



## Florida Department of Transportation

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SECRETARY

August 18, 2009

**This Memo Has Expired**

**DCE MEMORANDUM NO. 16-09**  
*(FHWA Approved: 8/14/09)*

**TO: DISTRICT CONSTRUCTION ENGINEERS**

**FROM:** David A. Sadler, P.E., Director, Office of Construction

**COPIES:** Bob Burleson (FTBA), Chris Richter (FHWA)

**SUBJECT: HURRICANE IMPACTS TO CONSTRUCTION PROJECTS**

To account for the potential impacts of the hurricane season, the following process will be utilized, pursuant to sub-article 7-14 and sub-article 8-7.3.2, attached hereto, to “standardize” FDOT responses to contractors concerning impacts to construction projects in advance of event and after the event has occurred. Suspension and resumption of operations on projects shall be implemented by the Districts on a case by case basis. No statewide closures will be implemented in advance of a hurricane unless directed by the Chief Engineer.

1. A State of Emergency has to be declared by the Governor of the State of Florida.
2. During the period of the State 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 stored materials at the project site that would otherwise be permanently incorporated into the project (Federal-aid non-participating);
  - Reconstruction of permanent or temporary erosion control features in accordance with sub-article 104-7.1 (Federal-aid participating);
  - Taking down and replacing Maintenance of Traffic (MOT) devices as directed by the District Construction Office (Federal-aid participating);

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- Repair of damaged post-mounted MOT signs, deemed to be essential by the Engineer and damaged where left in place; and repair of damaged Changeable (Variable) Message Signs that were specifically directed by the Department to be placed on projects during the storm (Federal-aid participating);
- In the days immediately preceding a storm, the Department may prohibit lanes closures to allow departing travelers unrestricted egress. These days, up to two calendar days with prohibited lane closures, would not be eligible for compensation. For any days exceeding the two calendar days, the Department will compensate idle equipment and labor per sub-article 4-3.2 for the days on which the contractor could have prosecuted the work but for the District directed suspension of operations (Federal-aid participating);
- In the days immediately following a storm, the Department may prohibit lanes closures to allow returning travelers and assistance service vehicles unrestricted ingress. These days, up to two calendar days with prohibited lane closures, would not be eligible for compensation. For any days exceeding the two calendar days, the Department will compensate idle equipment and labor per sub-article 4-3.2 for the days on which the contractor could have prosecuted the work but for the District directed suspension of operations. Each contract will 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 (Federal-aid participating).

\* Reference to Federal-aid participation in this section refers to use of regular Federal-aid funds.

The Project Administrator and the Contractor must establish the extent of damage. The Department will pay these costs no later than the 2<sup>nd</sup> estimate following submittal by the contractor provided that proper information and documentation has been provided.

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 except as stated above;
- Idle equipment except as stated above;
- Reduced production rates due to effects of the inclement weather;
- Loss of Profits; and
- Home Office, Jobsite, and any other, Overhead except as stated above.

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3. Pursuant to sub-article 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 or for restoring water, electricity service, and signalization, 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 the Chief Engineer delegates authority to the District Construction Engineers (DCE) to approve requests to modify No-Excuse Completion/Milestone dates. The Director, Office of Construction shall be sent copies of all No-Excuse Completion/Milestone dates approved by the DCE.

A request for modification of any No-Excuse Completion/Milestone date **in excess of four days** must be submitted to the Director, Office of Construction for recommendation to the Chief 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 Chief 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 that the Department suspended the Contractor's operations during normal (scheduled) work days (i.e., If contractor had five day work week scheduled or the contract prohibited work on Saturday and Sunday, then time will not be granted for such days).

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 Chief 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

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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 sub-article 4-3.2 of the Standard Specifications.
- c. If applicable, listing of labor and idle equipment present at the job site the day prior to the suspension, (including its identification number with serial number, manufacturer, year manufactured, model and description), the standby rate determined in accordance with sub-article 4-3.2 and the number of hours.

The above information shall be submitted no later than six weeks after storm impact or 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 applicable provisions of the contract including Article 7-14 of the applicable Standard Specifications, and to the extent this Supplemental Agreement covers rebuild, repair, restore and make good costs under 7-14 it is expressly accepted by the Contractor as being the result of the exercise of the Department's District Secretary's discretion under 7-14. Further, it is expressly understood and agreed to by the Parties 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 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 this emergency shall be coded as "weather related new work, repairs, overruns or contract changes due to declared

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emergency”, please refer to the SCO website for the specific reason code for each hurricane.

<http://www.dot.state.fl.us/construction/Publications/ManualsMain.htm>

Pursuant to sub-article 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 sub-article 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.

7. Emergency Relief (ER) on Active Construction Projects:

The primary intent of this memorandum is to address the Department and FHWA position on reimbursing the contractor for damages on active construction projects as a result of hurricanes. It is FHWA’s position that a roadway under construction should be treated the same as a roadway with an inherent deficient condition unless a roadway segment cross section has been completed in conformance with the project’s contract requirements. Therefore, FHWA generally will NOT reimburse for fixing damages on active construction projects with ER funding unless damage occurs on a segment of the roadway in which the cross section has been completed. Regular federal aid funds may still be used for the repairs provided the repair work is determined to be outside the requirements of the construction contract, thus it is not the contractor’s responsibility to make the repairs at no additional cost under the contract terms.

The bulleted items under #2 above are the only relevant items possible for funding under FHWA’s Emergency Relief (ER) program. Below is the FHWA program position:

- a. Only project sites in declared counties sustaining at least \$5,000 in ER eligible damages are eligible for reimbursement.
- b. In addition to FHWA making an ER eligibility determination, the FHWA District Transportation Engineer must also determine if the repair is an Emergency Repair or Permanent Repair. Emergency repairs are reimbursed at 100% if completed within 180 days after the event. Permanent repairs are reimbursed at the normal pro-rata share for that particular facility (Interstate 90%, other 80%). FHWA approval must be obtained prior to performing repairs classified as permanent repairs. Any reimbursement request under the FHWA ER program must be documented on a FHWA Detailed Damage Inspection Report (DDIR) to be completed by FHWA.

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c. The following bulleted items in this memorandum are possibly eligible subject to review and approval by the FHWA District Transportation Engineer on a case by case basis:

- Damage to material that was incorporated into the projects.
- Reconstruction of permanent or temporary erosion control features in accordance with sub-article 104-7.1.
- 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.

If you have any questions, please call David Sadler at 850-414-5203 or Brian Blanchard at 414-5240.

DS/ww

Approval for Delegation

  
Brian Blanchard, P.E., Chief Engineer