



**OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE**

2020 REPORT

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

2020 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 2020.

In summary, the following matters were handled in calendar year 2020:

- One (1) construction contract appeal was heard and resolved by a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40. One (1) other appeal was received and is scheduled be heard in calendar year 2021.
- One (1) appeal of a sanction brought by the Department for non-compliance with the requirements of the DBE program was heard and decided in accordance with the terms of the applicable construction contract (Special Provisions, Document 00719-16, Section 9).
- Four (4) direct payment demands were ruled on in accordance with G.L. c.30, §39F.
- Four (4) contractor appeals from DBE decertification proceedings initiated by the MassUCP were received by the MassUCP Adjudicatory Board. For one appeal, the Board issued scheduling orders and rulings on discovery. All appeals will be scheduled for hearing in calendar year 2021 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

McCourt Construction Company #4-54923-003

The appeal involved a dispute concerning the interpretation of Specification Section 170 "Grading" and whether the contractor was due additional compensation in the amount of \$100,396.39 for grading and finishing non-pavement areas to construct detention basins, grass areas, and riprap slopes. After a hearing, this Office recommended that the claim be denied because the language of the contract and past precedent indicated that Item 170 applies only to grading and compacting pavement areas within the limits of the roadway.

Final Agency Decision concerning requirements of DBE program

Lawrence Lynch Inc. #102064

The contractor appealed a sanction in the amount of \$5,000 assessed by the Department for alleged non-compliance with the requirements of the DBE program. After a hearing, this Office issued a Final Agency Decision holding that the Department was justified in assessing the sanction. The decision was based on an interpretation of the contract, and not on any finding that Lawrence Lynch failed to make good faith efforts to comply with the DBE requirements.

Appeals Pending

DW White Construction Inc. #5-97935-001

A notice of appeal was received appealing the Chief Engineer's determination to deny a claim in the amount of \$67,034.40 for the additional cost to excavate 5,663 cubic yards of unsuitable materials and provide special borrow and backfill. It is expected that a hearing will be held and a report and recommendation will be made to the Secretary in calendar year 2021.

Direct Payment Demands

In 2020, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

Northern Land Clearance Inc. – December 7, 2020

General Contractor: SPS New England, Inc.
Contract: #90726 – Canton/Norwood/Westwood – Dedham Street. I-95 Interchange
Amount: \$31,572.72.
Decision: Under Review

Chapman Construction Group, Inc.– July 6, 2020

General Contractor: Siemens Industry, Inc.
Contract: #97596 – I-93 Southampton St to Neponset Ave.
Amount: \$151,355.33
Decision: Denied – August 7, 2020

Palmer Paving Corp.– June 24, 2020

General Contractor: A. Pereira Construction Co., Inc.
Contract: #102060 – Route 168, Southwick / Reconstruction & Related Work
Amount: \$47,718.79
Decision: Allowed in Part – July 30, 2020

HB Welding Inc. – January 9, 2020

General Contractor: CTA Construction Managers, Inc.
Contract: #99594 – Worcester – District 3 Administration Building
Amount: \$357,563.10.
Decision: Denied – April 30, 2020

Massachusetts UCP Board Appeals

In 2020, the Massachusetts Unified Certification Program Adjudicatory Board received the following contractor appeals from DBE decertification proceedings initiated by the MassUCP.

Matters Pending

Atlantic Bridge & Engineering, Inc. - MUCP #2020-0001

Atlantic Bridge & Engineering Inc. requested a hearing before the Board to appeal a determination by MassUCP to initiate decertification proceedings. The Board has issued scheduling orders and rulings on discovery. The matter will be scheduled for hearing in calendar year 2021.

RL Controls, Inc. - MUCP #2020-0002

RL Controls Inc. requested a hearing before the Board to appeal a determination by MassUCP that the firm is ineligible to remain certified as a Disadvantaged Business Enterprise (DBE) in NAICS code 811213 (“Communication Equipment Repair and Maintenance”). The matter is scheduled for hearing before the Board on January 25, 2021.

Vigil Electric Company, Inc. - MUCP #2020-0003

Vigil Electric Company, Inc. requested a hearing before the Board to appeal a determination by MassUCP to initiate decertification proceedings. The matter will be scheduled for hearing in calendar year 2021.

Strategic Environmental Services - MUCP #2020-0004

Strategic Environmental Services, Inc. requested a hearing before the Board to appeal a determination by MassUCP to initiate decertification proceedings. The matter will be scheduled for hearing in calendar year 2021.

APPENDIX OF DECISIONS/RULINGS

A. Construction Contract AppealsA-1

Report and Recommendation: McCourt Construction Company #4-54923-003

Final Agency Decision: Lawrence Lynch Inc. #102064

B. Direct Payment Demands B-1

Ruling, Direct Payment Demand of HB Welding, Inc. dated April 30, 2020

Ruling, Direct Payment Demand of Palmer Paving Corp. dated July 30, 2020

Ruling, Direct Payment Demand of Chapman Construction dated August 7, 2020

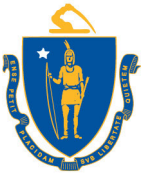
C. Mass. UCP Adjudicatory Board AppealsD-1

Scheduling Orders and Rulings, In the Matter of Atlantic Bridge & Engineering, Inc. (MUCP #2020-0001)

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS



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



MEMORANDUM

To: Stephanie Pollack, Secretary & CEO

From: Albert Caldarelli, Administrative Law Judge

Date: January 27, 2020

Re: **Report and Recommendation on Appeal of McCourt Construction Company from the Chief Engineer's Denial of Claim #4-54923-003**

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

The attached addresses an appeal by McCourt Construction Company ("MCC"), who is the general contractor on contract #54923 ("Contract"). The contract provided for the extension of two bridges and widening of Route 128/I-95 and I-93 from six to eight lanes in Randolph, Canton, Westwood, and Dedham. The project also included construction of a sound barrier along the northbound highway.

The appeal involves a dispute concerning the interpretation of Specification Section 170 "Grading". As part of the contract work, MCC performed grading and compacting in numerous areas. MCC was paid under Item 170 for grading and compacting pavement areas within the limits of the roadway. MCC claims that it should have received additional compensation under Item 170 for grading and compacting non-pavement areas to construct detention basins, grass areas, and rip rap slopes. The Department's position is that Item 170 applies only to grading and compacting pavement areas within the limits of the roadway, and that payment for grading and compacting non-pavement areas is included as part of the pay items covering construction of the detention basins, grass areas, and rip rap slopes.

The claim was denied by the Chief Engineer by letter dated December 3, 2018. On November 7, 2019, I conducted a hearing on the appeal. After considering the facts and the legal arguments presented by the parties, and past precedent, I have determined that Item 170 applies only to grading and compacting pavement areas within the limits of the roadway.

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

Approved

Not Approved

Stephanie Pollack, Secretary & CEO

dated: _____

REPORT AND RECOMMENDATION

APPEAL OF MCCOURT CONSTRUCTION COMPANY REGARDING THE CHIEF ENGINEER'S DECISION TO DENY CLAIM #4-54923-003

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

BACKGROUND

By letter dated December 3, 2018, the Chief Engineer made a written determination to deny a claim by McCourt Construction Company ("MCC") that the Department failed to pay for grading and compacting of detention basins, grass areas, and rip rap slopes. On January 3, 2019, MCC provided notice that it was appealing the Chief Engineer's determination; however, it failed to timely submit its Statement of Claim and the matter was administratively dismissed. On July 26, 2019, MCC's request to submit a Statement of Claim was allowed and the appeal was put back on the docket.

On November 7, 2019, I conducted a hearing on the appeal. Mr. Ryan McCourt, President, and Mr. Kevin Cleary, Project Manager, provided testimony and legal argument for MCC. For the Department, testimony was provided by Richard DeSantis, District 4 Assistant Construction Engineer, and Frederick Wijnen-Riems, Project Controls Engineer. George Kavalaris, Records & Procedures Engineer, and Lee Deveau, Claims Analyst, also attended. The Department was represented by Ingrid Freire, Legal Counsel.

Prior to the hearing, the Parties submitted a joint statement of undisputed facts. The parties were given the opportunity to fully present their cases at the hearing, and at its conclusion, 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 24, 2008, the Department and MCC entered into Contract #54923 (the "Contract"). The Contract incorporated the 1995 Metric Edition Standard Specifications for Highways and Bridges; the Metric Supplemental Specifications dated June 6, 2006; and the Special Provisions contained therein.¹
2. The Contract provided for the extension of two bridges and widening of Route 128/I-95 and I-93 from six to eight lanes in Randolph, Canton, Westwood, and Dedham. The project also included construction of a sound barrier along the northbound highway.

¹ Contract, Special Provisions, A00801-98.

3. MCC completed the Contract work on December 31, 2014.²
4. The Contract contained Section 170 “Grading”, as amended by the Metric Supplemental Specifications dated June 6, 2006. The language of Section 170, as amended, is included in Attachment A to this Report and Recommendation.
5. The Contract drawings include typical sections of Route 128 and the Auxiliary Lane. The drawings contain "Pavement Notes" that describe the requirements for full depth construction of the existing and added lanes on Route 128 and the materials to be placed. The subbase material is defined as "100mm Dense Graded Crushed Stone for Sub-Base over 200mm Gravel Borrow, Type b."³
6. The detail sheets that are incorporated in the Contract state that Item 170 is "For areas of full depth construction." The detail sheets include Pavement Notes for full depth construction and define the subbase material as "100mm Dense Graded Crushed Stone for Sub-Base over 200mm Gravel Borrow, Type b." The Pavement Notes include a preliminary estimate of the area of full depth construction of approximately 90,000 sq. m. (86,339 + 3889). The final estimated quantity included in the bid documents for Item 170 was 89,300 sq. m.
7. The Contract contains Special Provision Item 170.1 providing payment for fine grading, compacting and finishing areas of excavation adjacent to the sound barrier to be constructed along the northbound highway.
8. In connection with the project, MCC performed fine grading and compacting within the limits of the roadway (“pavement areas”). The quantity of such work completed and accepted by the Department was measured at 127,091.12 sq. m. MCC was paid for such work pursuant to Item 170 at the unit price of \$3.00/sq. m. The quantity and payment for this work are not in dispute.⁴
9. MCC also performed grading and finishing in preparation for detention basins, grass areas, and riprap slopes adjacent to the highway (collectively, "non-pavement areas").⁵ The measured quantity for that work is 33,465.46 sq. m.⁶ The Department considered grading and finishing in the non-pavement areas to be incidental to the pay items covering the preparation of areas for loam borrow (Section 751), and the preparation of areas for embankment materials (Section 150);⁷ therefore, it did not separately pay for this work under Item 170. MCC claims that payment is due for such work pursuant to Item 170 at the unit price of \$3.00/sq. m., or a total of \$100,396.39.

² The Parties' Joint Statement of Undisputed Facts, ¶3.

³ Contract drawings, Sheets 11 and 12; also see Desantis Hr'g. Tr. 28: 19-30:7.

⁴ DeSantis Hr'g. Tr. 13:8-14:17; also see Exhibit C to MCC Statement of Claim.

⁵ *The Parties' Joint Statement of Undisputed Facts* at Paragraph 5.

⁶ see Exhibit C to MCC Statement of Claim.

⁷ DeSantis Hr'g. Tr. 25: 18-28:11.

DISCUSSION

The appeal involves a dispute concerning the interpretation of Supplemental Specification Item 170 "Grading". The Department contends that payment under Item 170 is applicable only to grading and compacting performed on subgrade areas beneath the highway. MCC argues that it is entitled to payment under Item 170 for non-pavement areas where a "subgrade" was prepared for detention basins, grass areas, and riprap slopes adjacent to the highway.

Subsection 170.2, as its heading indicates, is a general description of the scope of work to be performed on the project. Two distinct types of grading work are referenced:⁸

1. *"The shaping, trimming, compacting and finishing of the surface of the subgrade or existing gravel base,*
2. *the grading and finishing of all unpaved shoulders and slopes and the preparation of all areas for topsoil, loam, riprap or slope paving"*

On its face, the plain language indicates that *the surface of the subgrade or existing gravel base* is something different than *unpaved shoulder and slopes and areas for topsoil, loam, riprap and slope paving*. The Contract defines *subgrade* as *the plane at the bottom of the sub-base*.⁹ Therefore, the term *subgrade* as used Item 170 is defined by the areas in which sub-base material is placed. The sub-base material to be used on the project is defined in the Contract drawings as *100mm Dense Graded Crushed Stone for Sub-Base over 200mm Gravel Borrow, Type b* to be placed in pavement areas as part of full depth construction of the highway. The term *subgrade*, therefore, can only refer to pavement areas because those are the only areas where sub-base material is to be placed. No sub-base material is shown in the Contract for placement in the non-pavement areas.¹⁰

The pavement notes contained in the detail sheets also describe the requirements for full depth construction of the existing and added lanes on Route 128 and the materials to be placed. The sub-base material is defined as *100mm Dense Graded Crushed Stone for Sub-Base over 200mm Gravel Borrow, Type b*. The detail sheets expressly state that Item 170 is for "areas of full depth construction." They also include an estimate of the area of full depth construction of the highway that directly correlates to the estimated bid quantity for Item 170.

Prior decisions of this Office have interpreted the term *subgrade*, as used in Item 170, to include existing gravel under the highway that was left in place in lieu of full depth reconstruction of the highway.¹¹ ALJ Clark noted in a 2004 decision that the words *or existing gravel base* were added to the language of Item 170 to reflect this meaning.¹² Based on past decisions of this Office, the phrase *subgrade or existing gravel base* refers to areas under the highway.

⁸ Contract, Subsection 170.20.

⁹ Contract, Subsection 1.40.

¹⁰ See Desantis Hr'g. Tr. 25:18-28:11

¹¹ Office of the ALJ, *Report and Recommendation re: Aggregate Industries* (November 30, 2004), citing *Report and Recommendation re: P. Caliacco Corporation* (October 8, 1997) and *Report and Recommendation re: L.A.L. Corporation Construction Co., Inc.* (March 4, 1998).

¹² *Id.* at fn. 3 and p. 10.

The construction methods to be used for each type of grading work are also described in different terms, e.g., *shaping, trimming, compacting and finishing* versus *grading and finishing*. This distinction is made in Subsection 170.61, which provides for shaping and compacting the subgrade and specifically refers to the *proposed cross section of the roadway*.¹³ The terms *shaping* and *compacting* are used when referencing work in the highway, while *grading, finishing, and preparation* are used when referring to unpaved areas and areas for topsoil, loam, riprap or slope paving.

Subsection 170.81, which governs the basis of payment under Item 170, is consistent with the above distinctions, i.e., payment is made under Item 170 for shaping and compacting subgrade areas or existing gravel under the highway, while grading and finishing other areas are included in the price for those items:

Payment for the shaping and compacting of the subgrade or existing gravel material as specified herein shall be included in the item for fine grading and compacting.
... Grading and finishing other than subgrade areas or existing gravel areas to remain in place will be included in the price of the other respective items of work involved.

The Contract contains Special Provision Item 170.1 providing payment for fine grading, compacting and finishing areas of excavation adjacent to the sound barrier to be constructed along the northbound highway. If Item 170 included payment for grading and compacting non-pavement areas, there would be no need for this provision.

For the reasons above, Item 170 is intended to pay for shaping and compacting subgrade areas for full depth construction of the highway or existing gravel material left in place in lieu of full depth construction of the highway. As expressly stated in Subsection 170.81, grading and finishing of all other areas are included in the pay items for the other work involved.

RECOMMENDATION

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

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: January 27, 2020

¹³ Contract, Subsection 170.61: "Before surfacing or sub-base is spread, the subgrade shall be shaped to a true surface conforming to the proposed cross section of the highway and compacted in accordance with the provisions of Subsections 150.60 and 150.62."

Attachment A

SECTION 170

GRADING

DESCRIPTION

170.20 General.

The shaping, trimming, compacting and finishing of the surface of the subgrade or existing gravel base, the grading and finishing of all unpaved shoulders and slopes and the preparation of all areas for topsoil, loam, riprap or slope paving as shown on the plans or as directed, shall be constructed in accordance with these specifications and in close conformance with the lines, grades and typical cross sections shown on the plans or established by the Engineer.

CONSTRUCTION METHODS

170.60 General.

All soft or spongy material below the subgrade shall be removed to a depth to be determined by the Engineer and backfilled with satisfactory material.

All material within a depth of 600 millimeters below the subgrade in embankment areas shall conform to the requirements of Subsection M1.02.0 for Special Borrow Material except that it shall contain no stone larger than 150 millimeters in its greatest dimension and shall be placed and compacted in layers not exceeding 200 millimeters in depth, compacted measurement.

In cut sections (excluding rock excavation) where existing soil within a depth of 600 millimeters below the subgrade, after testing, is found to comply with the requirements of Subsection M1.02.0 for Special Borrow Material, it shall not be excavated.

In cut sections (excluding rock excavation) where the existing soil within a depth of 600 millimeters below the subgrade, after testing for gradation requirements, is found to have greater than 14% material passing the 75 micrometer sieve, the material shall be excavated.

The replacing material shall conform to the requirements of Subsection M1.02.0 for Special Borrow Material, except that it shall contain no stone larger than 150 millimeters in its greatest dimension and shall be placed in layers not exceeding 200 millimeters in depth, compacted measurement.

In the areas described above where Special Borrow is to be used, the plane of the base upon which the material is to be placed shall be compacted and graded until the surface is smooth, without additional compensation. A tolerance of 25 millimeters above or below the proposed grade will be allowed, provided that this 25 millimeters above or below grade is not maintained for a distance longer than 15 meters and that the required crown is maintained.

In areas where the contract specifies the use of gravel borrow and the existing soil, after testing, is found to comply with the requirements of Subsection M1.03.0, the material may remain in place if so directed by the Engineer. If replacement material is required to supplement the existing gravel it too shall conform to the requirements of Subsection M1.03.0.

170.61 Fine Grading and Compacting.

Before surfacing or sub-base is spread, the subgrade shall be shaped to a true surface conforming to the proposed cross section of the highway and compacted in accordance with the provisions of Subsections 150.60 and 150.62. All depressions and high spots shall be filled with suitable material or removed and such areas again compacted until the surface is smooth and satisfactorily compacted. A tolerance of 15 millimeters above or below the finished subgrade will be allowed provided that this 15 millimeters above or below grade is not maintained for a distance longer than 15 meters and that the required crown is maintained in the subgrade. Any portion of the subgrade which is not accessible to a roller shall be thoroughly compacted with the mechanical tampers or by other adequate methods approved as satisfactory by the Engineer.

COMPENSATION

170.80 Method of Measurement.

The grading and compaction of the subgrade will be measured by the horizontal square meter at the plane at the bottom of subgrade in all areas where a subgrade was placed. The grading and compacting of the existing gravel material to remain in place shall be measured by the horizontal square meter.

Grading and finishing for the entire project will include all grading work not included under the item of Fine Grading and Compacting - Subgrade Area.

170.81 Basis of Payment.

Payment for the shaping and compacting of the subgrade as specified herein shall be included in the item for Fine Grading and Compacting - Subgrade Area. The removal and disposal of material below subgrade will be paid for at the contract unit price per cubic meter for the appropriate Excavation Items in Section 120.

Grading and finishing other than subgrade areas will be included in the price of the other respective items of work involved.

In areas where Special Borrow material is required as stipulated in Subsection 170.60, the material shall be paid for as Special Borrow. The provisions of Subsection 120.81 shall apply when the Special Borrow is obtained from excavated materials.

170.82 Payment Items.

150.1	Special Borrow	Cubic Meter
151.	Gravel Borrow	Cubic Meter
170.	Fine Grading and Compacting	Square Meter

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

FINAL AGENCY DECISION

**APPEAL OF SANCTION
PURSUANT TO CONTRACT #102064
SPECIAL PROVISIONS, DOCUMENT 00719-16, SECTION 9**

INTRODUCTION

This decision addresses an appeal by Lawrence Lynch Inc. concerning a sanction brought by the Department for non-compliance with the requirements of the DBE program. A hearing was held on February 18, 2020. Mr. Christopher Lynch, President, appeared and testified for Lawrence Lynch. The Department was represented by Mr. Neil Pasmanik. Keith Parrett, Michael Zuzevich, and Tanya Delgado-Figueiredo testified on the Department's behalf.

FINDINGS OF FACT

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

1. MassDOT has established a Disadvantaged Business Enterprise (DBE) Program in accordance with 49 CFR Part 26. The program requirements were incorporated into Contract #102064.¹
2. The Contract establishes a DBE participation goal. In order for a DBE's participation to count toward the goal, the DBE must serve "a commercially useful function" in the performance of the work. In general, a DBE performs a commercially useful function "when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved."²
3. For purposes of counting the DBE's participation toward the goal, "MassDOT will count the value of the work performed by the DBE's own forces."³
4. Prior to contract award, the contractor is also required to submit a Schedule of Participation to demonstrate how it intends to meet the goal and to "identify specifically the contract activity the DBE proposes to perform".⁴
5. For Contract 102064, Lawrence Lynch subcontracted with A.R. Plante Landclearing & Excavation LLC, a DBE firm. The subcontract agreement between Lawrence Lynch and A.R. Plante was memorialized in a December 14, 2017 email

¹ Special Provisions, Document 00719.

² Section 6(a) of Document 00719.

³ Section 6(a) of Document 00719.

⁴ Section 7 of Document 00719.

exchange between the companies.⁵ In substance, A.R. Plante agreed to provide a service truck (with plate compactor), an equipment trailer for a mini-excavator, a mini-excavator with an operator, and a dump truck for at a rate of \$2500/day.

6. There is no dispute that A.R Plante supplied the equipment and labor, performed the work, and received payment from Lawrence Lynch as specified in the subcontract agreement.
7. On its Schedule of Participation, however, Lawrence Lynch indicated that A.R. Plante would perform the following items of work:
 - Item 748 “Mobilization” for a total price of \$1,500;
 - Item 129 “Old Pavement Excavation” for a total price of \$30,000;
 - Item 170 “Fine Grading and Compacting” for a total price of \$5,000.⁶
8. The work of “Fine Grading and Compacting” is contained in Section 170 of the contract and is described as follows:

Before surfacing or sub-base is spread, the subgrade shall be shaped to a true surface conforming to the proposed cross section of the highway and compacted in accordance with the provisions of Subsections 150.60 and 150.62. All depressions and high spots shall be filled with suitable material or removed and such areas again compacted until the surface is smooth and satisfactorily compacted. A tolerance of 15 millimeters above or below the finished subgrade will be allowed provided that this 15 millimeters above or below grade is not maintained for a distance longer than 15 meters and that the required crown is maintained in the subgrade. Any portion of the subgrade which is not accessible to a roller shall be thoroughly compacted with the mechanical tampers or by other adequate methods approved as satisfactory by the Engineer.⁷

9. On September 17, 2018, Keith Parrett conducted a compliance review at the Contract site and observed work being performed in advance of construction of a bike path. He saw one A.R. Plante employee operating an excavator to remove old pavement, after which he would drag the excavator's bucket across the newly exposed strip of dirt before moving to the next section. The operation also included a dump truck operated by a Lawrence Lynch employee and another employee of Lawrence Lynch operating a hand-held compactor.⁸
10. Based on his observations, Mr. Parrett concluded that A.R Plante could not be credited with performing fine grading and compacting because A.R. Plante's employee did not perform any of that work.⁹ Mr. Zuzevich, who was the Resident Engineer for the project, testified that he did not consider A.R. Plante's work to constitute fine grading and compaction.¹⁰

⁵ Lynch, Hr'g Tr. 18:22-19:3; Exhibit 1, p. 12.

⁶ Exhibit 1, p. 4.

⁷ Contract, Division II, Section 170.61.

⁸ Parrett, Hr'g Tr. 7:9-9:19, 39:22-40:9; Exhibit 1, pp. 13-15.

⁹ Exhibit 1, pp. 13-15.

¹⁰ Zuzevich, Hr'g Tr. 9:23-10:13.

DECISION

The first issue is whether the Department was justified in its decision to not count the value of A.R. Plante's purported fine grading and compacting work toward the contract participation goal. I conclude that the Department's position was correct and in accordance with the Contract requirements.

My decision is based purely on my interpretation of the contract, and not on any finding that Lawrence Lynch failed to make good faith efforts to comply with the DBE requirements. The Schedule of Participation submitted by Lawrence Lynch inaccurately identified the specific contract activity that A.R. Plante was to perform. Based on the testimony and evidence presented at the hearing, this error was unintentional. However, the contract required Lawrence Lynch to "identify specifically the contract activity the DBE proposes to perform".

The Schedule of Participation submitted by Lawrence Lynch indicated that A.R. Plante would perform Item 170 "Fine Grading and Compacting" for a total price of \$5,000. Although an A.R. Plante employee participated in an operation that included an excavator and a hand-held compactor supplied by A.R. Plante, those activities in my view do not equate to A.R. Plante performing the fine grading and compacting of the subgrade in preparation for construction of a bike path or "actually performing, managing, and supervising the work involved." Assuming this work could be considered to include fine grading and compacting,¹¹ the work was not performed by the DBE's own forces, but rather by Lawrence Lynch. Therefore, pursuant to Section 6(a) of Document 00719, the value of the work cannot be counted toward the Contract participation goal.

The second issue is whether the Department was justified in retaining \$5,000 based on the above. The Department clearly has the discretion under the contract to retain the \$5,000 value stated on the Schedule of Participation for A.R. Plante's Item 170 work.¹² Given that the contract expressly prohibited Lawrence Lynch from performing work identified on the Schedule of Participation to be performed by A.R. Plante,¹³ I conclude that the Department's exercise of that discretion is neither arbitrary nor without a contractual basis.

For the reasons stated above, the appeal is DENIED.

Dated: September 11, 2020

Albert Caldarelli
Administrative Law Judge

¹¹ I note that the Department's Resident Engineer questioned whether this operation included any fine grading and compacting work.

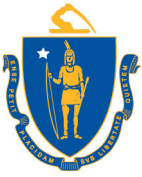
¹² See Section 9(a) of Document 00719.

¹³ Section 8(b) of Document 00719: "The Prime Contractor shall not perform with its own organization, or assign to any other business, an activity designated for the DBE(s) named on the Schedule(s) submitted by the Prime Contractor ..."

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS



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



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: July 24, 2020
RE: **Request for Direct Payment pursuant to M.G.L. c.30, §39F**

Claimant: Palmer Paving Corp.
Contractor: A. Periera Construction Co.
Contract: #102060
City/Town: Route 168, Southwick – Reconstruction & Related Work
Amount: \$47,718.79

This direct payment demand (Demand) by Palmer Paving Corp. (Palmer) was filed with the Department on June 24, 2020.

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 June 12, 2020 and attachments. The Demand is made by sworn statement of Fred Hugli, Contract Administrator for Palmer.
2. A copy of the Demand was delivered certified mail (#7015 0640 1681 7431) to the general contractor, A. Periera Construction Co. on June 19, 2020.
3. MassDOT did not receive a Reply from the general contractor within 10 days of the date of receipt of the Demand.
4. The Demand asserts that Palmer substantially completed its subcontract work in 2019. It also contains a detailed breakdown, with supporting documentation, showing (1) that Palmer invoiced the general contractor a total of \$1,056,933.89 for completed subcontract work on Contract #102060; (2) that it received payment from the general contractor in the amount of \$1,009,215.10; and (3) that there is a subcontract balance due of \$47,718.79. Palmer demands direct payment of that amount.
5. The detailed breakdown provided by Palmer also show differences in some of the quantities invoiced by Palmer with those approved for payment by MassDOT.
6. MassDOT construction staff advises that Palmer was approved to perform subcontract work under various paving pay items (Items 170, 402, 415, 450.90, 452, 453, 455.23, 455.31, 455.42, 470.2, 472, 702, 703).
7. MassDOT's Resident Engineer has confirmed that all subcontract work to be performed by Palmer on Contract #102060 has been substantially completed, and that the general contractor has been paid for such work with the exception of \$34,460.21.

RULING

The Demand complies with the formal requirements of M.G.L. c. 30, §39F. As to the merits of the Demand, it is APPROVED in part, and DENIED in part.

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.

Palmer’s demand of \$47,718.79 includes amounts for additional quantities of work that have not been approved for payment by the Department. The direct payment statute does not allow subcontractor to claim amounts that have not been approved for payment to the general contractor. Based on the records provided by the Department, \$34,460.21 is due Palmer for subcontract work completed on Contract #102060. Because A. Periera Construction Co. has not made payment to Palmer of the balance due under the subcontract within seventy days after substantial completion of the subcontract work, the Department is obligated to make direct payment of this amount in response to this Demand.

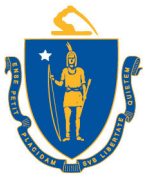
Kindly pay Palmer \$34,460.21 from the next periodic, semi-final, or final estimate, and deduct that amount from payments due A. Periera Construction Co. in accordance with Section 39F.

cc:

Palmer Paving Corporation
25 Blanchard Street, P.O. Box 47
Palmer, MA 01069

Pereira Construction Co., Inc.
11 Chapin Street
Ludlow, MA 01056

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
Peter Cavicchi, District 2 Highway Director



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



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: August 7, 2020
RE: **Request for Direct Payment pursuant to M.G.L. c. 30, §39F**

Claimant: Chapman Construction Group, Inc.
 Contractor: Siemens Construction, Inc.
 Contract: #97596
 City/Town: I-93, Southampton St. to Neponset Ave. – Highway Lighting System Replacements/ Improvements
 Amount: \$151,355.33

This direct payment demand (Demand) by Chapman Construction Group, Inc. (Chapman) was received by the Department on July 6, 2020.

FINDINGS

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

1. Chapman is an approved subcontractor on Contract #97596.
2. The Demand consists of a two-page letter dated June 29, 2020. It is signed under penalty of perjury by the company’s President. The Demand was sent by certified mail (#7018 2290 0000 2521 5338) to the general contractor, Siemens Industry Inc. Siemens)
3. The Demand in its entirety states:

“Approved Subcontractor. Chapman Construction Group, Inc. substantially completed its 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 due under the subcontract, a breakdown of which is as follows:

Original Subcontract Price	\$ 183,878.00
Total Work with Extras~Credits	\$1,608,816;69
Less Amount Paid	<u>\$1,457,461.36</u>
TOTAL BALANCE DUE	\$ 151,355.33

Please make direct payment to us of \$151,355.33, the entire balance due, in accordance with chapter 30, section 39F of the General Laws.”

4. The general contractor Siemens submitted a sworn Reply dated July 17, 2020. Siemens Reply states that it received Chapman's Demand on July 10, 2020; therefore, I find that the Reply was properly made with the 10-day period required by the statute.
5. The general contractor's Reply also states: "Siemens is withholding the amount of \$151,355.33 due to delays and damages resulting from the work under the bridge in accordance with [the subcontract]"
6. According to MassDOT construction staff, MassDOT has assessed Liquidated Damages against Siemens, in the amount of \$310,000.00, due to failure to complete work by the completion dates in the Contract.

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 submitted by Chapman fails to comply with the formal requirements of G.L. c.30, §39F. The purported "breakdown" provided in the Demand is not a "detailed breakdown of the balance due under the subcontract". It simply provides an amount that is claimed due without any explanation of what work was performed and paid for, what work was performed and when, and what work remains unpaid. As a result of this lack of detail, the Department is left to speculate on what amounts are being claimed by Chapman and for what work.

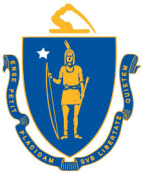
The Reply submitted by Siemens states that Chapman's demand relates to amounts being withheld under the subcontract for delays and other damages. It appears that there is a dispute between the two related to delays on the project and possibly disagreement between them concerning financial responsibility for MassDOT's assessment of liquidated damages. Although the Reply provides context, it does not and cannot cure Chapman's failure to provide a detailed breakdown as required in the statute.

For the reasons stated above, the Demand is DENIED.

cc: Chapman Construction Group, Inc.
17 Jan Sebastian Drive, Units 4&5
Sandwich, MA 02563

Siemens Industry, Inc.
3850 Quadrangle Blvd
Orlando, FL 32817

Patricia Leavenworth, Chief Engineer
Michael McGrath, Deputy Chief Engineer for Construction
John McInerney, District 6 Highway Director



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



MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: Albert Caldarelli, Administrative Law Judge
DATE: April 30, 2020
RE: **Request for Direct Payment pursuant to M.G.L. c.30, §39F**

Claimant: HB Welding Inc.
Contractor: CTA Construction Managers Inc.
Contract: #99594
City/Town: Worcester – District 3 Administration Building
Amount: \$357,563.10

This direct payment demand (Demand) by HB Welding Inc. was filed with the Department on January 9, 2020.

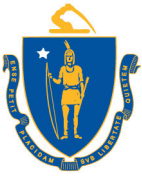
RULING

By letter dated April 20, 2020, the general contractor CTA Construction Managers provided confirmation of payment to HB Welding for the amounts claimed in the Demand. The Demand, therefore, is DENIED.

APPENDIX C-1

RULINGS

MASSUCP ADJUDICATORY BOARD APPEALS



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



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

To: Joseph Barra, Esq.
Robinson & Cole
One Boston Place, 25th Floor
Boston, MA 02108

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

In the Matter of Atlantic Bridge & Engineering, Inc. (MUCP #2020-0001)

MEMORANDUM AND ORDER

In accordance with 801 CMR 1.02(7)(c), the Adjudicatory Board of the Massachusetts Unified Certification Program (Board) hereby makes the following rulings:

1. *Stay of Proceedings.* On September 12, 2020, the Board issued an Order staying all proceedings pending Mr. Clifton's review and decision as to whether the issues raised in ABE's Motion to Recuse warranted his recusal. Mr. Clifton has since advised the Board that he is recusing himself from participating in this matter.

The Board's Order staying these proceedings is removed. The Board will hear the matter; however, Mr. Clifton will not participate.

2. *Atlantic Bridge & Engineering, Inc.'s ("ABE") Motion to Recuse.* Mr. Clifton's recusal decision moots the issues raised in ABE's Motion. ABE's Motion to Recuse is DENIED.

3. *MassUCP's Cross-Motion to Limit Discovery and ABE's Opposition.* Parties to an adjudicatory hearing "are encouraged to engage in voluntary discovery." 801 CMR 1.02(8)(a). A party also "shall have adequate access to and an opportunity to examine and copy or photocopy the entire content of his or her case file and all other documents to be used by the Agency ... at the hearing." 801 CMR 1.02(8)(b). The Board interprets the phrase "the entire content of his or her case file" to include any pertinent documents regardless of where they are located in MassUCP's files. The Board also finds ABE's document demand to be reasonably related to issues raised in MassUCP's determination dated April 30, 2020 and within the scope of documents that are required to be produced in accordance with 801 CMR 1.02(8)(b). MassUCP's Motion to Limit Discovery is DENIED.

4. *ABE's Motion to Serve Interrogatories and MassUCP's Opposition.* The informal discovery rules do not contemplate parties serving interrogatories. 801 CMR 1.02(8); compare 801 CMR 1.01(8)(g). ABE's Motion to Serve Interrogatories is DENIED.

REVISED SCHEDULING ORDER

The matter will be heard by the Board pursuant to the following:

1. The parties are encouraged to continue to engage in voluntary discovery.
2. On or before December 11, 2020, MassUCP shall provide ABE access to and an opportunity to examine and copy or photocopy the entire content of ABE's case file and all other documents to be used at the hearing, including the documents requested in ABE's Demand for Documents dated July 30, 2020.
3. On or before December 1, 2020, the MassUCP may submit a response to ABE's Opposition to MassUCP's Proposal to Decertify, which shall be limited to the factual and legal issues raised in the Opposition.
4. ABE may submit a sur-reply to MassUCP's response within 45 days of the date on which MassUCP submits its response to the Board.
5. Upon receipt of the parties' submissions, the Board will schedule a status conference to determine the following:
 - a. Confirmation that the Board shall decide this matter on the written record, or alternatively, that oral argument and/or live testimony is required and setting a date for doing so;
 - b. If the matter is to be decided on the written record, confirmation of the documents and materials that shall constitute the record upon which the Board shall base its decision.
 - c. Resolution of other pre-hearing and/or open matters, if any.

Dated: November 5, 2020

The Adjudicatory Board

Albert A. Caldarelli
David Spicer
** Kenrick W. Clifton

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

*** Mr. Clifton has recused himself and did not participate in these rulings and orders*