

# DISPUTE REVIEW BOARD RECOMMENDATION

February 23, 2003

E-Mailed February 23, 2003  
Original VIA US Mail

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RE: FPN: 231878-1-52-01  
SR-9 (I-95) PBIA from Interchg Southern Blvd. to N. of Belvedere Rd.  
Palm Beach County  
District 4  
Disputes Review Board

Subject: Over Excavation of Material in the Flood Plain Compensation Area

Dear Sirs:

The Contractor, Modern Continental South, Inc. (MCS), requested a hearing to determine **entitlement** to right to utilize existing materials located within the Florida Department of Transportation's (Department) Right of Way and within the Limits of Construction for the purpose of constructing necessary improvements on the above referenced project. Should entitlement be established, the parties would negotiate the quantum of any resulting impact.

Pertinent issues, correspondence and other information relating to the Contractor's and the Department's positions were forwarded to this Board for review and discussion at the hearing that was held on February 12, 2003.

## **CONTRACTOR'S POSITION:**

### ***EXCAVATION IN FLOOD PLAIN COMPENSATION AREA***

***QUESTION:*** Does a contractor have the right to utilize existing materials located within the Florida Department of Transportation's Right of Way and within the Limits of Construction for the purpose of constructing necessary improvements as required by Contract?

*It is Modern Continental South's position that the answer to this question is "YES". This position paper will present the information that substantiates Modern Continental South's position.*

***HISTORY:*** Modern Continental South (MCS) in the performance and execution of the contract was with prejudice denied the right to excavate material within the limits of the Florida Department of Transportation Right of Way for use in constructing improvements to the Department's project.

***On or about October 10<sup>th</sup>, 2002*** Modern Continental South ***began the excavation in the Flood Plain Compensation Area.*** This area as shown in the contract documents is ***depicted as being within the Florida Department of Transportation Right of Way.*** ***On October 11<sup>th</sup>, 2002*** Modern Continental South received a letter dated October 10<sup>th</sup>, 2002 from The ***Washington Group*** (Project CEI) ***directing MCS to cease excavation operations*** in the Flood Plain Compensation area. After various telephone conversations between MCS, FDOT District IV, and The Washington Group, MCS received a letter on October 18<sup>th</sup>, 2002, dated October 17<sup>th</sup>, 2002 stating FDOT's position. On October 28<sup>th</sup>, 2002 MCS notified The Washington Group that we would comply with their directive to cease excavation operations in the Flood Plain Compensation Area, however we disagreed with their interpretation of the specifications and therefore requested the issue be escalated to the Disputes Review Board.

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**INTENT:** It has been Modern Continental South's intention to utilize all material located within the Project Right of Way for construction of the Project. **Any area excavated beyond planned final cross sections would be restored to planned cross sections** utilizing materials excavated during later phases of the project, or with suitable material allowed by contract specifications.

**POSITION-CONTRACT PLANS** Plan sheet 116 and 638 (attached) clearly **define the limits** of the Departments **Right of Way** as being inclusive of the Flood Plain Compensation Area. Furthermore, plan sheet 116 **provides specific language as to the extent of work** to be performed in the area. Examination of the aforementioned plan sheet will show that a **minimum** volume of 2300 m<sup>3</sup> is to be removed and places **no restrictive covenants or language** with regard to a **maximum** amount of material that can be excavated. Plan sheet 116 provides a **detail "A-A" of the final cross section at final acceptance.**

### Summary-Contract Plans

1. Contract Plans clearly define the Flood Plain Compensation Area to be within the FDOT Right of Way.
2. Contract Plans do not impose a maximum excavation in the Flood Plain Compensation Area.
3. A cross section sheet for final configuration is shown in Contract Plans.

**POSITION-CONTRACT SPECIFICATIONS** Modern Continental South's position is that **over excavating within the FDOT Right of Way is a common practice in the Industry and is allowed within the specifications** under sections 4-5.1, 120-2.2, and 120-7 of the 1999 Standard Specifications for Road and Bridge Construction.

Specification 4-5.1 clearly states that the contractor has a **right** and also an **obligation** to **utilize materials**, within the FDOT Right of Way.

Specification 120-7 states that the contractor is to use **all suitable materials** resulting from **roadway excavation** as far as practicable for completion of the work.

Specification 120-2.2 clearly defines Roadway Excavation as consisting of the **Excavation** and **Utilization** or **Disposal** of **All Materials** necessary for the construction of the roadway, within the limits of the roadway right of way.

### Summary-Specifications

1. Contract Specifications clearly give the contractor the right and establishes the obligation to utilize materials within FDOT right of way.
2. Contractor is to use all suitable materials resulting from roadway excavations for completion of the contract work.
3. Roadway excavation is clearly defined to include excavation, utilization or disposal of all materials available within the Right of Way

**CLOSING** Modern Continental South **seeks relief** from the directive issued in the letters of October 10<sup>th</sup>, 2002 and October 17<sup>th</sup>, 2002 and **further to seek entitlement for both time and money for the delays caused by the directive to cease excavation within the Right of Way.**

## DEPARTMENT'S POSITION:

### Position Paper for Dispute Resolution

**Issue:** Over Excavation of the Flood Plain Compensation Area & Source of Materials for MSE Wall Select Fill

**Date of Hearing:** January 29, 2002

**Contractor:** Modern Continental South

**Project:** I-95 Interchange at Palm Beach International Airport

Financial Project ID: 231878-1-52-01

Work Program Item No: 4147515

State Job No: 93220-3465

Federal Job No: 0951-349-I

County / Section Number: 93/220

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Contract Number: 20788  
County: Palm Beach

- Exhibits:**
- 1.) Plan Sheet No: 19; Summary of Earthwork Quantities
  - 2.) Plan Sheet No: 116; Flood Plain Compensation Excavation Plan
  - 3.) Standard Specification Page No: 120; Section 120-13.3 Embankment
  - 4.) Supplemental Specification Page No: 316; Section 548-9 Basis of Payment for Retaining Wall Systems
  - 5.) South Florida Water Management District Environmental Resource Permit No: 50-04154-P Page No: 606; Note 5
  - 6.) SFWMD Permit Page No: 607; Note 10
  - 7.) SFWMD Permit Page No: 619; Background, paragraph 1 (compliance with FAA design requirements for wet detention ponds near airports)
  - 8.) SFWMD Permit Page No: 620; Proposed Facilities, paragraph 2
  - 9.) SFWMD Permit Page No: 621; Paragraph 6 (Purpose of Floodplain Compensation Area)
  - 10.) Plan Sheet W-65; Report of Core Borings
  - 11.) Standard Spec. 12-6.1 Authorization for Use of Borrow
  - 12.) Borrow Excavation - Value Engineering Incentive, Spec. Provisions Sht. 33
  - 13.) Earthwork Bid Items - Bid Tabulation Sheet
  - 14.) Retaining Wall Bid Item - Bid Tabulation Sheet

## **FDOT Engineer's Position:**

The **Department directed Modem Continental South (MCS) to cease over-excavating** the area designated in the contract plans as the **"Flood Plain Compensation Area" (FPCA)**. The Contractor **needed select fill for the MSE Walls remaining to be constructed on the project. The Contractor was unable to access any further select fill sources from anywhere else on the project due to construction phasing** and bridge staging in the remaining pond areas. The Contractor, therefore, **proceeded without approval to** over-excavate the Flood Plain Compensation Area (FPCA) **to generate the backfill material they required.**

The Department states that the Contractor is not allowed to mine materials from the FPCA and that the Contractor is responsible for obtaining the select fill material without the use of on-site borrow pits for the following reasons:

- The contract Supplemental Specifications state that **all materials** required for the construction of the MSE Walls, **including the fill, is included in the pay item for MSE Walls.** (See Exhibit #4)

Additionally, plan sheet #19 (see exhibit #1) shows from the Summary of Earthwork tabulation that this project is not a balanced earthwork (embankment/excavation) project.

The summary shows that there is a minimum of 130,000 cm<sup>+</sup>/- of imported fill required to complete the project. The Standard Specifications for Embankment Basis of Payment state that price and payment under the pay item is full compensation for all work specified in the Embankment section of the specifications, including all material for constructing the embankment. (see Exhibit #3)

Regardless of the general embankment requirements on the project, the earthwork summary does not include the quantity of select fill required for the construction of the MSE Walls. (see Exhibit #4)

The soil borings contained in the contract plans do not specifically indicate or warrant that the soils within the project limits meet the requirements of the MSE Wall select fill specifications. (see Exhibit #10) Therefore, the Contractor should have included in his bid for MSE Walls the cost of importing select fill that meets the specifications. (see Exhibits #13 & #14)

- Specification 120-6.1 (Authorization for Use of Borrow) states, "Do not borrow material until so ordered by the Engineer, and then only use material from designated borrow pits." There are no designated borrow pits shown in the contract plans and there is no bid item for borrow excavation. Regardless, **the Contractor never requested authorization to create a borrow pit on site (temporary or permanent) nor did he state his intentions for replacing the fill taken from the FPCA until after the Department shut down the operation.** (see Exhibit #11)

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- Construction of additional pits or pond facilities on the project violates the Department of Transportation's Environmental Resource Permit with the South Florida Water Management District. (see Exhibit #8)

**Page 606, Note #5** of the Supplemental Specifications (page 3 of 8 **SFWMD Permit**) states that **"Facilities other than those stated herein shall not be constructed without an approved modification of this permit."** (see Exhibit #5)

**Note #10** on page 4 of 8 in the Permit states **"All areas** which have been **disturbed** as a result of grading of the floodplain compensation scrapedown area shall be **sodded and/or seeded immediately thereafter.**" (see Exhibit #6)

The **Contractor did not obtain a permit modification** allowing him to over excavate the FPCA to a greater depth. The plan and permit's intent was for this area to be "scraped down" and "graded" followed by immediate sodding/seeding. The Contractor **proceeded, without authorization or permit**, to excavate a borrow pit / pond area that was not immediately stabilized thereafter with sodding or seeding.

- **Plan Sheet #116**; Flood Plain Compensation Excavation Plan has a **note** that restricts construction activities within the right of way east of I-95 bounded by the Vedado Neighborhood to the south and Pond 1 A to the North. **Construction activities** in this area "...**shall be limited to those expressly indicated within the plans.** The Contractor shall not occupy the area for the staging or storing of equipment or materials; for establishing or maintaining plant operations; or for any other activity not specifically called for in the plans." The Contractor violated the plan note by performing work not "expressly indicated in the plans" (over excavation of the FPCA and staging of materials) within this restricted zone. (see Exhibit #2)
- The Department and their Design Consultants went to great effort in their design to comply with the Federal Aviation Administration's design requirements for wet detention ponds near airports. The **area over excavated** by the Contractor **creates a wet detention area** within the PBIA runway glide slope and thereby **violates** the above referenced **FAA requirements.** (see Exhibit #7)
- The S.F.W.M.D. Permit included calculations to demonstrate that the Project meets the C-51 fill encroachment criteria. " In an effort to minimize impacts to existing trees and the adjacent neighborhoods, select locations within the area previously designated as Pond 1 will now serve as a scrapedown area to compensate for floodplain encroachment." (see Exhibit #9)  
  
The Contractor's over excavation of this area **voids the calculations** submitted with the permit application **and has created a potential environmental impact.**
- The **Floodplain Compensation Area** is shown in the plans **to be graded to a specific elevation.** (see Exhibit #2) Mining any additional material beyond the limits of those set elevations is not in accordance with the contract. **All material below the final elevation grades given in the plans is material owned by the state and the Contractor has no right of ownership of that material.**

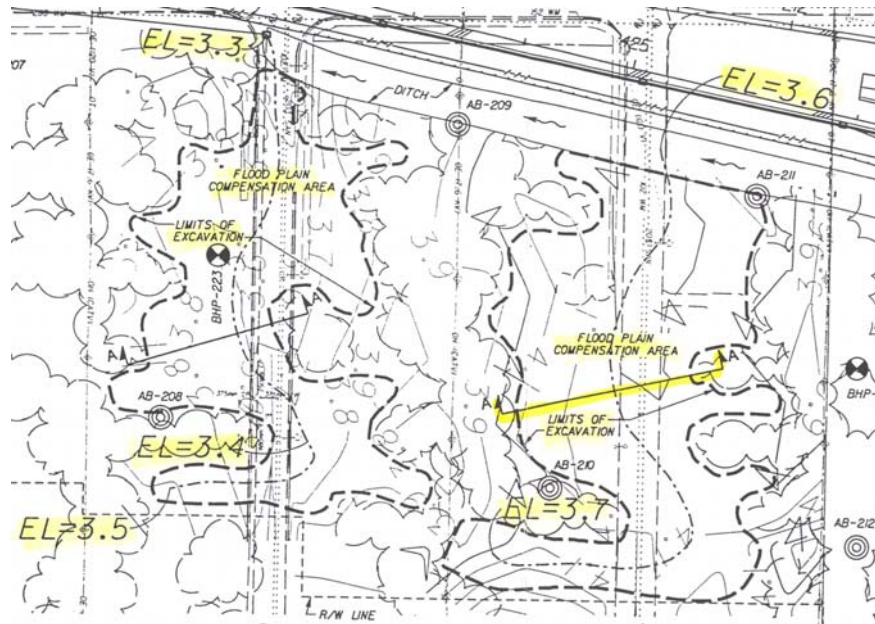
In conclusion, the **Department requests that the DRB support their directive to the Contractor to cease over excavation of the Flood Plain Compensation Area and concur with the Department that the Contractor has no basis for claim on this issue.**

We look forward to meeting with the Contractor on January 29, 2003 to discuss this issue further. Please advise our office if any additional information is required.

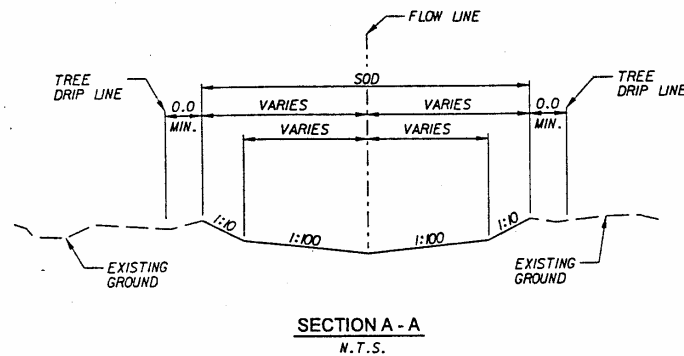
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## BOARD FINDINGS:

- Sheet 116 of the plans indicates the limits of excavation within the Flood Plain Compensation.



- Section A-A further defines the configuration.



- The temporary over excavation by the contractor is mostly outside of the limits of excavation shown on the plans.
- The note on sheet 116 alerts the reader that this is a sensitive area.

**NOTE:**  
CONSTRUCTION ACTIVITIES WITHIN THE RIGHT-OF-WAY EAST OF I-95 BOUNDED BY THE VEDADO NEIGHBORHOOD TO THE SOUTH AND POND I-A TO THE NORTH SHALL BE LIMITED TO THOSE EXPRESSLY INDICATED WITHIN THE PLANS. THE CONTRACTOR SHALL NOT OCCUPY THE AREA FOR THE STAGING OR STORING OF EQUIPMENT OR MATERIALS, FOR ESTABLISHING OR MAINTAINING PLANT OPERATIONS, OR FOR ANY OTHER ACTIVITY NOT SPECIFICALLY CALLED FOR IN THE PLANS.

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- It was acknowledged by the Department in the DRB hearing that this note was a hold-over from previous design considerations and should have been removed prior to bid.
- Although perhaps not best described as “common”, the Department has allowed contractors to over excavate sites within the right of way to obtain embankment or select material.
- This permission to over excavate has been on a case by case basis and after receiving approval from the Department.
- The ability of the Department to allow the Contractor to utilize materials from within the project limits is, at a minimum, limited by compliance with permits required by law.
- The partnering concept has generally encouraged mutual consideration between the parties for the needs of the other.
- Had the Contractor given adequate notice to the Department that he would like to temporarily over excavate in this area, he may have been allowed to do so after due consideration of the ramifications.
- The Contractor gave no prior notice of his intention, and his response when queried precluded the ability of the Department to assist him in his wish to over excavate.

### **BOARD RECOMMENDATION:**

Based on the materials supplied to the Board and presentations to the Board at the DRB hearing, **the Board finds that the Contractor has no entitlement for time and/or money for the delays caused by the directive to cease excavation within the Right of Way.**

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

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 the non-responding party.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board  
John H. Duke, Sr.; DRB Chairman  
Dallas Wolford, DRB Member  
Frank Proch, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



John H. Duke, Sr.  
DRB Chairman