this case is that the contract documents for this project were updated to address this issue before the project was put out for bids. Supplemental Specifications in this contract deleted and replaced Section 102 of the 2000 Standard Specifications, and in sub-article 102-13.12 (Temporary Vehicular Impact Attenuator) the contract now explicitly addresses payment for the repair of damaged temporary attenuators.

*Contract References*

**Supplemental Specifications 102-9.6 Temporary Vehicle Impact Attenuator (Redirect/Inertia):** This section of the specifications indicates the repair of damaged temporary attenuators is within the Contractor's scope of work, stating (in part): "Restore attenuators damaged by the traveling public within 24 hours after notification as authorized by the Engineer."

**Supplemental Specifications 102-13.12 Temporary Vehicle Impact Attenuator:** This is the applicable specification in the contract that describes and authorizes payment to the Contractor to restore damaged temporary attenuators. It states: "Restoration of damaged attenuators will be paid for at the invoice price plus 20%, for the new parts as authorized by the Engineer. Payment for restoration will be full compensation for all necessary work and materials. "

**Section 1-1 of the Standard Specifications:** "These specifications are written to the bidder, prior to award of the Contract, and to the Contractor." There is no ambiguity in this statement and it is a fundamental principle of the Contract. It follows logically that when specification 102-13.12 says invoice price plus 20% will be full compensation ... "to the Contractor" is implied. We find nothing in the Specifications or Contract qualifying this mark-up as being earmarked wholly for any particular' subcontractor, when the Contractor chooses to subcontract the work, or to be considered less than full compensation if the bidder misses the spec.

**Section 4-3.1 of the Supplemental Specifications:** This section of the Supplemental Specifications defines "significant changes" to provide a basis for the following section (4-3.2), and states this applies only when: "(A) The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or (B) A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity .... " Neither category in this section of the specifications applies to this situation, since the scope of work to repair damaged temporary impact attenuators is defined in the contract under Section 102 of the Supplemental Specifications, and that scope or "character of the work" has not been changed.

**Section 4-3.2 of the Supplemental Specifications:** Addresses payment when " ... alterations in the character of the work which involve a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance .... " This section does not apply, since the character of the work has not changed from that already specified in the contract under Section 102, and the method of compensation is addressed in Section 102-13.12 of the Supplemental Specifications.

**Sections 4-3.5 of the Supplemental Specifications:** States "Extra work authorized in writing by the Engineer will be paid in accordance with the formula in Section 4-3.2." This section does not apply to the repair of damaged attenuators, based on the definition of "extra work" in 1-3.

**Sections 1-3 of the Standard Specifications:** Defines "extra work" as: "Any 'work' which is required by the Engineer to be performed and which is not otherwise covered or included in the project by the existing Contract Documents." Repairing damaged temporary attenuators does not classify as "extra work," since the work is specifically included in the contract by Section 102 of the Supplemental Specifications, and payment for the work is specifically addressed by 102-13.12 of the same.

**Department's Position**
Section 102 of the Supplemental Specifications addresses compensation for repair and restoration of damaged temporary attenuators. The specification clearly defines to the successful bidder/Contractor what the Department will pay for this work. This information was available to all bidders to consider, accept or otherwise provide for in their original bid proposals. The Contractor accepted these terms when he executed the Contract. The Contractor is not now entitled to additional mark-ups for this work, beyond that specifically stipulated in 102-13.12 of the Contract, simply because he chose to subcontract this work.

Based on the above, we respectfully request the Board rule that the Contractor is not entitled to the additional mark-ups requested, and that payment for repairing any damaged attenuators be made per Section 102 of the Supplemental Specifications (invoice plus 20% for the new parts)."

## CONTRACTORS REBUTTAL

The Departments position regarding payment for repair of damaged Impact Attenuators (Temporary) s4ttes that Section 544-4.3 is the governing specification for this additional, and unforeseen work. However, the contract Pay Item. for Impact Attenuator- (Quadguard) (Temporary) is 102'-89-4, which is governed by Section 102 of the specifications.

Hubbard Construction Company initially addressed this issue in 1997, on a District IV contract. We submitted to the Department for payment the cost associated with the repair of an Impact Attenuator (Temporary) damaged by a third party. The cost where presented in accordance with Specification 4-3.2, (Labor plus mark-up of 25%, Materials and Supplies plus mark-up of 17.5%;· Equipment plus mark-up of 7.5%, Subcontract plus mark-up of 10%, and 1.5% mark-up on all cost for General Liability Insurance and Bond).

The Department countered stating that payment should be in accordance with section 544'-4 (invoice plus 20% for the new parts). Our Subcontractor agreed to accept this as compensation acknowledging that the overall price calculated by either specification yielded similar results, further Hubbard conceded to the Department with the Understanding that we receive the appropriate mark-up (10%) on our Subcontractors cost plus bond cost (1.5%) per Section 4-3.2.

It is Hubbard position that Section 544 does not govern a Pay Item designated under Section 102, further, Section 102 remains silent with regard to reimbursement for replacement of damaged Impact Attenuators (Temporary) and therefore the cost should be compensated as additional or unforeseen work as defined in Section 4."

## DEPARTMENTS REBUTTAL

The Corradino Group (TCG) respectfully submits this rebuttal to Hubbard Construction Company's (HCC's) position on the dispute over compensation for the restoration of damaged Temporary Vehicular Impact Attenuators.

1. HCC submitted copies of several supplemental agreements from previous projects to show they have been paid the requested additional mark-ups in the past. HCC also submitted a copy of the 1-95 Regional DRB recommendation on 1-95 Project 1 as further evidence of past practice. These are irrelevant, since the specifications have changed. The issue of entitlement in this dispute has to be evaluated on the basis of the terms in this contract, not past practice.
1. The repair of temporary vehicular attenuators is not "a significant change," or "extra work," as those terms are defined in the contract; therefore, Section 4-3 and the mark-ups referenced in that section of the specifications do not apply. The repair of temporary vehicular attenuators is included in the contract scope of work through

Supplemental Specification 102-9.6, and provisions for payment are provided in the contract by Supplemental Specification 102-13.12.

We do not believe the Contractor has demonstrated their basis for entitlement under this contract to any additional mark-ups for the repair of damaged temporary attenuators. We are paying for the work in accordance with the terms of our contract, and hope the Board will rule on that basis."

## BOARDS FINDINGS & RECOMMENDATION

HCI presented numerous specifications, past practices, and industry standards for the Board to consider. For brevity's sake they are not all included in this recommendation. The Board references what we believe to be the pertinent ones as follows:

1. Section 102-13.12.1 of the Supplemental Specifications
2. Section 4 - 3.2 of the Standard Specifications
3. DRB Ruling for Project FIN # 231937-1-52-01, Regarding Allowable Compensation for Temporary Quad guard Repair
4. Past Supplemental Agreements from FDOT District IV relation to attenuator repairs.

The Board will address these in order:

1. Section 102-13.12.1 states:

   *"Restoration of damaged attenuator will be paid for at the invoice price plus 20 %, for the new parts authorized by the Engineer. Payment for restoration will be* ***full compensation*** [emphasis added] *for all necessary work and materials".*

Taken on its own context this specification would lead the reader to assume that this is the only compensation to be paid the Contractor.

2. Section 4-3.2 of the Standard Specifications is relevant when there is additional or extra work not contemplated by the Contract. In this case, the work and the scope thereof is contained in Section 102-13.12.1.

3. The DRB Ruling for Project FIN # 231937-1-52-01, Regarding Allowable Compensation for Temporary Quad guard Repair is not relevant as it was for a different project with a different set of circumstances and specification content. There was no Section 102-13.12.1 contained in that project.

4. The past Supplemental Agreements for other jobs, while possibly being helpful when comparing projects with like specifications and circumstances, do not really offer insight into past practices of FDOT because of the new specification.

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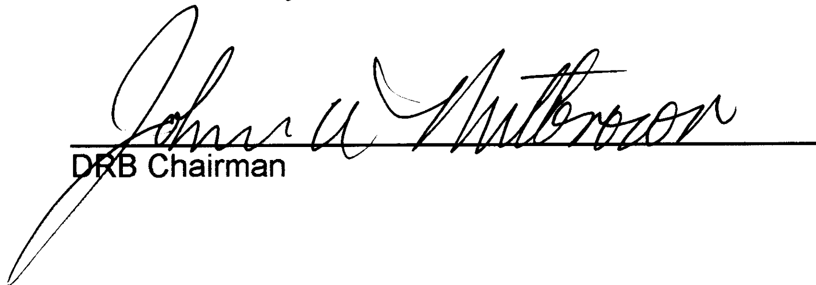
Based on the above the Board recommends that Article 4-3.2 of the FDOT Standard Specifications does not apply in its entirety. The Contract clearly contemplates that there will be work involving attenuator repairs and that 20% is to be the only allowable markup. However, the Contract does not include any type of quantity or fixed price giving the Contractor the avenue to include bond and insurance in his base bid price. The Contract cannot contemplate this. At contract closeout with the Bonding Company the Contractor would have to pay the additional bond cost. Therefore the Board recommends that the Contractor be paid an additional 1.5% over and above the price calculated according to Article 102-13.12.1

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 Lairscey, Member



DRB Chairman

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