



**OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE**

2017 REPORT

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE**

2017 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 2017.

In summary, the following matters were handled in calendar year 2017:

- Two (2) 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. One (1) appeal is pending a hearing.
- Fourteen (14) 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 resolved by stipulation of dismissal filed by the appellant.
- Two (2) new contractor appeals from DBE decertification proceedings initiated by the Supplier Diversity Office were filed in this Office. They were stayed pending the Secretary's appointment of members to fill two vacancies on the Board. Three (3) appeals were remanded to SDO for further review and action in accordance with the requirements of 49 CFR Part 26, Subpart D. Two (2) ruled on by the Massachusetts Unified Certification Program Adjudicatory Board.

- The Secretary of Transportation designated the Office of the ALJ to hear an adjudicatory appeal of electronic toll violations pursuant to 700 CMR 7.05(5)(c). The appeal is pending a hearing.

In addition, the Office addressed in the following administrative tasks:

- Adjudicatory appeals of fare violation citations pursuant to M.G.L. c.159, §101(c)
 - Development and support of MBTA's proposal to transition adjudicatory appeals from the MBTA Police to the Office of the ALJ.
 - A trial period for hearings before the ALJ is targeted for early 2018.
- Implemented new docket appeal tracking system.
- Continued to make updates/improvements to ALJ Webpage, including accessibility compliance

Construction Contract Appeals

In 2017, the following construction contract appeals were pending and/or resolved by rulings on the merits in accordance with M.G.L. c. 6C §40 and Division I §7.16 of the Standard Provisions.

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 assignment to and hearing by another hearing officer.

Appeals resolved by Report and Recommendation to the Secretary

MIG Corporation #1-72259-001

This appeal concerned a claim in the amount of \$24,000.00 for additional work related to safety controls for construction operations. After hearing, this Office recommended that the contractor be paid \$23,200 for providing traffic setups over 29 days at the contract unit price of \$800.00 per day.

MIG Corporation #4-68187-005

This appeal concerns a claim in the amount of \$116,501.19 for additional work related to concrete repairs on the underside of an existing bridge structure. After hearing, this Office recommended that the claim be denied because the contract expressly required the contractor to repair deteriorated concrete on the underside of the bridge.

Direct Payment Demands

In 2017, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

LM Heavy Civil Construction – October 5, 2017

General Contractor: Massachusetts Coastal Railroad
Contract: #81199 – Management of Railroad Capital Improvements
Amount: \$209,156.00
Decision: Denied – October 24, 2017

EBI Consulting – October 23, 2017

General Contractor: LM Heavy Civil Construction
Contract: #MBTA Contract #B64CN01 - Repair/Rehabilitation of Merrimack and Washington Street Bridges, Haverhill, MA
Amount: \$126,778.49
Decision: Denied – October 17, 2017

Vigil Electric Company – August 30, 2017

General Contractor: MDR Construction Co.
Contract: #81501 – Andover-Tewksbury / Dascomb Rd. and East St.
Amount: \$35,658.97
Decision: Denied – September 27, 2017

Liddell Bros. Inc. – August 23, 2017

General Contractor: SPS New England
Contract: #76862 – Lexington / Route 2 over I-95
Amount: \$18,502.07
Decision: Denied in part
Deposit Disputed Amounts to Joint Account – September 14, 2017

Liddell Bros. Inc. – August 23, 2017

General Contractor: SPS New England
Contract: #79743 – Boston / Bowker Overpass
Amount: \$18,750.00
Decision: N/A – August 30, 2017
(Subcontract Balance Due was Paid by General Contractor)

Liddell Bros. Inc. – August 23, 2017

General Contractor: SPS New England
Contract: #80370 – Chatham / Bridge Street Over Mitchell River
Amount: \$3,318.82
Decision: N/A – August 30, 2017
(Subcontract Balance Due was Paid by General Contractor)

T.L. Edwards, Inc. – July 7, 2017

General Contractor: Pavao Construction Company, Inc.
Contract: #78954 – District 5 / ADA Improvements and Upgrades
Amount: \$61,738.61
Decision: Denied – August 3, 2017

General Mechanical Contractors Inc. – June 30, 2017

General Contractor: Barr & Barr Inc.
Contract: #87589 - Research & Material Lab / South Boston
Amount: \$20,117.73
Decision: Denied – July 28, 2017

Dagle Electric Construction Corp. – April 20, 2017

General Contractor: Pavao Construction Company, Inc.
Contract: #75586 – Route 9 at Oak Street / Natick-Wellesley
Amount: \$74,979.56
Decision: Allowed – June 8, 2017

Dagle Electric Construction Corp. – April 20, 2017

General Contractor: Pavao Construction Company, Inc.
Contract: #73147 – Western Ave.-Safe Routes / Easton
Amount: \$2,662.58
Decision: Denied – April 28, 2017

Liddell Brothers, Inc. – April 21, 2017

General Contractor: Cardi Corporation
Contract: #84977 – I-95 SB to I-295 SB / Attleboro
Amount: \$2,771.00
Decision: Allowed – April 26, 2017

EJ USA, Inc. – March 9, 2017

General Contractor: Pavao Construction Company, Inc.
Contract: #78954 – District 5 / ADA Improvements and Upgrades
Amount: \$12,805.46
Decision: Allowed – April 20, 2017

Liddell Brothers, Inc. – March 13, 2017

General Contractor: Cardi Corporation
Contract: #84977 – I-95 SB to I-295 SB / Attleboro
Amount: \$108,338.90
Decision: N/A – Moot, Revised Demand Submitted April 21, 2017

Superior Sealcoat, Inc. – December 20, 2016

General Contractor: Pavao Construction Company, Inc.
Contract: #75586 – Route 9 at Oak Street / Natick-Wellesley
Amount: \$58,670.50
Decision: Allowed, in part – January 23, 2017

Outdoor Advertising Appeals

In 2017, the following appeal from the denial of an outdoor advertising permit was heard in accordance with 700 CMR 3.19.

Cove Outdoor LLC – Electronic Billboard Permit #2015D016

This was an appeal from the Office of Outdoor Advertising's Denial of an Electronic Billboard Permit. After completion of motion practice, a site viewing, and discovery, the appeal was scheduled to be heard on March 31, 2017. A Stipulation of Dismissal was filed by the Appellant prior to the Hearing.

Massachusetts UCP Board Appeals

In 2017, the Massachusetts Unified Certification Program Adjudicatory Board received the following contractor appeals from DBE decertification proceedings initiated by the Supplier Diversity Office.

Appeals Pending

Supplies Exchange Systems MUCP #2017-0001

Supplies Exchange Systems requested a hearing before the Board to appeal a determination by the Office of Supplier Diversity to initiate decertification proceedings. On June 22, 2017, the Board stayed all proceeding pending the Secretary of Transportation's appointment of members to fill two vacancies on the Board.

Aurora Engineers Inc. MUCP #2017-0002

Aurora Engineers Inc. requested a hearing before the Board to appeal a determination by the Office of Supplier Diversity to initiate decertification proceedings. On October 3, 2017, the Board stayed all proceeding pending the Secretary of Transportation's appointment of members to fill two vacancies on the Board.

Administrative Issues / Vacancies on the Board

In 2017, MassPort's member to the Massachusetts Unified Certification Program Adjudicatory Board, Mr. Albert Dalton, resigned effective May 31, 2017 due to his retirement from MassPort.

Also, in 2017, MassDOT's member, Mr. Miguel Fernandes, resigned due to potential conflicts of interest as a result of a reorganization of responsibility for the MUCP from the Office of Supplier Diversity to MassDOT's Office of Diversity and Civil Rights.

As a result of the above resignations, there are two vacancies on the Board. A request was send from the Board to MassPort by letter dated May 18, 2017 requesting that MassPort nominate a replacement member. To date, the vacancies remain.

Appeals of Electronic Toll Violations

In 2017, Secretary of Transportation designated the Office of the ALJ to hear an adjudicatory appeals of electronic toll violations pursuant to 700 CMR 7.05(5)(c).

Appeals Pending

Appeal of Electronic Toll Violations by EJT Management Inc.

By Memorandum dated October 25, 2017 (including attachments), MassDOT recommended to the Secretary that the Administrative Law Judge hear “a request for an adjudicatory appeal by EJT Management of toll charges that were issued to them as the registered owner of certain taxi cabs that operate on MassDOT’s toll roads.” The recommendation was approved by the Secretary on December 1, 2017. The appeal is pending a hearing.

Appeals of MBTA Fare Violation Citations

In 2017, the MBTA proposed a revision to the current adjudicatory appeal procedure governed by M.G.L. c.159, §101(c). During the calendar year, the Office of the ALJ worked with MBTA and MBTA Transit Police to develop and support MBTA's proposal to transition adjudicatory appeals from the MBTA Police to the Office of the ALJ.

A trial period for hearings before the ALJ is targeted for early 2018.

APPENDIX OF DECISIONS/RULINGS

A. Construction Contract Appeals A-1

Report and Recommendation: MIG Corporation #1-72259-001

Report and Recommendation: MIG Corporation #4-68187-005

B. Direct Payment Demands B-1

Ruling, Direct Payment Demand of LM Heavy Civil Construction, October 24, 2017

Ruling, Direct Payment Demand of EBI Consulting, October 17, 2017

Ruling, Direct Payment Demand of Vigil Electric Company, September 27, 2017

Ruling, Direct Payment Demand of Liddell Bros. Inc., September 14, 2017

Ruling, Direct Payment Demand of Liddell Bros. Inc., August 30, 2017

Ruling, Direct Payment Demand of Liddell Bros. Inc., August 30, 2017

Ruling, Direct Payment Demand of T.L. Edwards, Inc., August 3, 2017

Ruling, Direct Payment Demand of General Mechanical Contractors Inc., July 28, 2017

Ruling, Direct Payment Demand of Dagle Electric Construction Corp., June 8, 2017

Ruling, Direct Payment Demand of Dagle Electric Construction Corp., April 28, 2017

Ruling, Direct Payment Demand of Liddell Brothers, Inc., April 26, 2017

Ruling, Direct Payment Demand of EJ USA, Inc., April 20, 2017

Ruling, Direct Payment Demand of Liddell Brothers, Inc., April 21, 2017

Ruling, Direct Payment Demand of Superior Sealcoat, Inc., January 23, 2017

C. Outdoor Advertising Appeals C-1

ALJ Appeal Docket – Denial of Outdoor Advertising Permit #2005D016

Notice of Dismissal, April 12, 2017

*Memorandum and Order on Standard of Review, Appeal of Cove Outdoor LLC,
December 14, 2016*

*Memorandum and Order on Motion to Quash, Appeal of Cove Outdoor LLC,
November 23, 2016*

D. Mass. UCP Adjudicatory Board Appeals..... D-1

Scheduling Order, In the Matter of Supplies Exchange Systems, MUCP #2017-0001

Notice of Hearing, In the Matter of Supplies Exchange Systems, MUCP #2017-0001

Notice and Scheduling Order, In the Matter of Aurora Engineers, MUCP #2017-0002

Resignation Letter of Mr. Albert Dalton, dated May 15, 2017

Correspondence to MassPort regarding Board Vacancy, dated May 18, 2017

E. Appeal of Electronic Toll Violations..... E-1

ALJ Appeal Docket –Appeal of Electronic Toll Violations by EJT Management

Designation and Assignment by Secretary of Transportation - 700 CMR 7.05(5)(c)

F. Appeal of MBTA Fare Evasion Citations..... F-1

MBTA Fare Adjudication Proposal, dated October 10, 2017

M.G.L. c.159, §101

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

To: Stephanie Pollack, Secretary & CEO
From: Jamey Tesler, Assistant Secretary
Date: June 19, 2017
Re: **Report and Recommendation on Appeal of MIG Corp.
From the Chief Engineer's Denial of Claim #1-72259-001**

I am submitting for your consideration the attached report and recommendation.

I was designated to hear this appeal because the Administrative Law Judge was required to recuse himself because of his involvement in the claim prior to his appointment.

MIG Corporation is the general contractor on Contract #72259 ("Contract") providing for Scheduled and Emergency Bridge Deck Repairs at Various Locations in District 1. This matter concerns a claim requesting \$23,200.00 for providing traffic setups over 29 days at the contract unit price of \$800.00 per day.

On April 20, 2017, I conducted a hearing and I am recommending that MIG's appeal be allowed.

Approved Not Approved

Stephanie Pollack, Secretary & CEO

dated: _____

Report and Recommendation
Appeal of MIG Corporation
Regarding Chief Engineer's Decision
to Deny Claim #1-72259-001

Procedural Background

- 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.
- By letter dated February 13, 2014, the Chief Engineer made a written determination to deny a claim by MIG Corporation ("MIG") requesting \$23,200.00 for providing traffic setups over 29 days at the contract unit price of \$800.00 per day, a.k.a. Claim #1-72259-001 ("Claim"). On March 26, 2014, MIG 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 August 24, 2015, the Administrative Law Judge recused himself from hearing this appeal because prior to his appointment, he represented the Department and participated in Department decisions concerning the substantive issues in the appeal.
- I was designated to hear this appeal. On April 20, 2017, I conducted a hearing. Mr. David Kerrigan, Esq. represented MIG, and Mr. Robert Voghel, President and Chief Operations Officer, and Mr. Heath Kelly, Supervisor, offered testimony on MIG's behalf. The Department was represented by Mr. Owen Kane, Senior Counsel. The Department's witnesses were Mr. Scott Stevens, District 1 Assistant Construction Engineer, and Mr. Anthony Vona, Resident Engineer.
- The parties introduced the following exhibits at the hearing:

MassDOT Exhibit 1: Correspondence dated September 18, 2013 from Peter A. Niles, MassDOT District Highway Director to Larry Gordon, Area Manager, MIG Corporation.

MassDOT Exhibit 2: Page from Resident Engineer's notebook, dated June 4, 2013.

MIG Exhibit 1: Standard Specification, Section 850 "Traffic Controls for Construction Maintenance Operations."

MIG Exhibit 2: 2010 Supplemental Specifications, Section 850 "Traffic Controls for Construction Maintenance Operations."

MIG Exhibit 3: Special Provisions for Contract 72259.

MIG Exhibit 4: Transmittal dated April 10, 2013 from Peter A. Niles, MassDOT District Highway Director to Donald Voghel, President, MIG Corporation, with enclosure (Scope #03-13 Lee-US 20 Laurel St. over Housatonic River, Bridge No. L-5-11, Joint Repair).

MIG Exhibit 5: MIG Corporation Daily Field Reports, various dates.

Factual Background

- This claim by MIG Corporation (Contractor) arises out of MassDOT Contract #72259 (see MIG Exhibit 3), which provides for Scheduled and Emergency Bridge Deck Repairs at Various Locations in District 1.
- In accordance with the Contract and the Highway Department Standard Specifications for Highways and Bridges, as amended in 2010 (see MIG Exhibit 2), the Contractor is to be compensated for work performed based on unit prices that were bid under specific categories in the Standard Specifications (see MIG Exhibit 3 for Special Provisions related to Contract #72259).
- One of the unit prices in the Contract is Item #850.21 “Safety Controls for Construction Operations”. The Contractor bid \$800 per day for this item of work, which is described in the Contract as follows:

Safety Controls for Construction Operations consists of furnishing, positioning, repositioning, maintaining and removing, as needed and/or as directed: traffic cones, warning devices, special apparel, etc. high level warning devices, delineators, floodlights, Type I and II barricades, portable flashing and steady burning lights, hand signal devices, lanterns, and pilot cars.

The work consists of providing daily lane closures for purposes of safely directing traffic, by approved methods, away from and/or through areas affected by the contractor’s operations. The work shall be done in accordance with the Traffic Management Plan or as directed by the Engineer. This item does not include those specific devices for which payment is made under other contract items.

- On April 10, 2013, MassDOT directed the Contractor to complete joint repairs on a bridge in Lee, MA, which is detailed in Scope #03-13. (See MIG Exhibit 4).
- On June 28, 2013, Contractor provided written notice of a claim for additional compensation pursuant to Item #850.21 with respect to the project in Lee. See Exhibits 4A through 4F of MIG’s Statement of Claim.
- Contractor seeks compensation for 29 days in 2013: April 23, 24, 25, 29, 30 and May 1, 2, 3, 6, 7, 8, 9, 13, 14, 29, 30, 31 and June 3, 4, 5, 6, 7, 12, 17, 20, 21, 24, 25, and 26. Accordingly, the Contractor seeks additional compensation in the amount of \$23,200.00, which is \$800 per day based on the bid price for Item 850.21. (See Testimony of Mr. Kelly, Hearing Transcript Pages 30-48).
- The Contractor stated in a letter dated June 28, 2013 that it was required “to alternate one-way traffic and provide three police details”, then remove this setup

and reinstate two-way traffic each evening during the 29 days in question (see Exhibit 4 to MIG's Statement of Claim; also see testimony of Mr. Voghel, Hearing Transcript Page 17).

- The initial Traffic Management Plan (TMP) that the Department provided to MIG in Scope #03-13 called for two lanes of traffic to be open at all times. (See MIG Exhibit 4 and Testimony of Robert Voghel, Hearing Transcript pages 19-22).
- Both the Contractor and MassDOT acknowledge that the TMP was modified to require one lane during portions of the day. (See Testimony of Robert Voghel, Hearing Transcript pages 23-24). No document has been identified, from either the Contractor or MassDOT, which contains a contemporary record of this modification. (See Testimony of Mr. Vona, Hearing Transcript Page 130). In addition, there is no factual dispute that the traffic setup took place on the 29 days identified by Contractor.
- The parties have opposing positions regarding the purpose of the changes to the TMP. Specifically, MassDOT claims that the changes were for the "convenience" of the Contractor's work (see MassDOT Exhibit 1), while the Contractor claims that the change was for "safely directing traffic" as required by Item 850.21.
- Mr. Voghel testified that keeping two lanes open would have been "very dangerous." (Testimony of Robert Voghel, Hearing Transcript page 24). Mr. Kelly also testified that this traffic modification was made after discussion with MassDOT. (Testimony of Mr. Kelly, Hearing Transcript pages 25-26). Resident Engineer Vona testified that the change in traffic setup was for MIG's "convenience" and, as a result, not compensable under item 850.21. (Testimony of Mr. Vona, Hearing Transcript Page 89). Mr. Vona also stated that MIG was informed of this position in September 2013. (Testimony of Mr. Vona, Hearing Transcript Page 89). Additionally, Mr. Stevens stated that the purpose of the one lane setup was "mixed" meaning both for the Contractor's convenience as well as the safety of the personnel on the site. (Testimony of Mr. Stevens, Hearing Transcript Pages 96-97).
- Both the Contractor and MassDOT agree that signs and drums were used for this traffic setup and, notably, compensated under different pay items. A factual dispute, however, exists regarding the use of cones. Mr. Kelly testified that cones were required as part of the traffic setup on all 29 days. (See Testimony of Mr. Kelly, Hearing Transcript Page 27). By contrast, MassDOT noted in its September 18, 2013 that cones were deployed on 6 days between April 23 and May 1 (MassDOT Exhibit 1); and Mr. Vona testified that he expressly advised Contractor that he considered their use to be for the Contractor's convenience and not compensable. (Testimony of Mr. Vona, Hearing Transcript Page 89; also see Testimony of Mr. Vona, Hearing Transcript Page 102).
- There are notes in the Resident Engineer's notebook dated June 4 that reference cones being present on that day and also noting that none had been present prior. (MassDOT Exhibit 2; also see Testimony of Mr. Vona, Hearing Transcript

Page 104). The notes also state that the Contractor was informed that these cones would not warrant payment under Item 851.

- In response to questions, Mr. Vona was unclear as to the timing of these conversations and the use of cones. Mr. Vona stated the only conversation about cones was on June 4 and after further questions confirmed this. Testimony of Mr. Vona, Hearing Transcript Page 117-122. At another time, Mr. Vona acknowledged that cones were present on some dates in April and May. Testimony of Mr. Vona, Hearing Transcript Page 118-122.
- Both parties acknowledge that the use of cones, if required by the TMP, would not be compensated under Item 852 (Signing) and Item 859 (Reflectorized Drum) and would be compensated under Item 851.

Decision

- Conflicting testimony was presented at the hearing as to why was the TMP altered in April 2013. I found that neither party offered convincing evidence for its position. What is known is:
 - 1) MassDOT agreed in April 2013 to a change in the TMP from the initial TMP – this was not a unilateral change by the Contractor;
 - 2) The Contractor implemented the one-way traffic setup during the day for the time period in question;
 - 3) There is no contemporaneous record showing that the reason for the TMP change was for the Contractor’s convenience; and
 - 4) There is no record showing that the Contractor was advised in April 2013, when the TMP was changed, that it could not use cones or that the traffic setup would not be compensated under Item 850.21.

In such circumstances, I find that the Contractor had a reasonable expectation in April 2013 that it would be compensated under Item 850.21 for the TMP change.

- There is no meaningful dispute that the traffic setup took place on 29 days in the spring of 2013. Although the exact details concerning the setup are not clear, the Contractor did perform some level of effort to maintain the lane closure on the 29 days in question. I conclude that this work is within the scope of Item 850.21, which provides that the Contractor should be paid at a daily rate for “furnishing, positioning, repositioning, maintaining, and removing” traffic cones and/or other traffic control devices required to maintain the traffic setup (unless compensated under other items, such as Item 852 signs and Item 859 reflectorized drums).
- Based on the testimony and evidence presented at the hearing, I accept the Contractor’s testimony that cones were used and required as part of the traffic setup on all 29 days in question.

- **For the reasons discussed above, I find that Contractor should be compensated under Item #850.21 in the amount of \$23,200 based on 29 days at the rate of \$800 per unit day.**

RECOMMENDATION

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

Respectfully submitted,

Jamey Tesler
Hearing Officer

Dated: 6/19/17

Approved by Secretary: 6/29/17



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

To: Stephanie Pollack, Secretary & CEO

From: Albert Caldarelli, Administrative Law Judge

Date: April 21, 2017

Re: **Report and Recommendation on Appeal of MIG Corp.
from the Chief Engineer's Denial of Claim #4-68187-005**

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

The attached addresses an appeal by MIG Corporation ("MIG"), who is the general contractor on contract #68187. The contract was part of the Accelerated Bridge Program and provided for reconstruction and widening of a concrete arch Bridge located on the Mystic Valley Parkway over Alewife Brook in the Towns of Arlington and Somerville.

The appeal involves a claim in the amount of \$116,501.19 for costs that MIG incurred to repair deteriorated concrete on the underside of the existing bridge structure. The claim was denied by the Chief Engineer by letter dated April 11, 2016. On March 9, 2017, I conducted a hearing on the appeal. After considering the facts and the legal arguments presented by the parties, I have determined that the contract expressly required MIG to repair deteriorated concrete on the underside of the existing bridge structure; therefore, there is no basis for entitlement to additional costs for performing that work.

For the reasons stated in the attached report and recommendation, I recommend that the contractor's appeal be DENIED.

Approved

Not Approved

Stephanie Pollack, Secretary & CEO

dated: _____

REPORT AND RECOMMENDATION
APPEAL OF MIG CORPORATION
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #4-68187-005

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 April 11, 2016, the Chief Engineer made a written determination to deny a claim by MIG Corporation ("MIG") requesting \$116,501.19 for costs incurred to repair deteriorated concrete as part of a project to reconstruct and widen an existing concrete arch bridge, a.k.a. Claim #4-68187-005 ("Claim"). On May 12, 2016, MIG 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.

The parties participated in a status conference on September 30, 2016 concerning the factual background, procedural issues and potential legal and factual issues to be heard. The parties also engaged in voluntary discovery and fully briefed their respective positions in pre-hearing and post-hearing submittals.

On March 9, 2017, I conducted a hearing on the appeal. Mr. David Kerrigan, Esq. and Mr. Sakib Khan, Esq. represented MIG, and Mr. Robert Voghel, President and Chief Operations Officer, offered testimony on MIG's behalf. The Department was represented by Ms. Alicia Murphy, Senior Counsel. The Department's witnesses were Mr. Scott Kelloway, District 4 Assistant Construction Engineer; Christopher Leahy, District 4 Area Engineer; Juan Taveras, Resident Engineer; and Frederik Wijnen-Riems, District 4 Project Controls.

The parties were given the opportunity to fully present their cases. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

I have considered the papers submitted by the parties and the evidence and testimony presented at the hearing. I make the following findings:

1. Bridge No. A-10-014=S-17-026 ("Bridge"), located on the Mystic Valley Parkway over Alewife Brook in the Towns of Arlington and Somerville, was originally constructed in 1908. It is an earth-filled reinforced concrete arch, 57 feet wide, with single traffic lanes and sidewalks.
2. On July 27, 2011, the Department and MIG entered into Contract #68187 ("Contract"), which provided for reconstruction and widening of the Bridge. The project is identified in the Special Provisions and other provisions of the Contract as part of the Accelerated Bridge Program (ABP), which was established to

finance and expedite repairs to structurally-deficient bridges in the Commonwealth.¹

3. In order to widen the Bridge, MIG was required to remove a portion of the existing structure on each side of the structure, including the arch, footings and concrete spandrel walls. MIG then had to construct new bridge elements onto the existing structure to increase the width of the Bridge.²
4. The Contract required that the new work maintain the “character-defining features of the bridge.” This meant that the concrete spandrel walls, concrete coping and end posts, and bridge railings had to be replicated in the new construction. Also, the construction of the new outer arches had to replicate the exterior appearance of the existing ring stones.³
5. The demolition and removal of the existing concrete bridge elements are detailed in Special Provision Item 115.1. The construction of the new bridge elements onto the existing structure is detailed in Special Provision Item 995.01.
6. The work was “separated into distinct phases” or stages.⁴

Stage 1 included the work required on the north side of the bridge, i.e., traffic control, demolition of north fascia arch, footings and spandrel walls, and construction of the new bridge elements on the north side.⁵ The notes on Contract Drawing Sheet 29 generally provide the following sequence of operations:

- 1) Install temporary concrete barrier to shift traffic lanes to south side of the bridge.
- 2) Remove existing pavement/sidewalk and excavate bridge backfill within work area on north side of bridge.
- 3) Demolish existing spandrel walls on north side of bridge along with 5’6” of existing footings and arch span.
- 4) Construct proposed footings, spandrel walls and arch span with associated fascia textures.
- 5) Repair concrete and/or rebar along exposed areas of arch, as necessary. (A “Composite Sectional” view on Sheet 29 shows the location of the repairs indicated by an arrow pointing to the top side of the arch).
- 6) Apply waterproofing membrane over new construction joint
- 7) Backfill work area

Stage 2 included the work required on the south side of the bridge, i.e., traffic control, demolition of south fascia arch, footings and spandrel walls, and

¹ St. 2008, c. 233.

² See Contract, Special Provisions, Scope of Work, *et seq.*

³ *Id.*

⁴ See Special Provision Item 115.1; Contract Drawings Sheets 29 and 30. *Also see* Voghel, Hr’g Tr. 26:13-43:24; Kelloway, Hr’g Tr. 158:10-159:22.

⁵ *Id.*

construction of the new bridge elements on the south side.⁶ For the south side, Contract Drawing Sheet 30 provided a similar sequence of operations as used in Stage 1.

7. To perform the work, MIG had to excavate and expose a minimum of 12 feet of the top side of the arch on both sides of the bridge.⁷ The earth above the 21.5 foot center section of the arch was to be left in place to maintain the stability of the arch.⁸
8. The Contract contains Special Provision Item 909.2 entitled “Cementitious Mortar for Patching,” which provides in part:

Work under this item shall consist of repairing deteriorated concrete at areas of the existing bridge structure as directed by the Engineer. Work shall include removal of unsound portions of concrete, furnishing and placing dowels, grout, and galvanized wire fabric, and placing new concrete to the repair area.

Materials

- 4000 psi Cement Concrete, with AASHTO No. 8 Coarse Aggregate

...

Construction Methods

All areas to be repaired will be determined in the field by the Engineer.

...

Basis of Payment and Method of Measurement

The work will be paid for at the contract unit price per square foot. Such compensation shall include the cost of all labor, equipment, materials and all incidentals needed for the satisfactory completion of the work.

9. For Item 909.2, the Contract contained an estimated quantity of 550 square feet. MIG’s bid price was \$88.00 per square foot. MIG performed 193.86 square feet of concrete patching and was paid a total of \$17,059.68 under Item 909.2.
10. In reference to the above specifications, the Contract also contained Detail Sheets that provided in part:

ALL ITEMS NOT COMPLETELY DESCRIBED AND LOCATED ON THE PLANS ARE TO BE DETAILED AS SHOWN BELOW.

...

ITEM 909.2 CEMENTIOUS MORTAR FOR PATCHING

For miscellaneous patching of underside of existing bridge arch

11. The material specified in Item 909.2, i.e., “4000 psi Cement Concrete, with AASHTO No. 8 Coarse Aggregate”, describes a type of concrete. Concrete consists of sand, cement and stone.⁹ Although this type of concrete is appropriate

⁶ *Id.*

⁷ Contract Drawings Sheets 29 and 30; *also see* Voghel, Hr’g Tr. 35:11-17.

⁸ *See* Contract Drawings Sheet 28; *also see* Kelloway, Hr’g Tr. 122:13-123:5; Voghel, Hr’g Tr. 123:17-19.

⁹ Voghel, Hr’g Tr. 72:24-25.

for vertical and top-down concrete repairs, it is not suitable for overhead patching because, among other things, the aggregate (or stone) restricts proper flow into the repair area and prohibits proper bonding to existing rebar and concrete.¹⁰ Mortar, which consists of sand and cement and contains no aggregate, is typically used for overhead patching applications.¹¹

12. MassDOT maintains a list of qualified products for use on MassDOT Highway Division construction contracts, referred to as the “Qualified Construction Materials List.” The list includes products approved for use as Concrete Repair Materials (Vertical & Overhead Application), none of which contains aggregate.¹²
13. The Department approved MIG’s proposal to use of a mortar product made by SIKA Corporation for all of the concrete patching required on the underside of the bridge arch.¹³ The SIKA product used for overhead patching was “more expensive” than the patching material specified in Item 909.2.¹⁴
14. MIG’s claim is in the nature of a total cost claim. It is supported by a cost breakdown and backup documentation showing that MIG incurred \$133,560.87 for the labor, equipment, materials, and subcontractor costs to perform concrete patching on the existing bridge arch. The claim amount of \$116,501.19 is arrived at by crediting \$17,059.68 paid to MIG by the Department pursuant to Item 909.2.¹⁵

DISCUSSION

This appeal turns on the meaning and scope of Special Provision Item 909.2. The Department contends that the scope of work described in Item 909.2 expressly includes patching of deteriorated concrete on the underside of the existing bridge arch. MIG counters that the Item cannot include such work because it would necessitate overhead patching, which is inconsistent with the type of material specified, the description of the work and the associated drawings.

I start with the plain language of Special Provision Item 909.2 and associated drawings.

1. The general description of the work states: “Work under this item shall consist of repairing deteriorated concrete *at areas of the existing bridge structure* as directed by the Engineer. Also, it generally refers to *the repair area*.”
2. Under the heading “Construction Methods”, the specification states: “*All areas to be repaired* will be determined in the field by the Engineer.”
3. Additionally, Detail Sheets are included which advise: “ALL ITEMS NOT COMPLETELY DESCRIBED AND LOCATED ON THE PLANS ARE TO BE DETAILED AS SHOWN BELOW . . . ITEM 909.2 CEMENTIOUS MORTAR FOR PATCHING *For miscellaneous patching of underside of existing bridge arch.*”

¹⁰ *Id.* at 67:9-73:25.

¹¹ *Id.* at 72:25-73:12.

¹² Exhibit 7; *also see* Voghel, Hr’g Tr. 74:14-21.

¹³ Voghel, Hr’g Tr. 117:6-23.

¹⁴ Voghel, Hr’g Tr. 73:13-20.

¹⁵ Exhibits 11 and 12.

4. Drawing 33 of 40 entitled “Miscellaneous Details” shows the requirements for concrete repairs. The detail for Reinforced Concrete Repair refers to “*existing concrete*,” and the detail for Concrete Repair Existing Reinforcement refers to “*areas with existing reinforcement*.”
5. Drawings 29 and 30, entitled “Sequence of Construction”, state at Note 5: “repair concrete and/or rebars along exposed areas of the arch, as necessary” and show an arrow pointing to the topside of the arch.

There is nothing in Item 909.2 or in the associated detail drawing that limits the areas of the existing bridge to which the Engineer may direct repairs. There is no language to differentiate between the overhead areas, topside areas, underside areas, or any other area of the existing bridge that might require repairs to deteriorating concrete. Beyond that, the Detail Sheets expressly state that the intent of Item 909.2 is to provide for “miscellaneous patching of underside of existing bridge arch.” When read in its entirety, the basic purpose of the contract scope is to discover and repair deteriorated concrete wherever located on the existing bridge structure. In this context, I find the information shown on Sheets 29 and 30 to be complementary to the special provisions, detail sheets, and detail drawings,¹⁶ all of which anticipate the need to perform concrete repairs to the existing bridge structure, including the underside of the arch.

Plain words are to be given their plain meaning.¹⁷ Where the Contract expressly provides for “miscellaneous patching of underside of existing bridge arch,” one cannot assume that the Department included that provision “aimlessly, with the intent that it might be ignored.”¹⁸ Given the stated purpose of the scope of work, I do not see how a contractor bidding to repair a structurally deficient bridge could plausibly read Item 909.2 to exclude concrete patching of the underside of the arch. MIG was obligated to submit a bid based on performance of “all the work required by such contract in conformity with the plans and specifications contained therein.”¹⁹ It was required, therefore, that MIG include the cost of all labor, equipment, materials and incidentals needed for the satisfactory completion of the work, including patching of underside of existing bridge arch, in its bid price for Item 909.2.

I reach this conclusion notwithstanding the convincing evidence presented by MIG that concrete patching of the underside of the existing bridge arch necessarily required overhead repairs and that “4000 psi Cement Concrete with AASHTO No. 8 Coarse Aggregate” cannot properly be used for overhead patching. In the face of clear language requiring MIG to perform “miscellaneous patching of underside of existing bridge arch,” I cannot rationally draw the conclusion that the specified material, albeit unsuitable for overhead patching, evidences a contractual intent to exclude all concrete patching of the underside of the bridge.

Contractors are entitled to damages which are the direct, logical and proximate result of a breach.²⁰ Although MIG makes a persuasive case that the Department breached its implied warranty as a result of a deficient material specification,²¹ its claim over-reaches. The elements

¹⁶ See Division I, §5.04.

¹⁷ *Forte v. Caruso*, 336 Mass. 476, 480 (1957).

¹⁸ *Rose-Derry Corp. v. Proctor & Schwartz*, 288 Mass 332, 337 (1934).

¹⁹ M.G.L. c. 30, §39I.

²⁰ J. Lewin & C.E. Schaub, Jr., *Massachusetts Practice - Construction Law* §6:47 at 450 (2014), citing *MacDonald v. Hawker*, 11 Mass. App. Ct. 869, 877 (1981); Williston on Contracts §1344 (3rd Ed.).

²¹ See *Coghlin Electrical Contractors, Inc. v. Gilbane Building Company and DCAMM*, 472 Mass. 549, 556 (2015), citing *U.S. v. Spearin*, 248 U.S. 132 (1918).

required for recovery on a total cost basis are not present in this case.²² The total cost incurred by MIG to repair deteriorated concrete on the existing bridge structure cannot constitute the direct, logical and proximate result of the breach when the contract expressly requires MIG to perform that work. If MIG incurred any increased costs to perform overhead repairs as a result of using different concrete patching material than specified, it failed to meet its burden to quantify and segregate such costs from those that should have been anticipated and included in its bid price for Item 909.2.

RECOMMENDATION

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

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: April 21, 2017

²² A contractor seeking to utilize the total cost method must prove: (1) the nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses. *See Central Ceilings, Inc. v. Suffolk Construction Company, Inc.*, 91 Mass. App. Ct. 231, 239 (2017), *citing Raytheon Co. v. White*, 305 F.3d 1354, 1366 (Fed. Cir. 2002).

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: October 24, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c.30, §39F**

Claimant: LM Heavy Civil Construction
 Contractor: Massachusetts Coastal Railroad, LLC
 Contract: #81199
 City/Town: Southeastern Mass Rail Lines, Barnstable, MA
 Amount: \$209,156.00

This direct payment demand (Demand) by LM Heavy Civil Construction (“LMH”) was filed with the Department on October 5, 2017.

FINDINGS

Based on my review of the Demand, the applicable contracts and input from MassDOT’s Rail and Transit Division, I make the following findings.

1. Pursuant to a License and Operating Agreement dated September 26, 2007, Mass Coastal Railroad, LLC (“MCRR”) is the exclusive operator of rail freight service over several active railroad corridors in Southeastern Massachusetts, and has responsibility to manage, operate, maintain and repair such lines.
2. In accordance with and subject to the License and Operating Agreement, MassDOT engaged MCRR to manage and oversee certain capital improvements to the railroad corridors. The engagement with MCRR is governed by MassDOT Contract #81199, which is a services contract.
3. On behalf of MassDOT, MCRR solicited bids for labor, equipment and materials to repair two culverts that failed along the railroad corridor (a.k.a “Project 15.11”). Pursuant to the solicitation, LMH was awarded a contract by MCRR to perform the repairs.
4. The Project 15.11 repairs were completed by LMH on December 12, 2016. MassDOT has paid MCRR for all costs related to LMH’s work on Project 15.11.
5. The Demand consists of a 2-page letter dated September 21, 2017 with a “detailed breakdown”:

Original	\$409,156.00
Change Orders	\$ 0.00
Total	<u>\$409,156.00</u>
Amount Paid to Date	\$200,000.00
Amount Due	<u>\$209,156.00</u>

6. The Demand states, in part:

We understand that LMH [sic] be owed more from Mass Coastal Railroad, LLC ... than the final payment they are due from MassDOT because they have not made all of the required payments to LMH despite their receipt of payments from MassDOT...

LMH demands direct payment from MassDOT as the awarding authority pursuant to Chapter 30, Section 39F of the Massachusetts General Laws in an amount up to and including **\$290,156.00** representing the cost of labor and materials provided to the project between December 1, 2016 and December 12, 2016. LMH completed its subcontract work on December 12, 2016 and has not been paid for more than 70 days.

7. The Demand contains a sworn statement by the Chief Executive Officer of LMH and was sent by certified mail to MassDOT (#7000 1530 0003 9506 4115) with a copy delivered to MCRR.
8. The Department did not receive a reply from MCRR.

RULING

Direct payment demands are available to subcontractors on public works contracts awarded “pursuant to sections forty-four A to L, inclusive, of chapter one hundred and forty-nine” and contracts “awarded pursuant to section thirty-nine M of chapter thirty.” In this case, the contracts governing the relationship between MassDOT and MCRR are (1) Contract #81199, a services contract; and (2) a License and Operating Agreement by which MCRR is to manage, operate, maintain and repair several active railroad corridors in Southeastern Massachusetts. Neither is a contract awarded in accordance with G.L. c. 149, §§44A-L or G.L. c. 30, §39M. Also, for purposes of G.L. c. 30, §39F, MCRR does not act as MassDOT’s general contractor when it provides procurement and construction management services pursuant to Contract #81199 or the License and Operating Agreement. MCRR, as exclusive rail freight operator, is providing expertise and specialized skills to MassDOT in the nature of professional services. *See, e.g.*, 801 CMR 21.02 (definition of “services”).

In the circumstances presented in this Demand, it is the contract awarded to LMH for the repair of the two culverts that is governed by G.L. c. 30, §39M (and therefore subject to G.L. c. 30, §39F). Capital improvements to railroad assets owned by MassDOT constitute “construction, reconstruction, alteration, remodeling or repair to any public work.” LMH, as the entity awarded the contract pursuant to G.L. c. 30, §39M, is the general contractor. The fact that the procurement process and contract payments are managed by the railroad on MassDOT’s behalf does not give LMH standing as a “subcontractor” as that term is defined in G.L. c. 30, §39F.

Finally, the detailed breakdown provided in the Demand is insufficient. It does not clearly set forth the information needed to demonstrate what work was done but remains unpaid. In that regard, the Demand fails to comply with the formal requirements of G.L. c.30, §39F(1)(b).

For the reasons stated above, the Demand is DENIED.

cc: LM Heavy Civil Construction, LLC
100 Hancock Street – Suite 901
Quincy, MA 02171

Mass Coastal Railroad, LLC
3065 Cranberry Highway, Unit 5
East Wareham, MA 02538

Astrid Glynn, MassDOT Rail & Transit Administrator



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: October 17, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c.30, §39F**

Claimant: EBI Consulting
Contractor: LM Heavy Civil Construction
Contract: MBTA Contract #B64CN01
City/Town: Haverhill / Barnstable
Amount: \$126,778.49

This direct payment demand (Demand) by EBI Consulting was filed with the Department on October 3, 2017.

FINDINGS

The Demand arises out of a contract between the MBTA and LM Heavy Civil Construction.

RULING

M.G.L. c. 30, §39F allows a subcontractor to demand direct payment from an awarding authority if, within seventy days after substantial completion, it has not received from the general contractor the balance due under the subcontract. In this case, EBI Consulting has not made a demand on the proper awarding authority, which is MBTA. To the extent that EBI demands direct payment from MassDOT, the Demand must be DENIED.¹

cc: LM Heavy Civil Construction, LLC
100 Hancock Street – Suite 901
Quincy, MA 02171

Thomas K. McCraw, Jr., Esq.
LeClairRyan
One International place, 11th Floor
Boston, MA 02110

Sean McDonnell, MBTA
Ann DePierro, MBTA

¹ Copies of the Demand and this Ruling are being provided to MBTA for information. Nothing in this Ruling should be construed in any way as a determination on the merits should EBI Consulting submit its Demand to the proper awarding authority in accordance with G.L. c. 30, §39F.



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: September 27, 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:	<u>\$ 3,491.97</u>
Subcontract Sum to Date:	\$120,491.97
Total Completed to Date:	\$120,491.97
Retainage:	\$ 0.00
Previously Paid:	<u>\$ 84,833.00</u>
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).
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 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. That amount of the Demand is not eligible for direct payment, and is therefore DENIED.

With respect to the balance of the Demand in the amount of \$32,167.00, the record before me supports a finding that MDR Construction Co. has failed to make payment of that amount to Vigil Electric Company as required G.L. c.30, §39F. Further, the Demand and the amount claimed were not disputed by the general contractor as no sworn Reply was made.

Although Vigil Electric Company is eligible to receive direct payment from the Department in the amount of \$32,167.00, 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 at this time 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, the Demand for direct payment must be DENIED.¹

cc:

Vigil Electric Company
72 Providence Street
Hyde Park, MA 02136

MDR Construction Co., Inc.
1693 Shawsheen Street
Tewksbury, 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: September 14, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c.30, §39F**

Claimant: Liddell Brothers, Inc.
Contractor: SPS New England
Contract: #76862
City/Town: Lexington / Route 2 over I-95
Amount: \$18,502.07

This direct payment demand (Demand) by Liddell Brothers Inc. was received by the Department on August 23, 2017.

FINDINGS

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

1. Liddell Brothers was an approved subcontractor on MassDOT Contract #76862 and performed work under various scope items related to traffic control.
2. The Demand consists of a cover letter dated August 9, 2017, a Sworn Statement by the President of Liddell Brothers, copies of the subcontract and purchase order agreements between Liddell Brothers and SPS New England, statements and invoices, and a detailed breakdown indicating a balance due under the subcontract and purchase orders of \$18,502.07. I find that the Demand complies with the formal requirements of G.L. c.30, §39F.
3. A copy of the Demand was received by the general contractor SPS New England.
4. SPS New England submitted a Reply dated August 21, 2017 and a supplemental Reply dated August 22, 2017, within the required time period provided in G.L. c.30, §39F(d). The Replies contain sworn statements by the CEO of SPS New England. They also contain 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. SPS New England states that it issued payment to Liddell Brothers by check dated August 21, 2017 (#133107) in the amount of \$1,656.76. A copy of the check is provided as an attachment to the Reply
6. SPS New England also contends that the balance of the direct payment demanded by Liddell Brothers in the amount of \$16,845.31, is in dispute in accordance with G.L. c.30, §39F(e)(iii), and requests that the disputed amount be deposited into an interest bearing joint account as provided in G.L. c.30, §39F(f).
7. The basis SPS New England's dispute involves its right of setoff against payments due Liddell Brothers pursuant to the subcontract agreement arising from an incident that occurred on December 2, 2015, as detailed in the Reply.

RULING

The documentation provided in the Reply establishes that Liddell Brothers has received payment by check dated August 21, 2017 (#133107) of \$1,656.76. Therefore, that part of the Demand is DENIED.

With respect to the balance of \$16,845.31 claimed in the Demand (i.e., \$18,502.07 less the \$1,656.76 paid by SPS), 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 Liddell Brothers based on its right of setoff against payments due Liddell Brothers.

For purposes of G.L. c.30, §39F, the Department need not determine the merits of SPS New England's dispute. It need only determine that a dispute exists between SPS and Liddell Brothers 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).

Liddell Brothers' Demand establishes a claim in the amount of \$16,845.31 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). Please take appropriate steps in accordance with MassDOT's Standard Operating Procedure No. ALJ-01-01-2-000.

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

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

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



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: August 30, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Liddell Brothers Inc.
Contractor: SPS New England
Contract: #80370
City/Town: Chatham / Bridge Street over Mitchell River
Amount: \$3,318.82

This direct payment demand (Demand) by Liddell Brothers Inc. was received by the Department on August 23, 2017.

FINDINGS

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

1. Liddell Brothers was an approved subcontractor on MassDOT Contract #80370 and performed work under various scope items related to traffic control.
2. The Demand consists of a cover letter dated August 9, 2017, a Sworn Statement by the President of Liddell Brothers, copies of the subcontract and purchase order agreements between Liddell Brothers and SPS New England, statements and invoices, and a detailed breakdown indicating a balance due under the subcontract and purchase orders of \$3,318.82.
3. A copy of the Demand was delivered to SPS New England by certified mail (receipt #7015 0640 0000 2368 4693).
4. The general contractor SPS New England submitted a Reply dated August 21, 2017, which states that it issued payment to Liddell Brothers by check dated August 21, 2017 (#133105) in the amount of \$3,318.82. A copy of the check is provided as an attachment to the Reply.

RULING

The Demand submitted by Liddell Brothers complies with the formal requirements of G.L. c.30, §39F. Based on its Reply, SPS New England does not dispute that at the time the Demand was made there remained a balance due Liddell Brothers of \$3,318.82 for subcontract work completed on Contract #80370. However, the documentation provided in the Reply establishes that Liddell has since received payment of the balance due.

Based on the above, there is no action to be taken by the Department with respect to this Demand.

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

SPS New England
98 Elm Street
Salisbury, MA 01952

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



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: August 30, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Liddell Brothers Inc.
Contractor: SPS New England
Contract: #79743
City/Town: Boston / Bowker Overpass
Amount: \$18,750.00

This direct payment demand (Demand) by Liddell Brothers Inc. was received by the Department on August 23, 2017.

FINDINGS

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

1. Liddell Brothers was an approved subcontractor on MassDOT Contract #79743 and performed work under various scope items related to traffic control.
2. The Demand consists of a cover letter dated August 9, 2017, a Sworn Statement by the President of Liddell Brothers, a copy of the subcontract between Liddell Brothers and SPS New England, statements and invoices, and a detailed breakdown indicating a balance due under the subcontract of \$18,750.00.
3. A copy of the Demand was delivered to SPS New England by certified mail (receipt #7015 0640 0001 4294 5088).
4. The general contractor SPS New England submitted a Reply dated August 21, 2017, which states that it issued payment to Liddell Brothers by check dated August 21, 2017 (#133104) in the amount of \$18,750.00. A copy of the check is provided as an attachment to the Reply.

RULING

The Demand submitted by Liddell Brothers complies with the formal requirements of G.L. c.30, §39F. Based on its Reply, SPS New England does not dispute that at the time the Demand was made there remained a balance due Liddell Brothers of \$18,750.00 for subcontract work completed on Contract #79743. However, the documentation provided in the Reply establishes that Liddell has since received payment of the balance due.

Based on the above, there is no action to be taken by the Department with respect to this Demand.

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

SPS New England
98 Elm Street
Salisbury, MA 01952

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Walter Heller, District 6 Highway Director



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: August 3, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: T.L. Edwards, Inc.
Contractor: Pavao Construction Company, Inc.
Contract: #78954
City/Town: District 5 / ADA Improvements and Upgrades
at Various Locations
Amount: \$61,738.61

This direct payment demand (Demand) by T.L. Edwards, Inc. was received by the Department on July 7, 2017.

FINDINGS

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

1. T.L. Edwards, Inc. supplied materials to the general contractor on MassDOT Contract #78954.
2. The Demand consists of a cover letter dated June 29, 2017, a Sworn Statement by the President and Treasurer of T.L. Edwards dated June 29, 2017, and documentation including statements and invoices showing materials ordered from T.L. Edwards by Pavao Construction Company, Inc. and an accounting indicating a balance due of \$61,738.61.
3. An affidavit from Process Server Katherine Asaif attests that a copy of the Demand was delivered to Pavao Construction Company, Inc. on June 29, 2017.
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 work on Contract #78954 was completed on November 30, 2016 and there are no further payments to be made to the general contractor.

RULING

T.L. Edwards is a “subcontractor” as defined in G.L. c.30, §39F(3) because it contracted with the general contractor to supply materials used or employed in the Contract work for a price in excess of five thousand dollars. I also find that the Demand submitted by T.L. Edwards complies with the formal requirements of G.L. c.30, §39F.

As to the merits of the Demand, the record before me supports a finding that Pavao Construction Company, Inc. has failed to make payment of a balance due in the amount of \$61,738.61 as required G.L. c.30, §39F. Although T.L. Edwards 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.” In this case, there are no amounts payable or to become payable to the general contractor from which to make a direct payment to T.L. Edwards. As a result, there is no action to be taken by the Department with respect to this Demand.

cc: Pavao Construction Company, Inc.
1892 County Street
Dighton, MA 02175

T.L Edwards, Inc.
P.O. Box 507
Avon, MA 02322

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



Charles D. Baker, Governor
 Karyn E. Polito, Lieutenant Governor
 Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: July 28, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c.30, §39F**

Claimant: General Mechanical Contractors Inc.
 Contractor: Barr & Barr, Inc.
 Contract: #87589
 City/Town: Research & Material Lab / South Boston
 Amount: \$257,314.56

This direct payment demand (Demand) by General Mechanical Contractors Inc. was received by the Department’s Director of Accounts Payable on June 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. The Demand was not properly addressed to the MassDOT staff authorized to respond to direct payment demands. This caused delay in issuing this ruling.
2. Notwithstanding the above, for the following reasons I find that the Demand complies with the formal requirements of G.L. c.30, §39F:
 - the Demand has been made by a sworn statement;
 - the Demand was sent by certified mail (#7015 0640 0001 9254 3043), with a copy sent by certified mail to the general contractor (#7015 0640 0001 9254 3050);
 - 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.
3. General Mechanical Contractors Inc. is an approved subcontractor as a result of submitting a filed sub-bid for the HVAC work on Contract #87589 and receiving a subcontract as a result of that filed sub-bid.
4. General Mechanical Contractors Inc. demands direct payment in the amount of \$257,314.56 based on the following detailed breakdown:

Original Contract Amount:	\$4,824,000.00
Change Orders:	\$ 203,709.16
Adjusted subcontract Amount:	\$5,027,709.16
Completed to date:	\$5,021,895.16
Amount Paid to Date:	\$4,764,580.60
Amount Currently Due:	\$ 257,314.56

5. The general contractor Barr & Barr Inc. submitted a sworn Reply dated June 23, 2017.
6. The Reply disputes the entirety of the Demand as follows:
 - The Demand contains amounts for change order work that have not been approved or paid to Barr & Barr by MassDOT. Specifically, the Reply states that Approved Change Orders total \$201,634.00, not \$203,709.16, which is a difference of \$2,075.16;
 - The total amount of the Demand \$257,314.56 that General Mechanical Contractors Inc. claims due under the subcontract has yet to be paid by MassDOT to Barr & Barr.
7. The Department's construction staff advises that on June 20, 2017, MassDOT approved and processed Pay Estimates #19 and #20 providing payment to Barr & Barr. That payment included \$118,875.17 on account of work performed by General Mechanical Contractors Inc.
8. Barr & Barr provided confirmation to the Department that it made payment in the amount of \$118,875.17 by check sent to General Mechanical Contractors Inc. on June 28, 2017 (FedEx. Tracking #735355420593).
9. According to MassDOT construction staff, the balance of the Demand in the amount of \$138,439.39 has not been paid to Barr & Barr as it consists of retainage being held by MassDOT pending full functionality of the humidification system and completion of commissioning obligations and amounts claimed for unapproved change order work.

RULING

The Demand includes an amount of \$118,875.17 which has since been paid to General Mechanical Contractors Inc. by the general contractor. That part of the Demand is DENIED.

With respect to the remaining balance, G.L. c.30, §39F(1)(d) provides that a subcontractor may demand direct payment from an awarding authority of the balance due under the subcontract "less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work." The balance of the Demand consists of an amount held by MassDOT in retainage as the estimated cost of completing incomplete items of work; and an amount claimed as extra work but not approved by MassDOT for payment under the contract as change order work. Such amounts are not eligible for direct payment.

For the above reasons, the Demand is DENIED.

cc: Barr & Barr Inc.
260 Cochituate Road, 2nd Floor
Framingham, MA 01701-4608

General Mechanical Contractors, Inc.
29A Sword Street
Auburn, MA 01501

Patricia Leavenworth, Chief Engineer
Michael McGrath, Director of Construction
Stephanie LeBlanc, Property Utilization Manger – MHS



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: June 8, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Dagle Electric Construction Corp.
Contractor: Pavao Construction Co., Inc.
Contract: #75586
City/Town: Roadway Reconstruction and Related Work (Route 9 at Oak Street)
Natick / Wellesley
Amount: \$20,117.73

This direct payment demand (Demand) by Dagle Electric Construction Corp. (Dagle) was received by the Department on April 20, 2017.

FINDINGS

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

1. Dagle was an approved subcontractor on Contract #75586. Its approved scope included various traffic items, including signals and lighting.
2. The Demand contains a detailed breakdown showing a balance due under the subcontract of \$20,117.73. The Demand is made by sworn statement and indicates that a copy was sent by mail to the general contractor Pavao Construction Co., Inc. I find that the Demand complies with the formal requirements of G.L. c.30, §39F.
3. 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).
4. MassDOT construction staff has confirmed that Dagle has substantially completed its subcontract work, and all payments on account of such subcontract work have been paid in full to the general contractor.
5. The following three items contained in the Demand constitute corrective work for which the general contractor, whether on its own or through its subcontractors, was obligated to provide at no cost to MassDOT:

- WO 10618 – Repair Cables \$1,002.76
- CO – Service Call \$1,028.00
- Repair traffic Cables \$3,747.00

RULING

The record before me supports a finding that Dagle has substantially completed the subcontract work that is the subject of the Demand. The supporting documentation provided by Dagle indicates that there is a balance due under the subcontract of \$20,117.73. Of that amount, however, \$5,777.76 was for corrective work which is not compensable to the general contractor and not subject to direct payment. Therefore, that part of the Demand must be DENIED.

With respect to the remaining amount of the Demand totaling \$14,339.97, Section §39F(g) 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 ...” 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). Because the general contractor failed to make payment to Dagle of the \$14,339.97 amount due in accordance with G.L. c.30, §39F, this part of the Demand is ALLOWED.

The Department is obligated to make a direct payment in response to this Demand. Kindly pay Dagle \$14,339.97 from the next periodic, semi-final or final estimate and deduct that amount from payments due Pavao Construction Co., Inc. and/or its surety in accordance with Section 39F.¹

Dagle Electric Construction Corp.
68 Industrial Way
Wilmington, MA 01887

Pavao Construction Co., Inc.
P.O. Box 638
Dighton, MA 02715

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

¹ MassDOT understands that the general contractor is no longer in business. Accordingly, it has put the surety on notice and is awaiting reply. In that regard, it is uncertain whether and to what extent there are any amounts under this contract that will become payable to the general contractor or its surety from which to make a direct payment.



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: April 28, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Dagle Electric Construction Corp.
Contractor: Pavao Construction Co., Inc.
Contract: #73147
City/Town: Western Ave; Safe Routes / Easton
Amount: \$2,662.58

This direct payment demand (Demand) by Dagle Electric Construction Corp. (Dagle) was received by the Department on April 20, 2017.

FINDINGS

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

1. Dagle was an approved subcontractor on Contract #73147. Its approved scope included Item 823.151 "LED Area Lighting" and Item 823.70 "Highway Lighting Poles and Luminaire."
2. The Demand contains a detailed breakdown showing a balance due under the subcontract of \$2,662.58. The Demand is made by sworn statement and indicates that a copy was sent by mail to the general contractor Pavao Construction Co., Inc. I find that the Demand complies with the formal requirements of G.L. c.30, §39F.
3. 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).
4. MassDOT construction staff has confirmed that all work under Contract #73147 was completed as of December 18, 2012, all payments due under the Contract have been made, and no further amounts are payable to the general contractor.

RULING

Based on my findings above, Dagle 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 \$2,662.58. However, G.L. c.30, §39F(g) provides: “All direct payments ... shall be made out of amounts payable to the general contractor and out of amounts which later become payable to the general contractor ...” In this case, there are no amounts payable or that will become payable to the general contractor from which to make a direct payment. Therefore, the Demand must be DENIED.

Please note Dagle’s request for the payment bond and performance bond provided by the general contractor for Contract #73147. Copies are attached hereto and may be provided to Dagle along with a copy of this memorandum.

Dagle Electric Construction Corp.
68 Industrial Way
Wilmington, MA 01887

Pavao Construction Co., Inc.
P.O. Box 638
Dighton, MA 02715

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: April 26, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Liddell Brothers, Inc.
Contractor: Cardi Corporation
Contract: #84977
City/Town: I-95 SB to I-295 SB / Attleboro
Amount: \$2,771.00

This direct payment demand (Demand) by Liddell Brothers, Inc. (Liddell) was received by the Department on April 21, 2017.

FINDINGS

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

1. Liddell Brothers, Inc. supplied traffic control devices used or employed on the project by the general contractor, Cardi Corporation (Cardi), in accordance with Item 850 of the Contract.
2. The Demand contains a spreadsheet entitled "Detailed Breakdown of Balance Due", which includes an accounting of Purchase Order Agreement #15-091 dated April 23, 2015 (Purchase Order) between Liddell and Cardi. The value of the traffic control devices supplied to Cardi under the Purchase Order, as listed in the Breakdown, is \$23,268.26.
3. The Demand states: "there still remains additional monies due in the amount of \$2,771.00 for Purchase Order items that Cardi Corporation issued under this project ..." The Demand is made by sworn statement and there is evidence of timely delivery to the general contractor via certified mail (#7015 1520 0002 2354 3385). I find that the Demand complies with the formal requirements of G.L. c.30, §39F.
4. The Department received a Reply from Cardi, which is dated April 6, 2017 and indicated as hand-delivered to Liddell. The Reply is made by sworn statement and asserts that the amount claimed by Liddell "is for items supplied under the terms of a separate purchase order ..." I find that the Reply complies with the formal requirements of G.L. c.30, §39F.
5. It appears that the traffic control devices that are the subject of the Demand were arrow boards invoiced by Liddell to Cardi on Invoices #39578 and #39902 with a total a cost of \$2771.00. MassDOT District 5 staff confirms that Pay Estimate 11 dated December 30,

2016 included final payment to Cardi for all arrow boards used on the project pursuant to Item 856 of the Contract.

RULING

G.L. c.30, §39F(1)(c) provides that “if the awarding authority has received a demand for direct payment from a subcontractor 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 awarding authority shall act on the demand as provided in this section.” 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).

In its Reply, Cardi does not dispute Liddell’s breakdown showing a \$2,771.00 balance due on the Purchase Order. Rather, Cardi asserts that such amount “is not subject to direct payment demands under Chapter 30, §39F” because it arises out of a Purchase Order and not from the subcontract between the parties. I disagree. The definition of a “subcontractor” in Section 39F, Subsection (3)(iii) includes “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 record before me supports a finding that Liddell provided traffic control devices valued in excess of \$5,000.00 used or employed on the project by Cardi, and the parties contracted with each other through a purchase order agreement.

There is a balance due of \$2771.00 for traffic control devices supplied by Liddell, including arrow boards, used or employed on the project by Cardi. As of December 30, 2016, Cardi received payment from the Department for such items. Upon receipt of periodic payments from the Department for such traffic control devices, Cardi was obligated to pay Liddell “forthwith”. Based on the information provided in the Demand and Reply, Cardi has not done so.

For the reasons discussed above, kindly pay Liddell \$2,771.00 from the next periodic, semi-final or final estimate and deduct that amount from payments due Cardi Corporation, Inc. in accordance with Section 39F.

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

Cardi Corporation
400 Lincoln Avenue
Warwick, RI 02888

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: April 20, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: EJ USA, Inc.
Contractor: Pavao Construction Company, Inc.
Contract: #78954
City/Town: District 5 / ADA Improvements and Upgrades
at Various Locations
Amount: \$12,805.46

This direct payment demand (Demand) by EJ USA, Inc. was received by the Department on March 9, 2017.

FINDINGS

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

1. EJ USA, Inc. was an approved supplier of castings on MassDOT Contract #78954.
2. The Demand consists of a cover letter dated March 1, 2017, a Sworn Statement of Account dated March 1, 2017, and attachments. The documentation includes statements and invoices showing materials ordered from EJ USA by Pavao Construction Company, Inc. and an accounting of payments received and amounts owed for such materials, and a balance due of \$12,805.46.
3. Julee Zook, Assistant Credit Manager, for EJ USA, signed the Demand, the Sworn Statement of Account, and Proof of Service indicating that a copy of the Demand was sent certified mail to Pavao Construction Company, Inc. (#7015166000064179104) on March 1, 2017.
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 has confirmed that the materials included in the Demand were supplied by EJ USA. The Department's Quantity Control Sheets and Estimate Sheets confirm that the materials were installed as part of the Contract and payment was made by the Department to the general contractor for such work.

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 EJ USA 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 “if the awarding authority has received a demand for direct payment from a subcontractor 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 awarding authority shall act on the demand as provided in this section.” 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 EJ USA contracted with the general contractor Pavao Construction Company to supply materials used or employed in the Contract work for a price in excess of five thousand dollars. More than seventy days have passed since the work utilizing those materials was substantially completed, accepted by the Department, and approved for inclusion in progress payments made or to be made to the general contractor. The balance due for the cost of the materials was required to be paid by the general contractor “not later than the sixty-fifth day” after completion of the work. As Pavao Construction Company, Inc. 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 EJ USA, Inc. \$12,805.46 from the next periodic, semi-final or final estimate for Contract #78954 and deduct that amount from payments due Pavao Construction Company, Inc. in accordance with Section 39F.

cc: Pavao Construction Company, Inc.
1892 County Street
Dighton, MA 02175

EJ USA, Inc.
301 Spring Street
P.O. Box 439
East Jordan, MI 49727-0439

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



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: March 29, 2017
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Liddell Brothers, Inc.
Contractor: Cardi Corporation
Contract: #84977
City/Town: I-95 SB to I-295 SB / Attleboro
Amount: \$108,338.90

This direct payment demand (Demand) by Liddell Brothers, Inc. was received by the Department on March 13, 2017.

FINDINGS

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

1. Liddell Brothers, Inc. is an approved subcontractor on MassDOT Contract #84977. Its approved scope includes various traffic items.
2. The Demand contains a detailed breakdown, a sworn statement and evidence of delivery to the general contractor.
3. The Department received a Reply to the Demand from the general contractor, Cardi Corporation, which is dated March 16, 2017. The reply contains a sworn statement indicating that a payment of \$99,617.90, representing the entire balance due on the subcontract, was made to Liddell Bros. by check on March 16, 2017.
4. By letter dated March 27, 2017, Liddell Bros. submitted a new Demand to the Department, which acknowledges receipt of the above-referenced payment, explains certain adjustments in its detailed breakdown, and seeks direct payment of \$2,771.00.

RULING

The Demand received by the Department on March 13, 2017 is moot. Take no further action on that Demand.

The new Demand from Liddell Bros. dated March 27, 2017, along with any reply of the general contractor, will be evaluated and a recommended disposition will be provided at a later date.

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

Cardi Corporation
400 Lincoln Avenue
Warwick, RI 02888

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



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: January 23, 2017

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

Claimant: Superior Sealcoat, Inc.
Contractor: Pavao Construction Company, Inc.
Contract: #75586
City/Town: Route 9 at Oak Street, Natick/Wellesley
Amount: \$58,670.50

This direct payment demand (Demand) by Superior Sealcoat, Inc. was received by the Department on December 20, 2016.

FINDINGS

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

1. Superior Sealcoat, Inc. was an approved subcontractor on MassDOT Contract #75586. Its approved scope was saw-cutting, cleaning and sealing of transverse joints in finished Hot Mix Asphalt pavement pursuant to Contract Item 482.32 entitled "Sawing and Sealing Joints in Asphalt Pavement."
2. The Demand consists of a cover letter dated December 20, 2016 and attachments, including a copy of the subcontract agreement dated August 23, 2016 between Pavao Construction Company, Inc. and Superior Sealcoat, Inc.
3. The cover letter contains the following detailed breakdown of the balance due under the subcontract and statement of the status of completion of the subcontract work:

... Our company installed item 482.32 which is Sawing and Sealing Joints in Asphalt Pavement. Our work was completed 9/15/16.

Pavao Construction Company presently owes our company \$58,670.50. The quantity of 6754 lf x \$8.25 per lf = 55,720.50. They also owe \$2,950.00 for a night, Sept. 12, we showed up to work and they forgot to order the Police details.

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495

4. The subcontract price for Item 482.32 work is \$8.25/ft. The price in the Contract between MassDOT and Pavao Construction Company, Inc. for such pay item is \$5.00/ft.
5. Robert Vita, President, for Superior Sealcoat, Inc., signed the Demand. His signature is notarized by a Notary Public, who attests that the Demand was signed by Mr. Vita “under the pains and penalties of perjury.” A certified mail receipt (#70153430000016853415) is included as evidence that a copy of the Demand was sent certified mail to Pavao Construction Company, Inc. and received on December 20, 2016.
6. 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).
7. Department construction staff has confirmed that all subcontract work performed by Superior Sealcoat, Inc., has been completed to the Department’s satisfaction. In total, the amount to be paid under the Contract for work performed by Superior Sealcoat, Inc. is \$33,770.00 based the Department’s acceptance of 6,754 ft. of Item 482.32 work for payment at the Contract price of \$5.00/ft.
8. Contract pay estimate #63 includes payment for Item 482.32 work in the amount of \$15,245.00 based on 3,049 ft. @ \$5.00/ft. Contract pay estimate #64 includes payment for Item 482.32 in the amount of \$18,525.00 based on 3,705 ft. @ \$5.00/ft.

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 Superior Sealcoat, 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 “if the awarding authority has received a demand for direct payment from a subcontractor 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 awarding authority shall act on the demand as provided in this section.” 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 Superior Sealcoat, Inc. substantially completed its subcontract work as of September 15, 2016. More than seventy days have passed since the subcontract work was substantially completed and the work has been accepted by the Department and approved for inclusion in progress payments made or to be made to the general contractor. The balance due on the subcontract work was required to be paid by the general contractor "not later than the sixty-fifth day" after completion of the work. As Pavao Construction Company, Inc. 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.

The Demand seeks direct payment of \$58,670.50. However, \$2,950.00 of that amount appears to be a claim for delay damages. Unless and until a claim is approved for payment by the Department, it is not an amount that may form the basis of a direct payment demand. In addition, the Demand is based on pricing contained in the subcontract between Pavao Construction Company, Inc. and Superior Sealcoat, Inc. A demand for direct payment is limited to the "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." G.L. c.30, §39F(1)(c). In this case, that amount is \$33,770.00 based the pricing contained in the general contract.

Kindly pay Superior Sealcoat, Inc. \$33,770.00 from the next periodic, semi-final or final estimate and deduct that amount from payments due Pavao Construction Company, Inc. in accordance with Section 39F.

cc: Pavao Construction Company, Inc.
1892 County Street
Dighton, MA 02175

Superior Sealcoat, Inc.
236 Andover Street
Wilmington, MA 01887

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

APPENDIX C-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF DENIAL OF OUTDOOR ADVERTISING PERMIT #2015D016

PARTIES	
<p>APPELLANT</p> <p>COVE OUTDOOR LLC</p> <p>Address: P.O. Box 590545 Newton, MA 02459</p> <p>Counsel: David L. Sterrett, Esq. Sterrett Law, PLC 65 South Main Street, Ste. 1 Waterbury, VT 05676</p>	<p>APPELLEE</p> <p>OFFICE OF OUTDOOR ADVERTISING MASS. DEPT. OF TRANSPORTATION</p> <p>Address: 10 Park Plaza Boston, MA 02116</p> <p>Counsel: Eileen Fenton, Senior Counsel 10 Park Plaza, Room 3510 Boston, MA 02116</p>

PROCEEDINGS AND ORDERS		
Entry #	Filing Date	Description
1	2/16/16	NOTICE OF APPEAL filed by Cove Outdoor LLC by Letter dated February 11, 2016 from Edward E. O'Sullivan, Managing Member.
2	3/2/16	STATUS CONFERENCE held as scheduled.
3	3/3/16	<p>SCHEDULING ORDER: By April 15, 2016, Appellants shall file a Brief containing a statement of issues to be decided by this Office, including the relevant facts, legal argument, supporting documentation and the precise relief sought, and provide a copy to counsel for the Department. By May 20, 2016, the Department shall file a Brief responding to the issues raised in Appellant's Brief, and provide a copy to counsel for Appellants. The Parties shall engage in voluntary discovery concerning any documentation and reports relevant to the appeal. The Parties shall participate in a status conference to be scheduled in May 2016 to report on the status of discovery and any other pre-hearing matters required to be taken up prior to scheduling a date for a Hearing on the appeal.</p>
4	4/11/16	APPELLANT MOTION TO CONTINUE HEARING AND FILING OF BRIEFS filed by Cove Outdoor LLC, assented to by the Office of Outdoor Advertising.
5	4/20/16	<p>RULING: APPELLANT MOTION TO CONTINUE HEARING AND FILING OF BRIEFS is <u>ALLOWED</u></p> <p>MEMORANDUM AND ORDER The Scheduling Order of March 3, 2016 is rescinded. The Parties shall provide this Office with a status update on or before June 1, 2016. All proceedings in this Appeal are stayed until further Order.</p>
6	6/1/16	STATUS UPDATE filed by Cove Outdoor LLC by letter dated 6/1/16, including request to lift stay of proceedings and establish new schedule; requests assented to by the Office of Outdoor Advertising.
7	7/14/16	BRIEF OF APPELLANT filed

8	7/19/16	<p>RULING: APPELLANT REQUEST TO LIFT STAY AND ESTABLISH NEW SCHEDULE is <u>ALLOWED</u></p> <p>MEMORANDUM AND ORDER</p> <p>By August 22, 2016, the Department shall file a Brief responding to the issues raised in Appellant's Brief, and provide a copy to counsel for Appellants. If warranted, Appellant may file a supplemental response to the Department's Brief within 14 days of receipt.</p> <p>Upon receipt of the Briefs and any supplemental response, this Office will schedule a conference with the Parties to discuss the status of discovery and any other pre-hearing matters required to be taken up prior to scheduling a date for a Hearing on the appeal.</p> <p>The Parties shall engage in voluntary discovery concerning any documentation and reports relevant to the appeal.</p>
9	8/19/16	APPELLEE MOTION FOR ADDITIONAL TIME TO FILE ITS BRIEF ON OR BEFORE SEPTEMBER 9, 2016 filed by the Office of Outdoor Advertising, assented to by Cove Outdoor LLC
10	8/19/16	RULING: APPELLEE MOTION FOR ADDITIONAL TIME TO FILE ITS BRIEF is <u>ALLOWED</u>
11	9/9/16	BRIEF OF APPELLEE filed
12	9/21/16	STATUS CONFERENCE held as scheduled
13	9/27/16	<p>MEMORANDUM AND ORDER</p> <p>By November 10, 2016, Appellant shall file its Supplemental Brief responding to any new issues or arguments raised in the Department's September 9, 2016 Brief. The Supplemental Brief shall fully address the issue of the appropriate standard of review to be applied in this case to the extent that it is not already addressed in Appellant's July 14, 2016 Brief.</p> <p>The Department shall file any Sur-reply to Appellant's Supplemental Brief by December 1, 2016. The Sur-reply shall fully address the issue of the appropriate standard of review to be applied in this case to the extent that it is not already addressed in the Department's September 9, 2016 Brief.</p> <p>The parties shall continue to engage in voluntary discovery. All discovery shall be completed by December 1, 2016.</p>
14	11/9/16	REPLY BRIEF OF APPELLANT filed
14	11/17/16	APPELLEE MOTION TO QUASH AND VACATE APPELLANT'S DISCOVERY REQUESTS filed
15	11/23/16	<p>RULING: APPELLEE MOTION TO QUASH DEPOSITION NOTICES is <u>ALLOWED</u></p> <p>APPELLEE MOTION TO QUASH PUBLIC RECORDS REQUEST is <u>DENIED</u></p> <p>APPELLEE MOTION TO QUASH INTERROGATORIES is <u>ALLOWED</u></p> <p>APPELLEE MOTION TO QUASH REQUEST FOR PRODUCTION OF DOCUMENTS is <u>DENIED</u></p>
16	12/1/16	APPELLEE's SUR-REPLY filed
17	12/14/16	<p>MEMORANDUM AND ORDER (in response to the Parties' request that this Office confirm the standard of review to be applied at the hearing to take place in this matter)</p> <p>"The appeal hearing will be a <i>de novo</i> review of the Director's decision to deny Electronic Billboard Permit #2015D016 in accordance with G.L. c.30A and 700 CMR §3.19."</p>
18	1/11/17	<p>VIEWING SCHEDULED</p> <p>A viewing of the propose billboard site is scheduled for February 23, 2017 to allow the Parties to provide this Office with points of reference or context in which to consider the evidence to be presented at the hearing</p>
18	1/18/17	<p>NOTICE OF HEARING</p> <p>The Parties shall appear on March 7, 2017 at 9:00 am.</p> <p>If the Parties determine that there are any outstanding pre-hearing matters to be addressed by this Office, they shall raise them by appropriate motion or filing with this Office by February 28, 2017.</p>
19	2/23/17	VIEWING held as scheduled



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



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

NOTICE OF DISMISSAL

On April 11, 2017, Cove Outdoor LLC filed a Stipulation of Dismissal of the above referenced matter. Accordingly, this appeal is hereby dismissed.

Albert Caldarelli
Administrative Law Judge

Dated: April 12, 2017



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



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)

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495

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.

Dated: December 14, 2016

Albert Caldarelli
Administrative Law Judge



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



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.

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495

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.

Dated: November 23, 2016

Albert Caldarelli
Administrative Law Judge

APPENDIX D-1

RULINGS

MASSACHUSETTS UCP ADJUDICATORY BOARD



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**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

In the Matters of: Dow Company Inc.
A & A Electrical Supply Corporation
Transit Safety Management Inc.

MEMORANDUM

On October 2, 2015, the above matters were returned to the Office of Supplier Diversity for further review and action to ensure compliance with procedural notice requirements. This memorandum and order will serve to formally document the Board's prior action.

ORDER

The above matters are remanded to SDO for further review and action in accordance with the requirements of 49 CFR Part 26, Subpart D.

Dated: January 17, 2017

The Adjudicatory Board

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

On behalf of the Board: _____



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

To: Harold Rogers
Supplies Exchange Systems
204 Washington Street
Boston, MA 02121

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

In the Matter of Supplies Exchange Systems (MUCP #2017-0001)

SCHEDULING ORDER

On June 12, 2017, the Supplier Diversity Office (SDO) filed a Counsel Recusal & Motion to Continue.

In its motion, SDO requests that the hearing scheduled for June 22, 2017 be continued. SDO requests additional time as a result of counsel having to recuse herself from handling this appeal. SDO also advises that a continuance will not negatively affect Supplies Exchange Systems' current DBE certification.

The Board allows the motion so that SDO may reassign this matter to other counsel.

ORDER

The Hearing scheduled for June 22, 2017 is cancelled.

When SDO counsel is assigned to this matter, the Board will schedule a hearing date.

All proceedings in this Appeal are stayed until further Order.

Dated: June 20, 2017

The Adjudicatory Board:

On behalf of its members:

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



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

To: Harold Rogers
Supplies Exchange Systems
204 Washington Street
Boston, MA 02121

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

In the Matter of Supplies Exchange Systems (MUCP #2017-0001)

NOTICE OF HEARING

The Adjudicatory Board of the Massachusetts Unified Certification Program (Board) has allowed a motion filed by the Supplier Diversity Office (SDO) requesting that the hearing scheduled for June 7, 2017 be rescheduled.

The adjudicatory hearing will be held by and before the Board on the determination of SDO, dated March 30, 2017 that Supplies Exchange Systems is ineligible to remain certified as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26.

The Parties should appear as follows:

Date: **June 22, 2017**
Time: **9:00 a.m.**
Location: **Room 6620, 6th Floor**
10 Park Plaza, Boston, MA 02116

In accordance with 49 C.F.R. §26.87(d)(1), the SDO has the burden of proving by a preponderance of the evidence that Supplies Exchange Systems does not meet the certification standards of 49 C.F.R. Part 26 for the reasons stated by SDO in its letters dated March 30, 2017 and April 8, 2017.

The hearing in this matter will be held in accordance with (1) 49 C.F.R. §26.87, (2) G.L. c. 30A and (3) 801 C.M.R. §1.02 and §1.03.

The purpose of the hearing is to determine:

1. Whether the SDO initiated proceedings against Supplies Exchange Systems in accordance with the procedural requirements of 49 C.F.R. §26.87(b);

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495

2. Whether the SDO provided to Supplies Exchange Systems written notice under 49 C.F.R. §26.87(b) that sets forth a statement of reasons for its finding of reasonable cause, which specifically references evidence in the record on which each reason is based;
3. Whether the SDO's proposed determination that there is reasonable cause to find Supplies Exchange Systems ineligible to remain certified is based one or more of the grounds for decision under 49 C.F.R. §26.87(f);
4. Whether Supplies Exchange Systems is controlled by a socially and economically disadvantaged individual under 49 C.F.R. §26.71;
5. Whether Supplies Exchange Systems failed to cooperate with SDO under 49 C.F.R. §26.109.

Pursuant to 49 C.F.R. §26.87(d)(3), Supplies Exchange Systems may elect to present information and arguments in writing, without going to a hearing. In such a situation, SDO bears the same burden of proving by a preponderance of the evidence that Supplies Exchange Systems does not meet the certification standards of 49 C.F.R. Part 26, as it would during a hearing.

You are advised that you have the right to be represented by counsel or other representative, to call and examine witnesses, to introduce exhibits, to cross examine witnesses who testify against you and to present oral argument, pursuant to G.L. 30A §10 and §11, and the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. §1.02 and §1.03. A party may request an alternative hearing date. Any request to reschedule the hearing should be made in writing and will be allowed by the Board only for good cause.

Dated: June 6, 2017

The Adjudicatory Board

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

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



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

To: Manik K. Arora, President and CEO
Arora Engineers Inc.
61 Wilmington – West Chester Pike
Chadds Ford, PA 19317

Ingrid Freire, Esq.
MassDOT, Office of the General Counsel
10 Park Plaza
Boston, MA 02116

In the Matter of Arora Engineers Inc. (MUCP #2017-0002)

NOTICE

The Massachusetts Unified Certification Program Adjudicatory Board has received an appeal from Arora Engineers Inc. concerning the decision of the Operational Services Division to initiate ineligibility proceedings pursuant to Title 49 CFR, Part 26, Subpart D.

Currently, the Secretary of Transportation is in the process of appointing two Board members to fill vacancies. Upon such appointments, the Board will provide notice of a hearing date on the above referenced appeal.

SCHEDULING ORDER

Once the vacancies are filled, the Board will notify the parties of a Hearing date on the above Appeal.

All proceedings in this Appeal are stayed until further notice.

Dated: October 3, 2017

The Adjudicatory Board:

On behalf of its members:

Albert A. Caldarelli
Kenrick W. Clifton
MassPort member (currently vacant)
MassDOT member (currently vacant)



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



May 18, 2017

Catherine McDonald, Chief Legal Counsel
Massachusetts Port Authority
One Harborside Drive, Suite 200S
East Boston, MA 02128-2909

Re: MassPort Member to the Unified Certification Program Adjudicatory Board

Dear Attorney McDonald:

I write to you as Chairman of the Adjudicatory Board of the Unified Certification Program regarding the recent resignation of MassPort's member, Mr. Albert Dalton.

Pursuant to 49 CFR Part 26 EOT Subparts D and E, the Commonwealth has established a Unified Certification Program at the Supplier Diversity Office (SDO) for all recipients and individuals seeking to do business with transportation agencies as Disadvantaged Business Enterprises (DBEs). The Adjudicatory Board has jurisdiction to hear appeals from the denial of DBE certification. The four-member Board includes appointees from MassDOT (Miguel Fernandes), MBTA (Kenrick Clifton), MassPort (currently vacant) and the MassDOT Administrative Law Judge.

For your review, I have enclosed some background information related to the prior appointment of MassPort's member to the Board. On behalf of the Board, I respectfully request that MassPort submit a nominee to the Secretary for appointment to the Board so that each of the Commonwealth's major transportation agencies are represented.

If you have any questions or require additional information concerning the above, please feel free to call me at 857-368-8759.

Sincerely,

Albert Caldarelli
Administrative Law Judge

cc: Miguel Fernandes
Kenrick Clifton

Ten Park Plaza, Suite 6620, Boston, MA 02116
Tel: 857-368-9495

From: Dalton, Al [mailto:ADalton@massport.com]

Sent: Monday, May 15, 2017 10:51 AM

To: Harol, Lisa (DOT); Fernandes, Miguel (DOT); Clifton, Kenrick (MBTA); Caldarelli, Albert (DOT)

Subject: RE: Supplies Exchange Systems Request for Hearing - CONFERENCE CALL

Judge, Lisa, and fellow Board Members,

I apologize for this rather late notice, but be advised that I am retiring from Massport, effective May 31, 2017, and must therefore resign from my membership on the UCP Adjudicatory Board. I was hoping that, with this announcement, I could identify for you my replacement, but Massport's Chief Counsel has not yet coordinated that discussion with Secretary Pollack. I have enjoyed working with each of you during my relatively short appointment period, and I wish all of you the best going forward. It was a privilege to work with such outstanding public sector staff.

APPENDIX E-1

APPEALS OF ELECTRONIC TOLL VIOLATIONS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF ELECTRONIC TOLL VIOLATIONS BY EJT MANAGEMENT, INC.

PARTIES

PARTIES	
<p>APPELLANT</p> <p>EJT MANAGEMENT, INC.</p> <p>Address:</p> <p>Counsel: Andrew Good, Esq. Philip Cormier, Esq. Good Schneider Cormier & Fried 83 Atlantic Avenue Boston, MA 02110</p>	<p>APPELLEE</p> <p>MASS. DEPT. OF TRANSPORTATION</p> <p>Address: 10 Park Plaza Boston, MA 02116</p> <p>Counsel: Eileen Fenton, Senior Counsel 10 Park Plaza, Room 3510 Boston, MA 02116</p>

PROCEEDINGS AND ORDERS

PROCEEDINGS AND ORDERS		
Entry #	Filing Date	Description
1	12/1/17	DESIGNATION AND ASSIGNMENT by SECRETARY OF TRANSPORTATION. see 700 CMR 7.05(5)(c) By Memorandum dated October 25, 2017 (including attachments), MassDOT recommended to the Secretary that the Administrative Law Judge hear "a request for an adjudicatory appeal by EJT Management of toll charges that were issued to them as the registered owner of certain taxi cabs that operate on MassDOT's toll roads." Recommendation APPROVED by Secretary on December 1, 2017.
2	12/4/17	NOTICE OF APPEAL received. Receipt of Memorandum dated October 25, 2017 and Secretary's Approval, and attachments consisting of: March 17, 2017 correspondence to MassDOT from Counsel for EJT Management; June 8, 2017 correspondence to MassDOT from Counsel for EJT Management; June 28, 2017 correspondence from MassDOT to Counsel for EJT Management; and August 29, 2017 correspondence to MassDOT from Counsel for EJT Management.
3	12/18/17	STATUS CONFERENCE held as scheduled. Teleconference held to discuss preliminary matters concerning the Appeal. Eileen Fenton, Senior Counsel, representing MassDOT; Andrew Good, Esq. and Philip Cormier, Esq. representing EJT Management; Lisa Harol, Office of the ALJ, present to address administrative matters.

4	12/18/17	<p>REQUEST TO SUBMIT PRE-HEARING MEMORANDUM by EJT Management during Status Conference.</p> <p>Request is <u>APPROVED</u>. The Parties to engage in further discussion with the goal of preparing and submitting a joint pre-hearing memorandum outlining factual and legal issues to be decided at the hearing, any agreed stipulations of facts, and other recommendations concerning the scope of the hearing; and to provide update at next status conference.</p>
5	2/5/18	<p>STATUS CONFERENCE scheduled for 11:00 am.</p> <p>Parties to be available by telephone for conference call.</p>
6		
7		
8		
9		
10		
11		
12		



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

To: Stephanie Pollack, Secretary & CEO
Cc: Marie Breen, First Assistant General Counsel MassDOT and MBTA
From: Eileen M. Fenton, Senior Counsel, MassDOT
Date: November 9, 2017
Re: Administrative Law Judge Recommendation –
EZPassMA Toll Adjudicatory Hearings

Attached for your consideration, please find a recommendation regarding a request for an adjudicatory appeal by EJT Management (“EJT”), of toll charges that were issued to them as the registered owner of certain taxi cabs that operate on MassDOT’s toll roads.

MassDOT’s Administrative Law Judge (“ALJ”) is charged with establishing an efficient administrative appeal process within MassDOT. The ALJ is responsible for examining claims, holding hearings and making fair and impartial decisions on specifically named disputes, and other disputes as may be assigned by the Secretary. It is recommended that this matter relating to EJT, and certain other matters relating to the EZDriveMA tolling system such as appeals and hearings, or other disputes, be assigned to MassDOT’s ALJ for adjudicatory hearings on an as needed basis, as determined by the General Counsel.

Approved Rejected


Stephanie Pollack, Secretary & CEO

Dated: 12/01/17



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



MEMORANDUM

To: Stephanie Pollack, Secretary & CEO
Cc: Marie Breen, First Assistant General Counsel MassDOT and MBTA
From: Eileen M. Fenton, Senior Counsel, MassDOT
Date: November 9, 2017
Re: Administrative Law Judge Recommendation –
EZPassMA Toll Adjudicatory Hearings

Attached for your consideration, please find a recommendation regarding a request for an adjudicatory appeal by EJT Management (“EJT”), of toll charges that were issued to them as the registered owner of certain taxi cabs that operate on MassDOT’s toll roads.

MassDOT’s Administrative Law Judge (“ALJ”) is charged with establishing an efficient administrative appeal process within MassDOT. The ALJ is responsible for examining claims, holding hearings and making fair and impartial decisions on specifically named disputes, and other disputes as may be assigned by the Secretary. It is recommended that this matter relating to EJT, and certain other matters relating to the EZDriveMA tolling system such as appeals and hearings, or other disputes, be assigned to MassDOT’s ALJ for adjudicatory hearings on an as needed basis, as determined by the General Counsel.

Approved Rejected

Stephanie Pollack, Secretary & CEO

Dated: _____

GOOD SCHNEIDER CORMIER & FRIED

Andrew Good
ag@gscboston.com

Michael R. Schneider
ms@gscboston.com

Philip G. Cormier
pc@gscboston.com

Syrie D. Fried
sf@gscboston.com

Attorneys-at-Law

83 Atlantic Avenue, Boston, MA 02110
Tel. (617) 523 5933 Fax (617) 523 7554
gscboston.com

Benjamin Brooks
bb@gscboston.com

Jeffrey G. Harris
jh@gscboston.com

Of Counsel
Keith S. Halpern
kb@gscboston.com

March 17, 2017

BY FIRST CLASS CERTIFIED REGISTERED RETURN RECEIPT MAIL

Stephanie Pollack, Secretary of Transportation and Chief Executive Officer
Massachusetts Department of Transportation
Ten Park Plaza
Suite 4160
Boston, Massachusetts 02116

Re: MassDOT - EZDriveMA Tolling System

Dear Ms. Pollack,

On behalf of our client EJT Management Inc. ("EJT"), this letter constitutes written notice and demand for relief pursuant to M.G.L.c. 30A, M.G.L. c. 93A, M.G.L.c. 258, and 42 U.S.C. § 1983, for damages suffered by EJT as a result of MassDOT's EZDriveMA tolling system that became operational on October 28, 2016, after the toll booths were removed from the Massachusetts Turnpike, tunnels and bridges.

EJT manages and leases taxicabs that operate under City of Boston medallions. Since the inception of the EZDriveMA system last fall, MassDOT has been unlawfully and unfairly imposing toll charges on EJT that have been incurred by taxi drivers who operate cabs leased from EJT on the Mass Turnpike and in the tolled tunnels and bridges in and around Boston. The defects in the EZDriveMA system, which are well-known to MassDOT, are allowing cab drivers to evade the payment of tolls and bill-by-plate charges. As a result, the leasing companies, which have no control over the tolling system or the drivers,¹ are being charged tens of thousands of dollars by MassDOT for tolls that they did not incur and for which the drivers are legally obligated to pay. The combined effect of the defects in the EZDriveMA system and the

¹ As you may be aware, in August 2015, the Supreme Judicial Court ruled that cab drivers who lease cabs are not employees of the leasing companies. EJT and the other leasing companies have no control whatsoever over the drivers. The drivers are self-employed, Hackney-licensed drivers who are operating their own businesses.

failure of the Boston Hackney Unit ("Hackney") to enforce the taxi drivers' obligation to pay tolls enables taxi drivers to engage in unlawful toll evasion or theft of tolls paid by passengers, or both. These systemic defects and the failure to enforce toll-payment obligations deprive the leasing companies of property without due process of law and without compensation in violation of 42 U.S.C. § 1983. They also constitute deceptive and unfair trade practices and/or unlawful administrative actions actionable under M.G.L.c. 30A and/or M.G.L.c. 93A.

Last December, we met with MassDOT officials, employees of Raytheon, and representatives of the Hackney Unit to describe the scope of the problem to MassDOT and to request that the improper billing be rectified. Unfortunately, the problem has continued unabated.

Here is the background.

Since in or about 2006, most Boston cab drivers have been carrying their own transponders when they operate cabs such as those leased by EJT. The cab leasing companies were required to set up accounts in which they would be responsible for tolls that were not charged to a driver's transponder. This system worked fairly well prior to the removal of the tollbooths in late October 2016. Previously, in those instances where a taxicab went through a tollbooth and the transponder was without funds or was not detected, a violation notice would be sent to the cab leasing company. Using EJT as an example, in a typical month prior to November 2016, EJT was billed approximately \$1,000 per month through the system for cab-related toll charges. In contrast, shortly after the new gantry tolling system was turned on, the system began billing the leasing companies with exponentially higher monthly toll charges. Over the past four months, the charges to EJT's account have ranged from eight to sixteen times what it was charged under the old tollbooth system:

November 2016	\$15,020.19
December 2016	\$16,470.05
January 2017	\$ 8,284.45
February 2017	\$16,357.90

These charges not only include charges at the bill-by-plate rates but also additional manual toll charges and violation administration fees.

The new tolling system is designed and operates in a manner that unlawfully and unfairly shifts liability to EJT and other leasing companies for toll charges that the companies did not incur and over which they have no control. In situations in which an unfunded transponder is detected or no transponder is detected, the new system does not seek collection against the transponder subscriber or the individual who incurred the toll. Instead, the system defaults to invoicing the registered owner of the car at a higher toll rate (the bill-by-plate rate) than the rate that is invoiced when a transponder with sufficient funds is detected by the gantry.² Taxi drivers

² The bill-by-plate toll charges are much higher than the same toll billed at the transponder rate. According to MassDOT website's toll calculator, for a 2-axle commercial vehicle, the toll imposed on a ride from Logan Airport to Newton Corner is \$4.60 when using an adequately funded EZ-Pass transponder. However, the toll for the same ride is \$5.50 at the bill-by-plate

who utilize toll roads in the Commonwealth to operate their businesses are required to pay the tolls just like any other driver. In those instances where a driver without a funded transponder in his cab collects money for the tolls from his fare, the driver's nonpayment of the tolls to MassDOT is a theft in which the taxi leasing company, not MassDOT, is victimized. MassDot and Hackney are legally obligated to prevent and deter taxi toll evasion and theft, and to prevent taxi leasing companies from being victimized by such evasion and theft.

MassDOT's regulations clearly state that a person who is identified as the operator of a rented or leased vehicle at the time of a toll transaction is *prima facie* responsible for the payment of such toll charges. See 700 CMR 7.04(8). MassDOT has information from which it can identify cab drivers who pass through toll gantries with an unfunded transponder or without any transponder. The gantry system is designed to detect a transponder whether or not the account associated with it is funded.

In the case of an unfunded transponder MassDOT's system will have determined that the subscriber account associated with the transponder has insufficient funds, and it can invoice the subscriber for the toll at the bill-by-plate rate directly using the information associated with that transponder account.

In instances where the driver has incurred tolls without any transponder being detected, MassDOT knows what leasing company owns the cab by virtue of the photograph that is taken of the license plate and Hackney has access to real time meter data that enables the toll evading taxi driver to be easily identified. MassDOT and Hackney are obligated to prevent the burden of collection and cost of toll evasion from being shifted to the leasing companies when there are readily available means for Hackney and MassDOT to identify the driver, and to collect the toll from the party who incurred it. Hackney can also decide whether to suspend or revoke a driver's hackney license or impose some other form of sanction for the driver's toll evasion or both.

Aside from MassDOT's failure to pursue the cab drivers for the payment of tolls that they have incurred, there are several defects in the new tolling system that have contributed to the exponential increase in unlawful charges to EJT and the other leasing companies.

First, unlike the old tollbooth system, the new gantry system gives no warning to a driver (such as a yellow light or red light) that his transponder account is low or unfunded. The lack of any warning has made it difficult for cab drivers to know when their transponder accounts are without sufficient funds.

Second, cab drivers have reported that they are unable to determine how much money they actually have in their account at any given moment. This is because the system does not account for deposits and debits in real time. As we understand it, the system is configured to collect and transmit data in a batch process whereby it takes up to 3-6 days for debits and credits to post to a user's transponder account after the toll has been incurred or payment has been made to fund the account. As a result, it is very difficult for cab drivers to determine in real time how much money is actually in their transponder accounts. The system can mislead them into

rate, an increase of \$0.90. A cab driver with an unfunded transponder who takes a fare from Logan to Newton Corner and then returns to the Logan taxi pool, will incur a total of \$11.00 in bill-by-plate toll charges, all of which will be billed to the leasing company.

thinking there is a positive balance in their accounts when there are toll transactions from days earlier that have not yet posted which bring the balance to zero or below zero. Charge-by-plate charges are being incurred because deposited funds are not being credited in real time. As a result of this delayed-posting defect, many drivers are distrustful of the accounting that is being performed by the system and have been questioning its accuracy. This problem with cab drivers being unable to determine the actual balances in their accounts in real time is not limited to the set of drivers who in the past routinely had insufficient funds in their transponder accounts. Now, even drivers whose accounts were never previously underfunded are having problems determining their actual balances and they appear on EJT's EZDriveMA account for bill-by-plate tolls when previously they did not.

Third, Hackney has reported that the kiosk at Logan Airport, which is used by drivers to make cash deposits to fund their transponder accounts, is often inoperable and out of order because it cannot accept the volume of cash that drivers are trying to deposit. The kiosk also apparently does not accept credit or debit cards.³ We do not know if this defect has been remedied but it has also contributed to the problem.

Fourth, it appears that duplicate charges have been imposed on EJT. On January 18, 2017, EJT received the enclosed email notice notifying the company that EZDriveMA had posted duplicate charges to its account. According to EJT's account records, MassDOT entered eleven "V-Toll Reversal" credits to EJT's account on January 17, 2017, in the amount of \$2.65 each, for a total of \$29.15. The email notice does not describe how or why these duplicate charges came to be, but it certainly leaves us wondering whether duplicate charges were imposed on account holders in November and December of last year, and whether cab drivers, as well as the general public, have also been assessed similar duplicate charges.

Finally, the notice that MassDOT issued titled "E-ZPass Massachusetts Changes,"⁴ is inadequate and does not cure the illegal and unfair defects in the EZDriveMA system or Hackney's failure to deter and prevent toll evasion and toll theft. Experience since October 28, 2016, shows that the result of this ineffectual notice is that the burden of toll collection and the risk of non-payment is being unlawfully shifted from toll evaders and toll thieves to the taxi leasing companies. The resulting illegal charges are financially prohibitive for the leasing companies and violates the regulatory system that allocates costs between drivers and medallion owners.

All of the aforementioned defects result in a tolling system that is unlawful, deceptive and unfair, especially for the leasing companies who have no control over the drivers, who did

³ MassDOT is also charging a convenience fee of \$1.95 for each cash replenishment made to a driver's transponder account.

⁴ The notice urges cab drivers to keep sufficient balances on their EZ-Pass accounts and suggests, but does not require, that drivers link their accounts to a credit card or bank account, is not an effective solution to the problem. (Many drivers do not have credit cards or bank accounts). The notice also tells drivers that if they are using cash to replenish their account, they should keep close track of records of their trips to make sure that they have sufficient funds in their account. The notice further instructs drivers to contact www.ezpassma.com or call the customer service information center to update their account or review their options.

not incur the toll charges, and who have no access to the payments made by passengers to drivers ostensibly for toll charges. These problems are preventable, and as we have described above, there is a ready solution to the unlawful billing to the leasing companies.

EJT demands that MassDOT cease all billing to its EZDriveMA account for cabs that it leases. It further demands payment in the amount of \$56,132.59 for charges imposed and collected from EJT for the period November 2016 through February 2017. If payment of \$56,132.59 is not made within thirty days, it is EJT's intention to file suit seeking treble damages, attorney's fees and costs as provided in M.G.L. c. 93A, § 9.

After you've had a chance to review this, we'd like sit down with MassDOT counsel to discuss this matter.

Sincerely,



Andrew Good



Philip G. Cormier

PGC/ps

Enclosures: (1)

E-ZPass Massachusetts Changes

- Under the new E-ZPass MA system it can take from 3 to 6 days for tolls to be deducted from your account.
- If you have incurred tolls or airport fees in the past week, the amount shown on the airport Kiosk as your 'account balance' may not reflect your recent transactions! You should **not** rely on the kiosk for the current balance of your E-ZPass balance.
- To prevent your account from falling insufficient - which will prevent the MassPort taxi pool gates from opening - you should register a credit card or bank account to your E-ZPass account and replenish your E-ZPass MA balance automatically. E-ZPass MA will confidentially maintain your credit card and/or bank information – so that whenever your E-ZPass MA account balance falls below the low balance threshold, E-ZPass MA will charge your credit card or bank account to bring your balance back up to a safe amount. This will ensure your uninterrupted travels in the airport taxi pool, the TWT, the Tobin Bridge, the Sumner/Callahan Tunnels and the Turnpike.
- If you wish to continue to use cash it is important to maintain a safe balance at all times. This may require you to maintain records of your trips and continually replenish your E-ZPass MA account before each trip. As tolls post to your account, they will reduce your balance accordingly and it is important to make sure there is enough money in your E-ZPass MA account at all times.
- Please log into your account via www.ezpassma.com or contact the E-ZPass customer information center at 1-877-627-7745 to update your account or review your options.

GOOD SCHNEIDER CORMIER & FRIED

Andrew Good
ag@gscboston.com

Michael R. Schneider
ms@gscboston.com

Philip G. Cormier
pc@gscboston.com

Syrie D. Fried
sf@gscboston.com

Attorneys-at-Law

83 Atlantic Avenue, Boston, MA 02110
Tel. (617) 523 5933 Fax (617) 523 7554
gscboston.com

Benjamin Brooks
bb@gscboston.com

Jeffrey G. Harris
jb@gscboston.com

Of Counsel
Keith S. Halpern
kb@gscboston.com

June 8, 2017

BY FIRST CLASS CERTIFIED REGISTERED RETURN RECEIPT MAIL

Stephanie Pollack, Secretary of Transportation and Chief Executive Officer
Massachusetts Department of Transportation
Ten Park Plaza
Suite 4160
Boston, Massachusetts 02116

Re: EJT Management, Inc. - Administrative Appeal to MassDOT

Dear Ms. Pollack,

We are writing to follow up on our letter to you, dated March 17, 2017. That letter and this letter constitute our appeal of the unlawful electronic toll charges incurred by taxi drivers that have been imposed on our client EJT Management, Inc. ("EJT"). We have received no substantive response to our earlier letter. MassDOT is obligated to adjudicate these appeals forthwith.

In our March letter, we detailed that EJT had been assessed and paid a total of \$56,132.59 for the period November 2016 through February 2017.

November 2016	\$15,020.19
December 2016	\$16,470.05
January 2017	\$ 8,284.45
February 2017	\$16,357.90

Since March, EJT has been assessed and has paid an additional \$44,433.80 for the period March through May 2017.

March 2017	\$20,889.05
April 2017	\$ 9,903.45
May 2017	\$13,641.40 ¹

Subsequent to our March 17 letter, we met and communicated with MassDOT Director of Statewide Tolling Steve Collins and MassDOT Senior Counsel Eileen Fenton in an attempt to resolve the issues raised. Although some minor billing discrepancies were addressed and corrected, the major issue of the unlawful billing to EJT of the tolls incurred by cab drivers has not been rectified. As a result, we are seeking final administrative adjudication of the issues forthwith.

As we described in our March 17 letter, the tolls at issue are being incurred by cab drivers who lease taxi cabs from EJT to operate their independent businesses. EJT has no control over the tolling system or the drivers. Yet EJT is being forced to pay thousands of dollars each month for tolls that the drivers are legally obligated to pay. The MassDOT regulations governing toll collection and enforcement of tolls make clear that the person who incurred the toll is responsible for paying the tolls and that persons who fail to pay for the tolls they incur are in violation of the regulations prohibiting fare evasion and those requiring that they adhere to all laws, regulations and terms and conditions governing the use of the Massachusetts Turnpike, the Metropolitan Highway System, and the EZDriveMA system.

The relevant regulations provide that “[e]ach Operator shall pay the toll as established by MassDOT,” 700 CMR 7.03(2), and that a person who is identified as the operator of a rented or leased vehicle at the time of a toll transaction is *prima facie* responsible for the payment of such toll charges. See § 7.04(8). The regulations also expressly prohibit toll evasion and the nonpayment of tolls, and provide MassDOT with the authority to impose fines and to take other action against persons who commit such violations. See § 7.03(3) (“No person may commit, or attempt to commit, any act with the intent to evade the payment of a toll or to defraud the Department with respect to the payment of a toll. Refusal to pay a toll are both considered to be acts done with intent to evade the payment of a toll.”); § 7.04(2)(c) (requiring persons to adhere to “all laws, regulations, and terms and conditions governing the use of the Mass. Turnpike, MHS and EZDriveMA system); § 7.13 (imposing fines for violations of regulations contained in 700 CMR 7.00, including toll evasion); § 7.04(7) (prohibiting use or attempted use “of any device or method, the intended result of which is the inability of the EZDriveMA system to assess or collect the toll due on under 700 CMR 7.03 or the non payment of the toll[,]” and that such violations “shall be considered toll evasion and/or unauthorized use of the EZDriveMA system.”); and § 7.05(f) (“MassDOT may pursue such civil or criminal action as it deems appropriate to collect outstanding tolls, fees, and fines assessed as well as such additional fines or penalties as MassDOT may assess in accordance with 700 CMR 7.00”)

MassDOT is legally obligated to prevent and deter taxi driver toll evasion and theft, and to prevent taxi leasing companies from being victimized by such evasion and theft. MassDOT’s failure and refusal to enforce toll-payment obligations against the drivers deprives EJT of

¹ The toll charges imposed for the months of November 2016 through May 2017 are reflected on the last page of each monthly EZDriveMA invoice that was issued to EJT. See Exhibit 1.

property without due process of law and without compensation in violation of 42 U.S.C. § 1983. They also constitute deceptive and unfair trade practices and/or unlawful administrative actions actionable under M.G.L.c. 30A and/or M.G.L.c. 93A.

Kindly inform us when we may expect a prompt adjudication.

Sincerely,

A handwritten signature in blue ink that reads "Andrew Good".

Andrew Good

A handwritten signature in blue ink that reads "Philip G. Cormier".

Philip G. Cormier

PGC/ps

Cc: Eileen Fenton, Senior Counsel, MassDOT
Stephen Collins, Director of Statewide Tolling, MassDOT
Julie Green, Assistant Attorney General, Massachusetts Attorney General's Office



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, Secretary & CEO
Thomas J. Tirlin, Administrator



June 28, 2017

Andrew Good
Philip Cormier
Good Schneider Cormier & Fried
Attorneys at Law
83 Atlantic Avenue
Boston, Massachusetts 02110

Re: EJT Management, Inc. – Appeal of Toll Violations

Dear Attorneys Good and Cormier,

I am writing in response to your letter to Secretary Pollack dated June 8, 2017, regarding a dispute of toll charges that were issued to EJT Management for the period November 2016 through February 2017. Please note, however, that this response should not be construed as a review or disposition of an appeal pursuant to 700 CMR 7.05. The Registered Owner of record or responsible party, where applicable, is required to pay all tolls, fines, fees, and penalties that may be assessed by MassDOT by the Payment Due Date on the invoice or notice, unless an appeal is pursued in accordance with the procedures in 700 CMR 7.05. Your letter does not satisfy those requirements. Therefore, I have attached copies of the appeal forms for your review and convenience in the event that your client wishes to pursue such an appeal.

With respect to the issues raised in your letter, you provided no basis for your assertion that EJT Management, as the registered owner of the vehicles to which the associated toll charges were assessed, is not responsible for said charges. Pursuant to Massachusetts law and regulations, with limited exceptions, the registered owner of the vehicle is responsible for the payment of tolls, fees, fines and other associated charges.

MassDOT's enabling statute provides that "[f]or each violation of applicable department regulations related to electronic toll collection, a violation notice shall be sent to the registered owner of the vehicle in violation." M.G.L. c. 6C, §13(c). Applicable regulations provide that the "registered owner of record of the motor vehicle is prima facie responsible for the payment of the tolls, fees, fines and/or penalties that the Department assesses with respect to the nonpayment of the toll." See 700 CMR 7.04(8). The regulations also provide that where "the registered owner of record is *in the business of leasing or renting motor vehicles* and provides to MassDOT by the Payment Due Date on the Pay By Plate invoice, a copy of a lease, rental or similar contract document indicating that the vehicle was leased or rented at the time of the toll transaction and the identity, address and driver's license information of the person entitled to possession is discernible from the document, in which case that person is prima facie responsible." (Emphasis added). See 700 CMR 7.04(8)(b).

Ten Park Plaza, Suite 4160, Boston, MA 02116

Your suggestion that taxicabs are “in the business of leasing or renting motor vehicles” for purposes of 700 CMR 7.04(8)(b) is misplaced. A taxicab is any vehicle which *carries passengers for hire*, and which is licensed by a municipality pursuant to M.G.L. c. 40, § 22 as a taxicab. (Emphasis added). See 540 CMR 2.05; See also, Boston Police Department Rule 403 Hackney Carriage Rules and Flat Rate Handbook, Effective August 29, 2008 – Section 1, I. b.¹

The exception contained in 700 CMR 7.08(8)(b) applies to rental companies which are defined “as any person or organization in the business of providing private passenger automobiles for rent to the public from locations in the state”. See M.G.L. c. 90, §32E ½. Unlike taxicabs, the procedures for the rental and leasing of motor vehicles by rental companies are contained in M.G.L. c. 90, § 32C – 32F. It is clear from the statutory language that taxicabs are not rental companies. Taxi cabs are not private passenger automobiles and they are not available for rent to the public. To the contrary, taxis are highly regulated by municipalities, and in the present case, the only individual who can operate a taxi, is a “Licensed Hackney Driver”, who is granted a special license to operate a Hackney Carriage by the Police Commissioner.²

With regard to the Chapter 93A claims you allege, while the underlying basis for the claims is unclear, please note that c. 93A does not apply to MassDOT. It is established that Chapter 93A does not constitute a waiver of sovereign immunity because M.G.L. c. 93A, § 1(a) does not expressly include the Commonwealth in the definition of “person,” and M.G.L. c. 93A, § 2(a) is not rendered ineffective by excluding the Commonwealth from liability. *Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V. v. Whitehead Inst. for Biomedical Research* (D. Mass. Feb. 7, 2011), 850 F. Supp. 2d 317, 2011.

In addition, any claim under 93A against MassDOT must fail because MassDOT is motivated by legislative mandate and is not engaged in trade or commerce, as required by M.G.L. c. 93A, § 11. *Kinoo, Inc. v. Brinckerhoff* (Mass. Super. Ct. July 8, 2009), Mass. Super. LEXIS 191, (citing *Lafayette Place Assocs. v. Boston Redevelopment Authority*, 427 Mass. 509 (“c. 93A does not apply to parties motivated by legislative mandate, not business or personal reasons”)).

¹ Section 1: OVERVIEW, I. Definitions – b. Hackney Carriage: A vehicle used or designed to be used for the conveyance of persons for hire from place to place within the city of Boston...Also known as a taxicab or taxi.

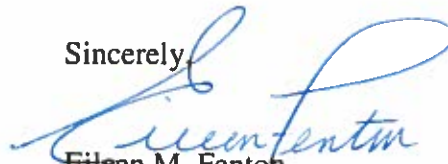
² Section 1: OVERVIEW, I. Definitions – d. Licensed Hackney Driver: An individual, also referred to as a “Diver,” granted a license to operate a Hackney Carriage by the Police Commissioner.

Notwithstanding the above, if EJT Management, as the registered owner of record, wishes to dispute the assessment of toll charges, it may do so by properly submitting its appeal in accordance with 700 CMR 7.05.

As discussed at our meeting in April, we appreciate your feedback and look forward to continuing to work collaboratively with the taxi industry.

Please contact me at 857-368-8764 if you have additional questions.

Sincerely,



Eileen M. Fenton
Senior Counsel

GOOD SCHNEIDER CORMIER & FRIED

Andrew Good
ag@gscfboston.com

Michael R. Schneider
ms@gscfboston.com

Philip G. Cormier
pc@gscfboston.com

Syrie D. Fried
sf@gscfboston.com

Attorneys-at-Law

83 Atlantic Avenue, Boston, MA 02110
Tel. (617) 523 5933 Fax (617) 523 7554
www.gscfboston.com

Benjamin Brooks
bb@gscfboston.com

Jeffrey G. Harris
jb@gscfboston.com

Of Counsel
Keith S. Halpern
kh@gscfboston.com

August 29, 2017

BY FIRST CLASS CERTIFIED REGISTERED RETURN RECEIPT MAIL

Stephanie Pollack, Secretary of Transportation and Chief Executive Officer
Massachusetts Department of Transportation
Ten Park Plaza
Suite 4160
Boston, Massachusetts 02116

Eileen M. Fenton, Senior Counsel
MassDOT
Ten Park Plaza
Suite 4160
Boston, MA 02116

Re: EJT Management, Inc. – Appeal of Toll Violations

Dear Ms. Pollack and Ms. Fenton,

We are writing in response to Ms. Fenton's letter dated June 28, 2017, in which you replied to our June 8, 2017 letter concerning EJT Management's ("EJT") disputed toll violations.

We are not persuaded by your argument that 700 CMR § 7.04(8) does not require MassDOT to seek payment for toll violations incurred by cab drivers with unfunded transponders directly from the drivers rather than from EJT. Nor are we persuaded that EJT has not properly sought administrative review of the V-tolls that have been shunted to its account when it is clear that MassDOT already has access to the information that allows it to bill the drivers directly. For these reasons, we don't see why your June 28 letter is not a final adjudication for purposes M.G.L.c. 30A.

It is clear that 700 CMR § 7.04(8)(b) applies to this situation. The text plainly states that the regulation governs where "[t]he registered owner of record is in the business of leasing or

renting motor vehicles . . .” There is no provision that carves out taxis, or any other leased vehicles, for that matter. Nor is there any provision that restricts application of the regulation to only passenger automobiles that are leased to the general public, as opposed to some other form of motor vehicle, such as rental trucks and leased taxis. Rather, it makes clear that the driver of any rental or leased vehicle is *prima facie* responsible for the toll if MassDOT is provided with the information that identifies the driver who was leasing the vehicle when the toll was incurred.

700 CMR § 7.04(8)(b) obliges MassDOT to collect tolls directly from the driver of a leased vehicle who incurred the toll when MassDOT knows who the driver is. MassDOT’s attempt to escape this obligation by claiming that leased taxi cabs are not covered by the regulation ignores the plain text of the regulation and constitutes an arbitrary and irrational application of the regulation. Boston Hackney Rule 403 requires taxi drivers to have a transponder in their leased cabs. As a result, MassDOT possesses the information that identifies cab drivers who incur tolls due to unfunded transponders. It is both irrational and unfair to exclude leased cabs from the application of the regulation when, due to the requirement that drivers carry a transponder in their cabs, it actually makes it easier for MassDOT to collect the tolls than it would in other similar situations involving leased vehicles.

MassDOT’s contention that taxicabs are not covered by 700 CMR § 7.04(8)(b) because they are vehicles that “carry passengers for hire” and are regulated by municipalities, (citing to M.G.L.c. 40, § 22 for the definition of a taxi cabs as a vehicle “which carries passengers for hire,” and also citing 540 CMR 2.05 and Rule 403), is a *non sequitur*. Whether intentional or not, you have conflated EJT’s leasing business with the business of the drivers who carry the passengers for hire. EJT is not in the business of providing taxi services. EJT is in the business of leasing motor vehicles that are used by independent businessmen to operate their own separate taxi service. They are not employed by EJT. They are not subject to control by EJT. They provide their passenger carrying services as they see fit. The SJC has expressly ruled that EJT is in the business of leasing cabs, and is not in the business of providing taxi services to the public. *See Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 334-337 (2015). Moreover, the statutory provisions and regulations that you have cited have nothing to do with the imposition or regulation of toll charges on vehicles that operate on the roads of the Commonwealth.

MassDOT’s reliance on the provisions that you have cited from M.G.L.c. 90 for the definition of a “rental company” is also misplaced. While M.G.L.c. 90, § 32E1/2 defines the term “rental company,” this term does not appear in 700 CMR § 7.04(8)(b), and the statutes to which it applies govern rental car agreements that have nothing to do with the imposition and regulation of toll charges. Likewise, M.G.L.c. 90, §§ 32C – 32F are also directed at the leasing of motor vehicles, and have nothing to do with the imposition of toll charges. None of these provisions constitute enabling legislation for the imposition and regulation of highway tolling in Massachusetts, and hence, they do not support your assertion that § 7.04(8)(b) applies only to leases of passenger automobiles to the public. And, as noted above, the law that governs the taxi leases in this case is Rule 403, which requires drivers of leased cabs to have transponders when

they drive, and thereby provides MassDOT with the information necessary for application and enforcement of § 7.04(8)(b).¹

We are commencing preparation of a complaint that will include, *inter alia*, a claim under c. 30A. Among other things, we intend to seek monetary damages for all V-Tolls billed to EJT for the period November 2016 to the present, and for an order requiring MassDOT to follow 700 CMR § 7.04(8) so that it directly invoices taxi drivers who evade tolls with unfunded transponders. We do not believe that the Superior Court will accept MassDOT's irrational position in this matter. Our prior letters of March 17, 2017 and June 8, 2017, addressed to Ms. Pollack, constitute notice of our claims for purposes of M.G.L.c. 258.

We would be happy to discuss this further if you wish, but if we cannot resolve this matter to our client's satisfaction in short order, we intend to file our complaint.

Sincerely,



Andrew Good



Philip G. Cormier

¹ As we've discussed in several recent meetings, MassDOT's electronic tolling system recognizes when a transponder passes through a toll gantry for purposes of ascertaining whether to bill the transponder account, or, alternatively as a default if the transponder has a zero balance, to issue a bill-by-plate or V-toll invoice. MassDOT also has the information in its database that identifies which license plates belong to taxis that are leased by EJT. Hence, for purposes of § 7.04(8)(b), MassDOT knows that the cab was a "leased vehicle" and knows the identity of the person to whom the unfunded transponder belongs for purposes of billing him or her for the toll incurred.

APPENDIX F-1

APPEALS OF MBTA FARE EVASION CITATIONS

Memo

Date: October 10, 2017

To: John Englander

cc: Jeff Mullan

From: Rachel Hutchinson, Giselle Joffre

Regarding: Step-by-Step Fare Adjudication Proposal

A. Current Citation Information

2015-2016 Citation Statistics

	2015	2016
Citations	3579	2903
Total Fines Owed	\$382,465	\$360,050
Total Outstanding Fines	\$145,365	\$257,440
Approximate Revenue Collection	<\$237,000	<\$100,000
# of Hearings	947	737
# of Violators with Driver's Licenses	1616	1790

Based on these totals, we can make the following estimates:

- Approximately 25% of citations are challenged
- About 60 hearings are scheduled per month
- Just under ½ of all violators have driver's licenses

Citation Payments

When an individual pays their fare citation, the payment is processed as follows:

- The passenger pays the citation either via check (typically) or cash (rarely), and mails it to TPD
- Maria Beno, a TPD employee, collects the citation payments, logs them, and sends them to Accounts Receivable for processing
- After processing, the payments are ultimately placed in a TPD funding account, together with income from other TPD revenue sources like parking tickets, restitution payments, unclaimed property, and Policy Academy tuition fees

B. Proposed Citation Process

1. Transit Police Officer issues citation. Three copies—pink, white, and yellow.
 - a. Passenger keeps pink copy.
 - b. Officer delivers white and yellow copies to the Prosecutor’s Office at TPD.
2. Once a week, the Prosecutor’s Office delivers all fare citations to a MassDOT Administrative Revenue Officer, a full-time position tasked with processing fare citations, scheduling hearings, and communicating with passengers.
3. The Administrative Revenue Officer enters the citations into tracking software.
4. If 30 days elapse without any action, the tracking software issues a form letter warning the passenger that they have 15 days to make a payment before their license is suspended.
5. If the 15 day grace period elapses without payment, the tracking software issues a form letter notifying the passenger that their license has been suspended. As of March 2018, the Administrative Revenue Officer will have the ability to suspend and reinstate licenses as needed.
6. The passenger’s copy of the citation contains instructions on how to make a payment or appeal the citation. Currently those instructions direct payments and appeals through TPD.
 - a. If the citation instructions can be easily updated, payments and appeals will instead be made directly through the Administrative Revenue Officer.
 - b. If not, TPD will forward all payments and appeals requests to the Administrative Revenue Officer once a week.

C. Proposed Adjudication Process

1. The passenger makes a written request for an appeal of their citation either by mail or email, following the instructions on the citation. Requests for a hearing must be received by MassDOT within 30 days of the issuance of the citation.
2. The Administrative Revenue Officer processes the request and schedules a hearing date.
3. The Administrative Revenue Officer notifies the passenger in writing by mail of the date, time, and place of the hearing. Failure to appear automatically results in denial of the appeal.
4. All hearings are handled by a MassDOT Hearing Officer, a full-time position responsible for adjudications. Hearings are informal, and the rules of evidence do not apply.
5. After the hearing, the Hearing Officer issues a written decision containing a short statement of reasons for the decision, including a determination of each issue of fact necessary to the decision.
6. The Hearing Officer’s decision is final, subject to judicial review as provided by M.G.L. c. 30A, §14. The passenger is notified of the decision by mail.

7. The passenger may appeal the Hearing Officer's decision to the Superior Court pursuant to M.G.L. c. 30A, §14.
8. Pursuant to M.G.L. c. 30A, §14, the Superior Court may set aside or modify the Hearing Officer's decision only if it determines that the substantial rights of the passenger have been prejudiced.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter COMMON CARRIERS

159

Section 101 EVASION OF PAYMENT OF TOLL OR FARE

Section 101. (a) Whoever fraudulently evades or attempts to evade the payment of a fare lawfully established by a railroad corporation or railway company, either by giving a false answer to the collector of the fare, by traveling beyond the point to which the person has paid the same, by leaving the station, train, trolley, car, motor bus or trackless trolley vehicle without having paid the fare established for the distance traveled or otherwise, shall forfeit not less than \$50 nor more than \$500. Whoever passes beyond the point where a fare is collected and does not first pay such fare shall not be entitled to be transported for any distance, and may be removed from a railway car, train, trolley, motor bus or trackless trolley vehicle; provided, however, that no person shall be removed from a car of a railroad corporation except as provided in section 93, nor from a train except at a regular passenger station.

(b) Passengers who fail to pay or prepay the required fare on any vehicle or ferry owned by or operated for the Massachusetts Bay Transportation Authority in violation of this section shall be subject to a noncriminal citation, and may be requested to provide identification to the Massachusetts Bay Transportation Authority police or employees within the instructor, chief inspector or inspector classifications for the purpose of issuing a noncriminal citation. Upon request by a Massachusetts Bay Transportation Authority police officer, a passenger shall make themselves known to police by personal identification or any other means for the purpose of issuing a noncriminal citation. Whoever fails or refuses to make oneself known by personal identification or any other means upon demand by a Massachusetts Bay Transportation Authority police officer for the purposes of issuing a noncriminal citation shall be subject to arrest for fare evasion under section 93. This paragraph does not confer any power of arrest or any other power, other than to inquire as to personal identification and to issue noncriminal citations to fare evaders, on Massachusetts Bay Transportation Authority employees classified as an instructor, chief inspector or inspector.

(c) A person who is issued a noncriminal citation shall be assessed a fine as follows: \$100 for a first offense; \$200 for a second offense; or \$600 for a third or subsequent offense. If the person fails to pay the fine within 30 days of the date of the issuance of a noncriminal citation under this section, or the person fails to request a hearing within 30 days of the date of the issuance of a noncriminal citation under this section, the Massachusetts Bay Transportation Authority shall provide notice of nonpayment of a fine indicating that the person's license or right to operate a motor vehicle shall be suspended until the fine is paid. The authority shall provide reasonable opportunity for a hearing and may waive or reduce a fine imposed under this section within its discretion. If the fine is not waived under this section, the violator shall have 30 days from the date of the hearing to pay the fine.

Each citation shall state: "This noncriminal citation may be returned by mail, personally or by an authorized person. A hearing may be obtained upon the written request of the violator. Failure to obey this notice within 30 days after the date of violation may result in the non-renewal of the license to operate a motor vehicle."

(d) Upon the report of the authority of nonpayment of a fine under this section, the registrar shall not renew that person's license or right to operate a motor vehicle under chapter 90 until the registrar receives a report from the Massachusetts Bay Transportation Authority indicating that the fine has been satisfied. Fines imposed under this section shall be paid to the general fund of the Massachusetts Bay Transportation Authority.

(e) If the records of the registrar indicate that the violator has no current information on file and the violator is under 17 years of age, the record shall be retained until such time as the violator is eligible for a license to operate a motor vehicle under chapter 90. The violator shall pay the fine before being issued said license.

If the records of the registrar indicate that the violator has no current information on file and the violator is 17 years of age or older and the violator fails to pay the fine or request a hearing, a surcharge of \$100 shall be assessed to each violation.