OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

2024 REPORT

MASSACHUSETTS DEPARTMENT OF TRANSPORTATIONOFFICE OF THE ADMINISTRATIVE LAW JUDGE

2024 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 2024.

In summary, the following matters were handled in calendar year 2024:

- One (1) construction contract appeal was heard and resolved by a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40.
- One (1) construction contract appeal is pending; however, the parties have advised that they have reached a settlement that will resolve the appeal. It is expected that the appeal will be withdrawn in 2025.

- Eight (8) direct payment demands were ruled upon in accordance with G.L. c.30, §39F.

- One (1) appeal from the denial of an application for an outdoor advertising permit for an electronic sign was received. An adjudicatory hearing will be held in 2025, and a final agency decision will be 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

Baltazar Contractors, Inc. # 3-101985-001

A notice of appeal was received appealing the Chief Engineer's determination to deny a claim in the amount of $376,796.91 for additional costs incurred for removal and replacement of damaged concrete sidewalks. A hearing was held, and a report and recommendation was made to the Secretary on July 10, 2024, recommending that the Department compensate Baltazar Contractor Inc. for a share of the repair costs in the amount of $280,000.00.

Appeals Pending

MDR Construction Company, Inc. #5-112878-001

A notice of appeal was received appealing the Chief Engineer's determination to deny, in part, a claim in the amount of $94,915.85 and a time extension resulting from differing site conditions encountered while performing drainage operations. The Chief Engineer made a determination to approve the claim for a reduced amount of $2,846.00 and a contract time extension of 13 days. After this Office made rulings on pre-hearing motions filed by the department, the contractor advised that the parties have reached a tentative settlement and that it intends to withdraw the appeal.

Direct Payment Demands

In 2024, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

N.E.L. Corp. – March 5, 2024

General Contractor:	Atsalis Brothers Painting Company
Contract:	Contract #116898 - Cleaning, Painting and Structural Repairs to Br. Nos. N-12-051, W-29-011 & W-29-028 Route 9 (Boylston Street) and 2 Bridges on Route 20 (Boston Post Road)
Amount:	$1,125,182.47
Decision:	Denied – April 22, 2024 (NEL's Demand is pre-mature.)

N.E.L. Corp. – April 22, 2024

General Contractor:	Atsalis Brothers Painting Company
Contract:	Contract #117131 - Bridge Repairs and Related Work (Including Painting) along a Section of Interstate 95 in the Towns of Sharon-Walpole)
Amount:	$1,023.00
Decision:	Denied – May 7, 2024 (Nothing in the direct payment statute authorizes direct payment to a subcontractor for future work.)

N.E.L. Corp. – April 22, 2024

General Contractor:	Atsalis Brothers Painting Company
Contract:	Contract #117131 - Bridge Repairs and Related Work (Including Painting) along a Section of Interstate 95 in the Towns of Sharon-Walpole)
Amount:	"over $900,000.00"
Decision:	Denied – May 7, 2024 (Nothing in the direct payment statute authorizes direct payment to a subcontractor for future work.)

VelCorp GEMS – April 24, 2024

General Contractor:	GLX Constructors
Contract:	MBTA Contract #E22CN07 – Green Line Extension
Amount:	$137,070.81
Decision:	Denied – June 22, 2023 (MassDOT is not the awarding authority for the contract in question)

Dauphinais Concrete, Inc. – April 16, 2024

General Contractor:	New England Building & Bridge Company, Inc.
Contract:	Contract #118480 - Uxbridge-Bridge Replacement (U-2-52) Rt 146 SB Exit 2 Ramp over Emerson Brook
Amount:	$30,812.00
Decision:	Disputed Amounts Set Aside – May 9, 2024

Coughlin Environmental Services, LLC – June 19, 2024

General Contractor:	New England Building & Bridge Company, Inc.
Contract:	Contract #118480 - Uxbridge-Bridge Replacement (U-2-52) Rt 146 SB Exit 2 Ramp over Emerson Brook
Amount:	$17,548.19
Decision:	Denied – July 8, 2024 (Coughlin Environmental Services, LLC is not a "subcontractor" as defined in G.L. c.30, §39F.)

Don Martin Corporation – June 10, 2024

General Contractor:	New England Building & Bridge Company, Inc.
Contract:	Contract #118480 - Uxbridge-Bridge Replacement (U-2-52) Rt 146 SB Exit 2 Ramp over Emerson Brook
Amount:	$67,715.75
Decision:	Allowed – July 22, 2024

Markings Inc. – September 16, 2024

General Contractor:	New England Building & Bridge Company, Inc.
Contract:	Contract #110155 - Bridge Replacement Br. No. U-02-041 (NEBT Beams) Route 146 Northbound over the Mumford River
Amount:	$27,806.43
Decision:	No Further Action Required – September 30, 2024 (Because final payment for Contract #110155 has been made, there are no amounts payable or that will become payable to the general contractor from which to make a direct payment.)

Outdoor Advertising Appeals

In 2024, the following appeal from the denial of outdoor advertising permits was received pursuant to 700 CMR 3.19.

Murray Outdoor Communications – Appeal of Denial of Outdoor Advertising Permits ##2024D002 and 2024D003

This appeal concerns the denial of applications submitted by Murray Outdoor Communications to convert static billboards located adjacent to Route I-95 in Attleboro to electronic billboards. A status conference was held with the parties on December 2, 2024, to discuss procedural matters in advance of a hearing on the appeal, and a scheduling order was issued. A hearing will be held in calendar year 2025.

APPENDIX OF DECISIONS/RULINGS

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

To: Monica Tibbits-Nutt, Secretary & CEO

From: Albert Caldarelli, Administrative Law Judge

Date: July 10, 2024

Re: Report and Recommendation on Appeal of Baltazar Contractors, Inc. from the Chief Engineer's Denial of Claim #3-101985-001

I am pleased to submit for your consideration the attached report and recommendation that addresses an appeal by Baltazar Contractors, Inc. (BCI), the general contractor for contract #101985. The contract provided for full-depth reconstruction of Summer Street in Lunenburg and Fitchburg and pavement micro milling, overlay, and full-depth patching of North Street in Leominster, including placement of concrete sidewalks, driveways, and wheelchair ramps along such roadways.

The appeal involves the cost to replace concrete sidewalk panels that showed signs of surface scaling. The contract required BCI to install a total of 10,070 square yards of sidewalk, which was completed by BCI's subcontractor in 2018 and 2019. After the winters of 2019 and 2020, surface scaling appeared on some of the sidewalk panels. The Department directed BCI to remove and replace them, a total of 4,361.75 square yards, which BCI did in 2021 at a cost of $376,796.91. That cost is the subject of BCI's claim.

By letter dated May 4, 2023, the Chief Engineer made a written determination to deny the claim, citing poor workmanship as the cause of the sidewalk scaling. The contractor appealed that decision, contending that the scaling was the result of the Department's defective specification for the concrete mix and damage caused by improper snow and ice removal by the municipalities.

I held a hearing on April 11, 2024, which was continued to May 10, 2024, to take testimony and evidence on the matter. The parties offered various theories as to the causes of the sidewalk scaling. Based on the evidence presented, my conclusion is that the sidewalk scaling resulted from multiple causes for which each party bears some responsibility. Therefore, it is appropriate to apportion the cost of the repairs between the parties. Based on an allocation of responsibility, which is discussed further in the attached report and recommendation, I recommend that the Department compensate BCI for a share of the repair costs in the amount of $280,000.00.

Agree [X] Disagree [ ]

[signature on original]

dated: 7/10/24

Monica Tibbits-Nutt
Secretary & CEO

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REPORT AND RECOMMENDATION
APPEAL OF BALTAZAR CONTRACTORS, INC.
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #3-101985-001

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

BACKGROUND

By letter dated May 4, 2023, the Chief Engineer made a written determination to deny a claim by Baltazar Contractors, Inc. (BCI) for additional costs in the amount of $376,796.91 to repair 4,361.75 square yards of sidewalk panels. On May 17, 2023, BCI timely appealed the Chief Engineer's determination in accordance with Division I, §7.16 of the contract by submitting a Statement of Claim dated May 17, 2023, to the Office of the Administrative Law Judge.

The parties participated in status conferences on November 30, 2023, and January 29, 2024, concerning the factual background, procedural issues, and potential legal and factual issues to be heard. The parties also engaged in voluntary discovery and briefed their respective positions. A hearing was held on April 11, 2024, which was continued to May 10, 2024. BCI was represented by Marwan Zubi, Esq. The Department was represented by Deputy General Counsel Owen Kane and Counsel Ingrid Freire. Testimony was offered by the following witnesses:

For BCI:

- Dinis Baltazar, Baltazar Contractors, Inc.
- Ralph Quiterio, Baltazar Contractors, Inc.
- John MacLellan, J.G. MacLellan Concrete Co., Inc.
- Ron Kozikowski, North S. Tarr Concrete Consulting, P.C

For the Department:

- Ryan Davison, Area Engineer
- Jason Robertson, Director of Research and Materials

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, expert opinion and reports, the contract plans and specifications, and the position papers submitted by the parties. I make the following findings of fact:

1. Contract #101985 provides for full-depth reconstruction of Summer Street in Lunenburg and Fitchburg, and pavement micro milling, overlay, and full-depth

patching of North Street in Leominster, including placement of concrete sidewalks, driveways, and wheelchair ramps along those streets.

2. The Contract required BCI to install 10,070 square yards of concrete sidewalks. The sidewalks were constructed in 2018 and 2019 by K. Daponte Construction Corp., a subcontractor of BCI.

3. The sidewalks were constructed with concrete supplied by J.G. MacLellan Concrete Co. Inc. in Lunenburg. The concrete was a 4000 psi ¾ inch mix design which was approved by the Department. The mix contained 50% slag and the 50% Type 1 cement.

4. In the fall of 2019, the sidewalks were inspected by the Department. Damage or cracks were found at 11 locations, and those sidewalks were removed and replaced by BCI at its expense. The sidewalk work was final measured and paid in accordance with the contract.[1]

5. The sidewalks were opened to public travel as of fall 2019, at which time the Department and the municipalities assumed responsibility for maintaining them and protecting them from damage.[2] Maintenance of the sidewalks by the municipalities during the 2019 and 2020 winter seasons included snow removal, plowing, and use of deicing materials during and after snow events.[3]

6. After the winters of 2019 and 2020, surface scaling appeared on some of the sidewalk panels. In a memo dated January 17, 2023, the District 3 Highway Director described the condition "as scaling in a line or streak, running mostly parallel to the roadway. In areas with scaling, the individual sidewalk panels also had areas of visually sound concrete."[4]

7. During that time, the Department also became aware of numerous instances of significant early concrete sidewalk degradation and deterioration due to scaling on at least fourteen other contracts throughout the Commonwealth.[5] As a result, the Department coordinated a study by the University of Massachusetts from October 2019 to April 2021 to identify and recommend best practices to incorporate into the materials and construction of concrete sidewalks to promote long-term durability and to prevent premature deterioration.[6]

8. The study identified dozens of variables that could cause scaling on concrete sidewalks, including poor workmanship, concrete mix design, timing of placement, temperature, and poor snow and ice removal operations.[7]

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[1] BCI Exhibit 3.at 4.
[2] MassDOT Exhibit 001 – 006; *also see* Division I, Subsection 7.17.
[3] MassDOT Exhibit 001 – 006.
[4] MassDOT Exhibit 001 – 006; *also see* BCI Exhibit 20, Figure 1.1 (right).
[5] BCI Exhibit 20 at 1.
[6] *Id*. at 2.
[7] *Id*. at 3-5.

9. In April 2020, the Department ordered BCI to repair and replace the sidewalks on the project that exhibited surface scaling damage.[8] In the summer of 2021, BCI removed and replaced those sidewalk panels, a total of 4,361.75 square yards at a cost of $376,796.91.

10. BCI is responsible for the quality of its work and that of its subcontractors. The work must be free of any defects and any defective work must be removed and repaired at BCI's expense. The contract provides in part:

> All defective work shall be removed, repaired, or made good, notwithstanding that such work has previously been inspected and approved or estimated for payment. If the work or any part thereof shall be found defective at any time before the final acceptance of the whole work, the Contractor shall at his own expense make good such defect in a satisfactory manner.[9]

11. BCI is also responsible for protecting the work from damage:

> Until written acceptance of the physical work by the Chief Engineer, the Contractor shall assume full charge and care thereof and the Contractor shall take every necessary precaution against injury or damage to the work by action of the elements, or from any cause whatever . . . The Contractor shall rebuild, repair, restore and make good all injuries or damages to any portion of the work . . . and shall bear the expense thereof . . .[10]

12. When work on the project is opened to public travel, the Department assumes all responsibility for maintenance, protection from damage, and the cost to repair and replace any damage to the work caused by traffic:

> . . . on such portions of the project as are opened for use of traffic, the Contractor shall not be required to assume any expense entailed in maintaining the roadway for traffic. The Party of the First Part will be responsible for maintenance and any damage to the work caused solely by traffic on any portion of the project which has been opened to public travel as stipulated above, and it may order the Contractor to repair or replace such damage, whereupon the Contractor shall make such repairs at contract unit prices so far as the same are applicable, or as Extra Work.[11]

SUMMARY OF TESTIMONY

Both BCI and the Department relied heavily on expert testimony to support their respective positions. Although the positions were diametrically opposed, there was consensus between the technical witnesses concerning the possible causes of surface scaling on the sidewalks.

[8] BCI Exhibit 4.
[9] Division I, Subsection 5.10.
[10] Division I, Subsection 7.18.
[11] Division I, Subsection 7.17.

Mr. Kozikowski, BCI's expert witness, explained in his testimony and reports that concrete mixtures with high slag or fly ash contents are more susceptible to scaling because such mixes are more difficult for a contractor to place, finish, and protect.[12] This is consistent with the conclusions contained in the University of Massachusetts report, which found better scaling resistance in sidewalks constructed using mix formulations containing the lowest amounts of fly ash and slag.[13] Mr. Robertson, MassDOT's Director of Research and Materials, testified that the Department has revised its specification for approved concrete mixes, based in part on the findings in the UMass study, to allow contractors to use mixes with lower slag and fly ash contents for sidewalk construction.

Both technical witnesses testified that sidewalk scaling can also result from poor workmanship, the timing of concrete placement, the temperature at the time the concrete is placed, inadequate snow and ice operations, and numerous other factors all of which are catalogued in the UMass study and related literature. The opinions offered by the technical experts were consistent with respect to the possible causes of the sidewalk scaling. Their differences related to the degree of probability or likelihood that each assigned to such causes based on assumptions of what happened during the project.

For example, BCI's expert characterized the high slag content in the concrete mix used for the sidewalks as "the primary cause" and "the main contributor to the observed scaling."[14] He also identified inadequate winter protection by the municipalities as playing an important role in the sidewalk failures.[15] He opined that poor workmanship was not "the primary cause of sidewalk scaling", but could have added to the scaling problems.[16]

Similarly, the Department's Director of Research and Materials discussed the variables that could have contributed to the sidewalk scaling on this project. He testified that it was not possible to identify the root cause with absolute certainty. However, he concluded that poor workmanship was the most likely cause based on his understanding of the means and methods used by BCI's subcontractor and his interpretation of findings contained in a petrographic analysis performed on core samples taken from the sidewalks.[17]

The testimony of both technical witnesses was professional and logically consistent. However, their opinions of the likely causes of the sidewalk scaling are only as reliable as the factual assumptions upon which they are based. In this case, the testimony and evidence concerning those factual assumptions lacked details and in some cases were highly speculative in terms of what actually happened on site during construction of the sidewalks and thereafter as far as maintenance, snow removal, and use of deicing materials during the winters of 2019 and 2020.

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[12] *E.g., see* BCI Exhibit 18 at 7.
[13] BCI Exhibit 20 at 97.
[14] BCI Exhibit 18 at 1 and 7.
[15] *Id*. at 1.
[16] *Id*. at 1 and 20 ("Contractor influences can be additive; however, for this Project, the unnecessary approval of a 50% slag mixture, inadequate durability requirements in the DOT specification compared to industry requirements, and evidence of poor winter protection of the sidewalks during the first winter of exposure carry more influence.")
[17] MassDOT Exhibit 001 – 0010-0045.

BCI engaged a subcontractor, K. Daponte Construction Corp., to construct the sidewalks. However, no representative of the company that performed the work was called to testify at the hearing. BCI's project superintendent testified as to what he observed during the sidewalk installation. His testimony consisted generally of conclusory statements that K. Daponte did what they were supposed to do or at least he didn't observe anything improper. No details were provided through testimony or contemporaneous records about K. Daponte's work over the many months that it was constructing the sidewalks: What means and methods were used? Were the workers properly trained? What was the crew size? What tools did they use? What did they do on the various dates and times and locations when the sidewalks were being constructed? Were the means and methods consistent over those various dates and times, or did they vary, and if so why?

There was conflicting testimony as to whether BCI's subcontractor followed cold weather procedures. The Department's Resident Engineer testified that some of the sidewalks were installed in cold weather.[18] He also testified that K. Daponte used blankets but did not use additional heat sources. BCI's project superintendent confirmed that K. Daponte used blankets,[19] but again no specific details were provided concerning when, where, how many, what kind of blankets, whether K. Daponte properly applied the blankets, whether K. Daponte monitored surface temperatures, and why additional heat sources were not used. However, BCI did establish through an analysis that there was no direct correlation between the cold weather pours and sidewalks that had to be replaced due to scaling.[20]

There was conflicting testimony as to whether the concrete was properly cured and also whether water was improperly added to the surface of the concrete during finishing operations. BCI's superintendent testified that he did not observe K. Daponte adding water and would not have allowed it. He confirmed that the subcontractor applied a curing compound using 5-gallon spray cans. MassDOT's Resident Engineer testified that he observed the subcontractor adding water to the concrete from a hose on a truck and adding a substance from a spray can which he originally assumed was water but conceded that it could have been a curing compound. It was unclear from the Resident Engineer's testimony whether these were isolated observations or made on multiple occasions, or whether his observations were made at sidewalk locations that later developed scaling or at locations that did not.

A second fact witness for BCI, who had no direct knowledge of the day-to-day on-site activities, testified about the curing compound that K. Daponte supposedly used based on a receipt maintained in BCI's files.[21] The evidence merely identified the product. There was no information about K. Daponte's use of the product, i.e., how much was used, whether the same product was used for the entirety of the sidewalk work, whether workers were trained in its application, and whether it was applied evenly and in sufficient quantity, pursuant to manufacturer's instructions, and prior to any product expiration date.

[18] MassDOT Exhibit 001 – 0047-0049.
[19] *Also see* BCI Exhibit 6.
[20] BCI Exhibit 7.
[21] *See* BCI Exhibit 1.

The parties and their technical experts drew different conclusions from the results of petrographic analysis of six core samples taken from the sidewalks.[22] The report, dated December 20, 2022, provided the following summary and conclusions:

> Observed crazing cracks indicate early drying of near-surface paste likely caused by improper curing practices, climatic conditions such as wind or heat, or a combination of these factors. Lack of moisture at the surface results in a thin layer of poorly hydrated paste relative to the remaining depth of concrete. This is evidenced by the increased frequency of unhydrated cement grains lacking reaction rims within the near surface paste. Poor hydration at the surface can result in a mortar layer of lower strength and durability, which is more susceptible to freeze-thaw damage. Elevated chloride levels, which are measured in these samples, can exacerbate the effects of freeze-thaw.
>
> Air content is measured to be lower in 22-1488F than 22-1488A and 22-1488D. Lower air content can decrease the concrete's ability to resist the effects of freeze-thaw. The porosity of the paste is moderate and relatively homogenous and excessive bleeding was not present, indicating the original w/c ratio was likely not high. Homogenous paste and even distribution of aggregate and air voids implies the concrete was not re-tempered. There is no evidence of surface finishing issues such as overworking, reincorporation of bleed water, or finishing in a late plastic state.
>
> The cores analyzed, regardless of scaling, exhibit similar degrees of hydration, carbonation, porosity, and chloride ingress. It is likely the scaled and intact concrete possess a similar susceptibility to future deterioration.

The parties emphasized those findings from the petrographic analysis that supported their positions while minimizing those that did not. For example, BCI points out that the report directly contradicts the Department's position that water was improperly added to the surface of the concrete during finishing operations. The petrographic analysis found no evidence of surface finishing issues such as overworking, reincorporation of bleed water, or finishing in a late plastic state. Yet, BCI downplays the finding that the likely cause of the scaling was poor workmanship in the form of improper curing practices and/or insufficient protection from wind and heat during sidewalk construction.

The Department also highlighted findings from three of the six core samples that were subjected to air void analysis. None of the samples were taken from the sidewalks panels that contained surface scaling and were replaced in 2021. The samples were collected later, in 2022, from the sidewalks that were not removed and replaced. One sample showed evidence of low air content while the other two did not. From this one core sample the Department infers that low air content in the concrete was a cause of the sidewalk scaling, with no explanation why the other two core samples did not show that condition or how concrete samples taken from sidewalks that were not removed due to sidewalk scaling are representative of the air content of those that were.

There was no testimony or evidence presented by the Department to explain the criteria it used to determine which sidewalk panels were deemed defective. The District Highway Director reported that more sidewalk was replaced in Leominster because the city "was more critical of

[22] *See supra* note 11.

damaged sidewalks and held a higher threshold for replacement."[23] The inference is that at least some of the sidewalk panels in Leominster were replaced simply in response to the city's complaints and not necessarily because they were found defective by the Department based on the contract requirements.

In 2019, the Department inspected the sidewalks and directed BCI to remove and replace sidewalks at 11 locations due to cracks or damage. The damage was repaired at BCI's expense, and the sidewalks were final measured and paid.[24] The sidewalks were then put into use and opened to traffic, at which point the Department assumed responsibility for maintenance and damage to the work.[25] During the 2019 and 2020 winter seasons, the municipalities and presumably dozens of private abutters cleared snow from the sidewalks by shoveling, plowing, and using deicing materials during and after snow events. There is no evidence that the Department or the municipalities took steps to ensure proper maintenance of the sidewalks and prevent damage to them once opened to public travel.[26]

BCI presented evidence that improper snow and ice removal practices by the municipalities contributed to the sidewalk scaling. The roads and sidewalk areas are plowed and treated by the municipalities with varying rates of application of deicing materials.[27] BCI's expert concluded that inadequate winter protection by the municipalities played an important role in the sidewalk failures.[28] The UMass study also found that scaling can occur when "chloride-laden water … remained on the surface of concrete for extended periods."[29] A communication from the Utility Contractors' Association of New England concluded that sidewalk scaling was occurring as a result of the use of harsh chemical deicers to combat snow and ice.[30]

DISCUSSION

Surface scaling occurred on 4,361.75 square yards of concrete sidewalks across three municipalities, over multiple years including two winters, in diverse environmental conditions, while being subjected to varying snow and ice operations and deicing chemicals. The concrete surface scaling on this project and on at least fourteen others undertaken by different contractors over the same period warranted a study by UMass to try to identify those causes and recommend best practices to incorporate into the materials and construction of concrete sidewalks to promote long-term durability and to prevent premature deterioration. Notwithstanding the general uncertainty as to why widespread sidewalk surface scaling occurred during that timeframe on this project and numerous others across the state, the parties want to assign responsibility for every

[23] MassDOT Exhibit 001 – 006.
[24] BCI Exhibit 3.
[25] Division I, Subsection 7.17.
[26] *See, e.g.*, BCI Ex. 20 at 103 and Ref, 26 (recommendation to minimize exposure of sidewalks to deicing chemicals for as long as possible and ensure that snow contaminated with chlorides is not allowed to remain on top of sidewalks following a storm event; and referencing FHWA guidance dating back to 2015 stating that sparing use of deicers should be encouraged when concrete is newer than 1 year).
[27] *Id*.
[28] *Supra* note 9.
[29] BCI Exhibit 20 at 103.
[30] BCI Exhibit 9.

square inch of scaling at issue in this appeal to the other party. The evidence and the contract, however, do not support such an "either-or" result.

Because of the inherent implausibility that there was a singular cause to account for surface scaling at every location and point in time, the theories offered by the parties tended toward speculation rather than complete coherent explanations of what happened and why. For example, the balance of the sidewalks on the project, some 5,700-plus square yards of concrete seemingly constructed under the same conditions with the same concrete mix and subjected to the same winter snow events, did not exhibit surface scaling over the same period or at least not to the degree requiring replacement. Why? What was different about the various sidewalk panels in terms of the means and methods of construction, concrete mix used, cold weather practices, curing and finishing, heat, wind, temperatures, maintenance, snow and ice removal, deicing chemicals, and other potential causes that made some susceptible but others impervious to surface scaling? If, as BCI contends, the use of a concrete mixture containing high slag content is the overwhelming cause of the scaling, then how was it that K. Daponte constructed sidewalks resistant to scaling using such a concrete mix? How have other contractors been able to do the same? Similarly, how does the Department square its claims that K. Daponte routinely added water to the surface of the concrete, disregarded cold weather requirements, wrongly cured, and used concrete with low air content with the fact that thousands of square yards of concrete sidewalks on the project were built with sufficient strength and durability to resist surface scaling? Because of basic inconsistencies such as these, I was not persuaded by either party's all-or-nothing approach to the claim.

Obviously, a contractor who constructs concrete sidewalks in the Commonwealth must expect that the sidewalks will be subjected to freeze-thaw cycles, snow and ice operations, deicing chemicals, and other external impacts. In that regard, BCI and its subcontractor were required to use appropriate means and methods and follow the contract specifications so that the concrete achieved the strength and durability to withstand those conditions. The fact that concrete mixtures with high slag or fly ash contents may be more difficult to place, finish, and protect as opposed to mixes with lower amounts of slag and ash does not excuse a contractor from its obligations to place, finish, and protect the concrete in accordance with the contract specifications.[31] The evidence and testimony presented by the Department, which in some cases went undisputed by BCI, established that BCI's subcontractor at times deviated from the specifications in ways that compromised the strength and durability of the sidewalks. Therefore, to the extent that scaling resulted from such deviations, it is BCI's responsibility to remove and repair that defective work at its own expense.[32]

Although BCI's contractual obligation to remove and repair defective work is clear, in light of the overwhelming evidence of other likely causes I cannot say that the entirety of the surface

[31] There is an implied warranty that the Department's specification for approved concrete mixes is defect-free. *See Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549, 556 (2015) *citing* P.L. Bruner & P.J. O'Connor, Jr., On Construction Law § 9:82 (2002). However, BCI's attempt to shield itself from any and all responsibility for the surface scaling based on a breach of that implied warranty fails as a matter of law because it did not establish that it relied upon and actually followed the plans and specifications. "It does the contractor little good to prove that the owner furnished defective plans if the contractor failed to follow them." Bruner & P.J. O'Connor, Jr. § 9:95.

[32] Division I, Subsection 5.10.

scaling is the result of defective work.[33] Credible information was put forth to establish that the sidewalks were damaged by elevated chloride levels, improper snow and ice removal, varying rates of application of deicing materials, and use of harsh deicing chemicals. Damage from these causes can occur when there is a lack of preventative care and poor maintenance even when contractors utilize best practices and follow all contract specifications.[34]

The contract allocates responsibility for damage to the work as follows: Until written acceptance by the Department, BCI is responsible for protecting the work from damage and the expense of repairing any damage.[35] However, when any part of the work is opened to public travel, the Department assumes all responsibility for maintenance, protection from damage, and the cost to repair and replace any damage to that work caused by traffic.[36] The Department may order BCI to repair such damage, but it is contractually obligated to provide compensation for the cost of repairs.

In this case, the Department inspected the sidewalks in 2019 and directed BCI to remove and replace sidewalks at 11 locations due to cracks or damage. That damage was repaired at BCI's expense, and the sidewalks were final measured and paid. No evidence was presented to indicate that surface scaling was observed on any portion of the sidewalks at that time, or that BCI was directed to remove and replace any sidewalks prior to final measurement because of surface scaling. Therefore, I infer that surface scaling did not occur at any time during which BCI was in control of and responsible for protecting the sidewalks from damage.

The sidewalks were put into use and opened to traffic prior to the 2019 winter season. It was during the 2019 and 2020 winter seasons, when the Department was responsible for maintaining and protecting the work from damage, that surface scaling appeared. The damage was caused in part by elevated chloride levels, improper snow and ice removal by the municipalities, varying rates of application of deicing materials, and harsh deicing chemicals that were used to keep the sidewalks open to public travel during and after snow events. There is no evidence that the Department or the municipalities took steps to ensure proper maintenance of the sidewalks and prevent damage to them once opened to public travel.

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[33] Given the many possible causes of surface scaling, it would be fallacy in the nature of *post hoc ergo propter hoc* to conclude that all the surface scaling at every location at all points in time was the result of defective work based only on evidence of noncompliance during some of the concrete placement. Further, to hold BCI responsible for the entire cost of repairs, the Department's burden was not just to establish that BCI deviated from the contract requirements, but to also demonstrate that such deviations "actually and proximately . . . with reasonable certainty" caused all the surface scaling that required replacement. *See e.g., Exeter Theatre Corp. v. T.G.I. Friday's, Inc,.*2011 Mass. App. Unpub. LEXIS 128; Restatement (Second) of Contracts § 346 comment b. The Department fell short of meeting that burden of proof.

[34] *See* BCI Ex. 20 at 2: "If proper care during the first winter is not adhered to, even high-quality concrete may be susceptible to scaling."

[35] Division I, Subsection 7.18.

[36] Division I, Subsection 7.17.

RECOMMENDATION

For the reasons discussed above, I find that the sidewalk scaling resulted from multiple causes for which each party bears some responsibility. Poor workmanship cannot be ruled out as a contributing cause of some of the sidewalk scaling, nor can damage from poor maintenance, elevated chloride levels, improper snow and ice removal, varying rates of application of deicing materials, and harsh deicing chemicals. Based on the testimony and evidence presented, the root cause of surface scaling at any specific location and point in time cannot be determined with any degree of certainty. Therefore, I recommend apportioning the cost of the repairs between the parties.[37]

Because all the surface scaling appeared after the sidewalks were opened to public travel and exposed to snow and ice operations during the 2019 and 2020 winter seasons, at times when the Department was responsible for preventing and mitigating damage to them, it is appropriate to allocate a higher share of the cost of repairs to the Department. I recommend, therefore, that the Department compensate BCI for a share of the repair costs in the amount of $280,000.00.

Respectfully submitted,

[signature on original]

_____
Albert Caldarelli
Administrative Law Judge

Dated: July 10, 2024

[37] Pursuant to a Scheduling Order dated June 6, 2024, the parties were advised of my intent to recommend apportionment of the cost of repairs and were given the opportunity to confer and attempt to agree on an allocation. They reported on June 20, 2024, that they were unable agree.

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: David Viens, Esq.
Kenney & Sams
10 High Street
Boston, MA 02110

Owen Kane, Deputy General Counsel
Ingrid Freire, Counsel
MassDOT
10 Park Plaza
Boston, MA 02116

Re: Appeal of MDR Construction Company, Inc.
5-112878-001 / Hoover Road Drainage Differing Site Conditions

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MEMORANDUM AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS

MDR Construction Company, Inc. ("MDR") is the general contractor on contract #112878, which provides for the reconstruction of a portion of Route 1A in Walpole, including intersection and approach improvements. MDR claims that it incurred additional costs in the amount of $94,915.85 when it encountered differing site conditions performing drainage work on Hoover Road. MDR appeals from the Chief Engineer's written determination dated June 16, 2023, which approved the claim for a reduced amount of $2,846.00 and a Contract Time Extension of 13 days.[1]

On May 31, 2024, the Department, citing Mass. R. Civ. P. 12(b)(6), moved to dismiss the appeal on the basis that it fails to state a claim upon which relief can be granted. MDR filed its Opposition to the Department's motion on July 1, 2024.

Based on the factual findings and legal conclusions discussed below, the Department's Motion to Dismiss is ALLOWED IN PART and DENIED IN PART.

FINDINGS

For purposes of this Memorandum, I accept the following factual allegations contained in the Statement of Claim as true, drawing all reasonable inferences from such facts in favor of MDR:[2]

1. On June 15, 2021, MDR discovered that the actual locations of existing sewer lines and services on Hoover Road differed from those shown on the plans. Specifically, the locations of the existing lines varied in elevations from 4 to 6 feet compared to

[1] MDR agrees with the Chief Engineer's determination to grant a 13-day time extension. That part of the determination is not disputed on appeal.

[2] The standard of review applicable to motions to dismiss requires that the factual allegations contained in MDR's Statement of Claim be accepted as true, as well as such inferences as may be drawn therefrom in MDR's favor, *Flagg v. AliMed, Inc.*, 466 Mass.23, 26 (2013), and a determination as to whether such "factual allegations plausibly suggest an entitlement to relief." *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008).

those shown on the contract plans. This differing site condition conflicted with the planned installation of a 30-inch drainage pipe on Hoover Road such that the work could not proceed as designed.[3]

2. While the drainage work was being redesigned, MDR could not proceed with other project work because materials needed for that work were in fabrication and not readily available. However, MDR kept certain labor and equipment on site on standby during the redesign process so that it could resume the drainage work once the redesign was complete.[4]

3. To mitigate its standby costs and delays to the Project, MDR accelerated the fabrication of materials required for later stage work. MDR also added additional resources to allow for out-of-sequence work so that activities planned for the following season could be performed earlier. These actions enabled MDR to resume project work on July 16, 2021.[5]

4. Between June 21, 2021, and July 16, 2021, MDR incurred labor, equipment, and materials costs to remain on standby while waiting for the Department to provide the redesigned drainage scope. The standby costs claimed were originally in the amount of $174,337.25 but were later adjusted to $142,147.93.[6]

5. On May 5, 2023, the Department issued Extra Work Order #14 to pay a portion of the claimed standby costs in the amount of $47,232.08.[7]

6. The balance of MDR's claim for standby costs, in the amount of $94,915.85, is the subject of this appeal. A detailed breakdown of the claim[8] as provided by MDR in its letter dated May 11, 2023 is reproduced and attached hereto as Exhibit 1.

DISCUSSION

The Department moves to dismiss MDR's appeal for failure to state a claim upon which relief may be granted.[9] In its motion, it contends that MDR's claim "is in reality a delay damage claim". As such, the Department argues, the appeal should be dismissed because the claim seeks damages that are expressly excluded by the "no damage for delay" provision of the contract.[10] Alternatively, the Department argues that the claim is also barred by Division I, Subsection 4.04 of the contract because it seeks compensation for costs which are expressly excluded from the

[3] MDR Statement of Claim, Section 7 and Supplemental Exhibit 3.
[4] *Id*. MDR ultimately began installation of the 30-inch drainage pipe pursuant to the Department's redesigned plans on September 13, 2021 and completed the work on October 11, 2021. *Id*. at 3.
[5] *Id*.
[6] MDR Statement of Claim, Exhibit 5 at 2-6.
[7] *Id*.
[8] MDR Statement of Claim, Exhibit 5 at 16-19.
[9] *See* Mass.R.Civ.P. 12(b)(6).
[10] Div. I, Subsection 8.05 provides that the contractor "shall have no claim for damages of any kind on account of … any delay or suspension of any portion" of the work.

calculation of an equitable adjustment under that subsection, namely delay damages, overhead, general superintendence costs, and use of small tools and manual equipment.

For purposes of M.G.L. c. 6C, § 40, a motion to dismiss will be allowed only where it is certain that the contactor is not entitled to relief under any combination of facts that could be drawn, or reasonably inferred, from the allegations contained in the claim. In other words, a motion to dismiss will be denied unless it appears beyond doubt that the contractor can prove no set of facts at a hearing which would lead to entitlement of the relief sought.[11]

In this appeal, MDR asserts a claim for standby costs incurred because of a differing site condition. Its position is that such costs are recoverable as part of an equitable adjustment pursuant to Division I, Subsection 4.04 of the contract. On a motion to dismiss, I accept the claim as presented to the Claims Committee and before me on appeal. MDR is not claiming that its standby costs were incurred because the project was delayed; its claim is that they constitute an increase in the cost of performance of the work due to the differing site condition. Therefore, any legal defenses that the Department might have concerning claims for delay damages are not applicable at this stage of the proceedings.[12]

There is no dispute that a differing site condition occurred. The only question to be addressed at this time is whether the costs that MDR is claiming are plausibly recoverable pursuant to Division I, Subsection 4.04 of the contract. When the contractor and Department fail to agree on an equitable adjustment, as is the case here, payment under Subsection 4.04 is priced as follows:

> *If the Contractor and the Department fail to agree on an equitable adjustment to be made under this Subsection, then the Contractor shall accept as full payment for the work in dispute an amount equal to the following:*
>
> *(1) The actual cost for direct labor, materials and use of equipment, plus 10 percent of this total for overhead.*
> *(2) Plus actual cost of Workmen's Compensation and Liability Insurance, Health, Welfare and Pension benefits, Social Security deductions, Employment Security Benefits and such additional fringe benefits which the Contractor is required to pay as a result of Union Labor Agreements and/or is required by authorized governmental agencies.*
> *(3) Plus 10 percent of the total of (1) and (2).*
> *(4) Plus the estimated proportionate cost of surety bonds. For work performed by a Subcontractor, the Contractor shall accept as full payment therefor an amount equal to the actual cost to the Contractor of such work as determined by the Engineer plus 10 percent of such cost.*
>
> *No allowance shall be made for general superintendence and the use of small tools and manual equipment.*

[11] *See Iannacchino v. Ford Motor Company,* 451 Mass. 623, 635-36 (2008); *also see Eigerman v. Putnam Invs., Inc.*, 450 Mass. 281, 286 (2007).

[12] Of course, the parties may raise any and all factual and legal defenses at the hearing. S.O.P. ALJ-01-01-1-000, "*Office of the Administrative Law Judge - Rules of Practice and Procedures*" at XI-E.

MDR claims "direct labor costs", including associated payroll and insurance, for time that its Superintendent, Project Manager, Assistant Project Manager, and Director of Operations spent during the standby period "mitigating direct cost damages on behalf of MassDOT, evaluating and proposing solutions to resume work, and monitoring the project conditions". The claim also includes trucks associated with the above positions, and costs to maintain, demobilize, and remobilize an office trailer, for utilities for the office trailer, for a storage container, and for a portable bathroom.[13]

MDR asserts that there are factual issues presented with respect to the nature of these costs that require a hearing. However, I see no combination of facts that can be drawn or reasonably inferred from the statement of claim that would lead to a conclusion that these costs are for anything other than general superintendence.[14] Such costs are expressly excluded from any calculation of the payment due under Subsection 4.04. In its Opposition, MDR contends that these are direct costs, and not general superintendence costs, because they would not otherwise have been incurred by MDR but for the differing site condition. Yet, all increases in the cost of performance of the work due to a differing site condition would be avoided had the differing site condition not occurred. The language of Subsection 4.04 expressly excluding general superintendence costs would have no meaning if MDR only had to show that the differing site condition caused it to incur the costs.

MDR's claim also includes costs paid to consultants to prepare time impact analyses and additional schedule updates. There is no plausible theory that these costs are recoverable pursuant Subsection 4.04. For time impact analyses or additional schedule updates that may have been required to address the differing site condition, MDR already receives payment on a lump sum, fixed price basis under Section 722 and Item 100 of the Special Provisions of the contract.[15] All required schedule-related work performed by the contractor is paid pursuant to Section 722 and Item 100, including Time Extension Analyses required as part of any claim, and preparation of alternative schedules used to evaluate proposed changes to the Contract scope or alternatives to previously approved approaches to complete the Work. Any claim for additional schedule-related work is governed by Section 722.80, not Subsection 4.04, and is contingent on a time extension and must be based on the fixed price amount of Item 100.[16]

The balance of MDR's claim is for equipment standby costs. "The essence of an equipment standby claim is that the contractor has been deprived of the productive use of its equipment by being compelled by circumstances for which the Government is responsible to keep the equipment

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[13] *See* Exhibit 1 hereto.

[14] "General superintendence", also referred to as "general conditions", "field overhead", and jobsite overhead," are the direct costs necessary to staff a construction project, such as salaries of project managers, superintendents, clerical workers, and other supervisory and management personnel; the costs of office trailers and storage trailers; utilities associated with the field office; and vehicle and equipment expenses necessary to generally oversee the work and maintain the contractor's presence on the site. *See Report and Recommendation re: Appeal of W.J. Mountford Co., MassDOT Office of the Administrative Law Judge*, Sept. 19, 2016 at fn. 4.

[15] Contract #112878, Special Provisions, Section 722 (Document A00801 – 30-46).

[16] *Id*. ("Should there be a Time Extension granted to the Contractor, the Engineer may provide an Equitable Adjustment for additional Contract Progress Schedule Updates . . . Item 100 will be the basis for this Equitable Adjustment.").

idle."[17] Equipment standby costs are recoverable when the contractor's equipment is ready to be used but must remain idle because of some reason out of the contractor's control.[18] Although standby costs are typically tied to a delay and associated time extension, there is precedent that the contractor need not be delayed beyond the scheduled completion date to recover standby costs.[19] Therefore, a factual basis for including such costs in an equitable adjustment under subsection 4.04 might be proven at a hearing, or at least cannot be ruled out with certainty at this time.

For the reasons stated above, the Department's motion to dismiss the appeal is ALLOWED IN PART and DENIED IN PART.

ORDER

1. That part of MDR's appeal claiming costs for general superintendence and additional schedule-related work, including any markups thereon, comprised of the following items, is DISMISSED:

Direct Labor:		*Insurance & Payroll Taxes:*	
Superintendent	*$15,388.80*	*Workers Compensation*	*$ 2,344.07*
Asst. Project Manager	*$10,772.80*	*Gen. Liability Insurance*	*$ 2,344.07*
Project Manager	*$ 7,694.40*	*Payroll taxes*	*$ 4,960.33*
Director Of Operations	*$ 8,002.40*	*Total*	*$ 9,648.47*
Total	*$41,858.40*		
		Subcontractors:	
Equipment:		*Comcast Internet/cable*	*$ 339.45*
Ford F 150	*$ 502.40*	*Demob of Office Trailer*	*$ 1,778.00*
Ford F 150	*$ 502.40*	*Remob of Office Trailer*	*$ 2,338.00*
Ford F 150	*$ 251.20*	*Total*	*$ 4,455.45*
Ford F 150	*$ 251.20*		
		Onpoint PTEA	*$ 990.00*
Office Trailer	*$ 1,005.00*	*Onpoint TEA*	*$ 1,155.00*
Storage Container	*$ 95.63*	*Onpoint Update*	*$ 1,445.00*
Portable Bathrooms (1)	*$ 260.00*	*Consultant Fee JS Held*	*$ 1,100.00*
Total	*$ 2,876.83*	*Consultant Fee JS Held*	*$ 3,356.34*
		Total	*$ 8,046.34*

[17] *See Appeal of Lionsgate Corp.*, 91-2 B.C.A. (CCH) P24,008; 1991 Eng. BCA LEXIS 12.
[18] Michael T. Callahan, Robert F. Cushman, John D. Carter, Paul J. Gorman, & Douglas F. Coppi, *Proving and Pricing Construction Claims* § 15.5 (2d ed. 1996).
[19] *Id*. Also, I note that EWO #14 may an example of this scenario since it appears that equipment standby costs were deemed compensable independent of any time extension.

2. That part of MDR's appeal claiming additional equipment standby costs, including any markups thereon,[20] comprised of the following cost items, will be set for hearing at a date to be determined by this Office:

Kodiak Rack/Traffic Truck	*$ 777.60*
Mikasa Hydraulic Plate	*$ 246.40**
CFM 185 Compressor	*$ 579.20**
CAT 25 kw Generator	*$ 462.40**
Gorman 2 inch subm Pump	*$ 152.00**
Gorman 2 inch subm Pump	*$ 152.00**
20 Ton Tag Trailer	*$ 1,254.40**
Barrells(30)	*$ 108.00*
Arrow Board	*$ 160.00*
Sequential Lights (10)	*$ 96.00*
Light Towers	*$ 600.00*
Total	*$ 4,588.00*

3. This matter will be set for hearing at a date to be determined by this Office

[signature on original]

Albert Caldarelli
Administrative Law Judge

Dated: August 13, 2024

[20] If MDR establishes at hearing that all or a portion of its claimed equipment standby costs are payable under Subsection 4.04 as an increase in the cost of performance of the work due to the differing site condition, as opposed to delay damages, the question of whether the 10% + 10% markups provided in Subsection 4.04 should apply to such costs will also be addressed at the hearing. This will also include that part of MDR's appeal claiming the 10% + 10% markup on the equipment standby costs already paid pursuant to EWO #14.

* The Chief Engineer already approved these items for payment in her written determination dated June 16, 2023.

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: April 22, 2024

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

Claimant: NEL Corporation
Contractor: Atsalis Brothers Painting Company
Contracts: #116898 - Cleaning, Painting and Structural Repairs to Br. Nos. N-12-051, W-29-011 & W-29-028 Route 9 (Boylston Street) and 2 Bridges on Route 20 (Boston Post Road)
District: District 6
Amount: $1,125,182.47

This Direct Payment Demand (Demand) by NEL Corporation (NEL) was received by the Department on March 5, 2024.

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. NEL is an approved subcontractor on Contract #116898. Its subcontract scope is to perform bridge repairs pursuant to all or some of the following Contract Items: 100.1, 107.97, 107.971, 107.972, 127.12, 748, 905, 910.1, 964.1, 999.761, 999.77, 999.85.

2. The Demand consists of a letter dated March 5, with attachments, signed by Mr. Glenn Roy certifying that NEL has completed subcontract work totaling $1,602,505.07, and has received payments from the general contractor Atsalis Brothers Painting Company (Atsalis) of $477,322.60, leaving a balance due of $1,125,182.47.

3. The general contractor Atsalis did not submit a reply within the 10-day statutory period for doing so.

4. MassDOT construction staff in District 6 reviewed contract payments to Atsalis for subcontract work performed by NEL and has confirmed the amounts claimed by NELin its demand for direct payment.

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

5. MassDOT construction staff in District 6 has advised that the Contract is approximately 49% complete, with much of the remaining work to be performed by NEL.

6. On April 5, 2024, MassDOT construction staff advised that a payment agreement was reached between Atsalis and NEL to resolve past and future subcontract payments on the Contract.

RULING

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

NEL's Demand is pre-mature. A subcontractor is not eligible for a direct payment until seventy days after completion of the subcontract work. MassDOT construction staff in District 6 has advised that the Contract is approximately 49% complete, with much of the remaining work to be performed by NEL. Accordingly, NEL has yet to achieve substantial completion of its subcontract work as required in G.L. c.30, §39F.

Also, MassDOT construction staff advised that a payment agreement was reached between Atsalis and NEL to resolve past and future subcontract payments on the Contract. If so, then the demand for direct payment is moot.

For the reasons stated above, the Demand is DENIED.

cc:

Atsalis Brothers Painting Company
24595 Groesbeck Hwy
Warren, MI 48089

NEL Corporation
3 Ajootian Way, Bldg B
P O Box 929
Middleton, MA 01949

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
John McInerney, District 6 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 7, 2024

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

Claimant: NEL Corporation
Contractor: Atsalis Brothers Painting Company
Contracts: Contract #117131 - Bridge Repairs and Related Work (Including Painting) along a Section of Interstate 95 in the Towns of Sharon-Walpole)
District: District 5
Amount: $1,023.00

This Direct Payment Demand (Demand) by NEL Corporation (NEL) was received by the Department on April 22, 2024.

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. NEL is an approved subcontractor on Contract #117131. Its subcontract scope is to perform bridge repairs pursuant to all or some of the following Contract Items: 106.491, 127.1, 127.41, 127.42, 129.6, 451, 482.31, 748, 853.21, 853.23, 904.3, 905, 909.3, 910.1, 966, 971.3, and 994.1.

2. The Demand consists of a letter dated April 1, 2024, with attachments, signed by Mr. Glenn Roy certifying that NEL has completed subcontract work totaling $992,378.26, and has received payments from the general contractor Atsalis Brothers Painting Company (Atsalis) of $991,355.26, leaving a balance due of $1,023.00.

3. The Demand states: “NEL will not perform any more work on Contract #117131 for Atsalis Brothers until an agreement is in place with Mass DOT for direct payment for any future work.”

4. The general contractor Atsalis did not submit a reply within the 10-day statutory period for doing so.

RULING

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

NEL has not demonstrated that it meets the requirements for direct payment of the balance due under the subcontract. NEL's statement indicates that it has "future work" remaining on the project. Since it has not achieved substantial completion of the subcontract work, the Demand is premature. Also, NEL's demand for direct payment of future work is beyond the scope G.L. c.30, §39F. Nothing in the direct payment statute authorizes direct payment to a subcontractor for future work.

For the reasons stated above, the Demand is DENIED.

cc:

Atsalis Brothers Painting Company
24595 Groesbeck Hwy
Warren, MI 48089

NEL Corporation
3 Ajootian Way, Bldg B
P O Box 929
Middleton, MA 01949

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

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 7, 2024

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

Claimant: NEL Corporation
Contractor: Atsalis Brothers Painting Company
Contracts: Contract #121734 - Bridge Preservation, W-26-018, W-26-019, 1-495 (NB/SB) Over Concord And Boston Road in the Town of Westford
District: District 3
Amount: "over $900,000"

This Direct Payment Demand (Demand) by NEL Corporation (NEL) was received by the Department on April 22, 2024.

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. NEL is an approved subcontractor on Contract #121734. Its subcontract scope is to perform bridge repairs pursuant to all or some of the following Contract Items: 106.88, 107.855, 127.1, 127.12, 748, 853.2, 853.21, 905, 909.2, 910.1, 912, 987, and 987.02.

2. The Demand consists of a letter dated April 1, 2024, with attachments, signed by Mr. Glenn Roy certifying that NEL has completed subcontract work totaling $992,378.26, and has received payments from the general contractor Atsalis Brothers Painting Company (Atsalis) of $991,355.26, leaving a balance due of $1,023.00.

3. The Demand states: "Atsalis Brothers Painting owes NEL Corporation over $900,000." There is no further breakdown of the of the balance due under the subcontract.

4. The Demand also states: "NEL will not perform any more work on Contract #121734 for Atsalis Brothers until an agreement is in place with Mass DOT for direct payment for any future work."

5. The general contractor Atsalis did not submit a reply within the 10-day statutory period for doing so.

RULING

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

NEL has not demonstrated that it meets the requirements for direct payment of the balance due under the subcontract. NEL's statement indicates that it has "future work" remaining on the project. Since it has not achieved substantial completion of the subcontract work, the Demand is premature. Also, NEL's demand for direct payment of future work is beyond the scope G.L. c.30, §39F. Nothing in the direct payment statute authorizes direct payment to a subcontractor for future work.

The Demand also fails to comply with the formal requirements of G.L. c.30, §39F. The Demand includes only a statement that "Atsalis Brothers Painting owes NEL Corporation over $900,000." It provides no detailed breakdown of the balance due under the subcontract, i.e. what work was both performed and paid for and what work was performed but remains unpaid.

For the reasons stated above, the Demand is DENIED.

cc:

Atsalis Brothers Painting Company
24595 Groesbeck Hwy
Warren, MI 48089

NEL Corporation
3 Ajootian Way, Bldg B
P O Box 929
Middleton, MA 01949

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 6, 2024

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

Claimant: VelCorp GEMS
Contractor: GLX Constructors
Contracts: MBTA Contract #E22CN07 – Green Line Extension
Amount: $137,070.81

This Direct Payment Demand (Demand) by VelCorp GEMS (VelCorp) was received by the Department on April 24, 2024.

FINDINGS

The Demand appears to arise out of a contract between the MBTA and GLX Constructors. 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, VelCorp has not made its demand on the proper awarding authority, which is MBTA.[1] To the extent that VelCorp demands direct payment from MassDOT, the Demand must be DENIED.

Direct payment demands arising from MBTA contracts should be made by a sworn statement delivered to or sent by certified mail to:

MBTA
Attn: Roger LeBoeuf, Senior Lead Counsel / Capital Delivery
10 Park Plaza
Boston, MA 02116
rleboeuf@MBTA.com

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

cc:

Tyler J. Oldenberg, Esq
Marks Gary P.A.
1200 Riverplace Blvd., Suite 800
Jacksonville, FL 32201-0447

Roger LeBoeuf, , Senior Lead Counsel / Capital Delivery
MBTA
10 Park Plaza
Boston, MA 02116

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: May 9, 2024

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

Claimant: Dauphinais Concrete, Inc.
Contractor: New England Building & Bridge Company, Inc.
Contracts: Contract #118480 - Uxbidge-Bridge Replacement (U-2-52) Rt 146 SB Exit 2 Ramp over Emerson Brook
District: District 3
Amount: $30,812.00

This Direct Payment Demand (Demand) by Dauphinais Concrete, Inc. (Dauphinais) was received by the Department on April 16, 2024.

FINDINGS

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

1. Dauphinais is a concrete supplier that furnished material used on Contract #118480 pursuant to a contract with New England Building & Bridge Company, Inc. (NEBB), the general contractor.

2. The Demand consists of a letter dated February 15, 2024, with a detailed breakdown and attachments, signed by counsel for Dauphinais, attesting that Dauphinais is owed $30,812.00 for materials supplied to NEBB for use on the project.

3. The general contractor NEBB submitted a Reply dated February 23, 2024, with copies of cancelled checks and credit card receipts, disputing the allegation that $30,812.00 was owed to Dauphinais. NEBB's Reply states that payments in the amount of $23,420.00 were made to Dauphinais and that it was in the process of paying the remaining balance due of $7,892,00.

4. By letter dated March 18, 2024, counsel for Dauphinais disputed that the amounts paid by NEBB satisfied the balance due for the material furnished to NEBB for use on Contract #118480.

RULING

Based on the above findings, a dispute exists between NEBB and Dauphinais concerning "the balance due under the subcontract" within the meaning of G.L. c.30, §39F (1)(e)(iii). Dauphinais' Demand establishes a claim in the amount of $30,812.00 for direct payment pursuant to G.L. c.30, §39F. NEBB has disputed the amount in its Reply. Accordingly, the Department is obligated to deposit the disputed amount into an interest-bearing joint account in the names of the general contractor and the subcontractor as provided in G.L. c.30, §39F(f). Please take appropriate steps in accordance with MassDOT's Standard Operating Procedure No. ALJ-01-01-2-000.

cc:

Dauphinais Concrete, Inc.
P O Box 461
Sutton, MA 01590

Rosemary M. Tootell, Esq.
Fletcher Tilton PC
100 Franklin Street, Suite 404
Boston, MA 02110

Laura Gammino, Office Manager
New England Building & Bridge Company, Inc.
388 Veazie Street
Providence, RI 02904-1016

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: July 8, 2024

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

Claimant: Coughlin Environmental Services, LLC
Contractor: New England Building & Bridge Company, Inc.
Contracts: Contract #118480 - Uxbridge-Bridge Replacement (U-2-52) Rt 146 SB Exit 2 Ramp over Emerson Brook
District: District 3
Amount: $17,548.19

This Direct Payment Demand (Demand) by Coughlin Environmental Services, LLC was received by the Department on June 19, 2024.

FINDINGS

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

1. Coughlin Environmental Services, LLC states in its Demand that it has provided SWPPP inspection and reporting services to New England Building & Bridge Company, Inc. on Contract #118480.

2. The services were provided pursuant to Purchase Order 2206.PO05 dated April 11, 2023.

3. Coughlin Environmental Services, LLC claims that the balance due pursuant to the terms and conditions of the Purchase Order is $17,548.19

4. The general contractor has not submitted a reply within the statutory 10-day period for doing so.

RULING

Direct payment pursuant to M.G.L. c. 30, §39F is available to a "subcontractor", which for purposes of contract #118480 means “a person approved by the awarding authority in writing

as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor" or "a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars." Providing engineering and consulting services, such as SWPPP inspection and reporting services, to a general contractor does not constitute performance of labor or the furnishing or supply of materials within the meaning of the direct payment statute.

Because Coughlin Environmental Services, LLC is not a "subcontractor" as defined in G.L. c.30, §39F, it is not eligible for direct payment from MassDOT.

For the reasons above, the Demand is DENIED.

cc:

Coughlin Environmental Services, LLC
62 Montvale Ave.
Stoneham, MA 02180

New England Building & Bridge Company, Inc.
388 Veazie Street
Providence, RI 02904-1016

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: July 22, 2024

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

Claimant: Don Martin Corporation
Contractor: New England Building & Bridge Company, Inc.
Contracts: Contract #118480 - Uxbridge-Bridge Replacement (U-2-52) Rt 146 SB Exit 2 Ramp over Emerson Brook
District: District 3
Amount: $67,715.75

This Direct Payment Demand (Demand) by Don Martin Corporation is dated April 30, 2024. It is unclear when it was received by the Department. The Director of Contract Payments referred it to this Office by memorandum dated June 10, 2024.

FINDINGS

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

1. Don Martin Corporation is an approved subcontractor on Contract #118480. Its subcontract scope includes work pursuant to all or some of the following Contract Items: 450.31, 450.42, 450.601, 450.7, 452, and 453.

2. The Demand consists of a letter dated April 30, 2024, with attachments, signed by Mr. Donald J. Martin, Jr., President, certifying that Don Martin Corporation has completed subcontract work totaling $67,715.75, and has received no payment from the general contractor for that work, leaving a balance due under the subcontract of $67,715.75.

3. District 3 construction staff confirms that all of Don Martin Corporation's subcontract work has been completed and accepted, and no unsatisfactory items of work have been identified.

4. The general contractor has not submitted a reply within the statutory 10-day period for doing so.

RULING

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

I find that the Demand complies with the formal requirements of G.L. c. 30, §39F. Further, the documentation before me supports a finding that Don Martin Corporation has substantially completed its subcontract work as of November 8, 2023. The balance due under the subcontract was required to be paid "forthwith" and "not later than the sixty-fifth day" from that date. As New England Building & Bridge Company, Inc. has failed to make such payment in accordance with G.L. c.30, §39F, the Department is obligated to make the payment in response to this Demand.

Kindly pay Don Martin Corporation $67,715.75 from future contract payments and deduct that amount from payments due New England Building & Bridge Company, Inc. in accordance with Section 39F.[1]

cc:

Don Martin Corporation
475 School Street, Suite 6
Marshfield, MA 02050

New England Building & Bridge Company, Inc.
388 Veazie Street
Providence, RI 02904-1016

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

[1] Note that the District has advised that future contract payments to the general contractor may be less than the direct payment amount. Pursuant to G.L. c. 30, §39F, direct payments "shall be made out of amounts payable to the general contractor . . . and out of amounts which later become payable to the general contractor." Therefore, there may be insufficient future contract payments to fully satisfy the direct payment amount.

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations

FROM: Albert Caldarelli, Administrative Law Judge

DATE: September 30, 2024

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

Claimant: Markings, Inc.
Contractor: New England Building & Bridge Company, Inc.
Contracts: Contract #110155 - Bridge Replacement Br. No. U-02-041 (NEBT Beams) Route 146 Northbound over the Mumford River
District: District 3
Amount: $27,806.43

This Direct Payment Demand (Demand) by Markings Inc. was received by the Department on September 16, 2024.

FINDINGS

Based on my review of the Demand, information provided by District 3 construction staff, and the applicable contract, I make the following findings:

1. Markings Inc. is an approved subcontractor on Contract #110155. Its subcontract scope includes work related to pavement markings pursuant to all or some of the following Contract Items: 854.016, 854.036, 854.1, 868.206, 869.206, and 864.31.

2. The Demand consists of a letter dated August 15, 2024, with attachments, signed by the President of the company, certifying that Markings Inc. has completed its subcontract work and that the general contractor has not fully paid for the work, leaving a balance due under the subcontract of $27,806.43.

3. District 3 construction staff confirms that all of Marking Inc.'s subcontract work has been completed and accepted, and no unsatisfactory items of work have been identified. Also, the general contractor has been paid in full for the subcontract work performed by Markings Inc. as of Contract Pay Estimate #42 dated June 12, 2022.

4. The final Pay Estimate for Contract #110155 was made as of September 9, 2024. As a result, pursuant to Division I, Subsection 9.05 of the Contract, no further contract payments are due the general contractor.

5. The general contractor, New England Building & Bridge Company, Inc., did not submit a reply within the statutory 10-day period for doing so.

RULING

Based on my findings above, Markings Inc. has demonstrated that it substantially completed the subcontract work that is the subject of the Demand. The supporting documentation provided supports a finding that there is a balance due under the subcontract of $27,806.43 which was required to be paid by the general contractor "forthwith" after receiving payment from MassDOT for the subcontract work as of June 2022.

In other circumstances, the above would cause the Department to make direct payment to Markings Inc. of the subcontract balance. However, direct payments "shall be made out of amounts payable to the general contractor . . . and out of amounts which later become payable to the general contractor." *See* M.G.L. c. 30, §39F(g). Because final payment for Contract #110155 has been made, there are no amounts payable or that will become payable to the general contractor from which to make a direct payment.

For the reasons stated above, there is no further action required by the Department with respect to this Demand.

cc:

Markings Inc.
30 Riverside Drive
Pembroke, MA 02359

New England Building & Bridge Company, Inc.
388 Veazie Street
Providence, RI 02904-1016

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

APPENDIX C-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF DENIAL OF OUTDOOR ADVERTISING PERMITS ##2024D002 and 2024D003

PARTIES	
APPELLANT **MURRAY OUTDOOR COMMUNICATIONS** **Address: P.O. Box 431 M.O.** **Shrewsbury, MA 01545** **Counsel: Steven S. Broadley, Esq.** **ArentFox Schill LLP** **800 Boylston Street** **Boston, MA 02199**	**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	11/5/24	NOTICE OF APPEAL filed by Murray Outdoor Communications by Letter dated November 5, 2024, from Joseph T. Murray, President
2	12/2/24	STATUS CONFERENCE held as scheduled.
3	12/3/24	SCHEDULING ORDER: • Position Papers: The parties have elected to submit position papers in advance of the hearing. - Appellant shall file and serve its position paper on or before December 20, 2024. - The Department shall file and serve its position paper on or before January 10, 2025. - If Appellant elects to submit a response to address new issues raised in the Department's position paper, it shall file and serve such response by January 17, 2025. • Discovery: The parties are encouraged to engage in voluntary discovery. • Witnesses: On or before January 17, 2025, each party shall file and serve its Witness List identifying the names, titles, and anticipated subject matter of testimony from each witness expected to testify at the hearing. • Hearing Exhibits: The parties shall serve copies of their proposed hearing exhibits on or before January 17, 2025. After conferring, the parties shall file a joint exhibit list at least 48 hours before the date of the hearing that identifies and attaches all hearing exhibits that are agreed upon and any proposed hearing exhibits that are dispute. • Hearing: A further Scheduling Order will be issued to set the date, time, and location of the hearing.
4	12/19/24	PRE-HEARING MEMORANDUM filed by Murray Outdoor Communications