OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

2019 REPORT

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

2019 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 2019.

In summary, the following matters were handled thus far in calendar year 2019:

- Three (3) construction contract appeals were heard and resolved by a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40. A hearing was held on one other appeal, which is pending a report and recommendation to the Secretary.

- Seven (7) direct payment demands were ruled on in accordance with G.L. c.30, §39F.

- One (1) appeal from the denial of an application to renew outdoor advertising permits was received. An adjudicatory hearing was held and a final agency decision was issued in accordance with 700 CMR 3.19 and G.L. c. 30A.

- One (1) contractor appeal from DBE decertification proceedings initiated by the MassUCP was heard and a decision was issued by the Board in accordance with 49 CFR §26.87 and M.G.L. c. 30A.

Construction Contract Appeals

Appeals Resolved by Report and Recommendation to the Secretary

Brox Industries Inc. #3-58007-003

This appeal concerns a claim in the amount of $106,232.77 for additional payments to offset credits taken by the Department for diesel oil price adjustments based on a fuel factor of 2.9 gal./ton. After a hearing, this Office recommended that the claim be denied because the contract expressly provides that the price adjustment would apply a fuel factor of 2.90 gal./ton.

Judlau-White JV, LLC. # 4-85015-001

This appeal concerns a claim in the amount of $128,749.69 for additional payments to offset credits taken by the Department for steel price adjustments on Grade 50W steel. After a hearing, this Office recommended that the claim be allowed because the price adjustment was inconsistent with the contract terms and the requirements of M.G.L. c. 30, §38A.

Middlesex Construction Corp. #5-76542-001

The appeal concerns a claim by Middlesex for an increase in mobilization costs incurred as a result of a change to its planned sequence of work. After a hearing, this Office recommended that the claim be allowed but in a lesser amount of $106,002.08.

Appeals Pending

McCourt Construction Co. #4-54923-001

A hearing was held on this appeal and the matter was taken under advisement. It is expected that a report and recommendation will be made to the Secretary in January 2020.

Direct Payment Demands

In 2019, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

Sealcoating, Inc. – February 11, 2019

General Contractor:	Cardi Corporation
Contract:	#83799 - Fall River/New Bedford – Replacement of 4 Bridges
Amount:	$10,879.65
Decision:	Allowed – March 5, 2019

Pacella Enterprises, Inc.– March 20, 2019

General Contractor:	UEL Contractors, Inc.
Contract:	#84663 – Intersection Improvements at Fall River and Arcade Avenue / Seekonk
Amount:	$39,108.57
Decision:	Denied – April 8, 2019

Pacella Enterprises, Inc.– March 20, 2019

General Contractor:	UEL Contractors, Inc.
Contract:	#89547 – Roadway Reconstruction along Route 123 / Brockton
Amount:	$316,120.91
Decision:	Denied – April 17, 2019

Pacella Enterprises, Inc.– May 7, 2019

General Contractor:	UEL Contractors, Inc.
Contract:	#84663 – Intersection Improvements at Fall River and Arcade Avenue / Seekonk
Amount:	$39,108.57
Decision:	Deposit Disputed Amounts to Joint Account – May 20, 2019

Pacella Enterprises, Inc.– May 20, 2019

General Contractor:	UEL Contractors, Inc.
Contract:	#89547 – Roadway Reconstruction along Route 123 / Brockton
Amount:	$92,149.77
Decision:	Deposit Disputed Amounts to Joint Account – June 3, 2019

Pine Ridge Technologies, Inc. – May 20, 2019

General Contractor:	J.F. White Contracting, Co.
Contract:	MBTA Contract #R32CN01 - Wellington Yard Improvements, Tracks 33-38
Amount:	$136,595.63
Decision:	Denied – May 21, 2019

Atsalis Bros. Painting – October 24, 2019

General Contractor:	Cardi Corp..
Contract:	#71232 – Structural Repairs and Painting of 12 Bridges on I-290
Amount:	$2,050,538.65
Decision:	Denied – November 5, 2019

Outdoor Advertising Appeals

In 2019, the following appeal from the denial of outdoor advertising permits was heard in accordance with 700 CMR 3.19.

City of Fall River – Denial of Four Applications for Outdoor Advertising Permits

This appeal concerned the denial of applications for permits to allow the City of Fall River to erect two electronic billboards. On July 23, 2019, a final agency decision was issued upholding OOA's denial.

Massachusetts UCP Board Appeals

In 2019, the Massachusetts Unified Certification Program Adjudicatory Board received the following contractor appeals from DBE decertification proceedings initiated by the MassUCP.

Decisions

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. The Board held a hearing on August 7, 2018, in accordance with the requirements of 49 CFR §26.87, M.G.L. c. 30A, and 801 C.M.R. §1.02 and §1.03. The Board determined that Arora exceeds the business size requirements of 49 CFR 26.65 for NAICS Codes 541330 and 541370, and that ehe MassUCP should decertify Arora from those categories of work.

APPENDIX OF DECISIONS/RULINGS

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF BROX INDUSTRIES, INC. – CLAIM #4-81581-001

PARTIES	
APPELLANT **BROX INDUSTRIES, INC.** **Address: 1471 Methuen Street** **Dracut, MA 01826** **Counsel: Richard Yurko, Esq.** **Yurko, Salvesen & Remz, P.C.** **1 Washington Street #1102** **Boston, MA 02180**	**APPELLEE** **MASS. DEPT. OF TRANSPORTATION** **Address: 10 Park Plaza** **Boston, MA 02116** **Counsel: Owen Kane, Senior Counsel** **10 Park Plaza, Room 3510** **Boston, MA 02116**

PROCEEDINGS AND ORDERS		
Entry #	**Filing Date**	**Description**
1	10/9/18	NOTICE OF APPEAL filed by Brox Industries, Inc. by Letter dated October 9, 2018 from Norman Saucier, Project Manager.
2	10/15/18	STATEMENT OF CLAIM filed by Brox Industries, Inc., dated October 10, 2018 and received on October 15, 2018
3	1/23/19	STATUS CONFERENCE held as scheduled.
4	1/25/19	SCHEDULING ORDER: By March 8, 2019, the Department shall file its Response to Brox's Statement of Claim, with a copy to Brox. If Brox wishes to file any supplement to its Statement of Claim to address issues raised in the Department's Response, it shall do so by March 22, 2019. The Parties shall attempt to agree on stipulations of facts. On or before March 22, 2019, the Parties shall provide any agreed-to stipulations and/or report on any factual issues in dispute. On March 27, 2019 at 10:00 am, the Parties shall appear in this Office for a Hearing on the appeal.
5	3/8/19	APPELLEE'S RESPONSE filed by the Department.
6	3/22/19	APPELLANT'S SUPPLEMENT TO STATEMENT OF CLAIM filed by Brox Industries.
7	3/22/19	STIPULATION OF FACTS filed jointly by Brox Industries and the Department.
8	3/27/19	HEARING held as scheduled
9	4/12/19	REPORT AND RECOMMENDATION submitted to Secretary of Transportation. "For the reasons stated in the attached Report and Recommendation, I recommend that the Contractor's appeal be DENIED."
10	4/22/19	REPORT AND RECOMMENDATION approved by Secretary of Transportation.
11	4/22/19	REPORT AND RECOMMENDATION mailed to the Parties.

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

From: Albert Caldarelli, Administrative Law Judge

Date: April 12, 2019

Re: Report and Recommendation on Appeal of Brox Industries, Inc. from the Chief Engineer's Denial of Claim #4-81581-001

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

The attached addresses an appeal by Brox Industries, Inc. ("Brox"), who is the general contractor on contract #81581 ("Contract"). The contract provided for roadway resurfacing and other maintenance of a section of Route 3 between Burlington to Tyngsborough.

The appeal involves a dispute concerning the proper calculation of a price adjustment for diesel fuel and gasoline. The price of diesel fuel declined during the project, which triggered a price adjustment resulting in a credit to the Department. The Department calculated the price adjustment credit at $154,037.51 based on a "fuel factor" of 2.90 Gallons/Ton as listed in Document 00812, Special Provisions of the Contract. The Contractor claims that the price adjustment credit should be $47,804.75 based on a fuel factor of 0.90 Gallons/Ton, which is contained in a Highway Research Board Circular referenced in the same Special Provision. As a result, the Contractor claims an adjustment to contract payments for the difference of $106,232.77.

The claim was denied by the Chief Engineer by letter dated September 10, 2018. On March 27, 2019, I conducted a hearing on the appeal. After considering the facts and the legal arguments presented by the parties, I have determined that the Special Provision expressly provides that the price adjustment will be at the fuel factor of 2.90 Gallons/Ton.

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

☐ Approved ☐ Not Approved

_____ dated: _____
Stephanie Pollack, Secretary & CEO

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

APPEAL OF BROX INDUSTRIES, INC.
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #4-81581-001

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

BACKGROUND

By letter dated September 10, 2018, the Chief Engineer made a written determination to deny a claim by Brox Industries, Inc. ("Brox") that the Department used an incorrect fuel usage factor in calculating a price adjustment credit for diesel fuel, a.k.a. Claim #4-81581-001 ("Claim"). On October 9, 2018, Brox 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 January 23, 2019 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 27, 2019, I conducted a hearing on the appeal. Attorney Richard Yurko represented Brox, and Mr. Gregory MacKenzie, Contracting Division Manager, offered testimony on Brox's behalf. Norman Saucier, Project Manager, and Nathan Hoitt, Project Manager/Estimator, also attended for Brox. The Department was represented by Attorney Owen Kane, Senior Counsel.

Prior to the hearing, the Parties submitted a stipulation of facts upon which to base a decision. At the hearing, the parties were given the opportunity to fully present their cases, including legal argument by each Party's counsel. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

I have considered the position papers, the stipulation of facts submitted by the Parties, and the evidence and testimony presented at the hearing. I make the following findings:

1. On July 16, 2014, the Department and Brox entered into Contract #81581 ("Contract"), which provided for roadway resurfacing and other maintenance of a section of Route 3 between Burlington and Tyngsborough.

2. The Contract contains a price adjustment provision for diesel fuel embodied in Document 00812 of the Special Provisions ("Special Provision"). The language of the price adjustment provision is included in Attachment 1 to this Report and Recommendation.

3. For the months of June, July, August and September 2015, the Department made price adjustments as a result of a decrease in the average price of diesel fuel, resulting in a credit to the Contract in the amount of $154,037.51.[1]

4. The price adjustments were calculated using:

   (a) the monthly price variances for diesel fuel;
   (b) the asphalt tonnage used by Brox during the four month price adjustment period; and
   (c) a fuel factor of 2.90 Gallons/Ton.

5. The Parties stipulated to the monthly price variances in the average price of diesel fuel and to the tons of hot mix used on the Contract for the four month price adjustment period.[2] The Parties dispute the fuel factor used to calculate the price adjustment.[3]

6. The Department applied a fuel factor of 2.90 Gallons/Ton, which is shown in the table contained in the Special Provision. Brox contends that the fuel factor should be 0.90 Gallons/Ton in accordance with the "Special Notes" contained in Circular 158 of the Highway Research Board, dated July 1974 ("Circular 158").[4]

7. Circular 158 contains the following "Special Notes" concerning the fuel usage factor contained therein for asphalt concrete production:

> The fuel usage factor for asphalt concrete production includes all requirements to produce a ton of asphalt concrete, including the material handling at the plant site, drying and heating of aggregate, heated asphalt storage and generating power for all plant machinery.
>
> In the event natural gas is used for the drying and heating of aggregates, fuel demands for diesel should be reduced appropriately. For normal projects approximately two gallons of diesel per ton of asphalt concrete should be deducted. (This deduction represents removal of 6% moisture and raising aggregate temperature 250 degrees F.)

8. Circular 158 is included as Attachment 1 to Federal Highway Administration technical advisory T5080.3 (December 10, 1980) on the development and use of price adjustment contract provisions.[5]

9. Brox does not use diesel fuel to dry aggregate in the manufacture of hot mix asphalt.[6] Brox uses natural gas for this purpose.[7]

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[1] Parties' stipulation of facts #5; *also see* Exhibit C to Brox Statement of Claim.
[2] Parties' stipulation of facts #4.
[3] Parties' stipulation of facts #5.
[4] The Highway Research Board issued Circular 158 in 1974 to provide factors to estimate fuel requirements for highway projects in order to comply with certain regulations promulgated under the Emergency Petroleum Allocation Act of 1973. The Act required the President to promulgate regulations to allocate and control price of petroleum products in response to the 1973 oil crisis.
[5] Parties' stipulation of facts #7.
[6] Parties' stipulation of facts #4.
[7] Testimony of Gregory MacKenzie.

10. The Parties stipulated that the price adjustment credit on Contract #81581 would be reduced to $47,804.75 if a fuel factor of 0.90 Gallons/Ton were applied, thereby resulting in an additional $106,232.77 to be paid to Brox under the Contract.[8]

DISCUSSION

This appeal is one of contract interpretation concerning the fuel factor that should be applied to monthly price adjustments for diesel fuel.

I start with the plain language of the Special Provision, which contains a table of fuel usage factors and describes the application of the fuel price adjustment as follows:

> The fuel price adjustment will apply only to the following items of work at the fuel factors shown:

ITEMS COVERED	**FUEL FACTORS**	
	Diesel	**Gasoline**
Excavation: and Borrow Work: Items 120, 120.1, 121, 123, 124, 125, 127, 129.3, 140, 140.1, 141, 142, 143, 144., 150, 150.1, 151 and 151.1 (Both Factors used)	0.29 Gallons / CY.	0.15 Gallons / CY
Surfacing Work: All Items containing Hot Mix Asphalt	2.90 Gallons / Ton	Does Not Apply

In its ordinary meaning, the word "only" describes something as "exclusive" or as needing "nothing else or more." BLACK'S LAW DICTIONARY, 1241 (Revised 4th ed. 1968). In this case, the use and underlining of the word "only" signifies to me that the price adjustment is limited in its application to the items of work and the fuel factors shown in the table, to the exclusion of all items of work and fuel factors not shown in the table.

The Special Provision also contains the following paragraph:

> This adjustment will be based on fuel usage factors for various items of work developed by the Highway Research Board in Circular 158, dated July 1974. These factors will be multiplied by the quantities of work done in each item during each monthly period and further multiplied by the variance in price from the Base Price to the Period Price.

Brox relies on this language in support of its position that the fuel factor should be 0.90 Gallons/Ton in accordance with the Special Notes contained in Circular 158. This interpretation is inconsistent with the plain language of the Special Provision limiting the price adjustment to the items of work and the fuel factors shown in the table. Also, the phrase "based on" means "an initial or starting point for calculation." BLACK'S LAW DICTIONARY, 192 (Revised 4th ed. 1968). Consistent with that definition, I read the language to mean that Circular 158 forms the basis of the fuel usage factors that are shown in the table and which will be used to calculate the price adjustment.

I believe this interpretation is consistent with the general scope and purpose for which Circular 158 is included in FHWA Technical Advisory T5080.3. The stated purpose of the Advisory was to provide "information for the development and application of price adjustment

[8] Parties' stipulation of facts #5.

provisions…"[9] The fuel usage factors contained in Circular 158 are described as "basic data" for application of the "Fuel Usage Per Unit Method", one of four methods deemed reasonable by FHWA for calculating a fuel price adjustment.[10] Additional fuel factors developed by states are also provided. All of the fuel usage factors are presented as a range of possible factors for inclusion in a price adjustment provision. MassDOT, therefore, had several options in developing its price adjustment contract provision with respect to the methodology and fuel factors to be used. It is evident that the fuel usage factor of 2.90 gallons/ton shown in the Special Provision is "based on" the factors appearing in Circular 158 for asphalt concrete under average conditions, namely production, hauling 0-10 miles, and placement (2.43+0.33+0.14 totaling 2.90). In that regard, I interpret the language in the Special Provision as a reference to the source of information that was used to develop the applicable fuel usage factor of 2.90 gallons/ton,[11] and not a reference to a supplemental set of fuel usage factors to be used to calculate the price adjustment.

Finally, my interpretation comports with fundamental requirements of public bidding in the Commonwealth. M.G.L. c. 30, §38A requires that all contracts awarded pursuant to G.L. c. 30, §39M, such as this one, include a price adjustment provision for diesel fuel. As such, the price adjustment provision must ensure that all bidders are on an equal footing and have the opportunity to "bid in the same way, on the same information..."[12] It would be contrary to this principle to interpret the Special Provision in a way that would have allowed bidders to assume different fuel usage factors based on their particular circumstances.

RECOMMENDATION

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

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: April 12, 2019

[9] FHWA Technical Advisory T5080.3 at paragraph 2.
[10] *Id*. at paragraphs 6 and 6(a).
[11] Given my interpretation of the Special Provision, I acknowledge, but do not discuss, the arguments made by Brox concerning the inherent flaws in MassDOT's use of a fuel factor of 2.90 gallons/ton for asphalt items, particularly with respect to contractors who operate gas-powered plants. Although I understand the arguments, their relevance is to MassDOT's decision to use a fuel usage factor of 2.90 gallons/ton in the price adjustment provision, not to whether Brox is contractually bound by it. The issues are also discussed in detail in the research paper, NCHRP Report 744, cited at fn.1 to Brox's Supplement.
[12] *Dep't of Labor & Indus. v. Boston Water & Sewer Comm'n*, 18 Mass. App. Ct. 621, 626 (1984)

ATTACHMENT 1

CONTRACT #81581
DIESEL FUEL PRICE ADJUSTMENT PROVISION

DOCUMENT 00812

SPECIAL PROVISIONS
MONTHLY PRICE ADJUSTMENT FOR DIESEL FUEL AND GASOLINE —
ENGLISH UNITS

Revised: 01/26/2009

This monthly fuel price adjustment is inserted in this contract because the national and worldwide energy situation has made the future cost of fuel unpredictable. This adjustment will provide for either additional compensation to the Contractor or repayment to the Commonwealth, depending on an increase or decrease in the average price of diesel fuel or gasoline:

This adjustment will be based on fuel usage factors for various items of work developed by the Highway Research Board in Circular 158, dated July 1974. These factors will be multiplied by the quantities of work done in each item during each monthly period and further multiplied by the variance in price from the Base Price to the Period Price.

The Base Price of Diesel Fuel and Gasoline will be the price as indicated in the Department's web site (www.MassDOT.state.ma.us) for the month in which the contract was bid, which includes State Tax.

The Period Price will be the average of prices charged to the State, including State Tax for the bulk purchases made during each month.

This adjustment will be effected only if the variance from the Base Price is 5% or more for a monthly period. The complete adjustment will be paid in all cases with no deduction of the 5% from either upward or downward adjustments.

No adjustment will be paid for work done beyond the extended completion date of any contract.

Any adjustment (increase or decrease) to estimated quantities made to each item at the time of final payment will have the fuel price adjustment figured at the average period price for the entire term of the project for the difference of quantity.

The fuel price adjustment will apply only to the following items of work at the fuel factors shown:

ITEMS COVERED	**FUEL FACTORS**	
	Diesel	**Gasoline**
Excavation: and Borrow Work: Items 120, 120.1, 121, 123, 124, 125, 127, 129.3, 140, 140.1, 141, 142, 143, 144., 150, 150.1, 151 and 151.1 (Both Factors used)	0.29 Gallons / CY.	0.15 Gallons / CY
Surfacing Work: All Items containing Hot Mix Asphalt	2.90 Gallons / Ton	Does Not Apply

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OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF JUDLAU-WHITE JV – CLAIM #4-85015-001

PARTIES	
APPELLANT **JUDLAU-WHITE JV** **Address: 867 Middle Road** **Acushnet, MA 02743** **Counsel: Michael Sams, Esq.** **Kenney & Sams** **45 School Street** **Boston, MA 02108**	**APPELLEE** **MASS. DEPT. OF TRANSPORTATION** **Address: 10 Park Plaza** **Boston, MA 02116** **Counsel: Owen Kane, Senior Counsel** **10 Park Plaza, Room 3510** **Boston, MA 02116**

PROCEEDINGS AND ORDERS		
Entry #	**Filing Date**	**Description**
1	10/9/18	NOTICE OF APPEAL filed by Judlau-White JV by Letter dated October 9, 2018 from Stephen Cobb, Project Manager.
2	12/13/18	STATEMENT OF CLAIM filed by Judlau-White JV, dated December 10, 2018 and received on December 13, 2018
3	1/23/19	STATUS CONFERENCE held as scheduled.
4	1/25/19	SCHEDULING ORDER: By March 1, 2019, the Department shall file its Response to Judlau-White's Statement of Claim, with a copy to Judlau-White. If Judlau-White wishes to file any supplement to its Statement of Claim to address issues raised in the Department's Response, it shall do so by March 15, 2019. The Parties shall attempt to agree on stipulations of facts. On or before March 15, 2019, the Parties shall provide any agreed-to stipulations and/or report on any factual issues in dispute. On March 20, 2019 at 10:00 am, the Parties shall appear in this Office for a Hearing on the appeal.
5	3/1/19	APPELLEE'S RESPONSE filed by the Department.
6	3/13/19	STATUS CONFERENCE held as scheduled.
7	3/15/19	APPELLANT'S SUR-REPLY filed by Judlau-White
8	3/20/19	HEARING rescheduled
9	3/21/19	REVISED SCHEDULING ORDER: The Hearing scheduled for March 20, 2019 was cancelled. The Parties shall attempt to agree on stipulations of facts. On or before April 15, 2019, the Parties shall provide any agreed-to stipulations. The Parties shall raise any pre-hearing issues or disputes requiring a determination by this office by appropriate motion on or before April 12, 2019. On April 18, 2019 at 10:00 am, the Parties shall appear in this Office for a Hearing on the appeal.

10	4/18/19	HEARING held as scheduled
11	7/3/19	REPORT AND RECOMMENDATION submitted to Secretary of Transportation. "For the reasons stated in the attached Report and Recommendation, I recommend that the Contractor's appeal be ALLOWED and that the Department return the credit of $128,749.69 back to the contract."
12	7/23/19	REPORT AND RECOMMENDATION approved by Secretary of Transportation.
13	7/23/19	REPORT AND RECOMMENDATION mailed to the Parties.

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

From: Albert Caldarelli, Administrative Law Judge

Date: July 3, 2019

Re: Report and Recommendation on Appeal of Judlau-White JV from the Chief Engineer's Denial of Claim #4-85015-001

I am pleased to submit for your consideration the attached report and recommendation that addresses an appeal by Judlau-White JV, the general contractor on contract #85015. The contract provided for replacement of two bridges on Revere Beach Parkway/Route 16: the Woods Memorial Bridge over the Malden River and Bridge No. M-12-017 over the MBTA.

The contractor's appeal involves a dispute concerning a credit in the amount of $128,749.69 that the Department applied to the contract based on a price adjustment for Grade 50W steel. The statute that governs price adjustment provisions on public works contracts, M.G.L. c. 30, §38A, provides that a base price for each material subject to a price adjustment "*shall be included in the bid documents at the time the project is advertised*." In this case, the Department failed to include a base price for Grade 50W steel in the bid documents. Nevertheless, the Department applied a price adjustment for Grade 50W steel using a base price included in the contract for a different type of steel. After considering the position papers submitted by the parties, and the evidence and testimony presented at the hearing, I concluded that the Department's position is inconsistent with the contract terms and the requirements of the statute.

For the reasons discussed in more detail in the attached, I recommend that the contractor's appeal be ALLOWED and that the Department return the credit of $128,749.69 back to the contract.

☐ Approved ☐ Not Approved

_____ dated: _____
Stephanie Pollack, Secretary & CEO

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

REPORT AND RECOMMENDATION

APPEAL OF JUDLAU-WHITE JV
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #4-85015-001

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

BACKGROUND

By letter dated September 10, 2018, the Chief Engineer made a written determination to deny a claim by Judlau-White JV that the Department improperly applied a credit to the contract in the amount of $128,749.69 based on a price adjustment for Grade 50W steel, a.k.a. Claim #4-85015-001 ("Claim"). On December 10, 2018, Judlau-White 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 January 23, 2019 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. On May 14, 2019, I held a hearing. Judlau-White was represented by Michael Sams, Esq. and Michelle De Oliveira, Esq. Testimony was offered by Jake Kilbreth, President of ARC Enterprises. Owen Kane, Senior Counsel, represented the Department, and William Moore, Assistant State Construction Engineer, offered testimony. Jack Harney, Vice President of D.W. White, Usha Wood from Saugus Construction, and Lee Deveau of Keville Enterprises were in attendence.

Prior to the hearing, the parties submitted a stipulation of facts. The parties were given the opportunity to fully present their cases, including legal argument by each party's counsel. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

I have considered the position papers, the stipulation of facts submitted by the parties, and the evidence and testimony presented at the hearing. I make the following findings:

1. In 2015, the Department and Judlau-White entered into contract #85015 ("contract"), which provided for replacement of two bridges on Revere Beach Parkway/Route 16: the Woods Memorial Bridge over the Malden River and Bridge No. M-12-017 over the MBTA (the "project").

2. The bid documents for the project contained a Notice to Contractors section which provided information about the project to prospective bidders, including a statement that the contract contains price adjustments for steel. The Notice to Contractors listed base prices for those items of steel subject to the price

adjustment. The relevant section of the Notice to Contractors is included in Attachment 1 to this Report and Recommendation.

3. The price adjustment provision for steel is contained in Document 00813 of the Special Provisions of the contract. The language of the price adjustment provision is included in Attachment 2 to this Report and Recommendation.

4. The plans and specifications for the project required the use of Grade 50W structural steel in replacing the two bridges. However, the Notice to Contractors section did not include a base price for Grade 50W steel.[1]

5. The Department has an internal process for establishing and updating base prices for different types of steel on a monthly basis based on steel mill price lists and the producer price index from the U.S. Department of Labor, Bureau of Labor Statistics; however, such base prices are not accessible to bidders unless they are included in the bid documents.[2]

6. For the months of January, February and November 2016, the Department made price adjustments for Grade 50W structural steel used on the project, which resulted in a credit to the contract in the amount of $128,749.69. There was no base price for Grade 50W steel listed in the Notice to Contractors. The Department calculated the price adjustment using a base price of $0.48/pound, which was listed in the Notice to Contractors for Grade 50 steel.[3]

7. Grade 50W structural steel is not the same material as Grade 50 structural steel.[4]

8. The Chief Engineer made a written determination to deny the Judlau-White's claim that the price adjustment for Grade 50W steel was improper.[5] The denial was based on the following determination by the Claims Committee:

> In making its determination, the Committee recognized that it did not have the authority to waive a requirement of Massachusetts General Law. The Law requires that the Department, through the Contract provisions, make a price adjustment for steel supplied to the project. The Committee also considered that the Contractor was aware that Grade 50W steel was required on the project but did not seek clarification of an obvious error through a bidder's question. The requirements of Division I, Section 5.04, indicate that the Contractor cannot take advantage of an apparent error or omission.

[1] Parties' stipulation of facts #3 and #17.
[2] Moore, Hr'g Tr. 53:21-54:22.
[3] District 4 Determination Letter dated April 18, 2017; Parties' stipulation of facts #24 and #25.
[4] Parties' stipulation of facts #27; Kilbreth, Hr'g Tr. 11:14-13:25.
[5] Chief Engineer's Determination Letter dated September 10, 2018.

DISCUSSION

Price adjustment provisions are intended to address the price volatility of construction materials and supplies such as asphalt, fuel, cement and steel, which can lead to price speculation by bidders and inflated bid prices.[6] They are designed to transfer a portion of the risk of price fluctuations in construction materials to the contracting agency, resulting in lower bids.[7] An index-based price adjustment provision is preferred because it avoids the administrative costs necessary to verify actual price changes and eliminates potential manipulation of construction costs by bidders.[8]

MassDOT is required to include an index-based price adjustment provision for steel and other materials in all contracts for road and bridge projects subject to M.G.L. c. 30, § 39M. The statute mandating price adjustment provisions, G.L. c. 30, §38A, states:

> Contracts for road and bridge projects awarded as a result of a proposal or invitation for bids under section 39M shall include a price adjustment clause for each of the following materials: fuel, both diesel and gasoline; asphalt; concrete; and steel . . . **A base price for each material shall be set by the awarding authority or agency and shall be included in the bid documents at the time the project is advertised.** The awarding authority or agency shall also identify in the bid documents the price index to be used for each material. The price adjustment clause shall provide for a contract adjustment to be made on a monthly basis when the monthly cost change exceeds plus or minus 5 per cent.

The statute recognizes the necessity of including a base price and identifying the price index in the bid documents in order for a price adjustment to work as intended. That information sets the parameters for a potential price adjustment and defines the risk that is to be shared by the parties with respect to price escalation of materials to be used on the project. It allows bidders to properly assess that risk and correlate their pricing for materials that will be subject to price adjustment. Also, the information is essential to ensure that all bidders are on an equal footing and have the opportunity to "bid in the same way, on the same information"[9] with respect to materials that are subject to price adjustment and those that are not.

If the Department inadvertently omits a base price from the bid documents, as it did in this case, the statute requires it to remedy that error prior to receiving bids. Without a base price

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[6] FHWA technical advisory T5080.3, § 2 (December 10, 1980)("Price volatility of construction materials and supplies such as asphalt, fuel, cement and steel can result in significant problems for contractors in preparing realistic bids. In many cases, prospective bidders cannot obtain firm price quotes from material suppliers for the duration of the project. This leads to price speculation and inflated bid prices to protest against possible price increases. This Technical Advisory will provide contracting authorities with information for development and application of price adjustment provisions to respond to this price volatility by transferring a portion of the risk to the contracting agency, resulting in lower bids").

[7] *Id*.

[8] J. Gallagher and F. Riggs, "Material Price Escalation: Allocating the Risks," § K at 12, 15 and § L at 17 (Construction Briefings, December 2006); *also see* FHWA technical advisory T5080.3, § 5 ("Price adjustments should be based on an index or other economic barometer which is not susceptible to manipulation by contractors and suppliers acting singly or as a group").

[9] *See Dep't of Labor & Indus. v. Boston Water & Sewer Comm'n*, 18 Mass. App. Ct. 621, 626 (1984).

at the time of bid, bidders are deprived of the opportunity to properly assess the risk of price escalation for that material, and any future attempt at a price adjustment will bear no relationship to the risk that the statute requires the parties to share. The absence of a base price may also cause bidders to carry contingencies and other allowances against price escalation for the material, which is contrary to the purpose of the statute. Finally, the bidders are deprived of equal footing because there is no common starting point to assess and price the risk of a potential price adjustment for the material. For these reasons, the statute requires that a base price "shall be included in the bid documents at the time the project is advertised." The statute does not authorize an awarding authority to make a price adjustment to materials for which no base price was included in the bid documents.

The safeguards in Division I, §5.04 do not excuse the Department's non-compliance with a statutory requirement.[10] Although the bid documents specify the use of Grade 50W structural steel on the project, the absence of a base price in the Notice to Contractors for that type of steel was not so obvious that Judlau-White or any other bidder should have been compelled to seek clarification at the time of bid. Bidders are entitled to rely on the integrity of the public bidding process and the presumption that the Department, which is charged with statutory compliance, has in fact complied with all statutory requirements, including the mandate in G.L. c. 30, §38A that a base price be provided in the bid documents for each material subject to price adjustment. When no base price was included for Grade 50W structural steel and none was added through subsequent addenda prior to bid opening, it was reasonable for Judlau-White and other bidders to conclude that the list of base prices in the Notice to Contractors was complete and that Grade 50W structural steel was not subject to price adjustment.[11]

Division I, §5.04 is also intended to guard against a bidder manipulating its bid to deliberately profit from an obvious error in the bid documents. Given the nature of an index-based price adjustment[12] and that fact that it is entirely unknown at the time of bid whether future prices will go up or down, there would be no plausible way for Judlau-White to manipulate its bid to take advantage of the absence of a base price in a price adjustment provision.

Finally, the contract defines Base Prices as "fixed prices determined by the Department and found in the Notice to Contractors section of the Bid Documents." Since price adjustments by definition are "variances between Base Prices and Period Prices",[13] the absence of a base price for Grade 50W steel makes it impossible to calculate a price adjustment for that material in accordance with the contract requirements. The Department's attempt to calculate a price

[10] Division I, §5.04 provides: "The Contractor shall take no advantage of any apparent error or omission in the plans and specifications. In the event the Contractor discovers such an error or omission, he shall immediately notify the Engineer."

[11] *See John F. Miller Co. v. George Fichera Constr. Corp*., 7 Mass. App. Ct. 494, 498 (1979) ("If the discrepancy is subtle, so that a person furnishing labor and materials, who examines the specifications reasonably conscientiously, might miss a requirement which is out of sequence or ineptly expressed, the burden of the error falls on the issuer of the specifications …"). The Department's omission of a base price for Grade 50W steel constitutes this sort of "inept expression" concerning the types of steel subject to price adjustment.

[12] *See* fn. 8.

[13] Contract, Document 00813 of the Special Provisions, "*Price Adjustments for Structural Steel and Reinforcing Steel for Contracts Bid on or after April 5, 2011*."

adjustment for Grade 50W steel by using a base price for a different type of steel is both arbitrary and inconsistent with the contract terms.

RECOMMENDATION

For the reasons stated above, I recommend that the contractor's appeal be ALLOWED and that the Department return the credit of $128,749.69 back to the contract.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: July 3, 2019

ATTACHMENT 1

CONTRACT #85015
NOTICE TO CONTRACTORS
RE: STEEL PRICE ADJUSTMENT

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⑥ADDENDUM NO.6, JUNE 18, 2015
①ADDENDUM NO.1, MAY 26, 2015

NOTICE TO CONTRACTORS (Continued)

STEEL PRICE ADJUSTMENT

This Contract contains Price Adjustments for steel. See Document 00813 - PRICE ADJUSTMENT FOR STRUCTURAL STEEL AND REINFORCING STEEL of the Special Provisions for their application.

The Base Prices for these items on this project are as follows:

⑥ *Rebar*

ASTM A6151A615M Grade 60 (AASHTO M31 Grade 420) Reinforcing Steel = **$0.34 per pound**

⑥ *Structural Steel*

ASTM A709 (AASHTO M270) Grade 36 Structural Steel Plate = **$0.55 per pound**
ASTM A709 (AASHTO M270) Grade 36 Structural Steel Shapes = **$0.39 per pound**
ASTM A709 (AASHTO M270) Grade 50 Structural Steel Plate = **$0.48 per pound**
ASTM A709 (AASHTO M270) Grade 50 Structural Steel Shapes = **$0.39 per pound**

⑥ *Piles*

ASTM A572 (AASHTO M223), Grade 50 H-Piles = **$0.39 per pound**
ASTM A572 / A572M, Grade 50 Sheetpiling = **$0.91 per pound**
ASTM A36/36M, Grade 50 = **$0.54 per pound**
ASTM A53, Grade B Structural Steel Pipe = **$0.62 per pound**
ASTM A328 / A328M, Grade 50 (AASHTO M202) Steel Sheetpiling = **$0.92 per pound**

MassDOT projects are subject. to the rules and regulations of the Architectural Access Board (521 CMR 1.00 et seq.)

Prospective bidders and interested parties can access this information and more via the internet at WWW.COMMBUYS.COM.

BY: Richard A. Davey, Secretary and CEO, MassDOT
Frank A. DePaola, P.E., Administrator, MassDOT Highway Division
SATURDAY, SEPTEMBER 20, 2014

① **A PRE-BID MEETING will be held on June 15th 2015, 9:00am-12:00pm at Conference Room 4 on the 2nd floor 10 Park Plaza, Boston, MA 02116, for this Project. Prospective Bidders are notified that, whereas all their reasonable questions will be discussed in this meeting, they must follow up with written questions which will be responded later in writing. Only written responses will be eligible as Contract Documents.**

ATTACHMENT 2

CONTRACT #85015
PRICE ADJUSTMENT PROVISION
FOR STRUCTURAL STEEL AND REINFORCING STEEL

DOCUMENT 00813

SPECIAL PROVISIONS
PRICE ADJUSTMENTS FOR STRUCTURAL STEEL AND REINFORCING STEEL
FOR CONTRACTS BID ON OR AFTER APRIL 5, 2011

May 11, 2011

This provision applies to projects containing a price adjustment for structural steel and reinforcing steel as stipulated in the Notice to Contractors section of the Bid Documents. It applies to all structural steel as defined below and all reinforcing steel on the project. Compliance with this provision is mandatory, i.e., there are no "opt-in" or "opt-out" clauses. Price adjustments will be handled as described below and shall only apply to unfabricated structural steel material, consisting of rolled shapes, plate steel, sheet piling, pipe piles, steel castings and steel forgings, and unfabricated reinforcing steel bars.

Price adjustments will be variances between Base Prices and Period Prices. Base Prices and Period Prices are defined below.

Price adjustments will only be made if the variances between Base Prices and Period Prices are 5% or more. A variance can result in the Period Price being either higher or lower than the Base Price. Once the 5% threshold has been achieved, the adjustment will apply to the full variance between the Base Price and the Period Price.

Price adjustments will be calculated by multiplying the number of pounds of unfabricated structural steel material or unfabricated reinforcing steel bars subject to a price adjustment by the index factor calculated as shown below under Example of a Period Price Calculation.

Price adjustments will *not* include the costs of shop drawing preparation, handling, fabrication, coatings, transportation, storage, installation, profit, overhead, fuel costs, fuel surcharges, or other such charges not related to the cost of the unfabricated structural steel and unfabricated reinforcing steel.

The weight of steel subject to a price adjustment shall not exceed the final shipping weight of the fabricated part by more than 10%.

Base Prices and Period Prices are defined as follows:

Base Prices of unfabricated structural steel and unfabricated reinforcing steel on a project are fixed prices determined by the Department and found in the Notice to Contractors section of the Bid Documents.

The Base Price Date is the month and year in which MassDOT opened bids for the project. This date is used to select the Base Price Index.

Period Prices of unfabricated structural steel and unfabricated reinforcing steel on a project are variable prices calculated based on the purchase date of the steel (Period Price Date) using an index of steel prices to adjust the Base Price.

The Period Price Date is the date the steel was delivered to the fabricator as evidenced by an official bill of lading submitted to the Department containing a description of the shipped materials, weights of the shipped materials and the date of shipment. This date is used to select the Period Price Index.

The index used for the calculation of Period Prices is the U.S. Bureau of Labor Statistics (BLS) Producer Price Index (PPI) Series ID WPU101702 (Not Seasonally Adjusted, Group: Metals and Metal Products, Item: Semi-finished Steel Mill Products.) As this index is subject to revision for a period of up to four (4) months after its original publication, no price adjustments will be made until the index for the period is finalized, i.e., the index is no longer suffixed with a "(P)".

Period Prices are determined as follows:

Period Price= Base Price X Index Factor
Index Factor= Period Price Index / Base Price Index

Example of a period price calculation:

Calculate the Period Price for December 2009 using a Base Price from March 2009 of $0.82/Pound for 1,000 Pounds of ASTM A709 (AASHTO M270) Grade A36 Structural Steel Plate.

The Period Price Date is December 2009. From the PPI website*, the Period Price Index= 218.0.

The Base Price Date is March 2009. From the PPI website*, the Base Price Index= 229.4.

Index Factor = Period Price Index / Base Price Index = 218.0 / 229.4 = 0.950
Period Price = Base Price X Index Factor = $0.82/Pound X 0.950 = $0.78/Pound

Since $0.82 - $0.78 = $0.04 is less than 5% of $0.82, no price adjustment is required.

If the $0.04 difference shown above was greater than 5% of the Base Price, then the price adjustment would be 1,000 Pounds X $0.04/Pound = $40.00. Since the Period Price of $0.78/Pound is less than the Base Price of $0.82/Pound, indicating a drop in the price of steel between the bid and the delivery of material, a credit of $40.00 would be owed to MassDOT. When the Period Price is higher than the Base Price, the price adjustment is owed to the Contractor.

* To access the PPI website and obtain a Base Price Index or a Period Price Index, go to http://www.bls.gov/PPI/

End of example.

The Contractor will be paid for unfabricated structural steel and unfabricated reinforcing steel under the respective contract pay items for all components constructed of either structural steel or reinforced Portland cement concrete under their respective Contract Pay Items.

Price adjustments, as herein provided for, will be paid separately as follows:

Structural Steel
Pay Item Number 999.449 for positive (+) pay adjustments (payments to the Contractor)

Pay Item Number 999.457 for negative (-) pay adjustments (credits to MassDOT Highway Division)

Reinforcing Steel
Pay Item Number 999.466 for positive (+) pay adjustments (payments to the Contractor)

Pay Item Number 999.467 for negative (-) pay adjustments (credits to MassDOT Highway Division)

No price adjustment will be made for price changes after the Contract Completion Date, unless the MassDOT Highway Division has approved an extension of Contract Time for the Contract.

*** END OF DOCUMENT ***

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF McCOURT CONSTRUCTION COMPANY – CLAIM #4-54923-001

PARTIES	
APPELLANT **McCOURT CONSTRUCTION COMPANY** **Address: 60 K Street** **South Boston, MA 02127** **Counsel: Pro Se**	**APPELLEE** **MASS. DEPT. OF TRANSPORTATION** **Address: 10 Park Plaza** **Boston, MA 02116** **Counsel: Ingrid Freire, Senior Counsel** **10 Park Plaza, Room 3510** **Boston, MA 02116**

PROCEEDINGS AND ORDERS		
Entry #	**Filing Date**	**Description**
1	1/3/19	NOTICE OF APPEAL filed McCourt Construction Company by letter dated January 3, 2019.
2	4/18/19	NOTICE OF DISMISSAL: As of this date, the Appellant has not submitted a Statement of Claim as required, nor provided any reason for failing to do so or to justify an extension of the date for submission. For the reasons stated above, the appeal on the above-referenced claim is DISMISSED.
3	7/8/19	REQUEST FOR LEAVE TO FILE STATEMENT OF CLAIM BY JULY 26, 2019, filed by McCourt by letter dated July 8, 2019 with a copy to the Department.
4	7/25/19	STATEMENT OF CLAIM filed by McCourt Construction Company, dated July 25, 2019.
5	9/11/19	MEMORANDUM AND SCHEDULING ORDER: McCourt's request to submit a Statement of Claim by July 26, 2019 is ALLOWED. By October 11, 2019, the Department may file a Response to the Statement of Claim, with a copy to McCourt. The Parties shall attempt to agree on stipulations of facts. On or before November 1, 2019, the Parties shall provide any agreed-to stipulations. On November 7, 2019 at 10:00 am, the Parties shall appear in this Office for a Hearing on the appeal.
6	10/11/19	APPELLEE'S RESPONSE filed by the Department.
7	11/1/19	JOINT STATEMENT OF UNDISPUTED FACTS filed jointly by McCourt and the Department.
8	11/7/19	HEARING held as scheduled, matter taken under advisement.
9	12/11/19	HEARING TRANSCRIPT received.

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

massDOT
Massachusetts Department of Transportation

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Kevin Cleary, Project Manager
McCourt Construction Company
60 K Street
South Boston, MA 02127

Ingrid Freire, Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of McCourt Construction Company
4-54923-001 / Item 170 Fine Grading and Compacting

MEMORANDUM

This Office received a Statement of Claim from McCourt Construction Company (McCourt) dated July 25, 2019 concerning the above referenced matter.

This matter had been dismissed by this Office on April 18, 2019 due to McCourt's failure to timely submit its Statement of Claim. On July 8, 2019, McCourt requested leave to submit its Statement of Claim by July 26, 2019. The Department did not oppose the request and there is no evidence before me to indicate that the untimely submission of the Statement of Claim would be prejudicial to the Department and its ability to fully present its position. Therefore, McCourt's request to submit a Statement of Claim by July 26, 2019 is ALLOWED.

SCHEDULING ORDER

By October 11, 2019, the Department may file a Response to the Statement of Claim, with a copy to McCourt.

The Parties shall attempt to agree on stipulations of facts. On or before November 1, 2019, the Parties shall provide any agreed-to stipulations.

On November 7, 2019 at 10:00 am, the Parties shall appear in this Office for a Hearing on the appeal.

Albert Caldarelli
Administrative Law Judge

Dated: September 11, 2019

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

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

massDOT
Massachusetts Department of Transportation

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Kevin Cleary, Project Manager
McCourt Construction Company
60 K Street
South Boston, MA 02127

David Spicer, State Construction Engineer
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of McCourt Construction Company
4-54923-001 / Item 170 Fine Grading and Compacting

NOTICE OF DISMISSAL

This Office received a Notice of Appeal dated January 3, 2019 concerning the Chief Engineer's written determination dated December 3, 2018 to deny of the above referenced claim.

In accordance with Standard Operating Procedure ALJ-01-01-1-100 ("ALJ Rules of Practice and Procedures"), the Appellant was required to fully brief all legal and factual issues to be decided on appeal by completing and submitting a Statement of Claim within 30 days of the Notice of Appeal. *See* ALJ Rules of Practice and Procedures, § IX and App. A, Standing Order 1-16 re: Scheduling Requirements.

This Office contacted the Appellant on at least three occasions regarding the above requirements. As of this date, the Appellant has not submitted a Statement of Claim as required, nor provided any reason for failing to do so or to justify an extension of the date for submission.

For the reasons stated above, the appeal on the above-referenced claim is DISMISSED.

Albert Caldarelli
Administrative Law Judge

Dated: April 18, 2019

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

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF MIDDLESEX CORPORATION – CLAIM #5-76542-001

PARTIES	
APPELLANT **MIDDLESEX CORPORATION** **Address: 1 Spectacle Pond Road** **Littleton, MA 01460** **Counsel: David Kerrigan, Esq.** **Kenney & Sams** **45 School Street** **Boston, MA 02108**	**APPELLEE** **MASS. DEPT. OF TRANSPORTATION** **Address: 10 Park Plaza** **Boston, MA 02116** **Counsel: Ingrid Freire, Counsel** **10 Park Plaza, Room 3510** **Boston, MA 02116**

PROCEEDINGS AND ORDERS

Entry #	Filing Date	Description
1	3/26/19	NOTICE OF APPEAL received on March 26, 2019, by letter from Middlesex Corp. dated March 19, 2019.
2	4/25/19	STATEMENT OF CLAIM filed by Middlesex Corp., dated April 22, 2019 and received on April 25, 2019 via email.
3	5/29/19	STATUS CONFERENCE held as scheduled.
4	6/3/19	SCHEDULING ORDER: By June 14, 2019, the Department shall file its Response to the Statement of Claim, with a copy to counsel for Middlesex Corp. If Middlesex Corp. wishes to file any supplement to its Statement of Claim to address issues raised in the Department's Response, it shall do so by June 28, 2019. The Parties shall attempt to agree on stipulations of facts. On or before July 12, 2019, the Parties shall provide any agreed-to stipulations and/or report on any factual issues in dispute. On July 16, 2019 at 10:00 am, the Parties shall appear in this Office for a Hearing on the appeal.
5	6/13/19	APPELLEE'S RESPONSE filed by the Department.
6	7/2/19	SCHEDULING ORDER: Hearing scheduled for July 16, 2019 is CANCELLED due to an unforeseen issue.
7	8/9/19	RESCHEDULING OF HEARING DATE: The Hearing will take place on August 20, 2019 at 10:00 am.

8	8/16/19	REVISED SCHEDULING ORDER: The Hearing scheduled for August 20, 2019 was cancelled. The Parties shall raise any pre-hearing issues or disputes requiring a determination by this office by appropriate motion on or before September 13, 2019. The Parties shall attempt to agree on stipulations of facts. On or before September 13, 2019, the Parties shall provide any agreed-to stipulations. On September 17, 2019 at 10:30 am, the Parties shall appear in this Office for a Hearing on the appeal.
9	9/13/19	JOINT STATEMENT OF UNDISPUTED FACTS filed jointly by the Parties.
10	9/17/19	HEARING held as scheduled.
11	10/17/19	HEARING TRANSCRIPT received.
12	11/1/19	SCHEDULING ORDER – POST-HEARING BRIEFS: If either party wishes to submit a post-hearing brief, such brief shall be submitted on or before November 22, 2019
13	11/22/19	APPELLANT'S POST-HEARING BRIEF received.
14	11/22/19	APPELLEE'S POST-HEARING BRIEF received.
11	12/9/19	REPORT AND RECOMMENDATION submitted to Secretary of Transportation. "For the reasons stated in the attached report and recommendation, I recommend that the contractor's appeal be APPROVED but in a lesser amount of $106,002.08."
12	12/18/19	REPORT AND RECOMMENDATION approved by Secretary of Transportation.
13	12/18/19	REPORT AND RECOMMENDATION mailed to the Parties.

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

From: Albert Caldarelli, Administrative Law Judge

Date: December 9, 2019

Re: Report and Recommendation on Appeal of Middlesex Corporation from the Chief Engineer's Denial of Claim #5-76542-001

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

The attached addresses an appeal by Middlesex Corporation ("Middlesex"), who is the general contractor on contract #76542 ("Contract"). The contract provided for replacement of drawbridge #O-01-001=T-04-001 on Beach Road over Lagoon Pond in Oak Bluffs/Tisbury on the island of Martha's Vineyard. The Contract also provided for demolition of a vacant house adjacent to the drawbridge and within the highway layout.

The appeal concerns a claim by Middlesex for an increase in mobilization costs incurred as a result of a change to its planned sequence of work. Middlesex bid the project based on demolishing the vacant house toward the end of the project so that it would be available for use as a field office and for temporary housing on the island during the first two years of the project. After Contract award, the Department directed Middlesex to demolish the house as one of the first tasks of construction, which eliminated the possibility of using it as a field office and temporary housing. Middlesex claims that it incurred additional costs to mobilize to the site, because it then had to rent and locate a field office trailer off-site and incur additional costs for employee housing during a two-year period.

The claim was denied by the Chief Engineer by letter dated March 14, 2019. On September 17, 2019, I conducted a hearing on the appeal. After considering the facts and the legal arguments presented by the parties, I conclude that the Department's direction did constitute a change to the contractor's planned sequence of work, which made Middlesex's mobilization to the site more difficult and costly than anticipated and than it should have been. However, I also conclude that certain damage amounts that Middlesex claims as a result of this change are overstated.

For the reasons stated in the attached report and recommendation, I recommend that the contractor's appeal be APPROVED but in a lesser amount of $106,002.08.

☐ Approved ☐ Not Approved

_____ dated: _____
Stephanie Pollack, Secretary & CEO

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

REPORT AND RECOMMENDATION

APPEAL OF MIDDLESEX CORPORATION
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #5-76542-001

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

BACKGROUND

By letter dated March 14, 2019, the Chief Engineer made a written determination to deny a claim by Middlesex Corporation ("Middlesex") for an increase in mobilization costs incurred as a result of a change to its planned sequence for the demolition of a vacant house within the project limits, a.k.a. Claim #5-76542-001 ("Claim"). Middlesex properly appealed the Chief Engineer's determination in accordance with Division I §7.16 of the Contract by timely submitting a Statement of Claim, dated April 22, 2019, to the Office of the Administrative Law Judge.

The parties participated in a status conference on May 29, 2019 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 September 17, 2019, I conducted a hearing on the appeal. Attorney David Kerrigan represented Middlesex, and Mr. David Skerrett, Senior Vice President, and James Doyle, Project Manager, offered testimony on behalf of Middlesex. The Department was represented by Ingrid Freire, Counsel. Richard McKenzie, Resident Engineer, provided testimony. Lee Deveau, Michael Broderick, Michael McGrath, and Lawrence Piazza also attended for the Department and District 5.

Prior to the hearing, the Parties submitted a stipulation of facts upon which to base a decision. At the hearing, the parties were given the opportunity to fully present their cases, including legal argument by each Party's counsel. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

I have considered the position papers, the stipulation of facts submitted by the Parties, and the evidence and testimony presented at the hearing. I make the following findings:

1. On July 29, 2013, the Department and Middlesex entered into contract #76542 ("Contract"). The contract provided for replacement of drawbridge #O-01-001=T-04-001 on Beach Road over Lagoon Pond in Oak Bluffs/Tisbury on the island of Martha's Vineyard.[1]

[1] Contract #76542; Parties' Joint Statement of Undisputed Facts #1, #2, #3, and #4.

2. The Contract also provided for demolition of a vacant residential house adjacent to the drawbridge (a.k.a "Building No. 1").[2] The Department advised the bidders that the property was in its possession.[3]

3. The Contract does not prescribe any schedule, sequence, or timing for completing the demolition work.[4]

4. The Construction Staging Plans (Sheets 73-75 of 257) describe a three-stage sequence of construction. Building No. 1 is shown as existing on the project site until Stage III, the final stage of construction.

5. The Temporary Traffic Control Plans (Sheets 37-38 of 257) describe four-phases for traffic control. Building No. 1 is shown as existing on the project site until Phase IV, the last phase of construction.

6. Middlesex bid the project assuming it would demolish Building No. 1 in the final phase of construction so that the structure would be available for its use as a field office and for temporary housing on the island for the first two years of the project.[5]

7. Shortly after Contract award, the Department directed Middlesex to demolish Building No. 1 as one of the first tasks of construction.[6]

8. Upon receipt of the Department's direction and before it began work, Middlesex advised the Department by letter dated October 1, 2013 of its intent to utilize Building No. 1 as a field office and as temporary housing for the first two years of the project until the beginning of Stage III.[7] The letter gave notice that the Department's direction would cause it to incur additional mobilization costs to establish its field office and secure temporary housing, and that Middlesex was entitled to an equitable adjustment.[8]

9. By letter dated October 21, 2013, the District 5 Highway Director denied Middlesex' request for an equitable adjustment for additional costs incurred for office space and housing as a result of early demolition of Building No. 1. The letter confirmed that the Department wanted Middlesex "to prioritize demolition as soon as construction begins" and "to complete demolition of Building No. 1 as soon as possible."

10. The Department's direction to demolish Building No. 1 as soon as possible was apparently related to a contentious eminent domain dispute concerning the

[2] Contract #76542, Special Provisions, Item 112.1; Parties' Joint Statement of Undisputed Facts #5.
[3] Contract #76542, Addendum No. 12, Question and Answer No. 18, June 21, 2013.
[4] Contract #76542; McKenzie, Hr'g Tr. 61:21-25.
[5] Skerrett, Hr'g Tr. 15:1-16:5, 16:24-17:2, 21:17-19; Doyle, Hr'g Tr. 21:9-16; Parties' Joint Statement of Undisputed Facts #9, including Exhibit A thereto.
[6] Parties' Joint Statement of Undisputed Facts #8.
[7] Parties' Joint Statement of Undisputed Facts #9, including Exhibit A thereto.
[8] *Id.*

structure.[9] It was not for any reason related to public safety, public convenience, or the project work.[10]

11. When Middlesex began work on the site, Building No. 1 had electrical service and a working septic system.[11] Plumbing was in place and water service could have been restored with certain upgrades/repairs.[12] The interior of the building was in disrepair and there were no furnishings;[13] however, according to the Department's Resident Engineer, utilizing the house as a field office and temporary housing was feasible with "a little work … depending on how good you wanted it to be."[14]

12. During the project, Middlesex had an average of 10 to 25 people on site per day, half of which would remain overnight on the island.[15]

13. Middlesex provided a 1,200 square foot, three-bedroom house on the island for the Department's use as a field office. The monthly rent was $1,700.[16] It also rented another house for its own employees at a monthly cost of $3,500.[17]

14. The Chief Engineer denied Middlesex's claim based on the following determination by the Claims Committee:

> … the Committee determined that the building was in the possession of the Department and was not available to the Contractor for use as temporary housing or office space. At the time of bid, the Contractor could not reasonably rely on having the use of the building for anything beyond demolishing the structure, certainly not for housing Contractor employees. The Committee noted that the Contractor indicated during the meeting that it had not taken into consideration certain offsetting costs to prepare the building for occupancy and to maintain the building which would have reduced the claimed amount.[18]

15. I take notice of Contract #86774, Special Provisions, Item 112.1 "Demolition of Building No. 1" which provides in part:

> **The work associated with Items 112.1, 112.2 and 112.3 shall be performed as one of the first tasks of construction so that utility work can proceed. The Contractor shall schedule the work accordingly to ensure compliance with this requirement**.

16. I take notice of Contract #90726, Special Provisions, Item 112.1 "Demolition of Building No. 1" which provides for demolition of a residential house located at

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[9] *See Holloman v. MassDOT*, DUCV2014-00040; *also see* Skerrett, Hr'g Tr. 23:23-24:4.
[10] *See* Contract, Supplemental Specifications dated June 15, 2012, Division I, §8.03 ("The contract work shall be expedited when the Engineer determines that the safety and/or the convenience of the public necessitates an earlier completion date for the performance of the work contained in the contract.").
[11] Parties' Joint Statement of Undisputed Facts #6 and #7.
[12] McKenzie, Hr'g Tr. 47:6-8, 58:15-20.
[13] McKenzie, Hr'g Tr. 47:15-18, 52:1-7.
[14] McKenzie, Hr'g Tr. 52:5-7, 55:11-24.
[15] Skerrett, Hr'g Tr. 29:12-14; Doyle, Hr'g Tr. 29:15-16.
[16] McKenzie, Hr'g Tr. 53:15-54:4.
[17] Skerrett, Hr'g Tr. 84:8-13.
[18] Chief Engineer's Determination Letter dated March 14, 2019.

248 Dedham Street in Canton. The Contractor on that project, SPS New England, is utilizing that house as its field office.[19]

DISCUSSION

A basic principle in construction is that the contractor is responsible for the means, methods, and sequences on the project.[20] Unless otherwise prescribed in the contract the contractor may plan for the most cost-effective schedule and sequencing during the bid process, and is generally free to use any means, methods, and sequences to accomplish the contract work.[21]

In this case, there was no specific schedule or sequence in the Contract with respect to demolition of Building No. 1.[22] Although the Contract prohibited Middlesex from demolishing the building "until it has been released to the Contractor by the Department in writing", once the building was released, there was no specific sequence or schedule to complete the demolition work. In addition, a contractor bidding on this project could reasonably infer from the Construction Staging Plans and the Temporary Traffic Control Plans, both of which show Building No. 1 existing on the project site until the final stage of construction, that the demolition work did not need to begin until that time.

For these reasons, I find that Middlesex was reasonable in assuming for purposes of preparing its bid that it could demolish Building No. 1 in the final phase of construction. The Department's direction to demolish the structure as soon as construction began, when the contract provided no specific schedule requirement for doing so, was a change to Middlesex's planned sequence of construction. When an owner directs changes in the method or sequence of construction from that upon which the contractor based its bid, the contractor may have grounds to claim compensation for increased costs if the change in sequence makes the work more difficult and expensive than anticipated.[23]

In this case, the change in sequence did not make the demolition work more difficult or expensive. Middlesex does not claim any delay, hindrance, inefficiency, or increased cost to perform the demolition work or any other work on the project. The claim is for additional mobilization costs to lease land, rent a trailer, and pay certain hotel costs to house employees on the island. Middlesex claims that these costs were incurred because the Department's direction to demolish Building No. 1 physically eliminated the availability of the building for use as a field office and temporary housing during the early stages of construction. For the claim to have merit, Middlesex must demonstrate that it had a right under the contract to use Building No. 1 for those purposes had the Department not ordered it to be demolished as soon as possible.

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[19] *See* Skerrett, Hr'g Tr. 16:6-17:14.
[20] J. Lewin & E.F. Eisenberg, Massachusetts Practice - Construction Law §7:8 at 451 (2018-19); *also see* Contract, Division I, §8.06 (expressly requiring that the Contractor determine the sequence of the work).
[21] *See* Division I, §8.07.
[22] *See* Special Provisions, "Prosecution and Progress" at A00801-6 to A00801-9; *also compare* Contract #86774, Special Provisions, Item 112.1 "Demolition of Building No. 1" ("The work associated with Items 112.1, 112.2 and 112.3 shall be performed as one of the first tasks of construction ...")
[23] *See Cent. Ceilings, Inc. v. Suffolk Constr. Co*., 2013 Mass. Super. LEXIS 230; *also see Mecca Constr. Corp. v. All Interiors, Inc.*, 2009 Mass. Super. LEXIS 253.

The Department argues that Middlesex had no contractual right to use the building as a field office and temporary housing. The building was in the possession of the Department.[24] The Department made no affirmative representations in the contract that the building would available to the bidders for use as a field office and for temporary housing. Therefore, Middlesex was required to obtain the Department's permission to do so,[25] and such permission was not given.

The Department also argues that all compensation for field office and housing costs are covered in the bid item for mobilization. Maintaining a field office and moving personnel to the project site is expressly required and should have been included in the bid.[26] The Department contends that the costs claimed by Middlesex are the result of a calculated business risk taken by Middlesex to not carry them in its bid. Any assumption that certain approvals would occur, which did not, is a risk that Middlesex took in pricing the work and no relief should be granted by means of an equitable adjustment.

I agree with the Department's view of the contract requirements as they apply to Middlesex's claim; however, I find merit to the claim because of the specific facts of this case. I believe this is one of those infrequent situations where the contractor's claim arises from a breach by the Department and therefore, falls outside of otherwise applicable contract terms. Contractually, it was entirely within the Department's discretion whether to allow Middlesex to use Building No. 1 for a field office and temporary housing, as long as it did not exercise that discretion arbitrarily.[27] Once the Department was advised of Middlesex's plan, its decision to nonetheless order early demolition of Building No. 1 was, in my opinion, arbitrary and amounted to a breach of contract.

Based on the evidence presented at the hearing, the Department's sole purpose for directing early demolition of Building No. 1 was simply to eliminate the object of a dispute that was in litigation. That decision, however, had nothing to do with any actual issue in the litigation. It was not based on any issues of public safety, public convenience, or other reasonable justification. The decision was entirely unrelated to the work to be performed by Middlesex. The Department was unable to articulate any reason why it insisted on ordering early demolition of Building No. 1 even after it became aware that Middlesex planned to use the structure for a field office and temporary housing. After Notice to Proceed, the Department had turned over responsibility for the structure to Middlesex until it was to be demolished.[28] The Department had no alternate use for the building pending demolition or any other reason to

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[24] *See* Addendum No. 12, Bidder Question No. 18.

[25] *See* Division I, §5.01 ("The engineer shall decide … all questions relating to the supervision, control and direction of work on the site and use thereof."); *also see generally*, Special Provisions, A00801- 27: ("No areas shall be used for storage without prior permission of the Engineer."); Division I, §4.09 (Contractor is required to obtain Department's prior written approval to use material found on the site.); Division I, §6.03 (Contractor is required to obtain Department's approval for use of portions of the right of way for storage and for the placing of plant and equipment.).

[26] Division II, §748 ("This item shall consist of preparatory work and operations including, but not limited to, those necessary for the movement of personnel, equipment, supplies, and incidentals to the project site, for the establishment of all contractor's field offices, buildings, and other facilities necessary for work on the project and all other work and operations which must be performed or costs which must be incurred prior to beginning work.")

[27] *See, e.g.,* M.G.L. c. 30, §39J which prohibits Commonwealth agencies, among other things, from making arbitrary decisions with respect to disputes arising under public construction contracts; *also see* G.L. c. 30A, §14(7)(g); and *L.L. v. Commonwealth*, 470 Mass. 169, 184-185 & n.27 (2014) (discussing the abuse of discretion standard).

[28] *See* Division I, §7.13; Special Provisions, Item 112.1.

prohibit Middlesex's planned use. The building had electrical service and a working septic system, plumbing was in place and water service could have been restored with certain upgrades/repairs, and the Department's Resident Engineer confirmed that the house could have been used as a field office and temporary housing with "a little work" had it not been demolished. The Department was using a similar three-bedroom residential house as its field office for the same project. The Department offered no reason why this situation was any different from the residence to be demolished pursuant to Contract #90726, for which permission was given to the contractor to use the house as its field office. Middlesex took a risk that its request to use of Building No. 1 for its field office and for temporary housing might be denied. That the Department's denial would be arbitrary and without any rational justification was beyond the scope of that risk.

Middlesex is entitled to damages resulting from the Department's breach. However, the claim includes markups and other amounts pursuant to the contract pricing terms for extra work. This overstates Middlesex's actual damages because no extra work was performed and the remedy for the breach lies outside of the contract terms. The Department points out, and I agree, that Middlesex failed to mitigate its damages with respect to temporary housing by incurring more expensive hotel costs.[29] Middlesex did not apply offsets for improvements, repairs and other costs that would have been incurred to convert Building No. 1 for its planned uses.

Based on the testimony and evidence presented at the hearing, I conclude that Middlesex is entitled to damages in the amount of $106,002.08 as follows:

1. $22,102.08 for rental cost of office trailer;
2. $24,100.00 for land lease to locate office trailer;
3. $59,800.00 for temporary housing based on cost of a three-bedroom house at average monthly rent of $2,600.00 x 23 months.

RECOMMENDATION

For the reasons stated above, I recommend that the contractor's appeal be APPROVED but in a lesser amount of $106,002.08.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: December 9, 2019

[29] I believe that the damage to which Middlesex is entitled is the loss of use of Building No. 1, a three-bedroom house. The rental cost of a three-bedroom house seems to be a more accurate measure of damage than the cost of renting three hotel rooms. According to the testimony presented, the monthly rental cost for such accommodations ranged from $1,700 to $3,500.

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS

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

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: March 5, 2019

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

Claimant:	Sealcoating, Inc.
Contractor:	Cardi Corporation
Contract:	#83799
City/Town:	Fall River/New Bedford – Replacement of 4 Steel Bridges
Amount:	$10,879.65

This direct payment demand (Demand) by Sealcoating, Inc. was filed with the Department on February 11, 2019.

RULING

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

1. The Demand consists of a cover letter dated February 1, 2019 and attachments. The Demand is made by sworn statement of Cindy Reed, Payroll Manager for Sealcoating.

2. A "cc" to the general contractor, Cardi Corporation ("Cardi"), appears on the cover letter to indicate that a copy of the Demand was sent to the general contractor at its usual place of business (400 Lincoln Avenue, Warwick, RI 02888).

3. MassDOT did not receive a Reply from the general contractor, Cardi, within 10 days of the date of receipt of the Demand.

4. MassDOT construction staff advises that Sealcoating was approved to perform subcontract work under Pay Items 453, 995.01, and 995.04.

5. The Demand contains a breakdown, with supporting documentation, showing (1) that Sealcoating, Inc. invoiced the general contractor a total of $99,244.57 for completed subcontract work under contract Pay Items 453, 995.01, and 995.04; (2) that it received payment from the general contractor in the amount of $88,364.92; and (3) that there is a subcontract balance due of $10,879.65.

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

6. MassDOT's Resident Engineer has confirmed that all subcontract work to be performed on Contract #83799 has been substantially completed by Sealcoating, and that the general contractor has been paid in full for such work as of Pay Estimate #67 dated December 5, 2017.

RULING

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

As to the merits of the Demand, G.L. c. 30, §39F(1)(d) provides in pertinent part: "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

Sealcoating has substantially completed its subcontract work in Contract #83799. As of Pay Estimate #67 dated December 5, 2017, the general contractor Cardi was paid in full for such work. However, Cardi did not made payment to Sealcoating within seventy days after substantial completion of the subcontract work. As Cardi 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 Sealcoating, Inc. $10,879.65 from the next periodic, semi-final, or final estimate, and deduct that amount from payments due Cardi Corporation in accordance with Section 39F.

cc:

Sealcoating, Inc.
825 Granite Street
Braintree, MA 02184

Cardi Corporation
400 Lincoln Avenue
Warwick, RI 02888

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

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: April 8, 2019

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

Claimant:	Pacella Enterprises, Inc.
Contractor:	UEL Contractors, Inc.
Contract:	#84663
City/Town:	Intersection Improvements at Fall River and Arcade Avenue / Seekonk
Amount:	$39,108.57

This direct payment demand (Demand) by Pacella Enterprises, Inc. (Pacella) was received by the Department on March 20, 2019.

FINDINGS

I make the following findings based on the Demand, the general contractor's Reply, the contract and subcontract, and input from MassDOT construction staff concerning the status of subcontract work:

1. Pacella is an approved subcontractor on Contract #84663. Its subcontract scope includes work under the following Contract Items:

    - #450.90 Contractor Quality Control
    - #452.00 Asphalt Emulsion for Tack Coat
    - #455.22 Superpave Surface Course
    - #455.31 Superpave Intermediate Course
    - #455.42 Superpave Base Course
    - #456.00 Warm Mix Asphalt Pavement
    - #470.00 Hot Mix Asphalt Berm Type A
    - #470.20 Hot Mix Asphalt Berm Type A (modified)
    - #570.30 Hot Mix Asphalt Curb (Type 3)
    - #703.00 Hot Mix Asphalt for Driveways

2. The Demand consists of a one-page letter dated March 12, 2019 signed by the Vice President of Pacella. The signature is notarized.

3. The Demand states: "We substantially completed our subcontract work on the above project in accordance with the plans and specifications and requested payment of the entire balance due under our subcontract from the General Contractor who has failed to pay. This is a written

demand for the balance of $39,108.57 due under the subcontract, a breakdown of which is as follows:

Subcontract Price:	$320,375.00
Approved Change Orders	28.925.13
Total Adjusted Subcontract	349,300.13
Payments to Date	(304,510.06)
	44,790.07
Less Agreed Back charge	(5,681.50)
Balance Presently Due	39,108.57

4. The Department received a reply from the general contractor, UEL Contractors, Inc. (UEL), on March 22, 2019. The Reply disputes that the amounts claimed in the Demand are due Pacella. However, the Reply was not made by sworn statement as required by M.G.L. c. 30, §39F(d).

5. The subcontract agreement between Pacella and UEL indicates that the total subcontract price is $297,875.00. It also contains pricing on a unit price basis, including estimated quantities, for the approved subcontract work

6. The Quantity Control Sheets and other information provided by the Department's construction staff do not identify any quantity overruns or approved change orders on any of Pacella's approved subcontract items.

RULING

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

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. A subcontractor is not eligible for a direct payment until seventy days after completion of the subcontract work. Although the Demand states that the work is substantially completed, it does not state when substantial completion was achieved. Therefore, the Department cannot confirm that the Pacella's subcontract work was substantially completed more than seventy days prior to the date of the Demand.

Also, G.L. c.30, §39F requires that the Demand contain "a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work." The Demand does not satisfy the requirement for a detailed breakdown because it does not provide sufficient detail to support the $39,108.57 amount claimed. There is no explanation as to why the subcontract price listed in the Demand is different than that shown in the applicable subcontract. Also, there are no details concerning the pay items and pricing for the subcontract work, the quantities of work completed and paid for, what work has not been paid for, the basis for the claimed subcontract adjustments, and all other information needed to demonstrate what Department approved work was done but remains unpaid. As a result of these deficiencies, the Department is unable to reconcile the inconsistencies between the

amounts claimed in the Demand, the estimated quantities and pricing contained in the subcontract agreement, and the final quantities and contractor payments documented in the Department's records.

I also find that the UEL's Reply was not made by sworn statement. Therefore, it also fails to comply with the formal requirements of G.L. c.30, §39F.

For the reasons stated above, the Demand is DENIED.[1]

cc:

Pacella Enterprises, Inc.
P.O. Box 1020
Wrentham, MA 02093

UEL Contractors, Inc.
65 Parker Street
Clinton, MA 01510

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

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

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: April 17, 2019

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

Claimant:	Pacella Enterprises, Inc.
Contractor:	UEL Contractors, Inc.
Contract:	#89547
City/Town:	Roadway Reconstruction along Route 123 / Brockton
Amount:	$316,120.91

This direct payment demand (Demand) by Pacella Enterprises, Inc. (Pacella) was received by the Department on March 20, 2019.

FINDINGS

I make the following findings based on the Demand, the general contractor's Reply, the contract and subcontract, and input from MassDOT construction staff concerning the status of subcontract work:

1. Pacella is an approved subcontractor on Contract #89547. Its subcontract scope includes work under the following Contract Items:

    - #450.90 Contractor Quality Control
    - #451.00 Patching
    - #452.00 Asphalt Emulsion for Tack Coat
    - #453.00 HMA Joint Sealant
    - #455.23 Superpave Surface Course
    - #455.32 Superpave Intermediate Course
    - #455.42 Superpave Base Course
    - #456.00 Warm-Mix Asphalt Pavement
    - #470.00 Hot Mix Asphalt Berm Type A
    - #472.00 Hot Mix Asphalt for Misc. Work
    - #702.00 Hot Mix Asphalt Walk Surface
    - #703.00 Hot Mix Asphalt Driveway

2. The Demand consists of a two-page letter dated February 28, 2019 signed by the Vice President of Pacella. The signature is notarized.

3. The Demand states:

> "… Pacella submitted requests for periodic payments to UEL totaling $862,468.59, representing the amount due for labor and materials to date. UEL paid $546,347.68, leaving a balance due of $316,120.91, which UEL failed to pay. This is written notice to you of our failure to receive such payment, a breakdown of which is as follows:

Date of Requisition	Net Amount of Requisition	Amount of Payment From General Contractor	Balance Due From General Contractor
9/1/2018	$174,530.65	$150,839.08	$ 23,691.57
12/10/2018	$381,240.63	$ 88,811.29 (joint check)	$292,429.34
TOTALS	$862,468.59	$546,347.68	$316,120.91
Periodic Payment Due			$316,120.91

4. The Department received a reply from the general contractor, UEL Contractors, Inc. (UEL), dated March 12, 2019. The Reply disputes that the amounts claimed in the Demand are due Pacella. The Reply also states that all amounts due and payable to Pacella as of Pay Estimate 52 have been made, with the exception of $22,200.00 that is being held against outstanding corrective work that the Department has ordered related to Pacella's subcontract work. The Reply was not made by sworn statement as required by M.G.L. c. 30, §39F(d).

5. The Department's construction staff advises that Pacella has substantially completed the subcontract work. However, a Deficiency report was issued for subcontract work performed by Pacella, explained as follows:

> "MassDOT is holding payment for 58.31 ton of top ($5,831) and 132.79 gallons of tack ($929.53) until the DR is addressed with the corrective action on the areas of top course of HMA. UEL is holding more than MassDOT's amount since MassDOT based this figure on contract unit prices, and if Pacella does not return to do the corrective work UEL will be required to hire another contract to do it at a premium.
>
> Additionally 310.14 ton of intermediate course was not paid to UEL as this was over and above theoretical yield between STA 17+50 and 26+50. This extra mix was placed due to UEL's poor grading of the gravel base prior to paving. The gravel grades being incorrect resulted in shimming with HMA to achieve the final plan grades. MassDOT refused to participate in this since the cost of HMA is way higher than the gravel costs. This does not appear to be accounted for in Pacella's demand."

RULING

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

The Demand fails to comply with the formal requirements of G.L. c.30, §39F. The Demand must 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 does not satisfy the requirement for a detailed breakdown because it does not provide sufficient detail to support the $316,120.91 amount claimed. There are no details concerning the pay items and pricing for the subcontract work, the quantities of work completed and paid for, what work has not been paid for, the basis for the claimed subcontract adjustments, and all other information needed to demonstrate what Department approved work was done but remains unpaid. In addition, the Demand does not account for amounts retained by the Department as the estimated cost of completing the incomplete and unsatisfactory items of work. As a result of these deficiencies, the Department is unable to reconcile the inconsistencies between the amounts claimed in the Demand and the final quantities and contractor payments documented in the Department's records.

I also find that the UEL's Reply was not made by sworn statement. Therefore, it also fails to comply with the formal requirements of G.L. c.30, §39F.

For the reasons stated above, the Demand is DENIED.[1]

cc:

Pacella Enterprises, Inc.
P.O. Box 1020
Wrentham, MA 02093

UEL Contractors, Inc.
65 Parker Street
Clinton, MA 01510

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

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

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 20, 2019

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

Claimant:	Pacella Enterprises, Inc.
Contractor:	UEL Contractors, Inc.
Contract:	#84663
City/Town:	Intersection Improvements at Fall River and Arcade Avenue / Seekonk
Amount:	$39,108.57

This direct payment demand (Demand) by Pacella Enterprises, Inc. (Pacella) was received by the Department on May 7, 2019.

FINDINGS

I make the following findings based on the Demand, the general contractor's Reply, the contract and subcontract, and input from MassDOT construction staff concerning the status of subcontract work:

1. Pacella is an approved subcontractor on Contract #84663. Its subcontract scope includes work under the following Contract Items:

    - #450.90 Contractor Quality Control
    - #452.00 Asphalt Emulsion for Tack Coat
    - #455.22 Superpave Surface Course
    - #455.31 Superpave Intermediate Course
    - #455.42 Superpave Base Course
    - #456.00 Warm Mix Asphalt Pavement
    - #470.00 Hot Mix Asphalt Berm Type A
    - #470.20 Hot Mix Asphalt Berm Type A (modified)
    - #570.30 Hot Mix Asphalt Curb (Type 3)
    - #703.00 Hot Mix Asphalt for Driveways

2. The Demand contains a sworn statement and detailed breakdown of the balance due under the subcontract. Pacella claims that it is due $39,108.57. The Demand indicates that it was delivered certified mail to the general contractor (#70172620000047188984).

3. The Department received a reply from the general contractor, UEL Contractors, Inc. (UEL), dated May 6, 2019. The Reply disputes that the amounts claimed in the Demand are due Pacella.

4. The subcontract agreement between Pacella and UEL indicates that the total subcontract price is $297,875.00. It also contains pricing on a unit price basis, including estimated quantities, for the approved subcontract work. The subcontract pricing also contains the following statement: "Based upon one mobilization – Additional Mobes @ $3,750.00 per."

5. The Quantity Control Sheets and other information provided by the Department's construction staff indicate that Pacella substantially completed is subcontract work as of December 18, 2018. Construction staff advises that Pacella is completing certain punch list items.

RULING

As an initial matter, I find that the Demand is properly filed and complies with the formal requirements of G.L. c.30, §39F.

Pacella makes a demand for direct payment in the amount of $39,108.57. Of that amount, $22,500.00 is claimed due under the subcontract on account of six additional mobilizations during the project. I note that the subcontract expressly states that Pacella's pricing is based on one mobilization with each additional mobilization to be paid at $3,750.00. In its Reply, the general contractor expressly disputes Pacella's claim for additional mobilization costs, but acknowledges at least three additional mobilizations. The remaining amount of the Demand appears to be based on disagreements between Pacella and UEL concerning the quantities of work completed by Pacella versus those that have been accepted and paid for by the Department.

For purposes of G.L. c.30, §39F, the Department need not determine the disputes between Pacella and UEL, only that a dispute exists concerning "the balance due under the subcontract." Based on these facts, I find that there is a dispute between the subcontractor and general contractor concerning the balance due under the subcontract within the meaning of G.L. c.30, §39F (1)(e)(iii). Accordingly, the Department is obligated to deposit the disputed amount of $39,108.57 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:

Pacella Enterprises, Inc.
P.O. Box 1020
Wrentham, MA 02093

UEL Contractors, Inc.
65 Parker Street
Clinton, MA 01510

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

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 21, 2019

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

Claimant:	Pine Ridge Technologies, Inc.
Contractor:	J.F. White Contracting, Co.
Contract:	MBTA Contract #R32CN01
City/Town:	Wellington Yard Improvements, Tracks 33-38
Amount:	$136,595.63

This direct payment demand (Demand) by Pine Ridge Technologies, Inc. was received by the Department on May 20, 2019.

FINDINGS

The Demand arises out of a contract between the MBTA and J.F. White Contracting, Co.

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. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, which in this case is MBTA. Pine Ridge Technologies, however, sent its demand by certified mail to MassDOT.

Take no action with respect to this Demand because MassDOT is not the awarding authority for the contract.[1]

cc: Pine Ridge Technologies, Inc.
50 New Salem Street
Wakefield, MA 01880

J.F. White Contracting, Co.
10 Burr Street
Framingham, MA 01701

[1] Nothing in this Ruling should be construed in any way as a determination on the merits should Pine Ridge Technologies, Inc. deliver 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: June 3, 2019

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

Claimant:	Pacella Enterprises, Inc.
Contractor:	UEL Contractors, Inc.
Contract:	#89547
City/Town:	Roadway Reconstruction along Route 123 / Brockton
Amount:	$92,146.77

This direct payment demand (Demand) by Pacella Enterprises, Inc. (Pacella) was received by the Department on May 20, 2019.

FINDINGS

I make the following findings based on the Demand, the general contractor's Reply, the contract and subcontract, and input from MassDOT construction staff concerning the status of subcontract work:

1. Pacella is an approved subcontractor on Contract #89547. Its subcontract scope includes work under the following Contract Items:

    - #450.90 Contractor Quality Control
    - #451.00 Patching
    - #452.00 Asphalt Emulsion for Tack Coat
    - #453.00 HMA Joint Sealant
    - #455.23 Superpave Surface Course
    - #455.32 Superpave Intermediate Course
    - #455.42 Superpave Base Course
    - #456.00 Warm-Mix Asphalt Pavement
    - #470.00 Hot Mix Asphalt Berm Type A
    - #472.00 Hot Mix Asphalt for Misc. Work
    - #702.00 Hot Mix Asphalt Walk Surface
    - #703.00 Hot Mix Asphalt Driveway

2. The Demand consists of a three-page letter dated May 6, 2019 signed by the Vice President of Pacella, and includes a breakdown of unit price items and quantities paid to date . The signature is notarized.

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www.mass.gov/massdot

3. The Department received a reply from the general contractor, UEL Contractors, Inc. (UEL), dated May 24, 2019. The Reply disputes that the amounts claimed in the Demand are due Pacella. The Reply also states that all amounts due and payable to Pacella as of Pay Estimate 52 have been made, with the exception of $22,200.00 that is being held against outstanding corrective work that the Department has ordered related to Pacella's subcontract work. The Reply was made by sworn statement of UEL's Vice President.

4. The Department's construction staff advises that Pacella has substantially completed the subcontract work. However, a Deficiency report was issued for subcontract work performed by Pacella, explained as follows:

> "MassDOT is holding payment for 58.31 ton of top ($5,831) and 132.79 gallons of tack ($929.53) until the DR is addressed with the corrective action on the areas of top course of HMA. UEL is holding more than MassDOT's amount since MassDOT based this figure on contract unit prices, and if Pacella does not return to do the corrective work UEL will be required to hire another contract to do it at a premium.
>
> Additionally 310.14 ton of intermediate course was not paid to UEL as this was over and above theoretical yield between STA 17+50 and 26+50. This extra mix was placed due to UEL's poor grading of the gravel base prior to paving. The gravel grades being incorrect resulted in shimming with HMA to achieve the final plan grades. MassDOT refused to participate in this since the cost of HMA is way higher than the gravel costs. This does not appear to be accounted for in Pacella's demand."

RULING

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

The Department is retaining $929.53 under Item 452, $5831.00 under Item 455.23, and $31,014.00 under Item 455.32 as the estimated cost of completing incomplete and unsatisfactory work performed by Pacella. These amounts totaling $37,774.53 are being held in retainage and have not been paid to UEL; therefore, they are not eligible for direct payment. In addition, the breakdown provided by Pacella appears to overstate the contract price adjustment for liquid asphalt by $18,138.74. For items 999.401 and 999.402, the Department calculated a net adjustment of $10,044.12, which UEL paid to Pacella; however, Pacella's Demand states an adjustment amount of $28,182.86.

The remaining amount of the Demand, $36,233.50, appears to be due to disagreements between Pacella and UEL concerning the quantities of work completed by Pacella pursuant to the terms of subcontract between them. For purposes of G.L. c.30, §39F, the Department need not determine these disputes, only that disputes exists concerning "the balance due under the subcontract." Based on these facts, I find that there is a dispute between the subcontractor and general contractor concerning the balance due under the subcontract within the meaning of G.L. c.30, §39F (1)(e)(iii). Accordingly, the Department is obligated to deposit the disputed amount of $36,233.50 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:

Pacella Enterprises, Inc.
P.O. Box 1020
Wrentham, MA 02093

UEL Contractors, Inc.
65 Parker Street
Clinton, MA 01510

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

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Contract Payments

FROM: Albert Caldarelli, Administrative Law Judge

DATE: November 5, 2019

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

Claimant:	Atsalis Bros. Painting
Contractor:	Cardi Corporation
Contract:	#71232
City/Town:	Worcester / Structural Repairs and Painting of 12 Bridges on I-290
Amount:	$2,050,538.65

This direct payment demand (Demand) by Atsalis Painting (Atsalis) was received by the Department on October 24, 2019.

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. Atsalis is an approved subcontractor on Contract #71232. Its subcontract scope includes bridge repair work and painting.

2. The Demand consists of a one-page letter summarizing a claim for extra work (referenced as "Claim Number 3-71232-008") and requesting "direct payment of the claim to Atsalis Brothers Painting when paid by MASS DOT."

3. The Demand contains nothing to indicate that a copy was "delivered to or sent by certified mail to the general contractor at the same time" as sent to MassDOT.

4. The general contractor, Cardi Corp., submitted a Reply within the 10-day period provided in M.G.L. c.30, §39F. By letter dated October 24, 2019, Cardi disputes the entire amount of the Demand because it consists of claims that have not been approved by MassDOT for payment to Cardi.

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5. MassDOT Construction staff confirms that a proposed settlement for one part of claim #3-71232-008 has been submitted for internal review. However, it has not been approved by MassDOT for payment to the general contractor as of this date. The remaining part of the claim has been denied by MassDOT and it is proceeding through the contract dispute process.

6. The amounts claimed in Atsalis' Demand are claims for extra work and additional compensation under the subcontract. They are not amounts that the Department has included in a payment to the general contractor for payment to Atsalis for approved subcontract work.

RULING

The Demand submitted by Atsalis fails to comply with the formal requirements of G.L. c.30, §39F. The direct payment statute requires that the Demand contain "a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work." Atsalis provides no detailed breakdown or statement. Also, there is nothing in the Demand to confirm that a copy was "delivered to or sent by certified mail to the general contractor at the same time" as sent to MassDOT.

In addition to the procedural deficiencies of the Demand, the amounts sought by Atsalis are not eligible for direct payment. The statute does not allow for submission of subcontractor claims for extra work. It is intended provide security against the general contractor's nonpayment of amounts paid or to be paid by the awarding authority for the subcontractor's work.[1] In this case, Atsalis is claiming amounts that at this time are merely the subject of claims for additional compensation, which have not been approved by the Department for payment to the general contractor as extra work. Such amounts are not eligible for direct payment

For the reasons stated above, the Demand is DENIED.

cc: Atsalis Bros. Painting
24595 Groesbeck Highway
Warren, MI 48089

Cardi Corporation
400 Lincoln Avenue
Warwick, RI 02888

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

[1] G.L. c.30, §39F(1)(c) provides that a subcontractor may demand direct payment from an awarding authority "for any amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor ..."

APPENDIX C-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF DENIAL OF OUTDOOR ADVERTISING PERMITS #2018D023, #2018D024, #2018D025, #2018D026

PARTIES	
APPELLANT **CITY OF FALL RIVER** **Address: One Government Center Fall River, MA 02722** **Authorized Rep: The Honorable Joseph Macy 1219 Highland Avenue Fall River, Massachusetts 02720**	**APPELLEE** **OFFICE OF OUTDOOR ADVERTISING MASS. DEPT. OF TRANSPORTATION** **Address: 10 Park Plaza Boston, MA 02116** **Counsel: Eileen Fenton, Senior Counsel 10 Park Plaza, Room 3510 Boston, MA 02116**

PROCEEDINGS AND ORDERS		
Entry #	**Filing Date**	**Description**
1	2/28/19	NOTICE OF APPEAL filed by City of Fall River by Letter dated February 28, 2016 from Cathy Ann Viveiros, City Administrator.
2	3/6/19	COPY OF OOA FILE (APPLICATIONS #2018D023, #2018D024, #2018D025, #2018D026) filed by Office of Outdoor Advertising via email dated March 6, 2019.
3	3/20/19	STATUS CONFERENCE held as scheduled.
4	3/25/19	SCHEDULING ORDER: By April 12, 2019, 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 3, 2019, 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 engage in discussions concerning the need for a view of the billboard sites. If they agree that a view is warranted, they shall submit to this Office no later than April 30 a proposed date(s) for undertaking the view, including logistical details.
5	4/12/19	APPELLANT'S BRIEF, due per SCHEDULING ORDER (#4). (Not Filed)
6	4/29/19	REQUEST FOR EXTENSION OF TIME TO FILE REPLY BRIEF by OOA
7	4/30/19	PARTIES' AGREEMENT REGARDING VIEW OF BILLBOARD SITES, due per SCHEDULING ORDER (#4). (None Filed)

8	5/1/19	OOA's REQUEST FOR EXTENSION OF TIME is ALLOWED.
9	5/1/19	REVISED SCHEDULING ORDER By May 10, 2019, the Department shall file its Brief, with a copy to Appellants
10	5/1/19	NOTICE OF HEARING The hearing requested by the City of Fall River concerning the denial of outdoor advertising permits will take place as follows: May 22, 2019, at 10:00 am, Room 6620, 6th Floor, 10 Park Plaza, Boston, MA 02116.
11	5/3/19	OOA BRIEF, due per SCHEDULING ORDER (#4). Due date extended (#8).
12	5/10/19	OOA BRIEF, due per REVISED SCHEDULING ORDER (#9). Filed with copy to City of Fall River
13	5/22/19	HEARING held as scheduled
14	7/23/19	FINAL AGENCY DECISION "For the reasons discussed above, the City's permit applications #2018D023, #2018D024, #2018D025 and #2018D026 were properly denied." A copy of the decision was sent to each party and attorneys of record pursuant to M.G.L. c.30A, §11(8).

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: The Honorable Joseph Macy
Office of the Corporation Counsel
City of Fall River
One Government Center, Room 627
Fall River, MA 02722

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

Cathy Ann Viveiros, City Administrator
City of Fall River
One Government Center
Fall River, MA 02722

Re: Appeal of Denial of Outdoor Advertising Permits #2018D023, #2018D024, #2018D025, #2018D026

NOTICE OF FINAL AGENCY DECISION

Pursuant to M.G.L. c. 30A, 700 CMR 3.19, and 801 CMR 1.02, the Office of the Administrative Law Judge hereby gives notice of a decision in the above-captioned matter.

A copy of the decision is attached. The decision is subject to judicial review in accordance with G.L. c. 30A, §14.

The parties have been notified by mail on this date.

Dated: July 23, 2019

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

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

FINAL AGENCY DECISION

APPEAL OF THE CITY OF FALL RIVER
REGARDING THE DENIAL OF FOUR APPLICATIONS
FOR OUTDOOR ADVERTISING PERMITS

INTRODUCTION

This decision addresses an appeal by the City of Fall River ("City") concerning the denial of four applications for outdoor advertising permits for two proposed electronic billboard structures on City property.[1] By letter dated February 28, 2019, the City requested an appeal hearing to contest the decision of the Office of Outdoor Advertising ("OOA") to deny the applications.

On May 22, 2019, I held an appeal hearing in accordance with the requirements of M.G.L. c. 30A, 700 CMR 3.19, and 801 CMR 1.02. The City appeared and was represented by the Honorable Joseph Macy, Corporation Counsel. The OOA was represented by Eileen Fenton, Managing Counsel. The following witnesses appeared and gave sworn testimony and evidence concerning the matters at issue in the appeal:

For the City of Fall River:
Cathy Ann Viveiros, City Administrator
William Roth, City Planning Director and City Planner

For the Office of Outdoor Advertising
John Romano, Director

FINDINGS OF FACT

After consideration of the testimony and evidence presented at the hearing, I make the following findings of fact:

Procedural Background

1. On September 11, 2018, the City applied for permits to construct an electronic billboard at the intersection of Bedford Street and Route 24 in Fall River ("Bedford Street Site"). The permits are identified as #2018D023 and #2018D024.[2]

2. The City also applied for permits to construct an electronic billboard at the intersection of Brayton Avenue and the I-195 Ramp in Fall River ("Brayton Avenue Site"). These permits are identified as #2018D025 and #2018D026.[3]

---

[1] Four permit applications are at issue because both proposed billboards are to be two-sided structures. Each sign face is considered a separate sign. *See* 700 CMR 3.01.
[2] Romano, Hr'g Tr. 46:12 – 48:2; Exhibit 4-1.
[3] Romano, Hr'g Tr. 76:6 – 78:2; Exhibit 4-4.

3. After receiving the City's applications, OOA conducted inspections of both proposed billboard sites for compliance with OOA's regulations.[4]

4. Initial inspections took place on September 25, 2018. OOA's field inspector noted that the Bedford Street Site did not have at least two businesses located within 500 feet, and was less than 100 feet from the Watuppa Reservation. He also noted that the Brayton Avenue Site did not have at least two businesses located within 500 feet.[5]

5. By letter dated November 6, 2018, the City acknowledged that the Brayton Avenue Site did not have at least two businesses located within 500 feet, and requested that the Director issue an exemption pursuant to his authority under 700 CMR 3.02(3).[6]

6. The City's applications and request for an exemption, and the report of OOA's field inspector were presented at a public hearing held on November 8, 2018. The Director of OOA took the matter under advisement.[7]

7. After the hearing, the Director of OOA ordered a second inspection of each proposed site, which took place on November 29, 2018.[8]

8. On the second inspection, OOA's field inspector noted that the Bedford Street Site did not have at least two businesses located within 500 feet, was less than 100 feet from the Watuppa Reservation, and was zoned as a water resource district, not commercial or industrial. He also noted that the Brayton Avenue Site did not have at least two businesses located within 500 feet.[9]

9. The City and OOA had discussions concerning the compliance issues identified during the site inspections. They discussed the issues at a meeting in early January 2019. The City also provided OOA with additional information related to those issues.[10]

10. By letter dated February 1, 2019, the Director of OOA advised the City that permit applications #2018D023 and #2018D024 for the Bedford Street Site were denied. He provided two reasons for the denial: noncompliance with 700 CMR 3.07(3)(a) because the proposed location of the billboard did not have two separate business, industrial or commercial activities being conducted within 500 feet, and noncompliance with 700 CMR 3.07(3)(c) because the site was not zoned for industrial or commercial use.[11]

---

[4] Romano, Hr'g Tr. 49:23 – 52:16, 78:24 – 80:14; Exhibits 4-2 and 4-5.
[5] Field Inspection Reports dated September 25, 2018 at Exhibits 4-2 and 4-5; *see* 700 CMR (3)(a), (3)(c) and (6).
[6] Exhibit 13.
[7] *See* OOA, Agenda and Transcript of Public Hearing (Nov. 8, 2018).
[8] Romano, Hr'g Tr. 52:17 – 57:22, 80:15 – 81:15.
[9] Field Inspection Reports dated November 29, 2018 at Exhibits 4-2 and 4-5.
[10] Romano, Hr'g Tr. 54:3-10, 58:14 – 59:11, 61:8-16; Exhibit 4-7.
[11] Exhibit 4-3.

11. By letter dated February 1, 2019, the Director of OOA advised the City that permit applications #2018D025 and #2018D026 for the Brayton Avenue Site were denied. The reason for the denial was noncompliance with 700 CMR 3.07(3)(a) because the proposed location of the billboard did not have two separate business, industrial or commercial activities being conducted within 500 feet.[12]

The Bedford Street Site

12. The Bedford Street Site is located on City property at the intersection of Bedford Street and Route 24 in Fall River.[13] It is in an area zoned by the City as a Water Resource District.[14] Municipal uses and municipal facilities are allowed in a Water Resource District; commercial and industrial uses are not.[15] The City has determined that its proposed billboard constitutes a municipal use that is allowed in the Water Resource District.[16]

13. Within a 500 foot radius of the Bedford Street Site, the area to the west is occupied by Route 24, the Greater Fall River Vocational School, the Talbot Middle School, and the City's water maintenance facility. The area to the east is occupied by the North Watuppa Pond and the City's water treatment facility located on its shore.[17]

14. The water treatment facility converts water from the North Watuppa Pond to potable drinking water used by the City and several surrounding communities.[18] It is part of the City's public water system operated by its Water Department.[19] The Water Department also operates a maintenance facility located on Bedford Street and maintains the infrastructure to distribute drinking water to residents and businesses throughout Fall River.[20]

15. The Water Department generates revenues of about $10 million per year from the sale of drinking water to residents and businesses. Additional revenue is generated from the sale of water to surrounding communities and private vendors (over $700,000 in FY18).[21] Driveways and access roads to the water treatment and maintenance facilities are used by the surrounding communities and private vendors.[22]

[12] February 1, 2019 letter from Director of OOA to City of Fall River denying permit applications #2018D025 and #2018D026.
[13] Exhibit 1.
[14] Roth, Hr'g Tr. 17:9-10, 18:8-10; *see* Exhibit 4-10 at Section 86-222 "Water Resource District."
[15] Roth, Hr'g Tr. 9:24-10:10, 18:15-18, 23:10-18; Exhibit 4-10 at Att. 2 "Table of Uses"; Exhibit 4-12.
[16] Roth, Hr'g Tr. 26:17-27:3.
[17] Exhibit 1; Roth, Hr'g Tr. 7:6-10:7.
[18] Roth, Hr'g Tr. 7:21-8:5.
[19] Viveiros, Hr'g Tr. 31:11-17.
[20] Roth, Hr'g Tr. 8:22-25; Viveiros, Hr'g Tr. 32:18-24; Exhibit 1.
[21] Viveiros, Hr'g Tr. 30:25-31:10.
[22] *Id*.; Exhibit 4-7.

The Brayton Avenue Site

16. The Brayton Avenue Site is located on City property at the intersection of Brayton Avenue and the I-195 Ramp in Fall River. Within a 500 foot radius, the area is occupied by Route 24 and other MassDOT properties, a waterbody owned by the City, and a waterbody believed to be owned by a private party.[23]

DISCUSSION

The Director's Denial of the City's Permit Applications

At issue is whether the Director of OOA properly denied the City's applications for permits to erect two new electronic billboards at the Bedford Street Site and the Brayton Avenue Site. The applications were denied pursuant to 700 CMR 3.07(3), which provides in pertinent part:

> No permit shall be granted or renewed for a sign that is not located in an area of a business character. An area may be deemed to be of business character only if all of the following requirements are met:
>
> (a) At least two separate business, industrial or commercial activities are being conducted within a distance of 500 feet from the proposed location of the sign, measuring from such proposed location to the buildings or parking lots or other places of actual business, industrial or commercial activity ...
>
> …
>
> (c) The area in which the sign is to be located is zoned for industrial or commercial use.

With respect to the Bedford Street Site, the Director's denial of the City's applications was appropriate. The site is not an area of a business character as defined in 700 CMR 3.07(3). The actual uses in the area around the Site are not commercial or industrial. There are no offices, retail stores, manufacturing plants, warehouses, garages or other places typically associated with business, industrial or commercial activity. The entire area is used for the following state and municipal purposes: a state highway, a middle school, a regional vocational school, and a municipal water treatment facility. The area in which the sign is to be located is zoned as a Water Resource District, which does not allow commercial and industrial uses.

The City's limited commercial activity associated with the sale of water to surrounding communities and private transport vendors/haulers does not make the Bedford Street Site an area of a business character. The water treatment facility is part of the City's public water system and its main purpose is to convert water from the North Watuppa Pond to potable drinking water for distribution to residents and businesses of Fall River. It is not a business, industrial or commercial facility. For purposes of outdoor advertising, it is of no significance that the proposed billboard is allowed in the Water Resource District as a municipal use. This is incidental to the primary noncommercial uses of the area surrounding the Bedford Street Site.[24]

[23] Exhibits 2 and 3; Roth, Hr'g Tr. 11:23-12:25.

[24] 23 C.F.R. § 750.708(d) ("A zone in which limited commercial or industrial activities are permitted as an incident to other primary land uses is not considered to be a commercial or industrial zone for outdoor advertising control purposes").

The Director's denial of the City's applications for the Brayton Avenue Site was also appropriate. The site is not an area of a business character as defined in 700 CMR 3.07(3). The surrounding area is occupied by Route 24 and other MassDOT properties, a waterbody owned by the City, and a waterbody believed to be owned by a private party. There was no evidence presented at the hearing to establish that there are at least two business, industrial or commercial activities within 500 feet of the proposed sign location. The City's letter dated November 6, 2018 acknowledges that the Brayton Avenue Site does not have at least two businesses located within 500 feet.

The Director's Denial of City's Exemption Request

The Director denied the City's request for an exemption pursuant to 700 CMR 3.02(3), which provides authority to "issue a permit for a sign which does not strictly comply with 700 CMR 3.00." The Director has discretion to grant an exemption, but he is not required to do so. He must also consider whether a waiver would be inconsistent with the general purpose and intent of the laws regulating outdoor advertising.[25] The regulation at issue, 700 CMR 3.07(3), is intended to limit billboards to areas of a business character as defined therein, and expressly prohibits permits for signs not located in such areas. Where neither proposed site meets the criteria defining an area of a business character, the denial of the City's exemption request cannot be considered arbitrary, unreasonable, or an abuse of discretion.

DECISION

For the reasons discussed above, the City's permit applications #2018D023, #2018D024, #2018D025 and #2018D026 were properly denied.

Albert Caldarelli
Administrative Law Judge

Dated: July 23, 2019

[25] 700 CMR 3.02(3)(d); *also see, e.g., Krafchuk v. Planning Bd. of Ipswich*, 453 Mass. 517, 529 (2009) (discussing the authority to waive strict compliance with rules and regulations).

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Joseph F. Carvalho
Special Projects Director
Green Futures
P.O. Box 9154
Fall River, MA 02720

cc: The Honorable Joseph Macy
Office of the Corporation Counsel
City of Fall River
One Government Center, Room 627
Fall River, MA 02722

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

Cathy Ann Viveiros, City Administrator
City of Fall River
One Government Center
Fall River, MA 02722

Re: Appeal of Denial of Outdoor Advertising Permits #2018D023, #2018D024, #2018D025, #2018D026

NOTICE OF DECISION
CONCERNING REQUEST TO INTERVENE OR PARTICIPATE
PURSUANT TO 801 CMR 1.01(9)

This Office received an email dated April 24, 2019 from Mr. Joseph F. Carvalho, Special Projects Director, Green Futures, concerning the above referenced appeal (copy of email is attached).

Pursuant to 700 CMR 3.19, hearings for notices of denials of outdoor advertising permits shall be conducted in accordance with M.G.L. c. 30A and 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure*. To the extent that Mr. Carvalho's email is intended as a request by a non-Party "to offer testimony at the appeal hearing," it does not meet the requirements of 801 CMR 1.01(9) with respect to petitions for leave to intervene or participate in an adjudicatory hearing. Therefore, the request is DENIED WITHOUT PREJUDICE.

If a non-Party wishes to intervene or participate in these proceedings, a written petition for leave to do so must be properly filed in accordance with 801 CMR 1.01(9). Such petition must "describe the manner in which the Person making the petition may be affected by the proceeding. It shall state why the Agency or Presiding Officer should allow intervention or participation, any relief sought, and any supporting law." 801 CMR 1.01(9)(b). The petition must demonstrate why the petitioner is "likely to be substantially and specifically affected by the

proceeding," and it must be properly served on all existing Parties to ensure notice and an opportunity to respond. 801 CMR 1.01(9)(c).

Mr. Carvalho's requests for information pertaining to scheduling and other proceedings are addressed in the attached copy of the Appeal Docket for this matter.

Albert Caldarelli
Administrative Law Judge

Dated: April 25, 2019

APPENDIX D-1

RULINGS

MASSUCP ADJUDICATORY BOARD APPEALS

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 OF FINAL AGENCY DECISION

Pursuant to 49 CFR §26.87, the Massachusetts Unified Certification Program Adjudicatory Board hereby gives notice of a decision in the above-captioned matter. The parties have been notified by mail on this date.

This decision may be appealed to the United States Department of Transportation in accordance with the process provided in 49 CFR §26.89. An appeal should be sent to the following address:

U.S. Department of Transportation
Departmental Office of Civil Rights
1200 New Jersey Avenue SE
Washington, DC 20590-0001

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

Dated: May 28, 2019

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

IN THE MATTER OF ARORA ENGINEERING

INTRODUCTION

The Adjudicatory Board of the Massachusetts Unified Certification Program is authorized to hold hearings on determinations to decertify or remove a Disadvantaged Business Enterprise's eligibility pursuant to 49 CFR §26.87.

By letter dated June 13, 2017, the Massachusetts Unified Certification Program (MassUCP) notified Arora Engineering, Inc. (Arora) that it was initiating ineligibility proceedings with respect to two NAICS codes, 541330 and 541370, because Arora exceeded the size standards for such codes. On June 23, 2017, Arora requested a hearing before this Board. The Board held a hearing on April 23, 2019, in accordance with the requirements of 49 CFR §26.87 and 801 C.M.R. §1.02 and §1.03.

FINDINGS

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

1. Arora is owned and operated by Mr. Malik K. Arora. It is in the business of providing professional design, construction management, facilities maintenance management, and surveying services.

2. Arora is currently certified by the MassUCP as a Disadvantaged Business Enterprise (DBE) in four NAICS code categories:

   236220: "Commercial and Institutional Building Construction"
   541512: "Computer Systems Design Services"
   541330: "Engineering Services"
   541370: "Surveying and Mapping (except Geophysical) Services"

3. Arora's annual receipts for tax years 2014, 2015, and 2016, as reported on its U.S. Income Tax Returns (Form 1120S)[1], are:

   2014 = $11,854,215
   2015 = $16,418,418
   2016 = $17,785,825

[1] Exhibits 1, 2, and 3.

4. As part of its annual review of Arora's eligibility as a disadvantaged business enterprise, the MassUCP reviewed whether Arora remained a "small business" as defined by the current size standards established by the Small Business Administration (SBA).[2]

5. MassUCP calculated Arora's annual receipts for 2017 to be $15,352,819.33, based on the amounts reported on Arora's tax returns for the most recent three year period, 2014 through 2016, divided by three.[3]

6. According to the size standards promulgated by SBA in 13 CFR 121.201, the maximum annual receipts allowed for a concern and its affiliates to be considered small for purposes of NAICS codes 541330 and 541370 is $15M.

DISCUSSION

The Board is presented with the issue of whether Arora Engineering meets the business size requirements to be eligible to participate as a DBE on federal-aid transportation projects in Massachusetts when performing work covered in NAICS codes 541330 ("Engineering Services") and 541370 ("Surveying and Mapping (except Geophysical) Services").

To be an eligible DBE, "a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards."[4] In making such determination, the MassUCP "must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts …"[5] In this case, MassUCP determined Arora's annual receipts for 2017 to be $15,352,819.33, based on the amounts reported on Arora's tax returns for the most recent three year period, 2014 through 2016, divided by three. This is consistent with the calculation described in the SBA regulations, which states: "Annual receipts … means the total receipts of the concern over its most recently completed three fiscal years divided by three."[6] Therefore, the Board finds that Arora's annual receipts for 2017 exceed the $15M threshold for NAICS codes 541330 and 541370.[7]

Arora advances two arguments, neither of which are found persuasive by the Board. First, Arora suggests that its annual receipts for years 2014 through 2016 should be reduced by the amounts paid to subconsultants because such costs are "pass through" expenses for which Arora derives no financial gain. However, the calculation requested by Arora is expressly prohibited by the applicable SBA regulations, which state "… subcontractor costs … may not be excluded from receipts."[8] Second, Arora presents certification letters from other jurisdictions and suggests that the MassUCP should accept those eligibility determinations. Although MassUCP may in its discretion grant reciprocity to other recipient's certification decisions,[9] it is not required to do so

[2] White, Hr'g Tr. 10:15-13:14; *also see* 49 CFR 26.65.
[3] White, Hr'g Tr. 15:6-16:18; *also see* 13 CFR 121.104.
[4] 49 CFR 26.65.
[5] *Id.*
[6] 13 CFR 121.104(c).
[7] 13 CFR 121.201.
[8] 13 CFR 121.104(a).
[9] 49 CFR 26.81(e) and (f).

and has not done so in this case. Further, the Board found nothing in any of the documentation that would cause it to set aside MassUCP's determination that Arora's annual receipts for 2017 exceeds the $15M threshold for NAICS codes 541330 and 541370.

The MassUCP initiated ineligibility proceedings to de-certify Arora from NAICS codes 541330 and 541370 because it exceeds the business size requirements for those codes. The Board finds that MassUCP has met its burden of proof in this regard.

DECISION

Based on the above findings, the Board finds that Arora exceeds the business size requirements of 49 CFR 26.65 for NAICS Codes 541330 and 541370. The MassUCP should decertify Arora from those categories of work.

Dated: May 28, 2019

The Adjudicatory Board:

_____
On behalf of its members:

Albert Caldarelli
David Spicer
Kenrick Clifton