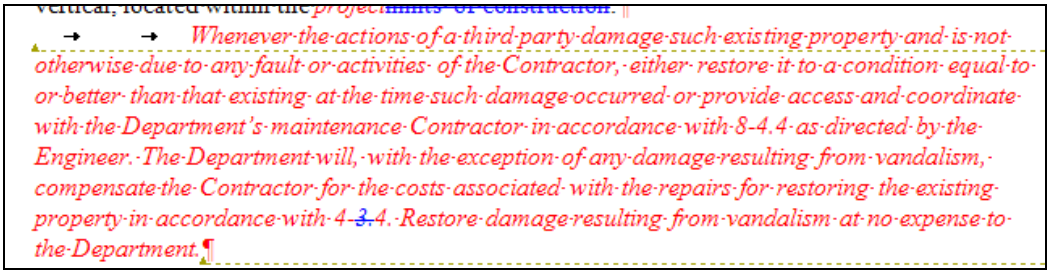
0071100 LEGAL REQUIREMENTS AND RESPONSIBILITIES TO THE PUBLIC COMMENTS FROM INTERNAL/INDUSTRY REVIEW

Steven King
D4 GC Office
954-777-4526
stephen.king@dot.state.fl.us

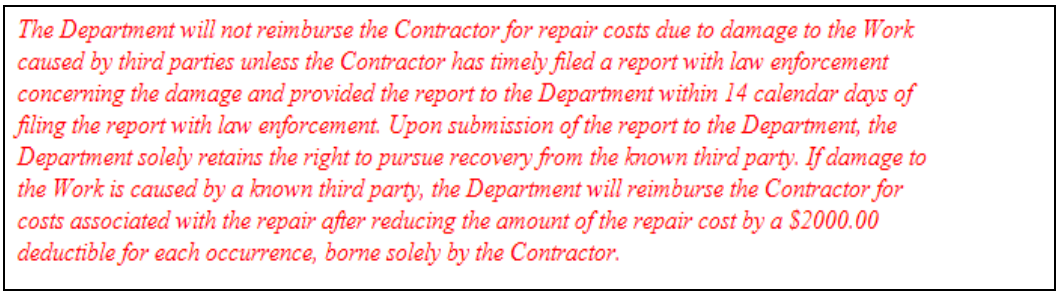
Comment: (6-9-13)
In the last paragraph of 7-11.1 it says



vertical, located within the ~~project limits of construction.~~

→ → *Whenever the actions of a third party damage such existing property and is not otherwise due to any fault or activities of the Contractor, either restore it to a condition equal to or better than that existing at the time such damage occurred or provide access and coordinate with the Department's maintenance Contractor in accordance with 8-4.4 as directed by the Engineer. The Department will, with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with the repairs for restoring the existing property in accordance with 4-~~3.~~4. Restore damage resulting from vandalism at no expense to the Department.*

7-14 (below) seems to indicate 3rd party damage, arguably including vandalism caused by a 3rd party, could be paid or partially paid for subject to a deductible, in possible conflict with 7-11.1. Would it be clear which provision controls?



The Department will not reimburse the Contractor for repair costs due to damage to the Work caused by third parties unless the Contractor has timely filed a report with law enforcement concerning the damage and provided the report to the Department within 14 calendar days of filing the report with law enforcement. Upon submission of the report to the Department, the Department solely retains the right to pursue recovery from the known third party. If damage to the Work is caused by a known third party, the Department will reimburse the Contractor for costs associated with the repair after reducing the amount of the repair cost by a $2000.00 deductible for each occurrence, borne solely by the Contractor.

Response: Vandalism or theft of existing property will be the responsibility of the Department (7-11.1). Vandalism or theft of installed material will be unknown third party damage (7-11.4). Articles 7-11.1 and 7-14 will be clarified. Changes made.

****

L. Ervin Sterling III
863-519-2919
ervin.sterling@dot.state.fl.us

Comment: (6-10-13)
1. Perhaps you will consider adding "sod" to the list of "…applies to, but is not limited to….." items. We often see plans notes addressing disturbed sod. Spec 570-3.1 addresses matching the sod type of adjoining private property, but not for replacing damaged sod. We often see plans notes on this, and are not finding specific language in the Specs to cover it.

Response: "Sod" will be added. Change Made.

2. Our District One Public Land Corner note has changed, with informal email approval from your office as of January 8, 2013. The PPM has not yet been edited to reflect this change, although a revision request was sent in last month. It now reads "If any Public Land Corner within the limits of construction is in danger of being destroyed and has not been properly referenced, immediately notify the Engineer in conjunction with the District Location Surveyor." I feel this may be a good time to strengthen the Spec, specifically 7-11.1 General, fourth paragraph, so that our plans note is no longer necessary (it goes on every set of plans).

Response: This will be reviewed, but the existing language appears to be sufficient. No changes made at this time.

****

Daniel Strickland
410-5620
daniel.strickland@dot.state.fl.us

Comment: (6-11-13)
I have a comment concerning Proposed Spec Revision for "LEGAL REQUIREMENTS AND RESPONSIBILITY TO THE PUBLIC, 7-11 Preservation of *Existing* Property". Copper theft is a very hot topic in Maintenance and we are currently in the process of revising our Performance Based Scope language to address this issue. We've recently had a few PB Contracts (for Highway Lighting) in South Florida where the amount of copper wire stolen exceeded the entire contract amount. Our revised language includes a cap (10% of annual contract amount) and the contractor is expected to repair/replace all damage up to that amount. We are finding it a little difficult to track and verify all the associated costs incurred so we plan to revise the language to better address our needs. See the proposed language below that expressly mentions how we want to address vandalism, but does not mention theft. The Legal Office has informed us that theft is not considered vandalism so I would recommend language be added to address 3rd party damage resulting from theft (specifically on Construction Contracts). Let me know if you have any questions or concerns.

> *Whenever the actions of a third party damage such existing property and is not otherwise due to any fault or activities of the Contractor, either restore it to a condition equal to or better than that existing at the time such damage occurred or provide access and coordinate with the Department's maintenance Contractor in accordance with 8-4.4 as directed by the Engineer. The Department will, with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with the repairs for restoring the existing property in accordance with 4-3.4. Restore damage resulting from vandalism at no expense to the Department.*

Response: Vandalism or theft of existing property will be the responsibility of the Department (7-11.1). Vandalism or theft of installed material will be unknown third party damage (7-11.4). Articles 7-11.1 and 7-14 will be clarified. Change Made.

****

Christian Cummings
ccummings@acmebarricades.com

Comment: (7-2-13) For the sake of avoiding confusion and arguments in the future, can we get something in writing from someone with authority at the Department that states that the proposed spec 7-14 includes temporary attenuators? Another option that might clarify the Department's intent would be to add language to 102-13.12 stating that "payment for restoring damaged crash cushions will be per 7-14."
The proposed spec 7-14 states that "Repair cost will be determined in accordance with 4-4". Spec 4-4 states "When the Department requires work that is not covered by a price in the Contract and such work does not constitute a "Significant Change" as defined in 4-3.1, and the Department finds such work is essential to the satisfactory completion of the Contract within its intended scope, the Department will make an adjustment to the Contract. The Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount." As I understand the specification, restoring damaged attenuators would not constitute "Significant Change" as defined in 4-3.1 and therefore, by spec, the "Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount". If this is the truly the case, it would present real problems as it would be completely subjective. If the Department's intent is to determine cost using time and materials, why isn't 4-3.2.1 just referenced instead of 4-4?

Response: Article 7-14 includes temporary attenuators. The Department's intent is to compensate the Contractor in a fair and equitable amount which may include time, material, labor, and equipment in accordance with 4-3.2.1 but also other options. No changes made.

****

John Baldwin
jbaldwin@bobsbarricades.com

Comment: (7-3-13 Text: PAYMENT FOR ATTENUATOR DAMAGE • Over the course of years Bob's Barricades has performed the Maintenance of Traffic on tens of thousands of projects throughout the State of Florida. The MOT includes installing, maintaining and repairing (damaged by motorists) crash cushions (attenuators. BBI has repaired or replaced thousands and thousands of crash cushions in a timely manner that have been hit, damaged or completely destroyed by motorists. • The cost of the device only is $9,000 to over $30,000 each. This does not include shipping, labor to repair, and lane closures. Time to schedule, Invoicing and clerical time to document the occurrences. • Damage to redirective crash cushions caused by motorists can range from a complete and catastrophic hit which requires replacement to a minor a nuisance hit. Many hits are somewhere in between. • The majorities of the collisions occur in the late night or AM hours between midnight and 5am during darkness. • The vast majority of the collisions are hit and run accidents with one vehicle involved. The driver's car in most cases is damaged but able to drive away from the incident. In some cases the cars are towed without the knowledge of the contractor as they are not on the job or may be working miles away. In this case no law enforcement report is ever recorded. • In the cases law enforcement is called to the scene a report

is written the following scenarios are likely to occur. • It is often difficult to determine which law enforcement agency if any was on the scene. Unless the Prime contractor is on the scene at the time of the incident. Therefore finding an accident report can be difficult if not impossible. • All to often the incident is a hit and run, the driver has no insurance or is underinsured as the minimum statutory requirement for liability insurance is below the cost of most damage. • In cases where a third party insurance company receives a claim the insurance company often haggles with the contractor over who is responsible or the cost of the repairs or replacement of the unit. Insurance companies are not familiar in most cases with a crash cushion therefore causing a great deal of delay if any costs of repair are to be covered. • The FDOT specification calls for repair or replacement of the damaged unit immediately or within 24 hrs. Currently the 20% mark up at times does not even cover the cost of the repair. Take into the consideration that we must pay for the parts (30 days net) and all of the other costs involved. • It is also impossible at bid time to determine the frequency of damage to the units and in many cases to even determine how many units will be used. The dilemma of who's will be responsible to cover the costs of the hits (the prime or the subcontractor is likely to cause a great deal of animosity) Does the Prime add a great deal of cost to their bid to the state to cover what may or may not happen causing the state to pay up front for damages that may not occur. • The system works fairly well at present. The attenuators are being repaired timely and the motoring public is safer for it.

Response: The Department recognizes this is a change in direction for crash cushions. These changes are a sharing of risk between the Department and Contractor for damages to installed material caused by third parties. Third party damage to temporary and permanent crash cushions will be handled in accordance with 7-14 the same as other installed materials. No changes made.

****

D-4

Comment: (7-7-13) Dist 4 Const has the following comments: (Resending under the correct spec section) 7-11.1:
Suggest the section include defining existing to also mean any such items that need to remain until replaced by the work. Example: existing ped pole gets knocked down by third party. The ped pole will ultimately be replaced when a new one is installed as part of the work.

Response: This is addressed in the first sentence of 7-11.1. If the ped pole is needed before it is replaced then the Department will either make the repairs or pay the Contractor to make the repairs. No changes made.

Also: the new text in this section should address theft vs. vandalism.

Response: Vandalism or theft of existing property will be the responsibility of the Department (7-11.1). Vandalism or theft of installed material will be unknown third party damage (7-11.4). Articles 7-11.1 and 7-14 will be clarified. Change Made.

7-14 Second para: "For damage to the Work caused by third parties, the Contractor may pursue recovery" add:"from the third party"

Response: Agree change made.

"after reducing the amount of the repair cost by a $2000.00 deductible for each occurrence, borne solely by the Contractor." Not sure what we mean by "solely by the Contractor", what about subs?

Response: "solely by the Contractor" clarifies there is no sharing of the deductible between the Department and Contractor. No Change Made.

"the Contractor may be reimbursed proportionally, up to the amount of the deductible" What do we mean by "proportionally"? Does this imply that if we may not recover 100% of our costs? If so thne I understand the purpose.

Response: If the Department is not successful in recovering 100% of the repair costs then the deductible reimbursed will be the percentage recovered. For example, if the damage is $50,000 and the Department recovers $25,000 then the Department will pay the Contractor $48,000 initially for the repair and reimburse the Contractor 50% of the deductible or $1,000 since 50% of the repair costs were recovered. Ultimately, the Contractor's cost is $1,000 and the Department's is $24,000 for the repair. No Change Made.

****

Tom Brady
954-895-9891
tmb@coloneybell.com

Comment: (7-5-13)
In speaking with ATSSA members, some contributed to the following questions/comments. Is it the Department's intent to reimburse the contractor under 7-14 for damages to temporary attenuators caused by a 3rd party? If so, will the Department clarify this by specifically mentioning temporary attenuators within 7-14?

Response: Article 7-14 includes temporary attenuators. There is no need to specifically mention temporary attenuators. No changes made.

Assuming that this is the Department's intent, we feel that the contractor should not have to bear the cost of the first $2,000 of all impacts. In the case of an unknown 3rd party, the contractor should not have to be liable for half the damages plus an additional $2,000. Unlike any other item covered in 7-14, attenuators are designed to be impacted. Energy is absorbed, therefore minimizing damages to a vehicle, thus allowing the driver to leave the scene undetected. This is not often the case when a vehicle hits a solid fixed structure such as a bridge.

Response: The Department recognizes this is a change in direction for crash cushions. These changes are a sharing of risk between the Department and Contractor for damages to installed material caused by third parties. Third party damage to temporary and permanent crash cushions will be handled in accordance with 7-14 the same as other installed material. No changes made.

****

From State Construction Office:

- The intent of Article 7-14 is to share the risk when damage to installed work is caused by a third party. The intent is not to share the risk when damage to stored material or equipment is caused by a third party. That will remain 100% the responsibility of the Contractor. To clarify this intent, "Work" has been changed to "installed material" in the second paragraph to better reflect the intent of the language.
- The Contractor doesn't file a report with law enforcement but contacts and receives a report from law enforcement. Also, the same report, called a Florida Traffic Crash Report, is provided statewide. The language is Article 7-14 has been changed to "… Contractor has contacted law enforcement and received a complete Florida Traffic Crash Report…"

THE REMAINING COMMENTS WERE RECEIVED DURING INTERNAL REVIEW AND RESPONSES PROVIDED PRIOR TO INDUSTRY REVIEW.

Response: The table below summarizes the current requirements and the proposed changes to Articles 7-11 and 7-14. I have provided responses to the individual comments and questions below.

Event	Current responsible party	Current Reference	Proposed responsible party	Proposed Reference
Damage to a existing property caused by third party	Department	Article 7-11.4	Same as current	Article 7-11.1 (The language was moved from 7-11.4 to 7-11.1)
Damage to a existing property caused by the Contractor	Contractor	Articles 7-11.1 and 7-11.2	Same as current	Articles 7-11.1 and 7-11.2
Damage to the Work (defined in 1-3) caused by a third party	Contractor	Article 7-14	Shared between Department and Contractor	Article 7-14

Dave,
I had good discussion with Rudy on Monday. I believe if you all would consider to issues that seem to be in everyone's comments we could move forward with pretty good buy-in.

1) Instead of basing replacement cost on unit price bid or statewide average let's use force account specs. In many instances you may find the repair is more costly than a new installation due to tearing out and disposing of damaged one. In other times the repair may only be for a partial item rather than the entire one (sign replaced, but not foundation, etc.). The statewide average or the unit price may not accurately reflect cost of that particular item in that location.

Response: The Department agrees. Change made.

2) Please consider removing the $2000 deductible when dealing with unknown 3rd party damage. The assessing of the "first $2000" seems very unfair.

Response: The proposed change is a risk sharing compared to the current requirement of all risk allocated to the contractor. The Department does not want to absorb more risk associated with damage caused by an unknown third party. The Department recognizes and understands Industry's desire for a more equitable risk allocation which is why the Department initiated this proposed specification change and Industry may mitigate this risk through construction prices. With these changes the Department will have data that can be reviewed to assess the risk allocation. No changes made at this time.

Thanks,
Bob

This seems to be very one-side for FDOT.
I'm assuming the Builders Risk insurance idea didn't pan out, as we had anticipated.

If the contractor does not submit a damage report for a known third party within the required time (not specified), the contractor is not eligible for any repayment by FDOT.

Response: Agree that a report is required to seek reimbursement from the Department. Language has been added clarifying that the contractor may choose to pursue recovery themselves from the third party and providing a timeframe to provide the report to the Department.

In that case, can the contractor go after the third party for payment?

Response: Yes, but if unsuccessful, the Contractor can't then seek reimbursement from the Department. Language added.

We typically recover overhead and profit when we do recover dollars.

Response: See above response to comment 1 from Bob Burleson.

As Bob mentions below, the Contractor has to take every necessary precaution against damage to the work. This is a tough sentence. We would love to shut down a facility or not open new lanes to traffic, but this is typically beyond our control. We have no means of making sure that drivers carry the minimal required insurance. We do not license drivers, or take away licenses of bad drivers.

Response: This is existing language that is unchanged. Shutting down a facility is not an option the vast majority of the time. The standard indexes and traffic control plans address the various conditions for maintaining traffic through the work zone.

7-14:
For known third parties:
Why the $2000 deductible? I feel the contractor should be paid the full amount whenever FDOT recovers those dollars. Remove the 'may reimburse'. If FDOT decides not to go after the third party, they should still pay the contractor the cost of the repair. Again, why should there be a deductible. We don't know how aggressive FDOT will be on this matter.

Response: The Department aggressively pursues recovery for damages and has a high success rate of recovery. The Department's intention is to reimburse the deductible when damages are recovered, but the Department will retain the option if some unknown situation occurs.

For unknown third parties:
The 50% seems reasonable, but I don't understand the $2,000 deductible. The contractor is already stuck with the method of determining repair costs. In many cases the statewide average will not cover repairs. For instance a sub mobilizing to repair a short section of guardrail, will likely charge a mobilization fee. The bid units for temporary concrete barrier include some handling costs, but the material costs are typically discounted for salvage at the end of the project. So we are already taking a hit. The cost to repair accident damage, is often more expensive than the cost of new work, since there is typically removal and incidental repairs required as well as installation. Of course FDOT will only remember those few times when it might work out in our favor.

Response: See above response to comments 1 and 2 from Bob Burleson above.

JC

"I think this is a good compromise, keeping in mind that all damages are currently 100% the responsibility of the contractor."

Response: Thank-you.

That's not how the Spec reads now. In 7-11.1, as it reads now, it states that repairs must be made at the Contractor's expense for damage to an existing structure caused by the construction operations or equipment. IT also states that we must "Preserve from damage all property which is in the vicinity of or in any way affected by the Work. Third Party damage to an existing sign doesn't fall into this and is the sole responsibility of the Department.

Response: See above summary table.

In the Department's addition in 7-14, they state that "The Contractor will take charge and custody of the Work, and take every necessary precaution against damage to the Work…" If this is the new rule, then when we request a reduction in the speed limit from 70 to 60 mph to keep

the public from bouncing off of each other, as we routinely do, the Department shouldn't be allowed to deny the request , as they routinely do, unless there is some danger to the travelling public. If we're that responsible for it, we need more control. Hell, barrier wall on both sides and down to one lane.

Response: This is existing language that is unchanged. Shutting down a facility is not an option the vast majority of the time. The standard indexes and traffic control plans address the various conditions for maintaining traffic through the work zone.

As for the deletion of payment for restoring damaged crash cushions and the $2,000 deductible per occurrence for damage by third parties, this isn't right. Most damaged signs aren't $2,000. So, this will be borne solely by the Contractors/subs. At some point, if this is implemented, we'll all get smart and add some amount to our bids to cover this additional risk-shift. I guarantee the MOT subs will increase the crash cushion costs by 1,000%; as they should. The Department is betting that we will continue to slit each other's throats, at least for a few years, and they will gain the windfall. What they should do is pay for damages to existing property 100%

(Response: That is the current requirement that is unchanged. See above summary table.),

pay nothing for damages by a known third party that has adequate coverage (we can go after the insurance)

(Response: Language added clarifying it the contractor's option to either seek reimbursement from the Department or pursue recovery themselves, but not both.),

and they should pay only true cost for damage to newly installed work done by an unknown third party

(Response: Paying actual costs split 50/50 subject to the deductible is what is proposed, see response to comment 1 from Bob Burleson. Paying invoice plus 20% for crash cushions is replaced by actual costs.); my opinion.

Bob
(772) 370-1598 m

Bob,
I believe this spec is better than what currently we have, but could use some tweaking. Here are my comments :

1) Am I right to interpret 7-11 and 7-14 that the cost of repairs to damage to **Existing** property will be reimbursed 100% to the Contractor and that the cost of repairs to damage to the **Work** (new installations) will be handled by 7-14? If so, that should be stated clearly.

Response: Correct.

2) $2,000 Deductible – 7-14 states that the Department will pursue reimbursement from known third parties and **if successful may** reimburse the Contractor for the deductible?? I guess this would be dependent on how much the FDOT would be reimbursed by the Insurance Co. in relation to the total claim submitted?? If so, then the spec should be restated. The use of the word "may" leaves it open to the CEI's whim and interpretation of this..

Response: The Department's intention is to reimburse the deductible when full damages are recovered, but the Department will retain the option if some unknown situation occurs.

3) Most of the items HSD installs are the above ground items that normally get hit – guardrail, cable rail, light poles, signs, permanent attenuators, ITS, and signal items. Many of the hits will be under the $2,000 threshold. This will be dealt with by including extra costs in the bid for this risk. Will they reduce the deductible to $1,000.

Response: With these changes the Department will have data that can be reviewed to assess the risk allocation. No changes made at this time to the deductible amount. Language added clarifying it the contractor's option to either seek reimbursement from the Department or pursue recovery themselves, but not both.

4) There will be much repair of "New work" and certainly existing property that may be partial or not covered by existing contract unit pricing. So, I would assume we will be allowed to price the work. For example, if a light pole is hit, the foundation may survive the hit. Spec isn't clear on how repairs on partial or new pay items (existing property) will be handled ??

Response: See response to comment 1 from Bob Burleson.

1) "Take every necessary precaution" – Can this be eliminated/modified, as it will leave it open to the CEI's opinion as to whether a concrete barrier wall or something else should have been placed in front of every light pole for protection. The necessary precautions are usually included in the MOT plans and the Standard Indexes.

Response: This is existing language that is unchanged. Agree that the standard indexes and traffic control plans address the various conditions for maintaining traffic through the work zone.

2) The language in the last paragraph of proposed Section 7-14 **"may, at its discretion, reimburse"** leaves Contractors at the FDOT's mercy for compensation of repairs due to unforeseeable causes - such as: Acts of God - Hurricanes, sink holes, tornadoes. This could be a very large risk. For example, will the FDOT force contractors to fix hurricane damage on the ongoing projects? This could get expensive if sign structures start blowing over. Can we get them to delete this paragraph?

Response: This is existing language that is unchanged. The Department's intention is to reimburse the Contractor in these situations and past experience has shown this to be true, but the Department will retain the option if some unknown situation occurs.

Regards,

Lou Buenaventura