

COMMONWEALTH OF MASSACHUSETTS

# Supreme Judicial Court

Appeals Court No. 2024-P-0941  
FAR No. \_\_\_\_\_

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AMP ELECTRICAL, INC.,  
Plaintiff-Appellant

v.

W.M. SCHULTZ CONSTRUCTION, INC.  
ENDURANCE ASSURANCE CORPORATION,  
and  
TOWN OF WEST SPRINGFIELD,  
Defendants-Appellees

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**PLAINTIFF-APPELLANT'S APPLICATION  
FOR FURTHER APPELLATE REVIEW AFTER  
DECISION OF THE MASSACHUSETTS  
APPEALS COURT**

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AUGUST 21, 2025

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### **1. Request for Further Appellate Review**

The plaintiff-appellant, AMP Electrical, Inc. ("AMP"), hereby respectfully applies, pursuant to Mass. R. App. P. 27.1, to this Honorable Court to obtain further appellate review of the summary judgment of the Hampden County Superior Court, affirmed by a Rule 23.0 decision of the Massachusetts Appeals Court No. 24-P-941 (July 31, 2025). AMP states that this application is founded upon substantial reasons affecting the public interests and the interests of justice as follows:

- the superior court judgment requires, AMP, an *electrical* subcontractor on a public construction project (MGL ch. 149, § 44F) to be responsible for significant (in excess of \$88,000) excavation and concrete fabrication;
- the appeals court decision found AMP's challenge to an electrical trade's responsibility for significant excavation work on a public construction project "frivolous" (Mass. R. App. P. 25) which has exposed AMP to petitions

for legal fees and costs of appeal in excess of \$73,000.

- the appeals court decision awarded legal fees and costs of appeal for frivolous appeal under Rule 25 to the Town of West Springfield who was added as a third party defendant by the general contractor, and against whom AMP made no claims and raised no issues on appeal.

## **2. Statement of Prior Proceedings**

AMP was a filed sub-bidder for the electrical trade in connection with wastewater pumping station improvements in the Town of West Springfield, the awarding authority. The general contractor was defendant, W.M. Schultz Construction, Inc. ("Schultz")

After completion of the job, AMP filed suit against Schultz and its surety for payment of \$88,730.70 for excavation, backfill and concrete encasement fabrication which AMP had been compelled by Schultz to provide under protest. A-10

Schultz answered and impleaded the Town of West Springfield contending that if AMP was owed

payment by Schultz, the town owed Schultz that amount. (A-5,22,37). AMP made no direct claims against the town, contending only that the disputed excavation work was the responsibility of Schultz under its general contract. AMP did not support Schultz' third party claim against the town that if Schultz was responsible for the disputed work, the town would owe Schultz additional money beyond its original bid.

Schultz filed a motion for summary judgment contending that AMP was responsible for the excavation and concrete work under the contract documents. AMP filed a cross motion for summary judgment contending that the excavation and concrete specifications were not included in the electrical specifications section and, in any event, excavation and concrete work was not properly work of the electrical subcontractor under the filed sub-bid law, MGL c. 149, § 44F. A-54-397.

The Superior Court allowed Schultz's motion for summary judgment, denied AMP's motion for summary judgment and dismissed AMP's complaint. Add. AMP timely filed a notice of appeal to the

appeals court of the summary judgment against it. AMP did not include in its notice of appeal the superior court's dismissal of Schultz's third party complaint against the town. AMP's main brief and reply brief addressed only its claims against Schultz. The town filed a brief which supported Schultz but was primarily focused on its arguments that if the summary judgment was reverse, Schultz had not effectively preserved its claims under its third party complaint.

By Rule 23.0 decision on July 31, 2025, the appeals court affirmed the superior court summary judgment against AMP and found AMP's appeal frivolous under Rule 25. Add. The appeals court invited fee petitions from both Schultz, whose judgment AMP appealed, and from the town, whom AMP did not sue or raise any issues against on appeal. On August 14, 2025, each appellee filed a fee petition seeking in excess of \$36,000.

On August 13, 2025, AMP filed a motion for reconsideration in the appeals court which was denied on August 15, 2025.<sup>1</sup>

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<sup>1</sup> The denial of AMP's motion for reconsideration was "without prejudice to the renewal of AMP's argument

### **3. Facts Relevant to the Appeal.**

AMP is an electrical contractor located in West Springfield, Massachusetts. A-107-08. Schultz is a general contractor located in New York. A-108. The Town of West Springfield was the owner of the public construction project at issue identified as Wastewater Pumping Station Improvements (the "Project").A-108. The town issued plans and specifications for public bid by general contractors and filed sub-bid subcontractors. A-108-09,209. The electrical sub-bidder specifications for the Project are contained in the Division 16, Electrical specifications. A-240. The excavation specifications were the responsibility of Schultz under general contract. No excavation specifications were written into the Division 16 Electrical Specifications.

Following the issuance of the bid documents, the town's engineer issued Addendum No. 2, dated March 19, 2018, which contained *Questions & Responses* consisting of various questions from

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regarding attorney's fees" in its response to the fee petitions due August 28, 2025.

bidders and the engineers' responses thereto, including the following:

*15. Who is responsible for excavation and backfill of underground electrical conduits?*

*Response: The electrical sub-bidder is responsible for this work. A-122,125.*

Three days before the bidding deadline, the Town's engineer issued Addendum No. 3, dated March 26, 2018 (A-127,128) which referenced trench details and added to a drawing for the excavation and backfill for underground electrical conduits for the Project (a-368).

The specifications for the excavation of trenches and backfill for the electrical conduit are contained in specification Section 02315 of the General Contract. A-234-237.

AMP submitted its filed subcontractor bid for the electrical work specified on the Project and was the lowest electrical filed sub-bidder. A-341,342. Schultz was the lowest eligible, responsive, and responsible general bidder. A-110 The town entered into a written construction contract with Schultz. On July 18, 2018, Schultz and AMP entered into a statutory filed sub-bidder

subcontract, wherein AMP agreed to perform the work specified in Division 16 (Electrical) of the specifications. A-166-167.

On June 26, 2019, AMP submitted to Schultz a Request for Increase in price for AMP's services, identified as a proposed change order, in the sum of \$88,730.70 for furnishing and installing the concrete encased duct bank as detailed in drawing E-401; excavation and concrete casement; backfilling and compacting trench and affected areas asphalt patching; and, providing and installing rebar per drawing E-401. A-134. It was AMP's position that the excavation and concrete work was not included in its Electrical specification and moreover, excavation and concrete work could not be included in the specifications for the electrical trade.

On July 2, 2019, W.M. Schultz advised AMP of the Town's engineers' rejection of AMP's initial proposed Change Order. A-140. In the rejection, the engineers stated that if excavation is not customarily done by electricians, AMP could subcontract the work to an excavation contractor.

On September 3, 2019, Schultz confirmed with

AMP that Schultz would not approve AMP's change order and acknowledged AMP's decision to contract directly with Borges Construction, Inc., an excavation contractor, for completion of the conduit excavation work. The correspondence further acknowledged AMP's position to complete the work prescribed in AMP's PCO #6, under protest. A-154.

**4. Points on which Further Review is Sought**

- A. AMP seeks further review on the issue of whether under public construction law (MGL ch. 149, § 44F), a named trade (here, electrical) can be responsible for work not "customarily performed" by that trade (here, excavation) and, in this case, whether or not AMP offered sufficient evidence that significant excavation is not work customarily done in the electrical trade to bar summary judgment.
- B. AMP seeks further review on the issue of whether its appeal of the summary judgment can be found frivolous in light of the fact that the only evidence in the summary judgment record was that significant excavation is not customarily performed in the electrical trade.

C. AMP seeks further review on the issue of whether, in any event, the town can be awarded legal fees under M.R.A.P.25 for a frivolous appeal when AMP did not make the town a party to the case, sought no relief against the town and appealed no finding related to the town.

**5. Statement as to Why Further Appellate Review is Appropriate**

A. Under Subcontracts Awarded Pursuant to Section 44F of Chapter 149, AMP cannot be Responsible for Excavation because Excavation is not a Customarily Performed by Electricians.

On cross motions for summary judgment in the superior court and on appeal, AMP argued that, even if the eleventh hour Addendum 3 aptly incorporated the excavation and concrete ductwork into the electrical trade specifications, because excavation, backfill and duck bank installation is not "customarily performed" by the electrical sub-trade, it could not properly have been included in the work of AMP. MGL c. 149, § 44F(1)(a). As stated in *Hardware Specialties, Inc. v. Mishara Const. Co.*,

This case is governed by the specific provisions of G.L. c. 149, ss 44A-44J, as amended.. The third

sentence of s 44C (as appearing in St.1957, c. 590, s 2) required that '(e)ach separate section in the specifications . . . (should) require the subcontractor to install all materials to be furnished by him . . . other than materials which in the opinion of the awarding authority it . . . (was) not customary under then current trade practices for such subcontractor to install and the installation of which . . . (was to be) expressly required by another section of the specifications.'

2 Mass. App. Ct. 277, 282-83(1974). Hence, the requirement that AMP's work only include that which is customary in the electrical trade is statutorily incorporated in its subcontract. See *Hardware Specialities*, 2 Mass. App. Ct. 277, 280 (valid usages incorporated by implication in the contract).

Accordingly, the town must be deemed to have concluded that the excavation, backfill and concrete duct bank work "is customarily performed" by the electrical sub-trade. MGL c. 149, § 44F(1)(a) (each section of the specifications includes work that "in the opinion of the awarding authority based upon an investigation of the work involved, is customarily performed in that sub-trade..."). Therefore, if the significant excavation, backfill and duck bank installation is not "customarily performed" by the electrical sub-

trade, it could not properly have been included in the work of AMP. MGL c. 149, § 44F(1)(a).

On summary judgment, the motion judge did not find that the excavation, backfill and duck bank installation is "customarily performed" by the electrical trade. The court addressed the issue only in a footnote, citing to a case where an electrical subcontractor had agreed to do certain trenching work.

The appeals court acknowledged, without accepting, AMP's argument but stated "AMP did not proffer any evidence to support this assertion on summary judgment." The appeals court conceded in footnote 7 that AMP had, indeed, filed an affidavit on the issue at summary judgment, but without explanation stated the affidavit was insufficient to raise an issue of material fact barring summary judgment.

AMP's burden on summary judgment (Mass.R.Civ.P.56) was to raise a genuine issue of material fact as to whether the work at issue in this case was "customary" in the electrical trade. With no facts offered in contradiction in the superior court, AMP offered the affidavit of its

president (A-92,93) that:

- I have been a licensed electrician in Massachusetts since 1998 and have operated AMP since 2006.
- Over that time AMP has been a filed sub-bidder for hundreds public construction projects in Massachusetts.
- It is beyond any dispute that excavation and backfilling (beyond extremely minimal work) is not part of the electrical trade.
- There is no relationship between the work of an electrical subcontractor and excavation and backfilling.

In its decision, the appeals court concluded, without explanation, that the affidavit was insufficient. Yet, this level of affidavit on this issue has been found sufficient at the trial court level:

In the present case, Zeraschi has submitted the affidavit of its president, Robert Zeraschi. In pertinent part, the affidavit states that: Zeraschi has never fabricated or furnished lead-coated copper flashing. It is not customary for masons to fabricate or supply lead-coated copper flashings, as Zeraschi was ordered to do on this Project. That is a craft customarily performed by the roofing or sheet metal subtrades.

*See Zeraschi & Son, Inc. v. R.W. Granger & Sons, Inc.*, No. CIV.A. 00-0473, 2001 WL 1902480, at \*5 (Mass. Super. May 30, 2001) (affidavit sufficient to raise an issue of fact for trial as to customary practice in masonry industry, even in the face of an affidavit to the contrary).

There was further evidence on summary judgment from which an inference could be drawn that excavation is not part of the electrical trade. In correspondence from Schultz to the town and its engineers (A-147-48), Schultz quoted the town engineers as stating:

"The argument that excavation is not work typically done by electricians does not preclude them from subbing out such work."

This is a tacit concession of the point by the town's agents. *See Attorney General v. Bailey*, 386 Mass. 367, 371 (1982) (in determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the non-moving party).

Additionally, all of the written excavation specifications in the contract are directed at the general contractor. (A-228-234). Lastly, it is probative that when AMP was compelled to complete

the excavation work under protest, AMP hired a construction company to do the excavation and duct bank, not an electrician. (A-154).

In reviewing the summary judgment motions *de novo*, the appeals court should have found sufficient evidence entitling AMP to a trial. See *Correllas v. Viveiros*, 410 Mass. 314, 316-17 (1991) (on summary judgment, all doubt as to the existence of a genuine issue of material fact must be resolved against the moving party); *Lawrence v. City of Cambridge*, 422 Mass. 406, 410 (1996) (the burden on a party opposing summary judgment "is not to prove his case at summary judgment, but to raise a genuine issue of material fact."). Instead, the appeals court assumed that it was appropriate under section 44F to include large scale excavation in the electrician's specifications.

More broadly, no Massachusetts decisions provide any guidance as to the limits on the awarding authorities' discretion to determine what work "is customarily performed" by a sub-trade listed in the statute. MGL c. 149, § 44F(1)(a) (requiring that each section of the specifications includes work that "in the opinion

of the awarding authority based upon an investigation of the work involved, is customarily performed in that sub-trade...").

B. AMP'S Appeal was not Frivolous.

In Massachusetts:

[a]n appeal is frivolous "[w]hen the law is well settled, when there can be no reasonable expectation of a reversal...." *Allen v. Batchelder*, 17 Mass.App.Ct. 453, 458, 459 N.E.2d 129 (1984). See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 717, 575 N.E.2d 734 (1991). Unpersuasive arguments do not necessarily render an appeal frivolous. *Shahzade v. C.J. Mabardy, Inc.*, 411 Mass. 788, 797 n. 8, 586 N.E.2d 3 (1992). *Glorioso v. Retirement Bd. of Wellesley*, 401 Mass. 648, 652, 518 N.E.2d 851 (1988). The determination whether an appeal is frivolous is left to the sound discretion of the appellate court. *Id.*

*Avery v. Steele*, 414 Mass. 450, 455, 608 N.E.2d 1014, 1017 (1993).

AMP's appeal should not be deemed frivolous. AMP reasonably believes that excavation is not customarily part of the roofing trade and therefor, under section 44F, it was not properly part of the electricians work. That AMP's affidavit was deemed inadequate does not render AMP's legal position frivolous.

It is meritorious to contend that, under section 44F of chapter 149, the work assigned to a trade under the filed sub-bid law must be customary

to that trade. Based on the summary judgment record, AMP had a "reasonable expectation of reversal" of the summary judgment entered against it. See *Allen v. Batchelder*, 17 Mass. App. Ct. 453, 458, 459 N.E.2d 129, 133 (1984) (frivolous appeal if there is no reasonable expectation of reversal under settled law).

C. Rule 25 Does not Contemplate, in any event, AMP Paying the Town's Legal Fees.

Without conceding the point, even if AMP's appeal was legally frivolous, it should not be obligated to pay the legal fees of the town. Although the town is an "appellee", its presence in the case is not AMP's doing. AMP did not sue the town. After Schultz impleaded the town, AMP asserted no direct claims against it. AMP's position has always been that the excavation work in dispute is the responsibility of Schultz under the documents as written. AMP's notice of appeal listed only the summary judgment entered against it on its claims against Schultz.

The town's brief, while weighing in on the superior court's summary judgment decision, was directed primarily at arguing that Schultz had not,

on appeal, perfected its claims against the town if AMP prevailed. There is no justification for construing Rule 25 to authorize a fee award against a party AMP neither sued nor appealed.

The cognate statute allowing sanctions for frivolous claims in the trial court is written so as to entitle parties to a legal fee award only if the frivolous claim is brought against that party:

If such a finding is made with respect to a party's claims, the court shall award *to each party against whom such claims were asserted* an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims.

Mass. Gen. Laws Ann. ch. 231, § 6F (emphasis added). There is no reason to interpret Rule 25 differently.

AMP ELECTRICAL, INC.  
PLAINTIFF-APPELLANT  
BY:

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*Atty for plaintiffs/appellants*

August 21, 2025

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of Court that pertain to the filing of briefs, including Mass. R. App. P. 20. I further certify that the foregoing brief complies with the applicable length limitations in Mass. R. App. P. 20 because it was prepared using Microsoft Word in Courier New 12-point font, a monospaced font, with 1 and 1/2-inch margins, and less than 10 typed pages of argument.

Dated: August 21, 2025

/s/ Bart Heemsker  
Bart Heemsker

**CERTIFICATE OF SERVICE**

I, Bart Heemskerk certify that on August 21, 2025  
I served the within application in the above  
captioned matter upon:

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via **Electronic Service** through the efileMA  
electronic filing system. /s/ Bart Heemskerk  
Bart Heemskerk

Dated: August 21, 2025

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-941

AMP ELECTRICAL, INC.

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vs.

W.M. SCHULTZ CONSTRUCTION, INC. & another; TOWN OF WEST  
SPRINGFIELD, third-party defendant.

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Pending in the Superior

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Court for the County of Hampden

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Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

 , Clerk

Date July 31, 2025.

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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-941

AMP ELECTRICAL, INC.

vs.

W.M. SCHULTZ CONSTRUCTION, INC. & another;<sup>1</sup>  
TOWN OF WEST SPRINGFIELD, third-party defendant.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, AMP Electrical, Inc. (AMP), appeals from a summary judgment dismissing its complaint against the defendants, W.M. Schultz Construction, Inc. (Schultz), and Endurance Assurance Corporation (Endurance). We affirm.<sup>2</sup>

Background. We summarize the undisputed material facts on the summary judgment record, reserving certain facts for later

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<sup>1</sup> Endurance Assurance Corporation.

<sup>2</sup> We note that Schultz brought a third-party complaint against the town of West Springfield, which was also dismissed on summary judgment. AMP's appeal does not raise any separate issues regarding the dismissal of Schultz's third-party complaint.

discussion. The town of West Springfield (town) is the owner of a public construction project identified as Wastewater Pumping Station Improvements (project). The town's project engineer drafted plans and specifications for public bid by general contractors and subbid contractors pursuant to G. L. c. 149, § 44F, for the project.

Schultz was awarded the general construction contract for the project.<sup>3</sup> Thereafter, the town's project engineer held electrical subcontractor bid meetings, which AMP attended prior to filing its subcontractor bid. At the meetings, the town distributed the project's specifications and drawings to the prospective electrical subcontractors. The town informed prospective subcontractors of project updates by releasing addenda to them during the prebidding process, some of which were in response to questions raised by the prospective subcontractors.<sup>4</sup>

As relevant here, the town issued Addendum No. 2 on March 19, 2018, which included the following question and response:

Question 15: "Who is responsible for excavation and backfill of underground electrical conduits?"

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<sup>3</sup> Subsequently, the town and Schultz entered into a written contract naming Schultz as the principal and Endurance as the surety. Endurance issued Schultz a payment bond for the project.

<sup>4</sup> AMP does not dispute that it received Addendum Nos. 2 and 3 prior to filing its subcontract bid.

Response: "The electrical sub-bidder is responsible for this work."

The town issued Addendum No. 3 on March 26, 2018, and it, among other things, replaced Drawing Sheet E-401 with Sheet E-401. The revised Sheet E-401 provided additional trench details regarding the excavation and backfill of underground electrical conduits for the project.

On March 29, 2018, AMP filed its electrical subcontractor bid; it was the lowest subbidder. On July 18, 2018, Schultz and AMP entered into a written contract (subcontract) whereby Schultz agreed to pay AMP \$1,800,000 for "all work specified in Division 16 of the specifications for Electrical," "the plans referred to therein," and Addendum Nos. 2 and 3.<sup>5</sup>

On June 26, 2019, AMP submitted a change order to Schultz requesting an increase in price in the amount of \$88,730.70. Among other things, AMP sought the increase for "[e]xcavation and concrete easement" and "[b]ackfilling and compacting trench and affected areas [a]sphalt patching." In short, AMP believed the subcontract did not include excavation and backfilling work and thus, requested that it be compensated for that additional work. The town's project engineer rejected AMP's request, stating that Addendum Nos. 2 and 3 clarified that the work AMP

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<sup>5</sup> Division 16 described the basic electrical requirements for the project.

now claims as extra was part of the electrical subbidder's responsibility. Ultimately, on August 25, 2019, AMP informed Schultz that it would proceed with the excavation and backfilling work under protest and it provided an updated change order (PCO #6) for the amount of \$83,490.15. Schultz rejected AMP's request for a change order and acknowledged that AMP would proceed with the work under protest.

In May 2021, after Schultz failed to pay AMP for the work it completed pursuant to PCO #6, AMP filed a complaint alleging two counts against Schultz: breach of contract and unfair and deceptive practices in violation of G. L. c. 93A, §§ 2 & 11.<sup>6</sup> The complaint also sought recovery on a payment bond pursuant to G. L. c. 149, § 29, from Endurance. The defendants moved for summary judgment on all counts. AMP cross-moved for summary judgment on the breach of contract and payment bond claims. The judge allowed the defendants' motion for summary judgment and denied AMP's cross motion for summary judgment. AMP timely appealed from the summary judgment.

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<sup>6</sup> AMP's complaint alleged breach of contract for both (1) Schultz's failure to pay for the work it completed pursuant to PCO #6 and (2) unpaid retainage. However, between the filing of the complaint and the judge's summary judgment decision, AMP received payment for the retainage. Thus, this decision only addresses the remaining breach of contract claim concerning the work completed pursuant to PCO #6.

Discussion. On appeal, AMP asserts that the judge erred in granting the defendants' motion for summary judgment. We review the grant of summary judgment de novo. See Le Fort Enters., Inc. v. Lantern 18, LLC, 491 Mass. 144, 149 (2023). Where, as here, the parties filed cross motions for summary judgment, we view the evidence in the light most favorable to the party whose motion was denied. See Smiley First, LLC v. Department of Transp., 492 Mass. 103, 108 (2023). Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 713 n.2 (1991). We discern no error in the judge's grant of summary judgment in the defendants' favor.

On appeal, AMP asserts that it was only required to complete the work designated in Division 16 of the subcontract. AMP relies on language in G. L. c. 149, § 44F, and insists that because the excavation and backfilling work described in Addendum Nos. 2 and 3 was "neither a 'specification' nor a contract term" and "was not directed to the electrical subbidder in particular," AMP was not required to complete that work.

The judge determined that "Addendum No. 2 clarified that the electrical subcontractor is responsible for all backfilling and excavating." Further, the judge concluded that "[t]he contract documents made clear that AMP was required to excavate

and backfill underground electrical conduits." We discern no error in the judge's determination.

As relevant here, G. L. c. 149, § 44F states,

"[e]very contract subject to [G. L. c. 149, § 44A] shall include specifications . . . . Such specifications shall have a separate section for each of the following classes of work if in the estimate of the awarding authority such class of work will exceed \$25,000: . . . (o) electrical work, . . . . Each separate section in the specifications . . . shall specify by number each sheet of plans showing work to be done by the subcontractor under such section, . . . . Each class of work set forth in a separate section of the specifications pursuant to this section shall be a sub-trade designated in the appropriate category of the general bid form and shall be the matter of subcontract made on the basis of the sub-bids."

G. L. c. 149, § 44F (1) (a). This language requires each class of work to be listed in separate sections of the specifications, but those specifications incorporate "number[ed] sheet[s] of plans." Id. Here, Division 16, in listing the electrical "[w]ork to be done," referenced Sheet E-401. That sheet, as amended by Addendum 3, showed the requirements to provide a concrete encased ductbank thirty-six inches below grade and to backfill the resulting trench. Nothing in G. L. c. 149, § 44F prohibits an awarding authority from clarifying a class of work in addenda, as AMP suggests it does. Indeed, during the prebidding process, questions arise and clarifications must be provided, and that is what occurred here. Here, the town provided clarification in the form of Addendum Nos. 2 and 3, both of which AMP received before it submitted its bid, and

AMP's bid was in response to the specifications and supplemental documents, including the addenda.

AMP acknowledges that it received notice of Addendum Nos. 2 and 3, yet insists that excavation and backfilling are not customary electrical work, and thus, are the contractor's responsibility. However, AMP did not proffer any evidence to support this assertion on summary judgment. Contrast John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 499 (1979) (court permitted evidence of business custom in construction and plumbing industry to resolve ambiguity with respect to plumbing subcontractor's duty to install certain toilet room accessories). Because no such evidence was proffered here, our analysis focuses on the language of the contract before us.<sup>7</sup>

AMP was on sufficient notice that its subcontract included the work it now claims was extra. AMP signed the subcontract which stated that AMP "agree[d] to furnish all labor and materials required for the completion of all work specified in Division 16 of the specifications for Electrical and the plans

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<sup>7</sup> At oral argument, AMP maintained that the town engineer's suggestion that AMP could "sub out" the excavation and backfilling work signaled that such work was not customary electrical work. However, the affidavit from AMP's president does not sufficiently address the custom of the electrical industry. Without a sufficient affidavit or other evidence, we remain unpersuaded that there was a genuine issue of material fact barring summary judgment.

referred to therein and Addenda . . . No. 2 dated 3/19/18, and No. 3 dated 3/26/18." See John F. Miller Co., 7 Mass. App. Ct. at 499 ("Sections of a construction contract, as of any other kind, ought to be construed to give a reasonable effect to each"). Thus, the subcontract clearly included the excavation and backfilling work as described in Addendum Nos. 2 and 3. Additionally, the "E" in Sheet E-401 from Addendum No. 3 stands for "electrical." Such a designation at the very least signaled to AMP that it should review the update because it contained electrical work therein.

AMP was on notice of Addendum Nos. 2 and 3's requirements when it submitted its bid; any confusion it may have had regarding whether the excavation and backfilling work were its duties should have been resolved by AMP clarifying such. See John F. Miller Co., 7 Mass. App. Ct. at 498. Even reviewing the evidence in the light most favorable to AMP, we discern no error in the judge's determination that the subcontract included the excavation and backfilling work.<sup>8</sup> Accordingly, where all of AMP's claims turned on its allegation that the subcontract did

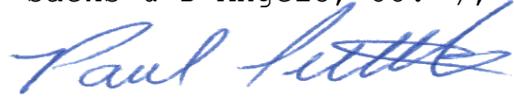
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<sup>8</sup> We pause to note that, as a public policy matter, parties to a construction contract must be able to confidently rely upon project updates communicated via addenda and other similar forms. It would be unworkable and inefficient if the entirety of a project's specifications were to be updated each time a question arose.

not include the excavation and backfilling work, summary judgment properly entered in favor of the defendants.<sup>9</sup>

Judgment affirmed.

By the Court (Blake, C.J.,  
Sacks & D'Angelo, JJ.<sup>10</sup>),

A handwritten signature in blue ink, appearing to read "Paul Little".

Clerk

Entered: July 31, 2025.

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<sup>9</sup> The defendants and town seek appellate attorney's fees and double costs, pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), on the ground that AMP's appeal is frivolous. Considering the subcontract's language and totality of the other circumstances, we agree that AMP's appeal is frivolous and therefore an award of fees is appropriate. Pursuant to Mass. R. A. P. 26 (a), as appearing in 481 Mass. 1655 (2019), single costs will be awarded to the defendants and town. Consistent with the requirements of Fabre v. Walton, 441 Mass. 9, 10 (2004), the defendants and town may file a request for appellate attorney's fees and single costs, with supporting documentation, within fourteen days of the issuance of the decision in this case. AMP shall have fourteen days thereafter within which to respond. See id.

<sup>10</sup> The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2179CV00239

AMP ELECTRICAL, INC.

vs.

W.M. SCHULTZ CONSTRUCTION, INC. & another<sup>1</sup>;  
TOWN OF WEST SPRINGFIELD, third-party defendant

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

MAY 20 2024

*James J. Jacob*  
CLERK OF COURTS

**MEMORANDUM OF DECISION AND ORDER ON (1) DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND (2) PLAINTIFF'S CROSS MOTION FOR SUMMARY  
JUDGMENT**

The plaintiff, electrical subcontractor Amp Electrical, Inc. ("Amp"), brings this action for breach of contract (count 1) and violation of G. L. c. 93A, §§ 2 & 11 (count 2) against general contractor W.M. Schultz Construction, Inc. ("Schultz"), and seeks recovery on a payment bond pursuant to G. L. c. 149, § 29 from Schultz's surety, Endurance Assurance Corporation ("Endurance") (together, "defendants").<sup>2</sup> Defendants filed a motion for summary judgment on all counts and Amp filed a cross motion for summary judgment on counts 1 and 2.<sup>3</sup> After hearing and a review of the parties' submissions, the defendants' motion is **ALLOWED** and the plaintiff's motion is **DENIED**.

**BACKGROUND**

The following undisputed facts are taken from the consolidated statement of facts and the joint exhibits attached thereto.

<sup>1</sup> Endurance Assurance Corporation

<sup>2</sup> Schultz filed a third-party complaint against the Town of West Springfield as the owner of the project at issue.

<sup>3</sup> The town filed a response to the defendants' motion for summary judgment, requesting that the court dismiss Schultz's third-party complaint against the town if the court grants the defendants' motion.

The Town of West Springfield (“town”) is the owner of a public construction project identified as the Wastewater Pumping Station Improvements (“project”). Schultz, the lowest eligible bidder under G. L. c. 149, § 44, was awarded the general construction contract for the project. Schultz, as principal, and Endurance, as surety, executed a bond required by G. L. c. 149, § 29, securing the payment of labor and material used or employed in the construction of the project. Tighe and Bond, Inc. (“T&B”) was the town’s project engineer.

On or about July 18, 2018, after Amp submitted its electrical subcontractor bid for the project’s electrical work<sup>4</sup> and was determined to be the lowest sub-bidder, Amp and Schultz executed a written statutory filed sub-bidder subcontract (“subcontract”). Under the subcontract, Amp agreed to supply certain electrical labor and materials to the project in accordance with the relevant incorporated plans, specifications, drawings, schedules, and addenda. It is undisputed that Amp received and reviewed all project-related plans, specifications, drawings, and Addenda Nos. 1-3 before submitting its electrical subcontractor bid.

On June 26, 2019, Amp submitted an initial proposed Change Order with a Request for Increase in price to Schultz in the amount of \$ 88,730.70 for: furnishing and installing the concrete encased duct bank; excavation and concrete easement; backfilling and compacting trench and affected areas; asphalt patching; and providing and installing rebar per a specific drawing. Schultz transmitted Amp’s initial proposed Change Order to T&B on June 28, 2019.

On July 2, 2019, T&B rejected the request. T&B determined that Amp’s proposed Change Order requested payment for completion of work which was within the scope of

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<sup>4</sup> Prior to submitting its bid proposal, Amp attended all pre-bid meetings, and received all plans, specifications, drawings, and Addenda Nos. 2 and 3 associated with the electrical sub-bidders’ scope of the work.

assigned work for the electrical sub-bidder on the project, as outlined in the contract, the pre-bid documents, and the subcontract. Schultz forwarded T&B's denial to Amp.

Amp disagreed with T&B's decision and advised Schultz that it would withdraw from the project. After much discussion and correspondence, Amp proceeded with the project under protest and circulated a revised Change Order proposal, marked Proposed Change Order # 6<sup>5</sup> ("PCO #6") in the amount of \$83,490.15 for excavation and backfill work (the "Disputed Work"). Schultz advised Amp that it could not approve Amp's PCO #6 due to T&B's earlier decision. Schultz advised Amp that it would contract directly with Borges Construction, Inc. ("Borges") to perform the Disputed Work associated with the project. Amp reluctantly contracted with Borges to complete the Disputed Work on the project under protest.

Amp filed its complaint (the "Complaint") against the defendants on or about May 14, 2021. Amp seeks damages in the amount of \$ 83,490.15 for unpaid money arising from work completed pursuant to the PCO #6 and \$13,543.14 for unpaid retainage and undisputed invoices.

On June 28, 2021, Schultz and Amp executed a Final Lien Waiver, Final Waiver of Claim, and Release ("Final Lien Waiver"). The Final Lien Waiver stated that Amp had already been paid \$1,741,961.16 for its work on the project and would be paid an additional \$13,543.06. Amp received the \$13,543.06 payment per a check dated May 17, 2021.

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<sup>5</sup> Joint Appendix, Ex. 10. Amp's revised change order referenced a sub-contract with Borges Construction, Inc. for excavation, backfill, and site restoration in the amount of \$ 83,490.15.

## DISCUSSION

### **I. Standard of Review**

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). “The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue.” *Scholz v. Delp*, 473 Mass. 242, 249 (2015). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party’s favor. *Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 680 (2016).

### **II. Breach of Contract**

Amp contends that Schultz’s failure to pay Amp \$ 83,490.15 for the work completed pursuant to the PCO #6 and \$13,543.14 for unpaid retainage and undisputed invoices is a breach of contract. Schultz argues that the backfill and excavation work at issue was a part of the contract, and that the retainage amount has since been paid.

#### *A. PCO #6 Work*

The court agrees with Schultz. The contract documents made clear that Amp was required to excavate and backfill underground electrical conduits. First, the conduit-related electrical specifications in the general contract require that trenches be backfilled. See Ex. 22, § 16131, Part 3.1 NN (“For non-concrete encased underground conduit installations, backfill the trench with sand borrow for the full width of the trench and extend the sand borrow 12-inches over the conduit.”).

Second, Addendum No. 2 clarified that the electrical subcontractor is responsible for all backfilling *and excavating*. See Ex. 1, A1-4 (question 15 and corresponding answer: “Who is

responsible for excavation and backfill of underground electrical conduits? Response: The electrical sub-bidder is responsible for this work.”).

Third, Addendum No. 3 informed bidders that Drawing Sheet E-401 was replaced with the drawing attached to the document.<sup>6</sup> See Ex. 2, A3-2, Item 3-18. E-401 provided specifications about the conduit trenching, including its depth, spacing, and backfilling. See Ex. 24 (note 6 to drawing stating “Provide direct buried conduit a minimum of 36” below grade, spaced apart 3” minimum. Provide continuous marker tape 1’ over the conduit. Provide 2” of sand around conduits and backfill trench with borrow.”)

All of these documents and provisions were a part of Amp’s contract with Schultz. See *John F. Miller Co. v. George Fichera Constr. Corp.*, 7 Mass. App. Ct. 494, 499 (1979) (“Sections of a construction contract, as of any other kind, ought to be construed to give a reasonable effect to each.”). The subcontract Amp signed was explicit that Amp “agree[d] to furnish all labor and materials required for the completion of all work specified in Division 16 of the specifications for Electrical and the plans referred to therein and Addenda No. 1 dated 3/7/18, No. 2 dated 3/19/18, and No. 3 dated 3/26/18 . . . for the sum of . . . \$1,800,000.00 . . .” Ex. 3, § 1. Amp “agree[d] to be bound to [Schultz] by the terms of the hereinbefore described plans[,] specifications (including all general conditions stated therein) and Addenda No. 1 dated 3/7/18, No. 2 dated 3/19/18, and No. 3 dated 3/26/18 . . .” Ex. 3, § 1(a). In addition, drawing E-401 was mentioned explicitly in the general contract’s section on basic electrical requirements as a drawing showing the work to be done under that section. See Ex. 22, § 16050, Part 1.1 B (“The Work to be done under these Sections is shown on the Drawings, Sheet Nos. . . . E-401 . . .”).

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<sup>6</sup> Addendum 3, Item 3-5 also deleted and replaced § 16131 – Conduit. No party has indicated that the copy of § 16131 provided in Ex. 22 is not the operative version.

Under these circumstances, it was clear that Amp was expected to perform backfilling and excavation work.<sup>7</sup> See *John F. Miller Co.*, 7 Mass. App. Ct. at 499 (“[I]t is hard to suppress the suspicion that the subcontractor intentionally examined the specifications wearing blinders.”). To the extent Amp viewed the contract documents as inconsistent, it could have asked for clarification.<sup>8</sup> See *id.* (“Where a contractor or a subcontractor is presented with an obvious omission, inconsistency or discrepancy, he should at least ask for clarification if he intends to bridge the crevasse in his own favor” [quotation and citation omitted].).

### *B. Retainage*

Although Amp contends that Schultz also breached its contract when it failed to pay Amp \$13,543.14 for unpaid retainage and undisputed invoices, it is undisputed that Amp received a \$13,543.06 payment per a check dated May 17, 2021, pursuant to the Final Lien Waiver.

Summary judgment will thus enter in favor of the defendants on the entirety of Amp’s breach of contract claim, count 1.

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<sup>7</sup> The defendants contend that the project engineer’s decision to deny PCO # 6 was “final and conclusive” because it was not “made in bad faith, fraudulently, capriciously, or arbitrarily[,] . . . unsupported by substantial evidence, or . . . based upon an error of law.” G. L. c. 30, § 39J. However, the parties have not directed the court to any record copy of article 10.07 of the general conditions of the contract between Schultz and the town, which, according to the defendants, allows the engineer to make decisions about interpretations of and changes in work referenced in the contract documents. Nor is article 10.07 referenced in the consolidated statement of undisputed facts. As a result, the court does not decide this issue.

<sup>8</sup> The fact that conduit-related electrical specifications in § 16 of the general contract do not cross reference the § 02315 “Excavation, Backfill, Compaction, and Dewatering” specifications (and vice versa) does not change the court’s interpretation of the contract as a whole. In addition, although Amp contends that excavation is not a filed sub-trade under G. L. c. 149, § 44F(1)(a), Amp does not provide any authority stating that an electrical sub-bidder is prohibited from being responsible for electrical-related excavation and backfill. Cf. *Richardson Elec. Co. v. Peter Francese & Son, Inc.*, 21 Mass. App. Ct. 47, 48-49 (1985) (electrical subcontractor on public works project agreed to provide trenching for conduit).

### III. Payment Bond Claim

Where Schultz does not owe Amp any additional funds for its work on the project, Amp's payment bond claim against Endurance cannot survive. Summary judgment will enter in favor of Endurance on count 2.

### IV. G. L. c. 93A

Amp's G. L. c. 93A claim against Schultz is based on Schultz's failure to pay Amp for the work referenced in PCO #6 and the previously unpaid retainage. Where Schultz was not obligated to pay Amp additional sums for such work and has paid \$13,543.06 pursuant to the Final Lien Waiver, there are no facts on this record that would support a G. L. c. 93A claim. Summary judgment will enter in favor of Schultz on count 3.

### V. Third-Party Complaint Against the Town

Finally, all of the claims Schultz filed against the town are based solely on Schultz's potential liability to Amp. Where summary judgment is entering in favor of the defendants on those claims, Schultz has no claims against the town. The third-party complaint will be dismissed.

### ORDER

For the foregoing reasons, it is hereby **ORDERED** that: (1) the defendants' motion for summary judgment is **ALLOWED**; (2) the plaintiff's motion for summary judgment is **DENIED**; and (3) Schultz's third-party complaint against the town is **DISMISSED**.

  
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Tracy E. Duncan  
Justice of the Superior Court

Dated: May 17, 2024