DISPUTE REVIEW BOARD RECOMMENDATION

January 6, 2022

Mr. Neil Mulrooney
Vice President
Middlesex Corporation
10801 Cosmonaut Blvd.
Orlando, FL 32824

Mr. Marty R. Sanchez, P.E.
Senior Project Engineer
HNTB Corporation
5906 Argerian Drive
Wesley Chapel, FL 33545

RE: I-75 Overpass Road Interchange
FPN 432734-2-52-01 and 432734-2-52-02
Contract E7R18

Subject: Hearing Dated December 21, 2021
Disputes Review Board Recommendation

Gentlemen:

Middlesex Corporation (TMC) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of a disputed issue. The hearing was held on December 21, 2021, at the FDOT Brooksville Operations Center in Brooksville, FL. The parties furnished the Disputes Review Board (DRB) position papers prior to the hearing. Both parties provided a rebuttal response for review prior to the hearing. The DRB was requested only to consider the question of entitlement. In accordance with your request the following recommendation is offered. The DRB encourages interested parties to review the entire position papers and rebuttal papers submitted by both parties.

Project Scope

This Design-Build project located in Pasco County, Florida includes the widening of Overpass Road to a divided urban typical section with a raised median, bicycle lanes and sidewalks between Old Pasco Road and Boyette Road and replacement of the existing four (4) span concrete girder bridge over I-75. A new westbound (WB) to southbound (SB) flyover ramp is also provided.

Issue Statement: Is the Middlesex Corporation entitled to additional compensation for Extra Work for subsoil excavation associated with NOI 01 (WREC Access Road)?

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Contractor Position

The following summary of the Contractor's position is based upon written materials submitted to the DRB and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Overview of Contractor's Position

This dispute deals exclusively with the claim NOI 1 submitted by The Middlesex Corporation (TMC) on September 1, 2020, for differing site conditions (DSC) that TMC experienced while performing subsoil excavation. The limits of subsoil removal differed materially from the subsoil limits indicated in the geotechnical information included in the RFP documents for this project provided by Florida Department of Transportation (FDOT) at bid time.

The increase in subsoil limits significantly increased TMC's scope of work for the subsoil excavation, replacement material and disposal of subsoil. It is important to note in consideration of this NOI, that even though TMC notified FDOT on September 1, 2020, TMC continued to try and mitigate the impacts and resolve the issue and progress the project in a manner that did not adversely affect the project schedule.

As specified in the Request for Proposal (RFP), TMC relied on the geotechnical information and cross sections provided in the contract documents to prepare its Technical and Price Proposal. Upon the completion of the geotechnical investigation, design, and Release for Construction (RFC) design plans, TMC started the proposed roadway construction which included subsoil excavation. As the roadway construction work progressed TMC encountered subsoil in areas that were not previously identified in the RFP soil borings and concept plan cross sections. In addition, there were locations where the limits of subsoil were wider and deeper than what was identified in the FDOT soil borings and RFP concept plan cross sections.

This type of differing site condition that TMC encountered is addressed in Section 4-3.7 of the Specifications which allows TMC to recover its damages and time if it encounters subsurface or latent physical conditions at the site that differ materially from the conditions indicated in the Contract. TMC reviewed the entire Contract Document package and as specified, paid particular attention to the borings provided for purposes of developing its price proposal. Moreover, TMC was reasonable in its reliance on the soil borings and concept plan cross sections, given their proximity to the roadway work to be performed.

In summary, in accordance with Specification 4-3.2, TMC requests $384,561.52 in compensation for the additional work associated with this differing site condition claim.

Timeline

August 3, 2020: FDOT Issued Notice to Proceed

August 28, 2020: TMC received formal Roadway Soil Survey Report for Initial Roadway Plan Submittal from our geotechnical consultant (Tierra). The document proposed remedies for organic soil on the WREC access Road. Please, also note the extensive soil boring survey location plan taken on the proposed Withlacoochee River Electric Cooperative (WREC) Access Road.

August 31, 2020: TMC submitted 90% Roadway Drawing Submittal to FDOT for Approval

September 1, 2020: TMC submitted NOI # 1

September 17, 2020: Pre-Construction Conference

September 28, 2020: Private Parcel "release" on Wildcat Property for the proposed WREC Access Road

October 14, 2020: TMC Submitted NOI # 1 WREC Access Road Entitlement Letter

December 9, 2020: FDOT/CEI WREC Access Road Response

December 23, 2020: TMC submitted RFC Roadway Drawing Submittal to FDOT for Approval

March 8 thru April 27, 2021: Subsoil Removal on WREC Access self-performed by TMC

August 12, 2021: First escalation Meeting with District 7

September 16, 2021: Second escalation Meeting with District 7

November 9, 2021: Formal DRB Request for Hearing

Supporting and Relevant Information

The WREC Access road was proposed to be located in the NW corner of the interchange west of Ramp A to the Proposed ROW limits. Please note that the alignment of the proposed WREC Access alignment was not included in the FDOT Concept Plan.[1]

Of major significance, please note the boring location plan on Ramp A ONLY. No borings were taken on the proposed WREC Access Road alignment. Specifically bore locations – AB-101A, AB 103A, AB-106A, AB107A, AB- 108A, AB-109A, AB-111A, AB-112A, AB-113A and AB-114A.

In addition, the Soils Report, classifies the northwest (Ramp A & WREC Access Road) and southeast (Ramp C) quadrants of the project as #8 Sellers which shows the soils in these locations consists of A-24 and A-3 material with no indication of subsoil.

The boring location plan for Ramp C given specific boring locations are AB-407C, SH408C, AB 409C, AB-410C, SH-412C, AB-413C, AB 414C, SH 415C, AB-417C, SH-418C, AB-420C, SH-422C, AB-422C.

The relevancy of Ramp C is that this ramp also had subsoil removal similar to Ramp A.

Please note that Tierra Inc. performed the initial soil survey for FDOT in 2019. As a reminder, Tierra was contracted as a subconsultant for TMC for the Geotechnical design scope of work.

During the bid process a question was asked by a shortlisted proposer requesting the "limits of work and work scopes associated with providing an access road for WREC along the L/A ROW paralleling Ramp A".[2] The published answer defined that the "Design Builder is required to perform all clearing and grubbing and construct the access road to facilitate relocation of WREC facilities. The Design Builder is also responsible to accommodate maintenance of traffic needs for WREC equipment access".

[1] TMC refers to the project concept plans included in the project Request for Proposal (RFP)
[2] TMC refers to the published Q and A record

Relevant Contract Provisions and TMC Position

Issue 1
FDOT Concept Plans included in the RFP Reference Documents. The WREC Access road was proposed to be in the NW corner of the interchange west of Ramp A to the Proposed ROW limits.
TMC Position: Please note that the alignment of the proposed WREC Access alignment was not included in the FDOT Concept Plan.

Issue 2
FDOT Roadway Soil Survey provided in the RFP Reference Documents.
TMC Position: Of major significance, please note the boring location plan shown on (pages 301 thru 303 of this document)[3] on Ramp A ONLY. No borings were taken on the proposed WREC Access Road alignment. Specifically bore locations – AB-101A, AB 103A, AB-106A, AB107A, AB- 108A, AB-109A, AB-111A, AB-112A, AB-113A and AB-114A. In addition, on (page 280 and page 282 of this document) of the Soils Report, classifies the northwest (Ramp A & WREC Access Road) and southeast (Ramp C) quadrants of the project as #8 Sellers which shows the soils in these locations consists of A-24 and A-3 material with no indication of subsoil. The boring location plan for Ramp C is shown on page 305 through 308. The specific boring locations are AB-407C, SH408C, AB 409C, AB-410C, SH-412C, AB-413C, AB 414C, SH 415C, AB-417C, SH-418C, AB-420C, SH-422C, AB-422C. Please refer to the Roadway Soil Profile for Ramp C on (page 334 of this document). The relevancy of Ramp C is that this ramp also had subsoil removal similar to Ramp A.
Please note the Tierra Inc. performed the initial soil survey for FDOT in 2019. As a reminder, Tierra was contracted as a subconsultant for TMC for the Geotechnical design scope of work.

Issue 3
During the bid process a question was asked by a shortlisted proposer requesting the "limits of work and work scopes associated with providing an access road for WREC along the L/A ROW paralleling Ramp A". The published answer defined that the "Design Builder is required to perform all clearing and grubbing and construct the access road to facilitate relocation of WREC facilities. The Design Builder is also responsible to accommodate maintenance of traffic needs for WREC equipment access".
The FHWA Geotechnical Notebook Issuance – GT-15 Geotechnical Differing Site Conditions as a subset of FHWA Checklist and Guidelines for Review of Geotechnical Reports and Preliminary Plans and Specifications which was provided in the RFP Governing Regulations.
From the FDOT RFP - E7R18 (page 159 of this document) Withlacoochee River Electric Co-op (WREC): "It is anticipated that WREC Transmission facilities will relocate once the Right-of-Way is secured. WREC Transmission will box around the Interchange of I-75 and Overpass Rd as depicted in the Advanced Utility Coordination provided as reference documents. The contractor is required to coordinate all clearing and grubbing as well as the maintenance of traffic with WREC for the placement of their poles. The Contractor is to provide access roads to the proposed facilities as depicted in the Concept Plans."
TMC Position: TMC was required to provide an access road for WREC as depicted in the concept plans "only". TMC used the information provided in the RFP and Concept Plans to prepare its Technical and Price Proposal. The typical section for the WREC access road in the concept plans clearly states that the new access road will "match existing" natural ground with a twelve (12) inch thick roadway section of "Type B Stabilization LBR 40". TMC used the information provided in the RFP and Concept Plans to prepare its Technical and Price Proposal.[4]

Issue 4
The boring location plan did not show ANY borings were completed in the location of the WREC Access Road west of new Ramp A.

[3] Page number references in the Contractor's position refer to the Contractor's position documents
[4] See Appendix A Figure A1

TMC Position: The boring locations shown in the draft soil survey did NOT include the WREC access roadway therefore TMC used the information provided in the RFP and Concept Plans to prepare its Technical and Price Proposal.

Issue 5

From the FDOT RFP E7R18 Reference Documents, "The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for reference and general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design- Build Firm can rely upon in performance of this contract. All information contained in these reference documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived."

TMC Position: "Except as specifically set forth in the body of this RFP" and "except as otherwise specifically stated herein" [emphasis added]. The emphasized language is crucial to the evaluation of this entitlement whereas page 5, Section A of the RFP explicitly states, "The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data and shall base their bid on their own opinion of the conditions likely to be encountered." The Contract Documents are complementary and must be read as a whole. Reading the RFP appropriately, it is clear in the language highlighted above that TMC shall base its bid on the geotechnical information provided in the Reference Documents which is the only geotechnical information available in the RFP package.

Issue 6

From the FDOT RFP E7R18, "The Design Build Firm shall examine the Contract Documents and the site of the proposed work carefully before submitting a Proposal for the work contemplated and shall investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents. Written notification of differing site conditions discovered during the design or construction phase of the Project will be given to the Department's Project Manager."

TMC Position: TMC did examine the contract documents and the site prior to submitting its Technical and Price Proposal. This section of the RFP addresses differing site conditions discovered during the design and construction phase as underlined above. TMC did notify the Departments CEI of potential differing site conditions encountered based upon the 90% drawings submitted for approval.

Issue 7

The Draft Roadway Soil Survey and the concept plan cross sections are components of the Contract Documents that TMC examined to gain understanding of the soil quality, quantity, and location within the site. In addition, and in accordance with RFP, specifically the FDOT Soils and Foundation Handbook, Chapter 11 Design Build, Section 11.2.2 specifies the Design-Build Team Responsibilities, during the Technical Proposal and Bidding Phase, "Short Listed Design Build Firms perform analysis of the preliminary geotechnical data … The preliminary geotechnical data is defined by this FDOT manual in Chapter 11 as "A sufficient number of geotechnical borings needs to be attached to the RFP to give DB Teams an understanding of the geotechnical conditions of the project."

In Section 11.1.1, it is the "Departments Geotechnical Engineer's responsibility to gather the data on the conditions at the site sufficient for the design-build team to make a realistic proposal."

This Manual also states that for Design-Build projects, "When possible, a more extensive geotechnical investigation should be performed for Design-Build projects than for normal design-bid-construct projects. The

total effort may exceed 120% of a normal investigation in order to assist the Teams in offering their most cost-effective solution for the project."
TMC Position: TMC fulfilled its responsibilities as specified in the RFP and did rely on the geotechnical data provided in preparing its Technical and Price proposal.

Issue 8
FDOT will endeavor to use information provided by TMC and included in our Technical Proposal submission related to unsuitable soils against our entitlement request. An extract from the Technical Proposal is shown below.
TMC Position: TMC performed muck probes along Ramp A during the procurement phase and evaluated the information provided in the RFP which further supports that TMC went over and above their contractual obligations during the procurement phase. A major concern was verification of the subsoil limits shown in the Concept Soil Survey provided by FDOT as a reference document. As shown in the extract, the information identified subsoil along Ramp A "only". We did not probe outside of the limits of Ramp A.

TMC also highlights that "a subsurface exploration program will be completed for the final design to supplement previously obtained information and RFP data. Soil explorations will be completed in accordance with guidelines in the FDOT Soils and Foundation Handbook and the RFP requirements." Upon review, no other proposer documented that they had performed additional muck probes in their technical proposal submittals.

TMC was not allowed to enter private property to complete any other potential additional muck probes. The areas investigated are clearly marked in the diagram below.

TMC would also like to include that the Parcel of property on which the WREC access road was proposed would not be acquired by FDOT until February 2021. As a reminder, the sequence of early project events was:

- E7R18 Price Proposal Submission – May 12, 2020
- E7R18 NTP – August 3, 2020
- NOI # 1 TMC Notification – September 1, 2020
- Actual Property Release by FDOT – September 28, 2020

The acquisition of this property was contentious and was completed after the NTP. FDOT could not enter private property to perform soil borings prior to the procurement phase, therefore the bidders had no geotechnical data along the WREC access road other than the Soils Report, specifically (pages 280 and 282) which classifies this area as #8 Sellers with soils consisting of A-2-4 and A-3.

Issue 9
From the FDOT RFP E7R18, Design-Build Responsibility: "The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data and shall base their bid on their own opinion of the conditions likely to be encountered. The submission of a proposal is prima facia evidence that the Design-Build Firm has made an examination as described in this provision."
TMC Position: This clause specifies that Design-Build Firms exam the boring data, where available. The only available boring data included in the bid documents was provided in Reference Documents provided by FDOT roadway soil survey and the concept plan cross sections which is the information TMC based its bid on.

Issue 10
From the FDOT RFP E7R18 Section III K states, "The Department does not guarantee the details pertaining to borings, as shown on any documents supplied by the Department, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated."

TMC Position: From the 23FDOT RFP E7R18_Add04_RFP_043020 (page 124 of this document) states that Design-Build Firms are to base their bids on the geotechnical information provided in the RFP documents which includes Section 4-3.7 of the specifications which addresses latent subsurface conditions.
"Written notification of differing site conditions discovered during the design or construction phase of the Project will be given to the Department's Project Manager."

Issue 11
From the FDOT RFP E7R18 Section V. C., Project Requirements and Provisions for Work. Geotechnical Services: "The Design-Build Firm shall be responsible for identifying and performing any geotechnical investigation, analysis, and design… The Design-Build Firm shall be solely responsible for all geotechnical aspects of the project."
TMC Position: TMC recognizes and continues to fulfil this responsibility as it pertains to "identifying and performing any geotechnical investigation, analysis and design". As specified, TMC did complete a geotechnical investigation for the project, which was completed subsequent to its price proposal being submitted. This clause also states "The DBF shall be solely responsible for all geotechnical aspects of the project". It is important to note that the Contract Documents are complementary and must be read as a whole. Reading them appropriately, the RFP and Specifications are clear that TMC did not assume responsibility for differing site conditions encountered on the project.

Issue 12
From the FDOT RFP E7R18 Section V. H Project Requirements and Provisions for Work. Verification of Existing Conditions: "… and that any information is being provided merely to assist the Design- Build Firm in completing adequate site investigation. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information."
TMC Position: The clause states, "Notwithstanding any other provision in the contract documents to the contrary". As such, there are other provisions in the contract, specifically (page 124 of this document) of the RFP states the Design-Build Firms shall base their bids on the geotechnical information provided in the RFP documents and Specification 4-3.7 addresses compensation if differing site conditions are encountered.

Issue 13
From the FDOT Design Build Specification - Section 4-1 Intent of the Contract: "The Design-Build Firm shall have all liability and responsibility for all unknown and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the contract. If unforeseeable work is provided in the contract, such work shall be paid for in accordance with 4-3.2."
TMC Position: In order to highlight our entitlement please recognize the following language, "unless otherwise stated in the Contract." [emphasis added]. The emphasized language is crucial to evaluating this claim, for the Specifications explicitly include a differing site conditions clause in Section 4-3.7. The Contract Documents are complementary and must be read as a whole. Reading the documents appropriately, the Specifications are clear that TMC did not assume liability for unknown and/or differing site conditions.

Issue 14
From the FDOT Design Build Specification - Section 4-3.7 Differing Site Conditions: "During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract, … if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made."
TMC Position: In reviewing the RFP borings, concept plan cross sections and the preliminary geotechnical data, this information did not account for the construction of the WREC access road. The additional borings on the WREC access road that were completed by TMC in the final design phase, better defined the limits of subsoil

removal to accommodate the design of the proposed access road. Simply stated there were not enough borings in the preliminary information provided in the RFP package to accurately capture the true extent of the subsoil material within the WREC access roadway template. These findings clearly meet the intent of specification 4-3.7 which entitles TMC to additional compensation and a potential time extension if necessary.

Issue 15

From FHWA – GT-15 Geotechnical Differing Site Conditions guideline, the following information can be extracted and used to support the TMC entitlement.
(Page 373) – "In summary, unless prohibited by State Law, Part 635 requires that "differing site condition" clause shall be made part of and incorporated into each highway project approved under Title 23……. adequate site investigation, disclosure and presentation of subsurface information in mitigating or resolving contractor claims"
TMC Position: There must be a differing site condition clause in this contract for the purpose of resolving claims by the contractor and that FDOT should provide an adequate site investigation and disclose all pertinent information.

Issue 16

From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 375) – "The objective of these recommendations is, in part, to decrease bidding contingencies on subsurface items, address unexpected subsurface problems early, and provide a basis for equitable resolution of contractor claims based on differing site conditions is borne by the contractors who in turn must increase the price bid to mitigate the risk."
TMC Position: TMC should not have made geotechnical "assumptions" outside of the information presented in the RFP. The potential for subsoil under the proposed WREC access road was unknown during the procurement phase. Since there were no boring locations in the original soil survey provided by FDOT, TMC assumed NO subsoil excavation in order to maintain a competitive bid and to eliminate significant bidding contingencies.

Issue 17

From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 376) – "…. due primarily to the complexity and variability of natural earth and rock formations and materials……however unanticipated latent ground conditions can and do occur. In such cases the contractor should be fairly compensated for extra work associated with unforeseen condition"
TMC Position: TMC acknowledges that there are inherent variabilities in the natural ground composition. However, in accordance with the RFP, TMC based their bid on the information presented in the RFP documents.

Issue 18

From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 379) – "the task of performing a subsurface investigation usually falls to the agency. The agency not only desires to avoid the unnecessary costs of bidders who include contingencies for unknown risks but also to avoid the latent costs for pre-bid subsurface investigations by bidders…. The resulting design implies, and the subsurface data describes the conditions on which bidding, and construction will be based. The
representation of these results also provides the basis for application of the DSC clause."
TMC Position: FDOT had not acquired the ROW in the area of the WREC access road therefore they were not able to perform an adequate subsurface investigation along the centerline of the WREC access road. Based on this, there was no borings available that TMC could rely on during the procurement phase.

Issue 19

(From FHWA – GT-15 Geotechnical Differing Site Conditions guideline Page 382) – "Guidelines for a minimum Subsurface investigation – An adequate site investigation is needed to minimize the potential for construction problems, change orders and claims. Such an adequate site investigation should include sufficient

amounts of boring, sampling and testing to identify potential sources of construction problems which were identified during terrain reconnaissance or site inspection. Accepted standard procedures from ASTM, AASHTO or as established by the agency should be followed in the investigation process."
TMC Position: There were no soil borings included along the WREC access road in the original soil boring survey presented as a reference document in the RFP.

Issue 20
From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 383) – "Courts have stated that agencies have a duty to disclose, to the contractor, pertinent information that the agency possesses or knows is available if such information could reasonably be expected to have a material effect on bidding or construction of the project……..The agency assumes the risk in the following situation: the bidders are not provided either adequate subsurface information or a reasonable opportunity to conduct subsurface investigations……. Interpretive information made, available to bidders, should have been analyzed and interpreted by qualified geotechnical engineers or engineering geologists."
TMC Position: FDOT had an obligation to provide information related to subsoil on the proposed WREC access road location.

Issue 21
From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 385) – "The inclusion of geotechnical information in the contract provides both the agency and contractor a consistent geotechnical baseline for determination of what constitutes a differing site condition……
Presentation of Subsurface Information: Presentation of subsurface information to bidders can take several forms. The key rule to follow is that all involved parties have access to the presented information. Factual information pertinent to the work is commonly shown in detail on the contract documents…… Factual data is commonly reproduced in a summary or a plot to permit the bidders an opportunity to easily interpret the data."
TMC Position: No "factual" information was provided to all bidders related to the existing geotechnical conditions associated with the proposed WREC access road therefore the conditions were unknown. The response related to the scope of work for the WREC access road to during the Question-and-Answer phase was the work included: clearing and grubbing and constructing the access road. There was no mention of subsoil excavation and the Typical Section scope called for a 25' access road constructed on 12" of stabilized base and sod.

Issue 22
From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 386) – Complex projects may use a "Geotechnical Design Summary Report" (GDSR) approach where the agency prepares a standalone report that is made part of the specifications by reference. The GDSR contains the design engineer's geotechnical interpretations regarding anticipated conditions for design and construction. A typical GDSR contains not only the subsurface data but offer opinions on both anticipated ground behavior and construction difficulties. The function of the GDSR is not to simply repeat factual information contained elsewhere in the contract documents, but to describe the thought process that led to the design and specifications included in the plans. Experience indicates that the GDSR provides a more realistic portrayal of actual conditions likely to be encountered than the raw data reports (with little or no interpretation) which are commonly provided in contract documents. Many claims (and resulting settlements) have been based on one or two words included (or omitted) on boring log descriptions that the contractor has subsequently maintained were key in his bid preparation. A clear statement of the conditions to be assumed during bid preparation will facilitate resolution of disputes in a more timely and cost-effective manner for both agency and contractor."
TMC Position: No "factual" information was provided that described anticipated ground behavior or construction difficulties to all bidders related to the existing geotechnical conditions associated with the proposed WREC access road.

Issue 23
From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 387) – "Recommendations - It is generally considered desirable and prudent to make all pertinent geotechnical data available to bidders……. All pertinent subsurface information should be disclosed in the contract documents…. Extraneous factual data should not be presented in detail in the contract documents but may be made available at a designated location and time for bidder inspection……Pertinent information from comprehensive preconstruction test program reports should be excerpted for inclusion in the contract documents."
TMC Position: There was no geotechnical data available or disclosed to all bidders.

Issue 24
From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Pages 387, 388 & 389) – "Recommendations - The agency should qualify the use of any preexisting surface or subsurface data which may be neither factual nor applicable to the project……. Interpretive information should be clearly labeled to represent the opinion of qualified engineers or engineering geologists of the agency and
should not be a substitute for personal interpretations of the contractor…… Use specific plan notes to communicate experience with the type of subsurface condition at a specific project site to all prospective bidders."
TMC Position: FDOT has consistently stated that TMC should have interpreted the geotechnical conditions on the proposed WREC Access road location. No specific notes or information were provided to shortlisted proposers. In fact, on (pages 280 and 282 of this document) of the Soils Report, label the Ramp A and WREC access road as #8 Sellers which shows the soils in this area to consists of A-2-4 and A-3 material.

Issue 25
From FHWA – GT-15 Geotechnical Differing Site Conditions guideline (Page 389ment) "Soil conditions between borings, which differ materially from those stated in the boring logs, may form the basis for a Type II DSC but not a type I DSC."
TMC Position: This clause establishes that the boring information provided is for the specific location of the boring and if the soil conditions change in the distance from one boring location to another it would provide the basis for a DSC. TMC was not provided boring information along the WREC access road and per the language in the RFP were not required to make assumptions of the geotechnical conditions. In addition, on (pages 280 and 282 of this document) of the Soils Report label the Ramp A and WREC access road as #8 Sellers which shows the soils in this area to consists of A-2-4 and A-3 material.

Other Relevant Considerations / TMC Position

WREC Access Road Location

Throughout the procurement process it was evident that negotiations between Pasco County and WREC were ongoing regarding the location of the WREC Access Road.
The original concept dated 4/17/19 provided by FDOT (pre-advertisement) showed the right of way intended for the WREC access road from Old Pasco Road.[5] No exact layout of the road itself was provided, just limits of ROW.
The final WREC design layout dated 1/30/20 which provided as a reference document with Addendum 2 showed only the following – only pole locations, no ROW, and no access road layout.[6]

During the course of our Utility Co-ordination contract obligation, WREC provided our Designer a picture that WREC claims was used to co-ordinate discussions from September 16, 2019. The access is from the North and shows dashed line access.

[5] See Appendix A Figure A3
[6] See Appendix A Figure A4

TMC Position: TMC acknowledges that in essence the location of the access road was always going to be in the Northwest quadrant of the new interchange. However, TMC wants to highlight that the situation was obviously dynamic during the bid process between Pasco County and WREC. We acknowledge that the Typical Sections in the last Addendum did specify the exact location, however why were there no soil borings taken during the original soil survey in 2019? TMC could speculate that when the original borings were taken by FDOT/Tierra (May 7, 2019) that there was no agreement on the location required by WREC to relocate their transmission poles.

Within the Original Soil Survey Report, every other major alignment had borings completed except the WREC Access Road. The same geotechnical engineer took the borings both for FDOT and TMC – Tierra Inc. It was not as if there was an inability to complete as shown by Tierra completing soil borings for the new WREC alignment in the TMC Soil Survey submitted with our Initial Roadway plans (August 28, 2020). Perhaps the alignment information was not available to Tierra in 2019.

TMC Position: TMC acknowledges that in essence the location of the access road was always going to be in the Northwest quadrant of the new interchange. However, TMC wants to highlight that the situation was obviously dynamic during the bid process between Pasco County and WREC. We acknowledge that the Typical Sections in the last Addendum did specify the exact location, however why were there no soil borings taken during the original soil survey in 2019? TMC could speculate that when the original borings were taken by FDOT/Tierra (May 7, 2019) that there was no agreement on the location required by WREC to relocate their transmission poles. Within the Original Soil Survey Report, every other major alignment had borings completed except the WREC Access Road. The same geotechnical engineer took the borings both for FDOT and TMC – Tierra Inc. It was not as if there was an inability to complete as shown by Tierra completing soil borings for the new WREC alignment in the TMC Soil Survey submitted with our Initial Roadway plans (August 28, 2020). Perhaps the alignment information was not available to Tierra in 2019. TMC based their bid on the geotechnical information provided in the RFP documents only.

Inherent Acknowledgement by FDOT of a Differing Site Condition

Timeline of Documents:

Original Roadway Soil Survey completed by Tierra for FDOT – May 7, 2019. This document did NOT include soil borings along a WREC Access Road Alignment.

Soil Survey Report completed by Tierra for TMC – August 28, 2020. This document did include soil borings taken along the proposed WREC access alignment with a detailed proposed remediation of Organic Soil.

Formal Submittal of Roadway Initial Plans – December 23, 2020. Including the Soil survey report taken by TMC post bid with the proposed remediations of organic soil.

TMC Position: TMC believes that the supporting RFC documents and their approval by FDOT, inadvertently acknowledges that there was a differing site condition between the Original Soil survey taken in May of 2019 and the formally submitted and approved soil survey submitted by TMC.

WREC Pole Installation Differing Site Condition

Timeline of Documents:

WREC received a Notice to Perform Utility Work from FDOT on April 21, 2020. FDOT informed WREC that they could perform utility relocation work once the right of way had been acquired. All costs are reimbursable to WREC on a Force account Method. A utility work estimate was provided with a Total Cost Estimate of $2M.

WSP/Harbor Coordination Solutions, Inc for FDOT provided a summary document dated April 22, 2020. A utility co-ordination document distributed to all proposers that highlights that WREC had received an agreement to receive $2M in reimbursable costs. The document also states and associated with the WREC access road that - "However specific locations were not locked down to allow the D/B firm latitude in their design, perhaps ATCs."

Letter from WREC to FDOT highlighting additional costs should be anticipated related to the installation of pole foundations – April 1, 2021. The letter states "WREC has concerns to the structural integrity from the fill and

base material at the pole # 4 location……. the muck must be removed and replaced with fill, at the location of Pole # 4……. The area where the muck was removed, at the Pole # 4 location, needs to be extended at least 30 to 40ft. south to insure better stability for the pole base. The pole will be installed in a 30ft. culvert with only about 16 ft. of embedment into native soil and the rest in fill WREC plans to create a fiber reinforced concrete collar around the top of the culvert with two 4ft. wide by 6ft. to 8ft. long Bog Shoes. The Bog shoes will be positioned parallel to the transmission line crossing I-75 connecting Pole # 4 to Pole # 3. The installation of the Bog Shoe structure will also add cost to the WRECs part of the project."
Regarding pole stability and the access road, the letter further details that "the removal of the muck and the replacement with fill will ensure better stability for the pole installation……. the WREC access road now and in the future will be impassible if the muck is not removed due to the fill used to create Ramp A for the project."
Regarding cost and implying a differing site condition for WREC than originally planned – "the fill and other issues with the WREC access area will increase the cost of this section
of the project since the estimate was not predicted to be as extensive in the original scope of the project."
TMC Position: TMC is not obligated to incur the cost for the remediation of FDOT property to suit the installation of the WREC deep foundations. Based upon the information in this document, FDOT should have required WREC complete the removal of muck to ensure the stability of "their" pole installation. Why is TMC being treated differently regarding entitlement by FDOT when associated with a differing site condition such as the obvious differing site condition associated with WREC (Bog Shoe)? As of the date of this Position Paper, and nearing final completion for WREC on site work, the total work order costs are approximately $1.7M out of an original budget of $2M. Overall and ultimately, TMC provided a stable WREC access road after the removal of subsoil for both the integrity of the new pole foundations and the access road and should be compensated for the cost associated with the unforeseen work.

Executive Summary

In summary, TMC is entitled to be paid in full for the unforeseeable work required due to the differing site conditions encountered on this project, which is supported by information provided herein and as summarized below:

The FDOT CEI responded with the following:

"RFP Page v – Reference Documents

The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for reference and general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these reference documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.

The concept plans are identified as Reference Documents R002.01 and R002.02"

TMC Position: The CEI fails to acknowledge the following language: "Except as specifically set forth in the body of this RFP" and "except as otherwise specifically stated herein" [emphasis added]. The emphasized language is crucial to the evaluation of this NOI whereas (page 124 of this document), Section A of the RFP explicitly states, "The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data and shall base their bid on their own opinion of the conditions likely to be encountered." The Contract Documents are complementary and must be read as

a whole. Reading the RFP appropriately, it is clear in the language highlighted above that TMC shall base its bid on the geotechnical information provided in the Reference Documents which is the only geotechnical information available in the RFP package.

The FDOT CEI responded with the following:

RFP Page 2 of 73 – Project Description

Constructing WREC access roads is included in the project description.

TMC Position: During the bid process a question was asked by a shortlisted proposer requesting the "limits of work and work scopes associated with providing an access road for WREC along the L/A ROW paralleling Ramp A". The published answer defined that

the "Design Builder is required to perform all clearing and grubbing and construct the access road to facilitate relocation of WREC facilities. The Design Builder is also responsible to accommodate maintenance of traffic needs for WREC equipment access".

During the post bid period and continuing TMC utility co-ordination efforts, TMC learned that WREC required an access road designed and constructed to accommodate a #60,000 piece of equipment for the installation of their new transmission poles.

Our interpretation of the published answer was that TMC should include the costs for clearing, grubbing and construction of the access road per the Typical Section # 22 (shown below) provided in the concept plans only and not the removal of any unsuitable soils. Please note that the typical section provided in the concept plans showed an "access road" only matching existing grade with a base section of 12" thick type B stabilization LBR 40. Our interpretation of the documents provided was that TMC were building an access road for pole relocation only and long-term maintenance access, NOT a traditional roadway section similar to Ramp A.

FDOT provided a Draft Roadway Soil survey as part of the reference documents. Within the specific northwest quadrant of the project, soil borings were only provided along the Ramp A. There were no borings provided along the WREC access road. These borings were omitted from the reference document. Shortlisted proposers did not have the ability to gain access to the private property parcel upon which the WREC access road was to be located.

The WREC access road was located a distance of over 105ft. (centerline to centerline) away from the newly constructed Ramp A roadway section. Please refer to the Concept Plans Typical Section 10 (page 205 of this document) that showed the WREC Access road outside of the Type A permanent fence.

After review of other shortlisted proposers submitted technical documents, no other proposers discussed or highlighted the WREC access road underground subsoil conditions as being an issue.

The FDOT CEI responded with the following:

RFP Page 4 of 73 – Section A. Design-Build Responsibility

*The Design-Build Firm shall be responsible for survey, **geotechnical investigation**, design…*

RFP Page 20 of 73 - Section V.C.1 – Geotechnical Services General Conditions

*The Design-Build Firm shall be responsible for **identifying and performing** any geotechnical investigation…,*

…The Design-Build Firm shall be solely responsible for all geotechnical aspects of the Project.

TMC Position: TMC recognizes and fulfilled this responsibility as it pertains to "identifying and performing any geotechnical investigation, analysis and design" after NTP. TMC did complete a geotechnical investigation for the project, which was completed after its price proposal being submitted. This clause also states "The DBF shall be solely responsible for all geotechnical aspects of the project". It is important to note that the Contract Documents are complementary and must be read as a whole. Reading them appropriately, the RFP and Specifications are clear that TMC did not assume responsibility for differing site conditions encountered on the project especially on a parcel that was NOT acquired by FDOT.

The FDOT CEI responded with the following:

RFP Page 5 of 73 – Section A. Design-Build Responsibility

The Design-Build Firm shall examine the contract documents and site of the proposed work carefully before submitting a proposal…

TMC Position: It's important that the full section of the RFP that the CEI referenced be included in our position. "The Design Build Firm shall examine the Contract Documents and the site of the proposed work carefully before submitting a Proposal for the work contemplated and shall investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents. Written notification of differing site conditions discovered during the design or construction phase of the Project will be given to the Department's Project Manager."
TMC did examine the contract documents and the site prior to submitting its Technical and Price Proposal. This section of the RFP addresses differing site conditions discovered during the design and construction phase as underlined above. TMC did notify the Departments Project Manager of the differing site conditions as soon as TMC identified the issue during design and construction.
Reference Document R007 Geotech Data reports, and the concept plan cross sections are components of the Contract Documents that TMC examined to gain understanding of the soil quality, quantity, and location within the site. In addition, in accordance with 38RFP (page 133 of this document), specifically the FDOT Soils and Foundation Handbook, Chapter 11 Design Build, Section 11.2.2 specifies the Design-Build Team Responsibilities, during the Technical Proposal and Bidding Phase, 39"Short Listed Design Build Firms perform analysis of the preliminary geotechnical data … The preliminary geotechnical data is defined by this FDOT manual in Chapter 11 as "A sufficient number of geotechnical borings needs to be attached to the RFP to give DB Teams an understanding of the geotechnical conditions of the project."
In Section 11.1.1, it is the Departments Geotechnical Engineer's responsibility to gather the data on the conditions at the site sufficient for the design-build team to make a realistic proposal."
This Manual also states that for Design-Build projects, when possible, a more extensive geotechnical investigation should be performed for Design-Build projects than for normal design-bid-construct projects. The total effort may exceed 120% of a normal investigation in order to assist the Teams in offering their most cost-effective solution for the project.

The FDOT CEI responded with the following:

RFP Page 12 of 73 – Section K. Department's Responsibilities

*The Department **does not guarantee the details pertaining to borings**, as shown on any documents supplied by the Department, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the location indicated.*
TMC Position: From the **FDOT RFP E7R18** (page 124) states that Design-Build Firms are to base their bids on the geotechnical information provided in the RFP documents which includes specifications Section 4-3.7 which addresses latent subsurface conditions.

The FDOT CEI responded with the following:
RFP Page 23 of 73 - Section V.H. – Verification of Existing Conditions
The Design-Build Firm shall be responsible for verification of existing conditions…
…Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.
TMC Position: The full section of the RFP reads: 41"The Design-Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information. By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information."

The CEI fails to recognize the clause also states, "Notwithstanding any other provision in the contract documents to the contrary". As such, there are other provisions in the contract, specifically (page 124 of this document) of the RFP states the Design-Build Firms shall base their bids on the geotechnical information provided in the RFP documents and Specification 4-3.7 addresses compensation if differing site conditions are encountered.

Relevant Division 1 Specifications

Section 4-1 Intent of the Contract: "The Design-Build Firm shall have all liability and responsibility for all unknown and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the contract. If unforeseeable work is provided in the contract, such work shall be paid for in accordance with 4-3.2."
TMC Position: The CEI fails to recognize the following language, "unless otherwise stated in the Contract." [emphasis added]. The emphasized language is crucial to evaluating this NOI, for the Specifications explicitly include a differing site conditions clause in Section 4-3.7. The Contract Documents are complementary and must be read as a whole. Reading the documents appropriately, the Specifications are clear that TMC did not assume liability for unknown and/or differing site conditions. How can TMC take liability for subsurface conditions on private property?

Section 4-3.7 Differing Site Conditions: "During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract, … if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made."
TMC Position: In reviewing the RFP borings, concept plan cross sections, the information provided differed materially from those indicated in FDOT's Draft Roadway Survey and what was encountered in the field. The additional borings that were completed by TMC in the final design phase, better defined the limits of subsoil removal to accommodate the design of the proposed roadway and WREC access road. Simply stated there were no borings in the preliminary information provided in the RFP package to accurately capture the true extent of the subsoil material within the WREC access road template. These findings clearly meet the intent of section 4-3.7 which entitles TMC to additional compensation and a time extension.

Supporting FDOT Precedence

In 2020, TMC previously completed a project (E8N75) with the Florida Turnpike Enterprise with similar conditions that involved a Supplemental Agreement for subsoil excavation related to differing site conditions.

Supporting DRB Cases

There are several past DRB disputes that involve similar arguments as TMC has made regarding this claim. The highlights are summarized below.

Example 1

Kiewit Southern Claim; Contract E5L60; March 2009. This was a Design Build Project that involved a differing site condition claim that arose from different geotechnical conditions encountered on the project than what was represented in the geotechnical data provided by the Department. The DRB found that the Contractor had the right to rely on the geotechnical data provided by the Department.

Example 2

J.B. Coxwell Contracting Claim; Contract T-2563; August 2017. This was a Design-Bid- Build project that involved a differing site claim for compensation due to a differing site condition. The Department provided preliminary geotechnical data for ponds which did not show any man-made debris within the pond. The contractor encountered trash in the pond which impacted how much of the soil could be used from the pond and necessitated clean fill be imported to make up the unusable volume. The DRB ruled entitlement to the contractor citing that the change in the soil characteristics is a differing site condition from what was presented by the Department in the preliminary geotechnical data.

Supporting Case Law

It has been established in many legal cases, that the broad disclaimer language which puts all risk on the contractor, is not valid and not found enforceable because these onerous clauses go against the true intent of the contract, which is to limit risk to all parties and eliminate inflated contingencies that the Government would be paying. It has also been determined that the purpose of including a typical Differing Site Condition clause is to limit the risk and contractors carrying high contingencies in their bids.

There are several examples of case law that support contractors making differing site condition request for compensation and prevailing over the broad disclaimer language. Examples of these cases are cited below.

As stated by Florida Courts in **Town of Longboat Key v. Carl E. Widell and Son**, 362 So.2d 719 (1978), the changed conditions clause is designed to get the lowest possible price for the owner. When the changed conditions clause is used, contractors do not have to inflate their bids by adding high contingency factors to protect themselves against unknown risks. Instead, the owner assumes some of the risk of conditions being different than as expected or as represented in the plans and specifications. Id. at 722.

The long history of the clause has been further explained by multiple jurisdictions in the United States and is relied on and adopted by the State of Florida. See Id. Generally speaking, those Courts have explained the purpose behind a differing site conditions clause in a similar manner: The purposes served by the differing site conditions

clause in a construction contract, which permits a contractor to seek an equitable adjustment in the contract price for a changed condition, is to prevent bidders from increasing their bid prices to protect against misfortunes resulting from unforeseen developments … and thus avoid turning a construction contract into a gambling transaction.

See, e.g., **Metcalf Construction Company vs United States**; Court of Federal Claims, 2012-2014. In this case the court points out the fact that the Differing Site Conditions clause is incorporated into the contract specifically to accomplish the risk shifting function. See, e.g., **Shank-Artukovich v. United States**, 13 Cl. Ct. 346, 354-55 (1987) aff'd, 848 F.2d 1245 (Fed. Cir. 1988) (internal citations and quotations omitted). Courts have also explained that borings, and not narrative descriptions, are "the most reliable reflection of subsurface conditions". **United Contractors v. United States**, 368 F.2d 585, 597 (Ct. Cl. 1966).

It is unquestionable that under Florida law a court should read "provisions of a contract harmoniously in order to give effect to all portions thereof, see" **City of Homestead v. Johnson**, 760 So.2d 80, 84 (Fla. 2000). Furthermore, "an interpretation which gives reasonable meaning to all parts of an instrument is preferred to one which leaves a portion of it useless, inoperative, void, meaningless, or superfluous." **Apollo Sheet Metal Inc. v. United States,** 44 Fed. Cl. 210, 214 (1999) (citing Blake Constr. Co. v. United States 220 Ct. Cl. 56, 60 (1979)). FDOT simply did not adhere to these basic principles of contract interpretation.

The differing site conditions provision is held in such high regard that under Florida law "a disclaimer clause requiring inspection of the site will not prevent a contractor from recovering additional costs under a differing site conditions clause." **Hendry Corp. v. Metropolitan Dade County**, 648 So.2d 140, 142 (Fla. 3rd DCA 1995).

There are several examples of case law that support contractor's reliance on owner provided borings and geotechnical information. Examples are cited below.

See Id. (see SAE/Americon, 98-2 BCA at 148,910 (quoting **United Contractors v. United States**, 368 F.2d 585, 597 (1966)); Cherry Hill, 92-3 BCA at 125,476 (same). Moreover, TMC was reasonable in its reliance on the borings cited herein, given their proximity to the subsoil removal work to be performed (see Appeal of GIIS Corp., 85-1 BCA P 17810 (1984)

The FDOT borings provided at the time of bid, were reasonably relied upon by TMC, to their detriment, and TMC is not liable for the risk of the differing conditions. See Foster Constr.

C.A. & Williams Bros. Co. v. U.S., 435 F.2d 873 (Ct.Cl. 1970) ("Even unmistakable contract language in which the Government seeks to disclaim responsibility for drill hole data does not lessen the right of reliance").

Executive Conclusion

FDOT fails to acknowledge that there were not enough borings in the preliminary information provided in the RFP package. TMC was provided geotechnical information needed to accurately capture the extent of the subsoil material within the WREC access road located on private property. FDOT also fails to acknowledge that the differing site conditions clause and is contrary to industry practice and significantly undermines the policy goals underlying the inclusion of these provisions in the contract. These broad remedy-granting clauses are a product of a generation of policy intended to level the playing field between owners and contractors. In fact, the differing site conditions

provision is held in such high regard that under Florida law "a disclaimer clause requiring inspection of the site will not prevent a contractor from recovering additional costs under a differing site conditions clause".

It is important to note in consideration of the NOI entitlement, that even though TMC notified FDOT on September 1, 2020, TMC continued to mitigate and complete the unforeseen work, progress the project in a

manner that did not adversely affect the project schedule. Based on the facts and information presented herein, in evaluating this DSC entitlement, FDOT is ignoring fundamental tenets of contract interpretation under

Florida law. It is unquestionable that under Florida law a court should read "provisions of a contract harmoniously in order to give effect to all portions thereof".

TMC respectfully requests the DRB support TMC in being entitled to compensation for all costs associated with the unforeseen work resulting from omissions and the differing site conditions encountered while performing the additional subsoil removal for this project.

Contractor Rebuttal

TMC submitted a rebuttal document in response to the FDOT position statement. The complete content of the rebuttal is contained in the Rebuttal document (28 pages). The following subjects were addressed in the TMC Rebuttal:

- Responsibility for geotechnical information
- Use of Reference Documents
- Responsibility for geotechnical investigation
- Wetland identified in northwest quadrant
- Access to the WREC access road area
- Examination of available boring data
- FDOT Soil Survey
- Responsibility for geotechnical investigation
- Responsibility for researching existing records
- Reviewing the work site
- Boring data
- Providing engineering and construction services
- Subsoil conditions
- Supplemental Geotech investigations
- Results of auger borings in NW quadrant
- Indications of soil conditions
- Wetland location implications
- Condition of unusual nature

FDOT Position

The following summary of the FDOT's position is based upon written materials submitted to the DRB and upon the hearing presentation. The complete position is available in the FDOT's submitted written materials.

Introduction

The Design-Build Firm (DBF) submitted NOI 001 WREC Access Road Additional Muck Removal and Disposal on September 1, 2020. The DBF stipulated *"that there is exists a large quantity of muck that my need to be removed and disposed."* The Department denies entitlement for this issue.

The three points of the assessment are as follows:

1. This agreement is a Design-Build construction contract. **The contract stipulates that the DBF is responsible for researching information provided, performing investigation, performing design, and construction.** The Request-For-Proposal and the FDOT Specifications overwhelmingly and explicitly stipulate that all geotechnical responsibility, including subsoil conditions, lies with the DBF.

2. **Nowhere in the information provided to the DBF is there any indication of favorable soil conditions within the WREC Access Road footprint.** To the contrary, all information made available to the DBF in the draft soil survey, PD&E documents and approved SWFWMD Permit indicate otherwise. There is no differing site condition.

3. **The existence of muck within a wetland is not a condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work.** The WREC access road is located within a wetland.

Chronology

September 13, 2019	Expanded Letters-of-Interest Submitted
October 25, 2019	Mandatory Pre-Proposal Meeting
February 28, 2020	Technical Proposal Submitted
May 12, 2020	Letting
August 2, 2020	TMC Notice-to-Proceed
August 10, 2020	TMC Performs Geotech at WREC Access Road
September 1, 2020	TMC Files NOI
October 1, 2020	ROW Acquisition in Northwest Quadrant Complete
December 2, 2020	Clearing Begins (approx)
March 1, 2021	WREC Subsoil Begins (approx)

Point 1

This agreement is a Design-Build construction contract. **The contract stipulates that the DBF is responsible for researching information provided, performing investigation, performing design, and construction.** The Request-For-Proposal and the FDOT Specifications overwhelmingly and explicitly stipulate that all geotechnical responsibility, including subsoil conditions, lies with the DBF.

Request-For-Proposal

REFERENCE DOCUMENTS

The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for reference and general information only. They are not being incorporated into and are not being made part of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these reference documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.

Figure 3 - From Attachment A - Reference Document Definition - Page 8 of 82

The reference documents are provided to the Design-Build Firm for reference and general informational purposes. These documents are provided for the DBF's use for developing their investigative plan and their design.

> **A. Design-Build Responsibility**
>
> The Design-Build Firm shall be responsible for survey, geotechnical investigation, design, preparation of all documentation related to the acquisition of all permits not acquired by the Department…

Figure 4 - From Attachment A - RFP Section 1.A - Design-Build Responsibility - RFP Page 13 of 82

The RFP stipulates the DBF is responsible for geotechnical investigation.

> The Design-Build Firm shall be responsible for reviewing the approved Environmental Document of the PD&E Study.

Figure 5 - From Attachment A - RFP Section 1.A - Design-Build Responsibility - Page 14 of 82

The PD&E document identifies the wetland located in the northwest quadrant.

> The Design-Build Firm shall examine the Contract Documents and the site of the proposed work carefully before submitting a Proposal for the work contemplated and shall investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents.

Figure 6 - From Attachment A - RFP Section 1.A - Design-Build Responsibility - Page 14 of 82

The DBF is directed to examine the site carefully before submitting their proposal and shall investigate the conditions to be encountered.

> The Design-Build Firm shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data and shall base their bid on their own opinion of the conditions likely to be encountered. The submission of a proposal is prima facia evidence that the Design-Build Firm has made an examination as described in this provision.

Figure 7 - From Attachment A - RFP Section 1.A - Design-Build Responsibility - Page 14 of 82

This article directs the DBF proposers to examine boring data "*where available".* All boring information required for design and construction of the project is not available. As stipulated by the RFP, the DBF is responsible for carrying out the geotechnical investigative plan, as they committed to do during their marketing effort.

Further, this section directs the DBF to examine the "*other preliminary data".* The PD&E documents and the approved SWFWMD permit are both made available to the DBF for their use. Both documents identify the presence of wetland conditions.

The borings provided in reference Document R007.02, *Draft Soil Survey,* indicate the presence of

> The Department does not guarantee the details pertaining to borings, as shown on any documents supplied by the Department, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated.

Figure 8 - From Attachment A - RFP Section III.K - Department's Responsibilities - Page 21 of 82

muck conditions.

> The Design-Build Firm shall be responsible for identifying and performing any geotechnical investigation, analysis and design of foundations, foundation construction, foundation load and integrity testing, and inspection dictated by the Project needs in accordance with Department guidelines, procedures and specifications. All geotechnical work necessary shall be performed in accordance with the Governing Regulations. The Design-Build Firm shall be solely responsible for all geotechnical aspects of the Project.

Figure 9 - From Attachment A - RFP Section V.C - Geotechnical Services - Page 29 of 82

The explicit direction to the DBF is that they are responsible for investigation, design, and construction.

> The Design-Build Firm shall be responsible for verification of existing conditions, including research of all existing Department records and other information.
>
> By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations. Notwithstanding any other provision in the contract documents to the contrary, no additional compensation will be paid in the event of any inaccuracies in the preliminary information.

Figure 10 - From Attachment A - RFP Section V.H - Verification of Existing Conditions - Page 32 of 82

The DBF is responsible for verification of existing conditions and researching all information. The DBF affirms that they are being compensated for performing adequate investigations of existing site conditions and that the information provided by the Department is being provided merely to assist the DBF in completing their site investigations.

Point 2

Nowhere in the information provided to the DBF is there any indication of favorable soil conditions within the WREC Access Road footprint. To the contrary, all information made available to the DBF in the draft soil

survey, PD&E documents and approved SWFWMD Permit indicate otherwise. There is no differing site condition.[7]

Point 3

The existence of muck within a wetland is not a condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work. The WREC access road is located within a wetland.

Division I Design-Build Specifications

> **4-3.7 Differing Site Conditions:** During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work. Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly.

[7] FDOT refers to Appendix B Figures B1 thru B7

Division I Design-Build Specifications

> Examine the Contract Documents and the site of the proposed work carefully before submitting a Proposal for the work contemplated. Investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents.

Figure 11 - From Attachment B - Article 2-4 Examination of Contract Documents and Site of Work - Page 12 of 125

The DBF is directed to review the site before submitting a Proposal. The DBF is directed to investigate the conditions to be encountered.

> The Department does not guarantee the details pertaining to borings, as shown on the plans, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated. The Bidder shall examine boring data, where available, and make their own interpretation of the subsoil investigations and other preliminary data and shall base their bid solely on their own opinion of the conditions likely to be encountered.

Figure 12 - From Attachment B - Article 2-4 Examination of Contract Documents and Site of Work - Page 12 of 125

The borings are shown to provide a general indication of the materials to be found adjacent to the holes bored at the site of the work and approximately at the locations indicated.

> The intent of the Contract is to provide for the engineering services, furnishing of materials, construction, and completion in every detail of the work described in this Contract.

Figure 13 - From Attachment B - Article 4-1 Intent of Contract - Page 20 of 125

The DBF is to provide engineering and construction services.

> The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract.

Figure 14 - From Attachment B - Article 4-1 Intent of Contract - Page 20 of 125

The specifications explicitly state the DBF is responsible for subsoil conditions.

DBF Expanded Letter-of-Interest (ELOI) - September 13, 2019

The geotechnical approach will use data provided by the Department as well as supplemental explorations gathered in accordance with the FDOT Soils and Foundations Handbook.

Figure 15 - From Attachment C - ELOI Geotechnical Section - Page 9 of 21

slopes where excavations expose the clayey substrata at lower elevations. Muck soils are anticipated in the southeast and northwest quadrants on the interchange and will need to be removed in accordance with Standard Plans Index 120-002.

Figure 16 - From Attachment C - ELOI Geotechnical Section – Page 9 of 21

GEOTECHNICAL INVESTIGATION PLAN

Tierra performed additional auger borings/probes to provide more extensive delineation of unsuitable soils. Combined with the RFP geotechnical data, the near-surface soils generally consist of sandy soils underlain by clayey soils. Muck (A-8) type soils were encountered along the alignment of Ramps A and C. A heat map (**Figure 3**) of the borings and muck probes identifies the extent of the muck requiring mitigation. Organic soils were encountered to a maximum depth of 17.5' below existing grade along Ramp A.

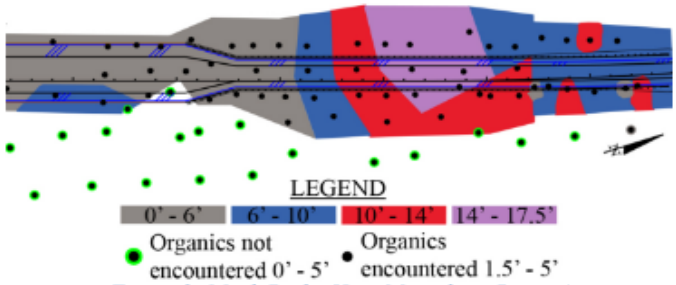


Figure 3: Muck Probe Heat Map along Ramp A: Approximately Sta. 105+00 to Sta. 111+00

A subsurface exploration program will be completed for the final design to supplement previously obtained information and RFP data. Soil explorations will be completed in accordance with guidelines in the FDOT Soils and Foundation Handbook and the RFP requirements. Proposed stormwater management sites will also be evaluated for suitability as potential borrow sources and fill. Usuitable soils will be used for pond berms, green areas, and anywhere else allowed. All geotechnical data will be summarized in formal reports to guide design and construction.

Figure 17 - From Attachment D - Geotechnical Investigation Plan - Page 5 of 12

DBF Technical Proposal - February 28, 2020

In their Expanded Letter of Interest, the DBF confirms they will perform supplemental Geotech exploration, and they affirm they are aware of the muck soils located in the northwest quadrant.

The DBF performed auger borings and developed the "heat" map shown above which was included in their Technical Proposal. This map indicates there is extensive muck up to 17.5' in depth located in the northwest quadrant. However, the DBF apparently elected to not continue with their investigation westward to the WREC access road despite the presence of the muck conditions depicted in their map, the presence of the muck conditions identified in the Draft Soil Survey and the wetland identified in the PD&E and SWFWMD permit documents.

FDOT Rebuttal

FDOT submitted a rebuttal document in response to the TMC position statement. The complete content of the rebuttal is contained in the FDOT Rebuttal document (64 pages). The following subjects were addressed in the FDOT Rebuttal:

- Subsoil removal limits
- Reliance on geotechnical information provided
- Opinion of conditions likely to be encountered
- Subsoil excavation limits
- Reliance on boring data
- Conditions depicted in contract documents
- Timeline
- Location of WREC access road
- Proximity of Ramp a soil borings
- USDA Soil Survey Map
- Providing WREC access road
- Reference documents and Contract documents
- Draft roadway soil survey and concept plans
- FDOT Soil and Foundation Handbook
- Chapter 11, FDOT Soil and Foundation Handbook
- Absence of muck probes in the WREC access road area
- Access to WREC access road area

- Basis of Bid
- Differing Site Condition specification
- Inaccuracies in preliminary information
- Available geotechnical data
- Differing site condition clause
- Geotechnical assumptions
- Variability in conditions
- Location of WREC access road
- Soil borings in the original Soil Survey
- Approval of RFC documents
- Cost of remediation of WREC access road
- Subsoil removal
- Payment for subsoil removal
- Subsoil conditions on private property
- FDOT precedence for payment for subsoil excavation
- Supporting DRB cases

Disputes Review Board Findings

1. The contract contains the following contract clause addressing Differing Site Conditions.

> "4-3.7 Differing Site Conditions: During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work. Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. The Engineer will notify the Contractor whether or not an adjustment of the Contract is warranted.
> The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has submitted the required written notice. The Engineer will not allow a Contract adjustment under this clause for any effects caused to any other Department or non-Department projects on which the Contractor may be working."

2. The WREC access road, which is the subject of the dispute, is located in the Northwest quadrant of the project immediately west of Ramp A.

3. No specific subsoil data was provided for the WREC access road prior to submission of the design-build proposal.

4. A reference document, USDA Soil Survey map provided by Tierra, the Geotech Consultant, indicated a soil classification of "(8) Sellers, A-2-4, A-3".[8] However, Tierra questioned the reliability of the USDA information.

5. Reference documents available prior to submission of the design-build proposal indicated that the Northwest quadrant of the project, where the WREC access road was located, was classified as a wetland.[9]

6. Soil boring information for Ramp A provided prior to submission of the design-build proposal indicated the presence of organic soil material in the Ramp A location.[10] Significant subsoil excavation and removal was necessary during the construction of Ramp A.

[8] Attachment E of FDOT position paper
[9] PD&E EA FONSI figure 3-16, SWFWMD environmental report Soils Map page 35, PD&E Wetlands/Other Surface Water Report sheet 4
[10] Draft Soil Survey Roadway Soil Profiles page 67

7. TMC by means of their geotechnical consultant, Tierra, performed subsoil exploration in the Ramp A area prior to submitting their proposal. TMC confirmed that they were aware of the presence of muck in the Ramp A area.[11]

8. Subsequently, following the submission of the design-build proposal, subsoil investigation of the WREC access road area indicated the presence of significant organic materials in the planned roadway path.

9. Initially TMC proposed a geo-fabric surface treatment in the WREC access road as a treatment for the underlying muck material. Ultimately, TMC abandoned the geo-fabric solution and removed the muck material.

Disputes Review Board Recommendation

The contract is silent regarding the specific subsurface conditions in the WREC access road area. No subsurface investigation information is provided for the WREC access road area. Therefore, the relevant issue is whether or not it is reasonable to conclude that the WREC access road area would not contain organic subsurface soils. The information available at the time of proposal submission is:

- The WREC access road was sited in a wetland area
- Soil borings for Ramp A, which is immediately adjacent to the WREC access road, indicated the presence of organic materials

Given the project information available, the DRB finds that it was not reasonable to conclude that organic soils would not be found within the WREC access road area.
The DRB does not recommend entitlement for additional compensation to TMC with regard to the issue before the DRB in this hearing.

[11] See Figure A2 in Appendix A of this document

The DRB appreciates the cooperation of all parties and the information presented for review to make this recommendation.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,
Disputes Review Board

Ralph Ellis Jr. – Chairman – Member
Murray Yates – Member
John Miseroy - Member

Signed for all with the concurrence of all members.

Ralph D Ellis Digitally signed by Ralph D Ellis
Date: 2022.01.07 07:54:29 -05'00'

Ralph D. Ellis, Jr.
Chairman

APPENDIX A FIGURES FROM CONTRACTOR POSITION

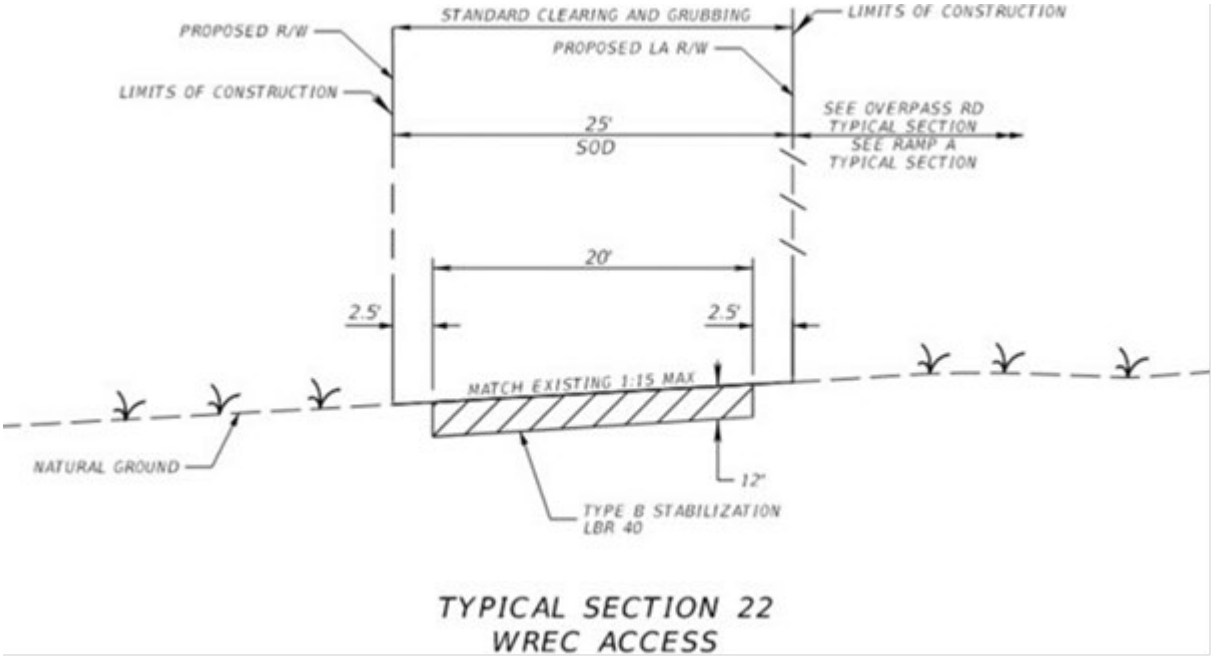

STANDARD CLEARING AND GRUBBING
LIMITS OF CONSTRUCTION
PROPOSED R/W
PROPOSED LA R/W
LIMITS OF CONSTRUCTION
25'
SOD
SEE OVERPASS RD
TYPICAL SECTION
SEE RAMP A
TYPICAL SECTION
20'
2.5'
2.5'
MATCH EXISTING 1:15 MAX
NATURAL GROUND
12"
TYPE B STABILIZATION
LBR 40
TYPICAL SECTION 22
WREC ACCESS

Figure A1

GEOTECHNICAL INVESTIGATION PLAN

Tierra performed additional auger borings/probes to provide more extensive delineation of unsuitable soils. Combined with the RFP geotechnical data, the near-surface soils generally consist of sandy soils underlain by clayey soils. Muck (A-8) type soils were encountered along the alignment of Ramps A and C. A heat map (**Figure 3**) of the borings and muck probes identifies the extent of the muck requiring mitigation. Organic soils were encountered to a maximum depth of 17.5' below existing grade along Ramp A.

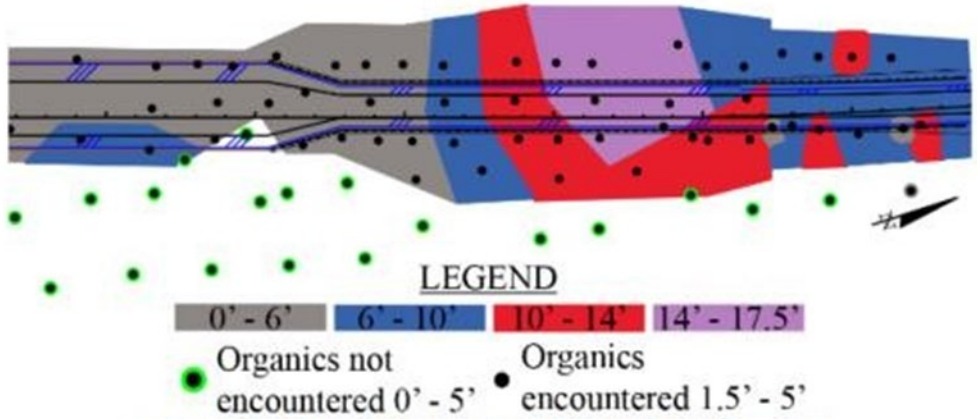


Figure 3: Muck Probe Heat Map along Ramp A: Approximately Sta. 105+00 to Sta. 111+00

A subsurface exploration program will be completed for the final design to supplement previously obtained information and RFP data. Soil explorations will be completed in accordance with guidelines in the FDOT Soils and Foundation Handbook and the RFP requirements. Proposed stormwater management sites will also be evaluated for suitability as potential borrow sources and fill. Usuitable soils will be used for pond berms, green areas, and anywhere else allowed. All geotechnical data will be summarized in formal reports to guide design and construction.

Figure A2

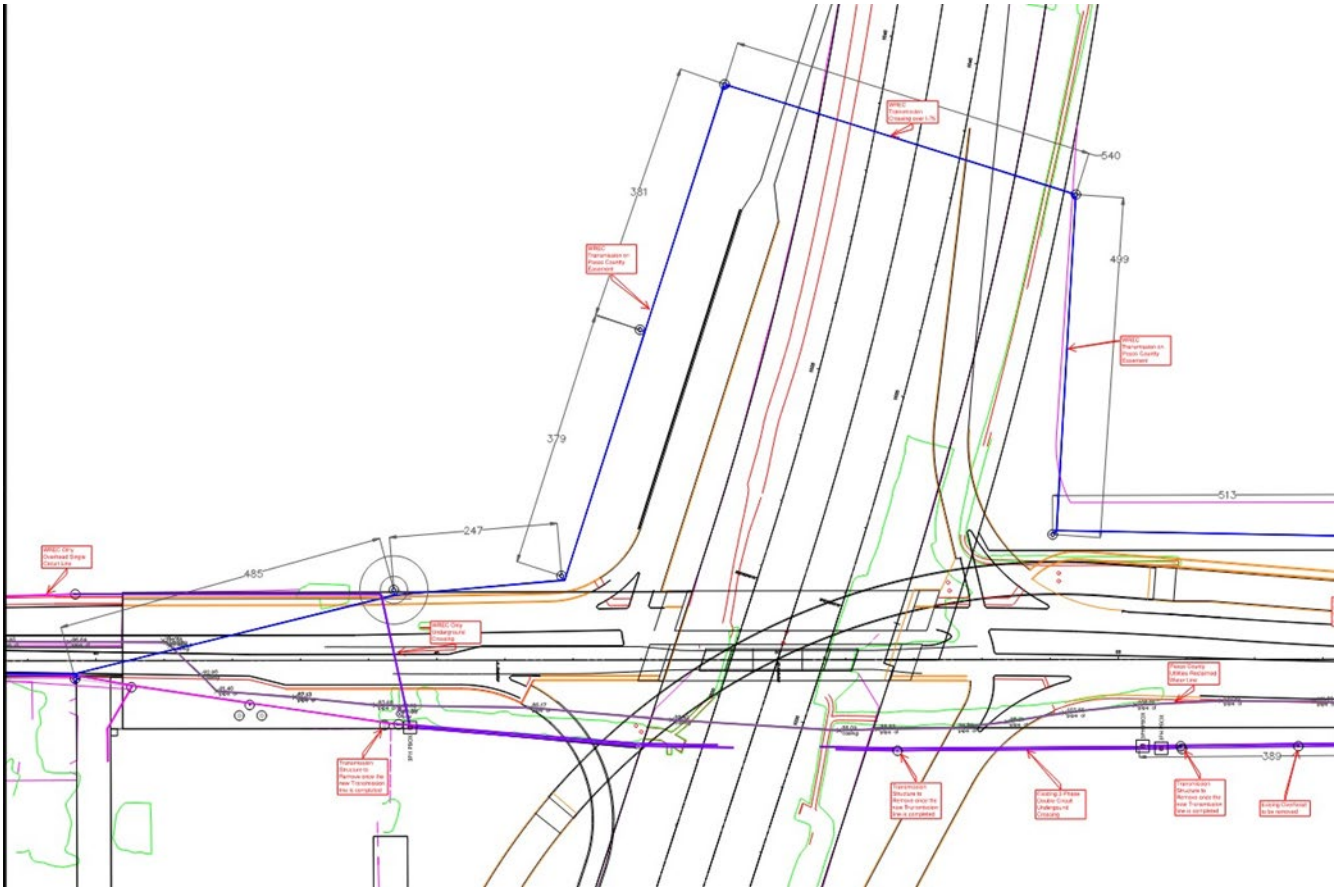


Figure A3 WREC Access Road Layout from TMC position paper

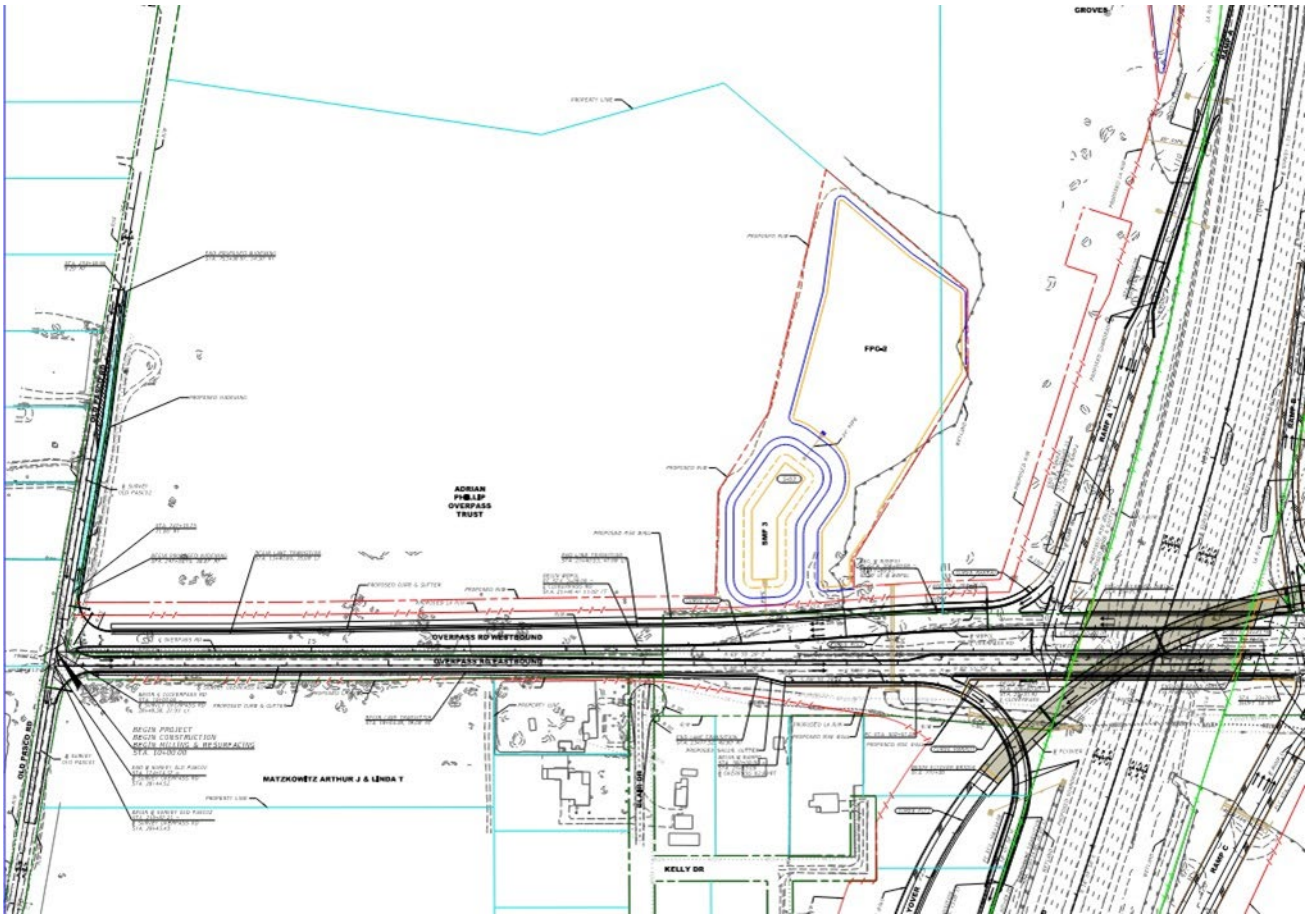

ADRIAN PHILIP OVERPASS TRUST
OVERPASS RD WESTBOUND
OVERPASS RD EASTBOUND
MATZKOWITZ ARTHUR J & LINDA T
KELLY DR
OLD FERGO RD
FPO-2
SMP 3
GROVES

Figure A4

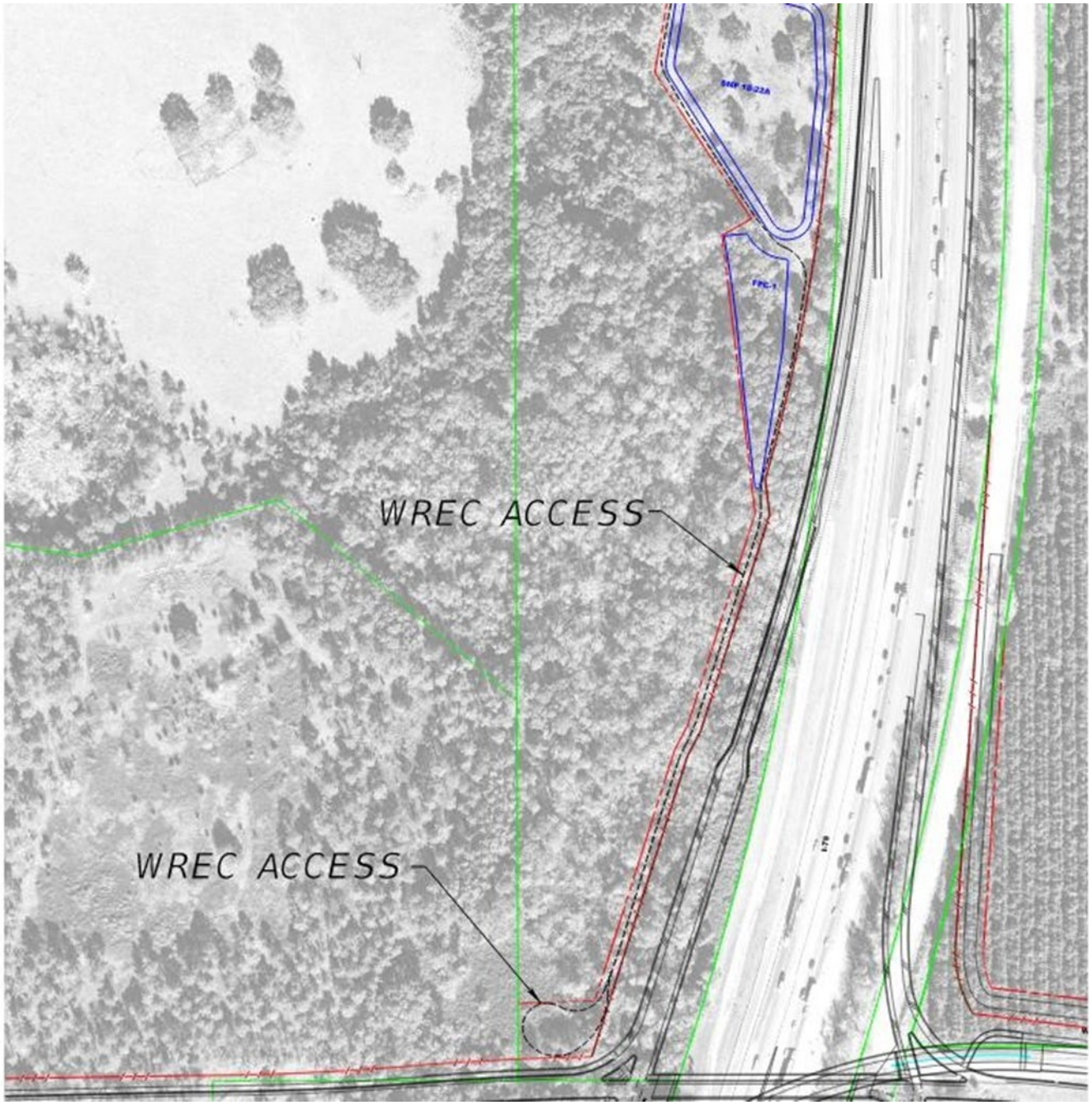


Figure A5 Illustration of Proposed WREC Access

7.2 Proposed Remediation of Organic Soil

Organic material (Stratum 7, A-8) was encountered in all hand auger boring/muck probes performed along the proposed WREC Access Road alignment. The WREC Access Road is proposed to have a roadway embankment approximately 2 to 3 feet above existing grades. The organic materials were encountered from the ground surface to depths ranging from approximately 4 to 16½ feet below the existing ground surface. At the time of this report, design criteria for the WREC Access Road has not been provided. Based on the provided project plans and discussions with the Design-Build team, removal of muck encountered up to 16½ feet below the existing ground surface in accordance with FDOT Standard Index 120-002 will result in excavations outside the right-of-way line. Therefore, full removal has been deemed impractical. It is recommended that the presence of organic materials along the WREC Access Road alignment be addressed through a combination of surficial muck excavation and installation of a geosynthetic support layer(s).

The geosynthetic support layer is recommended in order to retain fill material as well as enhance the stability of the proposed roadway embankment and to reduce and provide more uniform settlement. The installation of the geosynthetic will reduce long term total and differential settlements but will not fully eliminate settlement over time. Wherever the muck/organics are not removed settlement/consolidation will occur over time and maintenance will be required, as needed, to re-establish grades. Within the limits of the geosynthetic installation, Tierra recommends minimal disturbance to the root mat below the ground surface and vegetation should be cleared only from above the ground surface. Once the limits have been cleared, Tierra recommends installing two layers of a geosynthetic with sand backfill between and above the layers to the bottom of the proposed stabilized base. After allowing time to monitor the settlement of the geosynthetic reinforced subgrade the stabilized base should be placed and monitored. Tierra will coordinate with the Design-Build team on the limits of shallow muck excavation and geosynthetic material requirements for the WREC Access Road as the project progresses.

Figure A6 Excerpt from Tierra Soil Survey Report

APPENDIX B FIGURES FROM FDOT'S POSITON PAPER

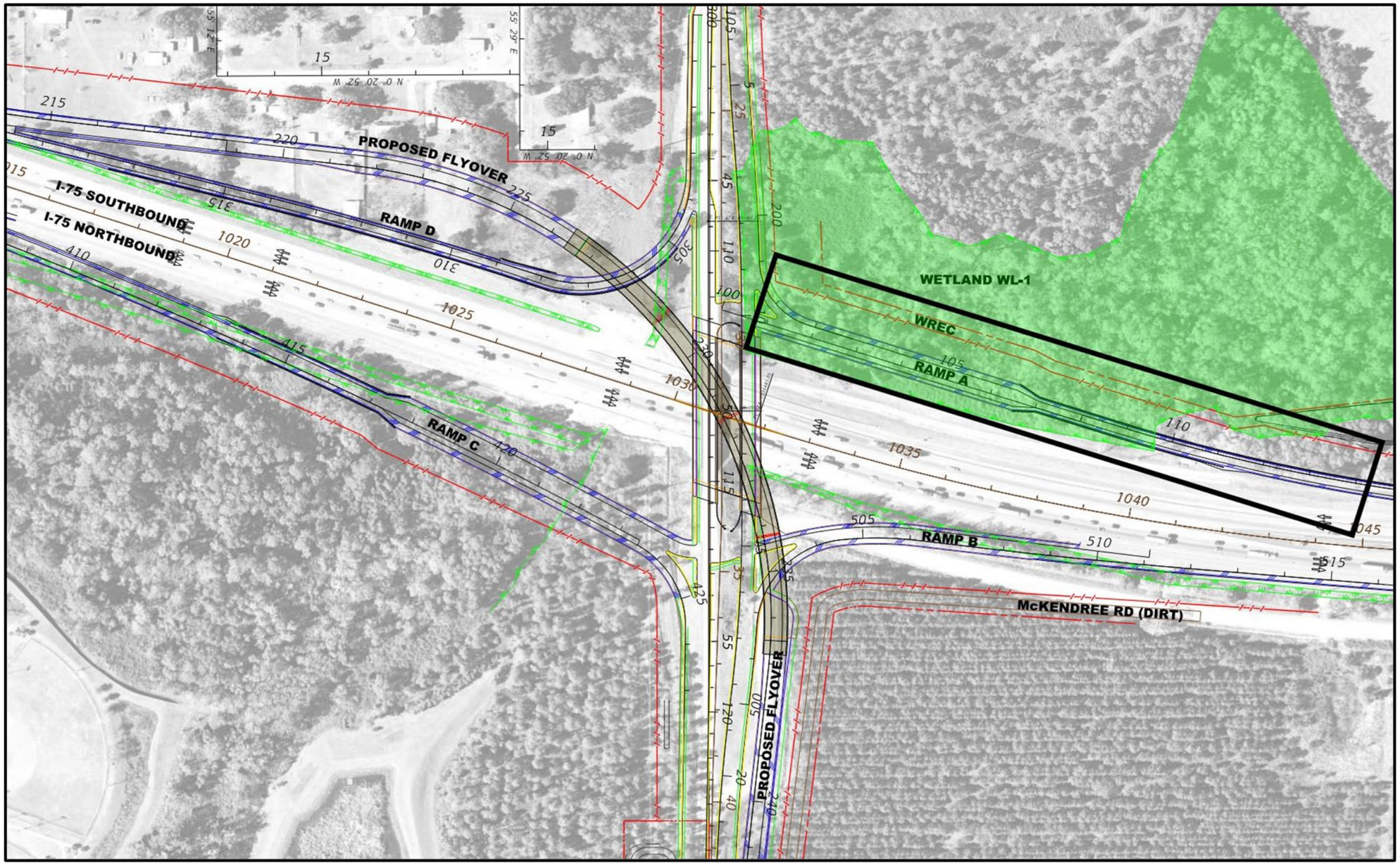


Figure B1 Overall Project View

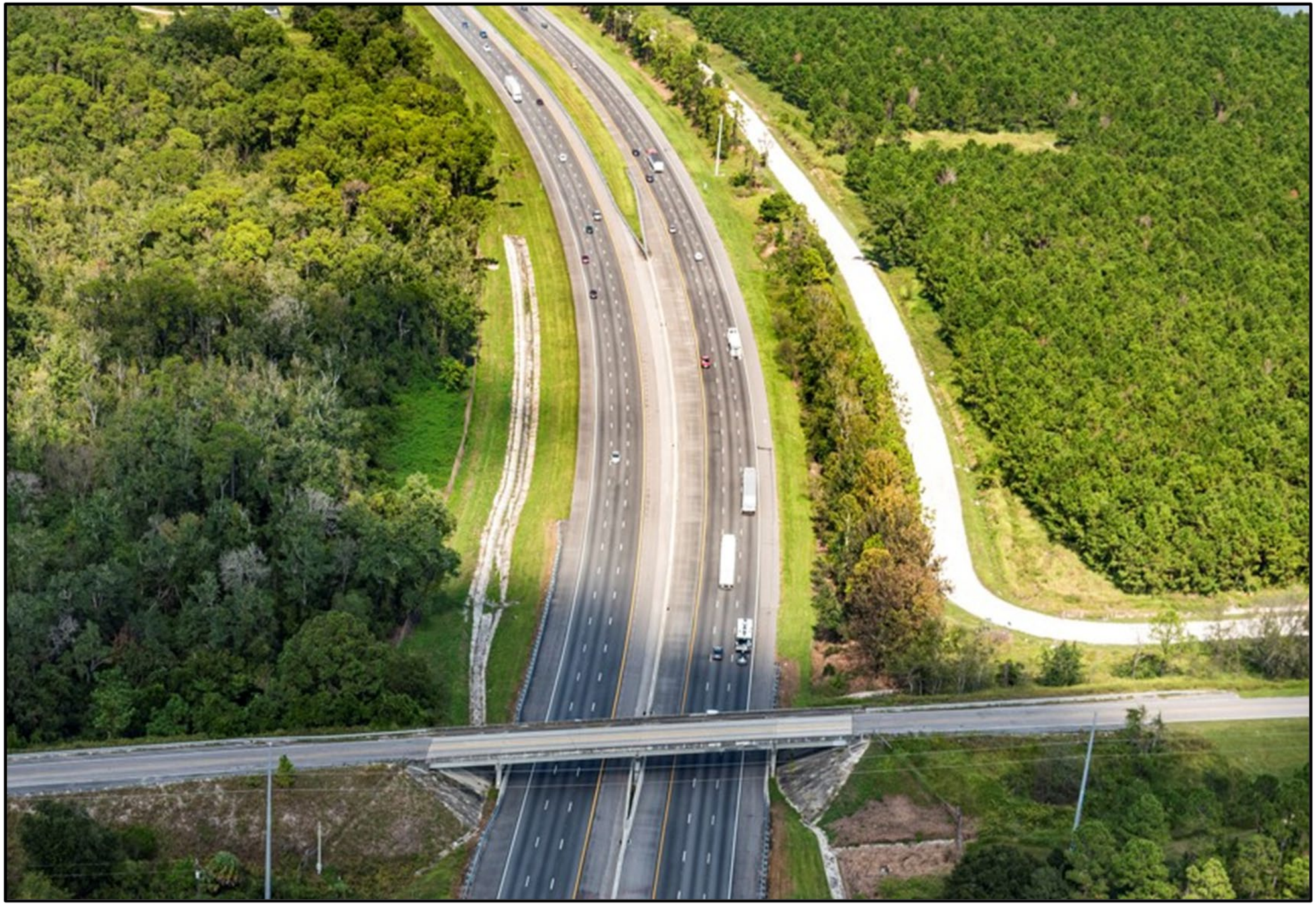
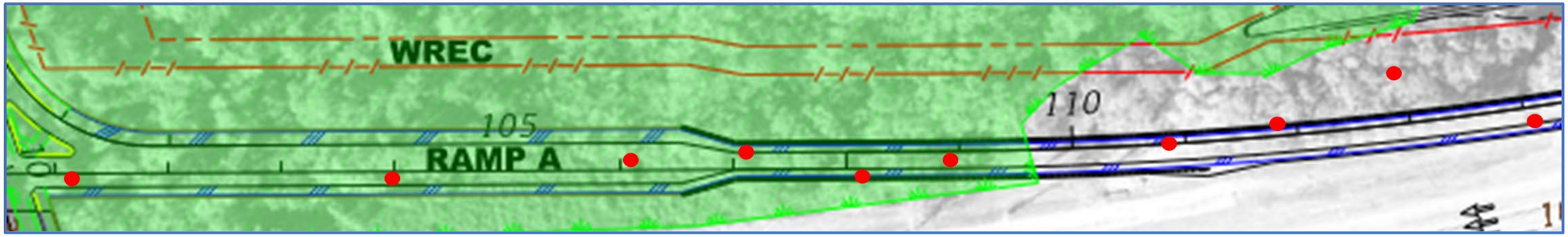


Figure B2 Aerial Looking North Along I-75 - October 15, 2021 - Approximately Six Weeks After NOI Filing



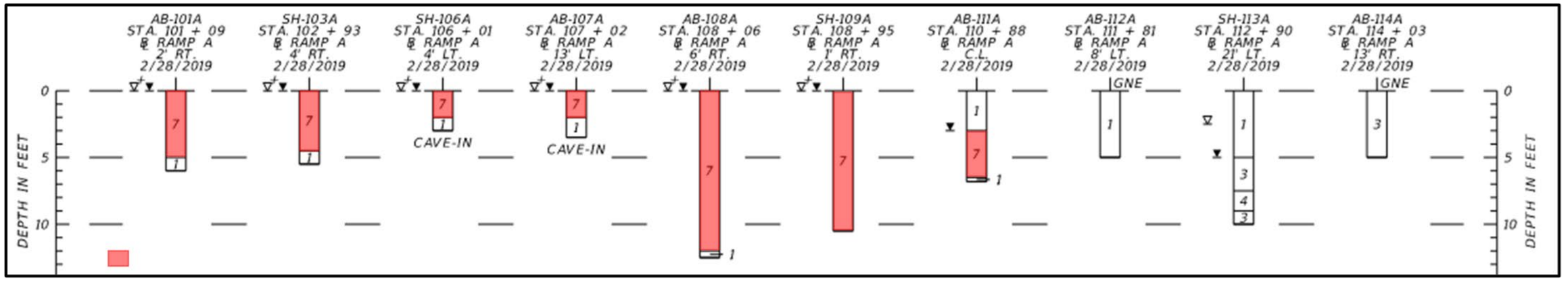


Figure B3 Ramp A boring locations and soil profiles

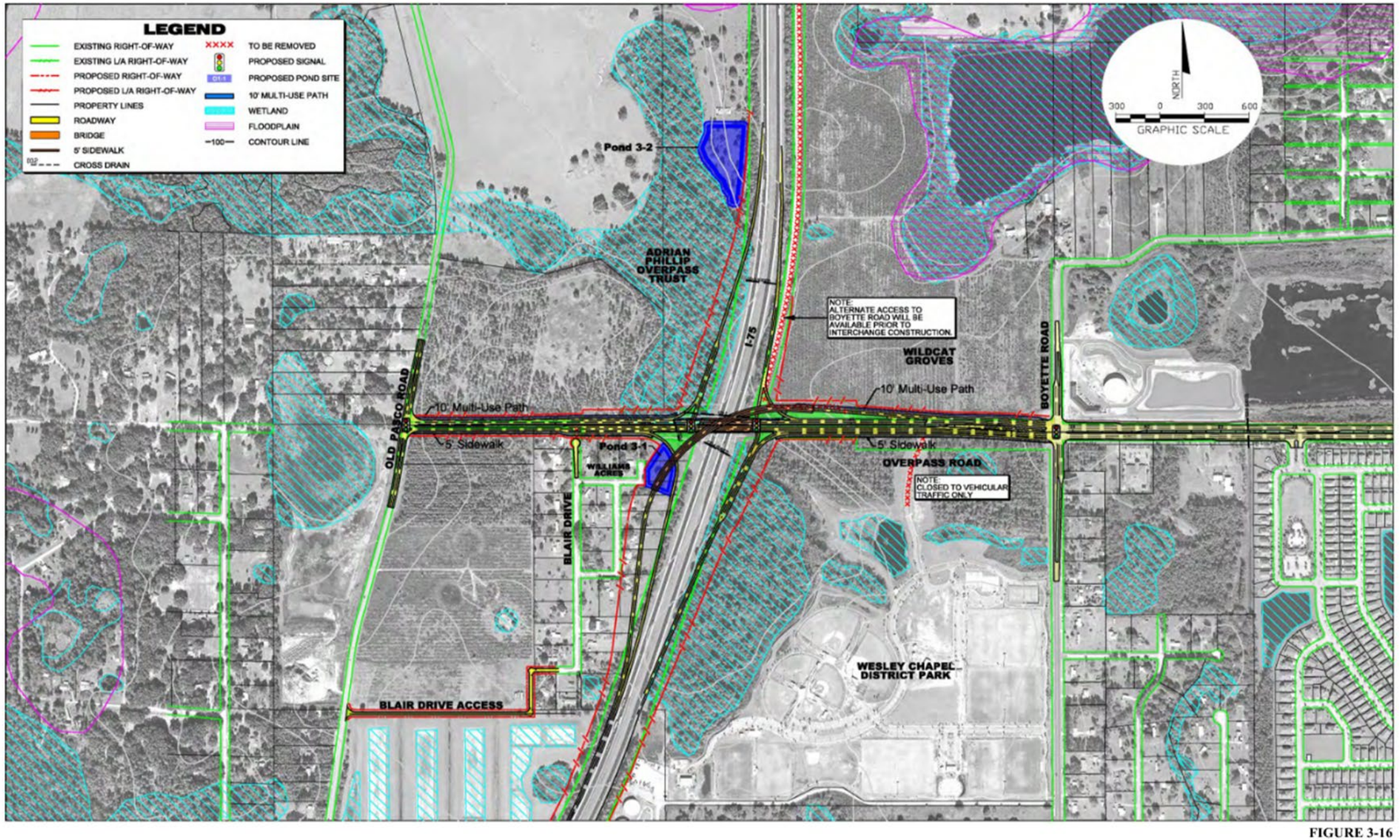


FIGURE 3-16
RECOMMENDED BUILD INTERCHANGE ALTERNATIVE

Figure B5 PD&E Excerpt from the EA FONSI Indicating existence of a wetland in the NW quadrant

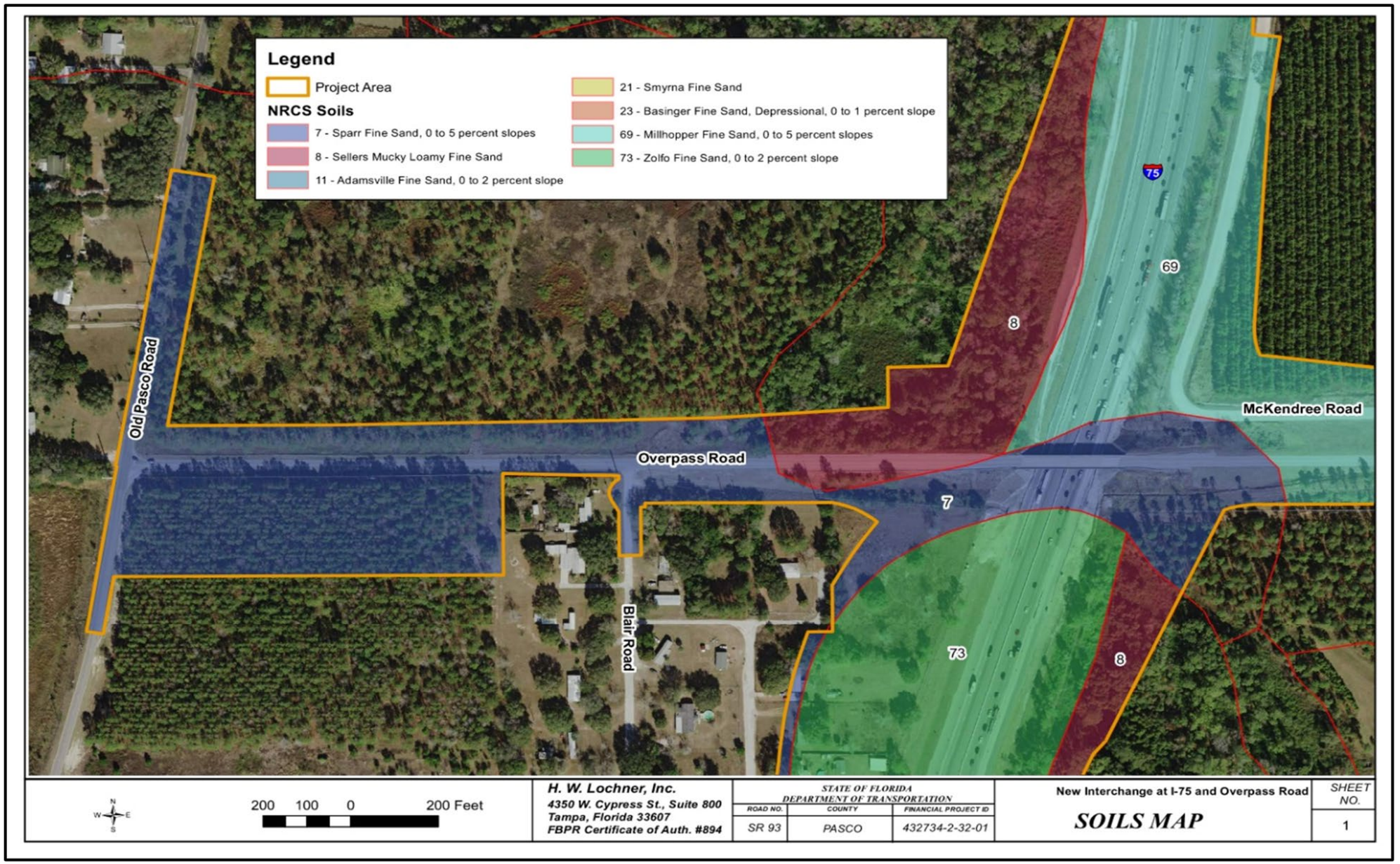


Figure B6 - Soils Map from SWFWMD Environmental report

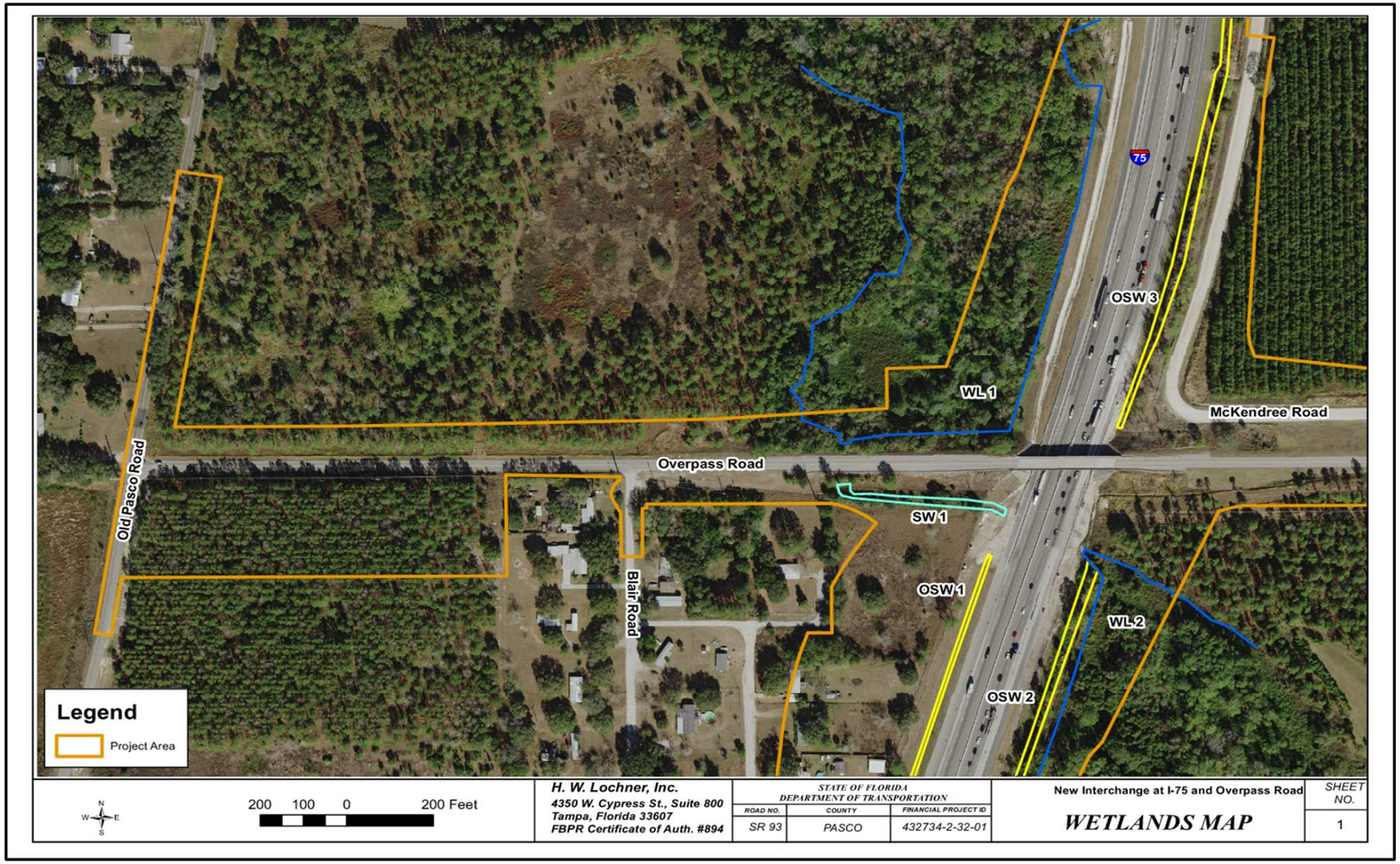


Figure B7 Wetlands Map From SWFWMD Permit Environmental Report