OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

2022 REPORT

MASSACHUSETTS DEPARTMENT OF TRANSPORTATIONOFFICE OF THE ADMINISTRATIVE LAW JUDGE

2022 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 2022.

In summary, the following matters were handled in calendar year 2022:

- Two (2) construction contract appeals were heard and resolved by a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40.
- One (1) construction contract appeal is pending and is expected to be heard in calendar year 2023.

- Four (4) direct payment demands were ruled upon in accordance with G.L. c.30, §39F.

- Three (3) contractor appeals from DBE decertification proceedings initiated by the MassUCP were heard by the MassUCP Adjudicatory Board and decisions were issued by the Board in accordance with 49 CFR §26.87 and M.G.L. c. 30A.
- One (1) contractor appeal from DBE decertification proceedings is pending and will be scheduled for hearing and decided in calendar year 2023.

- One (1) appeal from the denial of an application for an outdoor advertising permit for an electronic sign 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.

Construction Contract Appeals

Appeals Resolved by Report and Recommendation to the Secretary

A. Pereira Construction Company #2-102060-004

A notice of appeal was received appealing the Chief Engineer's determination to deny a claim in the amount of $236,508.08 for the additional cost to install utilities because the Department allegedly prohibited the use of steel plates in the roadway during construction. After a hearing, this Office recommended that the claim be denied because it was not timely submitted in accordance with Subsection 7.16 of the Contract.

A. Pereira Construction Company #2-102060-003

A notice of appeal was received appealing the Chief Engineer's determination to deny a claim in the amount of $11,846.67 for the additional cost to install a gutter inlet because the Department's directives allegedly caused delays and additional material costs. After a hearing, this Office recommended that the claim be denied because it was not timely submitted in accordance with Subsection 7.16 of the Contract.

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 2023.

Direct Payment Demands

In 2022, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

John W. Egan Company, Inc. – March 14, 2022

General Contractor:	Avatar Construction Company
Contract:	Hopkinton High School Classroom Addition
Amount:	$45,090.93
Decision:	Denied – March 22, 2022

K5 Corporation. – May 6, 2022

General Contractor:	Cardi Corporation
Contract:	#114847 – Middleboro = Centre St. at John Glass Square
Amount:	$9,172.90
Decision:	Denied – June 29, 2022 (moot, contractor was paid amounts due)

New England Bridge Products Inc. – May 6, 2022

General Contractor:	S&R Construction
Contract:	#90724 – Lowell – VFW Highway Beaver Brook
Amount:	$20,184.48
Decision:	Denied – July 5, 2022 (moot, contractor was paid amounts due)*
	*Initial Decision dated June 29, 2022, was retracted

ARC Enterprises, Inc. Corp. – May 17, 2022

General Contractor:	S&R Construction
Contracts:	#114109 – Norton & Taunton – Bridge Replacement
Amount:	$234,495.08
Decision:	Denied – June 2, 2022 (moot, contractor was paid amounts due)

Massachusetts UCP Board Appeals

In 2022, the following contractor appeals from DBE decertification proceedings initiated by the MassUCP were decided or were pending with the Massachusetts Unified Certification Program Adjudicatory Board.

Decisions

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 based on a finding that the owner of the firm is not "economically disadvantaged." The Board held a hearing 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 concluded that Atlantic Bridge & Engineering Inc. no longer met the eligibility standards of 49 CFR Part 26.

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 based on a determination that owner of the firm is not an enrolled member of a Federally or State recognized Indian tribe. The Board held a hearing 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 concluded that Vigil Electric Company no longer met the eligibility standards of 49 CFR Part 26.

Arora Engineers - MUCP #2021-0001

Arora Engineers appealed a determination by MassUCP to initiate decertification proceedings based on its finding that the firm's gross receipts exceed the USDOT size standard prescribed in 49 CFR § 26.65. Arora elected to present information and arguments in writing without going to a hearing. After review, the Board concluded that the firm exceeds the business size requirements of 49 CFR § 26.65.

Matters Pending

MON Landscaping Inc. - MUCP #2021-0002

MON Landscaping requested a hearing before the Board to appeal a determination by MassUCP to initiate decertification proceedings based on a finding that the owner of the firm is not "economically disadvantaged." It is anticipated that the matter will be heard and decided by the Board in 2023.

Outdoor Advertising Appeals

In 2022, the following appeal from the denial of outdoor advertising permits was heard inaccordance with 700 CMR 3.19.

Bay Colony Associates – Appeal of Denial of Outdoor Advertising Permits ##2002-041 and 2002-042

This appeal concerned the denial of applications for permits to allow Bay Colony Associates to convert two static billboards to electronic signs. On September 15, 2022, a final agency decision was issued.

APPENDIX OF DECISIONS/RULINGS

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Marwan S. Zubi, Esq.
Nicolai Law Group, P.C.
15 Main Street, Suite 1914
P.O. Box 15289
Springfield, MA 01115

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

Re: Appeal of A. Pereira Construction Co., Inc.
2-102060-003 / Replacement of Grade Stakes
2-102060-004 / Road Plates

MEMORANDUM

On June 6, 2022, the Department filed a Motion to Dismiss arguing that A. Pereira Construction Co. (APC) forfeited its claims by failing to comply with the Contract's notice and claim requirements. APC filed an Opposition contending that APC was not obligated to comply with the contract's notice requirements in the specific factual circumstances of the case.

In ruling on the Department's motion to dismiss, I make no independent findings of fact. The standard of review applicable to motions to dismiss requires that the factual allegations contained in APC's Opposition and the Affidavit attached thereto be accepted as true, as well as such inferences as may be drawn therefrom in APC's favor, *Flagg v. AliMed, Inc.*, 466 Mass.23, 26 (2013). The motion will fail if such "factual allegations plausibly suggest an entitlement to relief." *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008).

In applying the above standard of review, I find that APC has met its burden at this stage of the proceedings.

RULING

The Department's Motion to Dismiss is DENIED. A hearing on APC's appeal will be held on September 7, 2022 pursuant to my prior Scheduling Order.

Albert Caldarelli
Administrative Law Judge

Dated: June 28, 2022

Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Jamey Tesler, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

To: Jamey Tesler, Secretary & CEO

From: AC Albert Caldarelli, Administrative Law Judge

Date: November 30, 2022

Re: Report and Recommendation on Appeal of A. Pereira Construction Co. from the Chief Engineer's Denial of Claims #2-102060-003 & 004

I am pleased to submit for your consideration the attached report and recommendation that addresses an appeal by A. Pereira Construction Company, the general contractor on contract #102060. The contract provided for the reconstruction and widening of Congamond Road in Southwick, MA, and other related work including shoulder modifications, a sidewalk to the south of the road, a storm drain system, and modifications to existing utilities.

The contractor's appeal involves two claims. The first claim is in the amount of $236,507.08 for additional costs to install utilities. The contractor claims that the Department's authorized representative interfered with its means and methods by refusing to allow the use of steel plates to secure trenchwork during utility installation. As a result, the contactor claims that it incurred additional costs to backfill and excavate the trenchwork each day. The second claim, in the amount of $11,846.67, alleges that the Department's authorized representative refused to allow the use of barrels or cones to protect grade stakes on the center line or gutter area of the roadway, causing it to incur additional costs to replace grade stakes that were struck by vehicles overnight.

By letters dated November 11, 2021, the Chief Engineer denied both claims on the merits and on procedural grounds. The Chief Engineer noted that the work that is the subject of these claims occurred in 2018 and 2019; however, the claims were not submitted until the end of calendar year 2020, months beyond the time prescribed in Division I, Subsection 7.16 for submission of claims.

After considering the evidence and testimony presented at a hearing held on September 7, 2022, I conclude that the claims were not timely submitted in accordance with Subsection 7.16 and therefore, are "forfeited and invalidated, and [the contractor] shall not be entitled to payment on account of any such work or damage."

Based on the above, I recommend that both claims be DENIED.

☐ Approved ☐ Not Approved

_____ dated: _____
Jamey Tesler, Secretary & CEO

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REPORT AND RECOMMENDATION
APPEAL OF A. PEREIRA CONSTRUCTION COMPANY
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIMS #2-102060-003 & 004

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 letters dated November 11, 2021, the Chief Engineer made written determinations to deny two claims by A. Pereira Construction Company (APC). The first claim in the amount of $236,507.08 alleges that the Department's authorized representative interfered with APC's means and methods by refusing to allow the use of steel plates to secure trenchwork during utility installation. As a result, APC claims that it incurred additional costs to backfill and excavate the trenchwork each day. The second claim in the amount of $11,846.67 alleges that the Department's authorized representative refused to allow the use of barrels or cones to protect grade stakes on the center line or gutter area of the roadway, causing it to incur additional costs to replace grade stakes that were struck by vehicles overnight.

On December 9, 2021, APC appealed the Chief Engineer's determinations 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 May 16, 2022, concerning the factual background, procedural issues, and potential legal and factual issues to be heard. At the status conference, the Department advised that it intended to file a motion to dismiss the appeals based on APC's failure to comply with the notice requirements of the contract. The Department filed its motion on June 6, 2022. APC filed an opposition to the motion on June 17, 2022. Based on my review of the motion and opposition, and the appropriate standard of review, I denied the Department's motion to dismiss on June 28, 2022, and set the matter for a hearing which was held on September 7, 2022.

At the hearing, APC was represented by Marwan Zubi, Esq. The Department was represented by Owen Kane and Ingrid Freire. Testimony was offered by Michael Pereira, APC's Vice President; Dennis Murphy, MassDOT Inspector; and John Donoghue, MassDOT District 2 Construction Engineer. 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 evidence and testimony presented at the hearing. I make the following findings:

1. APC was the general contractor on contract #102060 ("Contract"). The Contract provided for the reconstruction and widening of Congamond Road in Southwick, MA, and other related work including shoulder modifications, a

sidewalk to the south of the road, a storm drain system, and modifications to existing utilities (the "Project").

2. By letter dated June 21, 2018, the District 2 Highway Director advised APC of the Department's concerns about the way in which APC was using steel plates in the roadway to cover trenchwork on the project.[1] Based on that letter, and on other communications with Department staff within that timeframe, APC concluded that it was not allowed to use steel plates in the roadway on the project.[2]

3. As early as June 2018, APC was aware that it would lose production and incur additional costs if it were not allowed to use steel plates on the project.[3] APC was also aware that if it wanted to receive additional compensation under the contract, it needed to file a claim.[4]

4. By letter dated December 24, 2020, to the District 2 Highway Director, APC provided written notice of its claim in the amount of $236,507.08, alleging cost impacts to work that it performed during the period June 2018 through November 2018 due to the Department's decision to not allow APC to use steel plates in the roadway during construction.[5]

5. By letter dated December 24, 2020, the District 2 Highway Director denied the claim because it was "untimely".[6]

6. By letter dated December 28, 2020, to the Chief Engineer, APC sought further review of its claim.[7] In the letter, APC stated "We didn't know about the time frame we had to submit a claim until recently from another claim that we were doing …"

7. During the months of April through July 2019, APC performed full-depth roadway excavation on the project. To establish the proper grade elevations for roadway reconstruction, APC utilized wooden stakes that were placed at various locations within the roadway.[8]

8. When the work ended each day, APC planned to place cones or barrels on or around the stakes to protect the stakes from being struck by vehicles during the night.[9] However, at some point during the months of April through July 2019, the Department's representative directed APC to stop using barrels and cones to protect the grade stakes.[10]

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[1] APC Exhibit 3.
[2] Michael Pereira, Hr'g Tr. 13:23-25.
[3] Michael Pereira, Hr'g Tr. 15:15-16:10.
[4] Michael Pereira, Hr'g Tr. 16:22-24.
[5] APC Exhibits 7 and 8.
[6] APC Exhibit 10.
[7] APC Exhibit 11.
[8] Michael Pereira, Hr'g Tr. 52:11-53:4.
[9] Michael Pereira, Hr'g Tr. 53:5-10.
[10] Michael Pereira, Hr'g Tr. 53:14-22.

9. As early as April 2019, APC was aware that it would incur additional costs if it were not allowed to use barrels and cones to protect its grade stakes.[11] APC was also aware that if it wanted to receive additional compensation under the contract, it needed to file a claim.[12]

10. By letter dated October 20, 2020, to the District 2 Highway Director, APC provided written notice of its claim in the amount of $11,846.67, alleging cost impacts to work that it performed during the period April 2019 through July 2019 due to the Department's decision to not allow APC to use barrels and cones to protect grade stakes during the project.[13]

11. By letter dated October 28, 2020, the District 2 Highway Director denied the claim because it was "untimely made under the contract".[14]

12. By letter dated October 30, 2020, to the Chief Engineer, APC sought further review of its claim. In the letter, APC stated "We … were never told by anyone that we only had two weeks to file a claim, otherwise we would have done so directly during the time frame mentioned above", referring to the period April 2019 through July 2019.[15]

13. The MassDOT employee (now a former employee) who served as Resident Engineer at commencement of the project, and later as Area Engineer overseeing staff on the project, made several outrageous and offensive statements to APC representatives and to other MassDOT staff about disadvantaged business enterprises in general and about APC, including the following:

    a. that there was no reason to have DBE's on state projects;[16]
    b. mocking APC's intent to submit claims;[17]
    c. telling APC's owner that he was dying for the day that he would never have to work with APC again;[18]
    d. telling other MassDOT employees that his goal was to put APC out of business;[19]
    e. telling other MassDOT employees that he didn't like working with Portuguese-owned companies;[20]

14. Since 2009, APC has performed over 20 projects as a prime contractor for MassDOT.[21] On one of those contracts, #607223, APC submitted notices of claims dated July 18, 2017, and March 5, 2018, each of which references

[11] Michael Pereira, Hr'g Tr. 54:12-55:15.
[12] Michael Pereira, Hr'g Tr. 55:16-19.
[13] APC Exhibits 16 and 17.
[14] APC Exhibit 18.
[15] APC Exhibit 19.
[16] Michael Pereira, Hr'g Tr. 11:1-2.
[17] Michael Pereira, Hr'g Tr. 16:22-17:6; 46:25-47:7;55:16-24.
[18] Michael Pereira, Hr'g Tr. 46:2-11.
[19] Michael Pereira, Hr'g Tr. 45:2-24; Dennis Murphy, Hr'g Tr. 64:16-21.
[20] Dennis Murphy, Hr'g Tr. 62:9-63-23.
[21] MassDOT Exhibit 6; John Donoghue Hr'g Tr. 85:16-19.

MassDOT's claim administration and dispute resolution process (S.O.P. CSD 25-14-1-000).[22]

15. The Contract, at Division-I, Subsection 7.16, entitled "Claims of Contractor for Compensation," provides the following:

> All claims of the Contractor for compensation other than as provided for in the Contract on account of any act or omission of by the Party of the First Part or its agents must be made in writing to the Engineer within one week after the beginning of any work or the substantiating of any damage on account of such act, such written statement to contain a description of the nature of the work performed or damage sustained; and the Contractor shall, on or before the 15th day of the month succeeding that in which such work is performed or damage sustained, file with the Engineer an itemized statement of the details and amounts of such work or damage and unless such statement shall be made as required, his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such work or damage.

DISCUSSION

With respect to APC's claims, there is a threshold question as to whether the claims were forfeited and invalidated because of a failure to provide timely notice in accordance with Division I, Subsection 7.16 of the Contract. The steel plates claim arose in 2018, but written notice was not provided until December 2020. Similarly, the grade stakes claim arose in 2019, but written notice was not given until October 2020. The Contract is clear that a contractor's failure to provide timely written notice of a claim means "his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such work or damage."

On public construction contracts in Massachusetts, a requirement to file a timely written notice of a claim is valid and enforceable, and failure to provide the required written notice within the specified timeframe forfeits the claim. *See Marinucci Bros. v. Commonwealth*, 354 Mass. 141, 144-145 (1968) (holding that a contractor's failure to timely submit its claim results in a waiver and forfeiture of the claim); *Glynn v. City of Gloucester*, 21 Mass. App. Ct. 390, 392-93 (1986) (claim for compensation shall be forfeited by failure to follow required notice provision). If a contract has specific submission requirements, such as a time within to which file a claim, "the contractor must follow the procedures spelled out in the contract … before unilaterally accruing expenses to be pursued later." *D. Federico Co. v. Commonwealth*, 11 Mass. App. Ct. 248, 252 (1981).

APC argues that, in the specific circumstances of this case, its failure to timely present its claims should be excused pursuant to the "futility" doctrine. *See D. Federico Co. v. New Bedford Redevelopment Auth*., 9 Mass. App. Ct. 141, 143-44 (1980)("Although performance of a particular act by one party is contractually specified to be precedent to the arising of an obligation in another, the prior act need not be performed where it would be a hollow gesture sure to be disregarded by the other party." *Id*. at 144 (*quoting Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Auth*., 367 Mass. 57, 61-62, n. 2(1975)). "A party may be excused from complying with a condition precedent if it has proven that performance of the condition would be futile: 'The law does not require useless acts.'" *Cheschi v. Bos. Edison Co.,* 39 Mass. App. Ct. 133, 142, n. 10 (1995)(*quoting Fortune v. National Cash Register Co.*, 373 Mass. 96, 107–108 (1977)).

The testimony presented at the hearing presents a persuasive case that there was a pattern of crude and unprofessional conduct by a former employee of the Department who served as Resident

[22] MassDOT Exhibits 7 and 8.

Engineer and Area Engineer overseeing the Project. He made outrageous and offensive statements to APC representatives and to other MassDOT staff about disadvantaged business enterprises in general and about APC in particular. He mocked APC's intent to submit its claims and told APC that the claims would never be paid. It is understandable that the APC's owner and other representatives were insulted and angered by his conduct, and that his fellow MassDOT colleagues were also turned off by his behavior. I am not convinced, however, that from the actions of this individual, as repugnant as they appear, it follows that APC's submission of written notices of its claims would have been "a hollow gesture sure to be disregarded" by MassDOT. *See D. Federico Co.* at 144.

In my opinion, APC knew or should have known that any comments made by the former employee were not determinative concerning the eventual outcome of any claim submitted by APC and therefore, cannot be construed to make submission of the required written notices "a useless act." First, the Contract is clear that decision-making authority on any claim submitted by APC is not vested in the Resident Engineer or the Area Engineer. The Contract establishes a process for reviewing contractor claims, and vests authority in the Chief Engineer to decide whether the claim has merit. *See* Division I, Subsection 7.16 ("The Engineer shall determine all questions as to the amount and value of such work, and the fact and extent of such damage and shall so notify the Contractor in writing of their determination"). Any determination of the Chief Engineer may be appealed to the hearing examiner for a report and recommendation to the Secretary of Transportation. *Id.* ("Such determination of the Engineer may be appealed … in accordance with General Law, Chapter 16, Section 5b, as amended").[23]

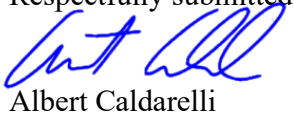
Also, APC has performed over 20 projects as a prime contractor for MassDOT since 2009. It was familiar with the contract claim process and MassDOT's process for claims administration and dispute resolution, having submitted notices of claims pursuant to the contract and the claims process on other contracts. Lastly, when APC finally provided written notice of its claims, the reason it gave for failing submit them on time was simply ignorance of the contract requirement.

The contractor failed to give timely notice in accordance with Division I, Subsection 7.16 of the Contract; therefore, the claims are "forfeited and invalidated, and [the contractor] shall not be entitled to payment on account of any such work or damage."[24]

RECOMMENDATION

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

Respectfully submitted,



Albert Caldarelli
Administrative Law Judge

[23] The requirements of G.L. c. 16, §5b are now contained in G.L. c. 6C, §40.

[24] Based on my decision on the threshold procedural issue, I do not discuss the merits of APC's claims. However, I note that the testimony and evidence at the hearing was sufficient in my view to support a finding, on appeal, of partial merit with respect to the steel plate claim due to the Department's interference with APC's means and methods. This is another reason why I believe it would not have been a futile exercise for APC to have submitted timely notice of its claims.

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS

Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Jamey Tesler, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: AC Albert Caldarelli, Administrative Law Judge

DATE: March 22, 2022

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

Claimant:	John W. Egan Co.
Contractor:	Avatar Construction Corp.
Contract:	Hopkinton High School Classroom Addition DRA# 20203
City/Town:	Hopkinton
Amount:	$45,090.93

This direct payment demand (Demand) by John W. Egan Co. was received by the Department on March 14, 2021.

FINDINGS

The Demand appears to arise out of a contract between the Town of Hopkinton and Avatar Construction Corporation. The jurisdiction of this Office extends only to direct payment demands made on the Massachusetts Department of Transportation.

RULING

M.G.L. c. 30, §39F governs the process for making a demand for direct payment from an awarding authority. In this case, John W. Egan Co. has not made its demand on the proper awarding authority, which in this case appears to be the Town of Hopkinton. To the extent that John W. Egan Co. demands direct payment from MassDOT, the Demand must be DENIED.[1]

cc: Marc Cole, Project Manager
John W. Egan Co.
3 Border Street
West Newton, MA 02465

Avatar Construction Corp
60 Arsenal Street, 2nd Floor
Watertown, MA 02472

[1] Nothing in this Ruling should be construed in any way as a determination on the merits should John W. Egan Co. submit its Demand to the proper awarding authority in accordance with G.L. c. 30, §39F.

Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Jamey Tesler, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: AC Albert Caldarelli, Administrative Law Judge
DATE: June 29, 2022
RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: K5 Corporation
Contractor: Cardi Corporation
Contract: #114847 - Middleborough – Center Street at John Glass Jr. Square
District: District 5
Amount: $9,173.90

This Direct Payment Demand (Demand) by K5 Corporation (K5) was received by the Department on May 6, 2022.

FINDINGS

K5 advised this Office on June 28, 2022, that it received payment from the general contractor of the amounts that were the subject of the Demand.

RULING

The Demand is moot because K5 has been paid the amounts that are the subject of the Demand. Therefore, no further action is necessary, and this matter may be closed.

cc:

K5 Corporation
9 Rockview Way
Rockland, MA 02370

Cardi Corporation
400 Lincoln Avenue
Warwick, RI 02888

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Mary-Joe Perry, District 5 Highway Director

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
www.mass.gov/massdot

Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Jamey Tesler, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: AC Albert Caldarelli, Administrative Law Judge
DATE: July 5, 2022
RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: New England Bridge Products Inc.
Contractor: S&R Corporation
Contract: #90724 - Lowell / VFW Highway over Beaver Brook
District: District 4
Amount: $20,184.48

On June 29, 2002, I advised you that the Direct Payment Demand (Demand) by New England Bridge Products Inc., received by the Department on May 6, 2022, was allowed and that a direct payment should be made from the next periodic, semi-final or final estimate due S&R Corporation. My decision was based on information contained in the Demand and input received from district construction staff.

On June 30, 2022, S&R provided you with a copy of a release agreement executed by New England Bridge Products on June 20, 2022, confirming that S&R has paid New England Bridge Products the full amount that is the subject of the Demand (see copy attached hereto).

RULING

In light of the above, please disregard my memo to you dated June 29, 2022. The Demand is moot because New England Bridge Products has been paid the amounts that are the subject of the Demand. Therefore, no further action is necessary, and this matter may be closed.

cc:

New England Bridge Products Inc.
93 Brookline Street
Lynn, MA 01902

S&R Construction
706 Broadway Street
Lowell, MA 01854

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Paul Stedman, District 4 Highway Director

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
www.mass.gov/massdot

S&R CORPORATION
Demolition · Environmental · Construction

706 Broadway Street
Lowell, MA 01854

FINAL SUBCONTRACTOR RELEASE

PROJECT: **BRIDGE REPLACEMENT VFW HIGHWAY OVER BEAVER BROOK, LOWELL, MA (S&R JOB #325)**

IN CONSIDERATION of the sum of **$20,18448** Check **#96498** paid to **NEW ENGLAND BRIDGE PRODUCTS, INC.** ("Subcontractor") by S&R Corporation ("Contractor"), and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Subcontractor, for itself, its heirs, executors, administrators, successors and assigns, hereby:

1. REMISES, releases and forever discharges the Contractor, the Owner, their agents, employees, officers, shareholders, directors, attorneys, independent contractors, sureties, heirs, executors, administrators, successors and assigns ("the Releasees") of and from all claims, debts, demands, suits, causes of action, accounts, covenants, contracts, agreements, damages and liabilities whatsoever, of every name and nature, both in law and in equity, which against the Releasees the Subcontractor now has or ever had in connection with or in any way relating to labor, materials, equipment or other work furnished to or performed on the Project up to and including **Estimate #85 through 1/31/2022**. Not including any retainages or additional quantities of work performed but not yet included on a pay estimate by the Awarding Authority / Owner;

2. WAIVES, relinquishes and resolves all rights to any lien, including without limitation, liens under G. L. c. 254 upon the property, real estate, buildings or improvements comprising the above-referenced Project, or upon any work which was performed or material or equipment supplied by or through the undersigned up to and including **Estimate #85 through 1/31/22.** Not including any retainages or additional quantities of work performed but not yet included on a pay estimate by the Awarding Authority / Owner;

3. CERTIFIES and warrants that all persons, parties or entities who supplied labor, equipment, materials, machinery, services, insurance, supplies or other items to, through or under the undersigned on the Project have been paid in full and that all taxes and bills of any other descriptive title in connection with the work performed for, through or under the undersigned on the Project up to and including **Estimate #85 through 1/31/22** have been paid in full, not including any retainages or additional quantities of work performed but not yet included on a pay estimate by the Awarding Authority / Owner;

4. AGREES to indemnify and save harmless the Releasees from all liens, claims, demands and all expenses incurred, including attorneys' fees and costs of defense, for or on account of or in any way growing out of claims for payment for any work and/or any labor performed or any benefits or assessments related thereto and any materials, equipment, machinery, services, supplies, insurance or other items furnished to, for, through or under the undersigned in connection with the Project up to and including **Estimate #85 through 1/31/22**. Not including any retainages or additional quantities of work performed but not yet included on a pay estimate by the Awarding Authority / Owner;

SIGNED AND SEALED this 20 day of June, 2022

NEW ENGLAND BRIDGE PRODUCTS INC.

By James D. Robson

State of Ma.
County of Essex

On this the 20 day of June, 2022 before me, John Conti, the undersigned Notary Public, personally appeared James Robson and proved to me through satisfactory evidence of identity, which was license, to be the person whose name was signed on the preceding document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief.

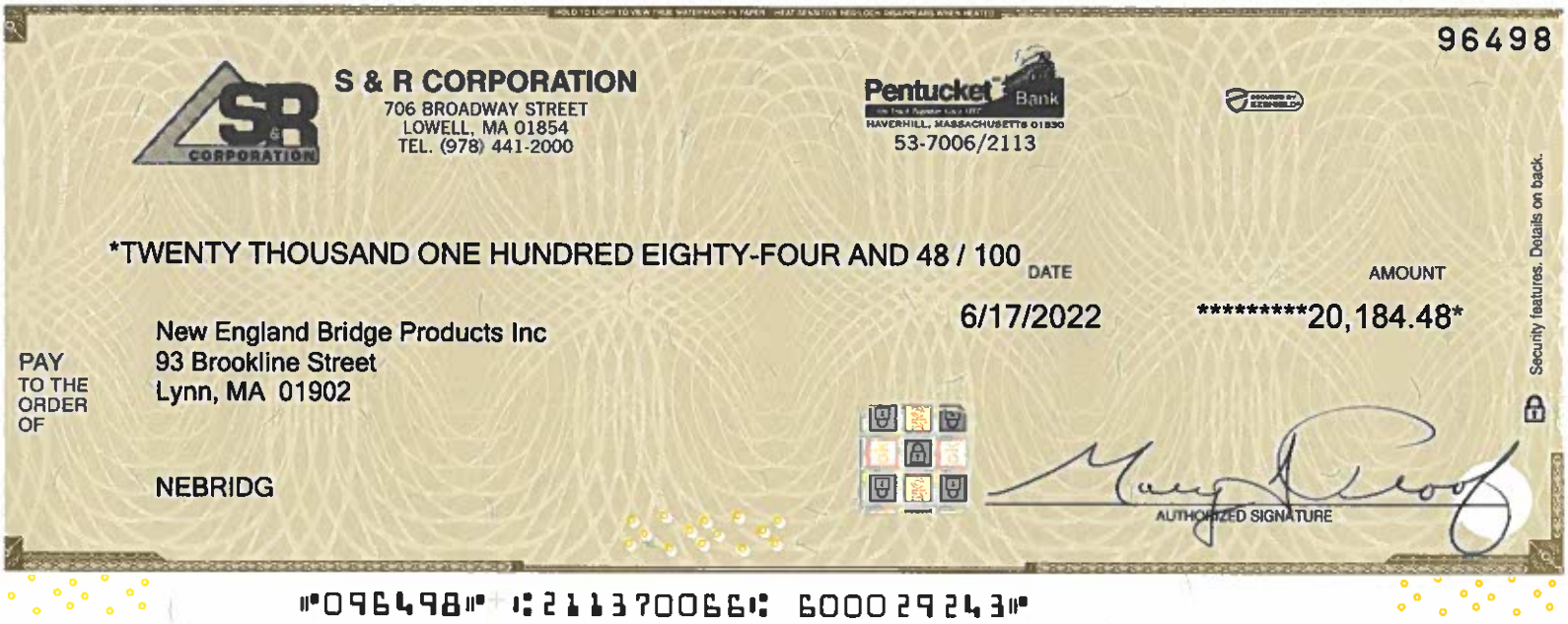
John Robert Conti
NOTARY PUBLIC
Commonwealth of
Massachusetts
My Commission Expires

Notary Public My Commission expires 5/13/27

S & R CORPORATION 96498

Date	Invoice Number	Comment	Amount	Discount Amount	Net Amount
1/31/2022	325-89-02	325 Sub Bridge Rail	20,184.48	0.00	20,184.48

Check: 096498 6/17/2022 NEBRIDG / New England Bridge Products Inc Check Total: 20,184.48



S & R CORPORATION 96498

Date	Invoice Number	Comment	Amount	Discount Amount	Net Amount
1/31/2022	325-89-02	325 Sub Bridge Rail	20,184.48	0.00	20,184.48

Check: 096498 6/17/2022 NEBRIDG / New England Bridge Products Inc Check Total: 20,184.48

Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Jamey Tesler, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: A C Albert Caldarelli, Administrative Law Judge
DATE: June 29, 2022
RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: New England Bridge Products Inc.
Contractor: S&R Corporation
Contract: #90724 - Lowell / VFW Highway over Beaver Brook
District: District 4
Amount: $20,184.48

This Direct Payment Demand (Demand) by New England Bridge Products Inc. was received by the Department on May 6, 2022.

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. New England Bridge Products is an approved subcontractor on Contract #90724. Its subcontract scope includes providing bridge rail to the project.

2. The Demand consists of a one-page letter dated April 22, 2022, signed by the Head of Sales-Chief Engineer of New England Bridge Products. The Demand includes a sworn statement that New England Bridge Products provided bridge rail to the general contractor and that $20,184.48 remains due under the subcontract.

3. The Demand indicates that a copy was also sent to the general contractor S&R Corporation. No Reply to the Demand was received from the general contractor.

4. District 4 construction staff reports that New England Bridge Products substantially completed its subcontract work on January 29, 2022, and that the general contractor was paid in full for such work on Pay Estimates 65 and 89.

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
www.mass.gov/massdot

RULING

District 4 construction staff confirms that New England Bridge Products substantially completed its subcontract work on January 29, 2022, and that the Department paid S&R Corporation in full for that work.

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

Because the general contractor failed to make pay New England Bridge Products the balance due under the subcontract in accordance with G.L. c.30, §39F, the Demand is ALLOWED.

The Department is obligated to make a direct payment in response to this Demand. Kindly pay New England Bridge Products $20,184.48 from the next periodic, semi-final or final estimate and deduct that amount from payments due S&R Corporation in accordance with Section 39F.

cc:

New England Bridge Products Inc.
93 Brookline Street
Lynn, MA 01902

S&R Construction
706 Broadway Street
Lowell, MA 01854

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Paul Stedman, District 4 Highway Director

Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Jamey Tesler, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: AC Albert Caldarelli, Administrative Law Judge
DATE: June 2, 2022
RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: ARC Enterprises, Inc.
Contractor: S&R Construction
Contracts: #114109 - Norton & Taunton: Middleboro Sub-Division Bridge Replacement
District: Rail & Transit Division
Amount: $234.495.08

This Direct Payment Demand (Demand) by ARC Enterprises, Inc. (ARC) was received by the Department on May 17, 2022.

FINDINGS

By email dated May 31, 2022, ARC's Office Manager advised the Rail & Transit Division that ARC received payment from the general contractor of the amounts that were the subject of the Demand.

RULING

The Demand is moot because ARC has received payment from the general contractor of the amounts due. Therefore, no further action is necessary with respect to this Demand.

cc:

ARC Enterprises, Inc.
27 Commercial Road
Kingfield, MA 04947

S&R Construction
706 Broadway Street
Lowell, MA 01854

Carlos A. Velasquez, Assistant Project Manager
MassDOT – Rail & Transit Division

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
www.mass.gov/massdot

APPENDIX C-1

RULINGS

MASSUCP ADJUDICATORY BOARD APPEALS

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

IN THE MATTER OF ATLANTIC BRIDGE & ENGINEERING, INC.
(MassUCP #2020-0001)

INTRODUCTION

The Adjudicatory Board of the Massachusetts Unified Certification Program (Board) 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 April 30, 2020, the Massachusetts Unified Certification Program (MassUCP) notified Atlantic Bridge & Engineering, Inc. (ABE) that it was initiating ineligibility proceedings based on a determination that ABE's owner is not economically disadvantaged. MassUCP advised that it had considered the factors included in 49 CFR § 26.67(b)(1)(ii)(A)(1)-(6) for the most recent three-year period at the time of its review (from 2016 through 2018) and determined that ABE's owner is able to accumulate substantial wealth.

ABE through its counsel submitted a letter dated June 10, 2020 disagreeing with MassUCP's findings. In accordance with 49 CFR § 26.87(d), a hearing was held over eight days during the period from September 30, 2021 through January 21, 2022.

FINDINGS

Based on the testimony and evidence presented at the hearing, the Board makes the following findings of fact:

The Company and its Owner/Stockholder

1. ABE was founded in 1996 by Ms. Victoria Kolenda, the company's sole owner and stockholder. ABE was certified as a DBE in Massachusetts in that same year. It currently employs about 50 people.[1]

2. When Ms. Kolenda established ABE, one of her strategies for the company's long-term success was to run it like a general contractor, albeit on a smaller scale. Through hard work and reliance on her experience in bridge engineering, Ms. Kolenda has effectively implemented her business plan and ABE has evolved into a successful and well-respected company.[2]

3. ABE has established itself as a strong player in the construction industry in Massachusetts, specifically with respect to its ability to both fabricate and install steel for construction

[1] Kolenda, Hr'g Tr. Day 4, 31:1-11, 80:15-16, 83:6-8.
[2] Kolenda, Hr'g Tr. Day 4, 80:11-87:3; *also see* Tynes, Hr'g Tr. Day 1, 150:4-9.

projects. The company fabricates steel at its New Hampshire facility for delivery to project worksites. It also performs on-site steel erection and installation. Ms. Kolenda advises that ABE may be the only company in Massachusetts that offers both steel fabrication and installation. It performs "all things that go along with building a bridge from a steel perspective," including fabrication, delivery, welding, drilling, installation, and equipment operation.[3]

4. ABE is certified by the American Institute of Steel Construction (AISC) in advanced steel erection with a bridge endorsement, which is the highest erector certification given by AISC. ABE may be one of only two Massachusetts companies achieving that level of certification. Its credentials for steel fabrication include certification by AISC as an intermediate/major bridge fabricator with a fracture critical endorsement.[4]

5. Over the years, ABE has applied its expertise in steel fabrication and installation on major public construction projects in Massachusetts, including repairs to the Longfellow Bridge in Boston, the MBTA's Green Line Extension, and the I-91 Bridge rehabilitation project in Springfield.[5]

Tax Returns and Financial Statements

6. For the three-year period at issue, Ms. Kolenda's Adjusted Gross Income (AGI) as reported on her individual tax returns[6] was as follows:

   - $[redacted] for tax year 2016
   - $[redacted] for tax year 2017
   - $[redacted] for tax year 2018

7. In other tax years, Ms. Kolenda's AGI as reported on her individual tax returns[7] was as follows:

   - $[redacted] for tax year 2013
   - $[redacted] for tax year 2014
   - $[redacted] for tax year 2015
   - $[redacted] for tax year 2019

8. ABE's consolidated financial statements[8] show that the company's retained earnings were;

   - $[redacted] at the end of 2016
   - $[redacted] at the end of 2017
   - $[redacted] at the end of 2018.

[3] Kolenda, Hr'g Tr. Day 4, 80:11-87:3.
[4] ABE Exhibits 102 and 103.
[5] Kolenda, Hr'g Tr. Day 4, 84:13-85:2.
[6] MassUCP Exhibits 005, 006, and 007; ABE Exhibit 120.
[7] MassUCP Exhibits 008, 009, 010, and 033; ABE Exhibit 152.
[8] MassUCP Exhibits 014, 015, and 016; ABE Exhibit 162.

9. For years ended December 31, 2018 and 2017, ABE's consolidated financial statement[9] contains the following note about the company's line-of-credit:

> The Company has a $[redacted] line-of-credit with a bank, interest is at [redacted] There were no borrowings outstanding at December 31, 2018 and 2017. The line is collateralized by a security interest in substantially all assets of the Company and the personal guarantee of the Company's sole stockholder."

10. ABE's consolidated financial statements and tax returns[10] show the following distributions to the stockholder of the company Ms. Kolenda:

- $[redacted] in 2016
- $[redacted] in 2017
- $[redacted] in 2018

MassUCP's Assessment of Ms. Kolenda's Overall Economic Situation

11. For years 2016 through 2018, the most recent three-year period at the time of its review, MassUCP concluded that Ms. Kolenda's average AGI over that period was $[redacted]. Its conclusion was based on the AGI amounts reported by Ms. Kolenda on her individual tax returns:[11]

- $[redacted] for tax year 2016
- $[redacted] for tax year 2017
- $[redacted] for tax year 2018

12. MassUCP concluded that the level of income realized by Ms. Kolenda during the three-year period from 2016 through 2018 was not unusual and is likely to occur in the future.[12] Its conclusion was based on the following rationale:

a. the AGI amounts reported by Ms. Kolenda on her individual tax returns over the six-year period from 2013 through 2018 were usually in the range of $[redacted].
b. the revenue generated by ABE, the main source of Ms. Kolenda's income, has been steady from 2016 through 2018, averaging $[redacted] annually. Therefore, it is unlikely that Ms. Kolenda's level of income will be affected by decreases in ABE's revenues.

[9] MassUCP Exhibit 014.
[10] MassUCP Exhibits 014, 015, 016, 017, 018 and 019.
[11] MassUCP Exhibit 001; *also see* Finding 6.
[12] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 44:12-50:7

13. MassUCP concluded that there were no losses offsetting Ms. Kolenda's earnings during the three-year period from 2016 through 2018. It noted that the sources upon which her earnings calculation is based are amounts reported by Ms, Kolenda and ABE on their respective tax returns, which already factor in allowable personal and business losses.[13]

14. MassUCP concluded that ABE's consolidated financial statements and tax returns contained no information to indicate that income realized by Ms. Kolenda during the three-year period from 2016 through 2018 was used to reinvest in her company or to pay taxes arising in the normal course of operations by her company.[14]

15. In consideration of supplemental information provided by Ms. Kolenda claiming that she reinvested earnings for the purchase of equipment, vehicles, and improvements to its fabrication shop and home office, MassUCP made the following downward adjustments to Ms. Kolenda's average AGI:[15]

    - In 2016, claimed reinvestments of $[redacted]
    - In 2017, claimed reinvestments of $[redacted]
    - In 2018, claimed reinvestments of $[redacted]

16. MassUCP also calculated ABE's tax liability based on the company's tax returns and applicable federal and state tax rates. MassUCP credited Ms. Kolenda with ABE's entire tax liability amount by making the following downward adjustments to her average AGI:[16]

    - In 2016, federal tax of $[redacted], and state tax of $[redacted]
    - In 2017, federal tax of $[redacted], and state tax of $[redacted]
    - In 2018, federal tax of $[redacted], and state tax of $[redacted]

17. MassUCP concluded that Ms. Kolenda's annual income (which it characterized as "discretionary" or "resulting" income) for years 2016 through 2018 averaged $[redacted]. The average was derived from the AGI amounts reported on her individual tax returns for those years less her claimed reinvestments and company tax liability.[17]

18. MassUCP considered other evidence tending to show that Ms. Kolenda's income for years 2016 through 2018 was not indicative of a lack of economic disadvantage:

    a. MassUCP noted that her income level is within the top 1% of earners in the United States based on data compiled by the IRS.[18] It also used economic data compiled by the Federal Reserve of St. Louis to compare her income to average incomes for individuals in states in which Ms. Kolenda lives and works. MassUCP concluded that Ms.

[13] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 50:20-54:2.
[14] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 65:8-15, 65:23-67:7, 73:12.
[15] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2,73:10-13; *also see* ABE Exhibit 105.
[16] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2,89:9-96:22.
[17] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 97:6-98:5.
[18] MassUCP Exhibits 001 and 023; Logan, Hr'g Tr. Day 2, 102:7-103:8.

Kolenda's income was at least 34 to 55 times higher.[19]

b. MassUCP also concluded that Ms. Kolenda has access to substantial credit. It identified $[redacted] in personal credit in the form of the mortgages on her real estate holdings. It also noted her ability to access ABE's $[redacted] line-of-credit.[20]

19. MassUCP concluded that the fair market value of all of Ms. Kolenda's assets total $[redacted]. Its conclusion was based on its valuation of Ms. Kolenda's ownership interests in her real estate holdings, business assets, financial and retirement accounts, and personal assets.[21]

a. MassUCP's valuation of Ms. Kolenda's ownership interests in real estate was based on information she reported in her 2019 Personal Net Worth Statement and information in publicly available sources, such as online real estate databases, town records, and tax returns. It valued Ms. Kolenda's ownership interests in real estate at $[redacted] based on the following values:[22]

- [redacted], Nottingham, NH $[redacted]
- [redacted] Hardwick, MA $[redacted]
- [redacted], Hardwick, MA $[redacted]
- [redacted] Ware, MA $[redacted]
- [redacted] Georgetown, ME $[redacted]
- [redacted], Georgetown, ME $[redacted]

b. MassUCP valued Ms. Kolenda's business assets at $[redacted], which includes the value of her ownership interests in ABE, Vignette LLC, and Longfellow LLC.[23]

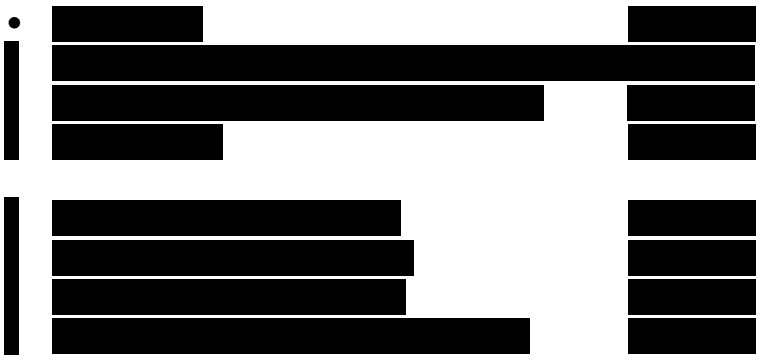
c. MassUCP valued Ms. Kolenda's ownership interests in ABE at $[redacted]. The valuation was based on 2018 assets and liabilities reported in ABE's consolidated financial statement for years ended December 31, 2018 and 2017 as follows:[24]

- Total Current Assets $[redacted]
- less Current Liabilities $[redacted]
- less Long Term Debt $[redacted]
- less Non-Controlling Interest in Equity $[redacted]

d. MassUCP valued Ms. Kolenda's ownership interests in Vignette LLC at $[redacted] and in Longfellow LLC at $[redacted], consistent with the values reported by Ms. Kolenda in her 2019 Personal Net Worth Statement and with respect to Vignette LLC, also reported in ABE's consolidated financial statement for years ended December 31, 2018 and 2017.[25]

[19] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 98:15-99:2.
[20] MassUCP Exhibits 001 and 014; Logan, Hr'g Tr. Day 2, 99:6-9.
[21] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 109:8-110:9.
[22] MassUCP Exhibits 001 and 024; Logan, Hr'g Tr. Day 2, 110:11-111:2.
[23] MassUCP Exhibit 001.
[24] MassUCP Exhibit 001; Logan, Hr'g Tr. Day 2, 129:17-131:7.
[25] MassUCP Exhibits 001 and 024.

e. MassUCP valued Ms. Kolenda's interests in financial and retirement accounts at $[redacted], and personal assets at $[redacted] as follows, based on the values reported by Ms. Kolenda in her 2019 Personal Net Worth Statement[26]:



20. Based on the above, MassUCP concluded that Ms. Kolenda has the ability to accumulate substantial wealth and is not in fact economically disadvantaged.

Other Factors to Consider Regarding Ms. Kolenda's Overall Economic Situation

21. For tax purposes, ABE elects to be an S Corporation pursuant to 26 U.S. Code §§ 1361-1362.[27] An S Corporation's income, deductions, credits, and other items are reported on the individual tax returns of the company's stockholders.[28] Because Ms. Kolenda is the sole stockholder of ABE, the company's income, losses, deductions, credits, and other items are reported on her individual tax return.[29]

22. The AGI amounts reported on Ms. Kolenda's individual tax returns, which were used by MassUCP to evaluate her income for the period 2016 through 2018, include items reported on ABE's Schedule K-1 tax filings, such as ABE's corporate income, losses, interest income, gain or loss on sale of its equipment, depreciation of equipment, and deductions.[30]

23. The AGI amounts reported on Ms. Kolenda's individual tax returns for tax years 2016 through 2018 that <u>were not</u> reported by ABE as corporate income, losses, deductions, credits, and other items are:

- $[redacted] for tax year 2016
- $[redacted] for tax year 2017
- $[redacted] for tax year 2018

The above non-corporate amounts average $[redacted] annually over the three-year period.[31]

[26] MassUCP Exhibit 024; ABE Exhibit 106.
[27] MassUCP Exhibits 005, 006, 007, 014, 015, and 016; ABE Exhibit 120; *also see* Comtois, Hr'g Tr. Day 6, 9:10-11:5.
[28] 26 U.S. Code § 1361, et seq.
[29] *Id*.; *also see* Comtois, Hr'g Tr. Day 6, 12:22-13:6.
[30] MassUCP Exhibits 017, 018 and 019; ABE Exhibit 152; *also see* Comtois, Hr'g Tr. Day 6, 18:1-22:21.
[31] *Id*.

24. The company distributions that Ms. Kolenda received in 2016, 2017, and 2018 totaled $[redacted].[32] Of that amount, she used $[redacted] to pay taxes on behalf of ABE in 2016,[33] and $[redacted] to pay taxes on behalf of ABE in 2017.[34] The remainder of these distributions totaling $[redacted] were not used by Ms. Kolenda to pay ABE's taxes or to reinvest in ABE; reinvestments that Ms. Kolenda made in the form of purchases of equipment, vehicles, improvements to ABE's fabrication shop and home office, and amounts needed to secure and maintain security bonds were made from ABE's retained earnings, not from the distributions that Ms. Kolenda received.[35]

25. Ms. Kolenda has a $[redacted] mortgage on the [redacted] property in Hardwick, MA. She has a $[redacted] mortgage on the [redacted] property in Georgetown, MA. She also has a $[redacted] mortgage on the [redacted] property in Ware, MA, which was purchased in May 2019.[36]

26. Based on ABE's consolidated financial statements for years 2014 through 2019, ABE's "Book Value" for each year over that period was as follows:

    - 2014 …… $[redacted]
    - 2015 …… $[redacted]
    - 2016 …… $[redacted]
    - 2017 …… $[redacted]
    - 2018 …… $[redacted]
    - 2019 …… $[redacted]

27. If Ms. Kolenda were to withdraw any amounts from her retirement accounts during the 2016 to 2018 period, she would incur taxes and penalties for early withdrawal because she is not over 59-and-a-half years of age.[37]

DECISION

MassUCP seeks to decertify ABE based on its conclusion that ABE's owner has ability to accumulate substantial wealth and as a result is not economically disadvantaged.[38] This Board, therefore, has one question before it: has MassUCP demonstrated by a preponderance of evidence that ABE's owner has ability to accumulate substantial wealth? To answer this question, the Board is instructed by the factors set forth in 49 CFR § 26.67(b)(1)(ii)(A), which are intended to provide guidance about the kind of evidence that may be considered.[39] Other factors presented by ABE through testimony and evidence at the hearing are also considered such that the Board's decision is based on the totality of the circumstances with respect to the overall economic situation of ABE's

[32] See Finding 10.
[33] ABE Exhibits 110 and 166.
[34] ABE Exhibit 112.
[35] Logan, Hr'g Tr. Day 2, 72:9-13; Kolenda, Hr'g Tr. Day 4, 54:21-58:25; Comtois, Hr'g Tr. Day 6, 53:7-54:18.
[36] ABE Exhibits 108, 109 and 122.
[37] Comtois, Hr'g Tr. Day 6, 58:14-19 and Day 7, 18:2-9.
[38] *See* 49 CFR § 26.67.
[39] *See* 79 FR 59569 (October 14, 2014).

owner.[40] The Board has weighed the evidence and testimony presented by MassUCP and ABE at the hearing, and its findings of fact are provided above.

MassUCP's proposal to decertify ABE is compelling. The preponderance of the evidence presented by MassUCP with respect to the overall economic situation of ABE's owner suggests that she is wealthy. Tax records, financial statements, and other information compiled by MassUCP demonstrate that she earns a high income, owns substantial business, real estate, and other assets of significant value, annually receives [redacted] dollars in corporate distributions, has access to large amounts of credit, and has the financial means to personally guarantee ABE's $[redacted] line of credit.

From 2016 to 2018, the most recent three-year period reviewed by MassUCP, the average AGI of ABE's owner was $[redacted]; this income was not unusual and is likely to occur in the future; her earnings were not offset by losses; her income level is within the top 1% of earners in the United States based on data compiled by the IRS; she received distributions from ABE totaling $[redacted] of which only a fraction was used to pay ABE's taxes and the balance of which was not reinvested in ABE; she owns various real estate properties valued at $[redacted]; and the total fair market value of her assets exceeds $[redacted].

The Board weighed other factors presented by ABE through testimony and evidence at the hearing, including the fact that ABE elects to be an S Corporation for tax purposes. As an S Corporation, the company's income, losses, deductions, credits, and other items are reported on the individual tax return of ABE's owner. If the so-called "corporate influence" of ABE is stripped from her individual tax filings, her AGI is reduced to an average of $[redacted] annually over the three-year period from 2016 to 2018. In the Board's view, an annual AGI that is slightly below the $350,000 amount referenced in 49 CFR § 26.67(b)(1)(ii)(A)(1) does not demonstrate economic disadvantage in the context of the overall economic situation of ABE's owner.[41]

ABE's owner has mortgages on three of her properties: a $[redacted] mortgage on the [redacted]. property in Hardwick, of MA; a [redacted] mortgage on the [redacted] property in Georgetown, MA; and a $[redacted] mortgage on the [redacted] property in Ware, MA. In the Board's view, the existence of mortgages on properties having a fair market value of approximately $[redacted] does not demonstrate economic disadvantage but rather tends to indicate the financial means and access to credit to buy and maintain real estate of significant value. The property in Ware, MA, valued by MassUCP at $[redacted], was purchased in May 2019, which is outside of the three-year period of MassUCP's review. If the fair market value of this property were disregarded, it would not, in the Board's view, demonstrate economic disadvantage given the overall economic situation of ABE's owner.

From 2014 through 2019, ABE's "Book Value" has fluctuated between $[redacted] and $[redacted]. In its valuation of the fair market value of all assets owned by ABE's owner, MassUCP used the most recent Book Value of ABE at the time of its review. The Board sees nothing arbitrary or irrational about MassUCP's use of the most current information to calculate the value of an asset at a particular point in time. Averaging over multiple years or using a lower Book Value from a previous year, as ABE suggests, would lower MassUCP's calculation, but would not

[40] *Id*.

[41] *Id*. ("An adjusted gross income below $350,000 may in appropriate circumstances indicate a lack of economic disadvantage.")

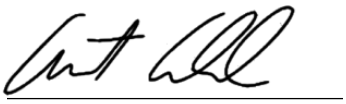
in the Board's view demonstrate economic disadvantage given the overall economic situation of ABE's owner.

ABE's owner would have incurred taxes and early withdrawal penalties if she had withdrawn any amounts from her retirement accounts during the 2016 to 2018 period. Factoring taxes and early withdrawal penalties into the fair market value of the retirement accounts would lower their value, but doing so does not in and of itself, or in combination with the other factors raised by ABE, demonstrate economic disadvantage given the overall economic situation of ABE's owner.

For the reasons stated above, the Board concludes that ABE no longer meets the eligibility standards of 49 CFR Part 26, and therefore, agrees that MassUCP's proposal to decertify the firm is appropriate.

Dated: May 2, 2022

The Adjudicatory Board:



On behalf of its members:

Albert Caldarelli
David Spicer

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM ADJUDICATORY BOARD

IN THE MATTER OF VIGIL ELECTRIC COMPANY
(MassUCP #2020-003)

INTRODUCTION

The Adjudicatory Board of the Massachusetts Unified Certification Program (Board) 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 September 25, 2020, the Massachusetts Unified Certification Program (MassUCP) notified Vigil Electric Company, Inc. (VEC) that it was initiating ineligibility proceedings based on a determination that VEC's owner is not an enrolled member of a Federally or State recognized Indian tribe. As a result, VEC may not receive the presumption of social disadvantage status to remain eligible as a Native American disadvantaged business enterprise.

By letter dated October 6, 2020, VEC requested a hearing on the matter. The Board allowed multiple requests by VEC for extensions of the hearing date. A hearing was held on March 8, 2022.

FINDINGS

Based on the testimony and evidence presented at the hearing, the Board makes the following findings:

1. VEC has been certified as a DBE in Massachusetts since October 1, 2000.[1]

2. VEC's certification was based in part on the presumption that its sole owner, Mr. Jerome Vigil, is socially disadvantaged as a Native American individual. Mr. Vigil is Cherokee, as evidenced by documentation from the Commonwealth's Commission on Indian Affairs, and his birth certificate documenting that his father was Cherokee Indian.[2]

3. On October 2, 2014, the U.S. Department of Transportation issued a Final Rule concerning the definition of Native American for purposes of the eligibility standards in 49 C.F.R. 26. The Final Rule, which became effective on November 3, 2014, provides in pertinent part:

> We are finalizing the changes to the definition of Native American to incorporate the requirement that an American Indian be an enrolled member of a federally or State-recognized Indian tribe to make it consistent with the SBA definition. By statute, the term "socially and economically disadvantaged individuals" has the meaning given the term in section 8(d) of the Small Business Act and relevant subcontracting regulations issue pursuant to that Act. As explained in the SBA final rule:

[1] MassUCP Exhibit 001.
[2] *Id.*

> This final rule clarifies that an individual must be an enrolled member of a Federally or State recognized Indian Tribe in order to be considered an American Indian for purposes of the presumptive social disadvantage. This definition is consistent with the majority of other Federal programs defining the term Indian. An individual who is not an enrolled member of a Federally or State recognized Indian Tribe will not receive the presumption of social disadvantage as an American Indian. Nevertheless, if that individual has been identified as an American Indian, he or she may establish his or her individual social disadvantage by a preponderance of the evidence, and be admitted to the [DBE program] on that basis.
>
> 79 Fed. Reg. 59579 (Oct. 2, 2014)

4. As a result of the above-referenced Final Rule, the definition of the term "Native Americans" as it appears in 49 C.F.R. §26.5 was revised to include only "persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians."

5. By memorandum dated August 26, 2019, the U.S. Department of Transportation instructed all recipients and sponsors implementing the DBE program to conduct a review[3] as follows:

> Please review your State UCP Directory to determine which DBEs are owned and controlled by Native Americans and verify whether the owner(s) relied upon for disadvantaged status is an enrolled member of a federally or State recognized Indian tribe (this request does not affect owners who claim status as an Alaskan Native or Native Hawaiian). If they are not, you must initiate proceedings to remove the firm's DBE eligibility under the procedures at Section 26.87. If the DBE's certification is removed through the Section 26.87 process, the firm may reapply for certification based on an individual determination of social and economic disadvantage under Section 26.67(d).

6. In June 2020, the MassUCP initiated a certification review of VEC as instructed by U.S. Department of Transportation. As part of the review, Mr. Vigil was asked to provide confirmation of enrollment in a federally or state recognized Indian tribe. He did not produce any evidence of such enrollment.[4]

7. Mr. Vigil testified that he is not enrolled in any federal or state recognized Indian tribe.[5]

8. Mr. Vigil contacted the Picuris Indian Reservation and talked to the Tribal Enrollment Officer to discuss his enrollment in the tribe. He was advised that the tribe was not accepting inquires for six months to a year.[6]

9. Mr. Vigil testified that he is a person of mixed ethnicity, with Native American and

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[3] MassUCP Exhibit 002.
[4] MassUCP Exhibit 001.
[5] Federally recognized Indian tribes are provided in 86 Fed. Reg. 7554. The Commonwealth of Massachusetts recognizes the following Indian tribes: the Chappaquiddick Wampanoag Tribe, Chaubunnagungamaug Nipmuc Tribe, Hassanamisco Nipmuc Tribe, Herring Pond Wampanoag Tribe, · Pocasset Wampanoag Tribe, Seaconke Wampanoag Tribe, Mashpee Wampanoag Tribe, and Wampanoag Tribe of Gay Head/Aquinnah. *See* MassUCP Exhibits 003, 004.
[6] VEC Exhibit entitled "Hearing Notes" REV 3.0.

Hispanic American origins.[7] He provided information about his family history that purports to document his mixed ethnicity.[8]

10. The current U.S. DOT Uniform DBE/ACDBE Certification Application form, at page 7, allows for multi-ethnic identification.[9]

DISCUSSION

There is no question of law before the Board. The DBE regulations at 49 C.F.R. §26.5 define "Native Americans" as "persons who are enrolled members of a federally or State recognized Indian tribe ..." In promulgating its Final Rule concerning this requirement, the U.S. DOT stated that the change was necessary to comply with statutory requirements and consistency with section 8(d) of the Small Business Act. The statutory and regulatory requirements are clear that an individual must be an enrolled member of a Federally or State recognized Indian Tribe in order to be considered Native American for purposes of receiving presumptive social disadvantage status.

There is no factual dispute before the Board. Mr. Vigil is not enrolled in any federal or state recognized Indian tribe. He testified to that fact and acknowledged that he was seeking enrollment in the Picuris Indian tribe, but currently is not enrolled. Therefore, MassUCP's initiation of proceedings to remove VEC's DBE eligibility because Mr. Vigil is not enrolled in any federal or state recognized Indian tribe is appropriate and consistent with the instructions given by U.S. DOT in its memorandum dated August 26, 2019.

Notwithstanding the above, Mr. Vigil maintains that VEC should remain eligible as a DBE because he is a person of mixed ethnicity, with Native American and Hispanic American origins. Therefore, if he cannot receive disadvantaged status as a Native American individual, he argues that he should receive the presumption of social disadvantage as a multi-ethnic and/or Hispanic American individual. He notes that declaring membership in multiple ethnic groups is consistent with the current U.S. DOT Uniform DBE/ACDBE Certification Application form, at page 7.

Although the Board understands Mr. Vigil's argument, the question of VEC's eligibility for DBE certification based on his identification as a person of mixed ethnicity and/or as a Hispanic American individual is beyond the Board's authority and the scope of these proceedings. This Board is charged with hearing and ruling on determinations by MassUCP to decertify or remove a DBE's eligibility pursuant to 49 CFR § 26.87. It cannot make certification decisions; such decisions are made by MassUCP in accordance with the procedures contained in 49 C.F.R. § 26.83.

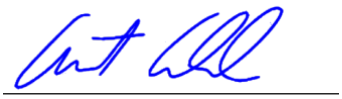
[7] *Id.*
[8] Vigil Exhibits 3, 3a, 4, 5, 6.
[9] Vigil Exhibit 2.

DECISION

MassUCP has met its burden of proof. Mr. Vigil is not enrolled in a federal or state recognized Indian tribe; therefore, he does not receive the presumption of social disadvantage as a Native American individual. Accordingly, MassUCP's determination to remove VEC's certification is appropriate.[10]

Dated: March 25, 2022

The Adjudicatory Board:



On behalf of its members:

Albert Caldarelli
Kenrick Clifton

[10] VEC may reapply for certification by MassUCP pursuant to the procedures and eligibility standards found in 49 C.F.R. Part 23 and 26.

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

IN THE MATTER OF ARORA ENGINEERING
(MassUCP #2021-001)

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 May 27, 2021, the Massachusetts Unified Certification Program (MassUCP) notified Arora Engineering, Inc. (Arora) that it was initiating ineligibility proceedings because Arora exceeded the USDOT size standard prescribed in 49 CFR § 26.65(b). Such proceedings apply to Arora's FHWA- and FTA-assisted work under the DBE program, and according to MassUCP expressly do not apply to Arora's eligibility as it relates to FAA-assisted work.[1]

MassUCP determined that Arora's annual receipts over the firms previous three years averaged in excess of $26.29 million. By letter dated June 11, 2021, Arora submitted a written contest in lieu of a request for a hearing before this Board. Arora contends that MassUCP's decision to find Arora ineligible for DBE certification is incorrect for reasons discussed in further detail below. MassUCP submitted a response letter dated March 8, 2022.

The Board acknowledges Arora's election pursuant to 49 CFR §26.87(d)(3) to present information and arguments in writing, without going to a hearing. The above-referenced letters, including exhibits, are attached hereto and form the basis of the Board's findings and decision.

FINDINGS

Based on its review of the information and arguments presented in the Parties' written submittals, the Board makes the following findings:

1. Arora is currently certified by the MassUCP as a Disadvantaged Business Enterprise (DBE) in Massachusetts in two NAICS categories: 236220: "Commercial and Institutional Building Construction" and 541512: "Computer Design Services."[2]

[1] *See* MassUCP letter dated March 8, 2022, fn.1: "The MassUCP does not contest that the gross receipts cap prescribed by 49 C.F.R. § 26.65(b) is inapplicable to a DBE's eligibility for FAA-assisted projects and withdraws its Proposal to the extent that it relates to FAA-assisted work. The MassUCP maintains its position that Arora is ineligible for participation in FHWA and FTA-assisted work under the DBE program."
[2] MassUCP letter dated March 8, 2022.

2. At the time of MassUCP's annual review in May 2021, Arora's Fiscal Year Form 1120S Gross Receipts for the most recent five-year period were as follows:[3]

2015 = $ [redacted]
2016 = $
2017 = $
2018 = $
2019 = $

3. Congress included a size requirement for firms seeking eligibility for the DBE program when it passed the 2015 Fixing America's Surface Transportation (FAST) Act. The legislation at Section 1101(b)(2)(A)(ii) states:

> The term "small business concern" does not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals that have average annual gross receipts during the preceding 3 fiscal years in excess of $23,980,000, as adjusted annually by the Secretary for inflation

4. 49 CFR § 26.65 reads as follows:

> What rules govern business size determinations?
>
> (a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you 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, including the primary industry classification of the applicant.
>
> (b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE for the purposes of Federal Highway Administration and Federal Transit Administration-assisted work in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.104), over the firm's previous three fiscal years, in excess of $26.29 million. The Department will adjust this amount for inflation on an annual basis. The adjusted amount will be published on the Department's website in subsequent years.

5. 13 CFR §121.104 in part reads as follows

> How does SBA calculate annual receipts?
>
> *(c) Period of measurement.* (1) Except for the Business Loan and Disaster Loan Programs, annual receipts of a concern that has been in business for 5 or more completed fiscal years means the total receipts of the concern over its most recently completed 5 fiscal years divided by 5. For certifications submitted on or before January 6, 2022, rather than using the definitions in this paragraph (c), a concern submitting a certification may elect to calculate annual receipts and the receipts of affiliates using either the total receipts of the concern or affiliate over its most recently completed 5 fiscal years divided by 5, or the total receipts of the concern or affiliate over its most recently completed 3 fiscal years divided by 3.

[3] *Id.* at p.1 and Exhibit A; *also see* Arora letter dated June 11, 2021, p.3.

6. As part of Arora's annual review in May 2021, the MassUCP examined whether the firm exceeded the size standards found in 49 CFR § 26.65(b). Based on Arora's tax returns for years 2017, 2018, and 2019 that show the firm had gross receipts of $[redacted], $[redacted], and $[redacted], respectively, MassUCP calculated Arora's average annual gross receipts to be $[redacted].[4]

7. Because Arora's average annual receipts over the firm's previous three years exceeded $26.29 million size standard prescribed in 49 CFR § 26.65(b), MassUCP concluded that the firm is ineligible to remain certified as a DBE.[5]

DISCUSSION

The Board is presented with the issue of whether Arora Engineering meets the business size requirements to remain eligible to participate as a DBE on federal-aid transportation projects in Massachusetts.

Based on the language contained in the applicable regulations, to be an eligible DBE a firm must meet both size requirements contained in 49 CFR § 26.65. First, paragraph (a) of the regulation requires that "a firm (including its affiliates) … be an existing small business, as defined by Small Business Administration (SBA) standards … found in 13 CFR part 121 …"[6] Second, the regulation expressly states that even if a firm meets the requirements of paragraph (a), it cannot be an eligible DBE if the firm has had average annual gross receipts over the firm's previous three fiscal years, in excess of $26.29 million.[7] This is consistent with the congressional mandate in Section 1101(b)(2)(A)(ii) that requires determination of a firm's size based on annual gross receipts during the preceding 3 fiscal years.

In this case, Arora's tax returns for years 2017, 2018, and 2019 show the firm had gross receipts of $[redacted], $[redacted], and $[redacted], respectively, which equals average annual gross receipts of $[redacted] over that period. This exceeds the $26.29 million amount contained in paragraph (b) of 49 CFR § 26.65.

Arora advances two arguments. First, that MassUCP should have allowed Arora to exercise the option permitted by 13 CFR §121.104 of calculating business size based on annual receipts over its most recent five fiscal years, which averaged annually $[redacted], or less than $26.29 million. This does not in and of itself satisfy the DBE eligibility requirements. As noted above, the Board's reading of the FAST Act and the language of 49 CFR § 26.65 is that a firm is deemed ineligible for certification as a DBE if its average annual gross receipts over the firm's previous three fiscal years in exceeds $26.29 million.

Second, Arora requests that MassUCP (and presumably this Board) in calculating annual receipts disregard certain subconsultant fees and travel expenses because such costs are "pass through" expenses. This argument was addressed by the Board in a prior appeal brought by Arora.[8] There is no basis for approving such a request because the proposed calculation is expressly

[4] MassUCP letter dated March 8, 2022, p.1 and Exhibit A.
[5] *Id.*
[6] 49 CFR § 26.65(a).
[7] 49 CFR § 26.65(b).
[8] MassUCP Adjudicatory Board, Final Agency Decision In the Matter of Arora Engineering, dated May 28, 2019.

prohibited by the applicable SBA regulations, which state "… subcontractor costs … may not be excluded from receipts."[9]

DECISION

Based on the above findings, the Board finds that Arora exceeds the business size requirements of 49 CFR § 26.65. The MassUCP has shown by a preponderance of evidence that Arora does not meet the certification standards of 49 CFR Part 26 and therefore, should remove Arora's eligibility for FHWA- and FTA-assisted work under the DBE program.[10]

Dated: March 22, 2022

The Adjudicatory Board:

On behalf of its members:

Albert Caldarelli
Kenrick Clifton

[9] 13 CFR § 121.104(a).

[10] The Board notes that MassUCP is not seeking to remove Arora's eligibility for FAA-assisted projects. Nothing in this decision affects Arora's status in that regard.

APPENDIX D-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF DENIAL OF OUTDOOR ADVERTISING PERMITS ##2002-041 and 2002-042

PARTIES	
APPELLANT **BAY COLONY ASSOCIATES, LLC** **Address: P.O. Box 590545** **Newton, MA 02459** **Counsel: Kelly L. Frey, Esq.** **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo** **One Financial Center** **Boston, MA 02111**	**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	2/7/22	NOTICE OF APPEAL filed by Bay Colony Associates LLC by Letter dated February 7, 2022, from counsel, Kelly L. Frey.
2	3/24/22	STATUS CONFERENCE held as scheduled.
3	4/6/22	SCHEDULING ORDER: • On or before April 8, 2022, each party shall serve its Witness List identifying the names, titles, and anticipated subject matter of testimony from each witness expected to testify at the hearing. • The parties shall engage in voluntary discovery, which shall be completed by April 11, 2022. • The parties may submit position papers in advance of the hearing. If Appellant elects to submit a position paper, it shall file and serve such paper on or before April 15, 2022. If Appellee elects to submit a response, it shall file and serve such response by April 25, 2022. • The parties shall serve copies of its proposed hearing exhibits on or before April 27, 2022. After conferring, the parties shall file a joint exhibit list by April 29, 2022 that identifies and attaches all hearing exhibits that are agreed upon and any proposed hearing exhibits that are disputed. • The parties shall appear for a hearing on this appeal on May 3, 2022 at 11:00 am. at 10 Park Plaza, 3rd Floor, Boston MA.
4	4/15/22	POSITION PAPER filed by Bay Colony Associates LLC.
5	4/25/22	POSITION PAPER filed by Office of Outdoor Advertising.
6	5/2/22	HEARING EXHIBITS filed by Office of Outdoor Advertising.
7	5/2/22	HEARING EXHIBITS filed by Bay Colony Associates LLC.
8	5/3/22	HEARING held as scheduled, to resume 5/9/22.
9	5/9/22	HEARING held as scheduled.

10	6/1/22	REQUEST TO STAY PROCEEDINGS submitted by Bay Colony Associates via email from counsel dated 6/1/22. Assented to by Office of Outdoor Advertising. Request is ALLOWED.
11	6/1/22	SCHEDULING ORDER: • All proceedings in the above referenced appeal are stayed until further Order.
12	6/8/22	TRANSCRIPT OF 5/3/22 and 5/9/22 HEARING received from Stenographer
13	7/25/22	MOTION FOR ORDER DIRECTING APPELLEE TO APPROVE PERMITS filed by Bay Colony Associates. OPPOSED by Office of Outdoor Advertisement via email from counsel dated 7/25/22. TAKEN UNDER ADVISEMENT.
14	8/5/22	REQUEST FOR EXPEDITED HEARING AND BRIEFING regarding Notice of Surrender of Permits for sign at 65 Tenean Street. TAKEN UNDER ADVISEMENT. Parties ordered to appear at status conference on 8/10/22.
15	8/10/22	STATUS CONFERENCE held as scheduled
16	8/15/22	MEMORANDUM AND ORDER PURSUANT TO 801 CMR 1.02(10)(h)(5) • On or before August 19, 2022, OOA shall provide additional evidence concerning the submission of a Notice of Surrender of Permits dated July 27, 2022, for a sign located at 65 Tenean Street (Permits #28115 and #28116) • On or before August 26, 2022, BCA may submit a response to the additional evidence provided by OOA in response to this Order and provide any additional evidence pertaining to the Notice of Surrender of Permits for the sign located at 65 Tenean Street.
17	8/18/22	REPLY TO 8/15/22 ORDER filed by Office of Outdoor Advertising
18	8/19/22	PETITION TO INTERVENE PURSUANT TO M.G.L. c. 30A §§ 10 and 10A submitted by Boston Residents Group, represented by Francis E. O'Brien. AFFIDAVITS stating intention to be part of the Boston Residents Group petitioning to intervene submitted by Francis E. O'Brien, Paul Lyons, Maria Lyons, Steve Bickerton, Jr., Judy O'Leary, Charlie Tivnan, Jessica Mink, Gail Miller, John Bookston, Susan Roche, Ed Roche, Eileen Boyle, Mike Skolka. PETITION TAKEN UNDER ADVISEMENT Petitioner and Parties ordered to appear at Status Conference scheduled for 8/24/22
19	8/24/22	STATUS CONFERENCE held as scheduled
20	8/24/22	REQUEST FOR COPY OF ADMINISTRATIVE RECORD submitted by Boston Residents Group, via email from Francis E. O'Brien. Request is ALLOWED.
21	8/25/22	SCHEDULING ORDER: • Bay Colony Associates shall submit its Opposition to the Petition on or before August 26, 2022. • If the Department elects to submit a response to the Petition, it shall do so on or before August 26, 2022. • On or before August 31, 2022, the Boston Residents Group shall submit its response to Bay Colony Associates' Opposition, as well as any response submitted by the Department should it elect to submit one. • Boston Residents Group has requested a copy of the administrative record of these proceedings to date for the purpose of preparing a response to issues raised at the August 24, 2022 status conference and any responses to be submitted by the parties. The request is ALLOWED. This Office will make appropriate arrangements to provide a copy.
22	8/26/22	REPLY TO 8/15/22 ORDER filed by Bay Colony Associates

23	8/26/22	OPPOSITION TO PETITION TO INTERVENE filed by Bay Colony Associates
24	8/31/22	REPLY TO OPPOSITION filed by Boston Residents Group
25	8/31/22	PROPOSED EXHIBIT LIST filed by Boston Residents Group
26	9/13/22	RULING ON PETITION TO INTERVENE The Petition of Boston Residents Group for Leave to Intervene is DENIED
27	9/15/22	FINAL AGENCY DECISION DECISION Upon the surrender of permits for the sign located at 65 Tenean Street and confirmation that the sign at 820 Morrissey Blvd. otherwise complies with the regulations for outdoor advertising, OOA should grant permits 2021D010 and 2021D011 to allow the conversion of the static sign at 820 Morrissey Blvd. to an electronic sign, in accordance with 700 CMR 3.17. REMAND OF PROCEDURAL ISSUES To the extent that certain procedural matters may need to occur to issue the digital permits for the sign 820 Morrissey Blvd. and effectuate the surrender of permits for the sign at 65 Tenean Street, I remand those procedural matters to OOA for appropriate action consistent with this decision.
28	9/15/22	MOTION FOR RECONSIDERATION filed by Boston Residents Group MEMORANDUM IN SUPPORT OF THE MOTION also filed Boston Residents Group move the Office of the Administrative Law Judge for reconsideration of the ALJ's ruling dated September 13, 2022, denying Residents' petition to intervene as a full party in this proceeding. Alternatively, Residents request that they be granted leave to join these proceedings as a participating party.
29	9/16/22	RULING ON MOTION FOR RECONSIDERATION The Boston Residents Group's Motion for Reconsideration is DENIED. The factors discussed in the Motion and Memorandum were given serious consideration and addressed in the September 13, 2022, Memorandum and Ruling on the Petition to Intervene. Also, Boston Residents Group's request to intervene is now moot because a Final Agency Decision was issued on September 15, 2022, prior to receipt of the Motion, which closed this proceeding.

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Francis E. O'Brien
for Boston Residents Group
44 Allandale St.
Boston, MA 02130

Kelly L. Frey, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C.
One Financial Center
Boston, MA 02111

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

Re: Petition of Boston Residents Group for Leave to Intervene pursuant to M.G.L. c. 30A, §§ 10 and 10A
Opposition of Bay Colony Associates, LLC

Bay Colony Associates, LLC
Appeal of Denial of Application to Convert Static Billboard to Digital Outdoor Advertising Permits #2002-041 and 2002-042
700 CMR 3.19

MEMORANDUM

This memorandum and ruling addresses a Petition for Leave to Intervene as a Full Party that was submitted on August 19, 2022, by the Boston Residents Group.

Procedural Background

Bay Colony Associates (BCA) appealed a decision of the Office of Outdoor Advertising (OOA) dated January 19, 2022, to deny an application for a permit to convert a static billboard located at 820 Morrissey Blvd. to an electronic sign. In its denial decision, OOA determined that the billboard is within 500 feet of a sign located at 65 Tenean Street and therefore does not meet the spacing requirements prescribed in the Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f). A hearing was held on May 3, 2022, and continued to May 9, 2022. On August 15, 2022, this Office ordered the parties to provide additional evidence, in accordance with 801 CMR 1.02(10)(h)(5), regarding a notice of surrender of permits for the sign located at 65 Tenean Street and whether the surrender of such permits resolves the spacing issue referenced in OOA's January 19, 2022, decision. The matter was taken under advisement.

On August 19, 2022, the Boston Residents Group petitioned to intervene in this adjudicatory proceeding as a full party. The Petition states that it is submitted under M.G.L. c. 30A, § 10 and the environmental protection purposes of G.L. c. 30A, § 10A. On August 24, 2022, a conference was held with Petitioners and the parties to discuss the scope of the Petition

and the respective positions of the parties. On August 26, 2022, BCA submitted an Opposition. On August 31, 2022, Boston Residents Group submitted a Memorandum and a Reply to BCA's Opposition, and Proposed Exhibits should its petition be allowed.

Summary

Based on my review of the Petition, the Opposition, and the Reply, and my reading of the applicable law concerning Intervention pursuant to G.L c. 30A, §§ 10 and 10A, the Petition of Boston Residents Group for Leave to Intervene is DENIED.

My decision to deny the Petition is based on the following:

1. Petitioners do not have standing to intervene pursuant to the requirements of G.L. c. 30A, § 10.
2. Petitioners cannot intervene pursuant to G.L. c. 30A, § 10A because this is not a proceeding where "damage to the environment" is or might be at issue.
3. Petitioners have not shown that the proposed digital billboard will violate a statute, ordinance, bylaw, or regulation, the major purpose of which is to prevent or minimize damage to the environment.

The Petitioners do not have standing to intervene as a Party pursuant to G.L. c. 30A, § 10

G.L. c. 30A § 10 states that "agencies may … allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding ... ." Petitioners have not shown, individually or collectively, that they may be substantially and specifically affected by these proceedings.

The scope and purpose of this adjudicatory proceeding is governed by 700 CMR 3.19, which provides: "Any applicant who is denied a request for a permit or license or whose permit and/or license has been revoked may make a written request for an appeal hearing before a hearing examiner designated by the Department." The Petitioners are not applicants for any permit or license for outdoor advertising. They have not been denied a request for a permit or license, or had any permit or license revoked. They are not engaged in the business of outdoor advertising in the Commonwealth. They do not hold or claim any right to the permits at issue in this proceeding and have no ownership interest in the billboards at issue or the real property on which they are located. Therefore, the granting or denial of the permits at issue in this proceeding will not substantially and specifically affect any legal rights, duties or privileges of the Petitioners.[1]

Petitioners state that they are "individuals in the Boston neighborhood of Dorchester where the electronic billboard is proposed, who enjoy the public parks, Greenways, and natural

[1] *See* G.L. c. 30A, §1(1): "Adjudicatory proceeding" means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.

areas which may be harmed by the proposed billboard, and who also may experience safety and public welfare harms should the proposed billboard be constructed."[2] They have submitted voluminous information with respect to their concerns about the possible impacts that the proposed digital billboard might have on natural and recreational resources in and around the area.[3] I have no doubt that Petitioners' concerns are sincere. However, they have not established that their legal rights, duties or privileges may be substantially and specifically affected by this proceeding, or that they are differently situated in that regard from individuals in the rest of the community. Merely identifying as concerned citizens does not meet the criteria for intervening as a party pursuant to G.L. c. 30A § 10.

Petitioners cannot intervene pursuant to G.L. c. 30A, § 10A because this is not a proceeding where "damage to the environment" is or might be at issue.

Pursuant to G.L. c. 30A, § 10A, ten persons "may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue."

G.L. c. 214, § 7A states: "Damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources."

Petitioners may not intervene in this adjudicatory proceeding pursuant to G.L. c. 30A, § 10A because it is not a proceeding in which damage to the environment is or might be at issue. The scope and purpose of this proceeding pursuant to 700 CMR 3.19 is to address the denial or revocation of outdoor advertising permits based on compliance or non-compliance with size, lighting, spacing, and other requirements applicable to outdoor advertising; the proceeding is not for the purpose of addressing or remedying allegations of damage to the environment. In this proceeding, the only issue to be decided relates to the question of whether and to what extent a 500-foot spacing requirement specified in the Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f) applies to the proposed electronic billboard at 820 Morrissey Blvd. in relation to a sign located at 65 Tenean Street.[4]

[2] Memorandum of Boston Residents Group, p. 11.
[3] *See* Boston Residents Group Petition, Memorandum, and Proposed Hearing Exhibits.
[4] MassDOT Hearing Exhibit 9; Bay Colony Notice of Appeal dated 2/17/22.

Expanding the scope of this proceeding to address the issues raised by Petitioners exceeds the hearing examiner's authority, which is to hear appeals from the denial or revocation of outdoor advertising permits. Decisions to grant or deny an outdoor advertising permit are to be based on compliance or non-compliance with the Highway Beautification Act, the Federal-State Agreement, G.L. c. 93D, and 700 CMR 3.00, et seq. Nothing in 700 CMR 3.19 authorizes the hearing examiner to hear and decide allegations of environmental damage, or base permitting decisions concerning electronic signs on anything other than the criteria contained in 700 CMR 3.17. MassDOT is not an agency expressly charged with enforcement of statutes and regulations to protect the environment.[5] Its Office of Outdoor Advertising and its hearing examiner have no special experience, technical competence, or specialized knowledge that would qualify it to make determinations on questions of potential damage to the environment and appropriate remedies to restrain or prevent such damage.[6] Whether and to what extent the proposed digital billboard at 820 Morrissey Blvd might cause future harm to the environment is not at issue in this proceeding, nor is it the proper forum to debate that issue.

To the extent that G.L. c. 30A, § 10A requires a decision on the disposition of Petitioners' allegations of damage to the environment, I make the following findings and conclusions:

Petitioners identify the fact that there are natural and recreational resources in the vicinity of the proposed digital sign, including parks, Tenean Beach, the William T. Morrissey Memorial Park open space, Boston Harbor, and the Neponset River Reservation. However, there is no allegation that "any destruction, damage or impairment, actual or probable," as defined in G.L. c. 214 § 7A, is or might be at issue with respect to the identified areas. Petitioners merely cite to "potential harms listed in M.G.L. c. 30A, § 10A, including to public safety, the public welfare, and to recreation open space, shoreland open space, and parkland."[7]

Relying on *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 343 fn 5. (2001), Petitioners claim that presentation of factual proof of environmental impact from the proposed billboard is not required at the initial petition stage, "only showing of connection between the applicable statutory mandate and the intervention status being sought."[8] Yet, Petitioners fail to show that connection. *Tofias* requires more than a recitation of potential harms listed in a statute. The Court in *Tofias* upheld the agency's decision to deny a petition to intervene because the petitioner's claimed environmental impacts were purely speculative.[9] Also, the hearing officer who denied intervention noted that the petitioner "simply failed to either allege or demonstrate how it may be substantially or specifically affected by … the proposed project."[10] I see the same situation here. Petitioners have failed to demonstrate beyond mere speculation how the proposed digital billboard would destroy, damage or impair any natural resource of the Commonwealth.

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[5] *Compare, e.g.,* G.L. c. 21A, Exec. Office of Energy and Environmental Affairs and departments thereunder.
[6] *See* G.L. c. 30A, § 14 (In reaching decisions in adjudicatory proceedings, agencies are expected to apply their experience, technical competence, and specialized knowledge, as well as any discretionary authority conferred upon it.)
[7] Petition at 17 – 20; Memorandum of Boston Residents Group, p. 14.
[8] Memorandum of Boston Residents Group, p. 15.
[9] *Tofias* at 349.
[10] *Id*. at 342 fn 5.

The closest Petitioners come to an allegation of "destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth" is in the offer of proof contained in their proposed hearing exhibits at Exhibit J. Petitioners contend that "the proposed digital billboards at 820 Morrissey Boulevard, Dorchester, will cause serious harm to the wildlife and enjoyment of Neponset River Reservation, the Neponset River Area of Critical Environmental Concern and the Neponset River Greenway Trail by exposing the area to excessive lighting."[11] Petitioners include a testimonial letter dated August 23, 2022, from the Neponset River Watershed Association stating that the proposed digital billboard "would shine unnaturally bright lights into the Neponset River Estuary", an area which "supports a valuable ecosystem and wetlands, significant to flood control, fisheries and wildlife habitat, and the prevention of pollution and storm damage." Petitioners also cite to articles and scholarly studies concluding that light emanating from digital billboards can cause environmental harm, including excessive use of energy, contributing to climate change, negatively impacting wildlife, and causing light pollution.[12]

Petitioners' allegations are speculative at best. The existence of research and studies finding that light emanating from digital billboards has the potential to cause environmental harm does not establish that the proposed electronic sign at 820 Morrissey Blvd. will actually and probably destroy, damage or impair the Neponset River Reservation, the Neponset River Area of Critical Environmental Concern and the Neponset River Greenway Trail, or any natural resources in those areas. Also, for purposes of intervention pursuant to G.L. c. 30, § 10A, there needs to be a showing that any alleged damage to the environment will be more than insignificant.[13] Petitioners explain the importance of the natural resources in the vicinity of the proposed digital sign, cite to information describing common features of digital billboards that might have negative impacts on the environment, then simply conclude that some or all of those negative impacts will actually result from the proposed digital billboard at 820 Morrissey Blvd. and cause "serious harm."[14] That leap of logic does not establish a sufficient nexus between the proposed electronic sign at 820 Morrissey Blvd. and actual and probable destruction, damage or impairment to any natural resources.

In the context of the statutory and regulatory framework that governs this proceeding, the concerns raised by Petitioners are addressed by the requirement that billboards may not be erected and maintained within 300 feet of any park, reservation or playground.[15] This prohibition has its origin in the Highway Beautification Act of 1965 enacted by Congress to regulate "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system."[16] The stated purposes of the Act are (1) "to protect the public investment in such highways", (2) "to promote the safety and recreational value of public travel", (3) "to preserve natural beauty", and (4) "to promote the reasonable, orderly and effective display of outdoor advertising."[17] To balance these objectives, Congress

[11] Boston Residents Group, Proposed Hearing Exhibits, Exhibit J.
[12] *Id*.
[13] G.L. c. 214 § 7A: "Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources."
[14] Boston Residents Group, Proposed Hearing Exhibits, Exhibit J.
[15] 700 CMR 3.07(6).
[16] 23 U.S.C. § 131, P.L. 89-285, 79 Stat. 1028
[17] 23 U.S. Code §§ 131(a) and (d).

determined that billboards may be erected and maintained within six hundred and sixty feet of highways provided they are located in areas zoned for industrial or commercial use and meet certain size, lighting, and spacing requirements, including the 300 foot spacing requirement related to public parks, playgrounds, forests, reservations, and scenic areas.[18]

Pursuant to 700 CMR § 3.07(6), OOA has determined that there is no park, playground, forest, reservation, or scenic area within 300 feet of the proposed digital sign.[19] Therefore, from the perspective of the Highway Beautification Act and applicable outdoor advertising regulations, the distance of the proposed digital billboard from any park, playground, forest, reservation, or scenic area is sufficient to avoid impairment to any public investment in the highway system, the safety and recreational value of public travel, and natural beauty. Petitioners state that they contest OOA's determination concerning the spacing between the proposed electronic billboard and nearby parklands. However, they do not have standing to intervene pursuant to the requirements of G.L. c. 30A, §§10 and 10A to challenge OOA's spacing determination. OOA's determination is not in dispute in this proceeding; therefore, I accept as fact that the proposed digital billboard at 820 Morrissey Blvd. is not within 300 feet of any parks, playgrounds, forests, reservations, or scenic areas.

Also, Petitioners' allegations of actual and probable damage to the environment are entirely at odds with the City of Boston's findings and conclusions on that point. The City concluded that the proposed digital billboard "will not be injurious to the neighborhood or otherwise detrimental to the public welfare."[20] In its decision dated November 9, 2020, the City's Zoning Board of Appeals (ZBA) granted permission to convert the static billboard located at 820 Morrissey Blvd. to an electronic sign. In doing so, the ZBA made the following findings:

> The proposal will allow the Appellant to have reasonable use of the premises by permitting the applicant to make a technological upgrade to a sign that has existed at this location since 1963. This project is an appropriate use for the property and will not adversely affect the community or create any detriment for abutting residents, as the property's location is uniquely well-suited for this type of digital conversion in that the sign faces the expressway (Interstate 93) and there are very few private residences within close proximity to the sign.
>
> For these reasons, the requested relief may be granted in harmony with the general purpose and intent of the Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
>
> . . .
>
> (a) The specific site is an appropriate location for such use;
> (b) The use will not adversely affect the neighborhood;
> (c) There will be no serious hazard to vehicles or pedestrians from the use;
> (d) No nuisance will be created by the use: and
> (e) Adequate and appropriate facilities will be provided for the proper operation of the use.

[18] *Id*.; Federal-State Agreement "Spacing of Sign Structures" (1)(b); 700 CMR 3.07(6).
[19] MassDOT Hearing Exhibit 5, Field Inspection Reports dated 4/29/2021 for Application/Permit Numbers 2021D010 and 2021D011.
[20] BCA Hearing Exhibit 7.

Based on the ZBA's findings and decision, a duly authorized official of the City of Boston certified in BCA's permit application that the proposed electronic sign is in conformity with the City's ordinances/bylaws, special permits and variances.[21]

I note that Petitioners take issue with the ZBA's handling of the matter, alleging lack of proper notice, incorrect interpretations of the zoning requirements, reliance upon false, misleading and incomplete evidence, and mis-stating the levels of community support and opposition.[22] Even if Petitioners' allegations are true, they cannot be litigated in this proceeding. Challenges to decisions of board of appeals are governed by G.L. c. 40A, § 17. Absent any ruling by the Superior Court invalidating the ZBA's findings and decision, I am required to take notice of their legal validity. Therefore, from the City of Boston's determination that the proposed billboard "will not be injurious to the neighborhood or otherwise detrimental to the public welfare", I draw the reasonable conclusion that the proposed digital billboard will not cause "damage to the environment" as that term is defined in G.L. c. 214, § 7A.

Petitioners have not shown that the proposed digital billboard will violate a statute, ordinance, bylaw, or regulation, the major purpose of which is to prevent or minimize damage to the environment

Petitioners have not alleged an essential element of their G.L. c. 214, § 7A claim because they have not shown that the proposed digital billboard will violate a statute, ordinance, bylaw, or regulation whose major purpose is to prevent or minimize damage to the environment.[23] Petitioners contend that the requirement applies only to the superior court's authority to issue injunctions, not to motions to intervene in adjudicatory proceedings.[24] However, that position is inconsistent with the SJC's ruling in *Wellfleet v. Glaze*, 403 Mass. 79 (1988). A showing of a violation is necessary to confer jurisdiction to the superior court to *both* "determine whether such damage is occurring or is about to occur and … restrain the person causing or about to cause such damage."[25] It follows that those relying on G.L. c. 214, § 7A to intervene in an adjudicatory proceeding must meet the same requirement; otherwise, a hearing examiner's jurisdiction to determine whether damage to the environment is occurring or is about to occur would exceed that of the superior court, which cannot be the case.

Finally, Petitioners' position is untenable given the relief that they request. They fail to show that the proposed digital billboard will violate any statute, ordinance, bylaw, or regulation whose major purpose is to prevent or minimize damage to the environment. Yet, the relief they seek is for MassDOT to deny BCA's appeal and not grant the requested permit to convert the

[21] MassDOT Exhibit 5; *see* 700 CMR 3.06(1)(i) and 3.17(1).
[22] Memorandum of Boston Residents Group, p. 2.
[23] G.L. c. 214, § 7A provides, in part: "The superior court for the county in which damage to the environment is occurring or is about to occur may … determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment."
[24] Memorandum of Boston Residents Group, p. 16.
[25] *See Wellfleet* at 83 ("[F]or the matter to be properly before the Superior Court this action must have been one in which equitable or declaratory relief was sought because (1) damage to the environment was occurring or about to occur, and (2) that damage constituted a violation of a statute, the major purpose of which is to prevent or minimize damage to the environment.")

billboard to a digital sign.[26] As discussed above, the only issue to be decided in in this proceeding relates to the question of whether and to what extent a 500-foot spacing requirement specified in the Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f) applies to the proposed electronic billboard at 820 Morrissey Blvd. in relation to a sign located at 65 Tenean Street, which will be decided on its own merits.

If OOA's determination on that issue is upheld on appeal, then the application for a permit to convert the billboard to a digital sign will be denied regardless of the issues raised in the Petition to Intervene. If, however, the appeal is decided in favor of BCA, then the proposed digital billboard will have been determined to comply with all requirements of 700 CMR 3.17. Without a showing that the proposed billboard will violate a statute, ordinance, bylaw, or regulation whose major purpose is to prevent or minimize damage to the environment, Petitioners' request for relief is baseless. There would be no justification for MassDOT to deny a permit for a billboard that complies with all regulations applicable to outdoor advertising and does not violate any statute, ordinance, bylaw, or regulation.

RULING ON MOTION TO INTERVENE

The Petition of Boston Residents Group for Leave to Intervene is DENIED.

Albert Caldarelli
Administrative Law Judge

Dated: September 13, 2022

[26] Petition of Boston Residents Group, 34 ("Residents seek relief through the OOA's decision being affirmed and the appeal being denied.")

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

FINAL AGENCY DECISION

APPEAL OF BAY COLONY ASSOCIATES
REGARDING THE DENIAL OF DIGITAL SIGN PERMITS

This decision addresses an appeal by Bay Colony Associates ("BCA") concerning the denial of two applications for outdoor advertising permits to convert a static billboard located at 820 Morrissey Blvd. to an electronic sign.

By letter dated February 17, 2022, BCA requested an appeal hearing to contest the decision of the Office of Outdoor Advertising ("OOA") to deny the applications. On May 3, 2022, 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 hearing continued to May 9, 2022. BCA appeared and was represented by Mr. Kelly Frey, Esq. 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 BCA: Mr. Philip Strazzula

For OOA John Romano, Director
Christopher Chaves, Transportation Program Planner
Jason Bean, Transportation Program Planner

FINDINGS OF FACT

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

1. The original sign at 820 Morrissey Blvd. was erected in 1965.[1]

2. In 1993, the sign was taken down, a new foundation was installed, and the sign was rebuilt to a single monopole, two-sided sign.[2] With respect to this modification, a preliminary determination dated October 7, 1993, was made by the Outdoor Advertising Division of the former Mass. Highway Department to grant approval to relocate the sign.[3]

3. In 2002, the sign was modified to convert the southern face of the sign to Tri-Vision format.[4] BCA's Permit Amendment Application for this modification was approved by

[1] Strazzula, Hr'g Tr., Day 1, 8:12-9:12; BCA Exhibit 26.
[2] Strazzula, Hr'g Tr., Day 1, 9:16-22.
[3] BCA Exhibit 41.
[4] Strazzula, Hr'g Tr., Day 1, 16:20-17:14.

the Outdoor Advertising Division of the former Mass. Highway Department on December 17, 2002.[5]

4. In 2008, Outdoor Advertising Division of the former Mass. Highway Department initiated a digital advertising pilot program. By letter dated September 11, 2008, the Division notified BCA that the sign located at 820 Morrissey Blvd. "has been selected for participation in the Outdoor Advertising Division's *Digital Advertising Pilot Program*." However, BCA did not take required steps to convert the sign to digital as part of the pilot program.[6]

5. In 2021, BCA applied for two electronic sign permits to convert the existing static billboard located at 820 Morrissey Blvd. to an electronic sign.[7] The proposed permits are identified as 2021D010 and 2021D011.

6. By letter dated January 19, 2022, OOA denied the permit applications.[8]

7. In its denial decision, OOA concluded that the billboard is within 500 feet of a sign located at 65 Tenean Street (Permits #28115 and #28116) and therefore, does not meet the spacing requirements prescribed in the Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f). It also concluded that the sign is "non-conforming" and may not be modified, including conversion to a digital sign.[9]

8. The sign located at 820 Morrissey Blvd. is 335 feet from the sign at 65 Tenean Street. The measurement was made on April 29, 2021, by OOA's field inspector Chaves using an engineering wheel and a methodology developed and approved by the Federal Highway Administration (FHWA).[10]

9. OOA's inspector testified that, other than non-compliance with the 500-foot spacing requirement, his April 29, 2021, inspection of the sign located at 820 Morrissey Blvd. identified no other violations of the applicable regulations.[11]

10. On August 2, 2022, OOA received a Notice of Surrender of Permits dated July 27, 2022, from the owner of the sign located at 65 Tenean Street (Permits #28115 and #28116).[12]

11. The Notice of Surrender is sufficient to commence and ultimately effectuate a Surrender of Permits #28115 and #28116, located at 65 Tenean Street.[13]

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[5] BCA Exhibit 31.
[6] Strazzula, Hr'g Tr., Day 1, 18:6-24:8; BCA Exhibits 5, 6, 46.
[7] MassDOT Exhibit 5; BCA Exhibit 13.
[8] MassDOT Exhibit 9; BCA Exhibit 1.
[9] *Id*.; *See* 700 CMR 3.15, 3.17(4), 23 C.F.R. § 750.707(d)(5).
[10] Chaves, Hr'g Tr., Day 2, 13:7-10, 72:23-73:20; MassDOT Exhibit 5 (Field Inspection Reports dated 4/29/2021 for Application/Permit Numbers 2021D010 and 2021D011); BCA Exhibit 39.
[11] Chaves, OOA Public Meeting, May 13, 2021, Tr. 21:10-17; Hr'g Tr., Day 2, 7:8-15; MassDOT Exhibit 5 (Field Inspection Reports dated 4/29/2021 for Application/Permit Numbers 2021D010 and 2021D011).
[12] MassDOT Response dated August 18, 2022 (additional evidence provided pursuant to 801 CMR 1.02(10)(h)(5)).
[13] *Id*.

12. The surrender of permits and the removal of the sign located at 65 Tenean Street will resolve the spacing violation that currently exists with respect to the sign at 820 Morrissey Blvd.[14]

DECISION

The issue presented in this appeal is whether and to what extent a 500-foot spacing requirement specified in the Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f) applies to the proposed electronic billboard at 820 Morrissey Blvd. in relation to a sign located at 65 Tenean Street.

OOA's denial determination on that issue was appropriate based on the facts before it at the time. There is no dispute about the distance between the two signs. It was measured by OOA's field inspector pursuant to an accepted methodology developed and approved by FHWA. The distance was confirmed to be 335 feet. Therefore, the sign does not meet the 500-foot spacing requirement prescribed in the Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f). So long as that spacing violation exists, the sign is "non-conforming" and cannot be modified or converted to digital. On appeal, BCA pressed several legal arguments as to why the sign nonetheless should be considered conforming for purposes of the application to convert the sign to digital format. I found those arguments unpersuasive.[15] If not for the following development, I would be inclined to uphold OOA's denial of BCA's permit request.

Since the Director of OOA made his January 19, 2022, decision, circumstances have changed in a way that appears to render the issue presented in this appeal moot. While this matter was on appeal, OOA confirmed that it received a Notice of Surrender of Permits for the sign located at 65 Tenean Street that is sufficient to commence and ultimately effectuate the surrender of those permits. The surrender of those permits will resolve the spacing violation that currently exists with respect to the sign at 820 Morrissey Blvd., thereby removing its non-conforming status.[16] Assuming no other issues of non-compliance have been identified, upon surrender of permits and removal of the sign located at 65 Tenean Street, there will no longer be any impediment to granting the permits to convert the static billboard at 820 Morrissey Blvd. to an electronic sign.

The Director's determination to deny an application for a permit does not become final until a decision is made by the hearing examiner to grant or deny after a hearing.[17] Also, in an adjudicatory hearing on an appeal of the denial of an outdoor advertising permit, the hearing examiner is not limited to the facts that were before the Director.[18] The hearing examiner has a duty to receive and consider all relevant and reliable evidence, and reach a fair, independent and

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[14] *Id*.
[15] Although I disagree with BCA's legal arguments, a detailed discussion is not required in this decision.
[16] *See, e.g.,* Chaves, Hr'g Tr., Day 2, 64:7-11, 74:21-75:3 (confirming that a sign that is non-conforming due to a spacing issue can come into compliance if the other sign is removed).
[17] 700 CMR 3.05(6)(b),
[18] *See Memorandum and Order, Cove Outdoor LLC, Appeal of Denial of Electronic Billboard Permit #2015D016*, MassDOT Office of the Administrative Law Judge, December 14, 2016.

impartial decision based upon the issues and evidence presented at the hearing.[19] If the evidence presented at the hearing indicates that facts differ from those relied upon by the Director, it is incumbent upon the hearing examiner to apply the facts as presented at the hearing in reaching a decision.

In this case, the facts indicate that (1) the sign located at 820 Morrissey Blvd. currently does not meet the 500-foot spacing requirement; (2) OOA's inspection on April 29, 2021, identified no other violations pertaining to the sign; (3) the Owner of the sign at 65 Tenean Street has submitted a Notice of Surrender that is sufficient to commence and ultimately effectuate a Surrender of Permits #28115 and #28116; and (4) such surrender of permits and the removal of the sign located at 65 Tenean Street will resolve the spacing violation that currently prohibits conversion of the sign at 820 Morrissey Blvd. to digital.

DECISION

Upon the surrender of permits for the sign located at 65 Tenean Street and confirmation that the sign at 820 Morrissey Blvd. otherwise complies with the regulations for outdoor advertising, OOA should grant permits 2021D010 and 2021D011 to allow the conversion of the static sign at 820 Morrissey Blvd. to an electronic sign, in accordance with 700 CMR 3.17.

REMAND OF PROCEDURAL ISSUES

To the extent that certain procedural matters may need to occur to issue the digital permits for the sign at 820 Morrissey Blvd. and effectuate the surrender of permits for the sign at 65 Tenean Street,[20] I remand those procedural matters to OOA for appropriate action consistent with this decision.

Albert Caldarelli
Administrative Law Judge

Dated: September 15, 2022

[19] 700 CMR 1.02(10)(f).

[20] *See, e.g.,* MassDOT Response dated August 18, 2022: "so long there is a date certain on which the Clear Channel signs will be removed that is contemporaneous with the issuance of digital permits for 820 Morrissey Boulevard, and advertising copy will not be displayed on the Clear Channel billboards after issuance of the digital permits at 820 Morrissey Boulevard, the permit surrender should be valid."

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

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Re: Motion for Reconsideration
Denial of Petition of Boston Residents Group for Leave to Intervene

MEMORANDUM

On September 15, 2022, the Boston Residents Group submitted a Motion for Reconsideration and a Memorandum in support of the Motion.

The Motion requests reconsideration of my decision to deny Boston Residents Group's Petition to Intervene in this proceeding as a party. It suggests that there are "significant factors the Administrative Law Judge may have overlooked in denial of Residents Petition." I have reviewed the Motion and Memorandum, and I am satisfied that the factors discussed were given serious consideration and addressed in my September 13, 2022, Memorandum and Ruling on the Petition to Intervene.

In addition, the Boston Residents Group's request to intervene pursuant to G.L. c. 30A, §§ 10 and 10A, or in the alternative participate pursuant to 801 CMR 1.01(9)(e), is now moot because a Final Agency Decision was issued on September 15, 2022, prior to receipt of the Motion, which closed this proceeding.

RULING ON MOTION FOR RECONSIDERATION

The Boston Residents Group's Motion for Reconsideration is DENIED.

Albert Caldarelli
Administrative Law Judge

Dated: September 16, 2022