

# DISPUTE REVIEW BOARD RECOMMENDATION

July 25, 2003

E-Mailed July 25, 2003

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RE: FPN: 258861 1 5201  
Federal Aid No.: 2757 346 I  
SPN 15190-3401  
Contract No.: 20489  
SR-93 (I-275) from East of Gandy Blvd. to East of Roosevelt Blvd.  
Pinellas County

Subject: **Claim Issue – Replacement Cost for High Mast Lighting Conduit Conflict at Ramp D1**

Dear Sirs:

The Owner, Florida Department of Transportation (Department), and Hubbard Construction Company (Hubbard) requested a hearing to determine **entitlement for replacement costs for high mast lighting pull boxes, conduit and conductors placed by Hubbard's subcontractor, Highway Safety Devices, Inc. (HSD)**, on the project. Should entitlement be established, the Parties were to negotiate the quantum of such entitlement.

Pertinent issues, correspondence and other information relating to the Department's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on July 21, 2003.

## **DEPARTMENT'S POSITION:**

### ***Issue:***

*The matter in dispute arises out of erroneously misplaced high mast lighting pull boxes, conduit, and conductors constructed as part of financial project number 258861, the Contractor having placed such out of the plan location. This work was located along the existing northbound I-275 on-ramp from westbound Roosevelt Boulevard (Ramp D-1).*

*During the construction of subsequent financial project number 258870, the pull boxes, conduit, and conductors were discovered to be in conflict with the proposed ramp D-1. **If these facilities had been installed per plan by the Contractor, there would not have been a conflict encountered during construction of the subsequent project.** The pull boxes, conduit, and conductors required replacement at a new location by the subsequent contractor.*

*The Department is seeking reimbursement of the replacement costs from the original Contractor that failed to properly locate the facilities when constructed.*

*The Disputes Review Board is being requested to rule on entitlement and quantum with respect to the Contractor's liability for this issue.*

### ***Status:***

*After meetings and much correspondence in regards to this matter, this issue remains unresolved. The escalation matrix established at the beginning of the project was followed. As of the last correspondence regarding this issue both parties, the Department and the Contractor, agreed to refer this matter to the Disputes Review Board.*

# DISPUTE REVIEW BOARD RECOMMENDATION

## Summary of Department's Position:

It is the Department's position that **pull boxes, conduit, and conductors were not installed in accordance with the contract plans**. Attached are as-built plans identifying the actual location of the lighting conduit (Index Section 17). The **conduit was shifted without prior approval of the Department to a position in direct conflict with future Ramp D-1** even though ramp D-1 was clearly shown on the 258861 plans. **In accordance with Standard Specification Section 5-13, the Department is seeking reimbursement of the costs incurred under financial project 258870 to install new pull boxes, conduit, and conductors, as required, in order to eliminate the conflict with the proposed ramp D-1 construction. The conduit was deep enough that it didn't affect the construction of Ramp D-1, so no delay costs were experienced by the Department's contractor on 258870. The total cost to construct a new conduit system under the subsequent project was \$75,376.56.**

## The following is a timeline of the events associated with this issue:

1. **January 6, 2000** was the first day of conduit installation on FPN 258861. On this date, the lighting subcontractor, Highway Safety Devices, Inc. (HSD), began work on the west end of the project near Gandy Boulevard. During this work **HSD attempted to relocate the conduit being installed along the east R/W line to avoid existing vegetation. The inspection personnel advised HSD that they would have to evaluate all relocated conduit in regards to its effect on future construction.** See Daily Report of Construction dated January 6, 2000 (Index Section 2).
2. The installation of the **conduit in question** took place in **March 2000**. At the beginning of the trenching for the conduit, the **inspector reminded HSD that a future ramp was being constructed in this area and that the location of the conduit should be evaluated.** The HSD superintendent stated that he had **discussed it with the project engineer and that this was the only place it could be installed.**
3. FPN 258861 was **final accepted on November 9, 2001.**
4. **Final Plans** were prepared and submitted by the CEI project personnel. These plans **identified all areas of authorized plan changes** regarding adjustments to the Lighting Plans. The pull boxes, conduit, and conductors in question were **not recorded on the Final Plans as a field adjustment.** See Lighting Plans (Index Section 3).
5. In **July 2002**, during the layout for the future ramp D-1 to be constructed as part of FPN 258870, it was **discovered that the pull boxes, conduit, and conductors in this area were in conflict (horizontally) with the construction of the proposed ramp.**
6. On **July 26, 2002** a field meeting was held to discuss and determine the most cost effective way to handle the matter. All involved parties from both projects were in attendance. It was determined at this meeting that the **conduit had to be replaced.** It was also apparent at this meeting that HCC/HSD were not agreeable to performing this work. The Department approached the contractor on project 258870 to perform the corrective work.
7. On **October 14, 2002**, a Work Order was executed to compensate the contractor on FPN 258870 to install new pull boxes, conduit, and conductors to eliminate the conflict. See attached Work Order No. 999-25-02 (Index Section 12).
8. It was **determined during the last discussions between the Contractor and the Department that a resolution could not be reached and it was agreed upon to refer this matter to the Disputes Review Board.**

In summary, the highway lighting pull boxes, conduit, and conductors in the area of ramp D-1 were not installed as per the contract plans for FPN 258861. As a direct result of the Contractor's unauthorized adjustment, these lighting items were discovered to be in conflict with the proposed ramp construction to take place as part of a future project (258870). The Department incurred additional costs under this future project to replace these lighting items. The **conflicting lighting items were abandoned in place beneath Ramp D-1.**

The first paragraph of **Section 5-13 of the Standard Specifications states:** "The Department reserves the right, if it discovers an error in the partial or final estimates, or if it discovers that the Contractor performed defective work or used defective materials, after the final payment has been made, to claim and recover from the Contractor or his surety, or both, by process of law, such sums as may be sufficient to correct the error or make good the defects in the work and materials." In accordance with Section 5-13, the Department seeks reimbursement from HCC of the costs incurred to install a new lighting conduit system.

# DISPUTE REVIEW BOARD RECOMMENDATION

The cost incurred was \$75,376.56. The justification for this cost is attached as Index Section 13. These costs were reasonable when compared to the available statewide averages and the original cost for this work. Index Section 13 also provides a comparison of these unit prices and costs.

In conclusion, the Contractor began the first day of conduit installation on the project attempting to **relocate conduit for his convenience without proper authorization**. This date was January 6, 2000. In another recently discovered area along ramp E, the conduit was again placed out of plan location without proper authorization. This section of conduit is approximately 15 meters out of plan location. See as-built location in Index Section 16. Similar to Ramp D- 1, this conduit has also been determined to be in conflict with the current construction that is underway. Please note that **this conduit is not part of this issue** and we are not requesting a ruling on its disposition at this time. Finally, at Ramp D- 1, the conduit was again placed significantly out of the plan position. We are using these three examples to illustrate the manner in which the Contractor knowingly installed conduit in various areas at convenient locations without proper authorization, rather than at the plan locations or after obtaining proper authorization from the Engineer. The **Department should not be responsible for the cost to correct this defective work** and we respectfully request the Board's recommendation as to HCC's financial responsibility for the corrective work at Ramp D- 1.

## **Rebuttal of the Contractor's Correspondence dated July 29, 2002, September 11, 2002, and September 16, 2002:**

1. Hubbard Construction Company's letter dated July 29, 2002 refers to **Plan Note 6** that states that the **location of the conduits shown is diagrammatic** and can be shifted to accommodate local conditions. The Contractor further states that the plans do not provide dimensions such as offsets for conduit placement.

We do not believe that the conduit, as installed, represents the intent of the plans in regards to location. Also, the **note in question clearly specifies that the conduit can only be shifted as authorized by the "Engineer "**.

2. Hubbard Construction Company's letter dated July 29, 2002 states that the **plans did not call for clearing and grubbing of the area where the conduit was to be placed**. This area was covered with trees and over growth and did not allow the placement of the conduit.

Even though the **typical section sheets of the plans did not specify this area to be cleared** and grubbed, this does not relieve the Contractor of his obligation to clear and grub the area as necessary to allow the installation of the conduit. **Other areas of the project were cleared solely for the construction of highway lighting facilities** and paid for under lump sum Clearing and Grubbing as per Specification 110-12.1.1. Upon review of the project files, **there is no record of correspondence regarding concerns about, or, payment for, the clearing and grubbing of this area, or a request to relocate the lighting from this area.**

3. Hubbard Construction Company's letter dated July 29, 2002 states that **the area where the conduit was to be installed was highly subject to wet conditions and would be difficult to access for future maintenance**. It was further stated that these issues were discussed and agreed on in the field with the CEI personnel.

The planned area for this conduit was wet throughout a portion of this project. However, the CEI personnel's recollection of discussions of areas holding water was at the pull boxes near station 164+16, which was not in the area of conflict. Upon review of the **project files there is no record of any correspondence regarding wet conditions or a request to relocate the lighting from this area due to such wet conditions.**

## **CONTRACTOR'S POSITION:**

### STATEMENT OF POSITION

This project was bid in March 1999 and work subsequently commenced with one of the first orders of business specified to be the installation of the high mast lighting system. The installation of the conduit in question adjacent to Ramp D-1 was done in March and April of 2000. **No other work was specified to be done in this area (clearing, grading, fencing, etc.)**. The lighting system was shortly thereafter placed in service.

A **final project inspection was done November 8, 2001** and final project acceptance was November 9, 2001. We received a correspondence dated July 26, 2002 from the FDOT stating the pull boxes, conduit, and conductors adjacent to Ramp D-1 had been found to be in conflict with work being done on another contract. The costs for the required relocation work were to be considered Hubbard

# DISPUTE REVIEW BOARD RECOMMENDATION

Construction Companies responsibility in accordance with the contract specifications. **This is the first notification we had received of any deficiency in the work done over two years earlier.**

When notified we responded July 29, 2002 with our initial findings and agreed to an on site meeting July 31, 2002. Based on our findings **we do not accept any liability for this conduit conflict** and have been unable to resolve this matter with the FDOT after several meetings. The FDOT authorized corrective work which was completed under the Jones Brothers contract in the amount of \$75,376.56.

The correspondence referred to in the above narrative is herein included under **TAB#11<sup>1</sup>**

## INSTALLATION OF WORK

Hubbard Construction field located the load center and pole location as required which were installed in the plan location. Highway Safety then proceeded with conduit installation and found heavy vegetation to be in the path of the proposed conduit, the removal of which was beyond the scope of their contract. **At this time their foreman, John Saks, notified our superintendent, Charles Loy, and representatives of Genesis of the necessary clearing needed for conduit installation.** As no clearing was to be done in this area per plan **we stated to Genesis that added compensation would be requested if this work was added.** Direction was received to **place the conduit at the edge of the vegetation, which was considered a minor shift in alignment, as allowed by the engineer. The conduit and pull box work was then accomplished with the on site inspection being done by Genesis CEI, the FDOT representative.**

## SUBCONTRACTOR'S POSITION:

### High Mast Lighting Conduit Conflict at Ramp D1

#### Summary Position

The Florida Department of Transportation's (FDOT) pursuit of Highway Safety Devices, Inc. (HSD) and Hubbard Construction Company (Hubbard) for compensation of the costs to resolve the Highmast Lighting Conduit Conflict at Ramp D1 is unjustified. Both Hubbard and HSD deny any wrongdoing

The facts show that HSD and Hubbard **could not install the conduit in its designed location due to the presence of heavy vegetation.** HSD and Hubbard inquired and were informed that the existing vegetation would not be cleared and grubbed. **After discussions with Genesis Group (Genesis), HSD and Hubbard installed the conduit in the only available location.** HSD and Hubbard installed the conduit in this location, under the direction and **with the full knowledge of all parties.** Further, the conduit installation **location was dictated to us by the actions or inactions of others, namely the Designer and the FDOT's onsite representatives.**

Also, the location of the conduit conflict is at the intersection of three different FDOT projects that were bid and constructed at three different times. **The Designer's depiction of the work at the convergence point of the three projects lacks clarity and renders a confusing set of Contract Documents.**

For these reasons, we request that the Disputes Review Board rule that HSD and Hubbard are not responsible for the relocation costs of the High Mast Lighting Conduit at Ramp D1.

#### Detailed Position

Highway Safety Devices, Inc. (HSD) was the lighting subcontractor for Hubbard Construction Company (Hubbard) on the I-275 project in Pinellas County, FIN 2588611-52-01 (Project). The Project was bid on March 31, 1999 and consisted of roadway widening and pavement rehabilitation work on I-275 from Gandy Blvd. to east of Roosevelt Blvd., for a distance of 2.84 kilometers.

The lighting scope of work for the project included the installation of a High Mast Lighting system providing illumination for I-275, north of Gandy Blvd. including the intersection of I-275 and Roosevelt Boulevard. Further, the lighting system included the installation of an underground electrical service; consisting of 63 mm (2 1/2") Rigid Steel Conduit, pull boxes and wire conductors. A portion of the underground electrical service lies along the eastside of the I-275 northbound On Ramp from Roosevelt Boulevard, Ramp D1. I have attached sheets L- 13, L- 14 and L-20 of the Project plans depicting this location (see Tab 3). The conduit and pull boxes for this electrical service was **installed** by HSD and Hubbard **during March and April of 2000.** It is this conduit that **the FDOT is wrongly pursuing compensation from Hubbard and HSD for the costs to relocate from under a future ramp.**

<sup>1</sup> See original position paper for all attachments.

# DISPUTE REVIEW BOARD RECOMMENDATION

Hubbard and HSD reject any liability for the costs to relocate the Highmast Lighting Conduit at Ramp D1. Further, we reject the FDOT's notion that HSD and Hubbard acted recklessly, making decisions to install conduit, as we desired. This is far from the truth. **HSD and Hubbard were placed in this position by the actions & inactions of others.**

Further, HSD and Hubbard acted with the full knowledge and consent of the FDOT & Genesis.

Our rejection of liability is based on the following reasons:

- **Confusing Set of Plans** - Ramp D1 is an area of convergence for three different projects.
- **Designer Error** - The Designer omitted from the Contract, the clearing and grubbing of the existing heavy vegetation along Ramp D1.
- **Oversight of Installation** - The FDOT's onsite representative, Genesis Group (Genesis), provided daily oversight and approval of the installation.

The facts demonstrate that Hubbard and HSD were provided with a **deficient set of Contract Plans that failed to consider the clearing and grubbing work required.** Further, the FDOT and the Designer divided this highway construction program into three separate projects that overlap at this location. This decision resulted in a confusing set of Contract Documents with unclear project limits. Ultimately, **all of the High Mast Lighting Conduit along Ramp D 1 was installed under the direct inspection and under the approval of the FDOT's representative, Genesis.** After a review of the facts, the Disputes Review Board (DRB) will agree that neither Hubbard nor HSD should be held responsible for the relocation costs of this conduit.

## Confusion in Contract Documents

The underground electrical conduit in question is located along the eastside of Ramp D1, from Roosevelt Blvd onto northbound I-275. The area along this ramp is a point of convergence for three separate FDOT projects: FIN 258861-1-52-01 (1<sup>st</sup> Job), FIN 256894-1-52-01 (2<sup>nd</sup> Job) and FIN 258870-1-52-01 (3<sup>rd</sup> job). The three projects include overlapping work in the Ramp D 1 area. However, **the Designer's attempts to portray the work in this area lack clarity and consistency.** This lack of clarity and consistency led to an unreliable and incomplete set of Contract Documents.

Please again refer to Sheets L-13, L-14 and L-20 in **Tab #3**, upon inspection of the right of way along the south side of Ramp D1, you will note **these plan sheets show two separate right of way lines.** It is confusing to have two separate right of way lines shown on a plan sheet. Which is correct?

Likewise, if you inspect the plan sheets in **Tabs #4 & #5**, for the right of way lines on the two other projects, you will note that they both differ from either of the right of way lines shown on the 1<sup>st</sup> project plan sheets. Why?

To further demonstrate the confusion surrounding the alignment and the work in this area, we have provided three RFI's from the 256894 (2<sup>nd</sup>) project in **Tab #6.** **Hubbard issued the RFI's requesting clarification of the survey data** for the right of way line along Ramp D 1 and for the layout of Ramps D and D1. Obviously, questions remained about the work in this area during the 2<sup>nd</sup> project.

It was confusing for Genesis as well. **Genesis alluded to a lack of clarity during a meeting with HSD, Hubbard and the FDOT on April 15, 2003.** During this meeting, Mr. Tony Harvey of Genesis stated that something had always seemed wrong to him about the manner in which the plan sheets depicted the work versus the actual field conditions (See **HSD letter dated April 17, 2003 in Tab #7**).

Genesis' confusion at the time of construction is further demonstrated in the project documentation. HSD and Hubbard installed the conduit and pull boxes along Ramp D1 on March 13 through March 16 of 2000. We have provided copies of FDOT's Daily Report of Construction for these dates in **Tab #8.** As detailed in the daily reports, **Genesis' onsite inspector was present and witnessed the installation of the conduit and pull boxes on these dates.**

In the reports, **Genesis has provided a detailed daily dairy that documents the work performed on each date.** The **information provided by Genesis on these reports includes the footages of conduit installed and the precise station and offset of the installed product.** I have plotted the information from Genesis' daily reports onto the plan sheets in **Tab #3.** Interestingly, you will note that a plot of the Highmast Lighting Conduit along Ramp D1, **from the information in Genesis' and the FDOT's Daily Reports of Construction shows that HSD installed the conduit to lie between the two right of way lines.** Genesis measured the conduit we installed it and they did not notice anything was wrong at the time. Genesis must have also been thrown off by the confusing set of Contact Documents.

We have successfully demonstrated that the Designer's depiction of the work along Ramp D1 led to ambiguous and unclear Contract Documents. The confusion was not limited to HSD or Hubbard on the

## DISPUTE REVIEW BOARD RECOMMENDATION

258861 (1<sup>st</sup>) project. It also included Genesis, the FDOT's onsite representative overseeing the installation of the Highmast Lighting Conduit along Ramp D1. Further, the confusion was not limited to the 258861 (1<sup>st</sup>) project, but it persisted during construction on the 256894 (2<sup>nd</sup>) project, **causing Hubbard to issue several RFI's seeking clarifications of the Ramp D1 baseline and of the right of way along this ramp.** The ambiguous plans are a key factor leading to the misplaced conduit.

### Designer Error

The Designer erred in the performance of his duties for this project. **The Designer must provide the Contractor with a set of Contract Documents that clearly depicts all work required.** This Designer failed to depict the entire scope of work required during the 258861 (1<sup>st</sup>) project. Specifically, the **Designer failed to provide for the clearing and grubbing** of the heavy vegetation **along Ramp D1** in the Contract Documents for the 258861 (1<sup>st</sup>) project.

In fact, the Designer failed to show Ramp D 1 in either the roadway plan sheets, the typical sections or in the cross sections for this project. The **Designer provided no direction in the Contract Documents to Hubbard or any other Contractor that the clearing and grubbing of the area along Ramp D1 would to be required.** However, **there did exist heavy vegetation along Ramp D1 in March of 2000 that prevented HSD and Hubbard from installing the conduit** (see tab #9).

Accordingly, during our preparations for the conduit installation, HSD requested from Hubbard a layout of the conduit route. It was then that the conflict with the existing vegetation along Ramp D1 was discovered. **HSD and Hubbard inquired with the FDOT & Genesis about the clearing and grubbing** of the area alongside Ramp D1. HSD was informed that Hubbard had reviewed its Contract Documents and had checked with Genesis, and that the **area along Ramp D 1 was not to be cleared.** Further, **we were directed to relocate the conduit outside of the existing vegetation.**

HSD proceeded to discuss the location of the new conduit with Hubbard and Genesis. It was determined that since the vegetation would not be cleared, **the conduit should be installed west of the existing vegetation,** between the vegetation and the existing ditch. This routing was reviewed and HSD proceeded with the installation of the conduit in the agreed upon location.

Hubbard's project superintendent, Mr. Charlie Lloyd was recently interviewed by HSD and Hubbard. During the interview, Mr. Lloyd confirmed that HSD notified him of the issue between the conduit and the existing vegetation. **Mr. Lloyd also stated that Hubbard discussed the matter with Genesis and it was determined that the vegetation was not to be cleared** under this Contract and therefore the conduit should be moved outside of the limits of the vegetation.

**Had the Designer designated that the area along Ramp D1 needed to be cleared and grubbed during the 258861 (1<sup>st</sup>) project, there would be never have been an issue.** Hubbard would have cleared and grubbed the area prior to the conduit installation and HSD would have installed the conduit in the cleared areas. However, the Designer failed in his duty to provide a clear and unambiguous set of plans depicting all work required. The failure by the Designer directly led to this dispute.

We must remember the three **projects were designed by the same Designer.** As previously stated, the Designer failed to depict any clearing requirements of the Ramp D1 area in the Contract Documents for the 258861 (1<sup>st</sup>) project. The Ramp D 1 area was not shown on any plan sheets, cross sections or typical cross sections for this project. What then did the Designer intend with regard to the clearing of the vegetation alongside Ramp D & D1?

To document the Designer's intent with regard to the clearing and grubbing of the area in question, we have provided copies of several plan sheets from the **256894 (2<sup>nd</sup>) project** in **Tab #10.** We have provided Plan Sheet 11, showing a typical section of Ramp D and Plan Sheet 190, showing a cross section at Station 56+00 of Ramp D. Upon review of these plan sheets, the **Designer designates that clearing will be required past the outside top of bank of the new drainage ditch that runs alongside Ramp D1.**

**Obviously, the Designer intended that the areas alongside Ramp D and D 1 be cleared during the 256894 (2<sup>nd</sup>) project, not during the 258861 (1<sup>st</sup>) project.** This is further documented by the RFI's Hubbard issued during the 256894 (2<sup>nd</sup>) project (see **Tab #6**). Hubbard issued the RFI's in order the clarify the survey data for the ROW and for Ramp D1. The survey data was required in order to allow Hubbard to perform the initial clearing and grubbing of the area along Ramp D1 during the 2<sup>nd</sup> project, not the 1<sup>st</sup>.

The Designer's omission of the clearing work coupled with the ambiguous layout information and his failure to clearly depict the future work **provided an environment ripe for error.**

We must also point out this Designer **omitted from the original Contract Documents, the rigid steel conduit required for the electrical service.** The original documents provided a schematic diagram and

# DISPUTE REVIEW BOARD RECOMMENDATION

identified only that conductors would be required. However, the Designer failed to include any provisions or bid items for the rigid steel conduit. The FDOT issued a Supplemental Agreement adding the conduit to the scope of work. We raise this point to show the **pattern of errors by the Designer**.

Again, this Designer erred by not depicting the clearing and grubbing of the area alongside Ramp D1 in the Contract Documents for the 258861 (1<sup>st</sup>) project. This caused HSD & Hubbard to inquire about the clearing of this area. **HSD and Hubbard were informed that the area along Ramp D1 would not be cleared and to relocate the conduit.** HSD proceeded as directed and should not be punished for the faults of others.

## Oversight of Installation

The FDOT and Genesis have previously indicated that HSD and Hubbard installed the conduit without the FDOT or Genesis knowing. The FDOT is insinuating that HSD acted in a reckless fashion and installed the conduit as we desired. This is false. The DRB should not be influenced by the FDOT and Genesis' attempts to misrepresent the involvement of the FDOT and Genesis during the installation of this conduit.

The records show that **Genesis was onsite inspecting the conduit installation work along Ramp D1.** Genesis completed Daily Reports of Construction documenting the work performed for the purposes of payment and in order to generate as-builts. To that end, Genesis **logged precise measurements of how much and where the conduit was installed.** For example, the FDOT's Daily Reports of Construction for March 13, 14, 15 and 16, 2000 document that 990.5 meters of rigid steel conduit and 15 pull boxes were installed along Ramps D1. Additionally, the **daily reports provide station and offsets from the baseline, detailing where the conduit or pull boxes were installed.**

To further demonstrate the level of the FDOT's and Genesis' involvement during the conduit installation, we bring up an incident that occurred **on March 14, 2000.** On this date, HSD **encountered a buried concrete obstacle** in the conduit trench line at station 10+81 of Ramp D1. **Our conduit installation was halted until Genesis and the FDOT determined the extent of the concrete obstacle.** Ultimately, the obstacle was determined to be concrete discharge from a previous project. The concrete obstacle was removed and HSD's conduit installation work resumed approximately 1 ½ hours later. For the record, this incident is documented in Page 6 of 8 of the FDOT Daily Report of Construction for March 14, 2000, **see tab #8.**

This documentation provides undeniable proof that **Genesis, the FDOT's representative was onsite inspecting, witnessing, measuring and overseeing the installation of the high mast lighting conduit along Ramp D1.** Further, Genesis and the FDOT accepted the conduit installations and provided full payment to HSD and Hubbard for the conduit work. As such, the FDOT and Genesis cannot plead ignorance that the conduit was installed without their knowledge. This conduit was installed in the open with the full knowledge and consent of the FDOT and Genesis.

The question remains, why, if Genesis was providing daily oversight and carefully measuring the conduit as HSD installed it, did Genesis not notice that the conduit was being installed in a wrong location? Perhaps, the answer may be found in Mr. Tony Harvey of Genesis' comments that something seemed wrong with the Designer's depiction of the work in this area versus the actual field conditions. **We have documented proof that the FDOT's own onsite representative, Genesis, was misled and confused by the unclear and ambiguous Contract Documents.** We also have original Contract Documents showing two Right of Ways in this area.

In summary, the **Designer erred by not including the clearing and grubbing** of the vegetation along Ramp D1 in the Contract Documents. When Hubbard and HSD discovered the conflict with the existing vegetation, we consulted with Genesis and were **informed that the clearing and grubbing of the vegetation was not included in this Contract.** Further, we were **directed to relocate the conduit to a location between the vegetation and the existing ditch.** The FDOT and its **on site representative Genesis participated in the decisions to not clear the vegetation and to relocate the conduit.** Also, Genesis, the FDOT's representative, was present and taking precise measurements of the actual location of the conduit, as it was installed.

On this project the FDOT's Designers, its planners and onsite representatives failed in their duties. The Designer failed to account for all of the work required in this Contract, namely he omitted the clearing and grubbing. Further, the Designer provided erroneous plans showing several ROW lines and failing to clearly depict the future work. Additionally, the FDOT's onsite representatives provided flawed direction and also did not consider the future work. These failures are directly responsible for this conduit dispute. **But most importantly, these failures were by others and were beyond the control of HSD or Hubbard.** As such, HSD and Hubbard bear no responsibility for the cost to relocate the High Mast Lighting Conduit along Ramp D 1.

# DISPUTE REVIEW BOARD RECOMMENDATION

Ultimately, the FDOT's project delivery system failed to provide a properly coordinated and clear set of Contract Documents. As such, the fault lies with others and not HSD nor with Hubbard.

## BOARD FINDINGS:

- The **plans do not depict clearing and grubbing at the plan location** for the conduit.
- A **follow-on project does** depict clearing and grubbing in this area.
- Plan sheet L-4 GENERAL NOTE 6 reads:

6. THE LOCATION OF THE POLES, CONDUCTORS, CONDUITS, PULL BOXES AND SERVICE POLES ARE DIAGMATIC ONLY AND MAY BE SHIFTED BY THE ENGINEER TO ACCOMMODATE LOCAL CONDITIONS AND EXISTING UTILITY LOCATIONS.

- Plan sheet L-4 GENERAL NOTE 10 reads:

10. CONTRACTOR SHALL AVOID CONFLICTS WITH FUTURE EMBANKMENT AND EXCAVATION IN THE INSTALLATION OF THE LIGHTING SYSTEM.

- The CEI recorded on the DAILY REPORT OF CONSTRUCTION HSD's progress in this area:

- On 03/13/00 - 477.0 M:

DESCRIPTION OF WORK	BEGINNING	ENDING
1. INSTALL 477.0M 63mm (2 1/2") RGS CONDUIT STA 28+50; 17M RT TO STA 10+00; 17M RT @ RAMP D1	7:00 A	3:30 P

- On 03/14/00 – 252 M:

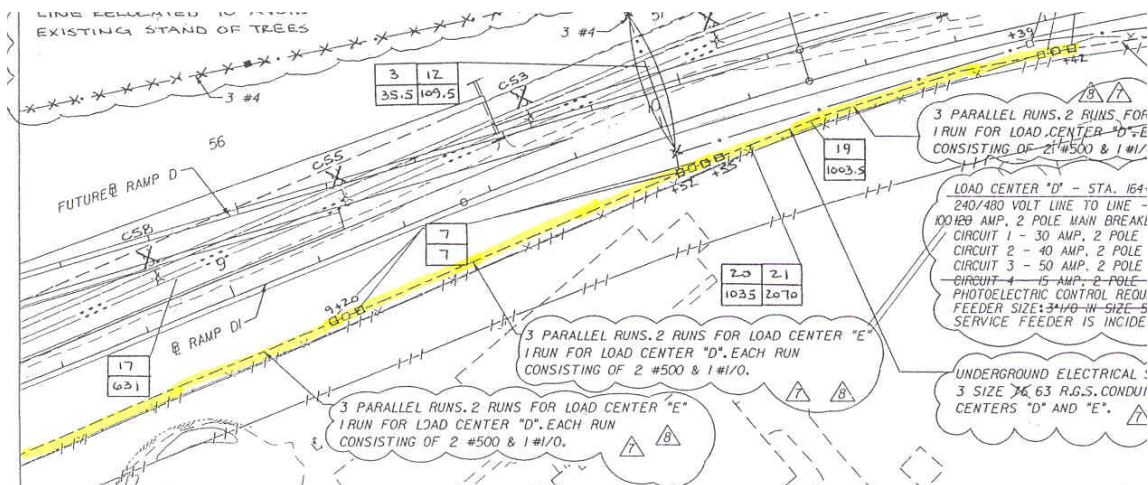
CONTRACTOR/SUBCONTRACTOR: HIGHWAY SAFETY DEVICES		TIME (AM/PM?)	
OPERATION and LOCATION		BEGINNING	ENDING
1. INSTALL 252M 63mm (2 1/2") RGS CONDUIT STA 10+00; 17 RT TO STA 10+81; 23 RT @ RAMP D1		9:00 A	3:30 P

- On 03/15/00 – 261.5 M:

DESCRIPTION OF WORK		TIME (AM/PM?)	
CONTRACTOR/SUBCONTRACTOR: HIGHWAY SAFETY DEVICES		BEGINNING	ENDING
OPERATION and LOCATION		BEGINNING	ENDING
1. INSTALL 63mm (2 1/2") RGS CONDUIT STA 10+21; 23 RT @ ROOSEVELT DRIVE TO STA 16+26; 240 RT @ CON		7:00 A	1:30 P

- The report of 03/16/00 further documented the work performed.

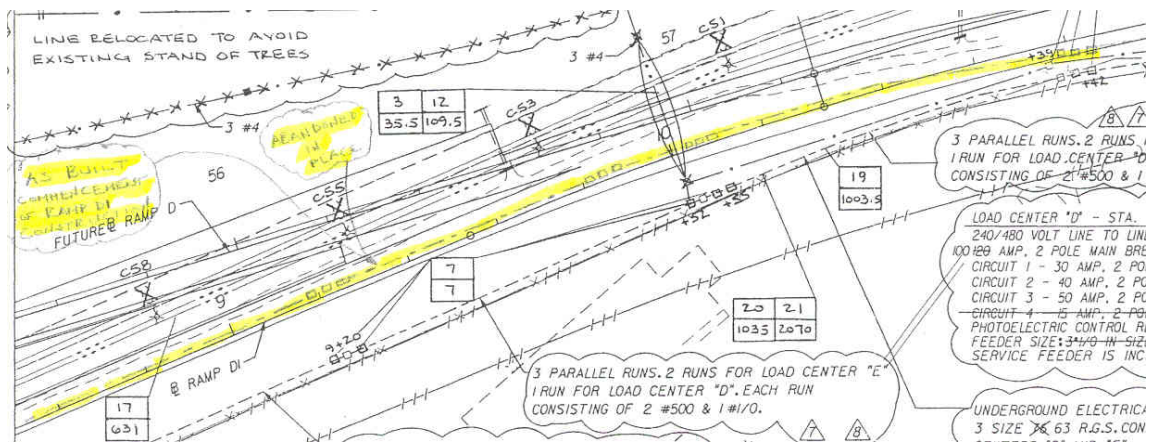
- In spite of the CEI's detailed daily reports, the Final Roadway Lighting Plans (**As Builts**) **do not depict the conduit in its installed location.**





# DISPUTE REVIEW BOARD RECOMMENDATION

- A succeeding project located the **actual location** of the conduit.



- Since this work was clearly installed substantially away from the pre-existing RW line, which also was marked by an existing fence, **it is not logical that the CEI did not know what HSD was doing.**
- FDOT Specifications state in part:

## SECTION 5 CONTROL OF THE WORK

### 5-9 General Inspection Requirements.

**5-9.1 Cooperation by Contractor:** Do not perform work or furnish materials without obtaining inspection by the Engineer or his representative. **Furnish** the Engineer with **every reasonable facility for ascertaining** whether the **work performed** and materials used are **in accordance with the requirements and intent** of the Contract Documents....

**5-9.2 Failure of Engineer to Reject Work During Construction:** **If**, during or prior to construction operations, the **Engineer fails to reject defective work** or materials, whether **from lack of discovery** of such defect **or for any other reason**, such initial failure to reject **in no way prevents** the **later rejection when such defect is discovered**, or obligates the Department to final acceptance. The **Department is not be responsible** for losses suffered due to any necessary removals or **repairs of such defects.**

**5-9.3 Failure to Remove and Renew Defective Materials and Work:** **If the Contractor fails or refuses to remove and renew any defective materials used or work performed**, or to make any necessary repairs in an acceptable manner and in accordance with the requirements of the Contract within the time indicated in writing, the **Engineer has the authority** to repair, remove, or **renew the unacceptable or defective materials or work** as necessary, all **at the Contractor's expense.** The Department will obtain payment for any expense it incurs in making these repairs, removals, or renewals, that the Contractor fails or refuses to make, by deducting such expenses from any moneys due or which may become due the Contractor, or by charging such amounts against the Contract bond.

### 5-10 Final Construction Inspection.

**5-10.1 Maintenance until Acceptance:** **Maintain** all work in first-class condition **until it is completed** as a whole and the **Engineer has accepted the work** under the provisions of 5-11, 5-10.2, or 5-10.3.

**5-10.2 Inspection for Acceptance:** When the Contractor has completed all work, or a portion of a project as provided in 5-10.3, with the exception of final striping, the landscaping establishment period, signalization "burn-in," or any other Contract item required to be performed or maintained more than 20 days after the completion of all other Contract items, the Contractor may request an inspection for acceptance. The Engineer will make an inspection for acceptance within seven days after such notice. **If, at the inspection for acceptance, the Engineer determines that the Contractor has completed all construction** provided for and contemplated by the Contract **to the Engineer's satisfaction**, the Department will consider such inspection as the final inspection. **If, however, at any inspection for acceptance, the Engineer determines that any of the Contractor's work is unsatisfactory, in whole or in part, the Engineer will give the Contractor the**

# DISPUTE REVIEW BOARD RECOMMENDATION

necessary instructions as to the replacement of material and the performance or reperformance of work necessary to achieve final completion and acceptance. Immediately comply with and execute such instructions. Upon satisfactory completion of the designated remedial work, the Engineer will make another inspection which the Department will consider as the final inspection if the Engineer determines that the Contractor satisfactorily completed the remedial work.

**Once the Department accepts the project or a portion of the project, the Department will provide written notice of the acceptance** to the Contractor and the Contractor's obligations for indemnification, defense, and hold harmless under 7-12.1 ceases. However, the Contractor remains responsible under 7-12.1 only as it applies to direct performance of work items of final striping, the landscape establishment period, signalization "burn-in," or any other Contract item required to be performed or maintained more than 20 days after the completion of all other Contract items.

....

**5-10.4 Final Inspection: Whenever the Contractor has** furnished all materials, **performed all work**, and **satisfactorily** completed all construction contemplated by the Contract, the **Engineer will make the final construction inspection.**

In the event that the Engineer has satisfactorily completed an Inspection for Acceptance, during final inspection he will only inspect additional items that the Department has not previously accepted that the Contractor was required to perform, maintain, or replace.

## **5-11 Final Acceptance.**

When, **upon completion of the final construction inspection** of the entire project, the **Engineer determines** that the Contractor has **satisfactorily completed the work**, the Engineer will give the Contractor **written notice of final acceptance.**

## **5-13 Recovery Rights, Subsequent to Final Payment.**

The **Department reserves the right**, if it discovers an error in the partial or final estimates, or **if it discovers that the Contractor performed defective work** or used defective materials, **after the final payment has been made**, to claim and **recover from the Contractor** or his surety, or both, by process of law, such **sums** as may be **sufficient** to correct the error or **make good the defects** in the work and materials.

...

## **CLEARING CONSTRUCTION SITE SECTION 110 CLEARING AND GRUBBING**

### **110-1 Description.**

Clear and grub within the areas of the roadway right-of-way and of borrow pits, sand-clay base material pits, lateral ditches, **and any other areas shown in the plans to be cleared and grubbed.** Remove and dispose of all trees, stumps, roots and other such protruding objects, and buildings, structures, appurtenances, existing flexible asphalt pavement, and other facilities necessary to prepare the area for the proposed construction, and remove and dispose of all product and debris not required to be salvaged or not required to complete the construction.

- The Department final accepted the project 11/09/01.
- While the Department may not have known of the installed location, the CEI did.
- The Board accepts the Contractor's declaration:
  - That the Contractor did notify the CEI of the need to C&G the path of the conduit.
  - That he was told that there would be no payment for any such clearing.
  - That lacking an SA or WO to clear said path, there was direction to move the conduit to the location immediately west of the needed clearing.
- These decisions would constitute **approval by the CEI for such move.**
- This acceptance by the Board of the Contractor's version of events is based on the actions of the CEI that are documented in the position papers.

# DISPUTE REVIEW BOARD RECOMMENDATION

## **BOARD RECOMMENDATION:**

Based on the materials supplied to the Board and presentations to the Board at the DRB hearing, **the Board finds that the Department should not be responsible for the cost to correct this problem. However, the Board does not find that the Contractor is responsible for this cost.**

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by the non-responding party.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully Submitted

Disputes Review Board  
John H. Duke, Sr.; DRB Chairman  
Ashley R. Cone; DRB Member  
Lester C. Furney; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



John H. Duke, Sr.  
DRB Chairman

EC: Mr. Brian M. McKishnie P.E. (brian.mckishnie@dot.state.fl.us)  
Mr. C. David Dempsey (ddempsey@Hubbard.com)  
Mr. Gerald A. Cavallaro (gerald.cavallaro@dot.state.fl.us)  
Mr. Andrew "Andy" Price Jr. (NicoleB@HighwaySafetyDevices.com)