MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

2016 REPORT

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2016 Report

Overview of the Office

The Office of the Administrative Law Judge is established pursuant to G.L. c. 6C, §40, as amended by St. 2009, c. 25, §8. Its essential function is to make fair and impartial decisions on disputes involving the Department, including:

- construction contract disputes appealed from decisions of the Chief Engineer
- appeals from the denial of outdoor advertising permits by the Department's Division of Outdoor Advertising
- contractor appeals from decertification of disadvantaged minority business enterprises
- appeals from decisions of the Department's Right of Way Bureau pursuant to the requirements of 49 CFR Part 24 §24.10
- other matters as assigned by the Secretary of Transportation

Executive Summary

This report provides the status and disposition of appeals and other matters brought to the Office of the Administrative Law Judge in 2016.

In summary, the following matters were handled in calendar year 2016:

- Six (6) construction contract appeals were resolved either by administrative dismissal or by a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40. Three (3) appeals are pending a hearing.

- Sixteen (16) direct payment demands were ruled on in accordance with G.L. c.30, §39F.

- One (1) appeal from the denial of an outdoor advertising permit was received. The appeal is scheduled to be heard in February 2017.

- Two (2) contractor appeals from DBE decertification proceedings initiated by the Supplier Diversity Office were ruled on by the Massachusetts Unified Certification Program Adjudicatory Board.

In addition, the Office completed the following administrative tasks:

- Issued new Rules of Practice and Procedures (SOP ALJ-01-01-1-000)
- Issued new procedure for Direct Payment Demands (SOP ALJ-01-01-2-000)
- Made Updates/Improvements to ALJ Webpage, including accessibility compliance

Construction Contract Appeals

Appeals Pending

MIG Corporation #3-58007-003

This appeal concerns a claim in the amount of $1,042,396.89 for additional work related to concrete repairs. The current ALJ recused himself from hearing this appeal. The matter is pending a hearing before another hearing officer.

MIG Corporation #1-72259-001

This appeal concerns a claim in the amount of $24,000.00 for additional work related to safety controls for construction operations. The current ALJ recused himself from hearing this appeal. The matter is pending a hearing before another hearing officer in February 2017.

MIG Corporation #4-68187-005

This appeal concerns a claim in the amount of $116,501.19 for additional work related to concrete repairs. A hearing is scheduled for February 7, 2017.

Appeals resolved by Report and Recommendation to the Secretary

P. Gioioso & Sons #5-73891-001

This appeal involved a claim in the amount of #113,995.20 for installation of steel sheeting. After hearing, this Office recommended that the claim be denied because the applicable contract specifications and drawings properly described the potential use of steel sheeting and how each use was to be compensated.

Middlesex Corporation #5-68152-001

This appeal involved a claim in the amount of $197,091.81 for back wages that a painting subcontractor paid to certain of its employees in order to comply with prevailing wage requirements. After hearing, this Office recommended that the claim be denied because the contractor and subcontractor were required to comply with prevailing wage requirements.

MIG Corporation #1-72123-003

This appeal concerned a claim in the amount of $27,378.96 for additional labor, equipment and material costs related to bridge substructure repairs. After hearing, this Office recommended that the contractor be paid an additional $20,497.03 based on time and materials incurred to complete the work.

W.J. Mountford #2-74817-002

This appeal concerned a claim for supervision and project management costs incurred as a result of contract delays. After hearing, this Office recommended that the claim be denied because it was barred as a matter of law by the express "no damage for delay" language contained in Division I, Subsection 8.05 of the Contract.

Appeals resolved by Administrative Dismissal

LM Heavy Civil Construction #5-60370-001

This appeal involved a differing site condition claim in the amount of $125,954.34. The Contractor alleged that it encountered a changed condition during the pile driving operations that required the piles to be driven to deeper tip elevations than indicated in the contract documents, resulting in pile splicing and additional pile lengths. The appeal was dismissed upon notice by the parties that the claim was settled.

MIG Corporation #4-68187-002

This appeal involved a differing site condition claim in the amount of $33,570.86 regarding the ground water conditions at the site, which increased the scope and cost required for control of water. Prior to the hearing date, the contractor advised that it was withdrawing the appeal.

Direct Payment Demands

In 2016, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

The Aulson Company – November 8, 2016, revised on December 5, 2016

General Contractor:	Atsalis Brothers Painting
Contract:	#86886 - District 3/Cleaning and Painting of 5 Bridges along I-90 in Charlton, Oxford, Westborough and Upton
Amount:	$7,479.34
Decision:	Denied - December 6, 2016

Warner Bros. LLC – September 23, 2016

General Contractor:	SPS New England
Contract:	#77719 - District 2/ Memorial Ave. Rotary Bridge Superstructure in West Springfield
Amount:	$48,561.32
Decision:	Denied – October 18, 2016

The Aulson Company – August 5, 2016

General Contractor:	Seaver Construction Inc.
Contract:	#81819 – Weston Police Barracks
Amount:	$22,214.75
Decision:	Denied – August 22, 2016

Sealcoating Inc. – June 13, 2016

General Contractor:	Cardi Corporation
Contract:	#71232 – Worcester I-290 / 12 Bridge Repairs
Amount:	$27,007.54
Decision:	N/A (Demand was withdrawn on July 29, 2016)

Marlin Controls, Inc. – May 13, 2016

General Contractor:	MDR Construction, Co.
Contract:	#81501 – District 4 / Roadway Reconstruction, Dascomb Road and East Street in Andover and Tewksbury
Amount:	$21,394.65
Decision:	Denied – June 8, 2016

John W. Egan Co., Inc. – May 16, 2016

General Contractor:	W.J. Mountford, Co.
Contract:	#74817 - Renovations to District 2 Administration Building
Amount:	$4,158.52
Decision:	Allowed – May 25, 2016

Iron Horse Corporation – April 19, 2016

General Contractor:	SPS New England
Contract:	#84972 - Bruce Freeman Rail Trail in Acton/Carlisle/Westwood
Amount:	$74,979.56
Decision:	Deposit Disputed Amounts to Joint Account – May 16, 2016

Liddell Brothers, Inc. – March 15, 2016

General Contractor:	S&R Corporation
Contract:	#79518 - Bridge Replacement - Route 24 over the Taunton River
Amount:	$256,845.04
Decision:	Denied – April 7, 2016

Iron Horse Corporation – March 4, 2016

General Contractor:	SPS New England
Contract:	#84972 - Bruce Freeman Rail Trail in Acton/Carlisle/Westwood
Amount:	$70,413.56
Decision:	Denied Without Prejudice – March 21, 2016

Vigil Electric Company – March 1, 2016

General Contractor:	MDR Construction, Co.
Contract:	#81501 – District 4 / Roadway Reconstruction, Dascomb Road and East Street in Andover and Tewksbury
Amount:	$68,579.07
Decision:	Denied Without Prejudice – March 21, 2016

Allied Painting, Inc. – January 29, 2016

General Contractor:	SPS New England
Contract:	#59992 – Gill/Montague Bridge
Amount:	$175,000.00
Decision:	Deposit Disputed Amounts to Joint Account – February 24, 2016

Allied Painting, Inc. – January 4, 2016

General Contractor:	SPS New England
Contract:	#55204 – Gloucester, Bridge Rehabilitation
Amount:	$143,911.29
Decision:	Denied Without Prejudice – February 24, 2016

Bedford Technology – January 14, 2016

General Contractor:	Middlesex Corporation
Contract:	#76542 - District 5 / Oak Bluffs-Tisbury-Beach Road over Lagoon Pond
Amount:	$356,944.41
Decision:	Denied – February 18, 2016

New England Building & Bridge Co., Inc. – November 2, 2015

General Contractor:	S&R Corporation
Contract:	#79518 - District 5 / Route 24 over Taunton River
Amount:	$416,276.40
Decision:	Allowed – January 13, 2016

Liddell Brothers, Inc. – November 17, 2015

General Contractor:	S&R Corporation
Contract:	#79518 - District 5 / Route 24 over Taunton River
Amount:	$130,051.00
Decision:	Denied – January 7, 2016

Allied Painting, Inc. – November 12, 2015

General Contractor:	SPS New England
Contract:	#59992 – Gill/Montague Bridge
Amount:	$175,000.00
Decision:	Denied Without Prejudice – January 5, 2016

Outdoor Advertising Appeals

In 2016, the following appeal from the denial of an outdoor advertising permit was brought to this Office in accordance with 700 CMR 3.19.

Cove Outdoor LLC – Electronic Billboard Permit 2015D016

This is an appeal from the Office of Outdoor Advertising's Denial of an Electronic Billboard Permit. The appeal is scheduled to be heard in February 2017.

Massachusetts UCP Board Appeals

In 2016, the Massachusetts Unified Certification Program Adjudicatory Board received the following contractor appeals from DBE decertification proceedings initiated by the Supplier Diversity Office.

Ellco Promotions MUCP #2016-0001

After an adjudicatory hearing in accordance with 49 CFR §26.87 and M.G.L. c. 30A, the Board found no grounds to remove Ellco Promotions, Inc.'s certification as a Disadvantaged Business Enterprise. The Board's findings are set forth in its written decision dated December 8, 2016.

New England Specialty Services MUCP #2016-0002

New England Specialty Services requested a hearing before the Board to appeal a determination denying its application for expanded certification as a Disadvantaged Business Enterprise. On October 6, 2016, the Board remanded the matter to the Supplier Diversity Office for further proceedings in accordance with the requirements of 49 CFR Part 26, Subpart D.

APPENDIX OF DECISIONS/RULINGS

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS

MEMORANDUM

To: Stephanie Pollack, Secretary & CEO

From: Albert Caldarelli, Administrative Law Judge, MassDOT

Date: December 21, 2015

Re: Report and Recommendation on Appeal of P. Gioioso & Sons from the Chief Engineer's Denial of Claim #5-73891-001

I am pleased to submit for your consideration the attached report and recommendation.

P. Gioioso & Sons ("Gioioso") is the general contractor on MassDOT Contract #73891, a project replacing two bridges over the Swan Pond River in the Town of Dennis. This matter concerns a claim made by Gioioso under the Contract requesting $113,995.20 for additional costs pursuant to Item 952 "Steel Sheeting" (a.k.a. Claim #5-73891-001). By letter dated June 30, 2014, the Chief Engineer made a written determination to deny the claim. Gioioso appealed that decision.

On December 7, 2015, I conducted a hearing on the appeal. After consideration of the testimony offered by the witnesses, the legal arguments presented by the parties both at the hearing and in pre-hearing position papers, and the applicable contract specifications and drawings, I find that the plans and specifications properly describe the potential use of steel sheeting and how each such use is to be compensated. Therefore, the Chief Engineer's denial of claim is appropriate.

I recommend that Gioioso's appeal be denied.

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REPORT AND RECOMMENDATION

APPEAL OF P.GIOIOSO & SONS
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #5-73891-001

This report and recommendation is provided in accordance with the provisions of M.G.L. c. 6C §40 and Division I §7.16 of the Contract.

BACKGROUND

By letter dated June 30, 2014, the Chief Engineer made a written determination to deny a claim by P. Gioioso & Sons ("Gioioso") requesting $113,995.20 for additional costs pursuant to Contract Standard Specification Item 952 "Steel Sheeting" (a.k.a. Claim #5-73891-001). On July 31, 2014, P. Gioioso & Sons properly appealed the determination in accordance with Division I §7.16 of the Contract by timely submitting a Statement of Claim to the Office of the Administrative Law Judge.

On appeal, Gioioso contends that the placement of certain steel sheeting on the project should have been compensated under a unit price pay item for "Steel Sheeting" (Item 952). The Chief Engineer denied the claim on the basis that such sheeting was compensated as part of lump sum pay items for "Control of Water" (Items 991.1 and 991.2) and/or "Temporary Shoring" (Item 950.1), and was not eligible for payment under Item 952 because the sheeting at issue was not cut and left in place. As will be discussed in detail in my findings and recommendations, the appeal hinges on the interpretation of the plans, specifications and the Department's responses to certain bidder questions contained in addenda issued during the procurement process.

After the appeal was filed, the parties engaged in voluntary discovery and fully briefed their respective positions in prehearing submittals. At a status conference held on October 28, 2015, both parties confirmed that they were prepared to present their respective cases and proceed to a hearing on the matter.

On December 7, 2015, I conducted a hearing on the appeal. The following representatives and witnesses participated:

For Gioioso:
James McGrail, Attorney
Joseph Gioioso, Project Manager

For the Department:
Owen Kane, Senior Counsel
Michael Broderick, District 5 Area Construction Engineer
Malcolm LaValley, District 5 Resident Engineer
Michael McGrath, District 5 Assistant Construction Engineer
Lawrence Piazza, District 5 Claims Engineer

The parties were given the opportunity to fully present their cases through sworn testimony of witnesses and legal argument of counsel. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

After consideration of the testimony offered by the witnesses, the legal arguments presented by the parties both at the hearing and in pre-hearing position papers, and the applicable contract specifications and drawings, I make the following findings:

1. On August 15, 2012, the Department and Gioioso entered into Contract #73891 ("Contract") providing for the replacement of two bridges, one on Upper County Road and the other on Main Street, both over the Swan Pond River in the Town of Dennis.

2. The scope of work included demolition of the existing two bridges, installation of a temporary bridge, drainage and utility construction, asphalt paving, curbing, wetlands mitigation, traffic control, pile driving, sheeting and control of water. The work also required construction of two retaining walls at the Main Street-Route 28 Bridge, one on the northwest side and the other on the southwest side.

3. The appeal pertains to Gioioso's installation of steel sheeting as part of a support of excavation system that was necessary to allow Gioioso to construct the two retaining walls at the Main Street-Route 28 Bridge.

4. The steel sheeting was placed by Gioioso in accordance with an approved submittal for temporary excavation support, developed by Gioioso's engineer TranSystems Corporation and date stamped April 16, 2013. It consisted of four distinct steel sheet pile walls:

    - on the "Inboard" or roadway side of the northwest retaining wall.
    - on the "Outboard" or water side of the northwest retaining wall.
    - on the "Inboard" side of the southwest retaining wall.
    - on the "Outboard" side of the southwest retaining wall.

5. The two Outboard or water side sheet pile walls mostly were left in place and cut at prescribed elevations. The Department made payment for all such steel sheeting cut and left in place pursuant to Item 952. Sheeting installed for the two Outboard sheet pile walls are not part of Gioioso's appeal.

6. The two Inboard or roadway side sheet pile walls were removed by Gioioso after construction of the retaining walls. It is this sheeting that is the subject of the appeal. Gioioso requested payment pursuant to Item 952 for the placement of this sheeting. The Department denied the request because the sheeting at issue was not cut and left in place.

7. The Chief Engineer's letter denial dated June 30, 2014 stated: "contract plan sheets 66, 83, 85 and 128 clearly indicate the outer-line of shoring is to be cut and left in place and is to permanently remain." With respect to the Inboard side sheet pile walls: "The contract plan sheet 66 of 152 clearly indicates the inner-line of shoring is to be removed after construction and on no plan is the inner-line of shoring shown as being cut and left in place."

8. Gioioso submitted a cost calculation for the claim by letter dated June 5, 2014 to the Department's Construction Claims Manager. That calculation is as follows:

"1. Inboard sheeting SW Main St., Removed

- 164.8 LF x 10' Ht x 22 lb/sf = 36,256 lbs x $1.70 = $61,635.20

2. Inboard sheeting NW Main St., Removed (Estimated)

- 140 LF x 10' Ht x 22 lb/sf = 30,800 lbs x $1.70 = $52,360.00

Total Value of Claim = $113,995.20"

9. The Contract contains at least four Items that contemplate the contractor's use of steel sheeting:

- Special Provisions Item 950.1 "Temporary Shoring"
- Special Provisions Item 991.1 "Control of Water Structure No. D-07-001"
- Special Provisions Item 991.2 "Control of Water Structure No. D-07-006"
- Standard Specification Section 952 "Steel Sheeting"

10. Special Provision Item 950.1 "Temporary Shoring" provides in pertinent part:

> The Work shall consist of furnishing, placing and removing a temporary earth support system, as required, during the construction of the proposed bridge abutments and retaining walls. For the purpose of this specification, the temporary earth support system shall be any type of adequately designed earth support system that satisfies the design criteria outlined within this section …
>
> Item 950.1 – Temporary Shoring will not be measured and will be paid by Lump Sum …
>
> Payment for the Work to be done under this item shall be at the Contact Lump Sum bid price for Item 950.1, Temporary Shoring, which price shall include full compensation for all labor, materials, tools, equipment and all associated Work that may be necessary to accomplish the specified Work. Payment under this item will be based on the following percentages (%); approved design 10%, installation 60% and removal 30%. The above percentages will be further proportioned to account for stage construction.

11. Special Provisions Items 991.1 and 991.2 "Control of Water" provide in pertinent part:

> The work shall include the furnishing, installation, operation, maintenance and removal of the water control system required for the construction of the proposed bridge structure ...
>
> Payment for the Work to be done under this Item shall be at the contract lump sum bid price for Item 991.1 Control of Water, Structure No. D-07-001 and for Item 991.2 Control of Water, Structure No. D-07-006 which price shall include all labor, materials, equipment, trenching, pumping and all incidental costs required to complete the work.

12. Standard Specification Section 952 "Steel Sheeting" provides in pertinent part:

> This work shall consist of furnishing and placing lumber, wood or steel sheeting of the kinds and dimensions required, complying with these specifications, where indicated on the plans or where directed …
>
> The items of Lumber Sheeting, Wood Sheeting, or Steel Sheeting will be a pay item only if indicated on the plans or in the Special Provisions to be left in place or when ordered left in place by the Engineer as a permanent part of the foundation. Otherwise the Contractor may remove the sheeting or abandon it at his option …
>
> Steel sheeting … will be measured by the pound. The weight of the quantity to be paid for shall be calculated on the basis of 22 pounds per square foot of wall in place.

Steel Sheeting, when indicated on the plans, in the Special Provisions, or when ordered by the Engineer, to be left in place as a permanent part of the foundation, will be paid for at the unit price per pound under the item for Steel Sheeting.

No direct payment will be made for any sheeting not indicated on the plans or in the Special Provisions or not ordered in writing by the Engineer to be left in place as a permanent part of the foundation. Such sheeting shall be considered incidental work necessary for the proper prosecution and protection of the work during construction operations and compensation therefor shall be included in the prices bid for the various items of work for which sheeting was used …

The sheeting item will be considered complete when the sheeting has been cut at the required elevation.

13. The Contract drawings indicate locations where steel sheeting is to be left in place, for example:

- Sheet 4 entitled "Typical Section Upper County Road" shows a cross section view of the bridge at that location with locations and dimensions of various work items. Below the riprap details is notation identifying "sheet pile, cut and left in place."
- Sheet 8 entitled "Construction Details" shows a RipRap Slope Detail at Upper County Road and identifies "sheet pile, cut and left in place" below such detail.
- Sheet 9, a plan view of Upper County Road, identifies "Prop. Sheet Piling (TYP)."
- Sheet 37 entitled "Construction Staging" for Upper County Road provides a suggested construction sequence, including the installation of control of water structures at the east and west abutments. The locations are shown on the drawing and indicated by "Prop. Control of Water Structure." The drawing also identifies the same structures as "cut sheet piling at river bed (elev. varies)."
- Sheet 66 entitled "Typical Section Main Street-Route 28" shows a cross section view of the bridge at that location with locations and dimensions of various work items. Below the riprap details is notation identifying "sheet pile, cut and left in place after construction (TYP)."
- Sheet 83 and Sheet 85 entitled "Traffic Control Plan" both show steel sheeting below the riprap identified as "Cofferdam to Remain."
- Sheet 128 entitled "Retaining Wall Details" shows steel sheeting below the riprap identified as "Cut Sheet Pile."

14. The Contract drawings indicate locations where steel sheeting is anticipated to be used by the contractor for either water control or temporary shoring, for example:

- Sheet 127 entitled "Retaining Wall Plan Main Street-Route 28" provides details and elevations for construction of retaining walls on the northwest and southwest sides of the bridge at Main Street-Route 28. The plan shows the temporary shoring anticipated to be required for retaining wall construction, which is identified as "Prop. Temp. Sheet Piles (TYP)".
- Sheet 117 entitled "Plan & South Elevation Main Street-Route 28" shows a plan view of various items. Temporary shoring anticipated to be required for retaining wall construction is identified as "Prop. Temp. Sheet Piles for Ret. Wall Construction (TYP)" and "Prop. Temp. Sheet Piles, See Sheet 15 and Special Provisions (TYP)."
- Sheet 66 entitled "Typical Section Main Street-Route 28" shows a cross section view of the bridge at that location with locations and dimensions of various work items. Temporary shoring anticipated to be required for retaining wall construction is identified as "Temp. Support of Excavation Removed After Construction."
- Sheet 128 entitled "Retaining Wall Details" shows temporary steel sheeting identified as "Sheet Pile for Ret. Wall Const. (TYP)."

15. During the procurement process, the Department issued addenda, which provided responses to several bidder questions concerning the Items that might be applicable to the contractor's use of steel sheeting:

- Question 27) Please clarify the use of item 952, there is no special provision regarding this item.
  Response 27) Item 952 Steel Sheeting shall be installed as shown on the drawings to support utilities and construction activities behind the sheeting and shall be paid to the cut off elevation as shown on rip rap details. (Commentary – Steel sheeting has been provided for the project and included with the environmental permit applications to reduce impacts to saltmarsh, prevent flooding of excavations, reduce Time of Year Restriction scheduling impacts, and to support temporary utilities)

- Question 32) The steel sheeting required at each bridge location is paid by the pound under Item 952. Steel Sheeting [sic] however there are no sheet pile lengths or section sizes given in the drawings and there is no Special Provision for this item. Please advise?
  Response 32) Sheeting will be measured from the cut off elevation to the bottom of the sheet pile. Lengths and section sizes will be determined by Contractor means and methods.

- Question 33) Will the sheet pile cut-off required be considered incidental to Item 952?
  Response 33) There will be no separate payment for sheeting above the cut off elevation under Item 952.

- Question 34) Are steel sheeting pay lengths based on driven lengths or cut-off lengths?
  Response 34) See Response to Questions 32 and 33.

- Question 35) Please confirm all of the steel sheeting shown on Sheet No. 127 for the retaining wall construction is paid under Item 952. Steel Sheeting and is not part of Item 950.1 Temporary Shoring.
  Response 35) Sheeting shown on Sheet 127 for retaining wall construction is paid under Item 952 and measured from the cut off elevation to the bottom of sheet pile. Steel sheeting above the cut off elevation will be considered Item 950.1, Temporary Shoring. Note the top of steel sheeting on the North side of D-07-001 (Rt. 28) shall match the proposed roadway profile to facilitate the relocation of the temporary Verizon Duct bank to the permanent location on the bridge. See Utility Tray Detail shown on Sheet 79. The sheet piling on the north side of the bridge is required to be of an elevation above high tide line to support the temporary gas pipe as shown on sheets 147 and 148.

- Question 47) Please confirm that all of the steel sheeting shown on contract drawing sheet #9 will be paid under Item 952. Steel Sheeting.
  Response 47) Sheet Piling shown on Sheet 9 will be measured from the cut off elevation to the bottom of sheet piling.

DISCUSSION

This appeal presents an issue of contract interpretation. Gioioso contends that the Contract plans and specifications are ambiguous with respect to the pay items applicable to the placement of the two temporary Inboard or roadway side sheet pile walls needed to allow construction of the retaining walls. Gioioso points to the several bidder questions concerning the use of and compensation for steel sheeting and suggests that this in and of itself demonstrates that the plans and specifications were unclear on those points in the eyes of the bidders. Further, Gioioso contends that the Department's answers to such questions, particularly Question and Response 35, caused bidders to reasonably assume for purposes of preparing their bids that all steel sheeting shown on Sheet 127 for proposed temporary support of excavation, including the Inboard side sheeting, would be compensated under Item 952. I disagree.

Although the Contract calls for multiple potential uses of steel sheeting, I do not see any ambiguity in the plans and specifications with respect to those potential uses and how each use of steel sheeting is to be compensated. Further, I do not find that the Questions and Answers in the addenda altered the requirements of the plans and specifications or reasonably led bidders to

believe that the Inboard side steel sheeting shown on Sheet 127 would be compensated under Item 952 regardless of whether such sheeting was removed or cut and left in place.

A contract should be construed "as a whole, in a reasonable and practical manner, consistent with its language, background, and purpose." *Downer & Co., LLC v. STI Holding, Inc.*, 76 Mass. App. Ct. 786, 792 (2010). Further, "a contract is to be construed to give a reasonable effect to each of its provisions if possible." *S. D. Shaw & Sons, Inc. v. Joseph Rugo, Inc.* 343 Mass. 635 , 640 (1962). When there are several documents comprising the contract, e.g., general conditions, plans, specifications, addenda, etc., each document must be read together as one consistent contract. *See Phoenix Spring Beverage Co. v. Harvard Brewing Co.*, 312 Mass. 501 (1943).

Gioioso contends that there are conflicts within the drawings because Sheet 127 identifies all the proposed steel sheeting, i.e., on both the Inboard and Outboard sides, as temporary shoring, yet on Sheet 66 the sheeting on the Outboard side is identified as "cut and left in place". According to Gioioso: "These callouts create confusion because 'Temp.' would indicate a temporary installation, not eligible for payment under Item 952 Steel Sheeting." Gioioso also points to Sheet 117 which identifies the Outboard side sheeting as temporary and references the Special Provisions which address only temporary sheet pile installation in the temporary shoring and control of water items. I do not find this line of argument persuasive: first, the Outboard side sheeting is clearly indicated on Sheet 66 to be left in place and there is no dispute that such sheeting was in fact left in place and compensated under Item 952; second, all of the referenced drawings show the Inboard side sheeting as temporary shoring. With respect to the Inboard side sheeting shown on Sheet 127, Mr. Gioioso testified that the temporary nature of the sheeting was "obvious".[1] In any event, any apparent confusion should dissipate when the specifications and drawings are read together as one consistent contract.

Sheet 66 identifies the Outboard sheeting as "cut and left in place" and is wholly consistent with the plain language of Item 952 providing that steel sheeting will be compensable "if indicated on the plans … to be left in place." Sheet 66 identifies the Inboard sheeting as "Temp Support of Excavation Removed After Construction (TYP)." According to Item 952, "such sheeting shall be considered incidental work necessary for the proper prosecution and protection of the work during construction operations and compensation therefor shall be included in the prices bid for the various items of work for which sheeting was used …", in this case Item 950.1. The same Inboard sheeting is shown on both Sheet 117 and Sheet 127 as "Prop. Temp. Sheet Piles (TYP)", i.e. temporary shoring. All of these drawings show the Inboard side sheeting as temporary, and there is no indication anywhere in the Contract specifications or plans to the contrary.

The language in Item 950.1 clearly advises bidders to include the cost of placing and removing temporary shoring within their lump sum bids for that work: "The Work shall consist of furnishing, placing and removing a temporary earth support system, as required, during the construction of the proposed bridge abutments and retaining walls." Payment for temporary shoring is made on a lump sum basis and "shall include full compensation for all labor, materials, tools, equipment and all associated Work that may be necessary to accomplish the specified Work. Payment under this item will be based on the following percentages (%);

[1] Responding to a question by Mr. Kane at about 56:10 into the Hearing, Mr. Gioioso testified: "There was no obvious reason why that sheet piling had to stay in the ground, and that's why we removed it."

approved design 10%, installation 60% and removal 30%." Gioioso's proposed interpretation of the Contract is inconsistent with the plain language of Item 950.1, which informs bidders that the furnishing, placing and removing of temporary shoring is to be compensated on a lump sum basis and to include all labor, materials, tools, equipment.

In the alternative, Gioioso contends that addenda issued pre-bid effectively modified the plans and specifications in a way that binds the Department to compensate all the steel sheeting shown on Sheet 127 as Item 952 Steel Sheeting:

> Our contention is that the Questions and Answers provided by Addendum, prior to the bid, constitute a binding modification to the Bid Documents and Contract. As such, the Bidders are allowed to rely on those modifications to prepare their bids, and the Department is required to honor those modifications in the prosecution of the contract.
>
> Gioioso's Statement of Claim, Section 7.

Gioioso's premise is correct that an awarding authority can change the plans and/or specifications by issuing pre-bid addenda. However, in this case the addenda, including the Questions and Answers provided therein, did not modify the plans and specifications concerning the Inboard side steel sheeting shown on Sheet 127.

As a general observation, all of the answers to bidder questions concerning the applicability of Item 952 reference a "cut off elevation". Work that is compensable under Item 952 is "considered complete when the sheeting has been cut at the required elevation." The references to a "cut off elevation" cannot reasonably be read to apply to steel sheeting that is clearly identified in the plans and specification as temporary and not to be cut and left in place.

With respect to Question 35, a bidder sought confirmation that "all of the steel sheeting shown on Sheet No. 127 for the retaining wall construction is paid under Item 952. Steel Sheeting and is not part of Item 950.1 Temporary Shoring." Although the Department's answer is not a model of clarity, I cannot reach the conclusion advocated by Gioioso. Response 35 did not confirm that <u>all</u> steel sheeting shown on Sheet 127 for the retaining wall construction would be paid under Item 952.[2] Rather, it indicated that both Item 952 and Item 950.1 apply. I find nothing in the Response or in the addenda that revises in any way either of those specifications or the drawings at Sheet 66 or Sheet 127. Further, Gioioso's interpretation renders the reference to Item 950.1 meaningless. If the intent was to compensate all of the steel sheeting shown on Sheet 127 as permanent under Item 952, there would be no reason for the reference to the temporary shoring item. The only reasonable reading of the Response that gives meaning and effect to both provisions and remains consistent with the plain language of the specifications and applicable drawings is that Item 952 applies to steel sheeting shown on Sheet 127 that is "indicated on the plans … to be left in place" (i.e., the Outboard side sheeting shown as permanent on Sheet 66 and other drawings), and that Item 950.1 applies to steel sheeting shown on Sheet 127 that is to be removed, including sheeting above the cut off elevation, as all such sheeting is temporary.

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[2] Contrast the Department's confirmation in response to Question 47: "Please confirm that all of the steel sheeting shown on contract drawing sheet 9 will be paid for under Item 952 Steel Sheeting. Response: Yes. Sheet Piling shown on Sheet 9 will be paid for under Item 952, and measured from the cut off elevation to the bottom of the sheet piling."

In addition, there is an inherent inconsistency in Gioioso's position. Gioioso makes claim to the pricing for Item 952, but ignores the contract requirements that establish entitlement to payment under that provision. Item 952 provides: "The sheeting item will be considered complete when the sheeting has been cut at the required elevation." With respect to the Inboard side steel sheeting, there is no dispute all of it was in fact temporary. It was removed after construction of the retaining walls and none of it was cut and left in place. As a result, the activity that expressly constitutes completion of the scope of work payable under Item 952 was never performed.

Finally, I note for the record that the Department disputes Gioioso's cost calculation for multiple reasons, but primarily on the basis that the quantities and amounts claimed are estimates that cannot be verified. Given my findings above, I need not reach that issue.

RECOMMENDATION

For the reasons stated above, I recommend that the contractor's appeal be DENIED.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: December 21, 2015

MEMORANDUM

To: Stephanie Pollack, Secretary & CEO

From: John Englander, General Counsel

Date: March , 2016

Re: Report and Recommendation on Appeal of Middlesex Corp. from the Chief Engineer's Denial of Claim #5-68152-001

I am pleased to submit for your consideration the attached report and recommendation.

Middlesex Corporation is the general contractor on Contract #68152 ("Contract") providing for the reconstruction and painting of two steel bridges over the Acushnet River in Fairhaven and New Bedford. This matter concerns a claim requesting $197,091.81 for back wages paid to employees of its painting subcontractor, who were erroneously paid the prevailing wage rate for laborers when they were required to have been paid the prevailing wage rate for painters.

On April 9, 2014, Middlesex properly appealed the Chief Engineer's denial of the claim in accordance with Division I §7.16 of the Contract by timely submitting a Statement of Claim to the Office of the Administrative Law Judge. On September 3, 2015, the Administrative Law Judge recused himself. Consequently, I was designated to hear this appeal. On January 14, 2016, I conducted a hearing.

After consideration of the testimony offered by the witnesses, the legal arguments presented by the parties both at the hearing and in pre-hearing position papers, and the applicable contract specifications and drawings, I am recommending that Middlesex's appeal be denied. My findings and reasoning are contained in the attached Report and Recommendation.

REPORT AND RECOMMENDATION

APPEAL OF MIDDLESEX CORPORATION
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #5-68152-001

This report and recommendation is provided in accordance with the provisions of M.G.L. c. 6C §40 and Division I §7.16 of the Contract.

BACKGROUND

By letter dated December 5, 2013, the Chief Engineer made a written determination to deny a claim by Middlesex Corporation ("Middlesex") requesting $197,091.81 for back wages paid to employees of its painting subcontractor Blastech Enterprises, Inc. ("Blastech"), who were erroneously paid the prevailing wage rate for laborers when they were required to have been paid the prevailing wage rate for painters. On April 9, 2014, Middlesex properly appealed the Chief Engineer's determination in accordance with Division I §7.16 of the Contract by timely submitting a Statement of Claim to the Office of the Administrative Law Judge.

After the appeal was filed, the parties engaged in voluntary discovery and fully briefed their respective positions in prehearing submittals. On September 3, 2015, the Administrative Law Judge recused himself. Consequently, I was designated by the Secretary to hear this appeal. On December 10, 2015, I held a status conference, at which both parties confirmed that they were prepared to present their respective cases and proceed to a hearing on the matter.

On January 14, 2016, I conducted a hearing on the appeal. Mr. David Skerrett, Senior Vice President of Construction, represented Middlesex. Mr. Owen Kane, Senior Counsel, represented the Department. The parties were given the opportunity to fully present their cases. The following documents were admitted as exhibits in evidence:

Exhibit #1:	MassDOT Contract #68152
Exhibit #2:	Executive Office of Labor and Workforce Development (EOLWD), *Notice to Awarding Authorities and Contractors Concerning the Removal and Application of Paint on Bridges and Tanks*, dated December 23, 2009
Exhibit #3:	Middlesex Corporation Data Sheet (Payments to Blastech)
Exhibit #4:	Middlesex Corporation Data Sheet (Blastech Pay Estimate #116)
Exhibit #5:	Middlesex Corporation Data Sheet (Balance/Excess Report for Pay Estimate #117)
Exhibit #6:	Subcontract Agreement #486-2 between Middlesex and Blastech
Exhibit #7:	Middlesex Corporation Data Sheet (Payment Tracking Sheets, Paid to Blastech Enterprises)
Exhibit #8:	MassDOT Standard Provisions, Division I, Section 7.01

At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

I have carefully considered the pre-hearing papers submitted by the parties, and the testimony, exhibits and legal arguments presented at the hearing. I now make the following findings:

1. On April 27, 2011, the Department and Middlesex entered into Contract #68152 ("Contract") providing for the reconstruction and painting of two steel bridges over the Acushnet River in Fairhaven and New Bedford. Hearing Exhibit #1.

2. The Contract required Middlesex to fully clean and remove the existing paint from the steel bridges and then repaint them. This work is specified in four lump sum pay items for which Middlesex provided the following bid prices:

   - Item 961.201 - Clean (full removal) & Paint Steel Bridge (West): $1,400,000
   - Item 961.202 - Clean (full removal) & Paint Steel Bridge (Middle): $1,000,000
   - Item 961.203 - Clean (full removal) & Paint Steel Bridge (East): $1,750,000
   - Item 961.204 - Clean (full removal) & Paint Steel Bridge (Hthwy Rd): $ 540,000

3. Middlesex retained Blastech to perform the painting work. The subcontract with Blastech dated June 9, 2011 requires Blastech to perform the work covered by Items 961.201-204, including cleaning and painting the bridges, installing and removing required containment systems and work platforms, blasting and priming, intermediate painting, and finish painting.

4. In its pre-hearing submittal, Middlesex makes the following allegations:

   a. Its subcontractor Blastech made wage payments to certain employees who installed and removed the containment system for the bridge painting work. Statement of Claim, Exhibits 2A, 2B, 2C and 2D.
   b. Blastech paid the employees based on the prevailing wage rate applicable to Laborers. It did so in reliance on the Contract language in Special Provisions, Item 101, which states: "The construction of any containment system as required for paint removal shall be paid for under Skilled Laborer." Statement of Claim, Exhibits 2B, 2C and 2D.
   c. In 2013, after a prevailing wage compliance investigation by the Office of the Attorney General, Blastech determined that the employees should have been paid the prevailing wage rate applicable to Painters (Bridges/Tanks). Statement of Claim, Exhibit 2B.
   d. Blastech paid back wages and benefits to the employees totaling $197,091.81. Statement of Claim, Exhibit 2B.
   e. Because Blastech relied to its detriment on "misleading information" in the Contract, Middlesex on behalf of Blastech is entitled to additional compensation in the amount of the back wages and benefits paid. Statement of Claim, Exhibit 2B.

5. Division I, Subsection 7.01 of the Contract provides:

   > The Contractor shall keep himself fully informed of all state and national laws and municipal ordinances and regulations in any manner affecting those engaged or employed in the work ... The Contractor shall at all times observe and comply with, and shall cause all his/her agents and employees to observe and comply with all existing laws, ordinances, regulations, orders and decrees.

6. The Contract is subject to prevailing wage requirements. Special Provision 00861 is a schedule of prevailing wage rates for various labor classifications, including a rate for "Laborer" and a rate for "Painter (Bridges/Tanks)". Special Provision 00860 provides:

> The Contractor's attention is directed to Massachusetts General Laws. Chapter 149, Sections 25 through 27H, and 150A. This contract is considered to fall within the ambit of that law, which provides that in general, the Prevailing Rate or Total Rate must be paid to employees working on projects funded by the Commonwealth of Massachusetts or any political subdivision including Massachusetts Department of Transportation (MassDOT).

7. Special Provision, Item 101 "Base Labor Rate", provides:

> This Item will be used for unanticipated work which is outside the scope of the contract Items, as directed by the Engineer. Under this Item the Contractor Under this Item the Contractor shall furnish competent artisans (skilled laborer, painter, carpenter, electrician, etc.) possessing all pertinent licenses and/or certifications, as directed by the Engineer to maintain and repair various components of the bridges to be worked on under this contract …
>
> Equipment and tools that are considered part of the artisan's tool kit are as follows:
>
> Skilled laborer:
> Small hand tools, hand held power tools, and equipment normally used in the trade
> ….
> Bridge Painter:
> Hand scrapers, wire brushes, paint spray apparatus, needle guns, wire wheels, gloves, protective clothing and all power tools common to the trade with power source as necessary to run the equipment. The construction of any containment system as required for paint removal shall be paid for under Skilled Laborer …

8. Prior to bid and award of the Contract, a *Notice to Awarding Authorities and Contractors Concerning the removal and Application of Paint on Bridges and Tanks*, dated December 23, 2009, was issued by the Executive Office of Labor and Workforce Development. Hearing Exhibit #2. The Notice provided:

> All awarding authorities and contractors are hereby notified that the Painter (Bridges/Tanks) occupational classification shall be used for the following tasks on public works construction projects covered by the prevailing wage law, Mass.G.L. c.149, §§26 to 27D. …The erection and dismantling of scaffolding, rigging and containment for bridge work and tank painting operations.

9. Blastech did not appear at the hearing and did not offer any proof that it was unaware of the December 23, 2009 Notice from EOWLD, that it detrimentally relied on the Contract language, or that it actually incurred the damages claimed.

DISCUSSION

This appeal fails for multiple reasons. First and foremost, Middlesex did not meet its burden of proof. The claim that is the subject of this appeal was presented to the Department as a claim on behalf of a subcontractor for $197,091.81 in damages incurred by the subcontractor. As in all cases, the appellant has the affirmative duty to prove fundamental facts relevant to the claim. Yet, no proof was presented at the hearing that Blastech was unaware of the December 23, 2009 Notice from EOWLD, that it detrimentally relied on the Contract language, or that it actually incurred the damages claimed.

Notwithstanding the above, the claim is without merit as a matter of contract. Division I, Subsection 7.01, requires Middlesex and its subcontractors to know the prevailing wage laws. Middlesex confirmed that it was unaware of the 2009 EOWLD Notice and in preparing its bid for this Contract mistakenly assumed that workers installing paint containment systems on this Contract were classified as Laborers for purposes of prevailing wage. In that regard, Middlesex

did not meet its obligation "to observe and comply with, and … cause all his/her agents and employees to observe and comply with all existing laws …"

To the extent that the claim is one of promissory estoppel, it fails as well. No proof was offered with respect to either Middlesex's or Blastech's detrimental reliance on statements in the Contract. Blastech did not appear at the hearing and did not offer any proof that it was unaware of the December 23, 2009 Notice from EOWLD, that it detrimentally relied on the Contract language, or that it actually incurred the damages claimed. Middlesex testified that it already believed prior to entering into the Contract that the Laborer's classification was correct.

Finally, I note that Middlesex tried at hearing to make a claim for its own damages. Middlesex argued that it sustained losses by paying Blastech for work that was not completed and unanticipated costs to follow-on subcontractors. For the reasons discussed above, those costs do not appear to be causally related to any breach by the Department. In any event, that claim is entirely outside the scope of this appeal. The appeal is from the Chief Engineer's denial of claim #5-68152-001 requesting $197,091.81 for back wages paid to employees of Blastech, who were paid the prevailing wage rate for laborers when they were required to have been paid the prevailing wage rate for painters. Middlesex did not pay the $197,091.81 and did not prove that it did.

RECOMMENDATION

For the reasons stated above, I recommend that the contractor's appeal be DENIED.

Respectfully submitted,

John Englander
General Counsel

Dated:

MEMORANDUM

To: Stephanie Pollack, Secretary & CEO

From: Albert Caldarelli, Administrative Law Judge, MassDOT

Date: June 7, 2016

Re: Report and Recommendation on Appeal of MIG Corporation from the Chief Engineer's Denial of Claim #1-72123-003

I am pleased to submit for your consideration the attached report and recommendation.

MIG Corporation ("MIG") is the general contractor on MassDOT Contract #72123 ("Contract") providing for scheduled and emergency bridge substructure repairs at various locations in District 1. This matter concerns a claim made by MIG requesting $27,378.96 for additional labor, equipment and material costs to related to bridge substructure repairs performed at a bridge over Williams River in West Stockbridge (a.k.a. Claim #1-72123-003). By letter dated June 15, 2015, the Chief Engineer made a written determination to deny the claim. MIG properly appealed the determination by timely submitting a Statement of Claim to the Office of the Administrative Law Judge.

On May 10, 2016, I conducted a hearing on the appeal. After consideration of the testimony offered by the witnesses, the legal arguments presented by the parties both at the hearing and in pre-hearing position papers, and the applicable contract specifications and drawings, I found that MIG is entitled to be reimbursed an additional $20,497.03 for labor and materials that it incurred in compleing the work. The balance of MIG's appeal in the amount of $6,881.93 should be denied because MIG has not established that such costs are recoverable under the Contract.

For the reasons stated in the attached Report and Recommendation, I recommend that MIG's appeal be approved in part, and denied in part.

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REPORT AND RECOMMENDATION
APPEAL OF MIG CORPORATION
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #1-72123-003

This report and recommendation is provided in accordance with the provisions of M.G.L. c.6C §40 and Division I §7.16 of the applicable contract.

BACKGROUND

By letter dated June 15, 2015, the Chief Engineer made a written determination to deny a claim by MIG Corporation ("MIG") requesting $27,378.96 for additional labor, equipment and material costs to related to bridge substructure repairs performed at Bridge No. W-22-019/I-90 Eastbound and Westbound over Williams River in West Stockbridge (a.k.a. Claim #1-72123-003). On June 26, 2015, MIG properly appealed the determination and timely submitting a Statement of Claim to the Office of the Administrative Law Judge.

After the appeal was filed, the parties engaged in voluntary discovery and fully briefed their respective positions in prehearing submittals. At a status conference held on March 18, 2016, both parties confirmed that they were prepared to present their respective cases and proceed to a hearing on the matter.

On May 10, 2016, I conducted a hearing on the appeal. The following representatives and witnesses participated:

For MIG:
David Kerrigan, Attorney
Robert Voghel, President and Chief Operations Officer
Heath Kelly, Superintendant
Gregory Bowden, Northpoint Survey Services

For the Department:
Owen Kane, Senior Counsel
Scott Stevens, District 1 Area Construction Engineer
John Pierce, District 1 Area Engineer
Anthony Vona, District 1 Resident Engineer

The parties were given the opportunity to fully present their cases through sworn testimony of witnesses, presentation of documents and exhibits, and legal argument of counsel. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

After careful consideration of the testimony offered by the witnesses, the exhibits presented at the hearing, the legal arguments presented by the parties both at the hearing and in pre-hearing position papers, and the applicable contract specifications and drawings, I make the following findings:

1. On August 9, 2012, the Department and MIG entered into Contract #72123 ("Contract") providing for scheduled and emergency bridge substructure repairs at various locations in District 1.

2. The Special Provisions of the Contract describe the scope of work as follows:

> The work to be done under this Contract includes but is not limited to removing and replacing deteriorated concrete and reinforcing steel from substructure elements such as pier caps, pier columns, exposed pier footings, wing walls, breast walls, parapets, and retaining walls; under the jurisdiction of District One.

3. There are 44 bid items contained in the Special Provisions and Standard Specifications for work to be performed under the Contract.

4. The Contract scope also includes "non-itemized related work":

> The work to be done under this contract also includes preparing the designs for structural repairs, furnishing various artisans (cement masons, iron workers, mechanics, welders, carpenters, laborers) as specified in Item 100.1 "Base Labor Rate", materials, equipment, and engineering services to perform scheduled repairs for non-itemized related work.

5. Special Provisions, Item 101.1, provides the requirements for labor furnished by the Contractor for "non-itemized related work":

> The Contractor will furnish competent artisans, possessing all pertinent licenses and/or certifications, as directed by the Engineer to maintain and repair various components of the bridges as they relate to the "Related Work" items. The Contractor must submit to the Engineer all pertinent licenses and/or certifications for each artisan prior to the commencement of any work. The payment under these Items will be for the artisan only. Payment for equipment (other than the usual artisan tool kit and artisans' vehicle) will be made under payment for equipment rental as stated elsewhere in these special provisions.
> …
> Under the above Item, the Contractor will furnish competent artisans, possessing all pertinent licenses and/or certifications, to maintain and repair various components of the bridges, as directed by the Engineer, as they relate to the "Related Work" items and shall not include labor incidental to Items 102.001 through 987.3. The Contractor must submit to the Engineer all pertinent licenses and/or certifications for each artisan prior to the commencement of any work.
> …
> Payment under this Item 100.1, Base Labor Rate will be made at the contract unit price per hour multiplied by the hours worked, multiplied by the appropriate compensation factor from the Compensation Table shown.

6. The general requirements for materials, equipment, and engineering services needed for scheduled repairs for "non-itemized related work" are contained in the Special Provisions under the section entitled "Non-Bid Items":

> The Contractor will be reimbursed through non-bid items, contingency payments, and the force account method when the Department directs him to perform work that is outside the basic scope of this Contract. Non-bid items and contingency payments are for the costs of materials, equipment rentals, and services performed by specialty sub-contractors and engineering consultants, and additional artisans. The Contractor will be paid for the cost of materials, suppliers' equipment rentals, and services, plus five percent (5%). The Contractor will be paid for his/her own rental equipment and additional artisans in accordance with Sub-Section 9.03.

When authorized by the Department, payment for force account work will be made in accordance with the relevant provisions of Sub-Section 9.03, unless otherwise directed in the special provisions, and except as noted under the following:

- Material Costs
- Suppliers Equipment Rental Costs
- Contractor's Equipment Rates
- Service Costs - Specialty Sub-Contractors
- Engineering Services
- Additional Artisans

7. For Material Costs, the Contract states in pertinent part:

> … the Contractor will be paid his actual cost plus 5 percent for materials supplied by him/her and incorporated into the work. No materials shall be ordered until approved by the Engineer …

8. For Supplier's Equipment Rental Costs, the Contract states in pertinent part:

> The Contractor will be reimbursed for the actual equipment rental cost on the supplier's invoice plus 5 percent. No equipment shall be rented until approved by the Engineer, and competitive rental rates may be required if the Engineer directs.

9. For Service Costs-Specialty Subcontractor, the Contract states in pertinent part:

> The Contractor will be paid his/her actual service cost plus 5 percent for the specialty Sub Contractors. No specialty Sub-Contractor shall be used until approved by the Engineer, and competitive service costs may be required if the Engineer directs.

10. For Engineering Services, the Contract states in pertinent part:

> If design work is required for structural repairs that are not otherwise anticipated in the Contract, the Engineer may direct the Contractor to hire a consultant to provide a design. The consultant must be approved by the Engineer. The Contractor will be reimbursed for the design services, after submittal of the invoices, plus 5 percent.

11. On March 27, 2012, the Department's Bridge Section issued "Maintenance Scope No. 14-12" for substructure repairs on Bridge No. W-22-019/I-90 Eastbound and Westbound over Williams River in West Stockbridge. *See* Exhibit 2.

12. Both parties understood that MIG would have to design a shoring support system in order to complete the substructure repairs on the bridge in West Stockbridge. Additionally, MIG would have to employ a jacking procedure to transfer the loads from the bridge superstructure to the temporary shoring system during the repairs. This work was not included in any of the contract bid items; therefore, it was considered non-itemized work to be compensated on a time-and-materials basis.

13. MIG requested and obtained approval from the Department to hire an engineering firm, Benesch, to design the shoring system. Benesch completed a shoring design and jacking procedure dated September 23, 2013, which was submitted by MIG and approved by the Department. Exhibit 3. The parties understood that the proper layout of the shoring system depended on placing six base plates in correct locations such that the rest of the shoring

system, when assembled on those base plates, would line up with the bridge beams to be jacked.[1]

14. Prior to assembly of the shoring system, representatives from MIG and the Department had a verbal conversation in the field about the work. MIG's Superintendent testified that he requested approval for a survey for the purpose of accurately locating the base plates.[2] The Resident Engineer testified that he understood MIG to be requesting services from the Department's survey section, and denied the request.[3] They presented conflicting testimony with respect to their understanding of MIG's request for a survey at the time it was made, including whether the Department's survey staff was being asked to provide the survey or whether such survey should be performed by MIG personnel or outsourced to a specialty subcontractor. MIG, in reliance on the contract provision stating that "no specialty sub-contractor shall be used until approved by the Engineer", contends that it could not hire a surveyor to layout the locations of the base plates once its request was denied by the Department. The Department's position is that MIG's initial request was only for Department survey staff to perform the survey, and after that request was denied, MIG did not make a request to hire a surveyor and instead proceeded to layout the locations of the base plates in accordance with its own means and methods.

15. In late November/early December 2013, MIG began the work. It used a so-called "plumb bob" method to attempt to properly locate the base plates. This method involved elevating a worker by means of a lift, who then would drop a plumb bob from the bridge structure to mark the centerlines of each bridge beam. The locations for installation of each base plate were then measured from those points in accordance with the shoring design. *See* Exhibit 6.

16. At the time, the Department was aware of the means and methods that MIG was using to layout the locations of the base plates. Also, for quality assurance, the Department's field staff checked MIG's measurements against the shoring system design.[4]

17. Later in December 2013/early January 2014 after some assembly had been completed, the parties discovered that the shoring system was not lining up with the bridge beams to be jacked.[5]

18. By email dated January 9, 2014, MIG advised the Department that it was hiring a survey crew to layout the correct locations of the base plates and would provide a quote for the Department's approval. Exhibit 11. Northpoint Survey performed the layout and the cost of the survey work was approved by the Department and paid to MIG. Exhibit 5.

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[1] E.g., see testimony of Mr. Stevens at 2:45:00 of the Hearing: "Everybody knew how accurate it needed to be."

[2] E.g., see testimony of Mr. Kelly at 1:04:00 of the Hearing: "I was asking for points in order to put the base plates in the correct position."

[3] E.g., see testimony of Mr. Vona at 1:11:00 of the Hearing: "He asked if they can have MassDOT survey."

[4] E.g., see testimony of the Department at also at 2:23:00 of the Hearing "Q: Did you know they were using this plumb bob method? A: Yes." And also at 1:12:00 of the Hearing: "MIG chose a method to get that point down to where it needed to be and they measured everything off of that for layout, and we checked the measurements."

[5] E.g., see testimony of Mr. Stevens: "What we found eventually was just that it didn't start in the right place. The base plates weren't in the right spots because everything went off of them, so things weren't lining up because they didn't start correctly at the bottom."

19. MIG then disassembled some of the shoring system, relocated the base plates in accordance with the survey provided by Northpoint, and reassembled the system. The work proceeded thereafter and the shoring system, jacking procedure and substructure repairs were performed as planned.

20. The Department paid MIG on a time-and-materials basis for the work, with the exception of $27,378.96 which is the subject of this appeal.

21. The parties have entered into the following stipulation:

> MIG Corporation and the Massachusetts Department of Transportation stipulate that provided that the Administrative Law Judge finds in MIG's favor on liability, MIG is entitled to at least $20,497.03 in damages … MassDOT continues to dispute entitlement to the following items being claims, even if liability has been found:
>
> 1) Classification of Robert Voghel and Heath Kelly as iron workers rather than laborers (the rate at which the DOT paid) for work to reassemble the support …
> 2) The equipment and materials for United Rental …

22. During January and February 2014, Mr. Voghel and Mr. Kelly worked on the reassembly of the support system. Exhibit 8. The Department paid MIG for this work at the contract base labor rate. Mr. Voghel and Mr. Kelly testified that they performed work that typically would be performed by an iron worker, such as rigging, erecting steel beams, and aligning and bolting steel. They also testified that if they had not performed this work, MIG would have had to retain additional iron workers to do the work. There was no testimony or other evidence presented by MIG to show that it had submitted to the engineer, prior to commencement of any work, licenses and/or certifications indicating that Mr. Voghel or Mr. Kelly were to perform work as iron workers.

23. MIG testified that it used a manlift rented from United Rentals during installation of the shoring and jacking system. MIG submitted to the Department for payment an invoice in the amount of $2,047.50 for the manlift, a copy of which is contained in Exhibit 8. The invoice includes charges for a one-month rental, pick-up charge and 5% markup. The Department did not pay the invoice. The Resident Engineer testified that he did not observe this manlift being used for this scope of work and has received no other evidence indicating that it was. Mr. Kelly testified that the manlift was used during the operation, but not used exclusively for this task nor was it used for this task during the entirety of the month billed.

DISCUSSION

The Parties entered into Contract #72123 providing for scheduled and emergency bridge substructure repairs at various locations in District 1. At the time of bid, MIG was required to submit unit bid prices for 44 items of work, most of them based on estimated quantities. The precise locations and scopes of repair were unknown other than the fact that substructure repairs could be performed on any bridge in the district. In that regard, the nature of the work at time of bid is prospective. See, e.g., *SPS New England Inc. v. Massachusetts Dept. of Transportation*, Attorney General Bid Protest Decision at p. 11 (May 21, 2013).

Similarly, the Contract anticipated that MIG would have to perform "non-itemized related work", which generally includes any additional work needed to perform required bridge substructure repairs which is not included in any of the 44 bid items. Again, the precise location

and scope of non-itemized work is unknown at the time of bid. The Contract provides that labor for such work is to be paid "at the contract unit price per hour multiplied by the hours worked, multiplied by the appropriate compensation factor." Materials, equipment, specialty services and engineering services are to be paid at "actual costs plus five percent." In other words, whenever non-itemized work is required, the Contract provides that MIG be compensated for such work on a time-and-materials basis.

A time-and-materials agreement is intended to compensate a contractor for the actual cost of labor, equipment and materials (plus a percentage markup, normally) incurred to achieve the result desired by the awarding authority. This method of payment is appropriate, as in this case, when the extent of work is unknown or is of such character that a price cannot be determined to a reasonable degree of accuracy. 23 CFR 635.120(d). It is also understood that an agreement to pay for work on a time-and-materials basis places less performance risk on the contractor. *CACI, Inc. v. General Services Administration,* GSBCA 15588, 03-1 BCA ¶32,106 (December 13, 2002).[6] If the contractor completes the work pursuant to the contract, it is entitled to be reimbursed for labor at the agreed upon rates and for materials purchased at cost. *Id*. It is in this context that I consider the parties' arguments on appeal.

Both parties rely heavily on their versions of the conversation in the field between MIG's Superintendent and the Department's Resident Engineer. Clearly, there was either a miscommunication or misunderstanding between the parties at the time of the request, as I found both witnesses to be truthful and credible with respect to their testimony. Despite the focus and time devoted at the hearing to that exchange, this appeal does not hinge on the uncertainties surrounding one conversation in the field.

The issue in this appeal arose prior to commencement of any work. From the outset, the design of the shoring system and jacking tower was recognized as highly complex. The Department testified that it had even "steered" MIG toward a particular designer for the required engineering services because of the anticipated complexity of the operation. In addition, because the work was to be paid on a time-and-materials basis, both parties were aware that all labor, equipment, materials, engineering services and specialty subcontractor to be used by MIG had to be approved in advance by the Department.

Both parties also understood that the shoring system needed to line up correctly with the bridge beams and that the correct layout depended on accurately locating the base plates. *See above* at n.1. It was "essential" to have an accurate survey layout to do the work properly.[7] As far as responsibility to perform the layout, Division I, §5.07 states that the Contractor "shall be solely responsible for the accuracy of the line and grade of all features of his work." Further, "[t]he Contractor shall employ qualified engineering personnel to insure adequate control …" Ultimately, MIG met these obligations. It retained Northpoint Survey, a qualified surveyor, and accurately laid out the shoring system.

[6] *Also see* 48 CFR 16.601(c)(1): "A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

[7] "With the complexity of the temporary support system to be installed, it was essential to have an accurate survey layout for the work to be done properly." Chief Engineer's letter dated June 15, 2015.

There is no disagreement between the parties that MIG's work was to be performed pursuant to a time-and-materials agreement. As such, MIG is entitled to be reimbursed for the labor and materials that it incurred to complete the work. The Department takes issue with certain labor and material costs incurred by MIG in having to disassemble parts of the shoring system once it was discovered that the plumb bob method did not produce the level of accuracy needed. It was MIG's decision to proceed with the plumb bob method to layout the locations of the base plates. Although the Department was aware of the method being used by MIG, it takes the position that is had no obligation to direct MIG's work or to order MIG to employ any particular means and methods to accurately layout the shoring system. That is true, the Contract does not obligate the Department to direct a contractor's means and methods. On the other hand, the Contract does not prohibit the Department from doing so, particularly in the context of its duty to supervise time-and-materials work to ensure that the contractor is using efficient methods and effective cost controls. In fact, the Department asserted strict control over other aspects of the work to ensure both efficiency and cost, including the selection of the engineer, the design of the shoring system and jacking procedure, and the equipment and materials to be used. Knowing "how accurate it needed to be", the Department could have similarly exercised its authority under the time-and-materials provisions of the Contract to "steer" MIG to a more accurate means of laying out the work. Having elected to defer to MIG with respect to the means and methods of locating the base plates, the Department accepted the risk that it may have to pay on a time-and-materials basis for inefficiencies associated with those means and methods. That is what happened here.

The Department argues that it should not have to pay for defective work. Initially, the shoring system did not line up correctly. The Department concludes, therefore, that costs incurred by MIG to correct the layout should not be reimbursed. Pursuant to Division I, §5.10: "If any work or any part thereof shall be found defective at any time before final acceptance of the whole work, the Contractor shall at his own expense make good such defect in a satisfactory manner." The Department, however, has not established that MIG's work was defective. The shoring and jacking system was constructed by MIG and it performed as designed, allowing the subsequent substructure repairs to be completed. The contract provides that MIG is to be paid for this work on a time-and-materials basis. At all times, the Department had the opportunity to exercise its contractual authority to oversee the time-and-materials work and take appropriate steps to ensure that efficient methods and effective cost controls were being used.[8] The fact that MIG incurred costs that in hindsight might have been avoided had it used a more efficient method of laying out the shoring system does not make MIG's work "defective" as contemplated by Subsection 5.10. *See Alpert v. Commonwealth*, 357 Mass. 306, 331 (1970).

For the reasons discussed above, this part of MIG's appeal is allowed. In light of the parties' stipulation, MIG is entitled to be reimbursed an additional $20,497.03 for labor and materials expended to perform the work at issue.

The balance of MIG's appeal is denied. With respect to the work performed by Mr. Voghel and Mr. Kelly in reassembling the shoring system, the Department paid MIG at the contractual base labor rate. MIG presented no testimony or other evidence to show that it had

[8] This should not imply that there was any issue with the Department's oversight of the work. The testimony and evidence presented in this appeal demonstrated that all Department staff acted professionally and competently at all times. This appeal turns solely on an issue of contract interpretation, not on any act or omission of the Department or its staff.

submitted to the engineer, prior to commencement of any work, licenses and/or certifications indicating that Mr. Voghel or Mr. Kelly were to perform work as iron workers. The Contract required MIG to do so in order to be eligible for the multiplication factor applicable to an iron worker.

Regarding the manlift from United Rentals, MIG submitted for payment an invoice for a one-month rental, pick-up charge and 5% markup. The Department's Resident Engineer testified that he did not observe this manlift being used for this scope of work and has received no other evidence indicating that it was. Mr. Kelly testified that the manlift was used during the erection of the shoring system, but not exclusively for the task and not during the entirety of the month billed. Even if the lift was used at some point to construct the shoring system, MIG has not presented any evidence of what hours and date it was used on this task and what part of the invoiced costs were incurred for such use. In that regard, MIG has not met its burden of proof.

RECOMMENDATION

For the reasons stated above, I recommend that the contractor's appeal be APPROVED in part, and DENIED in part.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: June 7, 2016

MEMORANDUM

To: Stephanie Pollack, Secretary & CEO

From: Albert Caldarelli, Administrative Law Judge, MassDOT

Date: September 19, 2016

Re: Report and Recommendation on Appeal of W.J. Mountford from the Chief Engineer's Denial of Claim #2-74817-002

I am pleased to submit for your consideration the attached report and recommendation.

W.J. Mountford Co. ("WJM") is the general contractor on contract #74817 providing for additions and renovations to the District 2 Administration Building in Northampton. By letter dated February 8, 2016, the Chief Engineer made a written determination to deny a claim by WJM requesting $167,413.19 for "general conditions" costs incurred as a result of delays to the project (a.k.a. Claim #2-74817-002).

On August 30, 2016, I held a hearing to address the Department's Motion to Dismiss and WJM's Opposition. After considering the facts presented by WJM and the legal arguments of the parties, I have determined that WJM's claim is entirely for additional "general superintendence" costs as a result of delays to the Contract. These costs are expressly excluded from compensation pursuant to Subsections 8.05 and 9.03B of the Contract.

For the reasons stated in the attached Report and Recommendation, I recommend that the Department's Motion to Dismiss be ALLOWED and that the contractor's appeal be DENIED.

☐ Approved ☐ Rejected

_____ dated: _____
Stephanie Pollack, Secretary & CEO

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REPORT AND RECOMMENDATION
APPEAL OF W.J. MOUNTFORD CO.
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #2-74817-002

This report and recommendation is provided in accordance with the provisions of M.G.L. c.6C §40 and Division I §7.16 of the applicable contract.

BACKGROUND

W.J. Mountford Co. ("WJM") is the general contractor on contract #74817 providing for additions and renovations to the District 2 Administration Building in Northampton. By letter dated February 8, 2016, the Chief Engineer made a written determination to deny a claim by WJM requesting $167,413.19 for "general conditions" costs incurred as a result of delays to the project (a.k.a. Claim #2-74817-002). On May 5, 2016, WJM properly appealed the determination by timely submitting a Statement of Claim to the Office of the Administrative Law Judge.

On July 1, 2016, the Department, citing Mass. R. Civ. P. 12(b)(6), moved to dismiss the appeal on the basis that it failed to state a claim upon which relief can be granted. WJM filed its Opposition to the Department's motion on August 5, 2016.

On August 30, 2016, I held a hearing to allow oral argument on the Department's motion and WJM's Opposition. Mr. Jonathan Elder, Esq. represented WJM and Mr. Owen Kane, Senior Counsel, represented the Department. Lisa Harol, Administrator, was present to address administrative matters. At the hearing, each party's counsel presented oral argument to advance their legal positions and clarify issues in response to questions that I put forth. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

For purposes of this Report and Recommendation[1], I accept the following factual allegations contained in the Statement of Claim as true, drawing all reasonable inferences from such facts in favor of WJM:

1. WJM began work on Contract No. 74817 in December 2012. The project scope included additions and renovations to the District 2 Administration Building in Northampton. WJM's bid for the original Contract scope was $5,247,000.00. The Contract required completion of the work within 450 calendar days.

[1] Procedurally, this is a ruling on the Department's motion to dismiss and WJM's Opposition. In that regard, I make no independent findings of fact. The standard of review applicable to motions to dismiss requires that the factual allegations contained in WJM's Statement of Claim be accepted as true, as well as such inferences as may be drawn therefrom in WJM's favor, *Flagg v. AliMed, Inc.*, 466 Mass.23, 26 (2013), and a determination as to whether such "factual allegations plausibly suggest an entitlement to relief." *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008).

2. During the project, the Department issued over 100 Extra Work Orders to incorporate design changes and scope revisions. These changes and revisions increased the Contract by over $800,000 and caused a 345-day delay to the project schedule. The Department compensated WJM for the scope changes through the Extra Work Orders and also granted time extensions covering the entire delay period.

3. During the delay period, from March 1, 2014 through December 1, 2014, WJM performed base Contract work that was delayed as a result of the design changes and scope revisions contained in the Extra Work Orders. During this part of the delay period, WJM assigned an additional on-site foreman to oversee the extra work, while also maintaining its existing supervisory staff onsite to oversee both change order work and base Contract work that was performed concurrently.

4. WJM submitted to the Department its initial Notice of Claim on April 21, 2014 and a final accounting on January 9, 2015 seeking compensation for its additional "General Conditions" costs incurred as a result of the delay to base Contract work. The claim is in the amount of $167,413.19 for additional costs incurred by WJM from March 1, 2014 through December 1, 2014 directly attributable to the delay caused by the Department without the fault of WJM.

5. A breakdown of WJM's claim is provided at Exhibit 4 to the Statement of Claim. It is entitled "Additional costs for Supervision and Project Management due to contract delays by no fault of WJ Mountford" and lists the following cost categories and amounts:

Mandatory Onsite Supervision	1	lot	87,909.09
Company Truck – Repair, maintenance, Insurance taxes	1	lot	5,000.00
Company Truck – Fuel Expenses	1	lot	2,868.01
Oil Changes (1,720 miles per month x 10 = 17,200/3000= 6 ea	6	45.00	270.00
Telephone/Internet	1	lot	1,139.69
Project Management (16hrs per week) $92.97hr	10	5,950.08	59,500.80
Administrative (see below)			
Month requisitions/Sub billing (8hrs per month) $44.69 per hour	10	357.52	3,575.20
Weekly payroll reporting 12 hrs per month $44.69 per hour	10	536.28	5,362.80
Posting/acknowledging payments on EBO website (4hrs month) $44.69hrs	10	178.76	1,787.60
Total for 10 Months (March-December)			167,413.19

6. Division I, Subsection 8.05 of the Contract provides in pertinent part:

> The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided.
>
> Provided, however, that if the [Department] in [its] judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time), and without the fault or negligence of the Contractor, an

adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay, or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted by the Department.

…

The contractor shall submit in writing not later than 30 days after the termination of such suspension, delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.

…

The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10.

7. Division I, Subsection 9.03B of the Contract provides in pertinent part:

Unless an agreed lump sum and/or unit price is obtained from above and is so stated in the Extra Work Order the Contractor shall accept as full payment for work or materials for which no price agreement is contained in the Contract an amount equal to the following: (1) the actual cost for direct labor, material (less value of salvage, if any) and use of equipment, plus 10 percent of this total for overhead; (2) plus actual cost of Workmen's Compensation and Liability Insurance, Health, Welfare and Pension benefits, Social Security deductions, and Employment Security Benefits; (3) plus 10 percent of the total of (1) and (2); plus the estimated proportionate cost of surety bonds. For work performed by a Subcontractor, the Contractor shall accept as full payment therefor an amount equal to the cost to the Contractor of such work as determined by the Engineer, plus 10 percent of such cost.

No allowance shall be made for general superintendence and the use of small tools and manual equipment.

DISCUSSION

The issue presented in this appeal concerns the enforceability and scope of Subsection 8.05 of the Contract. This provision is the Department's version of the "no damage for delay" clause, which has been the subject of prior review by this Office and the Court. *See Report and Recommendation re: Appeal of B&E Construction Corp.,* MassDOT Office of the Administrative Law Judge, May 5, 2011; *also see Sutton v. Commonwealth*, 412 Mass. 1001, 1005 (1992); *Reynolds Bros., Inc. v. Commonwealth*, 421 Mass. 1, 4 (1992); *Bonacorso Construction Corp. v. Commonwealth*, 41 Mass. App. Ct. 8, 10-11 (1996).

The above decisions follow a long line of cases in the Commonwealth enforcing "no damage for delay" clauses that limit monetary compensation to contractors in the event of a delay caused by an awarding authority. *See Charles I. Hosmer. Inc. v. Commonwealth*, 302 Mass. 495, 499-501 (1939); *Wes-Julian Constr. Corp. v. Commonwealth*, 351 Mass. 588, 594-597 (1967); *Joseph E. Bennett Co. v. Commonwealth*, 21 Mass. App. Ct: 321, 329-330 (1985). In that regard, Subsection 8.05 is a standard "no damages for delay" provision. *Sutton*, 412 Mass. at 1005. It specifically precludes damages for delays in the commencement or performance of work, unless the Department in its discretion determines that an adjustment should be made for an unreasonable delay caused either by an action of the Department in administering the contract or by the Department's failure to act as required in the contract. *Id*. at 1006. If the Department makes such a determination, Subsection 8.05 provides that "... an adjustment shall be made by the Department for any increase in the actual cost of performance of

the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption."

In *Appeal of B&E Construction Corp.*, this Office reviewed the application and scope of Subsection 8.05 and reached the following conclusions:

> Subsection 8.05, "Claim for Delay or Suspension of the Work," is the exclusive contractual remedy for monetary compensation due to delay. If MassDOT makes a finding that a delay is "without the fault or negligence" of the contractor and the work was interrupted for "an unreasonable period of time" by MassDOT's act or failure to act "... an adjustment shall be made by [MassDOT] for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption."
>
> Subsection 8.05 also requires that the contractor "submit in writing ... the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except that no allowance for overhead and profit shall be allowed." Subsection 8.05 and Subsection 9.03B must be read together. Subsection 9.03B sets forth a detailed formula for calculating allowable costs. The formula expressly provides "No allowance shall be made for general superintendence and the use of small tools and manual equipment." Hence, the plain language of Subsections 8.05 and 9.03, read together, requires MassDOT to make an "adjustment" in the contract price for the increased "actual costs" of performance for delays caused solely by MassDOT while limiting expressly what costs are compensable.
>
> … Subsection 9.03B expressly does not "allow" compensation for "general superintendence." Superintendence" is the "act or process of superintending," which means, in plain English, "to oversee and direct work." Random House College Dictionary (1984). The act of superintending this Contract was performed by the "project superintendent," who oversaw and directed the work. That the salary of the "project superintendent" is included within the cost of "general superintendence" cannot be doubted. [The costs of the] "project superintendent" are not compensable because they are expressly precluded.
>
> The language in the Contract that excludes such compensation is "strong, broad and unambiguous"; it may not be read out of the Contract. *Bennett v. Commonwealth*, 21 Mass. App. Ct. 321, 330 (1985). Even though B&E may have incurred costs of overhead and superintendence during prolonged delays, the Contract precludes compensation. Moreover, read properly, Subsections 8.05 and 9.03B do not permit B&E to seek reimbursement for overhead and superintendence because such costs may not be included in its "breakdown" of compensable costs. Since the Contract expressly excludes such costs from the "actual costs" B&E may recover and does not allow them to be stated in the "breakdown" of allowable costs B&E is required to submit, B&E's Claim fails as a matter of law.
>
> *Id.* At 5-7.

WJM suggests that the reasoning applied *Appeal of B&E Construction Corp.* is "flawed" and should not be followed because it would lead to "inequitable and undesirable results." I disagree. General criticism of "no damages for delay" provisions and their potential for inequitable results have been widely noted.[2] Despite that potential, Subsection 8.05 and other

[2] S*ee, e.g.,* Melinda Sarjapur, *Bargaining in the Dark: Why the California Legislature Should Render "No Damage for Delay" Clauses Void As Against Public Policy in All Construction Contracts,* 42 Golden Gate U.L. Rev. 283; Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause,* 46 Wm. & Mary L. Rev. 1857, 1859 (2005); Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 St. Thomas L. Rev. 425 (2002);

contract provisions that shift the financial risk of delay entirely to the contractor have been upheld as valid and enforceable in the Commonwealth. In that regard, I have no cause to stray from the reasoning applied *Appeal of B&E Construction Corp.*

For purposes of the present Motion to Dismiss and Opposition, WJM maintains that its claim has merit and that the factual assertions in its Statement of Claim establish entitlement to the compensation sought. WJM describes its claim as one for "actual, direct costs WJM incurred for personnel, equipment and services WJM provided on-site during the [delay]." The gist of WJM's position is that because it is not pursuing an extended home office overhead claim,[3] the claim does not constitute "overhead" within the meaning of Subsection 8.05. This Office ruled in *Appeal of B&E Construction Corp.* that home office overhead is part of excluded overhead under Subsection 8.05. *Id.* at 6. The flaw in WJM's argument is that the claim that it describes, albeit not for home office overhead, is clearly one for general superintendence,[4] which is also part of excluded overhead under Subsection 8.05 and expressly excluded under 9.03B. *Id.* at 6. Subsections 8.05 and 9.03B do not permit WJM to seek reimbursement for overhead and general superintendence because such costs may not be included in its "breakdown" of compensable costs. *Id.* at 7. The Contract expressly excludes such costs from the "actual costs" WJM may recover and does not allow them to be stated in the "breakdown" of allowable costs WJM is required to submit.[5]

WJM's claim is indistinguishable from the claim examined in *Appeal of B&E Construction Corp.* The breakdown describes the claim as being for "Additional costs for Supervision and Project Management due to contract delays by no fault of WJ Mountford." The cost categories are comprised of salaries, related administrative support costs, and vehicle and equipment costs for the project supervisor and management staff. In that regard, the claim is entirely for "general superintendence" costs. As held by this Office in *Appeal of B&E Construction Corp.*, such a claim fails as a matter of law.

[3] "Home office overhead" refers to the indirect cost of performing a construction contract, such as executive salaries, accounting and accounts payable services, insurance, and other general and administrative expenses of operating a construction company. *See* J. McNamara, MCLE - Massachusetts Construction Law and Litigation §7:5(d) (1st Ed. 2006, with 2013 & 2016 Supplements); *also see* J. Lewin & C.E. Schaub, Jr., Massachusetts Practice - Construction Law §6:45 at 448 (2014).

[4] "General superintendence", also referred to as "general conditions", "field overhead", and jobsite overhead," are the direct costs necessary to staff a construction project, such as salaries of project managers, superintendents, clerical workers, and other supervisory and management personnel; the costs of office trailers and storage trailers; utilities associated with the field office; and vehicle and equipment expenses necessary to generally oversee the work and maintain the contractor's presence on the site. *See* J. McNamara, *supra*; *also see* J. Lewin & C.E. Schaub, Jr., *supra*.

[5] As opposed to delay costs not expressly excluded by Subsection 8.05 and 9.03B, such as labor escalation, material escalation, extended equipment rental, storage and restocking of materials, winter conditions, demobilization and remobilization, for example.

RECOMMENDATION

For the reasons stated above, I recommend that the Department's Motion to Dismiss be ALLOWED and that the contractor's appeal be DENIED.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: September 19, 2016

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Jonathan T. Elder, Esq.
Hinckley Allen & Snyder LLP
28 State Street
Boston, MA 02109

To: Owen Kane, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of LM Heavy Civil Construction:
5-60370-001 / Pile Tip Elevation Changed Conditions

MEMORANDUM

Pursuant to the Parties' settlement agreement dated December 15, 2015, the above referenced matter has been resolved.

ORDER

The above referenced appeal is dismissed.

Albert Caldarelli
Administrative Law Judge

Dated: July 29, 2016

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: David Kerrigan, Esq.
Kenney & Sams, P.C.
Southborough Executive Park
225 Turnpike Road
Southborough, MA 01772

Owen Kane, Esq.
Office of the General Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of MIG Corp.
4-68187-002 / East Abutment Control of Water

MEMORANDUM

A Hearing had been scheduled for November 3, 2016 to hear MIG Corp.'s appeal of the Chief Engineer's denial of the above referenced claim.

On October 28, 2016, MIG Corp. through counsel advised that it was no longer pursuing the appeal, thereby eliminating the need for the Hearing and further action on the appeal.

ORDER

The Hearing scheduled for November 3, 2016 is cancelled.

The appeal is dismissed.

Albert Caldarelli
Administrative Law Judge

Dated: November 1, 2016

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: December 6, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	The Aulson Company
Contractor:	Atsalis Brothers Painting
Contract:	#86886
City/Town:	District 3/Cleaning and Painting of 5 Bridges along I-90 in Charlton, Oxford, Westborough and Upton
Amount:	$7,479.34

This direct payment demand (Demand) by The Aulson Company (Aulson) was originally filed with the Department on November 8, 2016. The amount of the Demand was later revised to $7,479.34 by certified letter received on December 5, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Aulson is an approved subcontractor on Contract #86886. Its subcontract scope includes work covered under pay item 182.2 “Asbestos Conduit Removal.”

2. The Demand complies with the formal requirements of G.L. c.30, §39F:

   a. It contains a sworn statement by the President of Aulson.
   b. A copy was provided to the general contractor, Atsalis Brothers Painting (Atsalis), by certified mail (receipt #7011 2000 0002 3850 1187).
   c. It contains a detailed breakdown of the item number and quantities of work completed, dates of completion, and amounts paid and unpaid.

3. The Demand asserts that the subcontract work was completed as of August 30, 2016; that a total of 4,350 LF of asbestos conduit was removed in accordance with pay item 182.2; and that there is a balance due of $1,249.50. In addition, Aulson claims that it is owed $6,229.84 for delay impacts.

4. The general contractor Atsalis submitted a reply, with a certified copy to Aulson, within the required time period provided in G.L. c.30, §39F(d). The Reply asserts that the $7,479.34 amount that is the subject of the Demand is not due Aulson because such amount has not been paid to Atsalis by the Department.

5. Department construction staff overseeing Contract #86886 confirms that the $7,479.34 amount that is the subject of the Demand has not been paid to the general contractor for the following reasons:

    a. The Department has approved and paid for removal of 4263.5 LF of asbestos conduit, not the 4,350 LF asserted in the demand. The difference between the quantities is the result of the removal of conduit that was supposed to be "retained" in accordance with the contract requirements. Those balance of the quantities, therefore, were not approved for payment.
    b. The amount listed in the Demand for "impacts" appears to constitute a claim, not an amount due under the contract.

6. Aulson has been paid a total of $89,533.50, based on its subcontract price of $21.00/LF, for removal of 4263.50 LF of asbestos conduit.

RULING

G.L. c.30, §39F(1)(c) provides that a subcontractor may demand direct payment from an awarding authority "for any amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor …" In this case, Aulson has been paid in full for all subcontract work approved by the Department. The $7,479.34 amount of the Demand is a claim for extra work and/or compensable delay that has not been approved by the Department, and therefore, is not subject to a direct payment demand.

For the reasons stated above, the Demand is DENIED.

cc:
The Aulson Company, Inc.
49 Danton Drive
Methuen, MA 01844

Atsalis Brothers Painting
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Jonathan Gulliver, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: October 18, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Warner Bros., LLC
Contractor:	SPS New England
Contract:	#77719
City/Town:	West Springfield
Amount:	$48,561.32

This direct payment demand (Demand) by Warner Bros., LLC was filed with the Department on September 23, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Warner Bros., LLC is an approved subcontractor on Contract #77719. Its subcontract work includes performance of partial scope within pay item 472.11 “Roadway & Pavement Work.”

2. The Demand complies with the formal requirements of G.L. c.30, §39F:
   a. It contains a sworn statement by the Construction Manager of Warner Bros., LLC.
   b. A copy was provided to the general contractor, SPS New England, by certified mail (receipt #7015 3430 0000 4680 6580).
   c. It contains a detailed breakdown supported by billing and receipt reports, account transaction reports, statements showing quantities and dates when subcontract work was performed, and a copy of the subcontract agreement between Warner Bros., LLC and SPS New England dated December 1, 2014.

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3. The documentation submitted with the Demand indicates that the subcontract work was completed and invoiced to the general contractor as of March 24, 2016 and that the balance due under the subcontract is $48,561.32.

4. The general contractor SPS New England submitted a reply, with a certified copy to Warner Bros., LLC, within the required time period provided in G.L. c.30, §39F(d). The Reply contains a sworn statement by the Senior Vice President of SPS New England. It also contains a breakdown of the balance due under the subcontract and of the amount due for each claim made by the general contractor against the subcontractor. I find that the Reply complies with the formal requirements of G.L. c.30, §39F.

5. The Reply also contains a copy of the subcontract agreement between SPS New England and Warner Bros., LLC dated December 1, 2014, and copies of Nonconformance Reports (NCR-24 and NCR-33) issued by the Department concerning the height of safety curb concrete and BR2 Rail from the finish roadway.

6. SPS New England contends that no further subcontract payments are due Warner Bros., LLC. The Reply contains the following allegations:
    a. Certain subcontract work performed by Warner Bros., LLC did not comply with the contract specifications.
    b. Warner Bros., LLC "breached the subcontract agreement by failing to meet the finish asphalt surface grades provided to them at three separate locations resulting in the BR2 railing height being out of conformance."
    c. SPS New England incurred costs in the amount of $172,955.21 to correct the defective work performed by Warner Bros., LLC.
    d. The subcontract between SPS New England and Warner Bros., LLC permits SPS New England to deduct such costs from payments otherwise due Warner Bros., LLC.

7. Department construction staff overseeing Contract #77719 advises that Warner Bros., LLC has completed its subcontract scope and that all such work has been reviewed and approved for payment.

8. The Department has assessed Liquidated Damages (LDs) against SPS New England pursuant to Section 7.1 of the Contract as a result of delays in completing the Contract work. The Department is currently retaining payments and will retain future payments up to $434,000.00 for LDs owed to the Department by SPS New England.

9. The Department is preparing a Final Estimate for the contract. After reconciliation of all payment issues, including LDs, it is expected that there will be a negative contract balance of $118,400.00 (i.e., owed by SPS New England to the Department).

RULING

Based on my findings above, Warner Bros., LLC has demonstrated that it substantially completed the subcontract work that is the subject of the Demand. Based on the supporting documentation provided, there is a balance due under the subcontract of $48,561.32. The sworn Reply submitted by SPS New England disputes the entire amount of the Demand. In other circumstances, the dispute would trigger an obligation on the Department to deposit the disputed amount into an interest bearing joint account in the names of the general contractor and the subcontractor as provided in G.L. c.30, §39F(f). However, that that obligation does not arise here.

The Department is retaining current and future contract payments up to $434,000.00 against LDs owed by SPS New England. Such retained amounts are exempt from any claim for direct payment pursuant to G.L. c.30, §39F(e)(i). As a result, there are no amounts payable to the general contractor from which to make a direct payment or from which to deposit into an interest bearing joint account as provided in G.L. c.30, §39F(f).[1]

For the reasons stated above, the Demand is DENIED.

cc:
Warner Bros., LLC
P.O. Box 91
Sunderland, MA 01375

SPS New England
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Patrick J. Paul, District 2 Highway Director

[1] If any amounts become payable to the general contractor at a later date, a lien should be placed on such payments up to the amount of the Demand pending further review and ruling by this Office.

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: August 22, 2016

RE: Request for Direct Payment pursuant to M.G.L. c. 30, §39F

Claimant:	The Aulson Company, LLC
Contractor:	Seaver Construction, Inc.
Contract:	#81819
City/Town:	Weston – State Police Barracks
Amount:	$22,214.75

This direct payment demand (Demand) by The Aulson Company, LLC was received by the Department on August 5, 2016.

FINDINGS

Based on my review of the Demand, the general contractor's Reply, the applicable contract, and input from MassDOT staff, I make the following findings:

1. The Aulson Company is a filed sub-bidder on Contract #81819 responsible for performing the scope of work contained in ITEM 100.7 - "ROOFING AND FLASHING WORK"

2. The Demand consists of a one-page letter dated July 21, 2016.

3. The Demand in its entirety states:

   "We substantially completed our subcontract work on the above project in accordance with the plans and specifications and requested payment of the entire balance due under our subcontract from the General Contractor, Seaver Construction, Inc., who has failed to pay. This is a written demand for the balance of $22,214.75, a breakdown of which is as follows:

Subcontract Price	$175,520.00
Change Order #1	3,050.00
Total	178,570.00
Paid	156,355.25
Balance Due	22,214.75

   Please make direct payment to us of $22,214.75, the entire balance due, in accordance with chapter 30, section 39F of the General Laws."

4. By letter dated August 4, 2016, the General Counsel for Aulson Company provided U.S. Post Office tracking information confirming that the Demand was delivered certified mail to the general contractor on July 26, 2016.

5. The general contractor Seaver Construction, Inc. submitted a sworn Reply dated August 4, 2016 requesting that the Department deny the direct payment demand made by The Aulson Company because (1) the subcontract work is not substantially complete, (2) the Demand was not made "by a sworn statement" as required by statute. The Reply was received by the Department within 10 days of the general contractor's receipt of the Demand.

6. Department construction staff advises that there is incomplete roofing work valued in the amount of $9,000.00 that The Auston Company is required to perform in accordance with Extra Work Order #26. Further, the Department is retaining $20,000.00 to address deficient roofing work performed by The Aulson Company that is causing puddling on the sally port roof.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work."

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. The direct payment statute requires that a "demand shall be by sworn statement." That requirement of the statute is typically met by a statement such as: "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct." The Aulson Company's notarized statement is not a sworn Demand. In addition, the "breakdown" provided in the Demand is not a "detailed breakdown of the balance due under the subcontract". It does not explain what work was both performed and paid for, what work was performed and when, and what work remains unpaid. There is no statement of the status of completion of the subcontract work.

Notwithstanding the procedural deficiencies of the Demand, the Department's construction staff confirms that the subcontract work to be performed by The Aulson Company is not substantially complete. There is incomplete roofing work valued in the amount of $9,000.00 that The Auston Company is required to perform in accordance with Extra Work Order #26. Therefore, the seventy day period after substantial completion of the subcontract work has yet to commence because work to be performed by The Aulson Company on Contract #81819 is still pending completion. Accordingly, the Demand is premature and must be denied.

In addition to the $9,000.00 that is being retained by the Department as the estimated cost of completing the incomplete roofing work, the Department is also retaining $20,000.00 as the estimated cost of addressing unsatisfactory items of roofing work related to puddling on the sally port roof. To the extent that the Demand seeks payment of all or a portion of the $29,000.00 otherwise due but retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the Demand must be denied as that amount is not subject to direct payment pursuant to the statute.

For the reasons stated above, the Demand is DENIED.

cc: The Aulson Company, LLC
49 Danton Drive, Suite 201
Methuen, MA 01844

Seaver Construction, Inc.
215 Lexington Street
Woburn, MA 01801

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Jonathan Gulliver, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: July 29, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Sealcoating, Inc.
Contractor:	Cardi Corporation
Contract:	#71232
City/Town:	Worcester I-290 / 12 Bridge Repairs
Amount:	$27,007.54

This direct payment demand (Demand) by Sealcoating, Inc. was filed with the Department on June 13, 2016.

RULING

On July 29, 2016, Sealcoating, Inc. advised this Office that it has received full payment from Cardi Corporation for all subcontract work performed on Contract #71232 and is withdrawing its Direct Payment Demand. Accordingly, take no further action on this matter.

cc:

Sealcoating, Inc.
825 Granite Street
Braintree, MA 02184

Cardi Corporation
400 Lincoln Avenue
Warwick, RI 02888

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Jonathan Gulliver, District 3 Highway Director

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495
www.mass.gov/massdot

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: June 8, 2016

RE: Request for Direct Payment pursuant to M.G.L. c. 30, §39F

Claimant:	Marlin Controls, Inc.
Contractor:	MDR Construction, Co.
Contract:	#81501
City/Town:	District 4 / Andover-Tewksbury
Amount:	$21,394.65

This direct payment demand (Demand) by Marlin Controls, Inc. was received by the Department on May 13, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. The Demand consists of a cover letter dated May 2, 2016 and attachments.

2. A "cc" to Mike Saccone, MDR Construction Company, appears on the cover letter, but the Demand contains no evidence that a copy was delivered to or sent by certified mail to the general contractor.

3. Erik M. Wolf, President of Marlin Controls Inc., signed the Demand. The signature is notarized. However, there is no sworn statement attesting that the statements made Demand are true, complete and correct.

4. The Demand states: "Our company had supplied traffic signal equipment back in September 2015 to Vigil Electric Company, which is a subcontractor to MDR Construction Co.

5. The attachments include the following:

    - Invoice #1504-3471 in the amount of $6,400.00 for "Item 816.01-Control/Radio Equipment."
    - Invoice #1532-3471 in the amount of $13,595.00 for "Item 815.1-Control/Radio Equipment."
    - Packing Lists dated June 15, 2015 and September 22, 2015 indicating that certain equipment was shipped to Vigil Electric Company.

- Purchase Order dated March 17, 2015 from Vigil Electric Company to Marlin Controls ordering Item 815.1 Traffic Signal Equipment-Loc.1 in the amount of $26,000.00, and Item 816.01 Traffic Signal Control Equipment-Loc.1 in the amount of $6,900.00.
- A quote dated June 15, 2014 from Marlin Controls Inc. to Vigil Electric Company for Item 815.1 and Item 816.01 equipment.

6. Department staff advises that Marlin Controls Inc. was not a subcontractor approved in writing by the Department to perform labor and/or furnish materials on contract #81501, and that Marlin Controls Inc. was a material supplier to Vigil Electric Company, who was a subcontractor to the general contractor MDR Construction Company.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work."

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. The direct payment statute requires that a "demand shall be by sworn statement." That requirement of the statute is typically met by a statement such as: "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct." Marlin Controls Inc.'s notarized statement is not a sworn Demand. Section 39F also requires that the Demand be "delivered to or sent by certified mail" to the general contractor at the time it is mailed to the awarding authority. No statement or proof that the mailing requirement was met is included in the Demand.

Beyond its procedural deficiencies, the Demand is unenforceable. The Department's obligation to make a direct payment arises only in the limited circumstances provided in the statute and only with respect to "subcontractors" performing labor or supplying materials. The statute defines a "subcontractor" as:

1. "a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a written contract with the general contractor", or
2. "a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars."

The Demand indicates that Marlin Controls Inc. provided materials to a subcontractor, Vigil Electric Company. Marlin Controls Inc. was not a subcontractor approved in writing by the Department and did not contract with the general contractor MDR Construction Company to supply materials. Because Marlin Controls Inc. is not a "subcontractor" as defined in the statute, it is not eligible for direct payment from the Department.

The Demand fails to state a claim for relief under G.L. c. 30, §39F. It is therefore DENIED.

cc: Marlin Controls Inc.
980 Quaker Highway (Route 146A)
Uxbridge, MA 01569

MDR Construction Co.
1693 Shawsheen Street
Tewksbury, MA 01876

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Paul Stedman, District 4 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 25, 2016

RE: Request for Direct Payment pursuant to M.G.L. c. 30, §39F

Claimant: John W. Egan Co., Inc.
Contractor: W.J. Mountford, Co.
Contract: #74817
City/Town: District 2 / Renovations to Administration Building
Amount: $4,158.52

This direct payment demand (Demand) by John W. Egan Co., Inc. was received by this Office on May 16, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. John W. Egan Co., Inc. was a filed sub-bidder who, as a result of that filed sub-bid, received a subcontractor on MassDOT Contract #74817 to perform painting work pursuant to Item 100.498.

2. The Demand consists of a cover letter dated December 11, 2015 and attachments, and states:

> We substantially completed our contact work … This is a written demand for the final balance of $4,158.52 due under our subcontact, a breakdown of which is as follows

Subcontract Price	$76,240.00
Change Order #1	$ 3,162.00
Change Order #2	$ 530.00
Change Order #3	$ 3,303.76
Change Order #4	$ 903.70
Change Order #5	$ 1,642.09
Change Order #6	$ 1,270.04
Change Order #6 (error-should be #7)	$ 5,076.69
Agreed Wage Increase Settlement	$ 1,537.30
Credit Provided PR#49	$ -286.06
Total Revised Subcontract	$93,379.52
Amount paid to date	$89,221.00
Balance Due	**$ 4,158.52**

3. Gail M. Alario, Project Manager for John W. Egan Co., Inc., signed the Demand. Her signature is notarized by a Notary Public, who attests that Ms. Alario "made oath that the above statements are true and that she mailed a signed copy of this letter by certified mail to the general contractor." A certified mail receipt (#9590940305125173315446) is included as evidence that a copy of the Demand was sent certified mail to W.J. Mountford Co.

4. The Department has no record of receiving a reply to the Demand from the general contractor within 10 days when such reply was due in accordance with G.L. c.30, §39F(1)(d).

5. Department construction staff advises that all subcontract work performed by John W. Egan Co., Inc. has been completed and all amounts due for such work have been included in progress payments made to W.J. Mountford Co. in or before July 2015, with the exception of the so-called "Agreed Wage Increase Settlement". The Agreed Wage Increase Settlement has been recently approved in Extra Work Order #119, which will be paid to W.J. Mountford, Co. in a future pay estimate.

6. The supporting documentation provided in the Demand indicates that John W. Egan Co. substantially completed its subcontract work as of December 1, 2014.

RULING

M.G.L. c.30, §39F(1)(b) provides: "The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work." The Demand submitted by John W. Egan Co., Inc. complies with the formal requirements of G.L. c.30, §39F.

As to the merits of the Demand, G.L. c.30, §39F(1)(c) provides that a subcontractor demand direct payment from an awarding authority "for any amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor …" The statute further provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority." G.L. c.30, §39F(1)(d).

The record before me supports a finding that John W. Egan Co. substantially completed its subcontract work as of December 1, 2014. All amounts due on such work were included in prior progress payments made or to be made to W.J. Mountford, Co. The balance due on John W. Egan Co.'s subcontract work is $4,158.52. That balance was required to be paid "not later than the sixty-fifth day" after completion of the work. As W.J. Mountford, Co. has failed to make such payment in accordance with G.L. c.30, §39F, the Department is obligated to make a direct payment in response to this Demand.

Kindly pay John W. Egan Co. $4,158.52 from the next periodic, semi-final or final estimate and deduct that amount from payments due W.J. Mountford, Co. in accordance with Section 39F.

cc: W.J. Mountford Co.
170 Commerce Way
South Windsor, CT 06074

John W. Egan Co., Inc.
3 Border Street
West Newton, MA 02465

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Patrick J. Paul, District 2 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 16, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Iron Horse Corporation
Contractor:	SPS New England
Contract:	#84972
City/Town:	Bruce Freeman Rail Trail – Acton/Carlisle/Westwood
Amount:	$74,979.56

This direct payment demand (Demand) by Iron Horse Corporation was filed with the Department on April 19, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Iron Horse Corporation is an approved subcontractor on Contract #84972. Its subcontract scope includes work under Contract Item 101 "Clearing and Grubbing," Item 129.5 "Track Excavation," Item 129.7 "Handling and Transporting of Rail Components," and Item 184.1 "Disposal of Treated Wood Products."

2. The Demand contains a sworn statement by the President of Iron Horse Corporation. A copy of the Demand was provided to the general contractor. The Demand contains a six-page letter and supporting documentation providing a detailed explanation and breakdown of the balance due under the subcontract and the status of completion of the subcontract work. I find that the Demand complies with the formal requirements of G.L. c.30, §39F.

3. The Demand is in the amount of $74,979.56. The supporting documentation submitted with the Demand indicates that Iron Horse Corporation seeks direct payment from the Department for completed subcontract work billed to SPS New England in nine specific invoices. In summary, the invoiced amounts as follows:

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495
www.mass.gov/massdot

- Item 184.1 “Disposal of Treated Wood Products”:

Invoice #	**Date**		**Unpaid Amount**
#15-ACT-118	12/11/15	99.38 tons	$4,566.00
#15-ACT-119	12/11/15	80.69 tons	$8,069.00
#15-ACT-120	12/15/15	63.03 tons	$6,303.00
#15-ACT-122	12/18/15	41.78 tons	$4,178.00
#15-ACT-124	2/02/16	82.03 tons	$8,203.00
#15-ACT-125	2/03/16	113.25 tons	$11,325.00
#15-ACT-126	2/04/16	54.63 tons	$5,463.00
		TOTAL	$48,107.00

- Item 129.5 “Track Excavation”:

Invoice #	**Date**		**Unpaid Amt**
#15-ACT-123	1/08/16	1,380 ft	$7,562.40
		TOTAL	$7,562.40

- Item 129.7 “Handling and Transporting of Rail Components”:

Invoice #	**Date**		**Unpaid Amt**
#15-ACT-123	1/08/16	1,706 ft	$3,241.40
		TOTAL	$3,241.40

- Item 101 “Clearing and Grubbing”:

Invoice #	**Date**		**Unpaid Amt**
#15-ACT-121	12/17/15	4 acres	$16,038.76
		TOTAL	$16,038.76

4. Iron Horse Corporation has provided documentary support as evidence that the above work was completed, including Scale Tickets, Bills of Lading, and shipping receipts. The Department’s records, including Quantity Control Sheets, indicate that the work that is the subject of the above invoices was completed by Iron Horse, accepted by the Department and paid to SPS New England in several pay estimates.

5. The general contractor SPS New England submitted a reply, with a certified copy to Iron Horse Corporation, within the required time period provided in G.L. c.30, §39F(d). The Reply contains a sworn statement by the Executive Vice President of SPS New England. It also contains a breakdown of the balance due under the subcontract and of the amount due for each claim made by the general contractor against the subcontractor. I find that the Reply complies with the formal requirements of G.L. c.30, §39F.

6. The Reply also contains a copy of the subcontract agreement between SPS New England and Iron Horse Corporation dated July 29, 2015 governing Iron Horse Corporation’s work on Contract #84972.

7. The Reply contends that the Demand submitted by Iron Horse Corporation is procedurally deficient in two regards: (1) failure to provide "a detailed breakdown" in accordance with the requirements of G.L. c.30, §39F; and (2) failure to substantially complete the subcontract work.[1]

8. The Reply also contends that entire direct payment amount of the Demand is in dispute in accordance with G.L. c.30, §39F(e)(iii) because Iron Horse Corporation has not completed the work that it claims it has completed and because SPS New England has the right under the applicable subcontractor to retain, offset and/or deduct payments otherwise due to Iron Horse Corporation. SPS New England claims that it has exercised that right in connection with SPS New England's claim that Iron Horse has breached the subcontractor agreement for failure to timely complete the subcontract work, for non-payment of bills and other charges, and for other allegations of non-compliance with the subcontract requirements.

RULING

Based on my finding above, Iron Horse has substantially completed the subcontract work that is the subject of this Direct Payment Demand. That work is valued at $74,979.56 per the pricing in Contract #84972 and the applicable subcontract. The Department has made payment to SPS New England for all such work, and SPS New England has not paid Iron Horse Corporation within 70 days of the work's completion. Accordingly, Iron Horse Corporation's Demand establishes a valid claim for direct payment in the amount of $74,979.56 pursuant to G.L. c.30, §39F.

SPS New England has disputed the entire amount in its sworn Reply in compliance with G.L. c.30, §39F(d). SPS New England contends that it has the right under its subcontract agreement with Iron Horse Corporation to retain, offset and/or deduct payments otherwise due as a result of its breach of contract claim based on failure to timely complete the subcontract work, non-payment of bills and other charges, and other allegations of non-compliance. It cites Articles VII, XIII, and XVI(2) of the subcontract agreement between the parties to support its position. Without regard to the merits of SPS New England's position, the Reply establishes that there is a dispute between the parties as to their respective rights and obligations under the subcontract and the amount, if any, due Iron Horse Corporation pursuant to the terms of the subcontract. For purposes of G.L. c.30, §39F, the Department need not determine that dispute, only that a dispute exists between SPS New England and Iron Horse Corporation concerning "the balance due under the subcontract."

Based on the above, I find that there is a valid demand for direct payment. However, there is also a dispute between the subcontractor and general contractor within the meaning of G.L. c.30, §39F (1)(e)(iii). Accordingly, the Department is obligated to deposit the disputed amount into an interest bearing joint account as provided in G.L. c.30, §39F(f).

[1] I disagree with SPS New England's procedural challenges. *See* Finding #2 above.

cc:
Iron Horse Corporation
20A Northwest Blvd. No.203
Nashua, NH 03063

SPS New England
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Jonathan Gulliver, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: April 7, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: Liddell Brothers, Inc.
Contractor: S&R Corporation
Contract: #79518
City/Town: Raynham/Taunton, Route 24
Amount: $256,845.04

This direct payment demand (Demand) by Liddell Brothers, Inc. was filed with the Department on March 15, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. The Demand complies with the formal requirements of G.L. c.30, §39F.

2. Liddell Brothers, Inc. is an approved subcontractor on Contract #79518.

3. Liddell Brothers, Inc. is approved to perform subcontract work under various scope items related to traffic control devices in accordance with Section 800, *et seq.*, of the contract specifications.

4. The general contractor S&R Corporation submitted a sworn Reply dated March 21, 2016.

5. S&R Corporation's Reply contends that Liddell Brothers, Inc. is ineligible for a direct payment because its subcontract work on Contract #79518 is not substantially complete.

6. S&R Corporation's Reply also contends that the Demand includes amounts that are not eligible for direct payment, including:

i. A claim in the amount of $125,000.00 for additional compensation under Item 856.3 that is not approved by the Department for payment as extra work;
ii. A claim in the amount of $200.00 for additional compensation under Item 853.1 that is not approved by the Department for payment as extra work;
iii. An amount of $1,176.24 that is scheduled for payment on Estimate #51, but for which the Department has not yet made payment to the general contractor;
iv. An amount of $100,026.23 that is scheduled for payment on Estimate #52, but for which the Department has not yet made payment to the general contractor.

7. The Department's construction staff advises that traffic control devices provided and to be provided by Liddell Brothers, Inc. in accordance with its approved subcontract work on Contract #79518, including drums, signs, attenuators, are continuing to be used on the project.

8. The Department's construction staff advises that Estimate #51 was approved on February 26, 2016 and Estimate #52 on March 11, 2016.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority."

In this case, the subcontract work is not substantially complete. The seventy day period after substantial completion has yet to commence because Liddell Brothers, Inc. is still performing subcontract work on Contract #79518. Accordingly, the Demand is premature and must be denied.

Further, G.L. c.30, §39F(1)(a) provides: "Forthwith after the general contractor receives payment on account of a periodic estimate, the general contractor shall pay to each subcontractor the amount paid for the labor performed and the materials furnished by that subcontractor." The Demand includes amounts that are scheduled for payment on Estimates #51 and #52, which have not yet been paid to the general contractor. Similarly, the Demand includes amounts that at this time are merely the subject of potential claims for additional compensation under the Contract, which have not been approved by the Department for payment to the general contractor as extra work. Such amounts are not eligible for direct payment.

For the above reasons, the Demand is DENIED.

cc:
Liddell Brothers, Inc.
600 Industrial Drive
Halifax, MA 02338

S&R Corporation
706 Broadway Street
Lowell, MA 01854

Patricia Leavenworth, Chief Engineer
Michael McGrath, Director of Construction
Mary-Joe Perry, District 5 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: March 21, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Iron Horse Corporation
Contractor:	SPS New England
Contract:	#84972
City/Town:	Bruce Freeman Rail Trail – Acton/Carlisle/Westwood
Amount:	$70,413.56

This direct payment demand (Demand) by Iron Horse Corporation was filed with the Department on March 4, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Iron Horse Corporation is an approved subcontractor on Contract #84972. Its subcontract scope includes work under Contract Item 101 "Clearing and Grubbing," Item 129.5 "Track Excavation," Item 129.7 "Handling and Transporting of Rail Components," and Item 184.1 "Disposal of Treated Wood Products."

2. The Demand consists of a one-page letter dated February 22, 2016 signed by the President of Iron Horse Corporation. The signature is notarized. The letter lists information about the Contract and general contractor, including the following:

Status for Work:	100% complete
Amount of Claim:	$70,413.56
Type of Claim:	Approved Sub-Contractor

3. The Demand states: "I've enclosed the unpaid invoices to SPS New England for review and payment. All of these invoices were approved by their project manager but my repeated efforts to get paid have had no results. I've notarized the claim, sent a copy to SPS New England and await your direction on what's next."

4. There are copies of eight invoices enclosed which are numbered #15-ACT-119, #15-ACT-120, #15-ACT-121, #15-ACT-122, #15-ACT-123, #15-ACT-124, #15-ACT-125, and #15-ACT-126 in various amounts and due dates ranging from January 11, 2016 to March 3, 2016.

5. The Department received a sworn reply from the general contractor, SPS New England, dated March 3, 2016. The Reply contends that Iron Horse Corporation's Demand is procedurally deficient, and also disputes that the amounts claimed in the Demand are due Iron Horse Corporation.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work."

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. The direct payment statute requires that a "demand shall be by sworn statement." That requirement of the statute is typically met by a statement such as: "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct." Iron Horse Corporation's notarized statement is not a sworn Demand.

Also, G.L. c.30, §39F requires that the Demand contain "a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work." Iron Horse Corporation provides no detailed breakdown or statement. The invoices enclosed with the Demand do not satisfy the requirement for a detailed breakdown because they do not provide sufficient detail to support the $70,413.56 amount claimed. There is no detail clearly setting forth the original value of the subcontract, all additions to the subcontract through Department approved amendments, all pending but unapproved amendments, all payments made by the general contractor for work done, any retainage held, all credits, back charges and all other information needed to demonstrate what Department approved work was done but remains unpaid, and establishing that Iron Horse Corporation has substantially completed the subcontract work.

Finally, G.L. c.30, §39F(1)(b) provides that a Demand may be made only when the general contractor has failed to make payment within seventy days from substantial completion of the subcontract work. In the absence of a proper detailed breakdown, the due dates indicated on the invoices, ranging from January 11, 2016 to March 3, 2016, raise a question concerning the timing of the Demand.

The Demand is DENIED WITHOUT PREJUDICE.[1]

[1] Iron Horse Corporation may refile a new Demand in compliance with the requirements of Section 39F. If Iron Horse does refile, its renewed demand must be by "sworn statement" and should contain a "detailed breakdown of the balance due under the subcontract" that clearly sets forth the original value of the subcontract, all additions to the subcontract through Department approved amendments, all pending but unapproved amendments, all payments made by the general contractor for work done, any retainage held, all credits, back charges and all other information needed to demonstrate what Department approved work was done but remains unpaid.

cc:
Iron Horse Corporation
20A Northwest Blvd. No.203
Nashua, NH 03063

SPS New England
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Jonathan Gulliver, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: September 26, 2017

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Vigil Electric Company
Contractor:	MDR Construction Co., Inc.
Contract:	#81501
City/Town:	Andover-Tewksbury / Dascomb Road and East Street
Amount:	$35,658.97

This direct payment demand (Demand) by Vigil Electric Company was filed with the Department on August 30, 2017.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Vigil Electric Company is an approved subcontractor on Contract #81501.

2. The Demand consists of a one-page letter dated August 7, 2017 and a spreadsheet attachment providing a breakdown of work performed under certain Pay Items, amounts paid to date by the general contractor, and the balance due under the subcontract.

3. The Demand provides the following "breakdown":

Original Subcontract Sum:	$117,000.00
Net Change by Change Orders:	$ 3,491.97
Subcontract Sum to Date:	$120,491.97
Total Completed to Date:	$120,491.97
Retainage:	$ 0.00
Previously Paid:	$ 84,833.00
Current Payment Due:	$ 35,658.97

4. The Demand contains a sworn statement by the Treasurer of Vigil Electric Company and was sent by certified mail to MassDOT (#7002 0860 0003 4543 1027) with a copy delivered by certified mail to the general contractor MDR Construction Co. (#7002 0860 0003 4543 1034).

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5. MassDOT construction staff has confirmed that Vigil Electric is approved to perform subcontractor work within the scope of Special Provisions, Item 815.1 "Traffic Control Signals Location No. 1" and Item 816.01 "Traffic Signal Reconstruction Location No. 1".

6. MassDOT construction staff advises:

    a. the Change Order amount of $3,491.97 claimed by Vigil Electric Company in its Demand has not been approved by the Department and payment to the general contractor for such work is still pending final approval and issuance of an Extra Work Order.
    b. the balance of the Demand in the amount of $32,167.00 is being held by MDR Construction Co. in connection with a dispute with Vigil concerning payments owed to a second-tier subcontractor.

7. MassDOT construction staff advises that all payments due MDR Construction Co. under the Contract have been made.

8. The Department received no sworn reply from the general contractor within the 10 day period provided in M.G.L. c.30, §39F to dispute the Demand or the amount claimed.

RULING

The record before me supports a finding that MDR Construction Co. has failed to make payment to Vigil Electric Company of a balance due in the amount of $32,167.00 as required G.L. c.30, §39F. The Demand and the amount claimed by the subcontractor were not disputed by the general contractor.

Although Vigil Electric Company is eligible to receive direct payment from the Department, a direct payment "shall be made out of amounts payable to the general contractor at the time of receipt of a demand for direct payment from a subcontractor and out of amounts which later become payable to the general contractor." The Department's construction staff reports that there are no amounts payable or to become payable to the general contractor from which to make a direct payment to Vigil Electric Company. As a result, there is no action to be taken at this time by the Department with respect to this Demand.[1]

cc:
Vigil Electric Company
72 Providence Street
Hyde Park, MA 02136

MDR Construction Co., Inc.
1693 Shawsheen Street
Tewsbury, MA 01876

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Paul Stedman, District 4 Highway Director

[1] If any amounts become payable to the general contractor at a later date, a lien should be placed on such payments up to the amount of the Demand pending further review and ruling by this Office.

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: February 24, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Allied Painting, Inc.
Contractor:	SPS New England
Contract:	#59992
City/Town:	Gill/Montague Bridge
Amount:	$175,000.00

This direct payment demand (Demand) by Allied Painting, Inc. was filed with the Department on January 29, 2016. The Demand alleges that all subcontract work by Allied Painting on the above referenced contract was completed in September 2014 and that retainage in the amount of $175,000.00 is improperly being held by SPS New England, Inc.

FINDINGS

Based on my review of the Demand, the Reply submitted by SPS New England, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. The Demand contains a sworn statement by the President of Allied Painting. Exhibit A to the Demand contains sufficient detail for the Department to determine the balance due under the subcontract and the status of completion of the subcontract work. Therefore, I find that the Demand complies with the formal requirements of G.L. c.30, §39F.

2. Allied Painting is an approved subcontractor on Contract #59992.

3. Allied Painting provided subcontract work under scope Item 961.3 (Clean, Full Removal and Paint) and Item 994.01 (Temp. Protective Shielding). The value of the subcontract work for Item 961.3 was $3,000,000.00 and for Item 994.01 was $500,000.00.

4. The subcontract work performed by Allied Painting on Contract #59992 is substantially complete, and MassDOT has paid to SPS New England all contract amounts due on account of Allied Painting's work, less $45,040.00 in retainage currently being held by the Department for incomplete and unsatisfactory punch list items related to the subcontract work.

5. SPS New England submitted a reply within the required time period provided in G.L. c.30, §39F(d). The Reply contains a sworn statement by the CEO of SPS New England. It also

contains a breakdown of the balance due under the subcontract and of the amount due for each claim made by the general contractor against the subcontractor. I find that the Reply complies with the formal requirements of G.L. c.30, §39F.

6. The Reply also contains copies of subcontract agreements between SPS New England and Allied Painting, including a subcontract dated September 21, 2012 governing Allied's work on Contract #59992.

7. The Reply contends that the entire direct payment amount demanded by Allied Painting is in dispute in accordance with G.L. c.30, §39F(e)(iii), and requests that the Department deposit the disputed amount into an interest bearing joint account as provided in G.L. c.30, §39F(f).

8. SPS New England states its position as follows:

> SPS disputes that Allied is owed any further amount under the subcontract at this time because SPS is invoking its contractual and common law right to offset amounts owed to SPS under other agreements with Allied … The subcontract agreements between SPS and Allied provide in Article XV that in the event of a breach of the subcontract by the subcontractor, "no further payment shall be made or become due the subcontractor until general contractor recovers its costs and damages due as a result of the breach"… Additionally, "General Contractor shall have the right of set-off against any payments due subcontractor under any other agreement between general contractor and subcontractor …"

9. Letters were submitted by counsel for Allied Painting dated February 4, and by counsel for SPS New England dated February 15, providing legal support for their client's positions. The legal positions advocated in those letters were also considered in reaching my decision.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "Not later than the sixty-fifth day after each subcontractor substantially completes his work in accordance with the plans and specifications, the entire balance due under the subcontract less amounts retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding authority shall pay that amount to the general contractor."

The Department has confirmed that the subcontract work performed by Allied Painting on Contract #59992 is substantially complete and all contract amounts due on account of Allied Painting's subcontract work have been paid to SPS New England, less $45,040.00 in retainage currently being held by the Department for incomplete punch list items related to the subcontract work. Pursuant to G.L. c.30, §39F(1)(b), the retained amount is not payable to the general contractor and therefore, not due the subcontractor at this time. That part of the Demand is DENIED.

With respect to the balance of $129,960.00 claimed in the Demand (i.e., $175,000.00 less the retained amount of $45,040.00), the statute requires SPS New England to pay "the full amount received from the awarding authority … less any amount claimed due from the subcontractor to the general contractor." In this case, SPS New England disputes that the balance is due Allied Painting because Allied Painting owes amounts in excess of $129,960.00 to SPS under other subcontract agreements. According to SPS, it has the right to offset such amounts owed on other subcontracts against payments due Allied on this subcontract; therefore, the entire balance of the Demand is in dispute and should be placed into an interest bearing joint account as provided in G.L. c.30, §39F(f).

I note that in at least one prior decision, the Department rejected the argument that a general contractor may deduct from a sum, otherwise due under a Chapter 30, §39F direct payment demand, claims or damages arising from an entirely different subcontract, and concluded that claims relating to another subcontract cannot constitute an amount "disputed" by the subcontractor and general contractor within the meaning of G.L. c.30, §39F (1)(e)(iii). See *Ruling Re: Direct Payment Demand of Rev-Lyn Contracting Company*, May 19, 2005. This interpretation promotes the primary purpose of Section 39F to ensure prompt payment to subcontractors performing work and supplying materials on public projects. It is also consistent with state finance laws limiting the expenditure of public funds to the specific contracts for which the funds were authorized through appropriation, allotment and subsidiary. G.L. c.29, §§26, 27 and 29.

In this case, however, SPS New England and Allied Painting have expressly agreed in the subcontract that SPS in certain circumstances may setoff costs and damages owed "under any other agreement" between them from amounts otherwise due Allied for subcontract work on Contract #59992. The subcontract provides that "no further payment shall be made or become due the Subcontractor until General Contractor recovers its costs and damages due as a result of the breach … Additionally, General Contractor shall have the right of set-off against any payments due Subcontractor under any other agreement between General Contractor and Subcontractor." Identical language is contained in the other subcontract agreements for Allied's work on MassDOT Contracts #73270 and #55204. SPS New England has established that it may exercise offset rights under the subcontract. Whether it can do so in this case against the subcontract amounts otherwise due Allied Painting presents a dispute between SPS and Allied concerning their rights and obligations under the subcontract. For purposes of G.L. c.30, §39F, the Department need not determine that dispute, only that a dispute exists between SPS and Allied concerning "the balance due under the subcontract." Based on these facts, I find that there is a dispute between the subcontractor and general contractor within the meaning of G.L. c.30, §39F (1)(e)(iii).

Allied Painting's Demand establishes a claim in the amount of $129,960.00 for direct payment pursuant to G.L. c.30, §39F. SPS New England has disputed the amount in its sworn Reply. Accordingly, the Department is obligated to deposit the disputed amount into an interest bearing joint account in the names of the general contractor and the subcontractor as provided in G.L. c.30, §39F(f).

cc: Allied Painting, Inc.
4 Larwin Road
Cherry Hill, NJ 08034

SPS New England, Inc.
98 Elm Street
Salisbury, MA 01952

Christopher J. Marino, Esq.
Joel Lewin, Esq.

Patricia Leavenworth, Chief Engineer
Michael McGrath, Director of Construction
Richard Masse, P.E., Acting District 2 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: February 24, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant:	Allied Painting Inc.
Contractor:	SPS New England
Contract:	#55204
City/Town:	Gloucester, Bridge Rehabilitation (G-05-017)
Amount:	$143,911.29

This direct payment demand (Demand) by Allied Painting, Inc. was filed with the Department on January 4, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Allied is an approved subcontractor on Contract #55204.

2. The Demand consists of a cover letter dated December 22, 2015, a copy of a letter to SPS New England dated October 9, 2015, a one-page account statement indicating a balance due of $143,911.29, and copies of four checks from SPS New England payable to Allied totaling $936,139.50.

3. The Demand contains a sworn statement by the Vice President of Allied and was sent by certified mail to MassDOT (#7014 2870 0001 4177 2542) with a copy delivered by certified mail to the general contractor SPS New England (#7015 1660 0000 6068 8228).

4. The cover letter states in part that "[w]ork was completed in June 2014 and Allied has yet to receive final payment and retainage totaling $143,911.29."

5. MassDOT construction staff has confirmed that the subcontract work performed by Allied on Contract #55204 is complete and SPS New England has been paid in full for such work.

6. The $143,911.29 amount that Allied claims is due from SPS cannot be verified by MassDOT construction staff based on the limited information provided in the Demand.

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RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work."

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. The Demand includes only a one-page account statement indicating a balance due of $143,911.29, and copies of four checks from SPS New England payable to Allied painting totaling $936,139.50. It provides no detailed breakdown of the balance due under the subcontract, i.e. what work was both performed and paid for and what work was performed but remains unpaid. It does not set forth the original value of the subcontract, additions to the subcontract through Department approved amendments, pending but unapproved amendments, payments made by the general contractor for work done, retainage held, credits, back charges and all other information needed to demonstrate what Department approved work was done but remains unpaid. It is deficient to the point that the $143,911.29 amount that Allied claims is due from SPS cannot be verified by MassDOT construction staff based on the information provided.

For the above reason, the Demand is DENIED WITHOUT PREJUDICE.[1]

cc:
Allied Painting, Inc.
4 Larwin Road
Cherry Hill, NJ 08034

SPS New England
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Paul Stedman, District 4 Highway Director

[1] It should be noted that MassDOT staff has advised this Office that final payment and release of retainage has been made on Contract #55204. If so, there are no contact amounts payable or to become payable to the general contractor from which to pay demands for direct payments. See G.L. c.30, §39F(g).

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: February 18, 2016

RE: Request for Direct Payment pursuant to M.G.L. c. 30, §39F

Claimant:	Bedford Technology
Contractor:	Middlesex Corporation
Contract:	#76542
City/Town:	District 5 / Oak Bluffs-Tisbury - Beach Road over Lagoon Pond
Amount:	$356,944.41

This direct payment demand (Demand) by Bedford Technology was received by the Department's District 5 office on January 14, 2016.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT staff, I make the following findings:

1. The Demand consists of a cover letter dated January 11, 2016 and exhibits. The exhibits include the following:

    - a one-page spreadsheet dated December 1, 2015 that appears to be a summary of Bedford Technology's account with Harbor Technologies;
    - twenty-seven pages of invoices and billings that describe part numbers, quantities and costs of various materials ordered by and delivered to Harbor Technologies.

2. The Demand states:

    The prime contractor, The Middlesex Corporation, purchased the fender system from Harbor Technologies, which purchased the wales for the system from Bedford. Though Bedford has delivered all of the wales, Harbor Technology has paid only $57,341.86 of the $414,286.27 owed, leaving an outstanding balance of $356,944.41.

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3. The Demand indicates that a copy was delivered by certified mail to the general contractor Middlesex Corporation.

4. Jeff Breitzman, President of Bedford Technology, signed the Demand and swore before a Notary Public as to the truth and accuracy of the statements therein.

5. The Department has no record of receiving a reply to the Demand from the general contractor within 10 days by January 24, 2016, the date by which such reply was due in accordance with G.L. c. 30, §39F(1)(d).

6. Department staff advises that Bedford Technology was a material supplier to Harbor Technology, who was a material supplier to the general contractor Middlesex Corp. Bedford Technology was not a subcontractor approved in writing by the Department to perform labor and/or furnish materials on contract #76542.

RULING

I find that the Demand complies with the formal requirements of G.L. c. 30, §39F.[1]

Pursuant to G.L. c. 30, §39F, the Department's obligation to make a direct payment arises in the limited circumstances provided in the statute and only with respect to "subcontractors" performing labor or supplying materials. The statute defines a "subcontractor" as:

1. "a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a written contract with the general contractor", or
2. "a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars."

The Demand indicates that Bedford Technology provided materials to another material supplier, Harbor Technologies. Bedford Technology was not a subcontractor approved in writing by the Department and did not contract with the general contractor Middlesex to supply materials. Because Bedford Technology is not a "subcontractor" as defined in the statute, it is not eligible for direct payment from the Department.

The Demand fails to state a claim for relief under G.L. c. 30, §39F. Therefore, the Demand is DENIED.

[1] In pertinent part, G.L. c. 30, §39F(1)(d) provides: "The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work."

cc: Bedford Technology
2424 Armour Road
P.O. Box 609
Worthington, MN 56187

Middlesex Corporation
One Spectacle Pond Road
Littleton, MA 01460

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Mary-Jo Perry, District 5 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: January 13, 2016

RE: Request for Direct Payment pursuant to M.G.L. c. 30, §39F

Claimant:	New England Building & Bridge Co., Inc.
Contractor:	S&R Corporation
Contract:	#79518
City/Town:	District 5 / Route 24 over Taunton River
Amount:	$416,276.40

This direct payment demand (Demand) by New England Building & Bridge Co., Inc. was filed with the Department on November 2, 2015.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. The Demand consists of a cover letter dated October 29, 2015 and several exhibits.[1] The exhibits include the following:

   - a copy of a subcontract agreement between New England Building & Bridge Co., Inc. and S&R Corporation dated April 16, 2014
   - an undated subcontractor requisition indicating a "total due" of $416,276.40
   - a document entitled "Subcontractor's Statement for Payment – Application No: 283-35-08" dated June 27, 2015
   - a copy of a letter dated September 1, 2015 from New England Building & Bridge Co., Inc. to S&R Corporation identified as a "Material Breach of Contract Notice"
   - a copy of a letter dated September 16, 2015 from S&R Corporation to New England Building & Bridge Co., Inc.
   - a copy of a document entitled "Estimate Summary (Bid Prices)"

[1] The Demand initially was made by letter dated October 23, 2015, which was subsequently superseded by an "Amended Demand" dated October 29, 2015.

2. The Demand contains a sworn statement and was sent by certified mail to MassDOT (#7014 2870 0001 2107 1870) with a copy delivered by certified mail to the general contractor S&R Corporation (#7014 2870 0001 2107 1887).

3. The Demand contains a detailed breakdown of the balance due under the subcontract and a statement of the status of completion of the subcontract work.

4. New England Building & Bridge Co., Inc. was an approved subcontractor on Contract #79518.

5. New England Building & Bridge Co., Inc. was approved to perform subcontract work under the following specifications: Item 912.5 "Drilled & Chemical Anchored #5 Dowels", Item 921.7 "Drilled & Chemical Anchored #7 Dowels", and a partial scope of lump sum Item 995.01 "Bridge Structure" consisting of abutment extensions, precast wingall CIP concrete pours in corrugated metal pipe voids, highway guardrail transition bases, abutment CIP caps, pier cap closure pours/CMP pours, abutment and pier keeper blocks and end diaphragms, bridge deck closure pours, approach slab closure pours and CF-PL3 CIP barriers.

6. According to the Demand, New England Building & Bridge Co., Inc. completed:

    - 442 of the 465 dowels called for in Item 912.5 for a total subcontract price of $13,702.00
    - 96 of the 144 dowels called for in Item 912.7 for a total subcontract price of $2,976.00
    - 55% of the subcontract scope under in Item 995.01 for a total subcontract price of $487,916.55

7. According to the Demand, New England Building & Bridge Co., Inc. was paid $88,318.15 by S&R Corporation for the completed subcontract work, leaving a balance due of $416,276.40.

8. On September 16, 2015, S&R Corporation terminated its subcontract with New England Building & Bridge Co., Inc. and retained another subcontractor to complete the remaining subcontract work.

9. MassDOT construction staff confirms that the subcontract work that is the subject of this Demand was completed and payment for such work was made to S&R Corporation.

10. MassDOT construction staff reports that there are no current claims against the general contractor for defective or incomplete work performed by the subcontractor

RULING

In pertinent part, G.L. c. 30, §39F(1)(d) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount

due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work." I find that the Demand complies with the formal requirements of G.L. c. 30, §39F.

On September 16, 2015, S&R Corporation terminated its subcontract with New England Building & Bridge Co., Inc. and retained another subcontractor to complete the remaining subcontract work. Therefore, for purposes of G.L. c. 30, §39F(1)(d), the seventy day period would commence as of the date of termination for any subcontract work completed by New England Building & Bridge Co., Inc. up to that point. The documentation before me supports a finding that prior to the termination date New England Building & Bridge Co., Inc. had substantially completed 442 dowels pursuant to Item 912.5, and 96 dowels pursuant to Item 912.7, and 55% of the partial scope to be performed pursuant to Item 995.01.

The Department has paid S&R Corporation for the subcontract work completed by New England Building & Bridge Co., Inc. However, S&R Corporation has paid only $88,318.15 to New England Building & Bridge Co. for such work, leaving a subcontract balance due of $416,276.40. That balance was required to be paid "not later than the sixty-fifth day" after completion of the work. As S&R Corporation has failed to make such payment in accordance with G.L. c.30, §39F, the Department is obligated to make the payment in response to this Demand.

Kindly pay New England Building & Bridge Co., Inc. $416,276.40 from the next periodic, semi-final or final estimate and deduct that amount from payments due S&R Corporation in accordance with Section 39F.

cc: New England Building & Bridge Co., Inc.
19 B Lark Industrial Parkway
Greenville, RI 02878

S&R Corporation
706 Broadway Street
Lowell, MA 01854

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Mary-Jo Perry, District 5 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: January 7, 2016

RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: Liddell Brothers, Inc.
Contractor: S&R Corporation
Contract: #79518
City/Town: Raynham/Taunton, Route 24
Amount: $130,051.00

This direct payment demand (Demand) by Liddell Brothers, Inc. was filed with the Department on November 17, 2015.

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. The Demand complies with the formal requirements of G.L. c.30, §39F.

2. Liddell Brothers, Inc. is an approved subcontractor on Contract #79518.

3. Liddell Brothers, Inc. is approved to perform subcontract work under various scope items related to traffic control devices in accordance with Section 800, *et seq.*, of the contract specifications.

4. Traffic control devices provided and to be provided by Liddell Brothers, Inc. in accordance with its approved subcontract work on Contract #79518, including drums, signs, attenuators, are continuing to be used on the project.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount

due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority."

In this case, the subcontract work is not substantially complete. The seventy day period after substantial completion has yet to commence because Liddell Brothers, Inc. is still performing subcontract work on Contract #79518. Accordingly, the Demand is premature and must be denied.

For the above reasons, the Demand is DENIED.

cc:
Liddell Brothers
600 Industrial Drive
Halifax, MA 01854

S&R Corporation
9706 Broadway Street
Lowell, MA 01854

Patricia Leavenworth, Chief Engineer
Michael McGrath, Director of Construction
Mary-Joe Perry, District 5 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: January 5, 2016

RE: Reconsideration of December 2, 2015 Findings and Conclusions

---

Claimant: Allied Painting, Inc.
Contractor: SPS New England
Contract: #59992
City/Town: Gill/Montague Bridge
Amount: $175,000.00

On December 2, 2015, I made certain findings and conclusions with respect to a direct payment demand by Allied Painting Inc. and a determination that the Department should pay Allied Painting $129,960.00 from the next periodic, semi-final or final estimate on Contract #59992 and deduct that amount from payments due SPS New England in accordance with Section 39F(1)(h). On December 28, 2015, this Office received a response from SPS New England Inc. that merits reconsideration of those findings and conclusions.

BACKGROUND

A direct payment demand (Demand) by Allied Painting was filed with the Department on November 12, 2015. The Demand alleged that all subcontract work by Allied Painting on the above referenced contract was completed in September 2014 and that retainage in the amount of $175,000.00 is improperly being held by SPS New England, Inc.

By memorandum dated December 2, 2015, I found, among other things, that "[t]he Demand complies with the formal requirements of G.L. c.30, §39F" and that "SPS New England did not submit a sworn reply as provided in G.L. c.30, §39F." Having reconsidered the facts presented in the Demand, those findings were in error. Accordingly, I make the following findings and rulings, which shall supersede those made in my memorandum dated December 2, 2015:

FINDINGS

Based on my review of the Demand, the applicable contract, and input from MassDOT construction staff concerning the status of subcontract work, I make the following findings:

1. Allied Painting, Inc. is an approved subcontractor on Contract #59992.

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495
www.mass.gov/massdot

2. The Demand consists of a cover letter dated November 6, 2015, a copy of a letter to SPS New England dated October 9, 2015, and a one-page account statement indicating a balance due of $175,000.00.

RULING

In pertinent part, G.L. c.30, §39F(1)(b) provides: "If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time."

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. Section 39F requires that a "demand shall be by sworn statement." That requirement is typically met by a statement such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct." Allied's letter dated November 6, 2015 is not a sworn Demand. In addition, there is nothing in the Demand evidencing that a copy was delivered to or sent by certified mail to the general contractor at the same time. The statute requires such delivery to provide the general contractor the opportunity to reply to the Demand within 10 days.

For the above reasons, the Demand is DENIED WITHOUT PREJUDICE.[1]

cc:

Allied Painting, Inc.
4 Larwin Road
Cherry Hill, NJ 08034

SPS New England
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Paul Steadman, District 4 Highway Director

[1] Allied may refile a new Demand in compliance with the requirements of Section 39F. If Allied does refile, its renewed demand should be by "sworn statement". A copy of the Demand also must be delivered to or sent by certified mail to the general contractor at the same time.

APPENDIX C-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: David L. Sterrett, Esq.
Sterrett Law, PLC
65 South Main Street, Ste. 1
Waterbury, VT 05676

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT, 10 Park Plaza
Boston, MA 02116

Re: Appeal of Denial of Electronic Billboard Permit #2015D016
Appellant: Cove Outdoor LLC

MEMORANDUM AND ORDER

This Office has before it the Department's Motion to Quash discovery requests served on the Department by Cove Outdoor LLC.

There are four discovery requests dated November 16, 2016: (1) Deposition Notices of John Romano, Neil Boudreau and Jim Danila; (2) public records request; (3) Appellant's First Set of Interrogatories to Appellee; (4) Appellant's First Set of Requests for Production of Documents to Appellee.

I make the following rulings in accordance with 801 CMR 1.02(7)(c):

1. Hearings concerning the denial or revocation of outdoor advertising permits are "informal." 700 CMR 3.19. The informal discovery rules applicable to such hearings do not permit depositions of witnesses. 801 CMR 1.02(8); *compare* 801 CMR 1.01(8)(c). Accordingly, the Department's Motion to Quash the Deposition Notices of John Romano, Neil Boudreau and Jim Danila is ALLOWED.

2. The Department's obligation to comply with a public records request is governed by M.G.L. c.66, §10 and disputes arising from public records requests are within the exclusive jurisdiction of the Supervisor of Public Records. This Office has no authority to rule on the scope and/or validity of a public records request. The Department's Motion to Quash Cove's public records request is DENIED.

3. The informal discovery rules do not permit parties to serve interrogatories. 801 CMR 1.02(8); *compare* 801 CMR 1.01(8)(g). Accordingly, the Department's Motion to Quash Appellant's First Set of Interrogatories to Appellee is ALLOWED.

4. The informal discovery rules permit a party and its authorized representative to "have adequate access to and an opportunity to examine and copy or photocopy the entire content of his case file and all other documents to be used by the Agency … at the hearing." 801 CMR 1.02(8)(b). There is nothing in the Department's Motion to demonstrate that the discovery request is inconsistent with or seeks documents that are not otherwise required to be produced in accordance with 801 CMR 1.02(8)(b). Therefore, the Department's Motion to Quash Appellant's First Set of Requests for Production of Documents to Appellee is DENIED.

Albert Caldarelli
Dated: November 23, 2016 Administrative Law Judge

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: David L. Sterrett, Esq.
Sterrett Law, PLC
65 South Main Street, Ste. 1
Waterbury, VT 05676

Eileen Fenton, Esq.
Office of the General Counsel
MassDOT, 10 Park Plaza
Boston, MA 02116

Re: Appeal of Denial of Electronic Billboard Permit #2015D016
Appellant: Cove Outdoor LLC

MEMORANDUM

The Parties have requested that this Office confirm the standard of review to be applied at the hearing to take place in the above referenced matter. The Department contends that a deferential "substantial evidence" standard should apply, while the Appellant maintains that the hearing requires *de novo* review.

The issue has been fully briefed by the Parties in accordance with my Order dated September 27, 2016. I have reviewed the Parties' arguments and legal support, and hereby rule on the matter in accordance with 801 CMR 1.02(7)(c).

Discussion

This issue arises in the context of an appeal by Cove Outdoor LLC ("Appellant") of a decision of the Director of the Office of Outdoor Advertising ("Director") to deny an application for an electronic billboard permit. The appeal will be the first to be heard by this Office pursuant to the current outdoor advertising regulations, which went into effect on December 7, 2012. Therefore, the issue is one of first impression regarding the standard of review applicable to appeal hearings as set forth in 700 CMR §3.19.

By way of background, in 2009, the Legislature enacted the Transportation Reform Act. St. 2009, c.25. The legislation established the Massachusetts Department of Transportation as the Commonwealth's integrated transportation agency; abolished the former Outdoor Advertising Board, *Id*. at §18; and granted authority to the Department to establish an Office of Outdoor Advertising and adopt regulations. M.G.L. c.6C, §§3(1), 39. In 2012, the Department promulgated the current outdoor advertising regulations, under which the Director is empowered to grant or deny an application for a new permit or permit renewal. 700 CMR §§3.05, 3.08. If the determination is to deny an application, the applicant may request a hearing concerning the denial. *Id*. §§3.05(4)-(5), 3.19(4).

For purposes of the appeal hearing, the Department asks this Office to give deference to the Director's denial decision. Citing *Wightman v. Superintendent*, 19 Mass. App. Ct. 442 (1985)

and *Goodridge v. Director*, 375 Mass. 434 (1978), it asks this Office to limit its review to the record that was before the Director and its decision to whether the Director's denial was based on substantial evidence. In reliance on *Medi-Cab v. Rate Setting Comm'n,* 401 Mass. 357 (1987), the Department further contends that this Office "is not empowered to make a *de novo* determination of the facts, to make credibility choices, or to draw different inferences from the facts found" by the Director. The above cases, however, speak only to the standard of review to be applied by a Court when reviewing an agency's final decision. They do not address the standard of review by a hearing examiner charged with conducting an agency's adjudicatory hearing pursuant to G.L. c.30A, 801 CMR §1.00, and 700 CMR §3.19.

The Department's position would alter the traditional role of a hearing examiner, which is fact-finding and decision-making based on a *de novo* review of testimony and evidence presented at a hearing. Cella, A., Massachusetts Practice – Administrative Law and Practice §349 at 656 (1986 with 2015 updates). The position is also at odds with the express statutory and regulatory requirements governing an appeal hearing under 700 CMR §3.19. The hearing is to be conducted in accordance with Chapter 30A and 801 CMR §1.00. *Id*. Each party has the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence. G.L. c.30A, §11(3). The parties may present and establish all relevant facts and circumstances by oral testimony and documentary evidence; advance any pertinent arguments; question or refute any testimony including an opportunity to cross-examine adverse witnesses; introduce evidence; and introduce any other pertinent documents. 801 CMR 1.02(10)(g). The hearing examiner's review is not limited to the record that was before the Director. The hearing examiner must consider *all relevant and reliable evidence* and reach a fair, independent and impartial decision *based upon the issues and evidence presented at the hearing*. 801 CMR §1.02(10)(f). In that regard, the appeal hearing set forth in 700 CMR §3.19 must be a *de novo* proceeding.

Finally, a *de novo* review of any decision to deny an outdoor advertising permit is required as a matter of due process of law. *Mass. Outdoor Advertising Council v. Outdoor Advertising Board*, 9 Mass App. Ct. 775, 790 (1980). The Appeals Court noted that a final agency decision to deny a permit "presupposes the availability of *de novo* review." *Id*. at 792. The right of applicants to appeal initial denial decisions to a hearing examiner for *de novo* review and decision, which may be adopted or rejected by the board/office empowered to grant or deny the outdoor advertising permit, has been the long-standing administrative appeal procedure of the Department and its predecessor agencies. *See, e.g., City of Boston v. Outdoor Advertising Board*, 41 Mass. App. Ct. 775 (1996); and more recently, *In the Matter of the Applications of Capital Advertising, LLC,* MassDOT Office of the Administrative Law Judge, August 28, 2012. There is nothing in the current outdoor advertising regulations that substantially alters that procedure or modifies the standard of review to be applied in this appeal.

ORDER

The appeal hearing will be a *de novo* review of the Director's decision to deny Electronic Billboard Permit #2015D016 in accordance with G.L. c.30A and 700 CMR §3.19.

Albert Caldarelli
Dated: December 14, 2016 Administrative Law Judge

APPENDIX D-1

RULINGS

MASSACHUSETTS UCP ADJUDICATORY BOARD

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

To:

William M. McAvoy
Deputy Assistant Secretary
for Operational Services
Supplier Diversity Office
One Ashburton Place, Suite 1017
Boston, MA 02108

Bonnie Borch-Rote, Esq.
SDO Counsel
Supplier Diversity Office
One Ashburton Place, Suite 1017
Boston, MA 02108

Ellen S. Orne, President
Ellco Promotions, Inc.
113 Smoke Hill Ridge Road
Marshfield, MA 02050

Adam L. Littman, Esq.
Posternak Blankstein & Lund, LLP
800 Boylston Street
Boston, MA 02199-8004

In the Matter of Ellco Promotions, Inc. (MUCP #2016-0001)

NOTICE OF FINAL AGENCY DECISION

Pursuant to 49 CFR §28.87(g) and M.G.L. c. 30A, §11(8), the Massachusetts Unified Certification Program Adjudicatory Board (Board) hereby gives Notice of its Decision (Decision) in the above-captioned matter. The parties have been notified by mail on this date.

The Board finds no grounds to remove Ellco Promotions, Inc.'s certification as a Disadvantaged Business Enterprise.

The reasons for the Board's finding are set forth in the attached Decision.

Dated: December 8, 2016

The Adjudicatory Board

Albert A. Caldarelli
Miguel G. Fernandes
Kenrick W. Clifton
Albert B. Dalton

By: _____
Lisa Harol, Secretary
Tel: (857) 368-9495

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

IN THE MATTER OF ELLCO PROMOTIONS INC.

INTRODUCTION

The Adjudicatory Board of the Massachusetts Unified Certification Program is authorized to hear and decide appeals from determinations of the Supplier Diversity Office (SDO) to decertify or remove a Disadvantaged Business Enterprise's eligibility pursuant to 49 CFR §26.87.

By letter dated May 26, 2016, SDO notified Ellco Promotions Inc. (Ellco) that it was initiating ineligibility proceedings. Ex. 2. On June 2, 2016, Ellco requested a hearing before this Board. Ex. 3. The Board held an adjudicatory hearing on November 9, 2016, in accordance with the requirements of 49 CFR §26.87, M.G.L. c. 30A, and 801 C.M.R. §1.02 and §1.03.

FINDINGS

After careful review of the testimony and evidence presented at the hearing, the Board makes the following findings:

1. Ellco is owned by Ms. Ellen Orne, who also serves as the company's President. Ellco is located at 113 Smoke Hill Ridge Road, Marshfield, MA, and is in the business of providing broker services on behalf of buyers and sellers of promotional products such as wearable apparal, executive gifts, caps, offices supplies, etc. Ex. 4, 6.

2. *i*PROMOTE*u* (IPU) is a company founded by Mr. Ross Silverstein, who serves as its President and CEO. Hr'g Tr. 135:25. IPU provides services to independent promotional products distributors, like Ellco, in the form of an online order management system through which distributors can place orders and manage their billings. Ex. 4; Hr'g Tr. 89:14-15.

3. In 2010, Ellco contracted for IPU's online order management services. Ellco and IPU entered into an "Independent Distributor Affiliate Agreement" dated February 12, 2010, which sets forth the terms and conditions of the contractual relationship between them. Ex. 5/SDO8.

4. Ellco's use of IPU's online order management system, in practice, is as follows:

    a) Ellco logs into IPU's online order management system, enters relevant order information, and generates and transmits a purchase order to the desired suppliers or manufacturers.

b) Upon receipt of the purchase order, the suppliers fulfill the order, ship the final products to Ellco's customer, and issue an invoice to IPU on Ellco's behalf for the cost of the goods.
c) IPU generates an invoice to Ellco's customer for Ellco's review.
d) When Ellco approves the invoice, IPU transmits it to the customer on Ellco's behalf.
e) The customer then remits a check payable to Ellco at an IPU drop-off location.
f) IPU deposits the check on Ellco's behalf, deducts the fee for its services, and remits payment to the manufacturer. The remaining proceeds of the customer payment are paid to Ellco for its services.

Ex. 4; Hr'g Tr. 101-123.

5. Ellco's relationship to IPU is entirely contractual. Ellco pays a fee to IPU to use its online order management system to save administrative time and effort. There is no common ownership or any exercise of authority or decision-making by IPU concerning the business activities of Ellco. Ex. 5/SDO 8; Hr'g Tr. 89-90. IPU has no role in determining what customers Ellco serves, what products Ellco sells, which manufacturers and suppliers Ellco uses, or what prices Ellco charges. Ms. Orne has full authority and control of Ellco, and does not delegate any of its fiduciary responsibilities to IPU. She directs the management, policies and operations of the company on a long term and day-to-day basis. Ex. 4; Hr'g Tr. 101-123.

6. The contractual relationship between Ellco and IPU was known to SDO since 2010, when Ellco provided a copy of the "Independent Distributor Affiliate Agreement" dated February 12, 2010 as part of Ellco's initial application for DBE certification. Ex. 5/SDO8.

7. On December 16, 2010, SDO certified Ellco as a Disadvantaged Business Enterprise (DBE) and classified Ellco's business under three NAICS[1] codes identified and defined as follows:

a. 541890 - Other Services Related to Advertising: This industry comprises establishments primarily engaged in providing advertising services (except advertising agency services, public relations agency services, media buying agency services, media representative services, display advertising services, direct mail advertising services, advertising material distribution services, and marketing consulting services).
b. 425110 - Business to Business Electronic Markets: This industry comprises business-to-business electronic markets bringing together buyers and sellers of goods using the Internet or other electronic means and generally receiving a commission or fee for the service. Business-to-business electronic markets for durable and nondurable goods are included in this industry.
c. 425120 – Wholesale Trade Agents and Brokers: This industry comprises wholesale trade agents and brokers acting on behalf of buyers or sellers in the wholesale distribution of goods.

[1] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. U.S. Census Bureau, 2012 NAICS introduction and definitions.

> Agents and brokers do not take title to the goods being sold but rather receive a commission or fee for their service. Agents and brokers for all durable and nondurable goods are included in this industry.
>
> Ex. 6.

8. On November 24, 2015, Mr. Wystan Umland, MBTA Government Programs Compliance Officer, conducted a "Commercially Useful Function" review[2] of Ellco in connection with a federal-aid contract for the MBTA's "THE RIDE" program. The review included a meeting and email exchanges with Ms. Orne, review of information posted on the websites of Ellco and IPU, and other internet research concerning Ellco's business. He recorded his observations and his "overall impressions" concerning Ellco and its relationship with IPU in handwritten and typed notes. Ex. 5/SDO4. He also completed a "Commercially Useful Function Checklist." Ex. 5/SDO2.

9. Based on his observations during the CUF review, particularly with respect to Ellco's interaction with IPU concerning its billing and payment practices, Mr. Umland made a determination that "Ellco is likely non-compliant with the DBE certification standards set forth in 49 CFR 26." Acccordingly, he referred the matter by memorandum dated December 14, 2015 to SDO for review and investigation. Ex. 5/SDO 3; Hr'g Tr. 33:6-10. SDO assigned the referral to Mr. Andre Titus, DBE Investigator, to review and investigate Ellco's DBE certification status. Hr'g Tr. 44:16-25, 45:1-3.

10. Mr. Titus conducted a site visit to Ellco on January 21, 2016 during which he interviewed Ms. Orne in accordance with an investigation questionnaire developed by SDO. Hr'g Tr. 46:10-21, Ex. 5/SDO 5. He reviewed information contained in SDO's certification file for Ellco, including purchase orders and the "Independent Distributor Affiliate Agreement" between Ellco and IPU. Hr'g Tr. 47:9-19, Ex. 5/SDO 7,8. He also considered the information and determinations contained in Mr. Umland's referral. Hr'g Tr. 47:20-25.

11. Based on his investigation, Mr. Titus concluded that Ellco "no longer meets the certification standards for independence and control as defined under 49 CFR Part 26 Subpart D Certification Standards." The information that he relied on to reach his findings and conclusion are contained in his report dated May 25, 2016 and entitled "Certification Investigator's DBE Report – Eligibility Review". Ex. 5/SDO 5.

12. Based on Mr. Titus' conclusions, SDO initated ineligibility proceedings that led to an adjudicatory hearing before this Board on November 9, 2016.

[2] A Commercially Useful Function (CUF) review is performed when a DBE participates in a federal-aid contract for the purpose of determining the value of the DBE's work toward the contract's DBE goals. 49 CFR §26.55(c). In this case, the CUF review of Ellco was conducted because Ellco was to perform work as a subcontractor under MBTA's "THE RIDE" contract. Hr'g Tr. 32:14-17.

DISCUSSION

Pursuant to 49 CFR §26.87(d)(1), SDO had the burden of proving by a preponderance of the evidence that Ellco does not meet the certification standards of 49 CFR Part 26. The meagre evidence presented by SDO at the hearing falls far short of meeting that burden.

The evidence and testimony presented at the hearing establishes that the control and operation of Ellco, including its relationship with IPU, is entirely consistent with operating a business within the industry of a Wholesale Trade Agent/Broker and Business to Business Electronic Markets as described by the NAICS codes for which Ellco is certified. Ellco pays a fee to IPU to use an online order management system to save administrative time and effort. In that regard, Ellco is merely one of many customers who contract for IPU's services. There is no common ownership or any exercise of authority or decision-making by IPU concerning the business activities of Ellco. IPU has no role in determining what customers Ellco serves, what products Ellco sells, which manufacturers and suppliers Ellco uses, or what prices Ellco charges. Ms. Orne has full authority and control of Ellco, and does not delegate any of its fiduciary responsibilities to IPU. She directs the management, policies and operations of the company on a long term and day-to-day basis. All of this satisfies the Board that Ellco is an independent business and meets the requirements of 49 CFR §26.71.

The Board is not satisfied, however, with SDO's investigation into Ellco's eligibility. Better efforts could have been made to verify basic factual information, which was readily available and may have avoided the need for a costly adjudicatory hearing. Also, it is not clear to the Board that SDO followed all of the steps and scrutinized all of the items required by 49 CFR §26.83 in making its determination regarding Ellco's eligibility to remain certified. Lastly, SDO initiated formal ineligibility proceedings based on IPU's purported control of Ellco's administrative and fiduciary responsibilities; yet, it made no direct inquiry of IPU to try to corroborate its assumptions. These and other shortcomings in SDO's investigation led to reliance on facts that were ambiguous, incomplete and, in some cases, patently incorrect.

DECISION

SDO requests that this Board approve its determination to remove Ellco's DBE eligibility pursuant to 49 CFR §26.87(f)(5) on the basis that its decision to certify Ellco in 2010 was clearly erroneous. For the reasons discussed above, the Board is in unanimous agreement that there are no grounds upon which to remove Ellco's eligibility.

Dated: December 8, 2016

The Adjudicatory Board:

_____

On behalf of its members:

Albert A. Caldarelli
Miguel G. Fernandes
Kenrick W. Clifton
Albert B. Dalton

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

To: William M. McAvoy
Deputy Assistant Secretary
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Bonnie Borch-Rote, Esq.
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Monica Biszko
New England Specialty Services
2 Lark Street, Suite #1
Fall River, MA 02721

In the Matter of New England Specialty Services (MUCP #2016-0002)

MEMORANDUM

By letter dated August 17, 2016, New England Specialty Services (NESS) requested a hearing before the Adjudicatory Board of the Massachusetts Unified Certification Program in response to a determination of the Supplier Diversity Office (SDO), dated August 4, 2016, denying its application for expanded certification as a Disadvantaged Business Enterprise (DBE).

Pursuant to the Massachusetts Unified Certification Program, this Board is authorized to hear appeals from SDO's determination to decertify or remove a DBE's eligibility pursuant to 49 CFR §26.87. The Board does not have jurisdiction to hear appeals of SDO's denial of an expansion of services under an existing DBE certification.

ORDER

This matter is remanded to SDO for further proceedings in accordance with the requirements of 49 CFR Part 26, Subpart D.

Dated: October 6, 2016

The Adjudicatory Board

Albert A. Caldarelli
Miguel G. Fernandes
Kenrick W. Clifton
Albert B. Dalton

On behalf of the Board: _____

APPENDIX D-1

STANDARD OPERATING PROCEDURES

I. PURPOSE

The purpose of these Rules is to ensure the impartial and efficient disposition of Appeals brought before the Office of the Administrative Law Judge.

II. SCOPE

These Rules govern the proceedings of the Office of the Administrative Law Judge and are established pursuant to M.G.L. c.6C, §3(1) and §40.

III. ADMINISTRATION

The Office of the Administrative Law Judge is established pursuant to M.G.L. c. 6C, §40, as amended by St. 2009, c. 25, §8. Its essential function is to make fair and impartial decisions on disputes involving the Department, including: construction contract disputes appealed from decisions of the Chief Engineer, appeals from the denial of outdoor advertising permits by the Department's Division of Outdoor Advertising, contractor appeals from decertification of disadvantaged minority business enterprises, appeals from decisions of the Department's Right of Way Bureau pursuant to the requirements of 49 CFR Part 24 §24.10, and other matters as assigned by the Secretary of Transportation. To accomplish its essential function, the Office of the Administrative Law Judge is authorized to establish rules and procedures for fair and efficient disposition of disputes and appeals.

IV. DEFINITIONS

A. **Administrative Law Judge**. The hearing examiner appointed pursuant to M.G.L. c. 6C, §40.
B. **Appeal**. Any matter properly brought before the Office of the Administrative Law Judge in accordance with a contract, statute, regulation or assignment of the Secretary of Transportation.
C. **Appellant**. The party who initiates an Appeal to be heard and decided by the Administrative Law Judge.
D. **Authorized Representative**. An attorney, legal guardian or other person authorized by a Party to represent him in a Proceeding.
E. **Construction Contract Appeal**. An Appeal brought before the Office of the Administrative Law Judge pursuant to Division I, Subsection 7.16 of the Department's Standard Specifications for construction contracts, and in accordance with Standard Operating Procedure CSD 25-14-1-000 "Claim Administration and Dispute Resolution Process".

F. **Department**. The Massachusetts Department of Transportation established pursuant to M.G.L. c. 6C; the party who must answer an Appeal to be heard and decided by the Administrative Law Judge.
G. **Hearing**. A Proceeding at which evidence and witness testimony are presented to the Administrative Law Judge.
H. **Proceedings**. The activities and Hearings of the Office of the Administrative Law Judge.

V. REPRESENTATION

An Appellant may appear at a Proceeding in his or her own behalf, or may be accompanied, represented and advised by an Authorized Representative.

VI. APPEAL – HOW TAKEN

A. **Notice of Appeal**. All Appeals shall be taken by filing a Notice of Appeal with the Office of the Administrative Law Judge.
B. **Timing**. Unless otherwise provided in the applicable contract, statute, or regulation, the Notice of Appeal must be filed within 30 calendar days of the Department decision or action being appealed.
C. **Manner of Filing**. The Notice of Appeal shall be made in writing and delivered either by hand or by U.S. Mail to the Office of the Administrative Law Judge, 10 Park Plaza, Suite 6620, Boston, MA 02116.
D. **Content of Notice of Appeal**. The Notice of Appeal shall identify the Department decision or action being appealed, and briefly state the facts upon which the Appellant is relying, the basis of the Appeal, and the relief sought.

VII. ENTRY OF APPEAL

A. **Docket**. Upon receipt of a properly filed Notice of Appeal, the Office of the Administrative Law Judge shall enter the Appeal on its docket
B. **Notice to the Parties**. The Office of the Administrative Law Judge will notify the Appellant and Department's General Counsel that the Appeal has been entered on the docket.
C. **Department's Representative**. The Department shall assign staff counsel, who shall enter his/her appearance.
D. **Initial Status Conference**. The Administrative Law Judge may initiate or upon the application of any Party, may call upon the Parties to participate in an initial status conference to clarify issues concerning the Notice of Appeal.

VIII. SCHEDULE

A. **Tracking Order**. Unless ordered otherwise by the Administrative Law Judge, Standing Order 1-16 attached hereto as Appendix A shall apply to all Appeals brought before the Office of the Administrative Law Judge.

B. **Time Extensions**. The Administrative Law Judge may, for good cause shown, extend any time limit contained in these Rules. All requests for extensions of time shall be made by motion.

IX. POSITION PAPERS

A. **Submission Requirement**. All legal and factual issues to be decided on Appeal must be fully briefed by the Parties in written submissions.

B. **Timing**. Unless ordered otherwise by the Administrative Law Judge, a Party shall file its position paper within the time mandated in Standing Order 1-16.

C. **Format**. Position papers shall be submitted on standard size (8 ½ x 11 inch) paper. If submitted electronically, the position paper must be able to be printed on standard size (8 ½ x 11 inch) paper. For Construction Contract Appeals only, the Appellant's position paper must be in the form of a fully completed Statement of Claim. See Appendix B.

D. **Page Limits**. A Party may include any relevant information and legal argument that he/she deems necessary to fully present his/her position. Unless ordered otherwise by the Administrative Law Judge, position papers are not limited to any specific number of pages.

E. **Appellant**. The Appellant's position paper shall contain the following:
   i. A statement identifying the Department decision or action being appealed;
   ii. A statement of the alleged facts relevant to the issues presented for review, with appropriate references to documentation and/or other evidence supporting such factual allegations;
   iii. The legal basis of the Appeal, including reference to applicable legal authority; and
   iv. The precise relief sought.

F. **Department**. The Department's position paper shall conform to the requirements of subsections (a) through (e) above, except that a statement of the alleged facts need not be made unless the appellee is dissatisfied with the statement of the Appellant.

G. **Reply**. The Appellant is permitted but is not required to file a Reply to the Department's position paper. No further position papers may be filed unless authorized by the Administrative Law Judge.

X. CONFERENCES

A. **Status Conferences**. The Administrative Law Judge may call upon the Parties to participate in status conferences to address scheduling issues, the status of discovery and other pre-Hearing matters.

B. **Final Pre-Hearing Conference**. The Administrative Law Judge may call upon the Parties to participate in a Final Pre-Hearing conference to consider:

i. timing, scheduling and other logistics concerning the Hearing;
ii. the simplification or clarification of the issues;
iii. the possibility of obtaining stipulations, admissions, agreements on matters already of record, or similar agreements which will reduce or eliminate the need of proof;
iv. whether there are discovery request and the scope of such discovery;
v. whether there are any pre-Hearing motions or legal issues to be decided;
vi. identification of witnesses; and
vii. such other matters as may aid in the fair and efficient decision on the Appeal.

XI. HEARINGS

A. **Scope**. The Administrative Law Judge shall conduct a fair and impartial Hearing on the Appeal.

B. **Summons**. Pursuant to M.G.L. c.6C, §40, the Administrative Law Judge shall, at the request of the Appellant or the Department or on his own motion, summon witnesses and require the production of books and records and take testimony under oath.

C. **Adjudicatory Proceedings**. The Hearing shall be conducted in compliance with the requirements of M.G.L. c.30A, if applicable.

D. **Conduct of the Hearing**. The Administrative Law Judge shall define issues, receive and consider all relevant and reliable evidence, including examining witnesses under oath, exclude irrelevant or unduly repetitious evidence, ensure an orderly presentation of the evidence and issues, ensure a record is made of the proceedings; and reach a fair, independent and impartial decision based upon the issues and evidence presented at the hearing and in pre-Hearing submissions and in accordance with the law.

E. **The Parties**. Each Party may present his or her own case, or may be assisted by an Authorized Representative, and shall have a right to present witnesses, present and establish all relevant facts and circumstances by oral testimony and documentary evidence, advance any pertinent arguments without undue interference, question or refute any testimony, and examine and introduce evidence.

F. **Time Limits**. A Party will be permitted to fully present all evidence and legal argument that he/she deems necessary to his/her position on Appeal. Subject to the general rules of conduct provided above or as ordered otherwise by the Administrative Law Judge, Parties are not subject to any specific time limits with respect to their presentations at the Hearing.

G. **Recording**. The Hearing will be recorded by electronic medium and such recording will be maintained in the files of the Office of the Administrative Law Judge. The Administrative Law Judge may permit any Party at his/her own expense to make his/her own stenographic or electronic record of the Hearing

H. **Decision**. After conclusion of the Hearing, the Administrative Law Judge will render a written decision as promptly as administratively feasible.

   i. **Chapter 30A Decision**. Decisions shall conform to the requirements of M.G.L. c.30A, §11(8), if applicable.

   ii. **Report and Recommendation**. For Construction Contract Appeals, the Administrative Law Judge, after a Hearing, shall render to the Secretary of Transportation a report of the matter, including a recommendation as to the disposition of the claim, in accordance with M.G.L. c.6C, §40.

APPENDIX A

STANDING ORDER 1-16
RE: SCHEDULING REQUIREMENTS

The following tracking deadlines shall be mandatory except as modified by the Administrative Law Judge. These tracking deadlines will be calculated from the date the Appeal is entered on the docket of the Office of the Administrative Law Judge.

0 days	A properly filed Notice of Appeal has been received by the Office of Administrative Law Judge and entered on the docket.
14 days	Entry of Department's Appearance
30 days	Appellant's Position Paper
60 days	Department's Position Paper
75 days	Appellant's Reply
90 days	All Pre-Hearing Motions Filed All Discovery Requests Served and Completed
120 days	All Pre-Hearing Issues Resolved Firm Hearing Date Set

APPENDIX B

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

Ten Park Plaza, Suite 6620
Boston, MA 02116
(857) 368-9495

STATEMENT OF CLAIM

Effective: January 1, 2014

1. Name of contractor: _____

Address of contractor: _____

Contract number: _____ Award amount: $ _____

Date of award: _____ Claim amount: $ _____

City/Town where project is located: _____ Highway District: _____

2. Please attach and label as exhibits, the following:

Your initial claim in writing to the district. (Ex. 2A)
The "itemized statement" as required under subsection 7.16. (Ex. 2B)
The District determination letter. (Ex. 2C)
The Claims Committee determination letter. (Ex. 2D)
A list of all claims under this Contract. (Ex. 2E)
A list of all claims from this Contract filed in any court. (Ex. 2F)

3. Have liquidated damages been assessed? (yes/no) _____

4. Please provide a detailed factual narrative of your claim. Include specific dates, actions, and the reasons why you were injured or damaged by MassDOT.

_____

_____

_____

5. Please explain, point-by-point, why you contend the Claims Committee determination is not correct. You must provide specific reasons addressing each ground for denial stated by the Claims Committee.

_____

_____

6. Please attach a copy of each contract specification that supports your contentions on appeal, including special provisions, plans, or drawings.

_____

_____

7. Please identify each statute, decision, or legal ground which substantiates your contentions on appeal.

_____

_____

8. Print the name of the authorized agent managing this appeal: _____

Telephone: _____

Street: _____

City, State, Zip: _____

Contractor's signature or signature of authorized agent:

Date: _____ _____

NOTICE

YOU MUST FILE A COPY OF THE COMPLETED STATEMENT OF CLAIM, INCLUDING ALL ATTACHMENTS AND EXHIBITS, AT MASSDOT, OFFICE OF THE GENERAL COUNSEL, 10 PARK PLAZA, SUITE 3510, BOSTON, MA 02116.

AN INCOMPLETE STATEMENT OF CLAIM MAY BE REJECTED.

Massachusetts Department of Transportation Highway Division Standard Operating Procedures			S.O.P. No. ALJ-01-01-2-000 Page 1 of 6
Subject: Direct Payment Demands			Distribution:
Effective: 11/1/16	Issued: 11/1/16	Supersedes:	Authorized: Albert Caldarelli (signature on original)

I. PURPOSE

To establish procedures for handling direct payment demands made on the Department pursuant to M.G.L. c.30, §39F.

II. SCOPE

These procedures govern the evaluation and disposition of demands for direct payment made on the Department pursuant to M.G.L. c.30, §39F.

III. DEFINITIONS

A. **Administrative Law Judge**. The hearing examiner appointed pursuant to M.G.L. c. 6C, §40.

B. **Department**. The Massachusetts Department of Transportation established pursuant to M.G.L. c. 6C.

C. **Direct Payment Demand**. A demand for direct payment made on the Department by a subcontractor pursuant to M.G.L. c.30, §39F.

D. **General Contractor**. A person awarded a contract by the Department pursuant to sections forty-four A to L, inclusive, of chapter one hundred and forty-nine, or pursuant to section thirty-nine M of chapter thirty.

E. **Subcontractor**. Defined in M.G.L. c.30, §39F(3) as follows:

1. for contracts awarded as provided in sections forty-four A to forty-four H, inclusive, of chapter one hundred forty-nine shall mean a person who files a sub-bid and receives a subcontract as a result of that filed sub-bid or who is approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor,
2. for contracts awarded as provided in paragraph (a) of section thirty-nine M of chapter thirty shall mean a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor, and
3. for contracts with the commonwealth not awarded as provided in forty-four A to forty-four H, inclusive, of chapter one hundred forty-nine shall also mean a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.

IV. RECEIPT OF DIRECT PAYMENT DEMANDS

A. **Receipt**. The Department's Chief Financial Officer, through his/her Director of Accounts Payable, is designated to receive all direct payment demands made on the Department.

B. **Initial Intake**. The Director of Accounts Payable shall record the date of the Department's receipt of the direct payment demand and other pertinent information, including the name and address of subcontractor, name and address of general contractor, the Department contract, location of project, federal aid number (if applicable), the amount claimed due under the subcontract, and whether the demand is by a subcontractor or a material supplier.

C. **Lien on Payments to General Contractor**. Upon receipt of the direct payment demand, the Director of Accounts Payable shall place a lien in the amount of the demand on contract payments due the general contractor. The lien shall remain until a determination is made by the Administrative Law Judge on the merits of the demand.

D. **Contractor's Reply to the Demand**. The Director of Accounts Payable is designated to receive any reply from the general contractor made pursuant to M.G.L. c.30, §39F.

E. **Referral to ALJ**. After initial intake, the direct payment demand and any reply by the general contractor shall be referred to the Administrative Law Judge for a determination on the merits of the demand.

V. EVALUATION OF DIRECT PAYMENT DEMANDS

A. **Evaluation**. The Administrative Law Judge is responsible for the evaluation and disposition of all direct payment demands received by the Department.

B. **Formal Requirements of Section 39F**. The demand will be reviewed for compliance with statutory procedures, such as proof of timely delivery to the general contractor, a sworn statement, a statement of the status of completion of the subcontract work, and a detailed breakdown of the balance due under the subcontract.

C. **Substantive Review.** The demand will be reviewed on the merits, including whether the subcontract work has been substantially completed, whether the Department has paid the general contractor for such subcontract work, whether the general contractor has failed to make timely payment to the subcontractor for such work, whether the Department is retaining any of the balance due under the subcontract as a result of incomplete or unsatisfactory items of work, and whether the general contractor has disputed such amounts in its sworn reply.

D. **Replies.** Any reply from the general contractor will be reviewed for compliance with statutory requirements.

E. **Consultation with District and Construction Staff**. In making evaluations and determinations on direct payment demands, the Administrative Law Judge shall consult with district and construction staff concerning the status of the project and the subcontract work described in the demand, including but not limited to:

1. Whether the subcontractor was approved in writing to perform the sublet work.
2. Whether the subcontractor substantially completed the work, and if so, the date of substantial completion.
3. Whether the subcontract work was inspected and approved for payment.

4. Whether the District intends to file a claim against the general contractor for defective or incomplete work performed by the subcontractor.

F. **Determination.** The Administrative Law Judge shall make a timely determination on the direct payment demand. The determination shall be in writing, which may be in the form of a memorandum to the Director of Accounts Payable, with copies to the subcontractor and general contractor.

G. **Department Distribution.** A copy of the determination shall be sent to the Chief Engineer, Deputy Chief Engineer for Construction, and the District Highway Director overseeing the project.

VI. DISPOSITION

A. **Denied**. When a direct payment demand is denied, the Department shall take no further action with respect to the demand. In such case, the Director of Accounts Payable shall also remove any lien on payments to the general contractor.

1. **Without Prejudice.** If a direct payment demand is denied without prejudice, the subcontractor may refile a new demand that remedies any procedural or substantive issue(s) which formed the basis of the denial.
2. **With Prejudice.** If a direct payment demand is denied with prejudice, such denial is final and binding.

B. **Approved.** When a direct payment demand is approved, the Department shall make the direct payment to the subcontractor out of amounts payable to the general contractor at the time of receipt of the demand and out of amounts which later become payable to the general contractor. The Director of Accounts Payable shall complete any necessary financial documentation to effectuate the direct payment.

C. **Amounts Disputed by General Contractor**. When a determination is made to deposit amounts disputed by the general contractor in an interest-bearing joint account as provided in G.L.c.30, §39F(1)(f), the Department shall proceed in accordance with Section VII below entitled "Depositing Disputed Amounts."

VII. DEPOSITING DISPUTED AMOUNTS

A. **Policy.** It is the Department's policy to deposit disputed amounts in an interest-bearing joint account in a bank agreed upon by the general contractor and the subcontractor as provided in G.L.c.30, §39F(1)(f), and not in a bank selected by the Department.

B. **Process.** The Department shall take the following actions to ensure timely deposit of disputed amounts in an interest-bearing joint account:

1. **Notice:** Notify the general contractor and subcontractor in writing that the Department will deposit the disputed amount in an interest-bearing joint account in the names of both the general contractor and the subcontractor in a Massachusetts bank agreed upon by the general contractor and the subcontractor, and request bank

and account information. This notice and request will be satisfied as part of the determination issued by the Administrative Law Judge, a copy of which will be provided to the general contractor and the subcontractor.

2. **Joint Check:** To ensure a timely deposit, upon receipt of the determination, the Director of Accounts Payable will process required financial documentation for issuance of a check in the disputed amount payable jointly to the general contractor and the subcontractor for deposit in the interest-bearing joint account in the bank agreed upon by the general contractor and the subcontractor.
3. **Second Notice:** If the bank and account information is not received within 30 days, the Department will provide a second notice in writing, including a copy of the joint check, to the general contractor and the subcontractor. The notice will reiterate that the Department is prepared to deposit the disputed amount forthwith in the interest-bearing joint account in the bank agreed upon by the general contractor and the subcontractor. The notice shall also advise the general contractor and the subcontractor of the requirements of G.L. c.29, §32. The second Notice shall be in the form provided at Exhibit A.
4. **Depositing Joint Check:** The Department shall provide the joint check to the general contractor and the subcontractor for deposit in accordance with c.30, §39F upon receipt of appropriate supporting documentation evidencing the joint account and/or pursuant to an agreement between the general contractor and the subcontractor concerning the matter.
5. **Release and Discharge of Obligations**: Prior to releasing the joint check, the Department may require execution of a release. See form provided at Exhibit B.

EXHIBIT A
DEPOSITING DISPUTED AMOUNTS
SECOND NOTICE

Date

To: General Contractor
Address
_____
_____

Subcontractor
Address
_____
_____

Subject: **Demand for Direct Payment**
MassDOT Contract #
Ruling of the Administrative Law Judge dated _____

Dear:

In the above referenced ruling, the Administrative Law Judge determined that the Massachusetts Department of Transportation is obligated to deposit disputed amounts into an interest bearing joint account as provided in M.G.L. c.30, §39F(1)(f). The deposit must be made into "an interest-bearing joint account in the names of both the general contractor and the subcontractor in a bank in Massachusetts selected by the awarding authority or agreed upon by the general contractor and the subcontractor …"

MassDOT elects to deposit the disputed amount into a joint account in a bank agreed upon by the general contractor and the subcontractor. To expedite the deposit, MassDOT has issued a check (copy enclosed) payable jointly to the general contractor and the subcontractor. The parties should contact my office to provide documentation of their agreement and make arrangements to pick up the original check for deposit in the bank upon which they have agreed.[1]

I can be reached at _____.

Sincerely,

[1] The parties should be aware of the requirements of G.L. c.29, §32: "Any check issued by the state treasurer or by any agent or agency of the commonwealth … , which is not presented for payment within 1 year after its issue date, shall be payable only at the office of the state treasurer …. Annually, on June 30, the comptroller shall transfer to the Unclaimed Property Fund, established in section 9 of chapter 200A, all funds that are identified by the state treasurer as funds of the commonwealth that have remained in the unclaimed check fund for not less than 1 year."

EXHIBIT B

RELEASE AND DISCHARGE OF OBLIGATIONS
PURSUANT TO M.G.L. c.30, §39F

Subcontractor:
Contractor:
Contract: #
City/Town:
Amount: $

The above-referenced Contractor and Subcontractor (jointly, "the Parties") hereby agree and acknowledge the following:

1. On the date below, the Parties took possession of a joint check issued by the Commonwealth of Massachusetts payable to the Parties (check #_____).

2. Said check constitutes a "direct payment" as defined in M.G.L. c.30, §39F and is being provided by the Massachusetts Department of Transportation ("MassDOT") pursuant to that statute for deposit into an interest bearing joint account in the names of the general contractor and the subcontractor in a bank agreed upon by the general contractor and subcontractor.

3. In accordance with G.L. c.30, §39F, this direct payment shall discharge the obligation of MassDOT to the Contractor to the extent of such payment.

4. The Subcontactor hereby releases MassDOT from any and all claims for direct payment for subcontract work performed on the above-referenced contract.

_____ _____
print name: print name:

General Contractor Subcontractor

Date: _____