

April 16, 2009

Frank DiGilio
Kiewit Project Manager
1510 SW 17th St – Unit 301
Ocala, FL 34471

Harold Dubon, PE
DMJM Harris Sr Project Engineer
1320 SE 25th Loop, Suite 103
Ocala, FL 34471

Contract E5L60
FAP No. 411665-2-582-01

RE: SR464 over CSX Railroad Unsuitable Materials Hearing

The Dispute Review Board held a hearing March 30, 2009 concerning the issue of Unsuitable Materials. This is a Design Build Project that included Geotechnical information in the pre-proposal package to assist the Contractors in preparing their Proposal for the work. Kiewit Southern Co., KSC, was chosen as the successful Contractor. During construction KSC stated that the material is substantially different than shown by in the information furnished by the Owner. The Contractor is seeking recovery of the cost they incurred to overcome the Unsuitable Material issue.

CONTRACTOR'S POSITION

KSC relied on assertions and representations given during bid preparation. FDOT shall present sufficient, accurate and complete geotechnical data for bidders to base their design and price on. Materials in pond 1A and 1B would be suitable for MSE fill and embankment. With the exception of the bottom 1.3 feet, materials in ponds 2A and 2B would be suitable for backfill and embankment material. KSC's estimate of imported fill required 37,065 cubic yards.

KSC planned to use 95,928cy of excavated suitable material to minimize the need for imported material. KSC planned to keep excavated pond material on site to use for embankment. KSC planned to use excavated material from pipe trenches as backfill and embankment material.

The actual events did not match pre-bid assertions and representations: Geotechnical data not an accurate representation of material encountered: The actual material encountered in Pond 1 was mostly A-7: The actual material encountered in Pond 2 consisted of rubble and debris: Pipe trench material not suitable for backfill and did not yield embankment material: Actual quantity of material imported increased by 49,289 cy.

Effects of Change on KSC's Plan of Operations : KSC could not implement its excavation and embankment operations as planned during pre-bid: Because of actual conditions discovered, KSC could not use the 95,928 cy of suitable onsite material as planned : KSC could not incorporate its original "material flow plan" into its operations: KSC could not use excavated pond material for embankment as planned: Material at Pond 2 required screening that was not in the original plan: KSC changed its pipe laying operations as a result of unsuitable materials: KSC experienced an increase of 5,347 hours in trucking.

The FDOT, by its own guidelines, had the responsibility to provide all bidders with geotechnical information sufficient for bidders to base their design and prices on to make a realistic proposal. By the FDOT guidelines this information should be 100-120 percent of what would normally be done, and was a critical part of the process. From this information bidders were required to make an analysis and reasonable assumptions to aid in their planning. KSC relied on the accuracy of the geotechnical information to determine the type, amount and location of material on the project. The pre-bid geotechnical information provided by FDOT indicated the vast majority of the material excavated would be suitable for fill and backfill purposes.

KSC's plan of operations was designed to maximize the use of onsite material and minimize cost. Integral to KSC's plan was to maximize the use of excavated material in fill areas and at the MSE walls, roadway, and trench backfill. The success and achievability of this plan could only be attained if the conditions in the field were similar to what was represented in the soil borings. After KSC started its work it became apparent that FDOT's geotechnical information was inaccurate and the project could not be built as originally planned. The FDOT has taken the position that this is a design build project and the unsuitable material issue is the Contractor's issue. At no time did the FDOT assist KSC in mitigating the issues.

KSC has tracked their cost and impacts and request an equitable adjustment of \$552,458.

DEPARTMENT'S POSITION

The Department's position is there is no entitlement due for the unsuitable materials issue.

The Department's reasons for denial of extra compensation include:

1. Lack of proper notification of intent per the Design Build Specifications
2. Language and information that was provided in the Contract Documents (a) Design Build RFP and Specifications (b) KSCs proposal/contract documents (c) KSCs accepted construction schedule
3. Additional material that testing was performed on material in pond 1A and 1B

Reason 1- Section 2-4...The Design Build Teams are to investigate the conditions to be encountered, as to character, quality, and quantities of work to be performed and materials to be furnished. Also 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 the holes bored at the site of work, approximately at the location 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.

Section 4-3.7 requires notification by the party discovering different site conditions to the other party prior to disturbing the conditions or performing the affected work, also, the Engineer will not allow a contract adjustment unless the Contractor has provided the required written notice. KSC did not provide any notice of intent regarding the unsuitable material encountered within the project limits. Section 5-12.2.1 "Claims for Extra Work" requires written notice prior to beginning work that the Contractor deems is due for work or materials not expressly covered in the contract. If such notice is not given and the Engineer is not afforded the opportunity for keeping strict account of labor, material, equipment, and time the Contractor waives the right to claim for additional compensation. Proper notice was not given for Ponds 1 and 2. The closest reference to a written notice was provided March 31, 2008, one week after the ponds were dug. Proper notice was not given for pipe excavation.

Reason 2- Contract Requirements (Design Build RFP and Specifications)

Section 4-1 Intent of Contract "The Design Build firm shall have all liability and responsibility for all unknown and/or differing site conditions..., subsoil conditions, permits...,

The RFP states that Design Build firm shall be responsible for survey, geotechnical investigations, design, acquisition of all permits not acquired by the Department.....,

KSC stated that during bid preparation and early stages of the Project, existing facilities and businesses were located in the area where the ponds were to be constructed. This should not have prevented KSC from performing additional geotechnical investigation within the project limits. Had KSC performed their own geotechnical investigation they would have realized that the material in Ocala is very variable and should not be relied on for fill material.

Reason 3- As part of the RFP documents a Geotechnical Report was provided, giving the Design Build teams informational borings that were taken by Ellis and Associates dated May 29, 2007. KSC also obtained borings by utilizing geotechnical services from Ardaman and Associates. The borings were taken on July 26, 2007 and September 24, 2007. The information in Ardaman's report did not vary significantly from what FDOT provided KSC prior to their proposal turn in date.

From the Geotechnical investigations performed by both parties for Pond 1 area and Pond 2 area, and the information contained in the borings, it is unreasonable for KSC to assume that 100% of the material

excavated would be classified as select fill.

In page 1-4 of KSC's proposal, under the section of Contaminated Soils the proposal states that "Due to the uncertainty of the soil properties and timing for clearance for this site, we have developed our construction schedule with the assumption that this site will not be available for earthwork, etc until phase 2 of our construction approach. With this assumption, we anticipate that all material excavated from the site cannot be used as select fill and therefore must be removed from the project areas".

KSC's accepted baseline schedule shows the ponds were to be completed in Phase 1A of their construction prior to the construction of the MSE wall fill placement, which was scheduled in Phase 1B. The base line schedule and updates show that the pond excavations were completed prior to the MSE wall embankment construction beginning.

The plans were developed by KSC and they are responsible for what is in them. A review of the plans reflects a considerable amount of subsoil excavation along the access roads. The Design Build Plans did not indicate any quantities for cut or fill, so how can there be a changed condition.

BOARD FINDINGS/EXPLANATION:

It should be noted that this Board was empanelled well after the issues stated above had occurred. The Board was deprived of the contemporaneous first hand observation of the conditions encountered during the course of the project and the actions of the Parties relating to the issue. This first hand observation is what distinguishes a Dispute Review Board from all other alternate dispute resolution processes.

This issue primarily revolves around whether the Contractor could rely on the Department's soil borings in formulating its bid and whether the actual conditions encountered differed materially.

- The *Florida Department of Transportation Design-Build Guidelines*, CHAPTER TEN, SOIL AND FOUNDATIONS GUIDELINES states in part:
10.1 DESIGN-BUILD PROJECTS

Design-Build projects are handled differently than the normal design-bid-build project.

...

10.2 RESPONSIBILITIES

The responsibilities between the Department's Geotechnical Engineer and the Design-Build Team can be broken down as follows.

10.2.1 Planning and Development Phase

- a **Department's Geotechnical Engineer – Gathers data** on the conditions at the site sufficient for the Design-Build team to make a realistic proposal.

...

10.2.2 Technical Proposals & Bidding Phase

- a Department's Geotechnical Engineer – Answers questions from the Design-Build team through the project manager.
- b **Design-Build Team – Perform analysis of the geotechnical data** and makes a determination of the appropriate design and construction method based on his approach/equipment. Submits technical proposal and bid.

10.2.3 Design/Construction Phase

- a **Department's Geotechnical Engineer – Verifies design and construction** are in compliance with the contract documents, including **verification testing if required**.
- b **Design-Build Team – Meets the requirements set forth in the contract documents**

...

10.3 PRESENTATION OF GEOTECHNICAL DATA

The geotechnical investigations for the Design-Build projects must be handled differently from the normal design-bid-build project. The **amount of geotechnical data gathered should be 100-120%** of what would be done for a typical project. The **analysis** of the data, however, is **left to the Design-Build Team**.

Upon completion of the subsurface investigation, the information obtained must be compiled in a format, which will present the work that has been performed to the various Design-Build Teams. It is perhaps the most critical function of the geotechnical process.

...

10.4 ROADWAY SURVEY

The geotechnical report for a roadway soil survey should present data only. The following is a general outline of the topics, which should be included.

- a Description of **significant geologic and topographic features of the site**.
- The Florida Department of Transportation *Soils and Foundation Handbook 2006* Chapter 11 states in part:
11 DESIGN-BUILD PROJECTS

Typically **more geotechnical investigation is performed for Design-build projects** than for normal design-bid-construct projects. This occurs because a **preliminary investigation is performed by the Department during the planning and development phase and then**

during the design and construction phase, the Design-build team performs the design specific investigation. The total may exceed 120% of a normal investigation. The **Design-build team shall be responsible for its own analysis** of any and all data used by the team.

The Contractor did identify on page 1-4 of its Design/Build Technical Proposal potential contaminates in Pond 2.

*Contaminated soils – Another Key Issue to the project and associated construction schedule is the **potential contaminates in Pond 2**. Due to the uncertainty of the soil properties and timing of clearance for this site, we have developed our construction schedule with the assumption that this site will not be available for earthwork, etc. until Phase 2 of our construction approach. With this assumption, we anticipate that **all material excavated from the site cannot be used as Select Fill and therefore must be removed from the project areas**.*

On page 1-6 of its Design/Build Technical Proposal the Contractor further stated:

Grading / Embankment Construction

*Pond Excavation: ...**Material from the ponds will be hauled and embanked in the mainline approach fills if the material meets the necessary fill requirements. Otherwise the material will be hauled offsite and disposed of accordingly.***

Page 1-6 does not state that all material will be hauled offsite but rather indicates that the Contractor expects to utilize material from the ponds in the embankment.

There is no mention of the need to remove and replace unsuitable material encountered in pipe trenches.

This Board does find that there is some difference from that encountered during construction and that represented in the Department's geotechnical investigation.

Plan sheets from **other projects in Marion County** were presented to the Board at the hearing containing the following note on the Summary of Quantities sheet:

DUE TO THE EXTREME VARIABILITY OF THE SUBSURFACE PROFILE AND THE DIFFICULTIES ASSOCIATED WITH SEPARATING THE SOILS, ALL OF THE EXCAVATION SHALL BE CONSIDERED AS UNUSABLE FOR SELECT FILL MATERIALS FOR BID PURPOSES. DURING CONSTRUCTION, EXCAVATED MATERIALS MAY BE USED FOR SELECT FILL ONLY IF DEEMED SELECT AND AS DIRECTED BY THE ENGINEER.

This type of information **should have been included** in the **presentation of geotechnical data** pursuant to section 10.4 ROADWAY SURVEY, a) Description of **significant geologic** and topographic **features of the site**.

Section 4-1 of the Design/Build specifications states:

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.

Section 4-1 is at odds with the Design/Build Guidelines. It is generally held that when there is an ambiguity the impacts of the ambiguity shall be held against the writer. In this case, **there would be no need for the Department's Geotechnical Engineer to gather data sufficient for the Design-Build team to make a realistic proposal and furnish this data to the bidders if they could not then rely on said data.**

Therefore, the Board finds that the Contractor could rely on the Department's pre-bid borings and was responsible to make a reasonable interpretation thereof. Should conditions present themselves during the Design/Construction Phase that are at odds with a reasonable interpretation of the Department's pre-bid geotechnical report, the Contractor would be entitled to an equitable adjustment.

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. ...¹**

¹ DRBF Practices and Procedures Section 1 -- Chapter 6

BOARD RECOMMENDATION:

Therefore, based on the materials supplied to the Board and presentations to the Board at the DRB hearing, this Board finds:

- **No entitlement for materials removed from Pond 2 since Kiewit contemplated this removal in bidding the project.**
- **Entitlement of Kiewit to additional compensation for such quantity of material that can be determined to be different from that shown in the Department's geotechnical survey on other portions of the project.**

Other than the representation made by Kiewit in its position paper and talking points, there was insufficient presentation to the Board at the hearing for its independent determination. The quantity of such should be negotiated between the Parties. If the Parties are unable to decide the quantum of such entitlement, the quantum of such may be referred back to the Board.

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

Signed by the Chairman with concurrence of the Board members,



Robert D. Buser

DRB Chairman

DMJM Harris
 1320 S.W. 25th Loop, Suite 103
 Ocala, FL 34471
 T 352 369 9559 F 352 369 9611 www.dmjmharris.com

Position Papers & Rebuttal Documents

March 16, 2009

Mr Robert Buser, P E
 Chairman – SR 464 DRB Board
 201 Clear View Road
 Chuluota, FL 32766

Re DRB - 0003

Project No SR 464 over CSX
 FIN No 411665-2-52-01
 Contract No E5L60
 County Marion

RE Ruling Request on Specification Entitlement for replacement of Unsuitable Material

Dear Mr Buser,

Issue:

The Prime Contractor, Kiewit Southern, Co (KSC) has submitted a request for additional compensation for the removal and replacement of unsuitable material found within the project limits. The issue statement to be addressed by your board is, **“Is the Design-Build Contractor entitled to additional compensation for the removal and replacement of unsuitable material found within the project limits?”**

Background of Issue:

On March 11, 2008, KSC submitted letter “KSC-19” referencing the presence of contaminated and unsuitable material in ponds 2A and 2B **(Exhibit 1)**.

On March 28, 2008, DMJM Harris, the CEI for the Department responded to KSC’s letter with letter # 08-0005. This letter addressed the issue of unsuitable material encountered on the project and how it is to be handled by KSC. The letter also addressed that any costs incurred by KSC handling the unsuitable material was to be borne by KSC as per the RFP and the Design Build Specifications **(Exhibit 2)**.

On March 31, 2008, KSC submitted letter “KSC-23” disagreeing with the Department’s position regarding unsuitable material and requested additional compensation for unsuitable material not only encountered in ponds 2A and 2B but also in ponds 1A, 1B, the Mainline Construction, the Frontage Road Construction and the drainage trenches **(Exhibit 3)**.

On April 23, 2008, DMJM Harris responded to KSC’s letter with letter #08-0008. This letter addressed several issues regarding KSC’s request for additional compensation. Firstly, the RFP as well as the Design Build Specifications clearly state that the Geotechnical Investigation is the responsibility of the Design Build firm. Secondly, during the question and answer meeting, KSC specifically asked if additional borings could be performed by the Design Build firms and the Department responded that

they would not prevent any of the Design Build firms from performing their own investigations. Finally, the letter also addresses the fact that no Notice of Intent was ever given by KSC regarding the unsuitable material which did not afford the Department the ability to keep strict account of labor, material, equipment or time (**Exhibit 4**).

On April 28, 2008, KSC submitted letter "KSC-31" regarding unsuitable material encountered in approximately 150 feet of the Pond 2/Frontage Road 2 area and requested additional compensation (**Exhibit 5**).

On May 12, 2008, DMJM Harris responded to KSC's letter with letter #08-0009. In this letter DMJM Harris restated that as per the RFP and Design Build Specifications, KSC is responsible for unsuitable material encountered within the project limits (**Exhibit 6**).

On July 15, 2008, KSC turned in letter "KSC-40" submitting back-up information for their request for additional compensation in the amount of \$712,326.00. In this document, on Page 1 under the "Introduction/Executive Summary" KSC has made the assertion that "Integral to Kiewit's plan for construction of the project was to maximize the amount of excavated material to be used for fill material at the MSE walls, roadway embankment, and pipe trench fill. **Kiewit's bid price to the FDOT contemplated being able to use the excavated materials from the ponds as fill material at the MSE walls** and the excavated materials from the pipe trench operations as backfill at the same location (**Exhibit 7**).

On July 21, 2008, KSC submitted letter "KSC-40A" which was a narrative discussing how they estimated the amount of unsuitable materials found within the project limits and the costs associated with replacing this material (**Exhibit 8**).

On August 12, 2008 DMJM Harris responded to KSC's letter "KSC-40" with letter #08-0016. This letter rejected KSC's request restating the various reasons for the rejection. These reasons included the language in the RFP and Design Build Specifications placing the Geotechnical Investigation responsibility on the Design Build firm, the fact that additional material testing that was performed did not show sufficient variability with the borings provided prior to the bid proposal, and the lack of Notice of Intent being provided by KSC (**Exhibit 9**).

Statement of the Department's Position:

KSC has requested additional compensation for unsuitable material encountered within the project limits under Section 4-3.7 "Differing Site Conditions". The Department's position is that the contractor is not entitled to additional compensation. The reasons include lack of proper notification of intent, language and information that is provided in the Design Build RFP, the Design Build Specifications, KSC's proposal, KSC's approved construction schedule and additional material testing that was performed on the material from ponds 1A and 1B.

References to the RFP:

The RFP **clearly** states, under Section A of the "Introduction", on page 3 of 46, under "**Design/Build Firm Responsibility**" that "The Design/Build Firm **shall** be responsible for survey, **geotechnical investigations**, design, acquisition of all permits not acquired by the Department, any required modification of permits acquired by the Department, maintenance of traffic, demolition, and construction on or before the date indicated in their proposal" (**Exhibit 10**).

The RFP **clearly** states, on page 7 of 46, under Section J of the "Threshold Requirements", under "**Department's Responsibilities**" that "**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. Proposers shall examine boring data, where available, and make their 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. The submission of a proposal is prima facie evidence that the proposer has made an examination as described in the provision ” (Exhibit 11).

The RFP clearly states, on page 13 of 46 under Section J of the “Project Requirements and Provisions for Work”, under “Geotechnical Services” that “The Design Build Firm will be responsible for identifying and performing any geotechnical investigation, analysis, and design dictated by the project needs.” (Exhibit 12).

References to the Design Build Specifications:

The Design Build Specifications clearly state on page 13 of 116, under Section 2-4 “Examination of Plans, Specifications, Special Provisions and Site of Work” that the Design Build Teams are to “Investigate the conditions to be encountered, as to character, quality, and quantities of work to be performed and materials to be furnished.” This Section further states that “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 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.” (Exhibit 13).

The Design Build Specifications clearly state on page 20 of 116, under Section 4 “Scope of Work” under 4-1 “Intent of Contract” that “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. In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3 2 ” (Exhibit 14).

The Design Build Specifications clearly state on page 26 of 116, under Section 4 “Scope of Work” under 4-3 7 “Differing Site Conditions” that “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.” This section further states “The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has provided the required written notice.” KSC did not provide any Notice of Intent regarding the unsuitable material encountered within the project limits. This in turn did not afford the Department the opportunity to keep strict account of labor, material, equipment or time (Exhibit 15).

The Design Build Specifications clearly state on page 26 of 116, under Section 4 “Scope of work” under 4-5 1 “Ownership and Disposal of Existing Materials.” that the Contractor will “Take ownership and dispose of all materials that are not designated as the property of other parties, in both roadway and structures, found on the right-of-way, and all material in structures designated for removal (Exhibit 16).

The Design Build Specifications clearly state on page 38 of 116, under section 5 “Control of the Work” under 5-12 2 1 “Claims for Extra Work” that “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 in writing of the intention to make claim for additional compensation before beginning the work on which the claim is based” this section further states “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.” (Exhibit 17).

References to KSC’s proposal documents:

Page 1-4, under the section of “Contaminated Soils”, KSC’s proposal **clearly** states that “Due to the uncertainty of the soil properties and timing for clearance for this site, **we have developed our construction schedule with the assumption that this site will not be available for earthwork**, etc until Phase 2 of our construction approach **With this assumption, we anticipate that all material excavated from the site cannot be used as Select Fill and therefore must be removed from the project areas.” (Exhibit 18).**

Page 1-6, under the section of “Grading/Embankment Construction”, KSC’s proposal states **that “Material from the ponds will be hauled and embanked in the mainline approach fills if the material meets the necessary fill requirements. Otherwise the material will be hauled offsite and disposed of accordingly.” (Exhibit 19).**

Page 1-14, under their “MOT Plan”, KSC’s proposal **clearly** shows that the ponds 1A, 1B, 2A and 2B were to be **completely** excavated during Phase 1 of their construction schedule whereas MSE wall construction would not take place until Phase 2 **(Exhibit 20).**

Page 3-2, under the section of “Proposed Schedule”, KSC’s proposal **clearly** shows that the pond excavation would take place during Phase 1 of their construction schedule with preliminary dates of excavation occurring between Mid-April until Mid-June **(Exhibit 21).**

Reference to KSC’s contract submittals:

KSC’s Preliminary 120 Day Schedule **clearly** shows that the pond excavations were to be completed during Phase 1B of their construction schedule **prior** to the MSE wall construction **This preliminary schedule showed preliminary dates of excavation beginning December 2007 and completing excavation in February 2008. MSE Wall embankment was not to start until April 2008. (Exhibit 22).**

Page 3 of KSC’s Baseline Narrative under Section 2 2 “KSC Responsibilities”, their narrative specifically refers to Section 1A of the RFP which lists the Design/Build Firm’s Responsibilities as “The Design/Build Firm shall be responsible for survey, **geotechnical investigations**, design, acquisition of all permits not acquired by the Department, any required modifications of permits acquired by the Department, maintenance of traffic, demolition, and construction on or before the date indicated in their proposal ” **(Exhibit 23).**

Page 4 of KSC’s Baseline Narrative under Section 2 3 “FDOT Responsibilities”, their narrative specifically refers to Section 1B of the RFP which lists the Department’s Responsibilities as “The Department will provide contract administration, management services, construction engineering inspection services and quality acceptance reviews of all work associated with the development and preparation of the contract plans and construction of the improvements The Department will provide job specific information and/or functions as outlined in this document ” **Nowhere does it mention the department being responsible for the geotechnical investigation. (Exhibit 24).**

Page 1 of KSC’s Activity Report submitted with the narrative shows Activity MSE 120 “EMBANK WEST” as having an **early start** of July 16, 2008 Page 3 of this Activity Report shows Activity RD 1380 EXCAVATE/FINISH POND 1 as having a **late finish** of Feb 5, 2008 and Activity RD 1385 EXC/FINISH POND 2 as having a **late finish** of June 9, 2008 **This clearly shows that the pond excavations were to be started and completed, even with a late finish, prior to the MSE wall embankment construction beginning. (Exhibit 25).**

KSC's **Approved** Baseline Schedule shows that the pond excavations were to be completed during Phase 1A of their construction **prior** to the construction of the MSE wall fill placement which was scheduled to start in phase 1B Page 4 of the approved schedule shows Activity ST 2050 "EMBANK STARTER WEST" **starting May 9, 2008** Contrarily, Page 2 of 6 of the schedule shows Activity RD 1380 "EXCAVATE/FINISH POND 1 as **finishing January 11, 2008** with 15 days of float and Page 3 of 6 shows Activity RD 1385 "EXC/FINISH POND 2 AS **finishing February 12, 2008** with 75 days of float **This clearly shows that the pond excavations were to be completed prior to the MSE wall embankment construction beginning. (Exhibit 26).**

Geotechnical Information:

Pre-proposal

As part of the RFP Documents a Geotechnical Report was provided giving the Design Build Teams "informational" borings that were conducted by Ellis and Associates dated May 29, 2007 Two auger borings were performed, one in each pond area as well as two Standard Penetration Test (SPT) borings that were performed along the west side of the CSX tracks at the planned bridge location **(Exhibit 27).**

SPT Boring B1 showed approximately 13 feet of STIFF to VERY STIFF CLAY (CH) at a depth as shallow as 15 feet deep from top of ground SPT Boring B2 showed approximately 5 feet of STIFF to VERY STIFF CLAY (CH) at a depth as shallow as 8 feet deep from top of ground The shallower material encountered ranged from Fine Sand (SP), Fine Sand with Silt (SP-SM), Silty Fine Sand (SM), to Clayey Fine Sand (SC) **(Exhibit 27).**

The 25' deep Pond Boring P1 showed a minimum of 8 feet of Stiff to Firm Gray Clay with sand **(A-7-6)** as shallow as 17 feet deep from top of ground The 25' deep Pond Boring P2 showed a minimum of 16 feet of Firm to Hard Gray Clay **(A-7-6)** as shallow as 9 feet deep from top of ground The shallow materials encountered in these ponds ranged from Fine Sand **(A-3)**, Silty Fine Sand **(A-2-4)**, and Clayey Fine Sand **(A-2-6).** **(Exhibit 27).**

From reviewing the information in the geotechnical report, the following chart shows an "estimated" amount of material that was possibly good enough to use as embankment.

Pre Construction Soil from DOT Borings



During Construction

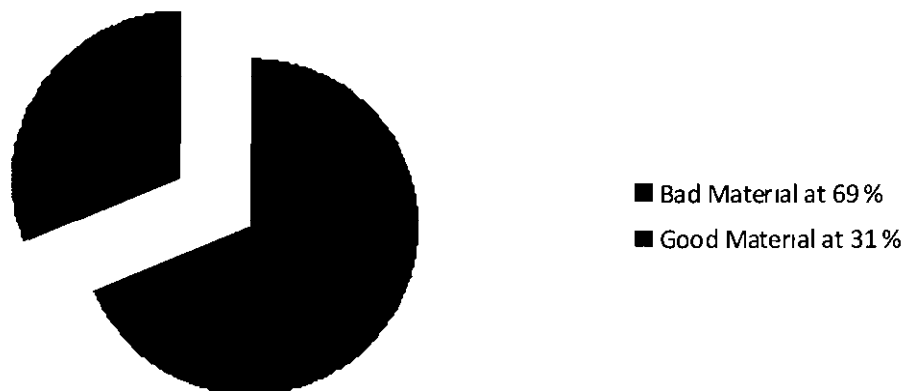
Kiewit failed to provide proper notice of intent for the unsuitable material that was encountered during construction. The only notice provided by Kiewit was for the contaminated material encountered in pond 2A. The closest reference to a notice of intent was KSC Letter #23 dated March 31, 2008 requesting compensation for replacing the unsuitable material encountered in Ponds 1A, 1B, 2A, 2B, Mainline, Frontage Roads and drainage trenches. KSC did not request that this material be tested for “unsuitability” while it was being removed. The bulk of this material was removed and delivered to a private landowner (Exhibit 28).

The Design Build Specifications clearly state that under section 5 “Control of the Work” under 5-12.2.1 “Claims for Extra Work” that “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 in writing of the intention to make claim for additional compensation before beginning the work on which the claim is based” this section further states “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.” (Exhibit 15).

On May 19, 2008 the Department’s testing lab (Central Testing Laboratory) along with Kiewit’s testing laboratory (Universal Engineering Sciences) took additional samples from the Pond 1A and 1B areas to determine material properties of these areas. Samples were taken at elevations of +/- 5’ deep, +/- 10’ deep and +/- 15’ deep from top of ground elevation. Samples were taken from various locations around each pond to get representative samples of the existing materials. The results varied from location to location as well as from lab to lab even though each lab sampled at the same location for each sample. What the results determined was that there is a variability in the strata depth where the different soil types were encountered, which is to be expected, but not much of a variability in the type of material to be expected in the Ocala area or what was encountered in the original borings provided prior to the bid proposals being turned in (Exhibit 29).

The results of the material sampled ranged from **A-3, A-2-4, A-2-6, A-2-7, A-6, A-7, A-7-5, and A-7-6**. The bold classifications are the same classifications as what was encountered in the original borings provided prior to the bid proposals. The other classifications shown are in the same group classifications differing typically in liquid/plastic limit thresholds. A-2-7 varies from A-2-6 similarly as A-6 varies from A-7 in the Liquid Limit Threshold. A-7, A-7-5 and A-7-6 are classified depending on the Plasticity Index Threshold (Exhibit 29).

After Construction Completion Sampling and Testing



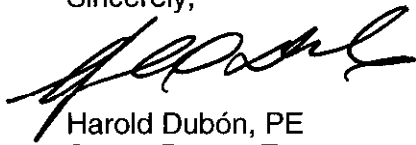
From reviewing the information from the additional test samples that were taken in ponds 1A and 1B, the above chart shows an “estimated” amount of material that was possibly good enough to use as embankment.

Conclusion:

It is the Department’s position that KSC is not entitled to any additional compensation for replacing unsuitable material encountered within the project limits

Firstly, various references within the documents listed above put the burden of the Geotechnical Investigation on the Design Build Team Secondly, if KSC regarded this as a “Differing Site Condition” they should have given proper notice as per the Specifications Thirdly, from reviewing KSC’s submittals they had no intention on using the material from the ponds to construct the MSE wall embankment as stated in their request for additional compensation and finally, the additional material testing performed did not show sufficient variability in the “type” of soil to be encountered within the project limits to warrant additional compensation

Sincerely,



Harold Dubón, PE
Senior Project Engineer
DMJM Harris

Cc Project File
Ronda Daniell, CPM



March 16, 2009

Bobby Buser, PE
Chairman of the DRB
201 Clearview Rd
Chuluota, FL 32766

Re Project SR 464 over CSX from SW 12th Ave to US 441/US 301/ US 27
 FIN No 411665-2-52-01
 Contract No E5L60
 County Marion County

Subject: Position Paper for Unsuitable Materials

Mr Buser

Please find attached Kiewit Southern Co 's (KSC's) Unsuitable Materials Position Paper and KSC Letter 74 Certifying the attached cost proposal for equitable adjustment

Should you have any questions or need additional information, please do not hesitate to contact me at (352) 622-8322

Sincerely,

Brian Tice
Project Manager

cc EMSI-Engineering Management Solutions, Inc (John Duke)
 Peter A Markham
 Harold Dubon

Attached Position Paper – Unsuitable Materials
 KSC Letter 74 -Certifying the Cost Proposal

SCANNED

APR - 8 2009

DMJM HARRIS



Kiewit

March 16, 2009

KSC- 74

Harold Dubon, PE
DMJM Harris
1320 South 25th Loop
Ocala, FL 34471

Re Project SR 464 over CSX from SW 12th Ave to US 441/US 301/ US 27
 FIN No 411665-2-52-01
 Contract No E5L60
 County Marion County

Subject: Unsuitable Materials

Mr Dubón

This is to certify that this submitted request for equitable adjustment for Unsuitable Materials is made in good faith, that any supportive data provided is accurate and complete to the Contractor's best knowledge and belief, and that the amount of the request accurately reflects what the Contractor in good faith believes to be the Department's responsibility

Sincerely,

E J O'Neill
Vice President

cc File
 PCO 7011
 Bobby Buser, PE
 EMSI-Engineering Management Solutions, Inc (John Duke)
 Peter A Markham
 Frank DiGilio

SR 464 Grade Separation over CSX Railroad Project

FIN No.: 411665-2-52-01

Contract: E5L60



UNSUITABLE MATERIAL DISPUTE REVIEW BOARD POSITION PAPER

TABLE OF CONTENTS

EXECUTIVE SUMMARY

SECTION I: INTRODUCTION

- 1 1 BID AND AWARD
- 1 2 SCOPE OF WORK
- 1 3 PROJECT LOCATION
- 1 4 LAYOUT OF DOCUMENT

**SECTION II: CONTRACT ASSERTIONS AND REPRESENTATIONS KSC
RELIED UPON DURING BID PREPARATION**

- 2 1 FDOT SHALL PRESENT SUFFICIENT, ACCURATE, AND COMPLETE
 GEOLOGICAL DATA FOR BIDDERS TO BASE THEIR DESIGN AND
 PRICE ON
- 2 2 MATERIALS IN PONDS 1A & 1B WOULD BE SUITABLE FOR MSE FILL
 AND EMBANKMENT
- 2 3 WITH THE EXCEPTION OF THE BOTTOM 1 3', MATERIALS IN PONDS
 2A & 2B WOULD BE SUITABLE FOR MSE FILL AND EMBANKMENT
- 2 4 PIPE TRENCH WOULD YIELD MATERIALS SUITABLE FOR BACKFILL
 AND ALSO EMBANKMENT MATERIAL
- 2 5 KSC's ESTIMATE OF IMPORTANT QUANTITIES CALCULATED 37,065
 TCY OF IMPORT MATERIAL WAS NEEDED
- 2 5 CONCLUSION

**SECTION III: KSC'S PLAN OF OPERATIONS BASED ON CONTRACT
REPRESENTATIONS AND ASSERTIONS RELIED UPON
DURING BID PREPARATION**

- 3 1 KSC PLANNED EXCAVATION AND EMBANKMENT OPERATIONS
 AROUND SUITABLE ONSITE MATERIALS

- 3 2 KSC PLANNED TO USE 95,928 TCY OF EXCAVATED SUITABLE MATERIAL FOR FILL TO MINIMIZE THE NEED FOR IMPORT MATERIAL
- 3 3 KSC's "MATERIAL FLOW PLAN" BASED ON QUANTITIES DETERMINED FROM THE SUITABLE MATERIAL REPRESENTED IN THE PRE-BID GEOTECHNICAL INFORMATION
- 3 4 KSC PLANNED TO KEEP EXCAVATED POND MATERIAL ON SITE TO USE FOR EMBANKMENT
- 3 5 KSC PLANNED TO USE MATERIAL EXCAVATED FROM THE PIPE TRENCHES AS BACKFILL AND EMBANKMENT MATERIAL
- 3 6 KSC PLANNED TO MINIMIZE THE QUANTITY OF IMPORT MATERIAL NEEDED
- 3 7 CONCLUSION

SECTION IV: ACTUAL EVENTS DID NOT MATCH PRE-BID CONTRACT ASSERTIONS AND REPRESENTATIONS

- 4 1 GEOTECHNICAL DATA NOT AN ACCURATE REPRESENTATION OF MATERIALS ENCOUNTERED
- 4 2 THE ACTUAL MATERIAL ENCOUNTERED IN POND 1 WAS MOSTLY A-7
- 4 3 THE ACTUAL MATERIAL ENCOUNTERED IN POND 2 CONSISTED OF RUBBLE AND DEBRIS
- 4 4 PIPE TRENCH MATERIAL NOT SUITABLE FOR BACKFILL AND DID NOT YIELD EMBANKMENT MATERIAL
- 4 5 ACTUAL QUANTITY OF MATERIAL IMPORTED INCREASED BY 49,289 TCY
- 4 6 CONCLUSION

SECTION V: EFFECTS OF CHANGES ON KSC’S PLAN OF OPERATIONS

- 5 1 KSC COULD NOT IMPLEMENT ITS EXCAVATION AND EMBANKMENT OPERATIONS AS PLANNED DURING PRE-BID
- 5 2 BECAUSE OF THE ACTUAL CONDITIONS DISCOVERED, KSC COULD NOT USE THE 95,928 TCY OF SUITABLE ONSITE MATERIAL AS PLANNED
- 5 3 KSC COULD NOT INCORPORATE ITS ORIGINAL “MATERIAL FLOW PLAN” INTO ITS OPERATIONS
- 5 4 KSC COULD NOT USE EXCAVATED POND MATERIAL FOR EMBANKMENT AS PLANNED
- 5 4 1 MATERIAL AT POND 2 REQUIRED SCREENING THAT WAS NOT IN THE ORIGINAL PLAN
- 5 5 KSC CHANGED ITS PIPE LAYING OPERATIONS AS A RESULT OF ENCOUNTERING UNSUITABLE MATERIALS
- 5 6 KSC IMPORTED 49,289 TCY OF MATERIAL NOT PLANNED FOR AS A RESULT OF UNSUITABLE MATERIALS
- 5 7 KSC EXPERIENCED AN INCREASE OF 5,347 HOURS IN TRUCKING
- 5 8 CONCLUSION

SECTION VI: SUMMARY OF ADDITIONAL COSTS

- 6 1 ADDITIONAL COSTS EXPERIENCED

SECTION VII: CONCLUSION

SECTION VIII: EXHIBITS

EXECUTIVE SUMMARY

On July 11, 2007, Kiewit Southern Co (“KSC”) submitted its bid proposal to the Florida Department of Transportation (“FDOT”) for the work on the SR 464 Grade Separation over CSX Railroad project (“Project”) in Ocala, Florida. The FDOT awarded a contract to KSC in the amount of \$24,500,000 and issued its Notice to Proceed on October 15, 2007.

The Project involves the construction of a four-lane, two-way overpass on SR 464 (SW 17th Street) over the CSX Transportation Railroad and two-lane, two-way service roads on SR 464 to provide access to adjacent development. Specific improvements at the Project include new pavement, drainage system improvements, bridge construction, retaining wall construction, a temporary crossing of the CSX railroad (including temporary signal control), signing and pavement markings, traffic signal removal and installation, sidewalk construction on both SR 464 and the service roads for the full length of the Project, and milling and resurfacing.

The specific drainage system improvements at the Project include the installation of drainage pipe along the roadway and the construction of four ponds. The ponds are identified as Pond 1A, Pond 1B, Pond 2A, and Pond 2B. During bid preparation and early stages of the Project, existing facilities and businesses were located in the areas where the ponds were to be constructed.

During pre-bid meetings, the FDOT represented that pre-bid geotechnical data would be provided by the FDOT to potential bidders. The FDOT subsequently issued this geotechnical data. The FDOT, by its own guidelines, had the responsibility to provide all bidders with geotechnical information sufficient for bidders to base their designs and prices on and make a realistic proposal. This information, which by the FDOT guidelines should be 100-120% of what would normally be done, was a critical part of the process. From this information, bidders, by the guidelines, were required to do an analysis and make reasonable assumptions to aid in their planning.

KSC relied on the pre-bid information provided by the FDOT. Specifically, KSC relied on the accuracy of the geotechnical information to determine the type, amount and location of material on the Project. The pre-bid geotechnical data specifically classified and represented the soil types to be encountered. The pre-bid geotechnical information/borings provided by the FDOT indicated the vast majority of the material to be excavated would be suitable for fill and backfill purposes.

Relying on the information provided by the FDOT, KSC developed a plan of operations that would maximize the use of onsite material and minimize costs. Integral to KSC’s plan was to maximize the amount of excavated material to be used for fill material at the MSE walls, roadway embankment, and pipe trench backfill. KSC’s bid price to the FDOT contemplated

DMJM Harris
 1320 SE 25th Loop Suite 103 Ocala FL 34471
 T 352 369 9438 F 352 369 9614 www.dmjmharris.com

March 25, 2008

Mr Robert Buser, P E
 Chairman – SR 464 DRB Board
 201 Clear View Road
 Chuluota, FL 32766

Re DRB – 0003R

Project No SR 464 over CSX
 FIN No 411665-2-52-01
 Contract No E5L60
 County Marion

SCANNED

MAR 26 2009

DMJM HARRIS

RE Ruling Request on Specification Entitlement for replacement of Unsuitable Material

Dear Mr Buser,

The Department respectfully submits this rebuttal to KSC's Position Paper.

Issue. In their position paper, Kiewit Southern Co, (KSC) has requested additional compensation for the removal and replacement of unsuitable material encountered within the project limits under Section 4-3.7 "Differing Site Conditions"

The Department's position is that the contractor is not entitled to any additional compensation. The Department's reasons include lack of proper Notification of Intent, language and information that was provided in the **contract documents** such as the Design Build RFP, the Design Build Specifications, KSC's own proposal, KSC's approved construction schedule and additional material testing that was performed on material from ponds 1A and 1B

KSC states in their position paper that "The FDOT, by its own **guidelines**, had the responsibility to provide all bidders with geotechnical information sufficient for bidders to base their designs and prices on and make a realistic proposal" KSC further states that "KSC **relied on the accuracy** of the geotechnical information to determine the type, amount and location of material on the Project" **KSC needs to review their contract and what the contract documents state instead of referencing FDOT "guidelines"**

KSC states in their position paper that "During bid preparation and early stages of the Project, existing facilities and businesses were located in the areas where the ponds were to be constructed"

This should not have kept KSC from performing additional geotechnical investigation within the project limits. There were plenty of areas accessible within the existing Right-of-Way to perform geotechnical investigations. In fact, another Design Build Team did take additional borings prior to turning in their proposal. Did KSC contact the District Geotechnical Engineer to ascertain what soils are typically encountered in the Ocala/Marion County area? Did KSC review roadway plans for other projects in the Ocala/Marion County area? Had KSC

performed their own geotechnical investigation prior to submitting their bid, they would have realized that the material in the Ocala area is very variable and should not be "relied on" for fill material (Index 1)

KSC stated in their position paper that "Integral to KSC's plan was to maximize the amount of excavated material to be used for fill material at the MSE walls, roadway embankment, and pipe trench backfill KSC's bid price to the FDOT contemplated being able to use the excavated materials from the ponds as fill material at the MSE walls and the excavated materials from the pipe trench operations as backfill at the same locations" KSC also stated "KSC planned to use materials from Ponds 1A and 1B in the common area of the MSE wall fill. A simple excavator-dump truck spread was planned to perform this work The ponds were planned to be excavated and loaded directly to onsite dump trucks, which in turn would deliver the material directly to the fill operation at the MSE walls " KSC further stated "The materials from Ponds 2A and 2B would be excavated next and taken directly to the common area of the MSE walls as needed, in the same fashion as materials from Pond 1." These bolded statements are untrue A review of KSC's proposal and schedule submittals show that KSC had no intention of using the material excavated from the ponds as MSE wall fill material

KSC's **Approved** Baseline Schedule shows that the pond excavations were to be completed during Phase 1A of their construction **prior** to the construction of the MSE wall fill placement which was scheduled to start in phase 1B Page 4 of the approved schedule shows Activity ST 2050 "EMBANK STARTER WEST" **starting May 9, 2008** Contrarily, Page 2 of 6 of the schedule shows Activity RD 1380 "EXCAVATE/FINISH POND 1 as **finishing January 11, 2008** with 15 days of float and Page 3 of 6 shows Activity RD 1385 "EXC/FINISH POND 2 As **finishing February 12, 2008** with 75 days of float **This clearly shows that the pond excavations were to be completed prior to the MSE wall embankment construction beginning.**

KSC's latest **approved** update reflects similar information The pond excavations were to be completed during Phase 1A of their construction **prior** to the construction of the MSE wall fill placement which was scheduled to start in phase 1B Page 4 of the approved update shows Activity ST 2050 "EMBANK STARTER WEST" **starting May 27, 2008** Contrarily, Page 2 of 6 of the approved update shows Activity RD 1380 "EXCAVATE/FINISH POND 1 as **finishing March 24, 2008.** The update also shows Activity RD 1385 "EXC/FINISH POND 2 as **finishing April 11, 2008.** **This clearly shows that the pond excavations were completed prior to the MSE wall embankment construction beginning as was also shown in the approved Baseline Schedule. (Index 2)**

KSC states that "While performing its excavation operations, **KSC encountered material that was different** from what was represented in FDOT's pre-bid geotechnical information " KSC further states that "After KSC started its work, **it became apparent that the FDOT's geotechnical data was inaccurate** and the Project could not be built as originally planned "

As part of the RFP Documents a Geotechnical Report was provided giving the Design Build Teams "informational" borings that were conducted by Ellis and Associates dated May 29, 2007 Two auger borings were performed, one in each pond area as well as two Standard Penetration Test (SPT) borings that were performed along the west side of the CSX tracks at the planned bridge location

The KSC Design Build team also performed additional borings in the pond areas. These borings were performed by Ardaman and Associates on **July 26, 2007** and **September 24, 2007** From reviewing the additional geotechnical information performed by

Ardaman and Associates, **it can easily be determined that KSC had knowledge that the material in the ponds would have a substantial amount of unsuitable material** and KSC should not come back now to the Department for additional compensation. The information in Ardaman's report **does not** differ substantially from the information in the original borings provided by FDOT. What it does show is how variable the material is in the Ocala/Marion County area **(Index 3)**

SPT Boring B1 showed approximately **13 feet of STIFF to VERY STIFF CLAY (CH)** at a depth as shallow as **15 feet deep from top of ground**. SPT Boring B2 showed approximately **5 feet of STIFF to VERY STIFF CLAY (CH)** at a depth as shallow as **8 feet deep from top of ground**. The shallower material encountered ranged from Fine Sand (SP), Fine Sand with Silt (SP-SM), Silty Fine Sand (SM), to Clayey Fine Sand (SC)

The 25' deep Pond Boring **P1 showed a minimum of 8 feet of Stiff to Firm Gray Clay with sand (A-7-6) as shallow as 17 feet deep from top of ground**. The 25' deep Pond Boring **P2 showed a minimum of 16 feet of Firm to Hard Gray Clay (A-7-6) as shallow as 9 feet deep from top of ground**. The shallow materials encountered in these ponds ranged from Fine Sand (**A-3**), Silty Fine Sand (**A-2-4**), and Clayey Fine Sand (**A-2-6**).

KSC has stated in their position paper that "To equitably compensate KSC for the costs experienced, KSC requests an equitable adjustment to the contract in the amount of \$552,458. **Kiewit failed to provide proper notice of intent for the unsuitable material that was encountered during construction.** The only notice provided by Kiewit was for the contaminated material encountered in pond 2A. **The closest reference to a "notice of intent" was KSC Letter #23 dated March 31, 2008** requesting compensation for replacing the unsuitable material encountered in Ponds 1A, 1B, 2A, 2B, Mainline, Frontage Roads and drainage trenches. KSC did not request that this material be tested for "unsuitability" while it was being removed. The bulk of this material was removed and delivered to a private landowner. In fact Pond 1 had been completely excavated by March 24, 2008 a full week before KSC submitted their request for additional compensation on March 31, 2008

The Design Build Specifications **clearly** state that under Section 4 "Scope of Work" under 4-3.7 "**Differing Site Conditions**" that "**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.**" This section further states "**The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has provided the required written notice**" KSC did not provide any Notice of Intent regarding the unsuitable material encountered within the project limits. This in turn did not afford the Department the opportunity to keep strict account of labor, material, equipment or time **(Index 4)**

The Design Build Specifications **clearly** state that under section 5 "Control of the Work" under 5-12.2.1 "**Claims for Extra Work**" that "**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 in writing of the intention to make claim for additional compensation before beginning the work on which the claim is based**" this section further states "**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**" **(Index 4)**

Now that we have established some background to this issue let's look at each area that KSC is requesting compensation for and why they are not due any additional compensation

Pond 1 Area

Proper notice was not given. The closest reference to a notice being provided by KSC was their letter number KSC-23 dated March 31, 2008. A full week after the Pond 1 area had been **completely** excavated.

KSC's schedule submittals did not reflect their "plan". KSC has stated that they "planned" on moving the excavated materials from the Pond 1 area directly to the MSE wall fill. According to their approved Baseline Schedule, as well as their latest approved update, **this was not true**.

Geotechnical Information performed by KSC's Design Build team reflects similar information. The borings performed by Ardaman and Associates do not differ significantly from what FDOT provided prior to the proposals being turned in. If you analyze the information in the borings, FDOT's borings reflect approximately 43% of the material would be classified as select fill whereas KSC's borings reflect approximately 40% of the material would be classified as select fill.

From the geotechnical investigations performed by both parties, and the information contained in the borings, it is unreasonable for KSC to "assume" that 100% of the material excavated would be classified as select fill as shown in Page 39 of their position paper (**Index 5**).

Pond 2 Area

Proper notice was not given. The closest thing to a notice provided by KSC was their letter number 23 dated March 31, 2008. A full week after excavation activities started in the pond 2 area. Notice was provided for the contaminated material encountered which was resolved and paid for during the course of the project. It should be noted that **no compensation was given to KSC for removing or replacing the material excavated from pond 2A.**

Further, in Page 1-4 of KSC's proposal, under the section of "Contaminated Soils", the proposal **clearly** states that "Due to the uncertainty of the soil properties and timing for clearance for this site, **we have developed our construction schedule with the assumption that this site will not be available for earthwork**, etc. until Phase 2 of our construction approach. **With this assumption, we anticipate that all material excavated from the site cannot be used as Select Fill and therefore must be removed from the project areas**.

KSC's schedule submittals did not reflect their "plan". KSC has stated that they "planned" on moving the excavated materials from the Pond 2 area directly to the MSE wall fill. According to their approved Baseline Schedule, as well as their latest approved update, **this was not true**.

Geotechnical Information performed by KSC's Design Build team reflects similar information. The borings performed by Ardaman and Associates do not differ significantly from what FDOT provided prior to the proposals being turned in. If you analyze the information in the borings, FDOT's borings reflect approximately 33% of the material would

be classified as select fill whereas KSC's borings reflect approximately 35% of the material would be classified as select fill

From the geotechnical investigations performed by both parties, and the information contained in the borings, it is unreasonable for KSC to "assume" that 100% of the material excavated would be classified as select fill as shown in Page 39 of their position paper **(Index 5)**

Pipe excavation

Proper notice was not given. The closest thing to a notice provided by KSC was their letter number 23 dated March 31, 2008 A full week after excavation activities started in the pond 2 area Notice was provided for the contaminated material encountered which was resolved and paid for during the course of the project It should be noted that **no compensation was given to KSC for removing or replacing the material excavated from pond 2A**

Geotechnical Information performed by KSC's Design Build team reflects similar information. The borings performed by Ardaman and Associates do not differ significantly from what FDOT provided prior to the proposals being turned in If you analyze the information in the borings, FDOT's borings reflect approximately 43% of the material would be classified as select fill whereas KSC's borings reflect approximately 40% of the material would be classified as select fill

From the geotechnical investigations performed by both parties, and the information contained in the borings, it is unreasonable for KSC to "assume" that 100% of the material excavated would be classified as select fill as shown in Page 39 of their position paper **(Index 5)**

Under Section 125 of the Standard Specifications in subsection 125-14.7 **Removal and Replacement of Material Unsuitable for Backfill.**

When it cannot reasonably be anticipated from information contained in the plans, that material excavated for the structure will be unsuitable for use as backfill, and such material proves to be unsuitable for this use, the work of disposing of such material away from the site will be paid for as unforeseeable work, and the work of bringing in substitute material for the backfill will be paid for as specified for the particular case shown below

a) No additional payment will be made for backfill materials obtained from surplus material available from the normal excavation or grading operations

(b) When the necessary material is not available from the normal excavation or grading operations, and the Contract includes an item for Borrow Excavation, backfill material authorized to be obtained from designated borrow areas will be included in the volume of Borrow

(c) When the necessary material is not available from the normal excavation or grading operations and no separate item for Borrow Excavation is included in the Contract, any backfill material obtained by increasing the volume of excavation within the roadway right of way will be measured and paid for as regular excavation subject to the provisions of 9.3.2.2

(d) When authorization is given for obtaining the material from outside the right of way and from other than designated borrow areas, such excavation will be paid for as unforeseeable work **(Index 6)**

- The plans were developed by the KSC Design Build team and they are responsible for what is contained in them.

- A review of the plans reflects a considerable amount of subsoil excavation along the access roads.

- A review of the borings performed by the Design Build team reflect many areas of unsuitable material within the project limits.

- The Design Build Plans do not indicate any quantities for any cut or fill, so how can there be a changed condition?

Conclusion.

It is the Department's position that KSC is not entitled to any additional compensation for replacing unsuitable material encountered within the project limits.

- Firstly, various references within the **contract documents** put the burden of the Geotechnical Investigation on the Design Build Team. This is a Design Build project where more of the risk is on the Design Build Team, this is not a typical Design-Bid- Build project where more of the risk would be on the Department.

- Secondly, if KSC regarded this as a "Differing Site Condition" they should have given proper notice as per the Specifications. **They did not.**

- Thirdly, from reviewing KSC's schedule submittals they had no intention on using the material from the ponds to construct the MSE wall embankment as stated in their request for additional compensation.

- Finally, the additional material testing performed did not show sufficient variability in the "type" of soil to be encountered within the project limits to warrant additional compensation. Based on the geotechnical investigation performed by both parties, it is not reasonable for KSC to assume that **all** of the material could be used as select fill.

Sincerely,



Harold Dubón, PE
Senior Project Engineer
DMJM Harris

Cc Project File
Ronda Daniell, CPM

**SR 464 Grade Separation over CSX Railroad
Project**

FIN No.: 411665-2-52-01

Contract: E5L60



**UNSUITABLE MATERIAL
DISPUTE REVIEW BOARD
REBUTTAL PAPER**

SCANNED

APR - 7 2009

DMJM HARRIS

EXECUTIVE SUMMARY

During the course of the SR464 Project, KSC encountered unsuitable materials that were not represented in the FDOT's original pre-bid geotechnical data. As a result of the erroneous information provided by the FDOT, KSC incurred additional cost in the mitigation of the issue. The FDOT has maintained that this issue was the responsibility of the Design Build Team, and not the FDOT.

The FDOT bases its position on the issue on three main points: 1) KSC was responsible for its own pre-bid borings, 2) the material encountered did not show sufficient variability in the "type" of soil from what was represented, and 3) KSC did not provide proper notice.

The FDOT has taken the position throughout this issue that KSC was responsible for their own pre-bid geotechnical investigation. This position contradicts the Project Specifications and the FDOT manuals and guidelines, incorporated by reference, which set forth the standards of geotechnical investigation for design-build projects. The *"Soils and Foundations Handbook"*, which is specifically cited in the RFP as a manual to adhere to, clearly establishes the fact that the FDOT is responsible to provide *"data sufficient for the design-build team to make a realistic proposal"*. KSC did make a realistic proposal based on the data provided to bidders before the bid.

The FDOT also contends that the material did not show "sufficient" variability in the "type" of soil actually encountered on the Project. The FDOT does not offer any explanation of what "sufficient" actually is. However, it is not solely the types of materials encountered that created the issue, rather it is where the elevations at which these materials were found that created the issue. The elevations at which the unsuitable materials were discovered were within the limits of KSC's excavations, contrary to the FDOT's pre-bid geotechnical data showing the unsuitable material to be for the most part below KSC's excavation limits. KSC also encountered rubble and debris in the Pond 2 area, which did not fall into any of the "types" of material classified in the pre-bid data. The FDOT tries to slant the argument by referring to the "types" of material encountered throughout the project, when it was the elevations of the "types" of material in the excavations that was the determining factor of this issue.

The FDOT also alleges that KSC failed to provide adequate notice in rejecting KSC's request for compensation. The FDOT contends that they were prejudiced in the issue by not having the opportunity to keep track of actual labor, material, equipment and time relating to the issue. This statement could not be further from the truth. The FDOT was provided every opportunity to keep track of the issue, but chose not to. The FDOT actually provided KSC sheets to measure truck bodies to keep track of the unsuitable material encountered in the pipe operations. KSC used these sheets to measure truck bodies. KSC made a point of keeping the FDOT involved in the issue with updates including actual site visits, meetings, and letters.

In summary, the FDOT is responsible to provide geotechnical data sufficient for the Design / Build Team to make a realistic proposal. KSC relied on this FDOT provided information and prepared the bid proposal using the suitable material as represented in FDOT's pre-bid geotechnical data. The materials actually encountered by KSC differed from the materials represented in FDOT's pre-bid geotechnical data. As a result, KSC experienced additional costs in order to mitigate the effects of this issue. The FDOT was fully aware of the issues relating to the unsuitable materials at all relevant times and had ample opportunity to quantify and mitigate the additional costs experienced by KSC.