

DISPUTES REVIEW BOARD RECOMMENDATION

December 08, 2009

Robert A. Parks III
Executive Vice President
Westwind Contracting, Inc.
2675 Winkler Avenue
Fort Myers, FL 33901

Kristina Clarke deMoya, P.E.
CEI Sr. Project Engineer/Vice President
Consul-Tech Construction Management, Inc.
3434 Hancock Bridge Parkway, Suite 207
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RE: Financial Project No. 195705-1-52-01; SR 78 from East of Slater to West of I-75,
Lee County

Dear Mr. Parks and Mrs. deMoya:

Westwind Contracting, Inc. (Westwind) requested a Dispute Review Board Hearing concerning entitlement to their certified claim dated April 15, 2009. Westwind contends this claim was submitted pursuant to the claim provisions of the contract and was denied in its entirety by FDOT, through its representative ConsulTech Construction Management, Inc. This claim is for monetary compensation and additional contract time arising from extra work to implement repairs to storm sewer pipe installed on the above referenced project. Westwind seeks to recover costs incurred to perform repair work which was required due to design errors, express and constructive changes to Westwind's work and over-inspection of Westwind's work. Westwind also seeks a contract time extension and delay damages as a result of the delays it suffered as a result of the issues over the storm sewer pipe.

Contractor's Position:

CLAIM OF WESTWIND CONTRACTING, INC.

Westwind Contracting, Inc. ("Westwind") presents its Claim for monetary compensation and additional contract time arising out of extra work to implement repairs the Florida Department of Transportation ("FDOT") demanded to storm sewer pipe installed as part of Westwind's contract with FDOT for work on State Road 78 (Bayshore Road) from East of Slater Road to West of I-75 in Lee County Florida (hereinafter the "Project"). This Claim is being submitted in accordance with Supplemental Specification Sections 8-7.3 and 5-12 of Westwind's contract. This Claim is being certified per Specification Section 5-12.9.

A Narrative and Supporting Exhibits are included in this Claim . The Narrative provides a factual summary of events that led to the extra work Westwind was required to perform to repair portions of the storm sewer pipe in late 2006 and early 2007 as well as in late 2008. Westwind seeks to recover costs incurred to perform repair work which was required due to design errors, express and constructive changes to Westwind's work, and over-inspection of Westwind's work. Westwind also seeks a contract time extension and delay damages as a result of the delays it suffered as a result of the issues over the storm sewer pipe.

Relevant Project documentation is attached as exhibits to this Claim. Calculations computing the compensation Westwind is due are set forth in this Narrative and in the tabbed exhibits. Westwind reserves the right to amend this Claim as circumstances dictate.

I. INTRODUCTION TO THE CLAIM

Westwind's Contract included the widening of Bayshore Road. The scope of Westwind's Work included milling, resurfacing, new construction, shoulder pavements, drainage improvements, and highway signage along State Road 78 (Bayshore Road) in Lee County, Florida. ConsulTech was designated to be FDOT's CEI on the Project. The Contract provided a contract performance time of 550 calendar days. This performance time was extended by the parties through contract modifications during the course of the Work to December 29, 2007.

Westwind's Work included installation of storm pipe in accordance with the details and profiles shown on the drawings and Sections 125 and 430 of the Standard Specifications (2004 edition). A copy of Section 125

is attached to this Claim Narrative as Exhibit 1, and a copy of Section 430 is attached as Exhibit 2. Westwind would be paid based on unit prices for installed quantities of pipe culvert.

A.

The Standard Specifications required a minimum amount of backfill cover to properly protect installed pipe. Section 125 specified 4 feet as the minimum amount of backfill needed to protect the pipe.

Section 125-8.1.3 included:

"Do not allow heavy construction equipment to cross over culvert or storm sewer pipes until placing and compacting backfill material to the finished earthwork grade or to an elevation at least 4 feet above the crown of the pipe."

Damage could occur if the pipe was not buried deep enough to dissipate loads imparted from either vehicle traffic or construction activities. Section 125-8.1.3 was included in the contract because of this issue and was a directive that pipe be protected from construction and traffic loadings by at least four feet of backfill.

To insure this specification requirement was satisfied, FDOT's design should have placed the pipe deep enough to provide at least 4 feet of fill on top of the pipe. If the pipe was designed too shallow, the contractor would not be able to provide the minimum cover needed to protect the pipe.

FDOT's designers on the Bayshore Project did not design the storm sewer system deep enough to provide the needed 4 foot of cover. In many instances, the top of the storm pipe was designed at elevations within the stabilized layer of the subgrade and often within inches of the base material.

As will be explained in this Claim, Westwind installed the storm sewer system under close and constant surveillance by ConsulTech. The pipe was inspected before installation and found acceptable. Westwind's installation work was closely observed, and construction procedures were noted and approved. Densities were taken of the pipe backfill. Despite Westwind providing proper and acceptable pipe, and installing and backfilling it properly, there were many instances where the pipe was ultimately found damaged when final inspections took place. Much of the damage to the pipe is directly attributable to the defective design that did not properly protect the pipe and left it exposed to damage from vehicle loads.

Westwind had to expend substantial resources and money to investigate FDOT's allegations and to implement the pipe repairs demanded by FDOT and ConsulTech. Westwind seeks time extensions and compensation for all its costs and to administer and repair pipe that was damaged as a result of the design's failure to properly protect the pipe. Specifically, Westwind claims compensation for the costs and time impacts to repair damage to storm pipe designed with less than 4 foot of needed backfill. In fact, much of the damage that Westwind repaired was to pipe with less than 1 foot of cover.

The Contract referenced FDOT's Design Standards Booklet, dated January 2002. This booklet included Index No. 205 entitled "Cover Height." (Exhibit 3) This Index identified a minimum cover height for asphalt pavements of six inches from the top of concrete pipe (top of the bell) to the bottom of base material. This six inch minimum dimension was increased to seven inches in the Contract Special Provisions.

Index 205 also provided notes and details for "Extra Material for Cross Culverts under Flexible Pavements." To the extent pipe cover was less than twelve inches, these notes required base material to extend down to the spring line (midpoint) of the pipe. The purpose of this increased thickness of base material was to protect the pipe from damage from vehicle loads.

Westwind's contract did not include any requirement for a thickened base around shallow pipe as set out in Index 205.¹ As a result of FDOT's failure to provide for this "extra" base material, Index 205 effectively required a minimum of 12 inches of cover between the top of the pipe and the bottom of the base.

The Contract thus provided two different requirements for minimum design depths of concrete pipe: Index 205 and Standard Specification 125-8.1.3. Index 205 required a minimum cover of 12 inches (below the base), and Specification 125-8.1.3 required 4 feet of cover above the crown of the pipe. Satisfying both provisions in the contract required the design and construction to provide a minimum cover of 4 feet.

¹ It is standard for FDOT designers to identify in the plans the specific locations where a thickened base must be installed to protect shallow pipe. FDOT and its designers show on the cross sections where the thickened base detail will be employed so bidders can properly price the work. No such designations were made in the plans for the Bayshore Project

A hearing was conducted by the Disputes Review Board ("DRB") on June 29, 2007. At that time the parties debated whether the design of the pipe was too shallow, and whether damage to the pipe was caused by the lack of cover over the pipe. The DRB found entitlement to Westwind:

"for claims for payment for repairs to pipe that do not have the clearance of one foot (1') cover between the bottom of the base and the top of the pipe bells for such that may reasonably be determined not to be caused by the Contractor whether by improper installation or inadvertent destruction."
(Exhibit 4, p. 7)

Much of the repairs was to pipe that had cover less than what the DRB expressly found entitlement for, and thus, the DRB decision directly supports Westwind's claim. However, the DRB did not specifically rule on Westwind's entitlement to recover for repairs that were required to pipe with more than 12 inches of cover (i.e., between 1 and 4 ft of cover). Westwind seeks to recover not only the costs to repair pipe with less than 12 inches of cover but for repairs made whenever total design cover was less than four feet.

The pipe damage that Westwind repaired in 2006 and 2007 stemmed from the same problem - a defective design. Obviously, the shallower the pipe, the more likely the pipe would be damaged from vehicle loads. According to the Contract Documents any pipe with less than 4 feet of cover was not properly protected and was subject to damage from traffic and construction loads.

The damage found to the pipe in 2006 and 2007 only can be explained by lack of cover and traffic and construction loads. The pipe had been thoroughly inspected by ConsulTech before installation. Installation methods and backfill procedures were carefully maintained by Westwind and monitored by ConsulTech's full time inspectors. Even though the Standard Specifications recommend 4 foot of cover, very little pipe was designed deep enough to meet this criteria. Since the pipe was undamaged when it was placed and its installation was carefully controlled, the only explanation for the cause of the damage was the shallow design and the construction and traffic loads imposed after installation.

B.

Separate and apart from the issues related to the lack of adequate cover for the pipe, FDOT and ConsulTech implemented inspection procedures and inspection criteria that were not supported by or consistent with the Contract. These new and more stringent inspection criteria were a change to the Contract, which directly and significantly increased the extent of pipe repairs FDOT and ConsulTech demanded. Many of the repairs performed in 2008 arose from the new and more stringent inspection procedures.

Westwind seeks to recover all costs and time impacts for the repairs that were required because of FDOT's use of inspection criteria that was not authorized or supported by the Contract.

II. SUMMARY OF FACTS — 2006-2007 REPAIRS

A. The Design of the Pipe

FDOT's design of the storm sewer system did not provide the minimum cover as required in the Contract Documents. The vast majority of pipe on the Project was designed with cover less than 4 feet. Most pipe had cover of less than 1 foot. Exhibit 5 is a table which identifies the specific pipe locations repaired by Westwind in 2006 and 2007. This table lists the actual pipe cover as established in the plan cross-sections and profiles for each pipe run. The ranges of pipe cover are color coded for easy reference. The design cover is the dimension from the top of the pipe bell and the bottom of the base material.

The plan cross sections confirm that FDOT and its designer made a concerted effort to design the storm pipe on this Project as shallow as possible. While a shallow design will reduce construction costs, it unreasonably exposes the pipe to damage from construction activities and traffic loads. The designers ignored the mandates of Standard Specification Section 125 and Design Index 205 regarding providing minimum cover to protect the pipe.

Designers are obligated to take constructability issues into consideration when developing a design and preparing plans. CPAM requires careful consideration of constructability issues. In this case, while the designers sought to minimize costs, they failed to consider the damage that could occur because the pipe was designed so shallow.

B. Westwind's Original Installation of the Pipe

Installation of the storm sewer pipe started in 2004 and was completed in 2006. FDOT pre-approved pipe was purchased from authorized suppliers and delivered to the site. ConsulTech, the Project CEI, inspected and approved all pipe before installation.

ConsulTech observed Westwind's work during pipe installation and performed verification testing to confirm that Westwind achieved required densities of the backfill. Project records confirm that backfill was properly placed and densities achieved.

ConsulTech voiced objections to Westwind's work whenever ConsulTech saw anything irregular. Generally, ConsulTech noted few problems with Westwind's work and rarely noted that Contract requirements were not being met or that pipe sections were not being properly installed. On those occasions where ConsulTech noted problems, Westwind always took action to correct the issue and resolve the concern. ConsulTech documented these problems and Westwind's corrections in its Daily Reports of Construction.

On at least three occasions Westwind performed repairs to damage that was caused by the pipe being designed too shallow. For example, on January 23, 2006, ConsulTech documented Westwind's replacement of several sections of pipe damaged by the mixing equipment used to stabilize the subgrade. This mixer had hit and damaged the bells of pipe joints. (Exhibit 6) The pipe was so shallow that it extended into the stabilized subgrade portion of the embankment. Similar repairs were performed during the original pipe installation on January 19 and March 13, 2006 (see, e.g., Exhibit 7).

During the original pipe installation, Westwind expressed concerns about the pipe being designed too shallow and being exposed to damage. Westwind's concerns were documented in correspondence dated March 23, 2006. (Exhibit 8) Westwind recommended to ConsulTech that the pipe be protected using the thickened base details shown in Index 205. However, ConsulTech refused to consider any design corrections. ConsulTech insisted that the Index 205 detail was not applicable and, furthermore, ignored the obvious problem with the shallow pipe design. ConsulTech merely instructed Westwind to proceed with "caution".

The record further confirms that discussions were held during job progress meetings about the problems being created by the shallow pipe. None of these discussions produced any resolution of the problem. Westwind continued and ultimately completed its pipe work under ConsulTech's constant and close supervision.

C. ConsulTech's Review of the Pipe Videotapes

After completing the pipe work, Westwind arranged to videotape the pipe as required by the inspection provisions of Section 430. VHS tapes were made in the latter part of 2006 per the Contract requirements and delivered to ConsulTech. The videotapes Westwind produced met the requirements of Specification Section 430-4.8.

Under Contract requirements, ConsulTech reviewed the videos to "inspect the pipe for line and grade, joint gaps, joint misalignment, leaks, damage, and for debris." As this review proceeded, ConsulTech began issuing letter reports identifying locations where ConsulTech believed deficiencies might exist.

It soon became apparent that ConsulTech was not experienced in inspecting pipe by the examination of VHS tapes. ConsulTech identified "possible" and "apparent" deficiencies at hundreds of pipe locations. However, once documented, FDOT and ConsulTech considered these "possible" and "apparent" problems to be actual Contract deficiencies. These deficiencies were found even though ConsulTech had maintained close and constant monitoring of all Westwind's piping work.

ConsulTech wrote at least 30 letters to Westwind identifying locations where ConsulTech found possible deficiencies. Some of these letters, including those dated October 30, November 10, December 13, December 28, 2006, January 12, 2007 and February 2, 2007 are attached to this Claim. (Exhibit 9) The list of possible deficiencies grew significantly as the video review continued and more and more letters arrived from ConsulTech.

ConsulTech's inspection letters identified all leaking joints as deficiencies even though the Specifications required that joints be water tight only to 2 psi. ConsulTech made no effort to determine whether joints met this 2 psi criterion. Moreover, ConsulTech identified hairline cracks as deficiencies even though cracks were not a criterion for inspection under Specification Section 430, which only listed line and grade, joint gaps, joint misalignment, leaks, damage, and debris.

Westwind was shocked at the number of deficiencies ConsulTech was finding and concerned about ConsulTech's qualifications to review and interpret the pipe videos. It did not make sense for ConsulTech to be finding so many deficiencies in light of the close and continuous surveillance that ConsulTech had maintained throughout performance. The only possible explanations for the large number of deficiencies being discovered, despite ConsulTech's close inspections during the work, were that they had occurred after installation (i.e., from traffic loads), and/or that ConsulTech had not properly analyzed the videotapes. Westwind suspected that ConsulTech was identifying many pipe problems that did not exist, that were not deficiencies under the Contract inspection criteria, or that were caused by the shallow pipe design.

FDOT accepted ConsulTech's inspection results without question and demanded that Westwind repair all pipe deficiencies identified by ConsulTech. Westwind obviously had major concerns about ConsulTech's video inspections and the scope of repairs FDOT was demanding. Westwind put FDOT on notice under the Claims provisions of the Contract that it would seek to recover all costs associated with the repairs to the pipe, including administrative and technical time to evaluate the videos and respond to the allegations being made by FDOT. In addition, it would seek an extension of time and its delay costs associated with having to make repairs to the pipe. (Exhibit 10)

D. Westwind's Separate Evaluation of the Pipe

Westwind's concerns over ConsulTech's qualifications to interpret the videotapes, and the large number of pipe deficiencies ConsulTech was finding, prompted Westwind to retain Danny Kirkland, an independent pipe consultant. Mr. Kirkland worked for Florida Concrete Pipe Corporation and had over a decade of experience in the design, construction and inspection of concrete pipe. (Exhibit 11) Mr. Kirkland's background and experience qualified him to review and interpret pipe videotapes.

Mr. Kirkland performed **an independent review** of the videotapes for the purpose of identifying pipe that failed to meet the inspection criteria of the Contract specifications. A copy of his analysis is included at Exhibit 12. Mr. Kirkland was able to identify all pipe locations that had problems and needed repairs per the Contract requirements. **The number of pipe deficiencies Mr. Kirkland found was significantly less than what ConsulTech had identified.** Mr. Kirkland's separate evaluation confirmed: 1) that ConsulTech had identified numerous "possible" or "apparent" deficiencies where none actually existed, and 2) that most of the locations in need of repairs were in shallow pipe runs.

It is now obvious that ConsulTech had little if any experience in inspecting pipe using videotapes and that ConsulTech adopted a policy to identify any irregularity it saw as a deficiency in need of repairs. For example, ConsulTech considered all locations where hairline cracks existed to be defects. **Concrete pipe will naturally develop hairline cracks, and such cracks do not make the pipe deficient. It is well established in the engineering profession that autogenous healing of cracks in concrete pipe occurs and solves most all crack issues.** Moreover, the Standard Specifications do not even list cracks as an inspection criterion. Nevertheless, ConsulTech identified a large number of cracks as requiring repairs.

Most of the pipe damage Mr. Kirkland identified was in locations where the pipe was designed too shallow to satisfy the requirements of Section 125-8.1.3 or even the minimum 1 foot cover required by Index 205. While ConsulTech had ignored Westwind's concerns expressed during the work about potential damage to shallow pipe, it was not hesitant to identify this shallow pipe as requiring repairs when damage was found.

E. 2006 - 2007 Repairs Performed by Rockline

Westwind was unwilling to make all repairs being demanded by FDOT because many of the alleged problems ConsulTech had identified did not exist or did not require repairs. However, **Westwind did repair all deficiencies that Mr. Kirkland could identify in his videotape analysis.** Westwind made these repairs between December 2006 and February 2007. All repairs were performed under protest because the vast majority of the pipe damage arose from the shallow design of the pipe, not from Westwind's performance.

Most of the repair work was performed by Rockline VAC System Inc., a subcontractor to Westwind experienced in pipe repairs. Rockline's work included chemically sealing pipe joints and lining sections of pipe. Westwind paid Rockline for its repair work. Copies of Rockline's proposal and invoice for its repairs are attached as Exhibit 13. Rockline's charges for its pipe repairs total \$323,212.50. As explained later in this Claim presentation, Westwind seeks to recover \$284,085.90 (plus markup) of the amount charged by Rockline. This amount represents the invoiced costs to repair pipe that was designed too shallow to provide proper protection. Westwind also claims the costs it incurred to support Rockline's repair activities. The computations of Westwind's claim amounts are discussed later in this Narrative.

F. Early Repairs Performed by Westwind

Prior to Rockline performing its repair work, Westwind had performed repairs to shallow pipe using its own crews. Westwind's crews made pipe repairs on eight dates prior to Rockline's involvement. Three of these dates occurred during the major pipe installation work and involved repairs to pipe that had been damaged by the mixing equipment employed to stabilize the subgrade. Westwind also made pipe repairs on five additional dates between September 18 and November 11, 2006. All this work was to repair damage to shallow pipe.

Force account charges for the work Westwind performed on these eight dates are included at Exhibit 14 and total \$37,615.96. Westwind claims this amount as compensation for the repairs to shallow pipe it made with its own forces.

G. Completion of the Early Repair Work and FDOT's Initial Assessment of Liquidated Damages

By late 2006, Contract time had been adjusted several times extending the Contract completion date to December 29, 2006. **By December 29, the Project was substantially complete, the road was open, and FDOT was enjoying beneficial occupancy of the roadways.** Pipe repairs Westwind was performing did not affect the beneficial use of the Project. No liquidated damages were justified under the Contract in light of the completion of the work.

The pipe repairs recommended by Mr. Kirkland were completed by Westwind, under protest, in February 2007. At that time ConsulTech informed Westwind that FDOT was stopping contract time as of February 19, 2007. FDOT thereafter **assessed 52 days of liquidated damages (Dec. 30 — Feb. 19)** at the contract rate of \$5,240 per day. In a March 28, 2007 letter, ConsulTech threatened an additional assessment of liquidated damages if more repairs were required after FDOT made further pipe inspections. (Exhibit 15). The 52 days of liquidated damages covered the time used by Westwind to make repairs to shallow pipe in early 2007. No other work activities occurred during this timeframe.

Westwind seeks an extension of its Contract performance time in this Claim. Part of the time extension claim is for the time needed to make the repairs to the shallow pipe in early 2007. Those repairs were required because of a design defect, and therefore the time associated with those repairs is excusable. As will be further described in this Narrative, Westwind is entitled to a time extension through the date when ALL repairs were completed on the Project (December 24, 2008) and remission of ALL liquidated damages, including the 52 days of liquidated damages that FDOT withheld due to the pipe repairs performed in 2007.

When FDOT stopped time in February 2007, it was not prepared to accept the Project and issue a final estimate. FDOT suggested that Westwind had not performed all pipe repairs needed on the Project. While FDOT did not have a problem with the repairs Westwind had performed, it would not agree that the Kirkland videotape analysis identified all needed repairs. In the weeks and months that followed Westwind's repairs to the problems identified by Mr. Kirkland, **FDOT continued to demand repairs to all the other locations where ConsulTech had found "possible" and "apparent" problems.** Although time had been stopped on February 19, the Contract remained open, inspections continued and there continued to be the threat of additional liquidated damages.

III. SUMMARY OF FACTS — FDOT 2007 LASER INSPECTIONS AND ADDITIONAL REPAIRS PERFORMED IN 2008

A. FDOT'S Decision to Perform Further Inspections Using Laser Profiling Measurement Technology

Before and during Westwind's contract performance, FDOT was in the process of developing new procedures for the inspection of concrete pipe. These new procedures used laser profiling measurement technology. The 2007 Standard Specifications ultimately included substantially revised inspection provisions requiring this laser profile technology.

These new and more sophisticated inspection procedures were not applicable to Westwind's contract. Westwind's contract fell under the 2004 Standard Specifications, which required Westwind to make and submit VHS videotapes of its installed pipe. Westwind followed its contract procedure and prepared and submitted videotapes. However, as previously discussed, **ConsulTech was not qualified to interpret the VHS tapes and ended up identifying far more deficiencies with the pipe than actually existed.**

In response to the obvious difficulties ConsulTech had in interpreting the VHS tapes, FDOT decided to implement its new laser technology procedures to inspect Westwind's pipe.

The evidence also suggests that FDOT wanted to use Westwind's project as a "test" case for its new laser inspection procedures.

Westwind first learned of FDOT's plan to initiate laser measurement technology inspections from ConsulTech's letter of March 28, 2007. (Exhibit 15) At that time the parties still were debating whether any deficiencies with the pipe remained after Westwind had performed repairs. Rather than resolve the debate per the terms of written agreement, FDOT decided to do a further inspection of Westwind's pipe using these new laser measurement procedures.

FDOT's unilateral decision to implement laser profiling measurement technology to inspect Westwind's pipe constituted a deviation from or modification to Westwind's contract. Westwind initially voiced objections to this unauthorized procedure and demanded a hearing with the DRB. One of the issues addressed by the Disputes Review Board at the June 29, 2007 DRB hearing was whether FDOT had the right to utilize laser profiling measurement technology to inspect Westwind's pipe. The DRB found that FDOT had the right to inspect pipe located within FDOT owned right-of-way in any manner FDOT wished. However, the DRB found that FDOT could not "use laser profiling to force the contractor to a higher standard of

repairs beyond those which would be discovered on the standard videos without additional compensation." (Exhibit 4) In other words, while FDOT had discretion to inspect pipe it owned (i.e., found in FDOT right-of-way) in any manner, it could not change the inspection and acceptance criteria for Westwind's work from what had been agreed upon in the Contract Documents. To the extent defects were not revealed using the Contract VHS videotape procedures, **FDOT could not demand repairs to problems found only through the laser measurement technology.**

FDOT hired Carter Pipe Inspection, LLC ("Carter") to inspect all of Westwind's pipe using this new laser measurement technology. However, events ultimately confirmed that **Carter was not properly qualified to perform these inspections and did not properly calibrate, maintain or operate its laser equipment.** As a result, the data generated by Carter's inspections was inaccurate and unreliable. By the time Carter completed its laser work and its data could be analyzed, it was obvious to all that Carter was inexperienced and unqualified to either take the laser videos or interpret the laser data. However, for nearly a year FDOT relied on the Carter analysis as the measure to evaluate Westwind's performance.

As a result of its laser inspections of virtually every pipe run Westwind installed, Carter identified as many as 700 problems, with 590 identified as violations of Westwind's contract obligations. These alleged deficiencies included open joints, chipped spigots, cracks, defective or exposed gaskets, incorrect laterals, leaks and spalls. FDOT demanded, in correspondence issued by ConsulTech, that Westwind make repairs to all these reported deficiencies. In making these demands **FDOT ignored the DRB ruling that FDOT could not use laser technology to identify deficiencies that were not revealed through the contractually authorized video inspections, and threatened to place Westwind in default if it did not make all demanded pipe repairs.**

B. Additional Testing and Investigations of the Pipe after the Carter Laser Inspections

Westwind was forced to expend extensive efforts to review, catalog, interpret and analyze the Carter laser data. Hundreds of hours had to be devoted to study and respond to the data generated by the unauthorized laser inspections. It was only after a careful and thorough investigation of the data that Westwind (and ultimately FDOT) realized that most of the Carter data was flawed and unreliable.

It was unfair for FDOT to unilaterally change the inspection procedures and then use flawed methodologies to implement these unauthorized procedures. It was only through a detailed study of the Carter data that Westwind was able to discover the significant deficiencies in Carter's analysis. Westwind suffered substantial prejudice in having to devote time to study and rebut the unreliable data generated by Carter. FDOT's departure from the Contract and its hiring of an unproven and inexperienced consultant created a large amount of work for Westwind to defend its pipe installation. Westwind seeks to recover compensation for the estimated costs of Westwind's own in-house forces having to devote time and energy to respond and rebut FDOT's unauthorized laser inspections.

In addition to having to devote its own in-house work force to evaluate the Carter data, Westwind determined that it was necessary to hire engineering support. Westwind hired Joe Ebner, a professional engineer to assist it in reviewing and responding to the laser measurement procedures use and the data being generated by Carter. Mr. Ebner's resume is attached at Exhibit 16.

Westwind refused to proceed with repairs to locations identified by Carter for multiple reasons. First, the contract did not authorize FDOT to use laser technology to inspect Westwind's pipe. Second, Westwind previously had repaired all actual deficiencies identified through contractually authorized inspection procedures. Third, **Carter had identified numerous problems that had never been observed by ConsulTech when it evaluated the original videos.** In using laser technology, FDOT was requiring repairs to areas "beyond those which would be discovered on the standard videos." Fourth, the Carter analysis was inherently flawed because of Carter's lack of qualifications and experience, and because of its misuse and the mis-calibration of the laser equipment. Fifth, Carter had identified literally hundreds of what it referred to as "open joints" without following the joint criteria set out in the Standard Specifications, Section 430-7. Finally, many of Carter's deficiencies were identified as "cracks" when cracks were not defects under the Standard Specifications.

Westwind continued to work with FDOT not only to avoid an impasse over repairs but also to avoid a precipitous declaration of default by FDOT. Multiple meetings and discussions were held to discuss the Carter findings, the actual condition of the pipe, and the need for any additional repairs. The parties spent significant time addressing the issue of "open joints" that Carter had created by its laser measurements. Carter identified approximately 275 "open joints" as being defective because they were outside the specified tolerances. FDOT adopted Carter's findings that 275 "open joints" were defective and demanded Westwind make repairs.

Westwind never believed that there were actual problems with these pipe joints. Unfortunately, it took months to convince FDOT and ConsulTech that the 275 joints Carter identified were not defective. The

"open joint" issue was only resolved when Westwind spearheaded efforts to identify the correct inspection criteria and arrange for testing of representative joints. This testing confirmed that the joints were in compliance with and acceptable under the Contract. Westwind's in-house staff and Mr. Ebner took the lead in coordinating this investigation and testing to evaluate and confirm the acceptability of pipe joints. In a May 27, 2008 ConsulTech letter, FDOT finally conceded this issue and accepted the joints as installed. (Exhibit 17)

According to FDOT and ConsulTech's count, the resolution of the 275 "open joints" reduced the number of pipe deficiencies identified by Carter to 315. For the most part, these remaining defects included locations where Carter had found "cracks", "leaks", "repairs", or "exposed gaskets".

Again, Westwind had to investigate and address these 315 remaining issues even though it did not consider them deficiencies. Numerous field studies, meetings and communications occurred to evaluate these additional locations. Westwind noted that under a clear reading of the contract the vast majority of these locations were not defective.

Over one-third of the remaining items on Carter's deficiency list (122 locations) were identified as "cracks." Cracks in pipes, particularly hairline cracks, are not a criterion for inspection, acceptance or rejection of the pipe. According to Section 430 of the Specifications, inspection of pipe will include "line and grade, joint gaps, joint misalignment, leaks, damage, and for debris." (Standard Specifications, Section 430-4.8). Not cracks². FDOT had previously received a DRB ruling under the 2004 Specifications on FDOT's rights to inspect and reject pipe based on cracks. This DRB decision, dated 16 September 2007, ruled that Specification Section 430 did not include cracks as a criterion for inspection and acceptance purposes. (Exhibit 18) Demanding repairs to cracks was not authorized by the Standard Specifications, and any such repairs would be extra work under Section 4-3.

Carter's list of deficiencies also included 49 locations described solely as "leaks". (Exhibit 17) Leaks are not defects unless the hydrostatic pressure on the installed and leaking pipe is less than 2 psi (for pipe required to be "soil tight"). FDOT, Carter and ConsulTech all failed to determine whether any leaks violated this 2 psi specification. They simply assumed that any leak constituted a deficiency that had to be repaired. Such an interpretation of the contract cannot be supported.

Under Article 5-9 of the Standard Specifications, Westwind is entitled to recover all its costs to evaluate and respond to the unauthorized laser inspections Carter conducted. This included but is not limited to Westwind's efforts to evaluate the condition of pipe joints, leaks, cracks and other alleged deficiencies. Westwind's analyses, investigations and testing were equivalent to the process of "uncovering the work" under Article 5-9. Since the vast majority of Westwind's work was ultimately determined to be acceptable (Westwind only made 59 repairs out of 700 problems Carter identified), Westwind is entitled under the Contract to be reimbursed for all its expenses in responding to and rebutting the Carter inspections.

C. Additional Pipe Repairs Performed by Westwind

After all the investigations, meetings, calls and correspondence, FDOT ultimately agreed to reduce its demands for further repairs to 59 specific pipe locations. A list of the 59 repair locations is attached as Exhibit 19. Westwind thereafter proceeded to make repairs to these 59 specific locations under protest and reserved its rights to claim for the costs and time impacts to implement these repairs. (Exhibit 20)

The work to repair these 59 locations occurred between November 24 and December 24, 2008. Many of these repairs involved the installation of liners by Rockline, the same subcontractor that had made liner repairs late in 2006 and early in 2007. FDOT gave written notice of the Final acceptance of Westwind's work on January 28, 2009 and issued the Final Estimate (Estimate No. 35) for the contract on or about March 4, 2009.

Westwind agreed during discussions with FDOT/ConsulTech (and agrees for purposes of this Claim) to accept responsibility for the repair of two of the 59 locations. Westwind agrees to be responsible for these two repairs due to the nature of these specific problems.³

Westwind therefore seeks recovery in this Claim for the costs and time associated with repairing the remaining 57 pipe locations. Of these 57 locations, 50 were identified as cracks and 5 were identified as leaks. (Exhibit 19) As explained above, neither cracks nor leaks are deficiencies under the terms of Westwind's Contract. Requiring Westwind to fix these 55 locations without adequate contractual justification

² FDOT has since deleted this inspection provision from the 2007 Standard Specifications. Again, FDOT wants to ignore the Contract it entered with Westwind in favor of applying a later version of its Standard Specifications.

³ Westwind agrees to accept responsibility to repair the last two locations listed on Exhibit 19. These locations are highlighted in a tan color on Exhibit 19.

constituted a change to the contract. The repair work was extra work under the Contract and Westwind is entitled to be compensated for these repairs.

Further justification for Westwind's recovery of its repair costs for the work to make these 2008 repairs includes the following:

1. The inspection provisions in Westwind's contract called for preparation and review of VHS videotapes. Videotapes were prepared and submitted by Westwind consistent with the requirements of the contract. **ConsulTech failed to properly review these videotapes.** Danny Kirkland properly analyzed these videotapes and identified all areas in need of repairs. In 2006 and early 2007, Westwind completed all repairs to all problems identified by the videos. In doing so, Westwind satisfied the requirements of its Contract. All additional repair work was not required by the Contract and thus was extra work.

2. The DRB ruled that FDOT could not force Westwind to a higher level of repairs beyond those which would be discovered on the standard videos. (Exhibit 4) However, a substantial number of deficiencies identified by Carter's laser measurement technology were not revealed through the contract VHS videotaping procedures. In fact, of the 57 repairs Westwind seeks to recover on, 28 (or 49%) were not discovered or listed in ConsulTech's original inspection letters. These 28 "new" repair locations are identified with yellow highlighting on Exhibit 19. Repairs to problems that were not discovered using the contractually authorized inspection procedures constitute extra work for which Westwind is entitled to recover.

3. **Many of the 2008 repairs were repairs made to shallow pipe.** Similar to the pipe repairs performed in late 2006 and early 2007, damage identified and repaired in 2008 involved pipe runs designed too shallow to protect the pipe from damage caused by construction and traffic loads above. Westwind is entitled to recover all costs associated with the repairs of these pipes as a result of this design defect.

A summary of the pipe cover (between type of top of pipe bell and bottom of base) is included in the last column of the repair chart included as Exhibit 19. This information confirms that only **8 of the 57 locations being claimed had 4 feet of cover** as contemplated by Section 125-8.1.3 of the Standard Specifications. **Two locations had less than 12 inches of cover, 13 additional locations had less than 18 inches of cover, 15 additional locations had less than 2 feet of cover, and an additional 19 had between 2 and 4 feet of cover.**

Westwind seeks recovery for its repairs it made in 2008 to shallow pipe for the same reasons it is entitled to recover for similar repairs completed in 2006 and 2007 (as previously discussed in this Claim Narrative).

IV. WESTWIND'S DIRECT COST CLAIM FOR REPAIRS TO THE PIPE

A. Westwind Claims for the Costs to Repair Shallow Pipe in 2006-07

Westwind seeks compensation for the costs associated with its repairs to shallow pipe in 2006 and early 2007. Westwind **claims for repairs to all damaged pipe designed without at least 4 foot of cover. Pipe with less cover was subject to being damaged by traffic and construction loads.** Section 125-8.1.3 of the Standard Specifications requires at least 4 foot of cover. There is no dispute that **nearly all storm pipe on the Project was designed without 4 feet of cover.** In fact there are numerous locations where the design did not provide the 1 foot of cover required by Design Index 205.

Westwind followed good construction practices and cannot be held responsible for damage to pipe when the design failed to provide a minimum cover. Moreover, ConsulTech refused to address and resolve this problem when Westwind raised it during construction early in 2006.

As detailed below, Westwind seeks compensation for the costs of liner repairs performed by Rockline, for Westwind's incurred costs to support Rockline's operations, for repairs performed by Westwind's own forces, for Westwind's estimated administrative costs to evaluate the design and confirm that damage was occurring at shallow pipe locations, and for Westwind's project overhead expenses (both jobsite and home office) incurred during the extended period that repairs were being made.

1 Westwind Claims for the Costs Incurred for Rockline's 2006-07 Repairs to Shallow Pipe

Westwind evaluated the design depths and design cover at all locations repaired by Rockline. This evaluation is included at Exhibit 5 and is organized by pipe run. Every Rockline repair made to a particular run of pipe is listed in the line item for that pipe run. For example, Exhibit 5 lists the pipe run from structure **S-106 to S-103 and shows that two separate repairs** were performed, **one at 53 feet and one at 95 feet.** This chart shows that the design cover (amount of backfill material from the top of the bell to the bottom of the base) was .29 feet (at 53 feet) and 1.14 feet (at 95 feet). Westwind **claims reimbursement for the repairs to these two areas since neither have 4 feet of cover as required by the Specifications.**

The table included at Exhibit 5 lists all the 2006-07 Rockline repairs Westwind claims for. These tables are color coded to easily identify the depth of the design cover for each repair location. The invoiced amount for each Rockline repair is listed in the last column and totals \$284,085.90 (which includes mobilization). Westwind claims this amount plus its general contractor markups for Rockline's repair work, or the total of \$316,915.27.

2. Westwind Claims for the Work Performed to Support Rockline's Activities during the 2006-07 Repairs

Westwind incurred direct expense to provide labor and equipment support to Rockline during Rockline's pipe repairs. Rockline required a crew and equipment from Westwind to support and assist in its pipe repairs. Westwind provided MOT services including flagmen and signs. It provided equipment support including pumps, and on occasion, a backhoe. Westwind also provided labor support.

The total expenses incurred by Westwind for this support totaled \$86,551.87 and is detailed in Exhibit 21. Appropriate adjustments are made to Westwind's total support costs to account for the Rockline pipe repairs that Westwind is not claiming for (i.e., repairs made to pipe with at least 4 foot of cover). Since 87.89% of Rockline's costs were to make repairs to pipe with inadequate cover (less than 4 feet) Westwind claims 87.89% of its total Rockline support costs, or \$76,070.44. ($\$284,085.90 / \$323,212.50 = 87.89\%$). This computation is shown on page 4 of Exhibit 5.

3. Westwind Claims for its 2006 Repairs to Shallow Pipe

Westwind claims for the costs of pipe repairs performed by Westwind with its own crews. Specifically, Westwind devoted time to make repairs to shallow pipe during 8 days in 2006. These 8 dates are identified and listed in Exhibit 14. On these 8 dates, Westwind mobilized crews to either replace pipe or make pipe repairs due to the shallow design of the pipe. Force account charges Westwind is seeking to recover for this work total \$37,615.96. (Exhibit 14)

B. Westwind's Claims Arising from the Investigation and Testing of the Pipe

Westwind claims for its **estimated costs to investigate and test the pipe locations claimed to be damaged**. This claim includes Westwind's review of the pipe damage originally identified by ConsulTech in its videotape reviews in 2006 and 2007. Westwind spent substantial time and effort to investigate the design and determine that the damage to the pipe was typically at locations where the pipe was designed with insufficient cover. Westwind has estimated the amount of time devoted to the review and evaluation of ConsulTech's inspections and the actual condition of the installed pipe. This work was done by Westwind employee Ramon Castillo in December 2006 through February 2007. Estimated time devoted to this analysis is summarized in Exhibit 22.

Westwind also **claims for the estimated time devoted by Westwind employees to review and analyze the data generated by the Carter laser measurements**. FDOT changed the inspection procedures for this contract and then hired an unqualified and inexperienced consultant to perform these inspections. Westwind's project management had to expend numerous hours in reviewing and responding to the hundreds of deficiencies identified by Carter. In that regard, Westwind incurred employee time to review the Carter laser data, compare that data to the original ConsulTech inspections, evaluate the data against the contract documents, perform further cover evaluations, evaluate pipe joints against the Carter data, determine whether observed leaks violated the 2 psi requirement, and develop and implement testing of representative pipe joints.

Westwind claims for the estimated time devoted to this investigation. Westwind employees did not keep detailed records of the amount of time devoted to these tasks. However, estimates could be developed from the dates and scope of work for the various evaluations, tests, studies and field work performed. Estimates of this overall effort are also included in Exhibit 22 and include the time of Ramon Castillo, Brian Ziglar, Rick Camp, and survey rodmen who were involved in monitoring ground water elevations. Including the early evaluations performed in 2006 and early 2007, Westwind claims a total \$92,721.39 for the estimated effort needed to react to FDOT's demands and the Carter analysis.

Westwind also hired Joe Ebner to assist in the review and evaluation of the Carter analysis. Westwind incurred third party costs to arrange for the pressure testing of pipe joints to prove to FDOT that the Carter inspection had improperly identified "open joints" as a problem.

Westwind claims:

1. *For Westwind's project management to address, study and respond to the allegations made by ConsulTech and Carter: \$ 92,721.39 (Exhibit 22)*
2. *Amounts for Joe Ebner to assist Westwind in investigating and responding to the Carter inspections: \$ 17,860.09 (Exhibit 23) and*
3. *In house and third-party charges for Pressure testing of Pipe Joints to confirm the Joints were acceptable: \$11,494.80 (Exhibit 24)*

C. *Westwind Claim for Costs for 2008 Pipe Repairs*

1. *Westwind Claims for its Subcontractor Costs for 2008 Pipe Repairs*

Rockline performed liner repairs in 2008 and invoiced Westwind \$97,596.10 for this work. Rockline installed liners at 23 specific locations, and these are identified on Exhibit 19 (Column identified as "Repair Type"). As previously described, Westwind is entitled to recover compensation for repairs at all 23 locations.

Copies of Rockline's invoices for this liner work are included at Exhibit 25. Westwind also claims contract authorized markups on Rockline's invoiced costs for a total claim amount of \$108,966.05. (See Exhibit 27, page 27)

Sewer Viewer also performed repairs in 2008 including all pressure grouting and grout wiping and invoiced Westwind \$17,341.85 for its work. Copies of Sewer Viewer's invoices are included at Exhibit 26.

Westwind does not claim for the repairs performed by Sewer Viewer for the repairs in the line from S-520 to S-530. (See Exhibit 19) The value of Sewer Viewer's work in connection with this repair is found at Exhibit 27, sheet 28. Adjusting Sewer Viewer's invoiced costs for this item not being claimed, and including appropriate markups for Westwind, results in a net claim for Sewer Viewer's work of \$18,905.25. (See Exhibit 27, sheets 28 & 30)

Westwind also claims for the costs of MOT barricades provided by Bob's Barricades. Invoiced costs for these barricades totaled \$901.32. Westwind seeks reimbursement for the costs of these barricades plus markup. Total claimed for this item is \$1,006.32 (See Exhibit 27, sheet 29)

2. *Westwind Claims for the Costs to Perform and Support the 2008 Pipe Repairs*

Westwind incurred direct expenses to provide labor and equipment support for the repairs subcontracted to Rockline and Sewer Viewer. In addition, Westwind used its own forces to perform some repairs in 2008 and claims for those repair costs. Support equipment included pumps, an excavator, a compactor, and a loader. Labor costs included equipment operator support, MOT services, operation of the pumps, surveying support and supervision.

Westwind does not claim for the work to make the repairs to the run between S-561 to S-562. Charges for repairs to this specific location are found at Exhibit 27, sheet 31 and have a marked up value of \$3,083.27.

Total claimed costs for Westwind labor and equipment totals \$52,782.15, less \$3,083.27, or \$49,698.88. Support for these costs are included at Exhibit 27, (sheets 2 - 25, 31).

Finally, in addition to labor and equipment costs, Westwind also claims \$1,831.80 for the costs of materials purchased and used for the repairs. These material costs are listed on Exhibit 27, sheet 26.

V. *WESTWIND'S CLAIM FOR ADDITIONAL TIME AND COMPENSATION FOR DELAYS.*

A. *Westwind's Request for a Time Extension*

*Previous supplemental agreements had extended the Contract time to December 29, 2006. By this date, the Contract work was substantially complete and the Project was open to traffic. **FDOT had beneficial use of all areas on this Project. Thus time should have stopped by December 29, 2006.***

The repairs Westwind performed in 2006-07 and in 2008 did not affect traffic nor FDOT's beneficial use of the Project. Thus, this pipe repair work should not have had any effect on Contract time. Nevertheless, FDOT decided not stop time until all repairs were completed.

FDOT assessed 52 days of liquidated damages from December 30 to February 19, 2007, during the time pipe repairs were being performed as a result of the ConsulTech/Danny Kirkland videotape inspections. Moreover, in a letter of March 28, 2007, FDOT asserted that it would assess additional liquidated damages

for the time required to perform any additional repairs. (Exhibit 15) As confirmed in the Final Estimate, FDOT continued time through December 24, 2008 and assessed an additional 31 days of liquidated damages.

Westwind seeks a time extension from December 29, 2006 through and including December 24, 2008. Estimate 35 reflects that contract time continued to run through December 24, 2008, the date when the last pipe repairs were completed. While FDOT had stopped liquidated damages on February 19, 2007, it took the position that contract time would continue to run until all issues concerning the pipe were resolved. Westwind seeks a time extension extending contract time up to and including December 24, 2008. This would result in an extension of 726 calendar days from December 29, 2006 to December 24, 2008.

This extension is justified under the contract. The pipe repair work was extra work and was performed after contract time had expired and after Westwind should have demobilized. As of December 29, 2006, the Project was substantially complete and open to traffic. The storm sewer system was operational and in use. There was no portion of the Project that FDOT did not have beneficial use of. The only work that occurred after December 29, 2006 was the work to repair the storm pipe.

B. Westwind's Claim for Delay Related Costs

Westwind makes the following claims arising from its extended performance on the Project:

1 Remission of Liquidated Damages

Westwind claims the recovery of \$434,920 in liquidated damages FDOT assessed against Westwind for 83 days of delay through final acceptance. FDOT assessed 52 days of liquidated damages from December 29, 2006 through February 19, 2007 during the time pipe repairs were performed. FDOT assessed an additional 31 days of liquidated damages for the time associated with the additional pipe repairs in 2008.

The only work performed during the time LDs were assessed was pipe repairs. As previously established, these pipe repairs were beyond the scope of the Contract requirements, and Westwind is entitled to be compensated for this work. Westwind therefore is entitled to a time extension through the date that these repairs were completed. As demonstrated above, time extensions due Westwind total 726 calendar days, through December 24, 2008. Once the contract completion date is adjusted to account for the excusable delays caused by FDOT's demands that Westwind repair the pipe, Westwind's performance is within a properly adjusted contract completion schedule, and liquidated damages cannot be assessed.

2. Jobsite Overhead Costs for the Extended Contract Performance in 2007

Westwind incurred extended jobsite overhead costs after December 29, 2006 until the time it demobilized after pipe repairs were completed in February 2007. Westwind claims for its extended jobsite overhead costs for the 52 days of extended time that it was performing pipe repairs.

The longer Westwind remained mobilized on site, the more jobsite overhead costs it incurred. Jobsite overhead costs were incurred during January and February 2007 to support the ongoing pipe repairs. These include the costs of Westwind's supervision, overhead vehicles, job trailers, communications equipment, utilities etc. Westwind has computed its extended jobsite overhead costs using an average cost per day from a summary of monthly costs. The summary of monthly costs is provided in Exhibit 28. These costs establish an average daily cost of \$1,941.58 or \$100,962.16 over the 52 days being claimed. Because some of the repairs were made to pipe with adequate cover, Westwind seeks to claim only 87.89% of these extended overhead expenses, similar to Westwind's claim for its work to support the Rockline repair operations. Thus, Westwind seeks \$88,735.64 for its extended jobsite overhead. (See Exhibit 5, sheet 4)

3. Westwind Claims for Extended Home Office Overhead for the Time Needed after Contract Completion to Perform All Pipe Repairs

The additional time (past December 29, 2006) needed to complete pipe repairs extended Westwind's performance on the Project and required additional support from Westwind's home office. The compensation received under Westwind's contract did not properly absorb the continuing home office overhead costs incurred during the extended performance time needed to make these pipe repairs.

Westwind seeks its home office overhead costs in accordance with the Section 5-12, the Claims provisions of the Contract. This specification provides that contractors will be reimbursed for overhead delay costs through the following formula: $D=A \times C / B$, where

A equals original contract amount (\$13,583,753.33)

B equals original contract time (550 days)

C equals 8%.

Using this formula, the average overhead compensation per day is calculated at \$1,975.82 per day for the additional 83 days (52 days in 2007 and 31 days in 2008) needed to perform repairs. Westwind claims \$163,993.06 for its home office overhead.

VI. SUMMARY OF CLAIM AMOUNTS

Westwind seeks the following compensation in this Claim:

a.	2007 Rockline Repairs	\$ 316,915.27
b.	Westwind's 2007 Support Rockline	76,070.44
c.	Westwind 2006 Pipe Repairs	37,615.96
d.	Westwind Costs of Pipe Investigation & Testing	92,721.39
e.	Consultant Charges (Joe Ebner)	17,860.09
f.	Costs Associated with Pressure Testing	11,494.80
g.	2008 Liner Repairs by Rockline	108,966.05
h.	2008 Repairs by Sewer Viewer	18,905.25
i.	2008 MOT Charges of Bob's Barricades	1,006.32
j.	Westwind's 2008 Pipe Repairs	49,698.88
k.	Materials Charges for 2008 Westwind Repairs	1,831.80
l.	Remission of Liquidated Damages	434,920.00
m.	Extended Jobsite Overhead in 2007	88,735.64
n.	Home Office Overhead	<u>163,993.06</u>

SUBTOTAL **\$ 1,420,674.95**

o. Pre-Judgment Interest on Above Amounts: To Be Determined

In addition to the amounts set forth above, Westwind seeks a contract time extension of 726 days extending the contract performance time through December 24, 2008.

VII. CONCLUSION

As demonstrated in this Claim Narrative, Westwind is entitled to be compensated for its work to make repairs to storm pipe on the Project. Westwind seeks compensation for the costs and expenses it incurred to effect repairs to pipe in the amount of \$ 1,420,674.95, plus pre-judgment interest, and a time extension of 726 days.

This Claim has been presented consistent with the Claim Provisions contained in the Standard Specifications. Westwind has attempted to present all its claims that exist at this time in this Claim Narrative. This Narrative covers all amounts known by Westwind to be due from FDOT as a result of the pipe repairs performed to date.

Westwind reserves the right to amend or correct this Claim in the event that additional facts are uncovered.

It is hoped that this Claim presentation will facilitate discussions between Westwind and FDOT with the goal of reaching a resolution of these matters quickly and equitably. Westwind requests the opportunity to meet with the appropriate representatives of FDOT to discuss these claims and to answer any questions they might have.

This Claim document is being certified as required by the claims provisions of the Contract.

Department's Position:

ISSUE STATEMENT

The issue statement for this hearing as agreed to by the parties is a determination of "**entitlement to additional compensation and/or time contained in Westwind's Certified Claim dated April 15, 2009.**"

In accordance with page one (1) of its claim; "**Westwind seeks to recover costs incurred to perform work which was required due to (1) design errors, (2) express and constructive changes to Westwind's work, and (3) over-inspection of Westwind's work. Westwind also seeks a contract time extension and**

delay damages as a result of the delays it suffered as a result of the issues over the storm sewer pipe"⁴ as well as recovery of liquidated damages assessed on the project.

POSITION OF THE DEPARTMENT

The Department refers back to its letter to the Board dated September 3rd reminding the Board that **in our opinion these issues and entitlement for this claim was presented and determined in the hearing conducted between the parties on June 29, 2007.**

At the conclusion of that hearing, the Board found **"entitlement to WCI for claims for payment for repairs to pipes that do not have the clearance of one foot (1') cover between the bottom of the base and top of the pipe bells for such that may reasonably be determined not to be caused by the Contractor whether by improper installation or inadvertent destruction"**⁵. Both parties accepted the Board's recommendation dated July 21, 2007.

The Department firmly disputes Westwind's statement on page five (5) of their claim that **"the DRB did not specifically rule on Westwind's entitlement to recover for repairs that were required to pipe with more than 12 inches of cover..."**⁶ In fact, item #8 on page 24 of Westwind's Position Paper for the June 29th, 2007 hearing states; **"Westwind also seeks recovery, of all other repairs to pipe on the Project, including the repairs to pipe with cover in excess of twelve inches."**⁷ **It was the Board's ruling that provided the 12" designation as the basis for entitlement.**

Further, Westwind's Position Paper specifically included locations with greater than 12" of cover (refer to Exhibit M of the Westwind Position Paper which includes numerous locations with greater than 12" cover⁸) and the Board duly considered those items in their recommendation for entitlement provided on July 21, 2007, finding no such entitlement.

As previously noted in our September 3rd letter to the Board⁹,

- 1) In June, 2007 the Board heard and provided a recommendation on **"the merits of Westwind's claim that it is entitled to compensation for the costs to repair damage to drain pipe on the project because the damage to the pipe was caused by a design error, namely the design failed to provide for necessary cover to adequately protect the pipe from damage caused by traffic loads above."**¹⁰ The ruling as provided by the Board on this issue was accepted by both parties. However, Westwind's claim of April 15, 2009, fails to relate any of its requested costs back to the criteria for entitlement as established in the Board's ruling of 2007. **The Board was clear on Westwind's ability to recover costs provided it could demonstrate the damage was caused by traffic loads at locations with less than the required cover in accordance with the Design Index.** Westwind has ignored these provisions and now re-submits its request for compensation with no attempt to demonstrate the conditions stipulated by the Board for entitlement. **Moreover and as it was made clear during the initial hearing, the majority of the damaged pipe is located in the medians, ponds, or under the curb and sidewalk**
- 2) As described in the Department's letter to the Board of August 21, 2009, by its claim it appears Westwind is attempting to rephrase its original position for entitlement for repairs to pipe damaged by "traffic loads above"¹¹ to that of entitlement for repairs to all pipes with less than four feet (4') of cover damaged from **any cause whatsoever**. As the Board members are aware, **drainage culverts are routinely and successfully installed with less than four feet of cover.** Moreover, should this ridiculous argument be considered a new claim for entitlement, **the Department asserts that proper and timely notice on any issue other than what was previously heard by the Board in June, 2007 was never provided and therefore in accordance with Article 5-**

⁴ Exhibit A — Pages from Westwind Claim of April 15, 2009

⁵ Exhibit B — Board's Recommendation dated July 21, 2007

⁶ Exhibit A — Pages from Westwind Claim of April 15, 2009

⁷ Exhibit C — Westwind Position Paper (page 24)— June 14, 2007

⁸ Exhibit D — Westwind Position Paper (Exhibit M)— June 14, 2007

⁹ Exhibit E — FDOT Letter to the Board dated September 3, 2009

¹⁰ Exhibit B — Board's Recommendation dated July 21, 2007

¹¹ Exhibit F — Westwind Position Paper (page 3) - June 14, 2007

12.2¹² of the contract, Westwind has "completely, irrevocably and absolutely" waived its rights to additional compensation or a time extension.

As per the above, it remains the Department's opinion that there is no need for a DRB hearing at this time since (1) in accordance with Section 8.1 of the DRB Operating Guidelines, there is no merit to a reconsideration by the Board as "Reconsideration should only be considered when there is new information to present or what was assumed to be agreement on factual matters turns out to be incorrect, and clarification is needed. Rearguing the same issue on the same facts is not productive"¹³, (2) to re-hear the same issue could potentially result in an inconsistent ruling by the Board and (3) no such hearing on any other issue would be worthy since proper notice was never provided to the Department.

Therefore, it is clear to the Department that any hearing on entitlement would be nothing more than a re-hearing of the position originally argued by the parties for which the Board's ruling was accepted by all.

Despite the Department's position regarding this hearing, the Department will address each of the three bases for entitlement as presented in Westwind's claim as described on page one of the claim and referenced above.

Sub-Issue #1: Westwind has alleged that the repairs to pipe were the result of design error. In this regard, the Board previously provided its recommendation on entitlement in harmony with the contract documents (specifically Design Index 205) which outlines the requirements for design cover. In the Department's Position Paper for the June 29, 2007 hearing, the Department provided evidence that none of the repairs made by Westwind could be found to be the result of a design error since (a) the great majority of the repairs made were in areas not subjected to traffic and (b) the remaining repairs were made to pipes with sufficient cover in accordance with the requirements of the Index, therefore these repairs could only be reasonably determined "to be caused by the Contractor whether by improper installation or inadvertent destruction" as per the Board's prior recommendation (refer to Appendix D of the Department's Position Paper for that hearing).¹⁴

In the Summary of Facts Part A (The Design of the Pipe) on page seven (7) of its claim, Westwind alleges that the "designers ignored the mandates of Standard Specification Section 125 and Design Index 205 regarding providing minimum cover to protect the pipe"¹⁵. In this regard, the Department directs the Board to the locations of the pipe damages in accordance with Appendix D of the Position Paper previously submitted which clearly shows that the Designer used due diligence in designing the project pipe to the minimum depths while still maintaining cover requirements as outlined in the Design Index. Sufficient cover can also be clearly and undisputedly proven by reviewing the project plans provided with the Appendix.

Additionally, the Department directs the Board's attention to page one (1) of the Standard Specifications which states, "These Specifications are written to the bidder, prior to award of the Contract, and to the Contractor ...sentences that direct the Contractor to perform the work are written in the active voice... These directions to the Contractor are written as commands..."¹⁶

The Department's Specifications are for "Road and Bridge Construction" as the book is titled and are not design mandates as Westwind alleges. These specifications clearly provide direction to the Contractor to protect and control its operations as described in detail below which by their own claim, Westwind apparently disregarded during the pipe installation on this project.

Westwind further attempts to support their position of the Department's design error by quoting construction specification 125-8.1.3 on page two (2) of their claim as stating; "Do not allow heavy construction equipment to cross over culvert or storm sewer pipes until placing and compacting backfill material to the finished earthwork grade or to an elevation at least 4 feet above the crown of the pipe."¹⁷

While Westwind repeatedly refers to the requirement of four feet as written in this specification, it fails to acknowledge that this specification is a directive to the Contractor, not the Department or its Designer.

Further, specification 125-8.3 provides specific requirements for compacting backfill for "Pipe 15 Inches Inside Diameter or Greater" in the "cover zone" of the pipe as follows;

¹² Exhibit G — FDOT Specification 5-12

¹³ Exhibit H - FDOT DRB Operating Guidelines

¹⁴ Exhibit I — Position Paper of FDOT (Appendix D) - June 14, 2007

¹⁵ Exhibit A — Pages from Westwind Claim of April 15, 2009

¹⁶ Exhibit J — FDOT Specification 1-1 (page 1)

¹⁷ Exhibit A — Pages from Westwind Claim of April 15, 2009

125-8.3 Additional Requirements for Pipe 15 Inches [375 mm] Inside Diameter or Greater: 125-8.3.1

General: Trenches for pipe may have up to four zones that must be backfilled.

Lowest Zone: The lowest zone is backfilled for deep undercuts up to within 4 inches [100 mm] of the bottom of the pipe.

Bedding Zone: The zone above the Lowest Zone is the Bedding Zone. Usually it will be the backfill which is the 4 inches [100 mm] of soil below the bottom of the pipe. When rock or other hard material has been removed to place the pipe, the Bedding Zone will be the 12 inches [300 mm] of soil below the bottom of the pipe.

Cover Zone: The next zone is backfill that is placed after the pipe has been laid and will be called the Cover Zone. This zone extends to 12 inches [300 mm] above the top of the pipe. The Cover Zone and the Bedding Zone are considered the Soil Envelope for the pipe.

Top Zone: The Top Zone extends from 12 inches [300 mm] above the top of the pipe to the base or final grade.

125-8.3.2 Material:

125-8.3.2.1 Lowest Zone: Backfill areas undercut below the Bedding Zone of a pipe with coarse sand, or other suitable granular material, obtained from the grading operations on the project, or a commercial material if no suitable material is available.

125-8.3.2.2 Soil Envelope: In both the Bedding Zone and the Cover Zone of the pipe, backfill with materials classified as A-1, A-2, or A-3. Material classified as A-4 may be used if the pipe is concrete pipe.

125-8.3.2.3 Top Zone: Backfill the area of the trench above the soil envelope of the pipe with materials allowed on Design Standard, Index No. 505.

125-8.3.3 Compaction:

125-8.3.3.1 Lowest Zone: Compact the soil in the Lowest Zone to approximately match the density of the soil in which the trench was cut.

125-8.3.3.2 Bedding Zone: If the trench was not undercut below the bottom of the pipe, loosen the soil in the bottom of the trench immediately below the approximate middle third of the outside diameter of the pipe. If the trench was undercut, place the bedding material and leave it in a loose condition below the middle third of the outside diameter of the pipe. Compact the outer portions to meet the density requirements of the Acceptance Criteria. Place the material in lifts no greater than 6 inches [150 mm] (compacted thickness).

125-8.3.3.3 Cover Zone: Before placing the Cover Zone material, lay pipe according to Section 430. Excavate for pipe bells before laying pipe. Place the material in 6 inches [150 mm] layers (compacted thickness), evenly deposited on both sides of the pipe, and compact with mechanical tampers suitable for this purpose. Hand tamp material below the pipe haunch that cannot be reached by mechanical tampers. Meet the requirements of the density Acceptance Criteria.

125-8.3.3.4 Top Zone: Place the material in layers not to exceed 12 inches [300 mm] in compacted thickness. Meet the requirements of the density Acceptance Criteria.

The specifications provide clear and concise direction to the Contractor as to how and when compaction equipment can be utilized when installing project pipes, specifically when working within the top 12" over the pipe. Based on the above, the Contract clearly establishes responsibility for operation of heavy equipment over pipes as being that of the Contractor's. Westwind's attempt to make this a requirement of the Department or its Designer is absurd. The Department cannot be held responsible if Westwind failed to abide by these requirements, as previously found by the Board.

***Sub-Issue #2: Westwind has alleged that the repairs to pipe were the result of express and constructive changes to Westwind's work and over-inspection of Westwind's work. Once again the Department must refer back to the prior hearing on this issue held on June 29, 2007 and the recommendation provided by the Board as follows;**¹⁸*

The Department owns the right-of-way for this project and has the right to inspect the pipe by any means that they desire. Florida Department of Transportation Standard Specification for Road and Bridge Construction 2004, Section 1-3, Definitions, Page 6, Right-of-Way states: "The land that the Department has title to, or right of use, for the road and its structures and appurtenances, for material pits furnished by the Department."

¹⁸ Exhibit B - Board's Recommendation dated July 21, 2007

However, the Department **MAY NOT** use laser profiling to force the contractor to a higher standard of repairs beyond those which would be discovered on the standard videos without additional compensation.

The Board recommends that the Contractor be held to the normal standard of substantial conformance with (specification 430-7.2).

The Board went on to state that, "It is ultimately the responsibility of the Department to determine the amount of deficiencies and method of repairs it wishes to have performed" and "the Board finds entitlement of the Owner to re-video the pipe to better ascertain the amount and level of repairs necessary due to the poor quality of the original video furnished by the Contractor."

As ruled and accepted by both parties in the summer of 2007, the Department was well within its contractual rights to re-video the pipe and demand that damages and deficiencies found be addressed. This is precisely what the Department did, and in doing so was able to confirm the numerous deficiencies and damages originally found. Westwind is alleging that the Department has no right to "add" additional locations to their list of deficiencies. However, due to the vast amount of damages discovered in the project pipe, the Department did not Final Accept the project and therefore as per Specification 5-9.2 of the contract, "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."¹⁹ Samples of the damages confirmed by the Carter videos that Westwind alleges they should not have been obligated to repair in its claim are provided in Appendix R of this Paper.

As can be seen clearly from these video images, the typical damage discovered is obvious by review of the videos and does not represent any higher standard for acceptance than that which was previously provided in the contract under Specification 430. The fact of the matter is that many of these damages went initially undetected due to Westwind's failure to abide by Specification 430-4.8 which requires (1) the use of "a camera with lighting suitable to allow a clear picture of the entire periphery of the pipe" and (2) to "stop the camera and pan when necessary to document defects"²⁰. The Department had every right to perform additional inspections of the project pipe upon the Contractor's refusal to complete the project and had every right to demand that damages discovered be repaired.

Sub-Issue #3: Westwind's Claim for Additional Time and Compensation for Delays.

On page 28 of its claim, Westwind states factually that previous supplement agreements extended contract time to December 29, 2006. However, it goes on to allege that work was substantially complete and the "FDOT decided not to stop time until all repairs were completed".²¹ The Department directs the Board to Specification 8-7 which provides guidelines for the computation of contract time. Under this Specification, the Contractor is directed to "perform the contracted work fully, entirely and in accordance with the Contract Documents within the Contract Time specified in the proposal or as may be extended in accordance with the provisions herein..."²² The contract provides no means for the Department to "stop time" except by way of Final Acceptance of the project which due to the extent of the damages and deficiencies in the project pipe could not be granted. Further, Specification 8-10 stipulates "If the Contractor... fails to complete the work within the time stipulated in the Contract, or within such extra time that the Department may have granted then the Contractor... shall pay to the Department, not as a penalty, but as liquidated damages, the amount so due by the Code requirements, as provided in 8-10.2"²³. Allowable contract time on the project was 815 days with Final Acceptance being granted on Contract Day 1543.

The Department had every contractual right to assess more than 728 days of liquidated damages on the project but in the spirit of resolution of the dispute, charged only those days during which actual contract work was performed in the right-of-way (85 days). The Department has expended and continues to expend enormous resources on the resolution of the disputes on this project including incurring substantial CEI costs, internal project administration costs, the cost to video the project pipe due to Westwind's failure to abide by its contractual requirements in this regard, and is well within its contractual rights and obligations under the Florida Public Transportation Code to assess these liquidated damages.

Beneficial use of the roadway is not a condition in assessing liquidated damages as can be confirmed in review of the Florida Public Transportation Code (Chapter 337) which specifically notes that "Every contract let by the department for the performance of work shall contain a provision for payment to the department by the

¹⁹ Exhibit K - FDOT Specification 5-9.2

²⁰ Exhibit L - FDOT Specification 430

²¹ Exhibit A — Pages from Westwind Claim of April 15, 2009

²² Exhibit M — FDOT Specification 8-7

²³ Exhibit N — FDOT Specification 8-10

contractor of liquidated damages due to failure of the contractor to complete the contract work within the time stipulated in the contract or within such additional time as may have been granted by the department. The contractual provision shall include a reasonable estimate of the damages that would be incurred by the department as a result of such failure. The department shall establish a schedule of daily liquidated damage charges, based on original contract amounts, for construction contracts entered into by the department, which schedule shall be incorporated by reference into the contract. The department shall update the schedule of liquidated damages at least once every 2 years, but no more often than once a year. The schedule shall, at a minimum, be based on the average construction, engineering, and inspection costs experienced by the department on contracts over the 2 preceding fiscal years. The schedule shall also include anticipated costs of project-related delays and inconveniences to the department and traveling public. Anticipated costs may include, but are not limited to, road user costs, a portion of the projected revenues that will be lost due to failure to timely open a project to revenue producing traffic, costs resulting from retaining detours for an extended time, and other similar costs. Any such liquidated damages paid to the department shall be deposited to the credit of the fund from which payment for the work contracted was authorized. "²⁴

As mandated by the Code, as well as by the contract documents, the Department has both a right and an obligation to assess liquidated damages against contractors who fail to complete project work within the allowable contract time.

Lastly, Westwind alleges on page 29 of its claim that, "The only work that occurred after December 29, 2006 was the work to repair the storm pipe"²⁵. However, Westwind's As-Built CPM Schedule submitted on February 16, 2007²⁶ as well as the daily construction reports clearly prove that there were numerous other on-going work items during that period including signing, striping, curb, and sidewalk work among other items.

SUMMARY OF THE DEPARTMENT'S POSITION

In conclusion, the Department summarizes its position of no entitlement for Westwind's Claim dated April 15, 2009 as follows.

1. *The Department believes that the issues of entitlement contained in Westwind's Claim are the same heard by the Board on June 29, 2007, and that the Board issued its recommendations and findings on said same issues on July 21, 2007, and that both the Department and Westwind have accepted the Board's prior ruling of that hearing. A summary of that recommendation is provided below;*

On Issues #1-4, the Board recommended that "...the Contractor be held to the normal standard of substantial conformance with the following specification be followed" and quoted Specification 430-7.2 which addresses the allowable gaps between sections of pipe and other criteria.

The Board wrote that it "...finds entitlement of the Owner to re-video the pipe to better ascertain the amount and level of repairs necessary due to the poor quality of the original video furnished by the Contractor."

On Issue #5, the Board stated that it "...finds Entitlement to WCI for claims for payment for repairs to pipes that do not have the clearance of one foot (1') cover between the bottom of the base and top of pipe bells for such that may reasonably be determined not to be caused by the Contractor whether by improper installation or inadvertent destruction."

2. *All the pipe damage on the project was either a result of improper installation or failure on the part of the Contractor to protect the pipe as required by the Standard Specifications, not from either a design error or from "traffic loads above".*
3. *The second video inspections performed by the Department (Laser Profile Video Inspections) were necessary due to the poor quality and incompleteness of the videos provided by Westwind. The Department did not hold the Contractor to a higher level of acceptance than that contained in the original contract and, as per the Board's prior ruling, the construction contract does not prohibit the Department's use of alternate inspection methods.*
4. *After review of Westwind's claim submittal of April 15, 2009, the Department issued its response and denial of Westwind's claim on June 11, 2009. At the core of the Department's denial of the Claim was of*

²⁴ Exhibit 0 — Florida Public Transportation Code 337.18

²⁵ Exhibit A — Pages from Westwind Claim of April 15, 2009

²⁶ Exhibit P — Westwind CPM Schedule Submittal of 2/16/07

course the simple fact that the Claim was not in furtherance of the recommendations and findings that the DRB Board had already ruled on and that the parties had accepted.

5. *Should the April 15, 2009 claim submittal be considered a new claim and not a rehearing for entitlement on the original issues presented to the Board on June 29, 2007, entitlement cannot be found since the Contractor has not complied with the contractual requirements for submission of timely and accurate notices of intent to claim for any new issues nor did it provide weekly submittal of daily records.*

Contractor's Rebuttal Statement: No written statement was furnished.

Westwind stated that they were being held to a higher standard by the Department in using the laser profiling for the pipe inspection, which was not part of the original contract.

Westwind referenced a previous DRB ruling as to pipe repairs dated September 17, 2007, FPID # 194093-1-52-01 concerning cracked pipe.

The Contractor points out that general specifications 125-8.1.3 states “ *do not allow heavy construction equipment to cross over culvert or storm sewer pipes until placing and compacting backfill material to the finished earthwork grade or to elevation at least 4 feet (1.2 m) above the crown of the pipe*”.

Laser found:

- Approximately 800 issues reduced to 59 deficiencies (Tab 19)
- 28 were new detected deficiencies
- Fifty cracks
- Five were leaks - specs only say soil tight
- Two (S561, S-520) Westwind agreed to fix from start - added S-133 and S-520
- Threaten with default.
- FDOT does not know how to interpret videos
- Questioned video company incompetence
- 385 joints were to be pressure tested - after 39 joints passed, the rest were accepted
- 122 cracks
- 49 leaking joints
- 78 unauthorized repairs
- 33 exposed gaskets

Asking for Entitlement

1. Repair cost to pipe
2. Remission of liquidated damages
3. Jobsite overhead
4. Home office overhead

FDOT charged 52 days of liquidated damaged including the time from December 30th 2006 to February 19th 2007 in violation of the previous DRB ruling that was accepted by both Parties

Department's Rebuttal Statement: No written statement was furnished.

The Department read several quotes from the original ruling dated July 21, 2007.

DRB Findings:

In so far as the Parties seemed to consider the hearing a necessity only as the prerequisite to proceeding to court, neither side made much of a presentation at the DRB hearing. Therefore, the Board was forced to rely more heavily than normal on the positions presented in writing prior to the hearing.

The Board previously recommended:

... that the Contractor be held to the normal standard of substantial conformance with the following specification be followed.

Section 430-7.2 Laying Requirements for Concrete Pipe with Rubber Gasket Joints:

Do not allow the gap between sections of pipe to exceed 5/8 inch for pipe diameters of 12 inches through 18 inches [16 mm for pipe diameters of 300 through 450 mm], 7/8 inch for pipe diameters of 24 through 66 inches [25 mm for pipe diameters 600 mm through 1.7 m] and 1 inch for pipe diameters 72 inches and larger [25 mm for pipe diameters 1.8 m and larger]. Where minor imperfections in the manufacture of the pipe create an apparent gap in excess of the tabulated gap, the Engineer will accept the joint provided that the imperfection does not exceed 1/3 the circumference of the pipe, and the rubber gasket is 1/4 inch [6 mm] or more past the pipe joint entrance taper. Where concrete pipes are outside of these tolerances, replace them at no expense to the Department. Do not apply mortar, joint compound, or other filler to the gap that would restrict the flexibility of the joint.

It is ultimately the responsibility of the Department to determine the amount of deficiencies and method of repairs it wishes to have performed. Should such determination be unreasonable the Contractor would be entitled to additional compensation. It should be noted that the Board was not given or offered the tapes for review.

The Board finds entitlement of the Owner to re-video the pipe to better ascertain the amount and level of repairs necessary due to the poor quality of the original video furnished by the Contractor.²⁷

...
Entitlement to WCI for claims for payment for repairs to pipes that do not have the clearance of one foot (1') cover between the bottom of the base and top of the pipe bells for such that may reasonably be determined not to be caused by the Contractor whether by improper installation or inadvertent destruction.

State of Florida Department of Transportation Design Index No. 205 Sheet 1 of 5 General Notes state:

- 1. The tabulated values are recommended minimum dimensions to withstand anticipated highway traffic loads. Additional cover may be required to support construction equipment loads or traffic loads before pavement is completed. Some size thickness combinations may require minimum cover greater than those listed above. See Sheets 2, 3, & 4.*
- 2. Less than the tabulated minimum cover may be used provided suitable method(s) are detailed in the plans.*

No such method(s) were shown to be in the Plans.

It is not unusual for pipe to be designed with less than four (4) feet of cover.

Both parties stated that they accepted the DRB's recommendation dated July 21, 2007.

The decision to "Laser Profile" the pipe introduces the question and defense by the Contractor that he was held to a higher standard than was required in the contract. Based on the material presented, the Board does not find that laser profiling identified "discrepancies" (within the context of the final 59) that would not have otherwise been found by proper contractual required videoing of the pipe.

Insofar as the pipe videos were not furnished to or reviewed with the Board and only "still" pictures provided in the position papers, the Board is unable to make a determination as to

²⁷ However, the Department **MAY NOT** use laser profiling to force the contractor to a higher standard of repairs beyond those which would be discovered on the standard videos without additional compensation.

whether the Contractor was held to a unreasonable standard of contract compliance. Further, there was no presentation by either Party as to the level of acceptance or rejection of the cracks found in the laid pipe.

The Contractor was aware of the location and depth of the pipe and should have taken precautions to not damage any pipe outside of the traveled way whether or not the backfill was “at least 4 feet [1.2 m] above the crown of the pipe.”

When suspected discrepancies to the work are suspected FDOT Standard Specifications SECTION 5 CONTROL OF THE WORK comes into play:

5-3 Conformity of Work with Contract Documents.

Perform all work and furnish all materials in reasonably close conformity with the lines, grades, cross-sections, dimensions, and material requirements, including tolerances, as specified in the Contract Documents.

In the event that the Engineer finds that the Contractor has used material or produced a finished product that is not in reasonably close conformity with the Contract Documents, but that the Contractor has produced reasonably acceptable work, the Engineer will determine if the Department will accept the work in place. In this event, the Engineer will document the basis of acceptance by Contract modification, which provides for an appropriate reduction in the Contract price for such work or materials included in the accepted work as deemed necessary to conform to the determination based on engineering judgment.

In the event that the Engineer finds that the Contractor has used material or produced a finished product that is not in reasonably close conformity with the Contract Documents, and that the Contractor has produced an inferior or unsatisfactory product, the Contractor shall remove and replace or otherwise correct the work or materials at no expense to the Department.

...

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. If the Engineer so requests at any time before final acceptance of the work, remove or uncover such portions of the finished work as directed. After examination, restore the uncovered portions of the work to the standard required by the Contract Documents. If the Engineer determines that the work so exposed or examined is unacceptable, perform the uncovering or removal, and the replacing of the covering or making good of the parts removed, at no expense to the Department. However, if the Engineer determines that the work thus exposed or examined is acceptable, the Department will pay for the uncovering or removing, and the replacing of the covering or making good of the parts removed in accordance with Section 4-4.

Therefore, for those alleged discrepancies that went unrepaired and were determined ultimately to be acceptable, the Contractor would be entitled to compensation for the effort in proving to the Department their acceptability.

The DRB was not involved and had no direct knowledge as to the facts concerning the hearing and subsequent recommendation on pipe cracks for project FPID # 194093-1-52-01. Each contract is different and stands on its own contract requirements and facts surrounding an issue.

Specification for pipe cracks are derived from the Standard Specification, Section 430 which refers you to section 449 which in turn refers to ASTM C 655, Standard Specification for the **manufacture** of Reinforced Concrete Pipe D-Load Culvert, Storm Drain, and Sewer Pipe. The Department has recognized that the requirements as written in the Standard Specification dated 1994 Section 430 do not address cracks in laid pipe. It is the Board’s understanding that Supplemental Specifications have been written that address this oversight. Hairline cracks in and of themselves do not constitute sufficient reason for the necessity for repairs to laid pipe. This does not preclude the rejection of laid pipe that has cracks that are not hairline that clearly

(within the normally accepted standard construction recognition) jeopardize the integrity and normal expected life of the pipe.

Westwind was charged LD's from December 30, 2007 to February 19, 2008 and November 24, 2008 to December 24, 2008.

There is no contract provision cited that provides for "stopping of time".

Video taping, identification of anomalies, method of repair and acceptance by the Department of storm sewers in part based on the video is a relatively new specification that is still under review as to its implementation.

DRB Recommendation:

The Board does not believe that the Contractor is blameless in not providing an acceptable product to the Department, neither is the Department blameless in not properly and timely identifying deficiencies that are unacceptable. The Board finds that the Contractor has entitlement to the repairs to the pipe that were not outside the normally acceptable standard of substantial conformance. Additionally, he is entitled to compensation for uncovering the work that was ultimately found acceptable without repairs.

The Board's recommendation is constrained by the provisions of the contract and acknowledges that it is and has been aware of Specification 8-7, which is why the Board recommends, as stated in the original recommendation and this recommendation that the Contractor not be charged liquidated damages for the period of repair, as may be implemented by Partnering and negotiation of a final settlement:

Further, it appears that due to the time taken to come to an agreement on the design issues and pipe repairs, and since the roadway has been substantially complete and is being used by the traveling public, concurrent delay and liquidated damages should not be charged for this period. Each Party should bear their own costs. This might possibly be arrived at through partnering of a final settlement between the parties.

The Contractor remains entitled to that granted in our previous recommendation.

The Disputes Review Board's Recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their Partnering agreement.

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 non-responding party.

I certify that I participated in the Hearings of the DRB regarding the Disputes indicated above and concur with the findings and recommendations.

Respectfully submitted,

Disputes Review Board

Frank E. Proch, Dispute Review Board Chairman
Carson Carner, Dispute Review Board Member
John H. Duke, Dispute Review Board Member