

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
C.A. NO.

In the Matter of
NEL CORPORATION.

ASSURANCE OF DISCONTINUANCE PURSUANT TO G. L. c. 93A, § 5

I. INTRODUCTION

1. The Commonwealth of Massachusetts, through the Attorney General and the Inspector General, and NEL Corporation (collectively, the “Parties”) voluntarily enter into this Assurance of Discontinuance (“AOD”) pursuant to G. L. c. 93A, § 5.

2. NEL Corporation (“NEL”) is a Massachusetts corporation whose office and principal place of business is 3 Ajootian Way in Middleton, Massachusetts, 01949.

3. The Commonwealth conducted an investigation of NEL’s billing under contracts for scheduled and emergency bridge repairs between NEL and the Massachusetts Department of Transportation (“MassDOT”). As a result of the investigation, the Commonwealth alleges that NEL violated G. L. c. 93A, § 2, and G. L. c. 12, § 5B, by engaging in the conduct described in Section III herein (the “Covered Conduct”).

4. The Commonwealth agrees to accept this AOD on the terms and conditions contained herein, pursuant to the Massachusetts Consumer Protection Act, G. L. c. 93A, § 5, in lieu of litigation.

5. NEL enters into this AOD for settlement purposes only and neither admits nor denies the Commonwealth’s allegations.

II. DEFINITIONS

As used herein:

6. “Commonwealth” means the Attorney General acting in conjunction with the Inspector General pursuant to G. L. c. 12A, § 11.
7. “Effective Date” shall mean the date the AOD is filed with the Superior Court for Suffolk County.
8. “Employee” means workers, managers, supervisors, executives, directors, officers, subcontractors, temporary workers, contract workers and all other persons performing work on behalf of NEL.
9. “MassDOT” shall mean the Massachusetts Department of Transportation and its subsidiary divisions or authorities, including, but not limited to, the Highway Division.

III. COVERED CONDUCT

Based upon its investigation, the Commonwealth alleges that NEL violated G. L. c. 12, § 5B and G. L. c. 93A, § 2 as follows:

10. NEL is a general contractor that specializes in rehabilitation and maintenance of bridges.
11. MassDOT awarded the following contracts (the “Contracts”) for scheduled and emergency bridge repairs and maintenance to NEL:

Contract number	Award date	Scope of work
62451	March 9, 2010	Scheduled and Emergency Bridge Structural Repairs at Various Locations in Highway Division District 5
64399	August 3, 2010	Scheduled and Emergency Drawbridge Repairs at Various Locations in Highway Division District 5
65603	September 15, 2010	Scheduled and Emergency Bridge Beam End Repairs at Various Locations in Highway Division District 5
68373	May 25, 2011	Scheduled and Emergency Bridge Shielding Installation at Various Locations in Highway Division District 5

70215	November 10, 2011	Scheduled and Emergency Bridge Repairs at Various Locations in Highway Division District 6
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12. MassDOT awarded the Contracts to NEL because it was the lowest bidder. Each Contract had a one- or two-year term.

13. Each Contract was structured as a “unit price contract,” wherein NEL bid and agreed to unit prices for specific contract work items.

14. The Contracts expressly stated that certain tools, equipment and work were incidental to contract work items or otherwise NEL’s responsibility to provide at no additional cost to MassDOT. These included:

- a. Personal protective safety equipment;
- b. Sanitary facilities;
- c. Certain tools and equipment for skilled laborers known as “tool kit” items;
- d. Mobilization of personnel, equipment and supplies;
- e. Equipment for the engineer’s field office;
- f. Incidentals to working barges; and
- g. “Company tools,” which included tools and equipment that were “incidental to the work.”

15. Notwithstanding the plain terms of the Contracts, NEL knowingly submitted claims to MassDOT for reimbursement or compensation for incidental items.

16. In periodic pay requisitions to MassDOT, NEL created documents that falsely represented it was entitled to payment for the rental of NEL-owned equipment and to reimbursement for the cost of incidental materials, tools and equipment. NEL marked up its requests for payment and reimbursement, charging MassDOT in excess of NEL’s actual costs.

17. NEL also falsely certified its compliance with the Contracts on periodic billing packages known as “contract quantity estimates.” NEL knew at the time that the certifications were a condition of payment.

18. At the time it bid on the Contracts, NEL knew that the Contracts required it to assume certain incidental costs. When NEL was billing MassDOT, it knew that it had been awarded the Contracts because it was the lowest bidder, and that its bids necessarily assumed that it would not charge MassDOT for incidentals. By disregarding the terms of the Contracts and billing MassDOT for incidentals, NEL submitted material false claims to MassDOT.

19. By, *inter alia*, falsely representing its compliance with the Contracts and knowingly presenting false claims for payment, NEL violated G. L. c. 12, § 5B and G. L. c. 93A, § 2.

IV. PAYMENT TO THE COMMONWEALTH

20. NEL agrees to pay \$700,000.00 by wire(s) to the Commonwealth of Massachusetts (to the attention of the AGO False Claims Division). Payment shall be made by wire in accordance with instructions provided by the Commonwealth. NEL shall pay \$350,000.00 within five days of the Effective Date and the remaining \$350,000 on or before November 30, 2021.

V. ASSURANCES

NEL agrees to the following assurances (“Assurances”):

Starting sixty days after the Effective Date and for five years thereafter,

21. For each new or existing contract with MassDOT, NEL will designate a Contract Manager who is responsible for reviewing the terms of the contract, training all employees who have responsibility for billing under the contract, and ensuring that NEL is meeting all contract

requirements with regard to billing for bid, non-bid and incidental items. The Contract Manager shall determine, at least quarterly, that all such billing meets contract requirements and shall notify the Director of the Office of the Inspector General's Internal Special Audit Unit for MassDOT ("ISAU") of that determination.

22. If the Contract Manager determines that NEL has requested a payment from MassDOT to which it is not entitled under a contract, the Contract Manager shall notify the applicable MassDOT District Highway Director and Director of ISAU within five business days of discovery. NEL shall provide the District Highway Director and Director of ISAU a plan that includes actions to correct the cause of the unallowed billing and prevent future billing noncompliance within 30 days of discovery. If NEL properly and timely provides notice and a corrective plan as required under this paragraph such an event shall not be considered a breach of the AOD.

23. If the Contract Manager determines that NEL has received a payment from MassDOT to which it is not entitled under a contract, NEL shall notify the applicable MassDOT District Highway Director and Director of ISAU immediately, but within no more than five business days of discovery. NEL shall provide a credit or reimbursement to MassDOT for the overpayment within 60 days of discovery. If NEL properly and timely provides notice and a credit or reimbursement as required under this paragraph, such an event shall not be considered a breach of the AOD.

24. NEL will engage an independent third-party auditor to undertake annual, internal reviews of its billing for bid, non-bid and incidental items under all open MassDOT contracts. NEL shall certify to the applicable MassDOT District Highway Director and Director of ISAU that it has completed the review and provide to them a copy of the written audit report. The

notice should state whether NEL identified deficiencies in its billing. If so, NEL shall include with the notice a plan to correct any deficiencies. As used in this paragraph, the term “deficiencies” includes any requests for payments or overpayments identified in paragraphs 22 and 23 above.

25. NEL shall cooperate with MassDOT and the ISAU to resolve any billing issues and respond to all reasonable requests for documents and information relating to its compliance with the AOD.

26. NEL will maintain records sufficient to demonstrate its compliance with the terms of this Section and will provide such records promptly upon the Attorney General or Inspector General’s reasonable request pursuant to this AOD.

VI. RELEASE

27. In consideration of the foregoing and except to enforce the obligations set forth in Sections IV and V herein, the Commonwealth forever discharges and releases NEL together with its predecessors, current and former parent companies, direct and indirect affiliates, divisions and subsidiaries and their current and former employees, agents, representatives, shareholders, officers, directors, managers, successors and assigns, from civil liability to the Commonwealth pursuant to G. L. c. 12, § 5B or G. L. c. 93A, § 2, arising from the Covered Conduct.

28. NEL forever discharges and releases the Commonwealth from civil liability for any claims arising from its investigation of the Covered Conduct.

VII. NOTICES AND CHANGE OF ADDRESS

29. Any notices or communications transmitted between NEL and the Commonwealth pursuant to the AOD shall be provided in writing by first class mail and email to the Commonwealth or NEL, as follows:

Commonwealth:

William J. Durkin
Lead Counsel
Civil Recovery Unit
Office of the Inspector General
One Ashburton Place
Room 1311
Boston, MA 02108
william.durkin@mass.gov

Cassandra Arriaza
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Cassandra.Arriaza@mass.gov

NEL:

John Davagian
Davagian Grillo & Semple LLP
365 Boston Post Road, Suite 200
Sudbury, MA 01776-3043
jsdavagian@dgsllp.com

VIII. MISCELLANEOUS

30. By signing below, the Parties agree to comply with all terms of the AOD.
31. The AOD may be enforced only by the Parties. Nothing in the AOD shall provide any rights to or permit any person or entity not a party hereto to enforce any provision of the AOD.

32. The AOD is not intended to be construed or used as a waiver or any limitation of any defense otherwise available to NEL in any pending or future legal or administrative action or proceeding relating to the Covered Conduct.

33. The AOD does not constitute an approval by the Commonwealth of any of NEL's business acts and practices, and NEL will make no representations to the contrary.

34. The AOD contains the complete agreement between the Parties concerning the Covered Conduct. No promises, representations or warranties other than those set forth in the AOD have been made by any of the Parties. The AOD supersedes all prior communications, discussions or assurances, if any, of the Parties, whether orally or in writing.

35. The AOD may not be changed, altered or modified, except by order of the Court or by written agreement of the Parties.

36. The AOD may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same AOD. The Parties shall be entitled to sign and transmit an electronic signature of the AOD (whether by facsimile, PDF or other email transmission), which signature shall be binding on the party whose name is contained therein. After which NEL shall send via express mail original, signed copy(ies) to the Commonwealth with specific instructions to be provided.

37. NEL acknowledges that it is represented by legal counsel, including John Davagian of Davagian Grillo & Semple LLP and Miranda Jones of O'Reilly, Grosso, Gross & Jones, P.C., with whom they have consulted concerning the AOD.

38. The undersigned acknowledge that execution of the AOD is voluntary and authorized.

39. The AOD and its provisions will be effective on the Effective Date.

Office of the Attorney General

/s/ Amy Crafts

Amy Crafts
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Cassandra.Arriaza@mass.gov

March 16, 2021

Office of the Inspector General

Susanne M. O'Neil

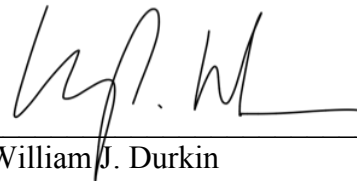
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March 16, 2021

NEL Corporation

Michael Galasso, President

_____, 2021



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March 16, 2021

Office of the Attorney General

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Office of the Inspector General

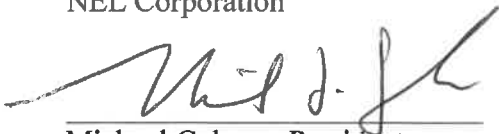
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NEL Corporation



Michael Galasso, President

3/10, 2021