



Florida Department of Transportation

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November 8, 2004

This Memo Has Expired

MEMORANDUM NO. 23-04
(FHWA Approved 11-8-04)

TO: DISTRICT CONSTRUCTION ENGINEERS

FROM: *For* Ananth Prasad, Director Office of Construction *David White*

COPIES TO: Bob Burleson (FTBA), Freddie Simmons, Don Davis (FHWA)

SUBJECT: HURRICANE IMPACT

In light of recent tropical storms and hurricanes affecting the State of Florida, the following process will be utilized, pursuant to subarticle 7-14 and subarticle 8-7.3.2, to “standardize” our response to contractors concerning impacts to construction projects.

1. A State of Emergency has to be declared by the Governor of the State of Florida. The Governor declared a state of emergency due to the threat of Tropical Storm Bonnie, Hurricane Charley, Hurricane Frances, Hurricane Ivan, and Hurricane Jeanne through Executive Order Nos. 04-0182, 04-184, 04-192, 04-202, and 04-217, respectively. The effective period for such states of emergency was declared on August 10, 2004 and set to expire on November 23, 2004 (60 days from the last Executive Order).
2. During the period of these states of emergency, the Department elects to pay the Contractor for the following, where the Contractor has taken every reasonable precaution:
 - Damage to material that was incorporated into the projects (Federal-aid participating);
 - Damage to material that would otherwise be permanently incorporated into the project (Federal-aid non-participating);

- Reconstruction of permanent or temporary erosion control features in accordance with subarticle 104-7.1 (Federal-aid participating);
- Taking down and replacing Maintenance of Traffic (MOT) devices as directed by the State Construction Office (Federal-aid participating);
- Repair of damaged post-mounted MOT signs, deemed to be essential by the Engineer and damaged where left in place; and repair of damaged Changeable (Variable) Message Signs that were specifically directed by the Department to be placed on projects during the storms (Federal-aid participating);
- On a case-by-case basis, as to suspension of operations ordered during the days following a storm and beyond the attached periods, idle equipment at a rate of 0.80 times the Standby Rate of 50% of "Rental Rate Blue Book" per subarticle 4-3.2, for the days on which the Contractor could have prosecuted work if not for the suspension. Each contract shall be evaluated on a case-by-case basis and factors such as adverse conditions at the job site, loss of power, etc shall be considered in the determination of whether the Contractor could have prosecuted work.

The Project Administrator and the Contractor must establish the extent of damage.

The following are non-compensable:

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

3. Pursuant to subarticle 8-7.3.2, the Department will grant a non-compensable time extension for the effects of the inclement weather.

If project resources (equipment and/or personnel) documented to be allocated to critical path or controlling items of work are diverted for emergency work for other governmental agencies, the Department will grant non-compensable weather days equal to the duration those resources were reasonably diverted. For project resources that are documented to initially not be allocated to critical path but due to their diversion from the project become critical, the Department may consider granting non-compensable weather days only to the duration equal to the time documented to be on the critical path.

For contracts with No-Excuse Completion/Milestone dates, any request for modification of any No-Excuse Completion/Milestone date must be submitted to the Director, Office of Construction for recommendation to the State Highway Engineer for approval/disapproval. Such No-Excuse Completion/Milestone dates will only be adjusted by the Department in its sole and absolute discretion, by action of the State Highway Engineer, based on the following criterion, and then only to the extent of whichever time calculation is greater:

- a. The amount of time that serious adverse conditions existed on the project (i.e. flooding, substantial erosion, etc.); and
- b. The amount of time the Department suspended the Contractor's operations.

There shall be no right of any kind on behalf of the contractor to challenge or otherwise seek review or appeal in any forum of any determination made by the State Highway Engineer under this provision.

4. The Contractor will be required to submit, at a minimum, the following below listed items, along with a certification under oath and in writing, in accordance with the formalities required by Florida law, that the request for compensation, time extension and/or modification of a No-Excuse Completion/Milestone date is made in good faith, that any supportive data provided are accurate and complete to the Contractor's best knowledge and belief, and that the amount of compensation and/or days requested accurately reflects what the Contractor in good faith believes to be well founded under the criteria provided above for consideration by the Department. Such certification must be made by an officer or director of the Contractor with the authority to bind the Contractor. Items required to be provided, and certified as to under oath and in writing, to the Department are:

- a. A detailed description of the activities and justification, with associated dates.
- b. A detailed cost estimate for work to be performed or actual costs for work already performed. Work should be priced based on bid items to the maximum extent possible or in accordance with subarticle 4-3.2 of the Standard Specifications.
- c. If applicable, listing of idle equipment present at the job site the day prior to the suspension, (including it's identification number with serial number, manufacturer, year manufactured, model and description), the standby rate determined in accordance with subarticle 4-3.2 (compensation only limited to 0.80 times the standby rate as described above), and the number of hours.

The above information shall be submitted no later than December 11, 2004 or 2 (two) weeks after final acceptance of the contract, whichever is sooner. A timely request is a condition precedent to any right for the Contractor to recover any time

and/or compensation. Any request that fails to fully comply with the certification requirements will not be reviewed by the Department.

5. Incorporate the following into the terms of the Supplemental Agreement:

Notwithstanding the provisions of paragraph 4 of this Supplemental Agreement Form, this Supplemental Agreement is entered into pursuant to Article 7-14 of the applicable Standard Specifications, and the contract time adjustment, if any, and the sum agreed to in this Supplemental Agreement are expressly accepted by the Contractor as being solely the result of the free exercise of the Department's District Secretary's sole discretion under 7-14. Further, it is expressly understood and agreed to by the Contractor that any time adjustment or sum to be paid pursuant to this Supplemental Agreement shall have no precedential value for purposes of constituting a basis for determining any potential future grant of time or money on this or any other project, and the facts, basis for, and particulars underlying the granting of any time or money hereunder shall also be inadmissible in any administrative, arbitration or legal proceeding arising out of this project, or any other project, for purposes of or relating to a claim of entitlement to time or money, whether as a settlement document or otherwise. The Department and the Contractor agree that the contract time adjustment, if any, and the sum agreed to in this Supplemental Agreement constitute a full and complete settlement of any and all issues of entitlement to either time or money under Article 7-14, for any events, occurrences, claims, or other circumstances arising on the project at any time, up to and including the date of this Supplemental Agreement, and the Contractor hereby accepts the terms of this Supplemental Agreement as full compensation for all costs of equipment, manpower, materials, overhead, profit and delay damages and for all their costs, whether direct or indirect, whether incurred now or in the future, related to any of the issues set forth in this Supplemental Agreement.

6. All time extensions and costs paid in relation to these emergencies shall be coded as "weather related new work, repairs, overruns or contract changes due to declared emergency" and the following reason codes:

901 – Hurricane Charley
902 – Hurricane Frances
903 – Hurricane Ivan
904 – Hurricane Jeanne

Pursuant to subarticle 8-7.3.2, the Department's determination as to entitlement as to time will be final, unless the Contractor can prove by clear and convincing evidence to a Disputes Review Board that the Department's determination was without any reasonable factual basis.

Pursuant to subarticle 7-14, the Department's determination as to entitlement as to cost will be final and there shall be no right of any kind on behalf of the contractor to challenge or otherwise seek review or appeal in any forum of any determination made by the District Secretary under this provision.

Applicability of this memorandum and/or specific inclusions and/or exclusions of items that are to be compensated for can only be appealed to the Director, Office of Construction.

If you have any questions, please feel free to call me at 850-414-4140 or suncom 994-4140.

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Attachment