DISTRICT 5 REGIONAL DISPUTE REVIEW BOARD REVIEW BOARD RECOMMENDATION

Date: October 16, 2006

Department Representative: Mr. Hector L. Matos Brevard Operations 555 Camp Road, MS 590 Cocoa, FL 32927-4738 Contractor Representative: Mr. Edwin Makiewicz III, P.E. Ranger Construction Industries, Inc. 1200 Elboc Way Winter Garden, FL 34787

RE: Project No: 23929415201 Project Description: Widening of SR 520 County: Brevard

Dear Sirs:

The Florida Department of Transportation and Ranger Construction Industries, Inc. entered into a contract to widen a portion of SR 520 in Brevard County and as a part of the contract initiated a Joint Project Agreement (JPA) with the City of Cocoa to take two existing pipelines (a 36' diameter and a 48'' diameter) out of service and remove them and install a new 48'' line that would be joined to the existing 48'' and installed in a location south of the old line.

The bid documents show an existing 54" pipe line in place on the north side of the project. However, when the project was ready to start the 54" pipeline was not complete, which prevented the existing 36' and 48" lines from being removed.

The Department issued a Unilateral Supplemental Agreement awarding the contractor 74 additional contract days to compensate for the 54" line not being complete when the contractor started work.

The District 5, Regional Dispute Review board was asked to rule on two issues:

- 1. Was the contractor entitled to an additional 90 days of contract time due to the late completion of the 54" line?
- 2. Was the contractor's subcontractor (Maxwell Contracting, Inc.) on the JPA work of installing the new 48" line entitled to additional compensation for additional work and due payment for the Megalugs used on the pipe installation?

CONTRACTOR'S POSITION

We will state the Contractor's position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractor's position paper has the following statements and references to document their claim for entitlement.

The Florida Department of Transportation entered into a contract with Ranger Construction Industries, Inc. to reconstruct and Widen SR 520. There was also a Joint Project agreement with the City Of Cocoa to replace a potion of the City's existing 36" and 48' water lines with a new 48" water line. The length of the project was 2.234 miles. The project was bid as an A + B project for \$9,784,483.61 with an original

contract time of 360 calendar days. The project contract time started on March 8, 2004 with final acceptance on February 10, 2006.

ISSUE #1

Prior to the start of Ranger's contract, a new 54" water was to have been installed by the City of Cocoa by a separate contractor. The 54" water had to be complete before Ranger could take the existing 36" and 48" lines out of service. At a meeting prior to the start of construction Ranger was notified that the 54" line was not complete but would be completed by April 1, 2004. At that time Ranger notified the Department that they would be delayed if the 54" line was not complete by April 15, 2004. The Department acknowledged this in their letter of April 27, 2004. The 54" line was not completed until June 28, 2004. The Department acknowledged the delay by issuing a Unilateral Supplemental Agreement awarding Ranger 74 days additional contract time and indirect costs.

The contractor contends that the late completion of the 54" line caused them to work sequentially instead of concurrently and caused them much more than a 74 day delay. The contractor quoted relevant sections of the FDOT Standard Specifications 8-7.3.2 indicating that the Department may grant an extension of time when a CONTROLLING ITEM of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid. The contractor further quoted Section 1-3 Definitions, of the Standard Specifications, that DELAY is defined as any unanticipated event, action, force or factor which extends the Contractor's time of performance of any CONTROLLING ITEM of work.

Ranger contends that they established the bid amount for the project based upon their assessment of the risk associated with the project as shown on the bid documents. Since the project was not as shown on the bid documents any and all delays, disruptions, interference, impedance, or hindrance experienced as a result would constitute a time extension to the point where Ranger is reestablished to a position "but for" the changed condition.

Ranger also pointed out that Section 1-3 defines controlling items of work as "those items of work that are directly interrelated such that each has a definite influence on progress of the overall work.

ISSUE #2A

Ranger believed that the contract documents showed the installation of the 48" water line below the Taylor Creek box culvert invert elevation to be performed by the use of fittings. The contractor (Maxwell Contracting, Inc.) was directed by the City of Cocoa through the Department to install the proposed 48" line without the use of fittings, but by deflecting the pipe. This resulted in extra work due to the length of pipe that needed deflecting. Ranger believes that these directions were outside the Contract Documents.

Ranger maintains that the Technical Special Provisions (TSP) section 3600-6.1 states that "Exception to stated depth requirement will be those portions of water main within casings or those portions that go over or under storm drains, sanitary sewers or other utilities as shown on the plans. In all such cases water main shall be immediately brought back to proper grade by way of mechanically retrained MJ offset fittings.

The interpretation by a contractor would be, and in fact was, to use fittings to lay the pipe underneath the Taylor Creek box culvert so as to comply with this section of the specifications.

In addition the plans show an 8 foot change in elevation in 100 feet of pipe at the Taylor Creek location and a 7.33 feet difference in 45 feet the other side of the creek. This would support the Specifications and dictate the use of fittings.

Plan sheet U-7 (see Tab E) has a note which states "Use pipe deflections as necessary to maintain 36" minimum below the invert of the box culverts. Do not exceed manufacturer's allowable maximum joint deflection. The Department is interpreting this note to say that no fittings are allowed to be used. In fact it is merely saying that when taken together with the Technical Special Provisions a combination of deflection and fittings are to be used. There is no manufactured pipe that the manufacturer absent the use of fittings allows deflection of 8 feet in 100 feet. Moreover the use of the phrase "as necessary" indicates that if fittings can accomplish the requirements shown in the TSPs and plan sheets then deflection is not necessary. Maxwell Contracting through Ranger submitted a request to use fittings it was denied. Since the directions are not consistent with the contract Ranger feels that the Department has directed extra work and they should be compensated for it. Ranger notes that the Department agrees with their position as Mr. Hector Manos of the Department pointed out in his letter to the City of Cocoa that their seems to be a

conflict between Plan Sheet U-7 and the TSPs. When this occurs the governing order of contract documents rules. The TSPs override the Plan sheet.

ISSUE # 2B

Ranger's position is that full and complete compensation has not been made by the Department for water pipe fittings as specified in the contract documents. In particular the Department has not provided compensation for megalug joint restraints and associated necessary connecting devices i.e. nuts, bolts etc. used in fittings for the JPA 36" and 48" water mains. It is Ranger's position that all fittings, inclusive of megalugs, nuts bolts etc. are to be paid under pay item 1610-140 "Water fittings (DI)" per ton. Ranger based their bid on the fact that joint restraints would be paid for by ton. Moreover the Engineer of Record included the weights of the restraints in developing the plan quantity for this item. Further there has been a previous DRB ruling that supports their position.

DEPARTMENT'S POSITION

We will state the Department's position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the department.

The Department's position paper has the following statements and references to refute the contractor's claim for entitlement.

ISSUE #1

The Department acknowledges Ranger's entitlement to a time extension in this case as evident in the previous granting of 74 days time extension on this contract for delays by the City of Cocoa Utilities in the installation of the 54" water main. The Department is not in agreement with awarding an additional 90 days for a total of 164 days. The Department gave Ranger 74 days of contract time equating to the delay between April 15, 2004 and June 28, 2004, the difference between when the 54" completion was promised and when it was actually completed. The department made numerous requests to Ranger to submit a request for additional time in accordance with the FDOT Standard Specifications.

The Department indicated that Ranger contends that the delay in completion of the 54" water line delayed the following activities:

- 1. start of construction of the right side of the bridge
- 2. Right side box culvert extension
- 3. Installation of the new 48" water main & removal of the existing 36" and 48" water lines
- 4. Completion of the right side roadway

The Department asserts that Ranger did not comply with FDOT Standard Specifications 8-7.3.2 and 5-12.3 requiring written notification within 10 calendar days after commencement of a delay on a controlling item of work.

The Department was made aware of Ranger's position on the delays when Ranger finally submitted a request for a time extension on June 11, 2005; nearly one year after the City of Cocoa had completed their work on the 54" water line. Ranger submitted a request for 133 days for impacts from the late completion of the 54" water line on the following activities:

- 1. detour construction
- 2. Subsoil excavation/embankment
- 3. Box culvert installation
- 4. Water line installation
- 5. Water line removal

Activity

The only activities depicted as controlling items were (a) detour construction and (b) subsoil excavation/embankment. The Department provided the following information from their daily reports:

Plan Start Actual Start Plan Finish A	ctual finish
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Detour	5/17/04	5/14/04	6/15/04	5/08/04
Subsoil excavation	6/16/04	3/15/04	11/10/04	10/26/04
Embankment	6/17/04	3/16/04	12/14/04	1/31/05

As shown above these activities completed within the original time frame or completed well within the 74 days of additional time. The other activities that Ranger contends were delayed by the 54" water line have the following planned and actual start and completion dates from the FDOT daily reports:

Activity	Plan Start	Actual Start	Plan Finish	Actual Finish
Right side bridge	6/16/04	7/09/04	9/10/04	11/23/04
Right side box culvert	7/15/04	11/16/04	8/25/04	01/13/05
New 48" water line	06/16/04	05/04/04	9/10/04	11/12/04
Existing 36" and 48" water lines	6/16/04	06/28/04	9/10/04	10/26/04

The above listed activities all finished within the planned early finish dates except for the Right side box culvert which completed 15 days after the late finish date still well within the 74 day extension granted. Therefore there is no entitlement for additional time.

ISSUE #2A

The Department stated that the plans clearly state on sheet U-7 to use pipe deflection to maintain 36" minimum cover under the canal. The quantities shown on sheet U-2 of the drawings clearly show no fitting weights for the work on this sheet. The cross sections on either side of the canal show only the required minimum cover on the pipe. The contractor had different pipe/joint options available to him per the TSPs. The amount of allowable joint deflection varies with the pipe/joint options; therefore any deflection that the cross sections represent may have been different than what could have been possible by the pipe/joint selected by the contractor.

Therefore there is no entitlement for Issue #2A.

ISSUE #2B

Section 3600-12 of the TSPs state that the unit price for fittings shall include polystyrene encasement, mechanical or manufactured joint restraints and as-built preparation. The TSPs do not state that measurement shall include weight of joint restraints. Joint restraints are intended to be an ancillary item to be included in the unit cost of the fitting. The contractor could have opted for a (manufactured) restraining system which does not require megalugs. The contractor opted to use megalugs with mechanical joint fittings and should have included the cost of megalugs in his unit price. A Dispute review Board heard a similar claim and ruled that the contractor had no entitlement to any additional payment for the megalug fittings.

The TSPs, section 3600-12 states in par that "Water lines will be paid for at the contract price per lineal foot of pipe furnished and installed." The amount of pipe furnished and installed is what has been paid to date. Section 3600-12 goes on to state that "Unit prices will include all items of work such as excavation, materials, labor, sheeting, and shoring where required, dewatering, backfilling, concrete encasement, grading, bedding material, "tie-ins", final clean-up, and testing.

Therefore the Department states there is no entitlement for additional costs.

CONTRACTOR'S REBUTTAL

ISSUE #1

Ranger asserts that the Department advertised a project that showed a 54" water main as existing and fully functional. As a result Ranger provided a bid which contained a price and a time component reflecting those conditions. In fact the 54" water line was not complete. Ranger agreed that if the line was complete by April 15, 2004 there would be no impact. The Department stated that the line was complete on June 28, 2004. Ranger disagreed with the Department as to whether the line was complete on June 28, 2004 and stated that just because the line was installed the effects of the delay that need to be considered.

Ranger stated the following facts:

- This an A + B bid contract
- Ranger established the contract time based upon the information provided and the associated risk
- The contract documents indicated the 54" water main was existing—it wasn't
- It was agreed that there would be no impact if the line was fully functional by April 15, 2004—it wasn't
- The contract documents indicated that the line pressure of the 48" pipe would be reduced to 30psi while working around it—it wasn't
- it took the Department several months to complete the 54" water main to the point it should have been at the time of bid
- The effects caused by the delay to the 54" water main are not being considered by the Department
- The effects caused by the delay to the 54" water main would not have occurred but for the fact that the 54" water main was delayed
- Ranger in no way caused the delay or its effects

ISSUE #2A

The plans clearly depict all pipe to be installed at grade elevations as shown in Cross Section sheets U-9 through U-45.

Ranger again stated the provisions of TSP 3600-1.3 Water main/Storm Drain crossing which states that where water mains cross over or under utilities restrained joints are to be used to immediately bring the water main back to proper grade.

TSP 3600-6.1 Pipe Laying. Pipe will be installed with a minimum of 36" of cover; a maximum of 42" will be accepted. This provision goes on to state that an exception to these depths will occur when the water main is in a casing or passes over or under a utility line. In those cases the pipe will be brought back to proper grade by use of mechanical joint restraints.

The Department pointed out that the contractor had different types of pipe/joint options available to him per the TSPs but then the Department refused to allow the contractor to use mechanical joints to get below the invert of the Taylor Creek box culvert.

ISSUE 2B

Ranger quoted TSP 3600-12 "Measurement and Payment" overrides TSP general specification 3600-6.4 "Mechanically Restrained Fittings". The Measurement and Payment Section 3600-12 states "unit price for fittings shall include polyethylene encasement, mechanical or manufactured joint restraints". Our unit price for fittings include the associated weight of both fittings and mechanical joint restraints since the unit is tons. The unit (tons) is a fitting with accessories. Without the accessories you have no unit. The specifications do not specifically state that weights of glands, bolts and gaskets are or are not included in fitting tonnage calculations.

Maxwell Contracting has requested on several occasions documentation as to how the EOR came up with the bid quantity of 19.04 tons versus the 12.579 tons paid to date in Pay Item 1610-140. There are only 9 fittings installed on this run of pipe which makes it clear that the intent was to include accessory/megalug weights along with the bare fitting weights as payment.

THE DEPARTMENT'S REBUTTAL

ISSUE #1

Ranger referred to their baseline schedule dated April 1, 2004. The Department states that the baseline or original schedule was submitted by Ranger at the pre-construction meeting dated February 19, 2004 which had a data date of March 8, 2004. On February 27, 2004 the Department wrote to Ranger detailing some inconsistencies in their schedule and Ranger corrects and resubmits. The Department's arguments in their position paper are based on the original schedule with a data date of March 8, 2004 that was submitted at the precon. This schedule reflects Ranger's intent as to the different activities before any of the issues arose.

Ranger presented in their position paper that they were forced to work sequentially instead of concurrently because of the 54" line. The only activity that was done sequentially was the water line installation and the

box culvert. As was explained in the Department's position paper, once the existing 36" and 48" water lines were removed, the box culvert south extension could have begun. Ranger made a "means and method" decision to wait for the completion of the 48" water line installation to begin the box culvert extension contrary to their schedule. Ranger stated in their position paper that according to the April 2004 Work Progress Schedule which was approved by the Department (the Department accepts does not approve schedules), the Box Culvert Extension activity 1080 is a direct successor to Water Line installation and removal, activity 1055 and Subsoil Excavation, activity 1060. The April 2004 schedule shows Water line installation with an early finish date of August 9, 2004 and a late finish date of December 27, 2004. The Box Culvert Extension reflects an early start date of June 11, 2004. Clearly the Box Culvert is not a direct successor to the water Line installation. The 74 days granted was sufficient to complete the project within the contract time. There were 104 weather days adjudicated to this contract. That is a total of 178 days between the weather days and the time extension. Ranger had opportunity to complete this project on time but for other circumstances not caused by the Department, they did not.

There is no entitlement to additional time.

ISSUE #2A

Ranger stated in their position paper that they believed the contract documents showed installation of the 48" water line below the Taylor Creek box culvert to be performed by the use of fittings. The Department directed them to deflect the pipe.

TSP 3600-6.1 first paragraph states "All water mains, service lines and appurtenances shall be installed as specified in these Special Technical Provisions and in accordance with the approved Plans and appropriate standard detail sheets as provided herein." This statement brings the plans in as part of the TSPs. The plans clearly specify the use of joint deflection going under the box culvert. Paragraph 8 of this provision refers to cases where the depth differences are extreme, still requires the Engineer's approval for the use of fittings. The Engineer denied the use of fittings and instructed the contractor to deflect the pipe in his answer to RFI# 2. Therefore there is no entitlement to additional compensation for the use of fittings.

ISSUE #2B

RANGER wrote in their position paper that the Department had not fully compensated them for the work performed in that Ranger had not been paid for the megalug joint restraints they used on the 36" and 48" water mains. Section 3600-12 of the TSPs state that the unit price for fittings shall include polyethylene encasement, mechanical or manufactured joint restraints and as-built preparation. The TSPs do not state the measurement shall include the weight of joint restraints. The DRB ruling quoted by Ranger has no relevance to this case, the TSPs are totally different.

There is no entitlement for payment for the megalugs.

DISPUTES REVIEW BOARD FINDINGS

The following is a compilation of facts that the Board obtained from the position papers and the hearing.

ISSUE 1.

Ranger states that they are due time to bring them "whole" i.e. to a position they bid the project with the 54" pipe already in place. The requirements of FDOT Specifications 5-12.2.2 and 8-7.3.2 require the contractor to provide written notice within 10 days of the commencement of the delay to a controlling item of work in order to maintain his right to additional time and/or compensation.

The Department stated that the contractor had not abided by the written notice within the 10 day time limit and therefore abandoned his right to time and/or compensation. However the Department issued a Unilateral Supplemental Agreement giving the contractor 74 additional days of contract time and continued to receive notice of additional delays due to the 54" pipe after the 74 day extension. The Board finds that Ranger gave sufficient notice. The Unilateral S.A. gave the contractor 74 days of time plus the indirect costs for those 74 days (see Tab A). Ranger did not show that they were delayed on "controlling items of work" over and above the 74 days granted. They submitted two schedules showing their project schedule with a data date of April 1, 2004 (see Tab B) and another schedule with a data date of June 1, 2004 (see Tab C). The stated purpose of the two schedules was to show that because of the 54" pipe line not being complete Ranger had to work sequentially instead of concurrently on controlling items of work. However, neither schedule shows the controlling items of work relative to the final completion date of the project. The Contractor provided no overall schedule or other means to demonstrate that it was the 54" pipe alone, and not delays in other areas of the project that extended time beyond the 74 days granted.

ISSUE 2A

Ranger's subcontractor, Maxwell Contracting, Inc. contends that the direction to "deflect" the 48" pipe under the box culvert was not supported by the contract documents and therefore Maxwell is entitled to additional money. Ranger's contention that the intent of the contract was to use fittings is not supported by the documents. The Technical Special Provisions 3600-6.1 states "Exception to stated depth requirement will be those portions of water main within casings or those portions that go over or under storm drains, sanitary sewers or other utilities as shown on the plans. In <u>all such cases</u>, water main shall be immediately brought back to proper grade by way of mechanically restrained MJ offset fittings". The interpretation of the contractor was to use fittings to go under the box culvert. The contractor submitted an RFI requesting the use of fittings to go under the box culvert (see Tab D) which was denied and he was instructed to deflect the pipe to go under the box culvert.

The Department and the City of Cocoa assert that the box culvert is not a "utility" and because the pipe crosses south of the box culvert, the crossing is a "stream crossing". Therefore the provisions of TSP 3600-6.1 do not apply. The requirement to deflect the pipe under the box culvert is clearly noted on Sheet U-7 to "deflect the 48" pipe under the box culvert" (see Tab E).

The Board questioned the pipe subcontractor as to how he bid the project, he replied to **deflect the pipe under the box as shown on sheet U-7**. The Board then asked how was the pipe installed and the reply was **by deflecting the pipe**.

ISSUE 2B.

Ranger contends that their subcontractor Maxwell Contracting, Inc. should be paid for installing "Mega-Lugs" on the fittings for the 48" pipe that it installed. Maxwell contends that the Technical Special Provisions for the project on page 27 of 41, Section 3600-12 states that the unit price for fittings was inclusive of joint restraints weights, associated accessories weights, bare fittings weights and is included in the tonnage calculations and should be paid for as such. They submitted a previous Dispute Review Board Finding that they stated supported their position. Technical Special Provision Section 3600-12 (see Tab F) starting at the last paragraph on page 26 of 41 actually states "Ductile Iron Fittings shall be included with the pipe laying length and shall be included in the price of the pipe for pipe sizes eight (8) inches or smaller. For sizes larger than eight (8) inches, ductile iron fittings will be paid for on a unit price per ton, laying length of fitting to be excluded from the total length of pipe. Unit price for fittings shall include polyethylene encasement, <u>mechanical or manufactured joint restraints</u> and as-built preparation". Ranger through their subcontractor points out that the Engineer (in their opinion) intended to pay for megalugs as the tonnage quantity he provided for ductile iron fittings was 19.04 tons versus the bare weight of the fittings is only 10.895 tons.

The Department and the City of Cocoa contend that the contractor was not required to use megalugs; he could have used a (manufactured) restraining system which does not require the use of megalugs per TSP section 3600-6.4 (see Tab G) "Mechanical joint (MJ) restraints shall be installed on all pipe connections......Acceptable restrainers are Grip Ring restrainers as manufactured by Romac Industries Inc., MJR restrainers as manufactured by Tyler Industries and Megalug retainer glands as manufactured by EBBA Iron Sales Inc. or approved equal.

As quoted above TSP Section 3600-12 states the Unit Price for fittings shall include polyethylene encasement, mechanical or manufactured joint restraints and as-built preparation. The Department also submitted a previous Dispute Review Board finding that supports their position. The Board finds that the

use of unit price language is similar to that used in many specifications (including FDOT Standard Specifications) wherein the use of "Unit Price for....shall include" are used to denote work that is to be included in the unit price for an item and not measured separately for payment. The Board finds that TSP 3600-12, by stating that the unit price for fittings shall include manufactured joint restraints, is consistent with industry practice for payment specifications in general, and clearly conveys that the restraints are to be included in the unit price for fittings and not measured separately by weight for payment.

DISPUTES REVIEW BOARD RECOMMENDATION

The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendations are based on the above documents.

The Board has reviewed all the information provided by The Department and Ranger. The Board met with representatives of both sides at the eastern end of the project and drove through the project stopping at key locations as one party or the other pointed out relevant aspects of the project. We listened to all the parties at the hearing held on September 28, 2006.

The Board finds, that in the case of ISSUE #1, the request for additional time over and above the 74 days granted by the Department, there is no entitlement. The contractor failed to establish that there was any delay, above the 74 days granted by the Unilateral Supplemental Agreement, to the controlling items of work, which is a requirement for a request for additional time.

In the case of ISSUE #2A, the request for entitlement to additional compensation for the use of fittings to allow the 48" pipe to be installed below the box culvert there is no entitlement. The plans clearly call for the pipe to be deflected to pass below the box culvert invert elevation, the contractor bid the job to include deflecting the pipe and the contractor installed the pipe by deflecting it to pass under the box culvert. Therefore, there is no entitlement to additional compensation.

In the case of ISSUE #2B, the request for entitlement to additional compensation for the use of Megalugs there is no entitlement. The Technical Special Provisions for the project do not specify the use of Megalugs. They do specify that the joints must be restrained but they list three different manufacturers of joint restraints, one of them being EBBA Iron Sales, Inc. the manufacturer of Megalugs that would be acceptable. They even provide for additional manufacturers if approved by the Engineer. The TSPs further stipulate that the cost of joint restraints, polyethylene lining and as-built preparation are to be included in the unit price for fittings and not paid for separately. The earlier DRB findings submitted by the Department are based on the same City of Cocoa specifications and this Board's ruling is consistent with the previous ruling.

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

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the District 5 Regional Disputes Review Board Peter A. Markham, P.E., Chairman Jimmy B. Lairscey, P.E., RDRB Member Michael C. Bone, P.E., RDRB Member

Signed for and with concurrence of all members

Peter A. Markham, P.E. Chairman

LIST OF TABS

A. FDOT UNILATERAL SUPPLEMENTAL AGREEMENT

- B. RANGER'S SCHEDULE. DATA DATE APRIL 1, 2004
- C. RANGER'S SCHEDULE. DATA DATE JUNE 1, 2004
- D. RFI #1 AND #2 RE: PIPE DEFLECTION
- E. PLAN SHEET U-7
- F. TECHNICAL SPECIAL PROVISION 3600-12 (portion thereof)
- G. TECHNICAL SPECIAL PROVISION 3600-6.4