

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

Steven King
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Comment: (6-9-13)

In the last paragraph of 7-11.1 it says

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

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

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

Response:

L. Ervin Sterling III
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Comment: (6-10-13)

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

Response:

2. Our District One Public Land Corner note has changed, with informal email approval from your office as of January 8, 2013. The PPM has not yet been edited to reflect this change,

although a revision request was sent in last month. It now reads "If any Public Land Corner within the limits of construction is in danger of being destroyed and has not been properly referenced, immediately notify the Engineer in conjunction with the District Location Surveyor." I feel this may be a good time to strengthen the Spec, specifically 7-11.1 General, fourth paragraph, so that our plans note is no longer necessary (it goes on every set of plans).

Response:

Daniel Strickland
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Comment: (6-11-13)

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

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

Response:

Christian Cummings
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Comment: (7-2-13) For the sake of avoiding confusion and arguments in the future, can we get something in writing from someone with authority at the Department that states that the proposed spec 7-14 includes temporary attenuators? Another option that might clarify the Department's

intent would be to add language to 102-13.12 stating that “payment for restoring damaged crash cushions will be per 7-14.”

The proposed spec 7-14 states that “Repair cost will be determined in accordance with 4-4”. Spec 4-4 states “When the Department requires work that is not covered by a price in the Contract and such work does not constitute a “Significant Change” as defined in 4-3.1, and the Department finds such work is essential to the satisfactory completion of the Contract within its intended scope, the Department will make an adjustment to the Contract. The Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount.” As I understand the specification, restoring damaged attenuators would not constitute “Significant Change” as defined in 4-3.1 and therefore, by spec, the “Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount”. If this is the truly the case, it would present real problems as it would be completely subjective. If the Department’s intent is to determine cost using time and materials, why isn’t 4-3.2.1 just referenced instead of 4-4?

Response:

John Baldwin
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Comment: (7-3-13)

PAYMENT FOR ATTENUATOR DAMAGE Over the course of years Bob’s Barricades has performed the Maintenance of Traffic on tens of thousands of projects throughout the State of Florida. The MOT includes installing, maintaining and repairing (damaged by motorists) crash cushions (attenuators. BBI has repaired or replaced thousands and thousands of crash cushions in a timely manner that have been hit, damaged or completely destroyed by motorists.

The cost of the device only is \$9,000 to over \$30,000 each. This does not include shipping, labor to repair, and lane closures. Time to schedule, Invoicing and clerical time to document the occurrences. • Damage to redirective crash cushions caused by motorists can range from a complete and catastrophic hit which requires replacement to a minor a nuisance hit. Many hits are somewhere in between.

The majorities of the collisions occur in the late night or AM hours between midnight and 5am during darkness.

The vast majority of the collisions are hit and run accidents with one vehicle involved. The driver’s car in most cases is damaged but able to drive away from the incident. In some cases the cars are towed without the knowledge of the contractor as they are not on the job or may be working miles away. In this case no law enforcement report is ever recorded.

In the cases law enforcement is called to the scene a report is written the following scenarios are likely to occur. It is often difficult to determine which law enforcement agency if any was on the scene. Unless the Prime contractor is on the scene at the time of the incident. Therefore finding an accident report can be difficult if not impossible. All too often the incident is a hit and run, the driver has no insurance or is underinsured as the minimum statutory requirement for liability insurance is below the cost of most damage.

In cases where a third party insurance company receives a claim the insurance company often haggles with the contractor over who is responsible or the cost of the repairs or replacement of the unit. Insurance companies are not familiar in most cases with a crash cushion therefore causing a great deal of delay if any costs of repair are to be covered.

The FDOT specification calls for repair or replacement of the damaged unit immediately or within 24 hrs. Currently the 20% mark up at times does not even cover the cost of the repair. Take into the consideration that we must pay for the parts (30 days net) and all of the other costs involved.

It is also impossible at bid time to determine the frequency of damage to the units and in many cases to even determine how many units will be used. The dilemma of who’s will be responsible to cover the costs of the hits (the prime or the subcontractor is likely to cause a great deal of animosity) Does the Prime add a great deal of cost to their bid to the state to cover what may or may not happen causing the state to pay up front for damages that may not occur.

The system works fairly well at present. The attenuators are being repaired timely and the motoring public is safer for it.

Response:

D-4 Const.

Comment: (7-7-13)

1. 7-11.1:

Suggest the section include defining existing to also mean any such items that need to remain until replaced by the work. Example: existing ped pole gets knocked down by third party. The ped pole will ultimately be replaced when a new one is installed as part of the work. Also: the new text in this section should address theft vs. vandalism.

Response:

2. 7-14 Second paragraph:

"For damage to the Work caused by third parties, the Contractor may pursue recovery" add:"from the third party" "after reducing the amount of the repair cost by a \$2000.00 deductible for each occurrence, borne solely by the Contractor." Not sure what we mean by "solely by the Contractor", what about subs? "the Contractor may be reimbursed proportionally, up to the amount of the deductible" What do we mean by "proportionally"? Does this imply that if we may not recover 100% of our costs? If so thne I understand the purpose.

Response:

Tom Brady
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Comment: (7-5-13)

In speaking with ATSSA members, some contributed to the following questions/comments. Is it the Department's intent to reimburse the contractor under 7-14 for damages to temporary attenuators caused by a 3rd party? If so, will the Department clarify this by specifically mentioning temporary attenuators within 7-14? Assuming that this is the Department's intent, we feel that the contractor should not have to bear the cost of the first \$2,000 of all impacts. In the case of an unknown 3rd party, the contractor should not have to be liable for half the damages plus an additional \$2,000. Unlike any other item covered in 7-14, attenuators are designed to be impacted. Energy is absorbed, therefore minimizing damages to a vehicle, thus allowing the driver to leave the scene undetected. This is not often the case when a vehicle hits a solid fixed structure such as a bridge.

Response:
