

DISPUTE REVIEW BOARD RECOMMENDATION

December 26, 2004

Mr. Michael Sturgeon
Project Manager
The Middlesex Corporation
114 County Road 470
Okahumpka, Florida 34762
E-Mail: (MSturgeon@mdlsxco.com)

Mr. Tim Heath
KCCS, Inc.
1035 CR 470
P.O. Box 655
Okahumpka, Florida 34762
E-Mail: (THeath@kcaeng.com)

DEC 28 2004

RE: SR 91 AT CR 470
FIN No.: 404214-1-52-01
County: Lake
District 8
Disputes Review Board

DISPUTE: Differing Soil Conditions – Pond 2.

Dear Sirs:

The Middlesex Corporation requested a hearing to determine **entitlement** in resolving an issue on **Different Soil Conditions**. Should entitlement be established, the Disputes Review Board (DRB) was not to decide quantum of such entitlement at this time, as the parties, the Florida Department of Transportation (FDOT) and Middlesex would attempt to negotiate the value of the entitlement.

Pertinent issues, correspondence and other information relating to Middlesex's, and FDOT's positions were forwarded to the DRB for review and discussion at the hearing that was held on December 16, 2004.

CONTRACTOR'S POSITION:

Claim

*The Middlesex Corporation is requesting additional compensation for labor and equipment for the **different soil conditions in Pond No. 2**. The contract plans greatly differ from what was actually found during the excavation of Pond No. 2. Due to this unforeseen condition The Middlesex Corporation was forced to haul fill material at a greater distance and resulting in additional cost to The Middlesex Corporation.*

The contract plans indicated that the material in Pond No. 2 was approximately 70 % of A-3 material. The Middlesex Corporation encountered very little A-3 material. This forced The Middlesex Corporation to haul more fill material from Pond No. 1 over the Turnpike to the west side of the project and haul Pond No. 2 fill material over to the east side of the project and mix with the material from Pond No. 1. The longer haul was not considered at bid time and resulted in additional cost to The Middlesex Corporation.

In order to keep the project moving The Middlesex Corporation proceeded with the embankment operation to avoid any delays.

Herein The Middlesex Corporation claims the damages resulting for additional cost consisting of hauling fill material at a greater distance for pipe trench backfill, subsoil excavation backfill and embankment.

Contract Plans

The contract plans informed The Middlesex Corporation of two vary (sic) important aspects for bidding the project. 1) quantities of embankment and 2) soil borings.

DISPUTE REVIEW BOARD RECOMMENDATION

QUANTITIES – The contract plans, Sheet 300, indicates Pond No. 2 has 80,217 cubic yards of material to be excavated and used for embankment.

*SOIL BORINGS -- The contract plans, Sheet 160 has the boring locations, **Sheet 169 has the pond auger boring soil classification.***

*The contract-plans show four (4) borings taken in Pond No. 2, PB-7, PB-8, PB-9 and PB-10. These boring indicate approximately 70 % of the material in Pond No. 2 classified as A-3 material. **During excavation of Pond No. 2 approximately 4,000 cubic yard of A-3 material was found (4.9%).***

Pipe Trench Backfill

In accordance with the contract specification, section 125-8.3.2.2 Soil Envelope for pipe backfill shall be classified as A-1, A-2, or A-3. Material classified as A-4 may be used if the pipe is concrete pipe.

The material from Pond No. 2 was not suitable to be used as backfill for the storm drainage pipe. The Middlesex Corporation was forced to haul suitable material from Pond No. 1 to the west side of the project to backfill the pipe trench resulting in additional cost for the longer haul and additional cost for the production of the pipe crew.

The following is the additional cost incurred by The Middlesex Corporation for pipe trench backfill.

Hauling of Material	\$15,117.92
Pipe Crew	<u>\$ 5,051.10</u>
Total	\$20,169.02

Subsoil Excavation Backfill

In accordance with the contract plans, Sheet 1 of 3, Index 0505 "Embankment Utilization" directs the contractor to backfill the water level at time the fill is placed to be classified as A-1, A-3 and a-2-4.

Again the material in Pond No. 2 was not suitable to be used for backfilling the subsoil excavation backfill and The Middlesex Corporation was forced to haul fill material from Pond No. 1 to the west side of the project to backfill the subsoil excavation resulting in additional cost for the longer haul.

The following is the additional cost incurred by The Middlesex Corporation for backfilling the subsoil excavation.

Hauling of Material	\$23,080.30
---------------------	--------------------

Sub-Soil Excavation Backfill

The material in Pond No. 2 was unsuitable to use as backfill for the sub-soil excavation. The Middlesex Corporation was forced to use the material from Pond No. 1 for all sub-soil excavation backfill. At bid time The Middlesex Corporation anticipated using fill material from Pond No. 2 to backfill all areas on the left side of the Turnpike (SR 91). The Middlesex Corporation was forced to haul fill material from Pond No. 1 to backfill the sub-soil excavation for Ramps D-1 and D-2 along with the left side of SR 91. The following is how The Middlesex Corporation calculated the additional cost.

<u>Area</u>	<u>CYDS</u>	
Ramp D-1	1,219	
Ramp D-2	15	
SR 91 (Left)	<u>3667</u>	
 TOTAL	 4,901 x 1.30 =	 6,371.30 CYDS
HR/CYDS		<u>0.0184</u>
 TOTAL HOURS		 117.23

The additional cost for haul from Pond No. 1 and not Pond No. 2 is \$23,080.30.

DISPUTE REVIEW BOARD RECOMMENDATION

Embankment

The Contract plans indicated Pond No. 2 having 80,217 cubic yards to be excavated and used for embankment. Approximately 70% of the material was classified as A3 material as indicated from the soil borings. This estimated that 56,151 cubic yards was A-3 material. The Middlesex Corporation discovered only 4,000 cubic yards classified as A-3 material. Arriving that 52,151 cubic yards was not class A-3 material, The Middlesex Corporation was forced to haul 43,725.64 cubic yards from Pond No. 1 to the west side and 43,725 cubic yards from Pond No. 2 to the east side of the project.

The following is the additional cost incurred by The Middlesex Corporation for the hauling of the embankment.

Hauling of Material \$65,39.97 (sic)

DEPARTMENT'S POSITION:

The following are KCCS's finding in review of Middlesex's claim, for additional compensation due to different site conditions encountered in pond No. 2.

Middlesex did file notice of intent to claim On August 22, 2003.

KCCS responded in letter # 065 dated August 26, 2003.

KCCS monitored the soils within the project limits to see if they differed significantly from those represented in the contract plans soil borings.

It is KCCS's findings that the contract soil borings did represent the soils found on this project and in particular those shown and found in pond No. 2.

The plan sheet does give an anticipated quantity of 80,217 cubic yards for pond No. 2. However KCCS strongly disagrees with Middlesex's presumed quantity of the differing soil types shown. **There are no such quantities found or implied in the contract documents.** Calculating such, one must assume things explicitly **not guaranteed by the contract documents.**

Plan Sheet No. 165, note (1) states, "Strata Boundaries are approximate and **represent soil strata at each test hole only.** Any stratum connecting lines that are shown are for estimating earthwork only and do not indicate actual stratum limits. Sub surface variations between borings should be anticipated as indicated in section 2-4".

Note; There are **no stratum connecting lines shown on the pond plan sheets.**

Standard Specifications for Road and Bridge Construction 2-4 Examination of Plans, Specifications, Special Provisions and Site of Work.

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.

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 Contractor shall **examine** boring data, where available, **and make his own interpretation** of the subsoil preliminary data, and shall base his bid on his own opinion of the conditions likely to be encountered.

The bidder's submission of a proposal is prima facie evidence that the bidder has made an examination as described in this Article.

Specification package, Supplemental specifications 120-3 Preliminary Sols Investigation.

When the plans contain the results of a soil survey, do not assume data is a guarantee of the depth, extent, or character of material present.

This claim package contains no validation of a changed condition.

DISPUTE REVIEW BOARD RECOMMENDATION

The following earth work pay items were provided and paid for during this project.

ITEM DESCRIPTION	PLAN	FINAL	\$\$\$\$\$\$	%-todate
EXCAVATION REGULAR (2-120-1)	360,893 CY	360,893 CY	\$685,696.70	100%
EXCAVATION SUBSOIL (2-120-4)	10,348 CY	10,141 CY +/-	\$53,240.25	98%
EMBANKMENT (2-120-6)	334,578 CY	334,578 CY	\$769,529.4	100%
STABILIZATION TYPE B (2-160-4)	126,292 SY	126,292 SY	\$202,067.2	100%

No significant quantity changes were encountered.

All of the material from the project ponds was utilized on site.

No off site material was required to perform the above pay item work.

No documentation was provided as called out in 5-12.7 mandatory claim records.

In conclusion;

KCCS found the soils on this project to be as represented in the plan sheet soil borings.

All embankment utilized on this project came from the project itself including the select backfill required for the construction of MSE walls 1 and 2 at the bridge abutments. For the contractor to have anticipated not having to haul embankment from one side of the project to the other was **their own assumption coming from their theory of the soil type quantities not implied nor given in the contract documents.**

KCCS finds no changed condition therefore this claim has no merit.

DEPARTMENT'S REBUTTAL:

Rebuttal Statements:

The Middlesex Corporation's Claim — "Different Soil Conditions" This claim is based upon four (4) borings taken from Pond #2.

The Contractor **alleges that the borings indicate quantities of materials in the pond.**

There is nowhere in the plans or contract documents that state this.

The borings represent soil found within that test hole only and do not indicate stratum limits.

See plan notes on Plan Sheets 165, 166, 167, 168, 177, 178, 179 and 180.

The Contractor is assuming things and making a claim on his own misjudgment.

KCCS began monitoring the soils throughout the project after The Middlesex Corporation submitted the Notice of Intent to File a Claim for Different Soil Conditions.

The soils found in Pond #2 were the same as shown in the plan borings. Differing quantity is not a changed condition, as the **plans never quantify the different types of material.**

The means by which the Contractor planned to sequence their work was never apart of the contract, and no one other than the Contractor made these determinations and assumptions.

There is no dispute of the overall pond quantity as shown in the plans.

The need to haul material from Pond #1 to the east side was always going to be required.

Pond #1 would have an excess to build that side by some 70,220.5 cubic yards, while to construct the west side, Pond #2 would fall short by some 53,352.5 cubic yards.

The need to haul material from Pond #2 to the east side was driven by the opportunity **to place clay fill material in high fill areas and to utilize this material as stabilization material.**

Pond #1 material was always going to have to be hauled to the East side; therefore it doesn't matter if it was hauled for pipe backfill or subsoil. It was going to be needed to complete the east side with approximately 16,868 cubic yards of excess material to be removed from the project out of Pond #1.

DISPUTE REVIEW BOARD RECOMMENDATION

The contractor alleges that 4,582 cubic yards of fill was hauled for storm pipe backfill from Pond #1 and some 6,371 cubic yards was for subsoil excavation backfill. The total amount is 10,953 cubic yards from Pond #1.

This means that the Contractor never had to haul one cubic yard of material from Pond #2 to the East side, except at their own option. They could have hauled it off site.

The excess material from the project is now being hauled to the Contractor's yard at the west end of the project, which is a longer distance than from Pond #2 to the east side of the project.

*The Contractor claims to have hauled 43,725 cubic yards of embankment from Pond #2 to the east side of the project, yet they supply no back up to support this. **Neither the project diary nor the Density Log Book supports this amount of hauling from Pond #2 to the east side of the project.***

Dispute to Drainage Section of Claim

Drainage

- | | |
|---|--|
| S-TP2 | <i>No Contractor Quality Control records are available for this structure.</i> |
| S-3, S-22, S-23
S-24, S-47
S-69, S-71 | <i>Density logbook does not show any lifts effected by water
any suitable backfill material could have been used</i> |
| S-13, S-20, S-66 | <i>Density logbook does not show any lifts effected by water,
backfilled with material from Pond # 2</i> |
| S-64 | <i>Backfilled with 1/2 of the material from Pond 1 and 1/2 the material from
Pond 2</i> |
| Station 708 & 718 | <i>These 2 turnouts areas are shown to be stabilized, due to the shallow nature
of this pipe, Friable Base per index 205 should be used above the springline
of the pipe</i> |

Dispute to Soil Test Section of Claim

Soil Test

Information shown in the Middlesex claim package is proctor curves only.

Contractor has not included any formal information as to the Sieve Analysis Gradation, Liquid Limits or Plastic Index of the earthwork samples taken.

Project Records for earthwork proctor samples taken from Pond # 2 reveal:

Quality Control Samples for proctors numbered 4, 5, 6 did not compare and no resolution samples were taken by QC or Verification. After these failing results were recorded, the areas were re-sampled.

- sample # 4 was resampled and re-numbered as sample # 9*
- sample # 5 was resampled and re-numbered as sample # 10*
- sample # 6 was resampled and re-numbered as sample # 8*

Out of those 3 samples # 8 and # 10 did not compare and went to resolution at the State Materials Office

Sample # 9, both QC and Verification samples compared, both samples indicated that the material was A-2-4 non-plastic

*Resolution Sample # 8 proctors compared favorably to Quality Control for the proctor portion of the sample but State Materials classified the material as A-2-4, the same as the Verification sample
Quality Control classified the material as A-2-6*

*Resolution Sample # 10 proctors compared favorably to Quality Control for the proctor portion of the sample but State Materials classified the material as A-2-4 the same as the Verification sample
Quality Control classified the material as A-2-6*

DISPUTE REVIEW BOARD RECOMMENDATION

Dispute for Different Soil Conditions

The following cross section plan sheets¹ of Pond No. 2 shows the strata encountered as observed by KCCS during excavation of the pond. Pond No. 2 was made up primarily of two different materials. A mix of dark brown, light brown and tan sand (A-3) with areas of orange and red clayey sand (A-2-6) to sandy clay (A-2-4), with varying degrees of sand and silt throughout the stratum. The blue colored portion of the sheets represent the organic topsoil layer, yellow represents the brown and tan sandy areas of the pond (A-3) and the orange represents the orange, red clayey sand to sandy clay areas (A-2-6 and A-2-4).

Dispute for Different Soil Conditions

In the Full Position Papers submitted by The Middlesex Corporation, additional compensation has been requested in part for the following. Differing soil conditions from the contract plans in Pond No. 2 has "forced The Middlesex Corporation to haul more fill material from Pond No. 1 over the Turnpike to the west side of the project and haul Pond No. 2 fill material over to the east side of the project". Additionally The Middlesex Corporation requests compensation because "The Middlesex Corporation was forced to use the material from Pond No. 1 for all sub-soil excavation backfill".

The Turnpike Enterprise Disputes these portions of the Claim and offers the following for review.

Attached please find Daily Work Reports for Contract: T8002. These reports range from September 3, 2003 through April 30, 2004. This represents the period approximately one week before excavation began on Pond No. 2 until excavation ended. The reports do not reflect the additional hauling of material from Pond No. 2 to the east side of the bridge nor do they support the claim that all subsoil excavation backfill came from Pond No. 1. These reports are highlighted to indicate the following activities. All activities that show Pond No. 2 material being hauled to the same side of the bridge (west) are colored yellow. All activities that show Pond No. 2 material being hauled to the other side of the bridge (east) are colored orange. Activities indicating hauling material for use in stabilization are colored blue. Finally, all days showing activities of subsoil excavation backfill from sources other than Pond No. 1 for this period only are underlined in green.

BOARD RECOMMENDATION:

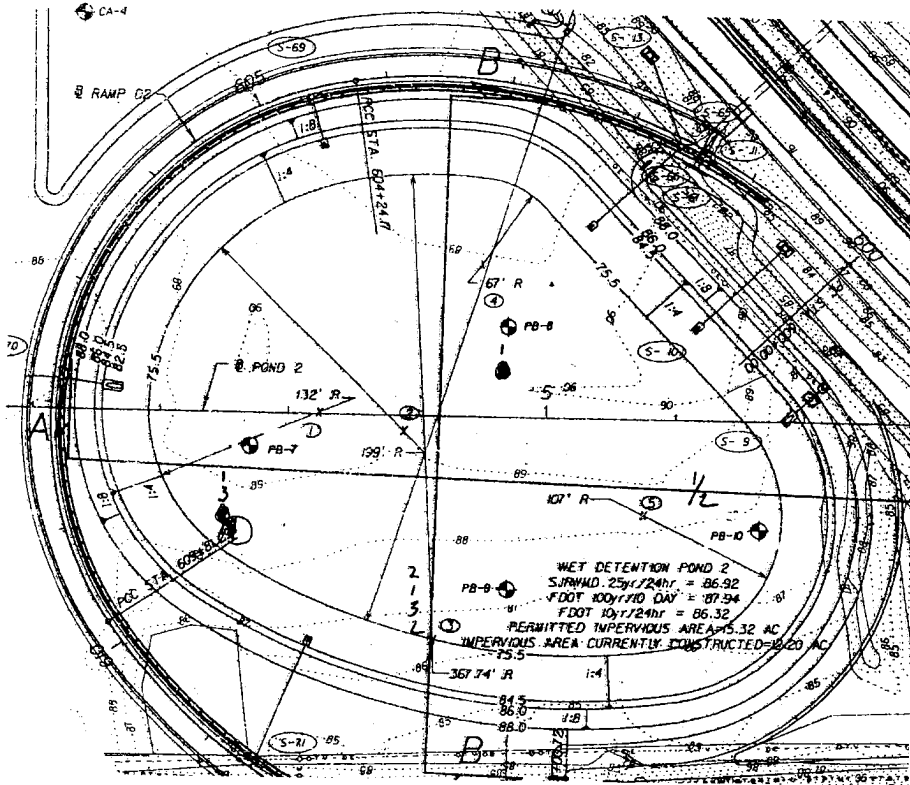
Based on materials supplied to the BOARD and presentations to the BOARD at the DRB hearing, the BOARD recommends that the Contractor is not entitled to additional compensation due to Different Soil Conditions.

¹ See original position papers for exhibits.

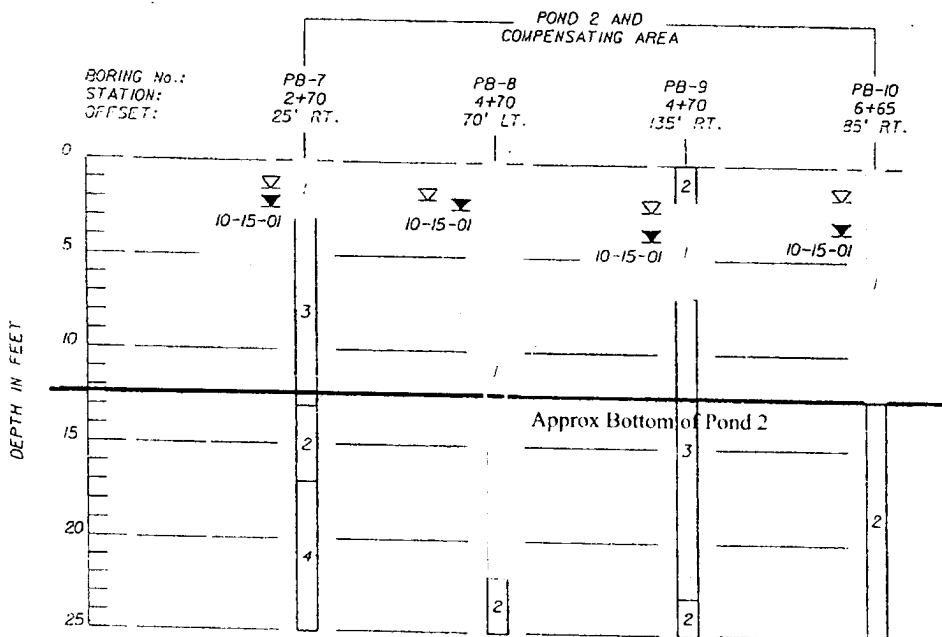
DISPUTE REVIEW BOARD RECOMMENDATION

BOARD EXPLANATION:

- The plan sheet 160 for Pond 2 does show borings within the pond:



- The plan sheet 169 - Pond Auger Borings shows the depth of the various strata within the pond:



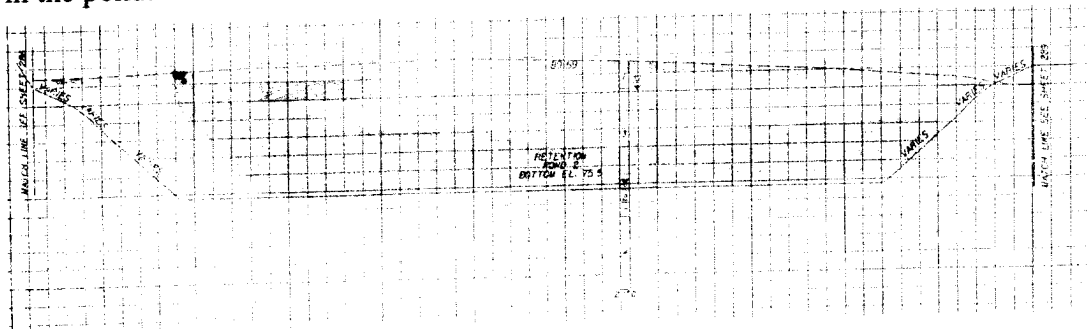
DISPUTE REVIEW BOARD RECOMMENDATION

- Strata 1 is identified as “LIGHT GRAY TO BROWN TO DARK GRAY FINE SAND WITH SILT (A-3)”. The note at the bottom alerts the reader to the fact that this determination was by visual examination.

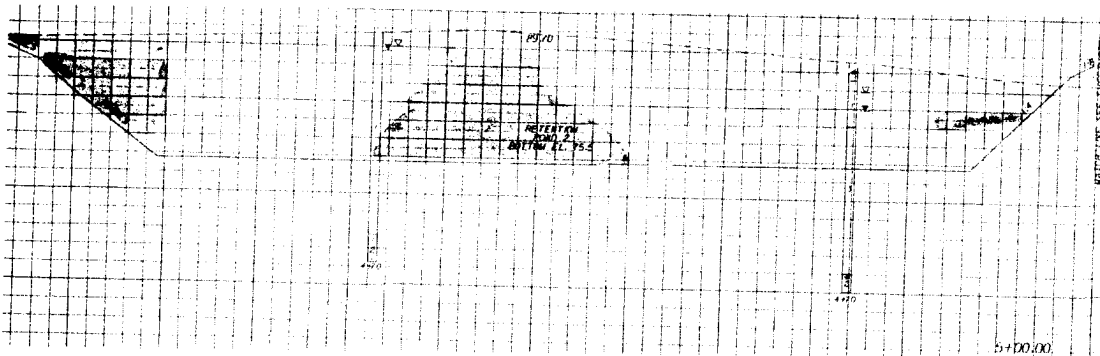
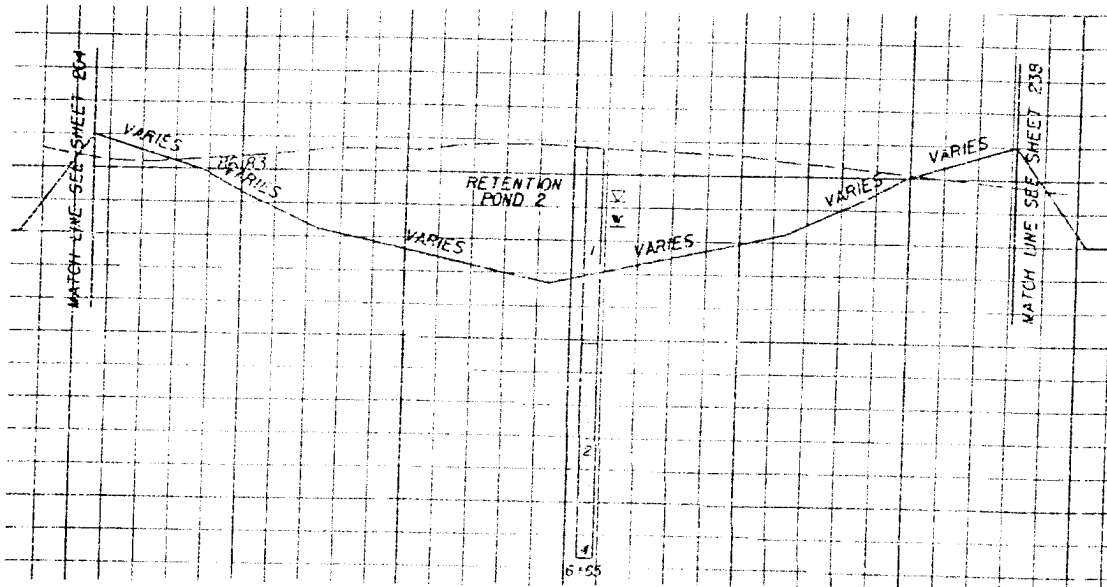
LEGEND

- 1 LIGHT GRAY TO BROWN TO DARK GRAY FINE SAND WITH SILT (A-3)
 - 2 LIGHT BROWN TO DARK BROWN SILTY FINE SAND, TRACE CLAY (A-2-4)
 - 3 LIGHT BROWN, BROWN, LIGHT ORANGISH-BROWN CLAYEY FINE SAND (A-2-6)
 - 4 LIGHT GRAY MOTTLED SANDY CLAY TO CLAYEY SAND (A-7-5/A-7-6)
 - 5 DARK BROWN SANDY PEAT AND SILTY FINE SAND WITH ORGANICS (A-8)
 - 6 DARK BROWN SILTY FINE SAND, TRACE ORGANICS (A-2-4)
- (A-3) A.A.S.H.T.O. SOIL CLASSIFICATION GROUP SYMBOL AS DETERMINED BY VISUAL EXAMINATION

- On the Roadway Soil Survey (Sheet No. 165) Stratum No. 1 is also identified as A-3 with 4-10 % passing 200 mesh. The soil classification of A-3 on the Auger Borings above was by “visual examination”.
- Marked up cross sections provided by the CEI further indicate the presence of A-3 material in the pond:



DISPUTE REVIEW BOARD RECOMMENDATION



- The Florida Department of Transportation Standard Specifications for Road and Bridge Construction, 2000 edition, contains the following provisions:

SECTION 120

EXCAVATION AND EMBANKMENT

120-3 Preliminary Soils Investigations.

When the plans contain the results of a soil survey, do not assume such data is a guarantee of the depth, extent, or character of material present.

SECTION 2

PROPOSAL REQUIREMENTS AND CONDITIONS

2-4 Examination of Plans, Specifications, Special Provisions and Site of Work.

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.

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 Contractor shall examine boring data, where available, and make his own interpretation of the subsoil investigations and other preliminary data, and shall base his bid on his own opinion of the conditions likely to be encountered.

DISPUTE REVIEW BOARD RECOMMENDATION

The bidder's submission of a proposal is prima facie evidence that the bidder has made an examination as described in this Article.

SECTION 4

SCOPE OF THE WORK

4-3 Alteration of Plans or of Character of Work.

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 provided 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.

SECTION 5

CONTROL OF THE WORK

5-12.2 Notice of Claim:

5-12.2.1 Claims For Extra Work: Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, **the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based**, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay. If such notification is not given and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time, the Contractor waives the claim for additional compensation or a time extension. Such notice by the Contractor, and the fact that the Engineer has kept account of the labor, materials and equipment, and time, shall not in any way be construed as establishing the validity of the claim or method for computing any compensation or time extension for such claim. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete claim documentation as described in 5-12.3. However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate.

Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing suit against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.

DISPUTE REVIEW BOARD RECOMMENDATION

- The Contractor's Notice of Intent dated August 22, 2003 states:

In accordance with the contract specifications, section 5-12 this letter serves as preliminary notice of intent to file a claim for additional compensation and time.

The notice of intent is filed due to differing site conditions. After recent investigation, The Middlesex Corporation has observed the material excavated from the proposed ponds appears to differ from the information supplied in the contract plans.

The Middlesex Corporation is now documenting and tracking those activities to evaluate the time and cost impacts associated with this matter.

It has become necessary for The Middlesex Corporation to re-sequence those activities related to excavation and embankment as a result of our discovery to minimize impacts and maintain progress.

If you have any question please contact me.

- The Florida Department of Transportation Standard Specifications for Road and Bridge Construction, 2000 edition, also contains the following provisions:

SECTION 5

CONTROL OF THE WORK

5-12.7 Mandatory Claim Records: After giving the Engineer notice of intent to file a claim for extra work or delay, the Contractor must keep daily records of all labor, material and equipment costs incurred for operations affected by the extra work or delay. **These daily records must identify each operation affected by the extra work or delay and the specific locations where work is affected by the extra work or delay, as nearly as possible.** The Engineer may also keep records of all labor, material and equipment used on the operations affected by the extra work or delay. The Contractor shall, once a notice of intent to claim has been timely filed, and not less than weekly thereafter as long as appropriate, provide the Engineer a copy of the Contractor's daily records and be likewise entitled to receive a copy of the Department's daily records. The copies of daily records to be provided hereunder shall be provided at no cost to the recipient.

- While the Pond 2 Auger Borings are variable, **the Contractor could have reasonably expected to find A-3 material.**
- The Contractor did not furnish his method of calculating that there was 70 % A-3 material represented in the plans.
- Neither did he furnish any substantiation that there was only 4,000 cy of A-3 actually available from Pond 2.
- **Both the Contractor and the Owner failed to identify the quantity of A-3 material actually found in Pond 2** and contrast that with what might reasonably be expected from the bid plans. **This is the very basis of the claim.** Apparently, neither side dug test holes at the location of borings PB-7, PB-8, PB-9 or PB-10, classified the type and depth of the various strata and compared the results to that shown on the plans. Test holes were dug at several locations and QC Samples numbered 4, 5 and 6 did not compare. Resolution samples of the three all tested as A-2-4 NP; however the contractor continued to treat the material as A-7-6, A-6 and A-2-6.
- Both the Owner and the Contractor advised the BOARD that they were "monitoring" the situation. No differing site condition was ever shown to the BOARD.
- As late as the DRB meeting of May 20th 2004, the Contractor "was looking into the possibility of seeking additional days/compensation due to differing soil conditions".

DISPUTE REVIEW BOARD RECOMMENDATION

- Again at the June 24th 2004, DRB meeting, “*Mr. Sturgeon reported that representatives from TMC were finalizing the details surrounding this matter. Mr. Heath mentioned that KCCS, Inc. had also been monitoring the soil on the jobsite.*”
- After having given **preliminary** notice of intent to file a claim, **the Contractor failed to follow through in perfecting said claim including providing to the owner the specific claim-related work as required by 5-12.7.**
- The BOARD would remind the parties that parts of this claim might be considered under specification 125.8.3.23 or 125.8.3.34 (pipe backfill) if there was pipe other than concrete.
- ...It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is not the DRB’s prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...²

The BOARD sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board’s recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation.

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

Respectfully Submitted,

Disputes Review Board
Charles C. Sylvester, P.E.; DRB Chairman
John H. Duke, Sr. DRB Member
Dallas Wolford; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



Charles C. Sylvester, P.E.
Chairman

² DRBF Practices and Procedures Section 1 – Chapter 6